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-XLVII. D.L.R. See Pages vii-xviii.

VOL. 47

EDITED BY

C. E. T. FITZGERALD

C. B. LABATT *and*

I. FREEMAN

CONSULTING EDITOR

E. DOUGLAS ARMOUR, K.C.

TORONTO:

CANADA LAW BOOK CO. LIMITED

84 BAY STREET

1919

CASES REPORTED.

IN THIS VOLUME.

TABLE OF ANNOTATIONS

(Alphabetically Arranged)

APPEARING IN VOLS. 1 TO 47 INCLUSIVE.

Re COCHRAN'S TRUSTS.
ROBINSON v. SIMPSON.

(Annotated.)

Supreme Court of Canada, Davies, C.J., Idington, Anglin, Brodeur and Mignault, JJ. February 4, 1919.

EVIDENCE (§ IV A—393)—PROOF OF IDENTITY—ALLEGED ANCIENT DOCUMENTS IN PROOF OF—ENLARGED PHOTOGRAPHS—EVIDENCE—CONSIDERATION OF BY COURT.

In order to establish the identity of a brother of the testator, who by his will directed his property to be divided under certain circumstances between the grandchildren of his brothers and sisters, certain claimants produced a large number of partially torn documents said to be recently discovered under the floor and between the walls of the family home of some of the claimants; copies of most of these writings were photographed on an enlarged scale by handwriting experts and put in evidence at the trial and these photographs were used on the appeal to the Supreme Court of Canada.

After examination of the original documents and the enlarged photographs and weighing the conflicting evidence the court held that the documents were not genuine, and found against these claimants.

APPEAL to the Supreme Court of Canada from the Supreme Court of Nova Scotia unanimously allowing the appeal from the decision of Russell, J., which reversed the finding of the referee, W. W. Walsh, K.C.

The Hon. James Cochran died in 1876 and under his will the bulk of his property was given to the executors in trust to pay the income to his children and on the death of his children, to divide the *corpus* among his grandchildren, and in case of his children dying without issue, the *corpus* was to be completely divided, "among the grandchildren then alive of the testator's brothers and sisters, Thomas Cochran, Michael Cochran, Bridget Leavy, wife of Thomas Leavy, and Mary Farrell, wife of Owen Farrell." The testator's children died without leaving issue. The amount of the estate to be equally divided among the grandnephews and grandnieces of the testator was about $200,000. Advertisements were inserted by the court to determine the names of the grandnephews and grandnieces of the testator and eleven claimants, grandchildren of Michael Cochran, Bridget Leavy and Mary Farrell filed claims which were admitted and not in dispute.

CAN.

S. C.

RE COCHRAN'S TRUSTS.

ROBINSON v. SIMPSON.

The only point on the appeal to the Supreme Court of Canada was as to the identity of Thomas Cochran, the brother of the testator mentioned in the will. The admitted claimants produced evidence at the hearing to establish that the real Thomas Cochran emigrated to New York and died there in 1864 and that this Thomas Cochran did not have any children alive on the death of the testator. The appellants, who were known as the Sarnia claimants, claimed that the real Thomas Cochran emigrated to Ontario and died at Mitchell, Ontario, in 1862.

In order to establish their claim the Sarnia claimants produced a large number of partially torn documents said to be recently discovered under the floor and between the walls of the family homestead at Mitchell, Ontario, containing references to the testator and shewing correspondence with the family at Halifax where the testator resided. They also produced an old geography containing references to their relationship to the family at Halifax and other papers. Copies of most of these writings were photographed on an enlarged scale by handwriting experts and put in evidence at the trial and these photographs were used on the Appeal to the Supreme Court of Canada.

The judgment of the Nova Scotia Supreme Court delivered by Drysdale, J., was as follows.

DRYSDALE, J.:—This matter arose out of an originating summons in the estate of the Hon. James Cochran, the application being at the instance of the trustees.

An order of this court was made appointing a referee, among other things, to enquire and ascertain to whom and in what shares the residue of the testator should be distributed, it being a part of the will of the testator that upon the death of his last child, his money should be divided amongst his grandchildren then alive.

In the course of administration, the trustees naturally required the order of this court as to the parties entitled. In pursuance of an order regularly granted, the heirs were advertised for, and, in this connection, arises the controversy. It seems that the Hon. James Cochran, who emigrated from Ireland in the early days to this country, had a brother Thomas, and rival claimants appear, alleging themselves to be *bonâ fide* descendants of Thomas, the brother. The trustees claiming that the only brother of the Hon. James Cochran lived and died in New York, prepared to

administer the estate accordingly, but claimants herein, called the Sarnia claimants, allege that one Thomas Cochran of Mitchell, Ont., was the brother of the Hon. James; hence this contest arises over what may be called the Sarnia claimants on the one hand, and the trustees, insisting that the Thomas Cochran of New York was the real and only brother of the Hon. James Cochran. When it became apparent that this was a real contest between the Sarnia claimants so called, and the trustees alleging that Thomas Cochran, the brother of the Hon. James, died in New York, it was necessary to have the question decided. To this end, in due course in chambers, an order was made directing one of the most reliable and best referees attendant on this court, namely, W. W. Walsh, to take evidence and proceed to determine the question. The questions referred to Walsh appear in the order of reference on pages 29 and 30 of the book. The material question he had to decide was, amongst whom, and in what shares the residue of the testator's property should go. It will be noticed that, under the will, on the death of his son and daughters without issue, the residue was to go to the grandchildren then alive of the brothers and sisters. It seems that the grandchildren then alive is the point of dispute. Walsh, the referee, after taking very great pains, and examining a great many witnesses, decided that the brother of the Hon. James Cochran was an emigrant to New York from Ireland; lived and died in New York City; figured out and reported his decision accordingly, rejecting the claims of the Sarnia claimants as being unfounded in fact. In other words, Walsh concluded that the Sarnia claimants were claiming through a Thomas Cochran who was not the brother of the Hon. James Cochran. He made his report accordingly. On a motion to confirm this report or vary it, Russell, J., a judge of this court, undertook to vary the referee's report and decided that the referee was wrong on the evidence before him in rejecting the claims of the Sarnia claimants. Russell, J., held that the Sarnia claimants were real representatives of Thomas Cochran, the brother of the Hon. James, and that the Hon. James Cochran's brother lived and died in Mitchell, Ontario. Of course, this made a great difference in the estate in the guidance of the trustees. The trustees, not being satisfied with this decision appealed to this court, and the question now is, to put it concisely, which Thomas

CAN.

S. C.

RE COCHRAN'S TRUSTS. ROBINSON v. SIMPSON.

Cochran was the brother of the Hon. James Cochran, late of Halifax, the Sarnia claimants contending that the Thomas Cochran was the Mitchell Cochran, and the trustees claiming that the only brother Thomas emigrated to New York, lived and died in New York, and is dead without issue.

The first thing that struck me on reading carefully the judgment of the judge below, in reversing the master or referee, was that the referee acted upon the evidence of admitted relatives of the Hon. James Cochran, whereas the judge seems to base his judgment on the very lowest kind of testimony, namely, pedigree testimony. I had to inquire again and again during the argument why the testimony of an admitted relative, named, Ann Fanning; and another relative named, Bridget Finnegan, should not be taken. To this I received no satisfactory answer, except an allegation that the Sarnia claimants pointed to the fact that, on a tombstone in New York, Thomas Cochran's death was said to be at a time much later than was probable. In fact, the evidence about the age of the Thomas Cochran in question seems to be the only thing in favour of the Sarnia claimants. After a careful reading of the evidence I think that the brother of the Hon. James Cochran, and the only brother he had named Thomas, lived in New York, that if apparently reliable people, like Ann Fanning and Bridget Finnegan are to be believed, James Cochran's brother Thomas lived and died in New York and was buried in Calvary cemetery. The referee, after taking the evidence of the relative Bridget Finnegan, and after due notice to the contestants, decided to examine one, admittedly a niece of James Cochran the testator, and proceeded to Byron, Illinois, and, after due notice of this intention, the contestants, namely, the Sarnia claimants, were not there even to cross-examine her. She made to my mind a conclusive and convincing statement of the family tree. I have intimated she was not cross-examined, and, as before intimated, I have asked again and again why her knowledge of the family and her statements should not be received. This is first hand testimony from a woman who is supposed to know her relatives. As against this, the judge below seems to rely upon hearsay statements of neighbors of an alleged relative and a claimant. I do not think this is satisfactory. Again, I would say, in examining the judgment of the judge below, that he seems to be compelled to

admit that the case for the Sarnia claimants is supported by the production of false or feigned documents. To the mind of the judge, these do not seem to carry weight, because indeed he says that when a man has a good case he can't hurt it by fraudulently making or exhibiting feigned or forged documents. To my mind this is not sound logic. When the Sarnia claimants, in support of their claim, are obliged or apparently are obliged to submit what is conceded to be fraudulent proof of their connection with the Hon. James Cochran, it ought to be enough to discredit any statements they make in support of their claim. As a matter of fact, there is no real evidence in the case that Thomas Cochran of Mitchell, Ont., was a brother of the Hon. James Cochran. The most that can be said for the Sarnia claimants is that neighbours of a daughter of one Thomas Cochran from Mitchell, Ont., tell us that children in the household of a daughter of the Ontario Cochran spoke to them in their youth of visiting the Hon. James Cochran of Halifax. What they said is very doubtful. That is to say, it is capable of giving every inference of truth in connection with their statement and yet it is no real proof that the Uncle James they claim to have visited was James Cochran of Halifax. I cannot get over the impression that the old papers alleged to have been found in the Port Huron house are not legitimate documents. When I find these documents produced for the purpose, and it could be the only purpose for which they were produced, of establishing a connection between that particular family at Port Huron and the Hon. James Cochran, and when I find these documents taken out of the walls of an old house and alleged to be for this purpose, and this purpose only, it strikes me that when you examine the documents and find modern King George stamps on some of them, and the date of a book scratched out, the gravest suspicion arises that these are not genuine documents. The judge below did not seem to pay much attention to these striking irregularities, but in the face of the direct proof of living relatives, in the face of the family photograph held in the family for 30 years, I am unable to see why the referee's report should be disturbed.

I would reverse the judge's decision and restore that of the referee, all with costs.

G. F. Henderson, K.C., for appellants.

Rogers, K.C., and *Burchell*, K.C., for respondents.

CAN.

S. C.

RE COCHRAN'S TRUSTS.

ROBINSON v. SIMPSON.

Davies, C.J.

DAVIES, C.J.:—(After dealing with the evidence in regard to the New York Thomas Cochran whom he finds to be the brother of the testator, refers to the evidence of three ladies who were called by the Sarnia claimants for the purpose of giving evidence to prove declarations by the family of the Sarnia Thomas Cochran of relationship to the testator at Halifax, and then proceeds as follows:—)

Now this evidence of three old ladies is all the oral evidence shews of the alleged Halifax visit. I do not think it is necessary to hold that the recollection of these elderly women as to Rose Ann having made a visit to some relatives in the Lower Provinces some time before 1856 when she would be between 15 and 20 years of age is unworthy of any credence, or that the whole story was made up out of whole cloth. But I cannot believe that Halifax in Nova Scotia was the place she visited. That place in my judgment was fixed upon by two out of the three as the place of the visit; this was, I agree with the referee, the result of suggestions made to them. The other witness would go no further than to say the visit was made "somewhere in the Lower Provinces." These witnesses were relating conversations which they said occurred 40 or 50 years before. One of them thought the uncle visited was a judge and one also would not go beyond saying that the visit was one made to some uncle in the Lower Provinces. And we all know that the Canada of 45 or 50 years ago was divided into what was called Upper and Lower Canada, the latter now being Quebec and the former Ontario, and a person speaking in Ontario of a visit to the Lower Provinces would be understood as meaning the Province of Quebec and not as including the Maritime Provinces of Nova Scotia and New Brunswick with which there was, at the time, no political or rail connection whatever. I am quite unable to believe that, at the time spoken of as that of the visit of Rose Ann, when there was no evidence given of any rail or steam communication between Rose Ann's then residence at Sarnia, Upper Canada, and Nova Scotia, some 1,200 or 1,500 miles away, a young girl of a family of the very slender financial condition of her father could have gone from one place to the other on a mere visit without any friend or escort accompanying her. It was suggested that she might have reached Halifax by first journeying to New York or Boston. It was no doubt possible,

but to my mind most improbable. There remains the other not unreasonable suggestion that the visit was made not to Halifax, Nova Scotia, but to some person, uncle or relative in the County of Argenteuil, Quebec, then Lower Canada, where Rose Ann was born and lived with her parents till they came to Sarnia. Such a visit to Montreal and from there to Argenteuil, a very short distance, could no doubt have been made from Toronto, and it would not be unreasonable to believe that the Cochrans had made friends there during their long residence in Argenteuil, where practically half of their children were born. Such a visit would not be incredible, and if made, it would offer a solution of the difficulty which pressed so much upon Russell, J., who based his judgment almost entirely upon his acceptance of the evidence of these three old women of Rose Ann's visit to Halifax as establishing the relationship between her father and the testator James.

I do not wish to be understood as agreeing that this hearsay evidence of people who were not of the family in question at all but were outsiders retailing what they said they recollected one member of the family had told them, was admissible at all as pedigree evidence. I am inclined to accept Mr. Rogers' strong contention against its admissibility. I have given the foregoing observations merely on the assumption, for the sake of argument, that it was admissible as pedigree evidence. If not admissible, of course, the case for the appellants would at once fall to the ground.

Then with regard to the letters and scraps of paper and parts of old books which the appellants' evidence went to shew were found between the floors and the walls of the attic of the Robinson dwelling house at Port Huron, I feel obliged to say that, after reading the evidence of the parties who produced these, and that of the two experts in handwriting, one from each side, who testified regarding the handwriting of several of the parts of letters and names of the Halifax Cochran, etc., I have reached the conclusion that they were unworthy of any consideration.

These papers and documents were not found until after counsel for appellants had been in New York and cross-examined Bridget Finnegan. The first lot was found, it is alleged, on October 10, 1915, another lot on October 24, and a third lot on October 25, by one Thomas C. Draper, husband of Louise C. Draper, who was

CAN.

S. C.

RE COCHRAN'S TRUSTS.

ROBINSON v. SIMPSON.

Davies, C.J.

one of the Robinson family and one of the claimants. The claim is that the Drapers found these documents under the floor in the garret and between the walls of some of the rooms. Photographs of the most important of them were put in evidence, some of these photographs being enlargements of the originals.

The attempt was made to shew, from two portions of scraps of letters said to be so found, corroboration of the claim of Rose Ann's visit to Halifax and that she had subsequently corresponded with the testator's daughter there. The two most important scraps or portions of letters are one claimed from its contents to have been written from Halifax by one of her cousins to Rose Ann after her visit there, and the other a letter claimed to have been written by Rose Ann to one of her brothers in which reference was made to the claimed Halifax visit. The agreed testimony of both experts was that these two papers or letters were in the same handwriting, that is the one supposedly written from Halifax to Rose Ann and the other which was presumably a draft or a copy of a letter by Rose Ann from Sarnia or Port Huron to her brother. This conclusion, if accepted and I do accept it at once, stamps these documents as spurious and fraudulent.

The conclusion I have reached from an examination of all the documents so produced, and the evidence relating to them is that no credence should be given to them as reliable documents confirming Rose Ann's supposed Halifax visit. The evidence with regard to the very modern character of the postage stamps, partly but not sufficiently torn off the backs of some assumed very old envelopes, and also with regard to the post office stamping on other assumed old envelopes, and also with regard to a scrap of a New York paper containing an advertisement shewing steam communication between New York and Halifax, but which on its reverse side shewed that it was published at a time when David Warfield was playing on the stage in the "Music Master" not more than 15 years ago, makes altogether pathetic reading. All this evidence as to the finding of these alleged ancient papers and documents and their authenticity was subjected to a merciless criticism by Mr. Burchell in his careful and well-reasoned argument. I have reached the conclusion that all of these documents should be ignored as not having any bearing upon the issue in the appeal and, with respect to any of the most important of them, as not being genuine.

Without dealing further with the case, I desire to say that we had the advantage of hearing able and well-reasoned arguments from counsel on both sides and that I have dealt with the evidence of the three old women who spoke of the alleged Halifax visit at great length out of deference to the opinion of Russell, J., who gave great weight to their evidence if he did not entirely rely upon it in reaching the conclusion he did. I do not entertain any doubt that the conclusion I have reached as to the Thomas Cochran of Sarnia not having been a brother of James the testator, while the Thomas Cochran of New York was, is one which is well supported by evidence of a most convincing character.

Davies, C.J.

I would dismiss the appeal with costs.

ANGLIN, BRODEUR, and MIGNAULT, JJ., concurred with the Chief Justice.

Anglin, J. Brodeur, J. Mignault, J.

IDINGTON, J., dissented. *Appeal dismissed.*

Idington, J.

ANNOTATION.

Annotation.

Use of Photographs.—Examination of Testimony on the facts by Courts of Appeal.

It appears that the decision in this case finally depended in large measure upon the interpretation of certain fragmentary and partially illegible documents and upon the examination of this evidence itself by the judges who were to make final judgment in the case. The documents had been appropriately enlarged and arranged in convenient and accessible form so that the evidence, some of which was of a somewhat delicate character, was easily available and could be distinctly seen. Without this photographic assistance it would have been difficult, if not practically impossible, to shew this evidence clearly to an appellate court under the usual conditions surrounding an argument.

The Judges in the Supreme Court in this case themselves examined and passed upon the physical evidence in its original form, and also in the form of enlarged photographs, and were thus able themselves to weigh the conflicting testimony of the witnesses on this particular subject. The Supreme Courts of numerous states of the United States, and some judges of Canada, refuse to consider questions of fact of this character in a case of conflict of testimony, and undoubtedly by this refusal may defeat the ends of justice.

A proper distinction in fact testimony thus is made, in the Supreme Court of Canada, between merely oral testimony and testimony relating to physical evidence like writings and photographs which are actually before the court.

It is obvious that with evidence of this kind before the court the usual objection to reviewing the facts, that the actual witnesses are not before the court, does not apply as it does with ordinary testimony, because the actual physical evidence itself is before the court. In some States of the United States, New York among others, courts of appeal in cases of this kind do consider the facts before them. This was done in a positive and definite

Annotation. manner in the case of *Townsend* v. *Perry* (1917), 177 Appel. Div. 415 (N.Y.), in which the Appellate Court set aside the verdict of a jury specifically on the facts. In this case the court says: ". . . a mere comparison of the signatures upon the instrument with the genuine signatures of Cyrenius C. Townsend, his wife, and of plaintiff's mother, clearly demonstrate, even to the layman, that the former are but clumsy forgeries."

Several State Supreme Courts of the United States have recently refused to pass upon, or even consider, the fact evidence even in cases in which the evidence was all before them; they would not make "a mere comparison." This question is often discussed in a manner that makes no distinction between merely oral testimony, the value of which depends solely upon the credibility of the witness, and technical testimony as to documents which illustrates and interprets physical evidence which is itself in visible form before the court. It would appear from the comments of some judges that they almost confessed to blindness and incompetence.

On this very point the Supreme Court of Kansas, U.S.A., in a recent case, *Baird* v. *Shaffer* (1917), 168 Pacific 836, discusses the question, emphasizing the modern view of the subject. Three witnesses testified that they had witnessed the will and the jury were convinced that the will was a forgery by the illustrated testimony of an expert witness. The proponents sought to reverse the verdict in this case on the question of weight of evidence, and the decision says:

"The testimony of attesting witnesses to a will may be overcome by any competent evidence . . . 2 Wigmore on Evidence, 886, 1514. Such evidence may be direct, or it may be circumstantial; and expert and opinion evidence is just as competent as any other evidence. Indeed, where the signature to a will is a forgery, and where the attesting witnesses have the hardihood to commit perjury, it is difficult to see how the bogus will can be overthrown except by expert and competent opinion evidence tending to shew that the pretended signature is not that of the testator, but spurious."

IMP.
J. C.

ELECTRICAL DEVELOPMENT Co. of ONT. v. ATT'Y-GEN'L OF ONTARIO.

Judicial Committee of the Privy Council, Viscounts Haldane, Finlay and Cave, Lords Shaw and Phillimore. April 7, 1919.

TRIAL (§ 1 B—5)—FIAT OF ATTORNEY-GENERAL—REFUSAL OF—COMMENCEMENT OF ACTION—RIGHT TO PROCEED.

The Hydro Electric Power Commission (the second defendant in the action) was established by an Ontario statute, 6 & 7 Edw. VII. c. 19, now embodied in R.S.O. 1914. This commission is a government department, and s. 23 of the original Act (now s. 16) provides as follows: "Without the consent of the Attorney-General no action shall be brought against the commission or against any member thereof for anything done or omitted in the exercise of his office." The sole question in issue on the appeal so far as the Hydro Electric Power Commission was concerned was whether this provision is *intra vires* the Ontario legislature.

Their Lordships thought it undesirable to express any final opinion upon the construction of the section and its effect upon the action until the precise nature of the plaintiffs' claim had been formulated. In their Lordships' opinion the appellants' contentions as to the section raised points of importance which ought not to be dealt with in a summary way, and which demanded serious consideration in the ordinary course

of law. Their Lordships, therefore, held that the action must proceed as against the Hydro Electric Commission, but without prejudice to the commission to raise this point as a defence when the pleadings have disclosed the exact nature of the plaintiffs' claim and the facts so far as necessary have been ascertained.

As to the motion to set aside the writ as against the Attorney-General of Ontario, and that any claim against the Crown should be brought forward by petition of right, the argument advanced on behalf of the Attorney-General for Ontario failed to satisfy their Lordships that it was so clear that no declaration could be made against the Attorney-General under the circumstances as to make it right that the action should be summarily stopped as against him. All that their Lordships decided was that the plaintiffs' claim ought not to be disposed of in a summary application.

[*Dyson* v. *Attorney-General*, [1911] 1 K.B. 410, referred to.]

APPEAL from 34 D.L.R. 92. Reversed.

Statement.

The judgment of the Board was delivered by

Viscount Finlay.

VISCOUNT FINLAY:—The question in this case is whether the writ of summons in the action was properly set aside. The action is one which raises questions as to the right to use the water of the Niagara River for the purpose of generating electricity.

By a treaty made in 1909 between His Majesty and the United States, which was confirmed by the Dominion of Canada Act of 1 & 2 Geo. V., c. 28, an arrangement was made to limit the diversion of water from the Niagara River, and it was agreed that the United States might divert on their side water above the Falls for power purposes not exceeding in the aggregate a daily diversion at the rate of 20,000 c. ft. of water per second, and that the United Kingdom (by the Dominion of Canada and the Province of Ontario) might do this on their side to an amount not exceeding a daily diversion at the rate of 36,000 c. ft. of water per second.

In 1887 a body called The Commissioners of the Queen Victoria Niagara Falls Park was incorporated by the Ontario statute, 50 Vict., c. 13. The park extended some way above and below the falls on the Canadian side, and it is under the charge of these commissioners on behalf of the Ontario government. In 1899 there was passed a provincial Act (62 Vict., c. 11), which, by its 36th section, empowered the commissioners to enter into agreements with any persons or companies enabling them to take water from the river for the generation of electricity, and under the powers of this statute the commissioners, by an agreement dated January 29, 1903, empowered a syndicate to take water from the river sufficient to develop 125,000 electrical horse-power

IMP.

J. C.

ELECTRICAL DEVELOPMENT CO. OF ONTARIO v. ATTORNEY-GENERAL OF ONTARIO.

Viscount Finlay.

for a term of 50 years from February 1, 1903. By clause 16 of this agreement the commissioners agreed that they would not themselves engage in making use of the water to generate power. The syndicate, on March 21, 1903, assigned the benefit of this agreement to the present appellants, the Electrical Development Co., the plaintiffs in the action, and the agreement and assignment were confirmed in 1905 by the Ontario statute, 5 Edw. VII., c. 12. The appellants erected works for the supply of electricity, and have supplied power in Ontario and also under a license from the Dominion government for the export of electricity, which license was granted under the Dominion statute, 6 & 7 Edw. VII., c. 16.

The Hydro Electric Power Commission (the second defendant in this action) was established in 1907 by an Ontario statute (6 & 7 Edw. VII., c. 19), which is now embodied in the R.S.O., 1914. This commission is a government department, and s. 23 of the original statute (now s. 16) provides as follows:—

> Without the consent of the Attorney-General no action shall be brought against the commission or against any member thereof for anything done or omitted in the exercise of his office.

It is on this section that the Hydro Electric Power Commission relied on their application to have the writ of summons set aside, no consent to the bringing of the action having been obtained by the appellants from the Attorney-General.

In 1916, there were passed by the legislature of Ontario two statutes (6 Geo. V., c. 20 and c. 21). The former of these statutes recited that it was desirable to utilise to the fullest extent the amount of water which might, by the treaty of 1909, be diverted from the Niagara River, that the Hydro Electric Power Commission had reported upon a scheme for its development, and that it was desirable that in the meantime the commission should procure on the best terms available the additional power wanted. The statute then proceeded to provide that the government might authorize the commission to construct and operate works for the diversion of the water and the production of electric power. S. 7 is as follows:—

> The exercise of the powers which may be conferred by or under the authority of this Act, or of any of them, shall not be deemed to be a making use of the waters of the Niagara River to generate electric or pneumatic power within the meaning of any stipulation or condition contained in any agreement entered into by the commissioners for the Queen Victoria Niagara Falls Park.

This section has obviously reference to s. 16 of the agreement of January 29, 1903, already mentioned in this judgment. The other of these two statutes (6 Geo. V., c. 21) contains provisions of an ancillary nature.

The action was commenced on August 30, 1916, the defendants being the Attorney-General of Ontario and the Hydro Electric Power Commission, and the following is the endorsement on the writ:—

The plaintiff's claim is for a declaration:—

1. That the defendant the Hydro Electric Power Commission of Ontario has not the legal right, either with or without the consent or authority of the Lieutenant-Governor in Council, pursuant to the Ontario Niagara Development Act, beng the statute 6 Geo. V., c. 20, or otherwise, to divert water from any part of the Niagara or Welland Rivers for the purpose of developing electrical or pneumatic power and that the Lieutenant-Governor in Council has no right or legal power, pursuant to the Ontario Niagara Development Act aforesaid, or the Water Powers Regulation Act, 1916, being the statute 6 Geo. V., c. 21, or otherwise, to make use of the waters of the Niagara River for the production of electric power, or to authorize the defendant the Hydro Electric Power Commission of Ontario to do so, or to regulate or interrupt the use of such waters by the plaintiff.

Or, alternatively,

2. That the covenants contained in paras. 16 and 20 of an agreement dated January 29, 1903, between the commissioners of the Queen Victoria Niagara Falls Park and William Mackenzie, Henry Mill Pellatt and Frederic Nicholls, which said agreement was assigned to the plaintiff on March 21, 1903, enure to the benefit of the plaintiff according to the true, proper and original intent thereof, and that the said covenants are binding on the commissioners of the Queen Victoria Niagara Falls Park, and on the Lieutenant-Governor in Council, the Ontario Niagara Development Act, being the statute 6 Geo. V., c. 20, notwithstanding.

And the plaintiff further claims an injunction to restrain the defendant the Hydro Electric Power Commission of Ontario from diverting any water from any part of the Niagara or Welland Rivers for the purpose of developing electric power.

On September 7, 1916, notice was given of a motion on behalf of the Attorney-General that the writ of summons should be set aside as against him, on the grounds that the writ has no statement endorsed thereon of the nature of the claim made against the Attorney-General, and that if the action is brought against the Attorney-General as representing the King, the King can only be proceeded against by petition of right. On the same day, notice was given on behalf of the other defendants, the Hydro Electric Power Commission, of a motion that the writ of summons should be set aside as against them, on the ground that the consent

IMP.

J. C.

ELECTRICAL DEVELOPMENT CO. OF ONTARIO v. ATTORNEY-GENERAL OF ONTARIO.

Viscount Finlay.

of the Attorney-General, required by the Power Commission Act (s. 16) to an action being brought against the commission, had not been first obtained. Orders setting aside the writ were made by the master upon each motion, and these orders were affirmed by the judge and by the Appellate Division of the Supreme Court of Ontario. The present appeal is brought to have these orders set aside, in order that the action may proceed.

The question raised by this appeal is whether the defendants in the action are entitled to have it summarily stopped upon the grounds stated in the two notices of motion.

The ground and the only ground on which the motion to set aside the writ was made on behalf of the Hydro Electric Power Commission was that the action had been brought without the consent of the Attorney-General. This appears from the notice of motion in the court below. And in the respondents' case on the present appeal it is stated that the sole question in issue on the appeal, so far as the Hydro Electric Power Commission is concerned, is whether the provision that no action shall be brought against the commission without the consent of the Attorney-General is *intra vires* of the Ontario legislature.

The appellants argued that, if this provision on its true construction applied to actions in which the right of the commission to do the acts complained of is challenged on the ground that they are *ultra vires* of the commission, such an enactment would itself be *ultra vires* of the provincial legislature. The appellants contended that it is essential to the working of the constitution of the Dominion under the B.N.A. Act that the provincial courts should have power in the first instance, and subject, of course, to appeal, to determine whether any particular act which is challenged could be competently authorized by the Ontario legislature.

The appellants further contended that, properly understood, the section relied on does not apply to an action bringing in question the validity of any proceedings of the commission as *ultra vires* and beyond the scope of its authority, but only to actions for acts done and omitted to be done in the exercise of the powers entrusted to the commission.

Their Lordships think it undesirable to express any final opinion upon the construction of this section and its effect upon the present action until the precise nature of the claim of the

plaintiffs in the action has been formulated. In their Lordships' opinion it is impossible to treat the appellants' contentions as to the section in question on this point as merely frivolous. They raise points of importance which ought not to be dealt with in this summary fashion, and which demand serious consideration in the ordinary course of law. The action must, therefore, proceed as against the Hydro Electric Commission, but the present decision will not prejudice the right of the commission to raise this point as a defence when the pleadings have disclosed the exact nature of the plaintiffs' claim and the facts, so far as necessary, have been ascertained.

In support of the motion to set aside the writ as against the Attorney-General of Ontario it was argued that he ought not to have been joined as a defendant at all, and that any claim against the Crown should have been brought forward by petition of right. It was urged that the decision in *Dyson* v. *Att'y-Gen'l*, [1911] 1 K.B. 410, has no application to any case in which relief might be sought by petition of right, and that the declaration asked for by the endorsement on the writ must have been intended merely to lay the foundation for a subsequent petition of right and a claim for damages. Their Lordships' attention was drawn to s. 33 of the Ontario Judicature Act, 1914, c. 56, under which an opportunity may be given to the Att'y-Gen'l for Canada and for the province to be heard before any decision is given on cases involving constitutional questions. It was pointed out that in proceedings under that section the Attorney-General does not become a party to the action, and it was urged that there was no justification for making him a defendant with the object of binding the Crown by any decision on fact or law which may be arrived at in the action.

The question of the limits within which the decision in *Dyson's* case is applicable raises points of nicety and some difficulty for the determination of which it is highly desirable that the court should have before it a precise statement of the grounds on which a declaration is sought against the Att'y-Gen'l. The elaborate argument advanced on behalf of the Att'y-Gen'l for Ontario has failed to satisfy their Lordships that it is so clear that no declaration can be made against the Attorney-General under the circumstances of this case as to make it right that the action should be

IMP.

J. C.

ELECTRICAL DEVELOPMENT CO. OF ONTARIO v. ATTORNEY-GENERAL OF ONTARIO.

Viscount Finlay.

summarily stopped as against the Attorney-General. It will, of course, be open to him to allege as a substantive defence to the action that on the facts there was no justification in point of law for making him a party, but their Lordships do not think that this question ought to be decided until pleadings have been delivered and evidence taken so far as may be necessary. All that their Lordships decide is that the plaintiffs' claim ought not to be disposed of in a summary application such as the present.

The Appellate Division gave judgment for the Attorney-General on the ground that the action did not fall within the authority of *Dyson's* case, but also added some observations to the effect that the claim must fail upon the merits. This point was not properly raised by the notice of motion, and their Lordships do not propose to express any opinion upon it because, whatever difficulties there may be in the way of the ultimate success of the appellants' case, it is not, in the judgment of their Lordships, so clearly bad as to make it right that the appellants should by a summary order be prevented from having it tried in ordinary course.

Their Lordships will humbly recommend to His Majesty that this appeal should be allowed, that the orders of the courts below should be set aside, and the action remitted to the Supreme Court to be proceeded with in the ordinary way.

There will be no costs of this appeal. The costs in the courts below of and incident to these motions should be costs in the cause. *Appeal allowed.*

ALTA.

S. C.

FAIR & Co. and LIVINGSTON v. WARDSTROM.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Beck, Simmons and McCarthy, JJ. June 4, 1919.

EXECUTION (§ II—15)—SALE UNDER SHERIFF'S WARRANT—JUDGMENT CREDITORS—PRUDENCE OF REASONABLE BUSINESS MAN IN CONDUCTING—NEGLIGENCE—DAMAGES.

The party having the conduct of the sale of goods and chattels, seized under the sheriff's warrant, issued at the request of the judgment creditors, is liable in damages, unless he exercises the judgment and discretion which a reasonably careful business man would exercise under the circumstances. Accepting the suggestion of the sheriff and one possible bidder that the goods be sold *en bloc*, without any further inquiry, is not such prudence.

Statement.

APPEAL from the judgment of His Honour Judge Lees. Reversed.

A. S. Watt, for appellants; *Frank Ford*, K.C., and *Murphy*, for respondent.

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

SIMMONS, J.:—The plaintiffs are execution creditors of one Graham for $235.83 and $251.22 respectively.

At the request of the plaintiffs the sheriff on behalf of all execution creditors of the judgment debtor issued his warrant directed to the defendant as his bailiff to levy on the goods and chattels of the judgment debtor. Pursuant to this warrant, seizure was made of the furniture and fittings of the Lakeview Hotel in the Village of Strome. Pursuant to further instructions from the sheriff, the defendant advertised for sale and placed on sale said goods and chattels. The sheriff suggested to the defendant that the goods should be sold in block if the defendant thought he could obtain as good a price as by selling the articles separately. The sale was advertised for 1 p.m. but did not open till about 1.30 p.m. Bidding was not very active and was at the last stages confined to one Nelson, a second-hand dealer from Wetaskiwin and one Graham, a brother of the execution debtor, to the latter of whom the goods were sold for $460.

At the opening the defendant asked those in attendance whether he should sell in block or in separate parcels. Nelson suggested sale in block and apparently on Nelson's suggestion the sale was conducted in this way. The defendant says he did not know which was the best way to sell, but he thinks he would not have sold in block if the sheriff had not suggested it. The purchaser disposed of a portion of the goods and chattels (just how much does not appear) by private sale and sold the balance by auction in parcels for $1,200.

Plaintiffs claim the sale was conducted improvidently, negligently and in collusion with the purchaser. The claim that there was collusion was abandoned on the appeal and argument was confined to the allegation that a sale *en bloc* under the circumstances was improvident, and a further allegation that one McMillen, a prospective bidder, was not given an opportunity to bid.

The trial judge found in favour of the defendant on all grounds set up by plaintiffs. As to the claim in regard to McMillen I think there is sufficient evidence to justify his conclusion.

ALTA.

S. C.

FAIR & CO. AND LIVINGSTON v. WARDSTROM.

Simmons, J.

In regard to the sale *en bloc*, the trial judge says the sale was made in accordance with the sheriff's instructions. I think he misconceived the effect of the evidence on this head. The instructions of the sheriff left it to the judgment and discretion of the defendant, although suggesting a sale *en bloc*. The responsibility was clearly upon the defendant.

It does not require citation of authority for the proposition that once the responsibility for the conduct of the sale is located that the party assuming this responsibility cannot be held to have discharged his duties unless he has exercised the judgment and discretion which a reasonably careful business man would exercise under the circumstances. The subsequent sale of a part of the goods at such an increase in price within a short period of the former sale furnishes, in my opinion, a *primâ facie* case of an absence of that reasonable care. This *primâ facie* case might be met by defendant producing evidence of unusual circumstances, which would excuse him.

He admits, however, that he did not exercise any discretion, other than accepting a suggestion of the sheriff and the suggestion of a probable bidder. There is nothing to suggest any further inquiry by him. This seems to be very far short of the investigation that a careful business man would make. The honesty of the defendant does not excuse him, if there was a failure of his duty to use reasonable precautions against a sacrifice of the goods. I think he should have made a return that the goods remained in his hands unsold for want of a buyer and he ought to have waited for a writ of *venditioni exponas*. *Keighley* v. *Birch* (1814), 3 Camp. 521.

I would, therefore, allow the appeal and give judgment to plaintiffs in damages in the sums of $36.88 and $39.27, being the respective deficiencies on the plaintiff's executions. As to the claim to include in the damages an item of $40, solicitor and clients' fees, for investigating the circumstances of the sale, I think this is too remote on the very indefinite evidence produced, and should not be allowed.

The plaintiff to have the costs of the trial and appeal.

McCarthy, J.

MCCARTHY, J. (dissenting):—This is an appeal from the judgment of His Honour Judge Lees dismissing the plaintiff's action. The action was brought to recover damages against the

defendant, a sheriff's bailiff, arising out of a sale by the defendant of goods seized under two executions against John and Jason Graham for $231.88 and $235.83 respectively.

The grounds upon which the action was brought and upon which the trial proceeded were the allegations of the plaintiffs that the defendant conducted the sale improvidently, negligently and in collusion with the purchaser at the sale, the reasons given in the statement of claim being:—

(a) The defendant instructed prospective purchasers to examine said goods and chattels in the various rooms in the said hotel in which they were situated, stating that he, the defendant, would await their return before commencing the said sale, but the defendant did not await the return of such prospective purchasers, but proceeded with such sale in their absence, well knowing they were absent for the purpose of inspecting the said goods and chattels.

(b) The defendant sold the whole of said goods and chattels *en bloc* instead of room by room or piece by piece, well knowing that so the number of bidders for said goods and chattels would be reduced to a minimum.

(c) The defendant fraudulently conspired with the said Grahams (and) or either of them to procure, as in point of fact he did procure, the sale of said furniture to the said George Graham at a price excessively below its market value and excessively below the price which would have been obtained had the said sale been conducted in a proper manner.

There are also allegations that the sale realized $460 whereas a portion of the furniture was, subsequent to the sale by the sheriff's bailiff, sold by the purchaser at public auction for $1,200.

The balances left unpaid of the plaintiffs' executions were $36.88 and $39.27 respectively. The further claim made was $40 for costs incurred by the plaintiffs in having their solicitor make an investigation of the circumstances surrounding the "improvident, negligent and collusive sale."

The trial judge has found, and I entirely agree with him in so finding, that the evidence failed to establish any fraud, collusion or conspiracy, and indeed counsel for the plaintiff upon the hearing before us agreed that there was no evidence to support such an allegation.

There remains, therefore, to be considered the other grounds of complaint with regard to the conduct of the sale, namely, that the chattels were sold *en bloc* and not piece by piece, whereas it is alleged that if the latter course had been followed a much larger sum would have been realized and a sum sufficient to have satisfied the plaintiffs' executions in full, and if such ground is open upon

ALTA.

S. C.

FAIR & CO. AND LIVINGSTON v. WARDSTROM.

McCarthy, J.

the pleadings, which I doubt, the fact that a larger sum than that procured by the bailiff was realized by a subsequent sale by an experienced auctioneer, piece by piece, shortly after the sheriff's sale.

Assuming that the ground of liability in damages is negligence, I am clearly of the opinion that there was no negligence in selling *en bloc* and not piece by piece. The goods sold were the ordinary furnishings of a country hotel and included amongst other things "one long bar and a gasoline lighting outfit" and a number of other things which, it would be reasonable to suppose, would be better sold *en bloc*.

It should be noted however that the first suggestion as to selling *en bloc* came from the sheriff. On November 9, 1917, the defendant wrote to the sheriff as follows:—

> Re Livingston & Ross: I enclose sale notice in the above. I have got permission from John Graham (execution debtor) to have the sale in the hotel and he also guaranteed that everything would be looked after, so I did not put a man in charge. I would like to know if I can engage an auctioneer and clerk and pay them out of the proceeds.

To which letter on November 10, 1917, the sheriff replied as follows:—

> In reply to your letter, you may employ a clerk, but you will have to auction the chattels yourself. Try and sell *en bloc* if you think you could get as good a price that way as selling articles separately. Some one may wish to buy the whole thing in to keep the hotel running.

Under the circumstances I think it was not an unwise suggestion to make that the sale should be *en bloc* and at the most, in view of what occurred afterwards, I think the worst that can be said of the action of the sheriff and his bailiff was that they committed an honest mistake in judgment.

If it can be said to be negligence to sell *en bloc* and not piece by piece, I think that, on the facts of this case, the negligence would be that of the sheriff who, as would appear, took charge of and conducted the proceedings with the exception of the actual conduct of the sale on the day of the sale, but, as I have said, I do not think any negligence can be imputed to the sheriff.

In my opinion the case of *Great Northern Ins. Co.* v. *Young* (1916), 32 D.L.R. 238, is distinguishable.

There remains to be considered the question of whether the sale by the bailiff, having been made at a price less than what at first sight may appear to be the true value of the goods sold of itself, makes the bailiff liable in damages.

There is authority for the proposition that the execution debtors' goods ought not to be sacrificed. See *Keightley* v. *Birch*, 3 Camp. 521, wherein it is laid down that the sheriff having taken goods in execution under a *fi. fa.* is not justified in selling them to the highest bidder greatly under their value, but if he cannot obtain a reasonable price, should return that they remain in his hands for want of buyers.

In this case Lord Ellenborough said, p. 523:—

> If the goods taken in execution really were worth £300 or £400, I think the sheriffs are liable for selling them for £72 15s. 10d. The return ought to have been that they had taken goods which remained in their hands for want of buyers. If a chattel worth £1,000 is put up for sale, and only £5 is bid for it, the sheriff ought not to part with it for that sum, and he may fairly say that it remains in his hands for want of a buyer. He ought to wait for a *venditioni exponas*, the meaning of which is "sell for the best price you can obtain."

See also Mather on Sheriff Law, 2nd ed., at p. 105.

In my view of the matter, the mere fact that the goods were sold piece by piece, by an experienced auctioneer for a higher price, is not sufficient evidence that the goods were sold "greatly under their value," and the conditions which have existed in this province for many years are such that it will be placing too serious a liability upon sheriffs and bailiffs if in a case such as this they could be made liable to pay the difference between what was obtained in a sale *bonâ fide en bloc* and what could be obtained by an experienced auctioneer selling some of the furniture piece by piece. In my view, it would not be unwise to inform the sheriff's bailiffs of their duties and to give them proper means of ascertaining values and of conducting sales to the best advantage. To hold that the bailiff at Strome acting *bonâ fide* and under the advice of his sheriff must know, at his peril, the value say of a prize bull for which a fancy price might be obtained if the value were known, is placing too high a standard of care upon him.

I think, therefore, that it should not be held in this case that there was any negligence in selling at the price obtained.

Furthermore, there is no evidence of any damage to the execution creditors as there is nothing in the evidence to shew that the execution debtors have not other property out of which the small balances could have been realized, and, in my opinion, the onus is clearly upon the plaintiff to shew that there has been

ALTA.
S. C.
FAIR & CO. AND LIVINGSTON v. WARDSTROM.
McCarthy, J.

misfeasance or negligence, and upon this ground alone, apart from the other considerations I have mentioned, I would dismiss the appeal with costs.

It is unnecessary for me to consider the point raised on the argument as to the possible difference between the rights of the owners of the goods, namely, the execution debtors, and the rights of the execution creditors. I content myself with finding that no damage has been proved, assuming that the execution creditors may have the same rights as the owners to complain of the conduct of the sheriff or his bailiff.

I would dismiss the appeal, with costs. *Appeal allowed.*

ONT.
S. C.

FLEXLUME SIGN Co. Ltd. v. GLOBE SECURITIES Co.

Ontario Supreme Court, Appellate Division, Mulock, C.J.Ex., Clute, Riddell, Sutherland and Kelly, JJ. December 9, 1918.

COSTS (§ II—60)—SETTING CASE DOWN FOR TRIAL—NOTICE OF—RIGHT OF COUNSEL TO FEE AT TRIAL.

Where a defendant is justified in setting his case down for trial and giving notice of trial the solicitor becomes entitled to deliver briefs to counsel, and if intending to take his own brief as a barrister is entitled to counsel fee at trial. In a number of cases which are identical, where one solicitor counsel is retained for all the cases, he is entitled to counsel fee in each case.

The general rule that the discretion of the taxing officer is not to be interfered with as to quantum does not preclude the appellate court from so interfering in very special circumstances.

Statement.

APPEAL by defendants from a judgment of Meredith, C.J.C.P., reducing the amount of costs allowed by the Taxing Officer in the above and eight other actions, each brought against a different defendant. The actions were for infringement of a patent for an invention.

An action was brought by the plaintiffs—not one of the nine actions—against the Macey Sign Company Limited; it was tried by Sutherland, J., who on the 29th May, 1916, dismissed it: *Flexlume Sign Co. Limited* v. *Macey Sign Co. Limited* (1916), 10 O.W.N. 305.

The nine actions had been commenced before judgment was given in the *Macey* action. On the 1st June, 1916, the defendants in the nine actions gave notices of trial and entered the actions for trial at the Toronto non-jury sittings. On the 7th June, the plaintiffs moved before the Master in Chambers to stay the trial of the nine actions. The motion was refused. The plaintiffs appealed, and upon the appeal Boyd, C., on the 21st June, 1916, made an

ONT.

S. C.

FLEXLUME SIGN CO. LTD. v. GLOBE SECURITIES CO.

order staying the proceedings in the nine actions until the result of an appeal in the *Macey* case should be known, on the plaintiffs undertaking that they would allow judgment to be entered for the defendants with costs if the appeal in the *Macey* case should be determined against the plaintiffs: *Flexlume Sign Co.* v. *Globe Securities Co.* (1916), 10 O.W.N. 380.

The appeal in the *Macey* case failed: *Flexlume Sign Co. Limited* v. *Macey Sign Co. Limited* (1917), 12 O.W.N. 89.

The nine actions were accordingly dismissed with costs to the defendants; and on the taxation of these costs the Taxing Officer allowed a counsel fee at trial of $100 in each action.

The judgment appealed from was as follows

Meredith, C.J.

MEREDITH, C.J.C.P.:—In all taxations of costs it should be borne in mind that allowances are to be made only for services actually performed, fees actually earned, and outlays actually incurred, all within the limitations which the tariff contains; that nothing is to be allowed for imaginary services, or services which might have been but were not performed: and that, in addition to this, the practice and the Rules, which have the force of legislation, prohibit in the taxation of party and party costs the allowance of costs for any proceedings unnecessarily taken, or not calculated to advance the interests of the party in whose behalf they were taken, or which were incurred through over-caution, negligence or mistake, or which do not appear to have been necessary or proper for the attainment of justice or defending the rights of the party (Rule 667). The rule has been admirably stated in these words of a learned Judge most capable of dealing with the subject:—

"It is of great importance to litigants who are unsuccessful that they should not be oppressed by having to pay an excessive amount of costs. . . . the costs chargeable under a taxation as between party and party are all that are necessary to enable the adverse party to conduct the litigation, and no more. Any charges merely for conducting litigation more conveniently may be called luxuries, and must be paid by the party incurring them:" *Smith* v. *Buller* (1875), L.R. 19 Eq. 473, 475 (*per* Malins, V.-C.)

The questions involved in this appeal are whether the solicitor for the defendants in the nine actions in which the appeal is brought should have been allowed in each case, in the taxation of party and party costs, a "counsel fee at trial;" and if so in what amount?

ONT.

S. C.

FLEXLUME SIGN CO. LTD. v. GLOBE SECURITIES CO.

Meredith, C.J.C.P.

The Taxing Officer gave him $900, $100 in each case, though none of these cases came to trial, and although in a tenth case, of the same kind, which did go to trial, he gave to the solicitor $500 as a counsel fee at the trial. I said "gave to the solicitor" because there was no other counsel for any of the defendants, and he alone gets the $1,400 counsel fees, if the Taxing Officer's allowances stand.

All the cases were brought by one solicitor for the one plaintiff: the solicitor-counsel who has been allowed that large sum being, as I have said, the one solicitor for all the several ten defendants.

That the cases were substantially alike is shewn by the fact that, after the trial of the one and before any trial of the others, it was arranged, and an order made upon that arrangement, that none of the nine cases should be tried, but that the fate of each should be determined by the ultimate fate of the one which was tried: and the ultimate fate of all was a dismissal of the action with costs.

The nine cases were set down for trial after the trial of the tenth: but they were set down for trial at the Toronto non-jury sittings, which, as every one knows, may have meant a trial only weeks or months afterwards quite as much as only days afterwards. And, the other, substantially same, case having been tried and being in appeal, there could hardly have been any excuse for bringing the nine on for trial, or any likelihood of having them tried, until the result of the appeal in the case tried was known: a view which must have been entertained by the Court as well as the parties, as is shewn by the order which was actually made tying the nine down to the result in the other.

No "counsel fee at trial" was paid: was any earned?

No evidence seems to have been given in the taxing office upon the subject: and when, here, the evidence which a trial brief should carry is called for, a clean copy of the pleadings is produced, a paper which is in no sense a brief, but more like something written only for the purposes of taxation as if a brief. There is nothing produced having the semblance of a brief of evidence, or to shew any kind of service such as "counsel fee at the trial" would cover. And why should there have been any such services rendered? Counsel who would have taken the brief at the trial was the solicitor in the action: having had instructions for action, instructions for pleading, for examinations for discovery, advising on evidence, if any,

and other services as solicitor in the action. He was familiar with the whole case, and so in a very different position from counsel retained for the trial only, who would need to learn, some time before the trial, part at least of all that the solicitor-counsel already knew.

As the matter now stands, there is no evidence upon which either counsel fee, or brief, at the trial, could justly be allowed; but the solicitor asserts that such evidence can be given; in these circumstances it seems to me that the taxation should be reopened, and that the Taxing Officer should inquire whether in fact any services were rendered such as the practice and Rules require, entitling the defendants to any fee with brief at the trial: but, as to the amount, that which has been allowed seems to me to be beyond any kind of reason. It is said that the amount was in the discretion of the Taxing Officer, and that it is a firm rule of the Courts not to allow an appeal in that respect: but a legislative Rule provides that there shall be an appeal, when duly taken, in regard "to any item" in a bill taxed. It is true that if the appeal be as to matters about which a Judge may think the Taxing Officer knows better than he, the appeal is apt to be dismissed: or, if matters of no considerable moment are made the subject of appeal, the appellant is not likely to fare well. Appeals from taxation are troublesome and not much encouraged. But, in such a case as this, an appeal lies, and must be considered. I cannot look upon it as an appeal, in this respect, as much from a discretion exercised as it is from an indiscretion exercised. Nine hundred dollars allowed without even a stroke of a pen of counsel to shew any service rendered: very like $900 of "luxuries."

Bullen. We offered to pay $100 in all, for counsel fees, divisible among the nine cases: and are willing to pay that now rather than have this litigation further prolonged.

THE CHIEF JUSTICE:—I cannot perceive how it can be possible for the defendants to shew a right to more than that. At present they have shewn no right to anything, and, if strictly dealt with, the whole of the fees in question should be struck off. In these circumstances, the proper order to make is: that the appellants may have either the items in question struck off the bill with a reference back to the Taxing Officer as to them; or have the $900 reduced to $100 and the taxation ended. They may take out an order in either form.

ONT.

S. C.

FLEXLUME SIGN CO. LTD. v. GLOBE SECURITIES CO.

Meredith, C.J.C.P.

The plaintiffs elected to have the $900 reduced to $100, and an order so directing was issued.

R. McKay, K.C., for appellants.

J. M. Bullen, for the plaintiffs, respondents.

THE COURT overruled the objection that an appeal did not lie without leave, pointing out that the test whether leave must be obtained for an appeal is not whether the order to be appealed from is "interlocutory" or not, but whether or not it finally disposes of the whole or some part of the matter.* The order of the Chief Justice of the Common Pleas finally disposed of the right of each defendant to receive certain money by way of costs, and therefore the order was appealable without leave. *Talbot* v. *Poole* (1893), 15 P.R. (Ont.) 274, was approved and followed notwithstanding the change in the law.

THE COURT on the merits held:—

1. That the defendants were justified in setting down their cases for trial and giving notice of trial.

2. That thereupon the solicitor became entitled to deliver briefs to counsel, and, if intending to take his own brief as a barrister, was entitled to a counsel fee at trial.

3. Reaffirming the general rule that the discretion of the Taxing Officer could not be interfered with as to quantum, the Court is not precluded from so interfering in very special circumstances. Here there were such special circumstances:—

(a) The actions were all practically the same and practically the same as the *Macey* case.

(b) The defendants were all represented by the same solicitor.

(c) And this solicitor had been counsel for Macey and intended to be counsel in all these actions.

(d) In the *Macey* action he had been taxed a counsel fee of $750.

(e) No facts or law were briefed, and no facts or law other than appeared in the *Macey* case were required to be considered.

(f) A fee of $25 in each case was allowed for "Preparation for Trial."

4. As the costs between party and party are the costs of the

*Rule 507.—(1) A person affected by an order or judgment pronounced by a Judge in Chambers which finally disposes of the whole or part of the action or matter may appeal therefrom to a Divisional Court without leave.

litigant, each bill of costs is a separate matter; and, each being taxed by itself, a counsel fee should be taxed in each.

5. A counsel fee of $50 in each case was allowed as "Counsel fee at trial."

The order of the Chief Justice of the Common Pleas was amended accordingly; costs of the appeal, fixed at $75, to cover all costs of appeal, including order thereon, to be paid by the plaintiffs; no costs of the appeal before the Chief Justice of the Common Pleas.

GRAND TRUNK PACIFIC R. Co. v. DEARBORN.

Supreme Court of Canada, Davies, C.J., and Idington, Anglin, Brodeur and Mignault, JJ. March 17, 1919.

STATUTES (§ IIA—104)—BILLS OF SALE ORDINANCE (N.W.T. CON. ORD. C. 43) —"CREDITORS"—MEANING OF AS USED IN ORDINANCE.

The word "creditors," as used in s. 17 of the Bills of Sale Ordinance (N.W.T. Con. Ord. c. 43), means all the creditors of the mortgagor and not merely the execution creditors.

[*Security Trust Co.* v. *Stewart*, 39 D.L.R. 518, overruled.]

Statement.

APPEAL *per saltum* from the judgment of the Supreme Court of Alberta, Ives, J., dismissing the plaintiff's action with costs.

H. C. Macdonald, for the appellant; *S. B. Woods*, K.C., for the respondent.

Davies, C.J.

DAVIES, C.J.:—This appeal comes to us by way of appeal *per saltum* from a judgment of Ives, J., delivered on the trial of an interpleader issue in which the Grand Trunk Pacific R. Co. was directed to be the plaintiff and the respondent Dearborn defendant for the purpose of testing the validity of a chattel mortgage given on January 29, 1914, by the Edmonton Gravel Co. Ltd. in favour of the Northern Trust Co., of which chattel mortgage the respondent Dearborn had become assignee.

On April 16, 1917, the Grand Trunk Pacific R. Co. obtained judgment against the Edmonton Gravel Co. in the sum of $7,808 and costs, and on May 4, 1917, a writ of *fi. fa.* for the amount of the judgment and costs was placed in the sheriff's hands with instructions to levy the amount thereof on the goods and chattels of the Edmonton Gravel Co.

On April 5, 1917, a distress warrant was placed in the hands of the sheriff by the defendant Dearborn as assignee of the mortgage bill of sale from the Edmonton Gravel Co. with instructions

CAN.

S. C.

GRAND TRUNK PACIFIC R. CO. v. DEARBORN.

Davies, C.J.

to take possession of and sell the goods and chattels set out and assigned in the said mortgage and pursuant thereto the sheriff did actually seize and take possession of the said chattels. A portion of them was actually sold by the sheriff and the remainder held by him subject to the order of the court on the interpleader issue.

The trial judge held that the facts did not constitute a delivery of possession by the mortgagor, and also held that while he agreed personally with the contention of the plaintiff and the dissenting judgment of Harvey, C.J., in the case of *Security Trust Co. Ltd.* v. *Stewart* (1918), 39 D.L.R. 518, that failure on the part of the mortgagee of the bill of sale or its assignee to file the renewal statement required by the statute

made void the mortgage against all creditors and that there was no sufficient justification for qualifying the term "creditors"

in s. 17 of the ordinance respecting the registration of bills of sale so as to read "execution creditors," he was nevertheless bound by the judgment of the court in that case and precluded from giving effect to his own opinion.

In this appeal the question is squarely raised before this court, which is, of course, not bound by any provincial judgments, whether under the Bills of Sales Ordinance, ch. 43 of the Consolidated Ordinances of the N.W. Territories, the defendant's mortgage, not having been renewed on or before January 18, 1917, as required by s. 17 of the ordinance, had in the words of the ordinance "ceased to be valid" as expressed in s. 6 or had become "absolutely null and void" as expressed in s. 11 against the creditors of the mortgagor, and whether the courts should limit the meaning of the term "creditors" in the section to execution creditors only.

The ordinance in question is substantially a copy of the Ontario statute upon the same subject before it was amended by enacting that the word "creditors" should not be limited to "execution creditors" as it had been by the judgments of the courts of Ontario.

Upon this question, as to the meaning of the word "creditors" in the section as originally enacted by the Ontario legislature and substantially copied by the ordinance of the N.W. Territories, there has been a great difference of judicial opinion.

In *Holmes* v. *Vancamp* (1853), 10 U.C.Q.B. 510, Robinson, C.J., delivering the judgment of the court, says at p. 515:—

It is established clearly that he (Vancamp) was in fact a creditor (of the mortgagor) when this mortgage was given, and when he shews that, he compels us to hold the mortgage void as against him from the first and not merely from the time his judgment was entered.

In a case in the Chancery Division of *Barker* v. *Leeson* (1882), 1 O.R. 114, it was held by Boyd, C., that

a chattel mortgage which has expired by effluxion of time under R.S.O. c. 119, s. 10, and has not been renewed or refiled, ceases to be valid as against all creditors of the mortgagor then existing.

The chancellor, in giving judgment, said at p. 117:—

The language of the statute is, that every mortgage shall cease to be valid as against *the creditors* of the person making the same after the expiration of one year from the filing thereof, unless there be a statement of renewal filed, as provided in the 10th section of the Act: R.S.O. c. 119. Why should this be read as meaning judgment or execution creditors?

The recovery of judgment merely facilitates the proof of the party who is the creditor, but he is as much a creditor before as after judgment. The object of the Act is plainly, by means of registration, to inform everybody that goods apparently in the possession and ownership of A. are not in truth his, but are held by him subject to the claim of B. under a chattel mortgage or bill of sale. The object of the Act is to enforce a visible and actual transfer of possession upon every change of ownership, or to compel the recording of the instruments which manifest the change of property. The intent is, that persons who are about to become the creditors of others by parting with money or money's worth, may, by searches in the public office, obtain information for their guidance; and that the ostensible owners of chattels may not gain fictitious credit on the faith of property which is either encumbered or belongs to other people. By the statute then, where the mortgagee has not renewed his security by refiling at the year's end, and is not in possession of the chattels, his mortgage ceases to be valid against creditors.

The case chiefly relied upon by the respondent was that of *Parkes* v. *St. George* (1884), 10 A.R. (Ont.) 496. There the appeal court held (Patterson, J., dissenting) that a creditor who is not in a position to seize or levy on an execution on the property cannot maintain an action to have the instrument declared "invalid," and that holding was, of course, followed in the Ontario courts in a series of decisions until the Act was amended eight years afterwards by declaring that the word "creditors" in the statute should not be limited to execution creditors.

In the Province of Alberta, in the case of the *Security Trust Co.* v. *Stewart*, 39 D.L.R. 518, the court, Harvey, C.J., dissenting, followed the Ontario decision of *Parkes* v. *St. George*, and limited the word "creditors" in the Act to "such as were either execution or attaching creditors."

CAN.

S. C.

GRAND TRUNK PACIFIC R. CO. v. DEARBORN.

Davies, C.J.

I agree fully with the dissenting Chief Justice Harvey, in his statement, p. 519 (2), that he could see

> no sufficient reason for concluding that when the legislature said that a mortgage would cease to be valid as against the creditors of the mortgagor, it meant anything different from what it said. To prefix the word "execution" before the word "creditors" would be a perfectly legitimate amendment, but it is only the legislature that has the right to make such amendment.

See also judgment of Walsh, J., in *Graf* v. *Lingerell* (1914), 16 D.L.R. 417, 7 Alta. L.R. 340.

The same question came before this court in the case of *Clarkson* v. *McMaster* (1895), 25 Can. S.C.R. 96. Strong, C.J., in his judgment, referring to the decision of the Ontario Court of Appeal in *Parkes* v. *St. George*, above referred to, and the cases which followed it, said at p. 100:—

> If it were necessary now to determine whether this construction was or was not correct I am compelled to say, with great respect for the opinions referred to, that I should find great difficulty in agreeing with these decisions. First, I see no reason why the word "creditors" should be restricted to a particular class of creditors, viz., judgment creditors. Why should the same word receive a different construction in this Act from that which it has received as used in the statute of the 13th Elizabeth? I see no reason for any such distinction. It is true that equitable execution as consequential on the avoidance of a transaction under the 13th Elizabeth could not, under the old system of separate jurisdictions for law and equity, have been obtained by any but judgment creditors, but the deed was nevertheless held to be void as against simple contract creditors.

And again at p. 101:—

> Then, there are reasons which, in my opinion, require a liberal construction of the word "creditors," derived from the manifest policy of the Chattel Mortgage Act. Registration or possession were required manifestly for the protection, not only of actual creditors, but of those who might become creditors, relying on the visible possession of property by their debtor, and the absence from the appropriate registry of any charge upon that property; and this for the protection of those who had not had the opportunity of recovering judgment, creditors payment of whose claims might be deferred, or who had not had time to get judgment.

I have no hesitation myself in putting the construction upon the section of the Ontario legislature, from which the ordinance was substantially copied, adopted by Robinson, C.J., in *Holmes* v. *Vancamp*, 10 U.C.Q.B. 510; Boyd, C., in *Barker* v. *Leeson*, 1 O.R. 114; and Patterson, J., in *Parkes* v. *St. George*, *supra*, and also by Strong, C.J., in *Clarkson* v. *McMaster*, *supra*, and, upon the N.W. Ordinance which is a substantial copy of the Ontario enactment, by Harvey, C.J., dissenting in the Appeal Court and

Simmons, J., the trial judge, in *Security Trust Co.* v. *Stewart*, 39 D.L.R. 518, and by Walsh, J., in *Graf* v. *Lingerell*, *supra*, on the N.W. Ordinance before us.

I cannot admit the right of the courts where the language of a statute is plain and unambiguous to practically amend such statute either by eliminating words or inserting limiting words unless the grammatical and ordinary sense of the words as enacted leads to some absurdity or some repugnance or inconsistency with the rest of the enactment, and in those cases only to the extent of avoiding that absurdity, repugnance and inconsistency.

I think the word "creditors" as used in this ordinance means just what it says and embraces all creditors and not merely execution creditors. Such a construction has in scores of cases in the English and in our courts been put upon the same word "creditors" in the Statute of Elizabeth.

I think the object and purpose of the legislation being construed was to compel either registration of a mortgage or other bill of sale from the owner in possession of the chattels to a mortgagee or the visible and actual transfer and possession of the chattels to him so that persons might not be entrapped or misled into advancing moneys or credits to others in ostensible possession of chattels and goods under the belief that they were the owners of the goods. It was intended to prevent the ostensible owner of goods from obtaining undeserved credit on the faith of his being the real owner of property which was either encumbered by secret bills of sale or belonged to other people. It does not require an actual change in the ostensible possession of property but it does require, if there is no such change of possession, that the security taken upon the property should be recorded in a public office; and it further requires that from time to time, as specified in the Act, such security should be renewed on the registry so as to conform with the actual existing facts. These requirements were not enacted surely for the benefit of execution creditors merely. They were so enacted for the benefit and protection of all who were or might become creditors before there was an open, visible change of actual possession of the goods and chattels or a registration in a public office of a mortgage of such goods. It comes down to this, that either registration and renewal or actual transfer of possession were required for the protection as well of existing as for future

CAN.

S. C.

GRAND TRUNK PACIFIC R. CO. v. DEARBORN.

creditors who might rely upon such possession and the non-registration or non-renewal of charges in the proper registry.

Being a remedial statute to prevent fraud and protect honest dealers it should rather be construed, if its language is doubtful, liberally and to advance the object the legislature clearly had in view.

Davies, C.J.

For these and other reasons I will not stop to enlarge upon, I would allow the appeal and direct judgment as prayed for in the statement of claim.

If a majority of the court does not agree with my construction I would still allow the appeal upon the second ground that the plaintiffs appellants having become execution creditors, and the goods not having been sold when the execution was placed in the hands of the sheriff, they were still held under the mortgage which had become invalid as against the plaintiffs as execution creditors and that as such these latter had priority over the claimant under the void chattel mortgage.

Idington, J.

IDINGTON, J. (dissenting):—I agree with the construction adopted herein by the court below, of the Bills of Sale Ordinance Act in question. Even if I had grave doubts (which I never had) of the correctness of that construction having been well founded, when adopted long ago by the courts of Ontario in applying the Act from which that now in question seems to have been copied, I should not feel at liberty at this late day to upset all that which now rests upon the adoption of such construction, supposed to have been settled so long ago.

There have been many interesting questions suggested in the course of the argument which, when connected with charges of fraud, might be well worth considering, but raises nothing herein when such charges are not made. Therefore I pass no opinion but upon the single point raised and dealt with above.

I think the appeal should be dismissed with costs.

Anglin, J.

ANGLIN, J.:—The defendant having failed to renew the registration of his chattel mortgage on or before January 18, 1917, as required by s. 17 of the Bills of Sales Ordinance (Con. Ord. N.W.T., c. 43), it "ceased to be valid as against the creditors" of the mortgagor. The plaintiff, the Grand Trunk Pacific R. Co., was then a simple contract creditor of the mortgagor. It became an execution creditor on May 4, 1917. Meantime, on April 5, the

defendant had caused what he asserts was a seizure to be made of the goods covered by his chattel mortgage and they were, formally at least, still under such seizure when the plaintiff company's execution was lodged with the sheriff on May 4, and when he was directed, on October 19, to hold the chattels or proceeds of the sale thereof to meet it.

Upon these facts, Ives, J., following, as he was bound to do, the decision of the Appellate Division of the Supreme Court of Alberta in *Security Trusts Co.* v. *Stewart*, 39 D.L.R. 518 (although he expressed his personal preference for the dissenting opinion of Harvey, C.J.), dismissed the plaintiffs' claim to have the chattel mortgage declared void as against them and for payment over to them of the proceeds of the sale of the goods in question (made without prejudice under an arrangement with the parties) by the sheriff in whose hands they are. From that judgment the plaintiffs appeal to this court—*per saltum* by consent.

The appeal rests on two distinct grounds: (1) that the word "creditors," in s. 17 of the Bills of Sales Ordinance, means all or any creditors of the mortgagor and not merely "execution creditors," as was held by the Appellate Division in the *Stewart* case, *supra*; (2) that the goods being only under seizure and not yet sold when the first execution was placed in the sheriff's hands, they were still held under the mortgage, which had become invalid as against the plaintiffs, if not before, at least immediately upon their attaining the status of execution creditors, and that as execution creditors they acquired a right to have the goods in question seized and disposed of for their benefit superior to that of the defendant as chattel mortgagee.

On the first point, notwithstanding Mr. Macdonald's very able argument and the powerful judgment of the late Chief Justice Strong in *Clarkson* v. *McMaster*, *supra*, by which he supported it, I am of the opinion that the word "creditors" in the Bills of Sales Ordinance has been properly held to mean execution creditors—creditors whose claims are in such a form as gives them a lien on the property and entitles them to seize it—creditors having rights in respect of the goods to the exercise of which the security to be avoided would, if valid, present an obstacle. The judgments in *Parkes* v. *St. George*, *supra*, have convinced me that the legislature

CAN.

S. C.

GRAND TRUNK PACIFIC R. CO. v. DEARBORN.

Anglin, J.

cannot have meant to give a simple contract creditor what would be tantamount to execution before judgment. It would be useless at the suit of such a creditor to set aside a mortgage which (subject to the statute against fraudulent preferences) could be at once replaced (no creditor having acquired a right to seize the goods covered by it and no subsequent purchaser or mortgagee having intervened) unless such goods should be held to meet the suitor's claim when he should have recovered judgment against his debtor. On this branch of the case, however, I merely desire respectfully to express my concurrence in the judgment in *Parkes* v. *St. George*, *supra*, and the numerous decisions which have followed it.

But upon the other aspect of the case, I think the appellants are entitled to succeed on the ground on which *Heaton* v. *Flood* (1897), 29 O.R. 87, was decided in favour of the execution creditor. I express no decided opinion upon the question whether there must be what is tantamount to "a delivery or new transfer by the mortgagor" to render the taking of possession effectual to cure the defect in the mortgagee's title due to non-compliance with the requirements of the statute. The mortgagee certainly took such possession as he obtained by virtue of his mortgage upon a suggestion that a seizure by him under it would "cure the defect" due to its non-renewal. He continued to hold solely under whatever right the defective mortgage gave him—a right good as against the mortgagor but which had "ceased to be valid" as against his execution creditors. There had been no sale of the goods such as was held in *Meriden Britannia Co.* v. *Braden* (1894), 21 A.R. (Ont.) 352, and *Cookson* v. *Swire* (1884), 9 App. Cas. 653, to vest in the purchaser a title not dependent on the continued subsistence of the chattel mortgage and good as against the subsequent execution creditor. There was nothing which amounted, or was equivalent, to a delivery or new transfer by the mortgagor—nothing which took the transaction out of the Bills of Sale Ordinance (*Smith* v. *Fair*, 11 A.R. (Ont.) 755, at 758), *per* Patterson, J.A., if an act of the mortgagor tantamount to delivery was requisite. The view that "the remedial effect of possession depends upon the act of the mortgagor" was taken at an early date in a case arising under the Bills of Sale Ordinance now under consideration by Wetmore, J., *Adams* v. *Hutchings* (1893), 3 Terr. L.R. 206, at 216.

CAN.

S. C.

GRAND TRUNK PACIFIC R. CO. v. DEARBORN.

Anglin, J.

But whether this view be or be not correct the evidence, in my opinion, to quote the language of Meredith, C.J., in *Heaton* v. *Flood*, 29 O.R. 87, does not "establish any change of possession, or anything more than a mere formal delivery" to the sheriff's officer as the mortgagee's bailiff, "without any real change of the possession being intended or effected." The apparent possession continued as before. The goods covered by the chattel mortgage were found by the sheriff's officer lying in or about a barn on a tenanted farm. After taking an inventory the officer left them on the place just as he found them in charge of the tenant, without pay, merely with instructions to "see that nobody took the stuff." In my opinion, even in the absence of a statutory provision expressly prescribing that the change of possession be open and reasonably sufficient to afford public notice thereof (*Hogaboom* v. *Graydon* (1894), 26 O.R. 298, at 302), what took place did not constitute the "actual and continued change of possession" requisite to dispense with a mortgage duly registered in conformity with the Bills of Sales Ordinance, and only such possession would enable the mortgagee to hold as against execution creditors of the mortgagor. *Scribner* v. *Kinlock* (1885), 12 A.R. (Ont.) 367, *per* Patterson, J.A., at 378 and *per* Rose, J., at 380. *Heaton* v. *Flood*, *supra*; *Steele* v. *Benham* (1881), 84 N.Y. 634, at 638. To hold otherwise would open the door to the very mischief against which the statute was designed to guard.

I would allow the appeal of the execution creditors and direct judgment in their favour in accordance with the prayer of the statement of claim.

Brodeur, J.

BRODEUR, J.:—The main question in this case is as to whether a chattel mortgage which has not been renewed is good against ordinary creditors of the mortgagor. The section we have to construe is s. 17 of the Bills of Sales Ordinance, c. 43, which enacted that every chattel mortgage has to be renewed within two years of the filing, under penalty that in default the mortgage shall cease to be valid as against the creditors of the persons making the same and against subsequent purchasers or mortgagees in good faith for valuable consideration.

That section has been the law of the North West Territories since 1881. That legislation had evidently been adopted from the legislation then in force in Ontario because the Ordinance of 1881 copies almost word for word the statute which was then in force in Ontario.

CAN.

S. C.

GRAND TRUNK PACIFIC R. CO. v. DEARBORN.

Brodeur, J.

It is contended by the respondent that the word "creditors" in that section means the execution creditors. The appellant, on the other hand, contends that the word "creditors" should be construed literally as applying to all the creditors, including the ordinary creditors.

We find in the statute 13 Eliz. that the name "creditors" is there mentioned in connection with the right to set aside fraudulent or preferential assignment. That word was construed in different cases in England, which are to be found in May on Fraudulent Conveyances, 3rd ed., p. 102; and I may in that respect quote the case of *Reese River Silver Mining Co.* v. *Atwell* (1869), L.R. 7 Eq. 347, where it was held by Lord Romilly, M.R., that simple contract creditors are entitled to a decree declaring a deed void under the Statute of Elizabeth, though not having obtained the judgment at law.

In 1881, in Ontario, in the same year in which the ordinance was passed in the North West Territories, Boyd, C., in the case of *Barker* v. *Leeson*, *supra*, being called upon to construe exactly the same section as the one passed in the North West Territories decided that the word "creditors" in that section could not be restricted to execution creditors but should apply to all creditors.

Then the Council of the North West Territories, in passing that legislation and in adopting the word "creditors," is supposed to have used the word according to the construction which it had received in England and was receiving in the Province of Ontario.

Three years later, in Ontario, was decided the case of *Parkes* v. *St. George*, *supra*, where the Court of Appeal held that a creditor, who is not in a position to seize or lay an execution on a property cannot maintain an action to have the chattel mortgage declared invalid.

That decision of the Court of Appeal of Ontario seems to have been followed in that province until 1892, when the law was changed.

In 1895, the question came up before this court in the case of *Clarkson* v. *McMaster*, 25 Can. S.C.R. 96, and there Sir Henry Strong, C.J., p. 100, said that he could not agree with the opinions expressed in the case of *Parkes* v. *St. George*, *supra*. I will quote his words:—

I see no reason why the word *creditors* should be restricted to a particular class of creditors, viz., judgment creditors.

And he goes on, p. 101:—

Registration or possession were required manifestly for the protection not only of actual creditors but of those who might become creditors relying on the visible possession of property by their debtor and the absence from the appropriate registry of any charge upon that property.

In the Province of Alberta from which the present appeal comes there seems to have been a great divergence of opinion among the judges of that province. It seems to me that the case of *Parkes* v. *St. George* has been decided on account of the peculiar expressions used in the English Bills of Sale Act, which speaks of execution creditors. Hagarty, C.J., in rendering the judgment in the case of *Parkes* v. *St. George*, at p. 506, says:—

It is significant that with the extreme care manifested in these Acts (the English Bills of Sales Acts) to avoid secret or fraudulent assignments of chattels, they should have carefully limited their operation to creditors having executions. I cannot believe our legislature ever contemplated applying the remedy of registration to the case of every person having a claim or account against the mortgagor at the date of the instrument.

It is pretty clear that the Ontario Bills of Sales Act was taken from the English Act. But if the Ontario Legislature has found it advisable to use the word "creditor" as it was used in the Statute of Elizabeth, it seems to me that the change was made intentionally on the part of the legislature and that it meant to give to the creditors the same rights as they had under the Statute of Elizabeth.

The Court of Appeal of Alberta came to the conclusion that they should follow the decision of *Parkes* v. *St. George*, *supra*. With a great deal of deference I hold the contrary view. It seems to me that the word "creditors" should be construed as applying to all creditors.

The appeal, then, should be allowed with costs of this court and of the courts below.

MIGNAULT, J.:—Two questions are submitted by the appellant: (1) by virtue of s. 17 of the Bills of Sales Ordinance, being c. 43 of the Consolidated Ordinances of the North West Territories, the respondent having failed to file a renewal statement within 30 days next preceding January 18, 1917, its chattel mortgage ceased to be valid as against the creditors of the mortgagor and the appellant was such a creditor. (2) This failure to file a renewal statement has not been cured by the seizure made by the respond-

Mignault, J.

CAN.

S. C.

GRAND TRUNK PACIFIC R. CO. v. DEARBORN.

Mignault, J.

ent on April 5, 1917, of the goods covered by the chattel mortgage, which was not such a taking possession of the mortgaged goods as could cure the omission to file the statutory renewal.

1st question.—The answer to this question depends on the construction of the word "creditors" in ss. 11, 17 and 19 of the ordinance, the appellant contending that it means creditors generally, the respondent claiming that it only applies to execution creditors, to the exclusion of mere contract creditors.

In this case the appellant became an execution creditor only on May 4, 1917, subsequent to the seizure made by the respondent on April 5.

As briefly as they can be stated, the provisions of the Bills of Sales Ordinance, with regard to the registration and renewal of registration of chattel mortgages, are as follows:—

S. 6 requires the registration, within 30 days from its execution, of every mortgage or conveyance of goods and chattels which is not accompanied by an immediate delivery and an actual and continued change of possession of the things mortgaged.

By s. 11 it is provided that if such mortgage or conveyance is not so registered, it shall be

absolutely null and void as against creditors of the mortgagor and against subsequent purchasers or mortgagees in good faith for valuable consideration.

S. 17 states that

every mortgage filed in pursuance of this ordinance shall cease to be valid as against the creditors of the persons making the same and against subsequent purchasers or mortgagees in good faith for valuable consideration after the expiration of two years from the filing thereof unless, within 30 days next preceding the expiration of the said term of 2 years, a statement exhibiting the interest of the mortgagee, his executors, administrators or assigns in the property claimed by virtue thereof and a full statement of the amount still due for principal and interest thereon, and of all payments made on account thereof, is filed in the office of the registration clerk of the district where the property is then situate.

Finally s. 19 directs that another statement in accordance with the provisions of s. 17 shall be filed in the office of the registration clerk of the district where the property is then situate within 30 days next preceding the expiration of the term of 1 year from the day of the filing of the statement required by s. 17,

and in default thereof such mortgage shall cease to be valid as against the creditors of the person making the same and as against purchasers and mortgagees in good faith for valuable consideration, and so on from year to year, that is to say, another statement as aforesaid duly verified shall be filed within

30 days next preceding the expiration of 1 year from the filing of the former statement, and in default thereof such mortgage shall cease to be valid as aforesaid.

This ordinance was adopted in 1881, and was substantially copied from the Ontario Act, R.S.O. 1877, c. 119, which also stated (s. 4) that chattel mortgages not registered would be

absolutely null and void as against creditors of the mortgagor, and against subsequent purchasers or mortgagees in good faith for valuable consideration.

Section 11 of the Ontario Act provided that

every mortgage, or a copy thereof, filed in pursuance of this Act, shall cease to be valid as against the creditors of the persons making the same and against subsequent purchasers and mortgagees in good faith for valuable consideration, after the expiration of one year from the filing thereof,

unless within 30 days next preceding the expiration of the said term of 1 year a statement exhibiting the interest of the mortgagee is again filed in the office of the clerk of the County Court.

The English Bills of Sale Act, 1878, 41-42 Vict., c. 31, also required the registration of bills of sale, failing which

such bill of sale, as against all trustees or assignees of the estate of the person whose chattels, or any of them, are comprised in such bill of sale under the law relating to bankruptcy or liquidation, or under any assignment for the benefit of the creditors of such person, and also as against all sheriffs, officers or other persons seizing any chattels comprised in such bill of sale, in the execution of any process of any court authorizing the seizure of the chattels of the person by whom or of whose chattels such bill has been made, and also as against every person on whose behalf such process shall have been issued, shall be deemed fraudulent and void as regards the property in or right to the possession of any chattels comprised in such bill of sale.

It is perfectly clear that decisions under the English Bills of Sale Act cannot be taken as a guide for the construction of the Canadian statutes. In drafting the latter statutes the legislature has departed from the carefully guarded language of the English Act, and that, it seems to me, cannot have been done with any other idea than of giving to the Canadian statutes a wider application than the English Act.

In *Parkes* v. *St. George*, *supra*, decided in 1884, the Ontario Court of Appeal, Hagarty, C.J., Burton, Patterson and Osler, JJ., held, Patterson, J., dissenting, that a judgment or execution creditor is entitled to impeach a chattel mortgage on the ground of an irregularity or informality in the execution of the document, or by reason of its non-compliance with the provisions of the Chattel Mortgage Act (R.S.O., c. 119), but that a creditor who is not in a position to seize or lay on an execution on the property,

CAN.

S. C.

GRAND TRUNK PACIFIC R. CO. v. DEARBORN.

Mignault, J.

cannot maintain an action to have the instrument declared invalid, and that a creditor in that position can only maintain such a proceeding where the security is impeached on the ground of fraud.

In 1892, the Ontario Act respecting mortgages and sales of personal property was amended by 55 Vict., c. 26, and it was enacted (s. 2) that in the application of the said Act the words,

"void as against creditors" shall extend to simple contract creditors of the mortgagor or bargainor suing on behalf of themselves and other creditors . . . as well as to creditors having executions against the goods and chattels of the mortgagor or bargainor in the hands of the sheriff or other officer.

Referring now more specially to *Parkes* v. *St. George*, *supra*, which was followed by the Alberta Court of Appeal in the *Security Trust Co.* v. *Stewart*, 39 D.L.R. 518, Harvey, C.J., dissenting, doubts as to its correctness were expressed by so eminent a jurist as Sir Henry Strong, C.J., in *Clarkson* v. *McMaster*, 25 Can. S.C.R. 96. Before *Parkes* v. *St. George*, Sir John Beverley Robinson, C.J., dealing with the statute then in force, had expressed a contrary opinion in *Holmes* v. *Vancamp*, 10 U.C.Q.B. 510, at 515, and Boyd, C., in *Barker* v. *Leeson*, 1 O.R. 114, had decided that a chattel mortgage, registration of which had not been renewed, ceased to be valid as against all creditors of the mortgagor then existing.

Mr. Woods, for the respondent, referred us to the dictum of Lord Atkinson as to the construction of statutes in *Banbury* v. *Bank of Montreal*, 44 D.L.R. 234, [1918] A.C. 626, where the noble Lord said, at p. 284:—

The question then is, does this section (section 6) of Lord Tenterton's Act apply to innocent representation? No doubt the words of the section are general. On its face it applies to every representation, innocent or fraudulent; but one cannot construe these words, general in character though they be, without having regard to the circumstances in reference to which they were used, and to the object appearing from the statute which the legislature had in view in using them. Lord Coke, in the well-known passage in *Heydon's* Case (1584), 3 Rep. 7b, lays it down that to get at the scope and object of an Act one should consider: (1) What the law was before it was passed; (2) what was the mischief or defect for which the law had not provided; (3) what remedy parliament has appointed; (4) the reason for the remedy. In *Hawkins* v. *Gathercole* (1855), 6 DeG. M. & G. 1, 20-1, 43 E.R. 1129, Turner, L.J., said that "in construing Acts of Parliament the words which are used are not alone to be regarded." He then quotes with approval and adopts a passage from the judgment in *Stradling* v. *Morgan* (1560), 1 Plowd. 199, at pp. 204 and 205, 75 E.R. 305. This statement of the law was by Turner, L.J., stated

to be the best he knew of. It has been approved of by Lord Hatherley in *Garnett* v. *Bradley* (1878), 3 App. Cas. 944, at 950, by Lord Selborne in *Bradlaugh* v. *Clarke* (1883), 8 App. Cas. 354, at 362, and by Lord Halsbury in *Eastman Photographic Materials Co.* v. *Comptroller-General of Patents, Designs and Trade Marks*, [1898] A.C. 571, at 575. The passage from Plowden is so applicable to the present case and, approved of as it has been, is so authoritative that one may be excused for quoting it at length. It runs thus: "The judges of the law in all times past have so far pursued the intent of the makers of statutes that they have expounded Acts which were general in words to be but particular where the interest was particular," and after referring to several instances proceeds: "From which cases it appears that the sages of the law heretofore have construed statutes quite contrary to the letter in some appearance, and those statutes which comprehend all things in the letter, they have expounded to extend but to some things, and those which generally prohibit all people from doing such an act, they have interpreted to permit some people to do it, and those which include every person in the letter they have adjudged to reach to some persons only, which expositions have always been founded upon the intent of the legislature, which they have collected sometimes by considering the cause and necessity of making the Act, sometimes by comparing one part of the Act with another, and sometimes by foreign (*i.e.*, extraneous) circumstances. So that they have ever been guided by the intent of the legislature, which they have always taken according to the necessity of the matter, and according to that which is consonant to reason and good discretion."

There is no doubt that, apart from the authority due to this exposition of the law governing the construction of statutes, the duty of courts is to have regard, in construing general terms,

to the circumstances in reference to which they were used and to the object appearing from the statute which the legislature had in view in using them.

But I can discover in this ordinance no indication that the intention of the legislature was not to use the words "creditors of the mortgagor" in their general sense. The statute provided for the establishment of registration districts and for the registration of mortgages and conveyances intending to operate as a mortgage of goods and chattels. The object of the statute was without doubt to secure the due publicity of these mortgages and conveyances, and this publicity was required for the protection of third parties dealing in good faith with a person in actual possession of goods and chattels, for registration was required in the case of

every mortgage or conveyance intending to operate as a mortgage of goods and chattels which is not accompanied by an immediate delivery and an actual and continued change of possession of the things mortgaged.

When, therefore, the statute says that in default of registration or the filing of a statement of the interest of the mortgagee, the mortgage shall be absolutely null and void, or shall cease to be

CAN.

S. C.

GRAND TRUNK PACIFIC R. CO. v. DEARBORN.

Mignault, J.

valid, as against the creditors of the mortgagor and subsequent purchasers or mortgagees in good faith for valuable security, I cannot think that the word "creditors" should be cut down by construction so as to read in the statute the qualification that these creditors must be judgment or execution creditors. The evil or mischief which the legislature unquestionably desired to remedy was the possibility of a debtor making secret conveyances or mortgages of his goods and chattels not accompanied by an immediate delivery and actual change of possession. That such secret conveyances or mortgages would be prejudicial to creditors generally, who have given credit to the mortgagor on the faith of his possession of ample goods and chattels, as well as to judgment or execution creditors who have obtained a lien on his goods, cannot be doubted, and the intention was to remedy this evil and to give to registration the same effect as an actual delivery and change of possession, both serving as a notice to third parties from whom the owner of the goods and chattels might seek to obtain credit or who might obtain a lien on his property.

I think that the Ontario statute passed in 1892, 8 years after *Parkes* v. *St. George*, 10 A.R. (Ont.) 496 was decided, expressly declaring that the word "creditors" shall extend to simple contract creditors of the mortgagor or bargainor suing on behalf of themselves, as well as to creditors having executions against the goods and chattels of the mortgagor or bargainor, shews that at least in Ontario, where this legislation was first enacted, the intention was not that the word "creditors" should be restricted to execution creditors. And notwithstanding the great respect which I have for the decision in *Parkes* v. *St. George*, and the reluctance which I naturally feel to dispute its authority, I cannot, now that the question is raised before this court, do otherwise than express the opinion that the appellant, although a contract creditor, was such a creditor as was in the contemplation of the sections of the ordinance above cited. For that reason, I think, with deference, that the decision of the Alberta Court of Appeal in *Security Trust Company* v. *Stewart*, 39 D.L.R. 518, should be overruled.

I, therefore, have come to the conclusion on this first question that the respondent's chattel mortgage ceased to be valid as against the appellant, no renewal statement having been filed as required by the ordinance.

2nd question.—I here express my entire concurrence with what my brother Anglin has said on this branch of the case, and I am of the opinion that there was not, by means of the proceedings under the seizure made by the respondent on April 5, 1917, such a taking of possession of the mortgaged goods as would dispense with compliance with the requirements of the statute as to registration or renewal thereof.

The appeal should, therefore, be allowed with costs throughout, and judgment should be rendered in accordance with the appellants' demand. *Appeal allowed.*

BING KEE v. MACKENZIE.

British Columbia Court of Appeal, Macdonald, C.J.A., Martin and Eberts, JJ.A. April 1, 1919.

CONTRACTS (§ II D—173)—COAL RESERVATIONS IN SALE OF LAND—PROOF OF—NOTHING SAID ABOUT RESERVATION DURING NEGOTIATION—INFERENCE TO BE DRAWN.

The party who alleges that all that usually goes with a sale of land was not conveyed must prove the reservation.

The true inference to be drawn from the fact that during the negotiations for sale of land nothing was said about coal reservations is that there was no reservation of the coal.

Statement.

APPEAL by plaintiff from the judgment of Gregory, J. Reversed.

E. P. Davis, K.C., and *H. M. Smith*, for appellant; *E. C. Mayers*, for respondents.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—The question in dispute between the parties is the coal and other minerals under section 2 and the E. 60 acres of section 3, range 7 in the Cranberry district of Vancouver Island. These sections lie within the boundaries of the Esquimalt and Nanaimo Railway belt, a block of land conveyed to that company in 1887 by the Crown, subject to certain exceptions in favour of settlers within the limits of said belt. One Joseph Ganner was one of such settlers, and in 1890 the railway company conveyed to him said two sections of land, reserving thereout the coal and other minerals. Ganner died in 1903 and the defendants are the executors of his will.

In February, 1904, the Vancouver Island Settlers' Rights Act, 1904, was passed by the legislature which enacted that, upon proof of his claim by the settler: "a Crown grant of the fee simple

B. C.
C. A.
BING KEE v. MACKENZIE.
Macdonald, C.J.A.

in such land (the land on which he had settled) shall be issued to him or his legal representatives." On March 13, 1904, the defendants entered into an agreement of sale of the said two sections of land to the plaintiff and this was followed a year later by a conveyance. The time having long expired within which settlers were entitled to apply for a grant under the said Settlers' Rights Act, the legislature extended such time by an amendment to the Act passed in 1917 and the defendants thereupon applied for a grant of the said two sections of land under the provisions of the said Settlers' Rights Act and obtained the same on February 15, 1918. The plaintiff then brought this action for a declaration that he was entitled to the coal under said lands.

One difficulty is owing to the loss of the plaintiff's said agreement and conveyance. A proper foundation, however, was laid for secondary evidence of the contents of these instruments and evidence was given which failed to satisfy the trial judge that the plaintiff had satisfied the burden which he thought rested upon him to make good his claim. The contention of the defendants is that they conveyed the land to the plaintiff subject to the reservation of the coal and other minerals contained in the railway company's deed to Ganner. The plaintiff's contention is that there was no reservation whatever. The judge thought that the burden of proof that the deed contained no such reservation was upon the plaintiff and that he failed to satisfy it. The evidence upon the point is practically uncontradicted and the question to be decided is as to its sufficiency. The plaintiff and the defendant Wilson say that nothing whatever was said about the coal or other minerals at the time of the agreement of sale, or at any time before the completion of the transaction. The defendant Mackenzie's evidence on discovery is to the same effect, but, at the trial, Mackenzie says that he told Judge (then Mr.) Young, who prepared the agreement and deed that "everything would be subject to the E. & N. deed." It is, therefore, established beyond dispute that during the negotiations, at all events, no direct reference was made to the coal and other minerals.

Mr. Mayers for the defendants strongly pressed the argument that because, as he submitted, neither the plaintiff nor the defendants had read the agreement and conveyance aforesaid, their evidence as to their contents was of no value. Judge Young, who

was the only other witness to the contents of the instruments, had no recollection whatever in respect of them. I think Mr. Mayers' proposition was too broadly stated. The defendants executed the agreement and conveyance, and the legal presumption from that is that they knew and understood their contents. The only question in dispute as to the contents of these documents is whether or not they contained a reservation of the minerals. The sale of the land, the parcels, the price, and all other terms are not in dispute. But apart from the presumption that the person who signs a document knows and understands its contents and, therefore, would know whether it contained a particular term or not, and apart from the fact that neither the defendants nor anyone else was able to say that this instrument did contain such a reservation, we have the evidence of the defendants, the true inference from which, in my opinion, is that no such reservation was inserted in these instruments.

Defendant Wilson on discovery says that the agreement was "one of the ordinary printed affairs such as you have around here."

Q. Was there a clause in there about coal? A. No.

Q. It was just an ordinary agreement? A. Yes.

Q. So far as you know you never discussed coal with Bing Kee? A. No, never dreamed of such a thing.

With respect to the conveyance the same witness on discovery said:—

It was an ordinary conveyance.

Q. Your names and the name of Bing Kee? A. Yes.

Q. And a description of the land? A. Yes.

Q. And the price? A. Yes.

Q. No special form about it? A. No.

Q. No special clause about it? A. Not any, no.

Q. No special clause in it about the coal? A. No, coal was never mentioned in any shape or form.

Q. At any time? A. At any time.

It is proper here to mention that this witness did not come in contact with the plaintiff during the negotiations and, therefore, this evidence must have reference to his meetings with Mr. Young, who was plaintiff's solicitor. The witness was then asked with respect to a certain conversation had some time before the trial between himself and Mackenzie over the telephone, and to the question: "You said to Mackenzie was there any reservation of

B. C.

C. A.

BING KEE v. MACKENZIE.

Macdonald, C.J.A.

coal in the deed?" answered: "I asked if he knew whether any reservation was made and he said, no, no reservation whatever." This last answer is contradicted by defendant Mackenzie at the trial and to some extent by the witness himself in his evidence at the trial. Mackenzie on discovery admits that an agreement was drawn up and when asked:

Do you recollect the contents of that document?

(he answered)

Not particularly.

Q. Did you read it over? A. I don't think I did. I read the deed over and the agreement was supposed to be subject to the deed.

Q. What deed are you referring to now? A. The E. & N. deed with Mr. Ganner.

Q. When you say you think there was a reservation there the only reason you had for saying that was because there was a reservation in the E. & N. deed? A. Yes.

Q. You do not speak about the recollection of what there was in the deed? A. No.

Q. And you never told Bing Kee you were not selling him the coal? A. It was understood.

Q. You never told him? A. No.

The evidence of these two witnesses, the defendants, at the trial is not altogether consistent with the above, but after a careful consideration of it all I accept the above wherever it conflicts with their evidence at the trial.

Where the evidence is, as here, of the sale of land, and one of the parties alleges that all that usually goes with such a sale was not conveyed, but that there was a reservation, I think he must prove it. But even if this be not the correct view of the matter, I think the evidence above referred to, coupled with the evidence of the plaintiff who was buying the land without any suggestion of a reservation of the coal or anything else that usually goes with the land, is sufficient to prove that neither in the agreement for sale nor in the deed itself was there any reservation of the coal and other minerals.

The true inference, in my opinion, to be drawn from the fact that nothing was said during the negotiations about the coal, is that there was no reservation of the coal. In argument the opposite construction was by defendants' counsel put upon the fact, but that construction will not bear consideration, otherwise the fact that nothing was said about timber, or buildings would import that these, if there were any, were not to pass with the land.

B. C.
C. A.
BING KEE v. MACKENZIE.
Macdonald C.J.A.

But, even if the deed contained the proviso suggested and which the defendant Mackenzie said he understood it was intended to contain, namely, that the conveyance was subject to the reservations mentioned in the E. & N. deed, or as it was put by defendant's counsel in his cross-examination of Judge Young when he said: "In every conveyance I have seen where original lands from the E. & N. Railway were being conveyed there is a clause attached to the end of the addendum 'subject to the limitations and reservations contained in the grant to the E. & N.R. Co.'"—still, in my opinion, the plaintiff must succeed. When the defendants conveyed the lands to the plaintiffs they were entitled to the benefit of the said Settlers' Rights Act. Their title to the coal under that Act was entirely independent of their deed from the E. & N.R. Co. The effect of the Act was to make the title of the railway company to the coal worthless. In order to succeed in this action, the defendants would have to prove that the deed contained a reservation of the coal to which they were entitled under the Settlers' Rights Act and no one suggests that any such reservation was in the deed or was ever thought of by the parties. When, therefore, the grant of February 15, 1918, was made, it inured to the benefit of the plaintiff.

In my opinion, therefore, the appeal should be allowed and the plaintiff's right to the coal should be declared.

MARTIN, J.A., would dismiss the appeal. Martin, J.A.

EBERTS, J.A., would allow the appeal. Eberts, J.A.

Appeal allowed.

ONT.
S. C.

TOWN OF EASTVIEW v. ROMAN CATHOLIC EPISCOPAL CORP. OF OTTAWA.

Ontario Supreme Court, Mulock, C.J.Ex., Clute, Riddell and Sutherland, JJ. December 13, 1918.

CEMETERIES (§ 1—1)—CEMETERY ACT, R.S.O. 1914, c. 261—POWERS OF MUNICIPALITIES AS TO PROHIBITING INTERMENT OF DEAD—MUNICIPALITIES CANNOT DIVEST THEMSELVES OF SUCH POWERS.

By s. 37 of the Cemetery Act (R.S.O. 1914, c. 261) the legislature conferred on urban municipalities the power in perpetuity of passing by-laws prohibiting the interment of the dead within the municipality, and such municipality is unable by contract to divest itself of such powers or abridge them.

An agreement under seal requires no other consideration, but if there in fact be one it must be a lawful one.

[*Ayr Harbour Trustees* v. *Oswald* (1883), 8 App. Cas. 623; *Montreal Park and Island R. Co.* v. *Chateauguay and Northern R. Co.* (1904), 35 Can. S.C.R. 48, referred to.]

ONT.

S. C.

TOWN OF EASTVIEW v. ROMAN CATHOLIC EPISCOPAL CORP. OF OTTAWA.

Statement.

AN appeal by the defendant corporation from the judgment of the Senior Judge of the County Court of the County of Carleton, in favour of the plaintiff, the Municipal Corporation of the Town of Eastview, in an action for the recovery of $200, being the amount of the first annual payment alleged to be due under a sealed agreement made between the two corporations, dated the 25th November, 1916, whereby the defendant corporation covenanted to pay $200 annually to the plaintiff corporation to compensate it for the loss of revenue from taxes upon certain lots of land in the town, which the defendant corporation had, with the consent and approval of the plaintiff corporation, added to a cemetery owned by the defendant corporation—the lots ceasing to be liable to assessment and taxation upon becoming cemetery lots. The defendant corporation alleged that the agreement was *ultra vires*, illegal, and void. Reversed.

Wallace Nesbitt, K.C., and *Henri St. Jacques*, for appellant corporation.

W. A. Armstrong, for the plaintiff corporation, respondent.

Mulock, C.J. Ex.

MULOCK, C.J. Ex.:—This is an appeal from the judgment of His Honour the Judge of the County Court of the County of Carleton.

The facts are as follows:—

The defendant corporation owned the Notre Dame Cemetery, which adjoins the municipality of the plaintiff corporation, and also a number of lots intersected by streets within the limits of the town, and desired to enlarge the cemetery by the addition thereto of the lots and the streets in question. To that end, it entered into negotiations with the plaintiff corporation, when it was arranged between the two corporations that the municipal corporation would consent to the closing of the streets and the enlargement of the cemetery by the addition thereto of the said lots and streets when closed, and would, through the Local Board of Health of Eastview, petition the Provincial Board of Health to approve of such enlargement of the cemetery, in consideration of which the defendant corporation, upon such enlargement of the cemetery, was to pay to the municipal corporation the annual sum of $200 in lieu of the general taxes and war tax levy which the defendant corporation had theretofore paid in respect of the said lots.

In furtherance of this arrangement, the County Court Judge, on application of the defendant corporation, and with the approval of the plaintiff corporation, on the 30th October, 1916, made an order closing the said streets, and the Local Board of Health of the town petitioned the Provincial Board of Health to approve of the enlargement of the cemetery in manner aforesaid; and, on the application of the defendant corporation, the Provincial Board of Health, by order bearing date the 10th November, 1916, approved of the application and ordered that the said cemetery be 'established, enlarged, and extended upon and to include" the said lots and the lands representing the closed streets. Thereupon the said lands, having become cemetery lands, ceased to be liable to assessment and taxation, and by way of compensation to the municipal corporation for such loss of revenue, and in pursuance of the understanding and arrangement between the two corporations, the following agreement was entered into between them:—

"This indenture made the 25th day of November A.D. 1916 between the Roman Catholic Episcopal Corporation of Ottawa hereinafter called the 'Episcopal Corporation' of the first part and the Municipal Corporation of the Town of Eastview hereinafter called the 'Municipal Corporation' of the second part:—

"Whereas the Episcopal Corporation is duly authorised by the Provincial Board of Health to use for cemetery purposes the lands hereinafter described:

"And whereas the said lands being cemetery lands are by virtue of the provisions of the Assessment Act not liable to assessment and taxation:

"And whereas with reference to said lands the parties hereto have mutually agreed as hereinafter set forth:

"Now therefore this indenture witnesseth that in consideration of the covenants of the Municipal Corporation hereinafter contained and the due authorisation and legalisation thereof by the Municipal Corporation the Episcopal Corporation covenants and agrees to pay annually to the Municipal Corporation the sum of $200 in lieu of general taxes and war tax levy heretofore paid by the Episcopal Corporation in respect of the lands hereinafter described:

"This indenture further witnesseth that in consideration of the covenants of the Episcopal Corporation herein set forth the Muni-

ONT.

S. C.

TOWN OF EASTVIEW v. ROMAN CATHOLIC EPISCOPAL CORP. OF OTTAWA.

Mulock, C.J.Ex.

cipal Corporation of the Town of Eastview covenants and agrees to approve and allow forever the use for cemetery purposes of the lands hereinafter described and to never attempt to prevent or prohibit interment of the dead in said lands which said lands may be known and described as follows:"

(Here follows a description of the lands).

"And the parties hereto further agree and declare that this agreement shall not be assignable by either without leave of the other in writing.

"In witness whereof the respective Corporations have hereunto affixed their corporate seals attested by the hands of their proper officers in that behalf duly authorised:

"Signed sealed and delivered
"In the presence of
J. Ernest Caldwell

The Roman Catholic Episcopal Corporation of Ottawa,
Eudore Theriault,
Priest Bursar.
(Corporate seal)

J. H. White,
Mayor.
Henry R. Washington,
Town Clerk."
(Corporate seal)

When the first annual payment of $200 became by the language of the agreement payable, the defendant corporation refused to pay the same, whereupon this action was brought for its recovery, and the learned County Court Judge directed judgment for the amount, and this appeal is from such judgment.

Amongst other defences the defendant corporation contends that the agreement in question was *ultra vires* of the defendant corporation, or, if *intra vires*, was illegal and void because the same was for the purpose of taxation and revenue, and not for that of protecting the health, safety, morality, and welfare of the inhabitants of the municipality. By this agreement the plaintiff corporation covenanted "to approve and allow forever the use for cemetery purposes of the lands hereinafter described and to never attempt to prevent or prohibit the interment of the dead in said lands."

The Cemetery Act, R.S.O. 1914, ch. 261, sec. 37, enacts as follows:—

"The council of every urban municipality and the trustees of every police village may pass by-laws for prohibiting the interment of the dead within the municipality or police village."

By this section, the Legislature conferred on the plaintiff corporation the power in perpetuity of passing by-laws prohibiting the interment of the dead within the municipality, and therefore the corporation is unable by any contract to divest itself of such powers or to abridge them. They were entrusted to it for the public good, and the municipality must always be in a position to exercise them when the public interest so requires.

If the plaintiff corporation were able to contract itself out of such powers, such a contract would be equivalent to amending the legislation which created them. Obviously the municipality, the creature of the Legislature, cannot, unless so authorised by the Legislature, vary its legislation. I therefore am of opinion that the covenant in question is illegal and void: *Ayr Harbour Trustees* v. *Oswald* (1883), 8 App. Cas. 623; *Montreal Park and Island R. Co.* v. *Chateauguay and Northern R. Co.* (1904), 35 Can. S.C.R. 48, 58.

The question then arises whether the covenant of the defendant corporation to pay the annual sum of $200 is valid. The agreement in question being under seal, no other consideration is necessary; but if, nevertheless, there in fact be one, it must be a lawful one. The agreement shews that the sole consideration for the defendant corporation's covenant was the unlawful one of the plaintiff corporation. Transgression of the law cannot give the transgressor a cause of action. No action would lie against the plaintiff corporation because of breach of its unlawful covenant; neither can it maintain an action against its covenantee on a covenant wholly induced by unlawful consideration.

For these reasons, I am, with respect, of opinion that the learned trial Judge did not rightly determine this case, and that his judgment should be set aside, and this appeal allowed and the action dismissed, but without costs.

Clute, J. Sutherland, J.

CLUTE and SUTHERLAND, JJ., agreed with Mulock, C.J. Ex.

Riddell, J.

RIDDELL, J.:—The Roman Catholic Bishop of the Diocese of Ottawa is, by virtue of the Acts (1849) 12 Vict. ch. 136 (Can.) and (1861) 24 Vict. ch. 128 (Can.), a body corporate under the

ONT.

S. C.

TOWN OF EASTVIEW v. ROMAN CATHOLIC EPISCOPAL CORP. OF OTTAWA.

Riddell, J.

name of "The Roman Catholic Episcopal Corporation of Ottawa." To make the rights of the corporation within this Province clear, the Act (1883) 46 Vict. ch. 64 (Ont.) was passed. One of the objects of the Legislature was to vest the title to the temporalities of the Church in the diocese in the corporation and to enable the corporation to deal with them.

In 1910 the defendant had considerable land in the village (now town) of Eastview and certain land adjoining; on the adjoining land was a cemetery—Notre Dame Cemetery—and it was desired to increase its area by taking in some of the land within the town, some 25 acres. Upon this land there were two streets at least laid down on the registered plan, and (the clerk of the town says) they were open.

The solicitor for the defendant on the 24th September, 1910, wrote asking the village corporation to close these streets; he said: "I think these streets or these parts of streets have never been used as public streets nor opened as such, although they are mentioned in the plan. I ask you on behalf of the Roman Catholic Episcopal Corporation, the owner of all the lots and other lands abutting on these streets . . . what condition would you require to have the by-law passed and adopted by your council?" The council declined to accede to the request, but passed a resolution: "In the matter of cemetery extension, be it decided that the present limits of the cemetery shall remain intact, and the clerk be instructed to inform Father Campeau that the said streets shall be kept open." (Father Campeau was the local parish priest.)

The project lay in abeyance for some years, but in 1916 it was again mooted.

Two representatives of the defendant, on the 27th October, 1916, attended the council and asked the council not to oppose the closing up of the streets, saying that they were going to apply to the Local and Provincial Boards of Health to allow the lands around these streets to be made into a cemetery, and were willing to enter into an agreement to pay a yearly sum in lieu of taxes, to offset what the town would lose in revenue. On this condition the council agreed not to oppose an application to be made by the defendant to have the streets closed. Thereupon notice of an application under the Registry Act, R.S.O. 1914, ch. 124, sec. 86, was served by the Episcopal Corporation upon the town corpor-

ation; this was not opposed by the town corporation, and an order was made by the County Court Judge under the said Act. At this time the town had street lights on the streets in question, and the defendant undertook to pay for them until they could be removed.

On the 6th November, 1916, the defendant petitioned the Local Board of Health to approve the land as a cemetery and to transmit the application so approved to the Provincial Board of Health (Cemetery Act, R.S.O. 1914, ch. 261, secs. 3, 4, 5). The petition expressly states that the application "is made on the representation that the petitioner will, upon the approval of the applicant" (*sic*—of course "application"), "be bound by agreement with the Municipal Corporation of the Town of Eastview to pay annually a sum equivalent to the present annual general and war taxes chargeable against said lands."

The Local Board gave the opinion required by sec. 5 of the Cemetery Act, approving the petition, and saying "that no public or private rights would by the said enlargement of said cemetery be impaired or infringed;" and sent the petition on to the Provincial Board (sec. 5.) The Provincial Board approved, ordering (10th November, 1916), that the "cemetery may be established, enlarged, and extended . . ."

Before this, however, a draft agreement and by-law had been drawn up by the defendant's solicitor; upon this being submitted to the town's solicitor, he expressed the opinion to his clients that if the agreement were "tested out in an action it would be held . . . beyond the powers of either of the parties . . . that the performance of the terms of the agreement must be regarded as a moral rather than a legal obligation," and that the town must rely "solely on the good faith of the Episcopal Corporation to carry it out," but he approved the form.

On the 16th November, representatives of the Episcopal Corporation appeared before the council with the draft agreement and by-law approving it—the by-law, No. 261, was passed the same day, approving the agreement, which is made a schedule to the by-law.

The defendant seems to have executed the agreement (in a manner to be considered later), but the town to have delayed—for on the 23rd November the solicitors for the defendant complain

ONT.

S. C.

TOWN OF EASTVIEW v. ROMAN CATHOLIC EPISCOPAL CORP. OF OTTAWA.

Riddell, J.

that "it has not yet been executed by the officers of the municipal corporation."

It was, however, executed on the 25th November by the town corporation. The agreement is called an indenture, is under seal, and, after reciting that the defendant is duly authorised to use the lands mentioned for cemetery purposes, and that these lands are, as cemetery lands, not liable to taxation, the "indenture witnesseth that in consideration of the covenants of the Municipal Corporation hereinafter contained and the due authorisation and legalisation thereof by the Municipal Corporation the Episcopal Corporation covenants and agrees to pay annually to the Municipal Corporation the sum of $200 in lieu of general taxes and war tax levy heretofore paid by the Episcopal Corporation in respect to the lands hereinafter described:

"This indenture further witnesseth that in consideration of the covenants of the Episcopal Corporation herein set forth the Municipal Corporation of the Town of Eastview covenants and agrees to approve and allow forever the use for cemetery purposes of the lands hereinafter described and to never attempt to prevent or prohibit interment of the dead in said lands. . . ."

The taxes had been $476, but the council, after first suggesting $300, agreed to take $200.

The defendant then applied to the Legislature and procured the Act (1917) 7 Geo. V. ch. 100, which applied the Cemetery Act to this cemetery, "save as is herein otherwise specially enacted," and enacted that "it shall be lawful for the said Corporation to hold and use for cemetery purposes and for the extension of Notre Dame Cemetery, and to make and allow interment of the dead at all times hereafter in the" said lands and a few other lots. The town corporation had no official notice of the application for this Act.

A short time afterwards, the solicitor for the defendant wrote to the clerk of the town—referring to the approval of the cemetery by the Local and Provincial Boards of Health and to the agreement whereby the town corporation agreed not to pass by-laws prohibiting the interment of the dead in the land described, in consideration of which the Roman Catholic Episcopal Corporation would pay $200 annually in lieu of taxes thereon—"You will note that this agreement says that your municipality will never attempt to prevent or prohibit interment of the dead in the said lands. All the

rights which you might have derived under this agreement have been forfeited by the conduct of the municipal council, and also by an Act of Parliament assented to on the 12th of April, 1917, and which can be found in 7 Geo. V. ch. 100. By this Act your rights to pass by-laws in reference to these lands have also come to an end. Therefore the Roman Catholic Episcopal Corporation offers to pay you under this agreement a proportion of the $200 which is to be calculated from the 25th of November to the date of the passing of the bill."

There is no pretence that any act of the council did in fact violate this agreement in any way, and the clerk wrote a reply to that effect. The solicitor served a formal notice that the lands were exempt from taxation from the 12th April, 1917. The town demanded payment of $200. The solicitor, on the 6th December, presumes that the sum will not be due till the 31st December. The amount was not paid. A writ was issued on the 4th February, specially endorsed.

The defendant alleges that the contract is not valid as being: (1) *ultra vires* the defendant; and (2) also *ultra vires* the plaintiff; (3) illegal as an evasion of the Assessment Act, sec. 5 (2); and (4) the Cemetery Act; (5) not entered into in good faith; (6) an invasion of the private rights of the defendant by reason of the Assessment Act, R.S.O. 1914, ch. 195, sec. 5 (2), and the order of the Provincial Board of Health; (7) the defendant also pleads the statute (1917) 7 Geo. V. ch. 100; (8) that the plaintiff never legalised the covenants; (9) but has several times attempted to prohibit the interment of the dead; (10) and in any case the defendant has been over-assessed. It is not pleaded that the contract or agreement was not properly or validly executed if within the powers of the defendant; but that claim is made before us for the first time.

The case went to trial before the Judge of the County Court of the County of Carleton, and resulted in a judgment for the plaintiff for $200 and costs. The defendant now appeals.

Upon the appeal, for the first time, a defence is taken which it is not possible to suppose could have been authorised by the Right Reverend Prelate ostensibly in whose name and on whose behalf it is taken. The negotiations for the contract were conducted on behalf of the defendant by two persons, one of whom was Father

ONT.

S. C.

TOWN OF EASTVIEW v. ROMAN CATHOLIC EPISCOPAL CORP. OF OTTAWA.

Riddell, J.

Theriault; the contract was drawn up by the solicitor for the defendant; the defendant delivered the contract (to which the official seal was affixed) as being the deed of the defendant; the solicitor for the defendant wrote on the 23rd November, 1916, complaining of the non-execution by the town. The present solicitor for the defendant wrote on the 10th July, 1917, asserting the existence of the contract, but contended that it had no validity to compel the payment of taxes after the passing of the Act of 1917, 7 Geo. V. ch. 100, and offered to pay a proportionate part. A very long and full affidavit of defence is put in (as statement of defence) setting up the grounds for alleging that the contract is not binding, and no such ground is there taken; but on this appeal it is urged that the contract is not binding on the defendant because opposite the official seal of the defendant is placed the name "The Roman Catholic Episcopal Corporation of Ottawa, Eudore Theriault, Priest Bursar," instead of the name (or signature) of the Bishop.

Were it necessary, in order to defeat this extraordinary defence, to refuse to allow the pleadings to be amended, I think we should do so—fortunately it is not necessary.

The Incorporation Act of 1849, 12 Vict. ch. 136, makes the Bishop of the diocese a body corporate with perpetual succession and a common seal, with power to acquire, hold, etc., "lands, tenements or hereditaments" for "religious, eleemosynary, ecclesiastical or educational purposes," the Act to extend only to Lower Canada (except as to acquiring, holding, etc., lands in Upper Canada). The wording of sec. 10 is obscure, but it has been interpreted by the Ontario Act (1883) 46 Vict. ch. 64, preamble. The original Act provided for alienation etc. by deed, on the face of which was to appear "the consent" of certain ecclesiastical dignitaries.

The Act of 1861, 24 Vict. ch. 128, simply changes the name, and it requires no further notice. The Ontario Act of 1883, 46 Vict. ch. 64, gave power to the corporation to acquire, hold, etc., "lands, tenements or hereditaments" in the diocese, "for the general uses and purposes eleemosynary, ecclesiastical or educational, of the said diocese or of any portion thereof;" sec. 7 provides that it shall be lawful for the Bishop in the name of the corporation "to make or execute any deed, conveyance, mortgage, etc., of the

whole, or any part of the lands, tenements or hereditaments acquired or held . . . under and by virtue of the said Acts or of this Act," with the consent of certain ecclesiastical dignitaries specified; and sec. 13 provides that, for the purposes of the corporation, "deeds or conveyances in the form and with the recitals as set out in schedule A . . . may as to real estate within Ontario be used . . . ." The form contemplates two credible witnesses, also the seal of the defendant corporation and the seals of the consenting dignitaries, "the seal of said corporation being affixed by the party of the third part," i.e., the Bishop of Ottawa—sec. 7 requiring the signature of the Bishop.

It is argued that, because the name of the Bishop is not written opposite the seal of the corporation, the contract is void; being under seal, it is a "deed," and the Bishop should have affixed the seal.

The argument is noticed here only because of the apparent earnestness with which it was urged; there are several answers, any one of which is fatal to the contention. One will suffice.

While in technical language any document under seal—and therefore this document—is a "deed," the word "deed" is most frequently used in the popular sense of a conveyance of real estate (sec. 13). The deed or conveyance is a deed or conveyance of real estate within Ontario, and the schedule indicates that it would come within one of the Short Forms Acts. The present contract has nothing to do with real estate; so far as the corporation is concerned, it is a personal promise to pay money, enforceable, if at all, only in a personal action against the corporation. There is no necessary invalidity of the contract at the common law. A corporation sole does not need a seal at all, and there is at the common law no necessity for such a corporation making its contracts under seal: Bl., Comm., bk. 1, p. 476.

If a corporation have a common seal, as the defendant is enabled by statute to have, the affixing of the seal alone without any signature is sufficient if delivery takes place: *Dartford Union Guardians of the Poor* v. *Trickett* (1888), 59 L.T. 754—of course there must be delivery: *Derby Canal Co.* v. *Wilmot* (1808), 9 East 360, 103 E.R. 610.

The Statute of Frauds is not pleaded, and it should not be allowed to be pleaded to effect what would virtually be a fraud.

ONT.

S. C.

TOWN OF EASTVIEW v. ROMAN CATHOLIC EPISCOPAL CORP. OF OTTAWA.

Riddell, J.

Even if it were pleaded or an amendment allowed, the defence could not avail. Where the seal of a corporation is affixed to a contract made by the corporation, it has the same effect as the signature of an individual. "In truth and fact the affixing of a seal by a corporation is for all contracting purposes the same thing as the signature of an ordinary individual:" *per* Pollock, B., in *Dartford Union Guardians of the Poor* v. *Trickett*, 59 L.T. at p. 757; *South Yorkshire R. Co.* v. *Great Northern R. Co.* (1853), 9 Ex. 55, at p. 84, 156 E.R. 23, *per* Parke, B.; *Bateman* v. *Mayor of Ashton-under-Lyne* (1858), 3 H. & N. 323, at p. 335, 157 E.R. 494, *per* Martin, B.

Whether in the case of an ordinary individual a seal is sufficient without signature to answer the Statute of Frauds has been somewhat canvassed—Blackstone, Comm., bk. 2, p. 306, thought not; Stephen, Comm., bk. 2, part 1, p. 292, doubts; Chitty, Contracts, 16th ed., p. 93, thinks Blackstone's view sound, though he admits that both Judges and text-writers (except Blackstone) have inclined more or less strongly in favour of the sufficiency: Williams, Real Property, 20th ed., p. 154; Leake, Contracts, 6th ed., p. 90; Addison, Contracts, 11th ed., p. 19; Pollock, Contracts, 7th ed., p. 165; Foa, Landlord and Tenant, 4th ed., p. 10. The cases are: *Aveline* v. *Whisson* (1842), 4 Man. & G. 801, 134 E.R. 330; *Cooch* v. *Goodman* (1842), 2 Q.B. 580, 114 E.R. 228; *Cherry* v. *Heming* (1849), 4 Ex. 631, 154 E.R. 1367, *per* Parke, Alderson, and Rolfe, BB. The previous case of *Pitman* v. *Woodbury* (1848), 3 Ex. 4, 154 E.R. 732, is not really adverse to this view.

The seal is witnessed in the present case by a priest, and we must presume it was affixed by competent authority—"*Omnia præsumuntur rite acta esse*"—and every one dealing with a corporation has the right to consider a seal on an instrument coming from the corporation to have been properly set thereto. And in any case it was explicitly affirmed by the defendant, acting through its solicitor.

The real defence to the action is the incapacity of the town corporation to enter into such a contract.

I do not investigate the right of a party to a contract to prove a consideration dehors the instrument—the cases are numerous and substantially in accord. The case of *Great Western Railway and Midland Railway* v. *Bristol Corporation*, in the House of Lords (1918), 87 L.J. Ch. 414, by no means supports the proposition for

which it was cited, being a case of the interpretation of the terms of a contract, i.e., the obligations laid upon one party or the other, not of the proof of a consideration not mentioned in the writing. It is unnecessary to express any opinion in this case; the consideration given by the town corporation at least includes the consideration expressed in the contract; that consideration is an indispensable part of the contract, and if that is illegal the contract cannot be sustained: *Featherston* v. *Hutchinson* (1590), 1 Cro. Eliz. 199, 78 E.R. 455; *Rex* v. *Inhabitants of Northwingfield* (1831), 1 B. & Ad. 912, 109 E.R. 1025; *Waite* v. *Jones* (1835), 1 Bing. N.C. 656, at p. 662, 131 E.R. 1270; *Shackell* v. *Rosier* (1836), 2 Bing. N.C. 634, 132 E.R. 245; *Lound* v. *Grimwade* (1888), 39 Ch.D. 605; *Leggatt* v. *Brown* (1898-9), 29 O.R. 530, 30 O.R. 225.

The defendant wished this land for a burying ground, for use as a burying ground so long as it might be needed as such; and a by-law of the town under R.S.O. 1914, ch. 261, sec. 37, while it would or might not prevent the land from continuing to be a "cemetery" (see the definition, sec. 2 (*a*)), would operate to prevent the object for which the land was intended to be used.

An essential part of the consideration for the promise of the defendant to pay $200 per annum being the agreement of the town never to attempt to prevent or prohibit interment of the dead in the said lands, if this agreement on the part of the town is illegal, the contract is void.

That in our system of government any contract whereby the freedom of action of a representative in Parliament is interfered with, is void, cannot be doubted: *Lord Howden* v. *Simpson* (1839), 10 Ad. & El. 793, 113 E.R. 300, affirmed in Dom. Proc., *Simpson* v. *Lord Howden* (1842), 10 Cl. & F. 61, 8 E.R. 338; *Earl of Shrewsbury* v. *North Staffordshire R. Co.* (1865), L.R. 1 Eq. 593, especially at p. 613; *Osborne* v. *Amalgamated Society of Railway Servants* (1908), 25 T.L.R. 107 (C.A.); affirmed in Dom. Proc., *Amalgamated Society of Railway Servants* v. *Osborne*, [1910] A.C. 87, especially at pp. 99, 110, 111, 112, 114, 115.

Our municipal councils are just as truly legislative bodies within the ambit of their jurisdiction as Parliament or the Legislature; and any contract which would interfere with the due exercise of the discretion and judgment of a member of such a council must equally be void as against public policy. Public office is a

ONT.

S. C.

TOWN OF EASTVIEW v. ROMAN CATHOLIC EPISCOPAL CORP. OF OTTAWA.

Riddell, J.

public trust, not a means of personal aggrandisement; nothing should be allowed to interfere with the honest judgment of a councillor, whether it be a persistence in or a change of opinion.

The same reasoning applies to a whole council. "Powers are conferred upon municipal corporations for public purposes; and . . . their legislative powers . . . cannot without legislative authority, express or implied, be bargained or bartered away:" Dillon, Municipal Corporations, 5th ed., vol. 1, p. 463, sec. 245—the learned author continues: "Such corporations may make authorised contracts, but they have no implied power . . . to make contracts . . . which shall . . . control or embarrass their legislative or governmental powers . . ."

Neither Parliament nor Legislature can validly bind itself not to pass any kind of legislation—"the Legislature has no power to control by anticipation the actions of any future Legislature or of itself:" *Smith* v. *City of London* (1909), 20 O.L.R. 133, at p. 142. In some cases express power is given to municipal corporations to bind themselves by a contract not wholly unlike the present, e.g., with street railway companies, R.S.O. 1914, ch. 185, sec. 231; telephone companies, R.S.O. 1914, ch. 188, sec. 8; for light, heat, and power, R.S.O. 1914, ch. 192, sec. 513 (*b*), etc., etc.; but there is no power given to the municipal corporation to bind itself not to prohibit the burial of the dead within the municipality. The implication of powers not expressly given has been jealously watched in this Province from the time of *Cornwall* v. *Township of West Nissouri* (1875), 25 U.C.C.P. 9, and before: *Ottawa Electric Light Co.* v. *City of Ottawa* (1906), 12 O.L.R. 290, especially at p. 299—"Any fair reasonable doubt concerning the existence of power is resolved by the Courts against the corporation, and the power is denied."

It must be held, I think, that the Legislature intended that the successive municipal councils must keep an open mind and judge of the propriety or necessity of a by-law under sec. 37 of the Cemeteries Act, R.S.O. 1914, ch. 261, from time to time according to the needs of the town and its inhabitants. Consequently the agreement not to pass such a by-law was "against the policy of the Act," and therefore void. As a consideration it is not only void, because were it only void it would be simply no consideration, and the contract, being under seal, would still be enforceable: *Gray* v.

Mathias (1800), 5 Ves. 286, 31 E.R. 591; but it is illegal and therefore voids the whole agreement—*cf.* the cases where contracts were held void as being against the policy of the Bankruptcy Acts and the Acts relating to champerty and maintenance, etc.: Leake, 6th ed., pp. 523, 524, and 562.

In view of this finding, it is unnecessary to express an opinion as to the powers of the defendant, a corporation formed apparently to deal with real estate and given powers accordingly, to enter into such a contract—it may well be that the contract, being made to ensure the temporal enjoyment in the way desired of real estate in Ontario, may be held within these powers—but I express no decided opinion.

The contract sued upon is, in my opinion, wholly void, and the plaintiff town corporation has no claim under it.

I do not, however, think we should now dispose of the case adversely to the town corporation. The permission to form this land into a cemetery was obtained on the representation by the defendant that the Episcopal Corporation would "be bound by agreement with the Municipal Corporation of the Town of Eastview to pay annually a sum of money equivalent to the present annual general and war taxes chargeable against said lands," and the present agreement was prepared by the defendant and delivered as the agreement by which it was bound. It would be unjust to allow the defendant to have the advantage of the acquiescence of the town corporation without paying the amount agreed upon. The town corporation is not without fault; it had been advised by its solicitor that the agreement was not legally binding; and, although part of the consideration for the covenant of the corporation was "the due authorisation and legalisation" of the contract by the Municipal Corporation," no steps were taken to legalise the contract.

The council, unless it was careless, perverse, or wilfully blind, should have known that this means "legislation" by the only authority from which legalisation could be obtained, the Provincial Legislature, procured by the municipal corporation. No application seems to have been made to the Legislature, and the council kept the power in its own hands at any time to destroy the usefulness of this land for cemetery purposes.

ONT.

S. C.

TOWN OF EASTVIEW v. ROMAN CATHOLIC EPISCOPAL CORP. OF OTTAWA.

Riddell, J.

It is not to be wondered at that the defendant declined to continue to be at the mercy of a council, and consequently applied to the Legislature for a private Act ensuring its rights in perpetuity. We are not informed whether the agreement on the part of the corporation to pay $200 per annum was used upon the application to the Legislature; the presumption is that it was.

The attention of the council was called to the arrangement with the defendant. We find that, after the Act of 1917 was obtained, a petition, signed by some ratepayers, was presented to the council, to take steps to prohibit the interment of the dead in Eastview, and the council considered the matter, ultimately throwing out the petition, the following being the official note of the proceedings:—

"That the clerk be instructed to prepare a by-law for next meeting to prohibit the interment of dead in Eastview—motion lost June 4th, 1917."

Even then the town took no steps to legalise the contract, but took action upon it as it stood.

I think the town has failed in a most important part of the consideration, but no time is fixed for the legalisation; and it would be just to allow the town an opportunity to have the contract legalised by the Legislature. Unless and until such legalisation is effected, the contract cannot stand.

Under all the circumstances of the case, it is not to be expected that the defendant will object to an Act for that purpose, but rather assist to have the contract binding upon itself as well; we cannot, however, bind either defendant or Legislature.

I would retain the present appeal a sufficient time to allow the town to apply to the Legislature for an Act validating the contract —if the town omit to apply or fail to procure such Act, the appeal should be allowed and the action dismissed; it is not a case for costs.

Unless there be some legislative adjustment or some settlement between the parties, interesting and difficult questions may arise as to the ownership of the fee in the streets, etc., etc. The parties will probably be well advised to have their rights declared by statute.

Appeal allowed.

THOMSON v. DENTON.

SASK.

C. A.

Saskatchewan Court of Appeal, Haultain, C.J.S., Newlands, Lamont and Elwood, JJ.A. June 19, 1919.

1. SALE (§ III B—61)—LIEN AGREEMENT—AGENT TO RECEIVE PAYMENT AT A CERTAIN TIME—GENERAL AGENCY TO RECEIVE PAYMENT.

A lien agreement in which a bank is named to receive the money due under the agreement on or before a certain date does not constitute the bank the agent to receive the money generally or at any other time than on the date on which the payment becomes due.

2. SALE (§ III B—62)—UNSATISFIED JUDGMENT AGAINST VENDOR—BREACH OF WARRANTY—NON-PAYMENT OF PURCHASE-PRICE—SET-OFF—SEIZURE.

An unsatisfied judgment against the vendor of a motor car for breach of warranty in connection with the sale of the car cannot be set off against the purchase-price of the car, and does not prevent such vendor from seizing the car under a lien agreement for non-payment of the purchase-price.

Statement.

APPEAL by plaintiff from the trial judgment in an action against the vendor of a motor car for illegal seizure and detention of the car under a lien agreement. Affirmed.

G. H. Barr, K.C., for appellant; *A. Ross*, K.C., for respondents.

The judgment of the court was delivered by

Elwood, J.A.

ELWOOD, J.A.:—This is an action brought by the plaintiff for detention of the plaintiff's second-hand Ford car, alleged to have been taken by the defendants from the plaintiff.

The car in question is one which was sold by the defendant Denton to the plaintiff under an agreement of sale, in part payment of which the plaintiff executed the following lien agreement:—

$150.00 No.... Regina, Aug. 19, 1918.

On or before October 1, 1918, for value received I promise to pay to W. S. Denton or order, the sum of one hundred and fifty dollars, at Bank of Nova Scotia, with interest at 8% per annum till due, and 8% per annum after due until paid. Given for one second-hand Ford car, No. 218409.

The title, ownership and right to the possession of the property for which this note is given shall remain at my risk in the holder hereof until this note, or any renewal thereof, is fully paid with interest, and if I make default in payment of this, or any other note in his favour, or should the holder consider this note insecure, he has full power to declare this and all other notes made by me in his favour due and payable forthwith, and he may take possession of the property and hold it until this note is paid or sell the said property at public or private sale, the proceeds thereof to be applied in reducing the amount unpaid thereon and the holder hereof, notwithstanding such taking possession or sale, shall have hereafter the right to proceed against me and recover; and I hereby agree to pay the balance then found due thereon.

Witness (Sgd.) C. R. GOUGH. (Sgd.) A. T. THOMSON.

Prior to the seizure of the car hereinafter referred to, the plaintiff had recovered judgment against the defendant Denton

SASK.

C. A.

THOMSON v. DENTON.

Elwood, J.A.

for the sum of $249.26, debt and costs for breach of warranty in connection with the said sale of said car, which judgment is still apparently wholly unpaid.

On or about October 5, 1918, the defendant Denton issued his warrant to the defendants Mackenzie and Etty to seize the said car under said lien agreement; and said car was seized by said defendants Mackenzie and Etty in pursuance of said warrant on or about December 19, 1918, and it is for such seizure that this action is brought.

On or about December 20, 1918, the plaintiff paid to the Bank of Nova Scotia, Regina, to the credit of the defendant Denton, the sum of $154.25, in full of the amount due under said lien agreement. At the time this payment was made, the said lien agreement was not in the possession of said bank, and was, apparently, only in the possession of said bank on the 3rd and 4th days of October, 1918. There was no evidence that said bank had any authority to receive said payment other than as provided for in said lien agreement. The district court judge dismissed the plaintiff's action.

It was contended on behalf of the appellant that, as, at the time of said seizure, the defendant Denton was indebted to the plaintiff in a sum greater than the amount due under said lien agreement, the debt due under said lien agreement was extinguished and there was no right of seizure.

I am of the opinion that the appellant's contention in this respect is not well founded. A right of set-off could only be by virtue of agreement between the parties, or, if an action had been brought by the respondent Denton against the appellant, the appellant then could set up his claim against the respondent. See 7 Hals., p. 461.

It was further contended by the appellant that the payment made to the Bank of Nova Scotia, after the seizure, was a good payment, and from the date of that payment the respondent was a trespasser in holding the car.

The only authority for the Bank of Nova Scotia to receive the money is that contained in the lien agreement. That lien agreement only designates the Bank of Nova Scotia as the place where the note is payable on October 1, but does not, in my opinion, make the bank the agent to receive the money generally, or at

SASK.

C. A.

THOMSON v. DENTON.

Elwood, J.A.

any other time than on October 1. As the lien agreement was not in the hands of the bank at the time that the payment was made to it, and as there was no evidence that it had any other authority to receive the money, I am of the opinion that the payment to the bank was not a payment to the defendant Denton.

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

GAVIN v. KETTLE VALLEY R. Co.

CAN.

S. C.

Supreme Court of Canada, Davies, C.J., and Idington, Anglin, Brodeur and Mignault, JJ. May 19, 1919.

1. NEW TRIAL (§ II—8)—NEGLIGENCE OF DEFENDANTS—CONTRIBUTORY NEGLIGENCE OF PLAINTIFF—INSUFFICIENT INSTRUCTIONS TO JURY.

The jury having found negligence on the part of the defendants' employees and of the plaintiff's wife, who was driving his automobile, in answer to two further questions found that after the employees of the defendants became aware, or ought to have become aware, that the automobile was in danger of being injured, they could have prevented the injury in the exercise of reasonable care by the speedy application of brakes. On these findings the trial judge entered judgment for the plaintiff.

The court held that the Court of Appeal was justified in ordering a new trial on the ground that the jury should have been instructed that it was the duty of the driver of the motor car as well as that of the railway employees to have taken all reasonable care to avoid the collision, when the danger of it should have been apparent, and that questions as to her conduct at that stage of the occurrence similar to those with regard to the conduct of the railway employees should have been submitted to the jury.

2. APPEAL (§ VII—346)—COSTS ONLY INVOLVED—REFUSAL TO ENTERTAIN—STATUTORY RIGHT TO COSTS—WRONG ORDER OF COURT BELOW—DUTY OF COURT TO REVERSE.

While the Supreme Court of Canada ordinarily refuses to entertain an appeal which merely involves costs, where a party entitled by statute to receive his costs of certain proceedings from his opponent has been ordered to pay that opponent's costs it is the duty of the court to reverse such order.

Statement.

APPEAL from a judgment of the Court of Appeal for British Columbia (1918), 43 D.L.R. 47, rendered on an appeal from a judgment of Macdonald, J., at the trial and ordering a new trial.

The action is one for damages to a motor car driven by the wife of the appellant, through a collision between the car and a passenger train of the respondent. The questions put to the jury and the answers were as follows:—

Q. Was the damage to the plaintiff's automobile caused by the negligence of the defendant? A. Yes.

CAN.

S. C.

GAVIN v. KETTLE VALLEY R. CO.

Q. If so, in what did such negligence consist? A. In delaying the application of brakes.

Q. Could the driver of the automobile, by the exercise of reasonable care, have avoided the accident? A. Yes.

Q. If she might, in what respect was such driver negligent? A. In not exercising sufficient watchfulness by looking to the right as well as to the left.

Q. If, after the employees of defendant became aware or ought (if they had exercised reasonable care) to have become aware that the automobile was in danger of being injured, could they have prevented such injury by the exercise of reasonable care? A. Yes.

Q. If so, in what manner or by what means could they have prevented the accident? A. By the speedy application of brakes.

Q. Amount of damages? A. $1,485.

After hearing argument, the trial judge directed that judgment be entered for the appellant for $1,485 and costs of the action.

From this judgment the present respondent appealed to the Court of Appeal for British Columbia; and one of its grounds of appeal was that the trial judge should have submitted a further question to the jury

as to whether, when the driver of the automobile in question became aware, or ought, if she had exercised reasonable care, to have become aware, that the automobile was in danger of being hit by the train, she could have prevented the injury by the exercise of reasonable care.

S. 55 of the Supreme Court Act of B.C., R.S.B.C. (1911), c. 58, provides "that in the event of a new trial being granted" by the Court of Appeal "upon ground of objection not taken at the trial, the costs of the appeal shall be paid by the appellant" . . .

The Court of Appeal, in this case, ordered a new trial, but directed the present appellant, then respondent, to pay the costs of the appeal.

Martin Griffin, for appellant; *A. J. Thomson*, for respondent.

Davies, C.J.

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

Idington, J.

IDINGTON, J. (dissenting):—The question raised herein is whether or not the trial judge in his charge to the jury so adequately dealt with the problems of law presented by the facts for the consideration of the jury, that there was no necessity for a new trial as directed by the Court of Appeal.

If the finding of contributory negligence on the part of the appellant's agent in charge of the automobile did not, as there is much reason for holding it did, deprive him of any right to recover, it could only be so by some very special circumstances, by no means self-evident in the case, requiring direction containing an explanation of the relevant law to enable the jury properly to deal with the possibilities of such a case.

If the facts had been such as to permit of the application of the principle acted upon in the *B.C. Elec. R. Co.* v. *Loach*, 23 D.L.R. 4, [1916] 1 A.C. 719, referred to in the judgments below and properly held inapplicable, one might have expected an exposition of the law bearing thereon.

There was nothing in the charge that would adequately fit such a case; probably because of the want of facts calling therefor.

If, as may possibly be arguable, the facts called for the application of the principle proceeded upon in the case of *Davies* v. *Mann* (1842), 10 M. & W. 546, 152 E.R. 588, and many like cases since then, there should have appeared in the charge something more than does appear.

The allusion to the illustration of the running down of the donkey tethered in the street should suffice for the lawyer conversant with the law of negligence, but I doubt if even the most intelligent jury would be enabled from what was said, intelligently to apply the principle in question. Indeed the result strongly suggests they did not.

I suspect it was the absence of the necessary facts in the case that caused the judge's terseness of allusion.

It is quite possible that the view suggested by McPhillips, J., which, strictly adhered to, would have involved a judgment of dismissal of the action, should have been the result in appeal. I pass no opinion thereupon, for as I view the case as presented to us, there must be a new trial, and the less said the better.

Had there been a cross-appeal claiming a dismissal, I should have felt bound to examine the evidence closely and determine for myself such issue.

The appellant is not, in my opinion, entitled to maintain the judgment so obtained and hence the new trial should be proceeded with.

The appellant's counsel submitted that in such event he was entitled to the costs of appeal because, as he alleged, and the Chief Justice seemed to admit, the counsel for respondent at the trial did not take the objection to the charge which he should have done.

In answer to my inquiry why he did not call the attention of the Court of Appeal to the non-application of the provision of the statute in that behalf, an explanation was given which leads me, in light thereof and of the fact that an objection was taken to the

CAN.

S. C.

GAVIN v. KETTLE VALLEY R. Co.

Idington, J.

learned judge's charge which he practically disregarded, to infer there had been a misunderstanding.

There is, in fact, no ground in this case to apply the new rule adopted in British Columbia for penalizing the party who is silent in presence of a misdirection.

The substantial ground of quarrel with the judge's charge is that he did not adequately deal with the subject-matter and not that it was absolutely necessary in law to have two or more specific questions submitted than he saw fit to submit.

Though the Chief Justice expressed the view that when such supplementary questions were put another should also be put, the court did not adopt or carry out or proceed thereon, but exercised its substantial power to grant a new trial as it properly might by resting upon the view that it was necessary in order that justice might be done.

We have long observed a very salutary rule borrowed from the practice of the court above, never to entertain appeals either for mere errors of practice or procedure or judgments as to costs, unless in some extreme case which, in view of the grounds upon which the majority of the court proceeded, this is not.

The decisions are collected at pages 86 *et seq.* of Cameron's Practice, beginning at foot of said p. 86.

It is not a question of jurisdiction but of the need to confine the litigious spirit within proper bounds.

The appeal should be dismissed with costs.

Anglin, J.

ANGLIN, J.:—The jury having found negligence on the part both of the defendants' employees and of the plaintiff's wife, who was driving his automobile, in answer to two further questions (Nos. 5 and 6) found that after the employees of the defendants became aware, or ought to have become aware, that the automobile was in danger of being injured, they could have prevented such injury, in the exercise of reasonable care, by the speedy application of the brakes. On these findings the learned judge entered judgment for the plaintiff.

The Court of Appeal ordered a new trial. Galliher, J.A., and Eberts, J.A., assigned no reasons for this order. Martin, J.A., while at first inclined to the view that the answers of the jury to the 5th and 6th questions could not be supported on the evidence, thought it safer to order a new trial apparently because

in his opinion the trial judge should have complied with the request of counsel for the defendants to direct the jury in accordance with the views expressed by the Supreme Court of Nova Scotia in *Morrison* v. *Dominion Iron & Steel Co.* (1911), 45 N.S.R. 466. McPhillips, J.A., while stating at some length reasons which would appear to warrant a judgment dismissing the action on the ground that the evidence did not sustain the answers to the 5th and 6th questions, and that the accident was ascribable solely to the reckless carelessness of the driver of the automobile, concurred in the order for a new trial on the ground that the jury should have been instructed that it was the duty of the driver of the motor car as well as that of the railway employees to have taken all reasonable care to avoid the collision when the danger of it became, or should have been, apparent, and that questions as to her conduct at that stage of the occurrence similar to those with regard to the conduct of the railway employees (Nos. 5 and 6) should have been submitted to the jury. The Chief Justice bases his judgment solely on the failure of the trial judge to instruct the jury as to

> the duty of the driver of the automobile to take reasonable care to avoid the collision after she became aware of the danger. . . . As the case was left to the jury, though the obligation of the defendants was submitted, that of Mrs. Gavin was ignored. While no objection in this connection was taken by defendant's counsel at the trial, yet it was the duty of the learned judge to leave the issues to the jury with proper and complete directions on the law and as to the evidence applicable to such issues: Supreme Court Act, s. 55.

The court ordered a new trial and directed that the costs of the appeal be paid by the plaintiff and that those of the former trial should abide the event of the new trial.

On examining the charge of the trial judge, I find that while it might, no doubt, have been more definite and explicit on these points, it contains the substance of the law as stated in the *Morrison* case, 45 N.S.R. 466, referred to by Martin, J.A., both as to the duties of a traveller on the highway and as to the rights and responsibilities of those in charge of railway trains when approaching highway crossings. An order for a new trial based solely on the ground of non-direction in these particulars, in my opinion, could not be supported. But although the learned trial judge alludes to the duty of a traveller on a highway to be more than ordinarily alert and observant when approaching a railway crossing, and to the allegation of the defence that Mrs. Gavin,

CAN.
S. C.
GAVIN
v.
KETTLE VALLEY R. Co.
Anglin, J.

after she became aware of the danger, was not able, or could not, on account of incompetency, avoid the danger, and thus brought the accident on herself (adding), there are two phases you have to consider in connection with her conduct that afternoon, *i.e.*, first as to her conduct before she saw the car or was aware of the approach of the car, and as to her conduct afterwards. I think I can hardly be of any further assistance to you on that branch of the case,

when dealing with the 5th and 6th questions, while he discusses the duty of the brakeman to have taken all reasonable means to stop the train when he came, or should have come, to the conclusion that there was danger of collision, he says not a word of the corresponding obligation of the driver of the motor car. As the case was left to the jury the true issue as to "ultimate negligence" under the circumstances in evidence, in my opinion, was not fairly submitted to them. I agree, therefore, that a new trial was properly ordered on that ground.

But the appellant complains, and I think with reason, that he has been ordered to pay the costs of the appeal to the Court of Appeal in contravention of an explicit provision of s. 55 of the Supreme Court Act (R.S.B.C. 1911, c. 58). That section is as follows:—

> 55. Nothing herein, or in any Act, or in any Rules of Court, shall take away or prejudice the right of any party to any action to have the issues for trial by jury submitted and left by the judge to the jury before whom the same shall come for trial with a proper and complete direction to the jury upon the law and as to the evidence applicable to such issues: provided also that the said right may be enforced by appeal, as provided by the Court of Appeal Act, this Act, or Rules of Court, without any exception having been taken at the trial; provided further that in the event of a new trial being granted upon ground of objection not taken at the trial, the costs of the appeal shall be paid by the appellant, and the costs of the abortive trial shall be in the discretion of the court.

I have carefully read the objections taken by counsel at the close of the judge's charge and I find the statement of the Chief Justice, as is usual, fully borne out that "no objection in this connection was taken by defendants' counsel at the trial." The questions put to the jury had been submitted to counsel before they made their addresses and counsel for the defendants accepted them as satisfactory. The order for a new trial, if not granted by the Court of Appeal on a "ground of objection not taken at the trial," is, in my opinion, maintainable only on such a ground and it follows that, under s. 55 of the Supreme Court Act of B.C., the appellant (plaintiff) was entitled to the costs of the appeal to

the Court of Appeal and was wrongfully deprived of them by that court, either through inadvertence or possibly because the majority of the court (Martin, Galliher and Eberts, JJ.A.) were of the opinion that the ground indicated by Martin, J.A., which had been taken by counsel for the defendant in his objections to the judge's charge, sufficed to support the order for a new trial.

Anglin, J.

While this court ordinarily refuses to entertain an appeal which merely involves costs, where, as here, a party entitled by statute to receive his costs of certain proceedings from his opponent has been ordered to pay that opponent's costs, I think it is our duty to interfere. The disposition of the costs in question was in no wise in the discretion of the Court of Appeal. They were erroneously disposed of because of a mistake on a matter of law which affected them. *Archibald* v. *DeLisle* (1895), 25 Can. S.C.R. 1, at pages 14-15; *Delta* v. *Vancouver Railway Co.* (1909), 2nd ed. Cameron's S.C. Practice 90. If not, this is an extreme case; a statutory right has been ignored and a gross error would appear to have been made. The jurisdiction and duty of this court under such circumstances to reverse an order as to costs, although not interfering with the disposition made of the case itself, has, so far as I am aware, never been disaffirmed. See *Smith* v. *St. John City R. Co.* (1898), 28 Can. S.C.R. 603, at p. 605. Moreover, the present appeal was not for costs only. On the merits it was fairly arguable that the answers to the 5th and 6th questions entitled the plaintiff to judgment. This appeal was not brought on colourable grounds merely for the purpose of introducing the question of costs. *Inglis* v. *Mansfield* (1835), 3 Cl. & F. 362, at p. 371, 6 E.R. 1472.

While sustaining the order for a new trial, therefore, I would set aside the order as to the costs of the appeal to the Court of Appeal and would substitute for it an order that the appellant's (plaintiff's) costs of that appeal should be paid by the respondents (defendants). The plaintiff was obliged to come to this court for redress and is, therefore, entitled to his costs of this appeal.

Brodeur, J.

BRODEUR, J. (dissenting):—This action was brought by the appellant to recover damages for the destruction of his automobile as the result of a collision with a train of the railway company respondent, on Winnipeg street, in the Town of Penticton.

CAN.

S. C.

GAVIN v. KETTLE VALLEY R. CO.

Brodeur, J.

The action was tried by a jury which found:—1. That the damage was caused by the negligence of the defendant in delaying the application of the brakes; 2. That the driver of the automobile was also guilty of negligence in not looking properly before attempting to cross the railway track; and 3. That the employees of the railway company could have prevented the injury by a speedy application of brakes after they had become aware that the automobile was in danger of being injured.

The evidence shews that the train which struck the automobile was moving reversely and, as required by s. 276 of the Railway Act there was stationed, on the part of the train which was then foremost, employees to warn persons crossing, or about to cross, the track of the railway.

The speed at which the train was moving was a moderate one and was likely less than the one at which it is authorized to run in the towns.

No negligence on the part of the railway company could be found, or has been found in that respect.

It seems to me that the only cause of the accident was that the driver of the automobile, Mrs. Gavin, did not look properly to see whether there was danger for her in crossing the track. She gives us an excuse that she had been informed that no train was expected from the right and that she had been looking only to her left.

A person approaching a highway crossing a railroad track should look and listen for approaching trains with the care and caution of an ordinarily prudent man. She must make a vigilant use of her senses, and she must look in every direction from which danger may be apprehended, and it would be very imprudent for her to rely then on the information of some person who has nothing to do with the administration of the railway. Some judgments go so far as to state that if the person does not look and listen, the court will draw the inference that his act contributed to the injury and will apply this rule although the railway company failed to give the proper cautionary signals, or was guilty of other acts of negligence concurring to cause the injury. *Damrill* v. *St. Louis & San Francisco R. Co.* (1887), 27 Mo. App. R. 202. A railway train is not bound to stop or to moderate its speed at every highway crossing. The law imposes upon the company

the obligation to make some signals. However, it is an obligation on the company to use ordinary care and prudence to protect the person at a highway crossing after discovery of his presence.

The travellers and employees who were on the platform of the train when they first saw the automobile never suspected that there was danger of the machine running upon the railway track. They all thought it would stop and in fact it would certainly have stopped if the driver had not been so negligent. When the brakeman of the train saw, however, that there was danger, he warned the driver of the automobile and some pedestrians nearby did the same thing. The brakeman at the same time signalled the engineer of the train to stop the train. The brakes were applied, but, unfortunately, it was too late.

Brodeur, J.

The evidence, according to my opinion, is very conclusive and discloses the fact that the accident was due entirely to the negligence of the driver of the automobile. The action, in my opinion, should have been dismissed.

The Court of Appeal ordered a new trial on the ground that some additional question should have been submitted to the jury as to whether Mrs. Gavin, after she became aware of the danger, could have prevented the accident by the exercise of reasonable care and also on the ground that the trial judge should have charged, as he was asked to do, that those in charge of the train were entitled to rely upon the driver using due care.

It seems to me that the evidence does not justify a finding of negligence on the part of the company. There is no cross-appeal on the part of the company and I must, therefore, purely and simply, dismiss the appeal. A new trial will then have to take place.

The appeal should be dismissed with costs.

Mignault, J.

MIGNAULT, J.:—The Court of Appeal of British Columbia has ordered a new trial in this case, on the appeal of the present respondent. The latter is apparently satisfied with the judgment and has not cross-appealed to this court. For that reason I will refrain from expressing any opinion as to the liability, on the findings of the jury, of the respondent.

After the verdict, the railway company appealed from the judgment of the trial judge condemning it to pay $1,485 to Gavin. Its grounds of appeal were five in number. The two first were

CAN.

S. C.

GAVIN v. KETTLE VALLEY R. CO.

Mignault, J.

grounds for the dismissal of the action. The third ground, referring to the alleged improper admission of evidence, and the fourth, pretending that the trial judge should have submitted a further question to the jury

as to whether, when the driver of the automobile in question became aware, or ought, if she had exercised reasonable care, to have become aware that the automobile was in danger of being hit by the train, she could have prevented the injury by the exercise of reasonable care,

were grounds for ordering a new trial. The fifth ground, "all other grounds appearing in the proceedings at the trial," notwithstanding its generality, was urged, I should think, as a reason for demanding a new trial.

The Chief Justice of British Columbia adopted the fourth ground of appeal, and was of the opinion that a new trial should be ordered. Martin, J., favoured granting a new trial on the ground that a direction should be given to the jury as to the common sense duty of persons crossing railway tracks and the reasonable anticipation of employees in charge of trains in accordance with the judgment of the Supreme Court of Nova Scotia in *Morrison* v. *Dominion Iron & Steel Co.*, 45 N.S.R. 466. Galliher, J., and Eberts, J., gave no reasons, and although McPhillips, J.'s opinion seems to lead to a conclusion favourable to the dismissal of the plaintiff's action, he concurred in ordering a new trial.

I take it that the charge to the jury of the trial judge was sufficient, but I am of the opinion that he should have put the question suggested by the fourth ground of appeal of the present respondent. I, therefore, think that a new trial was rightly ordered on that ground only.

But this ground was raised, not at the trial, but on the appeal. This brings me to consider the effect of s. 55 of the Supreme Court Act of British Columbia, R.S.B.C., 1911,c. 58, which reads as follows:—

55. Nothing herein, or in any Act, or in any Rules of Court, shall take away or prejudice the right of any party to any action to have the issues for trial by jury submitted and left by the judge to the jury before whom the same shall come for trial, with a proper and complete direction to the jury upon the law and as to the evidence applicable to such issues: provided also that the said right may be enforced by appeal, as provided by the Court of Appeal Act, this Act, or Rules of Court, without any exception having been taken at the trial; provided further that in the event of a new trial being granted upon ground of objection not taken at the trial, the costs of the appeal shall be paid by the appellant, and the costs of the abortive trial shall be in the discretion of the court.

This section directs that in the event of a new trial being granted upon grounds of objection not taken at the trial, the costs of the appeal *shall be paid by the appellant.*

Instead of following this imperative direction, the Court of Appeal of British Columbia condemned the respondent on that appeal (the present appellant) to pay the costs of the appeal. I am of the opinion that it could not do so.

This adjudication of the costs of the appeal was not a matter lying within the discretion of the court below, which was bound to grant the costs of that appeal to the present appellant. The only discretion that the court below had was as to the costs of the abortive trial, and it directed that those costs abide the event of the new trial. But it could not, under the circumstances, condemn the present appellant to pay the costs of and occasioned by the appeal.

Much as I feel reluctant to interfere with a judgment on a question involving costs, I cannot escape doing so here, for the imperative requirement of the statute above referred to has been disregarded. I would, therefore, affirm the judgment appealed from in so far as it orders a new trial, but I would vary it so as to condemn the present respondent to pay the costs of his appeal to the British Columbia Court of Appeal. He should also pay the costs of the appellant here.

Judgment varied as to costs.

JOHNSON & CAREY Co. v. CANADIAN NORTHERN R. Co.

Ontario Supreme Court, Appellate Division, Mulock, C.J.Ex., Riddell, Latchford, Sutherland and Kelly, JJ. December 27, 1918.

1. MECHANICS' LIENS (§ V—38)—MECHANICS' AND WAGE-EARNERS LIEN ACT—R.S.O. 1914 c. 140—NOT ENFORCEABLE AGAINST DOMINION RAILWAY.

A lien under the Mechanics' and Wage-earners' Lien Act, R.S.O. 1914, c. 140, cannot be enforced against a railway company incorporated under Dominion Act.

[*Crawford* v. *Tilden* (1907), 14 O.L.R. 572, followed; *Johnson & Carey Co.* v. *Can. Northern R. Co.*, 43 O.L.R. 10, affirmed on this point.]

2. MECHANICS' LIENS (§ VIII—70)—UNENFORCEABLE LIEN—VALID LIEN—JUSTIFICATION OF PROCEEDING TO JUDGMENT.

Where the lien cannot be enforced against the property of the company no valid lien, which justifies the plaintiff in proceeding to judgment under s. 49 of the Act, can be established.

[*Johnson & Carey Co.* v. *Can. Northern R. Co.*, 43 O.L.R. 10, reversed.]

ONT.

S. C.

JOHNSON & CAREY CO. v. CANADIAN NORTHERN R. CO.

Sutherland, J.

AN appeal by the defendants the Canadian Northern Railway Company and a cross-appeal by the plaintiffs from the judgment of Masten, J., 43 O.L.R. 10. Reversed.

A. J. Reid, K.C., for the defendants.

J. R. Cartwright, K.C., for the Attorney-General for Ontario.

A. C. McMaster, for the plaintiffs.

SUTHERLAND, J.:—An appeal and cross-appeal from the judgment of Masten, J., dated the 23rd April, 1918.

The defendants Foley Welch & Stewart are a copartnership composed of Foley Brothers (a corporation) and Patrick Welch and John W. Stewart. This copartnership entered into a contract in writing with the defendants the Canadian Northern Railway Company to construct a railway line in the Province of Ontario, including filling and constructing a new line of the said railway at Rainy Lake, Ontario, on the division east of Fort Frances, Ontario, of the Canadian Northern Railway, and the plaintiffs, also a corporation, entered into another written contract with the defendants Foley Welch & Stewart, as principal contractors for the filling and construction of the said new line of railway.

The plaintiffs allege that there was no agreement with the defendants, nor with either of them, that the plaintiffs should not be entitled to a lien upon the said lands and railway lines to be constructed thereon for the price of the work and materials to be done and furnished under the said contract. Having done certain work and supplied and furnished materials in the erection and construction of the said railway line and in addition force account and other work, they claimed to be entitled to a lien on the estate and interest of the defendants in the lands and railway line referred to in the statement of claim, and consisting of the railway line in question. They accordingly registered a mechanic's lien against the said lands.

In their statement of claim the plaintiffs allege that, by reason of being employed under the said contract, and doing the work and furnishing the materials mentioned therein, they became and were entitled to a lien on the estate and interest of the defendants in the lands referred to under the provisions of the Mechanics and Wage-Earners Lien Act, and that in pursuance thereof they caused to be registered in the registry office for the town of Fort Frances, in the district of Rainy River, a claim to a lien, a copy of which is set out in the statement of claim.

The proceedings were commenced and carried on "In the Supreme Court of Ontario, High Court Division, In the matter of the Mechanics and Wage-Earners Lien Act," and the plaintiffs claim: (1) that the defendants may be ordered to pay the plaintiffs the sum of $342,033.41, with interest and costs; and (2) that in default of such payment the estate and interest of the defendants in the land and railway lines heretofore mentioned or a component part thereof may be sold and the proceeds applied in and towards the plaintiffs' debt and costs of action pursuant to the said Act.

On motion by the defendants the Canadian Northern Railway Company, an order was made by Middleton, J., dated the 19th June, 1916, directing that "the following questions raised by the defendants the Canadian Northern Railway Company shall be determined before the other questions raised in the action:—

"(a) Can a lien claimed under the Mechanics and Wage-Earners Lien Act, R.S.O. 1914, ch. 140, exist or be enforced against the property of the Canadian Northern Railway Company referred to in the amended statement of claim in this action, under the circumstances therein alleged?

"(b) If not, can the plaintiffs proceed to obtain judgment under sec. 49 of the Act, or otherwise in these proceedings?

"(c) Are the provisions of the said Mechanics and Wage-Earners Lien Act conferring jurisdiction on the special officers referred to in sec. 33 of the said Act, *intra vires*?"

This action came on for trial before Masten, J., and by agreement of the parties the taking of evidence was waived, and the action set down for hearing in respect to the questions mentioned, upon the allegations set out in the statement of claim. In his judgment disposing of the questions which thus came before him (43 O.L.R. 10), the learned trial Judge came to the conclusion that it was impossible to distinguish this case from *Crawford* v. *Tilden*, (1907), 14 O.L.R. 572, and accordingly answered the first of the said questions in the negative.

In the case referred to, it was held that "a lien under the Mechanics and Wage-Earners Lien Act, R.S.O. 1897, ch. 153, cannot be enforced against the railway of a company incorporated under a Dominion Act, and declared thereby to be a company incorporated for the general advantage of Canada."

I think he was right in so holding.

ONT.
S. C.
JOHNSON & CAREY CO. v. CANADIAN NORTHERN R. CO.
Sutherland, J.

[As to the second question, Sutherland, J., quoted from the judgment of Masten, J., the two paragraphs dealing with that question (43 O.L.R. at pp. 11 and 12), and continued:]

In *Kendler* v. *Bernstock* (1915), 22 D.L.R. 475, 33 O.L.R. 351, Hodgins J.A., says (22 D.L.R. p. 477): "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 prime purpose of the Act in question is to enable a person who has supplied labour or materials to establish a lien and thus acquire authority to sell so as to realise his claim therefor. The lien is one created by the statute and one which was non-existent at common law. In *King* v. *Alford* (1885), 9 O.R. 643, at p. 647, it was decided that there was "nothing in the scope of the Act as to liens to indicate that it was intended to be operative to a greater extent than as giving a statutory lien issuing in process of execution of efficacy equal to but not greater than that possessed by the ordinary writs of execution."

Under the Mechanics and Wage-Earners Lien Act, R.S.O. 1914, ch. 140, sec. 6, a general right is given to workmen or materialmen who perform any work or service or furnish any materials to be used in the making, constructing, etc., of any erection, building, railway, etc., to a lien for the price of such work or materials; and it is provided by sec. 49 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 to be due to him and which he might recover in an action against such party."

The significance to be attached to the word "valid" in the expression "valid lien" is, I think, this: a lien which could under the statute be found to exist in favour of a claimant by reason of the fact that he had performed work or service or furnished materials to be used in the making, constructing, erecting, etc., of any erection, building, railway, etc., which could be legally

the subject of a lien under the Act, and which, but for his failure to take the steps and follow the procedure provided in the Act, would have been found to entitle him to a lien. In such case he can still be given the personal judgment mentioned in the section. If he had proceeded regularly under the Act, and been found entitled to his lien, it would have been for the same amount for which the judgment under sec. 49 would be.

It is clear that the lands in question, owned by the defendants the Canadian Northern Railway Company, incorporated under a Dominion Act, are not subject to a lien under the Act in question herein. I am unable to see how it can properly be held that an Act which fundamentally aims at giving a lien to specified classes of persons who may assert and establish claims for work or materials, and who can as a result acquire liens thereon and utilise these to obtain payment of their claims, can be effectively resorted to by any person where the lands from the outset cannot be made legally liable to any lien thereunder.

I am of the opinion that secs. 6 and 49 must, when read together, be construed to refer only to lands, including railway lands, to which the Act can apply, but not to railway lands to which liens can in no case under the Act legally attach.

In *Crawford* v. *Tilden* (1906), 13 O.L.R. 169, at p. 174, the late Chancellor said:—

"By Dominion statute 4 Edw. VII. ch. 81, the railway in question was incorporated and the undertaking was declared to be by sec. 11 a work for the general advantage of Canada. By the enactment it was brought within the exception as to the local works and undertaking specified in the British North America Act, sec. 92, sub-sec. 10 (*c*), and thereby placed under the exclusive legislative authority of Canada by virtue of sec. 91, sub-sec. 29. Being thus a federal railway exclusively under the legislative control of the Dominion, it is not competent for the local legislature of Ontario to enact any law which would derogate from the status and rights and property enjoyed and held by the federal corporation under its constitution created by the Dominion of Canada. That result follows inevitably, I think, from what has been decided in the earlier case of *Bourgoin* v. *La Compagnie du Chemin de fer de Montreal Ottawa et Occidental* (1880), 5 App. Cas. 381; and the more recent case of *Attorney-General of Canada* v. *Attorney-*

ONT.

S. C.

JOHNSON & CAREY CO. v. CANADIAN NORTHERN R. CO.

Sutherland, J.

General of Ontario, [1898] A.C. 247; *Canadian Pacific R. Co.* v. *Notre Dame de Bonsecours*, [1899] A.C. 367; *Madden* v. *Nelson and Fort Sheppard R. Co.*, *ib.* 626.

"The Mechanics' Lien Act of Ontario is extended to railway companies as owners and to railways and their lands with the safeguard in sec. 52. 'The provisions of this Act so far as they affect railways under the control of the Dominion of Canada are only intended to apply so far as the legislature of the province has authority or jurisdiction in regard thereto.' This was passed in 1886, after the decision in *King* v. *Alford* (1885).

"The effect of the legislation is to operate at once upon the property of the railroad affecting it *in rem* and creating a statutory lien on the undertaking for the benefit of the wage-earner. The initial proceedings under the Ontario Act is to place a burden on the lands of the railroad in addition to what may be imposed upon them under the Dominion Railway Act, secs. 111, 112, etc., Act of 1903. That appears to me to be a piece of legislation beyond the competence of the Provincial Legislature."

If the construction to be put upon the Act which I have suggested to be the proper one were not to prevail, a person having a claim for work or material might, as a claimant under the Act, and by asserting that claim thereunder, and in the manner therein provided, even though under no circumstances could he or any other claimant convert a claim into a lien, compel his adversary to fight the claim itself, whatever the amount, in the proceedings thus commenced and before the tribunal provided in the Act, thus depriving him of his right of defence before the usual tribunal, to which otherwise each would be compelled to resort. I cannot think that any of the decided cases, or that any expressions of individual Judges therein necessary to the decision of the cases, have gone this length. The trial Judge seems to have thought that the case of *Kendler* v. *Bernstock*, 22 D.L.R. 475, 33 O.L.R. 351, did, but I am unable to agree with him in this view. The claimant in that case could apparently have established his lien against the property in question but for his failure to take the proceeding which the Act enabled him to take for that purpose. Being, however, a person with a claim such as could properly be asserted against the property in question, and which property could under the Act be legally the subject of a lien, he could avail himself in the pro-

ONT.

S. C.

JOHNSON & CAREY CO. v. CANADIAN NORTHERN R. CO.

ceedings of the benefit of sec. 49, and, notwithstanding his inability to establish a valid lien, recover a personal judgment against a party to the proceeding for such sum as he might have recovered in an ordinary action.

In the present case, under no circumstances could the claimant, or any other claimant, establish under this Act a valid lien against the property in question. In these circumstances, I do not see that the railway company can be legally compelled to fight the claim in question under the statute or be deprived of their right to contest it before the ordinary tribunal.

Sutherland, J.

A further argument advanced on behalf of the plaintiffs was that a charge attached to the percentage required to be retained by the owner under sec. 12 of the Act. But, when sub-sec. 3 of the said section is referred to, it is plain that it is the lien which is to be a charge upon the amount so directed to be retained, and if no lien is established, the section cannot apply so as to aid the claimant.

I would allow the appeal of the railway company as to the section in question, and, doing so, think it is unnecessary to deal with the third question. The appeal should be allowed with costs, and the cross-appeal dismissed with costs.

MULOCK, C.J. Ex., agreed with Sutherland, J.

Mulock, C.J.Ex.

RIDDELL, J.:—The plaintiffs, sub-contractors for the construction of part of the Canadian Northern Railway, not being paid, took proceedings under the Mechanics and Wage-Earners Lien Act, R.S.O. 1914, ch. 140. Certain preliminary questions were ordered to be tried and determined in advance: Rule 122. These have been determined by Mr. Justice Masten with divided success. We have now to deal with an appeal and a cross-appeal.

Riddell, J.

The questions are set out in full in the judgment appealed from.

1. On the first question, i.e., whether a lien claimed under the Act can exist or be enforced against the property of the Canadian Northern Railway (a Dominion railway), referred to in the statement of claim, I entirely agree with my learned brother Masten that we are precluded by binding authority from deciding in the affirmative. In *Crawford* v. *Tilden* (1907), 14 O.L.R. 572, both the decision and the *ratio decidendi* cover the present case. We are not at liberty to depart from this decision: Judicature Act, R.S.O. 1914, ch. 56, sec. 32. Were the matter open, I should decide in the same way.

ONT.

S. C.

JOHNSON & CAREY CO. v. CANADIAN NORTHERN R. CO.

Riddell, J.

2. But it is argued, and my learned brother has held, that, though there can be no lien, the plaintiff may proceed to obtain judgment under sec. 49 of the Act.

This decision is apparently based upon two cases in the Divisional Court: *Kendler* v. *Bernstock*, 22 D.L.R. 475, 33 O.L.R. 351, and *Baines* v. *Curley* (1916), 33 D.L.R. 309, 38 O.L.R. 301. I think neither of these cases at all in point.

When examining the language used in a decision, it must always be borne in mind that the Judge is generally not writing a philosophical treatise, in which he would begin by defining his terms accurately, express fully and clearly the exceptions and limitations, etc., etc.; but he is writing on the matter and on the facts submitted to him, and his language must be read in view of the matter and of the facts. These are always to be understood. In saying, "Wherever there is a wrong there is a remedy," he would not need to say expressly, "I do not mean the partition of Poland or the rape of Belgium."

In scores of cases before and since *Quinn* v. *Leathem*, [1901] A.C. 495, has been said in substance what was said in that case, p. 506, by Lord Halsbury: "Every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found."

In neither the *Kendler* nor the *Baines* case was there any question that the property sought to be charged could be affected with a lien under the statute. The substratum, the condition, what was understood and taken for granted in both cases, was the existence of property which could be rightfully charged with the statutory lien.

In *Kendler* v. *Bernstock*, it was held that sec. 49 meant what it said, and that where a claimant could not establish a valid lien, as his lien had been voided by failure to take proceedings, he might still have a personal judgment. *Baines* v. *Curley* decided that a lienor, made a party by service upon him of notice of trial, did not lose his lien because the originator of the proceedings failed. In neither case was there any suggestion that a creditor could take proceedings under the Act where the property upon

which he claimed a lien could not be subject to a lien at all. As Mr. Justice Hodgins says in the *Kendler* case, 22 D.L.R. at p. 477: In "an action commenced . . . 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." And the statement in the *Baines* case, 33 D.L.R. at p. 312, that "any person claiming a lien can commence the action," is not to be extended to cover the case of one claiming a lien upon property upon which a lien cannot by law attach—"the generality of the expressions are . . . governed . . . by the particular facts of the case:" *Quinn* v. *Leathem*, [1901] A.C. at p. 506.

The point, then, being free from authority, I have no doubt that the procedure of the Act cannot be applied to the case.

The whole object of the Act is to insure the payment for work and materials, if necessary, out of property upon which work has been done or materials provided, and that by a cheap and expeditious method. "The substance of the enactment is the sale:" *per* Meredith, J.A. (now C.J.C.P.), in *Crawford* v. *Tilden*, 14 O.L.R. at p. 577 (*ad fin.*); and the procedure has been from time to time simplified in order to facilitate the enforcement of the lien by sale as quickly and cheaply as possible.

What is now sec. 49 of the Act was introduced by the Mechanics and Wage-Earners Lien Act, 1896, 59 Vict. ch. 35, sec. 48, allowing a personal judgment to be given where any claimant should fail to establish a valid lien "in an action brought under the provisions of this Act." The trifling change in terminology effected by the Mechanics and Wage-Earners Lien Act, 1910, 10 Edw. VII. ch. 69, sec. 49, does not change or affect the meaning. I think it obvious that there must be property which can be affected under the Act, and a lien attach under the Act, before the action can be said to be brought under the provisions of the Act, and that the change made in 1910 was never intended to change the manner of trial of cases where, from the nature of the property, there could be no lien. The only effect of the section in either statute, as it seems to me, is to permit a personal judgment where "by reason either of non-compliance with any of the statutory provisions (see secs. 17, 18, 19, 22, 24, 25) or otherwise, the lien . . . has . . . ceased to exist:" *Kendler* v. *Bernstock*, 22 D.L.R. at p. 477.

ONT.

S. C.

JOHNSON & CAREY CO. v. CANADIAN NORTHERN R. CO.

Riddell, J.

Otherwise the result would be that a claimant having an account for labour or materials need only allege a lien, set up a claim for a lien in any case, and deprive the person against whom he claimed of the right to trial of the case in the usual way.

Breeze v. *Midland R. Co.* (1879), 26 Gr. 225, might at first sight seem opposed to this view. A bill was filed to enforce a mechanic's lien for work done upon the defendants' station-house; it was taken *pro confesso*, and Blake, V.-C., said: "I do not think that you are entitled to that relief as against the land of a railway company required for the purpose of their railway. The only decree I can make is one for the payment of the amount due, with costs." But at that time the practice was under the Mechanics Lien Act, R.S.O. 1877, ch. 120, sec. 13, a continuation of the first Act, 1873, 36 Vict. ch. 27, sec. 6, and (1874) 38 Vict. ch. 20, sec. 11, and that provided that in cases other than those within the jurisdiction of the County or Division Court the claim was to be realised in the Court of Chancery according to the ordinary procedure of that Court. The bill filed, no doubt, set out the work done for the defendants, non-payment, that the work was done on the station-house, etc., and claimed payment, the enforcement of the lien claimed by sale, and such further or other relief, etc., etc. This came up for hearing in the usual practice of the Court, and on the statements contained in the bill the Court ordered payment, but declined to enforce the supposed lien. There was no special form and nothing different from the proceedings in the case of any other kind of lien. This is no authority for saying that where the claimant cannot have a lien from the nature of the property he may still have his personal claim tried by the special tribunal provided for trials of cases of liens.

King v. *Alford*, 9 O.R. 643, was a precisely similar case. This was under the Mechanics Lien Act, R.S.O. 1887, ch. 126, sec. 13, in the same words as (1873) 36 Vict. ch. 27, sec. 6, and the amending Act of 1874, 38 Vict. ch. 20, sec. 11. The change to the present practice was introduced by the Act of 1896, 59 Vict. ch. 35, sec. 29. How careful Courts have been in allowing such claims in derogation of the common law may be seen in such cases as *Trask* v. *Searle* (1876), 121 Mass. 229.

It is argued, however, that a lien or charge attaches to the sum to be retained under sec. 12 (1) of the Act; but sec. 12 (3) is the

effective clause, and that makes "the lien" a charge on this fund, i.e., a lien must exist before there can be any charge, and here there is no lien.

3. It is unnecessary to give an opinion on the third question. As at present advised, however, I have no scintilla of doubt of the validity of the legislation of the Province, in view of the British North America Act, sec. 92 (14) and sec. 96.

The appeal should be allowed and the cross-appeal disallowed, both with costs.

Riddell, J.

LATCHFORD, J., agreed with Riddell, J.

Latchford, J.

KELLY, J.:—I agree with the opinion of my brother Riddell in answer to questions (a) and (b) referred to in the judgment appealed from, and I would on these grounds allow the defendants' appeal and dismiss the plaintiffs' cross-appeal.

Kelly, J.

This disposition of the matter renders it unnecessary, for the purposes of this action, to consider question (c); I therefore express no opinion upon it.

Appeal allowed; cross-appeal dismissed.

REX v. WEINFIELD.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Beck, Simmons and McCarthy, JJ. June 7, 1919.

1. INTOXICATING LIQUORS (§ III D—70)—UNLAWFUL SALE BY DRUGGIST—CONVICTION—RIGHT OF APPEAL—STATED CASE—ALTA. LIQUOR ACT.
A druggist convicted of an offence under the Alberta Liquor Act has the right to an appeal by way of stated case under s. 41, sub-ss. 2 and 8, of the Act.

2. INTOXICATING LIQUORS (§ III J—91)—ALBERTA LIQUOR ACT—INFORMATION — PARTICULARS — CONVICTION — EVIDENCE TO SUPPORT — APPEAL.
It is no ground for objection to an information under the Alberta Liquor Act, that it does not contain all the particulars it might, where it is clear from the evidence that the informant was prosecuting for a breach of the Act, in selling on a prescription signed by a certain doctor, and where there is ample evidence to support a conviction for an offence in so doing. Whether the magistrate should have ordered particulars to be given is not a question of law which can be raised on a stated case.

Statement.

APPEAL by way of stated case by a druggist convicted by a magistrate of an offence under the Alberta Liquor Act. Affirmed.

J. K. Macdonald, for Crown; *J. McKinley Cameron*, for accused.

Harvey, C.J.

HARVEY, C.J.:—The accused was committed by Police Magistrate Saunders of Calgary upon a charge described in the informa-

ALTA.
S. C.
REX
v.
WEINFIELD.
Harvey, C.J.

tion as follows:—"That during the month of February, 1919, at Calgary aforesaid being a chemist or druggist (he) did unlawfully sell intoxicating liquors on other than *bonâ fide* prescriptions from a registered practitioner or practitioners or dentists, contrary to s. 23 (1) of the Liquor Act of Alberta, 1916, c. 4 (amended c. 4, 1918)."

S. 23 prohibits the sale of liquors but the proviso which is numbered (1), and which is no doubt what is intended by the words sub-s. 1 of the charge, excepts from its prohibition registered druggists and chemists who sell for strictly medicinal purposes upon a *bonâ fide* prescription from a registered practitioner and keep a record of the sale.

S. 32 furnishes some explanation and limitation of the above. It provides that a practising physician may give a written or printed prescription for intoxicating liquor to a patient in cases of actual need when in his judgment he considers it necessary for the health of the patient. The same section authorizes dentists to give prescriptions for external use.

After the conviction the accused applied in writing to the magistrate to state a case under s. 761 of the Code, upon twelve grounds, one of which has four subdivisions. The magistrate expressed his willingness to state a case but the case as stated to us sets out nine additional grounds. At the opening of the argumen objection was taken by counsel for the Crown that there is no right to a stated case.

S. 41 provides that a conviction by a justice, etc.,

> except as hereinafter mentioned shall be final and conclusive, and, except as hereinafter mentioned, against such conviction or order there shall be no appeal.

Sub-s. (2) provides that, subject to the foregoing provisions,

> an appeal shall lie to a judge of the district court in all cases where the person convicted is a druggist. . . .

It was held in *The Queen* v. *Robert Simpson Co.* (1896), 2 Can. Cr. Cas. 272, by the chancery divisional court of Ontario that (in the words of Boyd, C.):

> The Code, therefore, treats this method of stated case to be but a form of appeal equivalent to the ordinary appeal upon the facts and law to the general sessions.

I agree with this view.

Sub-s. 8 of s. 41 provides that:

The practice and the procedure upon such appeals and all the proceedings thereon shall thenceforth be governed by the provisions of Part 15 of the Criminal Code. . . . Provided no such conviction or order as aforesaid shall be removed by *certiorari* except upon the ground that an appeal to the court to which an appeal is by law provided would not afford an adequate remedy.

It would appear that reading sub-s. (2), which provides for the ordinary method of appeal by way of re-hearing, with sub-s. 8 all the methods of appeal of the Code are authorized, and on almost identical provisions of a Nova Scotia Act. The Supreme Court *en banc* of that province adopted that view in *Rex* v. *Oland* (1903), 8 Can. Cr. Cas. 206. This is also in harmony with s. 769 of the Code which provides that where there is no appeal there can be no stated case.

Accepting this view we decided that we had jurisdiction to consider the stated case.

I do not propose to spend several hours or days in considering and answering all the questions, material and immaterial, asked by the stated case.

Ss. 62 and 63 of the Act as enacted in 1918 by c. 4, ss. 16 and 17, provide that a conviction shall not be set aside if the court is satisfied that there was evidence on which the justice might reasonably conclude that an offence under the Act had been committed, but that if there is any defect the court may amend.

I can see no ground for objection to the information or conviction on its face. It is true the charge does not contain all the particulars it might, but that is a matter that could be cured by particulars in a proper case. As far as the date is concerned, the evidence shews that it is as definite as it could be made, but there is evidence of sale under 46 prescriptions under any individual one of which the magistrate might have been disposed to convict, for each one, if unauthorized, would constitute a separate offence. It is in this respect that the chief argument is made against the validity of the conviction. It is clear that the case is one where evidence of similar acts is admissible and that if the charge were specifically limited in its terms to one of these prescriptions, evidence of all the others on the facts of this case could be given.

Then how is the defendant prejudiced by the conviction not stating which one is the basis of the charge? Assuming, as counsel did in the argument, though as I shall shew not quite correctly,

ALTA.

S. C.

REX v. WEINFIELD.

Harvey, C.J.

that there is nothing in the evidence to indicate in respect of which particular sale the conviction is made, the result would be that the defendant would have a good plea of *autrefois convict* upon a subsequent prosecution for any one of the sales while if the particular sale were clearly indicated the plea would only apply to that; the result is that if the conviction stands simply as a sale during February, which might be in respect of any one of the prescriptions, the defendant has a protection from prosecution for 45 sales in respect of which he might be guilty.

The evidence is that the defendant, when the police went to inspect his records, gave them 1,743 liquor prescriptions, which he said were his February prescriptions, all of which he had filled. The 46 of these prescriptions put in evidence divide themselves into classes. There is one signed "Dr. Dice," one unsigned, one signed "Dr. Curtis," 42 signed "A. E. Shore, M.D." and one signed "E. S. Shore, M.D." The one signed "Dr. Curtis" is dated 28–2–19. One signed "A. E. Shore, M.D." in pencil has on it in ink in apparently different handwriting "Feb. 2–19." None of the others are dated.

The defendant told the police his method was to number the prescriptions when he filled them, write on it the brand of liquor sold and then make an entry of it in his book. The lowest number on the prescriptions is 2807, the highest 7207, the number on the dated prescription signed "Dr. Curtis." The other one with a date on it is numbered 3846.

The information was laid by a provincial police detective, who was the first witness. After explaining how he got the 1743 prescriptions and the information given him by the defendant, he says, "This is the prescription we are going to put in, the first one 'Dr. Dice.'" Then the following questions and answers regarding this occur:—

Q. What is wrong with that prescription? A. I am going to prove where it came from. It is supposed to be signed by Dr. Dice. He is here to give evidence.

Q. Why do you think it is not Dr. Dice's signature? A. There is several of those prescriptions signed by Dr. Dice and there is quite a difference in them.

Q. You found that out from the prescriptions you got from the accused? A. Yes, there is some 43 and they are different, and I went and saw Dr. Dice.

Q. Could you have told that without seeing Dr. Dice? A. Yes, anyone could tell that without being an expert.

The prescription was then marked as ex. 1. The detective also states that the number on this prescription is in the handwriting of the defendant. He then produces another prescription unsigned and again another on a prescription form with a heading "Johnston the Druggist, Drumheller, Alberta," which is signed "Dr. Curtis" with some undecipherable initials, and states that there is no doctor of that name at Drumheller, as he learned from inquiries. The first prescription is for "Spts. frumenti" and is endorsed "K.G.W. label," which the witness explained as King George White Label. This is one of the prescriptions furnished him by accused as having been for intoxicating liquor, all of which he said he endorsed with the name of the liquor supplied. The unsigned one is also for "Spts. frumenti" and is endorsed "W.I. Rye." The one signed "Dr. Curtis" is simply for rye.

The 43 which were subsequently put in evidence, all but one being signed "A. E. Shore, M.D." and that one "E. S. Shore, M.D." are in various handwritings and signatures, three at least, and on varying forms of paper. They are directed to persons as far north as Daysland and as far south as High River. One only apparently is for "Spts. frumenti." The Latin of the others appears in quite a variety of forms, many being "Speritii frumentii," not one apparently being "Spiritus frumenti," and one being "Spiritii phum." This is endorsed "R" and is numbered apparently in the same handwriting as ex. 1. Dr. H. E. Dice was called and swore that ex. 1 was not issued by him and that he was unaware of there being any other Dr. Dice practising in Alberta.

Evidence was also given to shew that Dr. A. E. Shore had left Calgary to go overseas in the Canadian Army Medical Corps on November 28, 1918, and had not been back since. There is undoubted evidence that the prescription signed "Dr. Dice" is not a *bonâ fide* prescription on which a druggist would be authorized to supply liquor. It would be unreasonable to argue that there is no evidence from which it may be inferred that it is a forgery because it is not conclusively established that there is no other Dr. Dice who could have signed it. The unusualness of the name and the evidence of Dr. H. E. Dice, certainly, in the absence of evidence to the contrary, leave little room for doubt that it is not an honest prescription. The defendant gave no evidence in his own behalf and it is perhaps doubtful whether, when it is once

ALTA.

S. C.

REX v. WEINFIELD.

Harvey, C.J.

established that he has supplied liquor on what is not a *bonâ fide* prescription, it is not incumbent upon him to shew that he has done so honestly in the well-founded belief that it was a *bonâ fide* prescription, especially in view of s. 51 of the Act, which provides that "the burden of proving the right to have or keep or sell or give liquors shall be on the person accused of improperly or unlawfully having or keeping or selling or giving such liquor," and s. 53, which casts on the defendant the burden of proving that he did the act lawfully when it would be unlawful if not duly authorized. There might, however, be room to argue that on the form of the charge in this case it was necessary to give some evidence of *mens rea* on the part of the accused, but having regard to the number of prescriptions issued in a month, which he himself stated, he was almost ashamed of, and which, if the defendant worked every day in the month 15 hours a day, would mean one every 15 minutes, to the fact that the prescriptions were not properly expressed, and that various persons were signing the same name and to the other facts referred to, there can be no question that there was plenty of evidence to justify an inference that the defendant was not honest in thinking that the prescription was a *bonâ fide* one or that he was at least careless whether it was or not.

It appears to me quite clear from the evidence to which I have referred that the informant was prosecuting for a breach of the Act in selling on the prescription signed "Dr. Dice," and that there is ample evidence to support a conviction for an offence in so doing. Whether the magistrate should have ordered particulars to be given, is not, I think, a question of law which can be raised on a stated case, but in view of the fact that the evidence for the Crown was practically all furnished by the accused himself it is hard to see where any prejudice resulted to him. Counsel for the defendant contends that the penalty of $100 and costs is unauthorized and that $200 is the minimum. If this were so, we could, of course, amend the conviction and impose the larger penalty, but I am of opinion that the conviction is not defective in this respect. Sub-s. 12 of s. 23 provides that any druggist "who colourably for medicinal purposes sells liquor to be consumed by any person as a beverage" shall be liable to a penalty of $200. Now it is clear that $200 is a maximum, whether it is a minimum or not.

ALTA.

S. C.

REX v. WEINFIELD.

Harvey, C.J.

S. 40 of the original Act, of which sub-s. (2) of s. 23 was part, provided for penalties where no other penalty was provided, graduated from $50 as a minimum for the first offence. S. 40 has been repealed and for it have been substituted two sections, 40 and 40 (*a*), that latest and present appearance being found in s. 12 of c. 4 of 1918. S. 40 provides a penalty for any person offending against the provisions of s. 23 of a minimum of $100 and a maximum of $200 for a first offence. S. 40 (*a*) provides a penalty for any offence for which some other penalty has not been provided.

In my opinion s. 40 as it now exists, which specifically covers offences under s. 23, without exception has superseded sub-s. 2 of s. 23.

Even if it were not so I would have doubt that the only penalty must be the full amount and the charge moreover is not in the words of the sub-section.

I would therefore affirm the conviction.

SIMMONS, J.:—I concur. Simmons, J.

BECK, J., owing to illness took no part in judgment. Beck, J.

McCARTHY, J. (dissenting):—The appellant, a chemist or druggist and the occupier of a store in the City of Calgary, was convicted by a court of summary jurisdiction under the Liquor Act, 1916, of unlawfully selling intoxicating liquors during the month of February, 1919, on other than *bonâ fide* prescriptions from a registered practitioner or practitioners or dentists contrary to s. 23 (1), of the Liquor Act of Alberta and was fined $100 and costs. McCarthy, J.

The information was in the same form as the conviction.

The evidence, which is part of the stated case, discloses that objection was taken to the information, as follows:—

Mr. Cameron (counsel for accused): I would ask to be furnished with particulars. In regard to the month of February, the selling of the liquor is different to keeping liquor for sale. I would ask that before the evidence is taken the prosecution state more specifically the dates or the particular charge it is.

The Court: Can you, Mr. Harvie, before the case goes on, inform the defendant of what you expect to prove?

Mr. Harvie (counsel for prosecution): Under this charge we intend to prove that he did during the month of February sell liquor on other than *bonâ fide* prescriptions.

The Court: On how many different occasions?

Mr. Harvie: *On 4 different prescriptions.* There are no dates on the prescriptions. In one case it might have been a mistake, but where there is a

ALTA.

S. C.

REX
v.
WEINFIELD.

McCarthy, J.

series of these going through there can be no doubt about it. I am unable to fix the dates.

Mr. Cameron: I don't want the prosecution to reveal their witnesses where there might be a suggestion that the defendant would get the witnesses out of the country, but perhaps my learned friend would give what specific date he could of the four charges he expects to prove. Would he give the names?

Mr. Harvie: It is practically impossible to do that. Some are not signed and no name is on them. I will mark them as exhibits and shew them to you in that way.

Mr. Cameron: Another question may possibly arise on the validity of your honour's conviction afterwards if the information is for four different offences included in the one information. If he sells a bottle to John Smith which is a violation of the Act that is a sale within the Act and would be an offence, and if during the same month he sells to John Brown, that would be another offence. I think in a case like this, which is not keeping for sale, then the evidence should all be confined to that particular sale.

A number of objections were urged to the conviction, but as I think this case can be disposed of by the consideration of two of them, I do not propose to deal with the others.

In the first place, it was urged by counsel for the accused that "the information is vague, indefinite and uncertain and discloses no offence or in the alternative is for more than one offence and not being in conformity with section 42 of the Liquor Act is illegal and void."

Objection was also taken that "the magistrate had pending before him at the same time at least four separate and distinct charges of a similar nature which destroyed his jurisdiction."

I think these two grounds urged against the information are fatal to the validity of the proceedings. The offence of selling liquor is not a continuous offence and I cannot distinguish this case from the case *Rex* v. *Aitken* (1917), 37 D.L.R. 530, 28 Can. Cr. Cas. 2, 11 Alta. L.R. 573, in which Scott, J., held that the conviction for selling liquor on a day named and for some time previous thereto charged more than one offence and quashed the conviction. I think that even if this is not so, that the charge coupled with the verbal particulars given at the hearing render the proceedings void as the magistrate really had pending before him at least four if not a great many more cases at the same time and convicted the defendant of "his said offence" without any indication of which particular offence mentioned in the depositions he was convicted of. On this aspect of the case I see no reason to change the views which I expressed in *Rex* v. *McManus* (1918), 30 Can. Cr. Cas. 122.

ALTA.

S. C.

REX v. WEINFIELD.

McCarthy, J.

It is provided by s. 710 of the Criminal Code, sub-s. 3, that every complaint shall be for one matter of complaint only and not for two or more matters of complaint and every information shall be for one offence only and not for two or more offences.

The principle underlying this section is that the inferior court must not have more than one matter pending against the accused at the same time and the principle is the same whether these matters are contained in the one information, or more. See authorities cited in *Rex* v. *McManus*.

The case of *Rex* v. *Hazen* (1893), 23 O.R. 387, on appeal 20 A.R. (Ont.) 633, is distinguishable from the present case. In that case the court held that the information disclosed more than one offence, being a charge of selling on two different days, and the Court of Appeal were equally divided on this question, but the Court of Appeal restored the conviction on the grounds that it was a defect in substance and not in form within the remedial provisions of the statute, but in the *Hazen* case, the conviction, which was finally sustained by the appellate court, was for selling on one day, and consequently, therefore, was a perfectly good conviction.

In *Rex* v. *Scott* (1919), 1 W.W.R. 1064, the conviction was quashed because the information clearly recited two offences and in the case of *Rex* v. *Austin* (1905), 10 Can. Cr. Cas. 34, Scott, J., acted upon what in my opinion is the underlying principle that having many charges pending and receiving evidence upon them the defendant is prejudiced in his trial and for this reason I do not think the case should be sent back to the magistrate, but I think the conviction should be quashed.

Conviction affirmed.

BROOKS-SCANLON O'BRIEN Co. Ltd. v. BOSTON INSURANCE Co.

B. C.

C. A.

British Columbia Court of Appeal, Macdonald, C.J.A., Martin and Galliher, JJ.A. April 1, 1919.

INSURANCE (§ III D—68)—MARINE—POSITIVE REPRESENTATION—WARRANTY —PROMISSORY REPRESENTATION—NOT INCLUDED IN WRITTEN CONTRACT—EFFECT.

In marine insurance law a positive representation, which in another transaction would amount to a warranty, is regarded as a promissory representation which may be relied upon notwithstanding that it was made by word of mouth and is not included in the written contract.

Statement.

APPEAL by the plaintiff from the judgment of Clement, J., in an action to recover marine insurance. Affirmed.

B. C.

C. A.

BROOKS-SCANLON O'BRIEN CO. LTD. v. BOSTON INSURANCE CO.

Macdonald, C.J.A.

Davis, K.C., for appellants; *C. W. Craig*, K.C., for respondents.

MACDONALD, C.J.A.:—The plaintiffs having a quantity of rails loaded on two scows which the Kingcome Navigation Co. were under contract with them to tow to their destination applied to the defendants for a policy of marine insurance on the rails. Mr. Kilty, plaintiffs' secretary, and Mr. Maitland, defendants' agent, met for the purpose of arranging the insurance. The latter called Kilty's attention to the fact that there was one rate of insurance when scows were to be towed singly, and another and higher rate when taken together. Kilty then, in the presence of Maitland, telephoned to Capt. McLennan of the said Navigation Co. and what then took place is, I think, fairly disclosed in the following extracts from the evidence.

Maitland says that he understood that Kilty was telephoning to ascertain "the extra cost of towage going up single scows," and Kilty in his examination for discovery said:—

> I enquired of him (Capt. McLennan) as to the rate of towing one or more than one scow, but eventually he agreed to handle this shipment as a single tow at the same rate.

The meaning of this is not in dispute between counsel, it being conceded that the scows were, according to this, to be towed singly without extra charge. On cross-examination at the trial, Maitland was asked the question:—

> And he (Kilty) came back after finishing the telephone conversation and said: "Yes, they are going single scow," didn't he?

to which he answered:—

> He told me they were going by single scow, yes.

Thereupon the policy was issued at the lower rate of insurance. The scows were not taken up singly and one was lost. The plaintiffs sue in respect of said loss and the defendants rely upon the representations aforesaid that the scows were to be towed singly, which representation was not fulfilled.

The plaintiffs do not dispute the materiality of the statement as to the manner of towing, but they say there was no representation, but merely a statement by Kilty of what Capt. McLennan told him, which both parties equally relied upon.

The question is one of fact, one which a jury could be called upon to decide under proper direction from the court. In this case it was decided by the judge himself, who held that the policy

never attached and that there was in the circumstances no insurance at all of the rails on the lost scow. I agree with him in the result, but for a different reason. The inference I draw from the evidence and which I think does not conflict with that drawn by the judge is that Kilty made a positive representation that the scows would be towed singly. In an ordinary transaction, that representation would amount to a warranty, but in marine insurance law it appears to be regarded as a promissory representation which may be relied upon notwithstanding that it was made by word of mouth and not included in the written contract. That such a parol promissory representation if made would be an answer to this action is not disputed by counsel for the plaintiffs. They put their defence on this—that Kilty's words amounted to nothing more than a repetition of what Capt. McLennan had told him and could, in the circumstances, amount only to an expression of expectation or belief. They rely on *Bowden* v. *Vaughan* (1809), 10 East 415, 103 E.R. 833, and *Hubbard* v. *Glover* (1812), 3 Camp. 313, while defendants rely on *Bailey* v. *Ocean Mutual Marine Ins. Co.* (1890), 19 Can. S.C.R. 153. In cases of this sort, where the question is one of fact, decisions on other facts are only helps to a conclusion on the particular circumstances before the court. The authors of Arnould on Marine Insurance, 8th ed., in a foot-note at p. 688, referring to *Hubbard* v. *Glover*, say:—

> It is submitted that with the modern means of communication a statement that there was a cargo ready would generally not be held to be a mere expression of belief.

In the case at Bar the parties were in immediate communication with Capt. McLennan. Mr. Maitland was, I think, entitled to believe that Kilty was making a definite agreement with Capt. McLennan about which there could be no question of mere expectation or belief. What was arranged was clearly within the control of Kilty and McLennan, and nothing but bad faith on the part of the latter could interfere with the carrying out of the arrangement. I think the true inference is that Kilty was willing to take the cheaper insurance on the strength of that arrangement and I would not infer that he was in effect asking Maitland to take the risk of McLennan's breach of that arrangement. In the cases, *supra*, upon which plaintiffs rely, the circumstances were very

B. C.

C. A.

BROOKS-SCANLON O'BRIEN CO. LTD. v. BOSTON INSURANCE CO.

Macdonald, C.J.A.

different to those of this case: in the nature of things, insurers could only speak of the sailings of ships in distant seas from expectation and belief. Uncertainty as to the sailings of ships more than a century ago, before the days of modern liners, must have always been in the minds of insurance underwriters and brokers, and they could well be assumed to understand that representations of insurers, no nearer the ships than themselves, as to dates of sailings or readiness of cargo were mere expectations.

The only difference of note between the facts of this case and *Bailey* v. *Ocean*, *supra*, is that here the insurers are not the owners of the ship, but are merely the owners of the cargo, while there, as appears from the report in the court below (22 N.S.R., p. 5), the insurers were the ship-owners. But in the view I take of the facts, Maitland had the right to assume from what passed at the telephone that Kilty had control and had by his arrangement with Capt. McLennan put an end to any doubt as to the manner in which the scows should be towed.

I would therefore dismiss the appeal.

Martin, J.

MARTIN, J.A., would allow the appeal.

Galliher, J.A.

GALLIHER, J.A.:—I would dismiss the appeal.

I take the same view as the trial judge that it is not a case of representation and does not fall within *Hubbard* v. *Glover*, 3 Camp. 313.

At p. 21 Maitland says: "After Kilty had telephoned the tug people he told me to insure them under single tow." He says at p. 20: "I did not pay particular attention to his conversation."

I don't think this is really affected by the cross-examination of Mr. Davis or the examination for discovery put in.

I do not regard what took place as being any different in effect to what would have been if Kilty had obtained all the facts from the tug people and then have gone down and instructed Maitland to make out a risk for two single tows.

Surely the fact that Maitland was sitting there and heard the conversation at one end and understood that Kilty was satisfying himself as to what kind of a policy he wanted cannot be deemed a representation on which he acted himself.

Appeal dismissed.

Re LABUTE and TOWNSHIP OF TILBURY NORTH.

ONT.

S. C.

Ontario Supreme Court, Mulock, C.J.Ex., Clute, Riddell, Sutherland and Kelly, JJ. December 23, 1918.

MUNICIPAL CORPORATIONS (§ II C—69)—MUNICIPAL DRAINAGE ACT—COMPLAINT AS TO DRAIN—ORDER OF COUNCIL TO SURVEY AND REPORT—ADOPTION OF REPORT—RATIFICATION—VALIDITY.

Where a complaint is made by a ratepayer as to the repair of a drain, and a request is made to have it repaired as soon as possible, there is nothing in the Municipal Drainage Act to prevent the municipal council from going beyond the complaint in ordering the engineer to make a survey of the drain and report. The adoption of the report which treats the work as a new one is a ratification and equivalent to previous instructions, and a by-law to carry it into effect is valid and should not be quashed.

Statement.

AN appeal by the township corporation from an order of the Drainage Referee quashing a drainage by-law passed by the township council on the 8th May, 1918.

The Drainage Referee gave reasons in writing for his order, as follows:—

Before going into the merits of this application, counsel have thought proper to deal with what may be considered preliminary questions, bringing the facts of this case very closely in line with *Gibson* v. *West Luther* (1911), 20 O.W.R. 405. The Macklem drain was originally a natural watercourse. Somewhere about 1904, under the superintendence of the late Mr. McDonnell, it became a municipal drainage work down as far as the road drain along the concession road into which it had its outlet. Since that time, minor changes have occurred and the concession road drain has been improved under the Municipal Drainage Act, but no work has been done over the course of the Macklem drain proper, unless perhaps (and as to this the evidence is not altogether satisfactory) to divert its course as it reached its outlet, running down the line between Mr. Labute and his neighbour into the concession road drain. The original by-law, report, plans, and specifications appear to have been lost, so that nobody to-day knows what the original assessments were. The resolution under which the present work is proposed to be done instructed Mr. Newman simply to repair the Macklem creek drain. It is unfortunate that the resolution did not go further and give him authority to vary the assessment or treat the work as a new work. He had no data upon which to work, and he has been obliged to treat the

ONT.

S.C.

RE LABUTE AND TOWNSHIP OF TILBURY NORTH.

scheme as one entirely new. He has not taken into account even the assessments for work done on the concession road drain, which he now proposes to incorporate as part of the new work. I cannot feel that counsel for the applicant has failed in meeting the onus of shewing this, even if the onus is on him. It seems quite evident that the case is practically in the same position as *Gibson* v. *West Luther*, and that in proceeding as he did Mr. Newman was without jurisdiction to make the particular report which he has made. I regret very much having to do anything which may result in adding expense to the very small drainage area concerned, because I assume that the council wil now give the necessary instructions and that Mr. Newman will make the same report, adopting the work already done; but, as against that, I cannot overlook the fact that the ratepayers concerned (including Mr. Labute) will then have certain rights which would have to-day been lost by reason of the lapse of time if this by-law had been permitted to stand. For example, he complained that the allowance for a bridge was not sufficient. That may or may not be the case. If the by-law has to be passed over again, he will be able to rectify the harm that has been done in that regard, if any has been done. Then the matter has had some publicity, and it is possible that the ratepayers in this small area may not think it advisable to take the risk of proceeding with this report. These things are only possibilities. Mr. Labute is entitled to exercise his legal right, even though the point upon which the matter turns now was not specifically mentioned in his notice. His application to quash, inasmuch as it is one which goes to the jurisdiction, is one which I cannot allow to be overlooked. In the result, the by-law must be quashed with costs; but, in view of the comparatively small drainage scheme, I think these costs should be on the scale of the County Court.

J. H. Rodd, for appellant corporation.

O. L. Lewis, K.C., for respondent.

Riddell, J.

RIDDELL, J.:—At a meeting of the Municipal Council of the Township of Tilbury North, in the County of Essex, holden on the 17th September 1917, the following took place:—

"Mr. Robert Holland complained of the bad state of repair of the Macklem creek drain, and asked the council that the same be repaired as soon as possible.

"Moved by J. B. Lalonde, seconded by J. Mailloux, that the clerk be and is hereby instructed to write engineer Newman to make a survey of same and report at his earliest convenience. Carried."

The engineer made a survey accordingly, and made a report to the council on the 16th February, 1918, which was adopted by the council, and by-law No. 400 was passed to carry it into effect, on the 18th March (provisionally) and on the 8th May, 1918 (finally). Claude Labute, a land-owner affected by the scheme, moved before the Drainage Referee to quash the by-law; and the Referee made an order, on the 28th June, 1918, quashing it. The township corporation now appeals.

The Referee proceeded on the narrow and technical ground that the resolution authorised the engineer simply to report a scheme "to repair the Macklem street drain . . . the resolution did not go further and give him authority to vary the assessment or treat the work as a new work;" he followed a case of his own: *Gibson* v. *West Luther*, 20 O.W.R. 405.

Assuming that this case is good law, I do not think it applies here—there the resolution directed the engineer to act under a certain specified section of the Act, and he acted under another. Here there is no such specific instruction; it is true, a ratepayer complains of the want of repair of the Macklem creek drain, but the resolution is not to have a report on the repair of the drain, but in the widest terms "to make a survey of the same" (i.e., the drain) "and report." The council had the right to require a report of the most extensive character without any petition or complaint from any one: Municipal Drainage Act, R.S.O. 1914, ch. 198, secs. 75, 77;* and there was nothing to prevent them going

*Sections 75 and 77 are, in part, as follows:—

†75.—(1) The council of any municipality liable for the maintenance of any drainage work may from time to time as the same requires repairs vary the proportions of assessment for maintenance, on the report and assessment of an engineer appointed by the council to examine and report on the condition of the work, or the portion thereof, as the case may be, which it is the duty of the municipality as aforesaid to maintain and on the liability to contribute of lands and roads which were not assessed for construction, and have become liable for assessment under this Act; and the engineer or surveyor may in his report upon such repairs assess lands and roads in the municipality . . .

77.—(1) Wherever for the better maintenance of any drainage work constructed under the provisions of this Act . . . it is deemed expedient to change the course of such drainage work, or make a new outlet for the whole or any part of the work, or otherwise improve, extend, or alter the work, or to cover the whole or any part of it, the council of the municipality . . .

†Repealed 6 Geo. v. 1916 c. 43 s. 5.

ONT.

S. C.

RE LABUTE AND TOWNSHIP OF TILBURY NORTH.

Riddell, J.

beyond the complaint of Mr. Holland. It is hard to conceive of a more comprehensive direction than is contained in the resolution. Any complaint that the engineer went beyond his mandate should come from the council: and the council have approved and adopted the report, thereby ratifying and adopting the interpretation by the engineer of his instructions.

But I am not prepared to assent to the proposition that, if the engineer has not in advance instructions to report in a particular way on a drain, but does report in that way, or if he is instructed to report under one section and reports under another, then the council must necessarily reject his report—it seems to me to savour of absurdity to say that the council must go through the solemn form—and farce—of passing another resolution, the engineer go away and return with the self-same report, and then the council adopt and act upon it, instead of pursuing the common sense method of adopting the report at once.

The appointment of an engineer may be ratified by the adoption of his report: *Tilbury East* v. *Romney* (1895), 1 Clarke & Sc. 261, at p. 264; *Tp. of Camden* v. *Town of Dresden and Tp. of Chatham* (1902), 2 Clarke & Sc. 308, 313, 314, affirmed in the Court of Appeal, *Re Tp. of Camden and Town of Dresden*, (1903), 2 O.W.R. 200. And I see no reason why the adoption of his report is not a ratification of his making the report and therefore equivalent to previous instructions. It is a general and elementary maxim of law, *Omnis ratihabitio retrotrahitur et mandato priori æquiparatur* —a subsequent ratification has a retrospective effect and is equivalent to a prior command. The subsequent assent by the mandator to the conduct of his agent undoubtedly exonerates such agent from the consequences of a departure from his orders—the subsequent sanction is considered the same thing in effect as a previous command—the difference being that where the authority is given in advance the party must trust him whom he authorises; if it be given subsequently, the party knows whether everything has

may, without the petition required by section 3, but on the report of an engineer or surveyor appointed by them to examine and report on the same, undertake and complete the change of course, new outlet, improvement, extension, alteration or covering specified in the report, and the engineer or surveyor shall for such change of course, new outlet, improvement, extension, alteration or covering, have all the powers to assess and charge lands and roads in any way liable to assessment under this Act for the expense thereof in the same manner, and to the same extent, by the same proceedings, and subject to the same rights of appeal as are provided with regard to any drainage works constructed under the provisions of this Act. . . .

been done according to his wishes: Broom, Legal Maxims, 8th ed., p. 673: *Maclean* v. *Dunn* (1828), 4 Bing. 722, 130 E.R. 947; *Wilson* v. *Tumman* (1843), 6 Man. & G. 236, 242, 134 E.R. 879.

(Of course the ratification can be only of an act which the party had the power to command at the time it was done: *Ashbury Railway Carriage and Iron Co.* v. *Riche* (1875), L.R. 7 H.L. 653. And, equally of course, the ratification will not be effective if the statute requires a previous express mandate.)

It is admitted that the council could command such a survey and report as were made in this case; and I can find nothing in the statute requiring an express direction before the report is made. The council may not act except "on the report of an engineer . . . appointed by them to examine and report . . " (sec. 77 (1)). In the ordinary case this appointment would naturally be made before the examination and report, but there is nothing in the statute requiring it, or excluding the ordinary principles of ratification. The case of *Re Johnston and Township of Tilbury East*, (1911), 25 O.L.R. 242, was urged against this view; but there is nothing decided in that case as to the manner in which the employment of the engineer is to be made, or his instructions given, whether by prior mandate or subsequent ratification—the necessity of a report is, indeed, affirmed; but that is not the present point.

The rule to be followed in matters of this kind has been laid down by the late Chancellor in *Re Stephens and Township of Moore* (1894), 25 O.R. 600, at p. 605: "In matters of drainage and other business of local concern the policy of the Legislature is to leave the management largely in the hands of localities, and the Court should be careful to refrain from interference—the meaning of which is always a large outlay for costs—unless there has been a manifest and indisputable excess of jurisdiction or an undoubted disregard of personal rights." If I may say so without presumption, I entirely approve of the rule so laid down, and would add that, when we are succeeding reasonably well in ridding our practice of the law of mere technicalities, it would be intolerable if petty and purely technical defects should be given weight in municipal affairs, which are largely in the hands of laymen.

Where a statute is express, full effect must be given to it; but every statute should, where possible, be interpreted so as to accord with common sense and public utility.

ONT.

S. C.

RE LABUTE AND TOWNSHIP OF TILBURY NORTH.

Kelly, J.

I would allow the appeal and send the case back to the Referee to deal with it on the merits—the respondent should pay the costs of the appeal, all other costs to be dealt with by the Referee.

MULOCK, C.J.Ex., agreed in the result.

CLUTE, J., agreed with Riddell, J.

SUTHERLAND, J., agreed in the result.

KELLY, J.:—I am of opinion that in the circumstances of this case the by-law should not have been quashed.

Appeal allowed.

ALTA.

S. C.

CANADIAN PACIFIC R. CO. v. CANADIAN WHEAT GROWING CO.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Beck, Simmons and McCarthy, JJ. May 2, 1919.

MORTGAGE (§ VI C—82)—FORECLOSURE—ADDING EXECUTION CREDITORS AND LIENHOLDERS—ALBERTA RULES 46, 47—PURPOSE OF—REDEMPTION.

The purpose of rules 46 and 47 (Alta.) is to obviate the adding in the first instance of caveators, lienholders, execution creditors and subsequent mortgagees, in an action for foreclosure while the rights of the mortgagor and first mortgagee are being determined, and also until it is determined whether there will be a surplus available for subsequent encumbrances.

Service of the order *nisi* gives an opportunity to subsequent encumbrancers to come in and redeem and in the case of a lienholder to establish his rights under the lien.

Statement.

APPEAL by a lienholder (a subsequent encumbrancer) from a judge's order on appeal from the master, in an action wherein judgment was given declaring the plaintiff to have a vendor's lien for unpaid purchase-money under a purchase agreement, ordering the lienholder to take proceedings directly under the Mechanics' Lien Act to enforce his claim. Varied.

Lougheed, Bennett & Co., for defendant appellant.

G. A. Walker, for plaintiff respondent.

Harvey, C.J.

HARVEY, C.J., concurred with Beck, J.

Beck, J.

BECK, J.:—This case calls for an interpretation of our rule 47 which is as follows:—

A vendor suing for specific performance with or without other relief shall not make any encumbrancer, whose claim arose subsequently to the making of the agreement, a party to the action, unless special relief is claimed against him; but all subsequent encumbrancers shall be served with notice of the judgment or order directed or made in the action.

Rule 46 reads as follows (Alta. Rules of Court, 1914):—

A mortgagee suing for sale or foreclosure with or without other relief shall not make any subsequent encumbrancer a party to the action except

for the purpose of obtaining possession against a subsequent encumbrancer actually in possession of the mortgaged property, but all subsequent encumbrancers shall be served with notice of the judgment or order directed or made in the action.

Our practice in mortgage actions differs materially from the practice in other jurisdictions where subsequent encumbrancers, if not made parties originally, are required to be served with a notice of the judgment or order and thereupon to come in and prove their claims and have their priorities settled. With us, the intention is to postpone all such questions until it can be seen whether there is likely to be a fund by which any of them can benefit. There is a notable difference in the wording of the two rules. R. 46 uses the expression "subsequent encumbrancer" throughout. R. 47 speaks of "any encumbrancer whose claim *arose subsequently to the making of the agreement*" and in this rule the expression used later in it "subsequent encumbrancer" must I think be taken to be used in that sense.

The mechanic's lien in the present case was an encumbrance *which arose subsequently to the making of the agreement*, the plaintiff company, therefore, properly refrained from making the lien claimant an original party to the action, no special relief being claimed against the lien claimant; any special relief which it is open to give in respect of it being something for the lien claimant to put forward. The lien claimant having been served with a copy of the judgment or order had a right to attend the proceedings thereunder and, if so advised, to move to discharge, vary or add to the judgment or order so as to obtain full protection of his claim. He has these rights by virtue of or at least (r. 3) by analogy to rules 35, 36 and 40. He may or may not be entitled to priority over the plaintiff company for the whole or a part of his claim either because the company is an owner with knowledge who has not given notice of objection or because the lien claimant can shew an increased value in the property. By procedure under these rules he is free to establish any such claim. The Mechanics' Lien Act provides, amongst other methods of procedure, by a lien claimant wishing directly to enforce his claim the method of an originating summons in chambers. On a proceeding under the above mentioned rules, he would be as fully protected. The purpose of r. 47 was to prevent dissimilar and unconnected issues being tried together, each attended by parties with no interest

ALTA.

S. C.

CANADIAN PACIFIC R. CO. v. CANADIAN WHEAT GROWING CO.

Beck, J.

in the other and to avoid costs, at all events until it should be seen that they were unavoidable.

The lien claimant having, therefore, as I hold, been properly not made an original party and been properly served with the judgment or order was bound and entitled, in order to protect his claim, to adopt the procedure applicable to the situation in which the notice of the judgment or order placed him, and the plaintiff company was not entitled to insist upon his taking proceedings directly against him under the Mechanics' Lien Act.

The lien claimant, therefore, after the service of the judgment or order might have moved, though I think he was not bound to do so, in such form as to have obtained directions under which he would, having stated the attitude he took, have been given an opportunity to establish his claim with the necessary extension of time for the purpose. This might have been done by referring the question to a judge by way of an issue or enquiry. Not having moved, the lien claimant ought, on the return of the plaintiff company's notice of application for an order to rescind in consequence of default in payment under the judgment or order, have, if he asked for it, been given the same opportunity. Counsel for the lien claimant states in his factum, in accordance with the facts, it would appear, that he expressed his readiness to have the questions involved in his claim determined in the action but that the solicitor for the plaintiff company declined to consent, whereupon the master adjourned the plaintiff company's application to enable the lien claimant to commence proceedings. The judge in appeal further extended the time for this purpose.

As I have already said I think that directions should have been given for the determination of the questions over the lien in the action and, consequently, that the orders of the master and of the judge were wrong. There were other subsidiary questions which entered into the discussion and which, I think, have a bearing upon the disposition of costs.

I think it well to point out that where, in cases like the present, having regard to the amount owing to the plaintiff and the probable value of the property, there is likely to be, as the result of a sale, sufficient to pay both the plaintiff and the lien claimant, the decision of the question of the priority of the latter over the former might well be postponed till after the sale.

ALTA.

S. C.

CANADIAN PACIFIC R. CO. v. CANADIAN WHEAT GROWING CO.

Simmons, J.

I would set aside the orders of the judge and of the master and give a direction in the sense I have already indicated leaving the costs of the proceedings before the master, the judge and this division to abide the result of the issue or enquiry into the lien. If it is found to have priority in any sense over the interest of the plaintiff company the plaintiff company should bear the costs, if otherwise, the lien claimant.

SIMMONS, J.:—The Canadian Wheat Growing Co. are the purchasers of certain farm lands from the Canadian Pacific Railway Co. The first named company made default in the payments agreed to be made by them on account of said purchase and the C.P.R. Co. brought action against the Canadian Wheat Growing Co. and obtained judgment in default in form of an order *nisi* declaring the plaintiff to have a vendor's lien for the unpaid purchase-moneys due and interest, and the right to enforce the vendor's lien if the defendant company did not redeem within the time prescribed in the order and also the right to apply for an order cancelling the agreement for sale and revesting the lands in the plaintiff upon default of defendant in redeeming.

The order *nisi* further provided for service of same upon all parties, subsequent encumbrancers or their solicitors, if any, who by the records of the Land Titles Office appeared to have acquired an interest in said lands. The Kennedy Lumber Co. were then registered lienholders pursuant to the Mechanics' Lien Act for material supplied to the Canadian Wheat Growing Co. which was used in the construction of buildings upon said lands, and were duly served with the order *nisi* pursuant to rule 47 of the Rules of Court.

The Canadian Wheat Growing Co. made default and the plaintiff respondent moved before the master for leave to foreclose all right, title and interest of the defendants, the Canadian Wheat Growing Co., and all persons claiming through or under them in respect of said lands.

The Kennedy Lumber Co. appeared by counsel on this motion and opposed the removal of their lien until their rights had been determined thereunder. The master apparently adjourned the hearing from November 27, 1918, until December 15, 1918, in order that the appellants, the Kennedy Lumber Co., might bring an action to determine their rights under their lien. The appel-

ALTA.

S. C.

CANADIAN PACIFIC R. Co. v. CANADIAN WHEAT GROWING Co.

Simmons, J.

lants took no further action and on the renewal of the motion before the master on January 29, 1919, an order was made directing the registrar of Land Titles to remove the lien from the register. An appeal was taken before Hyndman, J., who varied the master's order by extending the period of redemption for one month from the date of his judgment.

This in effect gave the lienholder an opportunity to take such action as he might think necessary to establish his rights under the lien.

As the case was presented to this court by counsel it seemed to resolve itself into a question of practice under r. 47 as to what form the proceedings should take to determine the lienholder's interests.

Under the Mechanics' Lien Act, s. 35, the respondents might have served a notice calling upon the lienholder within 30 days to take proceedings to enforce his lien. Likewise, the plaintiff might have proceeded under s. 25 and might have called upon the defendant to shew cause before the court or a judge why his lien should not be cancelled.

Likewise, the lienholder might have proceeded under s. 21 by originating summons or under s. 22, by action, to enforce his lien.

The purpose of rules 46 and 47 is quite apparent, and is to obviate the adding in the first instance of caveators, lienholders, execution creditors, and subsequent mortgagees in an action for foreclosure while the rights of the mortgagor and first mortgagee are being determined, and also until it is determined whether there will be a surplus available for subsequent encumbrances. I think the term "subsequent encumbrances" in r. 47, means subsequent in time as it may appear on the register of the Land Titles Office, notwithstanding the fact that by virtue of the Mechanics' Lien Act, the lien may be shewn to have a priority over the interest of the mortgagee who is asking for foreclosure. I think, however, it is really a matter of expediency and r. 47 should be applicable to a lienholder.

Service of the order *nisi* as was done in this case, would, therefore, give an opportunity to subsequent encumbrancers to come in and redeem and also as in the case of a lienholder to set up his rights under the lien.

Under s. 9 of the Act, "mortgage" includes the plaintiff vendor foreclosing the interest of the purchaser, and the lien has a priority

over his interest as to the increased value of the premises by reason of the works or improvements.

Also under s. 11 of the Act, if the *owner* has knowledge of the construction of the works for which the lien is registered, his interest shall be subject to the lien unless within three days after he shall have obtained knowledge of the construction he shall have disclaimed by a notice in writing to that effect. Under sub-s. 4 of 2, being the interpretation part, "*owner*" would include the plaintiff who was then the registered owner of the lands with a vendor's lien for the unpaid purchase-money. There are, therefore, two questions for determination.

I think the respondent was right in adding the appellant as a party to the proceedings at the time the defendant was served with the order *nisi*. Counsel for appellant in his factum alleges he was quite willing to have the lienholder's rights determined in the present action when the motion was before the master, but that counsel for the plaintiff would not consent to this.

The respondent's counsel in his factum alleges: "The appellants however refused the opportunity given them by the master of establishing their lien either by way of defence to the present action or by bringing an action as provided by the Act."

It looks a good deal like a sparring match between counsel.

I am of opinion that as soon as the appellant was served with the order *nisi* he was entitled to move to be added as a party to the proceedings for the purpose of establishing his rights under his lien. He did not do so, but he appeared on the motion to foreclose the Wheat Growing Co. and he still should have been allowed to be added as a party to the proceedings for the purpose of establishing his lien. Even on this motion the respondent did not make his motion specific as it only called upon those claiming through or under the defendants, the Wheat Growing Co.

Under s. 11 of the Act, the lienholder might have a direct claim against the plaintiff as owner of the latter had notice and had not disclaimed. This would hardly be a claim through or under the defaulting purchaser. Under both ss. 9 and 11 in my view the onus is upon the lienholder to establish his priority if any. Under a provision similar to s. 9 this view was taken by the British Columbia and Saskatchewan Courts following Ontario decisions.

ALTA.

S. C.

CANADIAN PACIFIC R. CO. v. CANADIAN WHEAT GROWING CO.

Simmons, J.

Great West Permanent Loan Co. v. *National Mortgage Co.* (1919), 45 D.L.R. 751; *Independent Lumber Co.* v. *Bocz* (1911), 4 S.L.R. 103; *Kennedy* v. *Haddow* (1890), 19 O.R. 240.

The parties are properly before the court under r. 47 and I can see no valid reason for relegating them to a separate action.

Since the onus is on the appellant he should be given a reasonable time to present his claim to which the plaintiff may make answer according to the practice of the court unless the parties agree to an issue containing the allegations upon which each party relies.

I would, therefore, vary the order appealed from by giving the lienholder appellant leave to file and serve his claim in regard to his lien.

I concur with Beck, J., as to costs and to postponement of the question of priority.

McCarthy, J.

McCARTHY, J., concurred with Simmons, J.

Judgment accordingly.

CAN.

S. C.

SMITH v. PROVINCIAL TREASURER OF NOVA SCOTIA.

Supreme Court of Canada, Davies, C.J., and Idington, Anglin, Brodeur and Mignault, JJ. February 4, 1919.

TAXES (§ V C—190)—SUCCESSION DUTIES—SITUS OF SHARES.

Shares of stock of a bank have their situs for the purpose of succession duties in the place where the bank has located their share registry office, and not where the bank has its head office; the share register is the document which determines the locality of the shares.

[*Provincial Treasurer* v. *Smith*, 35 D.L.R. 458, affirmed; *Cotton* v. *The King*, 1 D.L.R. 398, 15 D.L.R. 283; *Boyd* v. *A. G. for B.C.*, 36 D.L.R. 266, referred to.]

Statement.

APPEAL from the judgment of the Supreme Court of Nova Scotia (1917), 35 D.L.R. 458, 51 N.S.R. 490, in favour of the respondent on a case stated for the opinion of the court. Affirmed.

The appellants are executors of the estate of the late Wiley Smith, of Halifax, N.S., and the question for decision is whether the Province of Nova Scotia or the Province of Quebec is entitled to collect succession duties on stock of the Royal Bank held by the executors. The Province of Quebec intervened in this appeal.

Geoffrion, K.C., and *Lanctot*, K.C., for the Province of Quebec, intervenant; *Newcombe*, K.C., and *Jenks*, K.C., for respondent.

Davies, C.J.

DAVIES, C.J.:—This appeal comes to us from a judgment delivered by the Supreme Court of Nova Scotia on a special case stated under the provisions of the Nova Scotia Judicature Act.

The facts agreed upon which are essential for decision of the appeal are that one Wiley Smith departed this life intestate at Halifax, Nova Scotia, on February 28, 1916, and at the time of his death had his domicile within the said Province of Nova Scotia; that the aggregate value of the property passing on the death of the said intestate exceeded (within the meaning of the Succession Act, 1912) $100,000, consisting *inter alia* of 2,076 shares of capital stock of the Royal Bank of Canada of the value of $442,168 or thereabouts: that the bank had its head office in Montreal, Province of Quebec, and at the time of the passing of said property, and previously thereto, had maintained within the Province of Nova Scotia a share registry office under the provisions of s. 43 of the Bank Act (Canada), at which the shares of shareholders resident within the Province of Nova Scotia were required to be registered, and that the shares in question were so registered there.

The question for our opinion is whether under the circumstances stated the said shares are subject to succession duty for the use of the province.

I am of opinion that inasmuch as the deceased died intestate domiciled in Nova Scotia owning these shares in the bank the shares are liable to succession duty in that province.

The judgment now in question was based on the ground that as the shares were registered in the Province of Nova Scotia in the registry established pursuant to s. 43 of the Bank Act, where alone they could be registered, transferred or otherwise effectively dealt with, their situs was in Nova Scotia and succession duty was payable on them there.

The only doubt I have had is whether that ground is the true and proper one on which to base the conclusion the court reached. In other words, whether the liability to pay succession or legacy duty does not depend upon the application of the principle *mobilia sequuntur personam*. I am inclined to think that that principle is the one that should govern and that the law of domicile prevails over that of the locality of the property taxed.

In the case of *Harding* v. *Commissioners of Stamps for Queensland*, [1898] A.C. 769, which was approved of in the case of *Lambe* v. *Manuel*, [1903] A.C. 68, it was held that s. 4 of Queensland's Succession and Probate Duties Act, 1892, defining a "succession" (being the same as s. 2 of the English Succession Duty Act of 1853)

CAN.

S. C.

SMITH v. PROVINCIAL TREASURER OF NOVA SCOTIA.

Davies, C.J.

must be read in the sense affixed to the English Act by the English tribunals; and that it did not include movables locally situated in Queensland which belonged to a testator whose domicile was in Victoria; and it was held further that the amendment Act of 1895, s. 2, was not retrospective in its operation.

The amendment which was held not to be retrospective provided that succession duty was chargeable with respect to all property within Queensland although the testator or intestate may not have had his domicile in Queensland, but that if it had been retrospective it would have been conclusive. This finding of the Judicial Committee no doubt was reached because the powers of the legislature in that colony were plenary and not limited, and they could, if they chose to do so, displace the domicile rule.

But I am of opinion that the powers granted to the provinces of Canada under s. 92 of the British North America Act, 1867, are not plenary but limited.

Among the legislative powers granted to them under s. 92 of the said Act is sub-s. 2 "direct taxation within the province for the raising of revenue for provincial purposes."

The taxation imposed, therefore, must be on property "within the province" and what is personal property "within the province" determined by the rule so firmly established in Great Britain with respect to it at the time of the passing of the B.N.A. Act as that embodied in the maxim *mobilia sequuntur personam* under which all the decedent's personal property, wheresoever situate, is brought within the province or country of his domicile and made liable for all succession or legacy duties there imposed upon it.

After a careful study, not for the first time, of all the cases cited at bar bearing upon the question before us, I have reached the same conclusion with respect to the domicile being the determining factor as to what property is liable for succession and legacy duties as my brother Anglin and I concur in his reasons for the conclusion reached by him.

The broad ground on which that judgment rests is that the maxim *mobilia sequuntur personam* embodies the principle applicable to the succession of property of a domiciled decedent of any province of Canada for succession and legacy duties, as distinct

from probate or estate duties; that in regard to those special succession and legacy duties the domicile of the decedent and not the physical or artificial situs of the property must prevail; that this was the law in England decided in a series of cases before the B.N.A. Act was passed and that the power of taxation within the province granted to the provinces in sub-s. 2 of s. 92 of that Act must be construed in accordance with the English law as it then was decided to be; that accordingly each province has the power of levying succession and legacy duties only upon the personal property passed by a domiciled decedent of the province, which either is locally situate therein physically or by virtue of the maxim *mobilia sequuntur personam* is drawn into such province by reason of the domicile; that while the Imperial Legislature itself or a colony possessing plenary powers of taxation could at any time overrule the principle embodied in the maxim (see *Harding* v. *Commissioners of Stamps for Queensland, supra,*) the several provinces of Canada being limited in their powers cannot do so or by any enactment of their own enlarge or extend the powers of taxation granted to them by s. 92 of the B.N.A. Act; that any other construction of these powers of taxation would create endless, if not insuperable, difficulties and would subject the same property to possible double liability to succession duty taxation, one in the province where the domiciled decedent owned the property and the other in which it was locally situated at his death. The result of the holding, in which I concur, would be that the domicile of the decedent would be the test in Canada of the right to levy succession duties upon his personal property wherever it might be locally or physically situate and that such taxation could only be levied by the province of the domicile.

If I am wrong in my concurrence with my brother Anglin that the domicile of the decedent is the determining factor on the right of the province to levy succession and legacy duties, then I would uphold the judgment appealed from on the ground it is based, namely, that the bank shares in question were at the time of the death of the domiciled decedent registered in the Province of Nova Scotia where alone "they could be registered" and where alone "and not elsewhere" they could be transferred or effectively dealt with.

I do not think the mere fact of the head office of the bank being in Montreal and the board of directors meeting there to

CAN.

S. C.

SMITH v. PROVINCIAL TREASURER OF NOVA SCOTIA.

Idington, J.

manage the affairs of the bank, could be held to affect or alter the situs of the shares from their place of registry where alone they could be effectively dealt with.

IDINGTON, J.:—The question raised herein by a stated case is the right of respondent to collect, from appellants, succession duty upon shares held by the testator in the Royal Bank of Canada, having at his death its head office in Montreal.

In the stated case it is, with other things, admitted as follows:—

1. Wiley Smith departed this life intestate at Halifax, in the County of Halifax, Province of Nova Scotia, on February 28, 1916, and at the time of his death had his permanent domicile and residence within the said Province of Nova Scotia.

2. Letters of administration were on March 6, 1916, duly granted to Harriet W. Smith, L. Mortimer Smith, and the Montreal Trust Co. by the Probate Court for the probate district of the County of Halifax.

6. The said the Royal Bank of Canada, on and previous to the said February 28, 1916, as well as after the said date, had its head office in Montreal, in the Province of Quebec.

7. The said The Royal Bank of Canada, at the time of the passing of said property, and previously thereto, maintained within the Province of Nova Scotia, a Share Registry Office under the provisions of s. 43 of the Bank Act (Canada), at which the shares of shareholders resident within the Province of Nova Scotia were required to be registered.

The claim to collect succession duties must rest upon the following sections of the Act:—

The Succession Duty Act, 1912 (N.S.), being c. 13 of the Acts of 1912 as amended by c. 57 of the Acts of 1913, and chaps. 14 and 36 of the Acts of 1915.

S. 2. For the purpose of raising a revenue for provincial purposes, save as is hereafter otherwise expressly provided, there shall be levied and paid, for the use of the province, a duty at the rates hereinafter mentioned upon all property which has passed on the death of any person who has died on or since July 1, 1892, or passing on the death of any person who shall hereafter die, according to the fair market value of such property at the date of the death of such person.

S. 6. The following property, as well as all other property subject to succession duty, shall be subject to duty at the rates hereinafter imposed:

(1) All property situate in Nova Scotia, and any income therefrom passing on the death of any person whether the deceased was at the time of his death domiciled in Nova Scotia or elsewhere.

The place of residence of the executors is not stated, but in argument as I understood admitted, as to the Smiths, to be in Nova Scotia.

The Supreme Court of Nova Scotia held that the appellants were liable.

The answer to the question submitted seems to me to be concluded by the case of *Lambe* v. *Manuel*, [1903] A.C. 68, and in

principle the case of *Att'y-Gen'l* v. *Higgins* (1857), 2 H. & N. 339, 157 E.R. 140. The former decision was upon a claim by the appellant therein representing the Province of Quebec and claiming upon its behalf succession duties upon shares held, by a testator residing in Ontario, in the Merchants Bank of Canada, having its head office in Montreal, as well as in respect of other bank shares. The Quebec courts held respondent there was not liable to pay duties, in respect of such shares, to the Province of Quebec, and this holding was maintained by the court above in a judgment written by the late Lord Macnaghten, whose opinion alone must ever be held as entitled to the highest respect.

True the Quebec Act has been changed since and rendered more intelligible, as the result, I presume, of the case of *Cotton* v. *The King* (1912), 1 D.L.R. 398, 45 Can. S.C.R. 469, 15 D.L.R. 283, [1914] A.C. 176.

But in principle, so far as relates to the claim of that province herein, I am unable to see any distinction resting upon such amendment that can be made relevant to this case distinguishing it from *Lambe* v. *Manuel*, [1903] A.C. 68.

The domicile of the testator in question there was in Ontario, and that of the testator in question herein was in Nova Scotia. And as far as the Banking Act and its operation is concerned in relation to the situs of the property in shares, the Act has been amended by section 43 of that Act rendering it imperative to have a local provincial register where shares can be transferred, and thereby strengthening the claim of the province where the testator at death was domiciled.

In conformity with such requirement the bank in question had, as stated, a provincial register in Nova Scotia. That provision seems to put beyond doubt what, in the then doubtful frame of the Act, very able counsel in the *Manuel* case had at their hand, to press, and no doubt did press for all it was worth, the argument founded upon the registry for transfers of shares there in question being in Quebec.

I have considered the constitutional argument put forward relative to the limitations of the Dominion parliament in regard to property and civil rights.

I cannot accede thereto. Indeed it seems to me futile in view of the language of s. 91 of the B.N.A. Act assigning to "the exclu-

CAN.

S. C.

SMITH v. PROVINCIAL TREASURER OF NOVA SCOTIA.

Idington, J.

sive authority of the Parliament of Canada" by sub-s. 15 "banking, incorporation of banks, and the issue of paper money," and ending that section as follows:—

> And any matter coming within any of the classes of subjects enumerated in this section shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects by this Act assigned exclusively to the legislatures of the provinces.

There does not seem to me to be the slightest foundation for pretending that the power conferred by this enactment has been exceeded by the requirement for a local registry of shares. I repeat that this case falls in principle within the case of the *Att'y-Gen'l* v. *Higgins*, 2 H. & N. 339, so far as what has to be determined under the Nova Scotia Succession Duties Act can be affected by legislation defining the character and situs of shares in a corporation, but the respondents' claim does not rest upon that alone.

The *primâ facie* effect of the observance of the maxim *mobilia sequuntur personam*, subject to its many limitations which have to be borne in mind, when the necessity arises, for determining what may or may not fall within the legislative jurisdiction of a province to impose a succession duties tax supports respondents' claim.

For example, we had to determine recently the situs of a debt due under an Alberta mortgage, registered there, and payable there, to a testator dying in Ontario. We held its situs to be in Alberta and that province entitled, under an Act worded similarly to that of the N.S. Act here in question, to recover the succession duties alleged to be payable in respect of said mortgage.

And in passing I may say that the supposed case presented in argument, of shares in an insolvent bank being wound up might, though I express no definite opinion in that regard, in like manner give rise to very different considerations from those we have herein to deal with.

Again, on the other hand, we should bear in mind the provision in the Banking Act, s. 51 (*a*), (*b*) and (*c*), which read as follows:—

> Notwithstanding anything in this Act, if the transmission of any share of the capital stock has taken place by virtue of the decease of any shareholder, the production to the directors and the deposit with them of
>
> (*a*) Any authenticated copy of the probate of the will of the deceased shareholder, or of letters of administration of his estate, or of letters of verification of heirship, or of the act of curatorship or tutorship, granted by any court in Canada having power to grant the same, or by any court or authority in England, Wales, Ireland, or any British colony, or of any testament, testamentary or testament *dative expede* in Scotland; or

(*b*) An authentic notarial copy of the will of the deceased shareholder, if such will is in notarial form according to the law of the Province of Quebec; or

(*c*) If the deceased shareholder died out of His Majesty's dominions, any authenticated copy of the probate of his will or letters of administration of his property, or other document of like import, granted by any court or authority having the requisite power in such matters, shall be sufficient justification and authority to the directors for paying any dividend, or for transferring or authorizing the transfer of any share, in pursuance of and in conformity to the probate, letters of administration, or other such document as aforesaid.

I submit it, impliedly, recognizes the place where probate should issue as the situs of the property, and I infer the registration of any transfer by the executors must be transferred by registration in the province at all events when the executors resided there.

I asked counsel if there was anything more explicit in the Act but they could not refer me to anything further on the subject.

The argument put forward as to the bank shares being analogous to property in a partnership, I submit to be effective must be addressed elsewhere, in light of the decision we arrived at in the recent case of *Boyd* v. *Att'y-Gen'l for B.C.* (1917), 36 D.L.R. 266, 54 Can. S.C.R. 532.

Like the *mobilia sequuntur* rule, we found that the ordinary rule as to the situs of what had been partnership property could not have a universal application determining either the situs of such property or its taxability by a province.

This case is not within the lines presented in *The King* v. *Lovitt*, [1912] A.C. 212, though regard may well be had to what was in fact involved therein, when it was held that a deposit in a New Brunswick branch of a bank was taxable within the terms of the Act there in question. The testator there in question was domiciled in Nova Scotia.

If the proposition put forward by appellants and left by them to be maintained by the Province of Quebec, appearing as an intervenant herein, be tenable, that all shares in banks having a head office in Montreal are properly situate there, then not only can that province tax all such bank shares by way of death duties, but also from year to year for ordinary purposes. I imagine such an exercise of its alleged power which would apply also to the C.P.R. Co. shareholders, might awaken some people and they might produce a realization of how little dependence can be placed on mere theories no matter how plausible, and only useful as arguments to be tried on a court.

CAN.

S. C.

SMITH v. PROVINCIAL TREASURER OF NOVA SCOTIA.

Anglin, J.

A business tax has been successfully imposed in some such like cases (see *Bank of Toronto* v. *Lambe* (1887), 12 App. Cas. 575), but I respectfully submit that proceeded upon an entirely different basis.

I am of the opinion that the appeal should be dismissed with costs of the respondent, and that the intervenant should have no costs.

ANGLIN, J.:—The late Wiley Smith, who was domiciled and died intestate at Halifax, in the Province of Nova Scotia, owned 2,076 shares in the Royal Bank. The head office of that bank is at Montreal, in the Province of Quebec, but it maintains a share registry office at Halifax, under sub-s. 4 of s. 43 of the Bank Act, and, as prescribed by that sub-section, Smith's shares were registered and transferable there and not elsewhere. The question presented by the stated case before us is whether these shares are liable to taxation under the N.S. Succession Duties Act (2 Geo. V. ch. 15). Had they a situs in contemplation of law at Montreal or at Halifax? If at Montreal, does the N.S. statute, properly construed, apply to them? If it does, is such taxation within the legislative power of the province under s. 92 (2) of the B.N.A. Act —is it "direct taxation within the province in order to the raising of a revenue for provincial purposes?"

These were the questions discussed at bar.

I cannot agree with Mr. Newcombe's suggestion that bank shares may have no situs other than the Dominion of Canada at large because that is

> the locality of the business of the bank, of its legislative control, and of probate or administration for any purpose looking to the realization or enjoyment of the property.

For the purposes of taxation, probate and succession, bank shares must have a local situs. Neither can I accede to Mr. Henry's contention that if change of situs would result from the operation of s. 43 (4) of the Bank Act, as enacted in 1913, that fact would render it *ultra vires*. The control exercised by that provision over the registration and transfer of bank shares is, I think, undoubtedly within the legislative jurisdiction conferred on the Dominion under sub-s. 15 of s. 91—"banking (and) the incorporation of banks"—a power which, as Lord Watson says in *Tennant* v. *Union Bank*, [1894] A.C. 31,

is not confined to the mere constitution of corporate bodies with the privilege of carrying on the business of bankers (p. 46), (and) may be fully exercised although with the effect of modifying civil rights in the province (p. 48).

See, too, *Cushing* v. *Dupuy* (1880), 5 App. Cas. 409, 415, and compare *G.T.R. Co.* v. *Att'y-Gen'l of Canada*, [1907] A.C. 65, 68.

"The pith and substance" of the enactment being clearly *intra vires* any interference with civil rights which follows as an incidental consequence cannot affect its constitutional validity. Whether section 43 (4) in fact changes or affects the situs of bank shares to which it applies is, of course, quite another question and one by no means free from difficulty.

As at present advised, I am not convinced that for some purposes the situs of the shares now in question was not at the head office of the bank. The authorities cited by the judge who delivered the judgment of the Supreme Court of Nova Scotia are certainly not conclusive in favour of a situs at the place of registry. The case chiefly relied upon as "most directly in point, if not on all fours with the present case," was *Att'y-Gen'l* v. *Higgins*, 2 H. & N. 339. The question there at issue was liability for probate duty, not succession duty. The head office and the place of registration were identical. Of three judges who heard the case only one, Martin, B.—no doubt a judge of eminence—took the place of registration of the railway shares there in question as decisive of their situs. Watson, B., merely alludes to the fact that "the railway is in Scotland." Pollock, C.B., only determines that the shares did not cease to be property in Scotland because a statute intended to facilitate their transfer provided for the registration of it on production of an English probate. That was indeed all the case really decided. In *Att'y-Gen'l* v. *Sudeley*, [1896] 1 Q.B. 354, at 361, Lord Esher, M.R., says of *Att'y-Gen'l* v. *Higgins*, *supra*:—

> The head office of the railway company was in Scotland. The shares were, therefore, payable in Scotland.

A reference to the foot-note will shew that the passage cited by the Nova Scotia judge from 13 Hals. Laws of England, at p. 310, likewise affords little or no assistance. In *Att'y-Gen'l* v. *New York Breweries*, [1898] 1 Q.B. 205, [1899] A.C. 62, a modern case cited for its approval of the *Higgins* decision, both the head office and the registry of shares were situated in England—as both had been in Scotland in the *Higgins* case. Liability to probate

CAN.

S. C.

SMITH v. PROVINCIAL TREASURER OF NOVA SCOTIA.

Anglin, J.

duties was likewise the question at issue. The situs for that purpose was held to be in England. In the view I take, however, I find it is not necessary to determine the situs of these bank shares for any purpose other than their liability to succession duties under the N.S. statute. In none of the taxation cases cited in the judgment below did the statute under consideration resemble it.

Although the duty is imposed by the N.S. Act on the principal value of all property which passes on the death of the owner and is made payable at his death, or within eighteen months thereafter, but before distribution, by his personal representative to the extent of the property received by him—in these respects somewhat resembling an estate duty—having regard to the exemption of all bequests under $500, of all bequests for religious, charitable or educational purposes to be carried out in the province, and of bequests to certain classes of relatives where the estate does not exceed $25,000, to the higher rate of duty imposed where property passes to beneficiaries other than immediate relatives of the decedent owner, and to the fact that the legislature has itself styled the statute a succession duty Act, I am disposed to think that the taxes imposed by it should be classed as succession duties rather than estate duties. *Re Earl Cowley's Estate*, [1898] 1 Q.B. 355, at pages 374-5; *Winans* v. *Att'y-Gen'l*, [1910] A.C. 27, at 39-41. Lord Gorrell thus sums up the difference between the two classes of Acts:—

> The broad point with regard to the duties is that the first three ("probate duty," "account duty" and "temporary estate duty") dealt with the duty on the amount of property passing, whatever its destination, while the other two ("legacy duty" and "succession duty") dealt with the duty on the value of the interests taken, and the duty varied with the relationship of the person taking to the person from whom the interest was derived or the predecessor.

Although the N.S. statute does not impose the tax on the transmission itself, as is the case in the Quebec legislation (*Lambe* v. *Manuel*, [1903] A.C. 68; *Cotton* v. *Rex*, 15 D.L.R. 283), it imposes it on the property transmitted—the property passing on the death—"the succession"—as was the case under the English Succession Act of 1853 (16 & 17 Vict. c. 51, ss. 1 and 10; Hanson's Death Duties, 6th ed., p. 614), and the duty varies with the relationship of the person taking to the person from whom the interest is derived or the predecessor.

The features of the New Brunswick Succession Duty Act which led Lord Robson in *Rex* v. *Lovitt*, [1912] A.C. 212, at 223, to treat it as imposing a tax rather in the nature of probate duty than a succession duty are entirely absent from the N.S. statute.

The actual situs of tangible effects, the situs imputed by law to intangible effects, without regard to the domicile of the owner, carried with it liability to probate or estate duty. But under the English Legacy Act and Succession Duty Act the contrary rule has prevailed and the maxim *mobilia sequuntur personam* has been applied to subject to these imposts foreign movables of domiciled decedents and to exempt from their operation the English assets of foreigners. *Winans* v. *Att'y-Gen'l*, *supra*, at pages 31-34. Succession duty is exigible only in respect of movables which pass under English law—to which the beneficiary obtains title under English law. *Wallace* v. *Att'y-Gen'l* (1865), L.R. 1 Ch. 1, at pages 6-9; Dicey on Conflict of Laws (2nd ed.), p. 750 *et seq.*

By the law of England, therefore, which obtains in Nova Scotia, for the purpose of succession duties, as distinguished from probate duties and estate duties, personal property has its situs at the domicile of the decedent owner. I therefore reach the conclusion that whatever should be deemed their situs for other purposes, for that of the succession duties imposed by the Nova Scotia statute the bank shares in question had a situs under English law at Halifax, because of the applicability of the maxim *mobilia sequuntur personam*—because title to them passed under the law of Nova Scotia.

Although the Nova Scotia Act is not expressly made applicable, as was the New Brunswick statute dealt with in *Rex* v. *Lovitt*, *supra*, "to all property whether situate in this province or elsewhere," there are in it some indications of an intent to subject foreign personal property of a domiciled decedent to its operation. Thus by s. 2 the duty is declared to be leviable and payable in respect of all property which passes on the death of any person. By clause (*b*) of sub-s. 1 of s. 3 property includes everything real and personal capable of passing on the death of the owner. S. 6 enacts that "the following property" (*inter alia* "property situate in Nova Scotia"), "as well as all other property subject to succession duty shall be subject to duty at the rates hereinafter imposed."

CAN.

S. C.

SMITH v. PROVINCIAL TREASURER OF NOVA SCOTIA.

Anglin, J.

Ss. 3 (*a*) and 6 (1), on the other hand, leave no room whatever to doubt that the intention of the legislature was that the personal property of a non-domiciled decedent situate in Nova Scotia should be liable for the duties imposed by the Act. The intention to exclude the application of the maxim *mobilia sequuntur personam* in regard to such personal property is abundantly clear. With the validity of the imposts on this class of property, however, we are not now concerned. But see *Boyd* v. *Att'y-Gen'l for B.C.*, 36 D.L.R. 266. The presence of these latter provisions, however, does not suffice to take from the statute its distinctive character as a succession duty Act.

Although the statute makes no distinction between real and personal property it would seem to me impossible that the legislature meant to attempt to tax foreign real estate of a domiciled decedent. Following the principles established by *Thomson* v. *Advocate-General* (1845), 12 Cl. & F. 1, 8 E.R. 1294; *Re Ewing* (1830), 1 C. & J. 151, 148 E.R. 1371; *Wallace* v. *Att'y-Gen'l*, *supra*, and *Harding* v. *Commissioners of Stamps for Queensland*, [1898] A.C. 769, at 773-4, I would also be inclined to hold that the words "person" and "property" in s. 2 should be restricted respectively to a person domiciled in Nova Scotia and to property which may properly be made the subject of succession duties according to English law. For the same reason I would construe "all property situate in Nova Scotia" in clause 1 of s. 6 as meaning property having a physical situs in that province. (*Cotton* v. *Rex*, 15 D.L.R. 283), and the words "all other property subject to succession duty" in the opening paragraph of s. 6 as intended to bring in personal property which, although it has not a physical situs in the province, English law would regard as within it for the purpose of succession duties. While, having regard to the constitutional limitation on its powers of taxation, I should, if it imposed probate or estate duties, hesitate to find in the provisions of the N.S. Act to which I have referred a sufficiently clear expression of intention to subject to them personal property having a physical situs or an artificial situs in contemplation of law outside of the province, there is certainly nothing in the Act calculated to prevent the maxim *mobilia sequuntur personam* having the full operation given to it by English law for the purpose of succession duties in the case of all personal assets of the domiciled decedent.

The only authority at all in conflict with this view is *Woodruff* v. *Att'y-Gen'l for Ontario*, [1908] A.C. 508. But the conflict is more apparent than real. The property there in question consisted of bonds and debentures of a foreign company which were at the date of their transfer and remained in the custody of a New York deposit company. The transmission of them was not by will or upon an intestacy but by instruments *inter vivos* which took effect under the law of the State of New York. There was no succession or transmission by virtue of Ontario law. The ground on which the maxim *mobilia sequuntur personam* is applied in this case, therefore, did not exist in *Woodruff's* case, *supra*. Moreover, in speaking of that case in *Cotton* v. *Rex*, 15 D.L.R. 283, at p. 294, Lord Moulton delivering the judgment of the Judicial Committee said:—

> The circumstances of that case were so special, and there is so much doubt as to the reasoning on which it was based, that their Lordships have felt that it is better not to treat it as governing or affecting the present decision.

Before parting with this appeal I desire to reiterate my dissent already expressed in *Lovitt* v. *The King* (1909), 43 Can. S.C.R. 106, at p. 161, and *Boyd* v. *Att'y-Gen'l for B.C.*, 36 D.L.R. 266, from the view that a provincial legislature whose powers of taxation are restricted to "taxation within the province" may, for purposes of taxation, give to property a situs within the province although according to the general law of the province applicable under the circumstances its situs would be outside. If it can, the words "within the province" are practically deleted from sub-s. 2 of s. 92 of the B.N.A. Act, the same property may be subject to taxation identical in character in more than one province, and the exclusive right to tax property locally situate within the province, which s. 92 (2) was undoubtedly meant to confer, is non-existent. The case of *Rex* v. *Lovitt*, [1912] A.C. 212, is cited as opposed to this view and no doubt certain passages from Lord Robson's judgment are in conflict with it. With great respect, however, his Lordship, in applying the decision in *Harding* v. *Commissioners of Stamps for Queensland*, [1898] A.C. 769, would seem to have momentarily overlooked the fact that no restriction of its powers of taxation similar to that imposed upon Canadian provincial legislatures (taxation within the province) applied to the Legislature of Queensland. But all that the *Lovitt* case determined was that a debt (to which English law attributes

CAN.

S. C.

SMITH v. PROVINCIAL TREASURER OF NOVA SCOTIA.

Anglin, J.

a local situs at the residence of the debtor), held upon the facts to be payable at the St. John, New Brunswick, branch of the Bank of B.N.A., was liable to a New Brunswick tax which, in the opinion of the Judicial Committee, was assimilated to a probate duty. For that the *Lovitt* case is authority, but for nothing more. As Lord Moulton says of it in *Cotton* v. *Rex*, *supra*, at p. 294:—

> In the case of *Rex* v. *Lovitt* no question arose as to the power of a province to levy succession duty on property situate outside the province. It related solely to the power of the province to require as a condition for local probate on property within the province that a succession duty should be paid thereon.

I would dismiss the appeal.

Brodeur, J.

BRODEUR, J.:—This is a question of succession duty on the bank shares which the late Wiley Smith had in the Royal Bank. The deceased had his domicile in Nova Scotia. The Royal Bank has its head office in Montreal, in the Province of Quebec, and has a branch in Halifax, in the Province of Nova Scotia. According to the provisions of the Bank Act (ss. 43-4), it had opened in the latter place a share registry office at which the shares of Mr. Smith had to be registered and were registered. A stated case had been submitted by the Smith estate and by the Provincial Government of Nova Scotia for the opinion of the court as to whether those shares are subject to the payment of succession duty for the use of the Province of Nova Scotia.

The Supreme Court of that province decided that those shares were subject to that duty.

An appeal has been made by the estate to this court, and the Attorney-General of the Province of Quebec has intervened to support that appeal. He contends with the appellant that the Royal Bank, in establishing a share registry office in a province, does not change the situs of the shares from the head office of the bank to the place where the registry office is kept.

The appellant and the intervenant contend also that if the section of the Bank Act bears that construction, it is to that extent beyond the powers of the federal parliament. But that constitutional aspect of the case was simply mentioned at bar and not pressed.

The Succession Duty Act, of 1912, of Nova Scotia enacts that:—

> for the purpose of raising a revenue for provincial purposes . . . there shall be levied and paid for the use of the province a duty . . . upon all property . . . passing on the death of any person . . .

By s. 3 of that Act it is declared that the words "passing on the death" should be construed as meaning passing immediately on the death or after an interval either certainly or contingently and either originally or by way of substitutive limitation, whether the deceased was at the time of his death domiciled in Nova Scotia or elsewhere.

By s. 6 it is provided that all property situate in Nova Scotia is subject to duty. We have then to find out whether these Royal Bank shares belonging to the Smith estate are situated in Nova Scotia.

The law of the domicile of the owner governs movable property. But when it comes to determining the distinction or nature of the property, the contestation as to the possession or the rights of the Crown, the law of the situs governs. If it were a question of tangible movable property, there would be no difficulty. But when it comes to intangible property, like simple contract debts, specialty debts, bonds and bank shares, the question is more complicated.

It has been decided that specialty debts owing by persons outside of the jurisdiction are assets where the instrument happens to be. *Stamp Commissioners* v. *Hope*, [1891] A.C. 476.

Simple contract debts, whether the title is evidenced or not by bills of exchange or promissory notes, are assets where the debtor resides, *Att'y-Gen'l* v. *Pratt* (1874), L.R. 9 Ex. p. 140; *Att'y-Gen'l* v. *Bouwens* (1838), 4 M. & W. p. 171, 150 E.R. 1390; *Rex* v. *Lovitt*, [1912] A.C. 212.

In the case of bank shares, it was decided in the case of *Att'y-Gen'l* v. *Higgins*, 2 H. & N. 339, that where by statute the evidence of title to shares is the register of shareholders the property is located where the register is.

I think that the latter decision has a great bearing upon the question at issue in this case because it determines conclusively that the situs of bank shares is the place where they are registered.

Formerly the banks could open branch offices in different parts of the country and could open also share registry offices where shares could be registered and transferred. Under the provisions of that Act, it was decided in a case of *Hughes* v. *Rees* (1884), 5 O.R. 654, that shares in a bank whose head office was in Ontario, but which were registered in Quebec, were situate in

CAN.

S. C.

SMITH v. PROVINCIAL TREASURER OF NOVA SCOTIA.

Brodeur, J.

Ontario. The reason of the judgment was that the change had been made by the bank for convenience sake, but that the bank stock was, however, virtually situate in Ontario.

A similar decision was also rendered in the following case of *Nickle* v. *Douglas* (1874), 35 U.C.Q.B. 126, 37 U.C.Q.B. 51.

But it is submitted that s. 43, sub-s. 4, of the Bank Act has changed the law in that respect because it enacts that shares *shall* be registered at agencies within the province in the case of shares owned by residents of that province. The banks are not bound to open those branch offices, but once they have done so the law declares that all the shares of the "shareholders resident within the province shall be registered at that office at which and not elsewhere such shares may be validly transferred."

It is argued that in this case it is not a question of transfer; it is a question of transmission of shares by death.

I do not think that this constitutes any difference. S. 50 of the Bank Act says that if the transmission of shares is made by intestacy the probate of the will or the letters of administration should be produced and left with the general manager, or other officers or agents of the bank. That manager or agent shall then enter in the register of shareholders the name of the person entitled under the transmission. It may be that for convenience sake the documents shewing the title to the shares would have to be referred to the head office of the bank; but the transmission should be entered in the register of shareholders where those shares were entered. In this case the documents might have been sent to Montreal to be examined by the authorities of the bank there, but they had been entered in Halifax, where the shares were entered in the share registry office.

In the case of *Att'y-Gen'l* v. *Sudeley*, [1896] 1 Q.B. 354, the Master of the Rolls said that the head office of the railway company in question in that case was in Scotland and that the shares were, therefore, payable in Scotland.

The case of *Re Clark*, [1904] 1 Ch. 294, is conclusive on the point.

In that case, a testator domiciled in England, by his will bequeathed all his personal estate in the United Kingdom to certain persons whom he calls his home trustees upon certain trusts, and he bequeathed all his personal estate in South Africa

to certain other persons whom he calls his foreign trustees upon other trusts. At the time of his decease, the testator was possessed of bonds payable to bearer of a waterworks company in South Africa, and of shares in mining companies in South Africa. The mining companies were constituted according to the laws of Transvaal and Orange Free State, and had their head office in South Africa where the registry of shareholders was kept and where the directors met; but they also had an office in London, where a duplicate registry was kept and the shares could be transferred. The testator's name was on the London register of the company and all his bonds and share certificates were at his bankers in London.

It was held that the shares passed under the bequest to the home trustees.

Farwell, L.J., deciding the case, said:—

The property I have to deal with is a share and that is represented by a certificate without which no transfer can take place. The actual effective transfer can be done equally effectually in South Africa or in England, and the only conceivable distinction that I can discover in point of locality is the possession of the certificate which for this purpose is essential to complete the title to the shares. Therefore I hold that where the certificates of the shares in these companies were in England they passed under the gift of property situated in England, and not under the gift of property in South Africa.

In the case of *Clark* the transfer could have been made in two places, in South Africa and in England. In this case, I think, under a proper construction of the Bank Act, that the transfer could be made only at Halifax where the shares were already registered. I may quote in support of that contention *Stern* v. *The Queen*, [1896] 1 Q.B. 211; *Winans* v. *Att'y-Gen'l*, [1910] A.C. 27; *Att'y-Gen'l* v. *New York Breweries*, [1898] 1 Q.B. 205.

For these reasons I have come to the conclusion that the situs of those bank shares was in Halifax and that they were liable to succession duty in the Province of Nova Scotia.

The appeal should be dismissed with costs.

Mignault, J.

MIGNAULT, J.:—This is an appeal from a judgment of the Supreme Court of Nova Scotia *in banco*, on a stated case submitted by the respondent (plaintiff in the court below) and the appellants (defendants in the court below), under the provisions of the Nova Scotia Judicature Act, order 33. The Attorney-General of the Province of Quebec (claiming to have an interest in the question

CAN.

S. C.

SMITH v. PROVINCIAL TREASURER OF NOVA SCOTIA.

Mignault, J.

at issue) has intervened before this court and prays for the reversal of the judgment.

The whole question is whether succession duty can be claimed by Nova Scotia in respect of 2,076 shares of the Royal Bank of Canada, which the late Wiley Smith, of the City and County of Halifax, in the Province of Nova Scotia, owned at the time of his death. Wiley Smith died intestate at Halifax on February 28, 1916, and the appellants are his administrators. At the time of his death, and ever since, the head office of the Royal Bank was in Montreal, Province of Quebec, but the bank had in Nova Scotia a share registry office, where the shares of shareholders resident within that province were required to be registered under s. 43 of the Bank Act, and the shares in question were duly registered there at and before Smith's death. The Provincial Treasurer of Nova Scotia, under the provisions of the N.S. Succession Duty Act, 1912 (2 Geo. V. c. 13), claims to be entitled to the payment of succession duty on these shares, and the question submitted, and which the court below has answered in the affirmative, is whether, under the said Act, succession duty is payable upon the said shares.

The provisions of the Nova Scotia Succession Duty Act, 1912, so far as pertinent to the present inquiry, may be briefly stated.

It is provided by s. 2 that

For the purpose of raising a revenue for provincial purposes, save as is hereafter otherwise expressly provided, there shall be levied and paid for the use of the province, a duty at the rates hereinafter mentioned upon all property which has passed on the death of any person who has died on or since July 1, 1892, or passing on the death of any person who shall hereafter die, according to the fair market value of such property at the date of the death of said person.

S. 3 defines terms. I will quote two of these definitions given respectively by subsections (*a*) and (*b*).

(*a*) The words "passing on the death" mean passing either immediately on the death or after an interval either certainly or contingently, and either originally or by way of substitutive limitation, whether the deceased was at the time of his death domiciled in Nova Scotia or elsewhere.

(*b*) "Property" includes real and personal property of every description and every estate and interest therein, capable of being devised or bequeathed by will or of passing on the death of the owner to his heirs or personal representatives.

By s. 6 it is provided:—

6. The following property, as well as all other property subject to succession duty, shall be subject to duty at the rates hereinafter imposed:

(1) All property situate in Nova Scotia, and any income therefrom passing on the death of any person, whether the deceased was at the time of his death domiciled in Nova Scotia or elsewhere.

(2) Debts and sums of money due and owing from persons in Nova Scotia to any deceased person at the time of his death, on obligation or other specialty, shall be property of the deceased situate in Nova Scotia without regard to the place where the obligation or specialty shall be at the time of the death of the deceased.

It is also provided by s. 9 as follows:—

9. Any portion of the estate of any deceased person, whether at the time of his death such person was domiciled in Nova Scotia or elsewhere, which is brought into this province to be administered or distributed, shall be liable to the duty in this chapter imposed.

The concluding portion of s. 9 need not be given here. Its effect is merely to provide that if the property so brought into the province has paid succession duty elsewhere equal to or greater than the duty payable in Nova Scotia, no duty shall be paid; if the amount so paid elsewhere is less than that payable in Nova Scotia, the difference in amount has then to be paid.

It is under these provisions that succession duty is claimed on the bank shares owned by the intestate, who at the time of his death was domiciled in the Province of Nova Scotia.

The court below decided that inasmuch as the shares were registered in Nova Scotia, they were property situate in Nova Scotia, and subject to succession duty under the N.S. Succession Duty Act, 1912.

After due consideration, I have come to the conclusion that this is a case where the rule of law *mobilia sequuntur personam* applies. This rule has been followed in England in cases where the question to be decided was whether personal property in Great Britain accruing on the death of its foreign owner was subject to succession duty or legacy duty, properly so called, in Great Britain.

Thus in the case of *Thomson* v. *Advocate-Gen'l*, 12 Cl. & F. 1, the testator, who was domiciled in Demarara, where the Dutch law prevailed and no legacy duty existed, had loaned money in Scotland, and the House of Lords applied the rule *mobilia sequuntur personam* to this money to the exclusion of provisions imposing legacy duty in the United Kingdom. This decision was followed by Lord Cranworth, L.C., in a subsequent case, *Wallace* v. *Att'y-Gen'l*, L.R. 1 Ch. 1.

CAN.

S. C.

SMITH v. PROVINCIAL TREASURER OF NOVA SCOTIA.

Mignault, J.

This affords a simple solution of the problem submitted to this court, and it would not be necessary to decide the question whether, in view of the fact that the bank shares were registered in Nova Scotia, they acquired an actual situs in that province. But as this latter question was argued at great length by the learned counsel of the parties, it has seemed to me advisable that I should give it full consideration.

The bank shares owned by Mr. Smith at his death were registered in the Nova Scotia share registry office of the Royal Bank, as required by s. 43 (4), of the Bank Act, while the head office of the bank was in Montreal.

Sub-s. 4 of s. 43 is in the following terms:—

> 4. The bank may open and maintain in any province in Canada in which it has resident shareholders and in which it has one or more branches or agencies a share registry office to be designated by the directors at which the shares of the shareholders resident within the province shall be registered and at which, and not elsewhere, except as hereinafter provided, such shares may be validly transferred.

This is a comparatively recent amendment of the Bank Act, and prior to its enactment it was optional for a shareholder to have his shares registered either at the head office of the bank or at any share registry office which the bank had opened elsewhere for the convenience of its shareholders.

Independently of the new enactment of sub-s. 4 of s. 43 of the Bank Act, I would be of the opinion that if bank shares, being intangible or incorporeal property, can have any actual situs other than the domicile of their owner, this situs should not be placed at the share registry office where the shareholder has chosen to cause his shares to be registered.

Nor do I think, because it is now compulsory to register bank shares at the share registry office established in the province where the shareholder resides, that the situs of the shares, which previously might have been registered elsewhere, is in any way changed by the fact that they must now be registered at the provincial share registry office. It is entirely optional for the bank to open such an office, and after opening it, it may close it. Moreover, a bank might change the location of a provincial share registry office from one city to another in the same province, and then, under subsection 4, the shares of shareholders resident within the province would have to be registered at the new location.

To maintain that the situs of the shares would thus, on account of their registration, be shifted from one place to another, while the head office and the residence of the shareholder remain unchanged, would require the support of more conclusive authority than that on which the court below relied to decide that the place of registry of the shares determines their location.

The principal authority cited by Chisholm, J., is the case of *Att'y-Gen'l* v. *Higgins, supra*. There the testator domiciled in England owned shares in railway companies in Scotland, the head offices of which were also in Scotland. The Attorney-General argued that "the chief offices of these railways are in Scotland and therefore the shares in question are personal property in Scotland." The court was composed of Pollock, C.B., and Barons Martin and Watson. Martin, B., said that the argument of the Attorney-General had perfectly satisfied him. He added:—

> It is clear that by s. 19 of the 8 & 9 Vict., s. 17, the evidence of title to these shares is the register of shareholders, and that being in Scotland, this property is located in Scotland.

Neither of the two other judges expressed any opinion as to the register of shareholders determining the locality of the shares, and it is obvious that the Attorney-General merely relied on the fact that the head office was in Scotland and that, therefore, the shares were also in Scotland. If this authority has any effect, it would support the contention that shares in such a company are located at the head office, rather than the claim that their situs is at a share registry office which may have been established elsewhere.

The case of *Re Clark*, [1904] 1 Ch. 294, is not more conclusive than the *Higgins* case, 2 H. & N. 339. The testator was domiciled in England and bequeathed his personal estate in the United Kingdom to certain persons whom he called his "home trustees," and his personal estate in South Africa to other persons whom he termed his "foreign trustees." He possessed bonds and shares in South African companies which had offices, share registers and directors both in London and in South Africa. The testator's name was on the London register, and all his bonds and share certificates were at his bankers in London. Farwell, J., said that as between England and South Africa, the only conceivable distinction that he could discover in point of locality is the posses-

CAN.

S. C.

SMITH v. PROVINCIAL TREASURER OF NOVA SCOTIA.

Mignault, J.

sion of the certificate which is essential to complete the title to the shares. The certificates being in England, he held that the shares went to the home trustees.

The case of *Att'y-Gen'l* v. *New York Breweries Co., supra*, does not support the conclusion adopted in the court below that the situs of the shares was at the share registry office. This was a case where probate duty—entirely different from succession duty—was claimed on the shares of an English company, whose head office and register of shares was in England. To deal with these shares and transfer them some act had to be done in England, and this sufficed to render the shares subject to probate duty.

I find, therefore, no conclusive authority for the proposition that where a share registry office of bank shares is established in a province other than the province in which the head office of the bank is situated, the shares are located at the place where the share registry in which they are registered is kept. I would think that the authorities to which I have referred would lend more support to the contention that the shares are located at the head office of the bank rather than to the claim that their situs is at the share registry office.

It is, however, unnecessary to choose between the head office of the bank and the provincial share registry office, because the intestate being domiciled in Halifax where the share registry office was kept, the shares, in so far as liability for succession duty is concerned, must be considered as situate at his domicile under the rule *mobilia sequuntur personam*.

I would, therefore, basing my opinion on this rule, answer the question submitted in the affirmative. The appeal should be dismissed with costs against the appellants. The intervention should also be dismissed with a recommendation that the respondent be paid his costs on the same.

Appeal dismissed.

BROTHERSON v. KENNEDY.

SASK.

C. A.

Saskatchewan Court of Appeal, Haultain, C.J.S., Newlands, Lamont and Elwood, JJ.A. June 19, 1919.

1. ANIMALS (§ I—26)—OPEN WELLS ACT (SASK.)—"ANY PREMISES OCCUPIED BY HIM"—MEANING OF.

The Open Wells Act, which prohibits any person from having "on his premises" as well as "any premises occupied by him" any open well, applies to the owner as well as the occupant, and the owner is liable in damages for injuries to an animal lawfully running at large caused by its falling into an open well on his premises, although the premises are at the time in actual occupation of a tenant.

2. COURTS (§ II A—150)—OPEN WELLS ACT—BREACH OF—DAMAGES—OWNER OF LAND RESIDING OUT OF PROVINCE—JURISDICTION.

Having an open well, dangerous to stock on his premises, is a breach of the Open Wells Act (Sask.), and gives any person suffering damage on account thereof an action for tort against the owner, and the tort being committed on land within the province the court has jurisdiction over the owner although not residing therein.

Statement.

APPEAL by defendant and cross-appeal as to the amount of damages allowed in an action for damages for injuries to a mare caused by its falling into an open well while lawfully running at large. Appeal dismissed, cross-appeal allowed.

A. M. Panton, K.C., for appellant; *H. E. Grosch*, for respondent.

The judgment of the court was delivered by

Newlands, J.A.

NEWLANDS, J.A.:—The trial judge has found that defendant had an open well upon his premises, that plaintiff's mare, while lawfully running at large, fell into the same and was killed.

These findings are not appealed against, and therefore, under the authority of *Baldrey* v. *Fenton* (1914), 20 D.L.R. 677, 7 S.L.R. 203, and *Watson* v. *Guillaume* (1918), 42 D.L.R. 380, 11 S.L.R. 348, defendant is liable, unless he can escape that liability by reason of the defence he has set up, upon which he appeals to this court, viz.: (1) The land upon which the open well was was not occupied by defendant but by other parties. (2) Defendant was not at the time of the accident a resident of the Province of Saskatchewan.

The land upon which the open well was belonged to defendant, although occupied by a tenant. The Open Wells Act prohibits any person from having "on his premises" as well as "any premises occupied by him" any open well. The Act, therefore, applies to the owner as well as the occupier.

SASK.

C. A.

BROTHERSON v. KENNEDY.

Newlands, J.A.

The defendant had previously resided upon the property and knew of the open well. Before the accident to defendant's horse he had removed to Edmonton, in the Province of Alberta.

R. 24, par. 5, of the Rules of Court provides that service of a writ of summons on a defendant out of the jurisdiction may be allowed by the court or a judge whenever "the action . . . is founded on a tort committed within the jurisdiction."

By having an open well dangerous to stock upon his premises, defendant committed a breach of the Act respecting Open Wells which would give any one a right of action against him for a tort on that person suffering damage on account thereof.

The laws of Saskatchewan respecting land within that province are binding upon every one owning land within that province, no matter where they reside. A tort for which defendant was liable was, therefore, committed within the province, and, under the Rules of Court, a writ could be issued for service upon the defendant *ex juris*. This writ was, in my opinion, properly issued and the court had jurisdiction. The appeal should, therefore, be dismissed.

Upon the cross-appeal as to the amount of damages allowed, the evidence is, I think, to the effect that the mare was worth $300. The only evidence to the contrary is that of the defendant and Wing. Defendant puts the value of the mare at $100, and Wing says she has no value at all. I think Wing's testimony upon that point may be dismissed, and as defendant's evidence of value was based upon his statement that she had side-bones which would make her lame, as well as having her sight affected, and it was proved in rebuttal that this was not the case, his evidence should not be taken as against the plaintiff and his witnesses, all of whom swore her value to be $300. Another witness of defendant gave evidence as to value, but as he had never seen the mare in question it was of no value.

I would, therefore, vary the judgment by allowing the plaintiff $300 damages; plaintiff to have costs of appeal.

Judgment varied.

SHEPARD v. BRITISH DOMINIONS GENERAL INS. Co.

SHEPARD v. GLENS FALLS INS. CO.

CAN.
S. C.

Supreme Court of Canada, Davies, C.J., and Idington, Anglin and Mignault, JJ., and Cassels, J. ad hoc. May 6, 1919.

INSURANCE (§ VI H—425)—PROOFS OF LOSS—RELIEF AGAINST STRICT COMPLIANCE IN FURNISHING—EFFECT OF—SASKATCHEWAN INSURANCE ACT.

The effect of granting relief under s. 2 of the Insurance Act (R.S.S. c. 80, now s. 86 of 1915 Stats., c. 15), which permits relief to be granted from strict compliance with a condition in the policy requiring proof of loss to be furnished as soon as practicable after the loss has occurred, is to put the insured in the same position as if proofs of loss had been furnished as required, with the result that other conditions of the policy requiring a certain delay before action can be brought, and which would otherwise make the bringing of the action premature, should be deemed to have lapsed.

Statement.

APPEAL from the judgment of the Court of Appeal for Saskatchewan (1918), 42 D.L.R. 746, 11 S.L.R. 259, reversing the judgment of the trial court, Newlands, J., 10 S.L.R. 421, and dismissing the plaintiff's actions with costs. Reversed.

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

Davies, C.J.

DAVIES, C.J. (dissenting):—Concurring as I do with the judgment of the Court of Appeal of Saskatchewan and with the reasons for that judgment stated by Elwood, J.A., concurred in by Haultain, C.J., I would dismiss these appeals with costs.

Idington, J.

IDINGTON, J.:—These cases were argued together. The actions were brought to recover insurance moneys respectively due on policies assuring against fire and issued by the respondents respectively in September and October, 1912, to the appellant Shepard, providing in each case for the loss, if any, being payable to the appellant bank.

The only questions raised must turn upon the power of the court before which the actions were tried, when applied to the relevant facts in evidence, under and pursuant to s. 2 of the Fire Insurance Policy Act of Saskatchewan (R.S.S. c. 80), which reads as follows (repealed 6 Geo. V., 1915, c. 15, s. 204):—

> Where, by reason of necessity, accident or mistake, the conditions of any contract of fire insurance on property in Saskatchewan as to the proof to be given to the insurance company after the occurrence of a fire have not been strictly complied with or where, after a statement or proof of loss has been given in good faith by, or on behalf of the assured in pursuance of any proviso or condition of such contract the company, through its agents or otherwise, objects to the loss upon other grounds than for imperfect compliance with such conditions, or does not, within a reasonable time after receiving such statement or proof, notify the assured in writing that such statement or proof is

CAN.

S. C.

SHEPARD v. BRITISH DOMINIONS GENERAL INS. CO.

Idington, J.

objected to and what are the particulars in which the same is alleged to be defective and so from time to time or where for any other reason the court or judge before whom a question relating to such insurance is tried or inquired into considers it inequitable that the insurance should be deemed void or forfeited by reason of imperfect compliance with such conditions, no objection to the sufficiency of such statement or proof or amended or supplemental statement or proof as the case may be shall in any of such cases be allowed as a discharge of the liability of the company on such contract of insurance wherever entered into; but this section shall not apply where the fire has taken place before the first day of January, 1904.

The fire in question destroyed, on the first or second of April, 1915, the entire properties insured. The agent of said bank, on or about the fifth of said April, informed the local firm of insurance agents of the said insurance companies, of the said loss, and asked them if there was anything further to be done by him in regard thereto, and was told not.

The insurance agents at once communicated by wire and letter with their respective principals (now respondents herein) informing them of the loss.

That resulted in the said companies intrusting jointly the investigation and adjustment of the loss to Patterson & Waugh, a firm of professional adjusters in Winnipeg, with local agents in Saskatchewan and Alberta.

That firm and the companies turned the matter of investigation and adjustment over to one O'Fallen, a local agent of said firm at Saskatoon, who went on or about April 8, to Margo, where the fire occurred and Shepard lived, and spent a day there engaged in the necessary work of investigation.

On that occasion Shepard met him and answered all his inquiries and gave him all the information he could.

In the course of doing so there were some things said by Shepard which led to a suspicion of some incendiary origin being the cause of the fire. This led in turn to the matter of the origin of the fire being reported to the superintendent of insurance for the Province of Saskatchewan, who took some part in making inquiries. Another officer, called a fire commissioner, also took part.

O'Fallen, on his visit to Shepard and the scene of the fire at Margo, took from him, in order that such investigation as his firm might desire might "be as full and complete as possible," a document agreeing that everything done or demand made theretofore

or thereafter should not be claimed as a waiver on the part of the insurance companies of any of the terms or conditions of their policies.

This only, to my mind, concerns us now as an indication of the thorough nature of the investigation to be made and which, if so made, would reduce the need for the usual formal notice of loss and proof thereof to something utterly superfluous.

Yet it is alleged by respondents that because of the assured's non-compliance with the literal terms of the condition requiring same, his right and those of his co-appellant have been destroyed.

Hence the questions raised as to the power of the court to give the relief provided by the section above quoted. To estimate properly the weight to be attached to this condition under the foregoing circumstances and many others which appear in evidence, let us consider it as gravely as we can.

Condition No. 12 says:—

Proof of loss must be made by the assured, although the loss be payable to a third party.

Condition No. 13, so far as involved herein, is as follows:—

13. Any person entitled to make a claim under this policy is to observe the following directions:—

(a) He is, forthwith, after loss, to give notice in writing to the company.

(b) He is to deliver, as soon afterwards as practicable, as particular an account of the loss as the nature of the case permits.

(c) He is also to furnish therewith a statutory declaration, declaring:—

1. That the said account is just and true.

2. When and how the fire originated, so far as the declarant knows or believes;

3. That the fire was not caused by his wilful act or neglect, procurement, means or contrivance;

4. The amount of other insurance;

5. All liens and incumbrances on the subject of insurance.

6. The place where the property insured, if movable, was deposited at the time of the fire.

Unless for approximately fixing a date and fact, or as a trap, the importance of the notice being in writing is not of any great value, when assuredly there was not only from the bank but from Shepard also oral notice. And the document O'Fallen got him to sign contained all the notice required by the said requirement is sub-s. (a) of the condition need contain.

Indeed, I submit that in face of such document the plea of want of notice (a) seems unfounded if not improper.

CAN.

S. C.

SHEPARD v. BRITISH DOMINIONS GENERAL INS. CO.

Idington, J.

As to the requirement in (b), there is not the slightest pretence that the oral statement given by Shepard was incorrect or wanting in particularity and doubtless was noted in writing by O'Fallen.

Such pleas under such circumstances formerly were so common that legislation was found necessary to deal with them.

The requirement by sub-s. (c) of a statutory declaration is a more reasonable requirement and its absence under some circumstances might become a very important omission.

Its absence in this particular case is reduced in importance almost to nothing; for the respondents were by means of legal assistance placed by law at their disposal enabled to make their investigation thorough, indeed, much more thorough than any declarations such as required by above conditions.

Not a word is adduced in evidence to indicate that the oral account given as stated failed to supply what items Nos. 1, 2 and 3 require, or were untrue.

The evidence does not shew that there was no other insurance and the information was given by the appellant bank as to that and other liens and encumbrances on the subject of the insurance in answer to inquiries of respondents' agents.

More than that, the respondents on the trial produced through their cross-examination of appellants' witnesses, very much illuminating correspondence which, taken with that adduced by the appellants, leaves a rather unpleasant impression as to the conduct of respondents or their representatives in relation to the very probable reason for appellant's non-compliance with the condition I am dealing with.

I do not intend to elaborate or write at length upon all that which a perusal of the entire evidence suggests.

It is clear, however, that in fact the bank was the party most deeply interested in the loss and the party most urgent and insistent upon the inquiry coming to a decision or close and evidently was lulled into acquiescence of delay by such representation as reported in the letter from its manager at Saskatoon, to him managing at the agency in Edmonton as follows:—

> They ask for a full settlement of the bank's claim, but it will not be necessary to make the customary affidavit.

The appellant Shepard had enlisted, in July following the fire, to go to the front. Supposing he had reached there shortly after

so enlisting, then been killed or taken prisoner, and the respondents' construction of the law being upheld that the bank could not make proof, could any court be got to hold that it could not give relief under said section? I hope not.

Yet wherein does this contention set up differ? It is idle to answer this as counsel did that his agent could make it. No agent in all likelihood ever would have been left to look after what in fact had got to be looked on as the bank's own business.

It is clear to my mind that under the circumstances in evidence in this case the failure to put in the necessary proof in conformity with the condition was one of those mistakes from the consequences whereof, whatever they may be, the statute enabled relief to be given.

And as to the pretension that the giving such proofs in February changes the issue to one of not bringing either action within given delays, I agree with Newland, J.'s view that, as the giving such proofs at that time availed nothing, it must be treated as if non-existent.

I am of the opinion that the power given by the statute covers a defective proof of any kind even if oral or written, and that there is no room for the contention of the respondents' counsel herein and I need not perhaps examine the statute microscopically.

I may observe that, in looking at the authorities cited in respondents' factum, I find *Anderson* v. *Saugeen Mutual Fire Ins. Co. of Mount Forest* (1889), 18 O.R. 355, contains, to my mind, a decision by the late Chancellor followed by an able judgment of the late Ferguson, J., which, in principle, maintains when analyzed the conclusion I have reached so far as the bank is concerned, only by another road.

There, the condition No. 12 was held as it reads that the assured, being the mortgagor, must make the proof; and hence the usual clause giving the mortgagee entitled to the insurance the right to recover, though the mortgagor had lost his remedy, by reason of sixty days not elapsing from the time when prescribed before expiration of the year.

There the judges acted upon the said clause. Here, though the clause does not exist, the trial judge was right in acting by virtue of the statute in an analogous situation.

CAN.

S. C.

SHEPARD v. BRITISH DOMINIONS GENERAL INS. CO.

Idington, J.

If the Glens Falls Co. respondent, instead of denying everything and pleading as it did, had admitted fully the validity of the declaration in February, 1916, as a fulfilment of the conditions 12 and 13, it might have presented an arguable objection based on the condition respecting limit of time to bring an action. That limit means from a valid delivery of proof, which in the case in question never took place and had to be substituted by the relief which the trial judge gave.

In view of the failure to present a tittle of evidence relative to the charge of arson set up in the pleading, it is to be hoped the law, as claimed to be expressed in *Jureidini* v. *National British and Irish Millers Ins. Co.*, [1915] A.C. 499, is, as argued, applicable to such a case, but I have not had time to form an opinion founded thereon which, in my view herein, is unnecessary.

I think the appeal should be allowed with costs throughout and the judgment of the trial judge be restored. But there should be no costs allowed for printing an appeal case that so grossly offends the rules of this court as it does.

Anglin, J.

ANGLIN, J.:—The facts of these cases sufficiently appear in the judgments of the Court of Appeal for Saskatchewan, 42 D.L.R. 746.

By s. 2 of the Fire Insurance Policy Act (R.S.S. c. 80), the court is under certain circumstances enabled to decline to give effect to a defence based on an "objection to the sufficiency of (the) statement of proof" of loss required by statutory condition No. 13. In the present case proofs of loss were furnished on February 19, 1916, the loss having occurred on the night of the 1st-2nd of April, 1915. The only defence which, in my opinion, need be seriously considered on this appeal is based on the 17th statutory condition providing that "the loss shall not be payable until 60 (in the case of the Glens Falls policy, 30) days after completion of the proofs of loss . . ."

These actions were begun on March 22, 1916. Under statutory condition No. 22, the last day for commencing them would have been the first or the second of April, 1916.

The trial judge (10 S.L.R. 421) took the view that, upon the facts in evidence, the insured was entitled to be excused from strict compliance with condition 13 under the powers conferred

by s. 2 of the statute, and granted relief accordingly. The sufficiency of the case made to justify this course was not questioned by the Court of Appeal. The existence of the power itself is undoubted (*Bell* v. *Hudson Bay Ins. Co.* (1911), 44 Can. S.C.R. 419; *Prairie City Oil Co.* v. *Standard Mutual Fire Ins. Co.* (1910), 44 Can. S.C.R. 40), and after carefully considering all the facts in evidence I am satisfied that the discretion exercised by the trial judge should not be interfered with.

But the majority of the appellate judges (Haultain, C.J., and Elwood, J.), in this reversing the trial judge, held that the power conferred by s. 2 does not extend to relieving the insured from a disability created by the 17th statutory condition; and when the case is one of disability arising solely out of that condition I entirely concur in their view.

With great respect, however, I am of the opinion that there has been a misconception of the true nature of the defences in these actions based on condition No. 17. They are that the actions were prematurely brought because the period after the completion of proofs of loss which, under that condition, must elapse before action, had not in either case expired. Otherwise stated, the pleas are that the proofs of loss had been completed too late to permit of the actions being begun when they were. They, therefore, rest upon an "objection to the sufficiency of the statement of proof." The assumption of these pleas is that the proofs were completed when delivered to the companies on or about February 29. In the case of the British Dominions' policy, if the view taken by the appellate court is correct, the necessary result would be a forfeiture of the policy by reason of imperfect compliance with condition 13, since action could not have been brought more than 60 days after February 29, and yet within one year from the date of the loss as required by condition No. 22. In the case of the Glens Falls policy, however, if the delivery of the proofs on February 29 was a good delivery in compliance with that condition, action might have been brought on it after the lapse of the 30 days prescribed by condition 17 and yet before the expiry of the limitation of one year imposed by condition 22.

But the delivery of proofs on February 29 was not a compliance with the requirement of the 13th statutory condition prescribing that proofs of loss shall be made "as soon as practicable," and the

CAN.

S. C.

SHEPARD v. BRITISH DOMINIONS GENERAL INS. CO.

Anglin, J.

companies declined to accept these proofs as sufficient for that reason. That is one of the defences in each of the records in these actions. The proofs of loss became of value and were "completed" only when the court exercised its statutory power to relieve against the failure to comply strictly with the 13th condition. That necessarily took place after the actions were brought. The effect of granting relief under s. 2 of the Insurance Act was, in my opinion, to put the insured in the same position for all purposes as if proofs of loss had been furnished, as was required by the 13th statutory condition, "as soon as practicable afterwards," *i.e.*, after the giving of the notice in writing directed to be given "forthwith after loss," with the result that, treating the proofs as having been completed, *nunc pro tunc*, "as soon as practicable" after the loss, the respective periods prescribed by the 17th condition should be deemed to have elapsed and the loss under each of the policies to have been payable before the action upon it was begun. To hold otherwise would be to enable defendants to take advantage of their own wrong-doing since it was their misleading conduct that produced the situation which rendered it inequitable that they should be allowed to insist on anything resulting from the plaintiffs' non-compliance with the 13th statutory condition as a defence.

Mignault, J.

MIGNAULT, J. (dissenting):—The same questions arise in both these cases, the point mainly argued being whether the actions of the appellants could be maintained in view of conditions 13 and 17 of the insurance policies, being statutory conditions of the Province of Saskatchewan.

These conditions read as follows:—

13. Any person entitled to make a claim under this policy is to observe the following directions:—

(a) He is, forthwith after loss, to give notice in writing to the company.

(b) He is to deliver, as soon afterwards as practicable, as particular an account of the loss as the nature of the case permits.

(c) He is also to furnish therewith a statutory declaration declaring:—

1. That the said account is just and true.

2. When and how the fire originated, so far as the declarant knows or believes;

3. That the fire was not caused through his wilful act or neglect, procurement, means or contrivance;

4. The amount of other insurance;

5. All liens and incumbrances on the subject of insurance.

6. The place where the property insured, if movable, was deposited at the time of the fire.

(d) He is, in support of his claim, if required and if practicable, to procure books of account, and furnish invoices and other vouchers, to furnish copies of the written portion of all policies, and to exhibit for examination all the remains of the property which was covered by the policy.

(e) He is to produce, if required, a certificate under the hand of a justice of the peace, notary public, or commissioner for oaths, residing in the vicinity in which the fire happened, and not concerned in the loss, or related to the assured or sufferers, stating that he has examined the circumstances attending the fire, loss or damage alleged, that he is acquainted with the character and circumstances of the assured or claimant and that he verily believes that the assured has by misfortune and without fraud or evil practice sustained loss and damage on the subject assured to the amount certified.

17. The loss shall not be payable until sixty days (in the case of Glens Falls Co., this delay is 30 days, in that of the British Dominions Co. it is, as above indicated, sixty days) after the completion of the proof of loss, unless otherwise provided for by the contract of insurance.

S. 2 of the Fire Insurance Policy Act, c. 80, R.S.S. 1909, which has since been re-enacted as s. 86 of the Saskatchewan Insurance Act, 1915, is in the following terms:—

2. Where by reason of necessity, accident or mistake, the conditions of any contract of fire insurance on property in Saskatchewan as to the proof to be given to the insurance company after the occurrence of a fire have not been strictly complied with or where after a statement or proof of loss has been given in good faith by or on behalf of the assured in pursuance of any proviso or condition of such contract the company through its agents or otherwise objects to the loss upon other grounds than for imperfect compliance with such conditions or does not within a reasonable time after receiving such statement or proof notify the assured in writing that such statement or proof is objected to and what are the particulars in which the same is alleged to be defective and so from time to time or where for any other reason the court or judge before whom a question relating to such insurance is tried or inquired into considers it inequitable that the insurance should be deemed void or forfeited by reason of imperfect compliance with such conditions no objection to the sufficiency of such statement or proof or amended or supplemental statement or proof, as the case may be, shall in any of such cases be allowed as a discharge of the liability of the company on such contract of insurance wherever entered into; but this section shall not apply where the fire has taken place before January 1, 1904.

The fire in question occurred on April 1, 1915, and the proofs of loss, although dated February 29, 1916, were furnished, Mr. Allan stated, on March 1, 1916. The actions were taken on March 22. Among other contentions made at the argument, the respondents claimed that condition 13 was not complied with; that even granting that the trial court could, under s. 86 of the Saskatchewan Insurance Act, treat the filing of the proofs of loss on March 1 as a sufficient compliance with condition 13, the appellants were required by condition 17 to allow a delay of 30

CAN.

S. C.

SHEPARD v. BRITISH DOMINIONS GENERAL INS. CO.

Mignault, J.

days, in the case of the Glens Falls Co., and of 60 days, in the case of the British Dominions Co., to elapse before taking their action, and further that inasmuch as any action would be absolutely barred, under condition 22, on April 1, 1916, no action was possible on March 22 against the British Dominions Co., although the appellants, by waiting till March 31—and thus giving a full delay of 30 days for the completion of the proofs of loss—might have taken an action against the Glens Falls Co., assuming that they could be relieved from non-compliance with condition 13.

The trial judge, Newlands, J., relieved the appellants from the consequences of non-compliance with condition 13 in the following terms:—

> I also find that the notice of loss and proofs of loss were not given according to the terms of the policy.
>
> As plaintiffs have asked to be relieved under s. 2 of the Fire Insurance Policy Act, and as I am of the opinion that it was through mistake that the plaintiffs did not perform these conditions, I will relieve them from the consequences thereof.

Then as to the defence of the respondents that the actions were premature under condition 17, he said:—

> This action was brought on March 22, less than thirty days after such formal notice and proofs were given. These were not given forthwith nor as soon afterwards as practicable, and were, therefore, not a compliance with the terms of the policy and as I cannot accept them as such, they cannot be used to fix the time when the action should be brought.

This judgment was set aside by the Court of Appeal, Lamont, J., dissenting.

I have carefully read all the correspondence filed by the parties and I cannot help thinking that the appellants have only themselves to blame if they filed the proofs of loss at as late a date as March 1, 1916. Shepard was in the premises at the time of the fire, as he stated in his statutory declaration of February 29, 1916, yet he took no steps whatever to claim the insurance, probably because no moneys thereunder would go to him. He subsequently enlisted in the Canadian Expeditionary Forces, but the other appellant, the Merchants Bank, located him with apparent ease at Regina when it became concerned about the furnishing of the proofs of loss. It is a matter of surprise that this concern only came to the bank about February 12, when its solicitors addressed a letter to Shepard at Margo, where he no longer was, inquiring whether he had sent in proofs of loss. The whole matter was in

the hands of the bank's solicitors as early as October, 1915, and it must have been perfectly obvious to them that it would be necessary to take legal proceedings to recover the amount of insurance.

However, the trial judge, under the authority conferred by s. 86 of the Saskatchewan Insurance Act, relieved the appellants from the consequence of their failure to furnish notice and proofs of loss according to the terms of the policy. I am not inclined to interfere with the discretion of the judge. But I cannot see how this can deprive the respondents of the benefit of the delay for payment which must, under condition 17, run from the completion of the proofs of loss. The trial judge has not ordered—if indeed he could do so—that the proofs of loss furnished on March 1 be taken as having been given *nunc pro tunc*, but he says that these proofs were not given forthwith "nor as soon afterwards as practicable," and were not, therefore, a compliance with the terms of the policy, and as he could not accept them as such, they could be used to fix the time when the action should be brought. With all deference, I cannot concur in this reasoning, which would mean that when the assured has given notice and furnished proofs of loss several months after a fire, he could take his action the very next day, provided the judge was satisfied that, by reason of necessity, accident or mistake, the condition of the contract as to the proof to be given to the insurer after the occurrence of the event insured against has not been strictly complied with. Indeed, the reasoning of the trial judge would lead to the consequence that the assured would be in a better, and the insurer in a worse, position when the proofs of loss have, as in the present case, been furnished several months after the fire, provided the assured can obtain the indulgence of the court as to the strict compliance with condition 13. I can find no authority in s. 86 to dispense with the requirements of any condition of the contract, save that obliging the assured to give notice and proofs of loss to the insurer. It certainly does not allow me to disregard a condition granting a delay to the insurer to pay the loss insured against after proofs and particulars of loss have been furnished him by the assured. Even in this case the appellants could have given the Glens Falls Co. a delay of 30 days to pay the insurance without allowing a full year to elapse before taking their action, while, with regard to the British Dominions Co., they furnished proofs of loss at a

CAN.

S. C.

SHEPARD v. BRITISH DOMINIONS GENERAL INS. CO.

Mignault, J.

date when it was impossible to allow the company a delay of 60 days and take their action within the year. I cannot, upon due consideration, think that I can come to their assistance under s. 86, and it is, therefore, my duty to give effect to condition 17 which has not been complied with.

I have carefully considered two previous decisions of this court in which a provision similar to s. 86 was construed and applied.

In *Prairie City Oil Co.* v. *Standard Mutual Fire Ins. Co.*, 44 Can. S.C.R. 40, the question was whether s. 2 of the Manitoba Fire Insurance Act applied to a condition of the insurance policy obliging every person entitled to make a claim "forthwith after loss to give notice in writing to the company," and it was decided that under this section the court could relieve the assured from non-compliance with this condition.

In *Bell Bros.* v. *Hudson Bay Ins. Co.*, 44 Can. S.C.R. 419, it was held that the N.W. Terr. Ord., 1903 (1st sess.), c. 16, s. 2, applied to non-compliance by the assured with conditions requiring prompt notice of loss to the company and obliging the assured, in making proofs of loss, to declare how the fire originated so far as he knew or believed.

While I am undoubtedly bound by these decisions so far as they go, I think, with all possible deference, that they should not be extended to a condition such as the one here in question giving to the insurer a certain delay to pay the loss after he has been furnished with notice and proofs of loss. If s. 86 can be extended to such a condition, there would really be no condition of the insurance contract that could not be brought under its provisions. This would virtually permit the court, in any case where strict compliance with the statutory conditions might appear inequitable, to remake the contract for the parties. I cannot agree that such a power is given to the court, and in declining to apply s. 86 to condition 17 of these policies, so as to deprive the insurers of the delay therein stipulated, I do not believe that I am in any way in variance with these decisions so far as they go, for they are clearly distinguishable from the case under consideration.

It is, of course, conceivable that a case may arise where the insurer has himself fully investigated the cause of the fire and the damage thereby caused—and I think that was what had happened in the cases referred to—so that it would be unnecessary for the

assured to furnish any proofs of loss under condition 13. In such an event, it might be difficult to determine the starting point of the delay mentioned in condition 17, so that it might not be reasonable to apply this condition as regards an insurer who has voluntarily undertaken such an investigation, thus implicitly relieving the insured from the duty incumbent on him under condition 13. But here the assured has himself furnished proofs of loss and the insurer has done nothing to free him from this obligation, so assuming that s. 86 would permit the court to declare that there has been a sufficient compliance with condition 13, I cannot find any satisfactory reason for disallowing an objection based on condition 17 which clearly provides that the loss shall not be payable until the delay of thirty or sixty days has elapsed.

For these reasons, I am of the opinion that the appeal should be dismissed with costs.

Cassels, J.

CASSELS, J.:—I have had the privilege of perusing the reasons of judgment of Anglin, J. I concur entirely both in his reasons and his conclusions. If it were necessary for the decision of this case I would go further.

In my opinion, under the circumstances of this case, the proofs of loss were entirely dispensed with.

The companies took upon themselves, through the assistance of adjusters, to ascertain the amounts of the loss and dispensed with the proofs.

One cannot read the correspondence as I read it without coming to this conclusion.

Furthermore, it seems to me that as the defendants repudiate the whole contract on the ground of arson, they cannot avail themselves of the defences. I am not basing my opinion solely upon the allegation in the defence.

Before action the correspondence shews that the companies had pointed out as a reason why the settlement was not likely, viz., on account of arson. *Jureidini* v. *National British and Irish Millers Ins. Co.*, [1915] A.C. 499, may be referred to.

Appeal allowed.

B. C.

C. A.

YUKON GOLD Co. v. CANADIAN KLONDYKE POWER Co.

British Columbia Court of Appeal, Macdonald, C.J.A., Martin, Galliher and McPhillips, JJ.A. May 13, 1919.

1. CONTRACTS (§ IV C—340)—PURCHASE OF MEASURED ELECTRICAL CURRENT—UNMEASURED CURRENT OFFERED—PURCHASE OF MEASURED CURRENT ELSEWHERE—RIGHT TO RECOVER EXCESS IN PRICE.

One who has contracted to purchase measured electrical current is not obliged to take unmeasured current, and incur the danger of a controversy, but is entitled to obtain the measured current elsewhere at the best price procurable, and charge the defaulting party with the excess in price.

2. CONTRACTS (§ V C—407)—BREACH—RIGHT TO TERMINATE—SPECIAL CLAUSE—COMPUTATION OF TIME.

Where a contract for the supply of electric current gives the purchaser the right to terminate such contract if the supply is interrupted for a certain period, interruptions caused by such purchaser's own fault or by the act of God are not to be included in computing the length of such interruptions.

Statement.

APPEAL by defendant from the judgment of Macaulay, J. Affirmed.

E. C. Mayers, for appellant; *F. T. Congdon*, K.C., for respondent.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—The evidence in this case is very voluminous, but the issues are simple enough, though one might be deceived into thinking otherwise from a perusal of the pleadings which occupy some 70 pages of the case.

The contract in question covers a term of years, and by it the defendants agreed to supply to the plaintiffs electrical energy for the operation of plaintiffs' gold dredgers. The year of service is divided into four periods, the first period being from the 1st to the 14th of May inclusive; the fourth from the 1st to the 30th of November inclusive. The other two are intermediate periods which do not call for special mention.

Defendants' obligation commenced on May 1, 1911, but they were not at that time or at any time during the said first period of that year in a position to deliver measured electric current to the plaintiffs. They were under obligation to instal certain meters, which would measure the current taken by the customer. The defendants allege that they were in a position to deliver the current but not through the meters which they had failed to instal until after the expiration of the said first period. Plaintiffs, foreseeing the defendants' inability to supply the current as contracted for, obtained it elsewhere at the best price procurable, which was a price in excess of that at which the defendants had agreed to supply it. Plaintiffs, therefore, claimed the difference

between these two prices and were given judgment in accordance with that claim. I think the judgment is right. The plaintiffs were not obliged to take unmeasured current and thereby incur the danger of a controversy.

The next dispute arises out of alleged breaches of the contract by the defendants in the first and fourth periods of the year 1913. By the contract, the defendants agreed to maintain a voltage of 31,500 kilowatts and this was, by amendment, increased to 33,500, which is now to be taken as the agreed voltage. Art. 7 of the contract sets forth that if in any year the voltage shall fall below the agreed voltage more than 5% for a period of 4 hours in each of a number of days aggregating not less than 25 days, the plaintiff shall be at liberty to terminate the contract by notice to be given not later than November 10. That article sets forth a further event on the happening of which the contract may be terminated at the plaintiffs' option, but as I have come to the conclusion that they were entitled to terminate the contract on the first recited event I do not deal with the second. Art. 8 of the contract sets forth (*inter alia*) that if the service be interrupted in either the first or fourth periods, the defendants shall pay to and the plaintiffs shall accept in full satisfaction of all damages caused thereby a sum equal to $5 an hour of such interruptions, but not to exceed in the aggregate $5,400, and by art. 3 the falling below 95% of the agreed voltage is to be considered an interruption of the service.

Now during the first and fourth periods in the year 1913 there were many interruptions of the service, in some instances by total failure of current and in others by low voltage, by which I mean voltage below the 95% agreed upon. The plaintiffs gave notice terminating the contract on November 8 of that year, *inter alia*, because of said interruptions. They claim that the several interruptions which admittedly occurred in these periods not only entitled them to terminate the contract in the terms of the said art. 7 but amounted as well to a repudiation of it on defendants' part. I will dispose of this latter point at once. If there was such repudiation it was clearly not assented to on the plaintiffs' part. On the contrary, they elected to treat the contract as subsisting and to invoke it for the purpose of giving the notice of cancellation aforesaid.

B. C.

C. A.

YUKON GOLD CO. v. CANADIAN KLONDYKE POWER CO.

Macdonald, C.J.A.

The right to terminate the contract under that part of art. 7 on which I found my opinion, as above stated, is absolute when the supply of current had been interrupted for periods aggregating 25 days. In arriving at the said number of days, interruptions caused by the plaintiffs' own fault or by the act of God (art. 17) are to be excluded. It was conceded in argument that the total of the interruptions came to 30 days, but it was contended by defendants' counsel that some of these days are to be deducted because, as he contended, the interruption was brought about by plaintiffs' wrongful refusal or neglect to install certain safety devices in their plant which he submitted they were bound by the contract to install. The judge found that the plaintiffs committed no breach of their obligation in this respect and I agree with him. Moreover, I am of opinion that the assignment of that cause of interruption was a mere afterthought. Then again it was contended that some of the interruptions had been caused by accumulations of ice in the defendants' waterways which, it was submitted, were attributable to acts of God within said art. 17, and that these interruptions should be eliminated from the tally. But even if they were taken into account they were not of sufficient duration to reduce the aggregate of the interruptions below 25 days, hence it is unnecessary to decide whether they were within the exception or not.

It was also submitted that because the plaintiffs had not fully paid for current supplied at the time interruptions occurred, owing to a dispute about the amount due, that this circumstance was a justification for the interruptions. The contract will not bear out such a contention, nor were any interruptions attributable to such dispute.

I am, therefore, of opinion that the plaintiffs were within their right in terminating the contract.

The only question remaining is that of the damages to which the plaintiffs are entitled for the interruptions complained of. They are entitled to the said sum of $5 per hour for every hour of said first and fourth periods during which the current was either altogether withheld or had fallen below the agreed voltage of 95% of 33,500 volts. As I understand it, there is no dispute about the duration of these interruptions. They amount, I think,

to 30 days, but in case of dispute about this or any other question of computation, counsel may speak to the minutes.

The trial judge thought that the true inference to be drawn from the breaches of contract complained of was that defendants did not intend to perform their part of the contract; in other words, that they had repudiated their obligations and he applied the common law rule to the assessment of damages on the assumption that the compensation in the contract providing for interruptions in the service could not be applied. If, as was argued, the interruptions, or some of them, during the period in question, were wilful and amounted to repudiation of the contract, and there is no doubt evidence from which an inference of that kind might be drawn, and assuming that this would affect the measure of damages, yet the answer to the submission is that the plaintiffs, in these circumstances, had their election either to assent to the repudiation or to stand by the contract. They cannot approbate and reprobate; they cannot, after relying on them as within the contract in their computation of the 25 days mentioned in art. 7, now say that these interruptions were not within the purview of the contract at all.

The stipulations on defendants' part to hold power in reserve are mere surplusage. They are co-extensive simply with their stipulations to supply the power and they do not, in my opinion, in the circumstances affect the question of damages in the smallest degree.

GALLIHER, J.A.:—In my view of clause 8 of the contract it does not provide for all damages between the parties. Galliher, J.A.

That there was a wilful withholding of power from the plaintiffs in direct breach of their obligation under the contract by the defendants, I think there can be no question.

I do not think the words of clause 8 can be taken to apply to any such contingency, nor can it be said that the parties could have had such in contemplation, in fact it is in the face of what the parties were contracting for.

The penalty is, as I view it, in respect of interruptions as provided in the contract.

I have carefully read and weighed the evidence and the well reasoned judgment of the learned trial judge, and will content myself with agreeing in his findings of fact and disposition as to damages.

The appeal should be dismissed.

B. C.

C. A.

YUKON GOLD CO. v. CANADIAN KLONDYKE POWER CO.

McPhillips, J.A.

McPHILLIPS, J.A.:—This appeal has been very ably and exhaustively argued by the counsel for the appellant and respondent respectively. The evidence is voluminous, and to a great extent technical. The subject matter of the litigation is now rather well known to the courts having relation to the supply of electrical power. In the present case, however, it has the additional feature of the carrying on of undertakings in that remote portion of the Dominion of Canada known as the Yukon Territory, the climatic conditions of that part of the Dominion being severe, having a long winter, 7 to 8 months in duration. The gold mining is done with large dredges and at a time when the respondent was in active gold mining in the Territory with other electrical power it was desired to increase the supply of power for its operations. Then it was that negotiations opened with the appellant for the supply of electrical power, the appellant being then about to establish an electrical power plant, and it was at the outset the expressed desire on the part of the respondent and a matter of agreement with the appellant that the supply of power to be contracted for would extend from May 1 to November 1 of each year—the intention being to obtain a longer operating season. In the result, a contract was entered into under date May 5, 1910—between the appellant—under the then name of Granville Power Co. (afterwards changed to its present name) and the respondent—the undertaking of the appellant to be, in its nature, a hydro-electric power plant. The contract may be said to be the usual contract for the supply of electric power—with some features of unusual nature consequent upon the particular section of the country in which the power was to be generated; but it may be said that the parties to the contract were well versed in the conditions obtaining, and what would be the resultant effect of non-compliance with the express terms of the contract, *i.e.*, as to damages if there should be a failure to supply the power contracted to be supplied and taken. The appellants' undertaking was completed—and the supply of power was available on or about the time contracted that it should be available, but owing to default on the part of the appellant in installing the requisite meters to determine the power to be supplied, the respondent was unwilling to accept power until the meters were in place. This was the first happening. This was later remedied and power was

supplied and taken by the respondent at and from a later time and throughout the years 1911, 1912 and 1913, but not in the quantities called for by the contract, there being various reasons given for the non-supply in accordance with the terms of the contract, many of which were dealt with in the very elaborate and most careful argument of counsel for the appellant—in the main said to be consequent upon the act of God and default in the respondent. These excuses have all been dealt with by the trial judge in his very able and comprehensive judgment, with which I entirely agree—as after careful consideration of all that has been advanced at this bar I cannot but conclude that full consideration was given to all the points that have been elaborated here. The case is one that peculiarly required a thorough understanding of the *locus in quo*, and the nature of the operations carried on, and I feel constrained to say that the appellant cannot be viewed as having lived up to the terms of the contract, but in defiance of its plain contractual obligations, refused the respondent the supply of power contracted to be supplied and with the power available supplied it to others, in clear breach of the terms of the contract entered into with the respondent, with a full and complete knowledge of the consequent effect thereof. It, therefore, follows that, unless the terms of the contract will excuse, the appellant must be held to be responsible for the breaches thereof. The trial judge held against the appellant and assessed damages to the respondent for the non-supply of power and held that the respondent was entitled to rescind or put the contract at an end at the close of the season of 1913—and it is against this holding that the appellant appeals. In my opinion, it cannot be successfully contended that there was any waiver in the present case of the breaches of contract by any of the delays that took place. Upon this point of waiver I would refer to what the Earl of Halsbury, L.C., said in *Clydebank Engineering and Shipbuilding Co.* v. *Yzquierdo y Castaneda*, [1905] A.C. 6, at p. 15:—

> It is enough, however, to say that there is no evidence upon which any tribunal should reasonably act, even if there could be a waiver in point of law, as to which I venture to express considerable doubt; but, be that as it may, there is no evidence upon that, and I need not, therefore, express any opinion upon that subject.

The respondent was under a very considerable handicap by reason of the want of knowledge of the power generated and

B. C.
C. A.
YUKON GOLD CO. v. CANADIAN KLONDYKE POWER CO.
McPhillips, J.A.

capable of being supplied and the failure in supply to it and the facts on later disclosure demonstrated that the appellant was flagrantly and wilfully withholding power available and supplying it to others in plain dereliction of the contractual obligation to supply it to the respondent. Amongst other points strenuously urged at this bar was the contention that the respondent should have accepted power without the meters being first installed, claiming that meters, although not the ones contracted for, were available, for the indication of the power which could have been supplied, that there was at times default in making payments for power, and that the respondent failed to place protective devices to ensure against damage resulting to the works of the appellant from the works of the respondent. But I cannot agree that any of these objections can be said to be at all tenable or went to the root of the contract or are available as matters of excuse to the appellant for the non-supply of the power agreed to be furnished under the terms of the contract. There was default in the non-installation of the meters and the respondent was entitled to withhold taking power until they were installed, and there was no contractual obligation at all calling for the respondent placing other protective devices than the facts disclose they did instal, that is, the usual and customary protective devices that in well equipped undertakings such as the respondent had in place are always maintained. It occurs to me that all these exceptions are really matters of afterthought, and do not merit any serious attention, as after all they are beside the question, and do not really enter into the issue which requires determination upon this appeal.

Clause 21 of the contract reads as follows:—

It is further agreed by and between the parties hereto that in case of a disagreement between the parties hereto as to any question arising under this agreement, such question shall be submitted to arbitrators to be designated as follows: The Power Company shall appoint one arbitrator and the purchaser shall appoint one arbitrator and, if the two arbitrators so appointed shall disagree on the matter submitted to them, they shall appoint a third arbitrator, to be associated with them, if they can agree upon such an appointment; if the two arbitrators appointed by the parties hereto do not agree upon the third arbitrator, such third arbitrator shall be appointed by the gold commissioner of the Yukon Territory. The decision of any two of the arbitrators shall be binding and conclusive upon both of the parties hereto.

But nothing in this contract shall be construed to prevent either of the parties from bringing such action at law as it may deem necessary in order to

protect its rights against the wilful violation by the other party hereto of any of the terms or conditions of this contract.

The arbitration provisos above set forth were not invoked by either of the parties to the contract.

Clause 15 of the contract reads as follows:—

The purchaser agrees to permit the Power Company at any time on any day during the term of this agreement, to suspend delivery of electric power for the purpose of making repairs or improvements in any part of its generating or distributing system, on such notice from the Power Company as circumstances may permit, and the purchaser shall not claim any penalty for such interruption up to a period of 24 consecutive hours at any one time, but in the event of such interruption amounting in the aggregate to 288 hours in the four periods herein provided for then the purchaser may at its option terminate this contract provided such option is exercised before November 10 of the year in which the interruption occurred. The purchaser further agrees to permit the Power Company at all times, when it is delivering power under this agreement, to have access to and in the premises of the purchaser for any and all purposes connected with the delivery of electric power and for the exercise of the rights secured to the Power Company by this agreement.

Now the respondent in the exercise of the right given under the above clause elected to terminate the contract—this, that the conduct of the appellant in its flagrant breach of the terms of the contract, non-supplying to the respondent to the extent contracted for and supply to others, entitled the respondent to exercise this option—there can be no question. (See Earl of Selborne, L.C., in *Mersey Steel Co.* v. *Naylor* (1884), 9 App. Cas. 434, at pp. 439-440; *Meadow Creek Lumber Co.* v. *Adolph Lumber Co.* (1918), 25 B.C.R. 298—my reasoned dissenting judgment, 303-6, and the judgment of the Supreme Court of Canada reversing the judgment of this court (1919), 45 D.L.R. 579, 58 Can. S.C.R. 309—this was done by the letter of November 8, 1913, and reads as follows:—

Dawson, Y.T., Canada.
Nov. 8, 1913.

Granville Power Company, and
Canadian Klondyke Power Company, Ltd.,
Dawson, Yukon Territory.

You are hereby notified that we have decided to terminate the power contract dated May 5, 1910, and made between Granville Power Co., therein called the Power Company, and Yukon Gold Co., therein called the purchaser. We hereby terminate the said contract. We terminate the contract on the following, among other, grounds, viz:—

1. That the power furnished the Yukon Gold Co. during the 4 periods of the season of 1913 dropped more than 5% below the voltage agreed on and provided for in the contract for a period of 4 hours in each of a number of days in the said 4 periods aggregating not less than 25.

B. C.

C. A.

YUKON GOLD CO. v. CANADIAN KLONDYKE POWER CO.

McPhillips, J.A.

2. That the said power dropped more than 5% below the agreed voltage from causes not provided for in par. 15 or elsewhere in the contract during a greater number than 100 hours in the aggregate of the said four periods.

3. That the delivery of electric power was suspended and interrupted at different times amounting in the aggregate to 288 hours in the said 4 periods.

4. That during the said 4 periods the Power Company did not maintain electric power for delivery to the purchaser 24 hours per day at the voltage and in the amount specified in the said contract for use by the purchaser in the conduct of its mining operations, and for other purposes necessary and incidental thereto.

5. That during the said four periods the Power Company did not supply the purchaser with electric power 24 hours per day at the voltage and in the amount specified in the contract and not subject to fluctuation of frequency of sufficient extent to prevent the efficient operation of the machinery of the purchaser.

6. That during the said 4 periods and particularly during the first period, from May 1, 1913, to May 15, 1913, and during the 4th period, from Oct. 1 to Nov. 1, 1913, the power furnished was subject to fluctuations of voltage and frequency sufficient to prevent the efficient operation by the purchaser of its machinery, and such fluctuations did prevent the efficient operation by the purchaser of its machinery.

7. That during the said 4 periods the Power Company did not hold electric power in reserve for and ready to deliver to the purchaser up to the respective rates provided for in the contract for the different periods.

8. That from 9.45 o'clock in the afternoon of May 3, 1913, to 5.17 in the afternoon of May 11, 1913, with the exception of an interval of 15 minutes, the Power Company did not hold any electric power whatever in reserve for and ready to deliver to the purchaser and did not maintain any electric power whatever for delivery to the purchaser.

9. That on May 3, 1913, the Power Company, at a time when it was delivering electric power to the purchaser, wilfully cut off the supply of the said power and refused to supply any electric power to the purchaser until 5.17 in the afternoon of May 11, 1913, with the exception of an interval of 15 minutes, although it generated power during the said time and could have held power in reserve for and ready to deliver to the purchaser.

10. That on May 26, 1913, the Power Company, when it was supplying electric power to the purchaser, viz: about 8 o'clock in the afternoon, wilfully cut off the supply of the said power and for several days refused to deliver any power whatever or to hold any power whatever in reserve for and ready to deliver to the purchaser, although the Power Company at that time was generating power and holding the same in reserve for and ready to deliver to consumers of power other than the purchaser, and did deliver the said power to such other consumers.

11. That the Power Company did at many times during the said 4 periods generate electric power but refused to give the purchaser the first call on the said power, and also refused to deliver the purchaser any power at all, and in spite of the purchaser's request for the said power, delivered the said power to other consumers.

12. That about 8 o'clock in the afternoon of May 26, 1913, the Power Company wilfully opened the set of switches referred to in par. 16 of the said contract as the second set of switches to be located between the instrument

provided for in par. 2 of the said contract and the lines of the purchaser, and which second set of switches were, by the said par. 16, to be controlled and operated by the purchaser.

13. That the Power Company has wilfully violated the terms and conditions of the said contract and committed breaches thereof in many instances and in many respects and particularly in the following instances and respects:

(a) By wilfully refusing to deliver to the purchaser any electric power whatever from 9.45 o'clock in the afternoon of May 3, 1913, to 5.17 o'clock in the afternoon of May 11, 1913, with the exception of an interval of 15 minutes, although it was then generating power and could have delivered power to the purchaser.

(b) By wilfully refusing to deliver any electric power whatever to the purchaser from 8 o'clock in the afternoon of May 26, 1913, and for several days thereafter, although during that time it generated power and could have delivered power to the purchaser.

(c) That the Power Company has refused to allow the purchaser to make a copy of the records of the graphic recording meters that are required by the contract to be kept.

(d) That the Power Company has refused to allow the purchaser to see the said records.

YUKON GOLD COMPANY,
By C. A. Thomas, resident manager.

The contention upon the part of the appellant is that if there was any liability in damages to the respondent, that clause 8 of the contract controls, and no damages for interruption of the electric service are assessable, save in accordance therewith and with the limitation therein contained. Clause 8 reads as follows:—

The Power Company further agrees that if the electric service is interrupted from causes not within the control of the purchaser as provided for in this contract, then the purchaser shall be held harmless from liability under the terms of the guarantee in par. 9 of this contract during the continuance of the interruption, and in the event of such interruption occurring in either the first period (May 1 to May 15), or the last period (October 1 to November 1), except as provided for in par. 15, then the Power Company shall pay to and the purchaser shall accept in full liquidation and satisfaction for all losses and damages incurred by such interruption a sum equal to $5 (five dollars) per hour for each and every hour of such interruption, but the Power Company shall not be held liable for a sum greater than five thousand four hundred dollars, and the Power Company shall not be liable for any penalty whatsoever if the purchaser has received during the four (4) periods provided for in this contract electric service to the extent of three million (3,000,000) kilowatts.

All penalties, shall be adjusted after November 1, and before November 10 in each year, and the record of the graphic recording meters measuring the voltage and the power factor and the rate of delivery of power in kilowatts, together with the readings of kilowatts recording by the integrating wattmeter taken at the end of each of the four (4) periods provided for in this contract, shall be accepted as final in the adjustment of all questions as to any balances due to the Power Company and of all penalties due to the purchaser.

B. C.

C. A.

YUKON GOLD CO. v. CANADIAN KLONDYKE POWER CO.

McPhillips, J.A.

Clause 4 deals with the periods of supply and reads as follows:—

The Power Company further agrees to hold electric power in reserve for and ready to deliver to the purchaser up to the rate of thirteen hundred and fifty (1,350) kilowatts per hour from May 1 to May 15 and from October 1 to November 1, and to hold in reserve for and ready to deliver electric power at the rate of eighteen hundred and seventy-five (1,875) kilowatts per hour from May 15 to June 1 and from August 10 to October 1, the above periods to include the first day of each period, but to exclude the last day of each period.

Clause 24 shews the life of the contract, and reads as follows:—

It is further agreed by and between the parties hereto that this contract shall remain in full force and effect for a period of seven (7) years, that is to say from May 1, 1911, to November 1, 1917, or from May 1, 1912, to November 1, 1918, if extended under the provisions of the preceding paragraph, and shall be binding upon the respective successors and assigns of the parties hereto.

The damages which have been allowed to the respondent are damages for default in the supply of electric service during the year 1913, and it is clear that under the clause 15, November 10 in each year was the time fixed admitting of the respondent determining the contract and the four periods had to elapse to demonstrate the extent of the interruption, so that the breaches throughout the four periods cannot in any way be said to have been condoned—the right to rely upon the default is kept alive up to November 10 of each year.

I am of the opinion that clause 8 is in no way an absolute provision that damages must be assessed under it and it alone. The plain reading of that clause indicates that it is a provision only for assessing the damages when there is a fair compliance with the terms of the contract—and that it is limited in this way in its effect—this is the more apparent when it is seen that it has reference only to two of the four periods of the contracted-for electric service. The damages allowed by the trial judge extend over the second and third periods as well. It is absurd to think that in a contract of this nature where so much capital and expenditure was at stake that a sum of $5,400 would be the maximum of damages in any one year. It is plain that clause 8 has no relation to what may be said to be almost upon the facts a complete frustration of the contract upon the part of the appellant. The intention could not have been to have clause 8 the controlling clause where the contract itself speaks in terms of the right of action for "wilful violation" (see clause 21). In my opinion

clause 8 is a provision for limiting the damages for the breach of the particular stipulation contained therein and does not reach to that which goes to the root of the whole contract, a "wilful violation" of its terms its whole scope and tenor. Further, clause 8, in its application to the interruption of the electric service there contemplated is, in its nature, a penalty and does not inhibit damages being assessed for the breaches of covenant—that is, the respondent had his right of election to sue for damages independent of proceeding for the penalty and recovery may be had in damages even beyond the amount of the penalty. See *Harrison* v. *Wright* (1811), 13 East 343, 104 E.R. 402; *Wall* v. *Luggude*, [1915] 3 K.B. 66. It might well be thought that if clause 8 be confined to the breaches of the particular stipulation which, in my opinion, is covered and only covered by the clause, that the amount fixed is liquidated damages but it cannot extend to the "wilful violation" of the contract—a right of action specifically kept on foot by the terms of the contract (*Clydebank E. & S. Co.* v. *Yzquierdo y Castaneda, supra*; *Dimech* v. *Corlett* (1858), 12 Moo. P.C. 107, 14 E.R. 887; *Dunlop Pneumatic Tyre Co.* v. *New Garage & Motor Co.*, [1915] A.C. 79).

Now as to the damages allowed by the trial judge. I do not propose to discuss these items of damage in detail. The trial judge has amply defined the heads of damage and the method of assessment. I am not of the opinion that there has been any error in law in the assessment or that the trial judge proceeded upon any wrong principle—it may be that the damages are capable of assessment in other and different ways—but this is a case, special in its nature, and the undertaking of the respondent was so vitally dependent upon the electric service agreed to be furnished that it is a proper case for the imposition of at least all such damages as can well be deemed compensatory (*Addis* v. *Gramophone Co.*, [1909] A.C. 488, at 491; *Robinson* v. *Harman* (1848), 1 Ex. 855, 154 E.R. 363; *Sapwell* v. *Bass*, [1910] 2 K.B. 486; *Simpson* v. *L. & N.W.R. Co.* (1876), 1 Q.B.D. 274; *Chaplin* v. *Hicks*, [1911] 2 K.B. 786; *Roper* v. *Johnson* (1873), L.R. 8 C.P. 167; *Williams* v. *Agius*, [1914] A.C. 510), and I am not of the view that the damages allowed are in their nature excessive or too remote. During the argument, the counsel for the appellant frankly stated that the damages—if in law rightly assessable,

B. C.

C. A.

YUKON GOLD CO. v. CANADIAN KLONDYKE POWER CO.

McPhillips, J.A.

which, of course, he combatted—did not err in excessiveness, save as to the one item of damages in respect of the re-thawing of the ground—that that item of damage was not sustainable in any case; he did not labour the point, but I assume that, besides other exceptions thereto, it was in its nature too remote.

Upon the question of the assessment of damages, I would refer to what Lord Moulton said in *McHugh* v. *Union Bank*, 10 D.L.R. 562, at 568, [1913] A.C. 299, the language is peculiarly applicable to the task that Macaulay, J., had to perform in the present case:—

> Their Lordships are of opinion that the assessment of damages by the judge at the trial should stand. There was evidence on which the judge could come to the conclusion that by the negligent behaviour of the defendant's agent, the mortgaged property had become deteriorated so that it realized less than it ought to have realized upon sale. The assessment of the damages suffered by the plaintiff from such a cause of action is often far from easy. The tribunal which has the duty of making such assessment, whether it be judge or jury, has often a difficult task, but it must do it as best it can, and unless the conclusions to which it comes from the evidence before it are clearly erroneous, they should not be interfered with on appeal, inasmuch as courts of appeal have not the advantage of seeing the witnesses—a matter which is of grave importance in drawing conclusions as to quantum of damage from the evidence that they give. Their Lordships cannot see anything to justify them in coming to the conclusion that Beck, J.'s assessment of the damages is erroneous, and they are, therefore, of opinion that it ought not to have been disturbed on appeal.

For the foregoing reasons I am of the opinion that the appeal should be dismissed. *Appeal dismissed.*

SASK.

C. A.

BARAGER v. WALLACE.

Saskatchewan Court of Appeal, Haultain, C.J.S., Lamont and Elwood, JJ.A. June 19, 1919.

PRINCIPAL AND AGENT (§ II A—8)—LAND LISTED WITH AGENT FOR SALE—ABSENCE OF SPECIAL AGREEMENT—SALE BY OWNER—COMMISSION.

An agent with whom property has been listed for sale, but who has not an exclusive listing, in the absence of a special agreement that he is to be remunerated if he does not find a purchaser, is not entitled to a commission where the owner sells to a purchaser whom he himself has found.

Statement.

APPEAL by defendant from a judgment for plaintiff for $500 commission. Reversed.

A. Ross, K.C., for appellant; *A. E. Vrooman*, for respondent.

Haultain, C.J.S.

HAULTAIN, C.J.S.:—I concur in the result.

Lamont, J.A.

LAMONT, J.A.:—This is an action for commission on the sale of land.

SASK.

C. A.

BARAGER v. WALLACE.

Lamont, J.A.

The defendant listed his farm with the plaintiff for sale, but gave him no exclusive listing. On October 7, 1918, the defendant saw one Craib, whom he had learned was in the market to purchase a farm, and he asked Craib to come out and see the farm which he had for sale. Craib promised to do so. Up to that time the plaintiff had not spoken to Craib about the defendant's farm. He did speak to him about it on October 10, when Craib promised the plaintiff also that he would go out and see the farm. The plaintiff says that on that occasion he urged Craib to take a friend with him when he went out. Craib did not go to see the farm just then. Later the defendant himself again saw Craib, and suggested to him to bring someone with him when he came to inspect the place. Craib mentioned a Mr. Smith. The defendant went to see Smith and arranged with him that he would come over the next day with Craib and see the farm. They did so. The defendant sold the land to Craib. This was on October 21. On October 15 the defendant had cancelled the plaintiff's employment as agent.

In his evidence Craib testified that it was as "a result of the conversation with Barager on October 10 that he went down to see the farm."

Upon this evidence, the trial judge held that, although the defendant had himself asked Craib to go and see the farm before the plaintiff brought the land to his notice, and notwithstanding the fact, as expressly found by him, that the defendant, James Smith, and Gibson, the manager of the bank, as well as the plaintiff had done something towards bringing the parties together, the plaintiff was entitled to recover because he was the one who first suggested that Craib should inspect the property with a friend; that this suggestion, followed by the inspection and subsequent sale, made the plaintiff the *causa causans* of the sale, although Craib in his evidence had testified that he would not have purchased without Smith's advice. Judgment was given in the plaintiff's favour for $500 commission. From that judgment the defendant appeals.

In *Peacock* v. *Wilkinson* (1915), 23 D.L.R. 197, 51 Can. S.C.R. 319, Duff, J., says, p. 207:—

> The mere listing of property with such an agent implies nothing more than a representation that the proprietor is prepared to do business upon those terms and is not in itself an offer to sell which may be accepted and con-

SASK.

C. A.

BARAGER v. WALLACE.

Lamont, J.A.

verted into a binding agreement by any purchaser saying to the agent that he will take the property on those terms. The agent's business is to procure a purchaser, that is to say, to bring into contact with the vendor a person willing to purchase on the terms mentioned. Having done that he has performed his function and earned his commission, provided his authority is not in the meantime revoked by the sale of the property by the proprietor.

The work of the agent for which he is to be remunerated by payment of the stipulated commission is the finding of a purchaser. In the absence of a special agreement that he is to be remunerated if he does not find the purchaser, the agent is not entitled to a commission where the owner sells to a purchaser whom he himself has found.

That an owner of property is, in default of stipulation to the contrary, entitled to make a sale of the property himself notwithstanding that he has listed it with an agent for sale, is established by *Brinson* v. *Davies* (1911), 105 L.T. 134.

In *St. Germain* v. *L'Oiseau* (1912), 6 D.L.R. 149, 5 Alta. L.R. 420, Walsh, J., with whom Simmons, J., concurred, says, p. 150:—

> If the relation of buyer and seller had been really brought about between Denis and the defendant by the acts of the plaintiff he would certainly have been entitled to his commission even though he had no hand whatever in the actual making of the sale. But I am unable to see how it can be said in this case that anything that the plaintiff did brought about this sale. The position is simply this, that a man who knew that the farm of another was for sale asked the plaintiff to ascertain for him the price for which it could be bought, and that the plaintiff did ascertain and communicate the price to this man, who subsequently bought from the defendant without any further intervention from the plaintiff. How did the plaintiff make himself the efficient cause of the sale? He did not discover the purchaser. He simply ascertained for a man, who already knew that the land was on the market, the price at which it could be bought. If Denis had not known before this talk with the plaintiff that the defendant's land was for sale I think it might then be very well said that it was through him that the sale was afterwards made and that this, coupled with the other facts of the case, would entitle him to his commission. But it is the fact that it was not the plaintiff who, to quote from the evidence, "put Denis next to the farm" but that Denis came to him knowing as much about the matter apparently as the plaintiff himself did, which, to my mind, distinguishes this case from all others of its kind with which I am familiar.

In the present case it is established by the evidence and found by the trial judge, that the defendant himself found Craib as a possible purchaser, and interviewed him with a view to having him purchase the land before the plaintiff had spoken to him about it. Not having found the purchaser, the plaintiff is not entitled to commission, and there is no evidence that there was

SASK.

C. A.

BARAGER v. WALLACE.

any other agreement by which he was to receive remuneration for services performed.

The appeal should, in my opinion, be allowed with costs; the judgment below set aside and judgment entered for the defendant with costs.

ELWOOD, J.A., concurred. *Appeal allowed.*

Elwood, J.A.

WEISS v. SILVERMAN.

CAN.

S. C.

Supreme Court of Canada, Davies, C.J., and Idington, Anglin, Brodeur and Mignault, JJ. February 4, 1919.

MECHANICS' LIENS (§ VII—55)—ART. 2013 B.C.C. QUE.—EXPRESS RENUNCIATION—SUBSEQUENT REGISTRATION—SALE—RIGHTS OF PARTIES. The signing and delivery of a document by one entitled to a lien for material and labour, within the delay in which he had a lien on the property without registration under art. 2013b C.C. Que., by which he renounces all legal privilege, is an absolute renunciation which extinguishes such privilege.

APPEAL from the judgment of the Court of King's Bench, appeal side (1917), 24 R.L.N.S. 204, affirming the judgment of the Superior Court, District of Montreal, and dismissing the action with costs.

Statement.

Paul St. Germain, K.C., and *Weinfield*, K.C., for appellant; *Busteed*, K.C., for respondent.

DAVIES, C.J.:—I concur in the result.

Davies, C. J.

IDINGTON, J.:—The appellant sues as mortgagee of certain property to have it declared amongst other things that an alleged privilege created by a mechanic's lien registered by respondent against the mortgaged property had ceased to exist by reason of respondent's failure, within one year from the date of such registration, to take a suit to enforce same.

Idington, J.

The alleged privilege was registered on November 26, 1914.

On February 27, 1915, the owners made an abandonment of their property.

The respondent never filed his claim with the curator or took any steps of any kind either to enforce same or to have his right declared.

Art. 2013b C.C. provides as follows:—

The right of preference or privilege upon the immovable exists as follows:—

Without registration of the claim, in favour of the debt due the labourer, workman and the builder, during the whole time they are occupied at the work or while such work lasts, as the case may be; and with registration,

CAN.

S. C.

WEISS v. SILVERMAN.

Idington, J.

provided it be registered within the thirty days following the date upon which the building has become ready for the purpose for which it is intended.

But such right of preference or privilege shall exist only for one year from the date of the registration, unless a suit be taken in the interval, or unless a longer delay for payment has been stipulated in the contract.

I am of the opinion that such failures, as I have just now referred to, terminated his right if any ever existed, to enforce any such alleged privilege unless, which is not pretended, a longer delay had been stipulated for in the contract.

The express and imperative language of this article, which gives or enables the creation of the privilege, specifies the conditions of its existence, and limits its duration, cannot be overcome or defeated by references to the articles dealing with the powers and duties of a curator or the possibility of a successful issue to a suit so brought. The necessity for the prompt assertion (beyond mere registration) of such a claim is well illustrated in many phases of this litigation.

If, as is faintly suggested, the law does not permit of such a suit, then so much the worse for respondent's claim; for the doing so is one of the limitations imposed upon him as the boundary of his right to assert such a privilege, which is the creature of a statute.

But I see no insuperable obstacle in the way of bringing a suit. I need not labour with that. I submit that a sufficient answer is to be found in the unchallenged existence of this very suit by a mortgagee and the right to bring it even after all the property has been sold; upon which fact stress is laid as an argument against the respondent's right to do something akin thereto.

I may remark in passing that the considerant in the judgment appealed from which relies upon the sale of the property as an answer to this point is surely founded in error, for though there was an abortive sale by or for the curator within the year, there was no real sale until September, 1916.

The principle involved in the case of *La Banque d'Hochelaga* v. *Stevenson*, [1900] A.C. 600, is applicable to the decision of this case, and I intend to abide by it. In that case it was expressly held that the privilege is limited to one year from the date of registration.

The claim therein was as this put forward in one aspect on behalf of an assignee of the builder and alternatively rested on the

right given the supplier of material. It was held to have been barred in the first way of putting it by reason of failure to proceed within the year and in the alternative claim as invalid by reason of failure to give notice to the proprietors within the prescribed period for doing so.

I think the appeal should be allowed with costs throughout.

Since writing the foregoing, my brother Brodeur has called attention to the peculiarity of the assignees of some part of the claim in question not being parties to this appeal. I have considered the matter and agree that the rights of such assignees as not before us should be protected and agree in the mode of doing so suggested by the judgment of my brother Mignault.

Anglin, J.

ANGLIN, J.:—The plaintiff who holds a hypothec upon the property in question sues to set aside a privilege claimed by the defendant Silverman as a builder in which the *mis-en-cause* Brucker, Gurney-Massey, Ltd., and J. Watterson & Co., Ltd., are interested as transferees of it in part. The basis of the plaintiff's claim is an express renunciation by Silverman of his privilege under art. 2081 C.C., par. 4, made prior to any of the transfers.

The original renunciation was lost, and the plaintiff at the trial proved a copy of it by parol evidence. The learned trial judge dismissed his action on the ground that such evidence was inadmissible. The Court of Appeal held that the case fell within art. 1233 C.C., par. 6, and that parol proof of the renunciation was, therefore, admissible; and neither this point nor the sufficiency of the parol proof adduced is now contested on behalf of the respondent.

The Court of Appeal, however, maintained the judgment dismissing the action on other grounds, the lamented Archambeault, C.J., taking the view that the renunciation operated merely as a contract between Silverman and the other renouncing lien-holders who joined in it and one Bulkis, at whose instance it was obtained by the debtor-owners, that the liens would not be registered, of which only Bulkis could take advantage (art. 1023 C.C.). The Chief Justice based this conclusion upon his view that the lien or privilege did not exist when the document in the form of a renunciation was executed because it had not then been registered. I am, with profound respect, unable to accept this view because art.

CAN.
S. C.
WEISS
v.
SILVERMAN.
Anglin, J.

2013b C.C. declares in explicit terms that the lien exists without registration during the construction of the building and for 30 days after its completion. Art. 2081 C.C. declares that by a remission, express or tacit, the privilege becomes extinct. The instrument executed by Silverman was a remission or renunciation and no mere undertaking with Bulkis not to register. As Carroll, J., points out it was a unilateral—not a bilateral-contract, and therefore not within art. 1023 C.C. If the lien had been registered when the renunciation was executed the Chief Justice would apparently have considered it thereby extinguished. If the lien subsisted when the renunciation was executed although not yet registered, as I think it undoubtedly did, I can see no reason why the renunciation should not have the same effect.

Carroll, J., on the other hand, was of the opinion that although the renunciation when executed extinguished the defendant's lien for the benefit not merely of Bulkis, but of all the defendant's creditors, yet because after signing it the defendant registered a claim of lien and thereafter executed what purported to be transfers of partial interests therein to the three *mis-en-cause* above mentioned, which they registered without notice of the renunciation, the plaintiff was thereby precluded from setting up the renunciation which had not been registered as against the registered transferees. But, with deference, if the renunciation or remission extinguished the privilege (art. 2081 C.C.), subsequent registration could not revive it. If it were non-existent the attempted transfers of it were nullities and their registration was equally ineffectual. Art. 2127 C.C., cited by the judge, deals with conveyances or transfers, not with renunciations or remissions. It is the unregistered transfer of a privilege which is avoided in favour of a subsequent transfer duly registered.

I see no reason why the appeal should not be allowed as against the respondent and his interest. If the *mis-en-cause* have rights under the judgment of the Superior Court, the respondent Silverman cannot derive any advantage from them.

But although the view I have taken as to the nature and effect of the document signed by Silverman *et al.* is adverse to any claim of the *mis-en-cause* apart from the judgment dismissing this action, the appellant has failed to convince me that it is possible for us to adjudicate against them in their absence and deprive

them of the benefit of the judgments pronounced below. After I had dealt with the merits of the appeal, I had the advantage of seeing the opinions of my learned brothers Brodeur and Mignault, who differ in their views as to the consequences of the appellant's failure to give notice to the *mis-en-cause* of his appeal to the Court of King's Bench and likewise of his appeal to this court. My brother Mignault points out the gravity of the difficulty thus raised. My brother Brodeur's view is that, in the absence of any proof that Silverman's transferees notified the debtors of the transfers in their favour, we should hold them void as against the curator, to whom the debtors' estate has been transferred (arts. 1571 and 2127 C.C.), and, therefore, as against the appellant as a creditor (art. 1031 C.C.). But are we on this ground, any more than upon the ground that the registration of their void transfers was ineffectual, entitled as against the *mis-en-cause* in their absence to deprive them of whatever rights they may have under the judgments of the provincial courts? I fear not. I, of course, agree that Silverman cannot set up the plea of *res judicata* to the benefit of which the *mis-en-cause* may be entitled. But I incline to accept the view of my brother Mignault that since notice was not given to the *mis-en-cause* of this appeal the judgments of the provincial courts so far as they effect them cannot now be disturbed.

Under all the circumstances, however, I would reserve to the appellant the right, notwithstanding his appeals to the Court of King's Bench and to this court, to appeal against the judgment of the Superior Court in favour of the *mis-en-cause*, if, after the lapse of time that has occurred he can obtain any necessary leave to do so, or to take such other steps as he may be advised to protect his interests against their claims.

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

Brodeur, J.

BRODEUR, J.:—This is an action by Weiss, a mortgage creditor, to have declared illegal the registration of a builder's privilege by Silverman on the property covered by his mortgage.

The ground invoked by the plaintiff was that Silverman, the creditor of the privilege, had abandoned it by an agreement *sous seing privé*. The defendant Silverman denied having ever signed such an agreement.

CAN.
S. C.
WEISS
v.
SILVERMAN.
Brodeur, J.

At the trial it was proved that the document in question had existed but that it had been mislaid or destroyed. However, a copy of it had been made by a person in whose custody the document had been for a while and that copy has been filed in this case.

The Superior Court dismissed the action on the ground that the plaintiff had not produced the original writing, and had not obtained an admission from the defendant that would constitute a *commencement de preuve par écrit*.

The Court of Appeal, relying on par. 6 of art. 1233 of the Civil Code, decided, on the contrary, that proof could have been made by testimony, since the proof in writing, while being in possession of a third party, had been lost and could not be produced. They dismissed, however, the plaintiff's action on another ground, viz., that the renunciation signed by the defendant Silverman.

n'était qu'un engagement de la part de l'intimé de ne pas faire inscrire de privilège sur la propriété et ne peut avoir d'effet qu'entre les parties et . . . que l'appelant n'a pas été partie à la dite promesse de l'intimé et n'a pas titre pour s'en prévaloir.

On this appeal we are not concerned with the question of admissibility of evidence, since the respondent, in that respect, accepts the decision of the Court of King's Bench; but we have to construe the remission in question and find out if the appellant could invoke it.

The renunciation reads as follows:—

(Renonciation de privilège contre la propriété de G. Zudick et autres, 19 octobre 1914.)

Nous, soussignés, entrepreneurs d'ouvrages et fournisseurs de matériaux pour les constructions que MM. Joseph Shpretzer, Gershon Zudick, Henry Shapiro fait actuellement ériger aux Nos . . . de la rue Outremont sur le lot portant le numéro officiel 35, 386, 387, 388, 389, 390 & 391, Paroisse de Montréal, déclarons renoncer chacun pour nous *à tout privilege legal* que nous pouvons avoir comme tels sur ces immeubles et consentons qu'ils n'en soient jamais affectés ni à ce jour, ni à l'avenir.

That document was signed by several contractors and suppliers of materials, amongst whom was the defendant respondent, Silverman.

It would appear rather extraordinary that Silverman contended all along that he had not signed such a document, since the copy brought in evidence shews his name appearing amongst those who signed. It was contended at bar by his counsel that

the document being written in a language with which he was not familiar, that might explain the stand he took before the Superior Court in his plea and in his evidence.

I may have my doubts as to the good faith of the defendant; but it is not necessary to express any views as to that, since the case does not turn upon that. We have simply to deal with the agreement as it has evidently been written and signed.

Silverman, by that document, undertook to renounce any legal privilege which he could claim on the immovable property belonging to the persons for whom he worked, and he agreed that that property would never be burdened for the past or for the future with such a privilege.

It was a very sweeping engagement which he took; no reservation with regard to person or time.

It was not simply a promise that his privilege would not be registered; but he stated formally in the writing he signed that he abandoned his privilege.

By art. 2081 of the Civil Code a privilege becomes extinct by remission. The creditor of the privilege who gives up his right is in the same position as a creditor of an obligation. If the latter releases his debtor from his obligation it becomes extinct (art. 1138 C.C.).

At the time Silverman signed his release he had a right of preference as builder upon the additional value given to the immovable by his work done (arts. 2013, 2013b C.C.). He was within the delay during which his privilege existed without registration. His right was born and in existence; and he could undoubtedly release that right.

That is what he has done by the writing of which we have a copy. But it is contended that this document was signed in favour of a certain Bulkis, to whose agent it had been handed.

It is in evidence that the document was signed on the occasion of a loan which the owners of the property were negotiating with that man. But no stipulation is made in the document to the effect that Bulkis's mortgage or claim would have priority over Silverman's privilege. The document was in general terms; it was handed to the debtors themselves and constituted, as far as the evidence shews, a release on the part of the creditor of the privilege in favour of his debtors, since he was asked by the latter to sign such a release.

CAN.
S. C.
WEISS
v.
SILVERMAN.
Brodeur, J.

It is contended, however, that the appellant cannot take advantage of that instrument if we apply the rule *res inter alios acta*.

By art. 1023 of the Civil Code, contracts have effect only between the contracting parties. They cannot affect third persons except in certain cases; and amongst those are the right of the creditors to exercise actions of their debtors, when to their prejudice they neglect to do so (art. 1031 C.C.).

In this case the owners of the property on which the privilege has been registered should have taken the necessary proceedings to set aside that privilege and strike out its registration; but as they have failed to do so, Weiss, as one of their creditors, can proceed to exercise that right. I am, therefore, of opinion that Silverman, having given a release of his privilege, is now without any right to claim that such a privilege now exists; and, as far as he is concerned, the appeal should be allowed.

Weiss, however, by his action not only asks that Silverman's privilege be set aside but that the transfer which he made to third parties of a part of the sum covered by it, viz., Gurney-Massey & Co., Max Brucker and J. Watterson & Co., be declared illegal, null and void in so far as the property in question or the proceeds of sale thereof are concerned and that those transfers be radiated.

The plaintiff Weiss has summoned those third parties as *mis-en-cause*. They filed appearances but did not file any plea. They were given notice of inscription when the case was heard on the merits. The plaintiff's action having been dismissed, inscription in appeal was then made by Weiss; but he did not give notice thereof to those third parties, and the judgment of the Superior Court having been confirmed no notice of appeal to the Supreme Court was given to them and the defendant Silverman was the only one served with those notices of appeal.

It is contended by the respondent that the renunciation made by the transferor Silverman cannot affect the rights of the registered transferees; and he invokes art. 2127 of the Civil Code, according to which where there are successive transfers by the same person of the same privileged claim the rights of the transferees are governed not by priority of transfer but by priority of registration.

I am unable to agree with the respondent's contention. If the issue was between different transferees of Silverman, art. 2127 C.C. would apply. If Silverman had transferred that privilege to A., who had not registered his deed, and later on to B., who had his deed registered in due time, of course the latter would have a better claim than A. That is the case provided for in art. 2127 C.C. But this is not the present case. It is not a matter of dispute between transferees and transferees. It is the case of a privilege that has been abandoned by the creditor and which has been extinguished. The registration which Silverman made in order to revive that privilege was of no effect and he could not transfer to the *mis-en-cause* greater rights than he possessed. Aubry & Rau, vol. 3, 4th ed., p. 287.

Our registration laws protect in a certain measure the creditors of registered rights. For example, the real rights subject to registration take effect from the moment of their registration against creditors whose rights have been registered subsequently (art. 2083 C.C.).

There is a preference which results from the prior registration of the deed of a conveyance of an immovable between purchasers who derive their respective titles from the same person (arts. 2089, 2098 C.C.). In those cases the ordinary principles applied to obligations and contracts do not avail (arts. 1472-1480-1025-1027 C.C.).

But in this case the registration of the privilege was made on a property, of which Zudick and his associates were open owners, without their consent and likely without their knowledge. Silverman, in registering that privilege which he had abandoned, could not give to his transferees any rights which he did not possess himself (art. 2088 C.C.).

The Court of King's Bench, in a case of *Longpre* v. *Valade* (1880), 1 D.C.A. 15, decided that:—

L'enregistrement d'un acte résilié entre les parties ne peut faire revivre cet acte lors même que l'acte de résiliation n'aurait pas été enregistré.

In a case of *Stuart* v. *Bowman* (1853), 3 L.C.R. 309, it was decided also that:—

L'enregistrement ne valide pas un titre nul à l'encontre des droits du véritable propriétaire.

We may say in conclusion on that question of registration that the cessionnaires had no more rights on Zudick's property than

CAN.

S. C.

WEISS v. SILVERMAN.

Brodeur, J.

Silverman himself. His renunciation of his privilege has extinguished it and it could not be revived by registration.

The respondent, in a supplementary factum, now urges that the conclusions of the action concerning the transfers and their registration could not be granted because no notice of appeal was given to the transferees *mis-en-cause*, and that there is *res judicata* as to that part of those conclusions.

That contention is a forcible one, but the respondent is not the proper party to raise it. It should be raised by the *mis-en-cause* themselves. They are the only persons entitled to raise the issue of *res judicata*.

Besides, the evidence of record does not shew that the alleged transfers were duly made and served upon the debtors. In law the transferees have no possession available against third persons until signification of the deed of transfer and of the certificate of registration has been made to the debtors (arts. 1575-2127 C.C.).

There has been, since one of those transfers was made, an abandonment of property by the debtor and a curator has been appointed. In the case of the two other transfers, they have been made since the *cession de biens* has taken place. It may be that those transfers have been regularly served upon the debtor, but the evidence does not shew it. Some further facts and arguments could be brought up by the transferees on subsequent proceedings which could affect the rights of the plaintiff. But taking the record as it is, the pleadings as they have been made, I think that the plaintiff should succeed and obtain all his conclusions.

I may quote on that point the following authorities which shew that the judgment which has decided that a claim has been extinguished may be opposed to the transferee if that judgment has been rendered before the notification of the transfer. Aubry & Rau, vol. 8, p. 373; Demolombe, vol. 30, no. 351; Lacoste, Chose Jugée, no. 485; Dalloz, 1855, 1-281; Dalloz, 1858-1-236.

In the present case it does not appear that the transfers have been served upon the debtors. The *mis-en-cause* had registered their transfers, but the necessary notice has not been made and they have no possession available against the debtors or their *ayant cause*.

I come to the conclusion that the appeal should be allowed as to all the rights and interests of the respondent Silverman in

question in this action, without prejudice to the rights of the transferees, the *mis-en-cause*, if any, under the judgment of the Superior Court, and to whatever rights against them the appellant may have if any. Costs throughout to the appellant against the respondent Silverman.

MIGNAULT, J.:—With no little hesitation I have come to the conclusion that, as against the respondent Silverman, the appellant can rely on the unconditional renunciation to privilege made by Silverman on October 19, 1914. It is true that this renunciation was obtained by J. A. Parent, notary, acting for one G. Bulkis, who on the same day made a loan of $11,000 to Gershon Zudick, Joseph Shpretzer and Henry Shapiro, the owners of the building on which Silverman had acquired a builder's privilege. But this renunciation is absolute and unqualified. The document signed by Silverman says:—

> Nous, soussignés, entrepreneurs d'ouvrages et fournisseurs de matériaux pour les constructions que M. Joseph Shpretzer, Gershon Zudick, Henry Shapiro, fait actuellement ériger aux Nos . . . de la rue Outremont sur le lot portant le numéro officiel 35, 386, 387, 388, 389, 390 et 391, Paroisse de Montréal, déclarons renoncer chacun pour nous à tout privilège légal que nous pouvons avoir comme tels sur ces immeubles et consentons qu'ils n'en soient jamais affectés ni à ce jour, ni à l'avenir.

I would further add that, even construing this document as it was construed by the Court of King's Bench, this was a deliberate renunciation in favour of Bulkis, a hypothecary creditor, and Bulkis could not avail himself of this renunciation without the appellant, an anterior hypothecary creditor, getting the full benefit of it. Bulkis was examined as a witness but seemed singularly indifferent to the fact that he had lent $11,000 on the property and that he had a vital interest in having the builders and furnishers of materials renounce their privilege. Notwithstanding this he says that he got a paper from the notary containing some signatures, but never read it and finally lost it. This is one of the peculiarities of this rather remarkable case. I feel convinced, however, that, unless Bulkis has been promised security otherwise, he would act according to his interests, and then the appellant would have the full benefit of Silverman's renunciation.

On November 26, 1914, a little more than a month after signing this renunciation, the respondent Silverman registered a claim against the property for $7,375. Of this amount he transferred,

CAN.
S. C.
WEISS
v.
SILVERMAN.
Mignault, J.

on February 5, 1915, the sum of $2,571 to one Max Brucker, and, on April 9, 1915, he also transferred $2,429.77 to Gurney-Massey & Co. Ltd., and $1,688.45 to J. Watterson & Co. Ltd., so that he is now creditor only for the sum of $665.78. The appellant alleges that these transfers were registered, but does not pretend that the transferees did not comply with the requirements of art. 2127 C.C. as to the signification of the transfers.

In February, 1915, Zudick, Shpretzer and Shapiro made an abandonment of their property for the benefit of their creditors and the property in question was sold at the instance of the curator, and after collocating several privileged claims, there remained in the hands of the prothonotary the sum of $30,388.13, which was insufficient to pay the hypothecs and the builders' privileges so that the prothonotary reported that a "ventilation" would be necessary to determine the value of the improvements.

On February 15, 1917, the appellant took this action against Silverman, and made the above mentioned transferees parties to his action as *mis-en-cause*. He asks that the privilege be declared null and void, and also that the transfers be annulled in so far as the said property or the proceeds of sale thereof are concerned, that the prothonotary be ordered not to collocate the respondent and his transferees as privileged creditors, and that the transfers be radiated, cancelled and struck from the certificate of search.

The respondent Silverman contested the action, denying that he had signed the renunciation. The transferees appeared by attorney, but did not plead to the action, and were foreclosed. The judgment was rendered in the Superior Court on the inscription of the plaintiff against Silverman and on his inscription *ex parte* against the transferees.

Silverman having, as a witness, denied that he had signed the renunciation, the Superior Court refused to allow the plaintiff to make secondary proof of the renunciation and also decided adversely to the contentions of the plaintiff who pretended that the privilege was null for want of compliance with the necessary formalities. The action was dismissed with costs.

The plaintiff appealed to the Court of King's Bench, and the latter court, while deciding that the renunciation was legally proved, came to the conclusion that, as regards the appellant, it was *res inter alios acta* (art. 1023 C.C.). Carroll, J., was of the

opinion that the appellant could avail himself of the renunciation, but that it could not affect the transferees, who were protected by art. 2127 C.C., and could not lose their rights by reason of a renunciation which had received no publicity.

I agree that the renunciation of the respondent Silverman was legally proved. Undoubtedly Silverman, notwithstanding his denial, signed it, and his counsel very properly abandoned, at the hearing before this court, the plea that his client had not signed the document. I have also come to the conclusion, as stated above, that the appellant can claim the benefit of the renunciation as regards Silverman. Whether he can set it up against the transferees is, however, another question.

After the argument, an examination of the record in the court below disclosed the fact that although the transferees had been made parties to the suit in the Superior Court and had appeared by counsel, the appellant had not given them notice of his inscription in appeal to the Court of King's Bench (art. 1213 C.C.P.), nor did he give them notice of his petition for leave to appeal to this court, so that the transferees were not parties to the appeal, and the question might arise whether they were not protected by the judgment of the Superior Court which dismissed the appellant's action, not only with regard to Silverman, but also with respect to the transferees of the greater part of the claim he had registered against the property.

The attention of the solicitors of the appellant and of the respondent Silverman was called to this fact, and they were given the opportunity of filing supplementary factums if they desired. They have done so.

The respondent Silverman, in his supplementary factum, submits that the judgment of the Superior Court is now *res judicata* and, therefore, conclusive in favour of the transferees. He has, however, no right to make this plea on behalf of the latter.

The appellant, on the other hand, has filed a supplementary factum in which he takes several grounds, which I will briefly summarize. (1) The appellant claims that by appearing by counsel in the Superior Court, and failing to plead to the action the transferees tacitly shewed that they intended to submit themselves to justice and to acquiesce in the final judgment to be rendered upon the issues between the appellant and the respond-

CAN.

S. C.

WEISS v. SILVERMAN.

Mignault, J.

ent. (2) The appellant submits that the inscription in appeal against Silverman alone is effective against the transferees, the privilege claimed by Silverman and his transferees being indivisible (3) He also contends that the transferees were duly represented on the appeal by the respondent Silverman, inasmuch as they had taken the transfers as a pledge and were subrogated in Silverman's rights, so that Silverman, being the warrantor of the transfers he he had made to them, could plead in their name.

I think the first ground urged by the appellant is not a sufficient answer to the objection that the transferees should have been made parties to the appeal taken by the appellant. Granting that the transferees, who had appeared in the Superior Court, but did not plead to the action, tacitly shewed that they intended to submit themselves to justice and to acquiesce in the final judgment—and I do not consider that this was an acquiescence in any judgment that might be rendered in another court upon the issues between the appellant and Silverman—I am of the opinion that they were entitled to notice of any inscription for proof and hearing in the Superior Court (art. 418 C.C.P.), as well as of any inscription in appeal from the judgment. They received notice of the inscription in the Superior Court but not of the inscription in appeal. Most certainly the appellant could, after the first judgment, abandon, the conclusions he had taken against the transferees and limit the appeal to the respondent Silverman, and how could he more effectively shew his intention to do so than by giving notice of appeal to Silverman alone?

The second answer of the appellant is on its face more serious, and he undoubtedly cites in his supplementary factum very weighty authorities to shew that in the case of an indivisible obligation, legal proceedings or appeals taken by or against one of several creditors or debtors are effective as to the latter.

But on due consideration, I have come to the conclusion that, in view of the circumstances of this case, the answer of the appellant does not dispose of the objection.

In the first place, the appellant did not, before the Superior Court, conduct his action against Silverman as representing in any way his transferees, but he made the latter parties to his action, thereby separating their case from that of Silverman, and giving them the opportunity of contesting the action separately. The

fact that they did not make a separate defence does not alter their status in the action, and they were undoubtedly entitled to be heard on an appeal from the judgment, which judgment dismissed the appellant's action, not only as to his demand against Silverman, but also as to the conclusions taken by him against the transferees.

In the second place, I am of the opinion that the appellant misapplies the rules concerning indivisible obligations.

There is no doubt that a privilege is indivisible, but all the authors hold that this indivisibility, as well as the indivisibility of the contract of hypothec, is not of the essence of the contract, but exists by virtue of the will of the parties. It is without effect on the obligation itself, of which the privilege or hypothec is merely the accessory, and if the claim guaranteed by the privilege or hypothec be divisible, as this claim is divisible, it is not made indivisible because an indivisible security has been given. So, in my opinion, Silverman cannot in any way represent his transferees.

Moreover, the indivisibility of the privilege or of the hypothec exists in favour of the creditor and cannot be turned against him.

See Guillouard, Privilèges et Hypothèques, vol. 2, nos. 637 and 638; Laurent, vol. 30, nos. 175, 177, 178; Baudry-Lacantinerie, Privilèges et Hypothèques, vol. 2, no. 900; Paul Pont, Privilèges et Hypothèques, vol. 1, nos. 331 *et seq.*; Cassation, 9th November, 1847, Dalloz, 48, 1. 49.

The third answer of the appellant seems to me clearly unfounded. There is no proceeding here of the nature of an action in warranty. And assuming that Silverman is obliged to warrant the transfers he has made, this mere fact would not, in my opinion permit the appellant, after impleading the transferees in the first court, to entirely ignore them in his appeal to a higher court.

I think, therefore, under the very special circumstances of this case, that effect should be given to Silverman's renunciation merely in so far as his interest is concerned, to wit, the sum of $665.78. There would be a very serious question whether the unregistered renunciation could be opposed to the registered transferees. It is, however, not necessary to decide this question inasmuch as the transferees are no longer parties to these proceedings. It is also unnecessary to decide the objections made by the appellant as to Silverman's privilege, for the renunciation

CAN.

S. C.

WEISS v. SILVERMAM.

Mignault, J.

puts an end to it in so far as his interest is concerned, and as regards the transferees, the latter are not before this court, so I would not feel justified, even were I of the opinion that the appellant's objections are well taken—and I express no opinion on this point—in passing upon the validity of any privilege belonging to the transferees.

I would allow the appeal in so far as the interest of the respondent Silverman in this claim is concerned, without prejudice to any rights the transferees may have acquired under the judgment of the Superior Court, and to whatever rights against them the appellant may have, if any.

The appellant should have his costs throughout against the respondent Silverman. *Appeal allowed.*

ONT.

S. C.

STOTHERS v. TORONTO GENERAL TRUSTS Co.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee, Hodgins and Ferguson, JJ.A. December 20, 1918.

TRUSTS (§ II B—56)—ACCOUNTING—ACTION FOR—RULES (ONT.) 938 ET SEQ.—NOTICE OF MOTION—WAIVER OF BY PERSON TO BE SERVED—RIGHTS OF GUARANTORS.

A railway company issued bonds secured on its railway to the amount of $400,000, these bonds were guaranteed by four municipal corporations, and bonds to the further amount of $200,000 not so guaranteed.

By-laws guaranteeing these bonds are set out in schedules to the Act 8 Edw. VII. ch. 135 (Ont.), and each of them contains a provision that, prior to the execution of the guarantee, the company shall execute and deliver to a trustee, to be agreed on by the company and the corporation, a mortgage on the property, assets, rents, and revenues of the company, present or future, or both, which should secure and provide for the payment of the principal and interest upon the bonds and for the repayment to the corporation of all moneys which may be paid by it on the guaranteed bonds *pro ratâ* with the other bonds to be issued by the company, under the authority of its Act of incorporation and the amendments to it.

The by-laws also provide that all moneys, proceeds of the sale or pledge of any of the guaranteed bonds, shall be paid to the trustee, or the bonds themselves be deposited with the trustee, and shall be applicable only for the purposes of the railway *pro ratâ* with the proceeds of the sale or pledge of the other bonds, and shall be paid out by the trustee only as it receives progress certificates, and that no amount shall be paid out except to the extent of the "face value" of the certificates, which were to be issued for amounts from time to time not exceeding 90 per cent. of such services and materials as should be certified to by the engineer appointed to inspect the works, and *pro ratâ* as before mentioned, and that the balance should be paid out only after the completion of the railway and its opening, as authorized by the Ontario Railway and Municipal Board in accordance with the provisions of sec. 163 of the Ontario Railway and Municipal Board Act, 1906.

By the judgment in appeal the respondent was ordered to deliver to the appellant Stothers the 20 unguaranteed bonds and to pay to him the two sums of $30.06 and $317.96, afterwards mentioned; and subject to that direction, the action was dismissed.

The mortgage securing the bonds bears date the 1st day of May, 1908, and it was confirmed by 9 Edw. VII. ch. 139 (Ont.), and is set out in a schedule to the Act. The parties to the mortgage are the company and the respondent, which had been named as the trustee. By a clause numbered 3, it is provided that:—"As to certain of the bonds hereby secured, which have been or may hereafter be guaranteed by certain municipalities in the said counties or some of them, it is hereby stipulated and agreed, for the purpose of securing the said municipalities, as follows:—All moneys, proceeds of the sale or pledge of any of the said bonds so guaranteed, shall be paid to the said trustee, or the said bonds themselves shall be deposited with the said trustee, and shall be applicable only for the purposes of the said railway *pro ratâ* with the proceeds of the sale or pledge of the other bonds issued as aforesaid, and shall be paid out by the said trustee only as it receives progress certificates, and no amount shall be paid thereout except to the extent of the face value of such progress certificates, which are to be issued for amounts from time to time not exceeding 90 per cent. of such services or materials as are certified to by the engineer appointed to inspect the said works, and *pro ratâ* as aforesaid: and the balance shall be paid out only after the completion of the said railway and the opening of the same (or the section thereof in respect of which such progress certificates have been issued) authorized by the Ontario Railway and Municipal Board, in accordance with the provisions of section 163 of the Ontario Railway Act, 1906. Any delivery of bonds to be made by the trustee to the company hereunder shall be sufficiently made by delivery thereof to the president or secretary of the company."

The mortgage also provides that "the trustee shall not be responsible for any error or mistake made by it in good faith"; and that "the trusts created by this instrument are accepted upon the express conditions that the said trustee shall not incur any liability or responsibility whatever in consequence . . . nor for any other account, matter or thing other than the wilful breach of the party of the second part hereto" (the trustee) "of the trusts hereby created."

The guaranteed bonds were delivered to the trustee, and were disposed of by it, and the sum of $384,000 was realized from the sale of them.

The whole proceeds of the sale, except $30.06, were paid out by the trustee to the company on progress certificates signed by its chief engineer.

The certificates were accompanied by a statutory declaration of the chief engineer, and a certificate of the secretary of the railway company, as to the number of miles of railway under contract to be constructed, and a letter from the president of the company.

Payments were made from time to time on these certificates to the railway company, all having been made only to the extent of 90 per cent. of the "face value" of the certificates, and there then remained in the respondent's hands the $30.06.

The trustee acted upon the view that in these circumstances the railway company was entitled to receive 66⅔ per cent. of the money in the trustee's hands—that is, the proportion which the amount of the guaranteed bonds ($400,000) bore to the amount of all the bonds that had been issued ($600,000).

Ninety per cent. of the "face value" of the progress certificates which were issued by the chief engineer exceeded $400,000; and a question arose as to whether the railway company was entitled to be paid the whole of the money in the hands of the trustee, although it would exhaust the 10 per cent., which was to be paid over only after the completion of the railway and the opening of it as provided by the mortgage-deed.

The trustee was unwilling to accept that view of the railway company's right, and it was decided to have the question determined by the court.

Accordingly a motion was made under the originating notice provisions of the rules for that purpose.

ONT.

S. C.

STOTHERS v. TORONTO GENERAL TRUSTS CO.

No notice of the motion has been found, and it is said that none was served. It appears that counsel for the railway company and for the trustee and counsel for the appellant the Corporation of the Township of Ashfield, went before Middleton, J. and a motion was made to him to determine the rights of the parties as to matters in dispute between them, including the propriety of the respondent's action in making the payments it had made. The motion was made on the 31st March, 1911, and an order was then made that the Corporation of the Township of Ashfield represent all the municipal corporations interested for the purposes of the motion. The motion came on to be heard on the 13th day of April, 1911, when the same counsel appeared, and the matters in controversy were argued. After the argument in court, a written argument was put in by the solicitor for the Corporation of the Township of Goderich, and was considered by Middleton, J.; and, after the delivery of a considered judgment by him, an order giving effect to his conclusion was made, which bears date the 13th day of April, 1911, and which was duly passed and entered. (See *Re Ontario and West Shore R.W. Co.*, 2 O.W.N. 104).

By this order it is declared and adjudged that:—

"Upon the Toronto General Trusts Corporation, trustee under the said mortgage, receiving from time to time progress certificates of the chief engineer of the said railway company, in the form filed herein, certifying to 90 per cent. of the value of services and materials done or supplied in the construction of the said railway to the date of such certificates, it is the duty of the said the Toronto General Trusts Corporation, in every such case, to pay to the said railway company out of the moneys in its hands, proceeds of the sale of the guaranteed bonds in the third paragraph of the said mortgage mentioned, two-thirds of the said 90 per cent. set out in such progress certificates so issued and delivered to the said corporation, and that it is the duty of the said the Toronto General Trusts Corporation to make payments from time to time, notwithstanding that the said moneys in its hands, proceeds of the sale of the said guaranteed bonds, may, by payments made in accordance with such certificates, be wholly exhausted before the completion and opening of the said line of railway; and that all payments heretofore made by the said the Toronto General Trusts Corporation to the extent of two-thirds of 90 per cent. of the amount set out in the certificates of the said engineer, issued and delivered to it, have been properly made by the said the Toronto General Trusts Corporation in accordance with the terms of the said mortgage"; and it was so ordered and adjudged, and it was ordered:—

"That the said Toronto General Trusts Corporation do make payment accordingly out of the said proceeds and to the extent only of the said proceeds in its hands from time to time."

The respondent acted upon this order, and, in accordance with its provisions, paid over to the railway company the whole of the money which had come to its hands except the small balance mentioned and $317.96 payable to the company as interest on moneys in the hands of the trustee. The assets of the company were vested in the plaintiff as trustee of the four guaranteeing corporations by 3 Geo. V. c. 135 (Ont.).

The action was brought by the trustee for the guaranteeing corporations against the trustee for an account and for other relief.

Held, that service of a notice of motion was not essential to give jurisdiction to the court to deal with the case presented under Ontario rules 938 *et seq.*

If the person who is the person to be served under rule 938 is willing to waive that formality and to go before the court, in order that the motion may be made and dealt with, that course may properly be taken. Rule 940 provides that the judge may direct such other persons to be served as may seem just. The parties were properly before the court, and it was for the court to decide whether any other person ought to be served.

The matter in controversy came within clause (*h*) of rule 938 (Ont.). The only right which the corporations had against the respondent was *as cestuis que trust* under the mortgage deed. There was no contractual relation between them and the respondent, any contract there was, was with the railway company, but when the bonds or the proceeds of them were handed over to the respondent they became impressed with the trust which is declared by the mortgage-deed as to the application of them by the respondent.

The order was a valid order and binding on all the corporations and their claims failed except as to the two small sums admitted to be in the trustees' hands.

Statement.

APPEAL from a judgment of Sutherland, J. on an action by Thomas Stothers, in whom the assets of the Ontario West Shore Railway Company were vested by statute, and the Municipal Corporations of the Town of Goderich, the Town of Kincardine, the Township of Ashfield, and the Township of Huron, for an account of the moneys received and paid out by the defendant trust corporation in connection with the railway, and for payment to the plaintiffs of any money improperly paid out, and for interest, and for delivery up of bonds. Affirmed.

The judgment appealed from is as follows:—In and prior to the year 1908, one John W. Moyes promoted a line of railway between the towns of Goderich and Kincardine through the townships of Ashfield and Huron, and applied to all four of the said municipalities for financial assistance, which they agreed to furnish by guaranteeing the payment of certain bonds issued by the railway company to the extent of $400,000, and the said bonds were so issued by the company and guaranteed by the municipalities.

Additional bonds not guaranteed by the municipalities were issued to the extent of $200,000. Under an agreement between the railway company and the municipalities, the bonds were to be secured by a mortgage to a trustee on the roadbed and assets of the railway company, and the defendant corporation was appointed and accepted the position of trustee, the mortgage being executed to it by the railway company on the 1st May, 1908.

The by-laws passed by the municipalities and the agreements between them and the railway company are set out in (1908) 8 Edw. VII. ch. 135, intituled an Act respecting the Ontario West Shore Electric Railway Company.

ONT.

S. C.

STOTHERS v. TORONTO GENERAL TRUSTS CO.

By (1906) 6 Edw. VII. ch. 113, the time for the commencement of the said railway had been extended.

By (1909) 9 Edw. VII. ch. 139, the name of the company was changed to the Ontario West Shore Railway Company, and the mortgage-deed was approved and confirmed and the bonds authorised to be issued as therein mentioned declared to be valid and binding, and a copy of the said mortgage is set out in schedule A to the Act.

Clause 3 of the respective by-laws of the plaintiff municipal corporations is as follows:—

"As a condition of executing the said guarantee all moneys, proceeds of the sale or pledge of any of the said bonds or debentures to be guaranteed by virtue of the by-law, shall be paid to the said trustee, or the bonds themselves shall be deposited with the said trustee, and shall be applicable only for the purposes of the said railway *pro ratâ* with the proceeds of the sale or pledge of the other bonds so to be issued as aforesaid, and shall be paid out by the said trustee only as he receives progress certificates, and no amount shall be paid thereout except to the extent of the face value of such progress certificates, which are to be issued for amounts from time to time, not exceeding 90 per cent. of such services or materials as are certified by the engineer appointed to inspect the said works and *pro ratâ* as aforesaid, and the balance shall be paid out only after the completion of the said railway and the opening of the same authorised by the Ontario Railway and Municipal Board, in accordance with the provisions of section 163 of the Ontario Railway and Municipal Board Act, 1906."

And by clause 14 of the mortgage given by the railway company to the defendant, it is covenanted and agreed "that the trusts created by this instrument are accepted upon the express conditions that the said trustee shall not incur any liability or responsibility whatever in consequence of permitting or suffering the party of the first part to retain or be in possession of the estate and premises hereby mortgaged, or agreed or intended so to be; nor shall said trustee be liable for any depreciation or deterioration, loss or injury which may be done or occur to the premises herein mortgaged nor for any other account, matter, or thing other than the wilful breach of the party of the second part hereto of the trusts hereby created."

Other clauses are as follows:—

"The trustee shall not be responsible for any error or mistake made by it in good faith. The trustee shall not be compelled to take any action as trustee under this mortgage unless first properly indemnified to its full satisfaction, nor shall it be chargeable with notice of any default on the part of the company except upon delivery to it of a distinct notification in writing of such default by some person or persons interested in the trust whose interest, if the trustee shall require, must be proved to the reasonable satisfaction of the trustee.

"In case at any time it shall be necessary and proper for the trustee to make any investigation respecting any fact or facts preparatory to taking or refraining from taking any action, or doing or not doing anything as such trustee, the certificate of the company under its corporate seal attested by the signature of its president or secretary or the affidavit or statutory declaration of one or more directors shall be conclusive evidence of such facts to protect the trustee in any action or position that it may take or assume by reason of the supposed existence of such facts.

"The trustee shall be protected in acting upon any resolution, notice, request, consent, certificate, affidavit, declaration, voucher, bond or other paper or document believed by it to be genuine and to have been passed or signed by the proper party."

The plaintiffs allege in their statement of claim as follows.—

"(3) Under the agreement between said railway company and said municipalities all said bonds were to be secured by a mortgage to a trustee on the roadbed and all assets of said railway company as in said mortgage mentioned, and the defendant was appointed and accepted the position of trustee, and on or about the 1st day of May, A.D. 1908, such mortgage was executed by said railway company to said defendant, to which said mortgage plaintiffs crave leave to refer on the trial hereof.

"(4) Under the terms and conditions of said agreement between said railway company and said municipalities and of the by-laws passed by the plaintiff municipalities, the said bonds were to be issued by said trustee only upon the filing with said trustee of a certificate of the secretary of said railway (verified by affidavit or declaration of the president thereof) shewing the number of miles of single track constructed or under contract to

ONT.

S. C.

STOTHERS v. TORONTO GENERAL TRUSTS CO.

be constructed, and upon the filing of such certificate the trustee was authorised to issue bonds to the extent of $15,000 per mile of single track covered by such certificate.

"(5) That all moneys realised from the sale or pledge of all said bonds so guaranteed by said municipalities were to be paid to said trustee and were to be payable by it only for the purposes of said railway and *pro ratâ* with the proceeds of the sale of the other bonds issued as aforesaid and upon progress certificates which were to be issued from time to time for 90 per cent. of such services or materials as were certified to by the engineer appointed to inspect the said works, and *pro ratâ* as aforesaid.

"(5a) The balance of 10 per cent. over and above the 90 per cent. referred to in the preceding paragraph was, according to the provisions of the said by-laws, payable only after the completion of the said railway and the opening of the same as authorised by the Ontario Railway and Municipal Board in accordance with the provisions of section 163 of the Ontario Railway Act, 1906. The said railway was not completed nor was the opening of same authorised by said Board, and said 10 per cent. was not payable, yet, in breach of its duty as said trustee, the defendant improperly paid out the said 10 per cent., and is, the plaintiffs contend, now liable to make good the same.

"(6) That bonds to the amount of $15,000 per mile, aggregating $600,000, were issued and certified by said defendant under the provisions of said trust mortgage, and $400,000 of said bonds so guaranteed by said municipalities were sold for $384,000, which amount was paid to and received by said defendant under the trusts aforesaid.

"(7) That no part of said railway was constructed, and no contract for the construction thereof was entered into, and no proper or legal certificate was obtained by the defendant, as required by said trust mortgage, before such bonds were issued or certified by said defendant, and said defendant wrongfully and improperly issued said bonds.

"(8) That said moneys so received from the sale of said bonds were wrongfully and illegally paid out by said defendant without obtaining the certificate of the engineer, as required by said by-laws.

"(9) The defendant as such trustee was to pay out the proceeds of said guaranteed bonds so sold only for services and materials furnished in such construction work, and *pro ratâ* with payments made therefor by the railway company, and it was the duty of the defendant as such trustee to see that such proceeds were so applied and in that proportion; but the defendant, in neglect of its said duty, paid out the whole of the proceeds of said guaranteed bonds without seeing that the proportionate part was paid by said railway company, and said railway company paid nothing on account of the cost of such services and materials, but the whole cost thereof was paid from said guaranteed bonds.

"(10) Upon the sale of said guaranteed bonds the proceeds thereof, $384,000, were paid to said defendant and deposited with it, and said defendant agreed to allow interest on any portion of said moneys while on deposit with it.

"(11) The interest on said moneys as aforesaid deposited amounted to about the sum of $18,000, which sum was allowed by said defendant, but the defendant wrongfully and illegally paid away the whole amount of said interest."

On the 7th April, 1908, the Ontario West Shore Electric Railway Company passed a resolution to the effect that the appointment by it "of an engineer to inspect the works of the company and to issue progress certificates in respect of services and materials done and provided from time to time for and in the construction of the company's line of railway be left to the president of the company, and that the president of the company is hereby authorised to make the said appointment;" and on the 18th July, 1908, under his hand as president and the seal of the company, John W. Moyes issued a written certificate, to which was attached a copy of the said resolution, to the effect that, in pursuance thereof, he, "as president of the said company, appointed Vaughan M. Roberts engineer for the said purposes, and the said Vaughan M. Roberts has accepted the said appointment and undertaken the duties thereof and is now acting thereunder."

On the 20th July the railway company delivered to the defendant a certified copy of a resolution of the directors of the company authorising the president to sell and dispose of the guaranteed bonds at a price not lower than 95 cents on the dollar.

On the 17th April following, Vaughan M. Roberts submitted

ONT.
S. C.
STOTHERS
v.
TORONTO
GENERAL
TRUSTS CO.

a proposition in writing to John W. Moyes, the president of the company, as follows:—

"I hereby agree to make all surveys, plans, and profiles of the Ontario West Shore Electric Railway, from Goderich to Kincardine, in accordance with the provisions of the Ontario Railway Act, and to lay out all work ahead of construction for $7.50 per day, exclusive of all expenses contingent upon the work, such as livery when necessary, stakes, personal expenses away from home, wages, and expenses of staff, drafting material, note-books, &c., all original plans, field-notes, &c., to be the property of the Ontario West Shore Electric Railway Company."

The work of construction proceeded under the supervision of Roberts, and from time to time he issued progress certificates. The form at first proposed to be used by Moyes and Roberts, on being submitted to the defendant company, was referred by it to its solicitor, who revised the form of the progress certificates, and as so revised the certificates were thereafter issued by Roberts in the following form:—

"I, V. M. Roberts, Chief Engineer of the Ontario West Shore Electric Railway Company, hereby certify that for and in the construction of the line of railway of the above company from Goderich to Kincardine the materials and services already provided and done are—

90 per cent. thereof amounts to

Deduct amount previously certified

Balance for which this certificate is given

"And I certify that the said company has fulfilled the terms and conditions necessary to be fulfilled under by-law No. 49, 1907, of the Town of Goderich, by-law No. 532 of the Town of Kincardine, by-law No. 371, 1907, of the Township of Huron, and by-law No. VIII. of the Township of Ashfield, to entitle the said company to receive from the Toronto General Trusts Corporation the said sum of $——

"(Signed) ————————,

"Chief Engineer."

On the 10th July, 1908, Roberts made a statutory declaration as follows:—

"That I am the Chief Engineer of the Ontario West Shore Electric Railway; that surveys have been made under my direc-

tion and supervision of that portion of the said railway lying between and including the towns of Goderich and Kincardine, and I find and report that the length of track between the two said towns, including branches and that portion of the said railway within the said towns, is forty miles (40) and two-tenths ($\frac{2}{10}$) of a mile."

On the 20th July, 1908, H. J. A. McKeown, a solicitor practising at the town of Goderich, and acting as secretary of the Ontario West Shore Electric Railway Company, issued a certificate under the seal of the company to the following effect, "that the number of miles of single track of the line of railway of the Ontario West Shore Electric Railway constructed or under contract to be constructed, being the line from Goderich to Kincardine, is a fraction over 40 miles." And Moyes, as president, made a statutory declaration, to which the said certificate was attached, stating "that attached hereto is the certificate of the secretary of the Ontario West Shore Electric Railway Company, that the number of miles of single track of the said company's line of railway constructed or under contract to be constructed, being the line from Goderich to Kincardine, is a fraction over 40 miles, and I do solemnly declare that the said certificate and the statements therein contained are correct."

On the 23rd July, 1908, John W. Moyes, as president of the railway company, wrote a letter to the managing director of the defendant corporation as follows:—

"Herewith I beg to hand you twenty (20) $1,000.00 bonds (Nos. 581 to 600 each inclusive) of the Ontario West Shore Electric Railway Company, to be held by you on our behalf until the certificate of the Ontario Railway and Municipal Board shall be issued, when you will, on demand of the contractor, accompanied by the certificate of our engineer, deliver these bonds or their proceeds (if sold) to the said contractor, in satisfaction of the *pro ratâ* share of the company's share of the ten (10) per cent. deducted from the engineer's progress certificates issued to the contractor during construction of the company's line from Goderich to Kincardine.

"This does not, of course, refer to the *pro ratâ* share of the guaranteed bonds or their proceeds to be withheld by you for the same purpose, and it is expressly understood and agreed to by

ONT.

S. C.

STOTHERS v. TORONTO GENERAL TRUSTS CO.

you that these bonds (or their proceeds if sold) now delivered to you are to be used or held for no other purpose than as above set out."

And therewith handed to him the 20 bonds referred to.

On the 20th November, 1908, Messrs. Dickinson & Garrow wrote to the defendant corporation as follows:—

"You are the trustee in this matter for the bondholders of the above company and for the several municipalities who have guaranteed the payment of certain of the bonds. The Town of Goderich, as well as the other municipalities concerned, are getting a little anxious about the manner in which construction work is being dealt with, and the town has asked us to get some information from yourselves upon the subject.

"We have not a copy of the mortgage before us, but we understand that the proceeds of the bonds, which are to be applied in construction work, are to be applied ratably from the unguaranteed bonds, as well as those guaranteed by the municipalities. The municipalities do not know what the position is, and are impressed with the idea that no bonds have been sold, other than those that have been guaranteed, and that the construction work is being paid for entirely out of the proceeds of these latter bonds. Would you be good enough to inform us what bonds have been sold and if there is anything in their fears in that regard?

"There was a verbal agreement with Mr. Moyes that the progress certificates should be deposited here, or at least copies of them, with the Bank of Commerce, for inspection by the various municipalities concerned, so that they could keep in touch with the progress of the work, but this is not being done, and they are to that extent in the dark.

"Some of the municipalities consider that they should also have an independent engineer to inspect and check over the construction work. We presume that if they agree upon this you would have no objection to that course being taken."

A reply was, on the 25th November, 1908, sent by the defendant corporation to Messrs. Dickinson & Garrow as follows:—

"I beg to acknowledge receipt of your letter of 20th inst. and note that the Town of Goderich desires certain information in regard to construction in connection with the above railway company.

"This corporation, as you are of course aware, is acting as trustee under trust-deed dated May 1st, 1908. Our duties are confined strictly to the terms of the said mortgage, clause 3 of which provides that: 'As to certain of the bonds hereby secured, which have been or may hereafter be guaranteed by certain municipalities in the said counties or some of them, it is hereby stipulated and agreed, for the purpose of securing the said municipalities, as follows:—All moneys, proceeds of the sale or pledge of any of the said bonds so guaranteed, shall be paid to the said trustee, or the said bonds themselves shall be deposited with the said trustee, and shall be applicable only for the purposes of the said railway *pro ratâ* with the proceeds of the sale or pledge of the other bonds issued as aforesaid, and shall be paid out by the said trustee only as it receives progress certificates, and no amount shall be paid thereout except to the extent of the face value of such progress certificates, which are to be issued for amounts from time to time not exceeding 90 per cent. of such services or materials as are certified to by the engineer appointed to inspect the said works, and *pro ratâ* as aforesaid; and the balance shall be paid out only after the completion of the said railway and the opening of the same (or the section thereof in respect of which such progress certificates have been issued) authorised by the Ontario Railway and Municipal Board in accordance with the provisions of section 163 of the Ontario Railway Act, 1906. Any delivery of bonds to be made by the trustee to the company hereunder shall be sufficiently made by delivery thereof to the president or secretary of the company.'

"The guaranteed bonds have been deposited with this corporation, and some have been sold and the proceeds of same deposited to the credit of the Ontario West Shore Railway Company. These moneys are paid to the Ontario West Shore Railway Company upon receiving progress certificates signed by the engineer, Mr. Vaughan M. Roberts, who was appointed by Mr. Moyes, the president of the company, under authority of his directors, to inspect the works of the company. We only pay, however, to the company 66⅔ per cent. of the amount of such certificates, being the *pro ratâ* share of the guaranteed bonds.

"We trust this letter will give you the desired information."

The defendant corporation had been issuing cheques to the

ONT.

S. C.

STOTHERS v. TORONTO GENERAL TRUSTS CO.

railway company for two-thirds of the amount certified in each case, treating that as the *pro ratâ* share of the total issue of bonds as between the guaranteed and unguaranteed bonds. They made no inquiry, before issuing the cheques, to ascertain whether the proportional amount was being paid out on the unguaranteed bonds. They did not inquire or ascertain whether the unguaranteed bonds had been sold or not. Throughout, the defendant corporation's officials testified that they accepted and acted upon the documents produced, hereinbefore referred to, in good faith and believing that they were genuine and that the statements therein contained were true and correct, and throughout took the advice of their solicitors and acted upon it.

On the 10th May, 1909, Mr. Garrow wrote to the defendant corporation as follows:—

"Acting on behalf of the Town of Goderich, I am instructed to write you for information regarding the construction of the Ontario West Shore Electric Railway. The council has from time to time asked Mr. Moyes to let them see the progress certificates upon which payments have been made, and I understand this has been promised, but so far has never been done. The corporation think that they should not be left so absolutely in the dark in regard to the matter as they have been heretofore.

"Under clause 3 of the guaranteeing by-law, the moneys are to be paid out on progress certificates of the engineer appointed to inspect the said works, and the corporation would like to know whether there is an independent engineer for that purpose, or whether the progress certificates are those of the engineer of the railway company.

"As I have only recently had anything to do with this matter, I should consider it a favour if you would write me as fully as possible setting out the whole situation. The corporation of course does not suggest that anything is wrong, but it feels that it should be in a position to know exactly what is going on."

On the 13th May, 1909, a reply was sent to him from the defendant company as follows:—

"Your letter of the 10th inst. asking for certain information in regard to the above railway company duly received.

"I beg to enclose for your inspection a copy of the form of progress certificates which are filed by the chief engineer of the

railway company. We also send a memorandum shewing the amounts charged against the Town of Goderich account in our ledger, being the town's *pro ratâ* share of the 66⅔ per cent. of the various progress certificates.

"The form of the progress certificates, I think you will find, is in accordance with schedule A (section 79) of the Ontario Railway Act, 58 Vict. ch. 38, also the last Electric Railway Act, 6 Edw. VII. ch. 30, sec. 145 and schedule A.

"This corporation, I might say, is merely acting as trustee under terms of the mortgage deed of trust, and if there is any other information we can give you in connection with our duties as such trustee, we shall be pleased to do so."

In the spring of 1911, the railway company applied, through its president, to the defendant corporation, to pay the balance of the moneys then in its hands. The defendant corporation was reluctant to do so without the protection of an order of the Court. In consequence of this attitude on its part, a motion came on, under Con. Rule 938, before Middleton, J., to determine certain questions arising under the said debenture mortgage. Upon the motion the railway company and the defendant corporation were represented by counsel, and Mr. Proudfoot, K.C., appeared for the Township of Ashfield; and upon the argument the said Judge appointed that township to represent all the guaranteeing municipalities, with the exception of the Town of Goderich, for whom Mr. Garrow put in a written argument, adopting the argument made on behalf of the other municipalities by Mr. Proudfoot, as to the right of the trusts corporation to retain in its hands a portion of the proceeds of the guaranteeing bonds until completion of the railway. In the said argument he expressly took exception to the method of payment by the defendant corporation pursuant to the said progress certificates. I quote from the judgment of Middleton, J., delivered on the 13th April, 1911, *Re Ontario and West Shore R. Co.*, (1911), 2 O.W.N. 1041, at pp. 1042, 1043:—

"The construction of the railway is likely to cost more than $600,000, and the question arises whether the railway, on producing progress certificates shewing that work has been done, 90 per cent. of which exceeds $600,000, are entitled to demand the whole $400,000 from the trust company. The balance that is to be paid over is the balance, if any, remaining after the line is com-

ONT.

S. C.

STOTHERS v. TORONTO GENERAL TRUSTS CO.

pleted. The only thing that has been stipulated for by way of protection of the guaranteeing municipalities is the production of progress certificates shewing the value of the work done. I cannot read into the agreement a right to retain a sum of money until the road is completed. If the road can be built for less than the $600,000, then the balance is a security, as it is not to be paid until the road is completed. The letter of the bond must govern and I cannot make a new agreement for the parties. Both parties seem to have taken the risk of the available funds being sufficient to complete the building of the line, and the agreement makes no provision for the retention of such a sum as may be necessary to complete the line, and it would have been quite impracticable to devise any workable agreement to that effect.

"The other question is as to the engineer to certify. The agreement speaks of 'the engineer appointed to inspect the said works.' Section 145 of the Ontario Railway Act shews this to be 'the chief engineer of the railway.' Apart from this the progress certificates granted by the engineer in charge of the supervision of the work for the railway are intended to govern.

"Costs as arranged between the parties.

"Since the argument of the two questions already dealt with, a third question has been raised by Mr. Garrow as set out in his memorandum.

"I think Mr. Smoke in his memorandum successfully answers this contention. It may well be that the payment should be *pro ratâ* with the proceeds of the bonds of both classes. But if so, the guaranteed bonds would bring more than the bonds without guarantee, and the result would be less favourable to the municipalities than that which the railway is prepared to accept. I cannot think that the proceeds of the guaranteed issue is to be compared with the face value of the unguaranteed bonds, and this is not stipulated."

The judgment of Middleton, J., as formally issued, is as follows:—

"Upon motion made unto this Court on the 31st day of March, 1911, by counsel on behalf of the Ontario West Shore Railway Company (formerly the Ontario West Shore Electric Railway Company) in respect of the trusts of the mortgage made by the Ontario West Shore Electric Railway Company to the Toronto

General Trusts Corporation, dated the 1st day of May, 1908, to secure the bonds of the said company as in the said mortgage set out, and this Court having ordered that the Township of Ashfield do represent for the purposes of the said application the Township of Huron and the Town of Kincardine, and upon hearing read the affidavit of John Wilkie Moyes filed and the exhibits therein referred to, and upon hearing counsel for the Ontario West Shore Railway Company, the Toronto General Trusts Corporation, the Town of Goderich, and the Township of Ashfield, representing also the Township of Huron and the Town of Kincardine, and after reserving judgment until this day:—

"1. This Court doth declare that, upon the Toronto General Trusts Corporation, trustee under the said mortgage, receiving from time to time progress certificates of the chief engineer of the said railway company, in the form filed herein, certifying to 90 per cent. of the value of services and materials done or supplied in the construction of the said railway to the date of such certificates, it is the duty of the said the Toronto General Trusts Corporation, in every such case, to pay to the said railway company out of the moneys in its hands, proceeds of the sale of the guaranteed bonds in the third paragraph of the said mortgage mentioned, two-thirds of the said 90 per cent. set out in such progress certificates so issued and delivered to the said corporation, and that it is the duty of the said Toronto General Trusts Corporation to make payments from time to time, notwithstanding that the said moneys in its hands, proceeds of the sale of the said guaranteed bonds, may, by payments made in accordance with such certificates, be wholly exhausted before the completion and opening of the said line of railway; and that all payments heretofore made by the said the Toronto General Trusts Corporation to the extent of two-thirds of 90 per cent. of the amount set out in the certificates of the said engineer, issued and delivered to it, have been properly made by the said the Toronto General Trusts Corporation in accordance with the terms of the said mortgage, and doth order and adjudge the same accordingly.

"2. And this Court doth order and adjudge that the said the Toronto General Trusts Corporation do make payment accordingly out of the said proceeds and to the extent only of the said proceeds in its hands from time to time."

ONT.

S. C.

STOTHERS v. TORONTO GENERAL TRUSTS CO.

It appears to be obvious, upon the evidence adduced at the trial, that the order so made came to the knowledge of the plaintiff municipalities.

By an Act of the Legislature of the Province of Ontario, being 3 Geo. V. ch. 135, the charter and all assets of the said Ontario West Shore Railway Company were vested in the plaintiff Thomas Stothers as trustee for the said plaintiff municipalities.

In this action the plaintiffs assert that, by reason of the payments of the moneys being made without proper authority and in excess of the *pro ratâ* amount authorised, a large portion of the moneys was not applied in the construction of the railway, was lost to the plaintiffs, and the railway was not completed; that the plaintiff municipalities as guarantors have been compelled to pay large amounts on account thereof and are still liable for the balance thereof, and they therefore claim:—

"1. An account of all moneys received and paid out by said defendant as such trustee in connection with said West Shore Railway and payment to plaintiffs of any and all moneys improperly paid out by said defendant.

"2. An account of and payment to plaintiffs of all interest allowed upon said moneys so deposited with the defendant.

"3. Delivery to plaintiffs and cancellation of the $20,000 or other amount of bonds of said railway deposited with or handed to said defendant by said John W. Moyes, and of any bonds of said railway now in their possession or control.

"4. Such other relief as the plaintiffs may appear entitled to.

"5. The costs of this action."

The defendant corporation pleads as follows:—

"8. Pursuant to the terms of said mortgage, the defendant from time to time, on the receipt of said progress certificates, signed by said engineer, paid out to the said railway company two-thirds of 90 per cent. of the amount of money shewn and certified by the said respective progress certificates. Pursuant to the said progress certificates, the said trustee disbursed, out of the moneys received from the sale of guaranteed bonds, and according to the said method of computation, the sum of $383,-969.94, leaving a balance in their hands of $30.06. No payments were made by the defendant except on progress certificates signed by the engineer of said railway company, as required by said mortgage.

"9. During the course of construction of the said railway, and after the defendant had paid out the sum of $344,565.32 from proceeds of sale of guaranteed bonds, pursuant to progress certificates of said engineer, certain questions were raised by the plaintiffs other than the plaintiff Stothers as to the legality of the payments made by the said defendant under said progress certificates, and the method of computing the amounts which the said railway company should receive in respect of such certificates, including the question as to payment of the balance of 10 per cent. over and above the 90 per cent. of the amounts set out in the progress certificates above mentioned and which said balance was in the hands of the defendant at the date of the judgment of Mr. Justice Middleton hereinafter referred to. For the purpose of settling such dispute, proceedings were taken in this Court, to which the said railway company, the plaintiffs, other than the plaintiff Stothers, and the defendant were parties, and by judgment pronounced by Mr. Justice Middleton on the 13th day of April, 1913, the payments made by the defendant, and its said method of computing the amount of each payment under said progress certificates, were approved, and it was declared in said judgment that it was the duty of the defendant to make payments in pursuance of the said progress certificates, notwithstanding that such payments would wholly exhaust the moneys in the defendant's hands before the completion and opening of the said railway. The defendant says that all questions as to payment made by it are finally determined by the said judgment, and the plaintiffs are estopped from raising any objection thereto.

"10. The said mortgage contained no provision in regard to interest on moneys received by the defendant in respect of the proceeds of the sale of any bonds of the said railway company or otherwise, nor was the defendant under any obligation to allow or pay any interest on moneys received from or on behalf of the said company. By agreement made on or about the 23rd day of July, 1908, between the defendant and the said railway company, through its president, and amended by an agreement of the 30th December, 1908, made between the same parties, the defendant agreed to allow the said railway company interest on its moneys while in the defendant's hands, on the terms and at the rates set out in said agreements; and, in pursuance of said

ONT.

S. C.

STOTHERS v. TORONTO GENERAL TRUSTS CO.

agreements, the defendant allowed and paid the said company from time to time an aggregate of $18,867.64, and the said interest paid by the defendant to the said railway company was applied by the said railway company in paying interest on the said guaranteed bonds, which had been issued and sold by the said company.

"11. The defendant was not a party to any agreement referred to in paragraph 3 of the statement of claim, and the defendant says that it has in all respects carried out its duties as trustee and fulfilled its obligations under the said mortgage and agreements; that all documents furnished to it and on which it acted were received by it in good faith and were reasonably and honestly believed by it to be genuine, and by the terms of said mortgage it is protected in acting upon such documents.

"12. The defendant says that it has never been guilty of any wilful breach of any trust created by said mortgage, nor of any bad faith, gross negligence, or wilful default, and that it has never done or omitted any act, matter, or thing which would render it liable under the terms of said mortgage, and the defendant pleads and claims the benefit of the trustee protection clauses in said mortgage, and also pleads and claims the benefit of the Trustee Act, being R.S.O. 1914, ch. 121.

"13. The defendant further says that the plaintiffs other than the plaintiff Stothers have no claim or right in respect of the interest allowed and paid by the defendant to the said railway company, and that the plaintiff Stothers, except as to the sum of $317.96, balance in respect of said interest, has no claim, as the said railway company, which he now represents, received and accepted all moneys paid by the defendant in respect of interest, except the said sum of $317.96, and the said plaintiff is estopped from making any claim in respect thereof. If the said plaintiffs ever had any claim or right in respect of said interest, which the defendant does not admit but denies, the defendant says that all interest paid by it was applied by the said railway company in paying interest on said bonds guaranteed by the plaintiffs other than the plaintiff Stothers, and that such payments were in ease of such plaintiffs, and that the plaintiffs have suffered no loss or damage in respect of any payments of interest made by the defendant.

"14. On or about the 23rd day of July, 1908, the defendant

received from the president of said railway company 20 unguaranteed bonds of $1,000 each, numbered 581 to 600, both inclusive. The defendant has no personal interest in said bonds, and has always been and is now ready and willing to deliver them to the party lawfully entitled to receive the same, but has retained said bonds pursuant to the order or direction of the Ontario Railway and Municipal Board, made at the time said Board was investigating the affairs of said railway company, requiring the defendant to hold said bonds till the true ownership thereof should be determined, and the defendant is ready and willing to deposit the said bonds, if required, with the Accountant of this Court. Save and except the said unguaranteed bonds numbered 581 to 600 inclusive, and the said sum of $30.06, and the said sum of $317.96, which said sums the defendant is ready and willing to pay over or pay into Court as may be desired or ordered, the defendant has no money, property, or assets of the said railway company in its possession or under its control."

In reply the plaintiffs allege that the inspecting engineer required to be appointed by the said trust-deed was not an engineer to be appointed as alleged by the defendant, and that Roberts was not appointed and did not act as engineer of the railway company or as such inspecting engineer, but, if appointed at all, was the engineer of a company known as the Huron Construction Company, by which he was paid, and as such had no power to issue the certificates referred to.

A further contention put forward in the said reply was that the order made by Middleton, J., was so made without jurisdiction, and, if made with jurisdiction, was procured to be made by untrue and unfounded representations made by John W. Moyes in his affidavit filed on the motion.

It seems to me that, in so far as the matter of most importance in this action is concerned, namely, the payments made by the defendant under the authority of the engineer's certificates, what I am in effect asked to do is to hear and determine an appeal from the order of my brother Middleton. This I do not think it is open for me to do. If, therefore, I am compelled, as I think I am, to assume that the order was rightly made, then the matter of the said payments is *res adjudicata*, as pleaded and contended by the defendant.

ONT.

S. C.

STOTHERS v. TORONTO GENERAL TRUSTS CO.

Upon the evidence, it would be impossible for me to find the defendant guilty of any wilful breach of the trusts imposed upon it by the terms of the deed. Anything done by it was apparently done in good faith and in reliance upon the certificates and other documents referred to and the truthfulness and accuracy of the statements therein contained.

As to the item of $18,000 and upwards, being the interest upon the proceeds of the sale of bonds received by the defendant, it appears from the evidence to be the fact, as alleged by the defendant, that no clause is contained in the mortgage by which provision is made therefor, and that, in pursuance of the agreements made between the railway company and the defendant, the latter allowed and paid to the company from time to time interest at rates agreed upon, which interest was applied by the company in payment of interest on the guaranteed bonds issued and sold by the company. The railway company got the benefit of this interest; it went in ease of its obligations; and I do not think the plaintiffs are in a position now to question the transaction or ask repayment. All of the said interest received by the defendant, with the exception of $317.96, was so paid out as aforesaid, leaving that amount still in the defendant's hands. All of the moneys received by the defendant on account of the proceeds of the sale of guaranteed bonds has been paid out, with the exception of a small balance of $30.06 still in its hands. It has also in its hands the $20,000 of unguaranteed bonds hereinbefore referred to. There was substantially no controversy in this action over these three last mentioned matters, at all events after the filing of the statement of defence.

The plaintiff Thomas Stothers being now, as trustee for the said municipalities, entitled to receive the same, there will be judgment in his favour for delivery to him of the said unguaranteed bonds to the amount of $20,000, and for the said sums of $317.96 and $30.06 respectively, with costs down to the filing of the statement of defence. The plaintiffs' action will otherwise be dismissed with costs subsequent to the filing of the defence.

E. D. Armour, K.C., *William Proudfoot*, K.C., *P. A. Malcolmson*, and *C. Garrow*, for appellants.

I. F. Hellmuth, K.C., and *E. T. Malone*, K.C., for respondent, the defendant corporation.

Meredith, C.J.O.

MEREDITH, C.J.O. (after setting out the facts as stated in

ONT.

S. C.

STOTHERS v. TORONTO GENERAL TRUSTS CO.

Meredith, C.J.O.

the headnote):—The action of the respondent in paying over the money that it had received to the railway company is attacked on various grounds.

It is contended that no payments should have been made except on progress certificates issued by an inspecting engineer appointed either by the parties or by the Ontario Railway and Municipal Board, under the provisions of sec. 162 of the Ontario Railway Act, 1906.

It is also contended that no payments should have been made until the unguaranteed bonds had been sold, and the proceeds of the sale of them had come to the hands of the respondent, and then only *pro ratâ* out of the whole proceeds, according to the amounts that had been realised from the sale of both sets of bonds.

It is also contended that the order made by my brother Middleton was made without jurisdiction, and was therefore of no validity, for the following reasons:—

(1) That the foundation for the jurisdiction is the service of a notice of motion, and that none was served.

(2) That the case was not one coming within the Rules as to originating motions.

(3) That there was no authority to order that one of the corporations should, for the purposes of the motion, represent all the corporations, and that the order, having been made, as contended, without notice to them, was not binding on them.

I will first deal with the last of these contentions, because, if the order is a valid order and is binding on all the corporations, the appellants' case fails.

The Rules in force in 1911 as to originating notices were Rules 938 to 943 (inclusive).

Rule 938 provides, among other things, that the trustees under any deed or instrument "may serve a notice of motion returnable . . . for such relief of the nature and kind following, as may be specified in the notice, and as the circumstances may require, that is to say, the determination without an administration of the estate or trust of any of the following questions or matters;" and among these is

"(*h*) the determination of any question arising in the administration of the estate or trust."

Rule 939 provides that where the notice is served by an executor or administrator or trustee, the person to be served with the notice

ONT.

S. C.

STOTHERS v. TORONTO GENERAL TRUSTS CO.

Meredith, C.J.O.

in the first instance, shall be, where it is served by an executor or administrator or trustee, in the case provided for by clause (*h*), the person or one of the persons whose rights or interests are sought to be affected.

Rule 940 provides that the Judge may direct such other persons to be served as may seem just.

I cannot agree with the contention of counsel for the appellants that service of a notice of motion was essential to give jurisdiction to deal with the case under these Rules; the thing to be done was to bring the motion before a competent tribunal, and the notice of motion was only the form by which that was to be accomplished; and, in my opinion, if the person who under the Rule is the person to be served is willing to waive that formality and to go before the Court in order that the motion may be made and dealt with, that course may properly be taken. It would be an extraordinary thing if, in the case of a trustee and a single *cestui que trust*, both of whom, in order to save expense or for any other reason, appear before a Judge and the motion is made to him, in their presence, any order that he makes is made without jurisdiction and is a void order.

The Rules provide (Rule 120) that all actions shall be commenced by the issue of a writ of summons. It would be a startling thing indeed if, although a writ had not been issued, the parties had delivered their pleadings and gone down to trial and judgment had been pronounced and entered, the judgment must be held to be void because the action had not been commenced by the issue of a writ of summons, and the Court which pronounced the judgment was therefore without jurisdiction, and yet that is what the result would be if the contention of the appellants is well-founded.

If I am right in this, the parties were properly before the Court, and it was for the Court to determine whether any other person ought to be served, and, if so, who. What was done was, though in form a direction that one of the municipal corporations should represent the others, in reality a determination by the Judge that the corporation which was before him sufficiently respresented the interests of all the corporations—as the cases of all of them were identical—and in effect a determination by the Court that it was not necessary that any other than the persons before him should be served. The case was, therefore, not one in which it was necessary to exercise the powers conferred by Rule

200—which was probably not applicable because the parties having the same interest were not "numerous" within the meaning of the Rule.

It ought, I think, to be presumed, in the absence of evidence to the contrary, that the fact that the Corporation of the Township of Ashfield had been appointed to represent the other corporations was communicated to those corporations; and, even if the order were to be considered as having been made as to them *ex parte*, they might have applied under Rule 358 to rescind it.

Rule 193 may also be referred to. It provides that "trustees . . . may sue and be sued on behalf of, or as representing, the property or estate of which they are trustees . . . without joining any of the persons beneficially interested, and shall represent them; but the Court or a Judge may, at any time, order any of them to be made parties in addition to, or in lieu of, the previous parties."

That the matter in controversy came within clause (*h*) of Rule 938 I have no doubt. The only right which the corporations had against the respondent was as *cestuis que trust* under the mortgage-deed. I have already said that, in my opinion, there was no contractual relation between them and the respondent; any contract there was, was with the railway company; but, when the bonds or the proceeds of them were handed over to the respondent, they became impressed with the trust which is declared by the mortgage-deed as to the application of them by the respondent.

If I am right thus far, it is unnecessary for the disposition of the appeal that the other contentions made before us should be dealt with; but, as the case is one of considerable importance and may go further, I will deal with them.

I am substantially in agreement with the reasons for the judgment of my brother Middleton, on which the order made by him was founded.

The mortgage-deed provides, as do the by-laws of the municipal corporations who are plaintiffs, that the railway company is to be entitled to be paid by the respondent, out of the money in its hands, the 90 per cent. of the face value of the progress certificates issued by the engineer and received by the trustee.

The parties appear not to have had in contemplation the possibility of certificates being issued for amounts aggregating a

ONT.
S. C.
STOTHERS
v.
TORONTO GENERAL TRUSTS CO.
Meredith, C.J.O.

sum, 90 per cent. of which would exhaust the whole trust-fund, even if all the bonds should be disposed of at par, but that happened, and there is nothing in the mortgage-deed which justifies the conclusion that the railway company was not entitled to be paid the full 90 per cent. of the aggregate amount of the progress certificates, even if the payments exhausted the whole fund in the hands of the respondent.

It was argued, as I have said, that the progress certificates upon which the payments were made were not progress certificates such as the mortgage-deed and the by-laws provide for; that they should have been issued either by an engineer appointed with the concurrence of the municipal corporations, or the inspecting engineer appointed by the Ontario Railway and Municipal Board, under the provisions of sec. 162 of the Ontario Railway Act, 1906.

I am of opinion that that contention is not well-founded, and that an inspecting engineer appointed by the railway company, as its chief engineer was, was "the inspecting engineer" within the meaning of the mortgage-deed and the by-laws. An engineer to inspect the works, i.e., the works of the railway company, was not appointed by the Ontario Railway and Municipal Board; and indeed those words are not applicable to an inspecting engineer appointed by the Board. The inspecting engineer to be appointed under sec. 152 is an officer of the Board; and it is, no doubt, his duty, when ordered by the Board to do so, to inspect a railway in the course of construction; but it is not for the purpose of enabling him to certify as the inspecting engineer mentioned in the mortgage-deed or by-laws is to certify, but to inspect in the public interest and for the public safety; to require the concurrence of the corporations with the appointment is to read into the instruments something that is not to be found in them, at all events in terms. The parties must be taken to have known what the usual course was as to the issuing of progress certificates, which is, that the engineer of the railway company is the person who issues them.

The Railway Act (sec. 145), dealing with the trusts upon which bonds of a municipal corporation issued for a bonus granted by it to a railway company are to be held and the proceeds of them dealt with, provides for the payment by the trustee on the certificate of the chief engineer of the railway company, in the form provided by schedule A, which is the form in which the progress

certificates were in this case issued. This shews at least that, in the view of the Legislature, there was no reason why the chief engineer of the railway company should not be entrusted with that duty.

The next question is whether the respondent was justified in paying to the company, as it did, out of the proceeds of the guaranteed bonds, two-thirds of 90 per cent. of the "face value" of the certificates, although none of the unguaranteed bonds had been sold.

If the contention of the appellants is well-founded, no payment could be made until the unguaranteed bonds had all been sold; and that cannot, I think, have been in the contemplation of the parties.

If the unguaranteed bonds had been sold at 10 per cent. of their par value, the result would have been that, instead of the railway company being entitled to be paid the $66\frac{2}{3}$ per cent. it has received, it would have been entitled to be paid 85 per cent. The respondent dealt with the fund in its hands on the same footing as it would have been bound to have dealt with it if the unguaranteed bonds had been sold at par, and in this the respondent certainly dealt out full justice to the municipal corporations.

If the appellants' contention were well-founded, it would have been practically impossible to have carried out the trusts reposed in the respondent. The unguaranteed bonds were not in its possession, and it had no duty with regard to them. They were in the hands of the railway company—see para. 2 of the mortgage-deed—the respondent had no means of knowing what disposition had been made of them, or whether or not they had been disposed of

It may be admitted that it is difficult to say what the exact meaning of the provision I am dealing with is; but I am of opinion that, in paying out of the proceeds of the guaranteed bonds two-thirds of 90 per cent. of the face value of the certificates, the respondent did not contravene it.

I am also of opinion that, even if the respondent was wrong in accepting certificates signed by the chief engineer, and in paying out the proceeds of the guaranteed bonds, including the 10 per cent., to the railway company, it is protected from liability by the terms of the mortgage-deed. As I have mentioned, it is provided in it that "the trustee shall not be responsible for any error or mistake made by it in good faith."

ONT.

S. C.

STOTHERS v. TORONTO GENERAL TRUSTS CO.

Meredith, C.J.O.

It is also provided (para. 14) that "the trustee shall be protected in acting upon any . . . certificate . . . believed by it to be genuine and to have been . . . signed by the proper party;" and that "the trustee shall not incur any liability or responsibility whatever in consequence of permitting . . . nor for any other account, matter or thing other than the wilful breach of the party of the second part hereto" (i.e. the trustee) "of the trusts hereby created."

It was contended by the respondent's counsel that, even if the respondent was, in the matters complained of, guilty of a breach of trust, and it is not protected from liability by the provisions of the mortgage-deed, it should be relieved from liability under the provisions of sec. 37 of the Trustee Act; that section empowers the Court to relieve from personal liability for a breach of trust a trustee if he has acted honestly and reasonably and ought fairly to be relieved.

These provisions should, in my opinion, be applied. That the trustee acted honestly is beyond question, and that it acted reasonably is also shewn. What it did was done on the advice of an experienced solicitor, and was also, in the view of an experienced Judge, what it was bound to do, and I cannot conceive how it can be said that the trustee did not act reasonably, and as to the money that was paid out after the order of my brother Middleton was made, it is an *à fortiori* case for the application of the section.

If it were necessary for its defence, the respondent is entitled to rely on the provisions of sec. 66 of the Trustee Act, or the provision corresponding to it in force when the application to my brother Middleton was made. That section enables a trustee to apply to the Court for its opinion, advice or direction "on any question respecting the management or administration of the trust property," and provides that the trustee "acting upon the opinion, advice or direction given, shall be deemed, so far as regards his own responsibility, to have discharged his duty as such trustee . . . in the subject-matter of the application, unless he has been guilty of some fraud, wilful concealment or misrepresentation in obtaining such opinion, advice or direction."

The order of my brother Middleton, if it were not supportable

as properly made under the originating notice Rules, may well be treated as if it had been made under this section.

I am also of opinion that the claim of the appellants is barred by the Statute of Limitations (R.S.O. 1914, ch. 75, sec. 47) as to all sums paid to the railway company more than 6 years before the date of the issue of the writ (14th November, 1914).

It is not necessary to say anything as to the $20,000 of unguaranteed bonds in the hands of the respondent, which, by the judgment in appeal, it was ordered to deliver to the appellant Stothers, as that part of the judgment is not the subject of an appeal by either party.

The claim of the appellants as to the interest mentioned in para. 11 of the statement of claim is, in my opinion, unfounded. As alleged in para. 10 of the statement of defence, the mortgage-deed makes no provision as to interest on the proceeds of the sale of the unguaranteed bonds. By an agreement between the respondent and the railway company, the respondent agreed to allow to the company interest at certain stated rates on the money which came to its hands while it remained there, and the respondent in pursuance of that agreement allowed and paid to the railway company the agreed interest except to the extent of the $317.96 which it has been, by the judgment in appeal, ordered to pay to the appellant Stothers. The appellant corporations had no right to this money. All that they had a right to have applied in the manner provided by the mortgage-deed was the proceeds of the sale or pledge of the bonds which they had guaranteed. This claim is an extraordinary one, in view of the fact that the amount of the interest that was paid to the railway company was used to pay interest on the guaranteed bonds, and therefore in ease of the municipal corporations which had guaranteed them.

If I had been of a different opinion as to the rights of the appellants, it would have been necessary to consider whether the relief claimed could properly be awarded in an action in which the assignee of the railway company is a party plaintiff. He has no higher rights than the railway company had, and it certainly had no right to complain of the application of money which itself had received.

I would, for these reasons, affirm the judgment appealed from and dismiss the appeal with costs.

ONT.

S. C.

STOTHERS v. TORONTO GENERAL TRUSTS CO.

Meredith, C.J.O.

Since the foregoing was written, I have had an opportunity of reading the opinion of my brother Hodgins, and desire to add a few words as to the question with which he first deals. His view seems to lead to the conclusion that, unless money had been obtained by the sale or pledge of the unguaranteed bonds, and was in the hands of the respondent, no payment whatever could be made out of the proceeds of the guaranteed bonds: that, I venture to think, cannot have been in the contemplation of the parties, and would have frustrated the object the corporations had in guaranteeing the bonds, of having the railway constructed. It also leads to the conclusion that, if the railway company had been able to secure, from some source other than the sale or pledge of the unguaranteed bonds, an amount equal to the face value of them, and had used it in the construction of the railway, no part of the proceeds of the sale of the guaranteed bonds could under any circumstances be paid over to the railway company. That appears to me—I say it with great respect—the *reductio ad absurdum*.

That that had actually happened appeared from the certificates of the engineer, for his certificates shewed that, in all, the materials and services had been provided and done to an amount 90 per cent. of which exceeded $600,000. It may be said that the certificates do not shew that all this had been paid for, but that is, I think, not material. The important thing that was shewn by the certificates was that materials and services to that amount had gone into the railway.

I apprehend that, if the contractor who constructed the railway had been willing to take the unguaranteed bonds at their face value in payment, or payment *pro tanto*, for what he had done, and was not paid for out of the proceeds of the guaranteed bonds, though technically it could not be said that the respondent had in its hands any proceeds of the sale or pledge of the unguaranteed bonds, that course might have been properly adopted. In substance the transaction was the same as if it had had them in hand and had paid them out on the certificate of the engineer.

Maclaren, J.A. Magee, J.A.

MACLAREN and MAGEE, JJ.A., agreed in the result.

Ferguson, J.A.

FERGUSON, J.A.:—This is an action for breach of trust. The trust-deed provides:—

"The trustee shall not be responsible for any error or mistake made by it in good faith."

"The trustee shall be protected in acting upon any . . . certificate . . . believed by it to be genuine and to have been . . . signed by the proper party."

"The trustee shall not incur any liability or responsibility whatever in consequence of permitting . . . nor for any other account, matter or thing other than the wilful breach of the party of the second part hereto" (the trustee) "of the trusts hereby created."

I am of opinion that, on the proper construction of these provisions, the plaintiffs cannot succeed unless they establish that the defendant did the acts complained of knowing that it was acting contrary to the terms of the trust. This, I think, the plaintiffs have failed to establish; and, on the contract made between the parties, the action must fail.

I am also of the opinion that, under the circumstances adduced in evidence, it must be found that the defendant acted in good faith, honestly, and reasonably, and is, outside of the provisions of the contract to which I have referred, entitled to the benefit, protection, and relief afforded by sec. 37 of the Trustee Act, R.S.O. 1914, ch. 121, which reads as follows:—

"37. If in any proceeding affecting a trustee or trust property it appears to the court that a trustee, or that any person who may be held to be fiduciarily responsible as a trustee, is or may be personally liable for any breach of trust whenever the transaction alleged or found to be a breach of trust occurred, but has acted honestly and reasonably, and ought fairly to be excused for the breach of trust, and for omitting to obtain the directions of the court in the matter in which he committed such breach, the court may relieve the trustee either wholly or partly from personal liability for the same."

I have, for these reasons, not considered it necessary to deal with the regularity and validity of the order of Mr. Justice Middleton, or with the issue raised as to the meaning of the third clause of the trust-deed dealing with the application of the mortgage moneys.

I would dismiss the appeal with costs.

ONT.

S. C.

STOTHERS v. TORONTO GENERAL TRUSTS CO.

Hodgins, J.A.

HODGINS, J.A.:—To my mind the proper meaning of the clause in the mortgage in question, No. 3, is that the proceeds of the guaranteed bonds, that is, the money derived from them, should only be paid out *pro ratâ* with the proceeds of the unguaranteed bonds, that is, the money derived from them. To construe it as meaning that the proceeds of the guaranteed bonds are to be paid out *pro ratâ* with a sum of money which did not then exist and has never existed, but merely represents the par value of worthless bonds, seems to me illusory and unjustified. The whole object of the elaborate scheme of bond guarantee and mortgage was that money should be raised from both classes of bonds, and that the money produced by the guarantee of the municipalities should go into the road proportionately with the amount of money which the road itself or its promoters raised from the unguaranteed bonds. In no other way would the railway be constructed or finished, and I should have imagined that that would have occurred to those concerned in making the payments.

Emphasis must be placed upon the word "proceeds." The proceeds of the sale or of the pledging of the unguaranteed bonds must, I think, necessarily mean the amount produced by them, and that is the basis which fixes the proportion of the *pro ratâ* advances.

The construction urged by the respondent, which apparently is what has been acted upon, is that the words "the proceeds of the sale or pledge of the other bonds" do not mean the money derived from them, but rather the face value of the bonds irrespective of whether they produced any proceeds or not. I cannot—with very great respect to those who have a contrary opinion—bring myself to adopt that view of the clause in question. And, subject to what may have to be said of the subsequent proceedings, I think the respondent, as trustee, was entirely unjustified in assuming that the moneys required for the construction of the road, and to be advanced proportionately with that to be derived from another source, could be validly expended in the proportion indicated, when as a matter of fact there were no other moneys to settle what that proportion was.

The face value of the bonds does not seem to me to be an element either within the words of clause 3 or the scheme of the financial operation, and the results are what one might expect.

It is a pity that Mr. Garrow's written argument directed to this point was dismissed without attention being paid to his very practical suggestion that it was the duty of the trustee to get exact information as to the "proceeds" of the unguaranteed bonds. I also find it difficult to understand the remark of Middleton, J., which closes his opinion in *Re Ontario and West Shore R. Co.*, 2 O.W.N. 1041, 1043: "I cannot think that the proceeds of the guaranteed issue is to be compared with the face value of the unguaranteed bonds, and this is not stipulated." The exact opposite was Mr. Garrow's contention—that "the proceeds of the guaranteed bonds are to be paid out, not *pro ratâ* with the unguaranteed bonds (i. e., upon their full face value), but *pro ratâ* with the proceeds of the sale or pledge of them, which is a totally different thing." It is to be greatly regretted that this new point, which is now the principal one, should have been raised after the argument of the motion had taken place and in such a way as to lead it to be treated as comparatively unimportant. This is especially so, as the order, when taken out, validated all previous payments, upon the basis of this view of Mr. Garrow's point, though not included in the application or argument, as is indicated by the learned Judge's reasons for judgment in 2 O.W.N. 1041.

Another point: The wording of clause 3 has not been followed in a further respect, as in my judgment it ought to have been. The clause speaks of the progress certificates, "which are to be issued for amounts from time to time not exceeding 90 per cent. of such services or materials as are certified to by the engineer appointed to inspect the said works and *pro ratâ* as aforesaid." That seems to indicate that in the first place the engineer has to certify to services and materials, and then he has to issue progress certificates in amounts not exceeding 90 per cent. of what he determines and states to be the then value, and thereafter the trustee shall pay out to the extent of the face value but only *pro ratâ* as aforesaid. This part has been taken as meaning that the trustee is to pay a fixed proportion of 66 per cent. of 90 per cent. of the face value of the certificates, and may ignore any change brought about by sale or disposal of the other bonds. This view has been pushed to the extent of requiring the trustee to retain no balance in hand at all, although the section goes on to

ONT.

S. C.

STOTHERS v. TORONTO GENERAL TRUSTS CO.

Hodgins, J.A.

provide that the balance shall be paid only *after the completion of the railway*. It seems a reasonable meaning to give to the clause that, while the certificates as to the value of the services and materials may state their value at 100 per cent., the progress certificates must not exceed 90 per cent. thereof, and that 90 per cent. is to be paid on the *pro ratâ* basis, partly from the guaranteed and partly from the unguaranteed bonds, so that there will be always in hand a balance of 10 per cent. of the value of the services and materials as certified to. The payments made seem to be based first upon the assumption that there are proceeds from the unguaranteed bonds, and that payments are being made out of those proceeds, and then upon the assumption that the road will be finished from the same source. The result is what might have been foreseen—the road unfinished and useless and the whole cash proceeds expended, notwithstanding that 10 per cent. was directed to be retained until the road or section was opened, and that each certificate was intended to be discharged by two proportionate sums and not part of it only by one sum.

I therefore totally disagree with the meaning attached to clause 3 in the order referred to.

But, notwithstanding what may or may not be the proper meaning of clause 3, it is said that the order of Middleton, J., already referred to, construing this clause, is binding and conclusive, and that all that has been done is justified by that order. While my view as to the meaning of the clause and the plain duty of the trustee may be different from what is stated therein, the order is one whose bearing needs very careful consideration. It is dated the 13th April, 1911, and is as follows:—

"1. This Court doth declare that, upon the Toronto General Trusts Corporation, trustee under the said mortgage, receiving from time to time progress certificates of the chief engineer of the said railway company, in the form filed herein, certifying to 90 per cent. of the value of services and materials done or supplied in the construction of the said railway to the date of such certificates, it is the duty of the said the Toronto General Trusts Corporation, in every such case, to pay to the said railway company out of the moneys in its hands, proceeds of the sale of the guaranteed bonds in the third paragraph of the said mortgage mentioned, two-thirds of the said 90 per cent. set out in such progress certificates so issued

and delivered to the said corporation, and that it is the duty of the said the Toronto General Trusts Corporation to make payments from time to time, notwithstanding that the said moneys in its hands, proceeds of the sale of the said guaranteed bonds, may, by payments made in accordance with such certificates, be wholly exhausted before the completion and opening of the said line of railway; and that all payments heretofore made by the said the Toronto General Trusts Corporation to the extent of two-thirds of 90 per cent. of the amount set out in the certificates of the said engineer, issued and delivered to them, have been properly made by the said the Toronto General Trusts Corporation in accordance with the terms of the said mortgage, and doth order and adjudge the same accordingly."

It will be observed that the order purports in so many words to lay down the duty of the trustee and to say that such duty is to pay two-thirds of the 90 per cent. set out in the progress certificates, and that it is the further duty of the corporation to make these payments from time to time, notwithstanding that they may exhaust the moneys derived from the sale of the guaranteed bonds before the completion and opening of the line of railway, and that it validates all payments made upon that basis previous to the date of the order.

I venture to think that there was not jurisdiction to make the last part of the order. The trustee had apparently made payments on its own unaided view of the construction of the mortgage-deed and of the clause in question, and it came into Court only on an application for relief of the nature and kind provided for by Rule 938 as to two specific matters set out in 2 O.W.N. 104. I am unable to find in that Rule any warrant for the determination of a question of liability as between the trustee and those interested, arising upon what had previously occurred. If there was liability, it had already accrued and could not be relieved against. What had been done had taken place without the sanction of the Court, no doubt upon the advice of counsel for the trustee, but with full notice that the municipalities feared that there were no proceeds from the unguaranteed bonds (letter Dickinson & Garrow to trustee, Nov. 20, '08). In fairness to the respondent it should be stated that in reply to that letter it stated that it was paying 66 per cent. of the amount of the cer-

ONT.

S. C.

STOTHERS v. TORONTO GENERAL TRUSTS CO.

Hodgins, J.A.

tificates "being the share of the guaranteed bonds," to which the solicitor for Goderich made no reply. The trustee was entitled to whatever protection was afforded by law at that time; but the Rule was not intended to cover, and in my judgment does not cover, the settlement *ex post facto* of the responsibility or liability of the trustee originating in past transactions giving rise to rights or claims.

Of course if the order is right in its construction of clause 3 of the mortgage, this objection loses its weight, for then what the trustee did was correct, and it is not necessary for it to rely upon the order to justify it.

As to that part of the order itself which deals with the 10 per cent. and with the status of the engineer, if the parties who applied were *cestuis que trust* under a deed or instrument, then Rule 938 would apply. I think the Ontario West Shore Railway Company did occupy that position, and had the right to apply for the construction of the mortgage or trust-deed or that part of it which dealt with the payment out of moneys received from the sale of the bonds for which the mortgage was the security, and then remaining in the hands of the trustee. I think the order is correct in its interpretation as to the engineer, so far as it was necessary to determine it in regard to the disposition of the 10 per cent. It was contended, however, that the appellants were mere guarantors and not beneficiaries under the trust-deed, and so were unaffected by the order. If so, I fail to see any theory on which the appellants are entitled to recover against the respondent. The appellant Stothers represents the railway company, to which all the moneys were paid, and which fraudulently obtained and misapplied them. He cannot have any claim based upon a state of facts such as that.

The municipalities passed by-laws and guaranteed payment of the bonds and interest to aid the railway company in disposing of the bonds, but the guarantee was given to outsiders who might acquire the bonds. They agreed that those bonds were to be handed over to the respondent to be sold or disposed of by it or by the railway company, and the proceeds were to be dealt with between the railway company and the respondent in a way then agreed upon by them. They parted with their guarantee, intending it to be acted upon and operative before any moneys reached

the respondent's hands as trustee. If the trustee negligently or wrongly handed over the proceeds, then, unless there is some agreement in the mortgage, some contract with or some trusteeship for them in the mortgage-deed, I cannot see how they can call the respondent to account as trustee. The right, if any, does not arise out of the guarantee as such: that had been properly handed over to the purchasers of the bonds when they acquired them, and so the municipalities are liable just as they intended to be and no more. They suffer because, after they became liable, the proceeds were applied not as intended, but in a way which landed the whole enterprise in disaster. They have to pay, but only what they agreed to pay, and their grievance is that they have got no railway as security for what they have to pay. But, unless the trustee became their trustee as to the proceeds, no right to look to the trustee arises. I think, however, the municipalities have an interest under the mortgage-deed that enables them to maintain this action. Clause 3 of the mortgage-deed begins thus: "As to certain of the bonds hereby secured, which have been or may hereafter be guaranteed by certain municipalities in the said counties or some of them it is hereby stipulated and agreed, *for the purpose of securing the said municipalities*, as follows." (Then follows the provision as to *pro ratâ* payments etc.)

This agreement, binding upon the trustee, while made with the Ontario West Shore Railway Company, is clearly for the benefit of the municipalities. and is so expressed. It gives them the right to have the stipulation enforced or to get damages by way of an account if it is disregarded. It deals with property, the proceeds of the guaranteed bonds, which proceeds are clearly bound for the benefit of the municipalities by the terms of the stipulation for their protection, which the respondent was bound to carry out.

This was the term upon which the trust arose as to these proceeds, namely, that they should be parted with only in a specific way. The carrying out of this term was in fact needed to secure the municipalities, and in law it was attached to the moneys when they reached the hands of the respondent as trustee. The by-laws purport to make this provision a condition attached to the proceeds when paid to the trustee, and the statute 9 Edw. VII. ch. 139 recites that the mortgage was, before its execution, approved by the various municipalities. The mortgage states that the trustee

ONT.

S. C.

STOTHERS v. TORONTO GENERAL TRUSTS CO.

Hodgins, J.A.

accepted the trusts created by the mortgage and agreed to "exercise the powers and duties herein set out to the best of its ability." This stipulation creates, in my judgment, a right which "may be conferred by way of property, as, for example, under a trust," though it "cannot be conferred on a stranger to a contract as a right to enforce the contract *in personam*:" *per* Lord Haldane, L.C., in *Dunlop Pneumatic Tyre Co. Limited* v. *Selfridge and Co. Limited*, [1915] A.C. 847, 853.

"If the contract, although in form it is with A., is intended to secure a benefit to B., so that B. is entitled to say he has a beneficial right as *cestui qui trust* under that contract; then B. would, in a Court of Equity, be allowed to insist upon and enforce the contract:" *per* Cotton, L.J., in *Gandy* v. *Gandy* (1885), 30 Ch.D. 57, at p. 67.

In *Page* v. *Cox* (1851), 10 Hare 163, at p. 168, Turner, V.-C., states in words applicable here the effect of a clause in a partnership agreement that the vendor might, if she should think fit, buy her husband's share and continue the business: "The effect of the clause cannot, I think, be stated lower than that it was an agreement by both parties, that, upon the death of either of them, his share should be dealt with according to the provisions which the clause contains;" and that learned Judge held it to be enforceable by the widow.

Referring to *Gregory* v. *Williams* (1817), 3 Mer. 582, where the agreement was to pay out of property, Jessel, M.R., in *Re Empress Engineering Co.* (1880), 16 Ch.D. 125, says (p. 129): "One of the parties to the agreement may constitute himself a trustee of the property for the benefit of the third party."

The result of this conclusion is, that the order in question is and ought to be binding upon those municipalities which were actually or legally represented before the Court in regard to those questions which could properly arise upon the motion made, provided the order rests upon a proper foundation.

On the question of practice as to the effect of the absence of a notice of motion, which is said to involve the total invalidity of the order, reliance is put upon the maxim *Omnia præsumuntur rite esse acta*. I find in the evidence an absence of proof that no notice of motion was served upon any one, and I think the maxim just referred to may and should be acted on by this Court in dealing with the matter.

But I must not be understood as agreeing with the argument that a notice of motion is a matter of no consequence, or that its absence, if proved, might not result in undermining an order made if the action or matter had not been properly initiated and brought into Court. Under the Judicature Act then in force, R.S.O. 1897, ch. 51, sec. 122, the Judges are given power to make Rules for regulating the pleadings, practice, and procedure in the High Court of Justice and in the Court of Appeal, and it is provided by sec. 122, sub-sec. 4, that all Rules of Court, after they come into operation, shall regulate all matters to which they extend, until annulled or altered.

By sec. 129, the Consolidated Rules of Practice and Procedure are declared to be valid as if contained in an Act of the Legislature.

Rule 938 provides that those entitled to move may serve a notice of motion returnable before a Judge of the High Court either in Court or Chambers, as the case may be, for such relief of the nature or kind following *as may be specified in the notice*, and as the circumstances of the case may require, in any of the following matters or questions. Then follow certain descriptions of matters or questions, some of which are:—

(*a*) Any question affecting the rights or interests of the person claiming to be a 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 section 37 of the Act respecting Trustees and Executors and the Administration of Estates.

(*h*) The determination of any question arising in the administration of the estate or trust.

Under Rule 356, when any person other than the applicant is entitled to be heard upon a motion, he shall be served with a notice thereof.

By Rule 524 it is provided that affidavits upon which a notice of motion or petition is founded shall be filed before the service of the notice of motion or petition.

Rule 120 says that all actions shall be commenced by the issue of a writ of summons, which shall be prepared by the plaintiff, and shall contain the names of the parties and the characters in which they sue and are sued, the office for appearance, and a short statement of the claim.

ONT.

S. C.

STOTHERS v. TORONTO GENERAL TRUSTS CO.

Hodgins, J.A.

By Rule 132 the writ shall be in force for 12 months from the date thereof.

The Rules following 132 contain very detailed provisions for various endorsements such as the address of the plaintiff, the name of the solicitor, etc., and elaborate directions for the service of the writ.

I am not prepared to go the length of saying that an action can be begun without the issue of a writ, or, where it is allowed by notice of motion, without the service of any such notice. The Rules say distinctly the contrary; and, as the Rules have the force of law, it would seem to me to be ignoring instead of interpreting them so to decide.

To hold that an action which the Rules require to be commenced by a writ of summons or notice of motion may be initiated by an informal interview with a Judge in his Chambers, and a request that he adjudicate upon something which may or may not be set out in any formal way, would be to wipe out our present body of Rules. If the Rule requiring in the most positive terms an action to be commenced by a writ of summons can be entirely disregarded, so can the Rule requiring pleadings to be delivered, and, as well, any other Rule.

"Action" is defined in the Judicature Act, R.S.O. 1897, ch. 51, sec. 2 (3), as meaning *a civil proceeding commenced by writ*, and that has been held to include proceedings commenced by notice of motion under Rules 938 *et seq.* But it has not yet been determined that it includes a civil proceeding begun by consent and of an entirely informal character and initiated in a way which is not that laid down by the Rules.

It is for these reasons that, in regard to this order, I prefer to rest my conclusions upon the fact that, failing actual affirmative proof, the presumption of law is that the proceedings were properly commenced. Assuming, therefore, the valid status of this order, how does it stand as to those now appealing to this Court?

The order recites that the Court ordered that the Township of Ashfield do represent for the purposes of the said application the Township of Huron and the Town of Kincardine. The Township of Ashfield was before the Judge, and also the Town of Goderich, both of them being recited as having appeared by counsel.

What were the purposes of the application? The evidence

at the trial and the affidavit of Moyes make it quite clear that all that was before the learned Judge was the question of the 10 per cent. held back, whether it could be paid out, as the other 90 per cent. had been, upon the engineer's certificate, and the status of the engineer.

This he heard argument upon and reserved judgment. That was what the order of representation dealt with, and that alone. After the argument, Mr. Garrow, for the Town of Goderich, heard of the application and sent in a written argument dealing with the application and raising a new point not previously brought up and not argued, the last question by the way that the Ontario West Shore Railway Company would wish to raise, as it had got all there was except the 10 per cent. This is dealt with as a new question by the learned Judge (see 2 O.W.N. at p. 1043) and as one arising after the argument.

As to that question, no representation order was made, nor indeed is there any evidence that the Township of Ashfield or its solicitor knew that the point was up or learned of it afterwards. The order then, as to that question, binds neither Huron nor Kincardine, but it does bind Goderich, for the latter, having raised the point, apparently acquiesced in its disposition. I have some doubt as to whether it binds Ashfield on this particular matter; but I think, in the absence of affirmative evidence that the solicitor for that township was not informed that this point was raised and determined, that the order must govern. It would have been easy to have satisfied the Court that the solicitor had in fact no knowledge, but the appellants refrained from clearing up the doubt.

But I do not wish my judgment to depend wholly upon such a narrow ground. The Rules permitting an adjudication without direct notice to the parties affected are limited.

By Rule 200, in any action where there are numerous parties having the same interest, one or more of such parties may sue or be sued, or may be authorised by the Court to defend on behalf and for the benefit of all parties so interested.

Rule 193 provides that trustees may sue and be sued on behalf or or as representing the property or estate of which they are trustees, without joining any of the persons beneficially interested, and shall represent them; but the Court or a Judge may, at any

ONT.

S. C.

STOTHERS v. TORONTO GENERAL TRUSTS CO.

Hodgins, J.A.

time, order any of them to be made parties in addition to, or in lieu of, the previous parties.

Clearly neither of these Rules applies (*Re Braybrook* (1916), 60 Sol. J. 307); but, if Rule 193 could be invoked, can the order of representation be justified on the ground that the Judge, having by that Rule the right to add parties, or by Rule 940 or any other order the right to direct what other person should be served, treated the order as if he thought no one but the Township of Ashfield was a necessary or proper party? To direct the representation of certain parties by another party is not equivalent to a determination that they are not interested, but the reverse; and, if interested, then they cannot be deprived of their right, without notice or proper representation.

I do not think this Court can treat the order as meaning anything except what its plain language says, and that is representation, which, if properly done, involves all the consequences of actual appearance: Holmested's Judicature Act, 4th ed., p. 439. As I have pointed out, the representation here was illusory as to what appears now to be the main question at issue. I think that part of the order is without legal foundation under any of our Rules, and that Huron and Kincardine are not bound by the order of representation.

I should be glad if I could come to the conclusion that the trustee was absolved by the subsequent provisions of the mortgage-deed. By them, the trustee is not to be made responsible for any error or mistake made by it in good faith, nor is it to incur any liability or responsibility except for wilful breach of the trusts created by the deed.

If the municipalities are entitled to enforce the trust in their favour, they must be bound by these provisions. But, as I view the position of the trustee, it failed to carry out the trust according to its terms, and did so wilfully, in the sense that, having had its attention called to the exact phraseology of the clause, it decided to ignore its plain meaning. The trustee did this with its eyes open and upon its solicitor's advice that it could pay out without regard to whether the unsecured bonds were sold or not or applied in payment of the construction of the road, and the word "wilful" does not necessarily import blind determination but rather clear and definite resolve. "It amounts to nothing more than this,

that he knows what he is doing and intends to do what he is doing, and is a free agent:" *per* Bowen, L.J., in *Re Young and Harston's Contract* (1885), 31 Ch. D. 168, 175.

The error into which the trustee fell, and, judging from the order, in very good company, was due, I think, to a total disregard of the duty of the trustee in relation to the municipalities, based on the idea that no such duty existed. The trustee made no inquiries whatever as to the unguaranteed bonds, their sale or their proceeds, and none as to the actual construction of the road. See *Re Brookes*, [1914] 1 Ch. 558. The trustee proceeded, with due caution, upon the dry legal road of its mortgage-deed, and, in my humble judgment, mistook the path.

I grant the trustee's good faith, but ignoring the plain words of the trust is not, I think, to be classed as an error or mistake which good faith condones.

I agree in the conclusions on this point of the Court of Appeal in *Whicher* v. *National Trust Co.* (1910), 22 O.L.R. 460, which in the Privy Council was reversed upon the facts of the case without any opinion being expressed upon this point. So far as the Trustee Act is concerned, I am unable to come to the conclusion that the respondent acted reasonably, and I have given my reasons therefor. Consequently, sec. 37 cannot be applied. "It would be a dangerous doctrine to enable a well-meaning trustee, simply by the exercise of his honest and reasonable judgment as to the construction of the terms of his trust, to deprive one man of his fortune and hand it to another:" *per* Magee, J.A., in the *Whicher* case, at p. 483. As to sec. 66, in so far as the respondent acted thereafter under the order in question, I think it is protected, but advice under that section cannot have a retrospective effect.

The interest allowed by the respondent is not within the terms of clause 3, and its payment can form no part of the claim against it.

As to the municipalities of Huron and Kincardine, recovery can be had of the damage they sustained by the course pursued by the respondent, wholly unaffected by the order. As to Ashfield, it must be held to be bound by the terms of the order, for the reasons I have already given.

The judgment in appeal should be affirmed as to the appellants other than Huron and Kincardine, without costs, while the successful appellants should have one-half of the costs of action and of

ONT.

S. C.

STOTHERS v. TORONTO GENERAL TRUSTS CO.

Hodgins, J.A.

this appeal, which as to them should be allowed. They appear by the same solicitor as the other appellants, so that the costs should be divided as I have mentioned. The damages must be referred to the Master at the point most convenient to the appellants Huron and Kincardine, and if they cannot agree this should be determined by the Court.

It is impossible to part with the case without drawing attention to the apparent ease with which one man was enabled to extract from the source provided by the municipalities the whole amount raised. Whether the municipalities through whose territory the road was being built were asleep or not, does not appear. The respondent admits that it made no inquiry as to the fate of the unguaranteed bonds nor as to their proceeds, notwithstanding that that point was mentioned as one of the bases of the proportionate payments, nor as to whether the road was being built or not. The provision in the mortgage contained the same "joker" that wrecked the Grand Valley Railway Company by enabling bonds to be signed to the extent of $15,000 per mile of single track "now or hereafter constructed or *under contract to be constructed*." This latter phrase enabled a dummy company to make a contract with the railway company to construct 40 miles, and thus authorised bonds to be issued for $600,000 in advance of the doing of any work or construction, which it was intended should form the foundation for the security. I think trust companies should scrutinise the Acts authorising a bond issue, and refuse to act as trustees when the terms of the trust they accept permit the construction contract to be in the hands of a promoter who can nominate and pay the so-called chief engineer. Such a device can well wreck the whole enterprise, and trustees acting in such a matter should, for their own sake, if not for that of others, insist upon a proper construction company, an independent engineer, and a real acquaintance with the financial methods of those spending the money.

Appeal dismissed (HODGINS, J.A., *dissenting in part*).

THE KING v. BOARD OF COMMISSIONERS OF PUBLIC UTILITIES; Ex parte TOWN OF MILLTOWN.

N. B.

S. C.

New Brunswick Supreme Court, Appeal Division, Hazen, C.J., McKeown, C.J.K.B.D., and Grimmer, J. April 17, 1919.

1. CONTRACTS (§ III C—249)—FOR TERM OF YEARS—EXPIRATION OF TIME—NO NEW CONTRACT—CONTINUATION UNDER TERMS OF OLD CONTRACT—RENEWAL FROM YEAR TO YEAR OR MONTH TO MONTH.

A contract for the supply of water was entered into in 1886 to extend over a period of 20 years with right of renewal. At the end of that period no new contract was entered into, but the company continued to supply water at the old rate, and no effort was made to secure a renewal of the contract. *Held*, that the contract had not been renewed for a period of twenty years and at the most the supplying fo water under the original conditions and at the original rates could not be construed as anything more than a renewal of the contract from year to year or possibly only from month to month.

2. PUBLIC UTILITY COMMISSION (§ I—1)—JURISDICTION TO FIX WATER RATES AND REVISE SCHEDULES OF WATER COMPANIES.

The Board of Public Utility Commissioners in New Brunswick has jurisdiction over the water rates to be charged in the towns notwithstanding existing contracts for the supply of water to such towns, and where a company is not otherwise prevented from filing a new schedule of rates, it may do so on 30 days' notice to the Board and the Board may approve of such rates and order them to be effective or the public utility may itself make the application to fix the rate.

Statement.

THE Attorney-General, for the Board of Public Utilities, shews cause against a rule *nisi* to quash an order made by the Board of Commissioners on October 1, 1918, and a judgment of October 21, 1918, on an application of the Calais Water & Power Co., whereby a schedule of rates for water supplied the Town of Milltown by the said Calais Water & Power Co., was approved and ordered to be effective from October 1, 1918.

M. N. Cockburn, K.C., *M. G. Teed*, K.C., and *H. H. Murchie*, of the Maine bar, for Calais Water & Power Co.

W. P. Jones, K.C., and *N. M. Mills*, support rule.

The judgment of the court was delivered by

Grimmer, J.

GRIMMER, J.:—This case arises out of an application made by the Calais Water & Power Co. to the Board of Commissioners of Public Utilities for the approval of a new schedule of water rates for the Town of Milltown, and rules and regulations governing the same. The new schedule was filed with the Board on May 15, 1918, to become effective on July 1 following, and on May 17 the water company duly petitioned the said Board for the consideration and approval thereof. A time was fixed and a court was held on June 19, 1918, at which all the parties in interest were present or represented. After hearing all the evidence offered, and having considered the same, on October 21

N. B.

S. C.

THE KING v. BOARD OF COMMISSIONERS OF PUBLIC UTILITIES; EX P. TOWN OF MILLTOWN.

Grimmer, J.

last the Board gave judgment substantially approving the proposed new schedule and rules and regulations, and an order was made approving and ordaining a schedule of rates for the said Town of Milltown to be effective from October 1, 1918, and until further order of the Board altering or amending the same. On November 22 last, on the application of the said Town of Milltown, a writ of *certiorari* was granted by this court to bring up the said judgment and the proceedings upon which the same was founded, with a view to modifying, varying, or reversing the same.

From the evidence submitted to the Board at its hearing it appears that the first companies to supply water in what are known as the border towns of the County of Charlotte, including therein the Town of Milltown, were the St. Croix Electric Light & Water Co., incorporated in New Brunswick in 1886, and the Calais Water Co., incorporated in the State of Maine, United States of America, in 1887. The rights of both these companies were afterwards acquired by the Maine Water Power Co., the first by lease and the second by purchase. The Calais Water Power Co. was incorporated under the laws of the said State of Maine in the year 1917, and in this province in the same year, and under authority of the Act of the legislature of this province by deed dated March 9, 1918, purchased from the said Maine Water Co., the Calais Water Co. and the St. Croix Electric Light & Water Co., all the plant, franchises and other property of these companies. By an agreement made and entered into by and between the said Town of Milltown and the St. Croix Electric Light & Water Co. on May 25, 1886, provision was made for the supplying of water to the said Town of Milltown by the said St. Croix Electric Light & Water Co. The agreement was to run for the period of 20 years from the date thereof, with right of renewal for a like term, and the water which was to be supplied to the said town was to be taken from the St. Croix River at or near the upper bridge between the towns of Milltown and Calais. Subsequently, however, owing to pollution of the river by waste from a paper mill erected above the said source of supply the river had to be abandoned, and other supply furnished. The same was obtained by the water company from the Town of St. Stephen, which had installed and was operating

a water plant of its own. Notwithstanding the changes which have taken place in the ownership of the plant of the first water companies spoken of, water has been continuously supplied to the said Town of Milltown under the agreement which has been referred to and under a schedule of rates which was adopted by the water company at the time of the making of the agreement, and which has continued in force until the filing of the new schedule which was approved as aforesaid by the said Board. The writ of *certiorari* was granted upon the following grounds:—

1. That the Board has no jurisdiction in the matter because the application to fix the rate was made by the public utility itself, and it cannot do so except upon the complaint of a person aggrieved or a consumer.

2. That the Board has no jurisdiction over water rates in the Town of Milltown, by reason of existing contracts with the town.

3. That the schedule of rates ordered and approved by the Board is unreasonable and excessive, and is such as will produce a revenue greater than an amount sufficient to provide a depreciation fund, an allowance for ordinary and increased operating expenses, and a fair and reasonable return on the investment in the utility.

4. That the provision relating to the "extension of water main" and the rules and regulations approved by the Board are objectionable, unreasonable and oppressive.

5. That the amount upon which the Board decided that the company is entitled to a reasonable return is excessive and unjust as against the Town of Milltown and its inhabitants, and is not warranted by the evidence.

6. That the Board was in error in finding that the contract for water dated May 25, 1886, and made between the purchasers of the utility and the Town of Milltown had not been renewed and is not now in force.

7. That the Board was in error in finding that said contract had expired after the Board had been created.

8. That the Board was in error in finding that even if such contract had been renewed and in force, that it had power and authority to abrogate and modify said contract and order rates other than those stated in the contract.

N. B.

S. C.

THE KING v. BOARD OF COMMISSIONERS OF PUBLIC UTILITIES; EX P. TOWN OF MILLTOWN.

Grimmer, J.

9. That the evidence before the Board does not justify the Board in finding that the utility was not negligent,—(a) In not taking legal action to prevent the pollution of the source of its water supply, or in not taking action for damages for such pollution. (b) In not taking legal action to compel the Town of St. Stephen to continue supplying it with water at $24 per million gallons in accordance with the terms of its contract with the Town of St. Stephen. (c) In not extending its pipe line to Howard Lake. (d) In not accepting the offer of water from the Town of St. Stephen at $40 per million gallons.

10. That the evidence given before the Board does not warrant the finding made.

The Board of Public Utility Commissioners in this province was established by the Act of the Legislature 10 Edw. VII, c. 5, s. 7 of which provides:—

> The Board shall have the general supervision of all public utilities, and shall make all necessary examinations and inquiries and keep itself informed as to the compliance by the said public utilities with the provisions of this law.

S. 8 provides that on or before a date fixed by the Board every public utility shall file with it schedules which shall be open to inspection, showing all rates, tolls and charges which it has established and which are established at the time for any service performed by said public utility within the Province; also that until such schedules are filed all rates, tolls and charges shall not exceed those charged at the time of the passing of this Act.

S. 9 is as follows:—

> No change shall after the passing of said schedules be made in any of the rates, tolls or charges, except upon thirty days' notice to the Board, and all such changes shall be plainly indicated upon existing schedules or by filing new schedules in lieu thereof 30 days prior to the time the same are to take effect, provided that the Board upon the application of any public utility may prescribe a less time within which a reduction may be made, or within which additions may be made to such schedules in respect to services for which no rates, tolls or charges are thereby provided.

To my mind these sections of the Act fully establish the jurisdiction of the Board to deal with this matter, and its powers and authorities, in my opinion, are not limited to a complaint being made by a person aggrieved or by a consumer, as was strongly contended before this court, but the company,

unless otherwise prevented, may at any time, by giving 30 days' notice to the Board, and by filing a new schedule of rates with the Board, bring into effect an entirely new schedule of rates, the same, however, to be subject to the approval of the said Board. This disposes of grounds 1 and 8, upon which the rule was granted.

Grounds numbers 2 and 6 may be considered together. From the evidence, as has been stated, it appears a contract for the supply of water to the town was entered into in 1886, to extend over a period of 20 years, with right of renewal. At the expiration of that period, which occurred in May, 1906, no new contract was entered into between the town and water company, but the company continued to supply water to the said town at the old rates, and no effort appears to have been made by the said town at any time to secure a renewal of the contract. The Board decided that the contract had not been renewed for a period of twenty years, as was claimed on behalf of the town, and at the most the supplying of water under the original conditions and at the rates provided in the original contract could not be construed as anything more than a renewal of the contract from year to year, possibly only from month to month.

In this finding of the Board I concur. Applying to the contract, as I think we may very properly do, the principles of the law governing leases and the renewals thereof, I find it has for years been well recognized law that if a tenant for years holds on after the expiration of his lease, or continues in possession pending a treaty for a further lease, or is admitted into possession pending a treaty for a further lease, he is strictly a tenant at the will of the landlord, and may be turned out of possession without notice to quit. But if, during the continuance of such tenancy at will, the tenant has offered and the landlord has accepted rent for the use of the property, the law infers that a yearly tenancy was meant to be created between them. *Clayton* v. *Blakey* (1798), 8 T.R. 3, 101 E.R. 1234; *City of St. John* v. *Sears* (1889), 28 N.B.R. 1. Whether, however, the tenancy becomes from year to year or month to month is a question of fact or a matter of evidence rather than law, the payment of monthly or yearly rent being an important circumstance, some-

N. B.

S. C.

THE KING v. BOARD OF COMMISSIONERS OF PUBLIC UTILITIES; EX P. TOWN OF MILLTOWN.

Grimmer, J.

times decisive. *Mayor of Thetford* v. *Tyler* (1845), 8 Q.B. 95, 115 E.R. 810. Usually a tenant for month or months holding over becomes a tenant from month to month. If these principles, therefore, may be applied to this contract, can the conduct of the defendant at and after the termination thereof, hereinbefore referred to, be reasonably considered such as would lead to a renewal of the contract for 20 years upon the terms of the original agreement. As stated, I agree with the Board that it can not. The very most that could be successfully claimed is that the contract after its expiration became one from year to year, so that at the time of the filing of the new schedule of rates referred to there was no existing contract between the said Town of Milltown and the company, whereby the jurisdiction of the Board was ousted.

A matter of considerable importance in respect to the claim of the town as to the renewal of the contract with the water company and their contention in respect thereto, should not be overlooked, and arises out of art. 11 of the contract, under which the company agreed to furnish water in the town for municipal buildings, public libraries, school houses, churches, factories and engine houses along the line of its pipes, for sprinkling streets with watering carts, and one display fountain for not more than 6 months in the year, for four public drinking places for man and beast, and for flushing sewers without charge, the town agreeing that the water so furnished should be received in lieu of all taxes imposed by the said town upon the property of the said company within the town, and in full consideration and payment for all such taxes. Yet notwithstanding the fact that the company had, during all the time of the existence of the contract, and up to the date of the filing of the new schedule of rates carried out in full the provisions of this contract, during the year 1918 the said town assessed the property of the company within the said town and collected taxes thereon from the said company. It is hard to reconcile the contention of the company that the contract was renewed under these conditions, as they clearly by imposing taxes either recognize there was no existing contract for the supply of water by the company or else they deliberately violated

the agreement provided for in art. 11 of the contract. These two grounds of objection, therefore, fail.

In respect to grounds 3, 4 and 5, I am of opinion that the matters therein referred to were purely matters of fact upon which the Board had full jurisdiction to find, and having heard the evidence, having examined the same and arrived at the conclusion that they did, there is in my opinion sufficient evidence to support their finding and the same should not be interfered with.

I fully recognize the right of this court to examine and pass upon the evidence in the same manner and to the same extent as has been done by the Board and make its own finding thereon, but having examined the evidence produced before and submitted to the Board, I see no reason for altering the decision reached by it.

The seventh ground it seems to me does not in any way affect the merits of this case, and even if the Board was in error in finding that the said contract had expired after the Board had been created, it would not, in any way, invalidate or render void the judgment or conclusions at which the Board arrived.

In respect to the ninth ground, art. 4 of the agreement provides:—

> The said company agrees that the water shall be pumped by steam force pumps with two boilers of a combined capacity of not less than 3,000,000 United States gallons in 24 hours, said pumps being the property of the Calais Water Co. and operated under contract with said Calais Water Co. for such purposes. In case of declaration of war between the United States of America and Great Britain or Canada, or of inability to obtain a permanent and suitable supply from the pumps of said Calais Water Co., the said company agrees to erect and maintain in the Town of Milltown suitable force pumps of a capacity of not less than 1,000,000 United States gallons in 24 hours, or obtain its supply from such source in New Brunswick as will enable it to furnish water for the purposes of this contract, with a pressure not less than herein called for.

As had already been pointed out, by reason of the erection of a paper plant upon the St. Croix River, above the source of supply provided for in the contract, the waters of the river became polluted and unfit for use, and for the purpose of carrying out its contract the water company arranged with the Town of St. Stephen to supply it with suitable water to fulfill the conditions under which it was to supply water to the Town

N. B.

S. C.

THE KING v. BOARD OF COMMISSIONERS OF PUBLIC UTILITIES; EX P. TOWN OF MILLTOWN.

Grimmer, J.

of Milltown, and they obtained and have continued to supply the said town with suitable water which they purchased from the said Town of Saint Stephen. In my opinion, the company acted fully within the terms of the agreement, and the Board was justified in arriving at the conclusion it did, that the company was not negligent in not taking legal action to prevent the pollution of the source of water provided for in the contract, and in not taking action for damages for such pollution.

In my opinion, sections (b) (c) and (d) of ground 9 must fail, because the town was not in a position to make any complaint in respect to the action taken by the company in supplying it with water, in that it had not taken advantage of the enabling clause in the contract, whereby they could have renewed the contract in 1906 for a period of 20 years, and by reason of their failure so to do they are estopped from taking any objection in respect to the course pursued by the said water company to furnish the necessary supply of water to said town.

In view of the facts herein stated, and in consideration of the evidence submitted to the Board, I am of opinion it was justified in arriving at the conclusion it did, and that its judgment must be sustained and the rule refused.

Judgment accordingly.

MAN.

C. A.

OGILVIE FLOUR MILLS Co. v. CANADIAN PACIFIC R. Co.

Manitoba Court of Appeal, Perdue, C.J.M., Cameron, Haggart and Fullerton, JJ.A. June 9, 1919.

CARRIERS (§ III C—185)—LOSS OF GOODS ENTRUSTED TO—NO EXPLANATION—PRESUMPTION OF NEGLIGENCE OF.

In the absence of evidence that the loss of goods entrusted to a railway company for carriage was not caused by the negligence of the railway company, the rule *res ipsa loquitur* applies and the carrier is responsible.

[*Ferris* v. *C.N.R. Co.* (1905), 15 Man. L.R. 134; *Randall* v. *C.N.R. Co.* (1915), 21 D.L.R. 457; 19 Can. Ry. Cas. 343; 25 Man. L.R. 293, followed.]

Statement.

APPEAL from the County Court of Winnipeg, in an action brought to recover the sum of $66.12 being the value of 4,360 pounds of wheat. The county court judge entered a verdict for the plaintiff for the amount claimed.

L. J. Reycraft, K.C., and *H. A. V. Green*, for appellant; *H. Phillipps*, K.C., and *J. T. Thorson*, for respondent.

PERDUE, C.J.M.:—On February 23, 1914, one of the defendants' cars was loaded with wheat for the plaintiff at the Grain Growers Elevator Company's elevator at Fort William. The wheat was weighed into the car under the supervision of the Dominion government weighmaster and his certificate was given that the quantity of wheat loaded into the car was 62,900 pounds. On the following day a bill of lading was issued by defendants to the plaintiffs for 62,900 pounds of wheat consigned to the plaintiffs at plaintiffs' elevator in Fort William. The car was unloaded at plaintiff's elevator in the morning of February 25. The contents were weighed out of the car under the supervision of the Dominion government weighmaster who issued his certificate as to the quantity of wheat in the car when unloaded. According to this certificate the quantity of wheat in the car was 58,540 pounds. The deficiency therefore was 4,360 pounds. According to the evidence there was no leak in the car and the seals were intact when the car came to be unloaded. The weighmaster's certificate is, in all cases *primâ facie* evidence of the facts therein contained: See Canada Grain Act, 2 Geo. V, c. 27, s. 66. There was no evidence impeaching the correctness of the facts stated in the certificates.

The plaintiffs' case is that the defendants received 62,900 pounds of grain for conveyance from the Grain Growers Elevator Company's elevator to the plaintiffs' elevator in the same place, that defendants issued to the plaintiffs a bill of lading for that exact amount of grain and that they delivered only 58,540 pounds. No explanation of the loss has been given by the defendants. It has been held several times in this court that in the absence of evidence that the loss of goods entrusted to a railway company for carriage was not caused by the negligence of the railway company, the rule *res ipsa loquitur* applies and the carrier is responsible. See *Ferris* v. *C. N. R. Co.* (1905), 15 Man. L.R. 134; *Randall* v. *C. N. R. Co.* (1915), 21 D.L.R. 457, 19 Can. Ry. Cas. 343, 25 Man. L.R. 293.

Counsel for the defendants contended that the evidence indicated a delivery of the car in question on February 24, upon one of the sidings leading to the plaintiffs' elevator and that this shifted upon the plaintiff the onus of shewing that the loss did

MAN.

C. A.

OGILVIE FLOUR MILLS CO. v. CANADIAN PACIFIC R. CO.

Perdue, C.J.M.
Cameron, J.A.
Haggart, J.A.
Fullerton, J.A.

not occur while the car was in the plaintiffs' possession. Without expressing any opinion to the effect that might follow from shewing a delivery of the car on the day and in the manner suggested, I do not think that the evidence establishes that the car was delivered to the plaintiffs on the 24th or at any time prior to the morning of February 25.

I think that the findings of the county court judge should be affirmed and the appeal dismissed with costs.

CAMERON and HAGGART, JJ.A., concurred with Perdue, C.J.M.

FULLERTON, J.A. (dissenting):—This action is brought to recover $66.12 for the failure of defendant to deliver to plaintiff a quantity of wheat.

A car of wheat was loaded at one of the Grain Growers elevators at Fort William, between the hours of 1.30 and 4.50 in the afternoon of February 23, 1914.

The government weighmaster's certificate put in evidence shows that 62,900 pounds of wheat were put into the car.

The destination of the car was Ogilvies' elevator, Fort William, a little over a quarter of a mile distant from the grain growers elevator where the car was loaded. It reached there before 9 o'clock on the morning of the 24th and was unloaded between 8 and 11 o'clock on the morning of the 25th and weighed out only 58,545 pounds.

Arthur Lindsay, who was general yard master at Fort William for the defendants in February, 1914, was called, and gave the following evidence as to the usual custom respecting the movement of cars from the grain growers elevators to the plaintiffs' elevators:—

Q. What is the usual custom in the yard in the case of a car loaded in the grain growers in the afternoon for Ogilvies? A. The car would be pulled from the elevator and lined up on the track in the grain yard, which is for all cars going west of the Grain Growers. That would be taken to West Fort and put over the "hump" and switched in the different tracks. No. 12 track at West Fort is for Ogilvies' wheat. Any cars for Ogilvies would be switched into No. 12 track, and then we get the engine to go up and shove the cars down into Ogilvies. If a car was loaded at the grain growers this afternoon it would go to West Fort to-night and would be shoved down to Ogilvies to-night or first thing in the morning.

Q. That is the practice that is followed? A. That is the practice that is always followed.

The evidence shews that the seals on the cars were intact on the morning of the 25th, and that the car was a good car and fit

for loading grain. Day, who was working at Ogilvies as a trackman and whose duty it was to look for leaks in cars, examined the car on February 25. He states that if there had been a leak in the car he would have reported it on the proper form.

The defendants contend that the plaintiffs have failed to shew that the loss occurred while the car was in their possession and that to succeed the plaintiffs must do so.

The shipping order bears date February 24, 1914. Tremblay, who was the shipping clerk in the grain office, states that it was signed on that date. From his evidence it appears that the practice was for the shipper to make out the shipping order and bring it to the railway company for signature.

The loaded car must therefore have been in possession of the grain growers from 4.50 o'clock on the afternoon of the 23rd, until some time in the morning of the 24th, when the shipping order was signed.

Allan, who was a checker at the Fort William yard office, stated that the car in question was at the Ogilvie elevator on the morning of February 24, 1914, and that on the morning of February 25, 1914, it was still there unloaded.

Condition 9 of the shipping order reads in part as follows:—

> Bulk grain destined to a private siding or station where there is no duly authorized agent shall be at the risk of the carrier until placed on the delivery siding.

The defndants contend that the Ogilvie siding was a "private siding" within the meaning of the above condition, and that their responsibility ceased on the morning of the 24th, when the car was delivered at Ogilvies' siding.

Sellers, the grain superintendent of the plaintiff company, was called as a witness for the plaintiff. This cross-examination is as follows:—

Q. Your company does business in quite a large way? A. Well, yes.
Q. Like other big companies you have your own sidings at your elevators?
A. Yes.
Q. You know the elevator at Fort William? A. Yes.
Q. You have your own siding running up there? A. Yes.
Q. Where all the cars are placed? A. Yes.
Q. And that is where this car was placed? A. Yes.

Morgan, who was superintendent of terminals at Fort William at the time, says that the plaintiffs' cars were "pushed down to

MAN.

C. A.

OGILVIE FLOUR MILLS CO. v. CANADIAN PACIFIC R. CO.

Fullerton, J.A.

Ogilvies' siding, where they have a siding of their own at the elevator." He was asked "Where did Ogilvies receive grain from the C.P.R.? His answer was: "They received grain at their private tracks at their elevators."

Counsel for the plaintiff contended that the evidence shewed that the car "was not delivered at the elevator until the morning of the 25th," and that when the checker, Allan, spoke of the car being at the "Ogilvie elevator" he was referring to the classification switch number 12 on which all Ogilvie cars are placed before being shoved on their own siding."

The evidence satisfies me that he was referring to the Ogilvie elevator siding.

Allan says that the portion of the yard which it was his duty to check "included the Ogilvie elevator" and again, that "Ogilvies is included in my portion of the yard. From West Fort to Ogilvies was included in my portion of the yard."

Morgan says that track No. 12 is "what is known as the classification yard at West Fort."

Lindsay says "No. 12 track at West Fort is for Ogilvies' wheat."

It appears to me quite clear that Allan was not referring to track No. 12 in the classification yard at West Fort when he spoke of the "Ogilvie elevator."

The destination named in the shipping order is "Ogilvies' elevator," which can only mean the siding at the "Ogilvie elevator."

Under the condition in the shipping order I would hold that the car of wheat was delivered at Ogilvies' elevator on the morning of the 24th.

Counsel for the plaintiff in his cross-examination of Mr. Morgan suggested the possibility of the car being bored and grain drawn off. If the loss occurred in the way suggested, it was more likely to have happened while the car was in the possession of the plaintiff than the defendant.

The defendant had the possession of it for only a very short time. Mr. Morgan says that there is no access for teams to track No. 12 from any roads or crossings, while Ogilvies' private siding has a road crossing near the westerly end of the track, and another road crossing near the easterly end.

MAN.

C. A.

I think the plaintiff has failed to establish that the defendants are responsible for the loss of the wheat.

I would allow the appeal with costs and dismiss the action with costs.

Fullerton, J.A.

Appeal dismissed.

B. C.

C. A.

Re HAMILTON & HART AND ROYAL TRUST.

British Columbia Court of Appeal, Macdonald, C.J.A., Galliher, McPhillips and Eberts, JJ.A. April 1, 1919.

WILLS (§ III G—160)—PROPERTY DIRECTED TO BE SET ASIDE FOR ANNUITY—CONDITIONS NOT CARRIED OUT—BEQUEST OF REMAINDER—TIME OF VESTING.

A testator directed his trustees to set aside sufficient of his property to produce a certain annuity, after which they were to pay one-quarter to his daughters and one-half to his wife, and in the event of the wife dying before receiving the bequest, it was to go to the daughters.

The court held that the wife's share became vested although not actually received when the property required to be set aside to produce the annuity should have been set aside and that this should have been done at least within a year of the testator's death; and upon her subsequent death intestate, went to her personal representative.

Statement.

APPEAL by the defendant from the judgment of Macdonald, J. Reversed.

A. D. Macfarlane, for appellant Royal Trust; *Frank Higgins*, K.C., for respondent Hart; *H. A. Maclean*, K.C., for respondent Tripp; *H. Dawson*, for respondents, the plaintiffs.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—The facts of this case are very fully set forth in the judgment appealed from and I shall, therefore, not attempt more than a summary of them here.

The testator, who died on September 12, 1915, directed his executors, whom he also declared to be the trustees under the will, to take possession of all his estate, real and personal. He gave them full discretion to retain his real and personal property or to sell it and invest the proceeds and vary the investments. Out of the income arising from the "trust premises" and out of the principal if necessary he ordered and directed his trustees to pay his debts, funeral and testamentary expenses; to set aside a sufficient portion of the premises to produce an annuity of $500, and to pay same to the testator's father and mother for life or for the life of the survivor of them and on the death of the survivor he directed that the property so set aside should be divided between his two daughters, one-quarter each, and his wife the remaining half.

B. C.

C. A.

RE HAMILTON & HART AND ROYAL TRUST.

Macdonald, C.J.A.

The estate consisted of both lands and personalty, but the real estate was rather heavily encumbered and in the condition of the real estate market at the time of the testator's death and since, the executors and trustees thought it impracticable to sell it as it could, if salable at all, be sold only at a ruinous sacrifice. They have, therefore, not sold or converted the assets, nor have they set any of them aside for the production of the sum payable to the testator's father and mother, the latter of whom is still living. The income of the whole estate is insufficient to satisfy interest, taxes and other expenses chargeable against the property and to enable the trustees to pay the said annuity. The testator's wife died more than a year after his own decease.

In my opinion, it was the duty of the trustees to set aside the whole estate after payment of debts, funeral and testamentary expenses for the purpose of the annuity. They were clearly authorised to set aside sufficient of the testator's property to meet this clause of the will. They were not bound to sell or convert the estate or any part of it. If they could not sell they could at least obey the direction of the testator and set aside sufficient, or if there was not more than sufficient, the whole estate, for the purpose so expressly directed. Had this been done, no question would arise as to the disposition of the residue, because there would be no residue to distribute.

Now the question submitted for the opinion of the court has to do with the rights of the residuary legatees only and while in the result above stated it may not be strictly necessary to deal with this phase of the case, yet as I have considered it with some care and as our judgment must in any case be a declaratory one only and by way of advice to the trustees, I will state the conclusion to which I have come. Shortly, the testator directs his trustees after they shall have set aside the property required to produce the annuity "to pay"—which means to give, since it is not confined to money—one-quarter to each of his said daughters and one-half to the wife—"and in the event of my wife dying before receiving this bequest" then to the said daughters. The wife died intestate and her administrators, the Royal Trust Co., claim that this bequest became vested in her in her lifetime, while on the other hand the daughters claim that it could not vest until actually received by the wife.

In my opinion, the wife became entitled to receive it when the property required to be set aside to produce the annuity was or ought to have been set aside and that that property ought to have been set aside at least within one year from the testator's death. The cases dealing with the construction of clauses in a will similar to the one in question are considered in Jarman on Wills, 6th ed., at pages from 2175 and particularly from 2184 to 2194, and the rule seems to be established that, unless a contrary intention can be inferred, the court ought to favour an early vesting of the bequest and that rights of the beneficiaries are not to be left to the caprice or the dilatoriness of trustees or executors. It may be open to question as to whether or not the said bequest to the wife did not vest in interest at the time of the testator's death, I am, however, inclined to think not. I think a reasonable time was intended to be allowed the trustees to segregate the property to be set aside for the production of the income from the rest of the estate and that, upon such separation, the bequest to the wife should become vested in her in interest if not in possession. There were no insuperable difficulties in the way of the trustees carrying out the direction of the will. The fact that the property was not readily salable does not, in my opinion, affect the matter. They were not bound to sell; had they been, then perhaps the question of an enquiry as to when the residue might have been received so much discussed in the cases referred to in the pages of Jarman above referred to might have arisen, but here the duty of the trustees is imperative and does not depend upon the getting in and conversion of outstanding properties. That duty, therefore, ought to be discharged within a reasonable time and applying the rule which courts of equity have always applied in cognate matters, the reasonable time is in my opinion one year. I can find nothing in the context of the will or in the circumstances in which it was made to shew an intention that "receive" was intended to mean actual receipt or, as it has been said, receipt in hard money. It was not necessarily money which was to be distributed, but the residue of the property itself. I am, therefore, of opinion that, had the segregation been made as it ought to have been in the lifetime of the wife, her share in the residue would have, thereupon, become vested, though not actually received, and upon her death it would go to her personal representatives.

B. C.

C. A.

RE HAMILTON & HART AND ROYAL TRUST.

Galliher, J.A.

I would therefore allow the appeal.

GALLIHER, J.A.:—I would allow the appeal.

The intention of the testator as expressed in the will was that after payment of his debts, funeral expenses, etc., a sufficient portion of his estate was to be set aside to provide an income for the maintenance of the father and mother.

It was the duty of the trustees and executors to do this within a reasonable time and for that purpose the whole estate if necessary should have been set aside to produce this income or so much of it as would be produced thereby.

Had this been done no question could have arisen as to the interest vesting in the widow.

As no definite time was fixed for this in the will and as the widow survived the testator by more than a year I would treat the period of one year as the reasonable time within which what should have been done would be taken to have been done.

McPhillips, J.A.

MCPHILLIPS, J.A.:—This appeal calls for the consideration of a very close point—when the cases are looked at, and it would seem that there is variance of decision. We find it stated in Hawkins on Wills (2nd ed., 1912), at pp. 262, 263, that:—

> Where there is a gift over in the event of a legatee dying before "receiving" his legacy, a very difficult question arises. The decisions in *Johnson* v. *Crook* (1879), 12 Ch.D. 639; *Re Chaston* (1881), 18 Ch.D. 218; *Re Wilkins* (1881), 18 Ch.D. 634; and *Re Goulder*, [1905] 2 Ch. 100, ignore the fact that the *order* of the House of Lords in *Minors* v. *Battison* (1876), 1 App. Cas. 428, seems to imply that the divesting clause was void.

In the present case, as in *Minors* v. *Battison*, *supra*, it can be said that there is "not a mere power of sale, but an absolute trust for sale, subject to a discretion in the trustees as to the manner and time in which the sale should be carried out."

The words of the will which require particular attention are the following:—

> Pay to my wife, the balance remaining of said trust premises in the hands of said trustees after all the foregoing bequests have been set aside; and in the event of my wife dying before my decease or dying *before receiving this* bequest, then said balance of said trust premises shall go and be paid by the trustees to my said daughters:

The wife survived her husband, the testator, for more than a year—so the period for distribution of the estate had elapsed. After careful consideration of the authorities, I am of the opinion that the present case is one that falls within the *ratio decidendi*

of *Minors* v. *Battison*, *supra*, a judgment of the House of Lords and should be decided in accordance with the judgments of Malins, V.-C., in *West* v. *Miller* (1868), L.R. 6 Eq. 59, 37 L.J. Ch. 423, and *Bubb* v. *Padwick* (1880), 49 L.J. Ch. 178, 13 Ch. D. 517. In *West* v. *Miller*, the word calling for consideration was "received." Malins, V.-C., at p. 425, said:—

It was rightly admitted that the word "received" must be equivalent to "receivable," because of course it would depend on the diligence of the trustees whether the fund was actually to be got at or not.

and at p. 426, he said:—

I think a judge can never be worse occupied than in frittering down rules of this kind by minute distinctions; and I desire to be understood as deciding here, that in all cases where there is a gift for life, followed by a gift in remainder, which is to vest at the attainment of a particular age, or upon any other event personal to the legatee in remainder, and then a gift over in the event of the latter dying before the legacy is "payable," "receivable," "vested in possession," or any other form is used which means "paid" or "received," there all such expressions are to be taken as equivalent to "vested." I will only add, that I entirely agree with *Dodgson's Trusts* (1853), 1 Drew. 440, 61 E.R. 520, which decision has my full concurrence.

Bubb v. *Padwick*, *supra*, was a case where the testator directed that if any child should die before the youngest attained twenty-one and "without having actually received" his share then his share should go over. The testator died in 1879, his youngest child was then of the age of 6 years; it was held that each child on attaining 21 acquired an absolute vested interest. Now in the *Bubb* case Malins, V.-C., made reference to the decision of Jessel, M. R., in *Johnson* v. *Crook* (1879), 12 Ch. D. 639, in these words, at pp. 180, 181:—

I should have thought that these authorities were conclusive; but it is said that the Master of the Rolls, in an elaborate judgment in *Johnson* v. *Crook*, has come to an opposite conclusion. It is very unfortunate that, in that case, the two important cases of *Hallifax* v. *Wilson* (1809), 16 Ves. 168, 33 E.R. 947, and *Re Yates* (1852), 21 L.J. Ch. 281, were not cited or considered.

For the reasons I have stated I adhere to the old rule; and am clearly of opinion that, where a legacy is absolutely vested, it cannot be divested by a clause which says that it is to go over if the legatee die without having actually received his legacy. I therefore entirely dissent from the judgment of the Master of the Rolls in *Johnson* v. *Crook*. That being so, and the Master of the Rolls being a judge of co-ordinate jurisdiction, I am at liberty to follow my own opinion, though I should not have done so if I was not following a long line of authorities.

In my opinion the plaintiffs have acquired absolute vested interests. The question must, therefore, be answered in the affirmative.

If called upon to decide as between the two decisions, *i.e.*, as between that of Malins, V.-C., and Jessel, M.R., bearing in mind

B. C.

C. A.

HAMILTON & HART AND ROYAL TRUST.

McPhillips, J.A.

the House of Lords case of *Minors* v. *Battison*, *supra*, I would feel constrained to follow the judgment of Malins, V.-C., but I do not think it really necessary to go that far, as the facts of the present case are essentially different. But if I should be in error in so supposing, then I unhesitatingly accept the law as laid down by *Malins*, V.-C., as, in my opinion, it is in true compliance with a very long line of decided cases. Now *Johnson* v. *Crook*, *supra*, may be distinguished from the present case in this way (and all that the Master of the Rolls said which is in opposition to what Malins, V.-C., said in the *Bubb* case is *dicta* merely) not being the exposition of a legal proposition, necessary, in the judgment pronounced. In that case we have words which we have not in the present case, *i.e.*, "whether the same shall have become due and payable or not." It is true that the Master of the Rolls did not think these words mattered, but with great respect to a very eminent and distinguished judge, I venture to think the contrary, especially when I consider the facts of the present case. Here we have an immediate vesting of the bequest, and the widow lived beyond the statutory period for distribution. Can it be that the delay of the trustees in setting aside the bequests shall be held to postpone the vesting of the bequest in the widow? I think not, and *Minors* v. *Battison*, *supra*, makes this abundantly clear.

The case of *Re Chaston*, 18 Ch. D. 218, a judgment of Fry, J. (afterwards Fry, L.J.), creates, in my opinion, no difficulty in the decision of the present case. There, it was held that "payment" referred to the time when the shares given would become payable.

That Lord Justice Fry would have decided the present case in accordance with the conclusion I have arrived at I feel bold enough to say—when his judgment *Re Wilkins* (1881), 18 Ch. D. 634, 50 L.J. Ch. 774, is read. There the head-note reads as follows:—

> A testator gave each of four persons a fourth of the proceeds of his residue, and in case of the death of any legatee before the "final division" of his estate he gave that legatee's share over. One legatee died more than a year after the testator but before the estate had been distributed:—*Held*, that his personal representatives were entitled to his fourth share.

In *Re Goulder*, [1905] 2 Ch. 100, a decision of Swinfen Eady, J., (now Master of the Rolls), has relation to a contingency specifically set forth, which occurred and cannot be said to affect the point we have here to determine. It is true that in that case approval

was expressed of *Johnson* v. *Crook*, *supra*, but as I have indicated *Johnson* v. *Crook* is distinguishable from the present case. *Scott* v. *Campbell* (1891), Court of Sessions Cases (Scotch) 18 R. 1194, is much in point. It was there held "that the words 'after these payments are made' did not refer to a point of time but meant 'subject to these payments,' and that the residue vested in the son *a morte testatoris*." (Also see *Re Sampson* (1896), 65 L.J. Ch. 406, Stirling, J., at p. 409.)

That there was a vesting *a morte testatoris* in my opinion cannot be questioned and the court aids vesting rather than divesting—the latter is what is contended for here. See *Re Litchfield*, *Re Horton* v. *Jones* (1911), 104 L.T. 631, Parker, J. (afterwards Lord Parker of Waddington); also see *Ward* v. *Brown*, [1916] 2 A.C. 121.

I am therefore but with great respect to the learned trial judge of the opinion that the decision he arrived at cannot be affirmed. The appeal in my opinion should be allowed. I must confess though that with the many decisions and the variance existing the point of law is a difficult one. I wish to express my indebtedness to Mr. Macfarlane—the learned counsel for the appellant—for the brief but cogent argument with which he assisted the court.

EBERTS, J.A., allowed the appeal. *Appeal allowed.*

Eberts, J.A.

REX v. McCRANOR.

ONT.
S. C.

Ontario Supreme Court, Appellate Division, Mulock, C.J.Ex., Clute, Riddell, Latchford, and Sutherland, JJ. December 21, 1918.

APPEAL (§ VII C—301)—ONTARIO TEMPERANCE ACT—CONVICTION BY MAGISTRATE—APPEAL TO COUNTY JUDGE—HEARING—EVIDENCE—PREJUDICE.

A county judge sitting in appeal under sec. 92 of the Ontario Temperance Act is not justified in reversing the magistrate's finding because such judge has discredited the evidence of witnesses on whose evidence the magistrate's decision was based, in a previous case before such judge. He must not import prejudice from the other case, but should hear the witnesses and give them an opportunity of rehabilitating themselves in his good opinion.

A whiskey-detective or spy is not an accomplice and his evidence does not need to be corroborated.

Statement.

JAMES MCCRANOR, the defendant, who kept the Avenue Hotel in the city of Fort William, appeared before the Police Magistrate for that city on the 25th October, 1917, on a charge of having sold intoxicating liquor on the 27th September, 1917, in his hotel, contrary to the provisions of the Ontario Temperance Act, 6 Geo. V. ch. 50, sec. 40. The defendant pleaded "not guilty," but

ONT.

S. C.

REX v. MCCRANOR.

was convicted by the magistrate; as it was a second offence, he was sentenced to 6 months' imprisonment. He appealed to the Judge of the District Court of the District of Thunder Bay, who, on the 1st March, 1918, allowed the appeal. The prosecutor, a Government inspector, obtained the certificate of the Attorney-General under sec. 94 (1) of the Act, and now appealed to this Court. Reversed.

J. R. Cartwright, K.C., for appellant.

Riddell, J.

RIDDELL, J. (after setting out the facts as above):—The evidence was that of two "whisky detectives" in the employ of the Ontario Liquor License Department, and of long experience in their occupation. They swear categorically that they went into the defendant's bar, and that one of them bought a bottle of Scotch whisky from him, paying therefor $3. There are trifling differences between the witnesses in matters of detail, but not more than what are seen in almost every case between perfectly reliable witnesses; and their long and elaborate cross-examination did not shake their evidence in any degree.

The defendant was called on his own behalf: he plays a very common role—skirting the promontory of direct perjury, he "does not remember"—this is a sample:—

"Q. You have heard what these men say about selling that bottle of whisky on Thursday the 27th September? A. I don't remember doing it.

"Q. What do you say? A. I did not do so, I know of.

"Q. Would not you know if you had of? A. I don't remember."

Non mi ricordo has never been received with much favour; and I have seldom seen a jury or a Judge give credence to it. Except under extraordinary circumstances, no magistrate would be justified in refusing to convict on such evidence; and, in my opinion, the magistrate acted properly in convicting as he did.

The evidence for the prosecution is assailed because it is the evidence of detectives and not corroborated. But the detective or spy—call him what you will—is in law wholly different from the accomplice. The accomplice is the modern product of evolution from the common law approver, who, being indicted of treason or felony, and arraigned, confessed his guilt before plea pleaded, but said that another was his accomplice in the very

same crime, in order to procure his own pardon. The approver might, at the discretion of the Court, be allowed to "appeal" his alleged accomplice: if the alleged accomplice failed on his trial by battle or by the country, the approver was pardoned; if not, the approver was hanged out of hand. It was, therefore, of the utmost importance to the approver that the appellee should be convicted; so at the present time, an accomplice often offers himself as "King's evidence;" and, though he has no legal right to a pardon, such as the approver had, his services generally receive recognition. In any but the rarest case, the accomplice expects to benefit by the conviction of the accused. Accordingly the rule has grown up that juries are to be warned that the evidence of accomplices requires corroboration; this is, however, a rule of practice not of law (except in certain cases where the statute is express), and juries may disregard it and convict notwithstanding the absence of corroboration.

But even this rule does not apply to persons who have joined in or even provoked the crime as agents of the police or the authorities, as the ordinary spy or informer. "The case of a pretended confederate, who, as detective, spy, or decoy, associates with the wrongdoers in order to obtain evidence, is distinct from that of an accomplice:" Wigmore on Evidence, vol. 3, sec. 2060 (*b*). Maule, J., in *Regina* v. *Mullins* (1848), 3 Cox C.C. 526, 7 St. Tr. N.S. 1110, where a spy, who had been employed by the authorities to mix with the Chartists and pretend to aid their designs for the purpose of betraying them, gave evidence on the trial of one of them, said (7 St. Tr. N.S. at p. 1114): "In the case of an accomplice, he acknowledges himself to be a criminal. In the case of these men (spies), they do not acknowledge anything of the kind." And he held that no corroboration was necessary; Wightman, J., who sat with him, must have concurred, as he expressed no dissent.

The same rule was laid down in *Regina* v. *Dowling*, 3 Cox C.C. 509, by Erle, J. (Williams, J., with him), p. 516: "If he only lent himself to the scheme for the purpose of convicting the guilty, he was a good witness, and his testimony did not require confirmation as that of an accomplice would. . . ." And the same rule is laid down much earlier, in *Rex* v. *Despard* (1803), 28 How. St. Tr. 346, 489. Many American cases are given in note 9 to sec.

ONT.
S. C.
REX
v.
MCCRANOR.
Riddell, J.

2060, p. 2756, of Wigmore on Evidence, vol. 3. The English cases cited above do not quite cover the present case, as in them the crime was being committed independently of the spy, and he took part in the transaction simply to expose the crime of others.

But the late case of *Rex* v. *Bickley* (1909), 73 J.P. 239, is directly in point. There the police had reason to believe that the crime of abortion was common in the neighbourhood, and they suspected the accused of carrying on the business of procuring abortion; they accordingly sent a woman to pretend that she was in need of his assistance. He did unlawfully supply her a noxious thing with the intent to procure her miscarriage; the principal witness against him was this woman, the police spy and *agent provocateur*, and she was not corroborated. He was convicted before Darling, J., who sentenced him to five years' penal servitude. On appeal to the Court of Criminal Appeal it was held by that Court, Darling, Walton, and Pickford, JJ., that there was no need of corroboration—"This woman was a spy . . . sent by the police to the appellant to see whether he would commit the offence which he was subsequently accused of committing." See *Rex* v. *Baskerville*, [1916] 2 K.B. 658.

An objection was taken that, as it was alleged, evidence that the accused was previously convicted was allowed, before the conviction was made in the present case; but that is an error. The complaint is of the questions on the cross-examination of the accused, which are plainly allowable: see sec. 12 of the Canada Evidence Act, R.S.C. 1906, ch.. 145; R.S.O. 1914, ch. 76, sec. 19 (1).

There being no objection to the manner in which the case was conducted, and no necessity for corroboration, I think the District Court Judge was in error in allowing the appeal.

The proceeding before the District Court Judge being an appeal, he had the power to hear evidence; had he done so and given judgment upon the credibility of witnesses before him, we should have paid the utmost respect to his decision. *Beal* v. *Michigan Central R.R. Co.* (1909), 19 O.L.R. 502, is only one of many cases laying down the same rule. But he did not do so, and he should have dealt with the case as an appellate Court deals with a case which comes up before it on the reported evidence. And, if he found that the magistrate had sufficient evidence upon which to base his decision, he should not have reversed it. We are

ONT.

S. C.

REX v. MCCRANOR.

Riddell, J.

informed that the learned Judge had seen these witnesses before him in another case and did not believe them in that case: that is his right, and to determine their credibility in that case was his duty. But he may not import any feeling or prejudice into another case—*falsus in uno, falsus in omnibus*, is often a most misleading maxim. Our law will not allow a witness's credit to be attacked by proof that he had been disbelieved in another case, or even that he had sworn falsely in another case. If the learned Judge was to pass upon the credit of the witnesses in the present case adversely, he should have heard them and given them an opportunity of rehabilitating themselves in his good opinion. It is to my mind wholly unjudicial and of the worst tendency to import into one case an opinion on anything but law formed in another.

But in any case we are in quite as good a position as the Judge; and, in my opinion, the magistrate was wholly right in convicting.

We have nothing to do with the justice or otherwise of the law: that is made for us and our duty is to obey it loyally. *Lex dura forsitan, sed lex.* I have, however, little sympathy with a man who deliberately breaks the law for his own pecuniary advantage; who, in sheer greed of gain, seeks by breaking the law to obtain an advantage over his law-abiding neighbour.

I would allow the appeal with costs throughout.

Latchford, J.

LATCHFORD, J.:—At the close of the argument at Bar, the only point on which I was in doubt was as to whether the appeal was properly before the Court. This doubt having been removed, I am of the opinion that, without hearing additional evidence, it was not open to the learned District Court Judge to reverse the decision of the magistrate, based as it was on evidence which the magistrate credited, and which, as credited, amply warrants the conviction originally made.

The appeal should, therefore, be allowed with costs here and below.

Sutherland, J.

SUTHERLAND, J.:—On the 9th October, 1917, an information was laid against James McCranor, the keeper of the Avenue Hotel in the city of Fort William, for unlawfully selling intoxicating liquor. He appeared before the magistrate on the 11th, was remanded until the 19th, and again remanded until the 26th day of that month, when he was tried and convicted.

Thereafter, having admitted to the magistrate that this was a second offence, he was sentenced to 6 months' imprisonment.

ONT.
S. C.
REX
v.
MCCRANOR.
Sutherland, J.

The Ontario Temperance Act, 1916, 6 Geo. V. ch. 50, sec. 92 (2), (9), makes provision for an appeal to the Judge of a District Court.

The accused appealed from the said conviction to the Judge of the District Court of Thunder Bay, who, on the 1st March, 1918, quashed the conviction. This appeal is from the order quashing the conviction.

By sec. 94 (1) of the said Act, an appeal by the inspector or other prosecutor is given to a Divisional Court of the Appellate Division of the Supreme Court of Ontario from the decision of the Judge of a District Court in any case "arising out of or under this Act . . . in which the Attorney-General of Ontario certifies that he is of opinion that the matters in dispute are of sufficient importance to justify an appeal;" and sub-sec. 2 of the said section provides that notice of the intention to appeal, where the certificate of the Attorney-General is necessary and is obtained, may be given within 15 days after the judgment, decision, or order appealed from has been made.

On the 7th March, the Attorney-General for Ontario gave a written certificate. In compliance with sec. 94 (1), a notice of appeal was given within the 15 days mentioned in sub-sec. 2. It was argued that the appeal was not set down promptly, or within the proper time. The disposition of the appeal was apparently delayed from time to time, partly to suit the convenience of counsel, and partly owing to delay in the papers in the case coming forward. It was competent for us to extend the time for setting down the appeal, if it were not set down in time, and I think it would be appropriate to do so.

The evidence called in support of the charge was that of two special officers or "whisky detectives," employed by the Liquor License Department of the Province to travel about from place to place in connection with suspected or alleged violations of the Ontario Temperance Act. One of these, Alexander Correan, who had been thus employed for about 9 years, testified that, on the date named in the information, he had bought a bottle of Scotch whisky from the accused in the hotel mentioned, and had paid to him therefor the sum of $3. The other detective, Albert Barnett, testified that he was with Correan on the date named and saw him purchase from the accused the bottle of liquor.

The accused gave evidence on his own behalf, and among other things testified as follows:—

"Q. You are the proprietor of the Avenue Hotel? A. Yes.

"Q. You have heard what these men say about selling that bottle of whisky on Thursday the 27th September? A. I don't remember doing it.

"Q. What do you say? A. I didn't do so, I know of.

"Q. Would not you know if you had of? A. I don't remember . . .

"Q. Did you ever have any conversation with Correan at all, the first witness? A. Never.

"Q. You never had any conversation with him? A. Never that I remember of; I seen him at the end of the bar in the evening . . .

"Q. You heard what Correan said, that you sold him a bottle of liquor? A. I say I never remember selling him that bottle of liquor."

The magistrate, in giving judgment, said:—

"I would certainly be very pleased if I could find it in my heart to doubt these men; it would suit me very well, and I only wish I had some doubts in the matter: I would certainly give the prisoner the benefit of the doubt. The fact of the matter is, while it may be unpleasant, something I don't like to do, we are not here to do just as we like. I have nothing to do in this case only to find Mr. McCranor guilty of selling liquor."

It was competent for the District Court Judge, on the appeal, to hear evidence, but this he did not do, and disposed of the case on the evidence on which the magistrate had made the conviction. We are, therefore, in as good a position as he was to determine whether the conviction should stand or be quashed. We were told by counsel for the accused that, in the District Court Judge's reasons for his decision (a copy of which was not filed), he referred to certain discrepancies in the evidence of the two detectives. There are, it is true, some slight and inconsequential discrepancies, not at all sufficient, as it seems to me, seriously to weaken the effect of their consistent evidence on the matter of first importance —the sale and purchase of the whisky. Neither the District Court Judge nor any member of this Court is in as good a position as the magistrate, who saw them, properly to estimate the weight

ONT.
S. C.
REX
v.
MCCRANOR.
Sutherland, J.

to be attached to their testimony. Though reluctant to convict, he, after seeing and hearing them, had no doubt that he must give due credit to their evidence. After a careful perusal of it, I agree with him, and am unable to see how the District Court Judge could properly come to a different conclusion. It was said in argument that he had heard some other case which led him to form an unfavourable opinion as to the credibility of the two detectives, and it was argued that he could properly take judicial notice thereof and allow his judgment in the present case to be influenced or affected thereby. I am unable to agree with this view.

While it is true that Judges may use their general information in arriving at decisions: *Byrne* v. *Londonderry Tramway Co.*, [1902] 2 I.R. 457, at p. 480; *Hennessy* v. *Keating*, [1908] 1 I.R. 43, at p. 83; Best on Evidence, 11th ed. (1911), p. 275; they may not properly act on their own private knowledge or belief regarding the particular case, but should dispose of it upon the evidence: Phipson on Evidence, 5th ed. (1911), p. 11.

It was also argued that, as the detectives admitted that they were participants in the illegal sale and purchase, they were accomplices, whose evidence must be corroborated before a conviction based on it alone could be made. No doubt, as a rule, the fact of a witness being an accomplice detracts somewhat, and sometimes substantially, from the credit to be given to his testimony. Judges are in consequence required to warn juries of the danger of convicting on the uncorroborated evidence of an accomplice, though at the same time pointing out to them that they may, nevertheless, convict upon that evidence if they think proper so to do. The rule requiring corroboration in the case of accomplices, however, does not apply to informers, such as, for example, police spies, even though they have instigated, provoked, or joined in a crime.

In *Rex* v. *Bickley*, 73 J.P. 239, it was held that "a police spy or *agent provocateur* is not an accomplice, and the practice that a jury should not act on the uncorroborated evidence of an accomplice does not apply to the case of such a person." From the facts in that case it appeared that the police had reason to think that the appellant was carrying on the business of procuring abortion, and the charge was for "unlawfully supplying a noxious thing to a woman with the intent to procure her miscarriage."

The police had hired as a spy a woman, who went to the accused and was supplied by him with a noxious thing with the intent referred to, and Walton, J., in delivering the judgment of the Court, said: "But it is clearly established that the evidence of a woman acting as this woman did, is not to be treated as that of an accomplice. See *Regina* v. *Mullins* (1848), 12 J.P. 776, 3 Cox C.C. 526." And further: "This woman was a spy, and that she acted with the knowledge and approbation of the police was clear from the evidence that was put before the jury. That being so, there is no ground for saying that the jury ought to have been more fully warned as to her evidence."

It is also to be noted that, if corroboration be needed, it may well be found in the evidence of the accused himself. His attempted denial is so halting and hesitating as to amount in the circumstances to a practical admission of the offence. The interval between the date when the offence charged is alleged to have been committed, and the date at which the accusation was brought to his notice, was so comparatively short that it is incredible that he could not remember and testify that he did not sell a bottle of liquor on the day named.

I am of opinion that the appeal should be allowed with costs, including the costs of the appeal from the magistrate to the District Court Judge.

Clute, J.

CLUTE, J.:—Appeal from the decision, judgment, or order of the Judge of the District of Thunder Bay made on the 1st day of March, 1918, allowing the appeal of James McCranor against the conviction made against him by William Palling, Esq., Police Magistrate for the City of Fort William, on the 26th October, 1917, for the unlawful sale of liquor at Fort William, on the 27th September, 1917, and quashing the said conviction.

The charge was laid by A. R. Elliott, License Inspector, under the Ontario Temperance Act, 1916, 6 Geo. V. ch. 50. The appeal was taken by A. R. Elliott, the said inspector, pursuant to the fiat, granted in that behalf, of the Attorney-General for the Province of Ontario. Notice of appeal was served on the 15th March, and the appeal was set down on the 4th May, 1918. Objection was taken to the delay in causing the case to be set down for hearing. There was some delay in setting it down owing to the papers being incomplete, and objection was taken to the delay after the case was set down. At the instance of the defendant

ONT.
S. C.
REX
v.
MCCRANOR.
Clute, J.

the case was enlarged from time to time. If any undue delay occurred on the part of the appellant in having the case set down, it was waived by the enlargements granted at the defendant's request, without reserving his right to object to the delay, and I do not think the objecton can be sustained.

The main question is as to whether or not the District Court Judge is justified in reversing the decision of the magistrate. An appeal to the District Court Judge is given by sec. 92 of the Ontario Temperance Act, sub-secs. 2, 9.

"The practice and procedure upon such appeals, and all the proceedings thereon, shall thenceforth be governed by the Ontario Summary Convictions Act, so far as the same is not inconsistent with this Act" (sub.-sec. 9).

The appeal to this Court is under sec. 94, whereby an appeal is given where the Attorney-General for Ontario certifies that he is of opinion that the matters in dispute are of sufficient importance to justify an appeal (sub-sec. 1).

The appeal "shall be had upon notice thereof to be given . . . of the intention to appeal within 8 days, or where the certificate of the Attorney-General is necessary, and is obtained, within 15 days after such judgment . . ." (sub-sec. 2).

"The Clerk of the County or District Court shall certify the judgment, conviction, orders and all other proceedings, to the proper officer of the Supreme Court, at Toronto, for use upon the appeal" (sub-sec. 3).

"The Divisional Court shall thereupon hear and determine the appeal . . ." (sub-sec. 4).

No other practice is indicated.

The prisoner was found guilty before the magistrate, and a previous conviction under the Act was admitted, whereupon he was sentenced to imprisonment for 6 months.

There were two witnesses called for the Crown—Alexander Correan and Albert Barnett.

Alexander Correan, an Armenian, stated that on the morning of the 27th September, 1917, about 11 a.m., in company with Albert Barnett, another officer of the Department, he purchased a bottle of whisky for $3 from the accused; this was corroborated by the other detective, Albert Barnett.

On cross-examination, Correan said that he came from Turkish Armenia about 18 years ago. He came to Quebec, went to the

States for a while, and returned to Canada. He had been engaged for 9 years "spotting" under the Liquor License Act.

Albert Barnett, who had been engaged for about 8 months as a liquor detective, corroborated the evidence of Correan as to the purchase of the bottle of whisky.

Luke Leonard was the only witness called by the defence, He said: "I saw Correan on Sunday evening, and said to him. 'Will you have a glass of beer?' Correan said: 'No, I am feeling tough; you can appreciate it, bar-tender, when a fellow is hitting it up; he cannot drink this 2 per cent.' He said, 'Give me a drink.' I said, 'I don't believe there is such a thing in the house.' This was on Sunday the 23rd."

At the close of the evidence, the magistrate said:—

"I would certainly be very pleased if I could find it in my heart to doubt these men; it would suit me very well, and I only wish I had some doubts in the matter: I would certainly give the prisoner the benefit of the doubt. The fact of the matter is, while it may be unpleasant, something I don't like to do, we are not here to do just as we like. I have nothing to do in this case only to find Mr. McCranor guilty of selling liquor."

Thereupon McCranor was asked if he had been convicted of having liquor on his premises, to which McCranor answered, "Yes." He was thereupon sentenced to 6 months' imprisonment.

The appeal was heard by the District Court Judge on the 1st March, 1918, and the conviction quashed. No further evidence was called. Upon the argument it appeared from the judgment of the District Court Judge that he did not believe the evidence of the two detectives called by the Crown, and this was the ground upon which he set aside the conviction of the magistrate. No further evidence was given, nor were the witnesses who testified before the magistrate further examined.

It was suggested by Mr. Bain that the District Court Judge, a day or two before the decision in this case, had heard evidence given by the Crown witnesses Correan and Barnett in another liquor case, and that from hearing their evidence he did not believe them.

I think it clear that the evidence in the former case cannot be imported into the present case; but, at the same time, that does not preclude the District Court Judge from disbelieving these

ONT.
S. C.
REX
v.
MCCRANOR.
Clute, J.

witnesses. The evidence given by these witnesses in the other case, though not admissible, did not prevent the District Court Judge from forming an opinion of their character; and, if he did not believe them truthful or trustworthy, I do not see how he could free himself from that belief in a consideration of the present case.

Though not a rule of law, it is a rule of practice to require corroboration of the evidence of the accomplice: *In re Meunier*, [1894] 2 Q.B. 415, at p. 418. Where a prisoner is convicted upon the uncorroborated evidence of an accomplice the Court of Criminal Appeal may quash the conviction if the Judge at the trial omitted to caution the jury against convicting upon such evidence: *Rex* v. *Tate*, [1908] 2 K.B. 680. Lord Alverstone, C.J., agreed with counsel for the Crown that there is no definite rule of law that a prisoner cannot be convicted on the uncorroborated evidence of an accomplice, and approved of what Cave, J., said in *In re Meunier*, but thought he should have added, "assuming that the jury was cautioned in accordance with the ordinary practice," and was of the opinion that it is of the highest importance that the jury should be so directed. He quotes Taylor on Evidence, 10th ed., p. 688, as giving a correct statement of the practice, and Russell on Crimes, 6th ed., vol. 3, p. 646, "that the practice in question has obtained so much sanction from legal authority, that it 'deserves all the reverence of the law,' and a deviation from it in any particular case would be justly considered of questionable propriety."

In the *Tate* case the Judge did not direct the jury in accordance with the settled practice, but told them that the question for them was which of the two witnesses they believed, the boy or the prisoner, thereby leading them to suppose that if they believed the accomplice's story they might properly convict, although his evidence was entirely without corroboration. Under these circumstances, the Court of Criminal Appeal was of the opinion that there had been a miscarriage of justice, and that the conviction should be set aside.

Lord Alverstone adds: "We should not, however, have taken this view, notwithstanding the Judge's departure from the practice, if we thought that there was in fact substantial corroboration upon the evidence." But, in their opinion, there was no such corroboration.

There was no corroboration in the present case, and it is said that this was not necessary, as detectives are not to be considered as accomplices. It is so stated by Phipson, 4th ed., p. 471, but no authority is given for the statement. Corroboration must be by independent evidence. It is not sufficient by another accomplice: *Rex* v. *Noakes* (1832), 5 C. & P. 326.

Referring to the disclosures which are made by informers, to the Government, the magistracy, or the police, as privileged communications, the rule is, ". . . that those persons who are the channel by means of which that detection is made, should not be unnecessarily disclosed; if it can be made appear that really and truly it is necessary to the investigation of the truth of the case, that the name of the person should be disclosed, I should be be very unwilling to stop it:" *per* Eyre, C.J., in Roscoe's Criminal Evidence, 13th ed., p. 131.

The weight of American authorities is given in 16 Corpus Juris, pp. 955, 956:—

"An instruction which expresses or intimates an opinion as to the degree of credit or weight to be given to the testimony of a detective, a policeman, or an informer is erroneous, as where it charges that such testimony should be received with great, or more than ordinary, caution or with distrust, or with extreme care and suspicion. But this rule is not invaded by an instruction that the jury may consider the manner of a detective in testifying, or his interest in the case, or that it is legitimate for the State to employ detectives to run down crime, or that greater care should be used than in other cases, but that the testimony should not be disregarded entirely, and that the jury are the sole judges of the credibility of all the witnesses."

See *The State* v. *Fullerton* (1901), 90 Mo. App. 411 (holding that where the sole evidence on the trial of an indictment for selling liquor comes from detectives, the defendant is entitled to an instruction that such evidence should be received with the greatest caution). Compare *O'Grady* v. *The People* (1908), 42 Colo. 312, 346 (holding that the giving of instructions as to the caution to be observed in weighing testimony of private detectives or persons employed to find evidence is based upon rules of practice rather than of law, and rests largely in the discretion of the trial Judge).

ONT.
S. C.
REX
v.
MCCRANOR.
Clute, J.

There is one class of persons, apparently accomplices, to whom the rule requiring corroborative evidence does not apply, namely, persons who have entered into communication with conspirators, but who, in consequence of either a subsequent repentance or an original determination to frustrate the enterprise, have disclosed the conspiracy to the public authorities, under whose direction they continue to act with their guilty confederates, till the matter can be so far matured as to insure their conviction: Taylor on Evidence, 9th ed., sec. 971; *Rex* v. *Despard*, 28 How. St. Tr. 346, 489, *per* Lord Ellenborough. The law in this respect is the same in America. Greenleaf on Evidence, 16th ed., sec. 382: *Campbell* v. *The Commonwealth* (1877), 84 Penn. St. 187, 198.

It was held in *Commonwealth* v. *Downing* (1855), 4 Gray (Mass.) 29, that one who purchases intoxicating liquor, sold contrary to law, for the express purpose of prosecuting the seller for unlawful sale, is not an accomplice, and is a competent witness on the trial of the seller; but the jury should be instructed to receive his evidence with the greatest caution and distrust. Still, a refusal of the presiding Judge so to instruct, accompanied with a remark upon the necessity of sometimes resorting to such evidence, was held not a ground of exception. See also *Commonwealth* v. *Willard* (1839), 22 Pick. (Mass.) 476.

There appears to be very little authority in our own Courts or in England on the exact question herein involved, but the weight of authority is in favour of the view that an informer or detective, as in this case, is not an accomplice, and does not, therefore, strictly speaking, require corroboration; but where, as in this case, the complainant and witness invites the accused to commit the offence, his evidence should, I think, be examined with extreme care and caution, whether by Judge or jury; and, in the absence of any corroborative evidence, it is a question as to what weight, if any, should be given to it.

The District Court Judge hearing the appeal did not believe the detectives upon whose sole evidence the conviction was made, there being no corroboration.

I do not feel justified in reversing his decision. If, as is probably the case, he was possessed of such opinion from having seen and heard the witnesses, it is difficult to see how he could denude himself of that opinion upon reviewing the evidence in this case,

ONT.
S. C.
REX
v.
MCCRANOR.
Mulock, C.J.Ex.

nor do I think he should; at all events it is not for this Court, I think, to reverse his finding and judgment.

I would dismiss the appeal, protect the magistrate as far as this Court has power to do so, and give no costs.

MULOCK, C.J.Ex., agreed with Clute, J.

Appeal allowed.

ADVANCE RUMELY THRESHER Co. v. KEENE.

SASK.
C. A.

Saskatchewan Court of Appeal, Haultain, C.J.S., Lamont and Elwood, JJ.A. April 19, 1919.

SALE (§ II A—25)—CONTRACT—SPECIAL CLAUSE—MEANING OF.

A purchase contract contained the following clauses:—

There are no representations, warranties or conditions, express or implied, statutory or otherwise, other than those herein contained, nor shall any agreement collateral hereto be binding upon vendor unless it is in writing hereupon or attached hereto and duly signed on behalf of vendor at its home office.

No agent or employee of vendor is authorized to alter, amend or enlarge this contract in any particular.

Such parts or portions of said goods as are not manufactured by or for vendor or are second-hand or rebuilt or repaired are not warranted expressly or impliedly by statute or otherwise.

The warranty herein does not apply to second-hand or rebuilt machinery which it is agreed is not warranted.

Held, in view of these clauses, that the purchaser could not recover for any alleged breach of implied warranty contained in a verbal agreement made during negotiations and before the contract was signed.

[*Schofield* v. *Emerson-Brantingham Implement Co.* (1918), 38 D.L.R. 528; 11 S.L.R. 11; 43 D.L.R. 509; 57 Can. S.C.R. 203, distinguished.]

Statement.

APPEAL from the trial judgment, in an action for the amount claimed to be due under a purchase contract. Allowed in part.

F. L. Bastedo, for appellant; *J. C. Martin*, for respondent.

The judgment of the court was delivered by

Elwood, J.A.

ELWOOD, J.A.:—This is an action to recover the amount alleged to be due on the sale by the plaintiff to the defendant of one gas pull second-hand tractor and one 4 gang second-hand Rumely plough.

The action was tried before a judge with a jury, and the following are the questions submitted to the jury and the answers thereto:—

Q. Did the vendors deliver to the defendant machinery in accordance with ex. "C"? A. Yes.

Q. If the said machinery was not in accordance with ex. "C," in what did it differ? A.——

Q. Did the defendant make known to the vendors the purpose for which he required the said machinery so as to shew that he relied on the skill and ability of the vendors to furnish machinery fit for his said purpose? A. Yes.

SASK.

C. A.

ADVANCE RUMELY THRESHER CO. v. KEENE.

Elwood, J.A.

Q. Was it in the course of the vendor's business to supply such machinery? A. Yes.

Q. Was the machinery supplied fit for the said purpose? A. No.

Q. What was the understanding on the purchase of the engine? Was it bought as a new engine, a second-hand engine, or as a re-built engine? A. Rebuilt engine.

Q. Did the vendors or their agents make any verbal arrangement in regard to the machinery? A. Yes.

Q. If so, what arrangement? A. The engine was to haul a 4 furrow plough, and stand the strain.

Q. Did the defendant in fact know that the written agreement excluded warranties? A. No.

Q. Did the vendors carry out any special verbal arrangement you may have found was made? If they did not, wherein did they fail? A. Yes—but the engine did not stand the strain.

Q. Did the defendant accept the said machinery? A. Yes. With the understanding that the said engine would do the work required.

Q. At what sum do you assess the defendant's damages, if any? Distinguish between damage for failure to furnish machinery fit for the defendant's purpose, and damage for breach of vendors' arrangement and any other damage? A. We believe that the damages due the defendant should be $500—five hundred dollars—because engine furnished was not fit for defendant's purpose, in that it did not stand the strain.

On the answers by the jury the trial judge directed judgment to be entered for the plaintiff for the purchase price, less the sum of $500 damages awarded by the jury to the defendant.

The contract, *inter alia*, contains the following: (see headnote).

In view of the above quoted clauses, the defendant cannot, in my opinion, recover for any alleged breach of implied warranty. *Sawyer-Massey* v. *Ritchie* (1910), 43 Can. S.C.R. 614.

The verbal arrangement, whatever it was, referred to in the answers by the jury, was made during the negotiations for the sale of the machinery and some considerable time prior to the signing of the contract and the signing of the notes given in payment of the contract. The notes were in fact signed after the actual delivery of the machinery.

The trial judge in the course of his judgment says as follows:—

> And the practical effect of the jury's finding is, that he would not agree to purchase or make settlement unless and until the special arrangement, intended to override the written order, was arrived at that the engine was to haul a four-furrow plough and stand the strain, or as the defendant put it "do it right along." . . . In my opinion where it appears plainly that some special arrangement was made with an officer of the company having

authority to make such an arrangement, and it being in effect agreed that this special arrangement shall override the terms of the written contract, and where the purchaser does not know that the written agreement contains terms which may be interpreted to exclude the special arrangement, and such terms are not called to his attention, the company should not be allowed, or permitted, to set up the written document in answer to the purchaser's contention under the special arrangement. It is in effect saying that we took advantage of the carelessness of the purchaser to have him agree to something that he would never have agreed to had he known it, and we now ask the court to preserve to us the advantage that we obtained by so doing.

The evidence does not justify the trial judge in the conclusion that he has arrived at and has set forth above as to the circumstances under which the verbal arrangement was made. There is no evidence that at the time of the signing of the contract or delivery of the machinery, or the signing of the notes, any verbal representation was made, nor was there any evidence that any representation was made that the contract to be signed did or would contain what it is alleged was verbally represented.

This being so, the case is very easily distinguished from the case of *Schofield* v. *Emerson-Brantingham Implement Co.* (1918), 38 D.L.R. 528, 11 S.L.R. 11, 43 D.L.R. 509, 57 Can. S.C.R. 203 (leave to appeal to P.C. granted Mar., 1919).

The law as to the effect of the verbal arrangement, if any, is in my opinion correctly set forth by my brother Lamont in *Allcock* v. *Manitoba Windmill & Pump Co.* (1911), 4 S.L.R. 135 at p. 139, as follows:—

> Whatever led up to the agreement for purchase, there came a time when the agent placed before the purchaser a contract in writing which the purchaser signed, and that contract contains a clause that "all the said articles are sold subject to the following express warranty and none other, which said warranty excludes all implied warranties." The plaintiff in the contract agreed that the only warranty attaching to the machine was the one contained in the agreement. This excludes any verbal warranty given by the agent of the defendant.

In the case at bar it will be observed that the contract signed by the defendant was that there were

> . . . no representations, warranties or conditions express or implied statutory or otherwise, other than those herein contained, nor shall any agreement collateral hereto be binding upon vendor unless it is in writing hereupon or attached hereto and duly signed on behalf of vendor at its home office.

I am of the opinion that the trial judge was in error in giving effect to the alleged verbal agreement.

SASK.

C. A.

Elwood, J.A.

The appeal, in my opinion, should be allowed with costs, judgment entered for the plaintiff for the amount of its claim and costs and dismissing the defendant's counterclaim with costs.

Appeal allowed.

ALTA.

S. C.

NUNNELLEY v. BLATT.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Scott, Simmons and McCarthy, JJ. June 20, 1919.

CONTRACTS (§ I E—65)—SALE OF LAND—ALTA. STATUTES—AGENT TO SELL—NECESSITY OF CONTRACT IN WRITING.

Chapter 27, s. 1, Alta. stats. 1906, provides that no action shall be brought whereby to charge any person either by commission or otherwise for services rendered in connection with the sale of any land, etc., unless the contract upon which recovery is sought in such action or some note or memorandum thereof is in writing signed by the party sought to be charged or by his agent thereunto lawfully authorized in writing.

Held, that the correspondence relied on by the plaintiff did not constitute such an agreement as entitled him to recover under the above Act.

Statement.

APPEAL by defendant from the judgment of Walsh, J., in an action for commission on the sale of land. Reversed.

A. Macleod Sinclair, for appellant; *E. V. Robertson*, for respondent.

Harvey, C.J.

HARVEY, C.J.:—This is an appeal from the judgment of Walsh, J., in favour of the plaintiff for commission upon a sale of land effected through his agency. The chief defence is the Alberta statute, c. 27 of 1906, which provides that:—

> No action shall be brought whereby to charge any person either by commission or otherwise, for services rendered in connection with the sale of any land . . . unless the contract upon which recovery is sought in such action or some note or memorandum thereof is in writing signed by the party sought to be charged or by his agent thereunto lawfully authorized in writing.

The plaintiff seeks to make out compliance with the statute through correspondence. The plaintiff first approached the defendant, who lived in Chicago, by writing him on May 27, making certain propositions. In the letter he says: "Also let me know if in case a deal is effected through my efforts you will be willing to pay me the usual commission of $1 per acre." The defendant's reply was a telegram as follows:—

> Wire me immediately whether or not you can close deal basis your letter May 27, and how quickly, where are prospects located and are all first mortgages. Other deals pending so must have answer at once.

This is the only communication from the defendant. It is contended that the terms "basis your letter May 27," include the terms as to commission. I think it would be rather straining the terms to adopt such a conclusion but it would in any event carry the plaintiff no further because the telegram is nothing but a question and contains no suggestion of an agreement to anything and the trial judge was, in my opinion, unquestionably right in declining to find any contract thus far. He does, however, find a contract and evidence in writing of its terms from the foregoing and a letter from a firm of agents in Chicago who are admitted to have been, at the time of writing this letter, "authorized to act as his agents in the sale or exchange of the said lands" and also to have been authorized to execute the agreement for sale.

The letter in question informs the plaintiff that the defendant had been ordered into service and that they are writing at his instance. They say that, if the plaintiff has any definite offer to make, they will get—not give—an immediate answer and they end the letter with the words "in case a deal is made you will not have to divide commissions with us."

Now to make out a case for the plaintiff it must be held that those agents had authority from the defendant and that that authority was in writing and that the agents promised to pay a commission. The statute says "thereunto authorized" which, of course, means authorized to make the contract for compensation, not to make an agreement for sale. The admission of agency thus gives no assistance and I am quite at a loss to see how there is any possibility of inferring that they had any such authority, to say nothing of its being in writing. Then I cannot quite see how what was said can be construed in any way as a promise to pay commission. The letter shews that the agents will require to submit to the defendant any offer made and get his answer. The most the remark about commission involves in my opinion is, that whatever commission, if any, the plaintiff is entitled to, they will not expect to divide with him.

It seems to follow from the terms of the statute that an implied contract will not support an action because no such contract could be expressed in writing. The essential term of the contract must be expressed in writing and signed by the party sought to be charged. Nor does there seem any way whereby the court can

ALTA.

S. C.

NUNNELLEY v. BLATT.

Harvey, C.J.

grant relief if there be no such contract for the terms of the statute are very wide and cover any claim for compensation for services whether by way of commission or otherwise.

In my opinion, the plaintiff has failed to establish any legal right to any payment for his services and I would, therefore, allow the appeal with costs and dismiss the action with costs.

Scott, J.

SCOTT, J.:—I concur.

Simmons, J.

SIMMONS, J.:—The telegram sent by the defendant to plaintiff's propositions was, in my view, correctly interpreted by the trial judge as failing to constitute an acceptance of plaintiff's offer to sell defendant's lands on the basis of a commission of $1 per acre.

The same considerations apply to the second telegrams of the defendant referred to in the judgment.

The negotiations were then taken on by E. B. Woolf & Co. on behalf of defendant. Woolf's first letter asked for "any definite offers" the plaintiff was prepared to make.

The fact that it said in this letter "in case a deal is made you will not have to divide commission with me" does affect the issue.

Woolf asked the plaintiff for definite offers and gave him some information which one real estate agent might reasonably expect when dealing with another broker, namely: that he would not ask the plaintiff to divide his commissions.

I would not be able to read into this, as the trial judge has done, an implied contract to pay commission, much less does it conform to the requirements of the statute requiring the contract to be in writing signed by the person charged with the making of it.

I would, therefore, allow the appeal with costs.

McCarthy, J.

MCCARTHY, J.:—The plaintiff contends that by an agreement in writing the defendant, Blatt, undertook to pay $1 per acre commission on the sale or exchange of the lands mentioned in the pleadings, and upon the trial of the action recovered a judgment against the defendant, Blatt, for the sum of $4,010. From this judgment the defendant appeals.

The alleged agreement is contained in several writings, correspondence by letters and telegrams. The view I take of the case can best be understood by a reference to such of the correspondence which the plaintiff contends constitute a binding contract within the statute hereinafter referred to. On May 27, 1918, a letter was written by the plaintiff to the defendant Blatt, as follows:—

Re your land. All secs. 5, 6, and 7, tp. 3, r. 14, w. 4 m. All secs. 1 and 12, n. half and s. e. quarter sec. 2 and s. half sec. 13, tp. 3, r. 15, w. 4 m.—4,010 ac.

Are you now the owner of the above land and do you still wish to exchange it? I have the following to dispose of: (Property described).

These properties all supposed to be absolutely good value, and are all located in and near the City of Toronto, which would make it fairly easy for you to look after them.

All the property is revenue producing with the exception of the subdivision, the apartment house alone being rented for $11,000 per annum, of which about 70% is net interest on investment to owner.

I have placed the value of your land at $25 per acre or $100,250 with $35,000 mortgage, which leaves your equity $65,250. There would, therefore, be a balance of $4,250 due you if the deal were put through at these prices.

If you care to consider this please let me have a reply *immediately*. Also let me know if in case a deal is effected through my efforts you will be willing to pay me the usual commission of one dollar per acre? I may say that Toronto agents are handling that end of the deal and I shall only make my com. from the sale of your land.

EDWARD NUNNELLEY.

P.S.—An *immediate* reply *please*.

To which the defendant, Blatt, replies by telegram as follows:—

Wire me immediately whether or not you can close deal basis your letter May twenty-seventh and how quickly. Where are prospects located and are all first mortgages. Other deals pending so must have answer at once.

And on June 18 the following letter is sent to the plaintiff by the defendant's agent:—

At the instance of Dr. Blatt, who has been ordered into government service, we are writing you with reference to the 4,000 acres near Milk River.

Any proposition that you have to make on this property will have to be *bonâ fide*, as Dr. Blatt cannot first inspect any property offered in exchange. If you have any definite offers to make without being contingent on inspection of his land, we will get you an immediate answer.

Your wire of June 13 is interesting, but it is not descriptive enough, and consequently cannot give you any opinion as to whether or not it would be considered. You can communicate direct with us, which will save you considerable time, and in case a deal is made you will not have to divide commissions with us.

E. B. WOOLF.

If the plaintiff is entitled to succeed it seems to me that he must establish that these three communications constitute a binding agreement to pay commission under the statute. It would appear from the evidence that negotiations were entered into with regard to the exchange of the properties mentioned in the above correspondence and that considerable time was spent by the plaintiff in an endeavour to arrange an exchange, and that finally, in the month of October, 1918, an agreement was entered

ALTA.

S. C.

NUNNELLEY v. BLATT.

McCarthy, J.

into between the defendants and the Toronto agents of the plaintiff. At the trial of the action certain admissions of facts were filed by the parties and in these admissions is to be found:—"That the defendants Woolf and Co. were duly authorised by the defendant, Blatt, to execute on his behalf and did execute agreement for sale or exchange of the said lands for the property in and near Toronto, belonging to Nathaniel Sproule."

It was admitted by the defendants at the trial of the action that the defendant, Goodwin, was the registered owner of the lands mentioned in the pleadings, and that the defendant, Goodwin, held said lands as trustee for the defendant, Blatt, and that the defendants, Woolf and Co. on June 18, 1918, or prior thereto, were employed by the defendant, Blatt, and authorised to act as his agents in the sale or exchange of the said lands.

It would appear from the authorities to be found in Leake on Contracts, 6th ed., p. 117, that there is sufficient internal reference to connect the writings in order to shew a complete contract in writing within the Statute of Frauds, and if that were the only difficulty in the way I think the plaintiff would be entitled to succeed, but it is to be observed that in the Alberta statute of 1906, 6 Edw. VII. c. 27, the legislature of Alberta enacts as follows: (See Harvey, C.J.), and that, therefore, no action will lie to recover any commission for services in connection with the sale of land except upon a contract in *writing*, signed by the person sought to be charged or his agent thereto authorised in the *writing*.

The concluding words of par. 4 of the Statute of Frauds, 29 Car. II. c. 3, s. 4, are as follows:—

> Unless the agreement upon which such action shall be brought or some memorandum or note thereof shall be in writing signed by the party to be charged therewith or some other person thereon lawfully authorised.

Apparently the authorisation under the last mentioned section need not be in writing, and the distinction between the authorisation required under that section and the section of the Alberta Act relating to the recovery of commission upon the sale of real estate is quite apparent, and this would seem to me to be the difficulty in the way of the plaintiff's success in the action, although I must confess that I am of the opinion that the purchaser was found by the plaintiff, and the defendants availed themselves of his services, and were it not for the statute passed by the legislature

of Alberta in 1916, I think he would be entitled to recover his commission.

But in the correspondence above referred to, and nowhere else in the correspondence put in at the trial, or in the evidence can I find that the defendant bound himself under the statute to pay the commission or authorised any agent in *writing* to so bind him. This situation, apparently, was in the mind of the plaintiff on September 10, 1918, as an extract from his letter bearing that date to the plaintiff's agent in Toronto, is as follows:—

> However, I suppose you know that in our province commission is not collectable unless you have some memorandum actually in writing, a rotten law but there it is. For this reason, I have delayed putting you in direct communication with them. My lawyer tells me, though, that he thinks there is no doubt but that with the correspondence I have, I could collect, although it is just possible that I might slip up on it.

It is also to be observed in the telegram from the defendant, Blatt, of June 8 that no mention is made of commission; that there is no acceptance of the plaintiff's offer in terms. There may have been an acceptance of a general character to be limited and defined by a subsequent arrangement on terms but if a contract is to be made the intention of the offeree to accept must be expressed without leaving room for doubt as to the fact of its acceptance, or as to the correspondence of the terms of the acceptance with those of the offer.

The trial judge seems to have proceeded upon the assumption that the agent, Woolf, was authorised in writing to bind the defendant, Blatt, to the payment of a commission but I cannot see that the correspondence put in at the trial would justify any such assumption, and I am of the opinion that the failure of the plaintiff to establish that the defendant Woolf was authorised by the defendant Blatt, in writing, to enter into a contract respecting the commission to be charged, and the omission of any mention of commission in the telegram from the defendant, Blatt, to the plaintiff of June 8, 1918, are fatal to the plaintiff's right to succeed in the action.

It was also contended on the argument on behalf of the plaintiff that he was entitled to be remunerated for services as upon a *quantum meruit* but from an examination of the authorities submitted on his behalf, with regret, I am unable to conclude that the

ALTA.

S. C.

NUNNELLEY v. BLATT.

McCarthy, J.

authorities would have the effect of overriding the statute. It is to be observed that the Alberta statute in terms says:—"No action shall be brought whereby to charge any person either by commission *or otherwise* for services rendered in connection with the sale of land . . . unless the contract, etc."

In my opinion, the appeal should be allowed with costs.

Appeal allowed.

QUE.

K. B.

HYDE v. SCOTT.

Quebec King's Bench, Lamothe, C.J., Cross, Carroll, Pelletier and Martin, JJ. November 21, 1918.

COMPANIES (§ V E—231)—PROHIBITED FROM PAYING UNEARNED DIVIDEND—R.S.Q. (1909), ART. 5999—DUTY OF SHAREHOLDER RECEIVING.

R.S.Q. (1909), art. 5999, prohibits a company from declaring a dividend the payment of which impairs or lessens the capital of the company, and from declaring or paying any dividend which has not been actually earned.

A shareholder who has received such illegal dividends is bound to return to the liquidator of the company, bonds of the company which he received in payment thereof or the price for which he sold such bonds.

Statement.

APPEAL from a judgment of Lane, J. Reversed.

The judgment of the Superior Court, which was delivered June 30, 1917, is reversed by the majority of the Court of King's Bench.

The action is taken by the liquidator of the Great Northern Construction Co. against one of its shareholders, to recover bonds of the par value of $6,000, such bonds forming a part of $1,500,000 of bonds distributed by the company amongst its shareholders.

The Great Northern Construction Co. was incorporated for the sole purpose of contracting with the Great Northern Railway Co. to build a section of the latter's line of railway. A sub-contract was given to Ross, Barry, and McRea, railway contractors. The consideration with the railway company was: (a) First mortgage bonds of the railway of the par value of $2,280,000; (b) A transfer of subsidies of the federal and provincial governments; (c) Certain common stock of the railway company. The consideration of the railway contract was: (a) $450,000 cash; (b) Bonds of the railway company for $500,000; (c) A mortgage of $50,000 on Quebec car shops; (d) Transfer of the above subsidies and common stock. Other contracts were entered into between the construction company and the contractors amounting to $207,200.

Six calls were made on the shareholders of the construction company, payable at different dates, of 15% and a last one of 10%.

On June 12, 1899, a resolution was adopted by the Board of this last company authorizing the respondent, secretary of the company, to collect the call No. 1.

On June 15, 1899, the same Board resolved:—

That a dividend be and is hereby declared out of the net profits of this company earned and being earned under the contracts between this company and the Great Northern Railway Co. of Canada, and this company and Ross, Barry & McRea, dated the 18th March, 1899, payable in bonds of the Great Northern Railway to the amount of $1,500,000 of said bonds *pro ratâ* to and as the holders of stock of this company pay in the amounts of the call of the said stock.

The respondent secured the subscriptions of the shareholders, collected the calls thereon and delivered certificates setting forth that the shareholders were entitled to receive *pro ratâ* certain bonds of the Great Northern R. Co. The respondent received for himself bonds of the par value of $6,000.

The appellant, in his quality of liquidator of the construction company, alleges that the construction company, contemporaneously with the subscription for and payment of its shares of the capital stock, distributed not only the prospective profits which it might earn upon the completion of the construction of the line of railway, but also the assets which represent the investment of its cash capital. In other words, it not only distributed its profits, but the capital which should remain as security for its creditors, and that the only works undertaken by the construction company were the works in connection with the Great Northern R. Co., and that the only assets are the claim for a return of bonds sought to be enforced against the respondent and the other shareholders, and possibly certain shares of the common stock of the Great Northern R. Co., of no value.

The respondent admits the distribution, but avers that such distribution was legally made.

The Superior Court dismissed the action.

Markey, Skinner & Co., for appellant; *Pentland, Stuart & Co.*, for respondent.

MARTIN, J.:—The respondent invoked the prescription of one year against the action, and that the winding-up order was

Martin, J.

QUE.
K. B.
HYDE
v.
SCOTT.
Martin, J.

void; these matters have been, so far as this Court is concerned, definitely disposed of in the cases of *Hyde* v. *Thibaudeau* (1910), 20 Que. K.B. 200, and *Hyde* v. *Ross* (1910), 17 Rev. Leg., p. 88.

The respondent also contended that nothing was due to the contractors Ross, Barry & McRae, but the latter's claim for a large balance due has been affirmed by judgment of this court.

The legality of this distribution of bonds, amounting to $1,500,000, amongst the shareholders of the construction company *pro ratâ* and concurrently with the payment by the shareholders of their calls on stock, is the question to be determined on this appeal.

At the time, the construction company began to distribute these bonds amongst its shareholders, as profits earned and being earned, not a dollar had been paid in on the subscribed capital stock of that company, and the railway had not been constructed.

The result of the operation was that the shareholders paid in $1 with one hand and drew out bonds of the par value of $3 with the other.

These bonds, though at the time of doubtful value, were the only assets the company had, and it does not require a professor of mathematics to establish the result of such an operation oft repeated.

No provision was made for contingencies which might happen, and did happen. These shareholders were playing safe; they did not risk anything and they could not lose.

While not perhaps quite overlooking the anxiety displayed by Mr. McNaught, the president of the construction company, when first examined under commission, to exclude everything which could throw light upon the circumstances of this peculiar transaction in which he was the moving spirit, his calculation of prospective profits to be made by this railway when constructed is fantastic and imaginary. It was a case of not only counting one's chickens before they were hatched, but of cashing in on the chickens before the eggs were laid. He says:—

> That the shareholders were led to believe that somehow or some way and at some time they would receive in the way of dividends large profits on the money invested.

That was a perfectly legitimate expectation to hold out to shareholders, but it does not appear that even the most opti-

mistic of these high financiers expected such a large and quick return on their so-called investment.

Mr. Melville, a director of the construction company, says that it was represented to him that there would be a large profit in the form of bonds and shares of stock of the railway company for distribution at some future date.

No one ever pretended that the stock of the railway company was at that time, or afterwards, of any value.

The evidence of the liquidator is clear on this point and moreover it appears that the railway company subsequently defaulted on its bonds and a scheme of arrangement was carried into effect on the judgment of the Exchequer Court.

No reason is given why this construction company was incorporated in West Virginia, and in the absence of proof to the contrary it must be assumed that the company law of the State of West Virgina even if that governed, is similar to that of the Province of Quebec where this contract was made and where this company's operations were carried on.

The statutory law of the Province of Quebec at that time was art. 4736 R.S.Q.

> 4736. No company shall declare a dividend the payment of which infringes upon or lessens the capital of the company. No dividend shall be declared or paid which has not been actually earned by the company.

The Quebec Company Clauses Act was to the same effect.

The dividend declared by the resolution of June 15, 1899, was not a dividend then actually earned by the company. The prospective paper profits were at most only eventual, presumed, and fictitious, which a multitude of subsequent events and accidents might diminish or destroy, and the effect of such a distribution of bonds, concurrently with the payment of calls on stock, gave the shareholders a chance for future gains without any risk of loss.

The construction company had to pay $450,000 cash to Ross, Barry & McRae, and it is difficult to understand how it could do this and distribute amongst its shareholders all its available assets without impairing its capital.

The English authorities cited in appellant's factum are clear and convincing, and it is not necessary to here repeat the remarks of the judges in the cases cited. Palmer's Co. Law (9th

QUE.
K. B.
HYDE
v.
SCOTT.
Martin, J.

ed. (1911), p. 215; Stiebels Co. Law (1912), p. 73; Lindley On Companies, 6th ed. (1902), vol. 1, p. 598; Palmer's Company Precedents, 11th ed., Part II, p. 700; Mitchell, on Corporations, p. 666; *Moxham* v. *Grant*, [1900] 1 Q.B. 88; *Re Mercantile Trading Co., Stringer's Case* (1869), L.R., Ch. 475; *Guinness* v. *Land Corporation of Ireland* (1882), 22 Ch. D. 349; *Re County Marine Insurance Co.* (1870), L. R. 6 Ch. 104; *Leeds Estate Building and Investment Co.* v. *Shepherd* (1887), 36 Ch. D. 787; *Re Alexandra Palace Co.*, (1882), 21 Ch. D. 149; *Re Exchange Banking Co.* (1882), 21 Ch. D. 519; *Holmes* v. *Newcastle-Upon-Tyne Abattoir Co.* (1875), 1 Ch. D. 682; *Oxford Building Society* (1886), 35 Ch. D. 502; *Re National Funds Assurance Co.* (1878), 10 Ch. D. 118; A. and E. Encycl. of Law (2nd ed.) vol. 26, p. 1014, under heading Stockholders.

An examination of these authorities moreover clearly establishes that the liquidator can enforce claims, like the one in question, against the shareholders.

The doctrine of the French law and jurisprudence is the same. Pardessus, vol. 4, No. 1035, p. 218, says:—

> De nombreux abus pourraient d'ailleurs en résulter: lorsqu'une société fait son inventaire, et qu'elle se trouve avoir des bénéfices, tous les associés, sans distinction, en touchent souvent une partie sur les deniers en caisse, quoique ces bénéfices ne soient qu'éventuels et présumés, parce qu'ils reposent sur la supposition de la solidité et de la fixité des valeurs portées dans l'actif de l'inventaire, qu'une multitude d'événements ou d'accidents postérieurs peuvent détruire ou diminuer. Il peut aussi arriver qu'en formant l'actif, on y comprenne des créances douteuses, et des bénéfices momentanés que l'instant d'après fera évanouir. Des répartitions fondées sur de telles bases pourraient faire rentrer, entre les mains d'un commanditaire, autant et plus qu'il n'a versé pour sa mise, et lui laisser la chance de gains futurs, sans risque d'aucune perte.

Same author, pages 206, 260, 440.

Pandectes Françaises (Rép.), vo. *Société*, no 4778, p. 338; no 5379, p. 380; no. 1041, p. 713.

> No. 4778. Pareillement, le tribunal de commerce, est compétent pour connaître de la demande formée par le syndic de la faillite d'une société en commandite, contre les actionnaires, en restitution des dividendes qu'ils ont indûment touchés. Rouen, 25 novembre (1861), Journ. trib. comm., [1862], p. 471; D.P. [1862], 2, 106. Cass., 3 mars (1863), 2. Journ. trib. comm. (1863), p. 287; Jurispr. Hâvre, (1863) 193;—S. (1863) 1. 137. Caen, 16 août 1864, Journ. Trib. Comm., (1865), p. 531; S. [1865]. 2. 33. D.P.;—(1865) 2. 193;—Pau, 18 décembre 1865, S. (1866). 2. 178. Bourges, 21 avril 1871, D.P.

(1873) 2. 34;—Vavasseur, t. 1, n. 752;—P. Pont, t. 2, n. 1492. V. toutefois Cass., 8 mai 1867. Journ. Trib. Comm. (1867), p. 468;—S. 1867;—1, 253, D. P. 1867. 1. 193.

No. 5379. De même, les commanditaires ou actionnaires sont tenus de restituer à la masse, des dividendes fictifs qu'ils ont perçus: de telles distributions ne sont, en effet, en réalité, qu'un remboursement total ou partiel, fait aux associés, de la mise sociale qu'ils avaient versée, et qui était devenue le gage des créanciers.

No. 10410. La règle que la distribution des bénéfices réalisés dans un exercice peut être faite aux actionnaires, n'est pas douteuse: mais quand peut-on dire qu'il y a "bénéfice réalisé"? La cour de cassation a, dans la célèbre affaire Mirès, très nettement solutionné la question: il faut que le bénéfice soit produit, en caissé, qu'il n'ait plus rien d'éventuel et de problématique, en un mot, qu'il soit à la disposition de la société. Attendu, dit-elle, que l'art. 13 de la loi du 17 juillet 1856 exige formellement que les dividendes répartis soient réellement acquis; qu'il ne suffit pas que le bénéfice se fonde sur une convention qui l'assure: qu'il faut qu'il soit complètement réalisé, qu'il n'est acquis à la société, dans le sens de la loi, qui a voulu écarter les dividendes frauduleux, et même ceux qui ne seraient que hasardés, qu'autant qu'il est le résultat d'une opération accomplie; que, par conséquent, l'arrêt, attaqué, en réputant acquis un bénéfice, par cela seul qu'il est stipulé, et en n'exigeant pas, pour qu'il pût être régulièrement distribué, que l'opération qui le procure fût exécutée, a méconnu le véritable sens de la loi, et en a commis la violation. Cass., 28 juin 1862, Journ. Trib. Comm., (1862), p. 447;—S. 1862. 1. 625;—D.P. 1862. 1. 305.-7 mai 1872;—Pand. Fr. Chr., vol. 1. 72; S. [1872]. 1. 123;—D.P. (1872), 1. 233;—Trib. corr. Seine 13 decembre 1882, Rev. des Soc., 1883. p. 105;—Ruben de Couder, *loc. cit.*, Houpin, t. 1, n. 732, p. 588.

A full report of the leading case above referred to will be found in Dalloz, 62. 1. 305; et Sirey, 62. 1. 625.

Prior to 1867 the jurisprudence in France was practically unanimous that shareholders were bound to return fictitious dividends in all cases. By the amendment of 1867, shareholders were protected unless the dividends had been declared:—

en l'absence de tout inventaire ou en dehors des résultats constatés par l'inventaire.

It could not be successfully contended here that the respondent could urge condition to bring him under this amendment, even if it were in force here, which, of course, it is not.

I should hesitate to put the seal of judicial approval on a transaction of the character in question in this cause, and it appears to me that the distribution of the bonds of the railway company amongst the shareholders of the construction company in the manner and at the time the same was made, whether considered under English law, French law, American law, or our own statutory law, was illegal and should be so declared.

QUE.

K. B.

HYDE v. SCOTT.

Martin, J.

The respondent admits that he realized on the bonds in question $3,418.54. He received these bonds unduly and without right, and having sold them he is at least bound to restore the price he received for them.

The judgment of the Superior Court should be reversed and the respondent condemned to return the bonds of the railway company aggregating $6,000 or, in default, to pay $3,418.54 with interest from service of process, Vo. *Société*, n. 5386, and costs of both courts.

Carroll, J.

CARROLL, J.:—On June 5, 1899, a call was made on the shareholders, and further calls were subsequently made monthly; but on June 15, namely, before the first call was paid, the construction company declared a dividend upon its profits "earned and being earned," under the contract which has just been referred to. This dividend was payable in bonds of the company up to the amount of $1,500,000, in proportion to the number of shares held by each shareholder.

From different resolutions which were adopted, and from the letter of Pres. McNaught addressed to the defendant, it appears that this declaration of a dividend was made without a single cent having been paid upon the shares, and McNaught tells us in his evidence that the defendant received these bonds "as dividends."

Apparently this dividend was declared not only without any real profit having been realized, but were in anticipation of future profits. The construction company has been put into liquidation, and the sub-contractors, Ross, Barry & McRea, have been, by the judgment of this court, declared its creditors for a considerable amount.

It is well to state, just here, that corporations only have such powers as are specially granted them by their charter, and that they can do nothing but what is authorized by the Act creating them; and when the law is silent it is necessary to ascertain what the intention of the legislature was in creating the corporation. Now, under R.S.Q. (1909), art. 5999, no company shall declare a dividend the payment of which impairs or lessens the capital of the company. No dividend can be declared or paid which has not been actually earned. It is true that an annual dividend

may be paid out of the reserve fund, but such payment must be publicly announced to the shareholders at the annual meeting, and be duly authorized by resolution of the company.

So, if one keeps to the letter and the spirit of the Act, and to the wording of the resolution which was adopted by the construction company, the defendant could not receive as dividend a part of the capital of the construction company before the undertaking was carried out, or by way of being carried out. But the defendant tells us, supposing the action is illegal, that it is against the directors and not against the shareholders that the creditors should have their recourse.

It is true that the Act imposes severe penalties against directors who make themselves liable for offences of this nature, while it is silent with regard to shareholders. But the principles of the common law may always be invoked.

Possibly a shareholder who receives, in good faith, dividends improperly declared, may be free from the obligation to return them. Is the defendant in this position? He has himself received instructions directly from the president of the construction company, and he knew all the details of the transaction, so that he cannot plead "good faith." In Cyc., vol. 10, p. 546, there is a definition of what constitutes a dividend:—

> A dividend is that portion of the profits and surplus funds of the corporation which has been actually set apart by a valid resolution of the board of directors, or by the shareholders at a corporate meeting, for distribution among the shareholders according to their respective interests in such a sense as to become segregated from the property of the corporation, and to become the property of the shareholders distributively.
>
> A dividend is not a debt until it has been declared, but is a mere potentiality representing the right of the shareholder to a proportionate share of the profits of the corporate venture.

And on p. 549:—

> It has been well reasoned that shareholders among whom assets of the corporation have been distributed by its officers, without authority from the corporation, or when acting outside the scope of their ordinary powers, are technically at least guilty of a conversion of such assets. . . . This right of reclamation . . . passes to the assignee of the corporation, if the terms of the assignment are sufficiently comprehensive to embrace it.

On this point there can be no doubt. But the defendant tells us: "We required money to pay the sub-contractors, and the only means of procuring any was to sell our bonds to the shareholders."

QUE.

K. B.

HYDE v. SCOTT.

Martin, J.

Under the terms of the resolution, for a dollar paid to the construction company, each shareholder would receive $3 of bonds. In this way the shareholders were induced to buy the bonds. Whatever may have been the efficacy of the proceedings to obtain a certain amount of money, the dividend remains no less tainted with illegality. The capital of a company is a "trust fund," vol. 10, p. 551, for its creditors, and the law prevents these funds being divided among the shareholders, and so leaving the creditors without effectual recourse. Moreover, each shareholder is interested that the capital be employed to successfully conduct the business of the corporation.

It seems to me that transactions of the nature of the one submitted to us cannot be proved. The law demands that each shareholder of the company pay the amount which he has subscribed. Now, by clever manipulation the shareholders in this construction company not only have not paid a cent, but they have been given a portion of the capital to induce them to pay their shares, and this "bonus" is the bonds which constitute the capital of the company.

I think that the judgment is ill-founded, and should be set aside.

Pelletier, J.

PELLETIER, J. (dissenting):—We already know the chief facts which have given rise to the present litigation, for they have already been three times before this court; first, in the case of *Hyde* v. *Thibaudeau*, 20 Que. K.B. 200; then in the case of *Hyde* v. *Ross*, 17 Rev. Leg. n.s. 88; and, lastly in the case of *Great Northern Company* v *Ross* (1916), 25 Que. K.B. 385. [*Recital of facts.*]

Mr. Scott, the defendant in the present case, becomes one of the shareholders of this company, and has paid all his calls, making a total of $2,000.

$114,000 of bonds was reserved for the outfitting of the railway when it should be constructed. Having to pay Ross, Barry & McRea only $450,000 in money, it kept the other $50,000 remaining to help provide for future contingencies. It also kept in the treasury, for the same reason, an amount of more than $200,000 in bonds, and it distributed the excess of the bonds which it had on hand, namely, $1,500,000, in money, so

that in proportion to the amount of each subscription, each shareholder would receive in bonds three times the amount which he paid in money. With these $200,000 of bonds and the $50,000 in money, it kept, it seems to me, a considerable margin, and which any company or man of business would consider sufficient under the circumstances.

Could not the construction company, from that moment, consider that it had realized a sure profit of at least $1,500,000 in bonds, and had it not the right from that time to say: "Seeing that I kept so considerable a margin to provide for future contingencies, I make a first division of profits, which I now have, and later I will make second distribution for the $200,000 of bonds which I am keeping, and for the $50,000 of money which remains in the treasury."

As soon as the construction company should receive the completed railway from Ross, Barry & McRea, it would immediately deliver it to the railway company. It has then only to disappear, and to wind up.

However, matters did not so turn out. Ross, Barry & McRea did not complete the railway, and further, they handed in an account for extras of more than $130,000. These extras had not been legally authorized previously, and Ross, Barry & McRea would never have been able to obtain payment for them (see what I said on this head at p. 398 of vol. 25, Que. K.B.). But Ross, Barry & McRae were in possession of the road. They refused to deliver it if they were not paid for these extras, which they were not entitled to, and this faced the construction company, as well as the railway company, with financial disaster in every respect. Placed in this perilous situation, which it could not foresee and which should not have happened, the construction company made a compromise with Ross, Barry & McRae under which it obtained possession of the road, by undertaking to give Ross, Barry & McRae bonds to the amount of $75,000.

The construction company has already asked us for the cancellation of this contract, because it had been obliged, it stated, to give its consent to it under circumstances which rendered the contract void,—that it was an extortion, etc. We refused to comply with this request, because the construction

QUE.
K. B.
HYDE
v.
SCOTT.
Pelletier, J.

company having consented, as a compromise, to this contract with Ross, Barry & McRae, could not ask us to cancel it, and consequently Ross, Barry & McRae have to-day, against the construction company, a judgment of which the largest part results from the said compromise.

There is no doubt that, legally speaking, they are creditors; but they are so because they have placed the knife at the throat of the company, and that the latter was compelled to submit to a painful humiliation. The present action has been brought in order that Ross, Barry & McRae may be paid this debt.

The construction company was incorporated in the United States. They obtained, however, at Montreal a winding-up order which does not affect the American shareholders. Mr. Hyde, the appellant, was named the liquidator, and sued the defendant (as well as several other Canadian shareholders) to return the $6,000 of bonds which the defendant Scott received. The other Canadian shareholders who are also sued would have to submit to the same fate—this being a test case—before proceeding with the other suits pending.

It is admitted that the stock of the construction company is without value, and that the only purpose of the winding-up is to pay Ross, Barry & McRae the debt which I have just mentioned; they are the only creditors unpaid. The judge of the Superior Court dismissed the action; hence the present appeal.

The chief contention of the appellant, as liquidator, is that the $1,500,000 of bonds, allocated as we have seen above, was a payment of dividend; that a dividend could not be paid except with profits actually earned; that this allocation of $1,500,000 took place before the commencement of the works, and that consequently the construction company rendered itself insolvent by disposing of practically all its assets.

At first sight it seems that the appellant is here partly in the right. The resolution of June 15, 1899, reads in effect as follows: [see above]. If we only read the text of this resolution, especially the first part, we see that it is declared out of a net profit already earned or by way of being earned.

If I was right just now in saying that with a reserve of $200,000 in bonds and $50,000 in money to provide against con-

tingencies, the company (in view of the obligation of Ross, Barry & McRae to complete the railway in its entirety for what they should receive under their contract), was right, from that moment, to consider that it had at least $1,500,000 in bonds, as net profits, what legal reason prevents it from disposing of these profits? From that moment these profits were so much the more certain that one could not suppose that Ross, Barry & McRae, who were responsible contractors, not only would not finish their contract but would make an hypothetic account for things to which they had no right, and should succeed in obtaining the promise of a payment of half of this demand by illegally keeping possession of a railway which did not belong to them.

I did not say that in order to criticise the judgment given in favor of Ross, Barry & McRae—I took part in it myself—but I point out the special character of this debt in order to shew that the construction company could not foresee it when it distributed the $1,500,000 bonds, and that if, later, it agreed to pay half of this unjust demand, it was in order to avoid a still greater evil.

I state, then, that what happened subsequently, as to this judgment obtained by Ross, Barry & McRae, cannot affect the good faith with which the $1,500,000 was distributed, by describing it as a dividend. But there is more still. I think that the resolution properly speaks of a dividend earned and to be earned; but it is not only a question of words, and it is not really a dividend that they declare. What was done, in my opinion—and the matter doesn't appear to me to be in doubt for a moment—has been to give the name of "the payment of a dividend" to an operation which consisted in disposing of $1,500,000 of available bonds in order to find the $500,000 in cash which they required. A careful examination of the documents which we have before us brings this conviction. Let us first take the resolution of June 15, 1899, above quoted, and let us read again the two last lines: "to the amount of said $1,500,000 bonds *pro ratâ* to and as the holders of stock of this company pay in the amounts of the calls on said stock."

Then this resolution, re-read in its entirety, says that a dividend is paid, but adds that this dividend of $1,500,000 in

QUE.
K. B.
HYDE
v.
SCOTT.
Pelletier, J.

bonds will be exchanged for $500,000 of stock payable in money and in proportion to the amount paid by each shareholder. If there had been only this it would have been even then sufficient. But there is more. From the 12th of June the company had passed another resolution, a part of which reads as follows:—

Upon motion duly made and seconded, it was unanimously resolved: That the president and secretary of this corporation be and they hereby are authorized and directed to issue to each subscriber of the capital stock of this corporation, forthwith, upon the payment by each of the said subscribers of the initial assessment of 15 per cent. on said stock, known as "Call No. 1" an appropriate certificate setting forth that said subscriber is entitled to receive *pro ratâ* certain bonds of the Great Northern Railway Company upon the basis and under the term and condition of the two contracts, one between the Great Northern Railway Company and the Great Northern Construction Co. dated Quebec, March 18, 1899, and the other between the Great Northern Construction Co. and John Ross, James Barry, and John A. McRae, dated Quebec, March 18, 1899.

and on June 19 the president of the company wrote a letter to the defendant, from which I extract the following:—

That is to say: the certificates for bonds, I think, should call for bonds at 33⅓ cents, so that each subscriber will get three times as many bonds now as the number of dollars he pays in. This will leave a few bonds in the treasury of the company which will be declared as dividends on the final winding-up of the business. In order to make this plain, a subscriber for $15,000 will be required on this call to pay in $15,000, that being 15 per cent. of the total subscription, and he will receive a certificate calling for bonds to be signed by Mr. Garneau as president and yourself as secretary and treasurer, certifying that when the bonds of the Company are engraved and issued that the party will be entitled to three times as many bonds as he pays in dollars; that is to say, a hundred thousand dollars subscriber paying in $15,000 in money will receive a certificate calling for $45,000 in bonds; these bonds, of course, to be deposited with the trust company in pursuance of the terms of our various contracts. In the absence of Mr. Garneau, these certificates may be signed by the Honourable John Sharples and yourself. Kindly give this matter your immediate attention as the time for closing up the matter by Saturday next is exceedingly short.

Later still, on June 27, the secretary of the company wrote a letter to John Joyce, one of the subscribers to the capital stock. This is what he said:—

Great William Street, New York City, June 27th, 1899. Great Northern Construction Co. Call No. 1 of 15 per cent. John Joyce, Esq., Purchaser street, Boston, Mass. Sir,—Please send your check to me, address care of Farmers Loan & Trust Co., 20 William street, New York, for $3,750, being call No. 1 of 15 per cent. on your subscription to the capital stock certificate so that I can endorse the amount of your payment on the stock. On receipt of your check I shall send you a certificate for bonds of the Company to the

amount of $11,250 which bonds will be delivered to you as soon as they are engraved. Faithfully yours, ERNEST E. LING, treasurer of the Great Northern Construction Company.

Is not all this conclusive, and is it not evident that under pretence of declaring a dividend—something which appears to me legitimate—the construction company has actually obtained the $500,000 in money (which it had not received from the railway company) on giving $1,500,000 of bonds for the $500,000 in money?

Then what must we think of all this? Has not the company simply sold $500,000 bonds which were worth, then, approximately this amount. Even if we come to the conclusion that it was not a question of paying a dividend, I would still remain of the opinion that this payment of dividend was legitimate at that time, and even that another dividend might have been declared later with what was previously kept in reserve. But if the $500,000 was obtained by giving the $1,500,000 of bonds, there was a completed transaction whose legality may perhaps be disputed—I do not scrutinize it from that point of view, for that does not appear to me necessary—but one thing is very sure, namely, that there was a give and take contract, that the construction company has benefited from the $500,000 which it received, and that it cannot ask a return of the bonds without returning the money for which these bonds have been surrendered.

Now, what the appellant seeks to-day is that Mr. Scott, the defendant, refunds, at par, the bonds which he has received, and he does not offer to return to him the money representing the acquisition of these bonds. If this bargain is void, let it be cancelled, but the parties must then be placed in the position they were previously.

The liquidator asks for the bonds. He asks them from the Canadian shareholders only, for he has no right to ask them from the others; then the Canadian shareholders alone would return their bonds and would alone pay the debt of Ross, Barry & McRae. The reply to this is, that the Canadian shareholders may then exercise their recourse against the American shareholders. In order that this argument should be well founded it it necessary that the liquidator has joint and several recourse,

QUE.
K. B.
HYDE
v.
SCOTT.
Pelletier, J.

because it would be a matter of commerce, and then this remedy would be prescribed in five years, and this action, which was only brought in 1908, would be prescribed.

It is admitted that, in any event, the debt of Ross, Barry & McRae does not exceed $100,000, and that the bonds are worth approximately one-third, or 50%. of their nominal value, and if the liquidator should obtain the return of the bonds by everybody, he would then have $750,000 or $500,000 to pay $100,000.

Is it not clear, in view of all the circumstances, that the only recourse which the liquidator could have in any event, would be to obtain the return—the defendant has sold his bonds—of the price which the bondholders have realized, but upon refunding what they paid?

I have said that I would not discuss the value of this exchange of $1,500,000 of bonds for $500,000 in money. If this operation is legal, the question is decided and the action is ill-founded. If it is illegal, let it be cancelled in its entirety and the parties put in the *status quo ante*: In this case, again, the present action should be dismissed. Who is benefited by the $500,000 received, thanks to the bonds? It is Ross, Barry & McRae who have had them, less $50,000. Now, the liquidator desires that the contractors keep this $450,000, and that those who have refunded the $500,000 should pay a second time for the bonds which they received. That appears to me not properly to be admitted.

There is another aspect of the situation. The debt of the construction company is $100,000. Once again, Ross, Barry & McRae are the only creditors. In keeping $50,000 in money and $200,000 in bonds, the construction company had then made ample provision for the unforeseen, and even for more than what might have been foreseen. Events have shewn that the $1,500,000 of bonds were, from that time, a net profit.

Besides, where have the $50,000 in money and the $200,000 in bonds gone? They would be sufficient to pay all the debts. Where are they? Is it not there that the liquidator should seek and find, and is it not with that that Ross, Barry & McRae ought to be paid?

On the whole, I am of opinion that the provisions of the judgment are well founded.

Appeal Allowed.

KOSOLOFSKI v. GOETZ.

SASK.

C. A.

Saskatchewan Court of Appeal, Haultain, C.J.S., Newlands, Lamont and Elwood, JJ.A. June 19, 1919.

PARTNERSHIP (§ II—8)—DESTRUCTION OF PROPERTY OF—RIGHTS AND POWERS.

It is within the scope of a partner's authority to authorize the burning of partnership property which in his opinion is of no further value.

Statement.

APPEAL from the decision of a district court judge in favour of Peter Kosolofski. Reversed.

D. Fraser, for appellant; *C. M. Johnston*, for respondents.

The judgment of the court was deliverd by

Lamont, J.A.

LAMONT, J.A.:—The plaintiffs, father and son, are farmers, and in 1915 they farmed the southwest quarter of 34-21-25-W 3rd. The father took a lease of the land in question, and made an agreement with his son that the son would assist in the farming operations on this land, for which he would receive one-third of the crop while the father received two-thirds. The father had to pay the rent. Together they put in 160 acres of flax. Of this crop they cut only some 75 or 80 acres. About two-thirds of what was cut was threshed, the remainder was stacked some time in December and left on the land. In the spring of 1916 the defendant rented the same land, and wanted the plaintiffs to remove their stack, as he wished to burn the stubble. The plaintiffs put a fire-guard around the stack, but did not get it threshed. There was some evidence that the unthreshed portion of the flax was very weedy. In July, the defendant again saw the plaintiff's son with reference to the removal of the unthreshed flax, and the son told the defendant to burn it up, which he did. The plaintiffs now seek to compel the defendant to pay for the portion burned.

The district court judge gave judgment for the plaintiff Peter Kosolofski, holding that, even if there was a partnership between the father and the son, the son would have no right to give the defendant permission to destroy the partnership property.

That there was a partnership so far as the operation of the land in question is concerned, does not, in my opinion, admit of any doubt. In his examination for discovery, the father admitted that the son helped to put in the seed, to cut the crop, to

SASK.

C. A.

KOSOLOFSKI v. GOETZ.

Lamont, J.A.

stack it, and helped to thresh the part that was actually threshed, and that he got his share of that crop. He also admitted that the son is entitled to one-third of anything realized from this action. In his examination for discovery, he stated that his son was a partner so far as the crop was concerned, and that he was to pay one-third of the threshing bill. In his evidence at the trial he stated that the son was to get one-third of the crop as wages, and he denied that the son was to pay any portion of the threshing bill. He excused this statement in his examination for discovery by saying that he misunderstood the question.

In view of the fact that the son had a farm of his own which he operated that season, and that the father had also a farm which he operated besides the rented land in question, and there being no evidence that the son was subject to the father's orders in so far as the rented land was concerned, I am of opinion that we must reject the argument that the son was the servant of the father for wages payable with a share of the crop.

The question to my mind is: Does the agreement between the father and son, and their mode of carrying on farming operations, fairly evidence an intention on their part to become partners in the farming of the quarter in question? In my opinion, it does. They each had their own farming operations to conduct, and they farmed the rented land in common with a view to profit. This constitutes a partnership. Partnership Act, s. 3. *Witt* v. *Stocks* (1917), 33 D.L.R. 519, 10 Alta. L.R. 512, 11 Alta. L. R. 154.

The plaintiffs being partners, the firm is bound by any act of either partner in carrying on the business of the firm in the usual way in which business of a like kind is carried on. S. 7.

It was, however, argued that one partner cannot authorize the destruction of partnership property. Whether or not this is so depends upon the property and the circumstances. The property in this case consisted of a stack of weedy flax, which had been exposed to the weather from autumn until the following July. Its value was questionable. It was the plaintiffs' duty to remove it from the land of the defendant. They were unable to get it threshed. To have it removed would undoubtedly involve considerable labour and, probably, expense, to say

nothing of the loss of flax from wastage during removal. As there is no evidence that the son was not acting *bonâ fide* in authorizing the burning of the flax, I think we must presume that, in his opinion, that was the best thing to do under the circumstances.

If, instead of telling the defendant to set fire to the flax, the son had hired a man and sent him to burn it, could it for a moment be contended that such hired man would be liable in damages for burning up partnership property? Clearly not. In what different position is the defendant? Whether or not the act of the son, in causing the stack to be burned, was good partnership business, is immaterial. It was the business of the partnership to get the flax out of the defendant's way, and the manner in which the son obtained its removal cannot, in my opinion, under the circumstances, be said to be so unusual that the father would not be bound by his act. It is surely within the scope of a partner's authority to authorize the burning up of partnership rubbish on other property that, in his opinion, is no longer of value.

The appeal should be allowed with costs; the judgment below set aside, and judgment entered for the defendant with costs.

Appeal allowed.

FRANKEL v. ANDERSON.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Scott, Simmons and McCarthy, JJ. June 20, 1919.

APPEAL (§ VII E—323)—TRIAL—JUDGE RELYING ON CERTAIN EVIDENCE—OPPORTUNITY OF OBSERVING DEMEANOUR OF WITNESSES—DUTY OF APPELLATE COURT.

Where a trial judge who has had the opportunity of observing the demeanour of witnesses has expressly relied on certain evidence which if accepted undoubtedly is sufficient to support his finding, an appellate court will not reverse such finding.

[*Dominion Trust Co.* v. *New York Life Ins. Co.*, 44 D.L.R. 12, followed; see also *Granger* v. *Brydon-Jack*, 46 D.L.R. 571.]

Statement.

APPEAL from a judgment of Hyndman, J., dismissing plaintiff's claim and allowing defendants' counterclaim in an action for damages for failure to properly care for cattle under a contract in writing.

H. P. O. Savary, K.C., for appellant; *M. B. Peacock*, for respondent.

ALTA.

S. C.

FRANKEL v. ANDERSON.

Harvey, C.J.

HARVEY, C.J.:—This is an appeal from the judgment of Hyndman, J., in favor of the defendant and rests very largely upon his conclusion of facts upon conflicting testimony.

There were more than a dozen witnesses for the plaintiff, and nearly as many for the defence, and there was much conflict. If I had nothing more than the written record of the evidence I am by no means satisfied that I would come to the same conclusion as the trial judge, but even so it does not follow that if I had heard the evidence given in open court it might not have made a quite different impression on me. It was argued that because the trial judge stated that with respect to certain evidence he thought the witnesses were quite sincere we are free to estimate the evidence without regard to his conclusion. This view, however, can hardly be accepted. The value of oral testimony depends on other consideration as well as the veracity of the witnesses, and particularly their accuracy dependent even in honest witnesses upon their powers and means of observation, their memory and other circumstances, and assistance can be gained from an observance of their demeanour in respect to all of these which only the trial judge can obtain.

In *Dominion Trust Company* v. *New York Life Ins. Co.*, 44 D.L.R. 12, at p. 14, [1919] A.C. 255, Lord Dunedin, in giving the judgment of the Judicial Committee, quotes with approval Lord Halsbury in *Montgomerie & Co.* v. *Wallace-James*, [1904] A.C. 73 at p. 75, as follows:—

> Where a question of fact has been decided by a tribunal which has seen and heard the witnesses, the greatest weight ought to be attached to the finding of such a tribunal. It has had the opportunity of observing the demeanour of the witnesses and judging of their veracity and accuracy in a way that no appellate tribunal can have.

The trial judge expressly relied on certain evidence which, if accepted, undoubtedly is sufficient to support his finding. I do not see, therefore, how it is possible for an appellate court to say that he is clearly wrong.

I did have some doubt as to whether he properly interpreted the obligations arising under the contract, but, after further consideration, I am disposed to think that he did.

The contract is for feeding and watering cattle, and the feed is specially designated as well as the manner in which it is to be

furnished to the cattle. The defendant also agreed "to look after the cattle see that the cattle have plenty of water and salt." For this he was to receive $1.25 per head per month. The contract then continues:— ALTA. S. C. FRANKEL v. ANDERSON. Harvey, C.J.

> Said H. Anderson agrees to be responsible for all the cattle and to return the same number head cattle to said Frankel that he received from him, but said H. Anderson will not be responsible for any animal that should happen to die from natural or unavoidable causes and agrees to furnish the dead carcass in case one should happen to die.

This seems to involve that the defendant must return all the cattle, dead or alive, or make good the value of any missing. That would make him responsible for any strayed or stolen, and he might be liable for any dying by reason of avoidable causes. But this is where my difficulty arises. There is no doubt that if an animal die from want of sufficient food or water or care that is not an unavoidable cause, though it may be a natural cause under the circumstances, but having regard to the fact that the measure of his responsibility for feed and water has already been fixed by the terms of the contract I have come to the conclusion that the avoidability intended by the contract cannot rest on a greater case in this regard than has already been imposed, and this is apparently the view the learned trial judge took.

I would, therefore, dismiss the appeal with costs.

SCOTT, J., concurred with McCarthy, J. Scott, J.

SIMMONS, J.:—The plaintiff's claim against the defendant is in damages for failure to properly care for cattle under a contract in writing. Simmons, J.

Appellant does not, in his factum or upon the argument, question the correctness of the interpretation placed upon the written agreement, but asks this court to set aside the findings of fact of the trial judge upon a somewhat extensive volume of evidence given by witnesses upon each side.

It is obvious that the trial judge was in a better position than this court to judge as to the veracity, accuracy, and honesty of the witnesses. I do not question the principles he applied in determining these quantities.

I would therefore dismiss the appeal with costs.

MCCARTHY, J.:—This is an action arising out of a contract to winter cattle. McCarthy, J.

ALTA.

S. C.

FRANKEL v. ANDERSON.

McCarthy, J.

The material part of the contract dated January 3, 1918, is as follows:—

A. Anderson agrees to winter feed for said J. H. Frankel 100 head cattle with the straw that he has in his field, either let the cattle run to the stacks or carry the feed to the cattle and agree to look after the cattle, see that the cattle have plenty of water and salt, said Anderson to receive $1.25 (one dollar and twenty-five cents) per month per head and for the term up to May 1, 1918; said Anderson agrees to be responsible for all the cattle and to return the same number head cattle to said Frankel that he received from him, but said Anderson will not be responsible for any animal that should happen to die from natural or unavoidable causes and agrees to furnish the dead carcass in case one should happen to die. Said Frankel agrees to pay to said Anderson for feeding the cattle monthly each month at the expiration of each if said A. Anderson so request of him to do so.

For a breach of the terms of the above contract and for negligence, Frankel brings an action against Anderson to recover damages, and Anderson counter-claims for the amount due under the contract.

The action came on for trial at Calgary before Hyndman, J., without a jury on the 4th and 5th days of February, 1919. The trial judge dismissed the plaintiff's action and allowed the defendant's counterclaim. From this judgment the plaintiff appeals.

The breach of the contract mainly relied on by the plaintiff upon the argument was the failure of the defendant to water the cattle, and as to this there is a conflict of evidence; there is also a conflict of evidence as to the condition of the animals when they arrived on the defendant's farm. I am not satisfied if I had heard the evidence that I would have arrived at the same conclusion as the trial judge, but having read the evidence I am unable to say that his conclusion was wrong. There is, as I have said, a conflict of evidence, and his conclusion is not unreasonable. Lord Buckmaster, in a recent case before the Privy Council, *Ruddy* v. *Toronto Eastern R. Co.*, 33 D.L.R. 193, 21 Can. Ry. Cas. 377, [1917] W.N. 34, 38 O.L.R. 556, with regard to conclusions of facts says:—

But upon questions of fact an appeal court will not interfere with the decision of the judge who has seen the witnesses and has been able, with the impression thus formed fresh in his mind, to decide between their contending evidence, unless there is some good and special reason to throw doubt upon the soundness of his conclusions.

And in *Foley Bros.* v. *McIlwee* (1918), 44 D.L.R. 5, at p. 8, says:—

It is unnecessary to repeat the warnings frequently given by judges both here and in Canada, against displacing conclusions of disputed facts determined by a tribunal before whom the witnesses have been heard and by whom their testimony has been weighed and judged.

These two extracts from the judgment of McPhillips, J.A., in *Roray* v. *Nimpkish Lake Logging Co.* (1919), 47 D.L.R.— in my opinion, is a recent and brief statement of the result of the authorities which perhaps is unnecessary to repeat here.

The trial judge says: "The evidence is very conflicting." He, however, finds that the cattle were in a run down condition upon arrival at the defendant's farm, and that they were fed and watered under the contract. It is not unreasonable to conclude that when cattle in such condition are left out to run in very severe weather to be cared for in compliance with the contract the result will be depreciation and loss. There can be no doubt but that it was known to the plaintiff or his agent (Cohen) that the conditions of shelter on the defendant's farm were meagre and the stabling accommodation far below what would be required to stall feed the cattle should the weather become bad. If then the plaintiff leaves his cattle to run out to be fed straw and watered, at $1.25 per head per month, under severe weather conditions, such as happened and might be expected, although a common practice in this country, he must be assumed to take his chances as to depreciation and loss, unless he protects himself against same under a contract, and there is not, nor can there be any suggestion that, under the contract sued on, the defendant was an insurer.

It appears from the evidence that the temperature was low during December, parts of January and February, being as low as 24 degrees below zero in the month of February, and that it was a very severe winter.

Under the circumstances, and in view of the price paid for wintering the cattle, there is reason to find that all that was intended under the contract was that the defendant should account for the animals dead or alive to the plaintiff, should feed them straw and water them, and not to shelter or stable them, which the trial judge has found was done, and I think the judgment should stand. I would dismiss the appeal with costs.

Appeal dismissed.

SASK.

C. A.

HILTON v. ROBIN HOOD MILLS Ltd.

Saskatchewan Court of Appeal, Haultain, C.J.S., Lamont and Elwood, JJ.A. April 19, 1919.

MASTER AND SERVANT (§ II B—71)—FACTORIES ACT, SASK.—DANGEROUS MACHINERY—DUTY TO GUARD—FAILURE TO COMPLY WITH ACT—NEGLIGENCE—LIABILITY.

Section 19 of R.S.S. (the Factories Act) provides in part that: "In every factory all dangerous mill gearing and machinery . . . shall be so far as practicable securely guarded." Failure to comply with this statutory duty renders the factory owner liable for injuries causing the death of an employee, if such death resulted from breach of the statutory duty and not from the employee's own negligence.

General instructions not to go near machinery when in motion does not obviate the necessity of complying with the requirements of the statute, nor does the fact that they were given establish that a man found dead in the unprotected machinery was guilty of negligence when his duty took him upon a small platform upon which the machinery was situated.

Statement.

APPEAL from the judgment of McKay, J., awarding plaintiff $5,000 for the death of her husband, killed in defendants' mill. Affirmed.

The judgment appealed from is as follows:—

The evidence shews that said Hilton was at the time of his death on December 7, 1915, in the employ of the defendant, and was killed in the defendant's grain elevator building, in which were a ground floor, first floor and top floor.

The first floor is about 90 ft. above the ground floor, and the top floor is about 30 ft. above the first floor. From the ground floor to the first floor there is a spiral stairway, and between the first floor and the top floor there is a wooden stairway. In addition to the spiral stairway between the ground and first floor there is also a lift for passengers, or freight. It is worked by steel cables with electrical power. The machinery which works this lift is placed on a platform or stage, about 11 or 12 ft. high, on the first floor. The top of the stage is about 6 ft. wide and 12 ft. long. There is a 5 horse power motor on the southwest corner of the stage, which provides power for the lift. The lift or cage is made of wood, 4 or 5 ft. square, and can hold 4 men; it is carried up and down by 2 half-inch steel cables. These cables coil around and uncoil from a drum when the latter is started. The drum is on the top of the stage. The shaft of the drum runs into cross beams on the stage, running north and south. The drum is about 20 inches in diameter. There is another shaft and 3 wheels or pulleys on the easterly end of the stage, and belts connecting the different parts of the machinery. On the north side of the drum, near the bottom of it, there is a rod on which two guide pulleys move, there are grooves in these pulleys in which the two steel cables run when coiling on or uncoiling from the drum. Between the drum and the north side of the stage there is an open space, large enough for a man to fall through, down to the ground floor.

The lift cannot be started in motion without first starting the motor on the stage, and this motor can only be started from the ground floor. After the motor is started, the drum can be started and stopped from the ground floor, first floor, or top of the stage, and in fact from wherever a certain cable

running from the south-west corner of the stage to the ground floor can be reached. When the drum is started, it starts the lift or cage.

The means of getting to the top of the stage is from the first floor by a movable ladder made of wood 17 ft. long, resting at the bottom on the rough cement floor, and at the top against a steel chute or leg, 22 or 24 inches wide. The ladder is 12 or 14 inches wide. The steel leg against which it rests is a boxing used for the purpose of elevating or shooting down grain. There is a flange 1 or 2 inches wide on each side of this steel leg, which would help to prevent the ladder from slipping off the leg. The ladder is in two pieces, 5 or 6 ft. having been added to it. It is on the north side of the stage and practically touches it, and extends 4 or 5 ft. above it. The ladder is not rigid like a stairway, but shakes a little when one is ascending it. The top of the stage is covered with beams and planks which form its flooring, except certain small openings, and the hole north of the drum, above referred to. In stepping off the ladder to the stage you step on to a flooring 22 or 24 inches wide, the hole north of the drum being between this flooring and the drum. Plans shewing the stage, lift and drum, etc., were put in as exhibits, shewing details thereof, but I think the above is a sufficient description for the purpose of this judgment.

There is a speaking tube from the ground floor to the top floor. This speaking tube at the top floor is about 25 to 30 ft. from the top of the stairway. There is a bell near the speaking tube on the ground floor, and another on the top floor, also near the speaking tube. If a person on the ground floor desires to speak to a person on the first or top floor he gives two rings to the bell on the top floor; this is a call to the person on the first or top floor to come to the speaking tube.

Hilton's duties were general work around the elevator building, including sweeping and cleaning the elevator building and cleaning and oiling the machinery.

It appears that in the forenoon of December 7, 1915, Alexander Scott, the foreman of defendant, instructed Hilton to sweep upstairs, and as he came down at noon to sweep the spiral stairway. Later Scott went to the speaking-tube on the ground floor and rang the bell. Hilton came to the speaking tube and Scott told him he wanted him to come down and help at putting up some chicken feed. Hilton said "all right, send up the lift." Scott turned on the switch which started the motor, and started the lift up by pulling cable "C." This was the usual way of starting the lift. It takes 1½ minutes for the lift to go from the ground floor to the first floor. After starting the lift, Scott went about some other work, and in about ten minutes he had occasion to pass through that part of the building where the lift was, and he noticed that it was about 20 feet from the first floor and thought Hilton was coming down; later he saw the lift about the same place which should have been down before then, and he went to the bell and gave two rings, but received no reply. He then sent another man up the spiral stairs to see why Hilton did not answer, and he stopped the elevator machinery and quieted things down and went up the spiral stairs, and found the dead body of Hilton on the south side of the drum. His head was to the east, on top of the boxing at the east end of the drum. His neck was broken. His left arm was free and hanging to his side, the right hand was caught against the drum by the east cable. His right arm passed underneath the drum, coming up on the north side of the drum, his hand being almost to the top of

SASK.

C. A.

HILTON v. ROBIN HOOD MILLS LTD.

the drum. Two fingers of the right hand were caught by the east cable and drum, the cable passing over the first joint from the end of the first finger, and between the first and second joints on the second finger. The second lap of the cable was over the back of his hand. The east cable which held his fingers and hand against the drum was off the guide pulley. The evidence also shews that 2 or 3 days after the accident the cable would not stay on the pulley when the drum was started, but would come off, until the pulley was cleaned. When Hilton would be cleaning and sweeping upstairs he would usually have a corn broom, hand brush and rag, and his instructions were to bring these tools down, after he finished sweeping and cleaning, to the ground floor where there was a place for keeping them. When his body was found as above stated, the corn broom, hand brush and his mitts were found 4 or 5 feet from the ladder on the first floor, the hand brush lying on his mitts, or one of them, and the corn broom standing up against a grain spout near by. They looked as if placed there. The rag was on the stage on the west side, about 1½ or 2 feet from the northwest corner. There was dust on it, apparently having been lying there for some time. Hilton had swept the top floor, the wooden stairway and the first floor about the wooden stairway. According to witness Scott the easterly side of the stage had also been swept.

From the evidence I find that Hilton was caught by the fingers of the right hand by east cable, and being unable to release his fingers, as the drum revolved and the cable was coiling on it he was pulled over the drum from the north side and his arm continued to follow the drum until his body prevented it going further and the force of the pulling or the fall against the boxing broke his neck and he was killed.

N. R. Craig, for appellant; *C. E. Gregory*, K.C., for respondent.

Haultain, C.J.

HAULTAIN, C.J.:—I concur in the result arrived at by my brother Lamont, but with much doubt. That there is an almost unlimited scope for conjecture as to the circumstances under which the accident happened is made quite clear by the judgments of the trial judge and my learned brothers in appeal.

I agree with my brother Lamont that the machinery was dangerous, within the meaning of the Factories Act (R.S.S., c. 17.) The onus is consequently thrown on the appellant of proving that, in spite of its breach of a statutory duty, the accident was due to the negligence of Hilton. To establish negligence on his part, it is necessary to indulge in what is almost a guess as to why he went on to the platform at the time the accident happened. The theory that he went there for the purpose of adjusting the cable is not in my opinion supported by the evidence. The evidence, in my opinion, points clearly to the fact that the cable was out of position was due to the accident. On the other hand, the inference that Hilton went up on to the

platform either to finish his work or gather up his implements seems to me to be fair and probable, and the findings of the trial judge to that effect should not be disturbed.

I would dismiss the appeal with costs.

LAMONT, J.A.:—This is an appeal from a judgment awarding the plaintiff $5,000 for the death of her husband, A. A. Hilton, killed in the defendants' mill.

The facts are fully set out by the trial judge. Three grounds of appeal are urged: (1) The evidence did not warrant the inference drawn by the trial judge that the deceased met his death in the performance of his duty while on the stage where the machinery was placed. (2) The machinery was not dangerous, and, (3) the deceased was guilty of contributory negligence in going near the machinery while it was in motion, as he had been told not to do so.

To establish liability on part of the defendants, the plaintiff must prove that they were guilty of negligence, and that it was that negligence which caused the death of the deceased. There were no eye-witnesses to the accident, so the manner in which he came to his death is a matter of inference.

The principle upon which a court should proceed in a case of this kind is laid down in *Richard Evans* v. *Astley*, [1911] A. C. 678, as follows:—

> It is, of course, impossible to lay down in words any scale or standard by which you can measure a degree of proof which will suffice to support a particular conclusion of fact, the appellant must prove his case. This does not mean that he must demonstrate his case. If the more probable conclusion is that for which he contends and there is anything pointing to it, then there is evidence for a court to act upon. Any conclusion short of certainty may be miscalled conjecture or surmise. The courts, like individuals, habitually act upon a balance of probabilities.

and in *Winnipeg Electric R. Co.* v. *Schwartz*, (1913), 16 D.L.R., 681, at 684, 49 Can. S.C.R. 80, Davies, J., said:—

> A jury cannot, of course, select as between equally probable and fair inferences, one which they prefer. It is essential that their finding should not only be fair and reasonable, but that it should be of preponderating weight over other possible inferences.

Two theories were advanced as to how Hilton came to his death. That of the plaintiff was, that being called down by Scott to go to other work, and knowing it was his duty to put

SASK.

C. A.

HILTON v. ROBIN HOOD MILLS LTD.

Lamont, J.A.

away in their place on the ground floor his brooms and dusting cloth, and knowing that this cloth was upon the stage on which the revolving drum of the elevator stood, he went up to get his dusting cloth; that while stepping from the ladder to the platform, or while upon the platform, he somehow slipped or stumbled, and fell into the machinery. The theory of the defendants is, that Hilton—on returning from the speaking tube after Scott had started the elevator—had noticed that the east cable was out of the guide pulley, and he ascended the ladder to put back the cable in its place, and in attempting to do so was caught in the cable and drawn over the drum and killed.

As to these two theories the trial judge says:—

> In my opinion the plaintiff's contention is much more probable than that of the defendants; in fact, to my mind, it is the only reasonable explanation of how the accident happened.
>
> In order to adopt the defendants' contention we have to start out with the assumption that the cable did come off the guide pulley before the accident, as there is no direct evidence that it did. It seems to me it is just as probable that it came off after deceased was caught with it, during his struggles to free himself. Whereas, according to the plaintiff's theory, we have the fact proved that the rag was on the stage, and it was his duty to bring it down to the ground floor with the other tools. Furthermore, there is the evidence of Scott, who swears that Hilton was a very careful man, and not one who would take risks; and Bouskill's evidence is that it would be very foolish and practically suicidal for any person to try to put the cable in the guide pulley while in motion. While the evidence shews that Hilton did not use the rag that morning, Scott's evidence shews that he had swept the easterly portion of the stage, and very likely saw the rag while so doing, as the place was well lighted.

I agree with the trial judge. Two facts seem to me to make the plaintiff's contention the more probable one. (1) Hilton had swept the east end of the platform, his corn broom, hand brush and mitts were found near the foot of the ladder, the cloth he used as a duster was found upon the platform; and (2) it was his duty to take these down to the ground floor and put them in the box or locker where they were kept. To my mind, it seems highly probable that, being called to another job, he went up to the platform for his duster to put it away in its proper place.

As there was no evidence that the cable had ever come off the guide pulley prior to the accident, it seems to me there is no fact existing prior to the accident upon which to base the defend-

ants' theory that he went up to put the cable on the guide pulley. The fact that after the accident the cable was found to be off the pulley, and that it subsequently came off, would seem to me to be sufficiently explained by the fact that Hilton had been caught in the machinery. If Hilton's death is to be accounted for by either theory, the inference to be drawn from the known facts indicate that the plaintiff's theory is the more probable.

The next question is: Was the machinery dangerous? The defendants' contention is succinctly stated in their factum as follows:—

> It is submitted that the machinery in this case, having regard to its situation and the absence of necessity for going around it while in motion and the instructions as to its use, was not dangerous.

In my opinion, we can at once eliminate "instructions as to its use." The dangerous character of machinery cannot be affected by any instructions as to its use when in operation. Then as to its situation—the drum and cables in question were a little over 100 ft. from the ground floor and 11 ft. above the first floor, and were placed upon a stage or platform 12 ft. by 6 ft. I agree that if no employee was called upon in the performance of his duty to go upon that platform, there might be considerable force in the defendants' argument. But where an employee is called upon in the performance of his duty—even if that duty be only sweeping and dusting—to be in the vicinity of the machinery it is immaterial, so far as he is concerned, whether that machinery be on the ground floor or against the roof. It is equally dangerous. Then as to the other reason given, namely, "absence of necessity for going around it while in motion"—Scott, the elevator man, gave as a reason why the machinery need not be protected that "there was so little likelihood of a man going near;" but he admitted that, if it were in a place where a man had occasion to go, "it should have some covering or security to prevent accident." This, I think, establishes beyond question that the machinery was dangerous, at least so far as concerned Hilton and his fellow employee whose duties took them to the platform in question.

SASK.

C. A.

HILTON v. ROBIN HOOD MILLS LTD.

Lamont, J.A.

S. 19 of R.S.S. c. 17, provides in part as follows:—"In every factory all dangerous mill gearing machinery . . . shall be so far as practicable securely guarded."

The machinery which caused Hilton's death was not guarded, and could easily have been so. In my opinion, the defendants were guilty of a breach of their statutory duty and are liable if Hilton's death resulted from this breach, and not from his own negligence.

The defendants claim that Hilton's death was caused by his own negligence in disobeying instructions given to him by the elevator foreman. The foreman, referring to Hilton and his fellow employee whose duty likewise took him to the platform, said: "I gave them instructions to run no chances and not to go near moving machinery." Later he gave the following testimony:—

Q. Well, did you ever give him any instructions that he was not to do that? A. He wasn't to go on the platform?

Q. Yes, when the machinery was in motion? A. Well, I never gave him no particular instructions not to go on the platform, because I never thought there was any need for any man going there.

Q. You simply gave instructions that they were not to go near the moving machinery? A. Yes.

General instructions not to go near machinery when in motion cannot, in my opinion, be held to obviate the necessity of complying with the requirements of the statute, nor does the fact that they were given establish that a man found dead in the unprotected machinery has been guilty of negligence when his duty took him upon a 12 x 6 platform upon which the machinery was situated.

In my opinion, therefore, the proximate cause of Hilton's death was the failure of the defendants to securely guard, as far as practicable, the dangerous machinery which they had placed on the platform.

The appeal should be dismissed with costs.

Elwood, J.A.

ELWOOD, J.A. (dissenting):—This is an action which the plaintiff brought on her own behalf and on behalf of her two sons to recover damages from the defendant for the death of her husband, Alfred Hilton, who was killed in the defendants' grain elevator building at Moose Jaw.

SASK.

C. A.

HILTON v. ROBIN HOOD MILLS LTD.

Elwood, J.A.

The trial judge, *inter alia*, finds as follows:—(see statement).

The learned trial judge held that the drum and opening between the drum and the north side of the platform are things that come within s. 19, (*a*) and (*c*), c. 17 R.S.S. 1909, and should have been guarded and protected and the hole covered, and that the defendant in not doing so was guilty of a breach of statutory duty. The trial judge further found that the said Hilton came to his death while on the stage to which the drum was fixed; that the said Hilton had come up to said stage for the purpose of getting the rag above referred to, and that it was his duty to get said rag, and that in attempting to get it he in some way slipped, and fearing to fall down the hole or opening, which the defendant should have covered or protected, in his efforts to save himself was caught by the cable and drum and was unable to extricate himself, and met his death in consequence, and awarded damages to the plaintiff. From this judgment the defendant appeals.

The object of the above-referred-to statute of the Province of Saskatchewan is to afford protection to those whose duty requires them to go in the vicinity of dangerous machinery. The evidence in this case shews that except for the purpose of oiling the machinery and sweeping the stage upon which it was erected, there was no necessity for any employee of the defendant to go upon the stage or near said machinery. The evidence also shews that all of the defendant's employees were warned not to go near any moving machinery. There was no necessity for the said Hilton—or any person—to go upon the stage when the machinery was in operation. There was, convenient to said stage and without going upon said stage, the means of at any time stopping said machinery, and I am of the opinion that, under the evidence, the machinery and opening were, so far as practicable, securely guarded within the meaning of the above Act.

If, however, I am mistaken in this conclusion, there is to be considered the question of how did the deceased come to his death. I have stated above the conclusion that the trial judge came to, and the trial judge quotes the following extract from *Wakelin* v. *London & S. W. R. Co.*, (1886), 12 App. Cas. 41 at 44:—

SASK.

C. A.

HILTON v. ROBIN HOOD MILLS LTD.

Elwood, J.A.

My Lords, it is incumbent upon the plaintiff in this case to establish by proof that her husband's death has been caused by some negligence of the defendants, some negligent act, or some negligent omission, to which the injury complained of in this case, the death of the husband, is attributable . . . and if in the absence of direct proof the circumstances which are established are equally consistent with the allegation of the plaintiff as with the denial of the defendants, the plaintiff fails.

and from *Richard Evans* v. *Astley*, [1911] A.C. at p. 678, as follows:

It is, of course, impossible to lay down in words any scale or standard by which you can measure the degree of proof which will suffice to support a particular conclusion of fact. The applicant must prove his case. This does not mean that he must demonstrate his case. If the more probable conclusion is that for which he contends, and there is anything pointing to it, then there is evidence for a court to act upon. Any conclusion short of certainty may be miscalled conjecture or surmise, but courts, like individuals, habitually act upon a balance of probabilities.

The finding of the trial judge as to the cause of Hilton's death is certain conclusions which he comes to and which he says the facts indicate. He concludes that, after going to the top storey in answer to the summons of Scott to come downstairs and after the machinery to operate the elevator had been started by Scott, Hilton reached the first floor at or near the bottom of the stage, and then remembered the rag, which the trial judge has referred to, and went up the ladder on to the stage for the purpose of getting the rag, and in some way fell into the machinery. On the other hand, counsel for the respondent contends that when Hilton reached the first floor at the bottom of the stage he noticed that one of the cables was off the pulley of the elevator and went up to fix it, and got his hand caught in the cable and drum, and was killed in that way.

The trial judge rejected the latter contention as improbable. With great deference to the trial judge, I cannot agree with his conclusions. In the first place, I would say that the evidence abundantly demonstrates, and, in fact, he finds in effect—that the rag in question had not been left upon the stage that morning by Hilton, but had been left there by him on some previous day. The evidence would indicate that Hilton had been on the stage that morning prior to being summoned to the top floor by Scott. Is it probable, then, under those circumstances that Hil-

ton, after descending from the top to the first floor, and when waiting for the elevator to come up for him, would suddenly remember having seen the rag on the stage and go up and get it? And if he did go up the ladder to get the rag, would he have gone upon the stage if—as the evidence shews—he could have reached the rag from the ladder without going upon the stage?

On the other hand, the undoubted evidence is that when the witnesses went to release Hilton's body after the accident they found one of the cables off the pulley, and that for some days after the accident the cable continued to come off the pulley until the pulley was cleaned.

It was suggested that the accident might have caused the cable to come off the pulley. Possibly that might be. But that conclusion, to my mind, is greatly weakened by the evidence that for some days after the accident the cable continued to come off the pulley and so continued until the pulley was cleaned. That evidence, to my mind, is convincing that when the cable continued to come off the pulley after the accident, that condition of affairs was not caused by the accident.

It seems to me then, in the absence of any evidence to the contrary, to be at least probable that the cable was off this pulley immediately prior to the accident, and that Hilton went up for the purpose of putting it on to the pulley. It would appear that, while dangerous, the cable could, with very little effort, be placed upon the pulley while in operation. A photograph put in as an exhibit demonstrated that from the first floor Hilton could have seen whether or not the cable was off the pulley. The elevator could operate even with the cable off the pulley, and the theory as to the cause of the accident—under all of the circumstances—suggested by counsel for the appellant, seems to me at least as probable as, if not more probable than the theory suggested by counsel for the respondent and accepted by the trial judge.

I would say that the circumstances of this case bring the case very well within what was held in *Wakelin* v. *London & S. W. R. Co.*, which case is referred to by the trial judge, *supra*.

SASK.

C. A.

HILTON v. ROBIN HOOD MILLS LTD.

Elwood, J.A.

If, however, I am again mistaken in the conclusion I have come to, and if the trial judge was correct in his finding as to the circumstances and cause of the accident, there still, I think, remains to be considered whether or not the action of Hilton in going upon the stage when the machinery was in operation disentitles the plaintiff to succeed.

As I have stated above, the evidence shews that all employees were warned not to go near moving machinery. The finding of the trial judge is that the edge of the platform, against which the ladder used by Hilton was placed, was 22 to 24 inches from the opening on which the drum was placed, and that the drum was about 27 inches from the edge of the opening. Under these circumstances, it seems to me that to go upon this platform raised 11 feet from the ground, when the machinery was in operation, was going near moving machinery and was a disobedience of the orders given by the defendant to its employees, and that, as it was in consequence of this disobedience that the accident arose, the plaintiff is not entitled to recover.

In my, opinion, therefore, the appeal should be allowed with costs, and the plaintiff's action dismissed with costs.

Appeal dismissed.

MITCHELL v. JOHNSTONE WALKER Ltd.

ALTA.

S. C.

Alberta Supreme Court, Walsh, J. July 14, 1919.

NEGLIGENCE (§ I C—35)—MERCHANT'S STORE — INVITEE — IMPENDING DANGER FROM FALLING WALL ON ADJACENT PREMISES—NEGLECT OF DUTY TO WARN—INJURY—LIABILITY.

An invitee to a merchant's store is entitled to damages for injuries caused by the negligence of the merchant who, although he knew of impending danger threatened to his premises by the collapse of a nearby wall, failed to notify her, or advise her of the risk she was running in going into that part of the store in which she was injured by flying bricks and which was the part most surely to be affected by the fall, or to exclude her from that part of the building.

Statement.

ACTION against the owner of a departmental store for damages for injuries to an invitee caused by the falling of a nearby wall. Judgment for plaintiff.

Frank Ford, K.C., and *H. H. Robertson*, K.C., for plaintiffs; *S. B. Woods*, K.C., for defendant.

Walsh, J.

WALSH, J.:—The defendant is a company conducting a departmental store in Edmonton in premises on Jasper Ave. which run back to the lane running through the block. The shoe department is in a one-storey annex which is built up to this lane. On February 25, 1918, the female plaintiff was in this shoe department for the purpose of buying a pair of shoes for herself. Whilst she was there, a portion of the ruins of a building on the opposite side of and abutting on this lane which had been destroyed by fire the day before fell and some of the bricks of which it was composed came crashing through the window of this annex and fell upon the female plaintiff, doing her serious injury. For the resulting damages she and her husband bring this action.

The action is founded upon the contention that Mrs. Mitchell was invited to the defendant's store not only by the invitation impliedly extended to the public by this merchant to come to it for the purchase of its wares there exposed for sale, but by a particular invitation addressed to her as one of the public through the medium of an advertisement in a newspaper to go there on that day for the particular purpose for which she went and that whilst so on these premises this accident happened to her through the negligence of the defendant.

That she was an invitee in this store when this unfortunate occurrence happened I have no doubt. That it was the defendant's negligence that brought it about is another and more difficult

ALTA.

S. C.

MITCHELL v. JOHNSTONE WALKER LTD.

Walsh, J.

question. The negligence alleged consists in this, that the defendant, though knowing of the danger threatened to its premises and its occupants through the impending collapse of these ruins, neglected either to advise the plaintiff of the risk she was running in going into that part of the store in which she was hurt and which was the part most surely to be affected if any part was by the fall or to exclude her from the same.

Mr. Charles May, a citizen of Edmonton, whilst standing on the street opposite these ruins about 2 o'clock in the afternoon of this same February 25, came to the conclusion that they were liable to fall and that in doing so they might come upon the defendant's store and do injury to it and to people in it. He went at once to Mr. Engel, the defendant's secretary-treasurer, and warned him of this. There is no dispute about the fact of a warning having been given but there is one as to its exact terms. It was the north wall of the ruins that abutted on the lane. The south wall was 50 ft. from it and the lane was 20 ft. wide, so that the south wall of the ruins was 70 ft. from the nearest part of the defendant's store. In the south wall was the chimney said to be 56 ft. high. May says that the danger which to his mind threatened the defendant's building was in the collapse of this chimney for he thought that if it fell in its entirety straight to the north it would come in contact with the north wall of the ruins and the impact might result in the bricks of which it and the north wall were composed being hurled violently against the defendant's store. Of course, if that happened, or even if the chimney fell without coming in contact with the wall and as a result the bricks flew through the window in the shoe department facing the lane, as they in fact did, and hit some one in that department that some one would be hurt as was indeed the case with Mrs. Mitchell. I feel no doubt that May's apprehension of danger to the defendant's premises was founded entirely in the threatened collapse of this chimney and that it was that which took him to Engel. He says that he had no fear of the north wall falling unless it was struck by the chimney. The whole thing with him was the chimney. Whether or not that is what he actually told Engel constitutes the dispute that there is between them as to this warning. In direct examination he said that he did. In cross-examination he thought that he did. In a state-

ment prepared by the defendant's solicitors and signed by him shortly after the accident he spoke of the wall falling but made no mention of the chimney. Engel says that May told him there was danger of the north wall falling on the defendant's building but that he did not mention either the south wall or the chimney.

My finding upon this disputed question of fact must be in favour of Mr. May's version of it. He is quite disinterested and Engel is not, though I do not impute dishonesty to him in the giving of his evidence for it is quite possible that he honestly misunderstood the exact danger that was pointed out to him. The probabilities are in favour of May's version. I find it impossible to understand how he could have gone to Engel and warned him of danger from the north wall when as I am sure is the case he felt no apprehension whatever from its collapse and have refrained from mentioning the danger which stirred him to action, namely, the fall of the chimney upon the north wall. The evidence of Hollins does not, to my mind, go far enough in corroboration of Engel to justify me in acting upon it.

Whatever this warning was it was sufficient to create some apprehension in Engel's mind for he at once called up on the telephone Mr. McIvor, the city building inspector, who says that he (McIvor) informed him, as was the fact, that one Nesbitt, a contractor, had been employed to pull the walls down. Engel says that McIvor told him that the city was taking every precaution. McIvor had in fact examined the ruins that morning and had given orders to the owner to have them pulled down. Later in the morning between 11 and 12 he had met Nesbitt and had with him examined the walls and in the opinion of both of them there was then no immediate danger from them, McIvor saying that he thought that under normal conditions they might stand for days. McIvor did not think it necessary to give any warning to the defendant as he evidently was not apprehensive of any immediate danger to its premises. They seem to have collapsed when they did because of a very high wind described by at least one of the witnesses as in the nature of a cyclone which sprang up in the afternoon. The defendant gave no warning to its customers to keep away from that side of the store. On his examination for discovery Engel said that he "warned some of our people to keep away from a certain part of the store—the west side the highest part of the wall—to keep away from the south wall."

ALTA.

S. C.

MITCHELL v. JOHNSTONE WALKER LTD.

Walsh, J.

This certainly reads as though this warning was given to some of the employees who were working in the store but in his evidence at the trial he explained that those whom he warned were not inside employees but men whose business took them into the lane and this looks reasonable for at the time of the accident the defendant's employees were in the exposed area with apparently their usual freedom. The chimney fell and the accident occurred in about an hour from the time that Mr. May gave his warning.

Engel is the only witness who actually saw the chimney fall. He says that the north wall fell first and the chimney almost immediately afterwards. If that is so and I see no reason to doubt the truthfulness of Engel's story in this respect, the damage was done not by the impact of the chimney on the wall, but by bricks from the chimney hurled through the air as it fell. It seems to me immaterial whether that is so or not. The unquestioned fact is that it was the fall of the chimney that did the damage.

The duty which the defendant owed to the plaintiff in the premises is thus defined by Willes, J., in delivering the judgment of the Court in *Indermaur* v. *Dames* (1866), L.R. 1 C.P. 274, at 287 and 288, which is referred to in the 3rd ed. of Beven on Negligence, at p. 451, as the leading case on this branch of the law.

> We are to consider what is the law as to the duty of the occupier of a building with reference to persons resorting thereto in the course of business upon his invitation express or implied. The common case is that of a customer in a shop, but it is obvious that this is only one of a class, for whether the customer is actually chaffering at the time or actually buys or not he is, according to an undoubted course of authority and practice, entitled to the exercise of reasonable care by the occupier to prevent damage from unusual danger of which the occupier knows or ought to know, such as a trap door left open, unfenced and unlighted. . . . And, with respect to such a visitor at least, we consider it settled law that he using reasonable care on his part for his own safety is entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger which he knows or ought to know.

This language was approved by the court on appeal L.R. 2 C.P. 311, at p. 313. In *Norman* v. *Great Western R. Co.*, [1915] 1 K.B. 584, the Court of Appeal expressly adopted this as a correct enunciation of the law on the subject, Buckley, L.J., saying, at p. 592, that this language "has been repeatedly cited in subsequent cases as being a correct statement of the law." He himself states it on the same page in almost identical language. "The duty of the invitor towards the invitee is to use reasonable care to prevent damage from unusual danger which he knows or

ought to know." It is referred to with approval in the later Court of Appeal judgment in *Cox* v. *Coulson*, [1916] 2 K.B. 177.

Did the defendant discharge its duty as thus defined? That there was unusual danger to a portion of the defendant's premises and to those within it has been amply demonstrated by what actually happened. That it was not of the defendant's creation and that it lurked not on its premises but elsewhere on premises over which it had no control makes no difference for it threatened just as effectually as if it had created it on its own premises. Did the defendant know of this danger? Engel certainly knew of the standing ruins and so he knew of the existence of what proved to be a danger, but he did not regard them as such. I think that he did not realize that they were dangerous after his talk with McIvor whose assurance seems to have dissipated any fear that May's warning gave rise to. I am satisfied that he did not before the collapse came apprehend the trouble which eventually occurred. Ought the defendant to have known of this danger? I think it should. I do not say this simply because the accident happened. May's opinion was that it would happen exactly as it did and he was a man with considerable experience as a builder. The opinion of McIvor and of Nesbitt is that it was unlikely to occur because of the probability that the chimney in falling would buckle and collapse within the walls of the ruined building. That they expected it to collapse is admitted, for the preparation for pulling down the walls and the chimney was with the very object of preventing the possibility of which threatened of damage from the fall. Their view was based upon the unlikelihood of the thing happening just as and when it did. There was however the possibility that it would so happen and if it did there was the likelihood if not the certainty of injury to the defendant's premises and to people within them. The defendant appears to have weighed the chances. May's warning was sufficient to arouse in Engel enough fear of damage to induce him to take the matter up with the proper city official, but his talk allayed that fear. It is as though he argued with himself: "May says the ruins will fall and hurt us and McIvor says they won't. I will take a chance on McIvor's opinion," and unfortunately May was right. The defendant of course was under no obligation to tear down these walls or to prop them up. All that it could do to safeguard its customers was to warn them as it had been warned and let them

ALTA.

S. C.

MITCHELL v. JOHNSTONE WALKER LTD.

Walsh, J.

take their chances as it was doing or to exclude them from the danger zone until the threatened peril had been removed. It did neither. I think that at the least the defendant owed the female plaintiff the duty of telling her what it had been told. The defendant had an opportunity to gauge the risk and decide as to whether or not it should take the chances. In all fairness the customer should have had the same opportunity. In my opinion, the plaintiffs are entitled to judgment.

Happily there is not in this case the contradictory medical evidence that one expects in such actions. The plaintiffs called two medical witnesses and the defendant called none. There is no dispute of the fact that Mrs. Mitchell has suffered severely as a result of this accident. Although in the hospital for only 14 days, she was in bed at her home for 4 months after that, she was obliged to take a trip to the Coast under the doctor's advice, and stayed there for 2 months and since the outside nurses who were employed to take care of her left, her daughter, who is a trained nurse, has been obliged to stay at home to look after her. She is in a condition of profound traumatic neurasthenia according to the medical men. The principal contest on this branch of the case is over the probability of her recovery from this condition. My opinion is that she will eventually do so and that the ending of this litigation will materially help her to. In saying this I do not intend to suggest that she is malingering. On the contrary, I am quite sure that she is not. At the time of the accident she was 63 years of age and her expectation of life was 12.26 years. I think that $2,000 will be a fair and reasonable award of damages to her.

The male plaintiff claims $381:50 as special damages, details of which are given in the statement of claim. At the trial, evidence of other special damages was given without objection, and to the extent to which I allow the same, the statement of claim may, if necessary, be amended. I allow the following items:—Hospital account, $33.50; special night nurse, $20; doctors' accounts, $325; woman for housework, 23 weeks at $3, $69; drug bills, $43.85; ambulance, $8; daughter's services as nurse, $500; expenses of Vancouver trip, $494.10 = $1,493.45.

There will be judgment for the female plaintiff for $2,000 and for the male plaintiff for $1,493.45 with costs.

Judgment accordingly.

THE KING v. KOSTIUK.

SASK.

C. A.

Saskatchewan Court of Appeal, Haultain, C.J.S., Newlands, Lamont and Elwood, JJ.A. June 19, 1919.

1. CRIMINAL LAW (§ II A—38)—PROCEEDINGS BEFORE JUSTICE OF PEACE—SUFFICIENCY OF SIGNATURE OF JUSTICE TO DEPOSITIONS.

Where the proceedings before a justice, including the depositions appear on a number of successive pages which are fastened together, the evidence of each witness being signed by the witness, and following the signature of the last witness the following statement appears: "Having considered the above evidence I remand the accused for trial at the next court, etc.," and such statement is signed by the justice, it is a sufficient authentication of all the depositions returned into court by the justice.

2. CRIMINAL LAW (§ II C—50)—PRISONER IN GAOL ON CHARGE HEARD BY MAGISTRATE—ELECTION TO BE TRIED ON CHARGE BY JUDGE—SUBSEQUENT TRIAL—NO WARRANT OF COMMITMENT—OBJECTIONS.

The accused "being a prisoner in the gaol" upon the charge heard by a justice, and appearing before the district judge and electing to be tried on the said charge, which is the same as that contained in one of the counts of the charge upon which he was subsequently tried, the fact that there is no warrant of commitment on file cannot be an objection to the trial.

Statement.

APPEAL by way of stated case from a conviction of a district court judge. Conviction affirmed.

H. E. Sampson, K.C., for the Crown; *A. M. Panton*, K.C., for the accused.

The judgment of the court was delivered by

Haultain, C.J.S.

HAULTAIN, C.J.S.:—The following case is stated for the opinion of the court by the judge of the judicial district of Battleford:—

The above named accused was on the 27th and 28th days of June, 1918, tried before me in the District Court Judge's Criminal Court, judicial district of Battleford, on the following charges:—

1. For that he the said John Kostiuk at or in the vicinity of the post office of Krydor, in the said province and said judicial district, on or about the 15th day of February A.D. 1918, did unlawfully inflict grievous bodily harm upon Onofry Swistun by striking the said Onofry Swistun with a billiard or pool cue.

2. For that he, the said John Kostiuk, at or in the vicinity of Krydor, in the said province and said judicial district, on or about the 15th day of February, A.D. 1918, did unlawfully commit an assault and beat Onofry Swistun, and did thereby then and there occasion bodily harm to him the said Onofry Swistun.

3. For that he, the said John Kostiuk, at or in the vicinity of Krydor, in the said Province and said judicial district, on or about the 15th day of February, A.D. 1918, did unlawfully assault Onofry Swistun.

The accused was found guilty on the second count and sentenced to one month's imprisonment in the common jail at Prince Albert, with hard labour, and was admitted to bail.

After the charge was read and before the accused pleaded thereto, the counsel moved to quash the charges on the grounds:

(a) That the depositions on which the charges were founded were not signed by the justice before whom the preliminary enquiry was held, and

SASK.

C. A.

THE KING v. KOSTIUK.

Haultain, C.J.S.

(b) That there is no warrant committing the accused to trial on file in court, or in the custody of any official at Battleford.

(c) He was also moved to quash the first and third counts of the said charge on the grounds that the first and third counts were not, nor was either of them the charges specifically contained in the information laid before the justice who held the preliminary enquiry, and for which accused was committed for trial.

I refused the application. Counsel for the accused disputes the validity of the conviction and the questions submitted for the opinion of the court of appeal are:

1. Was I right in refusing to quash the charge on the ground that the said depositions were not signed by the magistrate?

2. Was I right in refusing to quash the charge on the ground that there was no warrant committing the accused to trial on file in court at the time of trial or in the custody of any official in Battleford? It did not appear whether any such warrant was ever made out.

3. Was I right in refusing to quash the first and third counts on the ground that the said counts were not the charge specifically set out in the information laid before the justice of the peace and for which the accused was committed for trial?

4. Could the accused be tried by me under Part 18 of the Code on a charge describing an offence other than the one described in the information or warrant of commitment as provided by s. 834 of the Code, when only such charge was read to him when he elected for speedy trial, when the depositions disclosed the commission of any such offence?

As to the first question: In my opinion the signature of the justice at the end of the depositions sufficiently identifies and authenticates all the depositions. The proceedings before the justice, including the depositions, appear on a number of successive pages which are fastened together. The evidence of each witness is signed by the witness. On the last page, just below the signature of the last witness, the following statement is signed by the justice:—

Having considered the above evidence, I remand the accused for trial at the next court of criminal jurisdiction to be holden at Battleford.

This seems to me to be a sufficient authentication of all the depositions returned into court by the justice. If his opinion is not correct, the question would still be answered in the affirmative for the reasons given in the case of *The King* v. *Trefiak* (1919), 47 D.L.R. (post), heard at the present sitting of this court.

As to the second question: It appears from the record of election, signed by the district court judge, that the accused, "being a prisoner in the gaol at Prince Albert" upon the charge heard by the justice, appeared before the district court judge and

SASK.

C. A.

THE KING v. KOSTIUK.

Haultain, C.J.S.

elected to be tried by him on the said charge, which is the same as that contained in the second count of the charge, upon which he was subsequently tried.

There is no warrant of commitment on file, but, under the circumstances, that cannot be an objection to the trial.

I would answer the second question in the affirmative.

As to the third question: The accused was acquitted on the first and third counts of the charge, and there is, consequently, no ground for a stated case on this point. S. 834 of the Criminal Code requires the consent of the accused to be tried on any charge other than that upon which he has been committed and has elected. Apparently, he did not consent to be tried on the first count. So far as the third count is concerned, the charge of assault is included in the more serious charge contained in the second count, and having elected to be tried on the charge contained in that count, the accused elected to be tried on any charge included in it.

As to the fourth question: This question, like the third question, is purely academic. S. 834 seems to me to deal quite clearly with the points raised.

As the accused was convicted on the charge on which he elected, the conviction must stand.

Conviction affirmed.

TOWN OF COBALT v. TEMISKAMING TELEPHONE Co.

CAN.

S. C.

Supreme Court of Canada, Idington, Anglin, Brodeur and Mignault, JJ. and Masten, J. ad hoc. 1919.

COMPANIES (§ III—31)—TELEPHONE—POWERS OF MUNICIPALITIES AS TO—DURATION OF CONTRACT AS TO POLES AND WIRES—ONTARIO MUNICIPAL ACT, SECS. 330, 331.

By sections 330 and 331 of the Ontario Municipal Act (6 Edw. VII. c. 34), the power of municipalities to allow telephone companies to place and keep their wires and poles on the streets of the municipalities is limited to a period of 5 years at one time.

[*Temiskaming Telephone Co.* v. *Town of Cobalt*, 46 D.L.R. 477, reversed; judgment of the trial judge, 43 D.L.R. 724, restored.]

Statement.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario, (1918), 46 D.L.R. 477, 44 O.L.R. 366, reversing the judgment at the trial, 43 D.L.R. 724, 42 O.L.R. 385, in favour of the appellant.

The respondent brought action for an injunction to restrain the Town of Cobalt from removing its poles and wires from the streets

CAN.

S. C.

TOWN OF COBALT v. TEMISKAMING TELEPHONE CO.

Idington, J.

and for damages. The streets were so occupied under an agreement with the town made in 1905 which the respondent claimed gave it a perpetual franchise. The two questions raised were whether or not the perpetual franchise was given and, if it was, whether or not the town had power to give it. The present appeal was disposed of on the second question.

H. J. Scott, K.C., for the respondent.

IDINGTON, J.:—The question raised herein is whether or not respondent, which is a telephone company incorporated under and by virtue of the Ontario Companies Act, has, under the circumstances I am about to refer to, the right to maintain on the public highways of appellant, which is a municipal corporation, poles and wires and ducts against the will of appellant's council.

It may conduce to clarity of thought on the subject to appreciate correctly the limits of power, right, and jurisdiction which these corporate bodies respectively had, or have, in the premises in question.

The respondent is a legal entity which only has the capacity given it by its charter and so far only as that is effective by virtue of the said Companies Act.

That charter only professes to give it the corporate capacity:—

> To carry on within the District of Nipissing the general business of a telephone company and for that purpose to construct, erect, maintain and operate a line or lines of telephone along the sides of or across or under any public highways, roads, streets, bridges, waters, watercourses or other places, subject, however, to the consent to be first had and obtained, and to the control of the municipal councils having jurisdiction in the municipalities in which the company's lines may be constructed and operated, and to such terms for such times and at such rates and charges as by such councils shall be granted, limited and fixed for such purposes, respectively.

The exercise of such powers as it may thus acquire is subjected to the limitations contained in a long proviso following this definition of capacity, expressed in distinctly separate paragraphs enumerated from (a) to (k).

Many of them are express limitations on the jurisdiction of the municipal corporations which may be concerned and designed to protect the public against the possibilities of neglect by municipal authority or aggressive acts of respondent impairing the rights of others.

It is to be observed that all the respondent can acquire is by the above quoted definition of its capacity expressly subject

to the consent to be first had and obtained, and to the control of the municipal councils having jurisdiction . . . and to such terms for such times and at such rates . . . as by such councils shall be granted.

It does not always happen that the legislature is so cautiously and properly restrictive relative to what a municipal council can do as has been thus pressed. Its acts here in question should be interpreted and construed consistently therewith.

Now let us turn to the powers of the municipality and see how far its council could go in disregard of the rights of those coming after it.

The title in and to the road allowance for a public highway may be, and generally is, technically vested in the municipal corporation, whose council has jurisdiction over it. But the jurisdiction of its council over that property is limited to discharging the duties relative to its maintenance and use as such, and it has no more power to grant concessions such as now in question to any one, than any man on the street has save so far as expressly conferred by statute.

As to its powers in that regard we are referred in argument to the provision in the Municipal Act, 3 Edw. VII. c. 19, s. 559 (4), enabling the council to pass by-laws:—

(4) For regulating the erection and maintenance of electric light, telegraph and telephone poles and wires within their limits.

And to the amendment of that by 6 Edw. VII. c. 34, which amended it by substituting the following:—

(4) For permitting and regulating the erection and maintenance of electric light, power, telegraph and telephone poles and wires upon the highways or elsewhere within the limits of the municipality.

These are simply general powers under the caption of Highways and Bridges to pass general by-laws, repealable when the council chooses, relative thereto and, besides the fact that no such by-law of appellant is in evidence, give respondent nothing more than in substance is conferred— by sub-s. 3 of same section, on cabmen to occupy certain stands on the street.

Can any one pretend that because a certain stand has been so allotted as therein provided, a cabman acquires thereby a right in perpetuity to stay at or on that same stand no matter what change of circumstances or by-law?

All that the amendment does relative to our present inquiry is to insert the word "permitting" which was rather stupidly omitted from the first of those enactments.

CAN.

S. C.

TOWN OF COBALT v. TEMISKAMING TELEPHONE CO.

Idington, J.

They furnish, however, incidentally, a very good illustration of how little importance is to be attached to the mere power of permission without anything more being given.

Section 331 of same Act is in truth the only one the respondent can rely upon and that is as follows:—

331. (1) The council of every city, town and village may pass by-laws granting from time to time to any telephone company upon such terms and conditions as may be thought expedient the exclusive right within the municipality for a period not exceeding five years at any one time to use streets and lanes in the municipality for the purpose of placing in, upon, over or under the same poles, ducts and wires for the purpose of carrying on a telephone business and may on behalf of the municipal corporation enter into agreements with any such company not to give to any other company or person for such period any license or permission to use such streets or lanes for any such purpose; but no such by-law shall be passed nor shall any such agreement be entered into without the assent of two-thirds of the members of the council of the municipality being present and voting therefor.

I fail to find in this section any warrant for the claim that a perpetual franchise could be granted by the municipality even if it desired. Nothing but an exclusive franchise and that for a limited time is countenanced in a single syllable of this section and, properly so, those who stop to think will say.

The implication in the proposition put forward that there is such a power seems to me, I submit with due respect, bordering upon the absurd, if not quite beyond.

The grant may be "from time to time" but it must be exclusive. The municipality cannot, as a matter of public convenience, grant more than one company rights to encumber and endanger the public highway, and the terms thereof must be so well considered and approved of, that two-thirds of the members of the council must approve.

The enactment of the provision therein specifically enabling the council to assure the successful applicant for the grant that no other shall be granted indicates how limited the legislature deemed the contracting powers of the council relative to such a subject matter had been.

And it can only be for a term of 5 years that it can be granted. The only right, otherwise given, is pursuant to another provision to give private parties a personal convenience, if desirable for their business reasons, and not detrimental to the public.

The assumption that the enactment in above quoted section was ever contemplated as giving powers to grant concurrent fran-

chises to more than one public company is fraught with such evil consequences that it can only be reached, I submit, by a disregard of the future possibilities of a growing town and an overlooking of the nature of the subject matter so involved.

The business is of a nature that, from every point of view, must involve a crossing of streets, by the works to carry it on, even if the cumbering of the public highway with poles or other appliances could be avoided, prudence, therefore, palpably dictates that the like appliances should not be multiplied.

The legislature, no doubt, had that in view and conferred no other power than the granting of one such concession at a time. It is not a kind of interference with public right to use the highway which we should try to spell out from possible constructions of the language used. It is a jurisdiction given to be used within the most restricted meaning possible that will effectuate the obvious purpose had in view in the same manner as every private act invading public rights is construed.

I submit there is no such plain and express language conferring the jurisdiction alleged to have been exercised as would have entitled the council of the appellant to have granted a perpetual franchise.

Nor do I think the council ever so intended by the agreement in question. To read the first clause of that standing alone as governing the whole instrument is not the way to interpret such a document.

It must be governed by the same restrictive canon of construction as relative to private Acts.

Read as a whole, and as amended by the later agreement if we have regard to the scope and purpose of the business in hand, can there be a doubt as to the intention of the council?

And as to the particularistic criticism of the amendment indicating a longer term than 5 years to which to apply the operation of the amendment, surely there was within the view of all concerned the possibility, nay, probability, of a satisfactory service leading to a continuation of business relations between these parties on the same terms as then reached.

On any other supposition we are driven to say that the first clause alone of the whole agreement was to stand when all else in it had become null and void and the respondent had a free hand

CAN.

S. C.

TOWN OF COBALT v. TEMISKAMING TELEPHONE CO.

Idington, J.

unrestricted by the necessity of observing obligations important to the appellant, to have duly observed by one serving the public.

In other words, the respondent was no longer to be a public servant, but a master of the public streets and possessed of a right of property therein which would debar the appellant from closing or widening or narrowing any of same unless upon such terms as the respondent should choose to dictate.

To test the construction contended for, and upheld below, suppose the agreement had consisted of nothing but clause 1, could it have been maintained as within the power conferred by s. 331?

I cannot reach such a conclusion as to answer in the affirmative, and, therefore, think the appeal should be allowed with costs throughout, and the judgment of the trial judge be restored.

Anglin, J.

ANGLIN, J.:—The plaintiff company sues for an injunction to restrain the defendant municipal corporation from removing poles and wires of the plaintiffs from its streets, the company having itself refused to do so. The trial judge dismissed the action, 43 D.L.R. 724, 42 O.L.R. 385, holding that the only right of the company to maintain its poles and wires on the streets of the town was conferred by an agreement made in June, 1912, with the municipal corporation, that the power of the latter to enter into such an agreement existed only by virtue of s. 331 (1) of the Municipal Act of 1903 (3 Edw. VII. c. 19), and that under that section the right to operate as a monopoly for the period of five years could alone have been given.

In passing, I may observe that, notwithstanding the history of s. 331 (1) (see Biggar's Municipal Manual, p. 345, note) and its collocation, I agree with what I conceive to have been Middleton, J.'s idea that it should be regarded not as merely providing for an exception to the prohibition of s. 330, but as conferring a substantive power to create a monopoly which a municipal council might possess even were s. 330 not in the Municipal Act. But I cannot accede to the view that s. 331 (1) is the only provision of that Act empowering a municipal council to authorize the use of its highways by a telephone company.

In the second appellate divisional court this judgment was reversed, 46 D.L.R. 477, 44 O.L.R. 366, the majority of the court (Mulock, C.J., Sutherland and Kelly, JJ.), holding that a muni-

cipal corporation had power under s. 559 (4) of the Municipal Act, as enacted by 6 Edw. VII. c. 34, s. 20, irrevocably to authorize the use of its streets by a telephone company for the purpose of erecting and maintaining its poles and wires for an indefinite period or in perpetuity, although its power to confer an exclusive right was restricted by s. 331 (1) to a term of 5 years, and that upon the proper construction of the agreement in question such authorization for an indefinite term or in perpetuity had been granted. Riddell and Latchford, JJ., dissented, holding that on the proper construction of the contract the authorization was limited to the 5 year term for which the municipal corporation had agreed that the right of the company should be exclusive.

The Town of Cobalt is in the District of Nipissing. In June, 1912, the plaintiff company had already established telephone lines in the town. In that month an agreement was made between the company and the municipal corporation on the efficacy of which as an irrevocable consent or license to the exercise of its powers within the municipality it is now conceded that the right of the company to maintain its poles and wires on the streets of Cobalt solely depends. It thus becomes unnecessary further to consider what the company had done in Cobalt prior to June, 1912, or the physical conditions then existing in regard to its poles and wires on the streets of that town, on which, at an earlier stage of this case, the plaintiffs had partly rested their claim of right to continue to maintain them.

While two questions—the first one of construction of the agreement of June, 1912, and the other one of the power of the municipality to make that agreement, if it should bear the construction put upon it by the plaintiff company—are presented for our consideration on this appeal. I have found it necessary to deal only with the second of these questions, which may be stated as follows:—If, notwithstanding the negative provision of the seventh clause of the agreement limiting the exclusive rights of the company to a period of five years and other clauses relied upon as indicating the consent of the municipal corporation

to the company exercising its powers by constructing, maintaining and operating its lines of telephone upon, along, across, or under any highway, square or other public place within the limits of the town, etc.,

given by the first clause should be likewise restricted in its opera-

CAN.

S. C.

TOWN OF COBALT v. TEMISKAMING TELEPHONE CO.

Anglin, J.

tion to the same term of years, the consent, permit or license so accorded should be regarded as having been intended to be effective and irrevocable for an unlimited period, was it within the power of the municipal corporation to give such a consent, license or permission?

Having regard to its definition clause, its scope and the fact that telephone companies were the subject of a special statute concurrently enacted, I agree with Middleton, J., that the Municipal Franchises Act of 1912 (2 Geo. V. c. 42) does not apply to those companies.

The Telephone Companies Act of 1912 (2 Geo. V. c. 38) only came into force on July 1, of that year and, therefore, did not apply to the agreement of June 19, 1912.

The plaintiff company was incorporated in April, 1905, by letters patent issued under the Ontario Companies Act (R.S.O. 1897, c. 191):—

to carry on within the District of Nipissing the general business of a telephone company, and for that purpose to construct, erect, maintain and operate a line or lines of telephone along the sides of, or across, or under, any public highways, roads, streets, bridges, waters, water courses, or other places, subject, however, to the consent to be first had and obtained, and to the control of the municipal councils having jurisdiction in the municipalities in which the company's lines may be constructed and operated, and to such terms, for such times and at such rates and charges as by such councils shall be granted, limited and fixed, for such purposes respectively.

Under s. 9 of that Act the lieutenant-governor in council was empowered to grant a charter of incorporation,

for any of the purposes and objects to which the legislative authority of the Legislature of Ontario extends,

with certain immaterial exceptions. By s. 15 it was enacted that the corporation so created

shall be invested with all the powers, privileges and immunities which are incident to such corporation or are expressed or included in the letters patent and the Interpretation Act and which are necessary to carry into effect the intention and objects of the letters patent and such of the provisions of this Act as are applicable to the company.

At bar the case was discussed as if, apart from the effect of any municipal by-law or contract conferring powers or rights upon the company, c. 191 of the R.S.O., 1897, were the only legislation to be taken account of in determining its status, capacity, powers and rights. No allusion was made, nor do I find any in the judgments below or in the factums, to the legislation of 1907 repealing

that Act and replacing it by a new Companies Act (7 Edw. VII. c. 34) which, by s. 210 (c), is made applicable (except so far as otherwise provided) *inter alia*

to every company incorporated under any special or general Act of the Legislature of the Province of Ontario.

By s. 211 (1) this statute enacts that:—

Any letters patent . . . made or granted with respect to any company, corporation or association within the scope of this Act under any enactment hereby repealed shall continue in force *as if it had been made or granted under this Act.*

It would seem to follow that the plaintiff company cannot invoke s. 15 of c. 191 of the R.S.O. 1897, of which I find no counterpart in the Act of 1907, to support or justify the existence or exercise of any powers or rights subsequent to the 1st of July, 1907.

On the other hand, Part XII. of the Act of 1907, dealing with "companies operating municipal franchises and public utilities," is, by s. 154, confined in its operation to "applications for incorporation" by such companies, and would, therefore, seem not to apply to a company like the plaintiff already incorporated, unless it should seek re-incorporation (s. 9) or (possibly) the grant of additional powers by supplementary letters patent (s. 10). S. 3 of the Act of 1907 re-enacts s. 9 of the superseded statute of 1897, and its purview is unaffected by a subsequent formal amendment made by 8 Edw. VII. c. 43, s. 1. S. 17 is in part as follows:—

17. A company having share capital shall possess the following powers as incidental and ancillary to the powers set out in the letters patent or supplementary letters patent:—

(f) To enter into any arrangements with any authorities, municipal, local or otherwise, that may seem conducive to the company's objects, or any of them, and to obtain from any such authority any rights, privileges and concessions which the company may think it desirable to obtain, and to carry out, exercise and comply with any such arrangements, rights, privileges and concessions.

(i) To purchase, take on lease or in exchange, hire or otherwise acquire, any personal property and any rights or privileges which the company may think necessary or convenient for the purposes of its business and in particular any machinery, plant, stock-in-trade;

(q) To do all such other things as are incidental or conducive to the attainment of the above objects.

The corresponding provisions of the present law are to be found in the R.S.O. 1914, c. 178, s. 23 (1) clauses (f), (i) and (q.).

CAN.

S. C.

TOWN OF COBALT v. TEMISKAMING TELEPHONE CO.

Anglin, J.

It may be probable that under the Act of 1907, letters patent in the terms of those granted to the plaintiff would not be issued, and it is not improbably the correct view that a company obliged to have recourse to clauses (f), (i) and (q) of that Act as the source of its powers and rights in that regard would possess nothing more than a subjective capacity to receive from a municipal corporation such rights upon its highways as it should see fit, acting within its powers, to confer. But I incline strongly to the view that the opening paragraph of s. 17 has the effect of a legislative recognition of the existence of the powers which their letters patent purport to confer, if not in the case of companies incorporated under the Act of 1907, at all events in that of companies then in existence which had been incorporated under any of the superseded Acts—*inter alia* c. 191 of the R.S.O. 1897. That recognition, I think, placed companies incorporated under the Act of 1897 in the same position after 1907 with regard to the character and efficacy of the powers and rights which their letters patent purported to confer as if s. 15 of that Act were still in force.

I am, with respect, unable to appreciate the force of the contention of counsel for the appellant that the powers and rights of a company incorporated as this company was under the Ontario Companies Act of 1897 in regard to the use and occupation of the streets of a municipality (apart from the effect of the Companies Act of 1907) differed from what they would be had it been incorporated by a private statute *conferring the same rights and powers in identical language*.

We are probably bound, in deference to the authority of the judicial committee in *Bonanza Creek Gold Mining Co.* v. *Rex*, 26 D.L.R. 273, [1916] 1 A.C. 566, to hold that a company incorporated by letters patent under the Ontario Joint Stock Companies Act

purports to derive its existence from the act of the Sovereign (through his representative the lieutenant-governor) and *not merely* from the words of the regulating statute,

and therefore possesses

a status resembling that of a corporation at common law—a general capacity analogous to that of a natural person.

But—I speak with deference—it possesses, in addition, within the province whatever capacity, powers and rights, within its competence the legislature, having provided for the creation of the

corporation by the lieutenant-governor in council, as its delegate, has seen fit by the terms of the Companies Act itself to bestow upon it when so created; and it derives its existence, at least in part, from that statute under and pursuant to which the lieutenant-governor in council purported to act in creating it and in defining its purposes, I am, with respect, unable to read the facultative language of authorization of ss. 9 and 15 of the Ontario Companies Act of 1897 as amounting to nothing more than

> words . . . which merely restrict the cases in which such a grant (*i.e.*, of corporate existence) may be made

by the lieutenant-governor in the exercise of the prerogative, 26 D.L.R. 283, [1916] 1 A.C. at p. 583. In both cases alike—that of such a company incorporated by letters patent issued under the Act of 1897 and that of the like company incorporated by special Act—the source of the power or right to use or occupy the highways is the legislature, the corporate body enjoying them being brought into existence in the one case through its delegate, the lieutenant-governor in council, and in the other by direct legislative action. In both alike, on the assumption that it is conferred in identical terms, the exercise of the power or right is conditional on the consent of the municipal corporation being obtained—which, so far as the constating instrument of the company affects the matter, may be given on such terms as the municipal corporation sees fit to impose—and remains subject to its control and regulation. But when and so far as that consent is effectively given the condition is satisfied and the power and right is then exercisable not by virtue of the consent, which merely removes a restriction that might not exist if unexpressed: *City of Toronto* v. *Bell Telephone Co.*, [1905] A.C. 52, but see *Sherbrooke Telephone Association* v. *Corporation of Sherbrooke*, M.L.R. 6 Q.B. 100; but by virtue of the authority of the legislature over public highways exerted on behalf of the company, *British Columbia Electric R. Co.* v. *Stewart*, 14 D.L.R. 8, [1913] A.C. 816, 824, 16 Can. Ry. Cas. 54.

If, on the other hand, the view should prevail that the effect of its incorporation, whether by letters patent issued under the Companies Act, or by special statute (the purpose and powers in either case being formulated in the terms of the plaintiff company's letters patent and of the Ontario Companies Act of 1897 above

CAN.

S. C.

TOWN OF COBALT v. TEMISKAMING TELEPHONE CO.

Anglin, J.

set forth), is merely the endowment of the company with a quasi-subjective capacity to acquire from those in control of it rights and powers in regard to the use of property vested in others, so that the exercise of such rights and powers when they are conferred upon it by those in control of the property on or over which they are to be enjoyed will not be *ultra vires* of the company or something to which any shareholder may object—for instance, to acquire from a municipal corporation the right to use and occupy highways under its control, so that the true source of the company's rights and powers in that respect is the act of the municipal council—what I am about to say as to limitations upon the consent, license, or permission to use its highways which a municipal council in Ontario may give to a telephone company will lose none of its force.

When the question before us is considered from the aspect of the power of the municipality to permit or consent to the use of the public highways, it may well be that such a power would be implied from a special Act of the legislature incorporating a company and granting to it powers similar to those here conferred in similar language, whereas the like implication would not arise upon the grant of letters patent of incorporation under the Companies Act couched in like terms. The lieutenant-governor in council is not by that Act made the delegate of the legislature to confer powers on municipal corporations. Any implication from a special Act incorporating a telephone company, however that power is thereby conferred on a municipal corporation to license the use of its highways by the company, would, in my opinion, be subject to such restrictions as are imposed by ss. 330 and 331 (1) of the Municipal Act.

But if the charter of the plaintiff company did not impliedly authorize the Corporation of the Town of Cobalt to give the requisite consent to the exercise of its powers by the plaintiff company within that municipality, s. 559 (4) of the Municipal Act, in my opinion, clearly did so, subject, however, to such limitations as were imposed by ss. 330 and 331 (1) of the same Act.

S. 559 (4) (as enacted by 8 Edw. VII., c. 34, s. 20) and ss. 330 and 331 (1) of the Municipal Act of 1903 (3 Edw. VII., c. 19) are as follows:—

559. By-laws may be passed by the councils of the municipalities and for the purposes in this section respectively mentioned, that is to say

(4) For permitting and regulating the erection and maintenance of electric light, power, telegraph and telephone poles and wires upon the highways or elsewhere within the limits of the municipality.

330. Subject to the provisions of secs. 331 and 332 of this Act no council shall have the power to give any person an exclusive right of exercising within the municipality any trade or calling or to impose a special tax on any person exercising the same or to require a license to be taken for exercising the same unless authorized or required by statute, so to do, but the council may direct a fee not exceeding $1 to be paid to the proper officer for a certificate of compliance with any regulations in regard to such trade or calling.

331 (1). The council of every city, town or village may pass by-laws granting *from time to time* to any telephone company upon such terms and conditions as may be thought expedient the exclusive right within the municipality for a period not exceeding five years at any one time to use streets and lanes in the municipality for the purpose of placing in, upon, over or under the same poles, ducts and wires for the purpose of carrying on a telephone business and may, on behalf of the municipal corporation, enter into agreements with any such company not to give to any other company or person for such period any license or permission to use such streets or lanes for any such purpose; but no such by-law shall be passed nor shall any such agreement be entered into without the assent of two-thirds of the members of the council of the municipality being present and voting therefor.

Ss. 331 (1) and 559 (4) being both found in the same statute must, if possible, be harmonized. So far as they may conflict, s. 331 (1) dealing with the special subject of user of highways by telephone companies must prevail over s. 559 (4), which has to do with the more general subject of the erection and maintenance by electric light, power, telegraph and telephone companies of poles and wires, whether on highways or elsewhere within the limits of the municipality. Whatever restriction or limitation may be necessary to give full effect to s. 331 (1) must be placed on s. 559 (4).

For the purposes of this appeal I shall assume that, were it not for the effect of ss. 330 and 331 (1), the defendant municipal corporation might, under s. 559 (4), have permitted or licensed a telephone company to erect and maintain its poles and wires upon highways within the municipality for an indefinite term without power of revocation. Whether that has in fact been attempted in the present instance is, of course, another question. But I am, with respect, of the opinion that ss. 330 and 331 (1) impliedly precluded the giving of such a consent or the granting of such an irrevocable permit or license to be effective for more than a term of five years. It was, in my opinion, incompetent for the municipal council to do any act which would have the effect directly or indirectly either of creating a monopoly prohibited by s. 330,

CAN.

S. C.

TOWN OF COBALT v. TEMISKAMING TELEPHONE CO.

Anglin, J.

or divesting itself of, or curtailing the free exercise of, the power conferred on it by s. 331 (1) of providing, *by by-laws to be passed from time to time*, for an exclusive right of user of its streets for the purpose of carrying on a telephone business during a period of 5 years being vested in some one telephone company.

A municipal corporation cannot validly contract not to use discretionary powers committed to it for the public good. *Ayr Harbour Trustees* v. *Oswald* (1883), 8 App. Cas. 623, at 634, *per* Lord Blackburn; *Staffordshire, etc., Canal Co.* v. *Birmingham Canal* (1866), L.R. 1 H.L. 254, at 268, 278-9; Brice on Ultra Vires (3rd ed.), p. 111. Dillon on Municipal Corporations (1911), par. 245; *Town of Eastview* v. *R.C. Episc. Corporation of Ottawa* (1918), 47 D.L.R. 47, 15 O.W.N. 211, 212; 44 O.L.R. 284. This case does not fall within the line of exceptions to or qualifications on this salutary rule indicated in *Stourcliffe Estates Co.* v. *Corporation of Bournemouth*, [1910] 2 Ch. 12. The municipal corporation in the exercise of its control over streets is a trustee for the public. It can sanction or license the exercise of rights which derogate from the public right of user of the highways only in so far as it is given legislative authority to do so.

The necessary effect of granting for an indefinite period—a period which might, therefore, endure throughout the existence of the license—an irrevocable license or permit to use the streets of the municipality for the purpose of carrying on a telephone business would be to preclude the municipal council from granting to any other company at any future time such an exclusive right as s. 331 (1) contemplates it may grant "*from time to time*." The continued exercise of such a license is incompatible with the creation of such an exclusive right. In *Hull Electric Co.* v. *Ottawa Electric Co.*, [1902] A.C. 237, cited at bar, the license of the respondent was revocable.

Having regard to the practical necessity for a single telephone system in a municipality owing to the manifest and manifold disadvantages and inconveniences of duplication, the granting of such an irrevocable license for an indefinite term would, in effect, be tantamount to the conferring of an exclusive right of equally indefinite duration upon the licensee. The legislature certainly did not contemplate that a municipality should be enabled, however indirectly, to tie itself up to one company as a donee of an

exclusive right of indefinite duration. Its doing so would alike be contrary to the spirit, if not to the letter, of the prohibition of s. 330 and would set at naught the limitation imposed by s. 331 (1).

Upon the grounds that the granting of an irrevocable consent or a license or permit of indefinite duration, such as it had been held the respondent company obtained, would involve the municipal corporation divesting itself of the discretionary power conferred by s. 331 (1), which it was the manifest policy of the legislature that it should retain in order to be in a position to exercise it *from time to time* in the interests of the municipality, and would, in effect, operate as an evasion, if not a direct violation, of s. 330, I am of the opinion that such a consent, license or permit, if the agreement here in question purported to grant it, would be *ultra vires* and therefore void.

I would, accordingly, allow this appeal with costs here and in the appellate division and would restore the judgment of the trial judge.

Brodeur, J.

BRODEUR, J.:—Without expressing any view on the power of a municipal corporation to make a perpetual grant to a telephone company I am of opinion that in this particular case the contract passed between the appellant and the respondent would not authorize the respondent to claim a perpetual franchise in the streets of Cobalt.

The telephone company had no right to put its poles upon the streets of the municipality without the consent of that municipality and on such terms for such times and at such rates and charges agreed upon with the municipal authorities. In this particular case, the time limit was 5 years and even during that time the privilege should be exclusive.

The contract was for that period of time only. The municipal corporation is now entitled, the 5 years having expired, to have the poles removed from the streets and the telephone company cannot claim a perpetual charter.

The appeal should be allowed with costs of this court and of the court below and the respondent's action should be dismissed.

Mignault, J.

MIGNAULT, J.:—The question involved in this appeal is whether the appellant having, in 1912, made a contract with the respondent, whereby it consented to the latter exercising its powers by constructing, maintaining or operating its lines of telephone in the

CAN.

S. C.

TOWN OF COBALT v. TEMISKAMING TELEPHONE CO.

Mignault, J.

Town of Cobalt, and having agreed during the period of 5 years not to give to any other person, firm or company any license or permission to use the highways, squares and public places of the town for the purpose of carrying on a telephone business, the respondent has the right to maintain its lines and poles in the said town indefinitely and in perpetuity.

It would, I must confess, require very cogent reasons to make me think that the parties ever contemplated that by this contract the Town of Cobalt had granted to the respondent a perpetual right to use its streets and public places for the purposes of its business. And notwithstanding the negative form of clause 7 preventing the town from granting to any other person or company during 5 years the right to use its highways, I would think, reading the contract as a whole, that it should be construed as having given to the respondent an exclusive right for 5 years to construct, maintain and operate its telephone lines, and that at the expiration of this term any right of the respondent to maintain its lines and poles in the public streets of the town came to an end unless a new agreement was made. I would not easily assume, in the absence of an express and clear covenant, that a perpetual right was granted, which would virtually deprive the town from exercising its full powers as to its streets and from making improvements or alterations therein.

But, if I am wrong in this construction of the agreement, I am of the opinion that in view of the terms of ss. 330 and 331 of the Municipal Act of 1903 (3 Edw. VII. c. 19), fully discussed by my brother Anglin, the appellant could not grant a perpetual right to the respondent to construct and maintain its telephone lines and poles in the Town of Cobalt. Had the appellant granted such a right—and I think it has not—it would have abdicated its power to

> pass by-laws granting from time to time to any telephone company upon such terms and conditions as may be thought expedient, the exclusive right . . . for a period not exceeding five years at any one time to use streets and lanes in the municipality for the purpose of carrying on a telephone business.

That such abdication by a municipal corporation of its powers over and to its streets and highways would be contrary to law and against public policy does not seem to me open to doubt. *Dubuc* v. *La Ville de Chicoutimi* (1909), 37 Que. S.C. 281.

If the consent contained in the first clause of the respondent's contract with the appellant be severable from the exclusive right

conferred to the respondent by the seventh clause, so that it would continue after the expiration of the exclusive period, I would think that it would amount to a mere license or permission which would be revocable at any time after the five years.

I would, therefore, allow the appeal with costs here and in the appellate division, and restore the judgment of the trial judge.

MASTEN, J. (*ad hoc*):—This is an appeal from the judgment of the appellate division of the Province of Ontario, declaring that the respondent has the right in perpetuity to maintain and operate on the streets of Cobalt its telephone system; and enjoining the appellant corporation from interfering with such rights.

Concurring as I do in the result at which other members of the court have arrived, I think the appeal should be allowed and the judgment of the trial judge restored.

I base my conclusions on the view that the rights of the respondent company were acquired by agreement with the municipality of Cobalt and that such rights terminated either on the expiry of the 5 year term mentioned in clause seven of the agreement of June, 1912, or by an effective revocation by the appellant corporation of any license granted under clause 1 of that agreement—if such license continued in force after the expiry of the 5 year term.

I think that what is termed in popular language "the franchise" granted by the agreement is to be defined in legal phraseology as a license coupled with an interest and the duration of such license, that is to say whether it was terminable or existed in perpetuity, is to be ascertained by an investigation of the intention of the parties and of their powers.

No express stipulation is made in the written agreement with regard to the continuance of the license after the expiry of 5 years of exclusive enjoyment and consequently the intention of the parties as to its duration falls to be ascertained by a general consideration of all the terms of the agreement, the surrounding circumstances, the capacity of the parties and by an application of the principle that a grant in derogation of a public right is in case of doubt to be construed in favour of the public and against the licensee. I agree with the view expressed by Riddell, J., in the court below, that clause 9 of the agreement (see note "A" below) indicates that the parties intended an agreement for a certain

CAN.

S. C.

TOWN OF COBALT v. TEMISKAMING TELEPHONE CO.

Masten, J.

term, that is a terminable agreement, not an agreement in perpetuity.

Note A.—Clause 9 above referred to is as follows:—

That the said company shall not, during the term of said franchise, charge more than forty dollars per year for a business wall telephone and twenty dollars per year for a private wall telephone to said municipality.

I also think that there is great force in the argument of the appellant corporation as stated in their factum in these words:—

that the letters patent shew clearly that a consent once given is not an end of the matter particularly where, as here, no consent whatever was given before the lines were constructed. The first action by the town that is claimed to amount to a consent occurred in 1912. By the letters patent, the consent of the municipal council was a condition precedent and they also provide for "control" by the municipality after consent is given. It could also impose and fix "terms, times, rates and charges," at any time after granting consent. Assuming, therefore, that the town consented to the respondent using its streets and originally imposed no limitation as to time and fixed no terms and rates, it could at a subsequent date limit the time and impose and fix terms and rates. Until the company fixed a time in a binding way its hands were free. The letters patent so provided.

For the terms of the charter see Note B.:—

Note B.—To carry on within the District of Nipissing the general business of a telephone company and for that purpose to erect, construct, maintain and operate a line or lines of telephone along the sides of or across or under any public highways, roads, streets, bridges, waters, watercourses or other places subject, however, to the consent to be first had and obtained, and to the control of the municipal councils having jurisdiction in the municipalities in which the company's lines may be constructed and operated and to such terms for such times and at such rates and charges as by such councils shall be granted, limited and fixed for such purposes respectively.

With respect to the surrounding circumstances, I note that in June, 1912, the respondent company had for some years been occupying the streets of the appellant corporation with their poles and wires. No consent had been given to such occupation and claim had been frequently put forward on behalf of the appellant corporation that the respondent company were trespassers. I think that clause 1 of the agreement was intended to operate as a fulfilment of the requirement of the charter as to municipal consent and an elimination of the claim which had theretofore been put forward that the respondent company had been or were then trespassers. Having thus cleared the ground, the next step taken by the parties was to provide by the combined operation of clauses 1 and 7 for an exclusive franchise definitely granted for a period of 5 years. It is possible that at the expiry of the 5 years of exclusive

franchise the situation as contemplated by the parties was that the respondent company should still be in occupation of the streets, not as trespassers, but as licensees under the provisions of clause 1. In other words, that clause 1 remained in effect notwithstanding the expiry of the exclusive franchise granted for the first 5 years, but in that event I think that the right of the appellant corporation to fix the time of the duration of the license came into operation and enabled it to effect a revocation, which it had done.

With respect to the capacity and power of the appellant corporation, I observe, without attempting to reach any positive conclusion, that it is manifest from the course of judicial decision in this case that grave doubts exist regarding the extent of the powers conferred on the municipality by the Municipal Act. In ascertaining the intention of the parties respecting the duration of the franchise the presumption is that the appellant corporation intended to act within the powers which it clearly possessed and not that it intended to assume powers the right to which was at least doubtful.

Lastly, if doubt remain notwithstanding the consideration to which I have adverted, such doubt is to be resolved in favour of the public right and against the respondent company.

I think that the principle of construction enunciated by Lord Stowell in *The Rebeckah* (1799), 1 Ch. Rob. 227, at 230, applies to this case.

> All grants of the Crown are to be strictly construed against the grantee, contrary to the usual policy of the law in the consideration of grants; and upon this just ground that the prerogatives and rights and emoluments of the Crown being conferred upon it for great purposes and for the public use, it shall not be intended that such prerogatives, rights and emoluments are diminished by any grant, beyond what such grant by necessary and unavoidable construction shall take away.

I think that the principle so stated applies to a license granted by a municipal corporation whereby the rights of the public in a highway are diminished. The principle was so applied by the Supreme Court of the United States in *Knoxville* v. *Knoxville* (1906), 200 U.S.R. 22, where Harlan, J., in delivering the judgment of the court, after referring to the various cases where the above principle had been applied, said (p. 34):—

> It is true that the cases to which we have referred involved in the main the construction of legislative enactments. But the principles they announce

CAN.

S. C.

TOWN OF COBALT v. TEMISKAMING TELEPHONE CO.

Masten, J.

apply with full force to ordinances and contracts by municipal corporations in respect of matters that concern the public. The authorities are all agreed that a municipal corporation, when exerting its functions for the general good, is not to be shorn of its powers by mere implication. If by contract or otherwise it may, in particular circumstances, restrict the exercise of its public powers, the intention to do so must be manifested by words so clear as not to admit of two different or inconsistent meanings.

The same view was maintained in *Blair* v. *City of Chicago* (1906), 201 U.S.R. 400.

This conclusion renders it unnecessary for me to consider the capacity or powers of the appellant corporation or of the respondent company, but in view of the discussion that has taken place in the courts below respecting the effect of the Companies Act and the letters patent incorporating the respondent company, I ought, perhaps, to add one word.

It seems to me that when the agreement of June, 1912, was made the respondent company was governed by the Companies Act of 1907 as amended in 1908 and 1910. In support of that view I refer to ss. 210 (*c*) and 211 (1) of the Companies Act of 1907. I agree with the view that the ultimate source from which the powers of a company are derived is the legislature and in certain cases the Crown (*Bonanza Creek Gold Mining Co.* v. *Rex*, 26 D.L.R. 273). I also agree that the legislature can clothe the company with rights as well as with powers and that in so doing it can act either directly or by delegating to the governor-in-council the necessary authority. I fail, however, to find in the provisions of the Companies Act of 1907, as amended in 1908 and 1910, any warrant for holding that there has been delegated by the legislature to the lieutenant-governor in council power to confer on a company objective rights as distinguished from subjective powers, or that this company was invested with such rights in 1912. I think that the "pith and marrow" of the Companies Act of 1907 is the incorporation of a company—the designation of its powers and the definition of the mutual rights of its shareholders *inter se*. In other words, the authority conferred upon the governor-in-council is, in my opinion, merely to bring into existence the entity known as the company and to endow it with certain powers, but I think the Act gives to the governor-in-council no authority as against other subjects of His Majesty to confer on the company so created objective rights of the kind here in question.

Dealing concretely with the facts of this case, I think that no actual immediate right to occupy the streets of Cobalt was, or could be, conferred on the respondent company through the provisions of the Companies Acts under which it was constituted, but that any such right must have been acquired from the appellant corporation. I agree on this point with the views expressed by the trial judge and by Kelly, J., in the courts below.

The appeal should be allowed and the judgment of the trial judge restored. *Appeal allowed.*

THE KING v. FLEMMING.

New Brunswick Supreme Court, Appeal Division, Hazen, C.J., McKeown, C.J.K.B.D., and Chandler, J. June 6, 1919.

PLEADING (§ II D—185)—MATTERS OF EVIDENCE NOT TO BE PLEADED—ACTION AGAINST FORMER PREMIER—ALLEGATION THAT HE ACTED AS AGENT FOR HIS MAJESTY—SUFFICIENCY OF.

Under the present system of pleading in New Brunswick, it is not necessary to allege matters which are strictly matters of evidence. In an action against a former Premier of the province, for corruptly receiving a secret commission while Premier, and in receipt of a salary from His Majesty and acting as agent for His Majesty—it is sufficient to allege that the defendant acted as agent for His Majesty, and that as such agent he received such secret commission; it is not necessary to set out that he was agent of His Majesty. Held that the allegations in the statement of claim set out in the judgment were sufficient.

Statement.

APPLICATION by defendant to dismiss the action brought by the plaintiff on a point of law, on the ground that the statement of claim does not set forth a good cause of action.

A. B. Connell, K.C., *M. G. Teed*, K.C. for defendant; *W. P. Jones*, K.C., and *P. J. Hughes*, *contra*.

The judgment of the court was delivered by

Chandler, J.

CHANDLER, J.:—In this case objection has been taken by the defendant under O. 25, r. 2, to the statement of claim in the action, on the ground that it does not set forth a good cause of action, other than the cause of action set out in par. 29 of the statement of claim, in which the plaintiff claims for money had and received.

In my view, the statement of claim does set out two causes of action other than that set out in par. 29, namely, the cause of action set out in paras. 23-24-25 and 26, and the cause of action set out in par. 28 of the statement of claim.

These paragraphs are as follows:—

23. The defendant while Premier of the said province was in receipt of a salary from His Majesty in right of the said province, and while such Pre-

N. B.

S. C.

THE KING v. FLEMMING.

Chandler, J.

mier in the year 1912 acted as agent for His Majesty to arrange for the appointment of a trustee under the provisions of the said trust mortgage.

24. The defendant as such agent in the year 1912 arranged for the appointment of the said trust company as such trustee and in effecting such arrangement secretly and corruptly received for himself from the said trust company a certain sum of money as commission on the proceeds of the said debenture stock which was deposited with the said trust company under the provisions of the said trust mortgage.

25. The amount of the said commission is unknown to the plaintiff, but the plaintiff alleges that it was the sum of $9,600.

26. The defendant did not account for or pay over to the plaintiff the said sum so received by him from the said trust company, or any part thereof.

28. The defendant while Premier of the said province was in receipt of a salary from His Majesty in right of the said province and while such Premier in the years 1911 and 1912 acted as agent for His Majesty to negotiate terms and arrange with the St. John and Quebec R. Co. for the making of a contract between His Majesty in right of the said province and the said railway company. The defendant as such agent in the years 1911 and 1912 did negotiate terms and arrange with the said railway company for the making of the said contract and in negotiating such terms and in arranging for the making of the said contract secretly and corruptly received for himself from Arthur R. Gould, then president of the said railway company, a certain sum of money as commission. The amount of such commission is unknown to the plaintiff, but the plaintiff alleges that it was the sum of one hundred thousand dollars ($100,000). The defendant did not account for or pay over to the plaintiff the said sum so received by him from the said Arthur R. Gould or any part thereof, but has refused to do so.

Under our present system of pleading it is not necessary, in my view, to allege matters which are strictly matters of evidence, nor is it necessary for the plaintiff to set out how the defendant is or was agent for His Majesty with any greater particularity than appears in the paragraphs of the statement of claim quoted, but it is sufficient to allege that the defendant acted as agent for His Majesty as in said paragraphs stated, and that as such agent he received a secret commission as in the said paragraphs alleged.

See Odgers on Pleading, 7th ed., at p. 106:—

> Facts should be alleged as facts. It is not necessary to state in the pleadings circumstances which merely tend to prove the truth of the facts already alleged.

See also Bullen and Leake, 7th ed., at p. 56, giving a form of a claim against an agent for a secret commisssion.

Paragraphs 1 to 22 of the statement of claim, while in my view redundant and largely unnecessary, may be considered as setting out matters of inducement leading up to the statement of the causes of action set out in the remaining paragraphs of the statement of claim.

I do not think that it is necessary to consid[illegible] or deal with the provisions of c. 42 of the Acts of Assembly for the year 1918, upon which so much time was expended on the argument of this matter to any great extent, as, in my opinion, nothing arises with respect to this legislation so far as the objection taken by the defendant to the statement of claim is concerned.

I do not think that the provisions of s. 2 of c. 42, 1918, set out or give a cause of action against any one, nor do I consider that any action could be maintained against the defendant, or any one else for that matter, based simply upon the provisions of s. 2. Ss. 20, 21 and 22 of the statement of claim are apparently based upon the provisions of s. 2 of c. 42, but in my view it is not open to the plaintiff to invoke the provisions of this section in order to establish or aid in establishing a cause of action against the defendant.

There are, in my opinion, 3 several causes of action properly pleaded in the statement of claim and there being two causes of action set forth in addition to that contained in par. 29, as to which no question is raised, I think the objection taken by the defendant to the sufficiency of the statement of claim as a pleading should be overruled.

On an application such as that made in this case, all allegations of fact set out in the statement of claim are, for the purposes of the application, admitted to be true, and I think it is sufficiently alleged in the statement of claim, that the defendant was and acted as an agent of the Crown, in connection with the matters mentioned in the statement of claim.

There is another question which was much discussed during the argument in this matter, in connection with the allegation in the statement of claim, that the defendant was the Premier of the Province of New Brunswick, when the transactions referred to took place, and as such was agent of His Majesty the King. The defendant contended on the argument, that no agency is constituted by the occupancy of the position of Premier, and with this contention I agree. As stated by Alexander C. Ewald in an article in vol. 16 of the Encyclopedia Britannica, the Premier is the head of the Government.

> Like the cabinet council, the Prime Minister is unknown to the law and the constitution, for legally and according to the fictions of the constitution,

N. B.

S. C.

THE KING v. FLEMMING.

Chandler, J.

no one privy councillor has as such, any superiority over another, yet practically the Premier is the pivot on which the whole administration turns. He is the medium of intercourse between the cabinet and the sovereign; he has to be cognizant of all matters of real importance that take place in the different departments so as to exercise a controlling influence in the cabinet; he is virtually responsible for the disposal of the entire patronage of the Crown; he selects his colleagues and by his resignation of office dissolves the ministry. Yet though entrusted with this power and wielding an almost absolute authority, he is in theory but the equal of the colleague he appoints, and whose opposition he can silence by the threat of dissolution.

If the plaintiff, in the statement of claim in this action, relied only upon the allegation that the defendant was the Premier of the province in order to establish agency on the part of the defendant, I do not think the statement of claim would be sufficient. But the plaintiff goes much further than this. He sets out not only that the defendant was Premier, but he says that while he was Premier, he acted as agent for His Majesty for the appointment of a trustee and also as such agent arranged for the appointment of the trust company as such agent, etc.

As stated above, I think that these allegations of agency are sufficient as a matter of pleading and I do not think that it affects the matter in any way to say that the defendant was Premier when the transactions referred to took place.

On the present application the court is not concerned with the mode in which the allegations contained in the statement of claim must be proved, nor with the evidence to be adduced for that purpose. *Application refused.*

ONT.

S. C.

TORONTO GENERAL HOSPITAL TRUSTEES v. SABISTON.

Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., Britton, Riddell and Latchford, JJ. April 28, 1919.

LANDLORD AND TENANT (§ II C—24)—RENEWABLE LEASE—SALARY TO BE FIXED—ELECTION OF TENANT—OCCUPATION AFTER END OF TERM—LIABILITY FOR REASONABLE RENT.

A tenant under a lease renewable at his option at a rental to be fixed by arbitrators before the end of the term, who remains in the use and occupation of the premises whilst the arbitration proceedings and his election are pending, and then elects to refuse the renewal term is liable for a reasonable sum for such use and occupation.

Statement.

APPEAL by defendant from the judgment of Middleton, J., reversing the finding of the official referee in an action for rental or for use and occupation of land. Affirmed.

Reasons for the report were given by the Referee as follows (in part):—

The defendant is the successor in title to a ground-lease from the plaintiffs to Mary Medcalfe. The ground lease is dated the 16th October, 1893. The term of the lease is 21 years from the 1st February, 1892, and the lease contains a covenant for renewal for a further term of 21 years at a rent to be fixed by arbitration.

It appeared that the ground-lessee and her successors in title built a number of houses on the Queen street and on the Esplanade frontages, and that the defendant was the owner thereof during and at the expiration of the lease. The land described in the lease and also the houses were very much depreciated in value by the construction of the high level bridge over the Don, and an arbitration was proceeded with to determine the compensation therefor.

The plaintiffs and the defendant entered into an agreement, a short time before the expiration of the term, to postpone proceedings for the renewal of the lease, and the agreement recited that it was advisable, in view of the arbitration between the plaintiffs and defendant and the Corporation of the City of Toronto in reference to the damage caused by the high level bridge, that the rent for the renewal term and all proceedings under the lease should be postponed until after the claim of the plaintiffs and defendant against the city corporation had been disposed of, and the right of the defendant to a renewal of the lease should not be impaired or affected by reason thereof. . . .

The arbitration took place, and an award was made. The defendant refused to sign or accept the renewal lease, and . . . he thereby forfeited the houses and improvements built on the land.

The plaintiffs commenced this action on the 16th April, 1917, for recovery of possession of the land and premises, and for a declaration that the right, title, and interest of the defendant was forfeited. The plaintiffs, pursuant to Rule 127, delivered an amended statement of claim, in which they alleged that the lease had expired, and the defendant refused to accept a renewal, and claimed that the right of renewal was forever barred.

The defendant in his statement of defence disclaimed all estate, right, title, and interest in the lease or the renewal thereof.

The plaintiffs are, therefore, entitled to a judgment declaring that the defendant has forfeited the lease and the houses and

ONT.

S. C.

TORONTO GENERAL HOSPITAL TRUSTEES v. SABISTON.

improvements and any right to renewal of the lease, and to the costs of the action as far as it relates to this issue.

The plaintiffs also claim to recover the sum of $6,067 for use and occupation of the premises from the expiration of the original ground-lease until the refusal of the defendant to accept the new lease.

The real issue for trial is whether the plaintiffs have proved a contract by the defendant, express or implied, to pay for such use and occupation.

The defendant denies any obligation to pay for the use and occupation during the said interval.

The evidence established that the defendant was in possession of the property and collected a small amount for rent. He also claimed a sum for services rendered to the plaintiffs in connection with their arbitration with the city corporation.

On the argument, counsel for the defendant said that he would waive any taking of accounts between the plaintiffs and defendant, and would make no claim against the plaintiffs for services, if the plaintiffs failed to prove an express or implied contract for the use and occupation during the course of the arbitration.

On the evidence, I must find that there was no express or implied contract, and I am of the opinion, and I find, that the relation of landlord and tenant ceased between the plaintiffs and the defendant at the expiration of the term of the original ground-lease, and that the relation was not continued after that date. A renewal of the lease for a further term of 21 years was in contemplation between the plaintiffs and the defendant during the course of the arbitration, and I find that the defendant acted in good faith throughout the arbitration, and he refused to accept the renewal lease under the award of the arbitrators.

After giving the matter my best consideration, I am of the opinion and find that the plaintiffs are not entitled to recover for the alleged use and occupation of the premises during the said interval, and that the action for use and occupation under an implied contract fails. See *Rumball* v. *Wright* (1824), 1 C. & P. 589; *Winterbottom* v. *Ingham* (1845), 7 Q.B. 611, 115 E.R. 620.

I therefore find in favour of the defendant on the issue of payment for use and occupation, and the defendant is entitled to the costs of this issue.

The judgment of Middleton, J., is as follows:—

January 8, 1919. MIDDLETON, J.:—Appeal from the report of an Official Referee, to whom the action was referred for trial, finding that the plaintiffs were not entitled to recover anything for rental or for use and occupation of the lands in question from the 1st February, 1913, when the term granted by the original lease expired, and the 7th May, 1917, when the plaintiffs recovered possession under a judgment of this Court.

The lands in question were demised for 21 years from the 1st February, 1892, by a lease of the 16th October, 1893. The title of the lessee became vested in the defendant.

The lease contained covenants entitling the lessee to a new and further lease for a further term of 21 years, at a rental to be fixed by the award of three arbitrators, to be made before the expiration of the term.

Arbitrators were duly appointed, but an award was not made within the time limited, as proceedings against the Corporation of the City of Toronto to recover damages for injury caused to the lands by the high level bridge across the Don were pending, and it was agreed by a formal document that the arbitration should stand till these proceedings should be ended, and the rights of the parties should not be prejudiced by this delay.

When the award was made, on the 30th December, 1916, the rental was increased from $200 per annum to $1,400 per annum—the tenant in each case paying the taxes.

Sabiston thought this award excessive, and refused to pay. Hence this action.

In the meantime the property had been in possession of sub-tenants, and a statement has now been put in shewing that the defendant has received $2,248 rental, and his mortgagee, the Toronto General Trusts Corporation, has collected $1,601.16, a total of $3,849.16, and taxes have been allowed to fall into arrear to the amount of $2,658.51.

The Referee has dismissed with costs the claim of the plaintiffs, holding that they have no claim of any kind against the defendant, and that he may retain for his own use all that he has received.

Mr. Laidlaw does not admit the accuracy of these figures, and desires time to look into them, and I should readily grant this if I regarded them as being material.

ONT.

S. C.

TORONTO GENERAL HOSPITAL TRUSTEES v. SABISTON.

When there was an agreement for a lease at a rental to be fixed by arbitration, in my view as soon as the rental was fixed the defendant became liable to pay the fixed rental, and only ceased to be liable when the lease was forfeited: *Walsh* v. *Lonsdale* (1882), 21 Ch. D. 9.

Mr. Gamble recognised the fact that the rental was fixed for the whole 21 years, probably having in view that the property might increase in value during the term, and assented to any abatement from the plaintiffs' strict right I might regard as fair.

Having this in mind, I give the plaintiffs judgment for $5,000, a sum considerably less than the rental and unpaid taxes—this sum to be taken to cover the costs of the action and appeal.

H. H. Dewart, K.C., for the appellant, contended that there was no liability, relying upon the two cases cited by the Referee.

Gamble, K.C., for the plaintiffs, respondents, was not called upon.

The judgment of the Court was delivered by

Meredith, C.J.C.P.

MEREDITH, C.J.C.P.:—The defendant was tenant of the plaintiffs under a renewable lease, renewable at the option of the tenant, at a rent to be fixed by arbitration. The arbitration was had and the rent so fixed at $1,400 a year and taxes.

The defendant elected to refuse the renewal term; but had been in possession for over 4 years before the award was made and the election declared by him, and he and his mortgagees had received rents of the property in the meantime, nearly $4,000, and taxes to the amount of more than $2,500 were in arrear.

Middleton, J., awarded the plaintiffs $5,000.

From whichever point of view this case is looked upon, the plaintiffs are entitled to judgment against the defendant for, at the least, the sum which has been awarded them. The defendant, having been in possession, and in receipt of the rents and profits, of the land whilst the arbitration proceedings and his election were pending, is, at the least, liable to the plaintiffs for a reasonable sum for such use and occupation. If really he had no right to reject the new term at the time when he did so, and after all that had happened up to that time, he should pay the rent fixed by the award, $1,400, and taxes; but, if his rejection of it was right—and the plaintiffs seem to have acquiesced in it—then he should pay a reasonable sum, if not the full rent; and, according to some

ONT.

S. C.

TORONTO GENERAL HOSPITAL TRUSTEES v. SABISTON.

Meredith, C.J.C.P.

of the witnesses, that sum should be much more than the amount fixed by the arbitrators: one of the witnesses testified that it should be $2,400 a year and taxes. So that either way the amount of the judgment appealed against is less, rather than more, than it should have been. The cases referred to by the Referee were cases in which the plaintiff was not the owner of the land and failed because of that: they have no application to a case such as this.

But Mr. Dewart relied mainly upon the testimony of the defendant that, in consideration of some services rendered by him to the plaintiffs in connection with a claim they had against the Corporation of the City of Toronto, he was to be given the renewal lease at a reduced rent. Assuming that to be proved, how can it give any right to him in this action? It was to have been a reduction of the rental for the term which he has rejected; and, if such a bargain were ever made, the arbitration was unnecessary, the parties had agreed upon the rental; and, if an arbitration were had notwithstanding such an agreement, the agreement should have been proved, and given effect, in the arbitration proceedings: but was not, nor was it in an appeal to this Court against the arbitrator's rulings (see *Re Toronto General Hospital Trustees and Sabiston* (1917), 33 D.L.R. 78, 38 O.L.R. 139). It is altogether too late, in any case, to raise it now for the first time with any hope of credit being given to the story, in the face of the explicit denial of it by the plaintiffs' agent with whom it is said to have been made, a denial testified to in the proceedings in the Referee's office.

The appeal must be dismissed. *Appeal dismissed.*

FOSTER v. INTERNATIONAL TYPESETTING MACHINE Co.

ALTA.

S. C.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Scott, Simmons and McCarthy, JJ. June 20, 1919.

MORTGAGES (§ II B—40)—CONDITIONAL SALE AGREEMENT—FAILURE TO REGISTER RENEWAL UNDER CONDITIONAL SALES ACT—SUBSEQUENT MORTGAGE DEBENTURE—PRIORITIES.

A publishing company purchased from the defendant in 1913 certain machinery under a conditional sale agreement—only a small portion of the purchase price being paid at the time of purchase. In 1915 the same company received an advance from the plaintiffs, as security for which they gave them what is described as a "first mortgage debenture" which specifically charged the assets of the company with payment of the amount and contained the words "but so that the company is not to be at liberty to create any mortgage or charge on its property ranking in priority to or *pari passu* with this debenture."

ALTA.

S. C.

FOSTER v. INTERNATIONAL TYPESETTING MACHINE CO.

Statement.

The defendant failed to register the renewal statement within the two years as required by the ordinance respecting Hire Receipts and Conditional Sales (Con. Ord. N.W. T., 1898, c. 44; see also amendment 1916, Alta., c. 3, sec. 8). In an action to determine priorities between the parties, it was held that the purpose of the Act required a benevolent and broad meaning to be given to the term "mortgage," that the plaintiffs' debenture fell within such term and was entitled to priority over the defendant's agreement.

APPEAL from Ives, J., in favour of the plaintiffs, on an issue between the parties to determine priorities in respect to securities upon the property of the Press Publishing Co. Affirmed.

A. Macleod Sinclair, for appellant; *H. P. O. Savary*, K.C., for respondent.

The judgment of the court was delivered by

Harvey, C.J.

HARVEY, C.J.:—The Free Press Publishing Co. purchased from the defendant in 1913 under a conditional sale agreement certain machinery for the sum of $2,150, of which $400 was paid. In 1915, the same company received an advance from the plaintiffs of $6,763.47 as security for which they gave them what is described as a "first mortgage debenture" which specifically charges the assets of the company with payment of the amount and contains the words "but so that the company is not to be at liberty to create any mortgage or charge on its property ranking in priority to or *pari passu* with this debenture."

By c. 44, C.O. 1898, it is provided that a conditional sale agreement must be registered as therein provided and that in default the seller cannot set up any right of property or possession "as against any purchaser or mortgagee of or from the buyer or bailee of such goods in good faith for valuable consideration or as against judgments, executions or attachments against the purchaser or bailee."

By c. 3 of 1916, s. 8, it was provided that unless a renewal statement of the amount due were registered each 2 years, the condition of the agreement "should cease to have effect and the property or right of possession therein mentioned shall be deemed to have passed to the purchaser or bailee."

The defendant failed to register the renewal statement within the prescribed two years in 1918 and neglected to retake possession within the same period in consequence of which the plaintiffs claim to have acquired priority over it.

The defendant's contention is that the absolute terms of the amendment cannot be given effect to, that it would never have

been intended that for all purposes, *e.g.*, as between the parties to the agreement, the legislature intended to put an end to the condition, and that it must mean simply as respects the person protected and benefited upon failure to register in the first instance and that the plaintiffs do not fall within any of the classes specified.

The plaintiffs on the contrary contend that it is to be taken for what it says but that, in any event, they fall within the class specified as mortgagees.

The legislature amended the amendment at its last session a couple of months ago (c. 4 of 1919, s. 52) and it is clear that now, at least, it does not mean what either contends, for, while the failure to register in the first instance enures to the benefit of purchasers and mortgagees generally but only judgment or attaching creditors, the failure to renew is now declared to benefit the creditors without limitation but only subsequent purchasers or mortgagees and in *Hulbert* v. *Peterson* (1905), 36 Can. S.C.R. 324, it was held that that meant those subsequent to the time when priority was lost by the failure to register. While the last amendment cannot be applied to the present case, it does shew that the legislature which must be deemed to intend what the statute clearly says, may require to have ascribed to it quite inconsistent intentions. If the terms of the last amendment were in fact due to a failure to consider the terms of the original provisions, of course it will be quite simple at a later session to amend one or other so as to make them harmonize.

Under the present law, however, the most the defendant can argue is that the protection is to be limited to the classes specified in the first section.

Assuming this contention to be sound, I am of opinion that still the plaintiffs have the benefit as mortgagees. The judge held that the debenture was not a mortgage within the Bills of Sales Ordinance and, therefore, did not require registration under that to preserve its priority. He relied on *Johnston* v. *Wade* (1908), 17 O.L.R. 372, and the cases there cited. These authorities, and especially *Re Standard Mfg. Co.* (1891), 1 Ch. 627, do, in my opinion, establish that and the only question then is whether it is a mortgage within c. 44. There were some of the judges in the cases referred to who considered that a debenture was to be deemed a mortgage even for the purpose of imposing upon it the burden of registration

ALTA.

S. C.

FOSTER v. INTERNATIONAL TYPESETTING MACHINE CO.

Harvey, C.J.

under such Acts as the Bills of Sales Ordinance, so there is certainly much to be said in favour of the view that it should be considered a mortgage for some purposes, especially for some purposes beneficial to the holders. In *British India Steam Navigation Co.* v. *Commissioners of Inland Revenue* (1881), 7 Q.B.D. 165, at 172, Lindley, J., says:—

> Now, what the correct meaning of "debenture" is I do not know. I do not find anywhere any precise definition of it. We know that there are various kinds of instruments commonly called debentures. You may have mortgage debentures which are charges of some kind on property. You may have debentures which are bonds.

Wharton's Law Lexicon says:—

> A mortgage is the creation of an interest in property, defeasible upon the condition of paying a given sum of money with interest thereon at a certain time.

For over 30 years a mortgage of land with us has not given any estate in the land to the mortgagee so there is quite clearly no reason why in this jurisdiction the term "mortgage" should necessarily import any thing more than a charge on property. This document is called a mortgage debenture. It might as aptly have been called a debenture mortgage. It charges the property and if it is not to be deemed a mortgage we would find from its terms that, while it would have priority over an ordinary mortgage given subsequent to it, and the latter would have priority as a mortgage over the defendant's agreement, yet the latter would have priority over it.

It was held also in *Johnston* v. *Wade*, *supra*, that such a mortgage debenture has priority over subsequent judgments, yet such judgments would have priority over the defendant. Then the clear purpose of the Act is to protect and benefit persons who advance money for or on the security of the goods. The plaintiffs come as completely within that class as if they had taken a mortgage in the ordinary form. The purpose of the Act clearly requires a benevolent and broad meaning to be given to the term "mortgage" and with such meaning the plaintiffs' debenture falls within it and is entitled to priority over the defendant's agreement.

I would, therefore, dismiss the appeal with costs.

Appeal dismissed.

DIAMOND v. WESTERN REALTY Co.

CAN.
S. C.

Supreme Court of Canada, Davies, C.J., and Idington, Anglin, Brodeur and Mignault, JJ. February 17, 1919.

VENDOR AND PURCHASER (§ I D—28)—PURCHASE AGREEMENT—FAILURE TO PAY PURCHASE MONEY AS AGREED—ACCEPTANCE OF PART OF PURCHASE MONEY FOR NEW TERM—NOTICE—INSUFFICIENCY OF.

A land purchase agreement contained provisions that if the purchaser did not sell 50 lots every six months from December 1st—half of every payment by the sub-purchaser being remitted to the vendor—the vendor could cancel the agreement, and the purchaser would be liable for the balance on any of his sales for which a deed was demanded. The purchaser during the first year and a half resold over 150 lots, but fell a few short of the required 50 in the last six months of that period which expired May 31st., although he had sold an average of 50 lots per each six months.

After having entered on and made a few sales in the fourth six-monthly period, the purchaser on account of illness fell behind and in July the vendors served him with notice under the clause to terminate the agreement.

Held, that the notice served was too late to be effective and in any event that the vendors had by accepting and crediting the purchaser with sales made during June, when the 4th six-monthly period had been entered upon, elected in law to overlook the non-observance of the literal terms of the contract and could not in July rescind or terminate the agreement.

Statement.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario affirming the judgment at the trial by which the action was dismissed.

Cohen, for appellant; *A. C. McMaster*, for respondents.

Davies, C.J.

DAVIES, C.J. (dissenting):—This was an appeal from the judgment of the Appellate Division of Ontario dismissing an appeal from the judgment of the trial judge (Britton, J.), which dismissed plaintiff's action and directed judgment to be entered on defendant's counterclaim for $400.

The only point upon which I entertained any doubt as to the correctness of the judgment appealed from arose out of the contention by counsel for the appellant that there had been an election on the part of the defendant company which destroyed the defendant company's right of cancellation of the agreement made by them with plaintiff for the sale of certain lands to him by the company, to be resold by him to purchasers on the terms and conditions in the agreement specified.

The right to cancel the agreement for default on the part of the plaintiff in reselling a stipulated number of the lots sold to him by the company defendant accrued on May 31, 1916. No immediate action was taken by the company regarding cancellation, but at the beginning of July the president of the company

CAN.

S. C.

DIAMOND v. WESTERN REALTY CO.

Davies, C.J.

made an inspection of the plaintiff's books at Niagara Falls, and on July 4, wrote plaintiff a letter stating the result of such inspection and demanding payment in accordance with the agreement of the instalments of purchase moneys which had been received by the plaintiff from the sub-purchasers and intimating that if a "satisfactory adjustment" was not made with the company by the 15th of the month they would avail themselves of their right of cancellation of the agreement. On the following day, July 5, the president of the company again wrote plaintiff saying he had received from the Niagara Falls office a statement for the month of June and found that according to that statement $53 had to be added to the total amount given in his letter of the previous day as due to the company by the plaintiff.

The letter does not state, and there is no evidence shewing, whether $53 which had been received in the month of June were on account of sales made in June or previously.

The contention is now made that this demand made after the date when the company became entitled to cancel (May 31) constituted an election not to cancel. I cannot agree with that. The company had notified the plaintiff on the 4th that they would give him till the 15th to adjust accounts with them and that failure on his part to do so would result in their then cancelling the agreement. That was a reasonable concession, and though accompanied with a demand for payment of the amount which the president's inspection and the Niagara Falls statements shewed as being due to them from plaintiff, that demand in no way could be construed as an election not to cancel. The formal cancellation was made as threatened on the 19th, four days after the date fixed, and I am quite unable to see how the previous demands of the 4th and 5th July can be construed as an election not to cancel or as in any way affecting their right to cancel. Such right to cancel was one dependent entirely upon plaintiff's failure to sell a stipulated number of lots. It had no reference to the non-payment of moneys he might have received on the lots he did sell, and plaintiff's letters expressly stated that the right of cancellation would be exercised if a satisfactory adjustment of the balance due was not made.

The formal cancellation, the plaintiff having failed to adjust his accounts with the company, was, in pursuance of the notice

they had given him, made on the 19th. It took effect then and did not relate back or have any reference to default on plaintiff's part in paying over moneys he had received. No such action in demanding payment of the moneys can be construed as an election to continue the agreement and destroy the company's express right of cancellation.

Under these circumstances I am of opinion that appellant counsel's able argument as to election arising out of the demand for payment of the moneys due the company cannot be accepted, nor can the defendant company's express right of cancellation arising out of failure on plaintiff's part to sell a stipulated number of lots within a given time, be affected.

I would dismiss the appeal with costs.

IDINGTON, J.:—The appellant entered into an agreement, dated November 6, 1914, to purchase from respondent, the Western Realty Limited, at $65 a lot, a little over 400 lots in a subdivision known as Lundy Park, in the Township of Stamford, of which said respondent was the owner subject to a mortgage to respondent Davidson and one Hunter who were parties to the agreement. It was a speculative venture based on the expectation that the purchaser would resell said lots at the rate of at least fifty each 6 months after said date.

The appellant bound himself to expend within the first six months from said date, $500 of his own money for advertising and expenses in connection with the said resales and to produce proof thereof to said company.

The company bound itself to spend $500 in other ways preparatory to and for the purpose of promoting such resales, and also to pay taxes on the whole up to and inclusive of the year 1917.

The appellant was not only to have the right to resell to sub-purchasers any or all of said lots, but also to have a conveyance made to any of such sub-purchasers freed from said mortgage so soon as $90 a lot paid said company for any lots in a specified district, and for the rest at the rate of $65 a lot until the total price owing the company was paid.

The company was not to get interest on any part of the price until after 3 years from said date.

The appellant was to get the first $15 a lot out of the purchase moneys got on his resales, and the company the next $15 a lot

CAN.

S. C.

DIAMOND v. WESTERN REALTY CO.

Idington, J.

thereout, and thenceforward the balance to be divided as specified in the agreement.

To secure due observance of the foregoing terms and others I am about to set forth, the company had expressly given it a right to examine and check the books

and accounts and agreements of the appellant once a month in order to verify the amount payable by the

appellant to the company.

In fact, accounts were rendered to facilitate this.

The appellant engaged respondent Bettel to assist him in carrying out the scheme of resale as designed and he was in charge of said business until the events I am about to advert to.

The agreement contained the following clause:—

9. If the party of the second part does not sell at least fifty lots of the said lots during the six months beginning with the 1st of December, 1914, or if commencing with the month of June, 1915, the party of the second part does not sell at least fifty of the said lots during each and every succeeding six months' period thereafter until the whole of the said lots are sold by the party of the second part, the company has the right to cancel this agreement forthwith by notice in writing addressed to the party of the second part at number 70 Victoria St., in the City of Toronto. And the party of the second part has the right at any time after the expiration of six months from the date hereof to cancel this agreement by notice in writing to the company addressed to the company, c/o Hunter & Hunter, Temple Building, Toronto. Upon the termination of this agreement none of the parties hereto shall have any recourse against the other or others of them, except that the company shall be entitled to collect from the party of the second part at the time any sub-purchaser is entitled to and demands a conveyance and discharge of the lot or lots purchased by him the balance of the amount necessary to discharge the said lots according to the terms of discharge and conveyance set forth in paragraph number 7 hereof.

The appellant was so successful that during the first year and a half he had sold a total of over 150 lots, but unfortunately fell short a few less than 50 in the last 6 months of that period, which expired on May 31, 1916, though taking the whole period he made that average of 50 lots per each 6 months.

He had entered on the fourth six-monthly term and made four sales in June, fell ill in July, and was in the hospital when complaint reached him from the company that he was falling behind. Despite his appeal for delay till he had recovered, the company served, on July 19, 1916, appellant with a notice claiming under, and by virtue of, the above quoted clause to terminate the agreement.

The respondents proceeded to try and get the fruits of appellant's labour and expenses by forcing or inducing sub-purchasers from him to surrender his agreements and respectively accept agreements from the company in substitution thereof.

The company, and Davidson, who was its vice-president, took part in such proceedings and induced respondent Bettel to enter the employment of the company to conduct in the future the business in question.

Hence this action for restraining the respondents from asserting that the agreement has been terminated and pursuing such a course of conduct and for damages.

The objection is now made by counsel for the appellant that the notice served on the appellant was too late to be effective and, in any event, that the respondent company had, before such notice, by the unequivocal act of accepting and crediting appellant with proceeds of sales made in June, 1916, when the fourth six-monthly period had been entered upon, had elected in law to overlook the non-observance of the literal terms nominated in the bond, and hence could not so late as July 19, 1916, rescind or terminate the agreement.

I think the point is well taken and the notice void.

I have no doubt of respondent company's knowledge of the fact of the sales in June. They had no right to accept a dollar of proceeds of any such sales affirming thereby the continuance of the contract, and then attempt to terminate it by such a notice as now in question.

When we find that a successful effort to do so would deprive appellant of all he earned and would yet be entitled to receive out of the proceeds of his resales, which would amount to $8,000 or over, and for which the rigorous terms of this contract would deprive him of any recourse against respondent company, one cannot see how, as suggested below, this is a one-sided contract giving the advantage only to the appellant.

It seems to me rather a case of diamond cut diamond.

The contract binds the respondent company to observe the rights of the appellant as against his sub-purchasers and all that is implied therein, even though he might have had no recourse against the company in the event of a successful termination under above quoted clause. With those rights it had no right to attempt to interfere.

CAN.

S. C.

DIAMOND v. WESTERN REALTY CO.

Idington, J.

Each of the sub-purchasers was accountable to appellant and should have been amply protected in claiming from the company such conveyance as the agreement in question entitled them to.

The action is not, as the court below seemed to assume, brought for specific performance.

The appeal should be allowed with costs throughout as against the company and Davidson, and the injunction granted as prayed for against all concerned, with nominal damages against Bettel.

There should be a reference to take accounts as prayed for if the parties cannot agree, and also to fix the damages done the appellant by the acts of the respondent company and Davidson, to be assessed separately as against each of the two lastly named parties if so desired by either. Further directions should be reserved until the report of the referee. The judgment entered for $400 against appellant should be set aside. There was no agreement to return such money to the company.

I think the utmost that can be said as to that is that in the ultimate accounting it might be chargeable against the appellant as intimated in the correspondence, and I would allow it to be set off in taking the accounts between the parties which seems to be a necessary result of this appeal.

Anglin, J.

ANGLIN, J.:—The facts of this case sufficiently appear in the reports of it in the Supreme Court of Ontario, 12 O.W.N. 226; 14 O.W.N. 94.

Counsel's admirably lucid and concise argument in support of the plaintiff's claim that the attempted cancellation by the defendants of their agreement with him was ineffectual failed to convince me that default had not been made by his client which entitled the defendants, on June 1, 1916, or within a reasonable time thereafter, to exercise their option to cancel. I thought he also failed to establish the estoppel which he urged because of lack of evidence of any change of position by the plaintiff induced by the defendants' conduct. But he satisfied me that the letter of their president of July 5, demanding payment of $53 shewn to be due to them by the plaintiff's statement of the June payment made by his sub-purchasers, as an unequivocal act in affirmance of the continued existence of the agreement, amounted to an election not to exercise the right of cancellation which had accrued to them under its terms on June 1.

The argument that there had been such an election by the letter of July 5, was based on two distinct grounds: (a) the demand of moneys payable in respect of sales made in June; (b) the demand under clause 6 of the agreement of moneys received by the plaintiff in June in respect of sales whenever made.

(a) By knowingly claiming proceeds of sales made by the plaintiff in June, the defendants would have unequivocally recognized his right to act under the agreement notwithstanding his default during the period ending on May 31, and would have precluded themselves from exercising their right to cancel the agreement for that default.

Counsel for appellant urged that the inference from the documents (the president's letter of July 4, shewing the result of his inspection of the plaintiff's books made on June 24, and the plaintiff's statement of June receipts, coupled with the admission of counsel that the McCully sales shewn in it had been made in June) that the defendants' president, when writing the letter of July 5, had "a conscious appreciation" of the fact that the moneys thereby demanded included proceeds of sales made in June is irresistible. No doubt a powerful case is made in support of that inference. But, although the president was examined as a witness at the trial, he was not confronted with it. While it may be urged that, under the circumstances, the burden was on the defendants to shew that the letter of July 5 was written in ignorance of this vital fact, yet if the appellant intended to rely upon the inference that he now seeks to have drawn, not having pleaded it, it was his duty at least to have directed attention to it at the trial—if not to have cross-examined Mr. Metcalfe in regard to it—in order that an opportunity for explanation might be afforded. Not having done so, he should, in my opinion, not be allowed now to rest a claim of election upon that inference which might, had opportunity been afforded, have been shewn to be unwarranted.

Confronted with this difficulty, counsel contended that knowledge of the June sales was not essential—that the right to elect to cancel rested solely on the December-May default, and that knowledge of it was indisputable and sufficed to make the letter of July 5, conclusive as an election. In support of this contention he relied on a distinction drawn by Mr. Ewart in his recent work on "Waiver Distributed" (pp. 75-6) between facts giving rise to

CAN.
S. C.
DIAMOND v. WESTERN REALTY CO.
Anglin, J.

the right to elect and facts calculated to influence the exercise of that right, and urged (again citing Mr. Ewart's book, pp. 84-88) that if the act relied on as constituting the election be unequivocal, the intention with which it is done is immaterial. *Scarf* v. *Jardine* (1882), 7 App. Cas. 345, 361. But we are here dealing not with what Mr. Ewart terms an "influencing fact," but with a fact which is relied upon to give significance and character to the act set up as an election. It may be that even ignorance of such a fact cannot be invoked to negative an election which would be indubitable and incontrovertible had it been known. I desire to leave this an open question finding it unnecessary now to pass upon it because, in my opinion, the alternative ground on which counsel for the plaintiff rests his assertion of the election is unanswerable.

(b) There can be no doubt that the demand for payment in the letter of July 5, was made, and consciously and intentionally made, in the exercise of the defendants' rights under the 6th clause of the agreement. I think it is equally clear that those rights could be exercised only while the agreement was subsisting and in force. Upon cancellation entirely different rights would arise under the 9th clause. Instead of the plaintiff's obligation being from time to time to hand over to the defendant certain portions of payments made to him by sub-purchasers, as it was while the agreement was in force, upon cancellation he would have been obliged to make payment to the defendants only when a sub-purchaser should be entitled to a conveyance and then of "the balance of the amount necessary to discharge" the lot or lots to be conveyed. If it was intended that any rights under clause 6 might be preserved after cancellation, not only is that intention not expressed, as it should have been, but the words of clause 9 express the contrary intention,

> upon cancellation none of the parties . . . shall have any recourse against the other or others of them except, etc.

as above indicated.

The defendants were fully aware of the facts entitling them to cancel and of their right to elect to do so. They knew that the moneys demanded by their letter of July 5 were on account of June payments—the fact which gave character and significance as an election to that demand for payment under clause 6. Their president made that demand deliberately. Having done

an act which would be justifiable if he had elected one way (not to cancel) and would not be justifiable if he had elected the other way (to cancel)—the fact of his having done that unequivocal act to the knowledge of the persons concerned is an election. *Per* Lord Blackburn in *Scarf* v. *Jardine*, 7 App. Cas. at p. 361.

Other authorities are cited in Ewart on "Waiver Distributed" *loco cit.*

I am, for these reasons, of the opinion that the attempted cancellation was ineffectual and that the appellant is entitled to judgment declaring the acts of the respondents of which he complains unwarranted and illegal, for an accounting by them in respect of moneys received from his sub-purchasers and for damages sustained by him as a result of their wrongful interference with his rights under subsisting agreements with sub-purchasers and also with his right to continue the sale of lots until his agreement with them was duly terminated. The last item may involve only a negligible amount.

If any of his agreements with sub-purchasers are still in such a position that they can be enforced he is entitled to have them delivered up to him and to an injunction restraining interference with his enforcement of them.

There is nothing to sustain the defence of abandonment by the plaintiff.

I should, perhaps, add that, if I had been of the opinion that the attempted cancellation was effectual, on the construction of clause 9 I should have held the appellant entitled to the like damages, accounting, etc., in respect of the agreements of sub-sale which were subsisting at the time it took place. There is no provision entitling the respondent company to deprive him of the benefit of these agreements.

For the reasons given in the Appellate Division, I think the judgment for the respondents upon their counterclaim for $400 should not be disturbed.

The appellant is entitled to his costs throughout.

BRODEUR, J.:—One of the questions raised on this appeal is whether or not the respondent company could cancel the agreement of November 6, 1914. Brodeur, J.

That agreement provided for the sale to the appellant Diamond by the Western Realty Co. of a subdivision known as *Lundy Park*

CAN.
S. C.
DIAMOND v. WESTERN REALTY CO.
Brodeur, J.

for the price of $65 a lot. The purchaser was bound to sell at least 50 lots during the 6 months commencing with the month of June, 1915, and 50 lots during each and every succeeding 6 months until all the lots would be sold; and if he did not sell that number of lots during one of those 6 months' periods the vendor had the right to cancel the agreement.

During the 6 months from December, 1915, to May, 1916, the purchaser sold only 14 lots, and on the 19th of July, 1916, the vendor cancelled the agreement.

The evidence shews that Diamond had intimated that he could not go on with the carrying out of his contract. He had left Ontario to go and reside in Detroit, and the few sales he had made in the 6 months' period above mentioned shewed that the sale of those building lots could not be successfully carried out.

The parties went into negotiations to put an end to the agreement of sale; but those negotiations fell through as to the terms on which the sub-purchasers should be dealt with and the money due by Diamond on his purchase price should be paid. Then the company had to exercise the right of cancellation.

It is claimed by the appellant that the company had no right to cancel the agreement because there had been a substantial performance of the contract.

It is true that during the two first 6-months' periods Diamond sold a certain number of lots but most of those sales had been cancelled, likely for failure of payment on the part of sub-purchasers. It is also in evidence that during the last period of 6 months Diamond sold only 14 lots and was then far from carrying out the obligation which he undertook in the contract to sell during each of these 6 months' periods at least 50 lots.

I am convinced that if Diamond had made to the company the remittance which he was bound to give under his contract out of each sale of lots which he had made, the company would not have exercised its right to cancel the agreement. But Diamond was in arrears in his payments, had practically left the province to go and reside in the United States, and had told the company that he was unable to meet his obligations.

There is no doubt that the terms stipulated were of the essence of the contract, as the purchaser had to pay by handing over to the company a part of what he would have received from his sub-purchasers.

It is contended also on the part of the appellant that the company had waived its right to cancel and had elected not to exercise that right.

I am unable to find in the evidence any such waiver or any such election. It is true that the last 6 months' period expired on May 31, 1916, and that the cancellation was made on July 19 of the same year; but negotiations were pending to bring about a settlement which would be satisfactory to both parties. The appellant should certainly not take advantage of those negotiations to say that there was on the part of the company waiver when this delay occurred just for the purpose of helping him to raise money which he had to pay to the respondent company.

As to the election which is alleged by the appellant, that contention is based upon 6 sales made in June which sales, according to the appellant, were known to the company. He relies in that respect on a statement of account handed over to the company for the June collections.

It is not clearly and conclusively shewn that the company in making a claim with regard to those payments knew that a small sum of money was coming from sales made after May 31, 1916. Of course, if the company had known that such sales had taken place after May 31, the situation might be different; but I am unable to find in the evidence the necessary element to shew that they possessed that knowledge. I am then of opinion that the company had the right to cancel the contract in question; and in that regard the appeal should be dismissed.

But another question comes up with regard to the right of the appellant concerning the contracts made with the sub-purchasers and the moneys paid by the latter. When the contract was cancelled the company obtained, through one of the respondents who was the clerk of Diamond, the agreement covering these sub-purchasers and they started to collect the money due under those agreements or to make some new contracts with those sub-purchasers.

The provisions of the contract between Diamond and the Western Realty Co. do not disclose very clearly what should be done with sub-purchasing agreements in case the contract would be cancelled. That right of cancellation was stipulated not only in favour of the vendor but also in favour of the purchaser. Diamond

CAN.

S. C.

DIAMOND v. WESTERN REALTY CO.

Brodeur, J.

had himself the right, after 3 months, to cancel the agreement if he did not find it satisfactory. On the other hand, as I have already said, the company had the right to cancel, if the purchasers did not sell so many lots during each of the 6 months' periods.

It had been provided in the contract that Diamond had the right to sell any of the lots to sub-purchasers and the money collected from those sub-purchasers was practically to be divided between Diamond and the company until the amount of $65 per lot would be paid; and it was stipulated that the amount in excess of $65 per lot should be applied upon the balance of the purchase money payable.

Now the contract having been duly cancelled by the vendor, who has the right to collect the money from the sub-purchaser?

I am of opinion that this money should be collected by Diamond. He is bound to hand over that money to the company until all the lots have been paid for; but if there was enough money due by those purchasers in order to cover the old purchase price which he owed to the company, then that balance would come to him.

In those circumstances, I think that the company had no right to interfere with those sub-purchasers and that it should render an account to Diamond of the money which it had received from those sub-purchasers since the cancellation of the contract.

The appeal should be allowed to that extent, each party paying his own costs.

Mignault, J.

MIGNAULT, J.:—I can entertain no doubt that, assuming the respondent had the right to cancel its agreement with the appellant under clause 9, for failure of the appellant to sell at least 50 lots during the 6 months' period ending on May 31, 1916, the respondent could not take possession of the contracts which the appellant had made with persons to whom he had sold lots, and give to the latter notice to pay to the respondent and not to the appellant amounts due the appellant under these contracts. Clause 9 of the agreement provided that:—

> Upon the termination of this agreement none of the parties hereto shall have any recourse against the other or others of them, except that the company (the respondent) shall be entitled to collect from the party of the second part (the appellant) at any time any sub-purchaser is entitled to and demands a conveyance and discharge of the lots or lot purchased by him the balance of the amount necessary to discharge the said lots according to the terms of discharge and conveyance set forth in paragraph number 7 hereof.

In so far, therefore, as the respondent interfered with contracts made by the appellant with sub-purchasers—and it did so interfere—it was clearly wrong and the appellant can demand to have these contracts delivered up to him and is entitled to an injunction to prevent the respondent from interfering with the sub-purchasers.

The question whether the respondent had effectually exercised its right of cancellation under clause 9 of the agreement is not so free from doubt. I think that the letters of the president of the respondent company, written to the appellant on July 4 and July 5, 1916, should be read together. It is noticeable that neither of these letters refer to the only ground upon which the respondent could cancel its contract with the appellant, *i.e.*, the failure of the latter to sell, during the 6 months' period ending on May 31, 1916, at least 50 lots. On the contrary, the letter of July 4, mentions the obligation assumed by the appellant under clause 6 to make remittances to the respondent on sales made by him, and alleges that the appellant is indebted in the sum of $370 for lots sold by him, besides a claim for taxes and amounts received on account of lots resold. It intimates that unless a satisfactory adjustment be made by July 15, the respondent will avail itself of its right of cancellation. And the president's letter of July 5, based on the appellant's June statement, claims $53 in addition. The June statement mentioned new sales made by the appellant in June, 1916, the respondent's counsel in the court below admitting four new sales in June.

Reading, therefore, together the letters of July 4 and 5, the respondent is in the position that it demanded from the appellant payment of all moneys received by him to June 30, including payments received by him on at least four sales of lots made by him in June, and notified him that if he did not make this payment, the contract would be cancelled.

It is obvious that, under the agreement, the right of cancellation could not be exercised by reason of the appellant's failure to make remittances to the respondent of the portion of the moneys due to it out of payments received by him from sub-purchasers. So when the respondent now seeks to justify its notice of cancellation of July 19, on the ground that the appellant had not made the required number of sales in the six months' period ending May 31, 1916—the notice of cancellation of July 19 made no such complaint

CAN.

S. C.

DIAMOND v. WESTERN REALTY CO.

Mignault, J.

—it is, in my opinion, prevented from so doing because, by demanding payments on sales made in June by the appellant and claiming benefit thereunder, it had acquiesced in the continuation of the agreement after May 31, notwithstanding that the appellant had not made the required number of sales during the 6 months' period ending on that date.

The complaint now made by the respondent that the appellant had failed to make the required number of sales seems to me to be an afterthought, probably suggested by counsel, but I cannot think that it was present in the president's mind when he wrote the letters of July 4 and 5. It does not appear in the correspondence that the respondent ever made such a complaint to the appellant. What seems evident is that the respondent assumed that if the appellant did not make the remittances demanded within the delay specified in the letter of July 4, it could on that ground cancel the contract. Unfortunately for its notice of cancellation, it had been preceded by a demand of payment of moneys received on account of June sales, and in view of this fact, I think that the respondent could not, on July 19, cancel the contract because the appellant had not made at least 50 sales between December 1, 1915, and May 31, 1916.

The appeal should, therefore, be allowed with costs, but I would not disturb the judgment of the trial court on the counterclaim of the respondent. *Appeal allowed in part.*

CAN.

Ex. C.

THE KING v. KILBOURN.

Exchequer Court of Canada, Cassels, J. May 26, 1919.

EXPROPRIATION (§ I D—60)—RIPARIAN RIGHTS—WATER-POWERS—PUBLIC WORK—7 WM. IV., c. 66—9 VICT., c. 37, s. 7—B.N.A. ACT, s. 108—VALUATION OF WATER-POWERS.

The River Trent, by a series of statutes, was appropriated by the Crown for the purpose of constructing the Trent Canal. At the time of Confederation the whole river from Rice Lake to the Bay of Quinte had become part of the canal system.

Held, that the river had, under the circumstances, become a public work of Canada and passed by s. 108 of the B.N.A. Act to the Dominion at the time of Confederation.

2. That the title of defendant to lots on the river did not carry with it the *solum* or bed of the river, and therefore the defendant had no legal right to compel the dam erected above his lots on the river to be maintained by the Crown.

3. In estimating the value of a water-power the cost of exploiting the same must be considered. That being so, even if the river in question were not a public work no value as enuring to the defendant could be placed upon the water-power, as it would cost more to develop than the results to be attained would justify.

[*The King* v. *Grass* (1916), 18 Can. Ex. 177, referred to.]

INFORMATION exhibited by the Attorney-General of Canada for the expropriation of certain lots in the Town of Campbellford.

Mr. Johnston, K.C., for the plaintiff, contended that the River Trent was appropriated by the Crown for the purpose of constructing the Trent Canal; that the statutes vested the whole river in Public Works Department and gave it the character of a public work. And by s. 108, B.N.A. Act, it passed to the Dominion at the time of Confederation; and, moreover, this river had been declared by statute a navigable river in fact; that the rule of "*ad medium aquae a filae*" is not without exception; that assuming that the River Trent is non-tidal, then the title of a grantee of land bordering thereon runs to the middle thread of the river. But this is a presumption which is rebuttable and in this instance is rebutted by the exclusion of 44 acres from the grant, taken out of the 200 acres of the lot. He further contends that the defendant's title was subject to reservations contained in the original grant from the Crown, which original grant reserved the water, and that, therefore, Kilbourn had no right to the water so reserved; that the owners of the several lots between defendant and the dam further up the river had a right also to the use of the water, and that there was nothing to limit the amount of water or power they could take.

Mr. McKay, K.C., for defendant, contended that the statute 6 Wm. IV., c. 29, only provides for certain expenditures, and the appointment of commissioners—and that there is nothing in all the Acts cited to vest the River Trent—except such lands as they actually took, and that the river was not a public work; these statutes give them authority to construct a canal, which was not limited to the line of the river; they could acquire and hold the boundary of the canal, but it vested in the Crown only what they actually took. He contended that defendant's lands were injuriously affected and that the water rights being part of the land shared therewith. He further contended his client was owner of the bed of the river opposite his property and had a right to maintain the dam in question, and had a right to excavate to continue the raceway to and onto his property, and in consequence was entitled to the water-power which could be obtained by such works.

Defendant cited the following authorities: *Lyon* v. *Fishmongers Co.* (1876), 1 App. Cas. 662 at 682; *North Shore R. Co.* v. *Pion*

CAN.
EX. C.
THE KING
v.
KILBOURN.

(1889), 14 App. Cas. 612; *Att'y-Gen'l of B.C.* v. *Att'y-Gen'l of Canada* (*Burrard Inlet* case), [1906] A.C. 552; *Embrey* v. *Owen* (1851), 6 Ex. 353, 155 E.R. 579; *Caldwell* v. *McLaren* (1884), 9 App. Cas. 392; *Lord* v. *Commissioners of Sydney* (1859), 12 Moore's P.C. 473, 14 E.R. 991; *Miner* v. *Gilmour* (1858), 12 Moore's P.C. 156, 14 E.R. 861; *Cedar Rapids Case & Lacoste*, 16 D.L.R. 168, [1914] A.C. 569; *Stockport Waterworks Co.* v. *Potter* (1864), 3 H. & C. 300, 159 E.R. 545; *Wood* v. *Waud* (1849), 3 Ex. 748, 154 E.R. 1047; *Durham R. Co.* v. *Walker* (1841), 2 Q.B. 940, 114 E.R. 364; *Attrill* v. *Platt* (1884), 10 Can. S.C.R. 425, 481; *Bullen* v. *Denning* (1826), 5 B. & C. 842, 108 E.R. 313; *Savill Bros.* v. *Bethell*, [1902] 2 Ch. 523 at 537, 538.

Strachan Johnston, K.C., and *G. A. Payne*, for plaintiff; *Robert McKay*, K.C., and *W. H. Wright*, for defendant.

Cassels, J.

CASSELS, J.:—An information exhibited on behalf of His Majesty, by the Attorney-General of Canada, plaintiff, and John M. Kilbourn, defendant, to have it declared that certain lands formerly the property of the defendant are vested in His Majesty, and to have the compensation ascertained.

The expropriation plan was registered on November 22, 1910.

The lands in question are said to comprise about thirty-six hundredths of an acre. These lands are situate in the Town of Campbellford, and front upon the River Trent, which flows through the said town. The lands expropriated comprise part of lots 8, 9, 10, 11, 12, 13, 14, 15 and 16 in what is called the east factory block.

A point of contention at the trial was that lot 16, marked upon the plan designated "Cady's plan" as lots 16 and 17, and the description in the deed to Kilbourn would include as part of lot 16, this lot marked lot 17. The question as to whether or not lot 16 includes what is called lot 17 on Cady's plan is not of very great moment. Later on, however, as counsel in the course of the trial have dwelt on this particular question, I will deal with it.

The Crown has expropriated 17,613 sq. ft. The total area of all the lots in question is 30,527 sq. ft.

The defendant in his defence, as originally filed, claimed the sum of $6,000 as compensation for the portion of the lands expropriated and all damages. By the amendment he changed this amount, and now claims the sum of $20,000.

An interesting question is raised in this case which in my view is not of much moment. The defendant claims a large sum of money for loss of water-power which he claims he acquired as owner of the lots in question, and of which he alleges he has been deprived by the removal of a dam which penned back the waters of the River Trent, causing the waters to flow through the raceway referred to. In my view even if the contention of the defendant were well founded there is practically no value in these particular lots for power purposes. I am of opinion, however, that he acquired no title to the bed of the river or the waters of the river except as an ordinary riparian owner and had no right to have the dam maintained.

The River Trent, by a series of statutes, was appropriated by the Crown as part of the public works required for the Trent Canal. The canal starts from Rice Lake and enters into the Bay of Quinte at Trenton.

I am indebted to the present Mr. Justice Masten when at the bar for the information contained in his argument in the case of *The King* v. *Grass*, 18 Can. Ex. 177 at 183. I have referred to the various statutes and verified Mr. Justice Masten's citations.

By c. 66 of 7 Wm. IV., 1837, it is recited in s. 1, that

> it is highly important that a line of communication should be formed between the waters of the Bay of Quinte and Rice Lake, by improving the navigation of the River Trent.

Commissioners were appointed to carry out the provisions of that statute. I pass over the statute of 4 and 5 Vict., c. 38, as it was repealed by a later statute, 9 Vict., c. 37 (Canada), 1846. By this latter statute a commission was established to superintend, manage and control the public works of the province. By s. 7 of this statute, the commissioners are given the

> control and management of constructing, maintaining and repairing of canals, harbours, roads or parts of roads, bridges, slides and other public works and buildings now in progress or which have been or shall be constructed or maintained at the public expense out of the provincial funds.

There are provisions enabling the commissioners to enter on property and make surveys, etc. S. 23 of this statute, which is of importance, provides, that

> the several public works and buildings enumerated in the schedule to this Act, and all materials and other things belonging thereto, or prepared and obtained for the use of the same, shall be and are hereby vested in the Crown, . . . and under the control of the said commissioners for the purposes of the Act.

CAN.
EX. C.
THE KING
v.
KILBOURN.
Cassels, J.

Schedule "A" to this Act is headed "Public works vested in the Crown by this Act;" and then below is the heading, "Navigation, Canals and Slides." Included in this schedule is the "Rice Lake and the River Trent, from thence to its mouth, including the locks, dams and slides between those points."

This statute in consolidated in the statutes of Canada (1859), c. 28, and in the same language as the statute to which I have previously referred.

By the Confederation Act, s. 108, the public works and property of each province enumerated in the third schedule to this Act shall be the property of Canada. The third schedule to this Act states, "Provincial public works and property to be the property of Canada." "Canals with lands and water-power connected therewith."

Counsel for the defendant in the case in question dealt at considerable length upon the point that opposite the lands in question owned by the defendant, the river was non-navigable in fact, and that the title of the defendant extended to the middle of the river.

After the best consideration I can give to the case I am of opinion that the whole of the River Trent, from Rice Lake to the Bay of Quinte, became part of the canal system. It was essential for the construction and maintenance of the canal that the River Trent should be vested in the Crown. It was declared to be a navigable river and became a public work of Canada, and in my opinion passed to the Dominion by the Confederation Act.

On August 25, 1852, the Crown granted to David Campbell, clergy reserve lot number 10, in the 6th concession of the Township of Seymour. This patent is the source of the title under which the defendant Kilbourn claims.

In the patent there is a reservation as follows:—

Exclusive of the waters of the River Trent, which are hereby reserved, together with free access to the shores thereof for all vessels, boats and persons.

The acreage of the lot granted to Campbell by the patent is 156 acres.

It is contended by Mr. Johnston, representing the Crown, that the lot 10 in question comprised 200 acres, and he refers to the evidence of Proctor to prove this fact.

Mr. James, a provincial land surveyor, measures the area of

land covered by the river bed, and states that it comprises 44 acres of land. From this Mr. Johnston contends that the reservation in the patent of the waters of the Trent included the reservation of the bed of the River Trent. There is considerable force in this contention.

At the time of this grant, as I have mentioned, the River Trent became part of the canal system and was declared to be part of the public works of the old Province of Canada, and I have but little doubt that the object of reserving the waters of the River Trent was to prevent any misunderstanding as to title being granted which would prevent the Crown from perhaps diverting all of these waters for the purposes of the canal.

The case of *Kirchhoffer* v. *Stanbury*, 25 Gr. 413, was tried before the late Spragge, C., in the autumn of 1868. Judgment was delayed for the reasons stated by the chancellor in his reasons for judgment, until the year 1878. It was apparently not necessary for the chancellor to deal with this question. The suit in question was instituted to have a construction placed in the bed of the river removed. It was obvious, as the chancellor pointed out, that if those claiming under Major Campbell did not own the bed of the river the action would necessarily fail, and therefore the question did not arise. In his reasons for judgment, the chancellor refers to the effect of the grant. He puts it in this way, p. 416:—

> The position of the plaintiffs is a peculiar one. The patent to Major David Campbell, which is put in by the plaintiffs, is of land in the Township of Seymour, "exclusive of the waters of the river Trent, which are hereby reserved, together with free access to the shores thereof for all vessels, boats and persons."

The chancellor states:—

> Not a very accurate mode of reservation. It would, however, probably operate though the *waters* only are reserved as a reservation of the bed of the river.

It appears that a dam had been erected above the lands in question. There are several lots from 1 to 16, namely, 7 lots further up towards the dam than the lands owned by Kilbourn. Kilbourn's lots commences with lot 8. Raceways were provided for both on the east and on the west side of the river, and mills and other factories had been erected, power to which on the east side was furnished from the raceway situate between those lots and Mill Street.

CAN.

EX. C.

THE KING v. KILBOURN.

Cassels, J.

The Hon. James Cockburn, Kirchhoffer and Robert Cockburn had apparently erected this dam without permission from the Crown, and being in doubt as to their right so to do, they applied to the Crown for a license to maintain this dam, and a license bearing date December 9, 1869, was given. It recites the grant of a patent in the year 1852 of lot 10, in the sixth, to David Campbell—and recites as follows:—

And whereas, it is represented unto us that the said lot of land extends across the River Trent and includes lots on both sides thereof;

And whereas, it is further represented unto us that the said David Campbell subsequently conveyed the same to the Honourable James Cockburn, Nesbitt Kirchhoffer, and Robert Cockburn, Esquires, their heirs and assigns, and further that the last mentioned parties have heretofore constructed a dam for manufacturing purposes, across the River Trent, at the intersection thereby of the said lot of land, and they have applied for a license from us to authorize them to maintain the said dam and the erections and constructions thereto appertaining, etc.;

And whereas, it is deemed advisable to grant the license so applied for;

Now know ye in consideration of the premises we have given and granted, and do by these presents give and grant unto the said Honourable James Cockburn, Nesbitt Kirchhoffer and Robert Cockburn, Esquires, their heirs and assigns, full power, leave, license and authority, to keep erected and maintained across the River Trent at the Village of Campbellford, in the said Township of Seymour, at the intersection of the said lot of land by said river, the said dam heretofore constructed and now being thereon, and all the works, erections, matters and things thereto belonging or therewith enjoyed.

There is a proviso to the license that

no compensation shall be claimed by the said the Honourable James Cockburn, Nesbitt Kirchhoffer, and Robert Cockburn, Esquires, or either of them or their heirs or assigns of, from or against us, our heirs and successors, or any other person or persons whomsoever *in respect* of the power, leave, license and authority hereby granted, in case the license hereby granted shall be at any time terminated or revoked or be the subject of any legislation as hereinbefore mentioned.

On August 24, 1911, the license was revoked. The revocation recites:—

And whereas, the removal of the said dam has now become necessary for the proper navigation of the River Trent.

The plan expropriating the lots in question was registered on November 22, 1910. I do not think this affects the question, as whatever title the defendant, Kilbourn, had in the lots in question entitling him to have the dam maintained and to the water-power, was all subject to be revoked if the interests of the canal so required. The Crown did revoke the license and removed the dam. It is not for me to question the judgment of the officials of the Crown

as to whether or not it was proper that the dam should be removed in the interest of navigation. At the time of the revocation the raceway had been excavated, as I have mentioned, as far as lot No. 8. It has never been excavated in front of or beyond lot No. 8.

Under the title through which the defendant claims, the defendant had a legal right to excavate and continue the raceway passing between his lots and Mill St., if so advised. He had never done so, nor do I think he ever contemplated such a work. It would have cost a large amount of money, and if continued there would have been almost no horse-power available for his property. I will endeavour to shew this later from the evidence.

On January 1, 1865, there was a deed of partition executed between the tenants in common, and amongst other things the water lots are referred to as the water lots referred to in the plan of George W. Ranney. Some of these water lots passed to one of the tenants in common, others to Kirchhoffer, and other water lots to the other tenants in common. The defendant has proved his title to these water lots other than lot 17, as to which there is no dispute.

By the deed of partition of January 1, 1865, these water lots are described as the water lots shewn on the plan of Ranney. This deed of partition also refers to other water lots apparently above the lots in question, which are referred to as shewn on a plan by Cady. This plan of Cady apparently was prepared and registered on May 8, 1865, subsequently to the deed of partition.

I am informed by counsel that Ranney's plan cannot be found. It is said that search has been made everywhere for it without any result, and the plan is not registered. It, therefore, leaves the question as to whether or not what is called lot 17 was included as part of lot 16 in doubt. It is not of much value, and very little turns upon it.

Now, as to the value of these nine lots for water-power purposes. It may be well to mention that Kilbourn purchased the nine lots in question in the year 1905 for the sum of $900, or $100 for each lot. He is a barrister of standing and a shrewd man of business, and on January 8, 1917, he writes a letter to the Minister of Railways, in which among other things he states that he is the owner of the lots, 8 to 16 inclusive, in the east factory block.

CAN.

Ex. C.

THE KING
v.
KILBOURN.

Cassels, J.

Possession has been taken of these lots by your Department for canal purposes and the embankment of the canal has been put upon all of them, practically destroying the lots. I believe the canal is now practically finished and presume you will be in a position to make compensation for the lots. I would be willing to accept $4,000 for the property.

I refer to this letter to shew first that, to the knowledge of Kilbourn, the portion of his lots expropriated had been taken for canal purposes. He admits in his evidence that when he bought he knew that the Crown was going to improve the navigation of the Trent. I also refer to it to shew the great difference between his present demand for $20,000 and the sum he was willing to take on January 8, 1917.

Dealing first with the question of the value of this property for water-power purposes. Duncan William McLachlan was a witness examined by the Crown. He was division engineer for the Trent Canal at Campbellford, in the year 1910. I have mentioned before that from the dam to the commencement of Kilbourn's lots there are seven other properties taking or entitled to take water from the raceway, the raceway having been extended to lot 8, the commencement of Kilbourn's property.

Mr. McLachlan states as follows:—

Q. Before returning to the amount of power that these users up the raceway took, I want you to state how much horse-power, assuming the average flow of the river to be 1,253 c. second feet, there would be available for the total raceway? A. There would be available 626 c. ft. per second. (This would be on the east side. The other 626 on the west side). Q. I was referring to the power taken by Smith and Doxie in c. second feet. Mr. Kerry in his figures used horse-power? A. Might I explain a question? Mr. Kerry quoted my report in these matters—and I have gone back to my original report and simply taken the equivalent amounts in water which appear in my original report which were not given. Q. Your report states that Smith & Sons took 162 horse-power off the raceway, what is the equivalent of that in cubic second feet? A. I think it would be better to state the actual measurement. The actual measurement at the full gauge opening was 261 c. feet per second for Smith. Q. And Doxie? A. 48, making 309. Q. And Dixon? A. 26. Q. And Weston? A. 86 is the actual measurement. Q. And the Town of Campbellford? A. 59. Q. That was a total of 580 c. second feet? A. Exactly. Q. And the available capacity in the raceway was 626 c. second feet? A. That is correct. Q. That would leave how many c. second feet? A. 46 feet per second. Q. That would be the maximum that would be available for Kilbourn, having regard only to the actual user by those above? A. Correct.

To my mind it is absurd to believe that anyone would go to the expense necessary to construct the raceway and continue it in front of the defendant's lots for this amount of power. The raceway would have to be excavated out of rock.

I think, moreover, that the evidence of the witness for the defendant confirms this view. It must not be lost sight of either that the quantity of water fluctuates according to the seasons. During a portion of the year there would be very little water.

The defendant examined in support of his claim one John George Kerry. He is a civil engineer, and had a great deal to do with the water-powers in question. He bases his evidence upon the construction of a storage dam up the river, at a distance above the point in question of from 30 to 100 miles. He states that the conservation would be above the navigable portion of the stream.—

Briefly, I went into that very carefully, and I figure that storage to the extent of about 500,000 acre feet was necessary to regulate the flow.

His estimate is that the whole conservation could be carried out at the rate of $2 per acre foot, or at a total cost of approximately, $1,000,000. He divides this cost among the different owners, and finds the amount chargeable to Kilbourn's property would be the sum of $6,000. He puts the cost to Kilbourn, the total cost, at from thirty-four-odd thousand dollars to twenty-six thousand dollars. He is asked:—

Q. Your general estimate is a wide thing. There is a new dam and new works, and a lot of other things. The point before me is what is the loss to Kilbourn, his taking the property as it was. If you take the old raceway as it stood in 1910, and extended it past Kilbourn's property, what would it cost? A. With that change the estimate would be reduced to $26,000. Q. It would cost how much? A. $26,000 to extend the raceway and put in the turbines.

His Lordship: So that Kilbourn before he could utilize this property for manufacturing, he would have to spend $26,000 on the property? A. Yes.

He states further on as follows:—

Q. It would not be possible for Kilbourn to develop any power in connection with these lots except by virtue of a dam far above Kilbourn's property? A. That is correct. Q. On these lots themselves it is not possible to develop any power? A. No. Q. Now you make an estimate of the cost of developing power on Kilbourn's property, and that was based, you said, on the possibility of certain conservation works being carried out. How far above Campbellford would those conservation works be? A. Roughly speaking, anywhere from 30 to 100 miles. Q. And it is not possible, as far as you know, or it would not have been possible in 1910, to regulate in any practical manner the flow of the river without going very far upstream? A. The proper place to put the regulation works is far up stream.

It seems to me that such an idea cannot enter into the consideration of the present case. I have pointed out that the River Trent has been taken for canal purposes. How is Kilbourn

CAN.
EX. C.
THE KING
v.
KILBOURN.
Cassels, J.

to get such a scheme as a conservation dam, as described by Kerry, carried into effect, and the expenditure of a large sum of money for a scheme which might turn out to be of no value?

I am, therefore, of opinion, for the reasons I have given in regard to the River Trent being a public work, and also for the reason that if not a public work, there is no value in the water-power, that this part of the case raised by the defendant fails.

The question is then raised that for building purposes the property is of large value. I have mentioned the fact that in 1905 the amount paid by Kilbourn was the sum of $900. The Crown has expropriated 17,613 sq. ft. out of a total of 30,527 sq. ft. Kilbourn has received for a part of what was left after the expropriation of lots 12 and 13 for the cheese factory the sum of $700. He is also left with the balance of the other lots for what they are worth. For building purposes it is necessary to consider that in front of all of these lots, and between Mill St. and the property in question, is the space of 20 ft., laid out for the proposed extension of the raceway. The title to this raceway has not been vested in Kilbourn. It may be, however, that for practical purposes he would always have the right of access from Mill St. to the residences, if any, erected on these different lots. The lots themselves have a frontage of 50 ft. with a depth of from 60 ft. to less, and it is apparent that a considerable portion of these lots in the freshets is overflowed. The evidence of the witnesses is, as usual, conflicting. There is evidence of sales of particular properties such as for the post-office site, etc., and it appears that erected on this property and also on other properties referred to in the evidence there were buildings of no value.

After analyzing the evidence carefully, I am of opinion that the sum tendered by the Crown of $1,200 is ample compensation, to include everything the defendant could reasonably hope to have obtained for the property, more particularly having regard to that portion of the property not expropriated.

Judgment will issue declaring that the tender of $1,200, with interest to date of tender, is ample to cover everything that the defendant can reasonably claim, including any allowance, if he be entitled to it, for compulsory expropriation. There will be no interest subsequent to the tender, and the defendant must pay the costs of the action. *Judgment accordingly.*

COOK-HENDERSON Ltd. v. ALLEN THEATRE.

SASK.

C. A.

Saskatchewan Court of Appeal, Haultain, C.J.S., Lamont and Elwood, JJ.A. June 19, 1919.

INSURANCE (§ III C—56)—CANCELLATION OF POLICY—SUFFICIENCY OF.

A notice to insurance agents as follows: "I have just learned from Calgary that they have taken care of the insurance for the Allen, Moose Jaw, etc.," held to be under the circumstances sufficient notice of cancellation of the insurance under s. 11 of the Insurance Act (1915, Sask. stats., c. 15), although it did not request the cancellation of the insurance or cancel it by express words.

Statement.

APPEAL by defendant from a District Court Judge in an action brought by the plaintiff for insurance premium on fire insurance policies effected in favour of the defendant through the plaintiff as insurance broker. Reversed.

E. F. Collins, for respondent; no one *contra*.

The judgment of the court was delivered by

Elwood, J.A.

ELWOOD, J.A.:—This is an action brought by the respondent for insurance premium on fire insurance policies effected, in favour of the appellant, through the respondent as insurance brokers.

The evidence of K. J. Henderson, vice-president of the respondent, is that, at the time the insurance was effected, it was suggested by Mr. Gage, a representative of the appellant, that possibly the insurance might have been placed in Calgary, and it was then arranged that the policies should be renewed, and if they were placed at Calgary within 30 days and the policies were returned within that time, the respondent would cancel the policies without charge. No notice was sent to the respondent within the 30 days, but on October 9 a letter was written by Gage to the respondent, as follows:—

> I have just learned from Calgary they have taken care of the insurance for the Allen, Moose Jaw. I do not know at what rate they got it. I do know they gave it to Niblock & Tull.

The District Court Judge before whom the action was tried held that this notice was not sufficient under s. 11 of the statutory conditions as contained in the Saskatchewan Insurance Act, being c. 15 of the statutes of Saskatchewan for 1915.

S. 11 of these conditions is as follows:—

> The insurance, if on the cash plan, may also be terminated by the assured by giving written notice to that effect to the company or its authorized agent, in which case the company may retain the customary short rate for the time the insurance has been in force, and shall repay to the assured the balance of the premium paid.

SASK.

C. A.

COOK-HENDERSON LTD. v. ALLEN THEATRE.

Elwood, J.A.

It was not suggested on the argument before us that the respondent was not the proper person to whom to give notice, but simply that the notice was not sufficient; that it did not request the cancellation of the insurance, or cancel it. Mr. Henderson, above referred to, in the course of his evidence and referring to the letter of October 9, was asked this question:—"Q. And you understood from that letter that they did not require your insurance any longer?" to which he replied "Yes." So we have the evidence that the respondent by receipt of the letter of October 9, understood that the appellant did not require the insurance any longer.

It seems to me, therefore, that that letter is a written notice to the effect that the insurance should be terminated; particularly so when coupled with the arrangement made with Gage.

Some evidence was given as to requests made by the respondent to the appellant for return of the policies, but that correspondence shews that the reason that the policies were not returned was that they were mislaid.

The duty of the respondent on the receipt of the letter of October 9, was, in my opinion, to immediately notify the insurance companies of the cancellation of the policies. If they failed to do this, and if, in consequence, they are liable to the insurance companies, that, to my mind, does not affect the liability of the appellant.

The respondents evidently had authority to cancel the policies, because they subsequently cancelled them by notice.

The appellant is liable for the premium earned up to the time of the receipt of the letter of October 9. It paid into court with its defence $99.79. I assume from the evidence that that would be sufficient to pay the premium earned up to the time of the receipt of that letter.

In my opinion, therefore, the appeal should be allowed with costs, and the respondent's judgment reduced to the sum of $99.79 and costs. One judgment to be set off against the other, and the one in whose favour the balance is to have execution, if necessary. If there is a balance in favour of the respondent, the money in court to be paid out to the respondent to the extent of such balance, and if, after so paying the respondent, said money in court is not exhausted, the balance of such money in court should be paid to the appellant. *Appeal allowed.*

UNITED STATES PLAYING CARD Co. v. HURST.

CAN.
S. C.

Supreme Court of Canada, Davies, C.J., and Idington, Anglin, Brodeur, and Mignault, JJ. February 4, 1919.

TRADE MARK (§ IV—21)—INFRINGEMENT—DESIGN—INTENT TO DECEIVE—PASSING OFF—DAMAGES.

The word "Bicycle" may be made a valid trade mark for a certain class of playing cards, and the sale by another manufacturer of a class of playing cards known as the "Bicycle series," the word "Bicycle" being in large letters in one line and the word "Series" being in smaller letters on the next line is an infringement of such trade mark.

United States Playing Card Co. v. *Hurst*, 34 D.L.R. 745, varying 31 D.L.R. 596 (annotated), reversed.]

Where in the opinion of the trial judge intention to pass off was abundantly proved, and all means necessary to facilitate passing off were provided, and enough was shewn to establish a reasonable probability of deception, his judgment enjoining infringement by passing off will be upheld although there is no proof of actual passing off.

Statement.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario (1917), 34 D.L.R. 745, 39 O.L.R. 249, varying the judgment at the trial, 31 D.L.R. 596, 37 O.L.R. 85, in favour of the plaintiff. Reversed

D. L. McCarthy, K.C., and *Britton Osler*, for appellant; *Moss*, K.C., and *Heighington*, for respondent.

Davies, C.J.

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

Idington, J.

IDINGTON, J.:—In regard to the claim herein made, and so far as founded upon mere passing off, the appellant obtains by the judgment in question herein all it is entitled to on the evidence presented for our consideration, and, I incline to think, a little more.

There is not, in my view of the evidence, enough therein to maintain a case merely of passing off, as defined and applied in such recent cases as *A. G. Spalding Bros.* v. *A. W. Gamage* (1915), 113 L.T. 198; *Horlick's Malted Milk Co.* v. *Summerskill* (1916), 33 R.P.C. 108; *Universal Winding Co.* v. *George Hattersley & Sons* (1915), 32 R.P.C. 479; *Singer Mfg. Co.* v. *Loog* (1882), 8 App. Cas. 18; *Standard Ideal Co.* v. *Standard Sanitary Mfg. Co.*, [1911] A.C. 78, at 86.

I am unable to agree with the trial judge that there was evidence of a conspiracy such as he finds between respondent and his employers. Indeed, the use, by the Goodall company, as evidenced by their catalogue, 1898-1899, of the pictorial representation of a bicycle design on one of their cards, 5 years before the respondent entered their employment, seems destructive of the basis of such finding and none the less when we are assured by appellant's

CAN.

S. C.

UNITED STATES PLAYING CARD CO. v. HURST.

Idington, J.

counsel that the production of that catalogue is the result of industrious search on the part of appellant.

There is indeed evidence of a somewhat earlier use by Goodall & Co. of the pictorial design of a bicycle. Like much else in this case the inquiry suggested by these facts does not seem to have been prosecuted. It may be, as suggested by counsel for respondent, his misfortune arising from war conditions rather than his fault. Be that as it may, we are limited to what is before us.

Again, I am unable to accept the theory put forward in argument that by reason of the mere word "bicycle" having been appropriated as a trade mark by appellant, the respondent was debarred thereby from the use of any design into which entered the pictorial representation of a bicycle or any part thereof, or of either coupled with a rider thereon, or anything else to attract the eye.

It is the right of every one of His Majesty's subjects to decorate his goods with any symbol he pleases, so long as that symbol has not become, by use or by virtue of registration, the individual property of another. It is equally his right to use language descriptive thereof so long as deception is not intended or likely to arise therefrom.

Yet it is mainly by disregard of these rights that the case for appellant has been built up; and largely by a confusing mass of evidence, much of it by leading witnesses who evidently had no correct appreciation of the matters they were talking about. In many parts of their evidence they confuse the design on the card with the trade mark which they seek to establish.

Nevertheless if we could properly find as a fundamental fact that there was a conspiracy of the kind claimed to have existed; then, even such unsatisfactory evidence might be made more or less properly serviceable to prove the actual execution of the purpose of such a conspiracy.

I admit that from circumstances attendant upon the execution, or even attempted execution, of an unlawful purpose, we may occasionally be able to infer the existence of a conspiracy.

But here I can find nothing sufficiently substantial in the respondent's acts and the circumstances relied upon to demonstrate either the existence of such a conspiracy or a course of conduct which can only be attributable to the purpose of illegally depriving

appellant by means of deception of that property it had in the goodwill or prosperity of its business, or whatever the legal right in question may be.

Nor can I find in the evidence that degree of probability of injury having been, or at the institution of this action, being, suffered by the appellant, from anything done by the respondent, which is necessary in order to maintain the action for a passing off, when there is not a vestige of direct evidence on the point.

There would not, in my opinion, have been the slightest chance of any wholesale dealer, or retailer buying from him, being deceived by reason of all that which is put forward in this case, and alleged to be a means of deception, into buying the Goodall cards instead of the appellants'.

And those buying from the retail dealer cards for use are not of the stupid variety of mankind whose eyes, when cast upon a card, are likely to be readily misled.

In so far, therefore, as this case rests upon a passing off, as claimed, I think it should have been dismissed.

In regard to the claim by appellant for an infringement of its trade marks, which are but an artificial means, as it were, for the protection of the rights which are liable to be invaded by a passing off, the exact nature in law of what such a trade mark is must be correctly appreciated before we proceed to consider the proof of infringement.

It may be still held in a passing-off action (as I have assumed for that part of this case) to have a meaning and effective force independently of that assigned it in our Trade Mark and Design Act but in light of s. 20 thereof, which reads as follows:—

> 20. No person shall institute any proceeding to prevent the infringement of any trade mark, unless such trade mark is registered in pursuance of this Act,

I think all the appellant can complain of herein, resting alone upon its claims for infringement of its trade marks, must fall within the meaning of Part I. of said Act.

In expressing my assumption that for the purposes of this case I have considered the trade mark as if possibly an effective force, had there been anything coupled therewith to make out a case of passing off, I must not be taken as having formed a decided opinion. The imperative language of prohibition in the section

CAN.

S. C.

UNITED STATES PLAYING CARD CO. v. HURST.

Idington, J.

just quoted may, in a passing-off case, some day be argued as depriving a plaintiff, or as enough to deprive him, of any support to be derived from a trade mark, unless it had been registered in course of what is alleged in the case.

On the principle that a man cannot do indirectly what he is forbidden to do directly, why should he get the benefit of an unregistered trade mark?

S. 4 defines and differentiates "general" from "specific" trade marks.

All those in question herein are of the latter class, which is defined as follows:—

(b) "Specific trade mark" means a trade mark used in connection with the sale of a class merchandise of a particular description.

Then follows s. 5 (which has a marginal note "What shall be deemed to be a trade mark") and reads as follows:—

5. All marks, names, labels, brands, packages or other business devices, which are adopted for use by any person in his trade, business, occupation, or calling, for the purpose of distinguishing any manufacture, product or article of any description manufactured, produced, compounded, packed or offered for sale by him, applied in any manner whatever either to such manufacture, product or article, or to any package, parcel, case, box or other vessel or receptacle of any description whatsoever containing the same, shall, for the purposes of this Act, be considered and known as trade marks.

S. 19 of the Act reads as follows:—

19. An action or suit may be maintained by any proprietor of a trade mark against any person who uses the registered trade mark of such proprietor, or any fraudulent imitation thereof, or who sells any article bearing such trade mark or any such imitation thereof, or contained in any package of such proprietor or purporting to be his, contrary to the provisions of this Act.

We are confined by virtue of Part 1 of the Act, and especially by these two sections, to an enforcement only of the rights which may be rested upon a correct interpretation and construction of the language therein.

The question raised herein must, therefore, be whether or not the respondent has in fact used in the manner indicated in the said s. 19, any of the appellant's registered trade marks, or any "fraudulent imitations" thereof.

I observe the change in the language in the first part of the section dealing with the use of the mark, to that in the second part dealing with him who sells any article bearing such trade mark, or any imitation thereof.

I incline to hold that the meaning of the word "imitation" in any case resting upon either branch of the section must be a "fraudulent imitation."

The registration by appellant of the word "bicycle" took place on July 17, 1906, and that seems to be the most important of the four trade marks in question, if we take the attention devoted to it in the case as a measure of its relative importance.

Now it is only the use of that word itself by respondent in the like manner to that which s. 5 indicated to be the measure of appellant's right, that can be complained of as an infringement.

And, by the express terms of s. 5, it must be a use falling within the words,

> for the purpose of distinguishing any manufacture, etc. . . . manufactured . . . applied in any manner whatever either to such manufacture, etc., . . . or to any package, parcel, case, etc., . . . of any description whatsoever containing the same,

that can be the basis of the right of action given in s. 19.

I do not think these words can be stretched to cover the use of the word "bicycle" in an advertisement as alone sufficient to found an action upon.

Much less can they be held to cover any pictorial representation of a bicycle or of any part thereof.

Eliminate these two grounds of alleged offence and I find nothing in what respondent has done since the registration by appellant of the word "bicycle" which can fall within the meaning of the words in s. 5 of the Act.

It is only by a confusing use of the word "bicycle" so as to make it cover any and every sentence in which that word can be found and thus extend the meaning of the trade mark beyond its limitations that the appellant can hope to succeed on this ground of complaint relative to the word "bicycle."

As to the objection taken by appellant founded upon the use of pictorial representation of a bicycle or any part thereof as an equivalent of the word, its own acts of registration furnish a complete answer by way of argument.

Before registering "bicycle" as a word, it had registered same day a representation of a bicycle and a rider thereon, and followed both by another pictorial representation of a bicycle and much else.

CAN.

S. C.

UNITED STATES PLAYING CARD CO. v. HURST.

Idington, J.

If the single word "bicycle" should be applied to cover all sought for it to cover herein, such a proceeding must have been useless.

True these trade marks are alleged in evidence and argument to be respectively applicable to different grades of cards. Assuming that to be so and possible within the meaning of the Act I imagine there should be something on record to distinguish what is intended to be covered.

There does not seem to be anything more than an intended use in the sale of playing cards indicated in the applications for these several trade marks in question. I doubt much if that is a compliance with the Act and fulfils the purpose thereof, but in my present view I need not follow that suggestion.

As to the other trade marks in question I can find no actual imitation thereof much less a fraudulent imitation. Indeed, the Goodall company, as already indicated, in dealing with the other phase of this complicated case, had been using for seven or eight years before these registrations cards having its own pictorial designs thereon.

Before parting with this case I may say that during the argument I had a decided impression that Mr. Moss's objection that a design on the back of a card could not properly be registered as a trade mark was unfounded. Much reading of evidence herein which exhibits the mind of those engaged in the manufacture of cards, and a further consideration of the Act, led me to doubt the propriety of such registrations.

I need not say any more in view of the conclusions I have reached and expressed.

I think the appeal should be dismissed with costs here and below; the cross-appeal allowed and action dismissed with costs, but as there were no costs by reason of a cross-appeal as such—as sometimes is found to exist—this should mean only one set of costs.

Anglin, J.

ANGLIN, J.:—My subsequent study of this case has confirmed the impression left on my mind by the argument that the findings of the trial judge, most of them confirmed in the appellate division, cannot be disturbed. Where the appellate division has interfered the evidence and the reasonable inferences from it, in my opinion, so far support the trial judge's conclusions of fact that they should

be restored. He held, upon facts which, if they did not compel, at least warranted, such a finding that

> the proper inference from all the evidence is that Hurst and the Goodalls conspired together to defraud the plaintiff of its trade name and of the profits legitimately its, as the result of its advertising and enterprise.

I am not inclined to differ from the judge who saw the witnesses on the question whether the defendant was an honest man or not, and where there is a finding such as we are here confronted with I am little disposed to make nice refinements or subtle distinctions in order to cut down what has seemed to an experienced trial judge to be necessary for the protection of the holder of a trade mark. *Perry & Co.* v. *Hessin* (1912), 29 R.P.C. 509, at 527-8, 532.

The only question on which I think there is room for any doubt is whether the plaintiffs did not adopt the word "bicycle" as a grade, quality or style mark rather than as a trade mark—(*U.S. Playing Card Co.* v. *Clark* (1907), 126 U.S. Patent Office Gazette 2190; 132 U.S. Patent Office Gazette 681). If this question be open under our statute (R.S.C., c. 71, ss. 5 and 13 (2) and 19), I think the better conclusion is that the finding of the trial judge in favour of the trade mark, affirmed in appeal, should not upon the evidence before us be disturbed.

The amendment to the 4th paragraph of the judgment made by the appellate division, however, is probably quite proper. The infringement therein dealt with would seem to have been of the specific trade mark mentioned by Hodgins, J.A., rather than of the several trade marks set out in par. 5 of the judgment of the trial court. Moreover, the judgment, as varied by the appellate division in this respect, seems to afford full protection to the plaintiffs.

But I cannot say the same of the amendments made to paragraphs 1, 5 and 7. These would seem to open the door to use of the word "bicycle" (for instances in the phrase "Bicycle Series" as used by Goodalls, the word "Bicycle" being in large letters on one line and the word "Series" in smaller letters on the next line), quite inconsistent with the measure of protection necessary to insure to the plaintiffs the full benefit and enjoyment of their trade mark for that word. In my opinion the declaration and injunction granted by the trial judge were not too wide for that

CAN.
S. C.
UNITED STATES PLAYING CARD CO. v. HURST.
Anglin, J.

purpose (*Singer Mfg. Co.* v. *Loog*, 8 App. Cas. 15; *Apollinaris Co.* v. *Norrish* (1875), 33 L.T. 242, and should be restored.

There remain the questions as to passing off and the assessment of damages.

It is common ground that no instance of passing off has been shewn. But in the opinion of the learned trial judge intention to pass off was abundantly proved and all means necessary to facilitate passing off were provided. These circumstances, in his view, made it unnecessary for the plaintiffs to shew that the opportunity thus afforded had been actually taken advantage of. In the appellate division it was thought on the other hand that the presence of the manufacturer's name on cards (the ace of spades), tuck cases and cartons would so probably preclude even retail customers being taken in that evidence of actual passing off was essential and that the plaintiffs should fail on this branch of the case because they had not established "a reasonable probability of deception." In this connection the evidence of Donald Bain, a leading retail stationer in Toronto, is important:—

Q. Do you remember whether any card of Goodall's during the time you were in business had any bicycle design on it or anything of that kind? A. Latterly they brought out a card with a bicycle design, more after the design of the American card, to take its place.

Q. Would you say when that was? A. I would not like to say the year.

His Lordship: About how many years ago? A. Of course, that is about 15 years ago.

Mr. McCarthy: About 15 years ago they brought out—do you know how they graded that card—what they called it? A. I think they called it, if I remember rightly, the "Bicycle" card, too.

Q. Then what was the result as far as the trade was concerned, with regard to using the word "Bicycle" when they brought that out? A. There was a good many of their cards sold, if you were a smart enough clerk, you could sell them in place of the American cards.

Q. If you were a smart enough clerk, you could sell them instead of the American card—in the trade what was meant by the "Bicycle" card after Goodall brought out his? A. It was an infringement.

While it would, no doubt, have been more satisfactory had there been evidence by several men engaged in the business similar to that given by Mr. Bain, and, better still, if actual passing off had been proved, I incline to accept Middleton, J.'s view that enough was shewn to establish a reasonable probability of deception, which would suffice to sustain his judgment. *A. G. Spalding* v. *Gamage*, 113 L.T. 198, at 199, 203; *Saxlehner* v. *Apollinaris Co.*

(1897), 14 R.P.C. 645, 654; *Iron-Ox Remedy Co.* v. *Co-operative Wholesale Society* (1907), 24 R.P.C. 425, 430; *Liebig's Extract of Meat Co.* v. *Chemists' Co-operative Society* (1896), 13 R.P.C. 635, 644; *Claudius Ash, Sons & Co.* v. *Invicta Mfg. Co.* (1912), 29 R.P.C. 465, at 475, 476; *Albion Motor Car Co.* v. *Albion Carriage and Motor Body Works* (1917), 34 R.P.C. 257.

As to the damages, with great respect, the fixing of them at $250 would seem to have been purely conjectural and arbitrary. It is true that the defendant's interests were in a measure protected by the offer of a reference at his own risk as to costs—a provision of which its omission from the formal judgment indicates that he declined to avail himself. But although the proof of infringement and the establishment of a case of passing off entitle the appellants to nominal damages, and the probability that actual damages were sustained entitles them to inquiry at their own risk, that, I think, is the full measure of relief that should be accorded. *A. G. Spalding Bros.* v. *A. W. Gamage, Ltd., supra*, at p. 199. The formal judgment of the appellate division directing a reference would seem to indicate that the appellants had accepted the provision made by Hodgins, J.A., for an inquiry, should they desire it, with a reservation of costs. The case of *Provident Chemical Works* v. *Canada Chemical Manufacturing Co.* (1902), 4 O.L.R. 545, 553, cited by the judge, is scarcely in point, however, because, as Moss, J., points out, it there

> appear(ed) from the evidence that no purchaser had been misled into buying the defendants' product instead of the plaintiff's.

Here this negative has not been established.

With the modifications indicated I would restore the judgment of the trial judge. The appellant should have its costs of the appeal to this court and the cross-appeal should be dismissed with costs.

Brodeur, J.

BRODEUR, J.:—This is an appeal from a judgment of the appellate division of Ontario varying a judgment of the supreme court rendered by Middleton, J.

The action had been brought to restrain certain alleged infringements by the respondent of the trade marks claimed by the appellant with respect to playing cards and to restrain the respondents from passing off the respondent's playing cards as cards of the plaintiff. These trade marks consisted of the word "bicycle" applied to playing cards and in three designs called respectively, "Safety,"

CAN.

S. C.

UNITED STATES PLAYING CARD CO. v. HURST.

Brodeur, J.

"Expert" and "Acorn," on which the bicycle was a characteristic feature.

Middleton, J., held that those trade marks had been infringed upon and the injunction prayed for was maintained.

The appellate division confirmed the injunction as to passing off and as to the trade marks, "Safety," "Expert" and "Acorn." As to the trade mark "Bicycle," the appellate division varied the judgment by deciding that the cards bearing a design representing a bicycle were not an infringement of the patent and that the use also of the words "Bicycle Series" did not constitute an infringement; but that the defendants should be restrained from using the word bicycle on tucks and cartons and should use the words "bicycle cards" generally. The nominal damages which had been granted by Middleton, J., were set aside by the appellate division. The plaintiff appeals to this court from the judgment of the appellate division and, on the other hand, the respondent cross-appeals and, therefore, all the questions which had been raised by the pleadings are now in issue before this court.

The evidence shews that in 1885 the appellant company was manufacturing four grades of playing cards which were known respectively as Tigers, Tourist, Army and Navy, and Congress. Those cards were of different prices, qualities and finish, two of those grades being expensive cards and two of a cheaper kind.

It was found advisable, in order to satisfy the demand in the trade for a playing card of another grade lying intermediate between the expensive and the cheap grade, to create a fifth grade. A name had to be given to that card; and, as at that time the use of the bicycle was becoming very popular, they thought of giving the name of "bicycle" to that grade; and, as the requirements of the trade demanded, different designs of bicycles were used on the back of the cards; and in that way the "Acorn," the "Expert" and the "Safety" were manufactured and put on the market. Some other designs of the bicycle idea were also put on the market; some were successful and were maintained, like the "Expert," the "Safety" and the "Acorn;" some others were less successful; and in 1906 trade marks were applied for and obtained.

About the time those designs were registered as trade marks another trade mark was obtained by the appellants for the word "bicycle." It appears that large sums of money were spent by the appellant company to advertise their cards, and particularly the

bicycle card. The result was that those bicycle cards were in great demand on the Canadian market and also in the United States, where, in all probability, the appellant company were the largest manufacturers.

In Canada one or two companies manufactured some playing cards; but it does not appear by the evidence that it was done on an extensive scale. The sales of playing cards appear, on the contrary, to be divided on the Canadian market between the appellant company and the large English firm of Charles Goodall & Co.

Hurst, the respondent, was a traveller for a wholesale stationery firm of Toronto; and, as such, was selling playing cards of the appellant company and of the Charles Goodall Co., and he was thoroughly familiar with the playing card trade in Canada. In 1901 he solicited from Charles Goodall & Co. the Canadian agency for the sale of their cards; and, having obtained that agency, he devoted himself entirely to it.

It appears that before that date the Goodall firm had in some cases also used the word "bicycle" in connection with their playing cards; but it was done in a very quiet way and the Canadian trade did not seem affected at all by it; but after Hurst became their sole Canadian agent their hesitation in that respect seemed to cease and they began to use extensively the word "bicycle" in connection with their cards, called the "Viceroys" and the "Imperial Club." Their sample books began to display in a conspicuous way the word "bicycle." It became pretty clear that the use of this word either by Goodall or by Hurst interfered with the trade of the appellant company; and the present action was instituted to restrain Hurst in connection with his playing cards.

It is contended that playing cards are not a proper subject-matter of trade mark registration. There is absolutely nothing in the statute which prevents the word "bicycle" or the designs mentioned in those trade marks from being the subject of a trade mark. It cannot be claimed that the word was descriptive of the article to which it was applied. It was a fancy word which certainly could be used in connection with the playing cards. The respondent himself admits that the term "bicycle" used in connection with the playing card trade had a definite meaning as referring to the manufacture by the appellants.

Our statute states (c. 71, s. 5) that all marks, names, labels packages or devices which are adopted for use by any person in his trade for the purpose of distinguishing any goods manufac-

CAN.

S. C.

UNITED STATES PLAYING CARD CO. v. HURST.

Brodeur, J.

tured by him be considered and known as trade marks. The word "bicycle" and the design in question had been in use for a great number of years by the appellant company. They were known in the trade as such and I have no doubt that they could be made the subject of a trade mark.

On that ground, the trial judge and the court of appeal express the same view in which I concur.

If the Goodall company had used, previous to the registration, the word "bicycle," it could not have affected the rights of the plaintiff company which had been using this description of goods for a great number of years and had established a trade by which those cards came to be known as "bicycle cards." I am unable to agree with the appellate division in its variation of the decision of the trial judge. If the word "bicycle" has become known in the trade as connected with the goods of the appellant company, it seems to me that the word used in some way or other by some competitive firm would be illegal. Whether the respondent would claim the Goodall cards to be part of the Bicycle Series or whether designs would be put on the back of those cards representing a bicycle, I think that either would constitute an infringement upon the trade mark of the appellant company. Sebastian on Trade Marks (5th ed.), p. 147; *Johnston* v. *Orr Ewing & Co.* (1882), 7 App. Cas. 219; *Read Bros.* v. *Richardson & Co.* (1881), 45 L.T. 54; *Edelsten* v. *Edelsten* (1863), 1 De G. J. & S. 185, 46 E.R. 72.

In those circumstances, I am of the opinion that the action of the plaintiff should be maintained, that the appeal should be allowed with costs of this court and of the court below, and that the cross-appeal should be dismissed with costs.

Mignault, J.

MIGNAULT, J.:—I concur in the opinion of Anglin, J.

Appeal allowed.

ONT.

S. C.

WITHERSPOON v. TOWNSHIP OF EAST WILLIAMS.

Ontario Supreme Court, Appellate Division, Mulock, C.J. Ex., Clute, Riddell, Sutherland and Kelly, JJ. December 31, 1918.

MUNICIPAL CORPORATIONS (§ II D—146)—CONTRACT TO BUILD BRIDGE—EXECUTION ACCORDING TO CONTRACT—RIGHT TO RECOVER—NO BY-LAW AUTHORISING—DUTY OF MUNICIPALITY TO KEEP HIGHWAYS IN REPAIR.

A plaintiff who has, according to the true meaning of a contract in writing and sealed by a municipal corporation, done what he contracted to do in constructing a bridge to replace one which formed part of a highway in the township is entitled to recover the contract price. The absence of a by-law authorising the construction is no defence to an action to recover the contract price, it being part of the duty of the municipality to keep the roads in repair and fit for ordinary traffic including the building and repair of bridges.

[*MacKay* v. *City of Toronto* (1918), 43 D.L.R. 263, distinguished.]

ONT.

S. C.

WITHERSPOON v. TOWNSHIP OF EAST WILLIAMS.

APPEAL from a judgment by ROSE, J., on an action to recover $2,500, the balance of the price of a bridge erected by the plaintiff for the Municipal Corporation of the Township of East Williams, the defendants. Reversed.

The judgment appealed from is as follows:—

ROSE, J.:—The plaintiff's claim is for $2,500, the balance of the price of a bridge erected by him for the defendants. There are no pleadings, the action having been commenced by a specially endorsed writ. The defence specifically raised by the affidavit of merits is, that the bridge has not been completed according to the agreement between the parties, in that the bridge for which the defendants agreed to pay was to be one of 15 tons' capacity, whereas the bridge erected is not of that capacity: at the trial, however, there was raised an additional defence, viz., that no by-law had been passed by the council of the defendant municipality authorising the order for, or accepting, the bridge. I delayed the delivery of judgment in order to see what the opinion of the Appellate Division might be upon the similar defence raised in the case of *Mackay* v. *City of Toronto*,* which, at the time of this trial, was standing for argument.

In January, 1915, the township council decided that a new bridge was necessary, and in some way or other it was made known that tenders would be considered. The recollection of the witnesses as to how this information was imparted is not quite clear; I think, however, that a plan (exhibit 2) and specifications (exhibit 3) were furnished to the probable tenderers, including the Sarnia Bridge Company, from whom the plaintiff procured the steel superstructure of the bridge. Both plan and specifications were prepared by Mr. Farncomb, a civil engineer, instructed by the Reeve in that behalf; neither shews the capacity of the bridge. After the invitations to tender had gone out, Mr. Farncomb wrote to the Reeve a letter dated the 8th February, 1915, in which he advised him to ask for figures on a "class A" bridge, instead of on a "class B" bridge, telling him that a "class A" bridge was designed to carry a concentrated live load of 15 tons at 10-foot centres, while a "class B" bridge would carry 10 tons at 10-foot centres. He also said "the latter" (i.e., class B) "bridge

*The judgment of MIDDLETON J, in the *Mackay* case is reported in 39 O.L.R. 34; it was affirmed by a Divisional Court of the Appellate Division on the 26th April 1918: see 43 D.L.R. 263, 43 O.L.R. 17.

ONT.
S. C.
WITHERSPOON v. TOWNSHIP OF EAST WILLIAMS.

is not approved for main roads. It might be well to ask for alternative bids on each class of bridge, and then you could decide which class to adopt." The definitions of the two classes are evidently taken from the specifications prepared under the direction of the Ontario Government for the assistance of municipalities: see the Annual Report upon Highway Improvement, 1911 (exhibit 18), p. 135.

No invitation to tender alternatively was sent out as suggested by Mr. Farncomb.

Tenders came in and they were opened at a meeting of the council held on the 22nd February, 1915. At that meeting Mr. Farncomb's letter was produced by the Reeve and was read. Amongst the tenders was one from the plaintiff for "your proposed bridge in accordance with plans and specifications furnished by your engineer," or rather, there is produced a letter from the plaintiff purporting to enclose such a tender. The letter is written in ink—but the prices are in pencil writing. The letter quotes prices for the steel superstructure $4,145, and for the combined steel and concrete work $6,400. There are also, in pencil, under the line quoting the price for the combined steel and concrete work, the words "for 15-ton capacity bridge $200 more," and there are carried out into the margin the figures "$6,600."

The evidence as to how the words written in pencil found their way into the letter, and as to what the real bargain was, is somewhat confused and conflicting, but I think that what really occurred was: that the plaintiff attended the meeting at which the tenders were considered, but was not in the room when Mr. Farncomb's letter was read; that the council decided that certain things not mentioned in the invitations to tender—an expansion apron, steel hub-guards, and the propping up of the old bridge until the new one was in place—would have to be provided for, and that they ought to have what they somewhat loosely called a "15-ton capacity" bridge; that the plaintiff was called in and was asked what he would charge for the apron, the hub-guards, and the propping up of the old bridge; that he said $300, but finally agreed to take $200; that there was some discussion as to the capacity of the plaintiff's proposed bridge, a strain-sheet (exhibit 4) furnished by the plaintiff being quite unintelligible to the council; that the plaintiff was told that the council desired a "15-ton capacity" bridge; that he asked what they meant by that, and was

told that they meant a bridge that could be crossed by a 15-ton threshing outfit; that the plaintiff said (as is true) that his bridge would be strong enough for that purpose; that the offer was accepted; and that the plaintiff inserted in his letter (exhibit 8) the words above quoted. The plaintiff says that the words were not all written at the one time; that the words and figures "$200 more" and "$6,600" were first written, as a part of the agreement to supply the extras; that, before he had finished the sentence, he was asked to retire from the room; that when he returned there was some talk about the capacity of the bridge, and that he then wrote "for a 15-ton capacity bridge," these words having no connection with the $200, which has reference solely to the extras. I am not entirely satisfied that his recollection as to this being the way in which the words were added is accurate; but I am satisfied that the $200 was for the extras, and that he was never asked to supply a "class A" bridge—that what the members of the council expressed themselves as wanting was a bridge that could safely be used by a 15-ton threshing outfit. They knew that the traffic in the road was not very heavy; some, at least, of them did not, even at the time of the trial, understand the difference between a bridge of "class A" and one of "class B;" what they thought was that it was desirable that the bridge should be safe for the occasional passage of a 15-ton threshing outfit, and they demanded an assurance from the plaintiff that his bridge would satisfy that requirement. If any of them really thought that they ought to have a bridge of "class A," as described by Mr. Farncomb, they could easily have expressed their thought by quoting his letter. They did not do so; and, if they have got, not what they wanted, but what they asked for, the fault is theirs, not the plaintiff's.

The agreement having been reached, a resolution was passed (exhibit 19) awarding the contract to the plaintiff. This calls for "a 15-ton capacity bridge," at the price of $6,600, "according to plans and specifications of the engineer for said bridge."

After the meeting, the strain-sheet furnished by the plaintiff was by the Reeve submitted to Mr. Farncomb, without any suggestion that his advice as to calling for a "class A" bridge had been acted upon. Mr. Farncomb wrote, on the 13th March (exhibit 13), that the strain-sheet appeared to be quite satisfactory; and his approval was communicated to the plaintiff.

ONT.

S. C.

WITHERSPOON v. TOWNSHIP OF EAST WILLIAMS.

The council had insisted upon the concrete work being done by a local contractor, and the plaintiff had it done accordingly. It has been paid for by the defendants. The plaintiff also ordered the steel from the Sarnia Bridge Company, and it was supplied.

Shortly before the council of 1915 went out of office, the Reeve and the plaintiff prepared a contract, upon a printed form furnished by the plaintiff (exhibit 1). This provides for a bridge to be completed on or before the 15th October, 1915, "in accordance with plans furnished by counsel" (*sic*) "for sixty-six hundred dollars and one hundred dollars for furnishing steel and widening west end of superstructure." (This widening, as also a certain lengthening of the centre span and a shortening of the approaches, had been agreed to by the plaintiff after the council meeting in February. The time for completion had been agreed upon originally, although the resolution and the letter contain nothing about it.) The Reeve took this contract (exhibit 1) to the last meeting of the council. It was explained that the incoming council ought to have before them something to shew what the bargain was, and the Reeve and the Councillor in whose riding the bridge was, signed it, and the clerk, apparently with the assent of the members, affixed the seal. It had been already signed by the plaintiff. No by-law or resolution authorising its execution was passed.

As has been mentioned, the original stipulation was that the bridge should be completed before the end of 1915; but there had been delay, for which, apparently, the plaintiff was not responsible. It was thought unwise to lay the concrete flooring during the winter; and a contract was executed, dated the 28th January, 1916 (exhibit 5), in which it was recited that the parties had agreed in writing that the plaintiff should build and the defendants should accept and pay for the bridge; that it was desirable to open the bridge for light traffic during the winter; that it had been agreed that the use of the bridge by the defendants should not be an acceptance, but that the duty of the plaintiff should be to finish and hand over the bridge by the 31st May, 1916, "completed according to the said agreement in writing," and that the duty of the defendants should be to accept and pay for it if so completed. The document went on to witness an agreement that the plaintiff should furnish temporary planking and the defendants should pay for it; that the plaintiff should have until the 31st May to complete the bridge; that upon its completion it should be

paid for as if it had been completed within the time fixed in the original agreement. This agreement bears the corporate seal of the municipality, but there was no by-law authorising its execution.

The plaintiff completed the bridge; there were disputes as to whether it was in accordance with the specifications. Mr. Farncomb inspected it and reported that certain work had to be done; this work was done, and the bridge is in good condition, and is in use by the defendants. It is well above the standard requirements of a "class B" bridge, and can safely be crossed by a 15-ton threshing outfit. The defendants have paid part of the price, but refuse to pay the balance, $2,500.

If the want of a by-law is not an insuperable difficulty, I think the plaintiff is well entitled to succeed. Whether the contract is to be found in the letter of the 22nd February, 1915 (exhibit 8), and the resolution of the council of the same date (exhibit 19), as the defendants contend, or in the document executed at the last meeting of the council of 1915 (exhibit 1), as the plaintiff argues, or is to be gathered from the evidence, I think the plaintiff has performed his part. The words in the letter of the 22nd February, "a 15-ton capacity bridge," are susceptible of two meanings. They may mean a bridge designed to carry a concentrated live load of 15 tons at 10-foot centres, i.e., a "class A" bridge, or they may mean a bridge which can safely be crossed by a 15-ton threshing outfit. As I have said, I am convinced that it is in the latter sense that the parties used them, and the evidence is clear that the bridge answers the description. It is also built in accordance with the plans and specifications furnished by Mr. Farncomb, and with the strain-sheet approved by him. The plans and specifications prepared by Mr. Farncomb were put forward by the council; so that, whether the words of the contract be "plans and specifications furnished by your engineer," as in the plaintiff's letter, or "plans and specifications of the engineer for said bridge," as in the resolution, or "plans furnished by council," as in the formal document (exhibit 1), the plaintiff has done what he contracted to do.

I have, however, come to the conclusion that I cannot give judgment in favour of the plaintiff. The decision of the Appellate Division in *Mackay* v. *City of Toronto* is noted in (1918) 14 O.W.N.

ONT.

S. C.

WITHERSPOON v. TOWNSHIP OF EAST WILLIAMS.

155, but is not yet fully reported.* The written opinions are, however, available, and I think that they compel me to hold that, even in the case of an executed contract such as this, the other contracting party cannot have judgment against the municipality unless the power of the council to enter into the contract has been exercised by by-law, in accordance with the statute, or there has been an adoption of the contract, evidenced by a by-law. There is, in this case, no difficulty about the seal. It was affixed to the contract executed in December, 1915 (exhibit 1), and, apparently, was so affixed with the assent of the members of the council present at the meeting; and it was affixed to the agreement of the 28th January, 1916, which recognises the existence of the contract; but, as I read the *Mackay* case, that is not enough; what is required is that the powers of the council shall be exercised by by-law; and there is no by-law here. The opinion of Mr. Justice Middleton at the trial was to that effect (39 O.L.R. 34, 46); Mr. Justice Maclaren, in whose opinion Mr. Justice Magee concurred, agreed with the trial Judge "as to the general result of the authorities" (14 O.W.N. at p. 156†); and Mr. Justice Ferguson was clear that sec. 249 of the Consolidated Municipal Act applies, whether the "power" which the council is exercising is an administrative power or a legislative power. He holds that the contrary opinion expressed by Gwynne, J., in his dissenting judgment in *Waterous Engine Works Co.* v. *Town of Palmerston* (1892), 21 Can. S.C.R. 556, does not state the law as established by the authorities.

If the power to contract is one that must be exercised by by-law, the use of the bridge by the defendants does not help the plaintiff. The argument based upon that use seems to be disposed of by Patterson, J., in the *Waterous* case, at p. 579; it is "the same discussion of section 282 (now 249) in a slightly different form." See also Middleton, J., in the *Mackay* case, 39 O.L.R. at p. 46.

The action will be dismissed, but without costs. I understood Mr. McEvoy to say, during the argument, that the members of the council were willing to pay what they thought the bridge was worth to the defendants. Perhaps it is not too much to hope that, notwithstanding the dismissal of the action, they may see their

*See now 43 D.L.R. 263, 43 O.L.R. 17.

†43 D.L.R. at p. 264, 43 O.L.R. at p. 19.

way clear to do so, and that, in view of Mr. Farncomb's written opinion that "the bridge is well above the standard required for a class B bridge" (exhibit 16), and his evidence that the elastic limit of the bridge will not be exceeded by the passing of a 15-ton threshing outfit, they may conclude that the bridge is really worth to the defendants the whole or nearly the whole of the contract-price.

T. G. Meredith, K.C., for appellant.

J. M. McEvoy and *C. St. Clair Leitch*, for defendants, respondents.

CLUTE, J.:—The facts as found by the trial Judge should not, in my opinion, be disturbed, and are quite sufficient to entitle the plaintiff to a verdict, if the want of a by-law is not an insuperable objection. Judgment was delayed by the trial Judge pending the decision of the Appellate Division in *Mackay* v. *City of Toronto*, 43 D.L.R. 263, 43 O.L.R. 17, and, when it was given, he felt compelled to hold "that, even in the case of an executed contract such as this, the other contracting party cannot have judgment against the municipality unless the power of the council to enter into the contract has been exercised by by-law, in accordance with the statute, or there has been an adoption of the contract, evidenced by a by-law."

The whole question therefore is, whether the plaintiff is entitled to succeed, upon the facts as found by the trial Judge, in the absence of a by-law.

The facts in the *Mackay* case differ widely from the case at bar. Maclaren, J.A., points out that the particular ground on which the judgment below was based was, that the defendants had never contracted with the plaintiff under seal or as required by the Municipal Act, and that the case did not fall within the class of cases in which such a formality might be dispensed with. In answer to the argument of counsel that, notwithstanding the lack of a seal, the plaintiff would nevertheless be entitled to recover if the contract had been fully carried out, the learned Judge said that "in the present case it cannot be said that the council had any knowledge that any such contract had been made with the plaintiff as he now claims, and the testimony of the Mayor, of which the trial Judge expresses his 'full and unqualified acceptance,' shews that he had no idea that he was entering into any such contract in his dealings and communications with the plaintiff; and, even if he had, it had not been fully carried out, and could by no means be called an executed contract." Magee, J.A,.

ONT.

S. C.

WITHERSPOON v. TOWNSHIP OF EAST WILLIAMS.

Clute, J.

concurred with Maclaren, J.A. Riddell, J., points out that "there was no executed contract in the sense that the council, knowing the facts, accepted the results of the plaintiff's labours. He had not even furnished what he set out to do—his 'final report' was never delivered. Any acceptance there was, was without a knowledge of the facts—and any so-called ratification was in the same condition." Hodgins, J.A., concurred with Riddell, J. The alleged contract was quite out of the ordinary, and one in which one would think the strictest formality would be required.

The present case is totally different; it is a part of the duty of the municipality to keep the roads in repair and fit for ordinary traffic, including the building and repair of bridges.

It is not disputed in the present case that it was the duty of the municipality to build the bridge in question. It is found that specifications and tenders were procured from an engineer authorised by the council to make them; that the plaintiff tendered in writing in accordance with the plans and specifications furnished by the defendants, and that his tender was accepted by resolution of council, and that the suggestion by the engineer that they should ask for tenders for "a bridge designed to carry a concentrated live load of 15 tons at 10-foot centres," was not received by the council until after the invitations for tenders had gone out; that, before the offer was accepted, there was some discussion as to the capacity of the bridge, and, when the plaintiff was told that the council desired "a 15-ton capacity bridge," he asked what they meant by that, and was informed that they meant a bridge that could be crossed by a 15-ton threshing outfit.

The trial Judge finds, on quite sufficient evidence, that the plaintiff never was asked to supply a "class A" bridge; that what the members of the council expressed themselves as wanting was a bridge that could safely be used by a 15-ton threshing outfit. They got in fact what they asked for. The strain-sheet furnished by the plaintiff was by the Reeve submitted to the defendants' engineer without any suggestion that the advice as to calling for a "class A" bridge had not been acted upon. The engineer advised that the strain-sheet appeared to be quite satisfactory, and his approval was communicated to the plaintiff.

The council insisted on the concrete work being done by a local

contractor, and the plaintiff had it done accordingly, and it was paid for by the defendants.

The contract provided that the bridge should be finished by the 15th October, 1915, "in accordance with the plans furnished by the council, for $6,600 and $100 for furnishing steel and widening west end of superstructure." There had been some delay, for which the plaintiff was not responsible; it was thought unwise to lay the concrete flooring during the winter; and a further contract was executed by the parties, dated the 28th January, 1916, in which it was recited that the parties had agreed in writing that the plaintiff should build and the defendants should accept and pay for the bridge; that it was desirable to open the bridge for light traffic during the winter, but it had been agreed that the use of the bridge by the defendants should not be an acceptance, but that the duty of the plaintiff should be to furnish and hand over the bridge by the 31st May, 1916, "completed according to the said agreement in writing," and that the duty of the defendants should be to accept and pay for it when so completed; that the plaintiff should furnish temporary planking, and that the defendants should pay for it; that the plaintiff should have until the 31st May to complete the bridge; that, upon its completion, it should be paid for as if it had been completed within the time fixed in the original agreement.

This agreement bears the corporate seal of the municipality, but there was no by-law authorising its execution.

The trial Judge finds that "the plaintiff completed the bridge; there were disputes as to whether it was in accordance with the specifications: Mr. Farncomb," the defendants' engineer, "inspected it and reported that certain work had to be done; this work was done, and the bridge is in good condition, and is in use by the defendants. It is well above the standard requirements of a 'class B' bridge, and can safely be crossed by a 15-ton threshing outfit. The defendants have paid part of the price, but refuse to pay the balance, $2,500. If the want of a by-law is not an insuperable difficulty, I think the plaintiff is well entitled to succeed."

Having regard to the findings upon which the judgment was based in each case, I am of opinion that the *Mackay* case differs so materially from the present that it is not an authority decisive of the case at bar.

ONT.

S.C.

WITHERSPOON v. TOWNSHIP OF EAST WILLIAMS.

Clute, J.

Waterous Engine Works Co. v. *Town of Palmerston* (1892), 21 Can. S.C.R. 556, is the leading authority for the necessity of a by-law. That case proceeded upon the ground that, though the contract was under seal, it was never executed, and that the engine was not accepted. Strong, J., said, p. 559: "Mr. Justice Rose, before whom the cause was tried, the Divisional Court of Chancery, and the Court of Appeal, have all successively held that the contract was never executed but was wholly executory. In this conclusion I entirely agree. The much debated question as to the liability of a corporation on an executed contract not entered into with the requisite formalities imposed *either by common law or by statute does not, therefore, arise here.* The question we have to determine is whether the municipal corporation of an incorporated town is liable on a contract for the purchase of a fire engine which has been entered into without the authority of a by-law under seal, and which contract has remained unexecuted."

The decision of a majority of the Court is limited to a case where the contract was not executed, and the fair inference is that, had it been satisfactorily established before the trial Judge that the contract was not executory but executed, the decision of the Supreme Court of Canada would have been the other way. Gwynne, J., as I read his judgment, treated the contract as executed, and it was thus a difference in respect of the question of fact that gave rise to the differences of opinion in that Court, and created a difference of opinion as to when a by-law is necessary.

Accepting the view that the contract in that case was executed and the engine accepted by the corporation, the reasons of Gwynne, J., seem to me to be unanswerable; and, having regard to the difference in the findings of fact, the case is, I think, an authority for the plaintiff in this action.

Reference is made, in the case referred to, to *Pim* v. *Municipal Council of Ontario* (1860), 9 U.C.C.P. 302, at p. 304, and Gwynne, J., points out that in *Perry* v. *Corporation of Ottawa* (1864), 23 U.C.Q.B. 391, Draper, C.J., held that the Court, notwithstanding the passing of the Municipal Act of 1858, which contained the clause now under consideration, was bound by the judgment in the *Pim* case. In that case the Chancellor points out (9 U.C.C.P. at pp. 305, 306) that "the action is brought upon an executed contract. The court-house had been built under the supervision

and to the satisfaction of the defendants' architect before action brought. The justice, therefore, of compelling the defendants to pay for the work, labour, and materials, of which they have had the benefit, is obvious; and if there be a principle upon which they are to be absolved from that just liability, it must be the principle, that being a corporation, their will cannot be expressed except through their common seal; and as they are incapacitated from making their own will known, except through their common seal, so it cannot be implied by courts of justice. . . . Now it will be found, I apprehend, that there never was any such universal rule as that which has been supposed."

The Chancellor (p. 306) quotes, among other cases, the observations of Erle, J., in *Henderson* v. *Australian Steam Navigation Co.* (1855), 25 L.T. (O.S.) 234, at p. 235: "It would be very dangerous to rest the exception upon the ground of frequency or insignificance; nor do I gather from the cases that that has been put forward as the principle. Certainly, as to trading corporations the exception has not been so limited; and I think that the soundest principle on such a matter is to look to the nature and subject-matter of the contract, and if that is found to be within the fair scope of the purposes of incorporation, to hold the contract binding, even though not under seal."

Hagarty, J., in the *Pim* case (9 U.C.C.P. at p. 312) quotes from Lord Denman in *Hall* v. *Mayor of Swansea* (1844), 5 Q.B. 526, 547, 114 E.R. 1348, where he says: "If the corporation have helped themselves to another's money, it would be absurd to say that they must bind themselves under seal to return it." And at p. 313, Hagarty, J., says: "I cannot see that it is the law of the land to consider the distinction between executed and executory contracts as exploded. Nor can I regard the cases in which corporations may be held liable without seal as confined to those of small amount and daily occurrence. . . . . I do not consider a decision of this case in the plaintiff's favour in any way countenancing a right to sue a corporation for damages on an executory contract not under seal, which they have repudiated before the work was done or accepted by them. I am quite willing to maintain the rigor of the law on that point. The distinction appears broad and intelligible between such cases and the present. The evidence in this case removes all difficulty

ONT.

S. C.

WITHERSPOON v. TOWNSHIP OF EAST WILLIAMS.

Clute, J.

on the question of acceptance by the defendants of the plaintiff's work; they were incorporated expressly to build this court-house and gaol; they engaged the plaintiff to build it, and they take it from him and for two years use it as such, and in it they transact all their official business as their official habitation."

These remarks apply, in my opinion, with full force to the present case, with this difference in the plaintiff's favour, that in the present case the contract is under seal, and again affirmed under seal by a further contract extending the time for completion.

Section 460 (1) of the Municipal Act provides that "every highway and every bridge shall be kept in repair by the corporation the council of which has jurisdiction over it . . . and in case of default, the corporation shall be liable for . . . damages."

Section 8 of the Municipal Act provides that "the inhabitants of every . . . township shall be a body corporate for the purposes of this Act."

Section 249 (1) provides that, "except where otherwise provided, the jurisdiction of every council shall be confined to the municipality which it represents and its powers shall be exercised by by-law."

As a general rule, no doubt, contracts entered into by a corporation must be made under seal, otherwise they cannot be enforced: *Mayor etc. of Kidderminster* v. *Hardwick* (1873), L.R. 9 Ex. 13.

It is said the seal of the corporation when affixed is equivalent to the signature by a private person and places the corporation in a similar position: *Dartford Union Guardians* v. *Trickett and Sons* (1888), 59 L.T.R. 754.

The corporation is not bound to set up the absence of a corporate seal: *Bournemouth Commissioners* v. *Watts* (1884), 14 Q.B.D. 87; and may ratify the contract under its seal: *Brooks Jenkins & Co.* v. *Torquay Corporation*, [1902] 1 K.B. 601; *Melliss* v. *Shirley Local Board* (1885), 14 Q.B.D. 911, reversed on other grounds, 16 Q.B.D. 446 (C.A.)

Even where a contract is not formally ratified, a corporation may be bound by acquiescence: *Hoare and Co. Limited* v. *Lewisham Corporation* (1902), 18 Times L.R. 816 (C.A.)

If sec. 249 of the Municipal Act is to be construed as meaning that all powers of the council shall be exercised by by-laws, it would paralyse the action of corporations in their multitudinous duties.

I think the sound view to be applied in a case like this is, that regard should be had to the nature and subject-matter of the contract, and, where the work to be performed by the contract falls within the scope and duty of the corporation, and the contract has been executed, and the corporation has accepted the work, it is liable for payment; and this would be so even if the contract were not under seal.

The appeal should be allowed and judgment entered for the plaintiff for $2,500, with interest and costs here and below.

Mulock, C.J.Ex.

MULOCK, C.J.Ex., agreed with CLUTE, J.

Riddell, J.

RIDDELL, J.:—This is an action begun by writ of summons specially endorsed "to recover from the defendants the sum of $2,500 and interest thereon from the 1st day of June, 1916. The following are the particulars: Balance due under a contract made between the plaintiff and the defendants for the construction and erection by the plaintiff for the defendants of a steel superstructure bridge, concrete substructure and floor, as provided and agreed upon by agreement in writing between the parties. . . $2,500." (A claim for interest is added.)

The affidavit of the present Reeve, filed with the appearance, sets up that, from information received from members of the council "who were in office when the agreement concerning the building of the bridge, part of the price of which bridge is being sued for in this action, was made, I verily believe that the said bridge has not been completed according to the agreement between the municipal corporation and David Witherspoon. . . . The bridge which the municipality agreed to pay for was to be a bridge with a 15-ton capacity, and . . . the bridge which has been constructed by David Witherspoon is not a bridge of 15-ton capacity, nor does it . . . approach nearly to that strength."

This affidavit, by Rule 56 (1), sets out "the facts and circumstances which" the defendants deem "entitle" them "to defend the action:" and the plaintiff elected to treat his special endorsement and this affidavit as the record; no pleadings were delivered, and the action went down for trial on this record.

The issues were and are quite plain: the plaintiff alleges that he had a written agreement with the defendants to build a certain bridge for them; the defendants do not dispute the agreement, but themselves assert it—and allege that the plaintiff has not

ONT.

S. C.

WITHERSPOON v. TOWNSHIP OF EAST WILLIAMS.

Riddell, J.

carried it out, as he was bound to build a "bridge of 15-ton capacity."

The council of the township, desiring to make a better crossing over the Aux Sables River, advertised for tenders; the plaintiff put in a tender, whereupon the council had the following proceedings:—

February 22, 1915: "Tenders opened for construction of McKenzie bridge over Sauble River, on motion of Loomis and Fraser that we award D. Witherspoon the contract of a fifteen-ton capacity bridge, steel superstructure and concrete abutments, of what is known as the McKenzie bridge of East Williams, sixty-six hundred dollars ($6,600), according to plans and specification of the engineer for said bridge. Carried."

The plaintiff ordered his material in March, and got it on the ground by the middle of the summer, having then blue print and specifications with strain-sheet, but no formal contract. The existing council being due to go out of office in January, a formal contract was entered into and executed by the plaintiff, and the Reeve and one Councillor of the municipality, with the seal of the municipality affixed—this the Councillor informs us was executed "to shew the other council coming in what Witherspoon is to get." This, leaving out what is quite immaterial, reads:—

"This contract, made in duplicate, this tenth day of A.D.19 , between David Witherspoon, of the Town of Ailsa Craig, in the County of Middlesex, and Province of Ontario, hereinafter called 'the contractor,' of the first part, and East Williams Township Council, hereinafter called 'the corporation,' of the second part:—

"Witnesseth, that, for and in consideration of the payments hereinafter specified to be well and truly made by the said corporation to the said contractor:—

"The said contractor hereby covenants and agrees to furnish all the fabricated steel and concrete materials and do all the necessary labour in the construction and erection of a 127-in. steel superstructure, concrete substructure, and floor for the said corporation in accordance with the plans furnished by counsel (*sic*) which are incorporated herewith and made a part of this agreement.

"The said work shall be completed on or before the 1st day of

October, 1915, it being understood that the substructure shall be made ready by the said corporation to receive the superstructure, on or before the day of , 19 .

"The said corporation hereby covenants and agrees to pay the said contractor, his executors, administrators, or assigns, for said work, the sum of sixty-six hundred dollars and one hundred dollars for furnishing steel and widening west end of superstructure, to be paid in Ailsa Craig, as follows: upon delivery of materials at the bridge-site 75% of the contract-price and the balance 30 days after completion when said work is erected and ready for traffic."

Delays took place, and the incoming council had an interview with the plaintiff, which resulted in the solicitor for the municipality drawing up another agreement and having it signed by the plaintiff and all the members of the council—also by the clerk—and the seal of the township corporation was affixed. This reads:—

"Memorandum of agreement made this 28th day of January, 1916, between the Municipal Corporation of the Township of East Williams, hereinafter called 'the township,' and David Witherspoon, of the village of Ailsa Craig, in the county of Middlesex, contractor, hereinafter called 'the contractor.'

"Whereas the parties hereto have agreed in writing that the contractor should build and the township should accept and pay for according to the said agreement in writing a certain bridge over the Aux Sable River where the said river crosses the allowance for road in the said township between lots numbers ten and eleven in the sixth concession of the said township.

"And whereas there has been delay in completing the said bridge, and on account of weather conditions it is not possible or proper to finish the said bridge by the laying of the concrete floor thereon during winter weather.

"And whereas it is desirable to open the said bridge for light traffic during the winter.

"And whereas it has been agreed between the parties that the contractor furnish planking for the floor of the said bridge and put the same in place and that the township pay the cost of the planking when the said bridge is finished, and then own the said planking.

"And whereas it has been agreed between the parties that the contractor shall have until the 31st of May to finish the said

ONT.

S. C.

WITHERSPOON v. TOWNSHIP OF EAST WILLIAMS.

Riddell, J.

bridge, and that the fact that the township shall have use of the said bridge for light traffic during the winter shall not in any way prejudice the township or be construed as an acceptance of the said bridge by the township, but that the duty of the contractor shall be to finish and hand over the said bridge by the aforesaid 31st day of May, 1916, completed according to the said agreement in writing, and the duty of the township shall be to accept and pay for the said bridge if finished in the manner provided in the agreement between the parties by the said 31st day of May, 1916.

"Now therefore these presents witness that it is agreed between the parties in consideration of the premises the contractor shall supply the necessary planking for flooring the said bridge for light traffic and lay the same and that the contractor shall complete the said bridge in the manner provided in the agreement between the parties except that the contractor shall have until the 31st of May, 1916, to complete the said bridge, and it is agreed that upon the contractor completing the said bridge on or before the 31st day of May, 1916, in the manner provided in the agreement between the parties, the township will accept and pay for the bridge as in the agreement between the parties provided, as if the same has been completed at the time fixed in the agreement between the parties. And it is agreed that the township, upon the completion of the said bridge, shall pay the contractor the cost of the said planking, and that otherwise this agreement shall not alter, change, or prejudice the rights of either of the parties in anywise whatsoever."

Obviously this agreement recognised the previously executed agreement, made modifications in its terms, but otherwise reaffirmed it, and provided that the use of the bridge for light traffic during the winter of 1915-1916 should not be construed as an acceptance of it.

The bridge was finished in due time, and the ordinary traffic of the road has been continuously passing over it. The only objection taken by the township to paying for the bridge is that, as they allege, it is not of 15-ton capacity—they assert that it is only of 10-ton capacity. Their counsel before us repudiated the proposition that they wished to retain from the plaintiff anything honestly earned, but would not assent to the Court deciding what should be paid. The learned trial Judge found the facts in favour

of the plaintiff: but considered himself bound by authority to dismiss the action for want of a by-law of the council.

I do not think we are called upon to decide as to the necessity for a by-law—it is not pleaded, no amendment has been made, and none asked for even before us. Rule 183 does not compel us to amend *proprio motu*: amendments under that Rule are "to secure the advancement of justice," not to enable a litigant to obtain a dishonest advantage. "The real matter in dispute" (see Rule 183), the real issue here, is—Did the plaintiff fulfil his contract?

In the consideration of this matter, we must remember that all parties contemplated a "15-ton capacity bridge;" to succeed, it is necessary for the plaintiff to prove that his bridge was a "15-ton capacity bridge."

But, in interpreting that expression, we must give it in the same sense as that in which it was used by the parties to the contract. The learned trial Judge, on satisfactory evidence, has found that both parties used it as meaning "a bridge that could be crossed by a 15-ton threshing outfit;" and that the bridge in question is such a bridge.

On this finding of fact, the plaintiff should recover.

I would allow the appeal and direct judgment to be entered for the plaintiff as asked, with costs here and below.

SUTHERLAND, J., agreed with RIDDELL, J.

Sutherland, J.

KELLY, J.:—If the rights of the parties are to be determined on the issues raised in the record, and if the findings of the trial Judge are adopted, then the case presents no difficulty,

Kelly, J.

By the endorsement on the writ of a summons, the plaintiff claimed $2,500, with interest thereon from the 1st June, 1916, "balance due under a contract made between the plaintiff and the defendants for the construction and erection by the plaintiff for the defendants of a steel superstructure bridge, concrete substructure and floor, as approved and agreed upon by agreement in writing between the parties."

An affidavit made by Alexander MacIntosh, who, at the time the action was commenced, was the Reeve of the Township of East Williams, was filed, in which the only defence set up is, "that the bridge has not been completed according to the agreement between the municipal corporation and David Witherspoon, and

ONT.

S. C.

WITHERSPOON v. TOWNSHIP OF EAST WILLIAMS.

Kelly, J.

that the money claimed in this action is not due and owing by the municipality of East Williams to the plaintiff David Witherspoon;" that the bridge which the defendants agreed to pay for was to be a bridge with a 15-ton capacity, and that the bridge constructed by the plaintiff is not of that capacity and does not approach nearly that strength.

The endorsement on the writ of summons and the affidavit constitute the record on which the action went to trial. On the defence thus set up, the controversy turned largely upon the interpretation of the contract as to the character of the bridge contracted for, and the trial Judge found in favour of the plaintiff's contention that what was meant by the contracting parties, when making the contract, was a bridge that could safely be used by a 15-ton threshing outfit, and that the bridge which the plaintiff built was sufficient for that purpose. The findings of the trial Judge are so supported by the evidence that it would be improper to attempt to disturb them.

On the record, judgment should, in my opinion, be in the plaintiff's favour. This was also the opinion of the trial Judge. He stated, however, that at the trial there was raised the additional defence that no by-law had been passed by the council of the municipality authorising the order for or accepting the bridge; and, disposing of the case on the defence so raised, he felt himself bound by the decision of the Appellate Division in *Mackay* v. *City of Toronto* (1918), 14 O.W.N. 155, and now reported in 43 D.L.R. 263, 43 O.L.R. 17, to give judgment in the defendants' favour. While I think that on the record the plaintiff was and is entitled to succeed, I shall deal as well with the other defence on which the case was disposed of.

Section 249 of the Municipal Act (R.S.O. 1914, ch. 192) enacts that, except where otherwise provided, the jurisdiction of every council shall be confined to the municipality which it represents and its powers shall be exercised by by-law; and by sec. 460 it is provided that "every highway and every bridge shall be kept in repair by the corporation the council of which has jurisdiction over it or upon which the duty of repairing it is imposed by this Act."

Mackay v. *City of Toronto* was decided on facts in several respects unlike those which arose in the present case. Here the

municipal council, in pursuance of its duty to keep the highways of the municipality in repair, set about having built the bridge in question, which formed a part of one of the highways; it procured specifications and plans from an engineer, and obtained from the plaintiff a tender the acceptance of which was the subject of a resolution of the council; and later on a written contract, which the Reeve took to a meeting of the council, was signed by him and another member, and to it, the trial Judge says, the clerk, apparently with the assent of the members, affixed the seal; and a further agreement, also under the defendants' corporate seal, by which provision was made for temporary use of the unfinished structure for light traffic during the winter months, expressly referred to and recognised the original contract. In the following spring the bridge was completed, including certain work which the defendants' engineer, after an inspection, required to be done; the bridge was then put into permanent use, and the defendants paid a substantial part of the contract-price.

In *Mackay* v. *City of Toronto*, the trial Judge found that there was no contract, oral or written, between Mr. Mackay and the city corporation; that his employment was by the Mayor; and that no agreement as to remuneration was made. The council was not in any way consulted and had no knowledge of the matter until long after the work was undertaken; there was an entire absence of any action on the part of the council. The contract was not an executed one, in the sense that the council, knowing the facts, accepted the result of Mackay's labours and ratified the agreement made by the Mayor. That was not done.

In these respects the two cases are clearly distinguishable. Leaving out of consideration for the moment the absence of a by-law authorising the contract, the plaintiff's case could not be stronger. But there is another ground of distinction of even greater moment, which would, in itself, distinguish the present from the *Mackay* case, even if in the latter the engagement of Mackay, instead of having been by the Mayor, had been by the council but without the authority of a by-law. This arises from a consideration of those instances where the statute imposes a compulsory duty upon municipal councils as contrasted with those which are not imperative. The work which Mackay performed, or was engaged by the Mayor to perform, was not a matter of

ONT.

S. C.

WITHERSPOON v. TOWNSHIP OF EAST WILLIAMS.

Kelly, J.

obligatory duty of the council; it was a matter within its discretion. On the other hand, under sec. 460, building the bridge as a necessary means of keeping the highway in repair was a statutable duty; it was not discretionary with the council to repair or not. I do not understand that it is questioned that this bridge is upon or forms part of the highway, and that its erection was necessary to keep the highway in repair. I discuss the question on the assumption that this is conceded.

In *Pratt* v. *City of Stratford* (1888), 16 A.R. (Ont.) 5, it was held that a municipal corporation can exercise and perform their statutable powers and duties in repairing highways or bridges or erecting a new bridge instead of an old and unsafe one without passing a by-law therefor. Hagarty, C.J.O., at p. 12, said, in reference to acts done by a municipality under their statutable powers and duties, that they had the right to do these acts without the formality of a by-law, as part of the ordinary duties imposed on them in the maintenance of roads and bridges. A perusal of the reasons for judgment in that case, and a reference to the authorities therein cited, throw much light upon the ground upon which the judgment proceeded, as it clearly indicates the class of undertakings which a municipal council can enter into without the formality of a by-law. That decision is still undisturbed. It was discussed by his Lordship the Chief Justice of Ontario, in *Taylor* v. *Gage* (1913), 16 D.L.R. 686, 30 O.L.R. 75. There the question arose as to what was and what was not a work of repair. The learned Chief Justice, 16 D.L.R. at p. 693, says:—

"I do not think that the decision in the *Pratt* case is binding on this Court to the extent of requiring that we should hold that in all cases, and under all circumstances, an alteration of the grade of the highway by a municipal corporation is a work of repair which may be done without a by-law; but that the decision must be taken to have depended on the particular circumstances of that case; and that the Court was mainly influenced, in coming to the conclusion which it reached, by the fact that the raising of the level of the highway, of which the plaintiff complained, had become necessary owing to the raising of the level of the bridge, and was therefore practically a part of or incidental to that work."

Assuming the work to be one of repair of the highway, neither *Pratt* v. *City of Stratford* nor *Taylor* v. *Gage* is in conflict with

Waterous Engine Works Co. v. *Town of Palmerston* (1892), 19 A.R. (Ont.) 47 and 21 Can. S.C.R. 566, which has been urged as supporting the proposition that a by-law is necessary in such cases as the present one. Indeed, from a perusal of the reasons for judgment in the latter case, it will be seen that there was in mind a distinction between acts of the council which are discretionary and those which are obligatory. That action arose out of an alleged contract for sale by the plaintiffs to the defendants of a fire engine and hose. The alleged contract was signed by the Mayor of the town and by the clerk of the council; the seal of the corporation was attached, but no by-law was passed authorising the purchase. The engine was sent by the plaintiffs to the defendants, but was not accepted, and it was held that the want of a by-law was fatal and that the instrument under the seal of the corporation was invalid; the judgment resting upon two sections of the Municipal Act (R.S.O. 1887, ch. 184) then in force: sec. 282, which enacted that the powers of municipal councils should be exercised by by-law when not otherwise authorised or provided for; and sec. 480, which authorised the council to purchase fire apparatus etc., but said nothing about passing a by-law for the purpose. The Municipal Act of 1914, in respect of these matters, does not differ materially from the two sections referred to in the Municipal Act, R.S.O. 1887.

As has already been observed, sec. 460 of the Act now in force imposes an obligation upon the council to repair—it is not discretionary. There are now, and there were when the *Waterous* case was decided, many sections of the Municipal Act conferring upon municipal councils the power to pass by-laws for the doing of a great variety of things, none of them compulsory. These powers are of a legislative character, which must be exercised by by-law. Certain other powers are administrative, in that the acts done in the exercise of them are merely in discharge of an imperative duty imposed by the statute.

The power possessed by the defendants in the *Waterous* case to purchase the fire apparatus which was the subject of that action was under sec. 480 of the Municipal Act then in force, which enacted that "every municipal council shall have power . . . to purchase or rent for a term of years or otherwise, fire apparatus of any kind, and fire appliances and appurtenances belonging

ONT.
S. C.
WITHERSPOON v. TOWNSHIP OF EAST WILLIAMS.
Kelly, J.

thereto respectively." No imperative duty was there imposed. The Court declared that the contract was executory only, and held that a by-law was necessary to support a valid contract—that a by-law could not be dispensed with.

A perusal of the reasons for judgment of the Court of Appeal makes it evident that that decision was not intended to apply to a case in which the act of the council is not discretionary, but compulsory, under the statute. Burton, J.A. (19 A.R. at p. 51), says:—

"As I endeavoured to point out in *Pratt* v. *City of Stratford*, 16 A.R. (Ont.) 5, a by-law is still necessary in every case (other than those expressly excepted), when it is not obligatory upon the corporation to do the act. In every case where the matter is discretionary with the council, the municipal corporation, in other words the ratepayers, cannot be bound except under a by-law of the council."

Reference is also made to *Shawinigan Hydro-Electric Co.* v. *Shawinigan Water and Power Co.* (1912), 4 D.L.R. 502, 45 Can. S.C.R. 585, and the reasons for judgment in *Foster* v. *Reno* (1910), 22 O.L.R. 413.

I have so far confined the reference to reported decisions to cases under the existing provisions of the Municipal Act, or provisions practically similar to those now in force. There are other decisions as well which indicate the principles to be applied in determining whether or not a by-law is necessary to validate the action of a municipal council.

See *Croft* v. *Town Council of Peterborough* (1856-7), 5 U.C.C.P. 35 and 141. At p. 46, Macaulay, C.J., says:—

"I am not prepared to lay down any general rule touching the line of separation in matters of this kind, between cases in which a by-law may or may not be necessary. In my present impressions, cases of either kind may arise, according to the circumstances. Whatever is cast upon the defendants as executive duties, under the statutes, in relation to the maintenance or repair of the roads, or whatever is fairly included in those terms, they may do without a by-law: when not so, and it is only within their discretion in the exercise of their legislative powers, it would be otherwise."

And at pp. 148, 149, he says:—

ONT.

S. C.

WITHERSPOON v. TOWNSHIP OF EAST WILLIAMS.

Kelly, J.

"If what was done could be regarded as necessary to maintain and keep the road in proper repair, and therefore incumbent upon the defendants, as a duty cast upon them by the statute . . . I have no doubt it could be justified without a by-law."

This case was decided under a different state of the statute law; but the cases to which I have earlier referred, decided since the coming into force of the provision requiring the powers of the municipal council to be exercised by by-law, are authority to support the proposition that, on the facts of the present case, a by-law was unnecessary.

On these two grounds I am of opinion that the appellant is entitled to succeed: (1) on the record on which the action went to trial; and (2) that in the circumstances a by-law of the council was unnecessary. Confining my opinion to these, I do not discuss and I express no opinion upon any other grounds advanced in the argument.

The appeal should be allowed, the judgment appealed from set aside, and judgment be entered for the plaintiff for the amount claimed, with costs throughout. *Appeal allowed.*

CASTLE v. HAYES

SASK.

C. A.

Saskatchewan Court of Appeal, Haultain, Newlands, Lamont and Elwood, JJ June 19, 1919.

ELECTION (§ IV—95)—PENALTIES UNDER DOMINION ELECTION ACT—REMOVING NAME FROM VOTERS' LIST—ADMISSIONS—EVIDENCE.

In an action for the penalty provided by s. 249 of the Dominion Election Act, an admission by the defendant that the plaintiff's name was on the voters' list and that he struck it off is sufficient to prove that the defendant had struck the plaintiff's name off the list, without its being produced. An admission of a party is always evidence against himself, unless privileged.

APPEAL from the trial judgment in an action for the penalty provided by s. 249 of the Dominion Election Act. Reversed. Statement.

A. M. Panton, K.C., for appellant; *B. H. Gordon*, for respondent.

The judgment of the court was delivered by

NEWLANDS, J.A.:—This is an action for the penalty provided by s. 249 of the Dominion Election Act, for which every officer or clerk is liable who is guilty of any wilful misfeasance or any wilful act or omission in violation of that Act. The wilful act complained of was the striking off of the plaintiff's name from the Newlands, J.A.

SASK.
C. A.
CASTLE
v.
HAYES.
Newlands, J.A.

voters' list made up by the defendant as enumerator, whereby plaintiff was deprived of his vote at the last general election for the Parliament of Canada.

The trial judge dismissed the action because the voters' list was not produced, and he held, and properly, that secondary evidence was not admissible of its contents.

He was, however, in my opinion, wrong when he decided that, because the voters' list was not produced, there was no evidence of any wilful act on the part of defendant in violation of the Election Act. The defendant himself admitted that plaintiff's name was on the voters' list and that he had struck it off. As an admission of a party is always evidence against himself (unless privileged), this admission was sufficient to prove that defendant had struck plaintiff's name off the voters' list, without the list being produced.

This being the case, the defendant is liable, if he is an officer, under s. 249, and plaintiff was deprived of a right to vote, to which he was otherwise entitled, without any just cause for striking his name off the voters' list.

The words "officer" or "clerk" used in that section are to be given their ordinary meaning. When the Act refers to a returning officer or deputy returning officer, or election or poll clerk, it always uses those words, therefore, the word "officer" or "clerk," by itself, means more than a returning officer or poll clerk. The ordinary meaning of "officer" would, I think, be an official appointed to do something under the Election Act, and that of "clerk" would be any one to perform clerical work under that Act. Either meaning would fit the defendant. He was appointed an enumerator to make up a list of the voters. He was, therefore, an official under the Act, and his work was largely clerical.

That plaintiff was entitled to vote was also proved, as he is a British subject by birth, and resided in the polling subdivision for some 5 years. Defendant says he struck plaintiff's name off the list because his wife was receiving separation allowance and a contribution from the Patriotic Fund, their son being a member of the Canadian Expeditionary Force. The defendant did not consider this a good ground for striking other names off the voters' list, but did so in plaintiff's case because plaintiff was able to work and did not.

SASK.

C. A.

CASTLE v. HAYES.

Newlands, J.A

In my opinion, this reason was no reason at all. Plaintiff's wife was not receiving charity by getting a separation allowance and a contribution from the Patriotic Fund, and, as defendant did not consider this a good reason for striking other names off, his doing so in plaintiff's case only shews that he must have had some personal reason which applied only to the plaintiff, and his act was, therefore, a wilful one, for which there was no justification.

Finally, was plaintiff aggrieved by this act of defendant?

By s. 62 of the Dominion Election Act, as amended by s. 1 (d) of the War-time Elections Act, plaintiff, his name not being on the voters' list, could vote if he got from the enumerator a certificate shewing that he was entitled to vote, or a certificate that he had applied for a certificate of his right to vote, and that it had been refused. Plaintiff says the defendant refused to give him a certificate that would allow him to swear for his vote, but defendant says he offered him a certificate that he had applied for a certificate of his right to vote, and that it had been refused.

If he had been given such a certificate by defendant, he could have marked a ballot, but his vote would not have been counted unless there was a recount, he was, therefore, practically disfranchised and aggrieved by the wilful act of the defendant, an officer under the Election Act, and is entitled to recover as against him the penalty provided by the Act.

There should be judgment for the plaintiff for $500 and costs.

Appeal allowed.

RORAY v. NIMPKISH LAKE LOGGING Co.

B.C.

C. A.

British Columbia Court of Appeal, Macdonald, C.J.A., Martin, Galliher and McPhillips, JJ.A. April 1, 1919.

CONTRACTS (§ I D—62)—COMPANY—GENERAL MANAGER AUTHORISED TO MAKE SPECIAL EMPLOYMENT CONTRACT—MANAGER EXCEEDING POWERS—LIABILITY OF COMPANY.

Acceptance of an offer to purchase binds a company, though ignorant of the employment, to pay to agents whom its general manager is authorised to employ to procure the very offer accepted, but not in like ignorance to pay commission on a contract of employment which the general manager has neither the actual authority to enter into nor to bind the company by estoppel.

APPEAL by the defendant from the judgment of Macdonald, J. Reversed. Statement.

E. P. Davis, K.C., for appellant; *S. S. Taylor*, K.C., for respondent.

B. C.

C. A.

RORAY v. NIMPKISH LAKE LOGGING CO.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—The defendant company were the owners of certain timber licenses and other assets which they desired to sell. At a shareholders' meeting held in Vancouver on September 6, 1910, a resolution was adopted authorising the board of directors to offer for sale and sell the company's said property for a sum to be not less than $650,000 upon terms agreeable to the directors, and without further reference to the shareholders.

I ought here to mention that art. 100 of the defendant company's articles of association contains this stipulation:—

> The property of the company shall not be sold or disposed of for a less sum than $640,000 cash without the consent of the holders of two-thirds of the shares numbered 1 to 1,000 inclusive.

M. N. Garland was managing director of the defendant company, and he, on December 2, 1914, wrote to the plaintiff Roray, a member of the plaintiff firm, a letter in which he said:—

> It is understood should you succeed in making a sale of the above named property (defendants' said property) for the sum of $685,000 the terms and conditions of sale to be satisfactory to the company, they will pay you the sum of $35,000 as a commission to you, as and when received. Any deviation from the above selling-price or commission allowance must be first agreed upon and in proportion to the above selling-price and commission allowance. This is subject to confirmation or previous sale or withdrawal without notice.

The concluding sentences are not very intelligible, but I do not think they have any substantial bearing on the issues involved in the appeal.

The defendants deny the authority of Garland to write that letter, but I will assume for the purposes of my opinion that he was authorised to write it or that, as between the plaintiffs and the defendant company, his authority to do so cannot be disputed. On that assumption, therefore, had the plaintiffs made the sale thereby authorised, their claim for the commission of $35,000 could not have been successfully resisted.

The sale which was made by the company, and because of which the plaintiffs make their demand in this action, was not for a lump sum. The purchase-price was based on board measurement to be paid for as the timber was taken with an additional sum of $25,000 to be paid when the timber had been logged. It was not actually effected by the plaintiffs, but by Wyatt and Dixon, whom Garland appears also to have authorised to offer the property for sale. The sale was consented to, or rather the

offer of the purchasers, Messrs Wood and English, was accepted with the consent required by said art. 100 and is binding on the company. But the said shareholders had no knowledge whatever of Garland's employment of the plaintiffs. The offer of Wood and English was communicated to them in England by cable through Mr. Pugh, the company's solicitor at Vancouver, by a message in which, after stating the terms of the offer of purchase, Mr. Pugh said:—

> We to pay . . . seven and one-half per cent. commission on each payment.

It was not therein stated to whom the commission was to be paid, nor did the shareholders in England know, but there is no pretence that the plaintiffs were the persons to receive it.

In these circumstances, the plaintiffs brought this action, claiming a commission under the contract evidenced by the letter of December 2, and in the alternative remuneration for their services on a *quantum meruit*. They found their claims on their efforts to effect the sale and their introduction of Mr. English, one of the purchasers, to Mr. Garland and allege that, as a result of this introduction, the sale was made.

The claim based upon the *quantum meruit* may be at once dismissed from consideration. The answers of the jury to the questions submitted to them amount, in my opinion, to a finding on the contract contained in the letter. It is true that, in their answers, there is a vague suggestion of additional authority conferred on the plaintiffs by Garland which the jury inferred from Garland's conduct in connection with plaintiff's endeavours to sell the property, namely Garland's interview with King & Bowden and his introduction of English to Garland, but these two incidents have no importance at all beyond shewing that the contract contained in the letter was then recognized as still subsisting, notwithstanding the lapse of 3 years' time since its date.

Plaintiff's counsel rely on the principle stated by Erle, C.J., in *Green* v. *Bartlett* (1863), 14 C.B. 681, 143 E.R. 613, and by Lord Watson in *Toulmin* v. *Millar* (1887), 12 App. Cas. 746, but, in my opinion, it cannot be held that the price named was a tentative one, such as is referred to by Lord Watson in the last named case. The price stipulated for was that fixed by the shareholders—$650,000, with the commission added, which

B. C.

C. A.

RORAY v. NIMPKISH LAKE LOGGING CO.

Macdonald, C.J.A.

would appear to be Garland's interpretation of the meaning of the resolution of September 10, 1910. Garland had actual authority only to employ plaintiffs to negotiate a sale at a fixed minimum price of $650,000. At best he might bind the company by estoppel to an agreement with plaintiffs to negotiate a sale at the minimum price of $640,000. He had no authority and no power to bind the defendants by an employment to procure a purchaser ready and willing to buy at such other price as defendants might be willing to accept. In other words, he had no authority to enter into a contract of general employment with plaintiffs or anyone else and, therefore, the letter must be construed with reference to these circumstances, and to the further fact that plaintiffs must be charged with knowledge of art. 100 and, therefore, of the limited authority of Garland. In this view of the case, the plaintiff's action must fail unless, as was contended for by their counsel, the acceptance of Wood and English's offer at a price and on terms different from those contained in the letter rendered the company liable to pay. As far as the contract contained in the letter is concerned, no ratification was necessary. A sale in the terms thereby authorised would have bound the company to pay the commission. The argument, therefore, must go this far—that by the acceptance of the Wood and English offer by the company with the consent of the shareholders mentioned in art. 100 a new contract between the company and the plaintiffs was created by which the company bound themselves to pay to the plaintiffs not 7½% commission, because the agreement to pay that commission had no reference to the plaintiffs, but $35,000. The acceptance of the offer to purchase might, and I think would bind the company, though ignorant of the employment, to pay commission to agents whom Garland was authorised to employ to procure the very offer accepted, but not in like ignorance to pay commission on a contract of employment which Garland had neither the actual authority to enter into, nor to bind the company by estoppel. I think the plaintiffs were bound to see to it that recognition by the company of their employment in the transaction was obtained, and this cannot be implied in the absence of knowledge on defendants' part of the plaintiffs connection with the offer.

There were other questions raised in the appeal, such as that the plaintiffs' introduction of English to Garland could not pro-

perly be held by the jury to be the effective cause of the sale. That is a question of some difficulty, and, in the result arrived at as above stated, it is unnecessary for me to decide it.

The appeal should, therefore, be allowed and the action dismissed.

MARTIN, J.A. Agreed that the appeal should be allowed.

GALLIHER, J.A.:—I think it is clear from reading the answers of the jury that their finding is based on the contract contained in the letter of December 2, 1914, confirmed as they state by acts of the managing director of the company, Mr. Garland.

None of the confirmations they allude to, in any way alter the nature of that contract, nor do their answers in any way indicate that they took into consideration the alleged verbal agreement to pay $50,000, or that they were awarding any sum outside the contract, notwithstanding that question was distinctly put to them.

If this be so, then the verdict must stand or fall as a judgment founded on the contract itself, in which case the question of *quantum meruit* does not arise. There cannot be both contract and *quantum meruit*.

The contract is complete in itself and provides for any necessary changes.

It is a contract for a sale at a specific sum for a specified commission with the proviso that any deviation from the selling price or the commission allowance must first be agreed upon.

The Chief Justice has gone very fully into the question of contract and I agree with his view.

This contract is, I think, one of special employment and comes within *Bridgman* v. *Hepburn* (1908), 13 B.C. R. 389, affirmed 42 Can. S.C.R. 228, and the case of *Holmes* v. *Lee Ho*, decided by this court (1911), 16 B.C.R. 66, and not within *Toulmin* v. *Millar*, 12 App. Cas. 746, and *Burchell* v. *Gowrie and Block House Collieries, Ltd.*, [1910] A.C. 614, followed by this court in *Prentice* v. *Merrick* (1917), 30 D.L.R. 388, 24 B.C.R. 432.

The contract calls for a sale at $685,000 with a commission of $35,000 leaving net to the company $650,000.

This amount would be in accordance with the sum fixed by the resolution of the directors of September 10, 1910, and is evidently what Garland had in mind when he gave the letter of December 2, 1914, to the plaintiffs, and would not require the assent of the

B. C.

C. A.

RORAY v. NIMPKISH LAKE LOGGING CO.

Galliher, J.A.

shareholders mentioned in art. 100 of the articles of association. Art. 100 is as follows:—

> The property of the company shall not be sold or disposed of for a lesser sum than $640,000 cash without the consent of the holders of two-thirds of the shares numbered 1 to 100,000 inclusive.

Keeping this in mind and turning to the contract, the plaintiffs must be taken to have known of this provision in the articles of association. With this knowledge, it is clear that the plaintiff must be taken to have known that Garland had no authority to bind the company by any contract for a less sum than $640,000, unless it was ratified by these shareholders.

I do not think, therefore, that the words of Lord Watson in *Toulmin* v. *Millar*, *supra*, apply where he is reported as saying: "The mention of a specific sum . . . is given merely as the basis of future negotiations . . ."

When we look at all the circumstances of this case, the contract is, I think, one of special employment.

If so, the sale which eventually took place cannot be said to be a sale within the contract.

In view of art. 100, Garland has no authority to enter into a contract of general employment, and if this were to be construed as such, then it is a contract beyond his authority, and assuming that the company would be bound by notice of the authorised acts of Garland, they could not be held to have notice of unauthorised acts which the plaintiffs themselves must be taken to have known were unauthorised, and notice would be necessary for ratification because you cannot ratify what you have no notice of either express or implied.

The evidence is clear they had no such express notice and under the circumstances no notice can be implied.

It is said this sale may be one which would eventually realize $685,000 or more for the company, but I do not think that is the point, and in any event it is subject to contingencies one of which, destruction by fire, would absolutely prevent it.

I am, therefore, in agreement with the conclusions reached by the Chief Justice upon this point.

Should this view be wrong, I think there should be a new trial on the ground that the finding of the jury as to who was the efficient cause of the sale is against the weight of evidence.

I have carefully read and weighed the evidence *pro* and *con* and without entering into a full discussion of it I will shortly state the reasons for my conclusions.

The plaintiffs on the one hand and Wyatt and Dickson on the other are given authority to sell the property.

The eventual purchasers of the property are a Mr. English and a Mr. Wood, interested equally.

Both parties have had dealings with English, but Wyatt and Dickson only with Wood.

Wyatt brought Wood and English together when it was agreed if they got a certain other property which Wyatt had then put to them, known as the Drummond limits and which were in proximity to the Nimpkish, they would take up the consideration of the latter as a logging proposition. Wood says he would not have gone into this without English and English says the same with regard to Wood and both say they would not have considered Nimpkish unless the Drummond deal went through.

Plaintiffs had nothing to do with the Drummond deal.

Wood, a half owner, was not induced to go into the deal by the plaintiffs, in fact, never knew them in it at all.

English swears he was not induced to go in by the plaintiffs. The jury can, of course, disbelieve that statement if they choose.

It is admitted that English was first introduced to Garland, the company's representative, on August 30, 1917, by the plaintiffs.

We have then spread before the jury on the one hand the evidence of the plaintiffs, their contract, their introduction of English and the work they did all uncontradicted. On the other hand, the evidence on behalf of Wyatt and Dickson, their contract and the work they did, also uncontradicted.

This up to the 30th day of August, 1917.

Up to this time no intimation had been given to the plaintiffs by English that he would take the property, no discussion of a deal on a stumpage basis, no tentative proposition discussed, merely going over plans and Rankin's cruise and a jotting down from that cruise, by English, of certain figures as to the timber.

I may say here that the letter of July 26, 1917, from Garland to Wyatt and Dickson giving them authority to deal with the property is attacked by Mr. Taylor as not genuine at least as to date, but unsuccessfully.

B. C.

C. A.

RORAY v. NIMPKISH LAKE LOGGING CO.

Galliher, J.A.

The position then on August 30, 1917, is that we have the two agents for the company dealing with the same prospective purchaser, English, and Wyatt and Dickson only with the other prospective purchaser, Wood.

The plaintiffs claim, and the jury are entitled to so hold, that the property was first brought to the notice of English by them and it is admitted that English was introduced by them to the vendors.

That might well be and still nothing result therefrom and it is only an element from which the jury can draw inferences in determining who was the *causa causans* of the sale going through.

In fact it is not a question here of contradictory evidence, but of drawing inferences from uncontradicted facts.

I have explained the position as it was on August 30, 1917. After that date, and after the Drummond deal had been closed through Wyatt and Dickson, English chose, as he had a perfect right to do, to carry on his negotiations regarding the Nimpkish through, or in conjunction with, Wyatt and Dickson rather than the plaintiffs; any propositions that he ever made were in conjunction with Wyatt and Dickson and the deal was finally closed without any intervention by the plaintiffs.

It is quite true if an agent procures and introduces a purchaser and a deal afterwards goes through by reason of that introduction the agent is entitled to his commission even if he does nothing afterwards.

The point here for the jury to decide was, did that introduction of English (I eliminate Wood for this purpose) become an effective cause of the sale or create the relation of vendor and purchaser, as it is otherwise put?

Apart from that I don't think the plaintiff's case could stand for a moment.

The weight of evidence is as I view it strongly against the introduction having any effect at all or in any way strengthening the plaintiff's case in conjunction with acts outside the introduction and the jury could not reasonably so find.

McPhillips, J.A.

McPHILLIPS, J.A. (dissenting in part):—This appeal has been very fully and ably argued and the evidence is somewhat voluminous—but the issue after all is a single one and does not partake of complexity of law or fact. The action was one for a commission

upon the sale of certain timber holdings of the appellants situate in the vicinity of Nimpkish Lake, Vancouver Island, B.C., and a sale was effected thereof, which to the satisfaction of both the judge and jury was the result of the services of the appellants acting as agents for sale duly authorised by Garland, the managing director of the appellants.

The case would appear to have been very fully presented to the jury, and the words of Lord Loreburn, L.C., in *Kleinwort Sons & Co.* v. *Dunlop Rubber Co.* (1907), 23 T.L.R. 696, at p. 697, are particularly applicable:—

> To my mind nothing could be more disastrous to the course of justice than a practice of lightly overthrowing the finding of a jury on a question of fact. There must be some plain error of law, which the court believes has affected the verdict, or some plain miscarriage, before it can be disturbed. I see nothing of the kind here. On the contrary, it seems to me that the jury thoroughly understood the points put to them and came to a sensible conclusion.

That there is sufficient evidence to support the jury's findings is clear to demonstration. The judge, however, has erred in law in this respect. The jury unquestionably in its judgment went upon the contract sued upon, *i.e.*, the letter of December 2, 1914, and the judgment is in error in being entered for $35,000, calling for the immediate payment thereof. That was not what the jury found. The jury found for the contract as contained in the letter and the respondents were only entitled to payment in the terms of the contract—that is—a declaratory judgment, the relief being limited to payment in accordance with the receipt of the purchase price, the words of the contract being: "as and when received." The letter referred to is in the words and figures following:—

Clifford S. Roray, Jr. Vancouver, B.C., Dec. 2nd, 1914.
Vancouver, B.C.

Dear Sir:—Re our conversation this morning on the Nimpkish Lake Logging Co. Ltd. property.

It is understood should you succeed in making a sale of the above named property for the sum of $685,000 (six hundred and eighty-five thousand dollars) the terms and conditions of sale to be satisfactory to the company, they will pay you the sum of $35,000 as a commission to you as and when received.

Any deviation from the above named selling price, or commission allowance, must be first agreed upon, and in proportion to the above named selling price, and commission allowance.

This is subject to confirmation, or previous sale, or withdrawal without notice.

M. N. GARLAND.

B. C.

C. A.

RORAY v. NIMPKISH LAKE LOGGING CO.

McPhillips, J.A.

The questions put to the jury and the answers thereto follow:—

Q. Did plaintiffs, acting as agents for defendant company, create the relationship of vendor and purchaser between such company and Wood and English? A. Yes.

Q. Did defendant company, with knowledge of the actions of plaintiff, as agents, adopt and take the benefit of their services? A. Yes, through the managing director.

Q. Did defendant company, in good faith, accept Wyatt and Dickson as the agents who alone had effected the sale to Wood and English? A. In our opinion the company through the managing director did not act in good faith.

Q. Did plaintiffs have authority, as agents of defendant company, to sell property in question? A. Yes.

Q. (a) If answer to question four (4) be in affirmative, then state whether there was any authority from company in addition to letter of December 2, 1914. A. In our opinion the authority was continued by various actions of the company's managing director. (b) If so, then state in general terms the nature of such additional authority. A. Interview of August 30 in plaintiff's office, acquiescence in the King deal and visit to Howden in connection therewith.

Q. (a) Did the company confirm the authority contained in letter of December, 1914? A. Yes, by the actions of the managing director. (b) If so, then state how and when such confirmation took place? A. By not withdrawing authority and by reasons expressed in clause (b) of question 5.

Q. (a) Did defendant Garland represent to the plaintiffs that he had full authority to employ them as agents in the sale of the property? A. Yes. (b) If so, did plaintiffs believe and act upon such representations? A. Yes.

Q. Damages against defendant company? A. $35,000.

Q. Or alternatively against defendant Garland? A. For the same amount.

The jury was composed of business men and undoubtedly were men of experience and good judgment, and it is evident thoroughly comprehended the points submitted for their consideration. The trial judge has this to say at the close of the trial when discharging them from further duties as jurors:—

The Court: Gentlemen, all I can say is to thank you for your attention, and I shall instruct the sheriff that these men be not called for 3 years on a jury. These are business men and it would be unfair to do so.

It is impossible to construe the findings of the jury in any other way than that what they found was liability upon the contract, and the respondents must abide by the terms thereof. That the appellants have admitted liability to other agents cannot avail as a defence as against the respondents. What the jury have found is reasonable upon all the evidence. I would refer to what Sir Arthur Channell said when delivering the judgment

of their Lordships of the Privy Council in *Toronto Power Co.* v. *Paskwan*, 22 D.L.R. 340 at 344, [1915] A.C. 734:—

> that they (the jury) have come to a conclusion which on the evidence is not unreasonable.

In two recent cases before the Privy Council, Lord Buckmaster made reference to conclusions of fact. In *Ruddy* v. *Toronto Eastern R. Co.*, (1917), 33 D.L.R. 193, 21 Can. Ry. Cas. 377, 38 O.L.R. 556, Lord Buckmaster said:—

> But upon questions of fact an appeal court will not interfere with the decision of the judge who has seen the witnesses and has been able, with the impression thus formed fresh in his mind, to decide between their contending evidence, unless there is some good and special reason to throw doubt upon the soundness of his conclusions,

and in *Foley Bros.* v. *McIlwee* (1918), 44 D.L.R. 5, at p. 8, said:—

> It is unnecessary to repeat the warnings frequently given by judges, both here and in Canada, against displacing conclusions of disputed fact determined by a tribunal before whom the witnesses have been heard and by whom their testimony has been weighed and judged, and did the question depend solely on the decision between rival evidence the case would be free from difficulty.

The learned counsel for the appellants—Mr. Davis—in his very able argument advanced three propositions: (a) That the verdict of the jury was not warranted by the agreement (I accede to this argument to the extent that the judgment must be varied, *i.e.*, the commission is only payable as the purchase price of the property is paid for—in the words of the contract—"as and when received"). (b) That there was no authority in Garland to enter into the contract, and no subsequent ratification thereof. (c) That there is no reasonable evidence that the respondents were the efficient cause of the sale. I do not consider it necessary to, in detail, refer to or canvass the evidence as to the authority in Garland but it is clear to me that what Garland did was well within the scope of his authority as managing director and that the contract as contained in the letter of December 2, 1914, must be held to be a contract binding upon the appellants and the respondent's services were referable to and consequent upon the giving of that authority, and that the appellants accepted the services of the respondents and profited by these services, the respondents being the effective cause of the sale made. There was no necessity in law for an express ratification of the commission

B. C.
C. A.
RORAY
v.
NIMPKISH LAKE LOGGING CO.
McPhillips, J.A.

contract. *Royal Bank* v. *Turquand* (1856), 6 E. & B. 327, 119 E.R. 886. It is unreasonable to hold otherwise, when all the facts and circumstances attendant upon the transaction are fully considered. It is wholly unreasonable to conclude that the managing director in British Columbia would not have the authority he exercised, and it was admitted at this Bar that the extent of Garland's authority might be assumed to be as extensive as any authority that his co-directors could give him, but it was contended, nevertheless, that that authority did not extend the length of authority entitling him to enter into the challenged contract.

The counsel for the appellants relied greatly upon art. 100 of the articles of association of the defendant company (appellants) which reads as follows:—

> 100. The property of the company shall not be sold or disposed of for a lesser sum than $640,000 cash without the consent of the holders of two-thirds of the shares numbered 1 to 100,000 inclusive.

No doubt the respondents would be in law affected with notice of this article, but I fail to see, with deference, what effect this has upon the commission contract. Further, there is nothing to establish that the sale will not work out and realize $640,000. In any case, the sale has been duly approved—the commission contract is a usual and customary incident of all such sales and I cannot see why the company should not be required to carry it out, it certainly was a contract made within the scope and authority of the managing director.

It was attempted to distinguish the case of *Canada Central R. Co.* v. *Murray* (1883), 8 Can. S.C.R. 313, but in my opinion that case is very much in point in the present case, and it may be said to be an analogous case, that is with many items of evidence in common. Here the appellants, as in that case, have taken the benefit of the services of the respondents. I would, in particular, refer to the judgment of Gwynne, J., from p. 324 to p. 334—unquestionably in the present case Garland, the managing director, would appear to have been in effect the defendant company—in the words of Gwynne, J., at p. 325: "in fact, himself the company."

Now one matter calls for consideration and that is that the case went to the jury in alternative form—that is, there was a claim for $50,000 as commission upon the sale, independent of the

express contract also relied upon for $35,000, and a claim upon the *quantum meruit* for $50,000. This was all presented to the jury—but it is abundantly clear that what the jury found was upon the express contract in writing, namely, the letter of December 2, 1914. It was strenuously contended at the Bar by counsel for the respondents that the verdict of $35,000 was a *quantum meruit* verdict. With this submission I cannot agree. The whole of the evidence, the charge of the judge to the jury, the questions put to them, and the answers thereto, portray in the clearest way that what the jury found was that the appellants were liable upon the contract of December 2, 1914, and it is impossible for the respondents to now contend otherwise. It is idle to contend that the jury in assessing the damages at $35,000 by mere accident arrived at the same figures as those contained in the letter of December 2, 1914. The verdict of the jury is plainly referable to the contract which they find, and as evidenced in the letter. There can be no question that the jury have answered the questions. Those questions and answers are what are to be looked at and to govern, when it comes to the entering of the verdict and judgment thereon. The present case is not one similar to *Bank of Toronto* v. *Harrell* (1917), 39 D.L.R. 262, 55 Can. S.C.R. 512, there was a general verdict as well. When that case was before this court, I said in my judgment, 31 D.L.R. 440, at 451, 23 B.C.R. 202, at p. 220:—

> . . . there is variance between the general verdict and the answers of the jury to the questions submitted. This is not a case of a general verdict without explanation (*Newberry* v. *Bristol Tramway Co.* (1912), 29 T.L.R. 177 at p. 179).
>
> Being of the opinion that the verdict is ineffective and cannot be looked at, and as the case is one that entitled the appellant to have the issues decided by a jury, there can be but one result of this appeal, and that is that a new trial be had.

Upon the appeal to the Supreme Court of Canada, Davies, J. (now Chief Justice of Canada), said, at pp. 265-266:—

> In this case, however, and apparently with consent of both parties and certainly without any objections, questions were put to the jury by the trial judge and they were told they were not obliged to answer them unless they chose. They, however, did answer most of them and added a general verdict for the defendant. Under these circumstances I think the general verdict being inconsistent and irreconcilable with the jury's specific answers to the questions put, must be ignored and the verdict entered . . . on these specific answers for the plaintiffs.

B. C.

C. A.

RORAY v. NIMPKISH LAKE LOGGING CO.

McPhillips, J.A.

And Anglin, J., at p. 281, said:—

I am also of the opinion that, inasmuch as the jury saw fit to answer the questions put to it, thus informing the court of the findings of fact upon which it based the conclusion expressed in its general verdict, those specific findings cannot be ignored. If they are inconsistent with the general verdict, the latter cannot be sustained.

They have expressed what they meant by their verdict and how they arrived at it, and it is on this basis that we have to consider their verdict. We must take it as we find it.

If any judgment is to be entered upon it, it must be that which it warrants when taken as a whole. That I understand to be the effect of the decision in *Newberry* v. *Bristol Tramways Co.*, *supra*, and *Dimmock* v. *N. Staffordshire R. Co.* (1866), 4 F. & F. 1058.

In the result, the Supreme Court of Canada held that the general verdict must be ignored and the verdict, as entered by the trial judge, based on the specific answers of the jury, be restored. In the present case, can there be any doubt, upon reading all the questions and the answers, that the jury have found anything else but that there was a contract upon which the appellants were liable, evidenced by the letter of December 2, 1914, and that there was continuation of the employment and confirmation thereof? Therefore, in my view, the jury in what they have said absolutely rebut any contention that the damages, as assessed, were assessed upon the *quantum meruit*, and the trial judge, with great respect, erred in entering the judgment as he did.

The respondents, as already stated, earned the commission under the contract of December 2, 1914, and were the effective cause of the sale which actually took place. That the appellants dealt with other agents and are liable to them cannot affect the rights of the respondents. The respondent's acts brought the purchasers into relation with the appellants. It was admitted at this Bar by counsel for the appellants that the respondents first brought the property sold to the attention of the purchasers. The evidence well supports this, and taking the whole evidence and the surrounding circumstances, the right to the commission, as found by the jury, is well supported and the finding is a reasonable finding. The jury cannot be said to have acted perversely.

And as to the law the present case is well within the *ratio decidendi* of the leading cases—amongst others: *Toulmin* v. *Millar*, 12 App. Cas. 746, and *Burchell* v. *Gowrie*, [1910] A.C. 614.

In *Prentice* v. *Merrick*, 38 D.L.R. 388, this court followed the last two cases referred to, and the Chief Justice of this court, in his judgment at pp. 436, 437, points out the form the judgment should take in that case. There a "bond" evidenced the sale—an agreement, in its nature, an option—*i.e.*, the purchaser could withdraw from the purchase at any time without penalty other than as stated in the agreement. The judgment, therefore, was for the commission on the moneys already paid, and a declaration of right as to any future payments. Here the case is somewhat different. The agreement of sale was entered into on October 15, 1917, and the consideration is a stumpage charge of $1.25 per 1,000 ft. board measure in respect of fir, spruce and cedar and 50c. per 1,000 ft. board measure in respect of hemlock, laurel and white fir—with a further payment of $25,000 for the balance of the scheduled premises payable at the expiration of 8 years, from the date of the completion of the logging of the timbers or the purchase of the timber licenses, whichever may be the sooner. The purchase-price will work out as it has been estimated at from $685,000, if the option be exercised to take the timber licenses at the stated cruise or possibly as much as $800,000 upon the stumpage basis. The terms of sale leave the payment of the consideration to be determined by the course adopted by the purchasers acting within the terms of the agreement, the respondents are unable to complain as to this, they must abide by the commission contract which reads: "They (the appellants) will pay you the sum of $35,000 as a commission to you as and when received." That the jury found upon this contract, as I have already pointed out in my opinion, cannot be gainsaid, and the judgment the respondents are entitled to and only entitled to is a judgment in conformity with the plain terms of the contract, nothing more and nothing less. There is no evidence that, up to the present time, any moneys have been received from the purchasers by the appellants in respect of the purchase-price, it follows that the relief can only be by way of a declaratory judgment. I cannot see that *Howard* v. *George* (1913), 16 D.L.R. 468, 49 Can. S.C.R. 75, is helpful to the respondents—save upon the point of the principle that the respondents have earned the commission, but only of course to be paid in accordance with the terms of the commission contract.

B. C.
C. A.
McPhillips, J.A.

I am, therefore, of the opinion that the appeal should succeed to the extent that there be a declaratory judgment that the respondents are entitled to a commission of $35,000 payable in accordance with the terms of the commission contract of December 2, 1914, and that the judgment be varied accordingly.

Appeal allowed.

ALTA.
S. C.

REX. v. KING
(2 cases)

Alberta Supreme Court, Walsh, J. July 8, 1919.

CRIMINAL LAW (§ II B—45)—TRIAL BEFORE MAGISTRATE —TWO SEPARATE CHARGES—INTERJECTION OF ONE TRIAL INTO THE OTHER.

Where an accused is being tried before the same magistrate on two separate charges, the interjecting of one trial into the other so prejudices the defence as to entitle the accused to have the conviction quashed.

[*Rex* v. *McBerny* (1897), 3 Can. Cr. Cas. 339; *Rex* v. *Bullock* (1903), 60 L.R. 663; *Rex* v. *Iman, Din* (1910), 18 Can. Cr. Cas. 82; *Rex* v. *McManus* (1918), 30 Can. Cr. Cas. 122, referred to.]

Statement.

MOTION by defendant to quash two convictions made against him by the same justices under the Liquor Act. Convictions quashed.

J. J. McDonald, for the motion; *E. F. Ryan,* for the Attorney-General.

REX v. ARTHUR KING.

Walsh, J.

WALSH, J.:—The defendant moves to quash two convictions made against him on the same day by the same justices under the Liquor Act, one of unlawfully having in his possession a quantity of beer for the purpose of sale, and the other of unlawfully having in his possession a quantity of liquor (to distinguish it I suppose from beer) for the purpose of sale. The evidence fully warranted these convictions, but there is one objection which is common to both cases, which I fear compels me to quash them.

The trial of the liquor charge started on the morning of June 9, when the evidence of all the available witnesses for the prosecution was taken and the further hearing was adjourned until the next day. On the afternoon of June 9 all of the evidence on the beer charge was taken and judgment was reserved until the next day. On the 10th the evidence of another witness for the prosecution was taken in the liquor case and the hearing was further enlarged until the 12th of June. Judgment was not

then given in the beer case, but it was also further adjourned to June 17. On June 17 the trial of the liquor charge was concluded and the presiding justice said "we find him guilty." Being asked by counsel on which charge, the justice answered: "we find him guilty on both charges," and sentenced him to 6 months imprisonment for each offence, the sentences to run concurrently. It is objected that upon these facts there was such a mixing of these two trials as to make both convictions bad.

There is authority both ways on this question. In *Rex* v. *McBerny* (1897), 3 Can. Cr. Cas. 339, the Supreme Court of Nova Scotia by the unanimous judgment of 6 judges held that where the defendant was being tried before the same judge on separate charges of theft the interjecting of one trial into another so prejudiced the defence as to entitle the accused to a new trial upon both charges. On the other hand, in *Rex* v. *Bullock* (1903), 6 O.L.R. 663, the Ontario Court of Appeal by the unanimous judgment of its 5 judges held that a similar mixing up of trials of different charges against the same defendant was not fatal to the convictions. In *Rex* v. *Iman Din* (1910), 18 Can. Cr. Cas. 82, the four judges of the British Columbia Court of Appeal divided evenly on the question. In England, *Hamilton* v. *Walker*, [1892] 2 Q.B. 25, is cited as the authority against the validity of such convictions and *Reg.* v. *Fry* (1898), 78 L.T.R. 716, as the authority supporting them, though Wills, J., in the latter case points out that there is no conflict between them. In our own court, the only decision that I know of is that of McCarthy, J., in *Rex* v. *McManus* (1918), 30 Can. Cr. Cas. 122, who held a conviction bad for this reason.

The practice of so mixing up trials is condemned in all the cases as objectionable, and it undoubtedly is. The tendency must certainly be to give the evidence a cumulative effect so that the magistrate is perhaps unconsciously disposed to reach his decision in each case not only by the evidence that he has heard in it, but also by that which he has heard in the other. Wills, J., in *Reg.* v. *Fry*, *supra*, says that if a *primâ facie* case has been made out that such an error has or may have been committed it will in general be upon the justices to shew very clearly that it has not been committed. In that case as well as in *Rex* v.

ALTA.

S. C.

REX v. KING.

Walsh, J.

Bullock and *Rex* v. *Iman Din, supra,* there was a statement from the justices and the judges whose convictions were under review that satisfied the court that the evidence heard by them in one of the cases had not affected their findings as to the guilt or innocence of the accused in the other case, and as I read these judgments it was largely if not entirely because of this that these convictions were sustained. There is nothing of the kind before me here. I have nothing but the bald facts as to the course which these trials took, without explanation from the justices, and with nothing from them to help me to a conclusion as to whether or not they kept the evidence in these two cases separated in their minds when they disposed of them. This distinguishes these cases from *Rex* v. *Bullock, Rex* v. *Iman Din* and *Reg.* v. *Fry, supra,* which are the only authorities I have been able to find in support of these convictions. The justices, therefore, have not shewn to me very clearly or at all that the error referred to in the above quoted language of Wills, J., has not been committed, and I think I should follow what I conceive to be the unanimous judicial opinion that in the absence of some such statement from them their convictions cannot stand.

I quite appreciate the force of what is said in some of the cases that each application of this kind must be dealt with in the light of its own circumstances. There is not very much in the material before me to help me to decide what effect, if any, the combined evidence in these two cases had upon the justices in disposing of each of them. Judging for myself, I should say that the evidence in each case, especially when, as is the case, it was uncontradicted by the defendant, was quite strong enough to justify a conviction without being bolstered up by the evidence in the other. On the other hand the justices may not so have viewed it. It may be that they would not have convicted in either case upon the evidence given in it alone. When I am driven to speculate on such a matter, I think I should, especially in a case where the liberty of the defendant is at stake, follow what I conceive to be the unanimous judicial opinion on the subject, and refuse to uphold the convictions.

This objection was taken in the notice of motion in each case, but unless I misunderstood Mr. McDonald, he only pressed

it in argument in the beer case. It seems to me that if the objection is fatal to the conviction in that case it must be equally so in the other, for the evidence in the beer case must have disposed the justices just as much against the defendant in the liquor case as must that in the liquor case have disposed them against him in the beer case.

There are other formidable objections raised to the validity of each of these convictions, but in view of the opinion which I have reached on this one, I need not consider them. Both convictions will be quashed without costs and with the usual protection to the magistrates.

REX v. WILLIAM NORRIS KING.

WALSH, J.:—A careful reading of the depositions has quite failed to reveal to me any evidence whatever against the accused to justify his conviction. The evidence for the prosecution shews that the purchase of the beer was made by his brother, Arthur King, who paid for it and made all of the arrangements for its shipment, and engaged in all of the efforts that were made to secure its delivery and ultimately its return to Edmonton. The accused took absolutely no part in any of these things, he was not seen or known by anybody in connection with any of them. All that there is against him is the fact that the beer was shipped in his name, not under his instructions, or, so far as appears, with his knowledge and consent, but under the instructions of his brother Arthur. There is not the slightest evidence of any authority from the accused to Arthur to do this, or any business relations subsisting between them such as that of principal and agent, master and servant or partners that would make the accused legally liable to the 3 months' imprisonment at hard labor to which he has been condemned because of what Arthur did. One witness said that Arthur had told him that he had paid $300 to have the accused released from gaol under a conviction for breach of the Opium & Drug Act. Just how such a statement as that made by another could be evidence against the accused I do not know, nor even if it is true do I see how it could be helpful to the prosecution in establishing an authority in Arthur to bind the defendant by the purchase of this beer in his name. And so without considering any of the other appar-

ALTA.
S. C.
REX
v.
KING.
Walsh, J.

ently formidable objections which have been raised to this conviction I quash it and order the release of the accused from the custody in which he has been held under it.

The punishment imposed upon the accused is that warranted only by a conviction for a second offence. Though the information purports to charge this as a second offence, there is absolutely nothing in the record to prove any former conviction. It may be that the defendant was at some earlier time convicted of an offence under the Liquor Act, but if so that fact should have been established and made a matter of record either by the admission of the accused or proof of the former conviction in the manner provided by s. 59. I am strongly tempted to withhold protection from the magistrates, for, upon the face of it, they have sent a man to gaol for three months without the option of a fine, when the limit of their power was to fine him $100 and costs, and in default of payment order his imprisonment for not more than two months. I have no reason, however, to doubt the *bonâ fides* of these magistrates, and so I extend the usual protection to them, but in future they should be more careful in this respect. *Judgment accordingly.*

QUE.
K. B.

REX v. BISSONNETTE

Quebec Court of King's Bench, Appeal Side, Lamothe, C.J., Cross, Carroll Pelletier and Martin, JJ. June 26, 1919.

CRIMINAL LAW (§ II B—40)—ELECTING MODE OF TRIAL—RE-ELECTION—"PROSECUTING OFFICER"—MEANING OF IN QUEBEC—CRIM. CODE, s. 828, 823.

Though, in general, a re-election by a prisoner may be validly exercised at any time before commencement of trial, and even after an indictment has been preferred (sec. 828 (2) Cr. C.), (saving the cases provided for in s. 830, where re-election must be made before the regular term of the jury court and saving the qualification indicated in *The King* v. *Everson* (1912), 4 D.L.R. 356, 20 Can. Cr. Cas. 103), it is now a requisite, in view of 8-9 Edw. VII. c. 9, that "if an indictment has been preferred against the prisoner, the consent of the prosecuting officer shall be necessary to a re-election, and in such case the sheriff shall take no action upon being notified of the prisoner's desire to re-elect unless such consent is given in writing."

In Quebec the expression "prosecuting officer" is to be given wide construction, and before indictment the notice may be given to the person to whom the name most nearly applies, viz.: the clerk of the peace, or even a high constable or counsel or a chief of police, but in prosecutions after indictments have been found, there is always the Crown prosecutor, and he is the prosecuting officer whose consent to re-election is necessary.

[In view of secs. 828 and 823 Cr. C. not mentioning any "prosecuting officer" for the Province of Quebec, as to the speedy trial of indictable offences the decision in this case is considered important.]

The question to be decided is whether the accused Bissonnette is triable in the Crown side of this court or has lawfully withdrawn himself from it and put himself in the jurisdiction of a judge for speedy trial. The judge of sessions has overruled an objection by the prosecutor and has decided to try Bissonnette.

On application of the prosecutor, this court has, in effect, reserved for its decision the question whether the decision of the judge of sessions is right or not.

There has been a preliminary inquiry, a committal for trial, a true bill found by the grand jury, and (in the Crown side of this court) a plea of "not guilty," a day fixed for trial and lastly an entry made on the day so fixed continuing the case for trial to the March term of the King's Bench.

On February 18 (the King's Bench, Crown side, not then being in session), the accused purports to have made a re-election for speedy trial before the judge of sessions and the judge of sessions was proceeding to try him.

It is right to say that the judge of sessions probably decided to try the case upon finding that the accused had not been called up for trial at the March term of the King's Bench, which would have been the short and simple course to have adopted if the accused was still properly triable there.

Capt. Louis Gosselin, K.C., Assistant Judge Advocate General, M.D. 4, Attorney of complainant; *F. J. Bissaillon*, K.C., and *F. J. Curran*, K.C., for Minister of Justice, intervenant.

LAMOTHE, C.J.:—Having heard counsel appearing on behalf of His Majesty upon the appeal herein, and in particular upon the questions reserved for the opinion of this court by its judgment pronounced on March 21, 1919; having also heard counsel for the said Firmin Bissonnette; examined the proceedings and deliberated. Lamothe, C.J.

It is by the court of our Sovereign the King now here considered, in answer to the said questions, that the re-election whereby the said Firmin Bissonnette purports to have elected to have a speedy trial before the judge of the sessions of the peace, in the City of Montreal, upon the charge set forth in the indictment found against him on the 11th day of December, 1918, by the grand jury, is null and void for as much as the consent of the

QUE.
K. B.
REX
v.
BISSONNETTE.
Lamothe, C.J.

prosecuting officer to such re-election was not given, and that, in consequence, the said Firmin Bissonnette still stands indicted and triable in this court on the Crown side thereof, in the district of Montreal, upon the said indictment;

And it is accordingly adjudged and determined that the said appeal of the prosecutor be maintained and that the trial of the said Firmin Bissonnette, upon the said indictment, do proceed in due course of law in this court on the Crown side thereof, in the district of Montreal, and not before the said judge of sessions unless the consent of the prosecuting officer to a re-election for speedy trial be given in writing; and it is further ordered that an entry hereof be made of record in the court of sessions of the peace, at Montreal.

Cross, J.

CROSS, J.:—It is conceded that the "Crown prosecutor" (as the advocate representing the attorney-general in this province in penal causes is commonly called) did not give the consent spoken of and that a notice was not given to the sheriff such as is prescribed, but it is said that the "Crown prosecutor" acts only in term, or in preparation for term, in this province, and also that a practice has become established, by general consent of the Crown prosecutor, according to which the clerk of the Crown and the peace represents him in his absence, and it is added that the clerk acquiesced in the re-election according to the practice.

In this province, prosecution for penal offences are in general left to private initiative or to municipal police in the more populous localities. There are district high constables who take up prosecutions for serious crimes, by special direction of the attorney-general, but there is no official who can with accuracy be described as a "prosecuting officer" great as is the need for such, especially in the large cities. If there were such, the office would be a creation of provincial legislation.

The Dominion parliament, legislating upon criminal procedure but not being in a position to create offices of a provincial character, had to content itself, in the matter here in question, by employment of a descriptive term "prosecuting officer."

It is to be observed that prior to the year 1900 or thereabouts, notice of desire to elect for speedy trial had to be given

to the judge. That is still the rule except when the judge does not reside in the county in which the prisoner is committed, (s. 826).

In cases in which it is the prisoner who has demanded a jury trial on being brought before the judge or "prosecuting officer," the notice of desire to re-elect is to be given to the sheriff (s. 828).

The provision enabling notice to be given to the prosecuting officer was introduced so that a prisoner might not have to lie in gaol because of difficulty in getting before the judge.

Who, then, is meant by the "prosecuting officer" whose written consent is necessary after indictment? Before indictment, I would say, in the state of affairs which prevails in this province, and, having proper regard for the liberty of the subject and the avoidance of undue restraint, that the expression is to be given a wide construction, that an accused prisoner is not to suffer because no prosecuting officer is known by that name and can consequently give the notice to the person to whom that name can most nearly apply, and that the notice addressed "to the prosecuting officer" might be delivered to the clerk of the peace or even a high constable or counsel or a chief of police, regularly retained by municipal authority in the prosecution of offenders, and that any of these could be considered a "prosecuting officer" for the purposes of the notice. But in prosecutions after indictments have been found, I consider that as there is always a "Crown prosecutor" he, and he only, is the "prosecuting officer," whose consent to re-election is necessary.

It is opportune to observe that the expression "prosecuting officer," in respect of accused persons committeed but not yet indicted, cannot have the same meaning as it has in respect of accused persons after indictment. In the former class of cases, the prosecuting officer acts only in the absence of the judge and, in districts such as Quebec and Montreal would never need to act at all, whereas, in the latter case—the case now before us—he acts to the exclusion of and without reference to the judge. The judge, indeed, cannot act unless the officer has given his consent in writing. The functions are different.

QUE.
K. B.
REX
v.
BISSONNETTE.
Cross, J.

I further consider that there cannot be a general delegation to the clerk of power to give such consent.

It follows that the so-called re-election is null, and that Bissonnette is still under indictment in the Crown side of this court and triable there.

I would, therefore, answer the question adversely to the accused. *Judgment accordingly.*

CAN.
S. C.

SHIVES LUMBER Co. v. PRICE BROS. & Co.

Supreme Court of Canada, Sir Louis Davies, C.J., and Idington, Anglin, Brodeur and Mignault, JJ. December 23, 1918.

NEW TRIAL (§ II B—16)—TIMBER LIMIT—INSTRUCTIONS AS TO RUNNING BOUNDARY — APPROVAL — INSUFFICIENCY OF EVIDENCE AS TO APPROVAL OF DEPUTY MINISTER.

In a case involving a question whether the boundary of a timber limit had been run according to the authorised instructions of the administrative authority and if it was approved by the Deputy Minister of Lands and Forests as required by regulation No. 24 of the Quebec Wood and Forests Regulations. The court held that a new trial should be had to determine whether the Deputy Minister had by placing his initials with the letters "app." on a report made by the Chief Superintendent of Surveys, in explanation of modifications made by him in the survey, meant to give his approval to the survey operations as required by regulation 24, or had merely meant to approve of the explanations made by the Superintendent of Surveys.

[See also *Shives Lumber Co.* v. *Price Bros. & Co.* (1918), 44 D.L.R. 390.]

Statement.

APPEAL from the judgment of the Court of King's Bench, appeal side, reversing the judgment of the Superior Court, District of Rimouski, which dismissed the plaintiff's action.

Alex. Taschereau, K.C., and *J. Hall Kelly*, K.C., for the appellant; *Tessier*, K.C., for respondent.

Davies, C.J.

DAVIES, C.J. (dissenting):—This is an appeal from the judgment of the Court of King's Bench which reversed a judgment of the Superior Court and awarded the respondent, Price Brothers & Co., the sum of $1,367.45 as damages for wood cut by the appellants upon the respondent's timber limit.

The dispute between the parties was as to boundary lines of their respective timber limits and that dispute depended largely, if not altogether, upon the result of a survey of these limits made by surveyor Addie, the plans and report of which survey Addie had reported to Mr. Girard, the director and inspector of surveys, who in his turn had formally submitted Addie's report to the Hon. Jules Allard, Minister of Crown Lands, with very full explanations as to certain changes in the instructions for the survey

which had been made by him and the reasons why they had been made.

This latter report had been approved of by the deputy minister of the department of lands and forests on April 7, 1914, and it is conceded that the approval of the deputy minister is equivalent by statute to the approval of the minister himself.

The main contention of the appellant Shives Lumber Co. on the appeal was that the report of Girard, the director and inspector of surveys, was only one relating to the changes he had made in the "instructions" for the survey and did not cover the survey itself which consequently had not been approved of as required by statute before it becomes binding upon interested parties.

I am quite unable to accept this argument.

It is true Girard deals at length in his report with the reasons why he had altered the original instructions, such reasons being that both the parties interested had desired and consented to the changes made, because while one would on the altered instructions gain somewhat on the west the other would receive compensation on the east.

The conclusions of his report, however, contain its pith and substance and read (as I translate) as follows:—

(The italics are mine.)

I will draw your attention also to the fact that said instructions were modified in March, 1912, that the line in question was run according to them, in 1913, giving therefore to the Shives Lumber Co. all the time necessary to oppose said instructions before the work was done on the ground, and that the protest was handed over to Price Bros. and to the Department only on the 15th March last (1914).

To the present report I attach a copy of the local map, shewing in yellow the dividing lines between the timber limits belonging to the Shives Lumber Co. and the Price Bros., *as well as a blue copy of the plans of the work of Surveyor Addie dividing the timber limits belonging to the two companies on River Rimouski as well as on River Kedzwick. I respectfully submit the whole matter.*

In my opinion, this report of Girard with its accompanying map and "plans of the work of Surveyor Addie dividing the timber limits belonging to the two companies" on both rivers contains all the essentials required by the law to enable the minister to approve or otherwise of the report of the survey, and when approved by the deputy minister became binding on the parties.

Many other questions were argued by counsel at bar. I have had the opportunity of reading the reasons for judgment prepared

CAN.

S. C.

SHIVES LUMBER CO. v. PRICE BROS. & CO.

Davies, C.J.

by Mignault, J., on all of these points and his conclusions are quite satisfactory to me and need not be repeated. In a letter of August 14, 1914, sent by the deputy minister of the department to each of the parties and enclosing copies of the report of Mr. Girard, superintendent of surveys, the deputy says expressly: "This report has been approved by this department." Nothing could be plainer or clearer than this as shewing departmental approval.

This appeal should be dismissed with costs.

Idington, J.

IDINGTON, J.:—This is an action by the respondent claiming by virtue only of being licensee of the Crown on behalf of Quebec, of a right to cut timber on the Crown domain, to recover from the appellant, which also is a licensee of the said Crown, the value of certain timber alleged to have been cut by the latter.

The licenses issued by the Crown for such purposes are somewhat indefinite in regard to the exact area supposed to be covered thereby. They transfer no right of property. They are mere licenses to cut. The fruits thereof are not such tangible things that trespass or trover may lie for, against one claiming as of right (whatever might be such right against a third party who was a mere tort feasor), unless and until the area covered thereby has been delimited.

The parties hereto are rival claimants. The Crown owns the land and the timber and, in order, I presume, to keep in its own hands the control of the delimitation of such lands as a license may be applicable to and cover, and avert the possibility of confusion arising from mistakes, or worse, on the part of any of those claiming under such licenses and consequent loss of revenue, as well as for the protection of all concerned, there are, amongst others of a like kind, regulations passed by the Lieutenant-Governor in Council, authorized by statute, of which the important one now in question is as follows:—

24. Crown timber agents, or any other authorized person shall, at the joint written request of holders of adjacent limits, give instructions as to the manner of surveying and running the boundaries of such lands in order that they may be conformable to existing licenses. But, in order to be valid, such instructions must be previously approved by the minister. Surveys shall be made at the expense of the parties requiring the same, and, when completed, the reports, plans and field notes shall be submitted to the minister and, if approved by him, a copy shall be sent to the office which issued such

instructions and be kept in its archives. The boundaries so established at the joint request of the interested parties shall be fixed and permanent and cannot be altered.

There had been instructions by the deputy minister, presumably pursuant to another regulation, issued to a surveyor at the request of respondent, to make a survey which might, if fully executed and the results had been duly adopted by the minister, have been held to have delimited the line between these parties. That work, however, was interrupted upon the appellant complaining to the minister or his department.

I am unable to see how the respondent can found upon that alone any claim.

Indeed, it is not pretended that in law such work as done thereunder can of itself support the respondent's claim.

It is useful as an historical introduction to that which transpired later and then coupling what had been so done with later work founded upon a variation of the prior instructions it is contended the whole proceedings constituted a compliance with the above quoted regulation, and thereby in law finally determined the line between the parties and consequently the right of property in that in question.

It is not seriously disputed, I imagine, that if such a line had been duly established then the appellant must be held on the facts to have cut some timber within the respondent's limit so established.

It is clear that there was a meeting, after the interruption of the survey as directed, of some persons representing in some capacity or other the parties concerned, in presence of the superintendent of surveys.

It is surprising that they should have left the nature of their decision, if any, of a clear definite nature ever reached, to be the subject-matter of dispute, as it is herein, instead of putting in writing what the above quoted regulation requires, namely, "a joint written request of holders of adjacent limits" to a Crown timber agent or other authorized person, which I presume the superintendent of surveys was. Even then the minister must previously have approved of the instruction to execute the purpose of said owners before proceeding therewith.

CAN.

S. C.

SHIVES LUMBER CO. v. PRICE BROS. & CO.

Idington, J.

Instead of such a simple and direct method of procedure as the "joint written request," we are asked to accept instead thereof what may be extracted from an involved, long drawn out correspondence from which assent or conditional assent by each party might be found in the nature of ratification or a willingness to join in such written request. I cannot think that should be accepted as a substitute for the express requirement of the regulation.

Nor can I accept in substitution for the previous approval of the minister, required by the regulation, a later adoption thereof long after the work relied upon had been completed. And much less so when there is the gravest reason to doubt the import of that which is relied upon as approval.

Long after the work now relied upon as establishing the line in question was done pursuant to such loose and unbusinesslike methods as I have adverted to, upon appellant complaining of the original instructions having been improperly changed, there seems to have been a request made by the deputy minister to the superintendent of surveys, to report upon that subject.

I infer from the contents of the report itself that such was the nature of the request the superintendent refers to, for we have not in the record the written request for a report. Why that is so, I am at a loss to understand, but must do the best I can with the material placed before us. I cannot, under these circumstances, draw from the initialled mark of approval by the deputy minister any such sweeping conclusions as we are asked to do from such dubious mark of approval.

That was no more nor less than a proper exoneration of an officer charged with erroneously having interpolated something into the original instructions his predecessor had framed, and which the minister had acted upon.

It was an entire work, founded entirely upon instructions previously given or approved by the minister, that the exigencies of the situation demanded.

What is produced and relied upon as in conformity with the exacting requirements of the regulation falls very far short thereof.

Indeed, no ratification would seem permissible under the regulation in the way of substitution therefor, no matter how desirable.

Ratification was beyond the power of the minister or his deputy.

Nor could the assent of the parties concerned either previous to or after the work was done alter the nature or quality of the proceeding or its results.

The rights of the Crown, the dominant proprietor, could not be thus disposed of.

Until the relation between the Crown and each of its licensees in question herein had been accurately determined or the lines thereof laid down as required by law, there was no property vested in respondent, or even right of property which it could assert.

It is conceivable that two such licensees as those in question might frame a contract between them providing that in certain contingencies in relation to such districts as in question either should pay or indemnify the other for some supposed wrong done to the other's interest under its license and thus found a something out of which an action at law upon that contract might arise even if independent of the regulation in question. But nothing of that sort exists in fact herein nor is any such like claim pleaded or attempted to be proven.

The action is founded upon a supposed wrong done in or upon or in relation to property which had not yet in law or fact become the property of respondent.

I can see no possibility of such a right of action being maintainable at present under existing circumstances. Nothing is existent capable of supporting a claim for damages or enabling the proper assessment thereof. Nor can there be unless and until, if ever, the delimitation of the properties under license has been established either pursuant to the section quoted above or the following s. 25 of the regulations which does not seem to have been invoked herein as foundation for present claim. I assume above it had originally been acted upon but was not pursued in such a way as to lead to any definite results.

I am, therefore, not surprised to find that upon appellant pressing its complaints on the attention of the minister that he finally decided to refer the question to the law officers of the Crown and as a result thereof that he found it necessary to inform these litigants that he had decided that the modification of instructions, not having been officially made, were of no value and pro-

CAN.

S. C.

SHIVES LUMBER CO. v. PRICE BROS. & CO.

Idington, J.

ceedings would have to be taken "to have this error straightened up," to use the phrase announcing the result.

The respondent saw fit to take and prosecute this action instead of abiding thereby.

It thus assumed the heavy burden of proving a compliance with the regulation and attempted it by circuitous methods which I find failed.

The onus of proof resting upon it, the proper and direct method would have been to call the minister or his deputy as a witness.

I infer that by reason of the impossibility of shewing that the surveyor's instructions, as amended, had the previous approval of either the minister or his deputy, which was needed to render same valid, either would have failed to supply the needed proof.

I, therefore, am of opinion, that the appeal should be allowed with costs throughout and the action be dismissed with costs without prejudice to the new survey being had under either regulation—24 or 25—with the approval of the minister or his deputy and to such, if any, rights as the result thereof may disclose the respondent to have.

Since writing the foregoing I find that I am alone in the result just reached, and to render a judgment of the court possible I assent to the result expressed by those desiring a new trial as being nearest of the divergent opinions of my colleagues to what I conceive right.

Anglin, J.

ANGLIN, J.:—I concur with Brodeur, J.

Brodeur, J.

BRODEUR, J.:—This case is a question of the boundary lines of public lands on which the appellant and defendant have licenses to cut timber, which have been granted under arts. 1597 *et seq.* of the revised statutes of Quebec.

The boundary line of these timber concessions cannot be agreed upon between the adjoining owners, or by the intervention of judicial authority, as articles 504 and 505 of the Civil Code prescribe it for the lands of the persons named, but it can only be upon the instructions of the administrative authority and would only be effective and legal after having been approved by the minister or deputy minister of lands and forests (arts. 24 and 25 of the Wood and Forests Regulations, and arts. 1527 and 1597 R.S.Q.).

The whole question in this case is whether the boundary line claimed by the plaintiff defendant has been run according to the authorized instructions of the administrative authority, and if it was approved by the deputy minister.

It is necessary to relate, briefly, the important facts which have given rise to the litigation. I shall first cite, however, the text of art. 24 of the Wood and Forests Regulations, which determine under what conditions the survey should be made, and which is, in effect:—

> Crown timber agents," says art. 24, "or any other authorized person, shall, at the *joint written* request of the holders of adjacent limits, give instructions as to the manner of surveying and delimiting the boundaries of such lands in order that they may be conformable to existing licenses: but *in order to be valid, such instructions must be previously approved by the minister.* Surveys shall be made at the expense of the applicants, and when they are completed the reports, plans and field notes shall be submitted to the minister, and, *if approved by him*, a copy shall be sent to the office which issued such instructions and be kept in its archives. The boundaries so established at the joint request of those interested shall be fixed and permanent, and cannot be altered.

I have underlined, in this quotation, the portions which bear upon the present litigation. The facts of the case are as follows.

In 1909 the Price company applied in writing to the department of lands to have a survey made of several timber limits which it had in the district of Rimouski River and the Kedzwick River. Instructions were prepared by Mr. Gauvin, who was then superintendent of surveys, approved by the deputy minister, Mr. Taché, and transmitted to the surveyor, Addie. This procedure was irregular, for this application for delimitation of boundaries should be made under art. 24 of the regulations, by the two interested parties jointly: It is only in a case where one of the holders (art. 25) refuses to join his neighbour in having the boundary run that the latter may make the application alone. In the present case there is no evidence that the Shives company refused to make a joint application. But this initial defect has certainly been covered by the subsequent proceedings of the Shives company, which, in 1911, requested the Price company to run this boundary in common, and, its request having been accepted, both companies effected the necessary organization in order that the survey of their dividing lines might be carried out according to the instructions which had been approved by the deputy minister; and they

CAN.
S. C.
SHIVES LUMBER CO. v. PRICE BROS. & CO.
Brodeur, J.

had both sent representatives to assist the surveyor, Addie, and to watch his operations. This was in the winter of 1912.

The timber limits of the Shives company are enclosed on the north, east and west by those of the Price company. The surveyor Addie began first on the west of the Shives limit upon the Rimouski River, and, following the instructions he had received from the department, proceeded to lay out the lines in a straight astronomical line. This operation gained about seven miles of land for the Shives company.

When the surveyor came to determine the eastern line of the Shives limit, he naturally followed the same course; but then the Shives company energetically opposed the surveyor continuing his operations, and the latter, accompanied by the parties interested, went to Quebec to see the surveyor-general of the department, who was then Mr. Girard. The latter, after having heard the parties and their suggestions, acknowledged that a survey at a right angle with the rivers would be the most fair; and, in order to give effect to what he deemed the consent of those interested, he altered the instructions to the surveyor. But, through forgetfulness or other reason, he did not have this alteration approved by the minister or deputy minister.

The surveyor, furnished with these new instructions, sent a copy to the Shives company on March 23, 1912, and the latter acknowledged receipt thereof and said:—

> The correct instructions which you now have from the department are in keeping with what was agreed upon.

Some days later, the Shives company asked how much land the Price Bros. Co. would gain in the western line by these new instructions; and the surveyor replied to them, by letter of April 4, 1912, that it would gain about 7 miles.

In the following winter, in 1913, the line was drawn according to the new instructions, and the Price company was found to get back the seven miles of land which it had lost by the survey of the preceding winter. On the other hand, the Shives company was found to gain considerable land on its eastern boundary.

The surveyor deposited with the minister his report, field notes, and plan, and was paid by the two companies the cost of survey, but the Shives company made the payment under protest, saying that the Price company had got more land than it had a

CAN.

S. C.

SHIVES LUMBER CO. v. PRICE BROS. & CO.

Brodeur, J.

right to. It then went to the department in order to object to the surveyor's report and plan being accepted because the latter's instructions had not been first approved by the minister or deputy minister.

The matter there remained for about a year, when the superintendent of surveys, Mr. Girard, on April 14, 1914, made a report to the minister on the complaint made by the Shives company. He admitted in his report that he had possibly been wrong in having changed the instructions without having received the authorization of the department; but, such change having been based upon the agreement of the parties, he did not think that there was any reason now for again altering the instructions without the consent of the Price company. He also states that the descriptions of the timber limits could be interpreted in different ways, and that is why he made the alterations asked for by the parties interested. He annexed to his report a copy of the plan of the survey. This report, around which all the litigation revolves, was approved by the then deputy minister writing thereon the word "app.," followed by his initials "E. M. D." and the figures "8-4-14," which denoted, according to the evidence, "approved-April 8, 1914."

The question is whether this action of the deputy minister constitutes the approval required by art. 24 of the regulations in the matter of the surveyor's plan or whether the approval of the deputy minister merely bore upon the conduct of Mr. Girard and the alteration made by him in the instructions.

I would at first have been brought to believe that this signature of the deputy minister upon the report of Mr. Girard constituted an approval not only of the instructions given to the surveyor, but also of the report and plan of survey made by the latter. But Mr. Girard, in his evidence, tells us that the minister or deputy minister took no action on the surveyor's plan. The following is the text of that part of his evidence:—

Q. Did the minister take any action on the plan and field notes after they were deposited? A. No, sir.

Q. Nor the deputy minister? A. No.

Q. Nor the department? A. No. I may add that I verified the notes and the plan to see if everything was correct, to see if Mr. Addie's portions of the work agreed with each other.

CAN.

S. C.

SHIVES LUMBER CO. v. PRICE BROS. & CO.

Brodeur, J.

Q. What do you mean by those words? A. I got a draughtsman, I reconstructed the plans to see if the plan agreed with that which is produced, in order to see if the plan conformed exactly to the notes furnished. One always does this.

Q. All this was not submitted to the minister or deputy minister for his approval? A. No, sir.

It seems to me that it would have been necessary to have the evidence on this point of the deputy minister in order to know exactly what he meant to approve when he put his initials on this report, as the action of the department, in transmitting a copy of the report, as approved, to the interested parties has been interpreted by the defendant as signifying that the boundary run by Addie was approved by the deputy minister and that certain expressions occurring in the letters of the attorney of the Shives company bring us to believe that, in his opinion, the approval of Girard's report by the deputy minister annuls the pretensions of this company as to the legality of the survey.

It is important to put an end to these difficulties between the two companies. I am not prepared to dismiss the action of the plaintiff if, through forgetfulness or otherwise, the evidence of the deputy minister has not been placed on the record, for, by dismissing the action, the parties would have to proceed again to the marking of the boundaries and incur costs much greater than the value of the timber in litigation. If it should be a question of marking the boundaries between persons named, or judicial authority should mark the boundaries (art. 504 Que. C.C.), we might, I think, dispose of the litigation with the evidence we have before us. But the courts, in the case of timber limits, have nothing to do with the legality of the marking of boundaries. This question is exclusively within the cognizance of the administrative authority.

In the present case, we must first ascertain if the marking of the boundaries was approved by the deputy minister. The document that we have before us is certainly ambiguous. The report of Mr. Girard shews the circumstances under which he changed the surveyor's instructions; and as his report is approved, the result would then be that the instructions which he prepared are equally approved.

It is very true that these instructions would not have then been approved before having been sent to the surveyor. But the

subsequent ratification of these instructions by the administrative authority would be sufficient to validate them. This follows from the decision of the Privy Council in the case of *Alexandre* v. *Brassard*, [1895] A.C. 301, at p. 307, where Lord Macnaghten, in speaking of what should be done before the religious authority for the canonical erection of a parish, said:—

> It is rather in the nature of a rule of procedure, and in their Lordships' opinion it is for the ecclesiastical authorities and for them alone to decide as to the validity of any objection founded on non-compliance with it.

In the present case, it was for the administrative authorities of the department of lands to decide whether the instructions had been regularly issued or not. And as the deputy minister approved of the action of his officer, Mr. Girard, he has, thereby, in my opinion, approved of the instructions which he gave to the surveyor; and when, subsequently, he sent a copy of the report to the Shives company and said that that report had been approved, he only brought to the knowledge of that party the fact that it had been decided that these instructions were valid and accepted as such by the minister.

One might say, perhaps, that the plaintiff could not make proof by testimony of the fact that the deputy minister approved not only of the instructions prepared by Mr. Girard, but also the report and plan of Mr. Addie.

The rule laid down by art. 1234 Que. C.C. is that proof by testimony cannot be admitted to contradict or alter the terms of a writing validly made. The wording of this article is evidently taken from Greenleaf on Evidence, which is moreover cited by the codifiers under this art. 1234 Que. C.C. This art. 1234 Que. C.C., in the English version, reads as follows:—

> Testimony cannot in any case be received to contradict or vary the terms of a valid written instrument.

Greenleaf, at par. 275, cited by the codifiers, states the same rule, using the following words:—

> Parol contemporaneous evidence is inadmissible to contradict or vary the terms of a valid instrument.

The similar article of the Code Napoleon, which is art. 1341, is more restrictive in some expressions, since it says that no proof by testimony is receivable *against* and *in addition to* what is contained in the instruments.

Bonnier, however, in Traite des Preuves, p. 120, no. 143, in commenting upon this article, declares that:—

CAN.

S. C.

SHIVES LUMBER CO. v. PRICE BROS. & CO.

Brodeur, J.

Only for the purpose of completing ambiguous or insufficient statements may proof by testimony be used to prove anything outside of what is contained in the instruments.

Langelier, De la Preuve, nos. 548-585, after having stated that the framers of our article copied the English rule of law rather than that of the French law, and after having laid down in no. 603 the rule that it cannot be proved by witnesses how the parties to a deed themselves understood it, says in no. 604 that if the writing gives a designation of a thing which might apply to several things, it may be proved which thing the author of the writing wished to so designate.

The same principle is laid down in Taylor on Evidence, 10th ed., p. 855, par. 1194, and in Best on Evidence, 10th ed., p. 208, par. 226.

In the present case it might, therefore, be proved by witnesses whether the deputy minister, in approving Mr. Girard's report, meant at the same time to approve of the surveyor's plan which was submitted to him. The courts might then, with this evidence, determine with certainty whether the boundary lines run by the surveyor Addie were approved by the administrative authority and whether the plaintiff's action was well founded.

On the principle that the courts have not jurisdiction to decide upon the legality of a survey of timber limits, but that it is a question whose decision belongs exclusively to the minister or deputy minister of lands: being granted the fact that we have to interpret a latent ambiguity, and that the written evidence does not clearly say whether the deputy minister approved of the boundary marking, I am of opinion, under the circumstances, that the record of the Superior Court should be sent back in order to prove whether the deputy minister, in initialling the Girard report, has or has not approved of the boundaries run, and whether he had or had not the intention of himself giving the approval required by art. 24 of the regulations.

The costs of this court, as well as of the courts below, should follow the event.

Mignault, J.

MIGNAULT, J. (dissenting):—At first sight this case appears quite a complicated one, but when the voluminous record and the lengthy factums are examined, the question to be decided is restricted into a very narrow compass.

The appellant and the respondent hold adjoining timber licenses from the government of the Province of Quebec. The respondent has, towards the west, timber limit River Rimouski No. 1 east, and, towards the east, timber limit Kedzwick No. 2. Between these limits, going in an easterly direction, the appellant holds timber limits River Kedzwick No. 3 and Kedzwick East. Consequently, the parties occupy neighbouring territory both on the east and on the west, and the difficulty between them arose in connection with the running of the boundary line between their respective concessions.

It is to be remarked that in as much as timber licenses confer no right of ownership in the land, the provisions of the Civil Code as to boundaries are without application. The whole matter is governed by the provisions of the Quebec revised statutes concerning public lands, and by regulations made by order-in-council under these provisions (art. 1534 R.S.Q.).

The regulation governing the parties in this case is regulation No. 24 of the Wood and Forests Regulations, and reads as follows:—[See Idington, J.]

It is common ground between the parties that, although the approval of the minister of lands and forests is required by this regulation, the approval of the deputy minister is to the same effect and is binding upon the licensees.

Some time in 1909, the respondent applied to the Crown Lands Department to have boundaries run between their respective limits, and George K. Addie, provincial land surveyor, was charged with the tracing of these boundaries under instructions issued by the department.

This was not the joint written request required by regulation 24, but the correspondence exchanged between the appellant and the respondent in 1911 and 1912 shews that the latter company agreed, and even proposed to the respondent, to join it in having the survey made jointly and to pay one-half of the expense, and in view of this agreement it is somewhat singular that the appellant should now raise the technical objection that a joint request from both parties for the survey should have preceded the instructions given by the department in 1909. I think the appellant should not be heard now to urge this objection in view of the full consent which it gave to the survey being made at the joint expense of the parties and of its participation therein.

CAN.
S. C.
SHIVES LUMBER CO. v. PRICE BROS. & CO.
Mignault, J.

I may, moreover, dispose of the objections of the appellant that, under regulation 24, a joint written request of the parties should have preceded the instructions given to the surveyor, and that these instructions should have been previously approved by the minister, by stating that, in my opinion, all these requirements, and also the approval of the field notes, strenuously insisted on by the counsel of the appellant at the argument, are of the nature of rules of procedure and are not a condition precedent to the validity of all subsequent proceedings. These rules are useful ones for the guidance of the minister and to permit him to give a sanction, by his approval, to the survey made with the concurrence of the holders of contiguous timber limits, but the whole matter is one for the consideration of the minister alone, and if he gives his approval to the survey and tracing of the boundary, this approval, when sufficiently expressed, covers any previous informality of the proceedings.

Support for the position I take is afforded by the decision of the Judicial Committee of the Privy Council in the case of *Alexandre* v. *Brassard*, [1895] A.C. 301. The question there was whether a decree of the Archbishop of Montreal, followed by civil recognition, canonically erecting the parish of St. Blaise, which had been formed by the dismemberment of three old parishes, could be sustained in view of the fact that it was alleged that the requirements of the Quebec revised statutes concerning the erection of parishes and their civil recognition had not been complied with. And it was contended that, although it was not competent for the court to set aside a canonical decree for the erection of a parish for ecclesiastical purposes, the court was at liberty to inquire into the proceedings which gave rise to the decree and that if these proceedings were found not in accordance with the provisions of the law, the decree could not be treated as a decree available for the purposes of founding civil recognition.

Answering this contention, Lord Macnaghten said, at p. 307 of the report:—

> **Their Lordships cannot take this view. It appears to them that the provision in question is not a limitation on the jurisdiction of the ecclesiastical authorities, or a condition precedent to the validity of all subsequent proceedings. It is rather in the nature of a rule of procedure, and in their Lordships' opinion it is for the ecclesiastical authorities and for them alone to decide as to the validity of any objection founded on non-compliance with it.**

I would apply this test to determine the validity of all the proceedings previous to the approval of the minister, and state that, in my opinion, it is for the minister alone to decide as to the validity of any objection with regard to the regularity of the proceedings. If he gives his approval, it precludes any question being raised as to the regularity of the proceedings.

Returning now to the recital of the pertinent facts, I may say that Addie went on the ground in February and March, 1912, and proceeded, in presence of representatives of the parties, to run these boundaries. Without any opposition whatever he ran the boundary between River Rimouski No. 1 East, held by the respondent, and River Kedzwick No. 3, occupied by the appellant. He then prepared to run the boundary between Kedzwick East (the appellant's) and Kedzwick No. 2 (the respondent's), when Dickie, representing the appellant, objected to the manner in which Addie desired to trace the boundary, and, in view of this opposition, Addie suspended operations and with, or followed by, representatives of the parties, he returned to Quebec.

Next in sequence in the recital of the facts comes a meeting, on March 20, 1912, between Addie and representatives of the parties, to wit, Anderson on behalf of the appellant and Sissons on behalf of the respondent, in the office of Plamondon, an employee of the department, at which Girard, superintendent of surveys, assisted. At this meeting, an agreement was arrived at by the parties as to the running of the boundaries between their respective limits on both the west and the east side, and the former instructions to Addie were modified. It is alleged that Girard made some changes in these instructions, but it was stated at the hearing by the learned counsel for the respondent that the changes in the instructions of 1909 were mentioned in Addie's letter to the appellant, dated March 23, 1912, and if so the appellant fully acquiesced therein by its letter to Addie of March 27, 1912.

Mr. Addie returned on the ground in February and March, 1913, and then and there, in presence of the representatives of the parties, and without any opposition from them, he ran new boundary lines between River Rimouski No. 1 East and River Kedzwick No. 3 on the one hand, and between Kedzwick east and Kedzwick No. 2 on the other. On May 14, 1913, he made a full report to the minister, with a plan of his operations and his field notes thereunto

CAN.

S. C.

SHIVES LUMBER CO. v. PRICE BROS. & CO.

Mignault, J.

annexed. He also sent a full report to the appellant on May 27, 1913, with a copy of his report to the minister and duplicates of the plans accompanying the latter report.

The appellant, on June 7, in a letter to Addie, acknowledged receipt of this report, sent to Addie a cheque for $1,085.54, for its share of the expenses of the survey, but stated that it was not at all satisfied with the result, as it could not understand why there should be the great difference between the first and last lines that Addie ran out.

Some months later, October 8, 1913, the Hon. Mr. John Hall Kelly, K.C., legislative councillor, wrote to the department on behalf of the appellant expressing the same dissatisfaction, and asking for a copy of all instructions given for the survey. It does not appear what answer was made to this letter, but nearly 6 months after, March 14, 1914, Mr. Kelly caused to be served on the respondent and on the minister a formal protest against the running of the line. At least one ground of this protest, that the line was run without the consent of the appellant, appears to me contrary to the facts proved in this case. Mr. Kelly followed this protest by a letter to the minister of March 28, 1914, in which he alleges that the first instructions were changed at the request of the respondent, an assertion also controverted by the evidence. Mr. Kelly asked the minister to give the matter his consideration at once, as otherwise "the matter will have to be thrashed out before the courts to have it decided."

It is under these circumstances, and in view of these letters and protests and of the request of Mr. Kelly that the minister should give the matter his consideration at once, that Girard, superintendent of surveys, made his report to the minister of lands and forests on April 7, 1914, in which he refers to Mr. Kelly's letter of the 28th of March, and in which he makes a complete report of all the operations connected with the survey and the running of the line, frankly admitting that he had made some changes in the instructions to the surveyor without the authority of the department. He concludes by saying:—

I attach to this report a copy of the map of the district, shewing in yellow the lines dividing the different timber limits belonging to the Shives Lumber Company and to Price Bros., as also a blue print of the working plans of the surveyor, Mr. Addie, dividing the timber limits belonging to these two companies on the Rimouski River as well as on the Kedzwick.

CAN.

S. C.

SHIVES LUMBER CO. v. PRICE BROS. & CO.

Mignault, J.

At the foot of this report we find the following:—

App.
E.M.D.
8, 4, 14.

This, Mr. Girard states, means:—

Approved E. M. D. (being the initials of the Deputy Minister, Mr. Elzéar Miville Déchênes) and the date, 8th April, 1914.

I fail to see how it can be disputed that this was a decision by the deputy minister on the very point which Mr. Kelly had asked the minister to consider. And although it is argued that this is merely an approval of Mr. Girard's explanation why the former instructions were modified, I am of the opinion that the approval so given extends to the whole report and to the plans and maps submitted with it. I cannot see the object of so initialling the report, if the intention was merely to accept Mr. Girard's explanation, and not to give official approval to the survey.

Mr. Kelly evidently placed this construction on the approval, for, on August 13, 1914, he wrote to the minister, referring to a letter from the department of April 16, enclosing a copy of Mr. Girard's report, and in this letter he says:—"I also note that this report has been approved by the department," and he expresses the regret that he had not been given the opportunity "to answer the said report, before the approval of the department was obtained."

In this letter Mr. Kelly submits that the instructions could not be modified without the written request of his clients and that these instructions should have been previously approved by the minister, and he requests that these two points be submitted to the law officers,

because a suit of considerable importance will be pending between Price Brothers and the Shives Lumber Co. and the department, in the event of the department maintaining the position that it has taken that the line, as run in the last instance, is a legal one.

Finally, we have a letter of August 14, from the deputy minister to the respondent, in which the deputy minister transmits a copy of Mr. Girard's report, adding: "This report has been approved by the department."

I cannot but believe that the intention of the deputy minister, in approving Mr. Girard's report, was to give the approval required by art. 24 of the Wood and Forests Regulations, for if the object

CAN.

S. C.

SHIVES LUMBER CO. v. PRICE BROS. & CO.

Mignault, J.

of the deputy minister was merely to accept, as argued, the personal explanation of Mr. Girard and not to approve the report itself, there would have been no reason for writing a formal approval at the foot of the report itself. And, as already stated, Mr. Kelly's letter of August 13 shews that he placed the same construction on the approval.

It is true that, at Mr. Kelly's request, the department referred the points raised by him to its law officers and subsequently to the attorney-general. It is also true that the deputy attorney-general reported that Mr. Kelly's objections were well taken, and that the department thereupon notified the parties that a new survey and determination of the boundary would be necessary. But I have, with deference, to disagree with the conclusions of the learned deputy attorney-general, and I think the approval of the deputy minister, covering, as it does, the whole of Mr. Girard's report, necessarily carries with it approval of the instructions issued to Mr. Addie. While no doubt it would have been more regular to insert the approval of the deputy minister on the plan itself, and the department should see that this is done now, I cannot take the responsibility of exposing the parties to the expenses of a new survey when I am convinced that there has been substantial compliance with the requirements of regulation 24, and that, if there be any informality, the approval of the minister disposes of any question as to the validity of the proceedings.

This is the only point on which this court is called upon to express any opinion, and it has not to say whether the lines run in 1913 gave to each party the territory to which it was entitled. This is a point as to which the minister, or his deputy, is the sole judge, and as I find that the deputy minister, by approving Mr. Girard's report, has given his approval to the line run by Addie, I can only concur in the exhaustive and very complete opinions of the late lamented Sir Horace Archambeault, C.J., and of Carroll, J., in the court below.

The lumber, the price of which is claimed by the respondent, was cut in territory which the survey of 1913 placed within the limits granted to it. The value of the lumber was admitted, and the appellant was condemned to pay it to the respondent. With this determination of the litigation between the parties I concur.

Some point has been made of the fact that the deputy minister was not called as a witness to state what he intended when he wrote his approval at the foot of Mr. Girard's report. Another question would be upon whom rested the onus of so calling Mr. Déchênes, on the respondent who relied on the approval as extending to the entire report, or on the appellant who sought to restrict this approval to the personal explanations of Mr. Girard? My personal view is that the respondent could rely on the approval as extending, as its unqualified terms shewed, to the whole report, and that if the appellant desired to limit in any way the general effect of this approval, the onus of proving the limitations rested on it. At all events, neither party saw fit to call Mr. Déchênes, and I do not think that the omission is one for which the respondent alone should be considered liable.

In my opinion substantial justice has been done to the parties by the judgment of the Court of King's Bench. A new survey might possibly give the same result and would undoubtedly expose the parties to considerable expense. It seems in every way desirable to bring the litigation to a close, and I would not lightly disturb so well considered a judgment as the one appealed from.

For these reasons, I am of the opinion that the appeal should be dismissed with costs.

Appeal allowed, new trial ordered.

MULVEY v. The BARGE "NEOSHO"

Exchequer Court of Canada, Maclennan, J. June 7, 1919.

MASTER AND SERVANT (§ II A—67)—INJURY TO SEAMAN—"DAMAGE DONE BY ANY SHIP"—ADMIRALTY COURT ACT, 1861, s. 7—INTERPRETATION—JURISDICTION—CONSENT OF PARTIES—ACQUIESCENCE.

The plaintiff, a seaman, brought an action *in rem* for damages against the barge "Neosho" for bodily injuries sustained by him in an accident alleged to have been occasioned by negligence for which the ship was liable.

Held, that the damage done was not "*by*" the barge, but "*on*" the barge, and is not such damage as gives plaintiff a remedy *in rem* within the meaning of sec. 7 of the Admiralty Court Act, 1861. The court was therefore without jurisdiction in the matter.

2. In the absence of jurisdiction existing by law, the filing of an appearance and the giving of bail by defendant do not give jurisdiction to th court in a proceeding *in rem*.

3. Jurisdiction is not a matter of procedure and cannot be derived from the consent of parties.

CAN.

S. C.

MULVEY v. THE "NEOSHA"

Statement.

ACTION in damages brought by a seaman to recover $5,000 against the barge "Neosho" for bodily injuries sustained on May 2, 1919, owing to being tripped up on deck by reason of ropes negligently left thereon.

The case came before the Honourable Mr. Justice Maclennan on a motion to dismiss for want of jurisdiction.

The whole case turns upon the interpretation of the phrase giving jurisdiction to the court, namely, "damages done by any ship."

The case was heard on June 7, 1919, and judgment was rendered on the same day, dismissing the action for want of jurisdiction.

R. S. Weir, K.C., for plaintiff; *W. B. Scott*, K.C., and *Hon. Adrian K. Hugessen*, for defendant.

Maclennan, J.

MACLENNAN, J.:—The plaintiff, a seaman, brings an action *in rem* for $5,000 damages against the barge "Neosho" for bodily injuries sustained by the fracture of his right forearm and bruises to his left knee and face, on May 2, 1919, owing to being tripped up in the middle deck by reason of ropes negligently left on the floor of the deck, which was dark; the barge was arrested and, upon bond given, was released.

The defendant has moved for order that the writ of summons be set aside and plaintiff's action dismissed with costs for want of jurisdiction on the part of this court, on the ground that the plaintiff's claim is not a "claim for damage done by any ship" within the meaning of s. 7 of the Admiralty Court Act, 1861. It is well settled by the jurisprudence that the court has jurisdiction over any claim for damages to property or person done by any ship.

The defendant submitted that the claim sued on, particulars of which are endorsed on the writ, is not damage done by any ship. The barge "Neosho" was in the harbour of Montreal and plaintiff's injuries were sustained on board. The question here is whether the words of s. 7 of the Act of 1861 "damage done by any ship" are applicable to the present case.

In *The "Vera Cruz"* (1884), 9 P.D. 96, at 99, Brett, M.R., said:—

> **The section indeed seems to me to intend by the words "jurisdiction over any claim," to give a jurisdiction over any claim in the nature of an action on the case for damage done by any ship, or, in other words, over a case in which a ship was the active cause, the damage being physically caused by**

the ship. I do not say that damage need be confined to damage to property, it may be damage to person, as if a man were injured by the bowsprit of a ship. But the section does not apply to a case when physical injury is not done by a ship.

In *The "Theta,"* [1894] P. 280, at 284, Bruce, J., said:—

Damage done by a ship is, I think, applicable only to those cases where, in the words of the Master of the Rolls in *The Vera Cruz*, the ship is the "active cause" of the damage. The same idea was expressed by Bowen, L.J., who said the damage done by a ship means damage done by those in charge of a ship, with the ship as "the noxious instrument." In this case, to put it at the highest, those in charge of the ship so placed a tarpaulin over the hatchway as to make a trap into which the plaintiff fell, whilst lawfully crossing the deck of the ship to reach his own vessel. The ship cannot be said to have been the active cause of the damage. The damage was done on board the ship, but was not, I think, within the meaning of the Act, done by the ship. Therefore, I must allow the motion with costs.

In *Currie* v. *McKnight*, [1897] A.C. 97, at 101, Lord Halsbury, L.C., said:—

The phrase that it must be the fault of the ship itself is not a mere figurative expression, but it imports, in my opinion, that the ship against which a maritime lien for damages is claimed is the instrument of mischief, and that in order to establish the liability of the ship itself to the maritime lien claimed some act of navigation of the ship itself should either mediately or immediately be the cause of the damage.

In the *"Duart Castle"* case (1899), 6 Can. Ex. 387, where an engineer, while working on a steamer, was injured by the breaking of a stop-valve and sued for damage, McLeod, J., held that the damage was done by the ship and that the court had jurisdiction, but dismissed the action as the plaintiff did not produce reasonable evidence of negligence causing the accident. The judge clearly held that the court had jurisdiction over the claim, as he came to the conclusion that the damage was done by the ship. In that case the stop-valve of the steam chest broke and plaintiff was scalded by the rush of steam.

In *Barber* v. *The "Nederland"* (1909), 12 Can. Ex. 252, which was an action by plaintiff for damages for personal injuries sustained while working on a ship as a stevedore, such injuries being caused by the faulty construction of hatch coverings and beams supporting the same, Martin, J., allowed a motion made on behalf of the ship setting aside the proceedings for want of jurisdiction.

The nature of the claim forming the basis of plaintiff's action is substantially similar to the claims set up in the cases of *The "Theta," supra*, and *The "Nederland,"* in both of which it was held the court had no jurisdiction.

CAN.

S. C.

MULVEY v. THE "NEOSHA"

Maclennan, J.

The plaintiff objects to the defendant's motion on the ground that it comes too late and that the defendant by having appeared and given bail submitted to the jurisdiction of the court; the *Milwaukee* case (1907), 11 Can. Ex. 179. The defendant appeared under protest and the application to give bail, in order to allow the barge to proceed on its voyage, was made under reserve and without prejudice to defendant's rights. The objections in the *Milwaukee* case were on mere matters of procedure. It was a case arising out of a collision in which the court had inherent jurisdiction, and the objections were purely technical. In the present case the objection, if well founded, is absolute and goes to the jurisdiction of the court; it is not a matter of procedure and cannot be affected by any proceedings already taken by the defendant. The court cannot get jurisdiction by consent of the parties, as jurisdiction must arise from the subject-matter of the claim. Dr. Lushington, in *The "Mary Anne"* (1865), Br. and L. 334, said, p. 335:—

> If at any time the court discover it has no jurisdiction, and the facts shew that the court has no jurisdiction, it cannot proceed further in the cause; the delay of one or both parties cannot confer jurisdiction.

The objection raised by defendant is not a mere technical objection which could be waived by appearance and giving bail, if under the statute there is absolute absence of jurisdiction; *The "Louisa"* (1863), Br. and L. 59; *The "Eleonore"* (1863), Br. and L. 185; *Richet* v. *The "Barbara Boscowitz"* (1894), 3 B.C.R. 445.

The application to dismiss by motion is in accordance with the practice in admiralty matters. I am unable to distinguish this case from *The "Theta"* and *The "Nederland."* The barge here was not the active cause or the noxious instrument of plaintiff's injuries. Damage done not "by" the barge, but "on" the barge is not such damage as gives plaintiff a remedy *in rem* such as he is seeking to exercise in this action. Plaintiff's action therefore fails for want of jurisdiction, and defendant's motion is granted, and the action is dismissed with costs.

Action dismissed.

FINDLAY v. HOWARD.

CAN.
S. C.

Supreme Court of Canada, Davies, C.J., and Idington, Anglin, Brodeur and Mignault, JJ. May 19, 1919.

DAMAGES (§ III P—340)—CONTRACT—BREACH—FUTURE PROFITS—ESTIMATION OF PRESENT LOSS OF.

The measure of damages for loss of future profits arising out of breach of contract must be assessed as being the loss or injury sustained at the date of the breach. But for the purpose of estimating the present loss, probable future events must be considered, and if the bringing of the action be delayed evidence as to actual subsequent consequential damage or subsequent relevant facts in mitigation of damage may be given.

[*Cockburn* v. *Trusts & Guarantee Co.* (1917), 37 D.L.R. 701; *Wood* v. *Grand Valley* (1915), 22 D.L.R. 614, followed.]

Statement.

APPEAL from a judgment of the Court of King's Bench, appeal side (1918), 27 Que. K.B. 375, Province of Quebec, varying a judgment of the Superior Court, sitting in review, at Montreal, 51 Que. S.C. 385, and maintaining the plaintiff's action.

The plaintiff sued to recover damages from the defendant for a breach of a 5 year partnership contract, in a real estate business in Montreal, about 21 months before it would have terminated by effluxion of time. The plaintiff's claim was for $350,000. The trial judge assessed his damages at $80,000; the court of review reduced them to $22,000 and the Court of King's Bench gave judgment for $40,000. The appellant seeks the restoration of the judgment of the court of review; and the respondent, by way of cross-appeal, demands the restoration of the judgment of the trial judge.

An important question of law was in issue: Is the court, in assessing damages for wrongful termination by a partner of a partnership, entitled to consider facts subsequent to the action, or must it ignore them and assess the damages according to conditions existing at the date of the action? The trial judge adopted the second alternative and the court of review the first; the Court of King's Bench did not expressly pass upon the question, although appearing to have proceeded on the principle laid down by the court of review.

E. Lafleur, K.C., *Aimé Geoffrion*, K.C., and *G. H. Montgomery*, K.C., for appellant; *J. L. Perron*, K.C., and *Cook*, K.C., for respondent.

Davies, C.J.

DAVIES, C.J.:—I agree with the principles stated by Lamothe, J. (now Chief Justice), in delivering his reasons for judgment in this case in the court of review, 51 Que. S.C. 385, as to the proper method of estimating and assessing damages in such a case as

CAN.
S. C.
FINDLAY
v.
HOWARD.
Idington, J.

the present. I would myself, however, in applying those principles have increased the amount of the damages somewhat, but I will not dissent on that ground alone and I concur in allowing the appeal with costs and restoring the judgment of the court of review.

IDINGTON, J.:—The appellant had established a real estate business in Montreal. On May 26, 1910, there was incorporated a company to carry on said business under the name of "Findlay & Howard." On August 22, 1910, an agreement was entered into between the parties hereto who were in fact the substantial members of the said incorporation, wherein it was stated

that in reality the said company was formed by the said parties hereto for the sake of enabling them to more conveniently carry on their business, but as between themselves they intend to operate the said company in somewhat the same manner as if they were co-partners carrying on business under the name of "Findlay & Howard" and not merely officers of the company.

This agreement was to have continued in force for 5 years.

They carried on business under said name accordingly until September 11, 1913, when appellant requested a termination of same.

There ensued a correspondence between them which terminated on December 12, 1913, by the forcible ejection of respondent by appellant from the premises wherein the business was carried on.

Immediately thereupon the respondent instituted this action for damages for breach of the said agreement.

Meantime, on October 7, 1913, a company was incorporated under the name of "John Findlay, Limited," to carry on the business of dealing in real estate and under cover of that name appellant took possession gradually of the entire business which the parties hereto had carried on as aforesaid and continued thereafter to exclude the respondent from any interference therewith, save and except such rights as conceded to him by a partial settlement of their difficulties.

All the pretensions of appellant in way of justification for his conduct have been decisively rejected and are not now in question. All that is in question herein is the amount of damages which respondent is entitled to.

The last clause of the respondent's declaration which, I think, for reasons I am about to state, seems to have been overlooked, reads as follows:—

41. The plaintiff expressly reserves his right to recover his share and proportion of the assets of Findlay & Howard, Limited, and further expressly reserves his right to take such other proceedings in the premises as may be necessary or advisable for the protection of his interests.

Inasmuch as the business carried on by the parties hereto was carried on in the name of "Findlay & Howard, Limited," and the fruits thereof passed to it, though the subsidiary agreement, on which in a technical sense their action rests, provided for the term of five years' control, and distribution of profits of said corporate business, we should not have to concern ourselves with anything but such loss of profits as the respondent suffered by his exclusion.

Yet I suspect there has, by a confusion of thought, entered into the estimate thereof much that should not have done so.

All the profits made by the carrying on of the business of "Findlay & Howard, Limited," became part of the assets thereof and should not enter into consideration in determining the problem of how much the respondent's share of its profits has been impaired by the wrongful conduct of the appellant.

It is that problem and nothing else that we have to solve.

The remarkable diversity of judicial opinion which this litigation has developed impresses me with the need of emphasizing this proposition which I have laid down for my guide.

It sometimes happens that when partners disagree and one excludes the other, the community in which they live take sides and thus the business is seriously impaired.

The respondent seems to have possessed so much strong common sense that he did not lend himself to anything necessarily productive of such results. He relied upon this action properly taken, if he could not have obtained an injunction, to preserve his rights and recover his share of whatever loss of profits the business sustained by his exclusion.

The trial judge finds the business though carried on, after the exclusion, under the name of "John Findlay, Limited," was the same business, only the name being changed.

The same staff (substituting one Parker for respondent), the same kind of business and the same prestige, and admittedly the same clientele should, under a continuation of same circumstances, have produced same results in way of profits. But everyone

CAN.
S. C.
FINDLAY v. HOWARD.
Idington, J.

knows the circumstances had changed so remarkably that to estimate the profits on the basis of former years must be illusory.

If the trial had been postponed for nine months and appellant then had been forced to produce his books a nearly absolutely correct assessment of damages could have been arrived at.

The misfortune is that the trial was too early for that and hence necessarily the result had to be determined by evidence which, in any such like case, must be more or less of a speculative character.

Added to this was the view of the law taken by the learned trial judge which has not been shared in by any of the other judges who have had to consider the case. Hence his judgment for $80,000 has been set aside.

The court of review reduced that to $22,000 upon an entirely different view of the law which has been given expression to by Lamothe, J., with whose main point of view I agree.

In the details thereof, I cannot say that I entirely agree.

There was before the court an account of the business of "John Findlay, Limited," for the year from November 4, 1913, to October 30, 1914, which was audited by same accountant as had been employed in former years by the parties hereto.

The net profits were shewn thereby to have been $13,353.86 which, if presumed to have continued for the balance of the 5 years' partnership now in question, would have produced to respondent a great deal less than the court of review awarded him.

That court, however, eliminated certain items of expense from that amount and seems to have assumed that the war conditions pending would have resulted in no profit. I am not quite satisfied with the details by which the award thus reached was fixed at $22,000. I think they are open to some criticism yet the substantial result reached is one I should not if in the place of the court of appeal have disturbed.

The basis taken was a much more satisfactory one than that taken by the court of appeal which took the year ending November 30, 1913. And apart from other considerations it included many questionable items which should not have entered into a basic computation of the probable profits from current earnings in the following period. Indeed, it seems to me far from furnishing a safe basis for computation.

Had its record been sifted in such a way as to eliminate items in respect of which there could be nothing analogous in the later period now in question and the case threshed out at the trial on some such basis, it might have been made useful, but I hardly think would have justified the result reached by the court of appeal.

Again, the court of appeal took into consideration the goodwill of the business and in a way that I can find nothing in law or fact to uphold.

Goodwill is sometimes a valuable asset of an old partnership. That, however, was the asset of the corporate company and hence excluded by the pleading.

If you choose to imagine a valuable asset in a five year term I much doubt its existence.

I quite agree that the possibility of a more satisfactory result in an amicable dissolution might have been reached, but I cannot say that respondent would have reaped much from that factor in this instance even if the partnership had run its full term.

A man might, by misconduct, so wreck a firm as to give rise to such a claim, but here it is something intangible.

The field was just as open for the respondent at the expiration of the term from all that appears as it ever would have been I imagine.

As an outside man, as it were, he never had the same chance of securing a share of the clientele in the end as the inside man who had founded the business as appellant had.

As to the respondent not seeking some other occupation or business this was not a case in which any such rule or principle as relied upon can be properly applied.

If nothing else, his position as outside man had become such that when the stage of decline in business had been reached he would have been, if staying on in that event, almost in the condition of a gentleman of leisure, as his active occupation would have been gone, and he was entitled to reap that reward with other earnings which his energetic efforts in the outside field had helped to make so successful.

I would allow the appeal and restore the judgment of the court of review, but I should hesitate to give costs.

The cross-appeal should be dismissed.

CAN.
S. C.
FINDLAY
v.
HOWARD.
Anglin, J.

ANGLIN, J.:—The plaintiff Howard sues to recover damages from the defendant Findlay for what the latter now admits to have been an unwarranted breach by him of a 5 year partnership contract on November 30, 1913, about 21 months before it would have terminated by effluxion of time. The plaintiff's claim was for $350,000, and he expressly excepted from this action, and reserved, his right to recover, his share and proportion of the assets of the partnership, and to take such other proceedings as might be necessary or advisable for the protection of his interests. The trial judge assessed his damages at $80,000; the court of review, on an appeal by the defendant, at $22,000; and the court of appeal, on appeal by the plaintiff, at $40,000. From the latter assessment the defendant appeals to this court seeking a restoration of the judgment of the court of review, from which he had not appealed. By a cross-appeal the plaintiff demands the restoration of the judgment of the trial judge.

Although "Findlay & Howard, Limited," was an incorporated company, by an agreement between the plaintiff and the defendant it was arranged that they should

> operate the said business in somewhat the same manner as if they were co-partners carrying on business under the name of "Findlay & Howard" and not merely as officers of the company.

This action has, therefore, been treated as a claim made by one partner against his co-partner; and I shall so deal with it. Although the defendant's notice of termination of partnership was given on September 11, 1913, to take immediate effect, for convenience the date of breach has been treated as November 30, 1913—the actual date of the closing of the books of the partnership.

While it does not formulate a definite basis for the assessment of the damages, the court of appeal appears to have proceeded on the principle laid down by the court of review and to have differed merely in its application to the facts in evidence. On the other hand, the difference in principle between the court of review and the trial judge is fundamental.

A *considérant* in the judgment of the trial judge reads in part as follows:—

> Considérant que le juge doit, quand il rend sa sentence, se rapporter à l'état de chose existant, au moment de la demande, et placer les parties, dans la situation, où elles se seraient trouvées respectivement, s'il avait pu statuer

immédiatement, les plaideurs ne devant pas souffrir des lenteurs de la justice, qui ne leur sont pas imputables, et que de même que des dommages réclamés par suite d'une rupture illégale de contrat, ne sauraient recevoir d'augmentation, par suite de circonstances subséquentes, comme une législation nouvelle, ou de récentes découvertes de la science apportant de nouveaux moyens d'exploitation, de même qu'ils ne sauraient recevoir de diminution, par suite de circonstances subséquentes et d'une nature temporaire, comme le relachement des affaires ou une guerre soudaine, et que si la rupture du contrat que le défendeur a voulu dissoudre, malgré les protestations de son associé, n'a pas été aussi fructueuse qu'il se l'était imaginé, par suite d'évènements qu'il n'a pas su ou n'a pas pu prévoir, il ne saurait en avoir le bénéfice, et que le demandeur a droit aux dommages causés par le défendeur et existant, autant qu'il est possible de les constater, à la date du 11 septembre 1913, jour de la rupture violente par le défendeur du contrat de société.

Very early in the course of the trial the judge said:—

We have to decide the right of the parties at the date of the pleadings, so that what happens subsequently to that we have nothing to do with.

He accordingly assessed the plaintiff's damages on the assumption that but for the defendant's breach the partnership would have endured for 19 months longer (the judge was somewhat in error in this computation of time), and that its profits during that period would have been proportionate to the $104,000 earned by it during the 12 months immediately preceding the breach; and on that footing he valued the plaintiff's loss of his share of the profits of the partnership business at $80,000.

The following passages from the formal judgment of the court of review, on the other hand, indicate the basis on which it proceeded:—

Considérant que dans l'estimation des dommages-intérêts réclamés par le demandeur, la cour doit tenir compte du passé de la dite société, des profits qu'elle avait faits jusqu'à la dissolution et des profits qu'elle devait rapporter aux associés, et cela en prenant en considération non seulement les faits qui existaient lors de la dissolution, mais encore les faits survenus depuis la dite dissolution, qu'il était possible d'établir au moment où s'est faite l'enquête;

Considérant qu'il est établi par la preuve que depuis 1911 jusque vers le printemps de 1913, le commerce d'immeubles que faisait la société a été très prospère, mais que depuis cette époque le commerce a subi une dépression graduelle jusqu'à la déclaration de guerre qui a eu lieu au commencement d'août 1914;

Considérant que les tribunaux sont censés connaître l'existence de l'état de guerre et sa continuation;

Lamothe, J. (now Chief Justice), in his opinion, thus states the view of the court:—

L'action a été intentée en décembre 1913; et la cour supérieure a posé en principe qu'elle ne devait pas prendre connaissance des faits postérieurs à

CAN.
S. C.
FINDLAY
v.
HOWARD.
Anglin, J.

cette date. Ce principe existe; il doit recevoir son application dans toutes les causes où la réclamation est basée purement sur des faits arrivés ayant fixé d'une manière définite la responsabilité des parties. Mais dans les cas où la réclamation est faite pour des dommages futurs, dommages basés sur des faits futurs et probables (savoir sur la continuation présumée d'une certaine serie de faits et de circonstances), la cour doit s'éclairer à la lumière des faits survenus subséquement, et, alors, au lieu de simples probabilities, la cour a devant elle des faits certains.

He also points out certain misleading elements included in the statement of earnings for the twelve months' period before the breach relied on by the learned trial judge. The formal judgment discloses the method of calculation by which the court reached its assessment of $22,000. Of this I shall have something further to say when discussing the *quantum* of the damages.

The Court of King's Bench, without disapproving of the basis of assessment in the court of review, finds:—

Que le cour de première instance lui a accordé un montant trop élevé et que la cour de révision a accordé un montant insuffisant;

and after alluding to certain alleged oversights in the estimate made by the court of review continues:—

Considérant que le montant le plus probable et le plus équitable, devrait être un juste milieu entre le montant accordé par la Cour Supérieure et celui alloué par la cour de révision, ce qui ferait une somme d'à eu-près $50,000; mais que, à tout événement, il est certain, vu la preuve, que le demandeur appelant a droit à un chiffre minimum de $40,000;

While claiming by his cross-appeal the restoration of the judgment of the trial court, counsel for the respondent in his factum appears partially to admit the soundness of the basis of assessment adopted by the court of review in this passage:—

It is not pretended that the past profits must be taken as a fixed and settled basis for settling the amount of future profits, for naturally all business is subject alike to periods of prosperity and depression and revenue from business in hand must necessarily be considered as subject to the ordinary trade contingencies, but the earnings of the firm in the past, especially if such earnings cover a period of years, are a good criterion of probable earnings in the future and deserve most serious consideration.

Citing the case of *Wakeman* v. *Wheeler & Wilson Manufacturing Co.* (1886), 101 N.Y. 205, he quotes these two sentences from the judgment:—

When the contract is repudiated the compensation of the party complaining of its repudiation should be the value of the contract. . . . His damages are what he lost by being deprived of his chance of profits.

The same principle is enunciated by the judicial committee in *Wertheim* v. *Chicoutimi Pulp Co.*, [1911] A.C. 301, at p. 307:—

> The general intention of the law in giving damages for breach of contract is that the plaintiff should be placed in the same position he would have been in if the contract had been performed.

An apt illustration of the application of these principles is afforded by the House of Lords in *British Westinghouse Elec. & Mfg. Co.* v. *Underground Electric R. Co. of London*, [1912] A.C. 673, the headnote of which is as follows:—

> *Held*, that the pecuniary advantage which the railway company derived from the superiority of the substituted turbines (*i.e.*, substituted for turbines supplied by the defendant which were deficient in value), was relevant matter for the consideration of the arbitrator in assessing damages.

In Mayne on Damages, 8th ed., at p. 141, the author says:—

> Where the action is to recover damage for some loss arising from the defendant's acts, evidence is admissible to shew that the injury is not so great as would at first appear.

In Arnold on Damages (1913), at p. 23, after referring to the authorities, the learned author says:—

> The conclusion to be arrived at is that where a contract is broken the cause of action at once accrues. The plaintiff may immediately sue for damages, and the measure of damages must be assessed as being the loss or injury sustained at the date of the breach of contract. But, for the purpose of estimating the present loss, probable future events must be considered, and if the bringing of the action be delayed, evidence as to actual subsequent consequential damage or subsequent relevant facts in mitigation of damage may be given.

In *Batten* v. *Wedgwood Coal & Iron Co.* (1886), 31 Ch. D. 346: where a solicitor acting for a receiver failed to fulfil a duty to have money invested in consols he was held liable for loss of interest which would have been earned by the investment, but he was allowed to set-off a gain to the client resulting from a fall in the price of consols between the date that the investment should have been made and the date of hearing. The receiver is only entitled to be recouped what he has actually lost.

In *Laishley* v. *Goold Bicycle Co.* (1903), 6 O.L.R. 319, in allowing an appeal from Ferguson, J., Garrow, J.A., speaking for the Ontario court of appeal, thus discusses, at p. 324, the proper basis for the computation of damages analogous to those here claimed:—

> The breach is clear, and admitted, and the only reason, apparently, for not permitting the ordinary consequences of adequate damages being adjudged

CAN.
S. C.
FINDLAY
v.
HOWARD.
Anglin, J.

to the plaintiff, is because such damages are, it is said, too vague and conjectural, which is the question to be determined on this appeal. Damages very seldom are capable of exact calculation, and yet I think many cases can be found in which damages have been awarded where the basis for a calculation was less certain than in this case. To begin with, there is the undisputed fact of the plaintiff's past earnings from commissions in 1898 and 1899; certainly some evidence of what he would probably have earned in 1900; and, indeed, in my opinion, strong evidence, unless affected by counter evidence on the part of the defendants to shew that these past earnings were abnormal, or that the business had depreciated or come to an end. But we have here not merely the past earnings but the fact that the bicycle business was continued under the new company after the plaintiff's dismissal, during the year 1900, but with, it is said, a diminished market. The manager for the new company puts this depreciation at about 40% of the previous year's demand; and another witness called by the defendants at about 50%. Giving credit to these witnesses, it appears to me that there is a proper and even sufficient material for a reasonably correct calculation of the amount of the damages in question to which the plaintiff is entitled, having regard, of course, to what the situation and outlook were at the time of the breach in November, 1899.

The decision of this court in *Cockburn* v. *Trusts & Guarantee Co.* (1917), 37 D.L.R. 701, 55 Can. S.C.R. 264, proceeds on the same view of the law as does also our decision in *Wood* v. *Grand Valley R. Co.* (1915), 22 D.L.R. 614, 51 Can. S.C.R. 283.

I have cited the foregoing authorities decided upon English law because many of them are relied on by the parties and because there appears to be a dearth of French authority on the matter under consideration. The principles under which damages are awarded under the law of Quebec in a case such as this are to be found in the following passages from the Civil Code:—

Art. 1065.—Every obligation renders the debtor liable in damages in case of a breach of it on his part.

Art. 1073.—The damages due to the creditor are in general the amount of the loss which he has sustained and of the profit of which he has been deprived.

Art. 1074.—The debtor is liable for the damages which have been foreseen, or might have been foreseen, at the time of contracting the obligation, when his breach of it is not accompanied by fraud.

Art. 1075.—In the case even in which the inexecution of the obligation results from the fraud of the debtor, the damages comprise only that which is an immediate and direct consequence of its inexecution.

Before proceeding to consider the quantum of damages justified by an application of these principles to the facts in evidence, I shall say a word on the merits, merely to indicate how far they influence me in the assessment. The trial judge found that

la société qui a été en existence entre les parties pendant environ trois ans et demi, avec un succès phénoménal, a été dissoute par le défendeur, illégalement, sans raison ni cause, d'une façon brutale, injuste, déloyale et malhonnête, que le défendeur, volontairement et délibérément, a renversé le superbe édifice élevé par l'activité, le zèle, l'industrie et l'habilité des associés, afin d'en faire sortir le demandeur, qui en était le propriétaire conjoint, et en devenir le seul maître et propriétaire, etc.

The court of review held

que le demandeur a prouvé l'allégation essentielle de sa demande, à savoir; que le défendeur a mis fin, sans cause légitime, au dit contrat de société, et que le défendeur n'a pas établi ses allégations sur ce point.

The court of appeal expressed its view in these terms:—

Considérant que l'intimé a mis fin au contrat de société existant entre lui et l'appelant et cela 21 mois avant l'expiration du terms convenu;

Considérant que la conduite de l'intimé sous ce rapport était arbitraire, injustifiable et inexplicable.

Considérant qu'aucune raison n'a été donnée par l'intimé pour justifier sa conduite, lorsqu'il a prétendu mettre fin à la dite société.

Having declined to hear argument by his counsel on the question how far the defendant's conduct should be deemed morally reprehensible, we should not, in my opinion, treat him as deserving of censure more severe than that pronounced by the judgment of the court of review in which he acquiesced.

But however gross the violation of the plaintiff's right, however discreditable the defendant's motives, the damages cannot be other than "compensation for pecuniary loss naturally flowing from the breach." No punitive or vindictive consideration may enter into the assessment. Art. 1075 C.C. must be obeyed. In the case of fraudulent breach of contract, actual damages sustained, though unforeseen at the date of the contract, must be made good. Where the breach is not accompanied by fraud damage which could not have been foreseen cannot be recovered. Whatever may have been the motive that induced the defendant to break the partnership contract, he took that step freely and deliberately and it must be ascribed to a determination to serve some purpose of his own. In the absence of proof of justification, such a breach should, I think, be regarded as falling within art. 1075 C.C. rather than within art. 1074.

Assuming the conduct of the defendant to merit no more emphatic denunciation than that pronounced by the court of review, in regard to such elements of damage as cannot be measured with mathematical exactitude but must be determined on such

CAN.
S. C.
FINDLAY
v.
HOWARD.
Anglin, J.

probabilities as a jury is justified in proceeding upon, he is not entitled to expect that the amount of the plaintiff's compensation shall be weighed in golden scales or to have the sum allowed interfered with on appeal merely because of some trifling error in its computation. On the other hand, he would be entitled to complain of any palpable substantial excess in the award, even were his conduct properly characterized by the vigorous terms employed by the trial judge.

Under art. 1075 C.C., the plaintiff would have been entitled to any unforeseen damages which were an immediate and direct consequence of the breach although they would not have arisen but for the happening of some events which could not have been anticipated when the contract was entered into. I have no doubt whatever that events which happened after the breach and would have adversely affected the profits that the plaintiff would have made had the contract been carried out until the end of the five year term must likewise be taken into account in estimating the loss for which the plaintiff is entitled to compensation and in determining what actually was the value of the contract to him at the date of the breach.

The purpose of awarding damages being to compensate for a loss sustained by the plaintiff, it seems to me, with great respect for those who take the contrary view, to be repugnant to common sense that he should be permitted to recover for loss which facts within the cognizance of the court at the time of the trial shew he did not suffer merely because upon the facts as they stood at the date of the commission of the wrong which subjected the defendant to liability, or even at the time the action was begun, it seemed probable that such loss would be sustained.

If there had not been any clear error in the basis of computation in the judgment of the Court of King's Bench, although it increased the amount of the damages allowed by the court of review by $18,000, I should have been loath to disturb it on a mere question of quantum, in a case where it is so obviously impossible to ascertain with anything approaching exactitude the amount of the damage actually sustained. But unfortunately for the plaintiff that court, as appears from the opinion of Pelletier, J., made the mistake of taking the $104,000 of earnings (which represented $67,000 of profits proper to be taken into account in the opinion

of that judge) for the year ending November 3, 1913, the period immediately preceding the breach, as having been received during the year which followed the breach, *i.e.*, the year ending on November 30, 1914. Proceeding on this erroneous footing the appellate judge estimated that the net profits for the latter period, had the plaintiff Howard continued to act as a member of the partnership during it, would have been not the $67,000 actually earned by the defendant, as he understood, but $33,000 more, *i.e.*, $100,000. It was by adding one-half of this additional amount, $16,500, to the estimated earnings for the 12 months following the breach (November 30, 1913, to November 30, 1914), and a further sum of $9,000 ($750 per month), to cover what would have been Howard's probable share of the earnings for the last year of the partnership term (August, 1914, to August, 1915), for which the court of review had allowed nothing, to the $22,000 allowed by that court that Pelletier, J., reached a sum approximating $60,000 as the amount of the plaintiff's damages which, in order to be "*bien sur de ne pas commettre d'erreur*," he fixed at $40,000. The appellate judge apparently quite overlooked the fact that the allowance for profits in the $22,000 and $16,500 was based on figures carried down to November 30, 1914, and that the $750 a month, if a proper addition, should, therefore, have been for 9 months and not for 12 months. Of course a judgment based on such a manifest and fundamental error as that in regard to the year in which the $104,000 was earned cannot be sustained. There is nothing to shew that had it not been for this mistake the court of King's Bench would have disturbed the assessment of the damages made by the court of review.

But it does not follow that the amount allowed as damages by the Court of King's Bench was clearly wrong or that the assessment of the court of review ought to be restored. The judgment of the latter court has been set aside and before we can restore it we must be satisfied that the respondent is not entitled to a larger sum than it awards. We are simply left without the assistance of the opinion either of the trial court or of the Court of King's Bench as to the quantum of the damages, the assessment of the former having been based on an erroneous conception of the law, and that of the latter on a mistaken view of the facts. Under these circumstances, we must determine for ourselves, proceeding

CAN.
S. C.
FINDLAY
v.
HOWARD.
Anglin, J.

largely as a jury, what is a fair amount to compensate the plaintiff for the loss of the profits that he would have received had the partnership business been continued until August 22, 1915, as the contract of the parties contemplated.

Inasmuch as the judgment of the court of review is based on a correct appreciation of the law as to the measure of the damages recoverable and has not been appealed from by the defendant, it might at first blush seem to be not unreasonable to limit the inquiry to ascertaining by what sum, if any, the $22,000 which it awards should be increased. On the whole, however, I think this would not be a satisfactory mode of dealing with the case. The basis on which the court of review estimated the plaintiff's profits for the eight months from November 30, 1913, to August 1, 1914, at $17,800 seems to me, with respect, to be too fanciful. Moreover, there is a patent mistake in its calculation. Estimating the profits of the business from November 30, 1913, to November 30, 1914, at $25,663 (as hereinafter indicated), the court in making its calculation took one-half of this amount, $12,800, instead of $8,500 as the plaintiff's share of them for 8 months. I, therefore, incline to think it will not be advisable to take as a starting point the $22,000 assessed by it as the plaintiff's damages.

In arriving at what would probably have been the profits for the year from November 30, 1913, to November 30, 1914, however, the court of review, very properly in my opinion, added to the $13,353 profits made by the defendant during that period, as shewn by his statement, several amounts which should not have been deducted from the gross earnings as against the plaintiff, thus bringing the profits actually earned by Findlay in that year for the purpose of its calculation up to $25,633. Having regard to the evidence of the witnesses DeCary, Beausoleil, Browne and Davis that the real estate market was, if anything, better between August, 1913, and August, 1914, than it had been during the preceding twelve months and giving due weight to the testimony of Messrs. Peloquin (50% decline in eight months before the war), Short (falling off began in the summer of 1913), Kirkpatrick, Casgrain, Ogilvy and Avard, in view of the enormous earning capacity of Findlay and Howard during the three years when both partners were co-operating, and especially to the profits of at least $67,000, or $33,500 for each partner, made during the 12

months ending November 30, 1913, I think there should have been allowed for the diminution of earning capacity due to Howard's absence during the latter twelve months over and above the $4,800 salary paid by Findlay to Parker, who replaced him, an additional sum of about $12,000, making the total probable profits for the year from November 30, 1913, to November 30, 1914, had Howard continued in the business, $37,633 instead of the $25,633 estimated by the court of review. On that basis, the plaintiff's share would have been $18,800.

No doubt the sales branch of the real estate business, formerly its most profitable part, amounted to little or nothing during the first year of the war. But, according to the evidence, collections continued to be good. I incline to think that, had the partnership business of Findlay & Howard been conducted during that year, having regard to the volume of its outstanding business, and its very extended connections, by cutting down expenses and "carrying on" on a conservative basis some substantial profits might have been realized. Placing them at one-fifth of the earnings in the preceding period of one year (obviously the approximation of a juryman), the plaintiff's share for 8 months would have been $2,500—about $300 a month in lieu of the $750 a month which Pelletier, J., was disposed to allow.

If the goodwill of the business of Findlay & Howard should not be regarded as one of the partnership assets as to which the plaintiff expressly reserved his rights, I am unable to find any appreciable value in it having regard to the character of the business and the events which followed the improper breaking up of the partnership.

I am not disposed to make any deduction on account of the plaintiff's receipts from assets taken over by him—the effect of that has been already allowed for in the reduced profits—or because of his failure to take steps to earn money in some other capacity than as a real estate agent.

Fully realizing that my estimate of the damages is quite as likely to be inaccurate as that of the court of review or of the Court of King's Bench, but discharging the functions of a juryman as best I can, I would, therefore, estimate the plaintiff's damages at $18,800 plus $2,500, or, say, $21,300 in all.

CAN.
S. C.
FINDLAY
v.
HOWARD.
Mignault, J.

It follows that the judgment of the court of review for $22,000 should be restored. The appellant should have his costs here and in the court of appeal.

BRODEUR, J., dissented.

MIGNAULT, J.:—This case raises some important questions on which notable differences of opinion have existed between the different courts that have dealt with it, although in each court the judgment was unanimous. There is before this court an appeal and a cross-appeal shewing that neither party is satisfied with the judgment rendered by the Court of King's Bench. The main respondent and cross-appellant, Howard, would, however, accept the latter judgment if he cannot get the judgment of the Superior Court restored. On the other hand, the main appellant and cross-respondent, Findlay, is now satisfied to abide by the judgment of the court of review, which, moreover, is conclusive against him inasmuch as Howard alone appealed from it. The only question at issue under these circumstances is the amount of damages, the liability of Findlay to pay to Howard at least $22,000, the amount granted by the court of review, being conclusively established.

Findlay and Howard had entered into a partnership to carry on a real estate business in Montreal for a term of five years from August 22, 1910, which business they conducted by means of a joint stock company, Findlay & Howard, Limited. Their profits were phenomenal, especially at first, owing to the real estate boom then prevailing in Montreal and vicinity. The partnership had nearly 2 years to run when, on September 11, 1913, Findlay put an end to it without cause or reason. Howard now claims damages and these must run from a minimum of $22,000, allowed by the court of review, to a maximum of $80,000 granted by the Superior Court. The Court of King's Bench awarded $40,000.

There is, however, an important question of law on which the Superior Court and the court of review took opposite sides, but which was not expressly passed upon by the Court of King's Bench. Is the court, in assessing damages for Findlay's wrongful termination of this partnership, entitled to consider facts subsequent to the action and shewing what profits the partnership would have earned had there been no dissolution? Or must it ignore all such facts, the most important of which is the European war which paralyzed

the real estate business in Montreal, and assess these damages on the basis of conditions as they existed on September 11, 1913, date of the breach of contract? The Superior Court adopted the second alternative, the court of review the first.

The trial judge lays down the rule that damages being, in general, according to art. 1073 C.C., "le montant de la perte faite par le créancier et du gain dont il a été privé," the court must in, rendering its decision, go back to the conditions existing at the date of the action, and place the parties in the situation in which they would have been had the judgment been rendered immediately, and that the damages for breach of contract can neither be increased by reason of subsequent circumstances, such as new legislation or recent discoveries of science, nor diminished on account of subsequent facts of a temporary nature, such as a slackening of business or a sudden war.

I would not feel disposed to quarrel with this rule rightly applied to a proper case. But, as I construe Howard's action, he is claiming, not the value of his share in the partnership as it stood at the date of the breach, for he expressly reserves his right to recover his share and proportion of the assets of Findlay & Howard, Limited, but the value of his share of the profits the partnership would have realized had not Findlay's wrongful act brought it to an end. That is to say, Howard demands really future damages, and I cannot follow the learned trial judge when he estimates the value of the future profits of the partnership by considering only its past profits, as if they were sure to continue, and closes his eyes to events which had happened since the action, but before the trial, and which shewed that these future profits would in no wise have been comparable to those made before the date of the breach. Where future damages are claimed, future conditions must necessarily be considered, and what better evidence of conditions, which were in the future at the date of the breach, can be made than by shewing, at the date of the trial, what has actually occurred since the breach of contract?

I, therefore, think that in his estimation of the damages granted to Howard, the trial judge has adopted an erroneous principle, and consequently his judgment cannot be restored.

The court of review, on the contrary, lays down a rule which I fully accept as applied to this case, and which I quote:—

CAN.

S. C.

FINDLAY v. HOWARD.

Mignault, J.

Considérant que dans l'estimation des dommages-intérêts réclamés par le demandeur, la cour doit tenir compte du passé de la dite société, des profits qu'elle avait faits jusqu'à la dissolution et des profits qu'elle devait rapporter aux associés, et cela en prenant en considération nonseulement les faits qui existaient lors de la dissolution, mais encore les faits survenus depuis la dite dissolution, qu'il était possible d'établir au moment où s'est faite l'enquête.

The judgment of the Court of King's Bench, I have said, does not expressly pass upon the question to which I have just referred, but holding that both the Superior Court and the court of review were in error, the former in granting too much, the latter in allowing too little, it comes to the conclusion that

le montant le plus probable et le plus équitable devrait être un juste milieu entre le montant accordé par la cour supérieure et celui alloué par la cour de revision, ce qui ferait une somme d'à peu près $50,000, mais que, à tout événement, il est certain, vu la preuve, que le demandeur appelant a droit à un chiffre minimum de $40,000.

If I may say so, with deference, this selection of a "*juste milieu*" between the amounts allowed by the Superior Court and the court of review, is rather a too rough and ready way of determining the amount which Howard ought to receive, and I cannot feel that I should adopt it. Moreover, Pelletier, J., who alone gave reasons for judgment, seems to take it that the partnership realized $104,000 for the year which followed the breach, whereas these profits were for the year which preceded the breach and had only a couple of months to run when Findlay broke the partnership.

I would, therefore, apply the rule adopted by the court of review, and consider the profits made by the partnership during the past up to the date of the breach, and those which it would have made had it continued for its full term, estimating the latter in the light of the circumstances disclosed by the evidence as having happened up to the date of the trial, some of which, like the gradual decline of the real estate boom in Montreal, could have been foreseen in September, 1913, and others, like the European war, were of such a nature that no man not versed in the secrets of diplomacy and of continental politics could have ventured to predict them.

In my view, the question of good or bad faith or of fraud, or what the French text of the Civil Code calls "dol" in articles 1073, 1074 and 1075 C.C., has little application here, for I am willing to grant that Findlay acted in bad faith in breaking his contract, and he is liable for all damages foreseen or not which

Howard suffered through the breach, provided that they directly resulted therefrom. If he is liable for the unforeseen but direct consequences of his breach of contract, he should at least, in an action claiming future damages, have the benefit of unforeseen circumstances, ascertained at the trial, shewing that these future damages were not incurred, or were incurred in a less degree than seemed probable at the date of the breach. This, moreover, is not a case where I would deem myself justified in granting punitive damages, although the conduct of Findlay was very reprehensible, or anything more than real damages, for Howard, who, I repeat, claims damages for the loss of future profits, should not be placed in a better position by reason of the breach of his contract than he would have found himself had the breach not occurred.

Taking now the past profits of the partnership, they are as follows:—

For the first 18 months..... $203,318.53
For the year ending on the 30th November, 1912. $161,216.83
For the year ending on the 30th November, 1913. $104,121.05

and from the latter sum certain amounts mentioned by the court of review should be deducted.

The evidence shews that the boom was at its height up to the close of 1912, that it then began to decline, and that the bubble—because, like so many other land booms, it was only a bubble—was rapidly nearing the bursting point when the war suddenly broke out to the astonishment of the whole world. The war killed it, and thenceforth, the witnesses say, the real estate business was dead.

The decline of the boom is shewn by the figures I have given as it affected Findlay & Howard, Limited. After the breach, Findlay continued the same business in the same premises, with the same subsidiary companies or syndicates formed by the parties, with also the same employees, with the exception of Edward C. Parker whom he engaged to replace Howard, while the latter did not go in the real estate business fearing, he states, had he competed with Findlay, that he might endanger his security for his claim for damages against Findlay, and yet Findlay's profits, for the year ending on November 30, 1914, are shewn by his balance sheet to have been only $13,353.86.

CAN.

S. C.

FINDLAY v. HOWARD.

Mignault, J.

But the court of review refused to take the latter figure as being a fair statement of the profits made by Findlay in the year ending on November 30, 1914. It deducted from the amounts indicated by Findlay's balance sheet as expenses the following items:—

Salary of Parker, who replaced Howard	$4,800.00
Deduction on automobile expenses and depreciation, comparing these expenses to those mentioned during the three years and half of Findlay & Howard	2,000.00
Expenses of stationery, which seemed unjustifiable when comparing 1914 with previous years	1,000.00
Travelling expenses, which were, in comparison with previous years, considered too high	4 500.00
Making in all	$12,300.00
Which added to the profits declared by Findlay's first balance sheet	13,353.86
would give a real profit of	$25,653.86

Then the court of review compared the 8 months of pre-war conditions in Findlay's first year, considering the business as having been dead during the 4 months of war, to the corresponding period in Findlay & Howard's last year, and found that Howard received for the latter period about $22,300, and that he would have been paid for the former period about $12,800, making a total of $35,100.

This would be, if Howard's share of profits were averaged, as the court of review averaged them, an amount of $17,550 for each period, so the court fixed Howard's share of profits for the year ending on November 30, 1914, had the partnership continued, at $17,500.

To this figure it added the sum of $4,500, which is estimated as Howard's share of the additional profits which he would have brought to the partnership had he not been excluded therefrom, and thus arrived at the total figure of $22,000 which it considered as representing Howard's loss of future profits through the breach of the contract of partnership.

I must confess that, in my opinion, the court of review dealt liberally with Howard. Its figures would shew that, the business having been at a standstill since August 1, 1914, on account of the war, Howard would have received, for the year 1914, one-half of

$25,633.86, or $12,816.93, and not its average of $17,500, which would decrease the damages it allowed by nearly $5,000. I fail to see the reason for averaging 2 years during which the land boom gradually and very rapidly declined, but Findlay is bound by the judgment of the court of review, and the amount this judgment granted to Howard cannot be decreased.

I have said that the judgment of the Superior Court cannot be restored, so the choice is between the judgment of the court of review and that of the Court of King's Bench.

I cannot, with deference, agree with the latter court when it endeavours to arrive at a "*juste milieu*" between the judgment of the Superior Court, which proceeded on an entirely wrong principle, and that of the court of review whose governing rule as to these future damages I fully accept. And I fail upon due consideration to find any satisfactory reason for the figure of $40,000, allowed by the Court of King's Bench, which it merely says the evidence fully justifies. Had it referred more in detail to this evidence, which, after all, is the evidence furnished by the balance sheets, I would have felt more hesitation in rejecting its estimate of Howard's loss, but, with all respect, I must say that Pelletier, J., seems to me to have been in obvious error when he stated that the court of review adopted as its basis $104,000 for the year following the breach of contract, and made thereto certain additions and therefrom certain subtractions, which reduced this figure of $104,000 to $67,000. Then the judge adopts $67,000 as the basis of his own calculation of Howard's loss of profits. The error here is that the court of review, with reference to the $104,000, reduced to $67,000, was dealing with the year preceding the breach for which Howard received his share of profits, and not with the year following it, and that Pelletier, J., used the figure of $67,000 as the foundation for his calculation of the profits which would have accrued during the year following the breach.

The judgment of the Court of King's Bench also criticises the judgment of the court of review because the latter judgment allowed nothing for the goodwill of the partnership. This is a matter of some difficulty, because by the supplementary agreement of the parties, dated January 9, 1913, the goodwill of Findlay & Howard, Limited, was valued at $12,500 in the case of one of the

CAN.
S. C.
FINDLAY
v.
HOWARD.
Mignault, J.

partners dying during the partnership, and the survivor purchasing the concern. But the goodwill of Findlay & Howard formed a part of its assets and Howard's right to claim his share of these assets was reserved by him, so I cannot look upon it as properly included in his action. It is true that Howard alleges that he has been deprived of all his right and interest in the future profits and goodwill of the partnership, which goodwill, he says, has been utterly destroyed by Findlay's wrongful acts. I am not satisfied, however, that after the beginning of the war this goodwill had any value. Moreover, the goodwill mainly consists in the name and Findlay did not use the name of Findlay & Howard, Limited, and he agreed to give Howard the first offer of the leases of the business premises. Under these circumstances I do not feel justified in adding anything to the amount allowed by the court of review.

My opinion in this very difficult case is, therefore, that the appeal of Findlay should be allowed and the cross-appeal of Howard dismissed, with costs in favour of Findlay here and in the Court of King's Bench, and that the judgment of the court of review should be restored.

Appeal allowed; cross-appeal dismissed.

CAN.
Ex. C.

GENERAL TRANSATLANTIC Co. v. The SHIP "IMO."

Exchequer Court of Canada, Nova Scotia Admiralty District, Drysdale, J. April 27, 1918.

COLLISION (§ I A—3)—SHIPPING—RESPONSIBILITY—GROSS NEGLIGENCE—REGULATIONS—ART. 27.

The collision happened in Halifax harbour at 8.50 a.m., in broad daylight. The weather was perfect, there being no wind, and the ships could see each other several miles away.

The "Imo" was keeping as far as practicable to her side of the fairway or mid-channel and blew a signal of three blasts and reversed her engines when about a mile apart, having previously signalled she would keep to starboard; she then reduced speed and did not put on engines again before collision. When "Mont Blanc" blew a two-blast signal, indicating she was coming to port and would cross bow of the "Imo," the "Imo" reversed engines and gave a three-blast signal. The "Mont Blanc" was travelling at excessive speed and, starboarding her helm, attempted to cross the bows of the "Imo." She did not reverse engines nor drop anchor.

The collision happened within the waters of the "Imo," that is, on the Halifax side of mid-channel, and after collision the "Mont Blanc" ran upon the Halifax shore, where the explosion took place.

Held, that the collision was wholly due to the last order of the "Mont Blanc" and to the gross negligence of her officers in attempting to cross the bows of the "Imo."

2. That the order could not be justified as an emergency order, in view of the respective positions of the ships.*

THE plaintiff by its action claims the sum of $2,000,000 against the "Imo" for damages caused them by collision in Halifax harbour in December, 1917, and the defendant by their counter-claim claim the same amount from plaintiff as damages occasioned by the same collision.

In the preliminary acts, filed by the plaintiff, it is claimed in substance that when the "Imo" was first seen the "Mont Blanc" blew one short blast to indicate that she was holding to the starboard side of the fairway and slowed her engines. After this signal had been answered by two short blasts from the "Imo" the "Mont Blanc" again gave one short blast which was again answered by two short blasts from the "Imo." The "Mont Blanc" stopped her engines to avoid what appeared to be otherwise an inevitable collision, blew two short blasts and starboarded her helm, bringing the ships in a safe position on opposite parallel courses. After this order was executed, the "Imo" was seen to swing to starboard. A collision was then inevitable whereupon the "Mont Blanc" reversed her engines full speed. The "Imo" was proceeding at too great a speed. The "Imo" was wrongfully coming down on her port side of the fairway or mid-channel. A good lookout was not kept on the "Imo." The "Imo" wrongfully directed her course to port, across that of the "Mont Blanc" and came in the "Mont Blanc's" water. The "Imo," when the ships were in a position to clear, wrongfully altered her course to starboard and attempted to cross the head of the "Mont Blanc," thus rendering a collision inevitable. The "Imo" was not navigated in accordance with the signals given to her.

The defendant in its preliminary acts claims in substance that the "Imo" was keeping as far as practicable to that side of the fairway or mid-channel which laid on her starboard side and blew a signal of three blasts and reversed her engines when ships were about one-half to three-quarters of a mile apart. "Imo's" speed was then reduced to about one mile per hour and engines were not put ahead again before collision, and "Imo" was kept under a port helm and signalled accordingly. When "Mont Blanc" blew

*On appeal to the Supreme Court of Canada judgment was rendered, allowing the appeal in part, and finding both ships equally at fault, Sir Louis Davies, C.J., and Idington, J., dissenting.

CAN.
EX. C.
GENERAL TRANS-ATLANTIC CO. v. THE SHIP "IMO."

a two-blast signal, indicating she was coming to port, and attempting to cross bows of "Imo," "Imo's" engines were immediately reversed and three-blast signals blown. The "Mont Blanc" was travelling at an excessive rate of speed; that she starboarded her helm thus coming to port and attempted to cross the bows of the "Imo" and in so doing committed a breach of the regulations and of good seamanship and caused the collision, and did not reverse her engines nor drop anchor as soon as they thought they heard a cross-signal from the "Imo" indicating, according to their understanding, although such in fact was not the case, that the "Imo" intended to come down the same side of the channel as that on which they were proceeding; that she did not keep as far as practicable to that side of the fairway or mid-channel which was on her starboard side as required by the International Regulations but crossed over to the other or Halifax side; that she did not give the proper whistle signals and did not navigate in accordance with her whistle signals; that she placed herself in the position of a crossing ship in relation to the "Imo," involving risk of collision with the "Imo" on the starboard bow of the "Mont Blanc," and the "Mont Blanc" did not as required by art. 19 of the regulations keep out of the way of the "Imo." Further the "Mont Blanc" attempted to cross the bows of the "Imo" in violation of art. 22, and also violated art. 23 in not reversing, and generally did not act with good judgment nor in a seamanlike manner.

Mr. McInnes, K.C., for the owner of the "Mont Blanc," claimed that the evidence established among other things that at 7.30 in the morning she started for Bedford Basin and, undoubtedly kept on her proper side of the harbour, the starboard or right or Dartmouth side. She sighted the "Imo" coming down from the Basin proceeding to sea, at about 8.30 in the morning, and blew one blast to indicate that she was in her own waters and would keep, as the regulations required, the starboard or right side of the channel. The "Imo" had then come out of the Basin and shewed her starboard or right side to the "Mont Blanc," and was heading also to the Dartmouth shore. Her position when in full view of the "Mont Blanc" was in the waters of the Dartmouth side of the channel. The "Imo" blew two blasts immediately after the signal from the "Mont Blanc," which the "Mont Blanc" con-

sidered an answer to her first signal and thus indicated to the "Mont Blanc" that she intended to keep to her own port side coming down, or the Dartmouth side of the channel. This would be in violation of the International Rules. The "Mont Blanc" almost immediately answered by another one short blast to further advise the "Imo" she intended to maintain her proper course in the waters on her own starboard side. The "Imo" continued on the Dartmouth side of the channel, and it is at the point when the ships were about 400 metres apart that there is any substantial dispute about what occurred. The officers and pilot of the "Mont Blanc" say that the "Imo" answered this second signal given by the "Mont Blanc" with two short blasts, thus reiterating the fact that she was to pass down the Dartmouth side of the channel, and there is other testimony to support their statements. As the "Imo" was coming fast on their side, if the "Mont Blanc's" officers tried to put their ship nearer the Dartmouth shore she must have gone aground, and there was nothing for them to do but to come to port and try to parallel the ships so that the "Imo" would pass on the right of the "Mont Blanc." This manoeuvre they executed as the only one to avoid a collision, giving at the same time the proper signal that they were going to port. It appears from the testimony that the captain and pilot were of one mind as to what was the proper action to take, and independently each of the other took steps to carry out the manoeuvre and placed the "Mont Blanc" in a position of safety. The "Imo" immediately thereafter swung sharply to her starboard, and though the "Mont Blanc" was then travelling slowly under reduced speed or reversed engines, the result was the stem of the "Imo" struck the starboard bow of the "Mont Blanc." The collision took place about the middle of the channel, probably a little nearer the Halifax side, though there is evidence it was on the Dartmouth side, shortly before 9 o'clock in the morning.

Mr. Burchell, K.C., for owners of the "Imo," claimed that the evidence established that the "Imo" left her anchorage on the western shore of Bedford Basin at about eight o'clock. Pilot Hayes was on the bridge in charge of the ship and with him were the captain and the wheelsman. The bridge was all open, not having a wheelhouse. There was a guard ship anchored in the Basin near the entrance to the Narrows, and before the "Imo"

CAN.

Ex. C.

GENERAL TRANS-ATLANTIC CO. v. THE SHIP "IMO."

could leave her anchorage it was necessary for the pilot to go on board the guardship and ascertain if permission had been granted for her to leave. Pilot Hayes went on board the guardship that morning between 7.30 and 8 o'clock on his way up to the "Imo" and was informed that everything was in order for the "Imo" to go to sea. When Pilot Hayes got on board the "Imo" it was then necessary for him to order the flags hoisted shewing the number of the "Imo" in the commercial code, and this was done. Corresponding flags were then displayed on the guardship and the "Imo" would not have been allowed to pass the guardship unless these flags were flying on both the "Imo" and guardship. There was no wind that morning and the flags on the guardship were hanging limp and it was necessary for the "Imo" to pass close to the guardship to see the signals displayed by her.

There were seven or eight ships anchored in the Basin between the anchorage of the "Imo" and the entrance to the Narrows and the "Imo" had to pursue a zig-zag course through them, and necessarily her speed had to be slow.

When the "Imo" had passed the guardship, but was yet in the Basin, an American tramp steamer in charge of Pilot Renner was coming up the Narrows on the Halifax side, which for an up-going steamer was the wrong side of the channel. The "Imo" blew a one-blast signal to the American tramp to indicate that the "Imo" was directing her course to starboard and keeping the Halifax side of the Narrows, which was the proper side for the "Imo," and that the "Imo" intended to pass the American tramp properly port to port. Pilot Renner on the American tramp, however, wanted to keep up the Halifax, or his port side of the Narrows on which the American tramp was then although his proper side under the Narrow Channel Rule No. 25 was the Dartmouth or his starboard side of the Narrows. The American tramp, therefore, after receiving the one-blast signal from the "Imo," gave a cross signal of two blasts, indicating that the American tramp intended to keep the Halifax side. In order to avoid a probable collision if the "Imo" had kept on her intended and proper course, Pilot Hayes of the "Imo" was forced away from the Halifax side of the Narrows and was compelled to give, and accordingly gave an answering two-blast signal to the American tramp and the two ships passed starboard to starboard instead of port to port. Pilot

Renner frankly admitted that it was entirely his fault that the vessels passed starboard to starboard, as, when the "Imo" blew the first one-blast signal, the American tramp, without difficulty, could have gone on the Dartmouth or proper side of the channel and passed the "Imo" port to port, and Pilot Renner was censured by the court accordingly.

The American tramp was just above pier 9, close to the Halifax side, and the "Imo" was about 4 ship lengths away when the American tramp blew the improper two-blast signal, which was subsequently answered by a two-blast signal from the "Imo," and the two ships passed opposite the first point north of Tufts Cove shewn on the chart and marked by Pilot Renner as point "T" on chart M.B.R.—4.

At the time the "Imo" was forced to give this two-blast signal to the American tramp the "Mont Blanc" was then distant from the "Imo" at least one mile. When the American tramp was passing the "Imo," Pilot Renner called out to Pilot Hayes and informed him that there was another ship following behind, meaning the "Mont Blanc."

Just after the "Imo" got past the American tramp another ship appeared ahead of the "Imo" and also, like the American tramp, in the "Imo's" waters. This was the ocean going tug, "Stella Maris," towing two barges behind her and going up the Narrows to Bedford Basin on the Halifax side. The "Stella Maris" thus put herself on the wrong side of the channel in what would be the proper course of the "Imo" and in the "Imo's" waters, and his tug and unwieldly tow was a formidable obstacle to the "Imo."

The "Imo," therefore, after being crowded away from the Halifax shore by the American tramp steamer in the upper part of the Narrows above pier 9, and after having been forced to give a two-blast signal to the American tramp, was for the second time prevented from getting close to the Halifax shore by the "Stella Maris" and her two barges. After getting past the American tramp the "Imo" had to turn a bend in the channel at the upper end of pier 9 and being a large ship required considerable room. When the "Imo" was approaching the "Stella Maris" after getting around this bend keeping as close to the Halifax shore as she reasonably could, having in view the fact

CAN.

Ex. C.

GENERAL TRANS-ATLANTIC CO. v. THE SHIP "IMO."

that the "Stella Maris" and her scows were in her waters, the "Imo" received a one-blast signal from the "Mont Blanc" which signified to her that the "Mont Blanc" intended to keep to starboard, which for the "Mont Blanc" would be the Dartmouth shore. The "Mont Blanc" was then about opposite the dockyard, pretty well in the middle of the harbour, but a little on the Dartmouth side, and the "Imo" was at the upper part of pier 8 or opposite pier 9, and the two ships would be approximately $^3/_4$ of a mile apart. The "Imo" answered this signal with a one-blast signal to signify to the "Mont Blanc" that the "Imo" was also keeping to starboard which would be for the "Imo" the Halifax side of the channel. As soon as the "Imo" got opposite the "Stella Maris" the "Imo" blew a three-blast signal and reversed her engines. The intention of Pilot Hayes in giving this three-blast signal when opposite the "Stella Maris" and reversing at this time, when the "Mont Blanc" and "Imo" were so far apart, was no doubt, for a twofold purpose, first, to arrest the attention of the "Mont Blanc," as even at that stage, the "Mont Blanc" was not keeping close in to the Dartmouth side as she should have been but was nearly in mid-channel, a little on the Dartmouth side, but angling across to the Halifax side and, secondly, to stop headway on the "Imo" and by reversing her engines to swing the "Imo's" bow to starboard so as to get around the stern of the barges of the "Stella Maris" and get closer to the Halifax side, the scows being then a little in advance of the "Imo's" bow, and the "Imo" herself being about opposite the tug. From this time when the ships were from one-half to three-quarters of a mile apart until the collision, the "Imo" was heading towards the Halifax side and the engines of the "Imo" were not again put ahead, but remained stopped until shortly before the collision, when they were reversed a second time. After this three-blast signal from the "Imo," the next signal was a one-blast signal from the "Mont Blanc." This signal was quickly repeated by the "Mont Blanc," causing the witnesses to remark that they were getting excited on board the French ship. This was followed by another one-blast signal from the "Imo," and the course of the "Imo" was then to starboard, or to the Halifax side of the channel, in accordance with her signal. The two ships were then heading courses on which several experienced seafaring witnesses testified

they would have properly passed in safety port to port, when in answer to the one-blast signal from the "Imo," the "Mont Blanc" blew the fatal two-blast signal and swung to port under a starboard helm, to the Halifax side, throwing herself across the channel in front of the bows of the "Imo." Capt. Maclaine on hearing this cross signal immediately called out: "The Frenchman has given a cross signal, a collision cannot be averted."

The "Imo" immediately blew a three-blast signal, being the second three-blast signal given by her that morning, and reversed her engines full speed astern, but with the "Mont Blanc" throwing herself directly across the "Imo's" bows the collision was inevitable and could not be avoided.

The "Mont Blanc" all this time had kept forging ahead through the water. Her engines were admittedly not reversed according to some of the witnesses on board their ship until after the collision, or, according to others, certainly not more than 20 to 30 seconds before the collision.

It may be stated generally that the evidence of practically all the disinterested witnesses disclosed that the "Imo" was properly navigated and gave the proper signals and that the "Mont Blanc" was improperly navigated.

By consent the evidence adduced before the Wreck Commissioner's Court was filed to be used on the trial and only one new witness on behalf of the "Mont Blanc" was heard at the trial.

The case turned upon a question of fact. The evidence is contradictory on the main and essential facts, namely:

1, What signals were given; 2, course followed by the respective ships; 3, the actual place of collision.

The Honourable Mr. Justice Drysdale who presided at the trial, found as a fact that the collision took place on the Halifax side of the Narrows, which, by the rules of navigation at such place, is the side which the "Imo" was obliged to take, and that the collision was due to the gross negligence of the officers of the "Mont Blanc" in cutting across the bows of the "Imo," and that such action on their part was not justified under r. 27, that it was an emergency order to avoid collision. He refused to believe the witness heard at the trial.

H. McInnes, K.C., for the "Mont Blanc;" *C. J. Burchell*, K.C., for the "Imo."

CAN.

EX. C.

GENERAL TRANS-ATLANTIC CO. v. THE SHIP "IMO."

Drysdale, J.

DRYSDALE, J.:—The actions here are being tried together, viz., the Claim v. the "Imo," now lying in the harbour, and the Counter-claim v. the "Mont Blanc." The circumstances attending the collision of these two ships were investigated before me, assisted by two of the best nautical assessors in Canada, and by common consent the evidence adduced on the investigation is to be considered the evidence in this case. The only attempt to vary the evidence in the investigation, is that of one Makinney called on the trial herein. As to Makinney's evidence I have only to say that he did not impress me as throwing any light on the situation. His manner was bad and his matter worse. In short, I did not believe him. Although he professed to be an eye-witness of the collision, I am convinced that he did not add any light to the controversy. He failed to convince me that he knew what he was talking about. Notwithstanding, he professes to be an eye-witness to the collision, I am quite sure he could not place the point or place of collision within one-half a mile of the actual place of occurrence. I think this man was a belated occurrence in the enquiry and came with a story, the result of instruction, and that on behalf of the French ship. I do not believe him.

As to fault or blame for the collision I am of the opinion that it lies wholly with the "Mont Blanc." Once you settle where the collision occurred, and I think it is undoubted that it occurred on the Halifax side of mid-channel, you find the impossibility of the story of Pilot Mackay. Even if you say mid-channel the story of the French ship is absurd. The fault to my mind clearly appears to have been the result of the last order of the "Mont Blanc" when, being in her own waters on the Dartmouth side, she took a starboard helm and reached for the Halifax wharves thus throwing herself across the bow of the outcoming ship "Imo." Why this order was given I know not but I feel sure it was gross negligence and in so thinking I am supported by the advice and opinion of both nautical assessors. The order for a starboard helm and to lay a course suddenly across the harbour was justified by the officers in charge of the "Mont Blanc" as an emergency order to prevent a collision, but taking into consideration the then position of the two ships this claim will not bear investigation.

I find the "Mont Blanc" solely to blame for the collision. I refer the question of damages to the Registrar and two merchants.

Judgment accordingly.

CAN.

Ex. C.

THE KING v. THE "HARLEM."

Exchequer Court of Canada, Nova Scotia Admiralty District, Drysdale, J. December 2, 1918.

COLLISION (§ I A—3)—RESPONSIBILITY—RIGHT OF WAY—REGULATIONS—ART. 19.

A collision occurred between the "Durley Chine," bound from Halifax to Norfolk, and the "Harlem," bound from New York to Bordeaux, at 1.19 a.m. on April 22, 1917, some 65 miles southeast of Ambrose Channel lightship, off New York harbour. It was starlight, though the night was dark, and a haze was on the horizon. Just before the collision, the course of the "Durley Chine" was s. 50° w. and that of the "Harlem," s. 52° e., or at right-angles to one another, with the "Harlem" on the starboard side of the "Durley Chine."

Art. 19 of the Rules to Prevent Collision at Sea provides that when vessels are crossing so as to involve risk of collision, the vessel which has the other on her starboard side shall keep out of the way of the other.

Held, that within the meaning of said rule, the "Harlem" was a crossing ship, carrying proper regulation lights, and that being so, the "Durley Chine" was obliged to keep out of her way.

Statement.

THIS is an action brought by His Majesty the King in right of the Dominion, as owner of the ship "Durley Chine" claiming $150,000 from the ship "Harlem," for the loss of the "Durley Chine" following a collision with the defendant.

The defendant asserted a counterclaim against the master and second officer, being the practice when a ship belongs to the Crown.

By Nos. 12 and 14 of preliminary acts of plaintiffs it appears they claim among other things that: Having seen the "Harlem's" white light, and no side lights, about four points forward of starboard beam, the helm of "Durley Chine" was put hard-a-starboard and blew 2 short blasts of whistle. When the bow had swung to port about 4 points she stopped engines and immediately after reversed engines and when headway was off blew 2 long blasts of whistle. Then she saw the hull of "Harlem" low in water on starboard beam heading across bow of "Durley Chine" and the "Durley Chine" still falling off a little to port, blew 2 short blasts several times; that the "Harlem" was a crossing ship within the meaning of art. 19, of the Regulations for Preventing Collisions at Sea, and, by art. 21 of said regulations, should have kept her course and speed; that the "Harlem," being bound to keep her course and speed, improperly starboarded her helm when in sight of the "Durley Chine," thereby directing her course toward, instead of away from, the "Durley Chine"; that the "Harlem"

CAN.

EX. C.

THE KING v. THE "HARLEM."

should have stopped and reversed before the collision; that the "Harlem" was not carrying or showing proper lights according to art. 2 of said regulations. The mast head or white light, which was seen, was not of such a character as to be visible at a distance of at least five miles. The side lights were not burning, or, if burning, were defective, and were not of such a character as to be visible at a distance of at least 2 miles. The signals sounded on the whistle of the "Harlem" were not in accordance with the courses taken by the "Harlem" and were misleading and deceptive. In particular she blew three short blasts several times when her engines were not going full speed astern. Having heard apparently forward of her beam, the fog signal of the "Durley Chine," whose position was not then ascertained, the "Harlem" did not stop her engines, nor navigate with caution, as prescribed by art. 16 of said regulations.

The defendant, on the other hand, claims that when the ships were so close that collision could not be avoided by the action of the "Durley Chine" alone, the helm of the "Harlem" was put hard aport and her engines full speed astern with the requisite signal of three short blasts. As this signal was unanswered by the "Durley Chine," it was twice repeated, before being answered, and twice after; that the "Durley Chine" should have kept clear of the "Harlem" which had the right of way. The "Durley Chine" should have ported in time and passed astern of the "Harlem." The "Durley Chine" did not keep a good lookout and was going at an excessive speed, and did not alter her course to port as she should have done when it was known that the "Harlem" had her engines reversed. The "Durley Chine" did not, on approaching the "Harlem" slacken her speed or stop and reverse.

The case turns largely on the question of facts, as to whether or not the "Harlem" was carrying proper regulation lights. The respective position of the ships and their course do not seem to be seriously contested.

W. A. Henry, K.C., for plaintiff; *H. Mellish*, K.C., for defendant.

Drysdale, J.

DRYSDALE, J.:—This action arises out of a collision between the defendant ship "Harlem," and the Government boat named

the "Durley Chine." The "Harlem" was laden with munitions bound from New York to Bordeaux. The "Durley Chine" was on a voyage from Halifax to Norfolk. The collision was off New York and the "Durley Chine" was sunk.

The serious controversy here is as to the lights of the "Harlem." The "Harlem" had the right of way and the "Durley Chine" was bound to keep out of her way. The "Durley Chine" really makes her case on the allegation that the "Harlem" was not properly lighted, that is, was running under screened lights and without side lights shewing. I find against this allegation: and I find that the "Harlem" before and at the time of the collision was carrying proper regulation lights. I believe the officer of the "Harlem" in this connection. I think the "Durley Chine" solely to blame for the collision. There was no reasonable excuse for such steamer not keeping out of the way of the "Harlem" as she was bound to do.

I find the "Durley Chine" solely to blame for the collision in question here and direct a decree accordingly.

Judgment accordingly.

STADDON v. LIVERPOOL-MANITOBA ASSURANCE Co.

Ontario Supreme Court, Appellate Division, Mulock, C.J.Ex., Riddell, Sutherland, and Kelly, JJ. December 20, 1918.

INSURANCE (§ III D—65A)—ASSIGNMENT OF INSURED PROPERTY—WRITTEN PERMISSION OF COMPANY NOT ENDORSED ON POLICY—VALIDITY—ONT. INSURANCE ACT.

Where insured property is assigned without the written permission of the insurance company being endorsed on the policy, the policy becomes void under statutory condition 3 of the Ontario Insurance Act, R.S.O. 1914, c. 183, s. 194.

Statement.

APPEAL by the plaintiff from the judgment of the Judge of the County Court of the County of Essex dismissing an action brought in that Court to recover the amount of a loss by fire alleged to have been insured against by the defendant company. A policy was issued by the defendant company; but the company pleaded that the policy was void by reason of breaches of conditions. Affirmed.

W. A. Smith, for appellant.

R. S. Robertson, for the defendant company, respondent.

Mulock, C.J.Ex.

MULOCK, C.J. Ex.:—This is an appeal from the judgment of the Judge of the County Court of the County of Essex dismissing the action. The material facts are as follows:—

CAN.

S. C.

STADDON v. LIVERPOOL MANITOBA ASSURANCE CO.

Mulock, C.J.Ex.

By a policy of insurance, dated the 30th July, 1914, the defendant company insured one John Griffin, his heirs, executors or administrators, for three years, to the amount of $800, against loss or damage by fire on a frame dwelling situate on land owned by Griffin. After the issue of the policy, Griffin sold and conveyed the lands, including the building, in fee simple, to the Caskey-Kamer Realty Company, which reconveyed the same by mortgage to Griffin to secure payment of $850, part of the purchase-price.

Thereafter the Caskey-Kamer Realty Company sold and conveyed its equity of redemption in the lands to one Sova, and later Sova sold and conveyed the same to one Pulford. To none of these conveyances did the defendant company give its written permission. On the 27th October, 1915, Griffin assigned to Pulford, the then owner of the equity of redemption, the policy of insurance and all benefits thereunder, by an assignment in writing endorsed on the policy and worded as follows:—

"For value received, I hereby transfer, assign, and set over unto Charles Pulford, of Sandwich West (the purchaser), all my right, title, and interest in this policy of insurance and all benefits and advantages to be derived therefrom, with loss if any payable to me as my interest may appear.

"Witness my hand at Windsor, Ontario, this 27th day of October, 1915.

"John Griffin."

Beneath this assignment, the company, by its agent, consented to such assignment, by endorsement on the policy, in the following words:—

"The Liverpool-Manitoba Assurance Company hereby consents to the above assignment, dated October 27th, 1915, by John Griffin, of Windsor, Ont., interest in this policy to Charles Pulford, present owner, subject nevertheless to all the terms and conditions herein contained, with loss if any payable to said John Griffin as his interest may appear. P. Hangeld.

"October 27th, 1915. "Manager."

Subsequently Pulford conveyed the lands, subject to Griffin's mortgage, to Thomas and W. Affleck, and they conveyed the same to the plaintiff. The written consent of the defendant company was not given to either of the two last mentioned conveyances.

On the 12th October, 1916, the building was totally destroyed by fire, and the plaintiff applied to the defendant company for

payment of the loss, but the company refused payment, on the ground that the insured property had been assigned without the written consent of the company, and that therefore the policy had become void under the terms of the third statutory condition, which is as follows:—

"If the property insured is assigned without a written permission endorsed hereon by an agent of the company duly authorised for such purpose, the policy shall thereby become void; but this condition does not apply to change of title by succession or by the operation of the law, or by reason of death."

On the company's refusal to pay the insurance moneys, the plaintiff paid to Griffin the amount owing upon his mortgage, and obtained from him an assignment of his interest in the policy and in all moneys payable thereunder, and as such assignee he now seeks to recover from the defendant company the sum of $800 mentioned in the policy.

The learned trial Judge, in my opinion, rightly decided the case. It is unnecessary to determine whether, in view of the consent given by the company to the assignment of the policy by Griffin to Pulford, the company's liability ceased upon the conveyance of the assured premises by Griffin to the Caskey-Kamer Realty Company. But for the subsequent assignment of the policy and the consent thereto of the company, the conveyance of the insured premises to the Caskey-Kamer Realty Company terminated the insurance contract created by the policy. The view most favourable to the plaintiff is that the effect of the subsequent assignment of the policy and the company's consent thereto was to create an insurance contract with Pulford as the assured, with loss payable to Griffin as his interest might appear.

With this as a starting point, the question is, what was the effect of the subsequent conveyance of the lands by Pulford to Thomas and W. Affleck subject to the mortgage to Griffin? By this conveyance Pulford denuded himself of all interest in the insured building. The company's contract was to the effect that the assured, to the extent of $800, should suffer no loss or damage, that is, the company would indemnify him in respect of loss or damage by fire to his building to the extent of $800. Having prior to the fire parted with all interest in the building, he suffered no loss or damage by its destruction, and therefore has no claim for indemnity, and is not entitled to maintain this action. Nor

ONT.

S. C.

STADDON v. LIVERPOOL MANITOBA ASSURANCE CO.

Mulock, C.J.Ex.

does the plaintiff stand in any better position than the assured. By the terms of the company's assent to the assignment of the policy to Pulford, with loss payable to Griffin, the latter became entitled simply to intercept for his own benefit moneys otherwise recoverable by Pulford; and, inasmuch as Pulford, having sustained no loss, cannot recover, neither can Griffin, whose title is derived from Pulford, nor can the plaintiff, whose title is derived from Griffin.

For these reasons, I think this appeal should be dismissed with costs.

Sutherland, J.

SUTHERLAND, J., agreed with Mulock, C.J. Ex.

Riddell, J.

RIDDELL, J.:—This is an appeal by the plaintiff from the judgment of the County Court of the County of Essex. The material facts are few and of frequent occurrence, and the law should be quite clear. By reason of the importance of the matters submitted we have thought it proper to reconsider the law. The facts (some of them immaterial) are as follows:—

1. On the 30th July, 1914, the defendant, a fire insurance company, issued a policy of insurance to John Griffin, agreeing to pay him, his heirs, executors or administrators, for damage up to $800 by fire on a certain frame building (described) until noon of the 15th July, 1917. The policy contained the Ontario statutory conditions.

2. On the 9th September, 1914, Griffin conveyed the property on which the house stood, and accordingly the house itself, by a statutory deed, to the Laskey-Kamer Realty Company, for $1,350 (registered on the 31st August, 1916, as No. 14023), taking from the purchasers a mortgage of the same date for $850 for the balance of the purchase-money, registered on the 25th November, 1914, as No. 12120. These transactions were without express notice to the company, and the company gave no consent, written or otherwise, to the transfer, but Gagnier, the company's agent at Windsor, was the conveyancer who drew the documents. Nothing was said about the insurance, although Gagnier knew of its existence.

3. The Laskey-Kamer Realty Company sold to one Sauvé (the date is not given), without notice to the company, but with the knowledge of Griffin. Griffin was told by one Belleperche (a sub-agent under Gagnier, the company's agent at Windsor) to notify

the company; he went to Gagnier's office and notified a lady clerk there and was told to bring in his policy.

4. Sauvé then sold to Charles Pulford (the date is not expressly stated, but apparently the 27th October, 1915). Griffin took the policy into Gagnier's office the same day as this transfer.

5. On the 27th October, 1915, in Gagnier's office, Griffin signed a transfer: "For value received, I hereby transfer, assign, and set over unto Charles Pulford, of Sandwich West (the purchaser), all my right, title, and interest in this policy of insurance and all the benefits and advantages to be derived therefrom, with loss if any payable to me as my interest may appear."

The agent, under authority given by the company, then signed a consent in the following terms:—

"The Liverpool-Manitoba Assurance Company hereby consents to the above assignment, dated October 27th, 1915, by John Griffin, of Windsor, Ont., interest in this policy to Charles Pulford, present owner, subject nevertheless to all the terms and conditions herein contained, with loss if any payable to said John Griffin as his interest may appear."

Griffin retained the policy in his possession. At this time Gagnier did not know of the mesne conveyance to Sauvé.

6. Pulford conveyed in fee subject to the mortgage to N. and T. Affleck (date not given.)

7. On the 4th August, 1916, the Afflecks conveyed to the plaintiff, subject to the mortgage to Griffin. Neither of these transfers was notified to or known by the company or its agent.

8. On the 12th October, 1916, a fire occurred, occasioning a total loss.

9. Griffin notified Gagnier, who repudiated the liability of the company, on the ground of change of ownership. His position was approved by the company.

10. The plaintiff paid off Griffin's mortgage.

11. On the 26th January, 1917, Griffin executed a formal assignment to the plaintiff of "all my right, title, and interest in the annexed policy of insurance . . . and all benefit and advantage to be derived therefrom and all moneys due or accruing due to me from the said company under said policy or otherwise."

12. The company refusing to pay, the writ in this action was issued on the 21st April, 1917.

ONT.

S. C.

STADDON v. LIVERPOOL MANITOBA ASSURANCE CO.

Riddell, J.

The very careful arguments presented to us require the consideration of four questions:—

A. The effect of the conveyances before consent of the company given after the assignment of the policy to Pulford.

B. The effect of such assignment and consent.

C. The effect of the subsequent deeds of conveyance.

D. And the effect of the assignment by Griffin to the plaintiff.

A. It was confidently argued that the policy was not voided by the conveyances to the realty company, to Sauvé, and to Pulford, because Griffin retained an interest in the property under his mortgage: and *Wade* v. *Rochester German Fire Insurance Co.*, (1911), 23 O.L.R. 635, was cited for that proposition.

There it was held that an assignment for the benefit of creditors was not an assignment within the meaning of statutory condition 3, on the principle that the kind of assignment intended by the Act is one by which the assignor is divested of all right, title, and interest in the property assured. But in this, as in the earlier case in the Supreme Court of Canada, *McQueen* v. *Phœnix Mutual Fire Insurance Co.* (1880), 4 Can. S.C.R. 660, the *ratio decidendi* was that, while the assured transferred the legal title, his real pecuniary interest was not altered. "If the goods were destroyed by fire the creditors would receive their payment, and plaintiff so be relieved from his indebtedness, and plaintiff would receive the surplus; if the goods had not been insured the whole loss would fall on the plaintiff, as he would lose his goods and still have to discharge his indebtedness to his creditors; so, though the assignment was made . . . if the goods were destroyed without insurance, plaintiff would be in the same position, and if destroyed . . . the result is just the same as if destroyed . . . before assignment, for . . . creditors will be entitled to receive only what is due them, and plaintiff will get the surplus. So that, as plaintiff was at the time of the making of the interim receipt interested to the whole value of the property and to the full amount assured in case of loss, so was he interested after the assignment and at the time of the loss:" *per* Ritchie, C.J., 4 Can. S.C.R. at pp. 676, 677.

"Although the assignors part with the title to the extent of passing the legal right to the assignee, they do not part with all their right and interest in it. They still retain rights and interests in the

property, and . . . there is nothing to prevent the assignors, if their financial circumstances become so bettered as to enable them to do so, upon paying all claims of creditors and satisfying all demands properly arising under the instrument of assignment, from requiring the assignee to retransfer the property in specie. See *Ball* v. *Tennant* (1894), 21 A.R. (Ont.) 602, at p. 610;" *Wade* v. *Rochester German Fire Insurance Co.*, 23 O.L.R. 635, at p. 640, *per* Moss, C.J.O.

It will be seen that these cases proceed upon the principle that the assignor is still in equity the owner of the assigned property, subject to a charge.

There is nothing of this kind where the owner of land sells it and takes a mortgage for part (or the whole) of the purchase-money; he remains or becomes, if you will, the owner in law, but ceases to be the owner in equity. He can by no means force his assignee to reconvey to him; the only interest he has in the land is to be paid his money; there is a complete change in the title. No doubt, a mortgagee has an insurable interest in such property, but his interest and his insurance are wholly different from those of an owner; for example, if a mortgagee insures his interest as mortgagee, the company upon payment of the loss becomes entitled to be subrogated to his rights against the mortgagor.

On principle, I think the assignments here were such as to bring the case under statutory condition 3.

No case was cited to us by either counsel on this point. It does not seem to have come up in our Courts, but it is not destitute of American authority. These seem to be all in the same sense: *Savage* v. *Howard Insurance Co.* (1873), 52 N.Y. 502; *Miner* v. *Judson* (1874), 2 Hun (N.Y.) 441; *Abbott* v. *Hampden Mutual Fire Insurance Co.* (1849), 30 Me. 414; *Home Mutual Fire Insurance Co. of Chicago* v. *Hauslein* (1871), 60 Ill. 521; *Dailey* v. *Westchester Fire Insurance Co.* (1881), 131 Mass. 173.

Nor will the existence (even if any did or could exist) of an equitable lien be of assistance: *California State Bank* v. *Hamburg-Bremen Insurance Co.* (1886), 71 Cal. 11.

I think, therefore, that statutory condition 3 applies, and that the company was relieved by the conveyances to the realty company and Sauvé.

B. The policy was rendered null and void, but any claim under it might still be paid, at the option of the company: Ontario

ONT.

S. C.

STADDON v. LIVERPOOL MANITOBA ASSURANCE CO.

Riddell, J.

Insurance Act, R.S.O. 1914, ch. 183, sec. 198; in other words, the company might treat the contract as subsisting.

By its consent to the assignment, the company recognised that Pulford was the owner of the property; on its own form it calls him "the purchaser" and "present owner," and recognises the policy as still existing, with the name of Pulford substituted for that of Griffin. Pulford is "the insured," and it is to him, his heirs, executors or administrators, that the money is now to be paid. It seems to me that it is of no consequence whether this should be called an entirely new contract or whether the doctrine of novation could be invoked; in any case it is a policy in favour of Pulford as the insured.

The provision "with loss if any payable to said John Griffin as his interest may appear" simply authorises the company to pay to Griffin the amount of his interest in the property, i.e., the amount of his mortgage: *McQueen* v. *Phœnix Insurance Co.*, 4 Can. S.C.R. 660; it in no way makes the policy double, insuring Griffin to the amount of his mortgage charge and Pulford for the remainder of the insurance moneys: *Mitchell* v. *London Ass'ce Co.*, (1888), 15 A.R. (Ont.) 262; *Livingstone* v. *Western Ins. Co.*, (1869), 16 Gr. 9; *Caldwell* v. *Stadacona Fire and Life Insurance Co.*, (1883), 11 Can. S.C.R. 212. There would be no difficulty in drawing a policy with that effect, a double policy; but it is sufficient to say that it would be different from this policy, a single policy.

Whether what was done be called novation or the formation of a wholly new contract, the effect is the same. Pulford is insured, loss payable to Griffin to the extent of his interest; in other words, the money (to the extent of Griffin's interest), which would without this provision as to payment to him have been payable to Pulford, is to be paid to Griffin. It is payable to Griffin because it would otherwise be payable to Pulford; and he has directed the payment to Griffin.

C. That the conveyances subsequent to the written consent made the policy void as against the owner of the equity of redemption cannot be disputed. Pulford had an interest at the time of the fire, and neither of his grantees, the Afflecks, nor their grantee, the plaintiff, is contracted with: none of them is an heir, executor or administrator, of Pulford. But it is contended that Griffin is not

affected by the assignments. That is on the hypothesis that Griffin is in some way an insured. We have seen that that view cannot be supported. Authority on that point is not wanting. The Court of Error and Appeal in this Province expressly held, in *Livingstone* v. *Western Insurance Co.*, 16 Gr. 9, that, where a fire policy in favour of a mortgagor contained a clause providing for the loss being payable to the mortgagee, the mortgagee's claim was destroyed by a breach of the conditions of the policy which would void the policy as against the mortgagor, i.e., the insured. *Chishom* v. *Provincial Insurance Co.* (1869), 20 U.C.C.P. 11, is to much the same effect. In Quebec there is *Migner* v. *St. Lawrence Fire Ins. Co.* (1900), 17 Que. S.C. 586 and 10 Que. K.B. 122. Then we have the recent decision of the present Chief Justice of Ontario in *Pinhey* v. *Mercantile Fire Insurance Co.* (1901), 2 O.L.R. 296.

It is plain on both principle and authority that Griffin was affected by the conduct of the owner of the equity of redemption; that, at the time of the fire, the owner had no claim, and accordingly Griffin had no claim.

D. The only possible hypothesis on which it was or could be argued that Griffin passed anything by the assignment to the plaintiff was that of an insurance of his interest as mortgagee, and not affected by an assignment of the property. That we have already seen was not existent; it was the property, not the interest, of the mortgagee which was insured. Gwynne, J., shews the difference in the *Chishom* case, 20 U.C.C.P. at p. 13. But, even if there was such an insurance, the company, on being called on to pay the amount of the loss to Griffin, would be entitled to the advantage of the mortgage.

(Of course, in the case of insurance upon the property payable to a mortgagee as his interest may appear, the mortgagor, having effected the insurance, has the right, in paying off the mortgage, to have the advantage of the insurance.)

The advantage to which it would be thus entitled Griffin disabled himself from giving the company before the assignment, and thereby lost any right he might otherwise have had. Even had he not discharged his mortgage, the company, on paying to him the amount of the mortgage, would become entitled to receive as

ONT.
S. C.
STADDON v. LIVERPOOL MANITOBA ASSURANCE CO.
Kelly, J.

much from the plaintiff: *Savage* v. *Howard Insurance Co.*, 52 N.Y. at p. 508. This would leave matters as they were; in no case could the plaintiff be advantaged.

The appeal should be dismissed with costs.

KELLY, J.:—In my opinion the result arrived at by the learned Judge who tried this action is correct.

Number 3 of the statutory conditions, which are to be printed on every policy (the Ontario Insurance Act, R.S.O. 1914, ch. 183, sec. 194), is in positive language:—

"If the property insured is assigned without a written permission endorsed hereon by an agent of the company duly authorised for such purpose, the policy shall thereby become void; but this condition does not apply to change of title by succession or by the operation of the law, or by reason of death."

Here the change of title was not by succession or by the operation of the law or by reason of death. Whatever may have been the effect of the consent by the respondent's agent to the assignment by Griffin to Pulford on the 27th October, 1915, need not, in the view I take of the matter, be now considered; the assignments or transfers subsequently made, without notice to or consent by the company, having the effect of rendering the policy void under statutory condition 3, not only as against the plaintiff but as against Griffin, the mortgagee, as well, whose position was not that of a mortgagee holding a contract of insurance of his interest as mortgagee, but as a holder of a mortgage with an authorisation to the company to pay to him out of the insurance moneys to the extent of his interest.

Counsel for the appellant contended on the argument that the respondent, by consenting to the transfer from Griffin to Pulford, waived the right to object; that, however, could not apply to the case of the subsequent transfers, which were made without the company's consent.

Moreover, the policy being void under the statutory condition referred to, and Griffin not being insured as mortgagee, the plaintiff's position is not improved by the assignment to him by Griffin of all the latter's right, title, and interest in the policy and all benefit and advantage to be derived therefrom, and all moneys due and accruing due to the assignor from the company "under said policy or otherwise."

ONT.

S. C.

STADDON v. LIVERPOOL MANITOBA ASSURANCE CO.

Kelly, J.

There is undoubtedly laxity at times in the matter of obtaining the consent of insurance companies upon a conveyance or transfer of property on which insurance exists, and the result of the present litigation may in some quarters cause surprise.

I am of opinion, however, that the judgment appealed from is based upon authority, and that it should be sustained, and the appeal be dismissed with costs. *Appeal dismissed.*

CAN.

Ex. C.

SINCENNES-McNAUGHTON LINE Ltd. v. McCORMICK and THE UNION LUMBER Co.

Exchequer Court of Canada, Maclennan, D.L.J. October 24, 1918.

TOWAGE (§ I—1)—LOSS OF TOW—RESPONSIBILITY—PRIVITY OF OWNER—LIMITATION OF LIABILITY—SS. 921 AND 922 OF CANADA SHIPPING ACT, R.S.C. c. 113.

In an action seeking a declaration of limitation of liability for negligence in the performance of a towing contract, the owner of the tugs in question established that his vessels had been inspected according to law and their machinery and equipment were in good condition at the time of the towage. It was, however, proved by defendants that a key-pin had fallen from the steering gear of one of the tugs and that there was some want of reasonable promptitude, foresight and seamanship on the part of the master and crew.

Held, that the dropping out of the key-pin from the steering gear was quite unforeseen and was not due to any neglect or want of supervision on the part of the plaintiff or their superintendent, and the accident having been due to the fault and negligence of the crews on board the tugs constituting the tow and having been caused without plaintiff's actual fault or privity, the plaintiff was entitled to an order limiting its liability.

Statement.

THIS is a case for limitation of liability.

The plaintiff by its statement of claim alleges that before and at the time of the grounding hereinafter stated, the plaintiff was the owner of the tug "Myra," registered at Montreal, and of the tug "Long Sault," registered at Sorel, P.Q., the defendant, Robert R. McCormick, was the registered owner of the barge "Middlesex," and the Union Lumber Company, Limited, was the registered owner of the schooner "Arthur." On the morning of August 13, 1917, the barge "Middlesex," schooner "Arthur" and the barge "Stuart H. Dunn," were descending the River St. Lawrence made fast abreast, in tow of the tug "Myra." When in the Rapide Plat, a short distance above Morrisburg, the steam steering gear of the said tug suddenly, and without warning, failed to operate, and the barge "Middlesex" and the schooner "Arthur" grounded in the shoal water on the south side of the channel. The

CAN.

EX. C.

SINCENNES-MCNAUGHTON LINE LTD. v. MCCORMICK AND THE UNION LUMBER CO.

barge "Dunn" struck the rocks, seriously damaging her hull, but did not ground, and subsequently succeeded in reaching the wharf at the foot of the Rapide Plat Canal. The barge "Middlesex" and the schooner "Arthur," with their cargoes, were subsequently salvaged. There was no loss of life or personal injury caused by reason of the said grounding.

At the time of the accident, the tug "Long Sault" was made fast alongside the tug "Myra," but was taking no part in the towing, and was not responsible for same.

On October 3, 1917, the defendant, Robert R. McCormick, as the owner of the barge "Middlesex," and the defendant, Union Lumber Company, Limited, as the owner of the schooner "Arthur," each instituted an action *in personam*, in this Court, against the plaintiff, claiming damages in respect to the said accident. Defendants herein alleged that plaintiff was the owner of the tugs mentioned, and that said vessels were, at the time, in tow of both of said tugs. These actions were tried together, and on the same evidence, on February 20, 1918, and following day; and, on April 5, 1918, judgment was rendered in both cases, condemning the present plaintiff personally, in the amounts to be found due to the defendants, Robert R. McCormick and the Union Lumber Company, Limited, and in costs (1918), 45 D.L.R. 392, 18 Can. Ex. 357.

The plaintiff admits that the said grounding, and consequent loss and damage, was caused by the improper navigation of the tug "Myra"; but denies that the same was caused by any improper navigation of the tug "Long Sault"; said grounding and consequent loss and damage occurred without the actual fault or privity of the plaintiff; and further says that its liability should, consequently, be limited to an aggregate amount not exceeding $38.92 for each ton of the gross tonnage of the tug "Myra," without deduction on account of engine room according to the provisions of the Act; and that the "Long Sault" should not be charged.

By their defence, the defendants deny most of the allegations of the plaintiff and specially assert that the "Long Sault" was assisting in the towing operations and should be condemned along with the "Myra"; they further say that the damage occurred through the actual fault and privity of the owners and further in

substance say that the tiller was improper and was not equipped so as to be capable of being steered by hand; there was no alternative hand steering gear; not supplied with proper spare parts and the tiller was not provided with necessary relieving tackle; and also claim that the "Myra" was improperly manned, being without the necessary chief engineer; and was not the suitable size for towing; that they fail to have the tugs in question periodically overhauled, and that there was no one on board capable of dealing with emergency.

MACLENNAN, D.L.J.:—On April 5, 1918, the present defendants obtained judgment in this Court against the present plaintiff for damages and costs arising out of the failure of the plaintiff to properly perform a towage contract, as a result of which a barge and schooner belonging to the present defendants went ashore on August 13, 1917, in the St. Lawrence River, near Morrisburg, Ontario, 45 D.L.R. 392, 18 Can. Ex. 357.

On the occasion in question the tow was in charge of the tugs "Myra" and "Long Sault," owned and operated by the present plaintiff. This action is taken for declaration of limitation of liability of the plaintiff upon the allegation that the accident happened by reason of improper navigation of the tugs without the plaintiff's actual fault or privity.

The defendants deny that the accident happened without plaintiff's actual fault and privity and allege that the tugs were unseaworthy in point of view of steering equipment and crew. On the occasion of the accident, the plaintiff's two tugs "Myra" and "Long Sault" were engaged in towing a barge belonging to the defendant McCormick, a schooner belonging to the defendant The Union Lumber Company, Limited, and another barge, when at a short distance above Morrisburg the steam steering gear of the tug "Myra" suddenly and without warning failed to operate owing to the dropping out of a key-pin on shaft of the steering apparatus in the wheel house. The tow lines from the three tows were all attached to the tug "Myra," and the tug "Long Sault" was lashed to the port side of the "Myra."

On the trial of the original actions, out of which present cause arises, the court held that the accident was caused by the failure of the captain and pilot of the "Long Sault" to assist the tow by

CAN.

EX. C.

SINCENNES-MCNAUGHTON LINE LTD. v. MCCORMICK AND THE UNION LUMBER CO.

Maclennan, D.L.J.

taking over the tow lines, and by the failure of the mate of the "Myra" to operate by hand the lever controlling the valves of the small engine which did the steering, and in the reasons for judgment the court held that the grounding of the tow was caused by the want of reasonable promptitude, foresight and seamanship on the part of the master and crew of the two tugs when and after the dangerous situation arose. The owners of the tugs were in no way to blame for the fault and negligence of the two crews. The absence of the chief engineer of the "Myra" in no way contributed to the accident. The steering apparatus on the tug "Myra" at the commencement of the season had passed through the hands of Alphonse Desrochers, the foreman and shore superintendent of the company plaintiff at its shops at Sorel, and on May 14, 1917, F. X. Hamelin, inspector of boilers and machinery for the Department of Marine and Fisheries, issued a certificate that the engine, boiler and machinery of the tug were in conformity with the provisions of the Canada Shipping Act. The dropping out of the key-pin was quite unforeseen and was not due to any neglect or want of supervision on the part of the plaintiff's superintendent in charge of the equipment. The accident to the tows having been due to the fault and negligence of the crews on board the tugs and in charge of their navigation, the plaintiff is entitled to limit its liability. Both tugs were involved in the accident and their combined tonnage must be taken into account. The statutory limitation for the combined tonnage of the tugs "Myra" and "Long Sault" amounts to $5,516.90, and there will be judgment limiting the plaintiff's liability accordingly, and directing the plaintiff to pay into court the said sum of $5,516.90, with interest thereon from the date of the accident on August 13, 1917. In accordance with the practice in cases of this kind the plaintiff will have to pay the costs of the two defendants.

The Registrar is also directed to give public notice of the deposit when made calling upon all parties having claims against the fund to file their claims with him.

Judgment accordingly.

Both defendants appealed to the Supreme Court of Canada. Appeals were dismissed.

CANADIAN PACIFIC RAILWAY Co. v. WORKMEN'S COMPENSATION BOARD.

B. C.

C. A.

British Columbia Court of Appeal, Macdonald, C.J.A., Martin, Galliher, McPhillips and Eberts, JJ.A. May 2, 1919.

STATUTES (§ I C—20)—WORKMEN'S COMPENSATION ACT, B.C.—PAYMENT OF COMPENSATION—ACCIDENT TO SAILORS ON SHIP IN FOREIGN WATERS—CONSTITUTIONALITY.

The Workmen's Compensation Act, 1916, stats. of British Columbia, 6 Geo. V. c. 77, in so far as it purports to warrant the payment of compensation to seamen or their dependants for accidents or death by accidents upon ships in foreign waters is *ultra vires* the Legislative Assembly of the Province of British Columbia.

Statement.

APPEAL by the defendant from the trial judgment in an action to restrain the defendants from paying compensation to the dependants of sailors who lost their lives when their ship sank in foreign waters. Affirmed.

S. S. Taylor, K.C., for appellant; *E. P. Davis*, K.C., and *J. E. McMullen*, for respondents.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—The plaintiffs, repondents in this appeal, sue to restrain the defendants, the Workmen's Compensation Board, from paying compensation to the dependants of members of the crew of the S.S. "Princess Sophia," who lost their lives when the ship sank in Alaskan waters in October last. They submit that ss. 8, 9 and 12 of the Workmen's Compensation Act, c. 77 of the provincial statutes of 1916, are *ultra vires* the legislature to enact.

It may be useful first to refer to some of the provisions of the Act bearing upon the present dispute. Employers are divided into several classes. The respondents are in class No. 10, and in this class are included 6 other companies engaged in enterprises wholly or partly within the province. The appellants were authorised to collect from the members of this class moneys which, when in hand, were to constitute a fund out of which they might pay to a workman, in the employ of any member of the class, compensation for injuries suffered by him arising out of his employment or to his dependants, as compensation, in case of his death. The Board has collected, pursuant to the Act, a fund out of which they will, if not enjoined therefrom, compensate the said dependants. The fund is obtained by assessments levied on the pay-rolls of the several members of the class. As, in my opinion, s. 8 (1), clause (*b*) of the Act, the section under which the Board asserts the right to pay the compensation in question, was *ultra*

B. C.

C. A.

CANADIAN PACIFIC R. CO. v. WORKMEN'S COMPENSATION BOARD.

Macdonald, C.J.A.

vires, it becomes unnecessary to consider other questions raised in argument. That section, so far as it is material to the case, reads as follows:—

> Where an accident happens while the workman is employed elsewhere than in the province, which would entitle him or his dependants to compensation under this part, if it had happened in the province, the workman or his dependant shall be entitled to compensation under this part (*b*) if the accident happens on a steamship or vessel or on a railway and the workman is a resident of the province and the nature of the employment is such that in the course of the work or service, which the workman performs, it is required to be performed both within and without the province.

The validity of this legislation is maintained by counsel, on behalf of the appellants, as falling within provincial legislative powers under classes 2, 13 and 16 of s. 92 of the British North America Act. Counsel advanced two propositions: (1) That the legislation is in respect of civil rights in the province or of matters of merely a local or private nature in the province, and (2) that in any case the compensation provided is payable out of the proceeds of taxation for provincial purposes authorised under clause 2 of the said s. 92. In short, said s. 8 imposes on the employer, as an incident of the contract between himself and persons resident in the province, an obligation to compensate his workmen, hired in the province, or his dependants in respect of injury or loss of life suffered outside the province. The fact that they are not to be entitled to compensation unless the workman is required by his contract to perform services within the province as well as without the province, cannot, I think, affect the question. The right which the legislature purports to confer on the workman and his dependants, is unquestionably a civil right, but I cannot think that it is a civil right *in the province* or a matter of merely a local or private nature *in the province*. The accident, out of which the rights of the said dependants spring, may give rise to civil rights in the foreign country in which it occurred. Whether, in this instance, it gave such, under the laws of Alaska, or not, cannot, I think, matter, since the rights given by s. 8 are given irrespective of country, and hence irrespective of foreign laws, which may vary widely in different countries. The right is a substantive one, not merely a legal remedy for a right otherwise recognised. Even when it is a matter of the remedy merely, while suit may be brought in one jurisdiction in respect of a tort

committed in another, the action will not be entertained in an English court if the Act complained of were justifiable under the laws of the foreign country in which it was committed. The legislature has, by s. 9 of the Workmen's Compensation Act, preserved the workman's right to treat the accident as one giving him a civil right in the foreign country. He may elect to take what the foreign law gives him or to take under the Act. Had that reservation not been made, leaving no option but to take under the Act, as is the case when the accident happens within the province, could it be said that the legislature had not legislated in respect to a civil right which the workmen enjoyed or might enjoy under the laws of another country? Now, while the workmen's extra-provincial rights are preserved those of the employer are not. He is given no option to have his obligations measured by the foreign law. I, therefore, think that s. 8 cannot be supported by reference to the powers conferred under class 13 or 16.

This brings me to the second branch of the argument, which was directed to the submission of counsel for the respondent that the fund in question was the proceeds of direct taxation imposed in order to the raising of a revenue for provincial purposes pursuant to the powers conferred under class 2 of s. 92 of the British North America Act. To decide this question, one must look at the substance of the legislation. It appears to me that the Workmen's Compensation Board is merely the intermediary between the employers and their workmen collectively. The Board is both judge and sheriff. It pronounces judgment and carries it into execution. It is a new court in substitution, to the extent of jurisdiction, of the ordinary courts with powers in part judicial and in part ministerial. The powers which it exercises to levy rates are powers relating to civil rights and cannot, I think, in any true sense of the word, be called taxation "in order to the raising of a revenue for provincial purposes."

This legislation was compared in argument to enactments of poor laws and also of state insurance. I do not think it is in the nature of either. No doubt the legislature has power to provide for the support of the needy whether they had lost their means of support in the province or in a foreign country. Being resident in the province the legislature could make due provision for their wants. Such legislation would not involve interference with civil

B. C.

C. A.

CANADIAN PACIFIC R. CO. v. WORKMEN'S COMPENSATION BOARD.

McPhillips, J.A.

rights beyond the boundaries of the province. It would not impose legal obligations of the nature imposed upon the respondents in this appeal, founded, as they are, not on residence or ownership of property in the province, but on the relationship of master and servant without the province.

I think the appeal must be dismissed.

MARTIN and GALLIHER, JJ.A., would dismiss the appeal.

McPHILLIPS, J.A. (dissenting):—This appeal, it may be said, raises a question of great public importance and involves the determination of whether the Workmen's Compensation Act (c. 77, statutes of B.C., 6 Geo. V., 1916) is *intra vires* of the powers of the Legislative Assembly of the Province of British Columbia in so far as it purports to warrant the payment of compensation to seamen, or dependants of seamen, for accidents, or death by accidents, upon ships in foreign waters, and specifically to the dependants of the crew of the steamship "Princess Sophia," which foundered in Alaskan waters (U.S.A.), all hands being lost. The Act in terms applies to employment outside as well as within the province (ss. 8 and 9) and the cause of the accident need not be one of negligence imputable to the employer. The accident may be occasioned wholly without the default of the employer, and compensation is payable, save only that it is provided—s. 6 (3):—

(3) Where the injury is attributable solely to the serious and wilful misconduct of the workman, no compensation shall be payable unless the injury results in death or serious and permanent disablement.

Nothing turns upon the above quoted provision as all suffered death in the accident that calls for consideration in the present case.

The ship went down in Alaskan waters, *i.e.*, waters of the United States of America, the ship there meeting with the mishap which engulfed it leaving no survivors. Viscount Haldane, in *Canadian Pacific R. Co.* v. *Parent*, 33 D.L.R. 12, at p. 18, [1917] A.C. 195, 20 Can. Ry. Cas. 141, said:—

No doubt the Quebec legislature could impose many obligations in respect of acts done outside the province on persons domiciled within its jurisdiction as the railway company may have been by reason of having its head office at Montreal. But in the case of art. 1056 there does not appear to exist any sufficient reason for holding that it has intended to do so, and, by so doing, to place claims for torts committed outside Quebec on a footing differing from that on which the general rule of private international law already referred to would place them.

B. C.

C. A.

CANADIAN PACIFIC R. CO. v. WORKMEN'S COMPENSATION BOARD.

McPhillips, J.A.

Viscount Haldane, in the *Parent* case, referred to *Machado* v. *Fontes*, [1897] 2 Q.B. 231, 66 L.J.Q.B. 542, but it cannot be said that their Lordships of the Privy Council adopted or approved *in toto* that decision. Rigby, L.J., in the *Machado* case, said—and the language is applicable to the present case:—

> We start, then, from this: that the act in question is *primâ facie* actionable here, and the only thing we have to do is to see whether there is any peremptory bar to our jurisdiction arising from the fact that the act we are dealing with is authorised or innocent or excusable in the country where it was committed. If we cannot see that . . . . the appeal must be allowed.

To entitle compensation being given under the Act it is not essential that a tort should be committed—the accident alone, unaccompanied by any wrongful act, is sufficient. Still, were that to be a determining factor, upon the evidence it cannot be said that the accident, the loss of the ship and the death of the workmen, was without fault, *i.e.*, that it is not common ground or an assumed fact for the purposes of this appeal. The headnote of the *Machado* case, as it appears in the Law Journal Report, reads as follows:—

> In order that an action may lie between parties in this country in respect of an act committed in a foreign country the act must be one which, if committed in this country, would be actionable and one which is not innocent according to the law of the country where it was committed, but it is not necessary that it should be the subject of civil proceedings in that country.

It is not an admitted fact that the happening—the loss of the ship under the circumstances—was an innocent happening according to the law of the United States. Therefore, our premise cannot be that, on that account, there is no liability or compensation payable. The inquiry must proceed, it seems to me, with the assumption that the happening was an innocent happening abroad and without the Province of British Columbia and not justifiable under the laws of the United States or the laws of the Territory of Alaska in the U.S. of America. Of course, the real question is, whether the Act in question can be said to be *intra vires* in any respect, where the accident has taken place without the Province of British Columbia.

Now, as to the point, it cannot be said that the Legislature of British Columbia did not advisedly, and in apt words, intend to provide for compensation for acts without the province—therefore, the reasoned judgment of Viscount Haldane upon this point, when dealing with the Quebec Code in the *Parent* case, cannot be

B. C.

C. A.

CANADIAN PACIFIC R. CO. v. WORKMEN'S COMPENSATION BOARD.

McPhillips, J.A.

said to be in the way of arriving at the contrary conclusion in the present case, *i.e.*, that the B.C. legislature has imposed obligations in respect of accidents occurring outside the province or "acts done outside the province on persons domiciled within its jurisdiction" (Viscount Haldane in the *Parent* case, *supra*). Upon the pleadings no point is made that the respondent is not domiciled within the jurisdiction of the B.C. legislature and the dependants of the crew of the "Princess Sophia" are domiciled in British Columbia. Further, as to the respondent, the Canadian Pacific Ry. Co., we find that the company is specifically mentioned in s. 25, clause 10, of the Act, under the heading of "Accident Fund and Assessments." Therefore, in my opinion, it cannot be said that the *Parent* case is an authority which, with great respect to their Lordships of the Privy Council, should I be in error, precludes it being held that the Act in question in the present case is *ultra vires* of the powers of the B.C. legislature.

Arriving at that conclusion, I am of the same opinion as Anglin, J., as expressed in the *Parent* case, as reported in 21 D.L.R. 681 at 698-700, 51 Can. S.C.R. 234 at pp. 279 and 282.

(Also see the view of Wightman, J., in *Scott* v. *Seymour* (1862), 1 H. & C. 219, 158 E.R. 865; *Hart* v. *Gumpach* (1872), 9 Moore P.C. 241, 17 E.R. 505; *B.S. Africa Co.* v. *Companhia de Mocambiuqe*, [1893] A.C. 602; *Rayment* v. *Rayment*, [1910] P. 271; *Phillips* v. *Batho*, [1913] 3 K.B. 882; *Buenos Ayres* v. *N.R. Co.* (1877), 2 Q.B.D. 210; the dissenting judgment of the C.J. of the C.A. for Manitoba in *Couture* v. *Dominion Fish Co.* (1909), 19 Man. L.R. 65; also the dissenting judgment of same judge, when Chief Justice of Manitoba, in *Simonson* v. *C.N.R. Co.* (1914), 15 D.L.R. 24, 17 D.L.R. 516, 24 Man. L.R. 267, here we have the intent absent in the Manitoba Act; see judgment of Richards, J.A., in *Simonson* case, and Perdue, J.A., and Cameron, J.A., and Howell, C.J.M., in *Lewis* v. *G.T.P. R. Co.* (1914), 19 D.L.R. 606, 24 Man. L.R. 807; and Cameron, J.A., and see Duff, J., in *Lewis* v. *G.T.P.R. Co.* (1916), 26 D.L.R. 687, 52 Can. S.C.R. 227.)

In *Tomalin* v. *S. Pearson & Sons*, [1909] 2 K.B. 61—a case referred to by Lord Atkinson in *Krzus* v. *Crow's Nest Pass Coal Co.*, 8 D.L.R. 264, [1912] A.C. 590—it was held that

the Workmen's Compensation Act, 1906, has no application outside the territorial limits of the United Kingdom except in the case of seamen and apprentices as provided by s. 7.

B. C.

C. A.

CANADIAN PACIFIC R. CO. v. WORKMEN'S COMPENSATION BOARD.

McPhillips, J.A.

In the present case, the assessments made by the Workmen's Compensation Board are in respect of the claim of the dependants of seamen, and there can be no question that under the B.C. statute, seamen come within the purview of the Act. Further, the express words of the statute cover an accident elsewhere than in the province. (See s. 8 (3), c. 77, 1916). It will be observed that in the *Tomalin* case, Cozens-Hardy, M.R., at p. 64, put the question, "what is the ambit of the statute and what is the scope of its operation?," and the decision is upon the rule which the Master of the Rolls quoted, namely:—

> In the absence of an intention clearly expressed or to be inferred from its language or from the weight or subject-matter or history of the enactment the presumption is that parliament does not design its statutes to operate beyond the territorial limits of the United Kingdom.

Here, of course, we have the intention clearly expressed. It is to be noted, though, that when reference is made to the claims of seamen covered by the enactment, no suggestion is made of any conflict with the Merchant Shipping Act, 1894. It might well be said that there is given by the Workmen's Compensation Act a civil right (s. 92 (13) of the British North America Act, 30 & 31 Vict. c. 3, 1867, Imp.) to workmen against their employer to be enforced by the Workmen's Compensation Board in respect to employment entered upon in the province where all parties are domiciled in the province, independent of where the accident occurs, that is within or without the province, as the case may be, whether it be upon a ship or railway or otherwise within the provisions of the Act. In this connection it is worthy of consideration to note what Cozens-Hardy, M.R., said in *Schwartz* v. *India Rubber Co.*, [1912] 2 K.B. 299 at p. 302:—

> . . . A British ship may, for many purposes, be British territory, and for many purposes British legislation would apply to what is done on a British ship . . .

In my opinion, the whole matter resolves itself into a determination as to whether we have here that which was absent in the *Parent* case—that is to say, legislation in apt words imposing "obligations in respect of acts done outside the province on persons domiciled within its jurisdiction." (Viscount Haldane, in the *Parent* case, 33 D.L.R. 12.) That there can be any question of this it seems to me admits of no doubt, the obligation imposed in the Workmen's Compensation Act is clear and unmistakable in its terms.

B. C.

C. A.

CANADIAN PACIFIC R. CO. v. WORKMEN'S COMPENSATION BOARD.

McPhillips, J.A.

Then, of course, there remains the further consideration that the Workmen's Compensation Act is in its nature a scheme of insurance or pension scheme providing compensation to workmen in case of injury and to their dependants in case of death caused by accident quite independent of negligence, and the obligation is imposed at large upon the employers covered by the Act in favour of the workmen and dependants of workmen defined in the Act. Upon this view can it be said to be *ultra vires* legislation, the employers and workmen being domiciled in the province? I cannot see upon what principle that it can be said to be *ultra vires* legislation; it amounts to statutory insurance on pension and is payable to workmen or their dependants, by statute, quite independent, so far as they are concerned, of whether the employers pay the assessments into the accident fund or not, and the employers who are called upon to pay the assessments are employers generally, not alone those who are concerned with the accident that gives rise to the compensation payable, and the assessments made as against the employers are not referable to any particular accident. If it be admitted that the subject might enter into such a contract of insurance, and this must be admitted—wherein is there disability upon the legislature to legislate for the class to be benefited or any constitutional inhibition to impose the obligation upon any other class? I cannot answer this in any other way than to say that the legislature is sovereign in the matter. It must be admitted that the legislature has complete power over property within the province (*McGregor* v. *Esquimalt & Nanaimo R. Co.*, [1907] A.C. 462), and here we have legislation conferring certain civil rights upon a class coming within the definition of workmen and dependants in the Act with an obligation upon a certain other class termed employers, all domiciled within the province. I cannot persuade myself that the legislation is in any way *ultra vires*. Further, wherein is there the right to inhibit the paying of compensation to the dependants of the crew of the "Princess Sophia," at the suit of the respondent, as quite independent of any payment of any assessment under the Act by the respondent, or for that matter by any of the employers, under the provisions of the Act, the dependants are entitled to be paid compensation? With deference to the trial judge, I cannot agree that *Royal Bank* v. *The King*, 9 D.L.R. 337, [1913] A.C.

B. C.

C. A.

CANADIAN PACIFIC R. CO. v. WORKMEN'S COMPENSATION BOARD.

283, is decisive of the present case, here it is not the case of a civil right of the respondent outside the province. The compensation is statutorily provided—no priority, friendship or relationship of any character exists as between the employers and workmen under the Act—in consequence of the accident—the compensation is payable by statute not at the suit of the workmen or the dependants, but by and through the Workmen's Compensation Board. If it is necessary, in view of the opinion at which I have arrived, to pass upon the contention pressed that because of the Merchant Shipping Act, 1894, and the Canada Shipping Act, the legislation is beyond the power of the legislature, I can only repeat that the existence of these Acts do not affect the legislative power existent in the legislature. Further, at most, they might have application in the way of *limitation of liability*, but I express no considered opinion upon that point, as at present advanced, I would say that any sums payable by way of compensation under the Workmen's Compensation Act are payable in full.

McPhillips, J.A.

It follows that, in my opinion, the judge erred in declaring that the Workmen's Compensation Act, in so far as it is claimed to warrant the payment of compensation to dependants of the crew of the "Princess Sophia," is beyond the power of the legislature of the province to enact, and further erred in enjoining the Workmen's Compensation Board from paying compensation to any of the dependants.

I would allow the appeal, being of the opinion that the legislation is legislation *intra vires* of the province, and the judgment under appeal should be set aside and the action dismissed.

EBERTS, J.A., would dismiss the appeal.

Eberts, J.A.

Appeal dismissed.

CANADIAN DREDGING Co. v. The "MIKE CORRY."

CAN.

Ex. C.

Exchequer Court of Canada, Hodgins, L.J.A. March 1, 1917.

SALVAGE (§ I—4)—WAGES—LOSS OF EARNINGS.

Held. 1. Where the wages of the crew of a ship which has been salved are paid by the salvors, a lien therefor attaches, and can be enforced against the salved ship.

2. No lien attaches in a case of attempted salvage where the services rendered produced no result, and contributed in no way to the subsequent saving of the boat.

NOTE.—On the first question decided above reference should now be made to a decision of Hill, J., in "*The Petone*," [1917] P. 198, reported since judgment was given in this case.

CAN.

Ex C.

CANADIAN DREDGING CO. v. THE "MIKE CORRY."

Statement.

ACTION brought by the plaintiffs against the ship "Mike Corry," a British vessel, registered in an Ontario port.

The claim was for salvage and also for the declaration of a lien on the ship for the sum of $215, advanced to the captain of the salved vessel to pay the crew's wages and discharge them from the said ship.

The claim of Kean & Milman against the said ship and heard at the same time, was for salvage, but included a claim for services which, as the evidence shewed, produced no result.

The claim of Dan Sullivan against the said ship and heard at the same time, was for salvage and use of tug, but included, as the evidence disclosed, a claim for loss of fishing (his usual occupation) whilst engaged in the salving operation.

The claims of John R. Carr and Alice Carr were dismissed without costs, no one appearing for them at the hearing.

As appears in the reasons for judgment, portions of the claims were allowed at the conclusion of the hearing and judgment was reserved on certain points.

C. M. Garvey, for plaintiffs; *J. Grayson Smith*, for Kean & Milman and Dan Sullivan. No one for the ship.

Hodgins, L.J.A.

HODGINS, L.J.A.:—I gave judgment at the close of the case for the salvage services, as follows: The plaintiffs, $500, Kean & Milman, $60, and Dan Sullivan, $79, and I dismissed the action brought by Carrs without costs.

I reserved consideration on two points: (1) Whether the plaintiffs could enforce a maritime lien for $215, paid by them when the vessel was salved as and for the wages of the crew so that they might be discharged and sent home. (2) Whether Kean & Milman could recover an additional sum for services rendered on July 18, 1915, which produced no result and contributed in no way to the subsequent saving of the vessel.

On the first point I think the plaintiffs can succeed. While their proper course was undoubtedly to apply to the court (*The Cornelia Henrietta* (1866), L.R. 1 Adm. & Ecc. 51), yet that rule has been relaxed in a later case (*The Tagus*, [1903] P. 44). In Maclachlan on Shipping, 5th ed., p. 258, it is said that: "The lien becomes vested in a person who pays the wages on the credit of the ship." That was the case here.

CAN.
Ex. C.
CANADIAN DREDGING CO. v. THE "MIKE CORRY."
Hodgins, L.J.A.

On the second point, I cannot allow any further amount. Success is an essential element in salvage.

I may add that in disallowing in the Sullivan claim any damages for loss of fishing, I am in accord with the decision of Bargrave Deane, J., in *The "Fairport,"* [1912] P. 168, where it is expressly stated that when seamen render salvage services they abandon their ordinary occupation for the purpose of another occupation, which is salvage, and they cannot be paid for both.

The claim included in the Marshal's account for possession money, $194, will be reduced to $1.25 per day.

Judgment will be entered in accordance with the above. The costs of the action of all three plaintiffs will come next after the Marshal's account, then the judgment of the three plaintiffs for salvage in proportion, unless the money in court is sufficient to satisfy them in full. If there is any balance, it will be applied on the $215, that part of the plaintiff's judgment which does not represent salvage. *Judgment accordingly.*

THE KING v. TREFIAK.

SASK.
C. A.

Saskatchewan Court of Appeal, Haultain, C.J.S., Newlands, Lamont and Elwood, JJ.A. June 19, 1919.

1. CRIMINAL LAW (§ II A—38)—FAILURE OF MAGISTRATE TO SIGN DEPOSITIONS—COMMITTAL FOR TRIAL—ELECTION—TRIAL BY DISTRICT COURT JUDGE—VALIDITY.
The failure of the magistrate committing an accused for trial for an indictable offence to sign the depositions does not affect the validity of the trial; the accused being admitted to bail by the district court judge, and subsequently appearing before him and electing to be tried by him.

2. CRIMINAL LAW (§ II B—40)—CRIM. CODE—TRIAL OF ACCUSED ON CHARGE OTHER THAN SET OUT IN WARRANT—CONSENT NECESSARY.
Under s. 834 Crim. Code (amendment 8 & 9 Edw. VII. c. 9, s. 2) an accused cannot without his consent be tried on a charge other than that specifically described in the warrant for committment and for which the accused was committed for trial.

H. E. Sampson, K.C., for the Crown; *A. M. Panton*, K.C., for the accused.

The judgment of the court was delivered by

Haultain, C.J.S.

HAULTAIN, C.J.S.:—The following case is stated for the opinion of the court by the judge of the judicial district of Battleford:—

On the 8th day of April, 1918, James H. Smith laid information before John H. Young, J.P., at Hafford, Saskatchewan, against John Trefiak, at Hafford, for that the said John Trefiak, at Hafford, in the said province, on the 8th day of April, 1918, at Hafford, in the said province, did have and

SASK.

C. A.

THE KING v. TREFIAK.

Haultain, C.J.S.

receive a quantity of stolen property, the property of Margaret Smith, knowing the same to have been stolen, contrary to Criminal Code of Canada, s. 399.

On the 8th day of April, 1918, the magistrate held a preliminary inquiry.

The witnesses signed the depositions, but the deposition of each witness was not signed by the magistrate.

After the close of the preliminary enquiry the magistrate committed the accused for trial on the charge contained in the information.

On the 9th day of April, 1918, the accused was, by my order, admitted to bail to appear for trial at the next court of competent jurisdiction in and for the judicial district of Battleford.

On the 22nd day of May, 1918, the accused appeared before me and elected for trial under Part 18 of the Code on the charge contained in the information.

On the 8th day of April, 1918, James H. Smith laid information before John H. Young, J.P., at Hafford, aforesaid, against Malay Trefiak, of Hafford, for that Malay Trefiak, at Hafford in the said province, on the 8th day of April, 1918, did have and received a quantity of stolen property, the property of Margaret Smith, knowing the same to have been stolen, contrary to the Criminal Code of Canada, s. 399.

On the 8th day of April, 1918, Malay Trefiak appeared before the said magistrate. No depositions were taken, but the proceedings before the said magistrate were as follows, as shewn by the minutes of same filed by him:—

Court opened at 6.40, case being a continuance of *Smith* v. *John Trefiak*, as both prosecution Const. Read and R. C. Hargreaves, solicitor for defence, ask that preceding evidence *Smith* v. *John Trefiak* be applied to this case. Witnesses called and re-sworn to original evidence knowing that it now applied to Malay Trefiak.

No depositions were taken save as aforesaid.

The witnesses did not re-sign the depositions taken in the case against John Trefiak and the magistrate signed no depositions.

After the close of the proceedings the magistrate committed the accused for trial on the charge contained in the information.

On the 9th day of April, 1918, the accused was, by my order, admitted to bail to appear for trial at the next court of competent jurisdiction in and for the Battleford judicial district.

On the day of May, 1918, the accused appeared before the said judge of the district court of the judicial district of Battleford and elected for trial, under Part 18 of the Code, on the charge contained in the information.

On the 28th day of June, 1918, both the above named accused were tried before me in the district court judge's criminal court, judicial district of Battleford, on the following charges:—

1. For that they, the said Malay Trefiak and John Trefiak, at or in the vicinity of s. 29, in township 45, in range 9, west of the third meridian in the Province of Saskatchewan, in or about the years 1917 and 1918, did unlawfully steal certain chattels, to wit: one set of work harness, 1 set of single harness (not including bridle and tugs), 1 riding bridle, about 75 bushels of oats, 1 spirit level, 1 end bar for triple box, 1 end gate for box, 1 lazy back spring seat, 2 tethering chains, certain chairs, 1 big arm chair, 1 china lamp, 1 fur muff, 1 tea kettle, 1 bed and coil spring, 1 mattress, certain lumbermen's

SASK.

C. A.

THE KING v. TREFIAK.

Haultain, C.J.S.

socks, 1 rain coat, 1 looking-glass for dresser, about 20 lbs. of lard, 15 lbs .of sugar, 1 clothes line and pins, 1 dozen men's neckties, 1 looking-glass with silver back, hand glass, 1 table cloth, 1 horse collar, bucksaw, 2 ladies' hats, certain window curtains, 2 ladies' dresses, pair of men's mits, 1 box containing jewelry and brooches, 1 ring, 1 neckchain, 1 curry comb, 1 horse brush, the property of James H. Smith and Margaret Smith.

2. The said Malay Trefiak and John Trefiak, further stated, stand charged for that they, the said Malay and John Trefiak, at, or in the vicinity of s. 29, in township 43, in range 9, west of the third meridian, in the said province and judicial district, in, during, or about the year A.D. 1918, did unlawfully receive or retain in his possession certain property, to wit: 1 set of work harness, 1 set of single harness (not including bridle and tugs), 1 riding bridle, about 75 bushels of oats, 1 spirit level, 1 end board for triple box, 1 end gate for box, 1 lazy back spring seat, 2 tethering chains, certain chairs, 1 big arm chair, 1 china lamp, 1 fur muff, 1 fox fur, 1 tea kettle, 1 bed and coil springs, 1 mattress, certain lumbermen's socks, 1 rain coat, 1 looking-glass for dresser, about 20 lbs. lard, 15 lbs. sugar, 1 clothes line and pins, 1 dozen men's neckties, 1 looking-glass with silver back, hand glass, certain window curtains, 1 table cloth, 1 horse collar, 1 bucksaw, 2 ladies' dresses, 2 ladies' hats, 1 pair men's mitts, 1 box containing jewelry and brooches, 1 ring, 1 neckchain, 1 curry comb, and 1 horse brush, the property of James H. Smith and Margaret Smith, and which had been heretofore obtained by a certain person or persons unknown by an offence punishable by indictment, to wit, by theft, the said Malay Trefiak and John Trefiak then knowing the said goods to have been obtained by the said person or persons unknown by the said indictable offence.

The accused were tried jointly.

After the charges were read, before the accused pleaded, counsel for the accused moved to quash the charge as against the said John Trefiak on the ground that the depositions on which the charge was founded were not signed by the magistrate before whom the preliminary was held; and further moved to quash the first count of the charge on the ground that the said charge was not the charge specifically described in the warrant for commitment and for which the accused were committed for trial; and moved to quash the charge as against Malay Trefiak on the said grounds and on the further grounds that no depositions were taken on the preliminary in the case of the said Malay Trefiak, which were sworn to and used by consent of accused counsel. Mr. Livingston, K.C., for the Crown, asked for leave to prefer a charge against both accused, notwithstanding any irregularity in the preliminary hearing.

I granted the order and at the same time refused the applicant to quash the charge.

The trial proceeded. At the close of the case for the prosecution the charge against both the accused was dismissed on the first count of the charge.

Both the accused were convicted on the second count, and sentence was postponed until the questions reserved had been disposed of, and accused were admitted to bail to appear at such time as the court directs.

Counsel for the accused disputes the validity of the conviction and the questions submitted for the opinion of the Court of Appeal are:—

1. Was I right in refusing to quash the charge on the ground that the said depositions were not signed by the magistrate?

SASK.

C. A.

THE KING v. TREFIAK.

Haultain, C.J.S.

2. Was I right in refusing to quash the first count of the charge on the ground that the charge contained in the said count was not the charge for which the accused had been committed for trial?

3. Was I right in refusing to quash the charge as against Malay Trefiak on the ground that the depositions taken in the case of John Trefiak, and re-sworn as set out above, were put in as depositions in Malay Trefiak's case, and no other depositions taken by the magistrate?

4. Could the accused be tried by me under Part 18 of the Code for an offence which was not contained in the information sworn by the magistrate or in the warrant of commitment, and which was not read to the accused at the time of their election, when the depositions disclosed the commission of any such offence.

As to q. 1:—I do not think that the failure of the magistrate to sign the depositions is a matter which in any way affects the validity of the trial. The accused were admitted to bail by the district court judge after being committed for trial by the magistrate, and apparently, later on, of their own accord, appeared before him and elected to be tried by him. On this point see *Ex parte Budd*, (1910), 17 Can. Cr. Cas. 235.

I would, therefore, answer the first question in the affirmative.

As to q. 2:—As the accused were acquitted on the first count, there is no foundation for stating the point involved in this question. I have, however, no hesitation in expressing the opinion that, under s. 834 of the Criminal Code, the accused should not have been tried on the first count without their consent.

As to q. 3:—The evidence taken on the preliminary examination of John Trefiak was, by consent of counsel for the defence, used in the case of Malay Trefiak. No copy of this evidence was made for this purpose, but both cases were practically heard at the same time and all the proceedings in both cases were returned into court by the magistrate together, as one file. Strictly speaking, a copy of this evidence should have been made and put in as part of the proceedings against Malay Trefiak, but as counsel for the defence consented to the manner in which the evidence was used, an objection does not now lie.

I would answer q. 3 in the affirmative.

As to q. 4:—This question is practically the same as q. 2, and under the circumstances is, like it, purely academic. S. 834 of the Criminal Code seems to me to clearly and specifically cover the point.

As the accused were convicted on the charge upon which they elected, the conviction must stand. *Conviction affirmed.*

LE BLANC v. THE "EMILIEN BURKE."

CAN.

Ex. C.

Exchequer Court of Canada, Prince Edward Admiralty District, Stewart, L.J.A. April 1, 1919.

COLLISION (§ I A—2)—REGULATIONS—ARTS. 17, 21 AND 27—DUTY IN EMERGENCY—PRELIMINARY ACT—BURDEN OF PROOF.

Held, 1. Where two sailing vessels are meeting and it is the duty of one, under the rules, to avoid the other, but who fails to do so, it then becomes the duty of the other to so manœuvre as to avoid the consequences of such breach of the rules, if possible to do so by exercise of ordinary care and prudence.

2. That the precise point when such manœuvring should begin by the vessel with right of way cannot be arbitrarily fixed and some latitude must be allowed the master in determining this.

3. The burden of proof in such a case is on the offending vessel.

4. The object of a preliminary act is to obtain a statement, *recenti facto* of the circumstances, to prevent parties shaping their case to meet the one put forward by the other at trial.

That the following answer is entirely too vague and indefinite, to wit: "That the plaintiff, or those on board the 'Florrie V.,' improperly neglected to take in due time proper measures for avoiding a collision with the 'Emilien Burke' and did not make any attempt to avoid same. She was not kept in her proper course, as required by law, and those on board of the said vessel violated the rules and regulations as to her proper navigation."

ACTION *in rem* and counterclaim for damages due to a collision between two sailing vessels.

A. B. Warburton, K.C., and *D. E. Shaw*, for plaintiff; *G. Gaudet*, K.C., and *J. M. Hynes*, for defendant.

STEWART, L.J.A.:—This is an action *in rem* brought by the plaintiff, the master of the schooner "Florrie V," registered at Arichat, Cape Breton, of about 97 tons, against the "Emilien Burke," for damages done by a collision in the Bras d'Or Lakes, off Baddeck, Cape Breton, on November 8, 1918, somewhere about 2 o'clock in the afternoon. There is a counterclaim by the owner and master of the "Emilien Burke" for damages caused to her in the same collision. Stewart, L.J.A.

The "Emilien Burke" is a schooner of about 90 tons. She had a crew, including Capt. Arsenault, of 4 men. At the time in question she was bound on a voyage from Sydney with a cargo of coal. The "Florrie V" was coming from Crapaud, in this Province, and proceeding to Sydney laden with turnips and potatoes. She also had a crew of 4. The weather at the time was clear and fine, with a moderate breeze.

It is very creditable to the parties to this suit that there is so little contradictory evidence. I was particularly struck with the

CAN.

EX. C.

LE BLANC v. THE "EMILIEN BURKE."

Stewart, L.J.A.

frank and candid manner in which the captain of the "Emilien Burke" gave his testimony. He has been sailing the seas for 56 years and a master mariner for 43 years. He made no attempt to suppress or explain away anything that might tend to prejudice his case; he was, in short, a model witness, and if it were necessary for me to decide the determining factors of this case on a conflict of evidence I would find some difficulty in disbelieving the account given by Capt. Arsenault.

There is, however, a slight disagreement between the parties as to the direction of the wind and the movements of their respective vessels a short time before the collision.

Capt. Le Blanc's account of that afternoon's event is substantially as follows: The "Florrie V" an hour or two before the collision had left the Grand Narrows bridge and was proceeding in an east-north-easterly course accompanied by the schooners, the "Rosy M. B." and the "John Halifax," all three vessels sailing close-hauled to the wind, which was north-north-east. The "Florrie V" continued on this course until she opened up into Baddeck Bay, off Burnt Point. She then headed on an east by north course and kept on that tack until she reached Coffin Island. At Coffin Island she tacked and stood on a north-west by north course for about a half a mile. Shortly before this she saw the "Emilien Burke" about 5 miles distant, coming west in a west by south course, after proceeding for about half a mile on that tack the "Florrie V" tacked again and stood on an east by north course close-hauled to the wind. The "Emilien Burke" was then coming from an opposite direction running free in a course parallel with that of the "Florrie V," and if she had kept her course would have passed the "Florrie V" 300 yards off her starboard side. The "Emilien Burke" when nearly abreast his starboard bow changed her course towards the "Florrie V." At that time his mate was stationed on the lookout and his seaman was at the wheel. The captain himself paced the deck near the lookout, and when he saw the "Emilien Burke" changing her course towards him he thought her captain wished to speak with him. He walked aft to give him an opportunity of doing so, as he would go by the stern. Noticing, however, that she was luffing up towards the "Florrie V" and coming nearer, he went to the forward part of

the poop and sang out, "Keep away, you are going to run into us." At this he saw a man stand up forward of the main hatch and abaft of the foremast and run towards the wheel and turn it over to starboard, but it was then too late to avert the collision.

In this he is corroborated by his mate and the seaman who was at the wheel.

The mate of the "Rosy M.B.," the master and owner of the "John Halifax," and Lorenzo Poirier, master mariner and owner of several vessels, support the evidence of Capt. Le Blanc as to the direction of the wind, and as to the vessels sailing close-hauled to the wind. Lorenzo Poirier stated that he was at New Harris, about 9 miles from Port Bevis, that morning on his way to Sydney—that there is a narrow outlet from that lake—that he couldn't get out because of a head wind blowing north-north-east—that there were 5 or 6 vessels there, and all were compelled to remain inactive, not only that, but the following day, and that if the wind had been north-north-east, as claimed by the captain of the "Emilien Burke," it would have enabled him, with the tide running out, to have got out that day and to proceed on his intended voyage.

Several of these witnesses also corroborate Capt. Le Blanc's statement that the "Florrie V." and "Emilien Burke" were sailing on parallel courses. The mate of the "Rosy M. B." also stated that hearing a call on board the "Emilien Burke" he saw a man leave her wheel and go forward, where he remained for about 2 or 3 minutes. When this man was away from the wheel he saw the "Emilien Burke" changing her course in the direction of the "Florrie V."

Capt. Arsenault, of the "Emilien Burke," admits that his course was west by south and that the "Florrie V." was proceeding in a course east by north. He also admits that he was running free. He, however, claims that the two vessels were approaching each other absolutely heads on and not on parallel lines. As to the direction of the wind, he said it was varying, puffing one way and another from north-north-west to north, that there was no east in it, and that it was fully north-north-west at the time of the collision. He further testified that the courses of both vessels were as stated until they were about half

CAN.

EX. C.

LE BLANC v. THE "EMILIEN BURKE."

Stewart, L.J.A.

a mile apart, that he then hove his helm to port in order to send his vessel to windward so that he might pass the other vessel on her port side. That he wished to bring his vessel as close to the wind as possible on the starboard tack—that at the time he began to change his course, the "Florrie V." began to change hers by starboarding her helm—that when the "Florrie V." was a quarter of a mile from him he tied his wheel with the helm ported and went forward to give two of his men a hand to raise the foreboom to get it out of the socket—that he was away from the wheel 2 or 3 minutes and while forward his vessel drew more into the wind. While rendering the assistance referred to he saw the "Florrie V." curving ahead of him, and that when he returned to the wheel she was about 300 yards off and that he then reversed his wheel, but it was too late to avoid the collision.

Thomas Gallant, the mate, supported to some extent the evidence of Capt. Arsenault. The wind, he said, was about north, and that the last change in the course of the "Emilien Burke" was made just before the collision. Thomas McGrath, the cook, was the only other witness produced by the defendant. He seemed to know very little about the case, except that he said the wind varied about two points each way off north-north-west.

Capt. Le Blanc and those of his crew who gave evidence denied having changed their course on the approach of the "Emilien Burke," but kept it right along until the happening of the collision.

There seems to me to be a preponderance of evidence that on the day of the collision the wind was about north-north-east.

The defendant in his preliminary act, to the question: "What fault or default, if any, is attributed to the other ship?" gives this answer:—

That the plaintiff or those on board the "Florrie V." improperly neglected to take in due time proper measures for avoiding a collision with the "Emilien Burke," and did not make any attempt to avoid same. She was not kept in her proper course as required by law, and those on board the said vessel violated the rules and regulations as to her proper navigation.

This, it seems to me, is entirely too vague and indefinite. The object of the questions is to obtain a statement *recenti facto* of the

circumstances from the parties and to prevent the defendant from shaping his case to meet the case put forward by the plaintiff. If answers like this were sufficient, the door would be open for the making out of almost any kind of a case. As neither party is allowed to depart from the case set up in his preliminary act, it can be readily seen how necessary it is that definite and precise answers should be given to the questions submitted. Besides the kind of answer given here might suggest inability to attribute any fault or default to the other side.

The regulations which it is material to consider in this case are articles 17, 21 and 27, which are as follows:—

"Article 17. When two sailing vessels are approaching one another so as to involve risk of collision, one of them shall keep out of the way of the other, as follows, viz.:

(a) A vessel which is running free shall keep out of the way of a vessel which is close-hauled.

(c) When both are running free, with the wind on different sides, the vessel which has the wind on the port side shall keep out of the way of the other.

Article 21. Where by any of these rules one of two vessels is to keep out of the way, the other shall keep her course and speed.

Note.—When, in consequence of thick weather or other causes, such vessel finds herself so close that collision cannot be avoided by the action of the giving-way vessel alone, she also shall take such action as will best aid to avert collision.

Article 27. In obeying and construing these rules, due regard shall be had to all dangers of navigation and collision, and to any special circumstances which may render a departure from the above rules necessary in order to avoid immediate danger."

Let me assume for the present that the direction of the wind was north-north-east and that the vessels were approaching one another on parallel courses and not heads on. It is admitted that the course of the "Florrie V." was east by north and that of the "Emilien Burke" west by south. On this assumption the "Florrie V." would be sailing close-hauled to the wind and the "Emilien Burke" would be running free. But the latter did not only keep out of the way of the "Florrie V." as provision "a" of article 17

CAN.

EX. C.

LE BLANC v. THE "EMILIEN BURKE."

Stewart, L.J.A.

required her to do, but, in changing her course to starboard, in place of continuing as she was going, she brought herself in the way of the "Florrie V." in direct violation of the rule.

Take now the contention of the "Emilien Burke" and assume that the wind was north-north-west, and that both vessels were coming heads on on the respective courses admitted by both sides. In this assumption it is admitted that both vessels would be running free. It would have been the duty of the "Florrie V." with the wind on her port side to have kept out of the way of the "Emilien Burke," having the wind on her starboard side. But it would equally have been the duty of the "Emilien Burke" to have kept her course and speed. This, however, is what she did not do, but deliberately altered her course when the vessels were half a mile apart, by porting her helm, and this at the very time the "Florrie V." had begun to starboard her helm, the proper move to make in order to keep out of the way of the "Emilien Burke." So whether I take the evidence of the plaintiff or the defendant, the result is the same, Capt. Arsenault has been guilty of a violation of the rules.

But it is necessary for me to consider the question whether the "Emilien Burke" being to blame, the "Florrie V." was not to blame also.

A contention was advanced by Mr. Gaudet with considerable emphasis that the "Florrie V." did nothing to avoid the collision, that the man at the wheel never attempted to change her course, although the two vessels were advancing in dangerous proximity to one another.

There is no doubt that the "Florrie V." was bound to comply with art. 21 and keep her course and speed until she found herself so close to the "Emilien Burke" that the collision could not be avoided by the action of the latter vessel alone. Then she should endeavour, if possible, to prevent disaster. The defence of contributory negligence is always open to the defendant ship, although she herself may have been guilty of a breach of the regulations.

Sir Gorell Barnes, in *The Parisian*, [1907] A.C. 193, at 207, deals with this point in a very common sense way. He said:—

It must always be a matter of some difficulty for the master of a vessel which has to keep her course and speed with regard to another vessel which has to keep out of her way, to determine when the time has arrived for him to take action, for if he act too soon he may disconcert any action which the other vessel may be about to take to avoid his vessel and might be blamed for so doing and yet the time may come at which he must take action. Therefore he must keep his course and speed up to some point and then act, but the precise point must necessarily be difficult to determine and some little latitude has to be allowed to the master in determining this.

It was the duty of the plaintiff to have avoided the consequences of the defendant's breach if he could have done so by the exercise of ordinary care and prudence. But the burden of proof lies on the offending vessel.

Reverting to the fact of the wind being north-north-east and the duty of the vessel running free to keep out of the way of the vessel which is close-hauled, Capt. Le Blanc would have no reason to doubt that the "Emilien Burke" would observe the rules and keep out of his way. When he saw her changing her course and advancing in his direction, it was not an unreasonable supposition for him to entertain that her captain desired to speak to him as he came near. He would naturally, up to the last moment, rely upon the "Emilien Burke" observing the rules of navigation.

If the captain of the "Florrie V." knew that the "Emilien Burke" was by means of some compelling situation obliged to run into his vessel, he should have used all necessary and possible means to avoid it. There must indeed be special circumstances within the meaning of art. 27 and the note to art. 21 to justify a departure from art. 21. Without the existence of such it would be extremely risky and likely to involve the chance of being mulcted in damages for any vessel to take such a departure. A learned judge in dealing with this point said:—

"But the principle embodied in this rule, though a sound one, should be applied very cautiously and only when the circumstances are clearly exceptional."

No such circumstances existed or were attempted to be shewn to exist in this case. The unfortunate event happened in broad daylight when the weather was clear and fine, and there was ample sea room in which to sail and manœuvre.

I have on a careful consideration of the whole case, come to the conclusion that no fault can be attributed to the "Florrie V.,"

CAN.

Ex. C.

LE BLANC v. THE "EMILIEN BURKE."

Stewart, L.J.A.

her master or crew, and that the "Emilien Burke" is alone to blame for the collision, and that she must be held liable for the damages that ensued.

These damages I will now assess, as follows:—

For damage done to the sails, $140.52; for rope and block, $21.55; for repairing boat, $35; for plank and fittings for davits, $58; for 24 turned stanchions, $15.60; for towage done by the "Rosy M. B.," $40; for help, $10; for costs of survey, $10; for damages done to hull, $229.33; total, $560; for which sum with costs I condemn the ship "Emilien Burke," her sails, apparel and equipment, and decree accordingly.

Order accordingly.

COLLISTER v. REID.

B. C.

C. A.

British Columbia Court of Appeal, Macdonald, C.J.A., and Martin, Galliher, McPhillips and Eberts, JJ.A. July 15, 1919.

MINES AND MINERALS (§ I C—21)—MINERAL CLAIM—APPLICATION FOR CERTIFICATE OF IMPROVEMENTS—MINERAL ACT, R.S.B.C. 1911, c. 157—ADVERSE CLAIM—EXPIRATION OF WRIT ISSUED—ABANDONMENT OF CLAIM—TRESPASS.

The owner of a mineral claim who has complied with specified conditions precedent, and has applied for a certificate of improvements as provided by s. 57 under the Mineral Act (R.S.B.C., 1911, c. 157) except that he was deterred from filing the affidavit required by subsec. (g) by the statement of the mining recorder that an adverse action had been begun, who does nothing further before the expiry of the writ, than to inquire of the mining recorder from time to time whether or not the obstacle has been removed, cannot be said to have intended to abandon the interest which he claims and is entitled to judgment in an action for trespass against the adverse claimant who has located mineral claims on the same ground after the expiry of the writ.

Statement.

APPEAL by plaintiff from the trial judgment in an action for trespass and to restrain defendants from interfering with plaintiff's alleged mineral rights. Reversed.

Armour, K.C., for appellant; *F. C. Elliott*, for respondent.

Macdonald C.J.A.

MACDONALD, C.J.A.:—When the owner of a mineral claim under the Mineral Act, R.S.B.C., 1911, c. 157, has complied with specified conditions precedent, and has applied for a certificate of improvements "as provided by s. 57 of the said Act," he is relieved from the necessity of doing further work on the claim pending the issue of the Certificate of Improvements (s. 52).

The plaintiffs, the recorded owners of the mineral claim in question in these proceedings, have performed all the conditions set forth in the sub-sections to said s. 57, except sub-s. (g) which required them to file with the mining recorder an affidavit in a form set out in the schedule to the Act, which is an affidavit shewing the performance of the conditions set forth in the said sub-section. The plaintiffs were deterred from filing such affidavit by the statement of the mining recorder that an adverse action had been begun, and notice thereof had been filed with him, and this being so, the plaintiffs were not in a position to make the affidavit aforesaid which would contain the statement that they were in *undisputed possession* of the claim. Whether the affidavit was actually made or not does not clearly appear, but it is certain that it was not filed and that the certificate in Form I was not issued. The said writ was not served upon the plaintiffs, nor did they enter an appearance *gratis*.

B. C.

C. A.

COLLISTER v. REID.

Macdonald, C.J.A.

After the expiry of the writ at the end of one year from the issue thereof, the defendants located mineral claims upon the same ground, and the plaintiffs now bring this action for trespass and to restrain the defendants from interfering with their alleged rights.

Two or three years have elapsed since the plaintiffs attempted to obtain said certificate. They have done nothing in the matter in the meantime except to inquire of the mining recorder from time to time whether or not the obstacle had been removed.

I do not think it can be said on the facts that they meant to abandon the interests which they claim, though during these years they have not done and recorded any work upon the claims, no doubt under the belief that the law did not require it. Unless, therefore, they had brought themselves within the benefit of said s. 52 their failure to do this work from year to year worked a forfeiture, and the defendants were entitled as against them to re-locate the ground.

It was contended by plaintiff's counsel that what they did before the mining recorder amounted to an application for a certificate of improvements within the meaning of said s. 52. Under the Act, it is to the mining recorder that the application is to be made, though it is the gold commissioner who is to issue the certificate. Written application is not required unless Form G is to be regarded as the form of application, which I hesitate to hold because if an adverse should happen to be filed before that document is executed, then no application can be made. Now an adverse, as it is called, is for the very purpose of preventing, not the application, but the granting of the application. An application verbally was in fact made to the recorder. Had the affidavit in Form G been actually made and tendered before the defendant had knowledge of the adverse claim, it could not, I think, be doubted that s. 52 would in such a case have protected the applicant for a certificate of improvements. While I am not free from doubt I think I shall not be far astray in giving effect to the spirit of the section, when to my mind the letter is not altogether clear. There has been delay, but it is explained, and as the whole trouble has been brought about by the false move of the plaintiffs in the adverse action in whose

interests the present defendants are, these defendants are not entitled to the benefit of the doubt. I would allow the appeal.

MARTIN, J.A., would allow the appeal.

GALLIHER, J.A. (dissenting):—I would dismiss the appeal.

The point is—has plaintiff complied with s. 52 so as to obviate the effect of s. 49.

The words are "has applied for a certificate of improvements as provided by s. 57 of this Act" (being c. 157, R.S.B.C. 1911).

Turning to s. 57 we find what is necessary to be done by an applicant before a certificate of improvements will be granted.

The application to the mining recorder is not for the purpose of obtaining from him a certificate of improvements for that is granted by the gold commissioner, but as a step towards procuring the mining recorder's certificate, Form I, to be used on an application to the gold commissioner, and perhaps a step in the application.

S. 59 directs within a specified time that an application shall be made to the gold commissioner for a certificate of improvements, otherwise the mining recorder's certificate, Form I, shall lapse.

On the application to the mining recorder the applicant shall file an affidavit in the Form G in the schedule. This affidavit is the proof produced by the applicant that all the requirements of s. 57 have been complied with, and without such affidavit there would be nothing upon which the mining recorder could issue certificate I, which certificate shews that the mining recorder has been satisfied.

When the applicant came to the mining recorder for this certificate it was found that an adverse had been filed, and it became apparent that the applicant could not make the affidavit Form G, as he could not swear that he was in undisputed possession of the mineral claims, and the mining recorder so informed the applicant.

Although s. 52 does not say to whom the application for a certificate of improvements shall be made, I think the application there referred to is the application provided for by s. 59.

In addition to certifying what is proved by the affidavit Form G, the mining recorder is by s. 58 required to set out in

B. C.

C. A.

COLLISTER v. REID.

Galliher, J.A.

his certificate the name of the owner of the claim at the date of the issue of the certificate. The obtaining of the mining recorder's certificate is a step taken by the applicant to procure a document for use on his application to the gold commissioner, and is just as necessary to the procuring of a certificate of improvements as any proof required by s. 57.

I do not fail to note that the Form G is headed "Application for Certificate of Improvements," or that Form I mining recorder's certificate starts out with these words: "I herewith enclose the following documents relating to your application for a certificate of improvements"—but the point is—can the application to the mining recorder be regarded as the application referred to in s. 52?

I note also that Form F, which is published in the "Gazette" and a newspaper circulating in the district, and which is also posted on the claim and in the mining recorder's office, reads as follows:—

> Take notice that I ..... Free Miner's Certificate No. ..... intend at the end of 60 days from the date hereof to apply to the mining recorder for a certificate of improvements for the purpose of obtaining a Crown grant of the above claim.

Now while this reads "apply to the mining recorder for a certificate of improvements," it is a fact that the mining recorder cannot grant it, but can only issue his certificate Form I, and an application must later be made to the gold commissioner and this certificate produced.

When the applicant comes before the gold commissioner he must shew that all the requirements of s. 57 have been fulfilled, and the reference in s. 52 to s. 57 is as I view it on an application to the gold commissioner, and not the mining recorder.

If this were not so, it seems to me the mere application to the mining recorder without the proper proofs necessary to obtain his certificate would stay the effect of s. 49 until those proofs were furnished, and that might mean for instance that the necessary work had not been done, or that no survey had been made, and in fact any of the requirements called for by the statute. I do not think this can be the intention of the Act.

Moreover, the words "as provided in s. 57" must have some application, and if as I have above outlined a mere application

to the mining recorder unaccompanied by the necessary proofs is sufficient, I fail to see in what way they can be applied.

McPHILLIPS, J.A.:—I concur with the reasons for judgment of my brother Martin and agree in allowing the appeal.

EBERTS, J.A., would allow the appeal.

Appeal allowed.

B. C.

C. A.

COLLISTER v. REID.

Eberts, J.A.

REX ex rel McNiven v. SMITH.

ALTA.

S. C.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Simmons and McCarthy, JJ. June 16, 1919.

ELECTIONS (§IV—91A)—MUNICIPAL DISTRICTS ACT (ALTA.)—DISQUALIFICATION OF MEMBER OF COUNCIL—POWER OF DISTRICT COURT—MAY DECLARE MEMBER OUSTED OF HIS SEAT—CANNOT DECLARE RELATOR ELECTED.

Section 78*a* of the Municipal Districts Act (see amendment 1918 Alta. Stats. c. 49) supersedes the former provisions on the same subject, and while a district court judge may, if it appears to him that a member of the council has forfeited his seat at the council or his right thereto, or has become disqualified to hold his seat, adjudge such person to be ousted of the same or may discharge the summons, there is now no jurisdiction in the district court or a judge thereof to declare any relator elected.

APPEAL from an order of a district court judge declaring a member of the council of a municipal district ousted from his office and the relator entitled to the seat. Varied.

Statement.

G. H. Ross, K.C., for appellant; *A. A. Ballachey*, for respondent.

The judgment of the court was delivered by

HARVEY, C.J.:—The appellant and the relator were the only two candidates for election for councillor of division No. 5 of the Municipal District of Royal No. 158. A poll was held at which the appellant received 44 votes and the relator 25. After the election, but not before, objection was made that the appellant was disqualified as not being a British subject, and proceedings were taken under the Controverted Municipal Elections Act (c. 20, 1911-12) for a declaration that he be removed and that the relator be declared elected. The appellant thereupon filed a disclaimer of office and when the application came on to be heard before His Honour Judge Jennison he did not appear and judgment was given removing him from office and declaring the relator duly elected. The appellant subsequently applied to the judge on notice to reverse his decision on the latter point, which

Harvey, C.J.

ALTA.

S. C.

REX EX REL McNIVEN v. SMITH.

Harvey, C.J.

was, however, refused and this appeal is now taken from his decision declaring the relator elected.

It is contended on behalf of the appellant that as our statutory provisions in this regard are taken from Ontario we should accept as binding the decisions of the Ontario courts in similar cases.

This division has held more than once that a judicial interpretation of a statutory provision made prior to its being adopted by our legislature should be accepted as the guide for determining our legislature's intention, but that is, of course, quite different from accepting, as binding on us, decisions as to rights and liabilities under a statute.

There is, however, a long line of decisions in the Upper Canada and Ontario courts which are entitled to the greatest respect in this court. In 1851 Draper, J., held in *Reg. ex rel Hervey* v. *Scott*, 2 C.L. Ch. 88, that though the respondent should be removed from office the relator, though next in order to him, should not be declared elected because the voters had no notice of the objection to the respondent's qualifications. In February, 1867, Adam Wilson, J., in *Reg. ex rel Tinning* v. *Edgar*, 4 P.R. (Ont.) 36, decided in the same way upon facts which were for all essential purposes the same as those in the case now under consideration. The respondent was the lowest of the candidates elected. The relator was the only one below him, so that the respondent not being a qualified candidate there was no candidate other than the relator who could have been elected. However, the judge refused to unseat him mainly upon the ground "that no notice of disqualification was given at the time of the nomination of candidates and no other person could have been put forward or voted for or elected, unless he had been a candidate who had been proposed and seconded at the nomination."

Those decisions and others have been consistently followed in numerous cases, vol. 5 O.L.R. published in 1903 containing no less than three decisions at pp. 565, 573 and 638, which are directly applicable to the present case, and two of which rest expressly on the ground of the decision of Adam Wilson, J., *supra*.

Under these circumstances, I would hesitate to decide that

a different rule should be adopted by our courts, but there is another ground which, in any event, though not raised in the argument before us, appears to me to be decisive.

The Controverted Municipal Elections Act (c. 20 of 1911-12) gives the right to the district court judge to declare the relator elected in a proper case. The jurisdiction and procedure being set out in ss. 18-31. That Act applies to elections in certain cities and in towns, villages and rural municipalities. By c. 49 of 1918, amending the Rural Municipality Act, the name "Rural Municipality" was changed to "Municipal District" but while it was declared that the term "rural municipality" in any Act should mean "municipal district" so that if nothing more had been done all the provisions of the Controverted Municipal Elections Act would have applied to elections in municipal districts, yet there was added after s. 78 a new section, 78*a*.

S. 78 provides that in case of a vacancy in a seat on the council a new election shall be held to fill the vacancy and the new s. 78*a* covers shortly and in a summary way the provisions of ss. 18-31 of the Controverted Municipal Elections Act providing for the ousting from office of a member of the council in much the same way as is provided by these sections but gives no power express or implied to declare any other person elected. This section would be entirely unnecessary if the other sections were applicable and it is not possible to consider it an alternative method of accomplishing the same results for the procedure is almost identical. I can come to no other conclusion than that as regards municipal districts, s. 78*a* of the Municipal Districts Act supersedes the former provisions on the same subject and, that there is now no jurisdiction in the district court or a judge thereof to declare any relator elected.

I think, therefore, that the appeal should be allowed with costs and that the judgment of the district court judge should be amended by eliminating that portion of it which declares the relator entitled to the seat.

Judgment accordingly.

MAN.

C. A.

LOCKSHIN v. CANADIAN NORTHERN R. Co.

Manitoba Court of Appeal, Perdue, C.J.M., Cameron, Haggart and Fullerton, JJ.A. July 15, 1919.

CARRIERS (§III D—406)—TERMINATION OF LIABILITY—ARRIVAL OF GOODS—REASONABLE TIME FOR DELIVERY.

The liability of carriers by railway *quâ* carriers terminates upon the arrival of the goods carried at their destination and the expiration of a reasonable time for delivery. From Saturday morning until Monday is not a reasonable time in which to pay the freight and demand delivery of a carload of potatoes in very cold weather.

2. The court will not give evidentiary value to statements made over the telephone by an unidentified person.

Statement. APPEAL by defendant from the trial judgment in an action for breach of contract to carry a carload of potatoes. Reversed.

R. A. Bruce for plaintiff; *O. H. Clark*, K.C., for defendants.

Perdue, C.J.M. PERDUE, C.J.M., concurred with Cameron, J.A.

Cameron, J.A. CAMERON, J.A.:—This action is brought to recover damages in respect of a carload of potatoes and cabbages shipped by the plaintiff, on Dec. 6, 1917, from Buchanan, Sask., to the plaintiff Bookhalter, a partner of the plaintiff. It is alleged that the vegetables were received by the defendant company in good condition, but it neglected to keep the car properly heated, in consequence of which the contents were frozen. Myers, Co. Ct. J., before whom the case was tried, entered judgment for the plaintiff for the amount claimed.

The evidence appears to be that the car was heated and the lamps burning until its arrival in Winnipeg at 5 o'clock Saturday morning. It was accompanied by a man named Rillick, who travelled on a pass given to the plaintiff for the occasion, and from time to time inspected the car. He says the heaters were going all right on his last inspection. On his arrival in Winnipeg he at once notified Lockshin, saying the car was in good condition (p. 20). It is a reasonable inference that the damage was done after the car reached Winnipeg. Early on Saturday the plaintiff's daughter called up the defendants' freight department, and her evidence of what occurred is as follows:

Q. Do you remember when that car arrived in Winnipeg? A. Yes, on a Saturday morning, and after we had been notified that the car was in I was asked to 'phone to the C.N.R. and ask whether we should come down and pay the freight and see the potatoes. I did that and they told me we could not do that until Monday morning and that the potatoes were all right until then. Q. Did you know who you spoke to on the 'phone?

A. I spoke to the freight department and that is all I know. Q. Did the party who spoke to you seem to know about the car. A. Yes. Well I have called up once and he said he would trace it up and for me to call up again. I called up again and he said he already knew about it and nothing could be done until Monday morning. Q. He told you they would be all right until then? A. Yes. I asked him particularly whether the potatoes would be all right until Monday and he said they would be all right. Q. Why did you ask him that? A. I was asked to ask that because when the potatoes arrived here we understood we were to be very prompt to pay the freight and accept the car and we did that. We knew we had to do it and we 'phoned up, and knowing that it was our responsibility to be there I asked him whether the potatoes would be all right and he said they would be. Q. On account of the cold weather? A. Yes, it was cold out and we wanted to know if the potatoes would be protected until then.

Lockshin then went to the freight department on Monday morning and paid the freight, surrendered his bill of lading and got a receipt in exchange. He gave instructions to have the car placed at the William Davies Co.'s siding, and states he was told they "would give him the car right away." It was delivered there on Tuesday forenoon, and the contents inspected at a quarter after one o'clock and rejected.

Ex. 1 is in form a Live Stock Special Contract given by the defendants' agent at Buchanan, and signed by the defendants. It contains no special provisions applicable to the shipment in question, and leaves the contract practically an open one, and the railway company remained under its common law liability.

The weather was considerably below zero during the time of the shipment and at and after its arrival (Napier, p. 59). The car was put in a "warm shed" on Monday. These warm sheds do not appear to be heated. Lockshin remarks: "Outside is warmer than the warm sheds."

The questions at issue seem to me to come down to a narrow point. Lockshin knew the goods were perishable, that the next day was a Sunday, that the temperatures were low and that delays were dangerous. There was no reason why he should not have paid the freight on Saturday and have demanded prompt delivery of the car, except that his daughter, who fully realised the situation, says she was told by some one in the freight office over the telephone that nothing could be done before Monday morning, and when she asked if the potatoes would be all right, some unknown person assured her they would be.

MAN.

C. A.

LOCKSHIN v. CANADIAN NORTHERN R. CO.

Cameron, J.A.

The consignee must have a reasonable time to remove his goods. "What that time is must depend on the circumstances of each case." Halsbury IV., p. 12. See also Macnamara, Carriers by Land, p. 82. We have in this case to take into particular consideration the perishable nature of the goods, and the extremely cold weather, and the fact that the next day was Sunday, of all of which the plaintiff was, of course, aware. He should have lost no time but should have paid the freight charges on Saturday and have given his directions for delivery on the same day. To delay was to invite the risk of loss. If he had acted promptly, the loss might well have been avoided. It is true that he gives as his reason for this what was said to his daughter over the telephone, but we cannot give evidential value to statements made over the telephone by an unidentified person. There was time to have put the transaction through on Saturday, and no adequate reason is given in evidence why it was not.

Corby v. *G.T.R. Co.* (1911), 23 O.L.R. 318, is the converse of this case, the railway company there being held liable for want of diligence in giving notice of the arrival of a car of pine-apples. The fruit arrived at its destination on Saturday, June 25, and notice was not given until the 27th, when it was found to be damaged by heating and the railway company was held liable.

There is a stage in such transactions where the company's liability as a carrier, and therefore, an insurer, ceases and becomes that of a mere warehouseman. This occurs when notice of arrival has been given (or dispensed with as in this case) and a reasonable time thereafter has elapsed. See the judgment of Dubuc, J., in *Burdett* v. *C.P.R.*, 10 Man. L. R. 5; citing *G.T.R.* v. *McMillan* (1889), 16 Can. S.C.R. 543, and other cases.

I am of opinion that in this case a more than reasonable time was allowed by the plaintiffs to elapse before they put themselves in a position to take delivery and the action must fail.

Haggart, J.A.

HAGGART, J.A., concurred with Fullerton, J.A.

Fullerton, J.A.

FULLERTON, J.A.:—This is an appeal from a judgment in favour of the plaintiff for the sum of $500 damages for the breach of a contract to carry a carload of potatoes and cabbages from Buchanan to Winnipeg. The contract is on the form known as the "Live Stock Special Contract," the agent having, through error,

used this form instead of the form of contract intended for ordinary shipments. The terms and conditions of this contract are for the most part inapplicable to the carriage of the goods in question. Eliminating what are inapplicable there remains simply an open contract of carriage, by which the defendant acknowledges receipt of 500 bushels of potatoes and cabbages consigned to S. Bookhalter, 644 Magnus Avenue, to be transported over the defendant railway and delivered at Winnipeg.

The car used was a refrigerator car heated with coal oil lamps.

It left Buchanan the night of Thursday, December 6, and arrived in Winnipeg at 7.30 on the morning of Saturday, December 8. One Rollick, an agent of the plaintiff, came to Winnipeg on the same train and immediately notified the consignee of the arrival of the car. The consignee took no immediate steps to take delivery. On Monday the 10th, he paid the freight and requested the defendant to deliver the car at the siding of the William Davies Co., which was done on the following day. When the car was opened the potatoes and cabbages were found to be frozen. The lamps were burning when the car was sealed by the agent at Buchanan.

The defendant called witnesses to show that the lamps were burning all the time the car was in transit and also while in the Winnipeg yards.

The weather was very cold on December 9, 10 and 11. Boyd, a car inspector in the employ of the defendant, says that it was 15 below zero at 7 o'clock in the morning of December 8.

Napier, a heater inspector, was asked: "Do you know anything about the temperatures on the 9th, 10th and 11th?" A. "Yes. Eight o'clock in the morning was 20 below." I think he is referring to the morning of the 9th.

Napier says that on the 10th the temperature was 26 below zero at 7 o'clock; 12 below at 13 o'clock and 10 below at 18 o'clock. On the 11th it was 4 below at 7 o'clock, and 1 below at 13 o'clock.

James McKay, a witness called for the defendant, states that "when you get 10 below or thereabouts it is pretty hard to heat a car," and that "down to about 20 below or thereabouts I don't think you could possibly heat it."

MAN.

C. A.

LOCKSHIN v. CANADIAN NORTHERN R. CO.

Fullerton, J.A.

The county court judge who tried the case thinks the potatoes were frozen after their arrival in Winnipeg, and the evidence supports his view.

It is important to determine when the transitus ended and the liability of the defendant as carriers ceased.

In *G. T. R. Co.* v. *McMillan* (1889), 16 Can. S.C.R. 543, Strong, J., at p. 555, said:

> It is well established by incontrovertible authority that the liability of carriers by railways *quâ* carriers terminates upon the arrival of the goods carried at their destination and the expiration of a reasonable time afterwards for their delivery. *Chapman* v. *G. W. R. Co.* (1880), 5 Q.B.D. 278. What is a reasonable time must be determined with a due regard to surrounding circumstances.

Burdett v. *C. P. R.*, 10 Man. L.R. 5, was an action to recover the value of goods destroyed by fire while on the siding of the defendant company at Emerson. The car arrived at noon and was burned during the following night. It was held that the transitus was at an end and the liability of the defendants as common carriers had ceased before the fire took place.

The temperature when the car arrived early Saturday morning was 15 below zero. The plaintiff knew the risk he was taking in neglecting to take delivery immediately. Fanny Lockshin, a daughter of the plaintiff, who was called by the plaintiff, says: "We understood we were to be very prompt to pay the freight and accept the car."

To account for the delay in taking delivery the plaintiff relies on a conversation which Fanny Lockshin swears she had over the telephone with someone in the freight department of the defendant company. She says she inquired about the car and was informed that "Nothing could be done until Monday morning." She further says, "I asked him particularly whether the potatoes would be all right until Monday morning and he said they would be all right."

While no objection was taken to the admission of this evidence the rule, as I understand it, is that the court should reject evidence not properly receivable even if it has not been objected to.

In my opinion before the plaintiff can bind the defendant by a conversation of this character he must first shew that it was

had with some person in authority. Here the witness can only say: "I spoke to the freight department and that is all I know."

In arriving at a decision in this case I would therefore disregard this conversation entirely.

Under all the circumstances, I would hold that it was the duty of the plaintiff to take delivery on Saturday, December 8, and that the defendant's liability as carrier ceased on that day.

It is contended that even if the defendant is not liable as a carrier it became a bailee of the goods the moment the transitus was completed and the fact of leaving the car in the open in such cold weather was evidence of negligence. Defendant has proved that it kept the lamps burning in the car, and short of unloading and storing its contents, it is difficult to suggest what they should have done further to protect the goods. The plaintiff was clearly at fault in failing to remove the goods on the Saturday, and it must be the plaintiff and not the defendant who should assume the risk of damage being caused by frost.

I would allow the appeal with costs and dismiss the action with costs. *Appeal allowed.*

MAN.

C. A.

LOCKSHIN v. CANADIAN NORTHERN R. Co.

Fullerton, J.A.

Re KELLY.

N. B.

S. C.

New Brunswick Supreme Court, Appeal Division, Hazen, C.J., White and Grimmer, JJ. June 6, 1919.

GUARDIAN AND WARD (§ I—3)—TESTAMENTARY GUARDIAN—APPOINTMENT OF NEW GUARDIAN—EX PARTE ORDER WITHOUT NOTICE—ERRONEOUS JURISDICTION OF PROBATE COURT.

No special form of words is necessary for the appointment of a testamentary guardian, and after such guardian has been appointed and the office is full, it is an erroneous exercise of jurisdiction in the Probate Court to appoint another guardian without serving notice on such testamentary guardian and taking evidence in support of the allegations contained in the petition for his removal.

APPEAL by testamentary guardian from an order of the Probate Court appointing a new guardian. Reversed.

Statement.

H. G. Teed, K.C., supported appeal; *H. A. Powell*, K.C., contra.

HAZEN, C.J. (oral):—Edward Kelly, prior to his death, made and executed his last will and testament, in which he gave to his brother, Patrick Kelly, all that he possessed in real estate, cash and property of every description, on condition, among others, that he bring up as he would his own the testator's three infant

Hazen, C.J.

N. B.
S. C.
RE KELLY.
Hazen, C.J.

children, Mary Elizabeth, Patrick Joseph and Margaret Catherine, until they were of age and able to provide for themselves. The youngest of these children, Margaret Catherine, was handed over to Patrick Kelly before his brother's death, and after his death, Patrick Kelly, who had been living in the United States, returned to Gloucester County, occupied the property of his brother and took charge of all three of his children.

An application was made to the judge of the Probate Court for the County of Gloucester, by the Rev. William Varilly, dated February 21, 1919, in which, after setting forth certain facts to the effect that he was a Roman Catholic priest, the death of Edward Kelly, the ages of the children and their relations, he stated that Patrick Kelly was endeavoring to sell the real and personal estate bequeathed to him by his brother on the condition which I have already mentioned; that Patrick Kelly was not a fit and proper person to be in charge of the infants, and that the welfare of the infants required that they be removed from his charge and custody.

On the strength of this petition the judge of the Probate Court for Gloucester County, without any notice to Patrick Kelly, and without his being afforded an opportunity of being present to meet the allegations against him, and without taking any evidence in support of the petition, made an *ex parte* order, granting the prayer of the petition and ordering that letters of guardianship be issued to the Rev. William Varilly. At a later date Patrick Kelly petitioned the judge of probate, praying that the order of appointment and the letters of guardianship granted by him on February 1, 1919, appointing the Rev. William Varilly guardian of the persons and estate of the said infant children of Edward Kelly, be cancelled, discharged and set aside, and that the said Varilly be ordered to pay the costs of the application. No evidence was heard on this application either, and the judge of probate gave judgment stating that, as the matter was to be appealed, and he understood he was asked to give a decision only to put the case in form for such an appeal on the points raised, he considered it superfluous for him to give in detail the reasons for his decision in refusing the application.

On this application the parties were represented by counsel, and it was admitted that the will was duly executed; that the

papers in the court were the papers used in obtaining letters of guardianship; that no *viva voce* evidence was given on the application, and that at the time of Varilly's appointment the children were in the custody of Patrick Kelly, acting under the will. It was further admitted that the children were taken by Varilly, since the issue of the letters of guardianship to him, without the consent of Patrick Kelly, and were at that time in the possession of Varilly, the girls being in the convent school at Bathurst, and the boy being at the Tracadie convent school.

It was agreed that on points taken by counsel for Patrick Kelly either party should have the right to appeal. The points taken by Mr. Teed were that under the facts as disclosed, both documentary and by admission, the court had no jurisdiction to appoint Varilly as guardian, the office being full, Patrick Kelly being the testamentary guardian under 12 Charles II., and that in any event such an order could not be made without notice to Patrick Kelly, and hearing.

In my view of the matter, Patrick Kelly was undoubtedly appointed testamentary guardian of the children, by his brother. He became testamentary guardian under the provision of the statute 12 Charles II., c. 24, and the language used in the will was amply sufficient, in my opinion, to make him such. In Simpson on the Law of Infants, at p. 191, it is stated that no special form of words is required for the appointment; any expression of intention would be held sufficient; and one of the examples given is: "I desire that my son shall be under the care of A. B." Having been appointed testamentary guardian, having undertaken the duties of such, and having the children in his possession, the question arises as to the authority of the Probate Court of Gloucester to appoint another guardian. It will be noted that the court did not remove Kelly from the position as testamentary guardian, but simply appointed the Rev. William Varilly thereto; that at the time the appointment was made the office was full, and even if the Probate Court had jurisdiction in a matter of this sort, I have no hesitation in saying that there was an erroneous exercise of such jurisdiction, and that it could only be exercised on notice to the party interested, and on taking evidence in support of the allegations contained

N. B.
S. C.
RE KELLY.
Hazen, C.J.

in the petition, the opportunity being afforded the party against whom allegations were made to give evidence in support of his own position.

It is laid down in the authorities that there is a difference between testamentary guardians and those appointed by the court, and although the court (meaning in that case the Chancery Court) has the power of interfering in the case of testamentary guardians, it proceeds on very different rules and principles from those which regulate its conduct where the discretion of appointing guardians devolves upon it in the first instance.

Without determining the question raised as to the jurisdiction of the Probate Court to act in the removal of a testamentary guardian, or the appointment of a guardian in place of the testamentary guardian, although I entertain very little doubt on the question, my opinion is, as I have stated, that there was an absolutely erroneous exercise of discretion in this case, and that the appeal should be allowed, with costs of this application and costs in the Probate Court.

Grimmer, J.

GRIMMER, J., agrees with Hazen, C.J.

White, J.

WHITE, J. (oral) :—I agree with the Chief Justice in thinking that the judge of the Probate Court erred in granting letters of guardianship, under the circumstances, without issuing a citation to Patrick Kelly and the parties interested, and especially so inasmuch as it appeared by the petition presented to him by Father Varilly that Patrick Kelly had been appointed testamentary guardian.

I express no view as to what jurisdiction the Probate Court possesses under the statute to remove a testamentary guardian, or to supersede him by the appointment of a new guardian under proper procedure.

I agree that the letters of guardianship to Father Varilly should be revoked, and that he should pay the costs of Patrick Kelly both here and in the court below.

Appeal allowed.

ADOLF v. ADOLF.

SASK.

C. A.

Saskatchewan Court of Appeal, Haultain, C.J.S., Newlands, and Lamont, JJ.A. July 9, 1919.

HUSBAND AND WIFE (§ I B—45)—USE OF WIFE'S PROPERTY BY HUSBAND FOR USE OF HIMSELF AND FAMILY—PRESUMPTION OF GIFT BY WIFE.

When husband and wife are living together and he uses her property or the income therefrom, for the joint use of himself and family, she is presumed to have made a gift of the same to him.

Statement.

APPEAL by defendant from the trial judgment in an action in which the wife claimed, under an implied lease, a portion of the crop grown by the husband on land owned by the wife. Reversed.

W. A. Doherty and *L. T. McKim*, for appellant; *A. R. Smith*, for respondent.

Haultain, C.J.S.

HAULTAIN, C.J.S., concurs with Newlands, J.A.

Newlands, J.A.

NEWLANDS, J.A.:—This is an action between husband and wife. Plaintiff, the wife, sues her husband, claiming under an implied lease or for use and occupation, one-third of the crop grown on the south-east quarter of 5-21-10, West 2nd, for the year 1916.

Previous to Oct. 7, 1915, plaintiff had left defendant alleging acts of cruelty, and had begun an action for alimony when defendant came to her and agreed to give her the land in question and certain personal property if she would return and live with him. This was done, and they lived together until Dec., 1917, when she left him again. Defendant farmed the quarter-section in 1916 and 1917, using horses and implements belonging to the plaintiff, as well as his own. There was no understanding or written lease about farming the land in question, and the trial judge found that there was no express agreement one way or the other.

The plaintiff returned to defendant's house in Jan., 1918, demanded and got certain of her chattels, and claimed the balance of the oats raised on her land which were still in defendant's possession. Some 2,000 bushels of oats had been raised on her land, and defendant had sold about 800, leaving some 1,200 bushels still unsold. Instead of giving her these oats, he paid her $600 for them.

The trial judge held that, by this payment of $600, her husband was paying her rent for 1917, and therefore tenancy from year to

SASK.

C. A.

ADOLF
v.
ADOLF.

Newlands, J.A.

year was raised by presumption, and he held the husband liable for rent for this land for the year 1916.

I cannot agree with this conclusion of the trial judge.

When husband and wife are living together and he uses her property, or the income therefrom, for the joint use of himself and family, she is presumed to have made a gift of the same to him. Eversley on Domestic Relations, p. 412.

Now this is what happened in 1916. In 1917, the husband raised a crop of 2,000 bushels of oats on her property. Before she left him, he had used some 800 bushels from this crop. After leaving him the wife claimed what remained of the oats, some 1,200 bushels, not as rent but as her property.

As a matter of fact, these oats were her property; they had been grown upon her land, without any agreement that the crop should belong to the husband, and they had not yet been sold. When the wife demanded the balance of her oats, her husband—wishing to retain them—bought them from her, paying her $600 for them; that is, at the rate of 50c. per bushel. There was no mention of rent. The trial judge held that a fair rent would be 1/3 of the crop. The amount of oats the defendant bought from plaintiff was 3/5 of the crop, which is another reason for holding that the defendant did not pay this money to the plaintiff as rent. If it was not paid as rent, then no presumption such as the trial judge has found to have arisen could have arisen, and if there was no tenancy either actual or presumptive, then the husband is not liable for rent.

I think the facts of this case, as proved at the trial, justify us in coming to the conclusion that in 1916 the husband and wife lived together and the husband farmed the wife's land with his own, using the produce therefrom for the joint benefit of himself and family, and cannot, therefore, be asked to account for it. That during 1917 the same conditions continued until his wife again left him. That at that time the husband had in his possession 1,200 bushels of oats raised on the wife's land, which would be her property, and these he bought from her for $600. This raises no presumption as to the conditions they lived on previously, and does not make him liable for the crop from her land for the previous year which was used for the joint benefit of husband, wife and family.

SASK.

C. A.

ADOLF v. ADOLF.

Lamont, J.A.

The appeal should, therefore, be allowed with costs and the judgment below reduced to $40.75 with costs on the district court scale.

LAMONT, J.A.:—The defendant and plaintiff are husband and wife. Prior to Oct. 5, 1915, the defendant was the registered owner of the East half-5-21-10-W 2nd, and the parties hereto as man and wife resided upon and farmed the said lands. The buildings were all on the N–E quarter. In September, 1915, the plaintiff left the defendant, and brought an action against him for alimony. In October the defendant agreed to transfer to the plaintiff the S–E quarter of said land, together with certain animals and machinery and the plaintiff agreed to return and live with him again. These agreements were carried out, and they lived together as before until December, 1917, when the plaintiff again left the defendant. In January, 1918, she returned to the farm for her goods and chattels, and while there claimed all the grain then on her quarter, amounting to some 1,200 bushels. The total crop grown on her quarter in 1917 was 2,000 bushels of oats. The defendant agreed that she could have the 1,200 bushels of oats. Why she was allowed to have them does not appear. She claimed the oats because they were grown upon her land, and he said he would give her $600 for the oats, which he did. In March, 1918, she brought this action, claiming 1/3 of the crop grown upon her land in 1916 under an implied lease with her husband, or for use and occupation of her land.

The plaintiff admits that there was no lease entered into, or any agreement by which her husband was to pay rent either in 1916 or 1917. She went back to live with him as his wife, and he went on farming the land, as he had done for the preceding 13 years. In cross-examination the plaintiff was asked if she would have asked for rent had there been no trouble and had they gone on living happily together. Her answer was, "Well, I do not know." Before leaving him in December, 1917, she never asked her husband for rent for 1916 or for any share of the crop, nor did she ask anything for the use and occupation of her land for that year.

The trial judge in effect held that, apart from the payment of the $600 for the 1917 oats, there was no evidence to support the claim of the plaintiff, but as the defendant had entered on the land

SASK.

C. A.

ADOLF
v.
ADOLF.

Lamont, J.A.

after transfer to the plaintiff and as he subsequently paid her $600, for what he terms her share of the 1917 crop, he thought a tenancy should be presumed.

If I were satisfied on the evidence that the $600 was paid to the plaintiff for her share of the 1917 crop on the basis that she was to get a portion of the crop as rent, or for use and occupation of her land, I would think the trial judge arrived at the correct conclusion. I have, however, difficulty in squaring that view with the admitted facts. It is admitted that the crop grown on the plaintiff's land in 1917 was 2,000 bushels, and the evidence establishes that a 1/3 share of the crop is a fair remuneration to the owner for the use and occupation of land. Had the defendant given her 1/3 of the 2,000 bushels, the inference that he was giving it as remuneration for use of her land would, to my mind, not be unreasonable. Instead, however, of claiming and getting a 1/3 share, she claimed all the oats then on the land, which amounted to 3/5 of the total crop. An independent witness, Aichele, who was present when the plaintiff claimed the oats, testified that she claimed them because they were grown on her land, and the defendant in his examination for discovery—which was put in evidence—said: "I just gave her $600 for what oats was grown on her land."

The proper inference to my mind to be drawn from the evidence is, that the $600 was paid not as rent or for use and occupation, but in the belief, evidently held by both parties, that the plaintiff was entitled to whatever grain was grown upon her land. If I am correct in this conclusion, the payment, under the circumstances, is not sufficient to establish a tenancy. The well-established rule is, that where a husband receives the income from his wife's property and this is expended for their joint purposes and advantages, the onus is on the wife to establish clearly and conclusively that he was to account to her for the income. This she has not done. *Rice* v. *Rice* (1900), 27 A.R. (Ont.) 121; *Ellis* v. *Ellis* (1913), 12 D.L.R. 219, at p. 222.

The appeal in my opinion should be allowed with costs, and the judgment below reduced to $40.75, with costs on the district court scale. *Appeal allowed.*

Re SUCCESSION DUTY ACT AND ESTATE OF SIR WILLIAM VAN HORNE.

B. C.

C. A.

British Columbia Court of Appeal, Macdonald, C.J.A., and Martin, Galliher, McPhillips and Eberts, JJ.A. July 15, 1919.

TAXES (§ V A—180)—SUCCESSION DUTIES ACT, R.S.B.C., 1911, c. 217—PROPERTY BOTH INSIDE AND WITHOUT THE PROVINCE—SUCCESSION DUTIES PAYABLE.

Under the Succession Duties Act, R.S.B.C., 1911, c. 217, and amendments thereto, where a deceased has property both inside and without the province and the property inside would otherwise be exempt from taxation, then for bringing such inside property within the ambit of taxation the outside property may be looked to, but the taxation shall only be on the actual value of such inside property.

Statement.

APPEAL by the Minister of Finance from a judgment of Hunter, C.J.B.C., determining the duties to be levied under the Succession Duties Act. Affirmed.

W. D. Carter, K.C., for appellant; *Charles Wilson*, K.C., for respondent.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—The deceased was domiciled and died in the Province of Quebec. He bequeathed a large estate which included personalty in this province valued at $300,000. The question to be decided is what duties should be levied upon the said property in this province under and by virtue of the Succession Duties Act, R.S.B.C., 1911, c. 217, and amendments thereto. The decision turns on the true interpretation of s. 7 of the said Act as amended by s. 4 of the Amending Act, 1915, c. 58. The Deputy Minister of Finance has, I think, misconstrued the section, which reads as follows:—

7. When the net value of the property of the deceased exceeds twenty-five thousand dollars and passes under a will, intestacy, or otherwise, either in whole or in part to or for the use of the father, mother, husband, wife, child, daughter-in-law or son-in-law of the deceased, all property situate within the province or so much thereof as so passes (as the case may be) shall be subject to duty as follows:—

(a) Not applicable.

(b) Where the net value exceeds one hundred thousand dollars, but does not exceed two hundred thousand dollars, at the rate of one dollar and fifty cents for every one hundred dollars of the first one hundred thousand dollars, and two dollars and fifty cents for every one hundred dollars above the one hundred thousand dollars.

(c) Where the net value exceeds two hundred thousand dollars, at the rate of one dollar and fifty cents for every one hundred dollars of the first one hundred thousand dollars, two dollars and fifty cents for every one hundred dollars of the second one hundred thousand dollars, and five dollars for every one hundred dollars above the two hundred thousand dollars.

The phrase "net value" in the first line thereof may be assumed to refer to the net value of the whole estate wherever situate (see

B. C.

C. A.

RE SUCCESSION DUTY ACT AND ESTATE OF SIR WILLIAM VAN HORNE.

Galliher, J.A.

definition in s. 2), but "net value" as used in ss. (b) and (c) which are applicable to this case, refers to the estate situate within the province. It is "all property within the province" which "shall be subject to duty as follows."

The appeal should therefore be dismissed.

MARTIN, J.A. (dissenting), would allow the appeal.

GALLIHER, J.A.:—It is not the purpose of the Succession Duties Act of British Columbia to impose taxation on property situate without the province.

We have in the case before us $300,000, approximately of property in the province liable to taxation.

Supposing there was no property outside the province this would be taxed as Mr. Wilson indicates.

All this property is taxable, and to adopt the method pursued by the Government brings about the result that a higher tax is imposed on this particular property by reason of the fact that the deceased also held property outside the province at the time of his decease.

It is true the rate imposed on each $100,000 of property is the same, viz: 1½, 2½ and 5%, but the result is that by applying the proportional system to both inside and outside property, the value of the inside property is enhanced so as to produce a revenue several thousand dollars in excess of what the tax would be if applied directly to the inside property.

I do not think the object or effect of the Act was to bring about either of these conditions.

I think the more reasonable construction is that where the deceased has property both inside and without the province, and the property inside would otherwise be exempt from taxation, then for bringing such inside property within the ambit of taxation the outside property may be looked to, but the taxation shall only be on the actual value of such inside property.

I would dismiss the appeal.

McPhillips, J.A.

MCPHILLIPS, J.A. (dissenting):—This appeal involves the consideration of a very important point. It may be shortly stated to be, that where admittedly there is property the *situs* of which is in the province the rate may be imposed, as fixed by the Succession Duty Act (c. 217, 2 Geo. V. 1911, s. 2, "aggregate value," "net value," s. 7 and Succession Duty Amendment Act,

5 Geo. V., s. 4, B.C.), taking into consideration the "aggregate value" and "net value" as defined in s. 2 of c. 217 the interpretation section of the Act.

The definitions as contained in the Act read as follows:—

"Aggregate value" means the value of the property before the debts, incumbrances, or other allowances authorised by this Act are deducted therefrom, and shall include property situate without the province as well as property situate within the province;

"Net value" means the value of the property, both within and without the province, after the debts, incumbrances, or other allowances or exemptions authorised by this Act are deducted therefrom.

The estate of the deceased is shewn to come within sub-s. (c) of s. 7, of the principal Act as amended by the Succession Duty Act Amendment Act, 1915, and the amount of duty has been fixed by the Minister of Finance taking into consideration the property of the deceased without the province, but the taxation is imposed only upon property within the province, *i.e.*, the property outside the province is only looked at to determine the aggregate value and net value which must be determined in pursuing and complying with the provisions of the provincial enactment. The point of law to determine is can this be said to be *ultra vires* legislation? There has as yet, so far as my research has gone, been no express decision. In *Re Renfrew* (1898), 29 O.R. 565, Mr. Justice Street, at p. 569, said:—

There is no doubt that it was within the powers of our legislature to have enacted that the property of a deceased person situate outside the province should be considered in arriving at this aggregate value, and it may also be conceded that the language of the sections relied on by the appellant taken in its ordinary sense is sufficiently wide to include such property,

But in the result the decision was that the then statute law of Ontario was held to be ineffective. Following this decision, legislation was enacted in Ontario to meet the point, that was An Act Respecting Succession Duties (62 Vict. c. 9), passed in 1899, s. 12 reading as follows:—

12. In determining for the purposes of sub-ss. 3 to 6 of s. 4 of the Succession Duty Act the aggregate value of the property of any person dying after this section takes effect, the value of his property situate outside of this province shall be included as well as the value of the property situate within this province.

Since this enactment, it would not appear that the question has been further agitated, save passing reference to it in some

B. C.

C. A.

RE SUCCESSION DUTY ACT AND ESTATE OF SIR WILLIAM VAN HORNE.

McPhillips, J.A.

cases, notably by Garrow, J.A., in *Att'y-Gen'l for Ontario* v. *Woodruff* (1907), 15 O.L.R. 416, at p. 432:—

Sub-ss. 3, 4, 5, 6, 7 of s. 4 have to do with the aggregate value (which, by 62 Vict. c. 9, s. 12, is to include the value of property situate within and without Ontario) rates, and further exemptions not now in question.

And at p. 434:—

Such property would by force of the rule be, *primâ facie* at least, included in the very wide definition of "property" contained in s. 2, even without the aid of the amendment to s. 4 (1) (a). But with the aid of that amendment, the rule and the statute agreeing, the case for the Crown becomes as plain as it appeared to be in *Att'y-Gen'l* v. *Newman* (1899), 31 O.R. 340, apart, of course, from the circumstances of the settlements, with which I will deal presently. That is to say, if the testator had owned at his decease the property covered by the settlements, it would have clearly fallen within the express words of the statute as amended, and have been liable to the duty, and the question of actual *situs* would have been of no importance.

Woodruff v. *Att'y-Gen'l* went on appeal to the Privy Council, see [1908] A.C. 508, and the judgment of the Privy Council reversed the judgment of the Court of Appeal for Ontario, but as I read the judgment, in no way passed upon or decided the question we here have to determine. The neat question for decision is, whether or not the British Columbia Succession Duty Act is within or without the powers of the British Columbia Legislature in so far as the scale of taxation is arrived at, taking into consideration in the aggregate value and net value property without the province? There is no attempt whatever to tax property without the province; that which is taxed is admittedly within the province. In effect a statutory rule or scale has been laid down to arrive at what is the aggregate value or net value, and can it be said to be *ultra vires* legislation? In my opinion it cannot, the resultant effect of *intra vires* legislation is not for the court unless satisfied that the legislature has gone outside its constitutional province, *i.e.*, beyond the powers conferred upon it by the B.N.A. Act, and as to that in my opinion the challenged legislation is effective and the succession duty as claimed is payable. I have given very anxious consideration to the judgment of the Chief Justice of British Columbia (Hunter, C.J.B.C.), from which judgment this appeal is taken and with great respect to the Chief Justice I am entirely unable to accept the view at which he arrived.

In my opinion therefore the appeal should be allowed.

Eberts, J.A.

EBERTS, J.A., would dismiss the appeal.

Appeal dismissed.

THE KING v. ALAMAZOFF.

MAN.

K. B.

Manitoba King's Bench, Mathers, C.J.K.B. August 11, 1919.

ALIENS (§ I—3)—DETAINED IN CUSTODY FOR DEPORTATION—IMMIGRATION ACT—JURISDICTION OF COURT TO ADMIT TO BAIL.

A court not seized of the inquiry has no inherent jurisdiction to admit to bail an alien detained in custody under the Immigration Act (9-10 Edw. VII. c. 27 (Dom.)) for the purpose of being deported.

[See also *Re Jeu Jang How*, *post* 538.]

Statement.

APPLICATION on a writ of *habeas corpus* to admit to bail an alien held in custody under the Immigration Act for the purpose of being deported.

Marcus Hyman, for appellant; *F. M. Burbidge*, K.C., for respondent.

Mathers, C.J.K.B.

MATHERS, C.J.K.B.:—This is an application by Solomon Pearl Alamazoff, a non-naturalized Russian subject who came to Canada in 1913, for bail pending an inquiry under the Immigration Act, 9-10 Edw. VII. c. 27 (Dom.), with a view to his deportation. He is at present detained at the Winnipeg Immigration Station by order of the Minister of Immigration upon a complaint that he, with others, by word or act created or attempted to create a riot or public disorder in Canada and did without lawful authority assume powers of government in the City of Winnipeg. The purpose of his detention is that an examination and investigation into the facts alleged in the complaint may be made by a Board of Inquiry. The authority for the proceedings taken is to be found in ss. 41 and 42 of the Act. Sub-s. 2 of the latter section provides that if the Board of Inquiry is satisfied that the subject of the inquiry belongs to any of the prohibited or undesirable classes mentioned in ss. 40 and 41 such person shall be deported forthwith as provided in s. 33 of the Act, subject to a right of appeal to the Minister.

Alamazoff was taken into custody on June 17 last. On July 16 a Board of Inquiry commenced an investigation into the facts alleged in the complaint against him, which investigation is still pending. S. 33, sub-s. 11, of the Act enacts that:

> 11. Pending the final disposition of the case of any person detained or taken into custody for any cause under this Act he may be released under a bond, which bond may be in the Form F in the schedule to this Act, with security approved by the officer in charge, or may be released upon deposit of money with the officer in charge in lieu of a bond, and to an amount approved by such officer; upon condition that such person shall appear before a Board of Inquiry or officer acting as such at any port of entry named by the officer

MAN.

K. B.

THE KING v. ALAMAZOFF.

Mathers, C.J.K.B.

in charge, and at such time as shall be named, for examination in regard to the cause or complaint on account of which he has been detained or taken into custody.

The Board of Inquiry and the officer in charge have both refused upon application to admit the applicant to bail under this subsection or to approve of the amount of the security required.

On July 29, I granted, upon Alamazoff's petition, a writ of *habeas corpus* to bring him before a judge of this court in order that he might make an application for bail here. Accordingly he was produced before me in Chambers on the 5th instant when the present application was made by counsel on his behalf and opposed by counsel representing the Minister.

The application is based both on the Common Law and on s. 3 of the Habeas Corpus Act, 31 Chas. II. c. 2.

That Act only applies where the person seeking its aid "shall be committed for any crime (unless for treason or felony) in vacation time and out of term." Counsel for the applicant argued that these deportation proceedings are criminal in their essence because there is first a charge then an order for arrest followed, if found guilty, by a sentence of deportation. I have found no English or Canadian authority on the point, but a consideration of the purpose of the Immigration Act convinces me that proceedings for the deportation of an undesirable alien are in no sense criminal proceedings and that a person arrested and detained for such purpose is not "committed for any crime" within the meaning of the Habeas Corpus Act. The object and purpose of the proceedings is not to punish for an offence against the law of Canada. It is to ascertain whether or not the conditions upon which the alien was permitted to enter and reside in Canada have been complied with by him or whether they have been broken.

The Parliament of Canada, acting well within its right, has prescribed the conditions upon which an alien may enter or be permitted to remain in Canada. In *Att'y-Gen'l for Canada* v. *Cain*, [1906] A.C. 542, at 546, Lord Atkinson, delivering the judgment of the Privy Council, quoted with approval the following passage from Vattel's Law of Nations:—

> One of the rights possessed by the supreme power in every State is the right to refuse to permit an alien to enter that State, to annex what conditions it pleases to the permission to enter it, and to expel or deport from the State,

at pleasure, even a friendly alien, especially if it considers his presence in the State opposed to its peace, order, and good government, or to its social or material interests.

The proceedings under the Act are merely a means provided for ascertaining whether or not Alamazoff as alleged has failed to comply with the conditions upon the observance of which alone he is entitled to remain in Canada. That such proceedings are not criminal in their essence has been decided by so high an authority as the Supreme Court of the United States. In proceedings to deport a Chinese subject pursuant to the Chinese Exclusion Act, the point arose as to whether or not such proceedings were criminal and in *Fong Yue Ting* v. *United States*, 149 U.S. 730, Gray, J., said that such a proceeding:—

> is in no proper sense a trial and sentence for a crime or offence. It is simply the ascertainment by appropriate and lawful means of the fact whether the conditions exist upon which Congress has enacted that an alien of this class may remain within the country. The order of deportation is not a punishment for a crime. It is not a banishment in the same sense in which the word is often applied to the expulsion of a citizen from his country by way of punishment. It is but a method of forcing the return to his own country of an alien who has not complied with the conditions upon the performance of which the Government of the nation, acting within its constitutional authority and through the proper departments, has determined that his continuing to reside here shall depend.

This language was subsequently approved by the same court in *Wong Wing* v. *United States*, 163 U.S. 228, at 236, and in *Chin Woh* v. *Colwell*, 187 Fed. 592. The same has been held with respect to deportation proceedings under the U.S. Immigration Act, 1907, upon which our Act was largely modelled: *Sere* v. *Berkshire*, 185 Fed. 967 (1911). This statement of the law is, to my mind, quite as applicable to deportation proceedings under the Canadian Act as it was held to be to the United States Act.

It is quite apparent that the applicant cannot have recourse to the Habeas Corpus Act for the purpose of obtaining his release on bail because that Act applies only to the case of a person committed for a crime and does not apply to the proceedings taken against him, and there is no other statute which empowers this court to grant bail in his case.

If there is any right to bail it must be sought elsewhere. Sub-s. 11, above quoted, may be passed over because it confers power only upon the immigration officer in charge.

MAN.

K. B.

THE KING v. ALAMAZOFF.

Mathers, C.J.K.B.

If a judge of this court has any power to admit to bail in such a case it must be because such a power has been derived from the common law.

In support of the contention that there is jurisdiction at common law to admit the applicant to bail, *The Queen* v. *Spilsbury*, [1898] 2 Q.B. 615, was relied upon. The applicant has been committed to prison to await his return or trial for a crime to another part of the British Dominions under the Fugitive Offenders Act, 1881. He applied to be admitted to bail while awaiting his return. It was contended that the Act gave no power to admit to bail, but the court in that case said: "This court has independently of statute by the common law jurisdiction to admit to bail." Then follows a passage from Chitty's Criminal Law in which it is said the law is well stated. This passage plainly refers to the common law powers of the court to admit to bail persons in custody upon a criminal charge.

That the *Spilsbury* decision was not intended as a declaration of the law applicable to all cases is shewn by the statement of Wright, J., that it is not to be taken as a precedent in a case under the Extradition Act. In *Wright* v. *Henkel*, 190 U.S., the *Spilsbury* case was relied upon as showing the right at common law to grant bail in an extradition case. Bail had been refused in the court below, and in that conclusion the Supreme Court concurred. With respect to the power of the court apart from statute to grant bail in such a case it merely made the cautious observation that:—

> We are unwilling to hold that the circuit courts possess no power in respect of admitting to bail other than as specifically vested by statute or that . . . these courts may not in any case, and whatever the special circumstances, extend that relief.

In applications under both the Fugitive Offenders Act, 1881, and the Extradition Act the party is charged with a crime, not of course a crime against the law of the jurisdiction where the proceedings are being taken, but against the law of the demanding state. It must appear that the acts alleged would constitute the crime charged within the local jurisdiction if committed there, and the object of the proceedings is that he be sent back to stand his trial before the tribunals of the demanding state. The whole proceeding is essentially criminal and the accused while under detention is in custody upon a criminal charge.

I have been referred to no English or Canadian authority nor have I found any which says that the court has inherent jurisdiction to grant bail on *habeas corpus* in a non-criminal proceeding such as this is. The question has, however, been before the United States courts in analogous deportation proceedings under the Chinese Exclusion Act, and the United States Immigration Act, 1907. Under these Acts the deportee has a right to appeal to the Federal District Court against the deportation order, and in a number of cases it has been held that the court to which such an appeal is made has inherent power to admit to bail as incident to its jurisdiction to hear and determine the right to make the order. *Wentfield* v. *Hanges*, 222 Fed. 745. In *Re Ah Tai* (1903), 125 Fed. 795, it was so held but the court at the same time expressly disclaimed power to admit to bail on *habeas corpus* proceedings. In *Chin Wah* v. *Colwell*, 187 Fed. 592, the circuit court of appeal for Oregon held that the power did not exist even in that case, and that the court had no inherent jurisdiction to admit to bail.

The concensus of judicial opinion in the United States is that a court not seized of the inquiry has no inherent jurisdiction to admit to bail an alien detained in custody under either of the above mentioned Acts for the purposes of deportation proceedings. *Ah May*, 21 Fed. 808, *Ah Tai, supra; Chin Wah* v. *Colwell, supra*; *United States, ex rel. Ng Hen* v. *Sisson* (1914), 220 Fed. 538.

As against this view of the law I have discovered only one decision, that of a single judge in *Lum Pay*, 128 Fed. 974, and the dissenting judgment in *Ah May, supra*.

The Act has provided for bail being granted pending the inquiry by the immigration officer. It has not expressly conferred any jurisdiction in that respect upon this court, and in my opinion there is no inherent power in this court to interfere.

But even if I had the power I should refuse to exercise it in the applicant's favour. Bail has been refused by the officer in charge and no case has been made for overruling the discretion he has exercised. The applicant is alleged to have been guilty of a very serious offence against the peace, order and good government of Canada. The offence alleged against him is one that is carried on in secret and if at liberty there can be no assurance that he would not continue to abuse the privilege of residence

MAN.

K. B.

THE KING v. ALAMAZOFF.

Mathers, C.J.K.B.

here. The liberty of the individual must at all times be subordinated to the safety of the state. His somewhat truculent attitude while before the board and his refusal to answer relevant questions put to him even when assured that his answers would not be used against him in any other proceedings does not impress me favourably. For these reasons I would, even if I had the discretion, refuse to admit the applicant to bail.

The writ of *habeas corpus* will be quashed.

B. C.

C. A.

Re JEU JANG HOW.

British Columbia Court of Appeal, Macdonald, C.J.A., and Martin, Galliher and McPhillips, JJ.A. July 2, 1919.

ALIENS (§ I—3)—ADMISSION TO CANADA UNDER DOMINION ACT—DEPORTATION.

A person having gained admission to Canada under the provisions of the Chinese Immigration Act (R.S.C. 1906, c. 95), can be deported, if at all, only under s. 7B of the same Act, as enacted by (1917) 7 & 8 Geo. V. c. 7.

[See also *The King* v. *Alamazoff*, *ante*, 533.]

Statement.

APPEAL by defendant from a judgment of Murphy, J., refusing to direct that a writ of *habeas corpus* should issue and that an alien should be accorded his liberty and freed from an order for deportation issued by the Board of Inquiry under the Immigration Act (B.C., 9 & 10 Edw. VII., c. 27, 1910). Reversed.

Alfred Bull, for appellant.

R. L. Reid, K.C., for respondent.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—The appellant was admitted to Canada pursuant to the provisions of the Chinese Immigration Act, R.S.C., 1906, c. 95, as appears by the statement and declaration for registration, dated Feb. 10, 1919, and the receipt for head tax bearing the same date. Some weeks later he was arrested and brought before a Board of Inquiry and by them ordered to be deported. An appeal was taken to the Minister of the Interior and dismissed. The appellant then moved for a writ of *habeas corpus* which was refused: whereupon he took this appeal.

One of the grounds of appeal is that there was no evidence before the board upon which appellant could be deported, and it was argued that in the total absence of evidence that the appellant was illegally in Canada the board had no jurisdiction to entertain proceedings for his deportation, and that therefore the court could

interfere notwithstanding the provisions of s. 23 of the Immigration Act, 9-10 Edw. VII., 1910, c. 27, (Dom.), which purports to take away the jurisdiction of the court to review, quash, reverse, restrain or otherwise interfere with the decision of the board or of the minister.

But there is another ground upon which I should prefer to rest my decision in this case. I think it right, however, to say that in my opinion no court of *justice* could, on the evidence adduced before the board, have made the order which the Board of Inquiry constrained itself to make. The ground upon which I prefer to rest my decision is based upon the following considerations: The appellant having gained admission to Canada under the provisions of the Chinese Immigration Act can be deported, if at all, only under its provisions. The Act provides clear and explicit procedure for deporting a person of Chinese origin who may be unlawfully in Canada. That procedure is quite different to that invoked in this case, founded as the latter is on the provisions of the Immigration Act, which by s. 79 is only to apply to Chinese immigration when not repugnant to the provisions of the Chinese Immigration Act.

The Immigration Act confers upon a Board of Inquiry power to deport, while the Chinese Immigration Act by s. 7B, as enacted by c. 7 of 7-8 Geo. V. (1917), provides that:—

> Whenever any officer appointed under this Act or under the Immigration Act has reason to believe that any person of Chinese origin is illegally in Canada he may, without a warrant, apprehend such person, and if such person is unable to prove to the satisfaction of the officer that he has been properly admitted into, and is legally in Canada, the officer may detain such person in custody and charge him before a magistrate with being illegally in Canada, which charge shall be brought summarily before the magistrate and the burden of proof of such person's right to be in Canada shall rest upon such person, and if the magistrate decides that he is illegally in Canada, such person shall be deported at his own expense, if able to pay, and if not, at the expense of His Majesty.

The submission of counsel for the immigration authorities was that either remedy was open to them, but there is nothing in either Act to entitle me to say that the remedies are alternative. On the contrary, the Immigration Act is to be applied only when not repugnant to the provisions of the Chinese Immigration Act. No doubt parliament could have made it optional with the immigration authorities to take proceedings under one or the other Act,

B. C.

C. A.

RE JEU JANG HOW.

Macdonald, C.J.A.

but it has not done so in express terms, and I think the repugnancy clause of the Immigration Act disentitles me to imply an option was given to the immigration authorities to proceed under the other as they might see fit.

Mr. Reid, counsel for the immigration authorities, referred us to a decision of the Supreme Court of the United States, reversing the judgment of the Circuit Court of Appeals of New York. The cases are very similar in their facts, and our statutes and those in question here are in general much alike. The decision in that case, however, appears to me to have been affected in no small degree by the history of the United States legislation and the rulings of the Executive thereunder. That case affords no satisfactory guide to a conclusion based on legislation having a different history and differing also in terms and sequence of dates. Said s. 7B is the last word in our legislation on the subject, and is all inclusive in its language, and any other mode of procedure in dealing with Chinese persons unlawfully in Canada must necessarily I think be held to be repugnant to that section. Once a Chinese person is admitted into Canada, *i.e.*, passed and allowed to enter, any question afterwards raised as to whether or not he is illegally here must be decided pursuant to s. 7B.

The appeal should be allowed and the writ should be directed to be issued.

Martin, J.A.

MARTIN, J.A., would allow the appeal.

Galliher, J.A.

GALLIHER, J.A. (dissenting):—I am in agreement with the conclusions reached by Murphy, J., and would dismiss the appeal.

McPhillips, J.A.

MCPHILLIPS, J.A.:—This is an appeal from Murphy, J., who refused to direct that a writ of *habeas corpus* should issue and that Jeu Jang How should be accorded his liberty and freed from the order for deportation issued by the Board of Inquiry under the Immigration Act (9 & 10 Edw. VII., c. 27, 1910). In justice to the judge it must be stated that the appeal was argued upon the basis that the Chinaman was granted a certificate under s. 8 of the Chinese Immigration Act (3 Edw. VII. c. 8)—see R.S.C., c. 95, s. 11—and that he was allowed to enter and given the certificate upon the representation that he was a student. The judge seems to have been under the impression that this was not the case. It is to be remarked however with great respect to the judge that there exists no requirement in s. 8 (3 Edw. VII. c. 8) for the status of the

immigrant being set forth. It is to be further observed that the claim may be made as was made in the present case that Jeu Jang How was a student—and later a refund could be applied for—viz., within eighteen months of arrival in Canada. See s. 7 (3 Edw. VII. c. 8). The certificate once granted under s. 8 (3 Edw. VII. c. 8) confers status and in my opinion may only be contested in the manner set forth in s. 8. It was strongly urged at this Bar that s. 79 of the Immigration Act had the effect of applying all the provisions of that Act and would empower the Board of Inquiry sitting under that Act to make the deportation order. It is to be noted, however, that that section reads as follows:—

> 79. All provisions of this Act not repugnant to the provisions of the Chinese Immigration Act shall apply as well to persons of Chinese origin as to other persons.

That the Board of Inquiry should be enabled to make an order of deportation notwithstanding the existence of the certificate granting status to the immigrant under the provisions of the Chinese Immigration Act at once indicates repugnancy. That certificate is *primâ facie* evidence that the person presenting it has complied with the requirements of the Chinese Immigration Act and the forum of contestation is defined, namely, in a summary manner before any judge of a superior court (s. 8, 3 Edw. VII. c. 8). It is clear that once the immigrant is permitted to land upon a representation then made—and a certificate issues—*that* certificate can only be displaced in the exercise of the powers conferred upon a judge of a superior court; it cannot be rendered nugatory by a Board of Inquiry acting as it may "upon any evidence considered credible or trustworthy" (see s. 16 of c. 27, 9-10 Edw. VII., 1910—the Immigration Act).

In my opinion the Board of Inquiry was without jurisdiction in the present case (also see *Rex* v. *Fong Soon* (1919), 45 D.L.R. 78, 31 Can. Cr. Cas. 78).

In my opinion the judgment appealed from should be reversed and the appeal allowed. *Appeal allowed.*

SASK.

C. A.

THE KING v. MEYERS.

Saskatchewan Court of Appeal, Haultain, C.J.S., Newlands, Lamont and Elwood, JJ.A. July 9, 1919.

CRIMINAL LAW (§ II B—49)—ACCUSED COMMITTED TO GAOL—REMOVED TO POLICE CELLS—ELECTION BEFORE DISTRICT JUDGE—CONSENT TO BE TRIED BY HIM—TRIAL—JURISDICTION OF COURT.

An accused who, at the preliminary hearing on an indictable offence, has been ordered to be committed to gaol for trial and has been removed to the police cells preparatory to being taken to the gaol, which is situated in another district, is "committed to gaol" and may be brought before the district judge of the district where the offence was committed for election, and having voluntarily appeared before such judge and with his own consent and the consent of the Crown prosecutor having been tried by such district judge, on a charge within the jurisdiction of the court, such court has jurisdiction to try the accused.

It is not necessary that the accused be actually transferred to the gaol or that the election be made before the district judge where such gaol is situated.

[*Giroux* v. *The King* (1917), 39 D.L.R. 190; 29 Can. Crim. Cas. 258, followed.]

Statement. CASE STATED for the opinion of the court as to the validity of an election for trial under certain circumstances and as to the jurisdiction of the district court.

P. E. Mackenzie, K.C., for the Crown; *C. A. Irvine*, for the prisoner.

The judgment of the court was delivered by

Haultain, C.J.S. HAULTAIN, C.J.S.:—The following case is stated for the opinion of the court by the judge of the district court for the judicial district of Saskatoon.

POINT 1.

The prisoner was extradited from the United States, received into custody of the police at Saskatoon, and charged before the police magistrate on May 28, 1919, for receiving stolen goods contrary to s. 399 of the Criminal Code.

On the preliminary hearing he was committed for trial; the warrant of commitment is not before me, but it is conceded by counsel for the Crown that the accused was committed to jail at Prince Albert to await his trial.

On May 31 he appeared before me with his counsel and elected for a speedy trial, which was fixed for June 5, when the case was heard.

On June 7 I found the prisoner guilty of the offence as charged.

On June 9 counsel took objection to the jurisdiction. It is contended that the prisoner, having been committed to the jail at Prince Albert, the election for trial should have been made before the judge at Prince Albert, that being the place where the jail is situated; that the election being void, the trial is also void; and in substance, that the provisions for holding speedy trials being purely statutory, there can be no waiver that can confer jurisdiction.

POINT 2.

The facts as I find them were as follows:—

The accused, Lillian Laird, and one Haines were together in her room at a rooming-house. The witness Laird had made an appointment with a

man named Marchildon to go to his bedroom that night, presumably for improper purposes. On this occasion Haines suggested, in the presence of the accused and Lillian Laird, that he would put up a frame-up on Marchildon, to which the accused consented, but no details were arranged, and the accused left immediately for the purpose of obtaining some liquor.

Lillian Laird went as arranged to Marchildon's room in the same building, and a little later Haines, in company with a policeman, proceeded there, where, under the guise of being either police or detective officers, Haines stole from Marchildon his watch, overcoat, and some $45 in cash, returning subsequently to Lillian Laird's room. Meyers, the accused, took no part in this theft, but returned a few moments later to Lillian Laird's room, when Haines suggested that they should split the money. This was agreed to, and after payment to the policeman of $15 the balance was divided between them; and it was arranged that Haines should keep the overcoat and Meyers should take the watch.

These articles were subsequently found a few days later in his possession by Detective Laver.

At the close of the Crown's case, it was objected on his behalf that the evidence disclosed that the accused was guilty of stealing the articles, and could not be convicted of receiving them knowing them to have been stolen.

I found the accused an accessory before the act, but also guilty of the charge as laid.

POINT 3.

The third point raised by the defence was that there was evidence to the effect that the prisoner stated these goods had been left with him by Haines; that this was a reasonable explanation; and that the burden of proof was then cast on the Crown to shew that it was not such.

The actual evidence on my notes shew a statement by Detective Laver in which he said that he was not sure but he thought that in the conversation he had with the accused when he got the goods the accused told him that Haines had left them with him.

At the request of the accused's counsel, I now desire the opinion of the court whether in the circumstances there was jurisdiction to try the accused.

Secondly, whether on the evidence above stated the prisoner can be lawfully convicted of receiving the goods knowing them to have been stolen.

And thirdly, whether I should have accepted the evidence of Laver as to what the accused told him as a reasonable explanation of the possession of the articles by the accused.

In the meanwhile I have remanded the prisoner to the sittings of the next district court pending the decision of the court.

Some further facts relating to this case were stated to us during the hearing of the appeal, and were admitted by both counsel.

It appears that after the accused was committed for trial by the magistrate at Saskatoon he was removed to the police cells in Saskatoon preparatory to being taken to the gaol at Prince Albert. While still in the cells at Saskatoon the accused, through his counsel, applied to the district court judge at Saskatoon to be brought before him for election in order to avoid delay, which would be occasioned by his being sent to the gaol at Prince Albert

SASK.

C. A.

THE KING v. MEYERS.

Haultain, C.J.S.

and then being brought back for trial at Saskatoon, the judicial headquarters for the district in which the alleged offence was committed. This application was granted, and the accused was brought before the district court judge and elected for a speedy trial. A date for the trial was then fixed, and the trial was held accordingly.

The accused voluntarily appeared before the district court judge, and with his own consent and with the consent of the Crown prosecutor was tried by that judge on a charge within the jurisdiction of the court. On these facts, and on the authority of *Giroux* v. *The King* (1917), 39 D.L.R. 190, 29 Can. Cr. Cas. 258, 56 Can. S.C.R. 63, I would answer the first question in the affirmative.

On behalf of the accused it was argued that until he was actually in gaol at Prince Albert he was not "committed to gaol," and consequently there was no foundation for an election. But the cases of *Reg.* v. *Laurence*, 1 Can. Cr. Cases 295, 299; *Mullins* v. *Surrey* (1882), 7 App. Cas. 1; *Mews* v. *The Queen* (1882), 8 App. Cas. 339, and *Giroux* v. *The King*, *supra*, seem to me to entirely meet that objection. The case of *Rex* v. *Tetreault* (1909), 17 Can. Cr. Cas. 259, cited by counsel for the accused, only decided that an election before a prosecuting officer without instructions from a non-resident judge was a nullity.

As to the second question:—

The facts, in my opinion, support a verdict of guilty of receiving, and I would therefore answer the second question in the affirmative.

As to the third question:—

The evidence as stated by the trial judge shews that the accused knew that the goods received by him from Haines were stolen, and the alleged explanation—even if more positively sworn to by Detective Laver—could not therefore be considered a reasonable explanation, that is, an explanation reasonably establishing an innocent possession of the goods by the accused. In any event the trial judge, after hearing the alleged explanation, found the accused guilty on the whole of the evidence.

The question is, therefore, answered in the negative.

The conviction is, therefore, affirmed.

[The conviction in *The King* v. *Kluck*, was affirmed for the same reasons as given in the above case.]

LIPSEY v. ROYAL BANK.

ALTA.

S. C.

Alberta Supreme Court, Harvey, C.J. July 9, 1919.

CHATTEL MORTGAGE (§ VI—55)—POWER TO SUE—ORDER PERMITTING SALE NECESSARY—SALE WITHOUT ORDER ILLEGAL—LIABILITY OF AGENT AND BAILIFF ENFORCING WARRANT — DUTY OF PRINCIPAL TO OBTAIN ORDER.

A mortgagee has no power to sell and recover the amount due under a chattel mortgage until an order is obtained from the judge permitting the sale (Alta. Stats. 1914, c. 4, s. 4), and a sale without such order is illegal although the warrant itself purports to give such authority. The sheriff to whom the warrant is directed acts as agent of the mortgagee and stands in no better position. The bailiff to whom he endorses the distress warrant cannot be said to exceed his authority in selling if the warrant expressly authorises the sale. It is the duty of his principals to obtain the order, and if they have not done so they should not direct more than a seizure.

Where a sale of mortgaged chattels has been illegally made in that the order of a judge has not been obtained as required by Alta. Stats. 1914, c. 4, s. 4, by the mortgagee, such mortgagee cannot set up his disregard of the law as an answer to an action at the suit of an innocent purchaser.

Statement.

ACTION by a purchaser of goods purporting to be sold under a distress warrant, for an injunction to restrain a proposed second sale and for a declaration that a re-seizure of the goods was illegal and for damages.

A. U. G. Bury, for plaintiff; *H. R. Milner*, for Royal Bank; *W. J. A. Mustard*, for sheriff.

Harvey, C.J.

HARVEY, C.J.:—On January 25, 1916, one R. W. Gibbs gave the defendant bank a chattel mortgage on certain chattels. On November 27, 1918, the mortgagor presumably being in default, the mortgagee issued a distress warrant in the following terms:—

To the sheriff, Edmonton, Alberta, my bailiff in that behalf: You are hereby authorised and required to seize and take possession of all the goods and chattels mentioned in the chattel mortgage which is hereto annexed, wherever the said goods and chattels may be found, and to sell and dispose thereof as provided by the said chattel mortgage so as to realise the sum of one thousand six hundred and sixty 51/100 dollars ($1,660.51) now due and owing to the Royal Bank of Canada by virtue of the provisions therein contained, and the said sum, or so much thereof as may be realized, to pay over to the Royal Bank of Canada, its successors or assigns, and proceed thereupon to obtain possession of such goods and chattels and for the recovery of the said sum as the law directs and the said indenture permits, and for your so doing this shall be your sufficient warrant and authority.

These chattels were situate in the Athabasca judicial district and the sheriff of that district endorsed the distress warrant as follows: "I hereby endorse this warrant to my bailiff James Londale," and sent it to the said Londale at Peace River with instructions to seize and report.

The bailiff did seize and, apparently, instead of reporting as directed, he followed the terms of the warrant, and after advertising

ALTA.

S. C.

LIPSEY v. ROYAL BANK.

Harvey, C.J.

sold at auction the goods to one Tait for $315 and endorsed a note of the sale on the back of a notice of sale as well as a receipt for a cheque for the full purchase price. Tait on the same day sold the goods to the plaintiff at an advance of $5 and endorsed a note of the sale and receipt of the purchase price on the same document. The sheriff having heard of the sale advised his assistant at Peace River that as no order for the sale had been obtained the sale was illegal and instructed him to recover possession of the goods, and returned to him the cheque which had been sent for the proceeds of the sale. The plaintiff refused to accept a return of the money and give up the goods. The bailiff who had made the sale re-seized the goods and a man was put in charge of them. Nothing further was done for some months, and then, apparently an order for sale having been obtained, the goods were re-advertised for sale. This action was then begun against the bank, the sheriff and the bailiff, for an injunction to restrain the proposed sale, a declaration that the re-seizure was illegal, and damages.

The bailiff did not defend the action, and counsel for the other parties have agreed on the facts as above set out and the case comes before me for judgment upon the facts as stated. C. 4 of the statutes of 1914 provides that every distress or seizure under lien, chattel mortgage, etc., must be made by a sheriff or his bailiff or some person authorised by the sheriff, and s. 4 provides that—

> Notwithstanding any rule of court or provision of any statute or ordinance no sale after seizure under process . . . or after distress or seizure under any of the authorities mentioned in s. 1 . . . shall be made, executed and carried into effect, except upon the order of a judge of the supreme or district courts respectively, or of a master in chambers granted *ex parte*, or on notice after consideration of all the facts and circumstances and upon such terms and conditions as to costs and otherwise as he shall determine.

That Act was assented to on October 22, 1914, 2½ months after the commencement of the war, and the last section provides that it may be repealed at any time in whole or in part by the Lieutenant-Governor-in-Council.

If the plaintiff was the owner of the goods in question or was otherwise rightfully in possession the interference with her rights by the defendants was wrongful and illegal and I cannot see that the sheriff is in any better position than the bank. He was not

performing any duty as sheriff but merely as agent for the bank and he was under no obligation to do any illegal or wrongful act because his principals desired it or because he thought it to be in their interests.

The defendants, however, seek to justify their re-taking the goods upon the ground that because no order authorising a sale had been obtained no right to the goods passed to Tait or to the plaintiff.

The first argument is that the bailiff under the warrant had no authority to sell except after an order and, therefore, could not give any right and that the purported sale was absolutely void. In my opinion, this argument is not sound. The warrant by its terms directs the bailiff to seize and sell and pay the proceeds to the bank. In the face of that, I fail to see how the words in the latter part of the warrant "and proceed thereupon to obtain possession of such goods and chattels and for the recovery of the said sum as the law directs and the said indenture permits," can be held to limit the authority so clearly and expressly given particularly having regard to the following and closing words of the warrant, "and for your so doing this shall be your sufficient warrant and authority."

That the mortgagees could not give absolute authority to sell without an order of a judge or master in no way prevents them from purporting to give such authority and it is difficult to see how a warrant could be better worded for the purpose of giving such authority. I think, therefore, without considering the aspect of ostensible authority that it cannot be said that the bailiff in selling was exceeding his authority. It was not his duty but that of his principals to obtain the order and as far as the warrant indicates they might already have done so. Indeed, if they had not, they certainly should not have directed anything more than a seizure.

The next question for consideration is what is the effect of a sale made in disobedience of the statute.

There is no suggestion of lack of good faith in anyone. The bailiff apparently thought he was doing right in making the sale. The bank did not know it was being made till it was over. The purchase by Tait and the sale by him to the plaintiff were, so far as the facts stated shew, likewise in perfect good faith.

ALTA.

S. C.

LIPSEY v. ROYAL BANK.

Harvey, C.J.

It is argued on behalf of the defendants that the sale being prohibited it is illegal. But even if that were so, it only carries us part way. The contract of sale might be void and unenforceable by either party, but it by no means follows that having been perfected by payment and delivery the transaction could be treated as a nullity or even be set aside to say nothing of a subsequent sale made in good faith. Even though the first sale, however, could have been set aside, s. 24 of the Sale of Goods Ordinance provides that,—

> where the seller of goods has a voidable title thereto, but the title has not been voided at the time of sale, the buyer acquires a good title to the goods provided he buys them in good faith and without notice of the seller's defect of title.

Unless then the sale to Tait was absolutely void and not merely voidable it would appear that the plaintiff acquired good title.

Now this statute is quite clearly for the benefit of certain classes of debtors, like the volunteers and reservists and other moratorium Acts, and as the last section indicates was intended to be of only temporary operation. The benefit of such an Act can undoubtedly be waived by the person intended to be benefited by it and I have not the slightest doubt that if the mortgagor had expressly authorised the mortgagees to sell without obtaining the order provided for, a sale so made would have been perfectly valid.

Maxwell (5th ed.), p. 625, says,—

> Everyone has a right to waive and to agree to waive the advantage of a law or rule made solely for the benefit and protection of the individual in his private capacity and which may be dispensed with without infringing on any public right or public policy.

We see instances of this every day in the case of such Acts as the Statute of Frauds, the Statute of Limitations, Moratorium Acts, etc., where proceedings expressly prohibited are held to be perfectly good unless objection is taken and the benefit of the Act expressly claimed by the person intended to be benefited. It seems to follow from this view both that the sale to Tait was at most voidable and that the mortgagor is the only person who could question it.

In *Bloxsome* v. *Williams* (1824), 3 B. & C. 232, 107 E.R. 720, one party to a contract alleged to have been made on Sunday and so prohibited sought to avoid it. One of the grounds upon which

judgment was given was, "that it is not competent to the defendant who alone has been guilty of a breach of the law to set up his own contravention of the law as an answer to this action at the suit of an innocent person."

The defendants may not have been guilty in the sense of having intended to disregard the law but they did disregard the law and it would seem to be most unjust that they should be able to set up their disregard of the law as their sole and only justification of their later conduct.

I am of opinion, therefore, that, even if the plaintiff has not acquired a good title to the goods the defendants have no standing to raise any such want of title and that, therefore, their re-taking possession was a trespass for which they are liable.

There will, therefore, be judgment for the plaintiff against all the defendants with a reference to the master at Edmonton to ascertain the damages according to the agreement of the parties.

It does not appear whether the goods have been taken out of the possession of the plaintiff. If they have, she should be entitled to a judgment for their return, if she desires to amend the prayer of her claim for relief to claim it.

Re ROBERT BELLS ESTATE.

Saskatchewan Court of Appeal, Haultain, C.J.S., Newlands, and Lamont, JJ.A. *July 12, 1919.*

DESCENT AND DISTRIBUTION (§ III—32)—DEATH OF SON IN LIFETIME OF FATHER—SON OWING FATHER ON PROMISSORY NOTE AT TIME OF DEATH—RIGHT TO DEDUCT AMOUNT OF NOTE FROM SHARE OF SON'S CHILDREN IN THEIR GRANDFATHER'S ESTATE.

A son died in the lifetime of his father leaving children; at the time of his death he owed the father on a promissory note:—

Held, that as the son was never entitled to a share in his father's estate because he died before his father, he never had in his hands a part of his father's estate, he only owed his father a debt. His children were not liable for that debt.

[*Re Akerman* v. *Akerman*, [1891] 3 Ch. 212, distinguished.]

Statement.

APPEAL by the administratrix from the King's Bench on a question submitted as to whether a debt owing by the deceased to his father should be deducted from the share of his children in their grandfather's estate.

T. D. Brown, K.C., for appellant; *H. Fisher*, for official guardian.

The judgment of the court was delivered by

SASK.

C. A.

RE ROBERT BELIS ESTATE.

Newlands, J.A.

NEWLANDS, J.A.:—In this case one of the sons of the deceased died in the lifetime of the father, leaving five children. At the time of the son's death he owed his father on a promissory note. On a question submitted to a judge of the Court of King's Bench he decided that the amount due by the son to his father should not be deducted from the share of his children in their grandfather's estate. From this decision the administratrix appeals.

The principle upon which it has been decided that when a legatee or person entitled to a distributory share of an estate owes the estate, he can only receive the balance of his legacy or distributive share, is, that the debt in question is part of the estate of the deceased; having that part in his hands, the legatee or personal representative has that much of his share of the deceased's estate in his hands, and can, therefore, only collect the balance. *Re Akerman* v. *Akerman*, [1891] 3 Ch. 212.

Now in this case the son was never entitled to a share in his father's estate, because he died before his father. He never had in his hands a part of his father's estate, he only owed his father a debt. His children are not liable for that debt. They take by reason of the Devolution of Estates Act, R.S.S. c. 43, s. 4:—

> And in the case of the decease of any of his children to such as shall legally represent them such representatives to take the share of the deceased child in equal proportions.

The share of the deceased child is the share that would have gone to him if he had survived his father. Not having done so, he was never entitled to any part of his father's estate; but his children are, by virtue of the above statute. They, not being liable for their father's debt, cannot be said to have any part of their grandfather's estate in their hands, and, therefore, do not come under the principle of the above decision.

Their father's estate owes a debt to their grandfather's estate. This debt not having become a part of their grandfather's estate in the hands of their father, cannot be taken as a payment on account of his share of such estate, and, therefore, cannot be a payment on account of the grandchildren's share.

The appeal should, therefore, be dismissed with costs.

Appeal dismissed.

RAYMOND v. TOWNSHIP OF BOSANQUET.

ONT.

S. C.

Ontario Supreme Court, Appellate Division, Mulock, C.J.Ex., Clute, Riddell, Sutherland, and Kelly, JJ. January 10, 1919.

HIGHWAYS (§ IV—115)—ONTARIO MUNICIPAL ACT—DUTY OF MUNICIPALITIES IN RESPECT TO KEEPING IN REPAIR—MUST BE REASONABLY SAFE FOR MOTOR CARS.

The duty imposed by the Municipal Act (R.S.O. 1914 c. 192, s. 460 (1)) upon municipalities in respect to keeping highways in repair is imperative and requires them to make the roads reasonably safe for the purposes of travel, and motor-vehicles being now an ordinary means of transportation this would include travel by such vehicles.

Held, that upon the evidence the defendant corporation were not guilty of breach of this duty, and the plaintiff's accident must be attributed to some other cause than the narrowness of the bridge or the condition of the road

[*Davis* v. *Township of Usborne* (1916), 28 D.L.R. 397, referred to; see also annotation on the "Liability of Municipal Corporations for Non-repair of Highways and Bridges," 34 D.L.R. 589.]

APPEAL by defendants from the judgment of Meredith, C.J.C.P., in an action for damages for injuries sustained in a motor-car accident. Statement.

I. F. Hellmuth, K.C., and *A. Weir*, for the appellants.

J. M. McEvoy and *E. W. M. Flock*, for respondent.

KELLY, J.:—The plaintiff claims damages for personal injuries sustained in a motor-car accident upon a highway in the township of Bosanquet, in the county of Lambton. The claim is based upon the duty resting upon the defendants under the Municipal Act, R.S.O. 1914, ch. 192, sec. 460 (1), which provides: "Every highway and every bridge shall be kept in repair by the corporation the council of which has jurisdiction over it, or upon which the duty of repairing it is imposed by this Act, and in case of default, the corporation shall be liable for all damages sustained by any person by reason of such default." Kelly, J.

The accident happened on the 26th July, 1917. This action was begun on the 27th August, 1917; the trial was before the Chief Justice of the Common Pleas without a jury on the 29th and 30th April, 1918; and judgment was given on the 7th August, 1918, awarding the plaintiff for all pain and suffering and for loss in a business way $1,500, and for out of pocket payments $250, subject to the right reserved to him "to prove to the trial Judge the

ONT.

S. C.

RAYMOND v. TOWNSHIP OF BOSANQUET.

Kelly, J.

actual amount thereof, such sum to be substituted for the said sum of $250."

The amount claimed by the statement of claim was $2,000, but at the trial application was made to increase this to $20,000, on the allegation by the plaintiff that his injuries were much greater than they were thought to be when the statement of claim was delivered. In his reasons for judgment the learned Judge says that he then granted leave to amend.

On the 26th July, 1917, at about 5.30 in the morning, several members of a fishing club, including the plaintiff, left London in motor-cars to go to Kettle Point, in the township of Bosanquet, on the shore of Lake Huron. The car in which the plaintiff rode—a 7-passenger Chalmers, with a wheel base said to be 124 inches—was owned and driven by Mr. Keene, the other passengers in it being Mr. Flock and Dr. Routledge. At about 7.30 or 8 a.m. (the witnesses do not agree on the exact time) this car and a smaller car, in which were other members of the fishing party, had reached the township of Bosanquet, and were proceeding northerly from Ravenswood on the highway on which the accident happened. Approaching the place where the accident occurred, there is, on the west or left hand side of the roadway and within the limits of the road allowance, an open ditch or stream. Several years ago this roadway continued along the easterly side of this stream or ditch northerly from the place of the accident, but the waters flowing therein so cut into and washed away the earth as to make that part of the roadway unsuitable for traffic; and the municipal corporation, to overcome the difficulty, diverted the roadway, crossing over the stream or ditch by means of a bridge then existing (the bridge in question) to the westerly side of the ditch on to a roadway which was then laid out from the bridge northerly along this side, upon land acquired by the municipality for that purpose.

On the roadway by which the plaintiff's party approached the bridge, there is, at some distance to the south, a hill or incline sloping towards the north. The foot of this incline is about 200 feet southerly from the bridge, the length of the incline itself being about 300 feet.

The roadway is gravelled, and from the top of the incline one

can easily observe the line of the road, the turn to the west at the bridge, and the roadway leading northerly from the westerly end of the bridge. After the traffic was diverted across the bridge, a fence or barricade was thrown across the part of the roadway which thereafter ceased to be used, on a line from about the north-easterly corner of the bridge easterly to the fence forming the easterly boundary of the road allowance. This also is observable by persons coming down the incline.

When the car in which the plaintiff was travelling reached the curve westerly on to the bridge, the driver, according to his own evidence, commenced to make the turn; but, instead of following the driveway across the bridge, the car proceeded towards and ran into the guard railing along the north side of the bridge, carried away part of it and the post by which it was supported at the north-easterly corner of the bridge, and went into the ditch.

The further evidence of the driver (Mr. Keene) is that, when he came to the curve from the roadway to the bridge, he thought that the turn was too sharp to permit of his car passing over the bridge in the usual way, and, fearing that it would be thrown sideways over the edge, he made a sudden turn to the right, and thus went into the ditch.

There is evidence of more than one witness who was on the scene soon after the accident that the right front wheel of the car at no time reached the bridge, but ran on a line about 4 feet east of the post referred to. The driver, who does not agree with this latter evidence, and others in the car, attribute the happening to the difficulty, or the impossibility—as some of them put it—of making the turn on to the bridge because of what they say was the sudden and sharp curve and the insufficient width of the bridge.

Mr. Farncomb, the surveyor who made the plan, exhibit 1, and who was called for the plaintiff, has this to say in cross-examination:—

"Q. Approaching the turn the ground is practically level, I think you said. A. This is shewn.

"Q. So that the whole 18 feet in width there would be quite level up towards the turn? A. 18 feet at the turn is level.

"Q. And that would be clear of the 12 feet?

"His Lordship: 18 and 12—would it not be 30 feet?

ONT.

S. C.

RAYMOND v. TOWNSHIP OF BOSANQUET.

Kelly, J.

"Mr. Weir: Q. On the other side of the ditch it is level? A. Yes.

"His Lordship: The part between the fence and the ditch is all level? A. Directly opposite the bridge it is level."

According to the evidence of Mr. McCubbin, who made measurements and prepared a plan, exhibit No. 3, and at the trial verified it, the width of the bridge between the inside lines of the railings is 13 feet, the width of the gravelled roadway approaching the bridge from the south varies from 12 to 15 feet; the centre line of the gravelled roadway as it turns on to the bridge forms a segment of a circle whose radius is 25 feet, and the radius of the curve drawn about 3 feet from the outside of the gravel is about 30 feet. At the trial this witness put it this way:—

"Q. Generally speaking what is the width of the gravel there? A. From 12 to 15 feet.

"Q. What is the radius of curvature? A. Just as marked on the plan; following the centre of the roadway to the continuation at the centre of the bridge, the radius of the centre line is 25 feet.

"Q. And a little further out than the centre? A. Keeping about 3 feet in from the outside, the radius is 30 feet.

"Q. What do you say as to whether that is the usual curvature in a place of that sort? A. It is about the ordinary condition you will find at the crossing of two roads in a rectangular system of surveys.

"His Lordship: Is the road allowance 66 feet? A. Road allowances are 66 feet, roadways of an ordinary width to travel on.

"Q. But surely where you run into a narrow lane like that it is different? A. The curvature here would be just about the same curvature on the travelled portion of two roads where you make a right angle turn from one to another."

And at p. 72 of the notes of evidence:—

"Mr. Weir: At ordinary intersections of highways, where one highway intersects another, would that be the usual curvature? A. Just about as you have it here.

"Q. Just about the usual thing? A. Yes.

"Q. The bridge was 13 feet between railings? A. Yes.

"Q. What is the ordinary width of the travelled track? A. Of the ordinary gravelled roadway?

"Q. Yes. A. About 12 feet.

"Q. About 12 feet is the width of the ordinary gravelled roadway? A. Yes."

The length of the bridge (by scale on exhibit 3) is about 13 feet. Exhibit 3 shews the floor of it to contain 11 planks of a width of 14 inches each.

There is evidence that the speed at which the plaintiff and his party were travelling, down to the time they reached the top of the incline, was, at times, very high—indeed excessive; one of the occupants of the car, speaking of the rate they had travelled, in answer to questions by the Court in which 30 miles per hour was mentioned, said they were travelling at about an average speed; that they had gone at some places faster than at others.

"His Lordship: Would you say you did not go at the rate of 40 miles per hour anywhere? A. I believe we did about Adelaide village, the only spot where we were going at what I think was a fast rate. Except at that one place we were not going 40 miles anywhere; that was a good many miles further east."

I do not find in the evidence any statement that the rate of speed after they started down the incline was excessive.

There can be no question that the turn in the road and the bridge could be seen for a very considerable distance before reaching that point. Mr. Flock, a fellow-passenger of the plaintiff, says that they could see the turn in the road when they were about half way down the incline, and probably 200 to 250 feet before making the turn, and that the gravel on the road was wide enough for two vehicles; and Keene says he saw the turn a few hundred feet away.

Briefly what is complained of is that the bridge was so narrow and the turn from the gravelled roadway on to it so sharp as to constitute a danger to those driving over it; and also that the highway was obstructed by piles or logs placed thereon by the defendants; and that maintaining the bridge and highway in such condition was a breach by the defendants of their statutory duty, rendering them liable.

On the argument it was not urged that there was otherwise want of repair. Much importance was attached, in the presentation of the plaintiff's case, to the presence of the piles or logs above referred to, which the evidence says were upon the right of way to the right of the gravelled portion of the road at the turn. It was

ONT.
S. C.
RAYMOND
v.
TOWNSHIP
OF
BOSANQUET.
Kelly, J.

sought to be shewn that these interfered with Keene's car properly making the turn on to the bridge. How far there was such interference may be inferred from the fact that according to occupants of the car—the driver and Mr. Flock—these piles or logs were distant about 3 feet from the travelled portion of the road. Mr. Flock says that they were within 3 feet of the gravel; and Keene says:—

"Q. Did you notice the position of these posts or whatever they were, that were lying there? A. They were alongside the road.

"Q. So you agree with what Mr. Flock said? A. Yes, I think they were alongside.

"Q. At the distance he speaks of? A. I don't know what distance he spoke of.

"His Lordship: 3 or 4 feet? A. That would be right.

"Mr. Weir: That would be right? A. Yes."

The driver intimates that it was necessary to keep to the right at this point to enable him to make a wider turn on to the bridge; hence the alleged interference.

In effect the learned trial Judge found that there was no negligence by the plaintiff and none by the driver of the car, or in any event none for which the plaintiff could be held responsible; and that maintaining the bridge and roadway leading on to it in the condition it was at the time of the accident, was a breach of the statutory duty to repair.

Assuming for the moment the correctness of the finding in favour of the plaintiff and the driver of the car, the question arises whether the bridge with the approach to it was, at the time, in such condition, under the circumstances in which it was ordinarily used, and having regard to the extent and character of the traffic which passed over it, as was reasonable for its purposes. As to this there is an overwhelming amount of uncontradicted evidence by many persons with intimate knowledge of the situation extending over many years; residents of the locality who habitually made use of it for purposes of ordinary traffic of various kinds; others who made frequent use of it for motor-traffic, particularly during the summer months, and others as well, who, unfamiliar with the road and ignorant of and unwarned of any possible danger from its condition, travelled over it for the first time in motor-cars and experienced no difficulty in making the turn on to or in passing over the bridge.

Several witnesses speak of the heavy motor-car traffic; that cars of all kinds passed that way; and there is the testimony as well of several who had the actual experience of using it with motor-cars, some driven by the witnesses themselves and some in which the witnesses were merely passengers.

There is also evidence as to other kinds of traffic, such as with a threshing outfit—in one instance a traction engine with a water-tank hitched behind it, the total length being 33 feet, and again a threshing separator, with a buggy connected to and drawn from the rear—going over it without difficulty, the length of the two being 40 feet, and of the separator itself 36 feet.

It will be observed that the length of Keene's car is sworn to as being about 13 feet; he himself says, "The length of the bridge would be about that of my car;" and, as already pointed out, the length of the bridge was shewn to be about 13 feet. That the shorter the vehicle, of ordinary construction, the more readily is it turned in a given space, does not need demonstration.

While there is evidence of persons who say they found difficulty in making the turn in the usual way—and some say it was impossible—there is, on the other hand, the uncontradicted evidence of many others as to actual happenings and actual use extending over several years, indicating positively that there was nothing to suggest, so far as the experience from such use is any guide, danger to traffic such as passed or reasonably could be expected to pass that way. It is not shewn that any complaint was made or objection raised that the bridge or its approaches were unsuitable for the traffic which passed over them, except on one occasion, to which I shall presently refer.

There is the positive evidence, on the other hand, of persons most likely to have heard of such complaint or objection—had there been any—that none such were made. There is likewise evidence that none of these persons knew or heard of any accident having happened in all these years, except in one instance—several years ago—when an automobile struck against the railing of the bridge; but on the evidence this was not necessarily attributable to the condition of the bridge. One witness, however, says that he knew of the projecting part of the frame-work of a sleigh having struck the side of the bridge, but the cause of this is not assigned.

ONT.

S. C.

RAYMOND v. TOWNSHIP OF BOSANQUET.

Kelly, J.

Dr. McCallum, who says this bridge is on the road to Iperwash Beach, where he had his summer home for 12 years, says also that he has travelled over it hundreds of times, "may be two hundred or more. I have gone over this bridge more than 4 times a week for 6 weeks every summer." He "counts" it dangerous from the standpoint of going down that hill," and says that whether there is "room to turn around properly will depend a great deal on the length of the car and the skill of the driver." He speaks of an occasion three or four years ago when, as president of the Iperwash Beach Association, members of the municipal council met him on his invitation and "talked of all the roads," he being anxious, as he puts it, to make the road good; but he does not tell us in what respect that road was not good or if the condition of the bridge was then in question. Again he says: "Mr. Spearman" (who he thinks was then the Reeve) "came down, and I think two Councillors with him. We spent the afternoon going over the road, and I pointed out the necessity for the Iperwash Beachers to have a good and a safe road. After we had gone over the bridge and were back into the road again, the whole road-situation was gone over."

"Q. Was anything said about the bridge? A. Yes, I pointed out the bridge was not safe. But it was merely incidental, the emphasis was on the other end" (of the road).

It is manifest that the bridge was not a matter of serious complaint on his part; his reference to it was, as he says, merely incidental.

The value of this witness's evidence can be estimated from the contradiction of his statements, in more respects than one, by other witnesses both for the plaintiff and defendants, as, for instance, when he speaks of the distance from the bridge to the foot of the hill (already referred to) as 30 or 40 feet.

The duty imposed by the Municipal Act upon municipalities in respect to keeping highways in repair is imperative and requires them to make the roads reasonably safe for the purposes of travel; and, motor-vehicles being now an ordinary means of transportation, this would include travel by such vehicles: *Davis* v. *Township of Usborne*, (1916) 28 D.L.R. 397, 36 O.L.R. 148.

In *Foley* v. *Township of East Flamborough* (1898), 29 O.R. 139, a judgment of a Divisional Court, Armour, C.J., in defining what is

meant by "repair," said (p. 141): "I think that if the particular road is kept in such a reasonable state of repair that those requiring to use the road may, using ordinary care, pass to and fro upon it in safety, the requirement of the law is satisfied." This judgment of the Divisional Court was reversed by the Court of Appeal (*S.C.* (1899), 26 A.R. 43), but on altogether different grounds, the Court not dissenting from this opinion of the Divisional Court, which is in harmony with other decisions, and may properly be applied here.

The duty so resting upon municipalities must not be treated lightly or minimised, and municipal councils should not be encouraged into the belief that the requirements of the Act need not be strictly fulfilled; but occurrences such as that involved in this case should be considered and their cause determined according to the circumstances and conditions in which they happen. I am not to be understood as holding that any other bridge and its approaches constructed as these existed at the time of the plaintiff's accident necessarily evidence compliance with the statutory duty of the municipality having jurisdiction over it. We are dealing here only with this particular occurrence, on the evidence and in the conditions which that evidence reveals, and it is only necessary that I should express an opinion on the facts of this case.

Returning to the evidence of the user of the bridge and road, it is not reasonable to accept as conclusive the statements of those who say that they found it difficult—nay impossible—to make the turn in the usual manner, and that they could only make it by stopping, reversing the motion of the car, and then making a fresh start more directly along the line of the roadway across the bridge, as against the evidence of many who either actually travelled over the bridge with motor-cars or spoke with intimate knowledge of the locality and of the large amount of traffic of all kinds (including motor-cars of all sizes) regularly passing that way, and who deny that at any time there was even a suggestion that the bridge and its approaches were objectionable or a source of danger from the standpoint of the conditions to which the plaintiff attributes his accident.

I much prefer the uncontradicted evidence of those who actually did the act or saw it done, without any thought or suggestion of anything out of the ordinary, to that of those who

ONT.

S. C.

RAYMOND v. TOWNSHIP OF BOSANQUET.

Kelly, J.

say it cannot be done; and, if further proof of the character of this bridge were necessary, there is the evidence afforded by the plan, exhibit 3, of the radius of the circle made by the turn from the roadway on to the bridge, the photographic view sworn to as correct by the person who made it, and the statement of Mr. McCubbin, experienced I assume in such matters, that this place presents "the ordinary conditions you will find at the crossing of two roads in a rectangular system of surveys"—a statement which I cannot find has been either contradicted or discredited.

Taking this with Keene's evidence as follows:—

"His Lordship: Could you turn in a 66 feet road? A. I could not turn in this room.

"Mr. Weir: To turn off one road on to another at right angles, what turn do you have to make? A. The average corner.

"Q. You could turn anywhere on the average corner? A. Yes.

"Q. Keeping to the centre of the road? A. Keeping to the centre of the road."—I find it impossible to harmonise with this evidence the other statements of this witness that it was impossible for him to make the turn on to this bridge in the usual manner. This witness also says that with his car (the one in question) in turning at a right angle he would require to follow a curve with a radius of 35 feet.

"Q. I do not mean turning to face in the opposite direction, I mean merely to take a right angle. Can you tell me in what radius you would do that? A. I would have to have 35 feet."

It is questionable if the municipality could reasonably have expected that on this highway vehicles requiring such space upon which to make a right angle turn would have to be provided for.

It must be apparent that traffic on the ordinary streets and highways, with many vehicles now in every day use, would be impossible for practical purposes if, as some of the plaintiff's witnesses say, motor-cars such as are here spoken of could not in the space afforded at this bridge make the turn unless by the unusual method sworn to by some of these witnesses.

The learned trial Judge expressly accepts the evidence of Mr. Flock as to the moderate and due care with which the car was driven when approaching the bridge. He also expressly credits the evidence of Mr. Coleridge, who drove over this road several

ONT.

S. C.

RAYMOND v. TOWNSHIP OF BOSANQUET.

Kelly, J.

times in the summer of 1917, and who says, "we" could never go around the turn without stopping; "we" always stopped, turned back, and then went over the bridge. He was not the driver of the car in which he rode, and could not say, and did not know, if the driver was experienced or not.

That evidence is of little assistance, for from all that appears from it the difficulty he says his driver experienced is as readily attributable to his inexperience or incompetency as a driver, as to the condition of the bridge or the road.

With great respect, I am of opinion that the learned trial Judge overlooked the inconsistencies in some of the evidence put forward for the plaintiff, such as that of Keene, and the effect of the uncontradicted evidence of the actual and continued use of this part of the highway by all kinds of vehicles, some of which, however, witnesses for the plaintiff in effect say was impossible, as well as the evidence of McCubbin that this point presents the ordinary conditions found at a crossing of two roads in a rectangular system of surveys.

After a careful analysis of the whole evidence, I am convinced that the predicament in which the plaintiff and his companions found themselves on the 26th July, 1917, must be attributed to some cause other then the width of the bridge, the curve from the roadway leading on to it, or the presence of the piles or logs on the right of way.

The appeal should, in my opinion, be allowed with costs, and the action dismissed with costs.

Mulock, C.J.Ex., Sutherland, J. Riddell, J.

MULOCK, C.J.Ex., and SUTHERLAND, J., agreed with KELLY, J. RIDDELL, J., agreed in the result.

Clute, J.

CLUTE, J. (dissenting):—Appeal from the judgment of Meredith, C.J.C.P., delivered the 7th August, 1918. Action tried at Sarnia on the 29th and 30th April, 1918, without a jury.

This action is brought by the plaintiff for injuries received on the 26th July, 1917, while the plaintiff was riding in a motor-car upon a highway within the defendants' municipality.

The plaintiff, with three others in the car, which was driven by one Arthur H. Keene, with whom the plaintiff was a passenger, was going north, and at a point where the road turns to the west and crosses a bridge, the accident occurred. In making the turn, the

ONT.
S. C.
RAYMOND
v.
TOWNSHIP
OF
BOSANQUET.
Clute, J.

driver Keene found that he could not clear the north railing of the bridge, but that, if he continued on, the right wheel would be north of the northern part of the bridge, and would cause, as he says, the car to upset. Thereupon, he turned the car to the right, knocking off a portion of the railing, and, putting on the emergency brakes, ran a few feet partly over the bank, and succeeded in stopping the car before it plunged into the creek. The plaintiff was seriously injured, and brings this action for damages, alleging: (1) want of repair of the approach to the bridge; (2) that the bridge was too narrow and crossed the creek at a sharp and dangerous angle; (3) that a view of the bridge was obstructed by underbrush and weeds which had been allowed to grow upon the approach thereto; (4) because of the sharpness of the turn necessary to cross the bridge; (5) because of the obstruction of the highway by a number of piles or logs placed thereon by the defendants some time previously, and allowed to remain there.

The defendants deny that the bridge or highway was out of repair, and assert that the same was in excellent condition and properly constructed, and that the bridge was of good width and amply sufficient for the safe passage of motor-cars and other vehicles, and further allege that the accident was caused by the excessive rate of speed of the motor-car in which the plaintiff was travelling and by the neglect of the plaintiff and driver.

The road had formerly passed north on the east side of the creek or ditch, as it is called. This creek ran along the highway, and at the point in question was wholly upon the highway, which was 66 feet wide, leaving 5 or 6 feet of the highway to the west of the ditch. To the north of the bridge in question, the water "had eaten" into the east bank, and the council purchased land immediately to the west of the road allowance, and constructed a road thereon on the west side of the creek, in lieu of the road which formerly passed to the north on the east side of the creek. The road upon the east side just north of the bridge was closed; a bridge which had been constructed across the ditch to enable the owner of the land at that point to reach the highway was utilised for the purpose of the highway. It was 13 feet 1 inch wide and about 12 feet in length across the stream. It was built wholly upon the original allowance for road, running north and south,

leaving 7 or 8 feet between the west end of the bridge and the west side of the original road allowance, running north and south.

The plan (exhibit 1) shews the stream or ditch from bank to bank below the bridge, 20 feet, turning into the bridge, which is 12 feet wide. The travelled part of the roadway is 12 feet; it is about 500 feet from the bridge to the top of the hill, the slope of which towards the bridge is 300 feet, and the balance of 200 feet is nearly a level, with a rise of about 18 inches as it approaches the bridge.

As the trial Judge points out (43 O.L.R. at p. 436), it is the character of the cross-over, which the defendants compel the traffic to make, that the plaintiff finds fault with: his contention is, that the turn which must be made, going north, at the bridge, is too sharp, having regard especially to the narrowness of the bridge, and that the bridge is altogether too narrow; that, instead of keeping the road in repair, the defendants have needlessly made it dangerous, really creating a public nuisance. The learned trial Judge finds that "it is a very serious objection, and obstruction to traffic, when made part of a much travelled highway." He further finds (p. 437) that it is made plain by the defendants' recent conduct, respecting the bridge, that they considered it insufficient; when the accident happened, they were about to widen it, and had building material for that purpose on the ground. He reaches the conclusion (p. 437) that the defendants had been guilty of neglect of the duty imposed upon them by statute, to keep in repair the highway in question at the place where the accident happened. After examining the evidence given by the defendants' witnesses, he considers it "quite insufficient to counterbalance the testimony to the contrary, the admitted facts as to the width of the bridge, the nature of the approach to it, and the defendants' intention immediately to widen it, combined."

After a careful reading of the evidence, I agree with the conclusion arrived at by the trial Judge and with the reasons for that conclusion.

The witnesses who were questioned upon the point expressed the view that it was easier to make the turn in question when leaving the bridge and turning south than it was in going north, as was the case when the accident occurred. This, I think, is obvious: in the

ONT.

S. C.

RAYMOND v. TOWNSHIP OF BOSANQUET.

Clute, J.

one case you are limited to the width of the bridge, 13 feet, to make the entry upon the bridge; in the other, passing from the bridge, you have the available width of the road.

It will be observed, as before indicated, that the turn has to be made within that portion of the 66 feet east of the bridge. The evidence establishes that it has been made by many motors of different sizes; it depends at what point and how the turn is made. No doubt the bridge is visible after the crest of the hill is passed, but to one not familiar with the road the width of the bridge would not be known, and this, I think, is very material. A skilful driver with a knowledge of the condition might make the turn. In the case of one who did not have a knowledge of the nature of the turn and the width of the bridge, if he delayed a second at the proper point where the turn should commence, it would be too late to make the curve to clear the north rail of the bridge, and an accident would be invited. At 10 miles an hour, less than 3 seconds would bring him to the bridge, and a moment's delay in making the turn might be fatal.

It was proven that this was a much travelled road, scores of motors sometimes passing in a day without accident, and this is urged as an answer to the plaintiff's claim. A careful reading of the evidence, however, does not lead me to this conclusion. Dr. McCallum, a physician of London, has occasion in going to his cottage at the beach to use this road very frequently in the summer, sometimes 5 times a week. In his evidence he says: "I count it a dangerous bridge from the standpoint of going down that hill; when I take a guest to my summer home, I generally stop on the hill, and if he is in a car behind I go back and instruct him how to turn and tell him it is a dangerous bridge. My own way in approaching the bridge is to come almost to a standstill and pass Dent's gate and go in that way. I have stood and stopped at the bridge before I attempt to go across it. . . . I pass out as far as I can go until I come opposite, then I go across that way, if I fail to stop. That gives me time to stop. I go as near to the gate as I can (that is, the gate opposite the bridge). I have gone as near to the gate as I could, or the fence rather. I drive a Ford car. . . . It is 8 years at least, I think, since J. McNaughton and Mr. Murphy and I rode down that hill and tore the side of the bridge off." He notified the council that the bridge was not safe.

Mr. Murphy, referred to by the last witness, states that he only tried the bridge once on the day of the accident, at other times he would not take the risk; he would back up and then make the turn as he did some half a dozen times.

Mr. George A. McCubbin, civil engineer, called by the defence, says that keeping in from the outside the radius is 30 feet, and that the curvature would be just about the same curvature on a travelled portion of the two roads where they make a right angled turn there one to the other. The fallacy in this evidence is, I think, that, while the curvature may be the same, the conditions are different. Here you have to make the entry on a 13-foot bridge, and if you are wrong in your calculations as to the exact point to make the turn, or the driver for a moment delays to act, the beginning curvature would have been carried too far forward to make the entry on the bridge safely. No doubt persons accustomed to drive motor-cars may become great adepts and be able to gauge with the eye almost instantly the point where the curve should commence, but that skill and perfection ought not to be called for on a highway; it ought to be safe for a person possessing reasonable skill and exercising reasonable care.

A Mr. Duffus, called by the defence, who lives near the place of the accident, says that he has seen the wide parts of sleighs knock that railing, and he had fixed it up when he was pathmaster, but had not heard of an automobile hitting it.

Mr. Coleridge, a barrister of London, who impressed the Judge with "the feeling that much dependence might be placed upon all that he said" (p. 438), stated that he had a cottage at Iperwash Beach, and that during the summer of 1917 he passed quite frequently over this bridge; he was not the driver; they used a McLaughlin car. "We could never get round that turn without stopping, that is all I can say, that was the practice, we always stopped, turned back, backed up, and then went over the bridge. This occurred from June to the end of August; that was the way we got across, and even then we scratched the rails."

Giving due weight to the whole of the evidence, and having regard to the amount of travel, I think there is quite sufficient evidence to support the findings of the trial Judge, and that the evidence established that the road is not reasonably safe, and that its defective condition was the proximate cause of the accident.

ONT.

S. C.

RAYMOND v. TOWNSHIP OF BOSANQUET.

Clute, J.

All the witnesses who are questioned upon the point agree that it was quite practicable to make the turn on an obtuse angle at an additional cost of from $75 to $100, or if the bridge was widened as proposed before the accident by 8 feet it would be sufficient to make an easy and safe approach.

Having regard to the travel and the financial condition of the township and its duty in that regard, there is, in my opinion, no excuse for the road being left in the condition it now is as a menace and danger to the public. There was little or no dispute as to the reasonableness of the amount of the damages found.

I think the findings of the trial Judge in all respects are right, and the appeal should be dismissed with costs.

Appeal allowed.

SASK.

C. A.

ADVANCE RUMELY THRESHER Co. v. COTTON.

Saskatchewan Court of Appeal, Haultain, C.J.S., Newlands, Lamont, and Elwood, JJ.A. July 9, 1919.

SALE (§ I C—17)—CONDITIONAL SALE OF GOODS—STATUTORY CONDITIONS AS TO RETAKING POSSESSION AND SELLING—NON-COMPLIANCE WITH ACT—ONUS OF PROOF—RIGHTS OF PARTIES.

A purchaser for whose benefit and protection the provisions of the Lien Notes and Conditional Sales of Goods Act (R.S.S. 1909 c. 145) were passed may waive the benefits thereof. Where the purchaser expressly sets up a failure on the part of the vendor to give the notice required by the Act (see 1910-11 c. 41, s. 16, amending s. 8) before selling the goods after retaking possession, the onus is on the vendor to prove that such notice was given, and failing to prove compliance with the Act he is not entitled to the balance of the purchase money.

Statement.

APPEAL by defendants from the judgment of the trial judge in an action to recover the balance of the price of two machines which were purchased under two separate purchase contracts. Reversed.

Russell Hartney and *C. B. Clarke*, for appellants.

F. L. Bastedo, for respondents.

Haultain, C.J.S.

HAULTAIN, C.J.S., concurred with Lamont, J.A.

Newlands, J.A.

NEWLANDS, J.A.:—The plaintiff's assignor sold the defendants Cotton an engine and separator by separate contracts. The contract for the separator contained a provision that the vendor could upon default take possession and sell without reference to the Conditional Sales Act, R.S.S., 1909, c. 145. The contract for the engine contained no provision waiving the terms of that Act.

The defendants pleaded that certain provisions of that Act had not been complied with, viz., that the goods had not been kept

20 days after seizure, and that 8 days' notice of the sale had not been given them. The trial judge held that the machinery was retained for 20 days, but that it was not proved that the 8 days' notice had been given.

Following a decision of my brother Elwood, he held that the burden of proving that the sale was not in accordance with the Conditional Sales Act was on the defendants.

In this case, *Mount* v. *Holland*, [1917] 1 W.W.R. 1188, Elwood, J., says, that it was incumbent upon the defendants to affirmatively plead and prove the failure of the plaintiff to comply with the provisions of that Act. He further says that in that case "there was a general plea of a sale in contravention; no particulars were given." His decision would therefore only cover a case where the defendant alleged generally that the plaintiff had not complied with the Conditional Sales Act, and not where, as in this case, the defendants have specified wherein the plaintiff failed to comply with the Act.

I am of the opinion that the provisions of this Act are conditions precedent to a sale under it. Rule 154 of the Rules of Court provides that any condition precedent, the performance of which is intended to be contested, shall be distinctly specified in his pleading; and, subject thereto, an averment of the performance of all conditions precedent necessary for the case of the plaintiff shall be implied in his pleading.

Odgers on Pleading, 7th ed., p. 101, in commenting on the English rule, which is similar to ours, says:—

> Although it is no longer necessary for a plaintiff to plead the due performance of all conditions precedent to his right of action, yet the burden of proving due performance is still on him if the defendant specially plead non-performance.

As the defendant specially pleaded non-performance in this case, the burden is on the plaintiff to prove the proper notice was given, which he failed to do.

In *American Abell Engine Co.* v. *Weidenwilt* (1911), 4 S.L.R. 388, 19 W.L.R. 730, at 732, Lamont, J., said:—

> I adhere to the view I expressed upon this point in *Sawyer-Massey Co.* v. *Dagg* (1911), 4 S.L.R. 228. On the authorities there referred to, I am of opinion that, in a conditional sale which reserves the property in the goods sold to the vendors, a resale by them operates as a rescission of the contract unless such resale was provided for in the agreement. If the resale made in this case was so provided for, the plaintiffs have acted within their rights.

SASK.

C. A.

ADVANCE RUMELY THRESHER CO. v. COTTON.

Newlands, J.A.

If it was not, it amounts to a rescission, in which case no action lies for the balance of the purchase-money. The agreement provides that, upon default in the payment of the price, the company may resume possession of the goods and resell the same, and, after crediting the defendants with the net proceeds thereof, may proceed against them for the balance. There is nothing in the agreement defining more particularly the resale which is to be made. The ordinance in force at the time the contract was entered into required the conditional vendors, upon retaking possession, to retain possession of the goods for at least twenty days, within which time the purchaser had the right to redeem them by paying the amount actually due upon them and the actual necessary expenses of taking possession. It also provided that the goods should not be sold without five days' clear notice being given to the purchaser or his successor in interest. See C.O. c. 44, ss. 7 and 8. All parties to the agreement are presumed to know the law; and, when they inserted a clause in the agreement by which the plaintiffs, upon default, might retake possession of the machinery and sell the same, they must be presumed to have been aware of the statutory provisions relating to such resale. As nothing appears to the contrary, the resale agreed to must be taken to be a resale according to law, that is, in accordance with these statutory provisions. I am, therefore, of opinion that the resale by the plaintiffs, without complying with the statutory provisions, was not such a resale as was contemplated by the parties in their agreement. Such being the case, its effect was to rescind the contract.

I agree with this decision, and, therefore, am of the opinion that plaintiffs by their sale rescinded the agreement as to the engine, and are not entitled to recover any balance due on it.

I would refer this case to the local registrar to ascertain the amount due on the separator agreement, and would allow the appeal with costs, reducing the judgment to the amount due on the separator.

Lamont, J.A.

LAMONT, J.A.:—The facts as found by the trial judge are as follows:—

On November 14, 1911, defendants ordered from the M. Rumely Co. a separator and engine, for $4,000. The machinery was delivered to the defendants, and notes signed for the amount due. As collateral security the defendant, Samuel Cotton, mortgaged to the company the N.W. quarter of sec. 12-41-9, W. 3rd Mer., for $4,000, on Nov. 16, 1911, and the defendant John Harold Cotton mortgaged to the company the S.E. quarter of sec. 12-41-9, W. 3rd, for $3,958.24, on April 1, 1913. The company repossessed the machinery on Sept. 27, 1915, and resold it at auction on Nov. 27, 1915, for $2,000. The expenses of repossessing and selling were $124.75, and the net proceeds of the sale $1,875.25, which the company credited on the account. This action is brought to recover judgment for the balance, and an order for sale or foreclosure of the lands. All of the interests of the M. Rumely Co. were duly transferred to the plaintiff. . . .

Defendants further contend that the company in reselling did not comply with the Act Respecting Lien Notes and Conditional Sales of Goods, and that therefore the company's action amounts to a rescission of the contract.

. . .

The pleading of the defendants alleges that the machinery was not retained for a period of twenty days, and that no notice, or no eight days' notice, was given to the defendants of the sale. The plaintiff answers this contention by saying:—

(1) That defendants contracted themselves out of the statute as to the separator, and (2) that the burden is on the defendants of shewing that the plaintiff did not comply with the Act.

In his factum counsel for the plaintiffs says:—

The respondents did not plead and did not attempt to prove any compliance with the Lien Notes and Conditional Sales of Goods Act, c. 145 of the revised Statutes. The appellants pleaded that the said Act had not been complied with but made no attempt to prove it.

By s. 7 of the said Act, the seller, in case he retakes possession of goods, must retain the same in his possession for 20 days, during which time the buyer may redeem.

S. 8 provides that the goods shall not be resold without 8 days' notice of intended sale given to the buyer or his successor in interest.

The evidence established that the plaintiffs repossessed the machinery on Sept. 27, 1915, and resold it on Nov. 27, but it does not establish that 8 days' notice was given to the buyers, as provided in s. 8.

The chief argument before us was as to the burden of proof. Is the onus on the plaintiffs to establish that they complied with the provisions of the Act, or on the defendants to establish that they did not?

The plaintiffs are suing for the balance of the price of the two machines which were purchased under two separate contracts. To be entitled to the purchase price a vendor must, generally speaking, be prepared to hand over the articles purchased on payment thereof. Here, the plaintiffs admit that they are not in a position to hand over to the defendants the machinery purchased, these being now the property of third persons. To be entitled to judgment for the balance of the purchase money, therefore, the plaintiffs must shew that, notwithstanding their inability to hand over the purchased articles, they are entitled to the purchase price. This they can do by shewing that the defendants agreed that under certain circumstances they could retake possession of the purchased machines and resell them, and that the defendants would be liable for the balance. If they establish such an agreement and the existence of the circumstances giving them the right to retake

SASK.

C. A.

ADVANCE RUMELY THRESHER CO. v. COTTON.

Lamont, J.A.

possession and to resell, and establish that the resale, which was in fact made, was the one they were empowered by the agreement to make, they would be entitled to recover the purchase money still unpaid.

There is no doubt the onus was on the plaintiffs to prove a right to resell and a resale in fact. If the defendants in their pleadings had not questioned the right of the plaintiffs to resell in the manner in which they did, it would, I think, be presumed that they resold according to law. But where, as here, the defendants expressly set up a failure on part of the plaintiffs to give the notice required by the statute, I am of opinion that the onus was on the plaintiffs to prove that such notice had been given. This onus they did not discharge. By failing to prove compliance with the statute, the plaintiffs have failed to prove that they are entitled to the balance of the purchase money.

The plaintiffs, however, say that, insofar as the separator is concerned, they were under no obligation to comply with the provisions of the statute, because the defendants expressly waived the benefits of that Act.

That a purchaser for whose protection these provisions were enacted can waive the benefits thereof does not seem to me to admit of doubt. *Union Bank of Canada* v. *McHugh* (1911), 44 Can. S.C.R. 473.

The defendants, in the agreement for the purchase of the separator, did expressly waive the benefits to these statutory provisions, and cannot now complain that the plaintiffs did not comply with them.

In the agreement with respect to the engine there was no such waiver. The plaintiffs are therefore not entitled to collect the balance unpaid on the engine, but they are entitled to collect the balance of the purchase price due under the separator agreement. What that balance is has not been shewn. It would be the difference between the amount due in respect of the separator at the date of the resale and the amount for which the separator was sold. The separator was not sold by itself, but, with the engine, brought $2,000. We can, however, arrive at an approximate value of the separator from the fact that, a short time afterwards, the machinery covered by the separator agreement was sold for $785, while the engine brought $1,650, net. Unless the parties agree to

SASK.

C. A.

ADVANCE RUMELY THRESHER CO. v. COTTON.

some other value, the purchase price of the separator on the resale may be worked out on this basis on the reference which the trial judge directed.

The appeal will be allowed with costs, and the amount for which the defendants' mortgages are security will be limited to the amount unpaid in respect of the separator. The costs of the action below will be determined after the reference by the trial judge.

Lamont, J.A. Elwood, J.A.

ELWOOD, J.A.:—I have had an opportunity of perusing the judgment of my brother Lamont and I concur in it.

In *Mount* v. *Holland*, [1917] 1 W.W.R. 1188 (trial judgment), referred to by the trial judge herein, I expressed the opinion that it was incumbent upon the defendant not only to *plead* but to *prove* failure on the part of the plaintiff to comply with the provisions of the Act respecting Lien Notes and Conditional Sales of Goods. I think I went further than was necessary to decide that case in stating that it was incumbent upon the defendant *to prove failure* and I am satisfied I was in error in so stating.

Appeal allowed.

THE KING v. STEIN.

MAN.

C. A.

Manitoba Court of Appeal, Perdue, C.J.M., Cameron, Haggart and Fullerton, JJ.A. July 15, 1919.

INTOXICATING LIQUORS (§ III H—91)—MANITOBA TEMPERANCE ACT—TRIAL OF OFFENDERS—RULES APPLICABLE.

The rules applicable to prosecutions in general apply to prosecutions under the Manitoba Temperance Act. The Crown cannot split up its case by merely putting in evidence of possession of the liquor to make a *primâ facie* case and withholding evidence relating to the charge so as to put it in rebuttal. The possession required by s. 49 of the Act is an actual possession and control over the liquor.

Statement.

MOTION for *certiorari* to quash a conviction under the Manitoba Temperance Act. Conviction quashed.

S. Hart Green, for the applicant; *W. Manahan*, for the Crown.

Perdue, C.J.M.

PERDUE, C.J.M.:—This is a motion for a *certiorari*. The accused was convicted by R. M. Noble, Police Magistrate for the City of Winnipeg, in that he "unlawfully did have liquor in a place other than in the private dwelling-house in which he resides." The facts are briefly as follows:—

The accused is a junk peddler and has a horse and wagon which he uses in his business. On Saturday, May 24, one Mock, another junk dealer, who did not own a conveyance, asked the

MAN.

C. A.

THE KING v. STEIN.

Perdue, C.J.M.

accused to deliver a parcel for him agreeing to pay him a dollar for so doing. Accordingly, the accused, driving his wagon, met Mock at the corner of Power and Pritchard Streets at 7 o'clock in the morning of Monday, May 26. Mock had a parcel in a bag, or with a bag wrapped around it, and this he put into the wagon of accused under the seat and covered it with some junk that was in the wagon. Mock got into the wagon and accompanied the accused. By the direction of Mock, Stein drove to St. Mary's Avenue. Mock stopped the wagon and got out to look for a house number while the accused drove on a short distance, stopped and waited for him. Two liquor detectives then came up, looked into the wagon, and seized the parcel placed there by Mock. The parcel was a case of whiskey. Mock admitted that he owned it, that he had intended to sell it, and that he was looking for the number of the house to which he was to take it, when the detectives came and seized the liquor. Mock was charged and convicted of unlawfully keeping liquor for sale. The magistrate imposed a fine of $300 and, in default of payment, imprisonment for five months. This disposed of the matter so far as Mock was concerned.

The charge against Stein was then proceeded with. It was agreed that the evidence in the *Mock* case should, as far as it was applicable, be used as evidence in the *Stein* case. This evidence was put in by the prosecutor. The two detectives again gave evidence as to finding and seizing the liquor. The case for the prosecution was then closed. Stein's counsel moved for a dismissal of the case on the ground that there was no evidence to shew that the accused knew of the liquor and further that it never was in his possession or under his control. The magistrate was at first of the opinion that no *primâ facie* case had been made out, but finally decided that a defence should be put in. The accused, who is a foreigner and speaks little or no English, gave his evidence through an interpreter. He told how Mock had hired him to deliver the parcel. He stated that he did not know what was in the parcel. On his cross-examination questions were put to him by the prosecuting counsel as to whether he had been at the house of McPhail, one of the detectives, along with Mock, three or four weeks previously. His answers were to the effect that he did not know McPhail or his house. McPhail was called in rebuttal and was asked by the Crown prosecutor whether Stein had ever been

at his place. This was objected to as irrelevant. After discussion, the magistrate allowed the question and permitted evidence to be given by McPhail that the accused and Mock had visited his house some three weeks previously, and that Mock, while Stein was present, had promised to get McPhail two bottles of whiskey for $7 each. The magistrate found the accused guilty and imposed a fine of $200.

The magistrate, in allowing the so-called rebuttal evidence, expressed the following view:—

> It seems to me that the whole method of trial procedure is changed by s. 91. Under that section the Crown puts in *primâ facie* evidence of possession of liquor by the accused and properly rests its case there. The onus of meeting the Crown's *primâ facie* case passes to the accused. The accused puts in his defence and the real trial then starts by the Crown putting in whatever evidence it has to meet the case established by the defence witnesses. The defendant must prove his innocence affirmatively and the Crown in rebuttal must meet the accused's defence.

I do not think that this is a proper view to take of s. 91. That section enacts that if in the prosecution of a person charged with committing any of the offences referred to in the section

> *primâ facie* proof is given that such person had in his possession or charge or control any liquor in respect of, or concerning which, he is being prosecuted, such person shall be obliged to prove that he did not commit the offence with which he is so charged.

I think the rules applicable to prosecutions in general still apply and that the Crown cannot split up its case by merely putting in evidence of possession to make a *primâ facie* case and withholding evidence relating to the charge so as to put it in rebuttal. The Crown had called McPhail as a witness to prove the case against Stein, and he had testified as to finding the liquor in Stein's wagon. McPhail should have then given all the evidence he could give to establish the charge. He was called in rebuttal in the first place to contradict answers given by the accused in cross-examination on immaterial matters. He was then allowed to give evidence which was not evidence in rebuttal but was intended to strengthen the main case.

This evidence related to a conversation with Mock carried on in English some time prior to the committing of the offence and having no reference to it. Nothing came of this conversation, and although it took place in the presence of Stein, it is unlikely that he would understand it by reason of his ignorance of the English

MAN.

C. A.

THE KING v. STEIN.

Perdue, C.J.M.

language. The evidence was given to prove guilty knowledge in Stein. It should have been put in, if at all, when the Crown was proving its case. Introducing it in rebuttal deprived the accused of an opportunity of contradicting it.

The evidence put in by the prosecution in the Mock case proved the case against him and disproved the case against Stein. The charge against Mock was that he "unlawfully did keep liquor for sale." The charge is laid under s. 48 of the Manitoba Temperance Act and the expression "keep for sale" implies possession of the goods and power to dispose of them. The evidence shewed that Mock owned the case of liquor and that when he placed it in Stein's wagon he got into the wagon and rode with Stein to the place on St. Mary's Avenue, where he got out to look for the number. Mock did not part with possession of the liquor during the few moments he was absent from the wagon. The evidence against Mock which was put in by the Crown to prove the charge laid against Stein established that the liquor was not, and never had been, the property of Stein, and that the latter was not, and had not been, in possession of it.

The charge against Stein is laid under s. 49 of the Act. The main paragraph of that section is as follows:—

> No person within the Province of Manitoba by himself, his clerk, servant or agent shall have or keep or give liquor in any place wheresoever, other than in the private dwelling-house in which he resides, without having first obtained a druggist's wholesale license or a druggist's retail license under this Act authorising him so to do, and then only as authorised by such license.

The expression "have or keep" has several times received judicial interpretation. In *Biggs* v. *Mitchell* (1862), 2 B. & S. 523, 121 E.R. 1167, a licensed carrier had received for carriage packages of gunpowder amounting to 300 pounds and had placed them in a warehouse in London until he could send them to their several destinations. The statute, 12 Geo. III. c. 61, enacted that a person not a dealer should not "have or keep" at any one time more than 50 pounds of gunpowder in any house, warehouse, etc., within the cities of London or Westminster. It was held that in the proper interpretation of the statute "have" was synonymous with "keep," that the kind of keeping meant was in the sense of "storing" and that the temporary having or keeping by a carrier while the goods were in transit was not an offence under the Act.

In *The Queen* v. *Rosenthal*, (1865), L.R. 1 Q.B. 93, the defendants had hired an unlicensed public room for six nights and performed stage plays in it. S. 2 of 6-7 Vict. c. 68 enacted that

it shall not be lawful for any person *to have or keep* any house or other place of public resort for the performance of stage plays,

without authority by letters patent or license. It was held that the section had reference to the person who has permanent control of the room and not to one who took it temporarily. Perdue, C.J.M.

In the present case, as I have above pointed out, Mock had not parted with the possession and control of the parcel in question. Stein was for a few minutes in *apparent* possession of the liquor, but the evidence put in by the prosecution proved that the actual possession was in Mock. I think that where the offence charged is that the accused "did have liquor in a place other than, etc.," under s. 49, and it is shewn that at the time when the alleged offence took place the accused had not the actual possession or ownership of the liquor, the prosecution must fail as against him.

In my opinion the conviction against Stein should be quashed and the fine remitted.

CAMERON, J.A. (dissenting):—Under s. 91 of the Manitoba Temperance Act *primâ facie* evidence having been given the accused is "obliged to prove that he did not commit" the offence charged. In this case he failed to convince the magistrate of his innocence, that is to say, the magistrate, as was his right, refused to accept the specific denials made by the accused. If he rejected the accused's story, it was his duty to convict him. Cameron, J.A.

As for the question of possession I have no difficulty whatever. The man Mock was the principal in the transaction, and the accused was his agent. When they were both in the vehicle in which the liquor was concealed, each was in possession of it, the accused having a certain authority subject to the control of his principal. The accused was the owner of the horse and vehicle and had control of them subject to Mock's directions until the liquor had been delivered. As a matter of fact, at the time of the discovery of the liquor by the officer underneath the seat of the vehicle, Mock was some distance away. Clearly if the accused thought that the case of liquor was insufficiently concealed, and if he thought it could be better hidden, without his movements being observed, he would have done that very thing. And if he thought

MAN.

C. A.

THE KING v. STEIN.

Cameron, J.A.

he could have avoided detection by driving away, he would have done that also. Had any unauthorised person attempted to seize the case the accused would probably have disputed the attempt. He would have assumed authority to do these things as naturally arising out of his employment by Mock in the illegal transaction in which they were engaged. But even if Mock were not absent, the accused's possession or charge or control of the liquor was, to my mind, unquestioned. The word "possession" in s. 91 does not mean ownership, but it and the words "charge or control" are of the widest application. When Mock put the case in the accused's vehicle, he put it in his charge or control, subject to his (Mock's) orders. I can see no reason for reading the word "exclusive" before the words "possession or charge or control" in the section, and, in my opinion, the legislature intended nothing of the kind.

I have no doubt the magistrate was of opinion that Stein was acting in collusion with Mock, and I do not propose to question his judgment that Stein's version of the matter was not to be believed. Without seeing the accused in the box, his story, as it is set forth in the evidence, strikes me as having been constructed for the occasion. I would affirm the conviction.

Haggart, J.A.

HAGGART, J.A.:—The charge is that the accused "did have liquor in a place other than in a private dwelling-house in which he resides contrary to the provisions of the Manitoba Temperance Act."

I agree with the magistrate's observations made during the trial when he said:—

> I doubt if you have even made out a *primâ facie* case here . . ., and as it stands at present, must I not dismiss the charge unless you have anything to say? It seems to me you must prove something more than that the accused had liquor in his possession, and that he knew it was liquor he had.

I think it would have been a proper disposition of the case if he had then dismissed the charge.

The accused then gave his evidence, which was briefly to the effect that pursuant to an arrangement made on the previous Saturday he met one Mock, who was to pay him a dollar for delivering a parcel. Mock got into the rig bringing a bag which contained the case of liquor in question.

As to the parcel, Stein's evidence on cross-examination is:—

Q. And who lifted this thing into your rig? A. Himself. I did not even see what he put there.

Q. He lifted it in. He did, and you never touched it? A. I not only never touched it, but I had never even seen it.

The man Mock got out of the rig to ascertain the number of the house which was the destination when the actual seizure was made, but they were a very short distance from each other. The magistrate thereupon apparently changed his mind and observes:—

It seems to me at the time this liquor was seized it was in the possession of the accused. He was alone at that time, and he had it in his rig, and s. 91 puts the onus on the accused to prove his innocence if he has liquor in his possession at the time it was seized.

With all due deference, I think the magistrate erred. Mock was then in possession. The liquor was never out of his possession, either actually or constructively, or possession ever delivered to the accused. He did not know the nature of the parcel. There is no evidence to shew that he knew there was liquor in his rig. Mock brought the liquor into the rig with him and was to take it away with him. It was under the seat upon which Mock sat. The real offender and the only offender was Mock. He has been punished for his offence, and, I think, the Crown might well have withdrawn the charge. It was proved that the accused Stein never had actual physical possession. Mock had possession, and never parted with it.

A similar case was *Bigattini* v. *Dixon* (a county court judgment), reported in, [1919] 1 W.W.R. 464. In that case the appellant was charged with "having liquor in a place other than the dwelling-house in which he resided." One B. had some liquor in an unlawful place. He engaged appellant to move it, apparently with some other stuff, to another place. Appellant knew he was removing liquor. B. accompanied him during the removal. It was there held that the appellant was improperly convicted, and the word "have" as used in the Act, denotes possession and it must be an actual physical possession, which the appellant did not have.

The order absolute for the *certiorari* should be made, and the conviction against Stein quashed.

FULLERTON, J.A., concurred with Haggart, J.A. Fullerton, J.A.

Conviction quashed.

N. B.

S. C.

THE KING v. VROOM; EX PARTE CRAWFORD.

New Brunswick Supreme Court, Appeal Division, Hazen, C.J., White and Grimmer, JJ. June 6, 1919.

1. INTOXICATING LIQUORS (§ III H—91)—TRIAL OF OFFENDERS—WHAT IS "LIQUOR"—QUESTION OF FACT FOR MAGISTRATE TO DECIDE.

Whether liquor proved to have been sold by the defendant is liquor within the meaning of the Intoxicating Liquor Act N.B. is a question of fact the duty of deciding which is imposed by statute upon the magistrate who has jurisdiction over the person and the offence charged and where there is evidence to support his finding an appellate court will not interfere.

2. INTOXICATING LIQUORS (§ I A—10)—NEW BRUNSWICK INTOXICATING LIQUOR ACT—SALE OF ESSENCES, TINCTURES AND EXTRACTS—PROVISIONS FOR.

There is nothing in the New Brunswick Intoxicating Liquor Act making an exception in the case of the sale of essences, extracts or tinctures which contain the quantity of alcohol which is prohibited by the Act.

[Temperance legislation of Alberta and Saskatchewan distinguished.]

Statement.

N. M. Mills shews cause against a rule *nisi* to quash a conviction under the Intoxicating Liquor Act, 1916; *A. R. Slipp*, K.C., supports rule.

The judgment of the court was delivered by

Hazen, C.J.

HAZEN, C.J.:—A writ of *certiorari* for the removal into this court of the conviction of George F. Crawford for unlawfully selling liquor at the Town of Saint Stephen on October 15, 1918, without a license, with a view of having the same quashed, was granted at a previous term on the following grounds: 1. That the preparation for the sale of which the defendant is convicted is not liquor as defined by or within the meaning of the Intoxicating Liquor Act, 1916, and the trial justice, therefore, had no jurisdiction to convict. 2. That the preparation sold is a medicine and is commonly used as such, and it was not intended by the legislature in passing the said Intoxicating Liquor Act, 1916, to prohibit either its use or sale.

Crawford is the proprietor of a drug store in the Town of St. Stephen. He is not a registered druggist, but has in his employ a clerk who is duly registered. The charge against him on which he was convicted is for unlawfully selling liquor without the license therefor by law required.

It appears from the evidence of James E. MacDonald that on October 15 last he went to the defendant's drug store and saw the defendant there and purchased "Two bottles of Jamaica

ginger at one time and two bottles another time on the same day." Both lots were bought in the morning. He drank two bottles after having mixed them with beer, and he states that they went to his head a little. He asked Mr. Crawford for Jamaica ginger and had no talk with him about getting anything to drink before that. He had tried the mixture before and stated that one could get intoxicated on it. He also stated that on the day before—that would be October 14—he had purchased two bottles and he bought them from Crawford himself. He did not tell Crawford what he wanted the Jamaica ginger for, and had no special conversation with him on October 15. Under cross-examination he stated that the Jamaica ginger he mixed with the beer was not bought from the defendant personally, and that he drank most of the first two bottles that he bought from the defendant on the 15th without mixing it with beer. He said it did not make him sick, and that he never drank enough Jamaica ginger to make him intoxicated. It was in the original package when he got it from Crawford.

George L. Moore, inspector under the Intoxicating Liquor Act, stated that MacDonald was apparently intoxicated about noon on October 15, that he searched him and found two bottles labelled Jamaica ginger. One of these bottles was taken to St. John and part of the contents analyzed by M. V. Paddock, the provincial analyst, who, upon being called, stated that his analysis shewed that the bottle contained 49 per cent. of absolute alcohol, that the balance was water and ginger resin. The sample he analyzed contained by weight more than 2 per cent. of proof spirit. Mr. Paddock, who is a druggist, stated that he was acquainted with the preparation which is known as Royal Essence of Jamaica Ginger, and which it appears from the affidavit of Charles H. Elliott, solicitor and counsel for the defendant, is a medicine duly registered as No. 87 under the provisions of the Proprietary or Patent Medicine Act, statutes of Canada, Edw. VII. (1908), c. 56. He stated that he sold it in his drug store and that most druggists handled it, and that a good many grocery stores throughout the province also handled it. The alcohol in it is necessary to keep the tincture in solution, and is used to extract the resin from the ginger, and the extract of

N. B.

S. C.

THE KING v. VROOM; EX PARTE CRAWFORD.

Hazen, C.J.

ginger could not be got out without the alcohol, and that there is no more alcohol in the preparation than is reasonably necessary for that purpose. It is one of the preparations in the British Pharmacopœia. He would call it a medicine, but many medicines are used as beverages, and he could not say there was sufficient medicine in it to offset the alcohol. The ordinary man would find it hard to take enough of it to harm him. He did not think it would be nauseating but it would leave a burning sensation. He had been handling it in his drug business for perhaps 40 years. He put it up in small bottles containing perhaps one-eighth as much as the bottles that were shown in court, and which were obtained by the inspector from MacDonald. He stated that the preparation in court was too hot to be used as a beverage, but could be used in addition to something else, and that if water was mixed with it, it would make it milky and unsightly, as it would throw some of the resin out of solution. In cross-examination he stated that he sold it in smaller quantities than in the bottle shewn, to prevent it being used as a beverage, and that he never sold it except in small bottles for household use, and that he would not sell 4 bottles as large as the one shewn to one person, because it would make him suspicious of what it was wanted to be used for. He had heard of people drinking such mixtures as a beverage.

A number of witnesses were called for the defence, for the apparent purpose of proving that the preparation was not capable of being used as a beverage, among them being the defendant, who stated that on October 15 he sold two bottles to MacDonald, that they were two ounce bottles and that if he bought two more on that day he must have bought them from one of his clerks. Those that he sold were taken from a carton the same as he bought them in and that he had not had the contents out or made any change in them; that the preparation was registered under the Proprietary Medicine Act as No. 87, and that the name and address of the manufacturer was on the label, as was also the number under the Proprietary Medicine Act. He stated that the preparation which was sold by grocers and other druggists in St. Stephen was a medicine used for curing cramps, and that he had taken a teaspoonful in some hot water and sugar

when he had a cold. He thought it was sufficiently medicated to prevent its use as a beverage; that the two ounce bottle was *the only sized one he had seen of the mixture.*

Harold Lynton, a resident of the Town of St. Stephen, stated that he had never tried to drink any essence of Jamaica ginger except according to directions on the bottle, which was a teaspoonful at a dose. It would relieve the pain or trouble he was taking it for, and he never wanted to take more than the specified dose for he found it harsh to take even in water, and would not like to try to drink it as a beverage.

Frederick McKay knew the preparation and had tried to drink it. He had taken about a teaspoonful in about a half glass of hot water, but would not want to try to take enough to make him drunk and could not drink it as a beverage. It was in his opinion a medicine.

Abram Levy, who had taken it as a medicine, stated that it was very strong stuff. It burned the stomach so that he would not like to take another spoonful. He could not drink enough of it to make him intoxicated, and in his opinion, it is not capable of being used as a beverage by the ordinary person.

Frank A. Dustin, physician, swore that the preparation is generally used by the public as a medicine. He had heard of its being used as a beverage. A person using it as a beverage would be one of depraved appetite, as the average person could not stand to drink such a combination. In cross-examination he said he had heard of its being used as a beverage, and he understood that people had been using other things to mix with U.N.O. beer, the beer with which MacDonald said he had diluted the ginger, and it might produce quite a kick if Jamaica ginger was mixed with this beer.

Thomas Smith, a painter, said that having taken a spoonful of Jamaica ginger in hot water he found it good when suffering with pains in his stomach. He never tried it as a beverage, and did not think he could drink it, but that he could drink quite a lot of it when mixed with water and sugar.

I have thought it desirable to give this synopsis of the evidence for reasons that will appear later.

The first question to be determined is whether or not this

N. B.

S. C.

THE KING v. VROOM; EX PARTE CRAWFORD.

Hazen, C.J.

preparation, for the sale of which the defendant has been convicted, is or is not liquor, as defined within the meaning of the Intoxicating Liquor Act, 1916, the contention being that it is not, and that, therefore, the justice had no jurisdiction to convict.

S. 5 of the Intoxicating Liquor Act, c. 20, 1916, provides that:

> No person shall, within the Province of New Brunswick, by himself, his clerk, servant or agent, expose, procure or keep for sale, or directly or indirectly, or upon any pretense, or by means of any device, sell or barter or offer to sell or barter . . . any liquor without having first obtained a wholesale license or retail license under this Act authorizing him so to do.

and the sale of liquor is prohibited in the province except for medicinal, scientific, sacramental or mechanical purposes, as authorized by the Act.

The interpretation of liquor is found in s. 2 (*a*), which enacts that:—

> "Liquor" or "liquors" means and includes every spirituous or malt liquor and any and every wine and any and every combination of liquor or drinks that is intoxicating and any mixed liquor that is capable of being used as a beverage and part of which is spirituous or otherwise intoxicating. A drinkable liquid which does not contain more than 2 per cent. by weight of proof spirits shall be deemed to be non-intoxicating, and shall not be included in the expression "liquor" or "liquors."

In this case, there is no question with regard to the amount of alcohol which the preparation contained. The question is as to whether or not it is a mixed liquor which is capable of being used as a beverage.

The question it seems to me is one of fact, and in view of the evidence, the substance of which I have given, I cannot come to any other conclusion than that there was evidence which justified the magistrate in concluding that such was the case. The preparation was purchased by MacDonald for use as a beverage, and was used by him as such, having at one time been diluted with a certain quantity of beer and at another time not having been so diluted, and having regard to the statements of the other witnesses I think it is quite clear that there was evidence that would justify the magistrate in concluding that it was capable of being used as a beverage, and in fact it is difficult to understand how he could have come to any other conclusion. There is nothing in the New Brunswick Act making an exception in the case of the sale of essences, extracts or tinctures containing the

quantity of alcohol that is prohibited by the Act, and the fact that at the last session of the legislature a bill was passed providing that this question might be dealt with by order-in-council, makes it evident, I think, that the legislature, at the time of the enactment of the prohibitory law, did not consider the question of dealing with this subject which is dealt with in prohibitory enactments in some of the other provinces. That the question is one of fact seems to have been the decision in cases that have arisen in other Canadian courts. In *Rex* v. *MacLean* (1918), 40 D.L.R. 443 at 451, 13 Alta. L.R. 244, 29 Can. Cr. Cas. 270, Beck, J., says:—

> In any case, under either Act (that is the Proprietary or Patent Medicine Act and the Alberta Liquor Act) the question whether the liquid in question comes within the prohibition is a question of fact. No decision or certificate of an analyst under the Dominion Act is conclusive.

and in the same case at p. 454, Hyndman, J., says:—

> Whether the liquor in question is not capable of being used as a beverage is, I think, one of fact to be proved in each particular case and not simply to be inferred from the fact of its being a patent medicine, for it might well be that a mixture through fraud or deception on the government or the public though licensed as a patent medicine might not in fact comply with the provisions of the Patent Medicine Act.

There is no doubt whatever but that the medicine sold by Crawford was a proprietary medicine such as is sold by druggists throughout the country and is used for the cure of certain complaints, but as there is evidence to support the finding of the magistrate that it is capable of being used as a beverage, and as no exception is made in the prohibitory law that will exempt it from its operations, I do not see how the decision of the magistrate can be interfered with, as he had jurisdiction to try the offence and was not ousted of such jurisdiction by the fact that there was no evidence that the preparation was liquor as defined by or within the meaning of the Intoxicating Liquor Act, 1916.

The case of *Rex* v. *MacLean*, *supra*, was relied upon by the defendant. In that case a motion to quash was made on a stated case, the facts being admitted by counsel for the Crown and for the accused, and the decision was that the word liquor within the meaning of the Alberta Act meant a liquor which is commonly known or adapted for reasonable use as a drink or beverage for human consumption, or which is reasonably capable

N. B.

S. C.

THE KING v. VROOM; EX PARTE CRAWFORD.

Hazen, C.J.

of being used as a substitute for such beverage or being converted into such beverage, and that, therefore, the sale of a preparation which complies with the requirements of the Proprietary or Patent Medicine Act, that is, which is so medicated that it cannot be used as a beverage and which is duly registered under that Act is not prohibited by the Liquor Act. It was held in that case and has been held in other cases that there was no conflict between the Liquor Act and the Proprietary or Patent Medicine Act, and that, therefore, there was no foundation for the argument that the sale of the liquor in that case called Tonic Port, was permitted by the Dominion Act, and that the prohibition of the Provincial Act could not apply to it.

The definition of liquor in the Alberta Act is different from that in our Act, the expression liquor or liquors in that Act being defined as:—

> Including all fermented spirits and malt liquors, and all combinations of liquors, and all drinks and drinkable liquids which are intoxicating.

The decision of the majority of the members of the Alberta court was to the effect that the word drinkable limited the meaning of the word liquid, and must therefore mean suitable for being drunk or fit for drinking. This language is very different from that of our Act, in which the words are: "Any mixed liquor that is capable of being used as a beverage."

It was contended by the counsel for the defence that the preparation the sale of which was the cause of this conviction would only be used as a beverage by people of depraved tastes, and, therefore, it should be held that it was not capable of being used as a beverage in the ordinary meaning of the word. I do not, however, think that this argument should prevail over the plain language of the statute. What appeals to the taste of one man may be entirely offensive to another. People who are in the habit of using wines of a superior vintage would no doubt not be attracted by liquors of an inferior quality, and from their standpoint the person who indulged in them might be considered to have a depraved or vitiated taste. Most people who use spirits as a beverage mix their drinks with soda or water, and may regard it as evidence of a depraved or abnormal taste on the part of those who indulge in their use in an undiluted state. It

would be utterly impossible for some people to so do, but from this it could not be considered that such spirits are not capable of being used as a beverage. The only question is whether the preparation in question was capable of being used as a beverage, and that it has been proved to have been so used it seems to me settles that point.

A short time ago a case very similar to the one under consideration came before Taylor, J., of the Supreme Court of Saskatchewan, and it was held by him in *Rex* v. *Campbell's Pharmacy* (1918), 11 Sask. L.R. 231, that as the evidence shewed that the liquid contained more than 2½ per cent. of proof spirits (the amount specified in the Saskatchewan Act) it must conclusively be admittted to be intoxicating under s. 1 (2) of the Act, and as the evidence further shewed that it was capable of human consumption it was "liquor" within the meaning of that Act. The Saskatchewan Temperance Act, 1917, s. 3, provides that no person shall expose or keep for sale or sell, barter or exchange liquor in Saskatchewan except as provided by the Act, and according to the interpretation section (s. 2) "liquor" means and includes:—

(a) Every spirituous and every fermented and every malt liquor.

(b) Every wine.

(c) Every and any combination of liquors and drinks or preparations or mixtures capable of human consumption, which is intoxicating.

(d) Any mixed liquor or liquid capable of being used as a beverage, part of which is spirituous and otherwise intoxicating.

This language is almost identical with the language used in our Act, and, in that case, the judge referring to the liquid that had been sold, which was known as Tonic Port and which was registered under the Proprietary or Patent Medicine Act, is reported to have said at p. 235:—

It contains more than two and one-half per centum of proof spirits, and is, therefore, by the statute conclusively deemed to be intoxicating; and, as the purpose of the manufacture . . . is to retain the solid matter in solution, it is a liquid capable of being used as a beverage and part of which is spirituous, and within the meaning of the statute conclusively deemed to be intoxicating.

In the Saskatchewan Act there is a provision to the effect that any druggist may sell to any person any mixture, compound or prescription made according to any formula of the British or United States Pharmacopœia, or French Codex, or any extract,

N. B.

S. C.

THE KING v. VROOM; EX PARTE CRAWFORD.

Hazen, C.J.

syrup, elixir, perfume or other preparation, provided it does not contain liquor in excess of the amount required as a solution, or preservative, and contains sufficient medication or other treatment to prevent its use as an alcoholic beverage. I cannot find that there is any such provision or anything analogous to it in the New Brunswick Act.

On the first ground, therefore, the defendant must fail.

With regard to the second ground, that the preparation is a medicine and is commonly used as such, and it was not intended by the legislature in passing the Intoxicating Liquor Act in 1916 to prohibit either its sale or use, I cannot find anything in the Act to support such a contention. As I said, the question of extracts, essences and tinctures was not dealt with by way of exception in the New Brunswick Act, and I cannot find anything in it which in any way limits the definition of liquor as found in s. 2 (*a*).

It was contended on the argument that as this preparation was registered under the provisions of the Proprietary or Patent Medicine Act for the Dominion of Canada, c. 56, of 1908, its sale was lawful. Whatever force (if any) there might have been in that contention certainly has been removed by the amendment to that enactment, 7 and 8 Geo. V, c. 30, 4 D, which provides that the provisions of the Proprietary or Patent Medicine Act—"Shall not be deemed to in any way affect any Provincial law," and it cannot be taken to be *in pari materia* with the N.B. Intoxicating Liquor Act, 1919.

In the language of Taylor, J., in *Rex* v. *Campbell's Pharmacy*, *supra*, the amendment disposes of the argument that registration under the Act relieves from the responsibility for compliance with the provincial law. See also *Rex* v. *Axler* (1917), 40 O.L.R. 304; *Rex* v. *Warne Drug Co.* (1917), 37 D.L.R. 788, 27 Can. Cr. Cas. 346, 40 O.L.R. 469.

The decision of Lamont, J., in *Rex* v. *Druggist Sundries Co.* (1916), 31 D.L.R. 761, 9 S.L.R. 443, which was referred to on the argument before this court was given prior to the amendment in c. 30, 7-8 Geo. V.

White, J.

WHITE, J. (oral):—I agree with the Chief Justice, that the question whether the liquor proved to have been sold by the

N. B.

S. C.

THE KING v. VROOM; EX PARTE CRAWFORD.

White, J.

defendant, was liquor within the Intoxicating Liquor Act, or not, is entirely a question of fact, the duty of deciding which is, by the statute, imposed upon the magistrate. As the magistrate had jurisdiction over the person and over the offence charged, and as *certiorari* is taken away by the Intoxicating Liquor Act, I think this court has no power to interfere with the decision of the magistrate upon a question of fact, which, as I have said, is exclusively entrusted to him by the Act. The case falls, I think, entirely within the judgment given by this court in *Ex parte Daley* (1888), 27 N.B.R. 129. That case, since it was first decided, has been many times reaffirmed by this court; and, I think, correctly declares the law as well established by a long line of English authorities, among which I may mention the cases of *Brittain* v. *Kinnaird*, 1 B. & B. 432, and *Reg.* v. *Bolton* (1841), 1 Q.B. 66. That being so, I do not feel called upon to express any opinion as to whether or not the liquor in question was liquor within the Intoxicating Liquor Act, 1916, or otherwise, because it seems to me any judgment we might deliver on that point would be simply *obiter*. I agree that the rule must be refused and the conviction affirmed.

Rule discharged.

ALBIN v. CANADIAN PACIFIC R. Co.

ONT.

S. C.

Ontario Supreme Court, Appellate Division, Mulock, C.J.Ex., Clute, Riddell, Sutherland and Kelly, JJ. January 9, 1919.

DAMAGES (§ III K—207)—SUBWAY—REMOVAL OF DIRECT APPROACH TO PROPERTY—COMPENSATION—MEASURE OF—LOSS OF BUSINESS.

Where a claimant's land is injuriously affected by the removal of the direct approach to the premises, by the construction of a subway by a railway company in a street in front of the land, such claimant is entitled to full compensation for all damage arising therefrom although no land is taken. The arbitrator under s. 155 of the Railway Act (R.S.C. 1906 c. 37) should ascertain the entire compensation to which the claimant is entitled and in doing so should consider evidence of loss of business and make such allowance therefor as forming part of the compensation to be allowed as he may think just under the circumstances.

[Review of authorities; see also annotation on Damages upon Expropriation, 1 D.L.R. 508.]

Statement.

APPEAL by the railway company, contestants, from an award of an arbitrator determining the compensation to be paid to the claimant, Alberta Albin, for injury sustained by the con-

ONT.

S. C.

ALBIN v. CANADIAN PACIFIC R. Co.

struction by the contestants of a subway in Yonge street in the city of Toronto.

The claimant's premises, in which she carried on the business of a confectioner, were situated on the west side of Yonge street, a short distance north of the railway tracks.

The arbitrator allowed $10,866, of which $4,500 was for loss of business. The balance represented the depreciation in the value of the property.

C. M. Colquhoun, for appellant;

William Laidlaw, K.C., for respondent,

Clute, J.

CLUTE, J.:—Appeal from the award of Coatsworth, C. J., in a matter referred to him by an agreement of reference to determine the compensation to be paid to the claimant for damages sustained by reason of the construction by the contestants of a subway in Yonge street.

The claimant's premises were No. 1204, situate on the west side of Yonge street, a short distance north of the Canadian Pacific Railway tracks.

His Honour allowed $10,866, of which $4,500 is "for loss of business." The balance, $6,366, represents the depreciation in the value of the property. There was no serious dispute as to the correctness of the amount thus allowed for depreciation, nor could there be, except possibly in respect of the costs of the sale of which I shall speak presently.

But it is contended that, under the statutes and authorities governing the case, the claimant is not entitled to be allowed anything for her loss of trade.

It is quite clear that, although no land of the claimant was taken, she was entitled to damages by reason of the railway company having cut away the street in front of her premises to the depth of over 5 feet, thus destroying her approach to Yonge street.

It is not disputed that the claimant was entitled to compensation, although none of her land was taken.

It has been held under the Imperial Acts (the Lands Clauses Consolidation Act, 1845, 8 Vict. ch. 18, sec. 68, and the Railways Clauses Consolidation Act, 1845, 8 Vict. ch. 20, secs. 6 and 16) that damage recoverable under the words "injuriously affected"

ONT.

S. C.

ALBIN v. CANADIAN PACIFIC R. Co.

Clute, J.

must result from an act made lawful by the statutory powers or be such as would have been actionable but for the statutory powers.

It is therefore necessary to examine in what respect our statute differs, if at all, from the Imperial Acts.

It will be seen by reference to these sections, that sec. 68 of ch. 18 and secs. 6 and 16 of ch. 20 refer to lands taken or "injuriously affected."

Section 68 contains these expressions: "If any party shall be entitled to any compensation in respect of any lands, or of any interest therein, which shall have been taken for or injuriously affected by the execution of the works . . . " he is to follow the course therein directed, that is, he may have an arbitration or a jury.

In the Railways Clauses Act, 8 Vict. ch. 20, sec. 6 declares: " . . . the company shall make to . . . all other parties . . . injuriously affected by the construction thereof, full compensation for the value of the lands so taken or used, and for all damage sustained by such owners, occupiers, and other parties, by reason of the exercise, *as regards such lands*, of the powers by this or the special Act, or any Act incorporated therewith, vested in the company . . . The amount of such compensation shall be ascertained and determined in the manner provided by the said Lands Clauses Consolidation Act."

Section 16, after giving powers to execute the works, goes on to say: "Provided always, that in the exercise of the powers by this or the special Act granted the company shall do as little damage as can be, and shall make full satisfaction in manner herein and in the special Act, and any Act incorporated therewith, provided, to all parties interested, for all damage by them sustained by reason of the exercise of such powers."

The Canadian Railway Act, R.S.C. 1906, ch. 37, sec. 155, follows the wording of the latter portion of sec. 16, but uses the word "compensation" instead of "satisfaction," and is as follows: "The company shall, in the exercise of the powers by this or the special Act granted, do as little damage as possible, and shall make full compensation, in the manner herein and in the special Act provided, to all persons interested, for all damage by them sustained by reason of the exercise of such powers."

ONT.

S. C.

ALBIN v. CANADIAN PACIFIC R. CO.

Clute, J.

Section 6 of ch. 20 and sec. 68 of ch. 18 of the Imperial Acts were not introduced in our statute, which does not limit the compensation to lands "injuriously affected" or as "regards such lands," as do the Imperial Acts. The right to compensation under our Act is declared by sec. 155, and is, in my opinion, distinctly different in its meaning and intendment from the sections of the Imperial Act above referred to.

It was held by Armour, C.J., in the case of *Re Birely and Toronto Hamilton and Buffalo R.W. Co.*, 28 O.R. 468, under the Canadian Railway Act, 51 Vict. ch. 29, sec. 92 (now 155), that the claimant was entitled to an award of damages arising in respect of the operation of the railway, notwithstanding that no part of his lands had been taken for the railway, and he distinguished *Hammersmith etc. R.W. Co.* v. *Brand* (1869), L.R. 4 H.L. 171, wherein it was held, under the Imperial Acts, that a person whose land had not been taken for the purposes of the railway could not recover statutory compensation from the railway company in respect of damage or annoyance from vibration occasioned by the passing of trains after the railway was brought into use, even though the value of the property has been actually depreciated thereby. Armour, C.J., referring to the *Hammersmith* case, says: "That case is no authority upon the construction of the (Canadian)Railway Act, 51 Vict. ch. 29, for it was decided upon the construction of the Imperial Act 8 Vict. ch. 20, which differs essentially from the Canadian Railway Act; and it is safe to say that, had the Imperial Act 8 Vict. ch. 20 been identical with the Railway Act, the decision would have been the other way." An appeal from this judgment was quashed: see 25 A.R. (Ont.) 88.

The *Birely* case was cited in *Powell* v. *Toronto Hamilton and Buffalo R.Co.*, (1897), 25 A.R. (Ont.) 209, and it was there pointed out by Osler, J.A. (pp. 213, 214), that the case differed altogether from such cases as *Corporation of Parkdale* v. *West* (1887), 12 App. Cas. 602; *Bowen* v. *Canada Southern R.W. Co.* (1887), 14 A.R. (Ont.) 1; *Beckett* v. *Midland R.W. Co.* (1867), L.R. 3 C.P. 82; *Caledonian R.Co.* v. *Walker's Trustees*, (1882), 7 App. Cas. 259; *North Shore R.W. Co.* v. *Pion* (1889), 14 App. Cas. 612, "where, by the actual construction of the railway, the access to private property was interfered with and practically destroyed. In cases of that class there

is a permanent injury to the estate of the land-owner, which, upon the principles explained and illustrated in these decisions, entitles him to compensation, although none of his land is actually taken."

It will be observed that the case at bar differs essentially from the *Powell* case in this, that the damage in the *Powell* case was from anticipation of injury by reason of the operation of the railway after construction, and it is expressly distinguished from the present case, where, by the actual construction of the railway, access to private property was interfered with and practically destroyed.

In *Ricket* v. *Metropolitan R. Co.* (1867), L.R. 2 H.L. 175, the claim was for (1) damage to the structure of the house, and (2) with respect to the claim for loss of profits. The jury found that there was no damage to the structure of the house, but that the plaintiff sustained damage in respect of the interruption to his business, and gave a verdict for £100. The case was afterwards removed into the Queen's Bench, the facts were turned into a special case, and the question for the opinion of the Court was, "whether the loss of customers by the plaintiff in his trade, under the above circumstances, was such damage as entitled him to recover from the company?" The Court, consisting of four Judges, unanimously gave judgment in favour of Ricket. The case was taken on error to the Exchequer Chamber, where it was heard by six Judges, four of whom were for reversing, and two for affirming, the judgment of the Court below. It was therefore reversed, and error was then brought to the House of Lords. The case was heard by the Lord Chancellor (Lord Chelmsford), Lord Cranworth, and Lord Westbury, and the judgment of the Exchequer Chamber was affirmed by the judgment of two, the third (Lord Westbury) dissenting.

Ricket was the occupier of a public house, situate in a place known as Crawford Passage, opposite Bowling Green Lane. It did not appear that the defendants blocked the immediate approach to Ricket's public house; they blocked the carriage-way of Bowling Green Lane, but gave a passage to foot-passengers across Coppice Row to the passage which led to the public house. This obstruction was continued for 12 months, and then the streets and passages were restored to their original condition.

ONT.

S. C.

ALBIN v. CANADIAN PACIFIC R. CO.

Clute, J.

The House of Lords held, Lord Westbury dissenting, that Ricket was not entitled under the 68th section of the Lands Clauses Act, nor the 6th or the 16th section of the Railways Clauses Act, to receive compensation for injury to his trade consequent upon these obstructions. Lord Westbury said (p. 202): "There is nothing in the statutes," that is, these two statutes, "to warrant the position that there shall be no compensation where at common law there would have been no right of action;" and also (head-note): "The trade carried on in particular premises is a thing appertaining to the premises, and, as such, is included in the 'interest' of the occupier; and that interest is part of the value of the property, and if injuriously affected, is to be compensated." Lord Westbury was also (head-note) of the opinion that the meaning of "parties interested," in the 16th section of the Railways Clauses Act, is, parties sustaining a special and individual loss by reason of the works which the section empowers the company to construct, and Ricket was entitled to compensation under this section. Thus four Judges of the Queen's Bench, two of the Exchequer Chamber, and one of the House of Lords, were of the view that Ricket was entitled to recover, and four Judges of the Exchequer Chamber and two of the House of Lords that he was not.

The facts in the *Ricket* case are so widely different from those in the present case that, even if it should be held that our statute is in effect the same as the English Acts, it is not an authority against the claimant binding in this case.

The *Ricket* case has been considered and followed in subsequent cases; the effect of it is considered in *Metropolitan Board of Works* v. *McCarthy* (1874), L.R. 7 H.L. 243; and to explain its effect, it is necessary to bear in mind the special points upon which the decision turned.

Lord Chelmsford, in the *Ricket* case, L.R. 2 H.L. at p. 188, states that "the damage which is the foundation of the claim to compensation . . . is too remote to be the subject of an action." This finding would have been sufficient in law to dispose of the case.

This question is dealt with in Cripps' Law of Compensation, 5th ed., p. 145: "If on the facts a jury or arbitrator had found that the damage complained of had affected the value of the premises apart from any question of injury to trade, a claim to compensation could have been maintained."

ONT.

S. C.

ALBIN v. CANADIAN PACIFIC R. Co.

Clute, J.

In the case of *Metropolitan Board of Works* v. *McCarthy*, the facts were as follows:—

M. was the lessee or occupier of a house in close proximity to a draw-dock which opened into the Thames. He had no right, in any way, to the use of the dock, except as one of the public; but, his premises being in close proximity to it, his use of it for the purposes of his business was very constant. The dock was entirely destroyed by the works of the Thames Embankment. M. sought compensation. The case submitted to the Court stated, "that by reason of the destruction of the dock, and the destruction thereby of the access to and from the Thames, the plaintiff's premises became and were, as premises either to sell or occupy in their then condition, and with reference to the uses to which any owner or occupier might put them in their then state and condition, permanently damaged and diminished in value." It was held that the plaintiff was, on these facts, entitled to compensation. This case was decided upon the meaning of the words "injuriously affected." The Lord Chancellor (Lord Cairns) said (p. 252): "The proper test is to consider whether the act done in carrying out the works in question is an act which would have given a right of action if the works had not been authorised by Act of Parliament. I do not pause to inquire whether or not, if the question was not to be decided for the first time, it is not a test somewhat narrow. I accept that test as being the test which has been laid down, and which has formed the foundation for the decision of so many cases before the present." He then (p. 253) referred to the argument of Mr. Thesiger, who stated "that the test . . . was this, that where by the construction of works there is a physical interference with any right, public or private, which the owners or occupiers of property are by law entitled to make use of, in connection with such property, and which right gives an additional market value to such property, apart from the uses to which any particular owner or occupier might put it, there is a title to compensation, if, by reason of such interference, the property, as a property, is lessened in value." The Lord Chancellor (pp. 253, 254) referred to the *Ricket* case, "which at first sight was supposed to militate against this proposition . . . but in truth that case has no application whatever to the present." Lord Chelmsford referred to the many irreconcilable decisions

ONT.

S. C.

ALBIN v. CANADIAN PACIFIC R. CO.

Clute, J.

under the Lands Clauses and Railways Clauses Acts, and said (p. 256): "It may be taken to have been finally decided that in order to found a claim to compensation under the Acts there must be an injury and damage to the house or land itself in which the person claiming compensation has an interest. A mere personal obstruction or inconvenience, or a damage occasioned to a man's trade or the goodwill of his business, although of such a nature that but for the Act of Parliament it might have been the subject of an action for damages, will not entitle the injured party to compensation under it."

Beckett v. *Midland R.W. Co.*, L.R. 3 C.P. 82, was approved. In that case the plaintiff's house fronted on a public highway. The defendant railway company, under its powers, erected an embankment, thereby narrowing the road from 50 to 33 feet, and thus, according to the evidence, materially diminishing the value of the house for selling or leasing. It was held that this was such a permanent injury to the estate of the plaintiff in the premises as to entitle him to compensation under the Lands Clauses Consolidation Act and Railways Clauses Consolidation Act, 1845. *Ricket* v. *Metropolitan R. W. Co.* (*supra*) was observed upon and distinguished.

When the facts in *Metropolitan Board of Works* v. *McCarthy* are considered, it strongly supports the claimant's rights in the present case.

In the *McCarthy* case the plaintiff claimed compensation for damages to his property caused by the works of the Thames Embankment. He carried on the business of a carman and contractor for supplying builders with lime, bricks, and other building material, and as a dealer in sand and ballast, near a dock leading to the Thames, which dock was largely used by the plaintiff in the way of his business. This dock was a free and open public dock; the plaintiff had no right or easement in the dock other than as one of the public, nor was there, appurtenant or otherwise belonging to his premises, any other right or privilege in or to the dock. By reason of the proximity of the dock to the plaintiff's premises and the access thereby given to and from the Thames, the premises were rendered more valuable to sell or occupy with reference to the uses to which any owner might put them. In the execution of the works, a solid embankment was carried along the foreshore

ONT.

S. C.

ALBIN v. CANADIAN PACIFIC R. CO.

Clute, J.

of the Thames, thus permanently stopping up and destroying the dock. By reason thereof the access through the dock to and from the Thames was destroyed, and the plaintiff's premises became and were as premises, either to sell or occupy, with reference to the uses to which any owner or occupier might put them in the then state and condition, permanently damaged and diminished in value. It was held that the plaintiff, on the facts, was entitled to compensation, and the damages were assessed at £1,900. Lord Chelmsford, at p. 259, said: "I cannot help observing that the Judges in the Court below appear to me to have needlessly embarrassed themselves with the consideration whether this case is distinguishable from *Ricket's Case*. The distinction is marked and obvious. In *Ricket's Case* there was no finding which related to the premises, but merely of a personal damage; here the special case expressly states an injury and damage to the premises."

Lord O'Hagan, while fully concurring in the judgment, intimated his opinion that the observations of Lord Westbury in the *Ricket* case had laid down the correct rule for construing sec. 68 of the Lands Clauses Act. The Legislature never intended "that the community should profit at the expense of a few of its members" (p. 265).

In *Caledonian R.W. Co.* v. *Walker's Trustees*, 7 App. Cas. 259, the Scottish Railways Clauses Act of 1845 (similar to the English Act) was considered. The trustees were possessed of a spinning mill 90 yards from an important main thoroughfare in Glasgow, having parallel accesses on the level from two sides of the mill to the thoroughfare. A railway company under their special Act cut off entirely one access, substituting therefor a deviated road over a bridge with steep gradients. And the other access they diverted and made less convenient. When the bill was before Parliament, the trustees were induced to withdraw their opposition in consideration of an agreement, by which the company undertook that, in the event of the land of the trustees and of others being injuriously affected by the construction of any of the works proposed by the bill, their claim to compensation should not be barred by reason of the company not taking part of their land. Held, that though the agreement gave no right to compensation, the trustees were entitled to it under the Railways and Lands Clauses Consolidation (Scotland) Acts, 1845. *Per* Lord Selborne,

ONT.

S. C.

ALBIN v. CANADIAN PACIFIC R. CO.

Clute, J.

L.C.: "The obstruction of access to a private property by a public road need not be *ex adverso*, but it must be proximate and not remote or indefinite to entitle the owner of that property to compensation for the loss of it." The *McCarthy* case was held undistinguishable; the *Chamberlain** and *Beckett* cases approved; *Ricket* v. *Metropolitan R.W. Co.* examined.

Lord Selborne (p. 276) lays down three propositions which he regards as having been established:—

"1. When a right of action, which would have existed if the work in respect of which compensation is claimed had not been authorised by Parliament, would have been merely personal, without reference to land or its incidents, compensation is not due under the Acts.

"2. When damage arises, not out of the execution, but only out of the subsequent use of the work, then also there is no case for compensation.

"3. Loss of trade or custom, by reason of a work *not otherwise directly affecting the house or land* in or upon which a trade has been carried on, or any right properly incident thereto, is not by itself a proper subject for compensation."

The distinction here given as to when loss of trade or custom is not a proper subject of compensation does not include the present case: it is where the work does not directly affect the house or land in or upon which the trade has been carried on. Here the work did directly affect the house and land: it took away from it the right of access to the public street, and it was by reason of the loss of that right that the damages accrued to the business. Lord Selborne points out the exact nature of the claim in the *Ricket* case (7 App. Cas. at p. 281), and shews that "there was, therefore, no obstruction at all which could interfere with the direct access to or from" Ricket's house. Lord Selborne (p. 283) sets forth fully the particulars of the *Ricket* case and its progress through the Queen's Bench and Exchequer Chamber, which reversed the Queen's Bench decision: "When *Ricket's Case* came to your Lordships' House the judgment of the Exchequer Chamber was affirmed, Lord Chelmsford and Lord Cranworth concurring in the result, though not in all their reasons. Lord Westbury

**Chamberlain v. West End of London and Crystal Palace R.W. Co.* (1863), 2 B. & S. 617.

dissented, calling in question the rule that the words 'injuriously affected', in the compensation clauses of the Lands and Railways Clauses Acts, mean only such a technical injury as would have been actionable if the work had not been authorised by the Legislature. Much of Lord Chelmsford's reasoning was founded upon a distinction between temporary and permanent damage under the 68th section of the Lands Clauses Act, and the 6th and 16th sections of the Railways Clauses Act, in which Lord Cranworth did not concur; and it certainly does not appear to me" (Lord Selborne) "that the decision of *Ricket's Case*, either in this House or in the Exchequer Chamber, can satisfactorily be explained by any such distinction. But both these noble and learned Lords agreed that the damage by loss of custom, of which the plaintiff complained, was a consequence of the works of the railway company, too remote and indefinite to bring it within the scope of any of the compensation clauses of the Acts."

He points out (p. 284) that the same view was taken of *Ricket's Case* by Willes and Byles, JJ., in the *Beckett* case, and that in the case then before the House (*Walker's Trustees*) as in the *Chamberlain*, *Beckett*, and *McCarthy* cases, the claim was made in respect of a direct and immediate injury to the trustees' estate by cutting off their direct and immediate access to the street.

The effect and meaning of this judgment, as I understand it, is that loss of trade is a proper ground for compensation when it arises by reason of the works directly affecting the house and land on which the trade is carried on. The reasoning of Lord O'Hagan in the *Walker's Trustees* case is to the same effect: he clearly distinguishes the *McCarthy* case from the *Ricket* case.

Lord Blackburn refers to the various decisions down to the *McCarthy* case, and holds that the cases shew that the right of access by a public way to land is a right attached to the land, and that, if any obstruction to the right of way occasions particular damage to the owner or occupier of that land by diminishing its value, an action which he might bring for that particular damage would be for an actual injury in respect of the land.

The effect of these decisions and especially of the *Walker's Trustees* case is that, where the land itself is injuriously affected by the removal of the direct approach to the premises, even under the Imperial Acts a claimant is entitled to compensation for loss directly arising from such cause.

ONT.

S. C.

ALBIN v. CANADIAN PACIFIC R. CO.

Clute, J.

Before leaving the English cases it may be well to refer to the authorities mentioned by Mr. Cripps in his Law of Compensation, 5th ed., p. 146 (note *f*), cases tending to shew that damage to trade or business cannot be allowed. In addition to those already referred to, he mentions *Re Penny and South Eastern R.W. Co.* (1857), 7 El. & Bl. 660, 119 E.R. 1390; *Regina* v. *Vaughan* (1868), L.R. 4 Q.B. 190; *Bigg* v. *London Corporation* (1873), L.R. 15 Eq. 376; *Metropolitan Board of Works* v. *Howard* (1889), 5 Times L.R. 732; *Dublin Corporation* v. *Dowling* (1880), 6 L.R. Ir. 502.

In the *Penny* case depreciation in the value of property adjoining a railway by reason of the premises being overlooked by persons on the railway was not allowed, but injury from vibration caused by ballast trains during construction was recognised as a ground for compensation.

In the *Vaughan* case, the railway company served upon F., a tenant from year to year, a notice of their intention at the expiration of 6 months to enter and take the premises. F. claimed compensation for depreciation in the value of his interest, which had taken place since the expiration of the 6 months by reason of the execution of the company's works, the custom of the public house having been greatly reduced by the pulling down of the neighbouring houses taken under the company's statutory powers. The magistrate having refused to assess this item of compensation, on a rule to compel him to do so it was held that this depreciation was not the subject of compensation, and the claim had been rightly rejected. Cockburn, C.J., said (L.R. 4 Q.B. at p. 194): "It is quite clear the tenant cannot ask for compensation because the neighbouring property has been taken. The company might have done this by voluntary agreement quite independently of any statutable powers, and so destroyed the custom of the public house, and no action could have been maintained by him for the loss, inasmuch as no injury or trespass was done to him; consequently he could not have claimed compensation for this description of loss. This is an item of compensation not contemplated by the statute."

It is apparent that the *Vaughan* case is distinguishable from and not applicable to the present case.

In *Bigg* v. *London Corporation*, the 4th item of the plaintiff's claim was "for depression of the trade carried on by the plaintiff

H. Adkins caused by the defendants' works, £150." Sir James Bacon, V.-C., said (L.R. 15 Eq. at p. 381): "There is not, strictly speaking, a particle of evidence that his trade has been in any degree depreciated; and it is clear that the plaintiff has no particular injury to complain of." He was allowed damages for the interference with his cellars, which was not authorised. The *Ricket* case was referred to by the Vice-Chancellor, who observed that it had gone far to settle the law in such cases; that remote and consequential damages cannot be claimed.

It is sufficient to distinguish this case from the one at bar to observe that there was no evidence of loss of trade, and it is to be considered having regard to the third proposition laid down by Lord Selborne in the *Walker's Trustees* case and the subsequent cases where it has been held that the destruction of a right of access is a ground for damage.

Metropolitan Board of Works v. *Howard*, 5 Times L.R. 732, was an appeal to the House of Lords from the decision of the Court of Appeal, *Howard* v. *Metropolitan Board of Works* (1888), 4 Times L.R. 591, affirming the judgment of Mr. Justice Denman in favour of the plaintiff. The claim was under the Lands Clauses Act, and was in respect of the injurious affection of the plaintiff's property by certain street improvements made by the defendants. The plaintiff was the tenant of a licensed public house in Bridge street, about 250 feet distant from old Putney Bridge. Bridge street was the main street on the Middlesex side of the Thames leading to old Putney Bridge. The Board built a new bridge a short distance up the river, and made a new thoroughfare on the Middlesex side leading to the new bridge. The old bridge was then closed, and Bridge street led down to the water only, and in consequence the traffic, which formerly went along Bridge street past the plaintiff's public house, was diverted at a point before the plaintiff's house was reached, and passed along the new thoroughfare and so over the new bridge. The plaintiff claimed compensation in respect of his property being "injuriously affected" by the works carried out by the defendants, and on the inquiry before the jury the plaintiff produced evidence that in consequence of the diversion of the traffic the trade of the public house had greatly diminished. The jury awarded the plaintiff £1,031 compensation. Upon the hearing of the action, the

ONT.

S. C.

ALBIN v. CANADIAN PACIFIC R. CO.

Clute, J.

defendants contended that the inquisition was bad, as it found solely, or to a great extent, money due to the plaintiff for loss of profits of the trade, which could not be the subject of compensation, the only subject for compensation being the depreciation in the value of the premises. Mr. Justice Denman, who tried the case, held that he was not justified in treating the inquisition as a nullity, and gave judgment for the plaintiff. The Court of Appeal affirmed the decision of the learned Judge, and Lord Herschell gave the judgment of the House dismissing the appeal, saying (5 Times L.R. 732) that he "did not think it could be doubted that an interference of this character with the access to the house of the respondent by means of thus dealing with the road or highway on which it was situated was an injurious affecting of his premises which would give him a right to compensation if those premises had been rendered less valuable than they were before." This case, below, is reported in 4 Times L.R. 591, where the *McCarthy* case and the *Walker's Trustees* case were referred to. In dismissing the appeal, the Master of the Rolls said: "The case came within the 4th proposition laid down by Lord Selborne in the *Walker's Trustees* case that 'the obstruction by the execution of the work of a man's direct access to his house or land, whether such access be by a public road, or by a private way, is a proper subject for compensation.' In considering that matter it would not be right to regard the house solely as a public house, but it would be equally wrong to exclude the fact that the house was in a position to be used, and was used, as a public house . . . It was not clear that the jury had not used the evidence as to the diminution of trade in considering the question of the depreciation in value of the house. Such evidence was always given and could not be shut out." Lopes, L.J., concurred. In his opinion, the "house was injuriously affected by the execution of the works, and the jury awarded compensation, not for the loss of trade, which would not, *per se*, be a legitimate head of damage, but for the deterioration in value of the house as measured by the loss of trade."

As the result of the cases under the Lands Clauses Act and Railways Clauses Acts (Imperial), the claimant would in the present case be entitled to a claim for compensation for deterioration in the value of the premises, in which evidence of the loss

of trade would be admissible, although possibly not allowable *per se*. It would be a question whether or not it could be rejected under the 3rd proposition as laid down by Lord Selborne in the *Walker's Trustees* case.

In my opinion, the effect of the 3rd proposition would not be to exclude the claim for damages for loss of trade. However that may be, I think it clear that, having regard to our statute, the claim is well supported. The claim clearly arises under the very language of the statute. The claimant is entitled to full compensation for all damage by her sustained by reason of the exercise of such powers. There is no decision, as I understand the cases, in our own Courts to militate against this view. The *Powell* case has been already referred to.

In *St. Catharines R.W. Co.* v. *Norris* (1889), 17 O.R. 667, compensation was sought for the loss of local custom to and from a mill, not arising from the construction of the railway, but from a subsequent user of it. It was held that the damages were too remote, and Galt, C.J., said (pp. 671, 672): "In the case of *Caledonian R.W. Co.* v. *Walker's Trustees*, it was manifest that the property in question had been seriously affected by the closing of access to a principal thoroughfare in Glasgow; and in the case of *Metropolitan Board of Works* v. *McCarthy*, it was clear his property had been very much lessened in value. In the case now before me no such damage was suggested. All that was urged before the arbitrators, or at any rate all on which their award is based, was that there was a speculative loss of local custom not arising from the construction of the railway but from the user of it." It also appeared to the Court, from the findings of the arbitrators themselves, that the damages were altogether too remote and speculative (p. 672).

In *Re Toronto Hamilton and Buffalo R.W. Co. and Kerner* (1896), 28 O.R. 14, the arbitrator found that the claimant had suffered no damage. Ferguson, J., on appeal, said (p. 19): "In the present case no sum was awarded. It cannot be said that the award exceeds $400, and I am of opinion that, as an appeal, this appeal does not lie. . . ." He stated (pp. 19, 20) that he thought there might be ground for separating the claim for $189, on the authority of *Ford* v. *Metropolitan R.W. Co.* (1886), 17 Q.B.D. 12, if the English Railway Act on the subject was the same

ONT.

S. C.

ALBIN v. CANADIAN PACIFIC R. CO.

Clute, J.

in effect as the Act of 1888 (Dominion), but was of the opinion that the Acts were materially different so far as the question there involved was concerned.

The case of *Leblanc* v. *The King*, (1917), 38 D.L.R. 632, 16 Can. Ex. 219, was referred to. In that case, the Crown had substituted for a level street crossing a permanent subway, which resulted in a material change in the level of the street opposite the property of the suppliant, who claimed both damages to his property and loss of business. Audette, J., held that, where no land is taken, the owner of property on such a street is precluded from recovering for loss of business, and referred to the decision by himself in *The King* v. *Richards* (1912), 14 Can. Ex. C.R. 365, where he held that the damages which a suppliant can recover are only those which would affect or would go to decrease the market value of the property.

These last two are the only cases which I have found where it has been so held in Canada, and it does not appear in the *Leblanc* case whether evidence of loss of business and trade was tendered as entering into the depreciation of the value of the land.

Re Meyer and City of Toronto (1914), 19 D.L.R. 785, 30 O.L.R. 426, was an appeal by the claimants from the award of the arbitrator, to increase the damages, under the Municipal Act, for the expropriation of a parcel of land on the Lake Shore upon which were erected a restaurant, boat-house, and dining-hall. The arbitrator found the value of the land and allowed in addition thereto $15,500 for business disturbance. Upon an appeal to this Court, the finding of the arbitrator was sustained and the appeal dismissed. Hodgins, J.A., gave the judgment of the Court dismissing the appeal. The cross-appeal was abandoned. It was held that the profits which are being earned are undoubtedly an element to be considered in deciding as to the value of the land and as demonstrating the use to which it may reasonably and advantageously be put, and as giving it unique and special value. In arriving at the amount of profits, salaries for the claimants, a fair rental, and an allowance for depreciation, were held to be properly chargeable against the business; and an allowance of three years' profits for the diminution of the business was held to be, in the circumstances, sufficient—the value of the land and

buildings having been based really on the amount of the annual profit.

In *City of Toronto* v. *J. F. Brown Co.* (1917), 37 D.L.R. 532, 55 Can. S.C.R. 153, it was held under the Municipal Act, sec. 325, that where there is injurious affection within the meaning of sec. 437, the owner is entitled to compensation, though none of his land is taken and no right or privilege attached thereto interfered with.

To sum up my conclusion on the examination of the cases, I am of opinion that the plaintiff is entitled to damages in the present case under the Canadian Railway Act, sec. 155; that the evidence shews that the damages arose directly from the execution of the works, and were in addition to the amount allowed as represented by the value of the property as it existed before and after the building of the subway. It was not argued that the amount allowed, if the plaintiff was entitled to any sum for loss of business, was too large.

In the case of *Re Hannah and Campbellford Lake Ontario and Western R.W. Co.* (1915), 25 D.L.R. 234, 34 O.L.R. 615, it was held by Riddell, J., that the proper method is to ascertain the value of the whole parcel of which part has been taken and the value of the remaining portion after the taking and deduct the one from the other: the difference is the compensation to be allowed.

There is no case deciding the method on the facts disclosed in the case at bar, nor do I think the rule laid down in the case just cited is applicable to the present case. If that rule were strictly applied, it would preclude the loss which might and which in this case largely did occur during the progress of the work.

Proceedings were taken with a view to commencing the work on the subway in question as early as 1913, and the work actually began in May, 1914.

The evidence shews that the business was increasing until the defendants commenced the subway in 1914, when it seemed to go back. The claimant says "she lost her trade and put her out of business;" "the people would not come up to buy." She continued the business up to 1918, when she sold the premises.

The evidence of the loss of business, upon the facts in this case, was properly admissible and very important on which to base the claimant's loss.

ONT.

S. C.

ALBIN v. CANADIAN PACIFIC R. CO.

Clute, J.

I can find no authority except the *Meyer* case which would warrant the arbitrator in accepting the three years' loss of business as the measure of loss which should be added to the depreciation of the property. The loss thus shewn by the evidence should be taken into account in ascertaining the total compensation to which the claimant is entitled. It forms an important element in considering damages, but cannot be taken in itself as the sum which should be added to the depreciation in the selling price of the property.

The case should go back to the arbitrator to ascertain the entire compensation to which the claimant is entitled, and in doing this he will consider the evidence of the loss of business and make such allowance therefor, as forming part of the compensation to be allowed, as he may think just under the circumstances.

Costs of this appeal and the costs of the reference back to be costs in the cause.

Mulock, C.J.Ex.
Sutherland, J.
Kelly, J.

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

KELLY, J.:—It is not seriously contested that the works constructed by the company were legally authorised and executed and that the proceedings for arbitration were properly brought under the statute. The question therefore comes down to this: has the plaintiff suffered injury of the kind for which the statute authorises the making of compensation, and, if so, for what is such compensation recoverable and what was the extent of the injury?

It seems beyond question that the construction of the works by the company has materially interfered with access to the property from the public street, and that its value, irrespective of any particular use which could have been made of it, is so dependent upon the existence of that access as to be substantially diminished by that interference. This, independently of what, if any, rights accrue to the owner from any other acts of interference found by the arbitrator, entitles her to compensation, under sec. 155 of the Railway Act, R.S.C. 1906, ch. 37.

As respects the land itself, the arbitrator has placed the damage at $6,366, the difference between what he finds was the value before the commencement of the work done by the company, and the value afterwards arrived at by taking the net proceeds of the sale made in February, 1918. The actual selling price was $3,100,

but the arbitrator, in fixing the amount, deducted not this sum, but the net proceeds of the sale ($2,908), arrived at by deducting from the $3,100 the costs of sale, legal expenses, etc. Except in respect of this deduction, I am of opinion that we should not, on the evidence and following recent decisions binding upon us as to the weight to be given the findings of an arbitrator in such cases, be justified in disturbing the amount stated by the arbitrator as the damage to the property itself. That item of the award should be reduced to $6,174 ($9,274—$3,100).

As to the damage for injury to business, I am of opinion, after a careful examination of the authorities, both English and Canadian, and from a comparison of the language of the sections of the English Acts on which the English cases have been decided, with the language of sec. 155 of the Dominion Railway Act, that the present case does not necessarily fall within any of the authorities cited, or which I have been able to find, declaring against allowance of compensation for injury to business. Section 155 is wider in its terms than the sections (taken together) of the English Acts referred to. So, too, the facts of the present case are quite distinguishable from those of the cases relied upon—such as *Powell* v. *Toronto Hamilton and Buffalo R.W. Co.*, 25 A.R. (Ont.) 209, which was urged as an authority binding upon this Court, but which presents an altogether different state of facts. Upon a perusal of the reasons for judgment in that case, it will be observed that the decision was based mainly upon the ground that there was no interference with the property itself, or with access to it, and that compensation recoverable in respect of lands injuriously affected must be based on injury or damage to the estate or land itself, and not on personal inconvenience or discomfort to the owner or occupier. Here, in the exercise of the powers possessed by the company, there was interference with the property and consequent damage; and the company, by sec. 155, is required to "make full compensation" to the owner for all damage by her sustained "by reason of the exercise of such powers."

I have had the advantage of reading the exhaustive judgment of my brother Clute in the present case, and I agree in his analysis of the decisions and in the conclusion that, in the circumstances presented, this property-owner is entitled to compensation for

ONT.

S. C.

ALBIN v. CANADIAN PACIFIC R. CO.

Riddell, J.

interference with and consequent loss to her business. I also agree that the method adopted by the learned arbitrator in arriving at what that compensation should be was not the proper one, and that there should be a reference back to ascertain the compensation, in the manner indicated by my brother Clute.

RIDDELL, J. (dissenting):—The Canadian Pacific Railway Company, being ordered to construct a subway in Yonge street, in the city of Toronto, were compelled to cut down the street for some distance on each side of their line to form a suitable grade; in so doing they interfered permanently with convenient access to the store of the claimant, a short distance north of their line.

The parties entered into an agreement to submit to Mr. Coatsworth, K.C., "the compensation to be paid to her by reason of the construction of the subway." While this submission is not formally under the Railway Act, the arbitration has been considered by all parties as being under that Act, and there is an express provision that "an appeal shall lie from the . . . award under the provisions of the Railway Act and amendments thereto."

The arbitrator awarded compensation under two heads:—

For the property	$6,366
For the business	4,500
	$10,866

The railway company now appeal.

The claimant bought the land, which is on the west side of Yonge street, in 1908, for $4,500, having been lessee for some years and having carried on a confectionery business in the store on the lot, which is 14½ frontage by a depth of 100 feet.

In May, 1914, the railway company excavated the highway the full width close up to the claimant's store, leaving her store some 5 feet from the surface of the street at the north and 5 feet 6 inches at the south. It was consequently inaccessible from Yonge street. Steps were put on the street leading up to the store, but the business fell off, as was to be expected; and at length she determined to sell the property. She sold by public auction for $3,100, but the legal and other expenses reduced the net proceeds to $2,908.

Mr. Coatsworth, finding the value of the land before the work to have been $9,274.00
deducts from this the net proceeds 2,908.00

and finds as compensation the balance $6,366.00

Three objections are raised to this estimate: (1) that the value $9,274 is too high; (2) in any event, the gross, not the net, proceeds are the value of the land after the work; and (3) a considerable part of the decrease in value was due to another cause, i.e., the removal of the Metropolitan Railway station further north.

I think that the arbitrator was fully justified in finding the value to have been $9,274. We should not interfere except in a clear case: *Ruddy* v. *Toronto Eastern R.W. Co.* (1917), 33 D.L.R. 193, 38 O.L.R. 556, in the Judicfal Committee.

As to the second point, no doubt the rule in cases where some land is taken is as laid down in this Court in Re *Hannah and Campbellford Lake Ontario and Western R.W. Co.*, 25 D.L.R. 234 34 O.L.R. 615, The true method of determining the amount of compensation is to deduct the value of the whole land after from the value before, the difference being the compensation to be allowed. There is no reason why the same rule should not be applied in the present case. The value before and the value after the work should be computed on the same basis—if the former value be computed as gross, so should the latter, and, if net, net.

There is nothing to indicate that the witnesses for the claimant in giving their estimate of $9,274 were not giving it as the amount it should bring if sold, the market, commercial, or pecuniary value without deduction of costs and expenses of sale. There was nothing to compel the claimant to sell out as she did; I mean nothing in law, for we cannot take account in such matters of personal considerations; and there is nothing to shew that, if she had before the work desired to turn her property into cash, she could have done so at less expense. I think we must consider the values of the land before and after as gross:

Value before	$9,274
" after	3,100
Diminution in value	$6,174

ONT.

S. C.

ALBIN v. CANADIAN PACIFIC R. CO.

Riddell, J.

I think we cannot reverse the finding of the arbitrator that all the loss in value of the land is due to the work; and the third ground of appeal on this head therefore fails.

The real and substantial ground of appeal, however, is as to the amount allowed for loss of business for three years.

Where no land is taken, but simply it is injuriously affected, it is well-settled that no compensation for loss of business can be allowed under the Imperial Land Clauses Act of 1845. The only damages recoverable are such as are referable to the land itself and not to the person or business—the same rule has been laid down in Canada in such cases as the present: *Leblanc* v. *The King*, 38 D.L.R. 632, 16 Can. Ex. 219. (I am informed by the Registrar of the Exchequer Court that this case has not been appealed to the Supreme Court, but that the parties have accepted the judgment.)

The arbitrator has given the meaning of "land taken" as he views it:—

"A very general and it appears to me erroneous impression prevails that the taking of land by a company, in such an undertaking as the construction of this subway, must be the physical deprivation of the claimant of a portion of the soil and superficial area of the land itself. This appears to me too narrow a construction, because land includes not only the area which it measures and the soil thereon, but the buildings and certain rights of way, rights of access, right to lateral support, and other rights which are appurtenant to and in my view form part of the land. The Act respecting Short Forms of Conveyances, R.S.O. 1914, ch. 115, sec. 2, clause (*a*), defines land as follows: '"Land" shall include freehold tenements and hereditaments, whether corporeal or incorporeal, and any undivided part or share therein.' This definition confirms what I have above stated, that all the rights which go to make the land available for use are part of the land itself, and therefore to take all or any of them is to take all or part of the land in fact. What was the condition in the present case was that right of access to the land was completely taken away by the excavation; also the right of lateral support was entirely taken; also the right of way in the rear to Birch avenue was taken by the extension of the excavation westward along Birch avenue. These among other rights which tended to make the claimant's land available for practical purposes and for the use of her business

were practically entirely taken away, and her place was left, so to speak, up in the air, with no means of reaching it; and consequently I find that, when the contestants, in the exercise of their rights and duties in connection with the construction of the said subway, took of the claimant's lands for that purpose, the claimant was entitled to damages for the disturbance to her business so far as it was directly connected with the property itself."

The difficulty in the way of accepting this reasoning is, I think, insuperable. In the Lands Clauses Consolidation Act of 1845, 8 Vict. ch. 18, sec. 3, "the words 'lands' shall extend to messuages, lands, tenements, and hereditaments of any tenure;" our Railway Act, R.S.C. 1906, ch. 37, sec. 2 (15), says: 'Lands' means the lands, the acquiring, taking or using of which is authorised by this or the special Act, and includes real property, messuages, lands, tenements and hereditaments of any tenure"—definitions practically identical.

The Judicial Committee has laid down an authoritative rule for our Courts in *Trimble* v. *Hill* (1879), 5 App. Cas. 342: where a Colonial Legislature has passed an Act like to one passed by the Imperial Parliament, the Colonial Courts should govern themselves by an authoritative decision in England on the Imperial Act: see p. 344.

Without discussing whether an easement can come under the word "land" in this section, and, if so, which kind of easement (as to which much has been said)—*Pinchin* v. *London and Blackwall R.W. Co.* (1854), 1 K. & J. 34; *S.C.* (1854), 5 DeG. M. & G. 851; *Great Western R.W. Co.* v. *Swindon and Cheltenham R.W. Co.* (1884), 9 App. Cas. 787; *Falkner* v. *Somerset and Dorset R.W. Co.* (1873), L.R. 16 Eq. 458; *Ramsden* v. *Manchester South Junction and Altrincham R.W. Co.* (1848), 1 Ex. 723 (perhaps the last word has not been said)—it may be said that it has been authoritatively decided that no one can claim for an easement annexed to his land except by way of claiming for his land as "injuriously affected."

In *Macey* v. *Metropolitan Board of Works*, 33 L.J. Ch. 377, the plaintiff owned land adjoining the Thames, and therefore had the right to free access to the Thames, etc., etc.: the Metropolitan Board of Works began to fill up the river in front of his wharf, and he applied for an injunction on the ground that they had

ONT.

S. C.

ALBIN v. CANADIAN PACIFIC R. CO.

Riddell, J.

entered on his "lands" without paying or offering compensation under sec. 84 of the Act. The Court held that the act of the Board was not a taking of land, "a substantial right" was to be taken away, "but it is not a right in any land which this Board is going to take, it is simply the right which any householder possesses in a street or other highway—a right, in common with the public, to pass along that highway; a right, separate from the public, of entering his own house from the highway. . . . If a person . . . is prevented from entering his house, he has a real wrong done to him by having that access interfered with; but that right of access surely is not a right or privilege in, over, or affecting lands." This was held to be injuriously affecting, not a taking of, lands, even though the special Act said that the word "lands" should include "easements, interests, rights and privileges in, over, or affecting lands" (p. 381.)

This case has been consistently followed: e.g., *Clark* v. *School Board for London* (1874), L.R. 9 Ch. 120; *School Board for London* v. *Smith*, [1895] W.N. 37; *Wigram* v. *Fryer* (1887), 36 Ch. D. 87, at p. 96; and it is too late to attempt to change the rule. Browne & Allan, Law of Compensation, 2nd ed., p. 144, put it thus: "In the case of injuriously affecting merely, under which is included the disturbance of easements;" and I agree with them.

It is well established that, where the only claim is for injuriously affecting lands, no allowance can be made for loss of business, goodwill, etc.: *Ricket* v. *Metropolitan R.W. Co.*, L.R. 2 H.L. 175; "though the profits of the occupier were diminished or destroyed" (p. 198.) "The damage complained of must be one which is sustained in respect of the ownership of the property,—in respect of the property itself, and not in respect of any particular use to which it may from time to time be put: in other words, it must . . . be a damage which would be sustained by any person who was the owner, to whatever use he might think proper to put the property: *Beckett* v. *Midland R.W. Co.* (1867), L.R. 3 C.P. 82, *per* Willes, J., at pp. 94, 95; "a damage in respect of some particular use of the premises to which they might be put by one occupant, but to which they would not be put by another . . . a damage in respect of loss of custom or of goodwill . . . was rejected by the House of Lords in *Ricket's Case*" (p. 95).

Wadham v. *North Eastern R.W. Co.* (1884), 14 Q.B.D. 747, is a

case where a railway company stopped up a street in which were a house and premises used as a hotel, whereby the value thereof for using, selling, or letting as a hotel was diminished—the Court held, "You are not, in calculating the damage for injuriously affecting the premises, to take into account any special and exceptional value which the premises may have in the possession of the then proprietor" (p. 752, *per* Mathew, J., Day, J., concurring).

Many other cases to the like effect are to be found in Cripps' Law of Compensation, 5th ed., pp. 146, 147, notes (*f*), (*g*), (*h*), (*k*).

The same rule has been followed in our Courts and in very many cases has been taken for granted: indeed this is the first time in my experience that the point has ever been argued. There are a few cases reported.

In *St. Catharines R.W. Co.* v. *Norris*, 17 O.R. 667, nothing was allowed for what was "calculated . . . to interfere with the trade of the owner" (p. 671).

In *Re Toronto Hamilton and Buffalo R.W. Co. and Kerner*, 28 O.R. 14, damages for "personal inconvenience" were disallowed, following *Ford* v. *Metropolitan R.W. Co.*, 17 Q.B.D. 12, in which, p. 25, it is laid down that "injuries sustained by the plaintiffs personally, injuries sustained by them in carrying on their business . . . must not be regarded."

Leblanc v. *The King*, 38 D.L.R. 632, 16 Can. Ex. C.R. 219, takes the rule as of course; on p. 221 a number of cases are cited, to which reference may be made.

Powell v. *Toronto Hamilton and Buffalo R.W. Co.*, 25 A.R. (Ont.) 209, is a decision of the Court of Appeal, and therefore binding upon us—it is there held that under the Dominion Railway Act compensation recoverable in respect of land injuriously affected must be based upon injury or damage to the land itself and not on personal inconvenience to the owner—the cases are there fully discussed.

Re Meyer and City of Toronto, 19 D.L.R. 785, 30 O.L.R. 426, is *nihil ad rem*. There the land was taken, and it was held that the profits which are being earned are undoubtedly an element in deciding as to the value of the land and as demonstrating the uses to which it might reasonably and advantageously be put and as giving it a unique or special value—it did not at all lay down

ONT.

S. C.

ALBIN v. CANADIAN PACIFIC R. CO.

Riddell, J.

the rule that where land is injuriously affected three years' profits or any profits should be allowed; nor that profits can be allowed *simpliciter*. In the present case, no doubt, the valuation of the land, before the work, was made in view of the unique and special value of the particular site; and of course the purchase-price when the land was sold was determined in view of the destruction of that value.

I am of opinion that the arbitrator erred in allowing three years' profits as he has done. There is, however, one matter in the consideration of which the loss of profits might be considered material, were it not for express adverse authority. Under the English Lands Clauses Act, where no land is taken but land is injuriously affected, there is clear authority for saying that the land-owner is not compelled to take proceedings under sec. 68 once the work is begun or threatened, but may wait until the completion of the work to advance a claim: "Where land is taken, the land should be taken, and its value ascertained, and then the additional inconvenience that is caused could be estimated. But when you have only to estimate the damage done by a particular work, it is more convenient to ascertain it after the damage is done than before:" *Macey* v. *Metropolitan Board of Works*, 33 L.J. Ch. 377, at pp. 383, 384. See also *Hutton* v. *London and South Western R.W. Co.* (1849), 7 Hare 259; *Temple Pier Co.* v. *Metropolitan Board of Works* (1865), 34 L.J. Ch. 262; *Regina* v. *Poulter* (1887), 20 Q.B.D. 132; *Delany* v. *Metropolitan Board of Works* (1867), L.R. 2 C.P. 532; *S.C.* (1867), L.R. 3 C.P. 111.

By a parity of reasoning, any arbitration to determine the extent of damage where the land is not taken should be after the work is done. It would seem reasonable that the damage should be assessed at that time, and I know no reason why the damage in the meantime should not be a subject of compensation. The only damage proved, however, is loss of profits: and that has been held "too remote and indefinite to bring it within the scope of an the compensation clauses of the Acts:" *Metropolitan Board of Works* v. *McCarthy*, L.R. 7 H.L. 243, at p. 253; *Ford* v. *Metropolitan R.W. Co.*, 17 Q.B.D. 12, at pp. 23, 24; *Ricket* v. *Metropolitan R.W. Co.*, L.R. 2 H.L. 175.

I am of opinion that we are bound by authority to hold that these profits cannot be allowed.

The amount of the award should be reduced to $6,174, and the respondent should pay the costs of appeal.

The order of the Court (RIDDELL, J., dissenting) was as follows:—

1. This Court doth declare that the claimant is entitled to be allowed compensation for the loss of business occasioned to her by the execution of the work in question in this matter as part of the compensation to be allowed her, but that the basis upon which the said arbitrator fixed the amount to be allowed for such loss of business was erroneous; and doth adjudge the same accordingly.

2. And this Court doth order that the said award be and that the same is hereby set aside, and that this matter be referred back to the arbitrator to ascertain the entire compensation which the claimant is entitled to recover, including as part of said compensation such damage for loss of business as he may under the circumstances think fit to allow, having regard to the declaration aforesaid.

3. And this Court doth further order that the costs of this appeal and of the reference back shall be costs in this matter.

Judgment accordingly.

HALLDORSON v. HOLIZKI.

Saskatchewan Court of Appeal, Haultain, C.J.S., Newlands, Lamont, and Elwood, JJ.A. July 9, 1919.

SPECIFIC PERFORMANCE (§ II—42)—VENDOR NOT SOLE OWNER OF PROPERTY AGREED TO BE CONVEYED—ABATEMENT IN PRICE FOR PORTION TO WHICH TITLE CANNOT BE GIVEN.

If a man having only a limited interest in one parcel of land, but entitled to the entire fee in another, chooses to enter into a contract for the sale of the whole, representing it all as his own, it is not competent for him subsequently to set up his lack of ownership in the whole as a reason for non-fulfillment of the contract. The purchaser is entitled to have the contract carried out so far as possible, with an abatement in price for the portion for which title cannot be given.

Statement.

APPEAL by defendant from the trial judgment in an action for specific performance of a land purchase contract. Affirmed.

G. H. Barr, K.C., and *C. M. Johnston*, for appellant; *P. E. Mackenzie*, K.C., for respondents.

The judgment of the court was delivered by

Elwood, J.A.

ELWOOD, J.A.:—By an agreement in writing dated October 24, 1917, the appellant agreed to sell to the respondents the N. W. quarter and north half of the S. W. quarter of section 19

SASK.
C. A.
HALLDORSON
v.
HOLIZKI.
Elwood, J.A.

in Tp. 31, Range 17, and the S. E. quarter of section 24, in Tp. 31, Range 18, W. of the 2nd Mer. in the Province of Saskatchewan, containing 400 acres, for the price or sum of $14,000, payable as follows: The sum of $1,000 in cash, and the balance in crop payments as therein set forth; interest on such balance to be computed at the rate of 6% per annum on December 31, 1918, and in each and every year thereafter that the agreement remained in force.

At the time that the agreement was entered into, one of the quarter sections was the homestead of the appellant, and although the appellant's wife was apparently present during the negotiations which led up to the signing of the agreement, and was apparently a consenting party thereto, she did not assent to the agreement in the manner required under the provisions of The Act respecting Homesteads, being c. 29 of the Sask. Stats., 1915, and the amendment by c. 27 of the Sask. Stats., 1916.

The respondents at the time of entering into the agreement were apparently not aware of the necessity for the wife of the appellant assenting to said agreement, although there was some conversation in which it was stated that she would be required to sign the transfer subsequently. The agreement, *inter alia*, contains the following:

> In consideration whereof and on payment of the full purchase price of the said land with interest thereon as aforesaid, the said vendor doth for himself, his executors, administrators and assigns, promise, covenant and agree to and with the said purchaser, his executors, administrators and assigns by a good and sufficient transfer in fee simple all that piece or parcel of land above described, together with the appurtenances thereto belonging or appertaining freed from incumbrances, but subject to the conditions and reservations expressed in the original grant thereto from the Crown.
>
> And also shall and will suffer and permit the said purchaser, his executors, administrators or assigns, to occupy and enjoy the same until default be made in any of the covenants herein, subject, nevertheless, to impeachment for voluntary or permissive waste.

The agreement provided that the respondents should have possession on or before March 20, 1918. It will be observed that the first part of the above quotation from the agreement does not make sense unless some omissions are supplied. I have looked at the original agreement, and the portion I have quoted from is printed. It is quite evident that a typographical error has

SASK.

C. A.

HALLDORSON v. HOLIZKI.

Elwood, J.A.

occurred in the printing of the agreement. The words that are omitted I would suggest are the following, or words to that effect, namely, after the word "assigns" where it occurs the second time, "that he will convey to the purchaser, his executors, administrators and assigns."

On the argument before us it was assumed by counsel for both appellant and respondents that there was a covenant on the part of the appellant to convey, and it was only when I came to read over the contract that I discovered the omission. The omission was never referred to in the argument before us. So that I think the fair interpretation to be placed upon the agreement is, that there is a covenant to convey by a good and clear title in fee simple.

Some time after the signing of the agreement, the appellant and his wife apparently learned that the wife had to assent to the agreement, and that without such assent the homestead could not be disposed of, and the appellant apparently was of the opinion that he was not liable to convey any of the land. He thereupon tendered to the respondents the $1,000 paid, and in March, 1918, when the respondents attempted to go on the land other than the homestead, refused to allow them to remain on the land and ordered them to vacate it.

This action was brought originally for possession of the land, for mesne profits, and damages for breach of contract. By an amendment at the trial, specific performance of the contract, except as to the homestead, with a diminution of price was asked for. The trial judge gave judgment for the respondents, giving the respondents the privilege of paying for the 240 acres other than the homestead in cash, as provided for by the contract, and fixed the sum of $7,120 as being the proper price to be payable therefor, and credited thereon the sum of $1,000 already paid, with interest thereon at 5% per annum from March 20, 1918, until possession was given, and further decreed that, if the respondents did not so elect, they should have judgment for $1,400 damages.

From that judgment this appeal is taken.

It was contended on the part of the appellant that this was an entire contract for the whole 400 acres, and that, as the

SASK.

C. A.

HALLDORSON v. HOLIZKI.

Elwood, J.A.

appellant could not convey the homestead, it could not be enforced.

It seems to me, however, that this contention is met by what is set forth in Fry on Specific Performance, 5th ed., in par. 849, where the following is stated:

It seems very questionable whether the principle that the court will not perform part of a contract if it cannot perform all, ever applied to cases where the impossibility of carrying a part into execution was due to the default of the defendant who set up this defence. To permit it to prevail would be counter to the maxim that no man shall take advantage of his own wrong. In the case of the defendant only possessing a part of the interest which he has stipulated to sell, the defect as to the other part is, as we have seen, no bar to specific performance at the suit of the purchaser.

In *Mortlock* v. *Buller* (1804), 10 Ves. 292, at p. 315, 32 E.R. —, Lord Eldon is reported as follows:

If a man, having partial interest in an estate, chooses to enter into a contract, representing it, and agreeing to sell it, as his own, it is not competent to him afterwards to say, though he has valuable interests, he has not the entirety; and therefore the purchaser shall not have the benefit of his contract. For the purpose of this jurisdiction, the person contracting under those circumstances is bound by the assertion in his contract; and, if the vendee chooses to take as much as he can have, he has a right to that, and to an abatement; and the court will not hear the objection by the vendor, that the purchaser cannot have the whole.

In *Barnes* v. *Wood* (1869), L.R. 8 Eq. 424 at p. 429, Sir W. M. James, V.C., is reported as follows:

The husband here represented himself to be owner of the fee, being, in fact, only entitled to the limited interest I have mentioned. The purchaser entered into his contract with the husband in total ignorance of the state of the title, and without any knowledge that the husband could only sell with the concurrence of his wife. The husband, therefore, is bound to convey all the interest that he has, according to the principle of the authorities that have been cited, and the court must endeavour to find out, in the best way it can, what compensation is to be made in respect of the interest which he is unable to convey.

This statement of the law was approved of by Lord Hatherley in *Castle* v. *Wilkinson* (1870), L.R. 5 Ch. App. 534, and, at p. 537 of that report, Sir G. M. Giffard, L.J., is reported as follows:

All those cases in which the contract has been enforced partially and a partial interest has been ordered to be conveyed, have been where the vendor has represented that he could sell the fee simple, and the purchaser has been induced by that representation to believe that he could purchase the fee simple.

In *Barker* v. *Cox* (1876), 4 Ch. D. 464 at p. 469, Bacon, V.C., is reported as follows:

. . . The rule of the court is plain, that if a man enters into a contract to sell something, representing that he has the entire interest in it, or the means of conveying the entire interest, and receives the price of it and does not perform his contract, then the other party to the contract, who has parted with his money or is ready to pay his money, is entitled to be placed in the same position he would be in if the contract had been completed; or if not, by compensation to be placed in the same position in which he would be entitled to stand.

And in *Bowes* v. *Vaux* (1918), 43 O.L.R. 521, at p. 525, Middleton, J., is reported as follows:

Where specific performance is sought by the purchaser, or he assents to specific performance, at the vendor's instance, with compensation, the principle applicable is widely different.

And he quotes what I have above quoted from Lord Eldon in *Mortlock* v. *Buller*.

In *Rudd* v. *Lascelles*, [1900] 1 Ch. 815 at p. 818, Farwell, J., while under the circumstances of that case he refused compensation on a purchaser's action for specific performance, states as follows:

In my opinion the jurisdiction to enforce specific performance with compensation on a vendor, where the contract is silent as to compensation, rests on the equitable estoppel referred to in *Mortlock* v. *Buller*, *supra*, namely, that a vendor representing and contracting to sell an estate as his own cannot afterwards be heard to say he has not the entirety.

As I have stated above, in my opinion the effect of the appellant's contract was a covenant to convey to the respondents a good and clear title to the land in fee simple, and, although there was some conversation in which it was stated that the wife would ultimately have to sign the transfer, yet, in view of the fact that the wife was apparently quite satisfied that the sale should take place, and as there is no evidence that the respondents were aware that the wife had to assent to the agreement, the respondents, in my opinion, were justified in assuming that the appellant when the time came for delivering a title would carry out his covenant in that respect, and, on the authority of the cases that I have above referred to, the respondents are entitled to specific performance as to the 240 acres, with an abatement of the price.

Subsequently to the signing of the agreement sued upon, and on various occasions up to and including the month of March, 1918, the appellant was willing to sell to the respondents the land mentioned in the contract, excepting therefrom the homestead, but he asked a price therefor greater than the respondents

SASK.
C. A.
HALLDORSON v. HOLIZKI.
Elwood, J.A.

were willing to give. The point, however, is, that he was willing to sell and convey.

I cannot find anything in the circumstances of this case which bring the case within the principles of any of the cases in which the court has refused to a willing purchaser specific performance with an abatement of the price.

The trial judge seemed to be of the opinion that specific performance of a crop-payment contract could not be ordered. While specific performance possibly could not be ordered *against* a purchaser under such an agreement, I cannot see anything in the contract in question to prevent specific performance being ordered in favour of the purchasers, and the amount of land to be placed in crop each year being reduced in the same proportion as the area of the land which the respondents are to receive is reduced.

The contract gave the purchasers the privilege of paying cash for the land, and the trial judge was only following the contract in allowing the respondents that privilege.

Our rules provide that in cases of specific performance damages may be awarded in lieu of or in addition to specific performance and the trial judge was quite within his powers in awarding damages in case the respondents did not wish to purchase the land for cash.

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

Appeal dismissed.

MAN.
C. A.

ALTEMAN v. FERGUSON.

Manitoba Court of Appeal, Perdue, C.J.M., Cameron, Haggart, and Fullerton, JJ.A. July 15, 1919.

LIBEL AND SLANDER (§ II B—15)—TRIAL—VERDICT FOR DEFENDANT—PLAINTIFF NOT DAMAGED—PLAINTIFF ENTITLED TO NOMINAL VERDICT—INTERFERENCE OF APPELLATE COURT.

Where in an action for slander a jury has brought in a verdict for the defendant on the ground that the plaintiff has suffered no damage, an appellate court will not interfere with such verdict on the ground that the plaintiff is entitled to a verdict for nominal damages.

[*Wilson* v. *London Free Press* (1918), 45 D.L.R. 503, followed.]

Statement.

APPEAL by plaintiff from the trial judgment in an action for slander. Affirmed.

C. Blake for plaintiff; *J. F. Kilgour*, K.C., for defendant.

The judgment of the court was delivered by

PERDUE, C.J.M.:—This is an action for slander tried at Brandon before Macdonald, J., and a jury. The slanderous words alleged in the statement of claim were: "You (meaning the plaintiff) stole Roy McKenzie's cutter," and "You (meaning the plaintiff) are the biggest crook in the country"; with the innuendo "meaning and implying thereby that the plaintiff was dishonest and guilty of stealing the goods of one Roy McKenzie and was guilty of acting dishonestly with his customers." The defendant denied having spoken the alleged words, that, if spoken, they were not, under the circumstances in which they were spoken, defamatory or intended so to be, but were words spoken in the heat of a quarrel between the plaintiff and defendant commenced by plaintiff; that any words spoken by defendant were provoked by abusive language used by plaintiff to defendant; that the words were mere abuse in the course of a petty quarrel and without any defamatory significance. Defendant also pleaded that on being served with the statement of claim the defendant in writing notified the plaintiff that there had been no intention on the part of the defendant to reflect on the plaintiff's character, that any such supposed imputation was unreservedly withdrawn and the defendant paid into court one dollar in full satisfaction of the plaintiff's claim.

The letter referred to in the defence was written by the defendant's solicitors to the plaintiff's solicitor and set out the circumstances leading up to the wordy fracas that took place between the parties. The letter stated that whatever was said by the defendant was the result of provocation, that no imputation such as was alleged in the statement of claim was intended and that any supposed imputation of that kind was unreservedly withdrawn. It suggested that the plaintiff should therefore drop the matter and that the incident was too insignificant to be made the subject of a suit.

At the trial of the action the jury brought in the following verdict:

> The jury unanimously agreed that this letter should have been an apology enough and the whole matter should have been dropped on the receipt of this letter and find no damage in connection with the case whatever.

MAN.

C. A.

ALTEMAN v. FERGUSON.

Perdue, C.J.M.

The trial judge then said: "That is a verdict for the defendant. You find a verdict?" The foreman said "Yes." A verdict for the defendant with costs was accordingly entered.

It is argued on behalf of the plaintiff that the finding of the jury was that the defendant had spoken the defamatory words complained of and that the jury were under the impression that the apology was a defence to the action: that the trial judge should have re-instructed the jury on this point and have sent them back to reconsider their verdict: that the plaintiff was entitled to a verdict, in any event, for the nominal amount paid into court. Counsel for the plaintiff relied upon the following authorities: *Bush* v. *McCormack* (1890), 20 O.R. 497; *Wills* v. *Carman* (1888), 14 A.R. (Ont.) 656; Odgers, 4th ed., 571; 18 Hals. 718.

In effect the jury said: "We find no damages for the plaintiff, and we find a verdict for the defendant." In *Milligan* v. *Jamieson* (1902), 4 O.L.R. 650, an action for slander, the jury found for the defendant on the ground that the plaintiff had sustained no damage. In giving the judgment of the court, Meredith, C.J.O., said, p. 651:—

> It is, I think, made out that the use by the respondent of the defamatory words was proved and admitted by the defendant; but granting this, *Simonds* v. *Chesley* (1891), 20 Can. S.C.R. 174, and *Scammell* v. *Clarke* (1894), 23 Can. S.C.R. 307, establish that ordinarily where a verdict has passed for the defendant when it should have been for the plaintiff for nominal damages, the court will not send the case down for another trial. In other words, that a new trial will not be granted to enable the plaintiff to obtain nominal damages.
>
> The actions on these cases were, no doubt, on contract, and the most that the plaintiff could have recovered was nominal damages, but I think the principle of the decisions applies here. All that the jury ought to have done, having come to the conclusion at which they arrived, was, putting the case most strongly for the appellant, to have found a verdict for him for nominal damages.

Wilson v. *London Free Press Printing Co.* (1918), 45 D.L.R. 503, 44 O.L.R. 12, was an action for damages for libel brought by a city alderman. The plaintiff complained that the defendants published false and malicious reports to the effect that he was not attending to his duties as alderman. On one occasion it was stated by defendants that the persons named, not including the plaintiff, were the only aldermen present, when in fact the plaintiff was present. The trial judge told the jury that the

MAN.

C. A.

ALTEMAN v. FERGUSON.

Perdue, C.J.M.

words were capable of a defamatory meaning, that it was their duty to find whether the words had, in fact, a defamatory meaning, and, if so, to assess damages. The jury brought in a general verdict "for the defendant." The appellate division declined to interfere with the verdict. Mulock, C.J. Ex., and Clute, J., thought that the jury may have taken the view that the publications were not on the facts libellous, but it was solely a question for the jury. Riddell, J., said that a new trial will not be granted to enable the plaintiff to recover nominal damages, citing *Milligan* v. *Jamieson*, *Simonds* v. *Chesley and Scammell* v. *Clarke*, *supra*. Sutherland and Kelly, JJ., thought that the verdict amounted to one or other of two things, "either that the publications were in fact not libellous or that any damage which could result therefrom was too trifling to warrant the jury in putting any money value thereon even to the extent of a nominal sum."

Applying the reasoning in the above cases to the present one, I do not think that this court should interfere with the verdict. The appeal will, therefore, be dismissed with costs.

Appeal dismissed.

BELWAY and PARNETT v. SEROTA.

SASK.

C. A.

Saskatchewan Court of Appeal, Haultain, C.J.S., Newlands, Lamont, and Elwood, JJ.A. July 12, 1919.

NEGLIGENCE (§ I B—5)—MAXIM RES IPSA LOQUITUR—INFERENCE ON FACTS ESTABLISHED—CAUSE OF ACCIDENT UNKNOWN—PROOF REQUIRED.

In cases in which the maxim *res ipsa loquitur* applies the facts established make the inference of negligence clear, and the defendant is liable if he does not produce sufficient evidence to counteract the inference. In cases where the cause of the accident is unknown the court is left to decide upon such facts as are available, whether negligence on the part of the defendant is the more reasonable inference or not.

[*McArthur* v. *Dominion Cartridge Co.* [1905] A.C. 72, referred to.]

Statement.

APPEAL by defendants from the trial judgment in an action for damages, for injuries caused by a piece of wood being thrown from a motor power saw and striking the plaintiff.

W. F. A. Turgeon, K.C., for appellants; *P. G. Makaroff*, for respondents.

The judgment of the court was delivered by

Elwood, J.A.

ELWOOD, J.A.:—The facts as found by the trial judge in this case are as follows:—

SASK.

C. A.

BELWAY AND PARNETT v. SEROTA.

Elwood, J.A.

On October 11, 1918, the defendants were engaged in cutting wood with a saw driven by motor power, on the premises occupied under lease by the defendant Parnett. The defendant Belway owned the wood-cutting machine, and was hired by his co-defendant to do the work. In the operation of cutting, Belway did the actual sawing, Parnett handed to him and held the sticks to be cut, and most of the time Mrs. Parnett was there to throw the sawn pieces of wood away from the saw. She, however, was not present all of the time. About 4 p.m., one John Kostiuk was on his way home from business and saw the defendants at work, with Mrs. Parnett helping. He told the latter he would do her work, and took her place to throw away the cut wood. She went into the house. Kostiuk worked 10 or 15 minutes, and went away before Mrs. Parnett came back. The defendants continued at work, and, while just the two of them were engaged, a piece of wood that had been cut was in some manner thrown by the saw and struck the infant plaintiff in the face, inflicting injuries. The infant plaintiff was then on a street or lane, the place where the sawing machine was stationed was some 15 feet from the said street or lane.

One Toney Fraser, experienced in cutting with motor driven saws, testified that it is not safe to saw with only two persons engaged, and that he had often seen saws throw wood when there was no one to remove it from the saw as cut. There was also some evidence that earlier in the day in question a piece of wood was thrown by the saw, and struck a wire staying a telephone pole.

The trial judge then proceeds as follows:

Exactly what caused the piece of wood to be thrown by the saw does not appear, but it seems to me that the facts bring this case within the maxim *res ipsa loquitur*. The happening of an accident out of the ordinary course of things casts on the defendants the onus of explaining it . . . I am also of the opinion that the defendants were negligent in continuing to saw when there was no one at hand to remove the cut wood. As already stated, there is evidence that it is dangerous to cut when only two persons are engaged in the work, as was the case at the time the accident occurred. The defendants shewed they appreciated there was danger by chasing children away from the vicinity. Had there been someone holding the piece of wood being cut off, the accident could not have happened.

Judgment was given for the plaintiffs, and from that judgment this appeal is taken.

In vol. 21 Halsbury, par. 751, I find the following:

751. An exception to the general rule that the burden of proof of the alleged negligence is in the first instance on the plaintiff occurs wherever the facts already established are such that the proper and natural inference immediately arising from them is that the injury complained of was caused by the defendant's negligence. To these cases the maxim *res ipsa loquitur* applies. Where, therefore, there is a duty upon the defendant to exercise care, and the circumstances in which the injury complained of happened are such that with the exercise of the requisite care no risk would in the ordinary course of events ensue, the burden is in the first instance upon the defendant to disprove his liability. In such a case, if

the injurious agency itself and the surrounding circumstances are all entirely within the defendant's control, the inference is that the defendant is liable, and this inference is strengthened if the injurious agency is inanimate.

In *Byrne* v. *Boadle* (1863), 2 H. & C., 721, the plaintiff was walking in a public street, past the defendant's shop, when a barrel of flour fell upon him from a window above the shop, and seriously injured him. Held, sufficient *primâ facie* evidence of negligence for the jury to cast on the defendant the onus of proving the accident was not caused by his negligence.

In *Scott* v. *London & St. Katherine Docks Co.* (1865), 3 H. & C. 594 at p. 600, Erle, C.J., in delivering the judgment of the court, is reported as follows:

> There must be reasonable evidence of negligence. But where the thing is shewn to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care.

If, under the circumstances of this case, the maxim *res ipsa loquitur* applies, then it seems to me that under the evidence the trial judge was justified in holding that the defendants had not satisfied the onus cast upon them of shewing that the accident did not arise through their want of care.

The evidence shews that prior to the accident as many as six sawn pieces of wood were allowed to accumulate near the bottom of the saw before being removed; that at the time of the accident Belway was sawing rapidly, and according to his evidence only one piece of wood was on the ground when the piece which struck the infant plaintiff was sawn, and that the piece which struck the infant plaintiff might have struck the stick which was on the ground and bounced into the saw.

If the piece which struck the infant plaintiff did strike the piece on the ground, that brought it so much nearer to the saw, and probably would be the cause of the accident, and, in that event, allowing one piece to be on the ground was just as negligent as allowing a number of pieces to be on the ground. According to the evidence of Fraser, the object of having a third man at the saw is to remove the pieces of wood as they are sawn, and prevent the occurrence, among other things, of just what occurred here.

SASK.

C. A.

BELWAY AND PARNETT v. SEROTA.

Elwood, J.A.

It was contended on behalf of the defendants that it only became dangerous when a number of pieces were allowed to remain on the ground without being removed. The more pieces that were left on the ground only increased the danger. The danger would probably be less with one piece on the ground than with a pile, but I am not satisfied, from the evidence, that it was not dangerous to leave any piece on the ground.

If, however, the maxim *res ipsa loquitur* does not apply, then it would seem to me that the accident is one of those in which the cause of accident is unknown, and as to which, in vol. 21 Halsbury, par. 752, I find the following:

> The cases in which the maxim *res ipsa loquitur* applies are to be distinguished from those in which the cause of the accident is unknown. In the one case further evidence is not required from the plaintiff, because the inference is already clear; in the other case it is not required because it would be impossible to give it. The effect of the distinction is that, in the one case, the defendant is liable if he does not produce sufficient evidence to counteract the inference; in the other case, the court is left to decide, upon such facts as are available, whether negligence on the part of the defendant is the more reasonable inference or not.

And the authority for the above proposition is *McArthur* v. *Dominion Cartridge Co.* [1905] A. C. 72.

In such a case, the court would be left to decide, upon such facts as are available, whether negligence on the part of the defendant is the more reasonable inference or not, and it seems to me that the effect of the judgment of the trial judge is, that he does not rest his judgment solely upon the maxim *res ipsa loquitur*, but finds that there was as a matter of fact negligence in the defendants, and that that negligence was in not having three men present at the operation, so that one of them might take the pieces away from the machine as they were cut. I am not prepared to say, under the evidence, that the trial judge is not correct in the conclusion that he has arrived at in this respect. It seems to me, therefore, that whichever of the two views of the case is taken, the plaintiffs are entitled to succeed.

It was further objected that the defendant Parnett was not, in any event, liable, as the defendant Belway was acting as an independent contractor.

In *Holliday* v. *National Telephone Co.*, [1899] 2 Q.B. 392. A. L. Smith, L.J., at p. 400, in delivering one of the judgments of the Court of Appeal, is reported as follows:

SASK.

C. A.

BELWAY AND PARNETT v. SEROTA.

Elwood, J.A.

The defence is that the defendants are not liable in respect of the injury sustained by the plaintiff, because it was occasioned by the negligence of an independent contractor for whom they are not responsible. In my opinion, since the decision of the House of Lords in *Hughes* v. *Percival* (1883), 8 App. Cas. 443, and that of the Privy Council in *Black* v. *Christchurch Finance Co.*, [1894] A.C. 48, it is very difficult for a person who is engaged in the execution of dangerous works near a highway to avoid liability by saying that he has employed an independent contractor, because it is the duty of a person who is causing such works to be executed to see that they are properly carried out so as not to occasion any damage to persons passing by on the highway.

I think that under the circumstances it could not be successfully urged that the work carried out in this case was not dangerous. As observed by the trial judge, the defendants recognized the dangerous character of the work by chasing children away, and, if I am correct in concluding that the work was dangerous, and I may say that the trial judge so concluded, then the defendant Parnett is liable, even if Belway were an independent contractor.

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

DUCHAINE v. MATAMAJAW SALMON CLUB.

CAN.

S. C.

Supreme Court of Canada, Idington, Anglin, Brodeur and Mignault, JJ., and Cassels, J. ad hoc. February 4, 1919.

FISHERIES (§ II—10)—PROVINCE OF QUEBEC—FISHING RIGHTS IN NON-NAVIGABLE STREAM—RIGHT OF ENJOYMENT ONLY—TERMINATION—PROFITS À PRENDRE.

There is nothing similar in the law of the Province of Quebec to the *profit à prendre* of the common law of England. The title of a riparian owner extends to the middle of a non-navigable and non-floatable stream, and an indefinite grant by such owner of the right to catch fish in such stream is one of enjoyment only, and although assignable, is essentially temporary in its nature and cannot endure beyond the lifetime of the grantee.

[See Annotation on "Profits à Prendre," 40 D.L.R. 144.]

Statement.

APPEAL from the judgment of the Court of King's Bench, appeal side, Province of Quebec, affirming the judgment of the Superior Court, District of Rimouski, and maintaining the plaintiff's action.

Ferdinand Roy, K.C., and *Charles Angers*, K.C., for appellant.

John Hall Kelly, K.C., for respondent.

Idington, J.

IDINGTON, J. (dissenting):—I think this appeal should be dismissed with costs. Agreeing, as I do in the substantial parts

CAN.

S. C.

DUCHAINE v. MATAMAJAW SALMON CLUB.

Idington, J.

thereof with the reasons of Pelletier, J., in the court below, I need not elaborate or needlessly repeat or indicate in detail minor matters of little importance wherein I might differ therefrom. I only desire to make clear in connection therewith my own point of view.

It seems to me this appellant's argument fails, as I have so often had occasion to remark in other cases, to recognise what the parties concerned in the several transactions in question were engaged in, or to realise the nature of the business they were about.

If we would first fully comprehend the facts relevant thereto and then seek for the relevant law properly applicable thereto, we should have some hope of reaching a correct conclusion.

We have presented here an exchange deed whereby one Blais ceded to Sir George Stephen all the rights of fishing in the river Metapedia opposite a certain lot, and got therefor from him an irregularly shaped but definite piece of land, bounded as described and a right of drainage thereof or therefrom.

I should have much preferred to have been told something of the value of that so given rather than much of that elementary law which is assumed as of course to be applicable.

If one knew the value of what was so given, then he might be able to appreciate properly what the parties in truth intended by a deed which may possibly be of doubtful import.

Seeing that Sir George Stephen, 18 months later, for then he had become Lord Mount Stephen, sold what he had got from Blais together with the like rights on three lots got from another man for $35,000, according to the deed in the record and I am inclined to suspect it was not a mere personal right for the life of Mount Stephen that was being bargained for.

This circumstance, of course, is of no value in aiding in the interpretation or construction of an ambiguously worded deed. I only use it to illustrate the possibilities that lay in an accurate and yet comprehensive knowledge of the basic facts in question and the need, or at least desirability, of being seized thereof.

If the said deed from Blais was only intended and can only be held in law to convey a personal right of use, then it is clear no more can be claimed.

But because such rights or personal servitudes do exist in law and cease with the life of the grantee that is no reason for holding

and determining that in law a proprietor of land, or river, or stream, is restricted to the limitations of such a personal grant in bargaining for the sale of a fishery to whomsoever he pleases. There is no prohibition in law against his dismembership of his property in any way or shape he chooses. Some prohibitions against the creation of a particular form of tenure which has been found to work injuriously to society in general have been enacted in divers countries.

I am unable to find any such prohibition in this country or in the law of Quebec in relation to an owner dealing in any way he sees fit with the proprietorship of the whole or part of a private stream non-navigable and non-floatable as the one in question is.

The sole question in this appeal save that of the possible want of conformity with the registry laws, is whether or not Blais intended to convey and did convey rights of fishing in perpetuity.

It is difficult to say why, if he did not, the exchange deed should contain the following:—

> Whereby the parties respectively release what was above granted in exchange and contra exchange and take the same in possession and also for their legal representatives.

But for the mode of thought which appellant's factum presents I should have said there could be no doubt of the reciprocal intention which this evidences by each grantor to vest in the other a right of property in perpetuity and hence that Sir George Stephen was getting something much more than a personal servitude.

As to the registration question, which only becomes important by virtue of holding that it was a *jus in re* that passed to Stephen, I may add to what has already been said below, that it does not occur to me that the widow Blais purchased or sold to appellant "the same property" (that is within the meaning of art. 2098 C.C.) as appellant now claims when he attempts to reach out and become possessed of the fishery gone forever to another.

The article, so far as necessary to consider herein, reads as follows:—

> 2098. All acts *inter vivos* conveying the ownership of an immovable must be registered at length, or by memorial.
>
> In default of such registration, the title of conveyance cannot be invoked against any third party who has purchased the same property from the same vendor for a valuable consideration and whose title is registered.
>
> Registration has the same effect between two donees of the same immovable.

CAN.

S. C.

DUCHAINE v. MATAMAJAW SALMON CLUB.

Idington, J.

All he got was what the curator of the Blais bankrupt estate had acquired and was authorised to sell, and that was bereft of the rights of fishing. He could sell no more than the insolvent possessed and passed to him.

And the purpose of that conveyance was made evident by the express exceptions made in the first paragraph descriptive of the properties being passed, which reads as follows:—

> But excepting the portions already alienated by emphyteutic leases or otherwise before the failure of the said R. A. Blais.

This exception is used again in the deed from Mr. Blais to the appellant and hence he never got anything more than the curator had. What can it mean but the exception of that right of fishing which is now in dispute? And why, if anything else, is the like exception not made in regard to the next three parcels conveyed by the same deed to her?

More than that, it is to me most significant that the notary drawing it should have thought of an emphyteusis or such like form of lease. True that does not, perhaps, with absolute accuracy in all the details express the legal nature of what was given Sir George Stephen, but much more accurately than does the personal servitude conception of which we have heard so much.

The draftsman hit more nearly the mark by the whole phrase

> by emphyteutic lease or otherwise before the failure.

than anything we have heard argued as being expressive of what the parties concerned had in view.

The late Chief Justice of Quebec, in his judgment, seemed to assume that for all practical purposes the appellant had failed and hence he leaves in doubt the result of the distinction he makes.

His opinion is, therefore, not necessarily in conflict with the conclusions reached by Pelletier, J., which in light of the formal judgment of the court must be held to have been concurred in by others and, I suspect, by all.

I cannot see why we should reverse a result so accordant with common sense and good law as I conceive to be the correct interpretation and construction of the deeds in question.

Anglin, J.

ANGLIN, J.:—I have had the advantage of reading the judgments to be delivered by my brothers Brodeur and Mignault, and I concur in their opinion and the reasons on which they base it that the grant of fishing rights to Sir George Stephen (now Lord

Mount Stephen), although effectively assigned to the respondent club, cannot endure beyond his lifetime. If this case had arisen in one of our provinces where the English law of property prevails, I should probably have reached the same conclusion as my brothers Idington and Cassels. But I share my brother Mignault's view that this case must be determined by the civil law of the Province of Quebec and that recourse to English authorities dealing with fishing rights *in alieno solo* as *profits à prendre* is apt to be more misleading and confusing than helpful. At all events English cases cannot properly be invoked as authorities until it is first established that the principles of the English law bearing upon the subject under consideration are the same as those of the civil law of Quebec. That may not be assumed.

Unlike the *profit à prendre* of the English law—a term which, notwithstanding its obvious Norman origin, is unknown to the civil law of France and Quebec—the right of fishing in streams non-navigable and non-floatable, which belongs to the riparian owner, whose title extends to the middle of the stream, *Maclaren* v. *Att'y-Gen'l for Quebec*, 15 D.L.R. 855, [1914] A.C. 258, 8 D.L.R. 800, 46 Can. S.C.R. 656, cannot be severed in perpetuity from the alveus of the river of which it is *une dépendance indivisible;* Fuzier Herman Rep. Vbo Pêche Fluviale, Nos. 25 and 26. An indefinite grant of fishing rights in such a stream must therefore be treated either as a lease (*Bourgeois* v. *Bourdin*), D. 85. 1. 348; S. 85. 1. 223, or as creating a restricted usufruct or *une servitude personelle et à titre de droit d'usage restreint*; 6 Baudry Lacantinerie et Chauveau (1905) "Des Biens," pp. 806-7. It can never constitute a real servitude. 3 Aubry et Rau (5 éd.), 109-10. Compare Fuzier Herman, Rep. (1902), Vvo Pêche Fluviale, Nos. 114-118, 125, 127. Indeed there is some authority for the view that the right created is not even a personal servitude but a mere right of enjoyment—a restricted use or usufruct. 44 Pand. Fr. Vbo Pêche Fluviale, No. 131. Planiol (Droit Civil vol. 1. p. 527 (1901)) makes this statement:—

> It is generally admitted that the right of hunting and fishing, which cannot constitute predial servitudes, can be established not only by means of a lease but as real rights for the benefit (*au profit*) of some one; they form, therefore, a special kind of life use. Aubry and Rau, II., p. 61, text and note 5; Demolombe, Title XII., No. 686; D. 91. 2. 48.

CAN.

S. C.

DUCHAINE v. MATAMAJAW SALMON CLUB.

Anglin, J.

But whether it be regarded as purely a right of enjoyment (restricted usufruct or use) or as a personal servitude, the right of fishing (*séparé du fonds*) is essentially temporary (*viager*) and, if no shorter term for its duration be fixed by the instrument creating it, must come to an end with the life of the person on whom it is conferred. Pothier (Bugnet), vol. 1, Introduction au Titre XIII. "Des Servitudes Réelles," art. 1, Nos. 1 & 2; 4 Huc, Nos. 165 & 253. The French legislation of 1898 which established the rights of riparian owners in the alveus of non-navigable and non-floatable streams in nowise affected the indivisibility of the right of fishing from the property (*fonds*). Labori, Rep. Enc. Supp. vol. 2, Vbo Pêche Fluviale, No. 3, p. 514.

No doubt the concession of the fishing rights now held by the respondent club carries with it as an accessory such enjoyment of the bank and bed of the stream belonging to the grantor as may be necessary to their exercise. Arts. 459, 552 and 1499 C.C. No grant of the alveus is, therefore, necessarily implied in the conferring of these fishing rights and as none is expressed in the deed to Sir George Stephen none passed by it. Pelletier, J., conceded that unless the grantee took title to the alveus he acquired merely *un droit d'usage*.

Although the issues raised by the defendant's plea are confined to averments of the non-transferability of the right granted to Sir George Stephen, that that right existed only as against the grantor and does not bind transferees of his property, who took title without reservation, and that it cannot affect them because not duly registered, the argument of counsel for both parties was chiefly addressed to the nature and duration of the right granted to Sir George and both seemed desirous that we should determine these questions with which the provincial courts had dealt. Moreover, one of the *considérants* of the judgment of the Superior Court which declared that the plaintiffs held

> a real right or right of property in the nature of a *profit à prendre*

was not explicitly set aside by the judgment of the Court of King's Bench. I say this in explanation of my discussion of an issue not directly raised on the pleadings and perhaps not necessarily involved in the disposition of the present action.

With my brother Mignault, I fear that such confusion and uncertainty as to titles would result from any departure from the

construction put upon art. 2172 C.C. by the judgment of the Court of Queen's Bench in *La Banque du Peuple* v. *Laporte*, 19 L.C. Jur. 66, that we should not now hold that renewal of registration of the rights asserted by the respondent was required by that article.

Nor does the statute of 1881 (44 & 45 Vict. c. 16) in my opinion affect it. That Act is intituled,

> An Act to provide for the registration of customary dowers and servitudes n certain cases not provided for by law.

The grant of the right of fishing to Sir George Stephen, because a restricted right of use or usufruct rather than a servitude, is probably not within the Act at all. It is certainly not a real servitude and, therefore, not within s. 5 prescribing original registration of real servitudes. Notwithstanding the striking difference of the language in s. 7, which has to do with renewal of registration, I cannot but think that it also was intended to deal with real servitudes only. The use of different terms in the same statute to describe the same subject is an all too familiar instance of unskilful draftsmanship.

In my opinion, while the judgment maintaining the action should be upheld it should be modified by inserting a declaration that the rights of the respondent will terminate on the death of Lord Mount Stephen.

Brodeur, J.

BRODEUR, J.:—In this case the question is whether the right of fishing as far as midstream in the Metapedia River opposite lot "C" of the first range of Causapscal is the property of the defendant appellant or of the plaintiff respondent.

In 1890, Lord Mount Stephen purchased from a man named R. A. Blais, who was then owner of the lot "C," this right of fishing; this deed of sale was registered.

In 1892 he sold this right of fishing to the Restigouche Salmon Club, and this deed of sale was likewise registered.

In 1905 the Restigouche Salmon Club granted in its turn, several rights of fishing to the Matamajaw Salmon Club, the respondent in this case, and, among others, the rights of fishing which had been acquired by Lord Mount Stephen opposite lot "C." This latter deed was registered, but by a singular enough error, the part of the deed which described the right of fishing opposite lot "C" was not transcribed.

CAN.

S. C.

DUCHAINE v. MATAMAJAW SALMON CLUB.

Brodeur, J.

In the interval, namely in 1899, the cadastre had been made and brought into force in this registration division according to the provisions of arts. 2166 *et seq.* of the Civil Code.

The Matamajaw Club only renewed the registration of its deed of purchase in June, 1915, namely, more than a year after the defendant appellant had bought the property in question (lot "C") and had properly registered his title deed.

In 1905, namely several years after he had granted the fishing rights to Lord Mount Stephen, R. A. Blais made an assignment of his property, and his curators sold to Mme. Blais the whole of the property "C" without excluding the fishing rights, and in 1914, Mme. Blais sold to the appellant in the present case the same land, also without excluding therefrom the fishing rights. These title deeds were properly registered.

We have, therefore, to decide whether the defect of renewal of registration of the deed of grant of the fishing rights has caused the respondent to forfeit these rights in favour of the defendant appellant.

In order to decide this question, it is necessary to determine the nature of a right of fishing in a water course which, like the Metapedia River, is neither navigable nor floatable.

The plaintiff respondent claims that it is an absolute right of property which can be alienated in perpetuity, and of which it is not necessary to renew the registration.

The defendant appellant, on the other hand, claims that it is a right of usufruct or of personal servitude which ends with the death of the usufructuary, and the registration of which should be renewed after the coming into force of the cadastre.

The Superior Court upheld the club's action, but did not, however, grant all it asked for. In short, it asked to be declared not only the owner of the fishing rights, but also of the river bed; and it was only successful in obtaining the fishing rights. Since no appeal was taken as to the ownership of the river bed, there is *res judicata* on this point.

The Court of Appeal did not adopt the reasons for judgment of the Superior Court, but it has nevertheless confirmed its final conclusions by deciding that the fishing rights granted to Lord Mount Stephen were transferable, and that the renewal of registration of the title deed was not necessary. But the court did not believe

it to be its duty to decide whether this right of fishing could be transferred in perpetuity or whether it was merely for life; or, in other words, whether it constituted a right of property or a right of usufruct.

The judges of the Court of Appeal were evidently divided upon this latter point; for the lamented Chief Justice, Sir Horace Archambeault, was of the opinion that it was a right of usufruct, that it was for life, and that consequently it could only subsist during the life of Lord Mount Stephen. The Honourable Judge Pelletier was of the opinion, on the other hand, that the sale to Lord Mount Stephen was an alienation of immovable property admitting the grant of a right of co-ownership in the river bed. The other judges have not written any opinion upon this important question.

I have come to the conclusion that the right of fishing is a right of usufruct; and, in that respect, I agree with the opinion expressed by Sir Horace Archambeault, but I differ with him, however, upon the necessity of the renewal of registration.

It is therefore impossible for me to concur in the views of Pelletier, J. First, the plaintiff having accepted the judgment of the Superior Court upon the question of the ownership of the river bed, and this question being finally decided, the Court of Appeal could no longer declare him a co-owner of the river bed. Moreover, the rights of usufruct, use and habitation upon immovables give their holders the power to reap the benefits arising from them; and in the exercise of these rights they are compelled to pass over the property. It does not follow, however, that they have the rights of owners in the bare ownership. Demolombe, vol. 9, No. 526. Fuzier Herman, vol. 3, Verbo Pêche No. 25.

One who has a right to gather certain fruits or even the right to cut wood in a bush has rights of usufruct or of use; but these rights would not give him a title to the ownership of the immovable upon which he has such rights of gathering or of cutting. For this reason I cannot share in the opinion of Pelletier, J.

Let us now examine the principles which, in my opinion, should guide us in the decision of this case. The rights which we have upon or in a thing are divided into three principal categories; we have on property, either a right of ownership, or a mere right of enjoyment, or only servitudes claimed (art. 405 C.C.).

CAN.

S. C.

DUCHAINE v. MATAMAJAW SALMON CLUB.

Brodeur, J.

An immovable includes the non-navigable and non-floatable streams which traverse it; and if it is merely a riverside property, then it includes the beds of these streams as far as the mid-water line (*usque ad medium filum aquæ*). This principle is formally admitted by the parties to the suit.

The right of ownership of an immovable situated upon one of these streams includes by right of accession all the profits of the bed of the river (art. 409 C.C.) among which are found, in my opinion, the right of fishing.

Proudhon, in vol. 2 as to Usufruct, p. 457, after stating that natural fruits are those which the earth produces spontaneously and that the produce of animals enters into the same class, adds:—

So the product of bee hives, of a warren, of a pigeon house, the right of fishing in a pond, are equally natural fruits in the words of the law.

Certain expressions used by French authors have contributed in this case to create much confusion and some uncertainty because account has not always been taken of the legislation which governed the matter at the period which they wrote of. A short résumé of this legislation would be useful to enable us to understand these authors, and the import of their expressions.

Before the French revolution, the seigniors had, usually, upon the non-navigable and non-floatable streams, either a right of property or at least a right of *haute justice*. The revolution suppressed these rights as savouring of feudalism. (Dalloz, Répertoire Pratique, verbo, Eaux, No. 677). But the Code Napoléon, which came into force some years later, avoided saying to whom these streams should belong. Then again, the authors disagree: some claim that the streams were *res nullius;* others say that they belong to the riparian owners while others again describe the state as the owner.

In 1898 an end was made to this difference of opinion by decreeing that the beds of rivers should belong to the riparian owners by right of accession.

The question was settled, but throughout the whole of the last century it gave rise to much discussion.

The right of fishing in streams was governed by the Act of 1829, which enacted that it was ancillary to the riparian ownership. The situation was little enough clear. You had, in effect, the bed of the river which up to 1898 was usually recognised as

res nullius, while the right of fishing was an accessory of the riparian estate. The situation was more clear in the Province of Quebec, as I shall shew farther on.

I note that the judge of the Superior Court states that the right of fishing ought to be deemed to be a real right of property of the nature of a *profit à prendre du sol*. The expression *profit à prendre* of the English Law is not found in our laws, and it is always dangerous to have recourse to legislation which does not govern us in order to determine principles of our own legislation. Besides the *profit à prendre* of the English law would be a servitude (11 Hals. 336), and the registration of a servitude, as well as its renewal, are necessary under our laws. It is much the best then to rely on our jurisprudence and our law, especially in cases where laws which do not govern us differ. Let us look at our law.

This question of whether the beds of non-navigable rivers belong to the riparian owners was settled in the Province of Quebec by the decision of the Seignorial Court which had declared that estates bordering on non-navigable or non-floatable streams extended to the middle of such streams. (Questions 28 and 30.)

In a case of *Boswell* v. *Denis*, decided by the Court of Appeal in 1859, 10 L.C.R. 294, it was held that non-navigable and non-floatable rivers are the private property of the riparian owners, and that the latter have the exclusive right to fish therein. See *Tanguay* v. *Canadian Electric Light Co.* (1908), 40 Can. S.C.R. 1; *McLaren* v. *Attorney-General*, 15 D.L.R. 855, [1914] A.C. 258.

These decisions lay down the principle that a riparian owner is at the same time the owner of the river bed; and, consequently, as owner of the river bed, he is the owner of what is above and below (arts. 409 and 414 C.C.), and has a right to the fruits which are there found, and particularly to the fish. He can sell and alienate the river bed; and thereupon, the right of fishing as an accessory, passes to the one who acquires the river bed. This would be an alienation in perpetuity.

But if, as in the present case, he only grants the right of fishing, then he only disposes of an accessory right, that of a portion of the fruits which the property produces, but he always remains owner of the soil. It is a right of usufruct which he grants to a third person; and the latter ought to enjoy it conformably to the rights of the usufructuaries.

CAN.

S. C.

DUCHAINE v. MATAMAJAW SALMON CLUB.

Brodeur, J.

On this point, the question presents itself whether a usufruct can last forever. Usufruct is the right of enjoyment of something which is owned by another. There is no doubt that under the old French law and under the C.N., the usufruct ceased upon the death of the usufructuary.

Our codifiers tell us that they followed the old French jurisprudence and the rules adopted by the C.N. (De Lorimier, vol. 3, p. 584); and for the study of the principles which govern this matter they refer us to Marcadé, to the French Pandects and to Maleville. These authors teach as an elementary principle that a usufruct is essentially of a temporary character. Marcadé, in vol. 2, No. 545, p. 529, says:—

A usufruct often ends before the natural death of the usufructuary; but it can never last beyond it and it cannot be transferred to the heirs of such usufructuary. It is because, in fact, the usufruct coming to nothing during its term the ownership of the thing cannot be permitted in perpetuity or for too long a period. In consequence, the Code, conformably to the principles of the old jurisprudence and to the Roman law, only allows it for the duration of the life of the usufructuary, and the usufruct intended to be constituted for a person and his heirs would be no less restricted to the life of such person.

Our codifiers, in framing art. 479 C.C., were guided by the C.N.; but they added three words which have given rise to a difference of opinion. The C.N. says (art. 617):—

Usufruct ends with the natural death and by the civil death of the usufructuary; by the expiration of the time for which it was granted.

The Civil Code of Quebec says (art. 479):—

Usufruct ends with the natural death of the usufructuary, *if it is for life;* by the expiration of the time for which it was granted.

These words "if for life" do not mean that the usufruct is perpetual if there is no date fixed, for that would be absolutely contrary to the nature of the usufruct. But the codifiers have probably had in view the discussion which then took place in France upon the import of the C.N. as to the right of the creator of the usufruct to fix a date which would extend beyond the life of the usufructuary; but I fear that the addition of the words "if it is for life" has not rendered the situation more clear. In fact, the commentators upon our Code are equally divided in opinion. Langelier, vol. 2, p. 228, and Mignault, vol. 2, p. 624.

These commentators are, however, unanimous in saying that if there is no time fixed for the duration of the usufruct, it ends with the death of the usufructuary.

In my opinion, the right of fishing granted to Lord Mount Stephen being a right of usufruct, ought not to extend beyond his life. It would be otherwise if the river bed had been sold at the same time. If there had been a term stipulated, the question would present itself whether it would continue after his death, provided that the term had not expired.

It is unnecessary to decide this point, because it does not arise. The reference in the agreement to his legal representatives would not have the effect of making the usufruct perpetual, seeing that this would be a stipulation contrary to the elementary principles which govern the matter. Marcadé, vol. 2, p. 524.

The right of fishing, being a right of usufruct accessory to the river bed, it follows that it cannot be perpetual and in the present case it would end with the death of the usufructuary.

But I go farther; and I am of opinion that this right cannot be invoked against the appellant because the registration of the deed of acquisition was not renewed.

Pothier, Bugnet ed., vol. 1, p. 312, says:—

> There are two principal kinds of servitude: personal and real. The rights of personal servitudes are those which are attached to the person to whom the servitude is due, and for whose use it was constituted, and, consequently, end with such person. The rights of real servitudes, which are also called predial servitudes, are those which the owner of an estate has upon a neighbouring estate, for his own convenience. They are called real or predial because, being established for the convenience of an estate, it is to the estate rather than to the person that they are due.
>
> Personal servitudes require both a person to enjoy them and a servient land. In the case of real servitudes, there must be both a dominant land and a servient land (art. 499 C.C.). I obtain a grant of a right of way over a property without having any property in the neighbourhood; that is a personal servitude. I am the owner of a piece of land, and in order to make use of it I require to cross my neighbour's; that is a real servitude, because my land becomes the dominant land, and as the servitude is established by its use it becomes perpetual without registration in a case where it would be apparent (2116a C.C.).

Our Code does not mention personal servitudes. It was drawn in this way following the framers of the C.N. who, at the end of the revolution, did not dare to mention the words personal servitudes. However, personal servitudes exist in our law, as they continue to exist in the French law, and among such personal servitudes are found the rights of usufruct, use and habitation.

CAN.

S. C.

DUCHAINE v. MATAMAJAW SALMON CLUB.

Brodeur, J.

Baudry Lacantinerie, after having stated that there are two kinds of servitude, real and personal, says, at No. 431 Des Biens:—

A personal servitude is that which exists upon something for the benefit of a definite person. As it belongs to the person it dies with him and sometimes before him. A personal servitude is therefore of a temporary nature. . . . a real servitude is that which exists upon a property to the advantage of another property. A real servitude forms a connection between two properties, and from its nature is perpetual as the properties to which it is inherent.

[Our Code shews three personal servitudes; usufruct, use and habitation.]

In No. 1070, he says:—

In practice, the difficulty arose respecting rights of hunting and fishing. These rights may, without any doubt, be established as personal rights and be the subject of a lease; this is, indeed, the more common hypothesis. But nothing prevents us, we believe, from acceding to them as personal servitudes, and on the ground of restricted uses.

Laurent, in vol. 7, No. 147, says:—

There can not be other personal servitudes than those which the Code upholds under the heading of usufruct, use and habitation.

Aubry & Rau, 5th ed., vol. 3, p. 110; Duranton, vol. 4, p. 292; Pardessus, vol. 1, No. 11; Demolombe, vol. 9, p. 626; Marcadé, art. 686, Nos. 1 & 2; Toullier, vol. 3, No. 382; all declaring the same principle.

Should these personal servitudes of usufruct, use and habitation be registered, and should the registration be renewed?

In art. 2172 C.C. it is stated that the registration of any real right upon any lot of land must be renewed, after the cadastre comes into force. The Court of Appeal, in 1874, decided, in a case of *La Banque de Penfell* v. *Laperte* 19 L.C. Jur. p. 66:—

That the renewal of registration of any real right required by art. 2172 of the Civil Code has reference only to hypothecs or charges on real property and not to the rights in or to the property itself.

This case has been decided by a majority only of the court and it did not appear to have been very favourably received, for we see that the courts refused to follow it in the cases of *Portras* v. *Lalonde* 11 Rev. Leg. p. 356 and *Despiens* v. *Deneau*, 32 L.C. Jur. p. 261.

The legislature itself intervened, in 1881, in order to declare that the registration of real, contractual, interrupted and non-apparent servitudes must be renewed (statutes of Quebec, 44 & 45 Vict. c. 16, s. 5). In s. 7 of the same Act it is formally enacted that within two years of the cadastre being brought into force, and

within two years of the coming into force of this Act every conventional servitude must be registered and renewed.

The provision of s. 5 of this Act of 1881 has been incorporated in the Civil Code by the commissioners for the revision of the statutes in 1888 and now forms part of art. 2116a, C.C. S. 7, which dealt with conventional servitude, was not reproduced in the Code. But, on the other hand, it has never been repealed and it is still in force (R.S.Q., 1888, appendix A, p. X).

Brodeur, J.

Every conventional servitude must, therefore, be registered, and be renewed when the cadastre comes into force. It was therefore the duty of Lord Mount Stephen, or the defendant club, to renew the registration of his fishing rights. Therefore, Duchaine, who has a valid title to the whole of lot "C," can invoke this default of renewal and claim that he is the owner of the whole property, therein including the right of fishing or the right of usufruct which was originally granted to Lord Mount Stephen.

The appellant should, therefore, succeed in having the action of the plaintiff respondent dismissed. His appeal should be maintained, with costs of this court and of the courts below.

Mignault, J.

MIGNAULT, J.:—This appeal raises very important questions of law which have received my most serious consideration. A short statement of the facts concerning which there is no dispute, will be more intelligible if presented in chronological order.

By a writing dated April 22, 1889, Joseph Pinault sold to Rodolphe Alexandre Blais

every right, title, interest and claim which he has and may claim, both in law and in equity, or which might be due or belong to him in the future, in and upon all the land hereinafter described, situate in the County of Rimouski, containing an area of 90 acres, more or less, and consisting of lot lettered "C" in the first range of the township of Causapscal.

This lot "C" fronts for a distance of 4 or 5 acres on the Metapedia river, admitted to be a non-navigable and non-floatable river, and it is common ground between the parties that, under the law of the Province of Quebec, the title of the owner of this lot extends to the centre of the stream.

On September 6, 1890, Blais and Sir George Stephen, Baronet (now Lord Mount Stephen), entered into a deed of exchange before Napoléon Michaud, notary, whereby, in exchange for a certain piece of land, Blais ceded to Sir George Stephen

CAN.

S. C.

DUCHAINE v. MATAMAJAW SALMON CLUB.

Mignault, J.

all fishing rights in the Metapedia River opposite the lot of the grantor, situate in the first range of the township of Causapscal and known under the letter "C" as the same appears on the plan of John Hill, Esq., surveyor, which is admitted as correct by the parties and signed by them and by me the said notary, *ne varietur*, annexed to these presents and forming part of them and with recourse if need be, with right to Sir George Stephen to pass over the said lot, both on foot and with vehicles, in the exercise of his right of fishing.

At the close of this deed of exchange it is stated:

Whereby the parties respectively release what was above granted in exchange and contra exchange and take the same in possession and also for their legal representatives.

It should be observed, however, that this general clause does not really add anything to the rights of the parties under this deed, for they must be held to have stipulated for themselves, their heirs and legal representatives, unless the contrary is expressed, or results from the nature of the contract (art. 1030 C.C.). Whether the rights in question would go to the heirs of Sir George Stephen, in other words, whether their duration is restricted to the life of Sir George Stephen, is the principal question involved under this appeal.

This deed of exchange was duly registered on October 1, 1890.

By deed passed before M. de M. Marler, notary, on March 3, 1892, and duly registered on March 20, 1892, Lord Mount Stephen sold to the Restigouche Salmon Club, a body politic and corporate, among other things:—

All the fishing rights in the said river Metapedia opposite the lot letter "C" in the first range of the township of Causapscal and the rights of passage over said lot acquired by the vendor under a deed of exchange between him and Rudolphe-Alexandre Blais, passed before N. Michaud, notary, on the 6th of September, 1890, registered in the said registry office on the 1st of October following, under No. 3918.

By indenture made in duplicate on May 31, 1905, the Restigouche Salmon Club sold to the Matamajaw Salmon Club Ltd., the respondent, among other things, the above described fishing rights, the sale being made without warranty of any kind, the purchaser accepting the lands, property, fishing rights and rights of way, easements, privileges and franchises at its own risk and without recourse against the vendor for restitution of money for any cause.

This deed was registered on November 6, 1905, but in transcribing it the clause relating to the fishing rights opposite lot "C" was

omitted, although the deed itself was entered in the index to the immovables. The Restigouche Salmon Club having—to satisfy a requirement of its charter—obtained the approval of the Lieutenant-Governor of the Province of Quebec in Council of its purchase of the fishing rights from Lord Mount Stephen, entered into a deed with the respondent, dated June 10, 1915, J. A. Dorais, notary, whereby it confirmed its sale to the respondent of May 31, 1905, and so far as necessary sold these rights to the respondent. This deed was duly registered on June 16, 1915.

Prior to the last mentioned deed, Rodolphe Alexandre Blais had become insolvent, and Messrs. Lefaivre & Taschereau had been appointed curators to his estate, and on December 30, 1905, the curators sold with judicial authority, by deed passed before M. P. Laberge, notary, to Dame Laura Brochu, widow of Raoul Mathias Blais, among other properties, lot "C" du cadastre officiel du rang sud du canton de Causapscal, tel que le tout est actuellement, circonstances et dependances, mais sauf les parties déjà aliénées par baux emphytéotiques ou autrement avant la faillite du dit R. A. Blais.

This deed was registered on January 27, 1906.

On April 25, 1914, by deed before the same notary, the appellant, described as being a farmer residing in the parish of Saint Gèdéon du Lac Saint Jean, purchased from Mrs. Blais the above mentioned lot "C,"

but excepting the portion of the said land already sold to Joseph Brassard and the portions leased to Xavier Bacon, Joseph Simard, N. Piché and Son and one named Benoit and their representatives.

It does not appear whether these parts of lot "C" were those described in the deed to Mrs. Blais as

the portions already alienated by emphyteutic leases or otherwise before the failure of the said R. A. Blais,

nor does it appear what emphyteutic leases had been granted. The appellant alleges that this deed was registered on June 2, 1914.

The appellant, having by a protest served on the respondent on June 15, 1916, disputed the latter's right to fish opposite his property, the respondent instituted this action against the appellant praying for a declaration that the respondent is the sole legal and lawful proprietor of all that part of the Metapedia river that fronts upon and flows on, over and opposite lot "C," and of the bed thereof, which forms part of said lot, and for a declaration that the

CAN.

S. C.

DUCHAINE v. MATAMAJAW SALMON CLUB.

Mignault, J.

respondent is the owner of the fishing rights therein and that the appellant be condemned to give up the possession thereof to the respondent.

The appellant contested this action, alleging that Sir George Stephen had acquired no more than a personal servitude, not assignable, and which could only be set up against R. A. Blais. He admitted that he had fished and allowed others to fish opposite his lot, but asserted that he had the right to do so, being the owner of the bed of the stream to the middle thereof. He also claimed that the respondent's title could not be set up against him for want of proper registration and also because its registration had not been renewed since the official cadastre came in force.

The evidence shews that there is a valuable salmon pool in the Metapedia river opposite lot "C." The membership of the respondent's club is restricted to ten members, but each member has the right to bring one guest. The fishing lasts continuously from June 1, to August 15.

The Superior Court (Roy, J.) maintained the respondent's action, holding that the fishing rights acquired by Sir George Stephen were real rights and rights of ownership

de la nature d'un profit à prendre du sol sur lequel coulent les eaux.

The judge also holds that the registration of the respondent's title did not require renewal after the official cadastre came into force, and that the sale from Sir George Stephen to the Restigouche Salmon Club had been properly registered. The judgment, therefore, grants the prayer of the respondent that it be declared owner of the fishing rights in the river Metapedia opposite lot "C" and condemns the appellant to restore the possession of these rights to the respondent, with costs.

On an appeal by the appellants to the Court of King's Bench, the latter court confirmed the judgment of the Superior Court for the reason that the fishing rights sold by Blais to Sir George Stephen were assignable, that the deeds of sale by the latter to the Restigouche Salmon Club, and by that club to the respondent, were legal and valid contracts, and transferred the said fishing rights to the Restigouche Salmon Club and to the respondent, and that the registration of these deeds of sale did not require to be renewed after the official cadastre was put in force in this registration division.

I have carefully read and considered the learned and elaborate opinions of Roy, J., in the trial court and of Pelletier, J., and Sir Horace Archambeault, C.J., in the Court of King's Bench.

Roy, J., as I have said, held that the fishing rights in question were real rights and rights of ownership

de la nature d'un profit à prendre du sol sur lequel coulent les eaux.

May I say, with deference, that, notwithstanding its French name, there is nothing similar, in the law of the Province of Quebec, to the *profit à prendre* of the common law of England, which is defined as the right to take something off the land of another person, or the right to enter the land of another person and to take some profit of the soil, or a portion of the soil itself, for the use of the owner of the right. It is considered as an interest in land and may be created for an estate in perpetuity. Hals. Laws of England, verbis Easements and Profits à Prendre, Nos. 656, 665, 667.

May I add that the use of such a term, in connection with a controversy arising under the law of Quebec, is confusing even though it may be thought that there is a certain analogy between one right and another. There are, of course, real servitudes in the Quebec law, but they can be granted only in favour of an immovable and not of a person, and whether the right acquired by Sir George Stephen could or could not be considered as a *profit à prendre* under the law of England, it is certain that it is not a real servitude under the Quebec law. To assimilate it, therefore, to the *profit à prendre* is, to say the least, misleading.

Art. 405 of the Civil Code describes the rights which can be acquired with regard to property in the Province of Quebec.

405. A person may have on property, either a right of ownership or a simple right of enjoyment, or a servitude to exercise.

The right acquired by Sir George Stephen must be brought under one of these three heads. I am of the opinion that it is not a right of ownership. Sir George Stephen purchased no part of the river bed, although he could, no doubt, make use of it insofar as necessary for the exercise of his right of fishing, but this is a mere right of enjoyment. He did not acquire a right of servitude, by which art. 405 means a real servitude, for that is

a charge imposed on one real estate for the benefit of another belonging to a different proprietor (art. 499 C.C.).

The only remaining real right (*jus in re*) which he could acquire is

CAN.

S. C.

DUCHAINE v. MATAMAJAW SALMON CLUB.

Mignault, J.

the right of enjoyment, and this is the very most that can be found in his title.

I am not unmindful of the fact that Sir George Stephen and his assigns have the right to pass over lot "C" for the exercise of their fishing rights. But this is a mere accessory of the latter rights, and is not a real servitude, for it is a right acquired by a person and not by an immovable, and thus does not come within the definition of art. 499 C.C. for want of a dominant property.

In the Court of King's Bench, Pelletier, J., expressed the opinion that Sir George Stephen acquired from Blais a sort of co-ownership with the latter in the river bed, because the fishing rights could not be exercised without using the bed of the river, but the answer seems to be that Sir George Stephen could use the river bed by virtue of the right of enjoyment granted him, so that it is not necessary to treat him as being a co-owner with Blais.

Archambault, C.J., on the contrary, expressed the opinion that what Sir George Stephen acquired was a right of usufruct. This would bring it under the second species of rights mentioned by art. 405 C.C., the right of enjoyment, and I agree that this wide term, right of enjoyment, would comprise any right obtained by Sir George Stephen, which, of course, excludes the right of ownership on the one hand and the right of real servitude on the other. The grant to a person of fishing rights in a non-navigable and non-floatable stream, by a riparian owner whose title extends to the centre of the stream, confers, under the authorities, a restricted right of use or usufruct (Baudry Lacantinerie, Biens, No. 1074; Pandectes Françaises, verbis Pêche Fluviale, No. 131; Fuzier Herman, verbis Pêche Fluviale, Nos. 114, 115, 118; Aubry et Rau, 5 ed., vol. 3, p. 110), which Demolombe (vol. 12, No. 686) calls "un usage irrégulier," but such a right is not and cannot be a real servitude. (See the same authors and an interesting decision, with regard to hunting rights, of La Cour de Cassation in Sirey, 1891, 1, 489; Dalloz, 1891, 1, 89, with special reference to the "rapport" of conseiller Sallantin and the "conclusions" of the avocat général Reynaud contained in the judgment.) There is no doubt that a right of usufruct can be restricted to certain fruits or products of a property by the title granting it (Demolombe, vol. 10, No. 265).

But the important question that dominates the whole controversy, and which was argued at great length at the hearing by both

parties is this: Granting that Sir George Stephen acquired a right of enjoyment or of usufruct, will this right last beyond the life of Sir George Stephen? A further question is whether this right is one that could be assigned.

I have no doubt that it was an assignable right, for a right of enjoyment, other than the right of use and habitation (arts. 494 and 497 C.C.), can be assigned to others. See art. 457 C.C. for usufruct and art. 1638 C.C. as to the contract of lease.

But I am equally convinced that it was essentially a temporary right, for the right of enjoyment, as distinguished from the right of ownership or the right of real servitude, cannot be granted in perpetuity.

If we take the type and the most important form of the right of enjoyment, the right of usufruct, it is entirely elementary to say that it is essentially a temporary right, and if no other term be specified, it ends at the death of the usufructuary.

Art. 479 C.C. says:—

> Usufruct ends with the natural death of the usufructuary, if for life; by the expiration of the time for which it was granted. . . .

The words "if for life" do not mean that unless the usufruct be created for the life of the usufructuary, it will last for ever. The Code evidently contemplates that the usufruct may be created for life or for a term. In the former case, it ends with the life of the usufructuary, in the latter case, on the expiration of the term, and the reasonable construction of this article is that if no term for its duration be fixed, usufruct ends with the life of the usufructuary.

This is shown by art. 481 C.C. which states:—

> A usufruct which is granted without a term to a corporation only lasts thirty years.

The reason for this is evident. A corporation has generally a perpetual existence and succession (art. 352 C.C.), and, therefore, the law fixes a term in the silence of the contract for the duration of the usufruct.

Where it is granted to a person, then unless a term be expressly stipulated, and it cannot be stipulated in perpetuity, the usufruct does not extend beyond the life of the usufructuary.

The whole policy of the law is against the indefinite duration of such a right.

Toullier, one of the earliest commentators of the Code Napoléon, says, in his second volume, No. 445:—

CAN.

S. C.

DUCHAINE v. MATAMAJAW SALMON CLUB.

Mignault, J.

If the usufruct could be for ever separated from the property, it would be no more than an empty name, and would become perfectly useless. It is recognized, therefore, that it cannot be perpetual, and that it is ended in several ways, some drawn from the nature of things, others from the provisions of the law.

And Huc, one of the most recent of the commentators, gives the reason why all rights of enjoyment are necessarily temporary.

Every division of property affecting the *jus utendi* and the *ius fruendi* is essentially temporary, for if it were perpetual it would be destructive of the very right of property, so reduced to being only an empty word. (Commentaire du Code Civil, vol. 4, No. 240).

This has always been the law, and from the time of Rome, the institutes of Justinian declaring expressly *finitur autem usufructus morte usufructuarii*.

Pothier, in his treatise on Dower, No. 247, says:—

The usufruct of a dowager is extinguished in every way that extinguishes that of all other usufructuaries.

1st. It is extinguished by the natural death of the dowager: *finitur usufructus morte usufructuarii.* Inst. tit. de Usufruct., s.4.

Also Guyot, Répertoire, Vo. Usufruct, vol. 17, p. 402:—

Property would be but an empty name and an illusory right if it was always separated from the usufruct; the laws have prevented this inconvenience by attributing to several causes the effect of re-uniting and consolidating them. The first is the death of the usufructuary.

My conclusions, therefore, on this branch of the case are: 1. That Sir George Stephen acquired under the deed from Blais no rights of ownership over the bed of the river. 2. That he did not acquire a servitude over the bed of the river, nor did he even get a real servitude of passage over any part of lot "C." 3. That he obtained from Blais a right of enjoyment or usufruct, which right will come to an end when he dies.

The mere sale of fishing rights, or of hunting rights, confers no title to the river bed or land where these rights are exercised, but only the right to use the same for the purpose of fishing or hunting, which is nothing more than a right of enjoyment, and therefore essentially temporary in nature.

So far, therefore, as the respondent's action merely claims the right to fish and seeks to prevent the appellant from interfering with this right, its action is, in my opinion, well founded, but the appellant's right to resume full possession of the river and its bed opposite lot "C" at the death of Lord Mount Stephen should be carefully safeguarded, which was not done in the courts below.

I have not yet dealt with the defence of the appellant based on the alleged lack of proper registration of the sale from the Restigouche Salmon Club to the respondent in 1905, and on the failure of the latter to renew the registration after the official cadastre was put in force.

I am, however, of the opinion that this defence fails.

The imperfect registration of the respondent's title from the Restigouche Salmon Club is immaterial, because, long before the appellant purchased lot "C," the sale from Lord Mount Stephen to the Restigouche Club was duly registered, and the respondent is entitled to avail himself of this registration as against the appellant.

And as to the failure to renew the registration, it suffices to say that ever since the decision, in 1874, of the Court of Appeal in the case of *La Banque du Peuple* v. *Laporte*, 19 L.C. Jur. 66, it is settled law in the Province of Quebec that the renewal of registration of any real right, required by art. 2172 of the Civil Code, has reference only to hypothecs or charges on real property and not to rights in or to the property itself.

The appellant has referred us to a statute passed by the Quebec Legislature in 1881, 44 & 45 Vict., c. 16, which requires the registration of customary dowers created before the Civil Code came into force and of real, discontinuous and unapparent servitudes. He especially insists on s. 7 of the statute ordering the renewal of the registration of conventional servitudes affecting any lot of land.

It seems to me sufficient to answer that the right acquired by Sir George Stephen was not a conventional servitude but a right of enjoyment, as to which right no question of the necessity of renewal of registration can arise in view of the decision in the case of *La Banque du Peuple* v. *Laporte*, 19 L.C. Jur. 66. To dispute now the authority of *La Banque du Peuple* v. *Laporte*, 19 L.C. Jur. 66, which as I have said, is settled law in Quebec, would imperil a great number of vested rights which rest on the authority of this decision. The statute of 1881 is, therefore, without application in this case, and I do not feel called upon to express any opinion as to the construction of s. 7.

On the whole, my opinion is that the appeal should be allowed to the extent of declaring in the judgment that the fishing rights now exercised by the respondent in the Metapedia river, between

CAN.

S. C.

DUCHAINE v. MATAMAJAW SALMON CLUB.

Mignault, J.

the middle of the stream and lot "C," in the first range of the township of Causapscal, and also the right of passage over lot "C," will come to an end at the death of Sir George Stephen, now Lord Mount Stephen. As this was the principal question discussed before this court, I would give the appellant his costs here. I would also give him his costs before the Court of King's Bench, because he was right in appealing from the judgment of the Superior Court, the latter judgment treating the fishing rights as being rights of ownership. In the Superior Court, I think the appellant should pay the respondent's costs for the reason that he illegally interfered with the respondent's fishing rights, and thus forced the latter to take proceedings against him.

Cassels, J.

CASSELS, J. (dissenting):—I have carefully considered the reasons for judgment of the trial judge and the reasons for judgment of Pelletier, J., and the other judges in the Court of King's Bench.

I have also had the benefit of a perusal of the opinions of my brother judges, Brodeur and Mignault, JJ.

The case is of such importance that I have deemed it necessary to give extra consideration to it. A number of titles to valuable properties are dependent upon the decision to be arrived at in this case.

With considerable diffidence, having regard to the knowledge of the French law possessed by my learned brothers from the Province of Quebec, I have come to the conclusion that the judgment in the court below should not be disturbed.

Mignault, J., in very carefully prepared reasons, has set out in a clear manner the facts of the case. It is unnecessary for me to repeat them.

I have come to the conclusion that the reasons of Pelletier, J., in the court below are correct and I agree with the conclusions he has arrived at.

The owner of the lots has title to the bed of the river to the middle of the stream. The river is neither navigable nor floatable. This, I think, is beyond question having regard to the present state of the law in the Province of Quebec.

I think also there is no question as to the right of the owner of the bed of the river to separate the right of fishing from the right of the soil. The law of the Province of Quebec in this respect is similar to

the English law. In the reasons for judgment of the trial judge, the language of Sir W. J. Ritchie, of Sir Henry Strong and of Gwynne J., in the case of *The Queen* v. *Robertson*, 6 Can. S.C.R. 52, are quoted.

The late Chief Justice Sir W. J. Ritchie, at p. 115, states:—

A right to catch fish is a *profit à prendre*, subject no doubt to the free use of the river as a highway and to the private rights of others.

He states, at p. 124:

Unquestionably the right of fishing may be in one person and the property in the bank and soil of a river in another.

Sir Henry Strong puts it as follows, at p. 131:—

It results from the proprietorship of the riparian owner of the soil in the bed of the river that he has the exclusive right of fishing in so much of the bed of the river as belongs to him, and this is not a riparian right in the nature of an easement but is strictly a right of property.

Gwynne, J., states, at p. 68:—

The right of fishing, then in rivers above the ebb and flow of the tide, may exist as a right incident upon the ownership of the soil or bed of the river, or as a right wholly distinct from such ownership, and so the ownership of the bed of a river may be in one person, and the right of fishing in the waters covering that bed may be wholly in another or others.

The late case *The Att'y-Gen'l for B.C.* v. *Att'y-Gen'l for Canada*, decided by the Privy Council, 15 D.L.R. 308, [1914] A.C. 153, is to the same effect.

In the Lower Canada Reports of Seigniorial question, vol. A, at p. 69a, is the answer to the following question: "On seigniories bounded by a navigable river can the seignior legally reserve the right of fishing therein?"

The answer of the court is as follows: "On seigniories bounded by a navigable river or stream the seignior could have reserved to himself the right of fishing therein."

I find no difference between the law of the Province of Quebec and the law of England in this respect. I am quite in accord with the view of my brother judges that when a question has to be decided arising in the Province of Quebec and governed by the laws of the Province of Quebec such a case should be decided by the laws of that province; but I fail to see why the decisions of the courts of England or of the United States should not be referred to as guides to arriving at the correct interpretation of such laws.

The reasons for judgment of Pelletier, J., are so clear and the citations of authorities both in the judgments of the trial judge and of Pelletier, J., so ample that it would be a mere repetition to repeat what these judges have so clearly expressed.

CAN.

S. C.

DUCHAINE v. MATAMAJAW SALMON CLUB.

Cassels, J.

It is conceded that the grant to Sir George Stephen was not a mere personal grant. All agreed that the grant extended at all events to the life of Lord Mount Stephen.

It is not a personal right, it is a right capable of assignment.

The point in litigation is whether or not this right is a mere right of usufruct terminable on the death of Lord Mount Stephen or whether it is an estate vested in him and his heirs capable of transmission. I agree with Pelletier, J., that the estate is not one in usufruct but that it is a conveyance of property. I also agree with him that the exclusive right of fishing carried with it the right to the soil or bed of the river during the term of the fishing season.

I refer to one or two additional authorities in support of this proposition.

The case of *Tinicum Fishing Co.* v. *Carter*, 61 Penn. St. 21, at p. 38, was decided by the Supreme Court of Pennsylvania. It is stated "that a fishing-place may be granted, separate from the soil, may be considered as settled in this State."

On p. 39, the following statement of the law occurs:—

If the easement consists in a right of *profit à prendre*, such as taking soil, gravel, minerals and the like from another's land, it is so far of the character of an estate or interest in the land itself that if granted to one in gross, it is treated as an estate and may therefore be for life or inheritance.

A right to take fish is a *profit à prendre in alieno solo*. It requires for its use and enjoyment exclusive occupancy during the period of fishing. It implies the right to fix stakes or capstans for the purpose of drawing the seine and the occupancy of the bank at high tide as well as the space between high and low water marks as far as may be necessary and usual. The grantee in the nature of things must have exclusive possession for the time he is fishing and for that purpose; the grantor at all other times and for all other purposes.

And in Massachusetts, in the Supreme Court, a case of *Goodrich* v. *Burbank*, 12 Allen (Mass.) 459, at p. 461, deals with the question.

The judgment of the court is as follows:—

In the case of rights of *profit à prendre* it seems to be held uniformly that if enjoyed in connection with a certain estate, they are regarded as easements, appurtenant thereto, but if granted to one in gross they are treated as an estate or interest in land, and may be assignable or inheritable.

In *Muskett* v. *Hill*, 5 Bing. (N.C.) 694, 132 E.R. 1267 it is pointed out "that a right to hunt and carry away game is a grant and held to be an assignable right."

So in Brooms' Legal Maxims, 8th ed. (1911), p. 367, it is stated "that by the grant of fishing in a river is granted power to come upon the banks and fish for them."

Citing Shep. Touch. p. 98.

CAN.

S. C.

DUCHAINE v. MATAMAJAW SALMON CLUB.

Cassels, J.

I refer to those authorities in addition to the authorities cited in the courts below as confirming the propositions mentioned by Pelletier, J., in his reasoned judgment.

I think the question of whether *profit à prendre* is known to the law of the Province of Quebec or not is a mere question of language. The fact exists that the right in this particular case, by whatever name you choose to call it, is a right of property. It is a right that passed by the grant and became vested in Sir George Stephen his heirs and assigns as a right of property and not a mere right of enjoyment.

It has always been held that a right granted by the King of France to the seigniors in Lower Canada of fishing in the St. Lawrence was something greater than a mere right during the lifetime of the seignior.

A number of valuable rights have been granted in the River St. Lawrence. It has never been doubted that these rights extended beyond the life of the seignior, nevertheless it never could be suggested that the soil of the river was vested in the seignior. If the decision of this court is to the effect that the granting of the fishing rights in question to Lord Mount Stephen is a mere right of personal enjoyment during the life of Lord Mount Stephen, by reason of its being only a right of usufruct, a number of rights which have heretofore never been questioned would be destroyed.

I am unable to arrive at such a conclusion as I have stated. I am of opinion the right in question is not one of usufruct but one of property and capable of being transmitted.

I think the judgment of the court below should not be interfered with. This appeal should be dismissed and with costs.

Appeal allowed.

PEDLAR v. CARSWELL.

MAN.

C. A.

Manitoba Court of Appeal, Perdue, C.J.M., Cameron, Haggart and Fullerton, JJ.A. August 12, 1919.

BILLS AND NOTES (§ I C—15)—SALE OF MOTOR CAR—AGREEMENT TO OBTAIN PROMISSORY NOTE OF THIRD PARTY—FAILURE TO OBTAIN—NOTE OF PURCHASER GIVEN IN PLACE OF—CONSIDERATION.

The purchaser of a motor car agreed to give a promissory note made by a third party in part payment. The note was endorsed to the vendor and the car delivered. The vendor objected to the note on the ground that it was written on a piece of note paper and had no place of payment mentioned. The purchaser thereupon agreed to get a new note but failed to do so, and the vendor having ascertained that the third party was not financially sound, the purchaser gave his own note for the amount.

MAN.

C. A.

PEDLAR v. CARSWELL.

Statement.

Held, that the failure of the purchaser to procure the new note constituted a liability on his part sufficient to furnish a valuable consideration for the note sued on under s. 53 of the Bills of Exchange Act (R.S.C. 1906, c. 119).

[*Haigh* v. *Brooks* (1839), 10 Ad. & El. 309, 113 E.R. 119; *Wilton* v. *Eaton*, 127 Mass. 174; *Coggins* v. *Murphy*, 121 Mass. 166, referred to.]

APPEAL by defendant from the judgment at the trial in an action on a promissory note. Affirmed.

P. C. Locke, for appellant; *F. M. Burbidge*, K.C., for respondent.

Perdue, C.J.M.

PERDUE, C.J.M.:—In June, 1917, the defendant desired to purchase a second-hand motor car from the plaintiff by giving him the note of one Ryder for $350, dated June 19, 1917, payable to the order of defendant six months after date with interest at 7% per annum. The plaintiff agreed to take the note in payment for the car and the defendant indorsed the note and delivered it to the plaintiff. There was no restriction on the indorsement and the defendant became liable to the plaintiff as indorser of the note. The car was thereupon delivered to the defendant. At the time the transaction took place the plaintiff raised an objection that the note was not on an ordinary note form but was written on a piece of letter paper. The note appears to have been quite regular so far as form, signature and other requisites are concerned. I notice, however, that there is no place of payment mentioned in the note. The maker is a farmer living at McCreary, a considerable distance from Neepawa where plaintiff resides. The trouble and expense of presenting and protesting the note in case of dishonour may have had something to do with the plaintiff's subsequent conduct. The county court judge has not given a written judgment but as he has given a verdict for the plaintiff we must assume that he has found all material questions of fact in the plaintiff's favour.

The defendant admits that at the time of the transaction the plaintiff took the above-mentioned objection to the note and that he, the defendant, promised to get a new note from the maker. On Aug. 2, 1917, the plaintiff wrote to the defendant reminding him of his promise to get a proper note and he enclosed a form of note bearing the same date and being similar in other respects to the note indorsed by the defendant to the plaintiff, except that it was payable at the Merchants Bank of Canada at Neepawa. The defendant did not procure the signature of Ryder to this note. On Sept. 24, plaintiff came to defendant and complained that the new note had not been procured. The plaintiff

then induced the defendant to sign the note upon which this action was brought. It is a note dated Sept. 24, 1917, for $350, payable to the plaintiff ten days after date with interest at 8% per annum. Defendant states that plaintiff when he received this note promised to return the Ryder note but did not do so. The Ryder note, however, was kept in plaintiff's control and was produced and filed in court. The plaintiff says that the defendant could have had it at any time.

The defence is that there was no consideration to support the note sued on. After careful consideration I have come to the conclusion that the defence fails. When the contract for the purchase of the car was made the defendant as a part of the consideration promised to procure a new note from Ryder in the form required and to indorse it and send it to the plaintiff in lieu of the original note handed to him at the time he delivered the car. This promise the defendant failed to fulfil and the breach constituted a liability on the part of the defendant sufficient to furnish a valuable consideration for the note of Sept. 24, under s. 53 of the Bills of Exchange Act. Or, viewing the transaction from another standpoint, the promise to return the Ryder note to the defendant was a consideration sufficient to support the making and delivery of the new note: *Haigh* v. *Brooks* (1839), 10 Ad. & El. 309, 113 E.R. 119; *Wilton* v. *Eaton* , 127 Mass. 174; *Coggins* v. *Murphy*, 121 Mass. 166; 4 Am. & Eng. Encyc. 188; 8 Corpus Jur. 217.

The case of *Bank of B.N.A.* v. *McComb* (1911), 21 Man. L.R. 58, is not applicable to the facts of this case.

The appeal must be dismissed with costs.

CAMERON, J.A.:—This is a county court action brought on a promissory note for $350, dated Sept. 24, 1917, payable ten days after date, with interest at 8%. The plaintiff sold to the defendant a motor, and in payment therefor the defendant gave him the promissory note of one W. Ryder, made in his, the defendant's, favor, dated June 19, 1917, for $350, with interest at 7%, payable six months after date. The plaintiff objected to receiving this last named note on account of its being written on note paper. The defendant in his evidence said they would go up to Ryder and get a new note, and that the plaintiff said he would get it

Cameron, J.A.

MAN.

C. A.

PEDLAR v. CARSWELL.

Cameron, J.A.

some time and send it to me (pp. 2 & 3). Defendant asserted that Ryder was good and would pay (p. 6). The plaintiff accordingly accepted the note. Afterwards on Aug. 2, he sent a letter to the defendant enclosing what he deemed to be a note in proper form. He asked in this letter that the note be signed and returned to the bank and added: "Your old one will be duly forwarded" and in this he was repeating what had been said by him at the time of the original transaction. Subsequently he discovered that Ryder was not financially good, and he stated this to the defendant, who signed the note in question. The trial judge entered judgment for the plaintiff and this appeal is from that judgment.

The question is whether, the original note being still current, there was consideration for the note sued on which was substituted for it. On this point *Bank of B.N.A.* v. *McComb*, 21 Man. L.R. 58, was relied on. But in this case it seems to me that there is to be found sufficient consideration for the giving of the note in question. The defendant made certain representations as to Ryder's financial standing, which the plaintiff discovered to be unfounded. He said: "I told him and said I had discovered that this man Ryder was not any good financially and said he would have to give me his own note on a short time note" (p. 14). He also added that before the signing of the note he said he would have nothing to do with Ryder, and the defendant accordingly gave him the note. This appears to me ample consideration to support the note.

As stated above, the plaintiff had, at the time of the transaction of sale, objected to the form of the original note, and subsequently forwarded a new note in the proper form offering to return the original. The defendant himself says he signed the note because he (the defendant) had agreed to do so (p. 4). And the defendant further says in answer to the question when the plaintiff told him he wanted a new note what was said about the old note: "He said it would be returned. He repeated that three or four times to me in the office." There can surely be no doubt that the promise to return the old note on the part of the plaintiff and the promise to give a new note on the part of the defendant are mutual, each a sufficient consideration for the other. Or, looked at in

another light, and viewing the transaction as a whole, the promise to give a new note was part of it and is supported by the same underlying consideration.

In view of the foregoing, I do not need to enter on the consideration of what constitutes an antecedent debt or liability under s. 53 of the Bills of Exchange Act. The words "or liability" were added to the English Bill in committee, and they perhaps extend the previous law. Chalmers, p. 89. Mr. Falconbridge in his work on Banking and Bills of Exchange points out that these words appear to have been overlooked in *Bank of Commerce* v. *Wait* (1907), 1 Alta. L.R. 68.

Cameron, J.A.

I think the appeal must be dismissed.

HAGGART, J.A.:—It was contended by the defendant that there was no consideration for the giving of the note sued on, and that the bank and plaintiff were not holders in due course. I cannot say there was no consideration. I look upon the deal from the time the bargaining began in June, 1917, until it was consummated on Sept. 24, 1917, by the giving of the note sued on as one transaction It was contemplated from the first tha there might be required a note given on such a form as the bank would ask for. The defendant in his evidence at the trial when asked concerning the giving of this note answered: "Q. He (the plaintiff) represented this as a Merchants Bank of Canada form? A. Yes. Q. You signed it? A. Yes, I had agreed to."

Haggart, J.A.

It is true both notes represented the same indebtedness and the payment of either would be the satisfaction of both as far as this defendant Carswell was concerned.

I do not think the case relied upon by the defendant, *Bank of B.N.A.* v. *McComb*, 21 Man. L.R., 58, applies to the facts se out in this case.

I would affirm the judgment of Barrett, J.

FULLERTON, J.A., concurs with Haggart, J.A.

Fullerton, J.A.

Appeal dismissed.

ONT.

S. C.

TRUSTS AND GUARANTEE Co. Ltd. v. GRAND VALLEY R. Co.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee and Hodgins, JJ.A. December 20, 1918, February 10, 1919.

COUPONS (§ I—1)—DETACHED INTEREST COUPONS—RAILWAY BONDS—SALE OF RAILWAY—DISTRIBUTION OF PROCEEDS—CONFLICTING CLAIMS—PRIORITIES.

A holder of detached interest coupons clipped from mortgage bonds issued by a railway company can sue on them without being at the same time the holder of the bond. The coupon does not lose the benefit of the mortgage lien when detached. (*McKenzie* v. *Montreal and Ottawa R. Co.*, 29 U.C.C.P. 333.)

As against bondholders, who presented their coupons for payment and not for sale, and who had the right to assume that they were paid and extinguished, a person who advances the money to take them up under an undisclosed agreement with the company, that the coupons should be delivered to him uncancelled as security for his advances, is not entitled to an equal priority in the lien or the proceeds of the mortgage by which the coupons are secured.

The question as to whether there was a payment in satisfaction or by way of purchase, lies in the knowledge and intention of both parties to that payment—which knowledge may be inferred from the circumstances and in case of doubt the scale will be turned against the idea of purchase either by the want of proof of mutual intent or by the fact that there is not enough in the security to pay the principal of the debt and the coupons as well; so that a purchase would be prejudicial to the bondholders.

[Review of American authorities.]

Statement.

APPEAL from the judgment of Falconbridge, C.J.K.B. Varied.

The judgment appealed from is as follows:—

The evidence and arguments have been extended, wherein the facts and contentions are fully set forth.

The issues for trial are stated in a consent order made by me dated the 28th May, 1917, as follows:—

"1. This Court doth order and direct that the said several and respective claims, rights, and priorities of the said several and respective classes represented as hereinbefore mentioned, for the payment out of the money paid into Court as aforesaid, be tried and determined by this Honourable Court at a special sittings of the Court to be appointed for that purpose, and in default of appointment of a special sittings at the sittings of the non-jury Court at Toronto."

Exhibit 1 purports to be a concise statement of the issues to be tried. This statement contained the following particulars as to the mortgages and bonds:—

1. The mortgage dated the 30th May, 1902, from the Grand Valley Railway Company to the Trusts and Guarantee Company Limited to secure an issue of bonds to the amount of $800,000. The bonds issued in pursuance of this mortgage amounted to $450,000, with interest at 6 per cent.

2. The mortgage dated the 1st July, 1902, from the Brantford Street Railway Company to the National Trust Company Limited to secure bonds which were issued to the amount of $125,000 with interest.

3. The mortgage dated the 27th August, 1907, from the Grand Valley Railway Company to the Trusts and Guarantee Company to secure bonds to the amount of $4,000,000 and interest; bonds to the amount of $1,774,500 and interest were issued in pursuance thereof.

4. The holders of original bonds under the first Grand Valley Railway Company mortgage—represented by Mr. Brewster and Mr. Laidlaw—hold bonds to the amount of $60,000 and interest more or less.

5. The holders of the other original bonds under the said first Grand Valley Railway Company mortgage surrendered their bonds to the company to the amount of $390,000—and received bonds in exchange therefor for a similar amount issued under and in pursuance of the second Grand Valley Railway Company mortgage—and the holders of these bonds are represented by Mr. McMaster.

6. The holders of the other bonds issued under the second mortgage to the amount of $1,324,500 are represented by Mr. Ballantyne.

7. The grounds of claim of holders of coupons alleged to have been clipped from the mortgage bonds issued under the Brantford Street Railway Company mortgage—represented by Mr. Roaf.

8. The grounds of claim of holders of coupons alleged to have been clipped from bonds issued under the first Grand Valley Railway Company mortgage and from bonds issued under the second Grand Valley Railway Company mortgage—represented by Mr. Ballantyne.

9. The grounds of claim of holders of bonds issued under the second Grand Valley Railway Company mortgage, which they received in exchange for the surrender of the bonds under the first mortgage—represented by Mr. McMaster.

ONT.

S. C.

TRUSTS AND GUARANTEE CO. LTD. v. GRAND VALLEY R. CO.

10. The grounds of claim of holders of bonds under the second Grand Valley Railway Company mortgage, which were original bonds and which were not received in exchange for other bonds under the first mortgage—represented by Mr. Ballantyne.

11. The grounds of claim of the holders of original bonds under the first Grand Valley Railway Company mortgage—represented by Mr. Brewster and Mr. Laidlaw.

The issues may be stated as follows, subject to explanatory comment by counsel, and any amendment which may be necessary:—

1. It is alleged by counsel for the holders of original bonds that the foundation of all the several and respective claims, rights, and priorities of the several and respective classes for payment out of the money paid into Court must be a legal right to a lien against the property included in the mortgages, and therefore a lien upon the money in Court.

2. The claim of the alleged holders of coupons is supposed to be that a verbal claim is made on their behalf that they paid the coupons and received possession of them.

3. The claim of the holders of original bonds under the first Grand Valley Railway Company mortgage is that they have a first lien on the property—and a first lien on the money.

4. The claim of the holders of bonds under the second Grand Valley Railway Company mortgage (1907) is a claim, "on the grounds of fraud and misrepresentation inducing them to make the exchange of the bonds under the mortgage of 1902 for bonds under the mortgage of 1907"—and that they are therefore entitled to a lien on the property and on the money.

The money in Court is identified by para. 5 of an order of my brother Latchford, bearing date the 1st March, 1917, as follows:—

"5. And this Court doth further order that the said receiver do forthwith pay into Court to the credit of this action the said sum of $66,273.51, being the remainder of the balance in the receiver's hands of the price on the sale to the Corporation of the City of Brantford of the property included in and covered by the mortgages to the Trusts and Guarantee Company Limited."

Exhibit 2. The mortgage of 1902 covers the railway owned by the company constructed or thereafter to be constructed . . .

ONT.

S. C.

TRUSTS AND GUARANTEE CO. LTD. v. GRAND VALLEY R. CO.

and all charters, franchises, . . . now owned or possessed . . . or to be hereafter acquired by it . . .

Exhibit 3. The mortgage of 1907, reciting the issue of bonds under exhibit 2, is made subject to the lien, priority, and charges in favour of outstanding first mortgage bonds.

The transaction entered into by W. S. Dinnick and other directors, claiming also to be unsecured creditors of the company to the amount of $100,000, with Verner and Drill, was a most extraordinary not to say an outrageous one. The details of it are set out, and they are of so improper a nature as to disentitle Dinnick or any other director who took part in it to rank on the assets of the company as coupon-holders or by any other species of claim.

As to the other 1902 bondholders who exchanged for 1907 bonds, the evidence is quite clear that they did so on the false and fraudulent representation that all the old bondholders had either exchanged or had agreed to do so; but I am of the opinion that I have no jurisdiction under the order to try this matter nor any questions except those which are set out therein. The parties for the disposal of this issue are not all before the Court. Therefore, although I have no doubt as to the merits, I cannot order the reinstatement of those who so exchanged their bonds.

And as to the coupon-holders, in any event I am of opinion that the effect of the transaction is that these coupons were paid and extinguished—not sold or transferred in such a way as to preserve a lien, and cannot now rank in priority.

The company paid the coupons on the exchange-bonds of 1907 until 1910. The holders of these bonds did not then repudiate the transfer nor offer to pay back the money.

All the claims put forward in competition with the bondholders under the mortgage of 1902 are disallowed, and these bondholders (having a clear priority) are declared to be entitled to the money in Court.

The order provides that the costs of the motion therefor shall be paid out of the money in Court.

The trial and determination of the claims are in the nature of an interpleader, and I make no order as to costs thereof.

Upon settlement of the judgment, a change was made as to costs.

ONT.

S. C.

TRUSTS AND GUARANTEE CO. LTD. v. GRAND VALLEY R. CO.

The judgment, as settled and entered, declared that the holders of the original bonds secured by the mortgage dated the 30th May, 1902, were entitled to the moneys in court ($66,273.51), so far as might be necessary to satisfy the amount due to them respectively, and ordered and adjudged accordingly; and ordered that the costs of the trial of the issue of the several persons appointed by the order of the 28th May, 1917, to represent and actually representing the various classes of claimants to the fund, including Thomas Dixon, be paid to them respectfully out of the fund.

McMaster and *Fraser*, for holders of bonds of 1907 who took them in exchange for bonds of 1902, appellants.

Ludwig, K.C., for the holders of certain detached coupons under the two bond issues of 1902, Brantford Street Railway Company and Grand Valley Railway Company, appellants.

W. T. Henderson, K.C., for the Corporation of the City of Brantford.

Ballantyne, for bondholders of 1907 who never had 1902 bonds, appellants.

Brewster, K.C., for bondholders of 1902 who had not exchanged their bonds, respondents.

William Laidlaw, K.C., for Thomas Dixon.

Joshua Denovan, for the trustees of the Davies estate, respondents.

Roaf, for coupon-holders under bonds of the Brantford Street Railway Company.

The judgment of the Court was read by

Hodgins, J.A.

HODGINS, J.A.:—Appeal by all except bondholders of 1902 from the judgment of the Chief Justice of the King's Bench, who, on an issue directed by himself, ordered payment of the sum of $66,273.51 to the bondholders of 1902. This amount, which is now in Court, comes from the sale, by the receiver of the Grand Valley Railway Company, of the Brantford Street Railway and the Grand Valley road between Brantford and Galt. The sale was under the Grand Valley mortgages of 1902 and 1907; that of 1902 including the Brantford to Galt railway and that of 1907 covering both, and as well what is known as the Thames Valley Railway. No evidence was given to enable the Court to say what proportion of the purchase-money was attributable to the Brantford Street Railway undertaking as distinguished from the Brantford to Galt railway,

ONT.

S. C.

TRUSTS AND GUARANTEE CO. LTD. v. GRAND VALLEY R. CO.

Hodgins, J.A.

but it was stated that each had a separate value and had been operated separately.

The 1902 Grand Valley mortgage covered the Brantford to Galt railway, and the railway "constructed or which may be hereafter constructed (under the powers conferred) and all charters, franchises, privileges, and immunities now owned or possessed by it or to be hereafter acquired by it from any town or municipality or county or from any source whatever." It also included "all property whatever which may be hereafter acquired by it." It was argued that, notwithstanding these words, as the Grand Valley Railway Company in 1902 did not own and had no power to acquire the franchise of the Brantford Street Railway Company or the railway itself, the mortgage only included franchises from a town or county through which the Grand Valley road was then authorised to build.

And it is said, in consequence, if the claim of the holders of coupons from the Brantford Street Railway Company is disallowed, then the bondholders of the issue of 1907 come next to the $125,000 bond issue of the Brantford Street Railway Company, and are entitled to the money in Court so far as it is derived from the sale of the street railway undertaking in Brantford itself.

The agreement for the sale which produced the money in Court is set out in the schedule to an Act respecting the City of Brantford, ch. 63 of the Ontario statutes of 1914, 4 Geo. V. The consideration is the assumption by the Corporation of the City of Brantford of three mortgages, one (dated the 1st July, 1902), for $125,000, securing a bond issue for that amount on the Brantford Street Railway and interest thereon from the 1st July, 1913, the release of claims for taxes, payment of various liabilities, and $90,100 in cash. This cash-payment, less certain deductions, is represented by the amount in Court.

During the hearing of the appeal, the Corporation of the City of Brantford was added as a party. At the same time counsel for the bondholders under the 1902 mortgage, and those under the 1907 who claim to be reinstated in the position they occupied prior to the exchange of bonds, came to an agreement as between themselves, which relieves the Court from deciding some of the questions that were in process of argument. By that settlement these parties agree to divide the sum in Court equally, after payment to the original 1902 bondholders of $18,000 and the costs of the issues

ONT.

S. C.

TRUSTS AND GUARANTEE CO. LTD. v. GRAND VALLEY R. CO.

Hodgins, J.A.

between them. Certain other provisions in the agreement may have to be dealt with hereafter.

There are two claims of coupon-holders to be considered. Dinnick and Pattison represent certain holders of coupons clipped from the issue of bonds covered by the mortgage for $125,000 of the 1st July, 1902. on the Brantford Street Railway. Dinnick claims $25,000 and Pattison $15,625, and they appear to be the only ones so claiming. Dinnick's coupons are pledged to the Dovercourt Land Company. Dinnick also represents holders of other coupons of the Grand Valley 1902 mortgage to the amount of $11,600. There are unpaid coupon-holders under the 1907 mortgage, but no one appeared to argue for them (p. 49) unless the holders of 1907 bonds include these coupon-holders.

The coupons from the bonds of the Brantford Street Railway Company and those from the Grand Valley Railway bonds secured by the mortgages of 1902 are in the usual form, and the title to the money secured by them passes by the delivery of the coupons.

The bonds themselves state that both the principal and interest are secured by mortgage, and this is the case, so that as against each company, until the interest is actually discharged by it or for its benefit, the interest remains a charge under the mortgage, and the holder of a coupon is entitled to the benefit of that charge.

It cannot injure the Brantford Street Railway Company or the Grand Valley road, as mortgaged in 1902, if, that company not being able to pay the interest, some one else paid it and retained a claim for reimbursement; for, if the interest had not been got out of the way, foreclosure or sale might have been the result.

But as to the holders of the bonds, if the payment did not discharge the security, to that extent, in their favour, then it was left outstanding, and, therefore, in competition with them upon the assets mortgaged for their benefit. Either the insolvency of the company or the sale of its assets for a sum insufficient to pay both the principal and unpaid interest in full would make it important to determine what the transactions were under which the coupons were acquired, those of purchase or of payment and satisfaction. And this is the dispute in the present case.

The evidence is rather meagre and extremely vague, and, apart from the surrounding circumstances, the issue depends upon the sketchy testimony of Dinnick, Pattison, and Stockdale only.

ONT.

S. C.

TRUSTS AND GUARANTEE CO. LTD. v. GRAND VALLEY R. CO.

Hodgins, J.A.

Dinnick was a director and vice-president of the Grand Valley Railway Company, and intimately aware, as his letter of the 12th October, 1909, to Mr. Warren (exhibit 16) shews, of the financial situation of all the companies concerned. He deposes to the fact that he personally paid for and purchased the coupons now outstanding, detached from the bonds, after they became due. Stockdale, manager of the Trusts and Guarantee Company, the trustee for the bondholders under the Grand Valley 1902 mortgage, says the coupons were paid out of moneys supplied by Dinnick, in the sense that Dinnick, having borrowed from that corporation certain moneys, directed their application to the payment or purchase of these coupons. The correspondence between the then holders of the Brantford Street Railway bonds, the Canadian General Electric Company, and Dinnick, shews that they dealt with Dinnick on one or more occasions and accepted part cash and his personal note for overdue interest. Dinnick, in speaking of the Grand Valley Railway Company's coupons, says that a large majority of the bondholders knew he was buying the coupons; that they knew the road could not pay them, and came to him, after presentation to the Trusts and Guarantee Company without obtaining payment of them; and that he gave them cheques and got delivery of the coupons and told them he was paying them himself, and that the Trusts and Guarantee Company knew that also. He considers the letter of the 12th October, 1909, in which he assured Mr. Warren, general manager of the Trusts and Guarantee Company, that "all interest to the 1st July (1909) has been paid," was a proper letter to write, and that Mr. Warren knew the coupons had not been paid by the company. Dinnick says he paid them to protect the very large amount of money he had in the road. He never told the coupon-holders that he was *buying* their coupons. He began to pay for them in 1907, when Verner took over the road. He does not know whether in his own books he charged them to the Grand Valley Railway Company. He does not produce these books and does not account for them as being either lost or destroyed. As to the Brantford Street Railway coupons, Dinnick says that the holders, the Canadian General Electric Company, would make demand on the Brantford Street Railway Company, and that he would ask for delay and in the end have to "take up" the coupons himself. He thinks Mr. Nicholls knew that he purchased the coupons, because "he never cancelled the coupons," but Dinnick never told

ONT.

S. C.

TRUSTS AND GUARANTEE CO. LTD. v. GRAND VALLEY R. CO.

Hodgins, J.A.

him so, and adds that Nicholls knew it was his money that took up the coupons because he gave his own personal cheque and note. He made no demand on the Brantford Street Railway Company, because it had no money. He produces letters between himself and the treasurer of the Canadian General Electric Company, one from him asking for coupons "that I have paid in connection with the Brantford Street Railway Company," and the other enclosing a note for Dinnick's signature for $1,570.20, the balance on a sum due for interest on these bonds, which Dinnick afterwards signed. There are other letters pressing for payment of the interest and addressed to Dinnick in Toronto. The coupons in question are all pledged to the Dovercourt Land Company. He admits that the directors, of whom he was one, sometimes provided the money with the Trusts and Guarantee Company, and he paid, he says, coupons on the 1907 mortgage for 5 years, but not all. A. J. Pattison, who was president and director of the Grand Valley Railway Company and subsidiary roads, about the end of 1907 or beginning of 1908, when he retired in favour of Verner, also claims to have purchased coupons of the Brantford Street Railway Company in 1905, 1906, and 1907, while he was president, from the National Trust Company, "by paying for them." He says the first coupons he paid were given to him stamped "paid," and that he told the National Trust Company that the railway company was not paying these coupons, and he would not pay any more unless they were delivered to him unstamped, and that his subsequent coupons were unstamped. He says that he personally and other members of a syndicate contributed the money for one instalment of coupons. In further examination he is unable to say just whether the money raised from the bank for the coupons was got upon the note of the Grand Valley Railway Company or on the covenant of the directors, but thinks the latter is the case. He sent his own cheque for the 1905 coupons, expecting to get the money back from the Grand Valley Railway Company. He deposited the coupons and bonds as security for money raised from the bank. Stockdale, now the receiver and also general manager of the Trusts and Guarantee Company, says that certain of the coupons were paid through that company as a "purely mechanical operation," and that if they received any money and had authority to pay the coupons they would pay them as long as the money lasted. He, however, says that they got moneys from Dinnick to pay coupons

on the 1902 and 1907 Grand Valley mortgages, and did so, turning them over to Dinnick because he had provided the money to pay them, and, "We had agreed that we should deliver them to him." Stockdale further says that exhibit 39 shews advances to Dinnick by the Trusts and Guarantee Company on collaterals which were used to pay coupons.

This evidence must be considered in the light of the whole operations of Dinnick and Pattison and the situation as it existed in 1907 and before. Pattison began his payments in 1905; "they were advanced from the day we took the road over," he says, and when he was president of the Brantford Street Railway Company. It may be noted that the Brantford Street Railway coupons were payable at the Canadian Bank of Commerce, and not at the National Trust Company's office. Stockdale says that, when the Trusts and Guarantee Company paid the coupons out of money supplied by Dinnick, the parties presenting the coupons did not know him in the transaction, and that they were paid "in the regular way." This is quite probably so, as, when the situation is considered, there seems every reason to suppose that no hint would be given that the companies concerned were not able to meet their interest obligations. The coupons of the Grand Valley Railway Company were in fact payable at the Trusts and Guarantee Company's office. No clear or satisfactory evidence is adduced as to any specific payment or purchase of coupons save what is disclosed in the correspondence between the Canadian General Electric Company and Dinnick, dealing with two occasions. The new bond issue which was intended to retire the earlier mortgages was, so far as put out, handed over to one Drill, acting for Verner, whose business ability and financial genius was expected not only to build the road but to finance it as well. Both Dinnick and Pattison say, either in terms or in effect, that they advanced their money to pay these coupons in the expectation that Verner, who had got the bonds in advance of the stipulated work, would make good, and hoping to keep things going till then. Both did so to protect their prior investments in the companies and they looked to the Grand Valley Railway to get their money back. Dinnick considered himself, and doubtless Pattison too, a creditor of that road. Pattison said he had a covenant from Verner to recoup him for his investment in connection with these roads. The handing over of the large amount of bonds to Verner and Drill

ONT.

S. C.

TRUSTS AND GUARANTEE CO. LTD. v. GRAND VALLEY R. CO.

Hodgins, J.A.

and the retransfer of part of them to Dinnick, Pattison, and other directors, was most improper and unbusinesslike, and affords another reason why quietude was advisable and an appearance of current solvency of prime importance to them. It, moreover, corroborates their statement that they looked to Verner and the proceeds of the bonds to recoup themselves, and the retirement of the coupons was a means to enable that end to be reached.

One element which is missing from the case as made is evidence that the bondholders knew that the person paying the coupons intended thereby to preserve not only the debt but the right to rank together with the bond for the interest payments, thereby reducing, in case of insolvency, the security of the bondholder for his principal.

Even the Canadian General Electric Company is not shewn to have known more than that Dinnick was making payment at a time when he was vice-president and was preserving the coupons. The other bondholders are said to have known the bare fact that their coupons were paid by Dinnick with his own money—a circumstance consistent with the preservation of the debt only. In Pattison's case, his refusal to accept cancelled coupons was only made known to the National Trust Company, the mortgagee to secure the $125,000 of bonds of the Brantford Street Railway Company. Save in that instance, the evidence in itself is open to the objection that those who knew are not in any way identified, and it cannot be received as making even a *primâ facie* case of knowledge as against any one unless that person is named and identified. It is singular that no one of the bondholders who are alleged to have known that their coupons were being purchased, and not merely paid, was called as a witness. It takes two to make a sale, and the total absence of any evidence save of the interested parties is not without its significance. The finding of the Chief Justice of the King's Bench upon the whole case is that the effect of the transactions was that none of the coupons were sold or transferred in such a way as to preserve their lien or the right to rank with the outstanding bonds.

The law in cases similar to the present one has been considered in many of the United States.

In *City of Kenosha* v. *Lamson* (1869), 9 Wall. 477, it was decided that a holder of detached coupons could sue on them without being at the same time the holder of the bond. This was also the conclu-

sion of the Ontario Court of Common Pleas in 1878 in the case of *McKenzie* v. *Montreal and Ottawa R. Co.* (1878), 29 U.C.C.P. 333.

As to the status of a coupon the Supreme Court of the United States in the *Lamson* case, 9 Wallace at p. 482, says:—

"The coupons are given simply as a convenient mode of obtaining payment of the interest as it becomes due upon the bonds. There is no extinguishment till payment."

And at p. 484: "The device affords great convenience to all persons dealing in these securities, especially to the holders in foreign countries, who otherwise would be obliged to forward the bond to the place of payment of the interest each time it became due, or trust them to the hands of their correspondents in the country where the payment is made.

"This convenience in the collection by the use of coupons, as is apparent, very much facilitates the negotiation of these securities abroad, and enhances their value in the foreign market. And any decision that would have the effect to lessen or impair the higher security for the interest as found in the bond, by the use of these coupons, would necessarily, to that extent, defeat the purpose for which they were designed."

That the coupon does not lose the benefit of the mortgage lien when detached is also clear.

In *Re Sewall* v. *Brainerd* (1865), 38 Vermont 364, the Supreme Court of Vermont held that, whether interest-coupons are negotiable or not, separate from the bonds, they are when matured a constituent part of the mortgage-debt, and an assignment of them carries with it by implication an interest in the mortgage-security; and it was said that upon realisation of the whole mortgaged property the bonds and the unpaid coupons would probably rank ratably. The bonds carried interest payable upon presentation of the coupons attached, and the whole bond issue was secured by mortgage upon the railway franchise and property.

In *Miller* v. *Rutland and Washington R. Co.* (1867), 40 Vermont 399, the Supreme Court of Vermont decided that a coupon, payable to bearer, detached from a bond, and owned by one party while the bond is owned by another, is still a lien under the mortgage given to secure the bond. A coupon, when payable, is a part of the mortgage-debt, and an assignment of a portion of the mortgage carries with it, in equity, a corresponding interest in the mortgage-security; and the coupon-dealer, in a foreclosure of the mortgage, is entitled to a *pro ratâ* distribution with the holders of the residue of

ONT.

S. C.

TRUSTS AND GUARANTEE CO. LTD. v. GRAND VALLEY R. CO.

Hodgins, J.A.

the mortgage-debt. This has been followed in other States. See *Commonwealth of Virginia* v. *Chesapeake and Ohio Canal Co.* (1870), 32 Md. 501; *Haven* v. *Grand Junction R. Co. and Depot Co.*, 109 Mass. 88; *Union Trust Co.* v. *Monticello and Port Jervis R.W. Co.* (1875), 63 N.Y. 311; and *Cameron* v. *Tome* (1885), 64 Md. 507.

It is upon questions of fact, as to the result of the payment of the coupon by a third party, that the Courts have somewhat divided. But the law seems to have become fairly clear, its application only differing when the facts themselves are matters more of inference than positive proof.

In the *Miller* case (cited *ante*), the corporation being unable to pay interest on its bonds, an agreement was made between the directors and B. that B. should deposit his own money in the bank where the coupons were payable, and should take and hold them as his own under the mortgage. He did so, and instructed the clerk whose duty it was to pay them that he wanted the coupons uncancelled and given to him—B.'s claim was allowed, as there was no superior equity shewn. The Court, however, remarked (40 Vermont at p. 408):—

"A court of equity will not convert a payment into a purchase in favour of a party advancing the money when there is a superior countervailing equity in another party"—such as the right of bondholders to be paid in full in case of a deficiency to pay them and the coupons both.

In Maryland, the Court took a different view of a somewhat similar transaction. In *Commonwealth of Virginia* v. *Chesapeake and Ohio Canal Co.*, 32 Md. 501, the facts were as follows. The company being unable to pay the interest due in January, 1851, the directors met and appointed a committee to procure for the company a loan or advance to meet and discharge such interest. The president later reported that he had arranged with Selden Withers & Co. to make such advance for payment of the January coupons. The firm advanced $50,000 at interest. This was repeated in July, 1851, and later. The coupons were handed over to Selden Withers & Co. Public notice was given to couponholders that the interest coupons would be paid at the banking house of Selden Withers & Co. The Court of Appeals held that this was an advance to the company to pay interest upon the security of the company's future resources, and not a purchase by Selden Withers & Co.

ONT.

S. C.

TRUSTS AND GUARANTEE CO. LTD. v. GRAND VALLEY R. CO.

Hodgins, J.A.

In *Haven* v. *Grand Junction R. and Depot Co.*, 109 Mass. 88, the Supreme Judicial Court of Massachusetts allowed a claim for coupons by Kimball, president and director of the company, who had supplied his own money, it being understood between the company and Kimball that they were not extinguished, and that he took the place of the persons who had presented them. "As between him and the company, this was an allowable arrangement, and a legitimate mode of furnishing pecuniary aid to the company, changing the form but not increasing the amount of its actual debt" (p. 97).

The security proved sufficient to pay the whole debt, principal and interest, no bondholder suffering any loss. But the Court add (p. 97):—

"The only parties who could have any right to object to this proceeding would be the other creditors of the company, to protect whose rights the mortgage was given. If the security had proved insufficient to pay the entire debt, the other mortgage creditors might say that . . . Kimball, having taken part in a transaction which appeared and was understood to be a payment, is estopped now to come forward as a purchaser and assignee, and thereby diminish the dividend which the other creditors, whose claims were covered by the mortgage, were entitled to receive."

In 1875, the Court of Appeals in New York State decided, in *Union Trust Co.* v. *Monticello and Port Jervis R.W. Co.*, 63 N.Y. 311, that:—

"Interest coupons upon the bonds of a railroad corporation received by one who has advanced the money with which they were taken up under an agreement that they were to be delivered to him uncancelled, as security for the advances, as against the corporation, are valid securities in the hands of the holder, and a mortgage upon the corporate property, given to pay the bonds, may be enforced for his benefit.

"But as between him and bondholders, who received the amount of their coupons in ignorance of the transaction, and supposing their coupons to have been paid, the latter have the prior equities, and if upon foreclosure and sale of the mortgaged property the sum realised is insufficient to pay the face of the bonds, the holder of the coupons is not entitled to share in the proceeds."

ONT.

S. C.

TRUSTS AND GUARANTEE CO. LTD. v. GRAND VALLEY R. CO.

Hodgins, J.A.

In 1877 the Supreme Court of the United States decided a very important case by a majority of one in a Court of nine. In *Ketchum* v. *Duncan*, (1877), 96 U.S. 659, they say (p. 662):—

"But that the coupons were either paid or transferred to Duncan Sherman & Co. unpaid, is plain enough. The transaction, whatever it was, must have been a payment, or a transfer by gift or purchase. Was it, then, a purchase? It is undoubtedly true that it is essential to a sale that both parties should consent to it. We may admit, also, that 'where, as in this case, a sale, compared with payment, is prejudicial to the holder's interest, by continuing the burden of the coupons upon the common security, and lessening its value in reference to the principal debt, the intent to sell should be clearly proved.' But the intent to sell, or the assent of the former owner to a sale, need not have been expressly given. It may be inferred from the circumstances of the transaction. It often is. In the present case, the nature of the subject cannot be overlooked. Interest-coupons are instruments of a peculiar character. The title to them passes from hand to hand by mere delivery. A transfer of possession is presumptively a transfer of title. And especially is this true when the transfer is made to one who is not a debtor, to one who is under no obligation to receive them or to pay them. A holder is not warranted to believe that such a person intends to extinguish the coupons when he hands over the sum called for by them and takes them into his possession. It is not in accordance with common experience for one man to pay the debt of another, without receiving any benefit from his act. We cannot close our eyes to things that are of daily occurrence. It is within common knowledge that interest-coupons, alike those that are not due and those that are due, are passed from hand to hand; the receiver paying the amount they call for, without any intention on his part to extinguish them, and without any belief in the other party that they are extinguished by the transaction. In such a case, the holder intends to transfer his title, not to extinguish the debt. In multitudes of cases, coupons are transferred by persons who are not the owners of the bonds from which they have been detached. To hold that in all these cases the coupons are paid and extinguished, and not transferred or assigned, unless there was something more to shew an assent of the person parting with the possession that they should remain alive, and be available

in the hands of the persons to whom they were delivered, would, we think, be inconsistent with the common understanding of business men."

The reasons which commended themselves to the majority of the Court for allowing the claim on these coupons were as follows:—

First, the coupons were not paid by the railway company nor by money furnished by the railway company, nor in pursuance of an agreement with the company to pay them for or on behalf of the debtors or in extinguishment of the debt.

Second, the coupons were not paid in the usual manner or at the usual place, or by the persons accustomed to pay them. The coupons were not left at the company's office. They were taken there for verification, and then returned to the holders, with directions to take them to the bank, but no cheques drawn upon the bank were given to the holders, as had been the previous course. Some knew the company were not paying the coupons, others inquired and were told the bank would purchase. Others did not know the company would not pay, and made no inquiry at the bank; and, as they brought no cheques, the holders must have known the bank had no vouchers for its payments, unless the coupons continued in force in the hands of the bank. On this the Court held that it is a fair presumption that, when they delivered the possession, they assented to a transfer of ownership.

Third, none of the original holders of these coupons had up to that time denied the sale and purchase, and not one had reclaimed the coupons and thus disaffirmed any sale.

Fourth, notices were posted in the bank and in the office of the company, and public notice was given abroad. This was done in the most complete manner, and the Bank of Mobile and the Union Bank of London purchased the coupons for Duncan Sherman & Co. openly, both in Mobile and London, and acted as agents for the firm in so doing. Duncan Sherman & Co. had been the financial agents in New York of the company, and Duncan had been a director for several years, and in April, 1874, was elected its president. The coupons in question were those of May, 1874, and November, 1874. The Court, in dealing with him, say (pp. 665, 666):—

"The duty of Duncan was to do what in his judgment at the

ONT.

S. C.

TRUSTS AND GUARANTEE CO. LTD. v. GRAND VALLEY R. CO.

Hodgins, J.A.

time was the best thing for all persons for whom he was a trustee. It surely was not his duty to permit the coupons to go into default. Still less, as it appears to us, was it a breach of trust in him to purchase the coupons and hold them, in order that the company might have time to provide for their payment. The company was informed of his intention to make the purchase, and its consent was given."

The Court further held that there was no estoppel proved against Duncan. The company consented to what was done, and no single coupon-holder had come forward who now claimed that he was misled or deceived by any of Duncan Sherman & Co.'s agents. He was in no worse position than a stranger, unless it could be shewn that he was guilty of bad faith.

The Court (p. 667) considered the *Monticello* case, and, in their view, it was not a case of purchase or transfer: it was a case of agency for the debtor. In the ultimate result, it was held that in the hands of Duncan Sherman & Co. the coupons and the bonds ranked equally.

It may be observed that out of a Court of nine members the majority judgment was given by five, the minority judgment by four. The minority judgment was based upon the principle that those who presented the coupons for payment had no thought of selling them and did not in fact sell them, and therefore in law they were paid and not sold.

It is evident that the great publicity which was given to this operation, the undoubted good faith of Duncan Sherman & Co., and the clear proof of the origin of the transaction and of the ownership of the money which paid the coupons, were the determining factors in this decision.

In 1885 the Court of Appeals of Maryland, assuming to follow the cases in the Supreme Court and in New York and Massachusetts already cited, decided *Cameron* v. *Tome*, 64 Md. 507. It appeared that the coupon-holder arranged with the president of the company to advance the money to take up the coupons, and did so. The secretary of the company published a notice that the coupons would be paid at the company's office. The Court said (p. 510):—

"There is not a particle of proof to show that the holders of these coupons ever sold or agreed to sell them to the appellant, or

that they were delivered to him with their knowledge or assent. They were due and it was the duty of the company to pay them. They constituted, so long as they remained unpaid, a part of the mortgage-debt, and an accumulation of unpaid interest would necessarily affect the value of the security held by the first mortgage bondholders. They had therefore a direct interest in having them paid and extinguished. The appellant advanced, it is true, the money to pay them, but he was a large holder of the second mortgage bonds, and was anxious to avoid a default on the part of the company, which might lead to a foreclosure and sale of the property of the company by the first mortgage bondholders. Besides, the agreement was one made between him and the company, and was unknown to the holders of the coupons, when they presented them for payment. This being so, we take the law to be well settled, that as against bondholders who presented their coupons for payment and not for sale, and who had the right to assume that they were paid and extinguished, a person who advances the money to take them up under an undisclosed agreement with the company, that the coupons should be delivered to him uncancelled as security for his advances, is not entitled to an equal priority in the lien, or the proceeds of the mortgage by which the coupons are secured. *Union Trust Co.* v. *Monticello and Port Jervis R. Co.*, 63 N.Y. 313; *Haven* v. *Grand Junction R. and Depot Co.*, 109 Mass. 96; *Ketchum* v. *Duncan*, 96 U.S. 662."

In 1888 the question again came before the Supreme Court of the United States in *Wood* v. *Guarantee Trust and Safe Deposit Co.* (1888), 128 U.S. 416, 9 Supreme Court Reporter 131. After quoting at length the reasoning of the same Court in *Ketchum* v. *Duncan*, Mr. Justice Lamar, who delivered the judgment of the Court, said (128 U.S. at p. 424):—

"That case clearly settles the proposition that in such a matter as this, the question, as between payment and purchase, is one of fact rather than of law, to be settled by the evidence, largely presumptive, generally, in the case. It is a question of the intention of the parties.

"In *Ketchum* v. *Duncan* stress was laid on these circumstances, viz., that the persons alleged to have paid the coupons had no connection with the company issuing the coupons, or interest in it; that they had repeatedly and publicly notified the holders of the

ONT.

S. C.

TRUSTS AND GUARANTEE CO. LTD. v. GRAND VALLEY R. CO.

Hodgins, J.A.

bonds and coupons that the coupons were to be purchased, not paid; and that the coupons were carefully received and preserved uncancelled. In the case at bar the conditions are radically different. Starr is essentially (that is, from a business point of view) the waterworks company, owning, as he does, 19,500 of its 20,000 shares of stock. Its prosperity is manifestly his prosperity, its disaster his disaster, and any disbursement made by it is substantially made by him. There is, therefore, no inherent improbability that he intended to *pay* the coupons, as he indeed instructed his agents, the brokers, that he did. Moreover, such notice as was given to call in the coupons, was notice of payment, not of purchase, so far as the evidence discloses the character at all. Finally, the coupons were cancelled by Starr; all of them being punctured and defaced by mucilage, and about one-half having the word "paid" written across them, in which condition they were received by the appellants. Looking to the testimony, we decline to disturb the finding of the Master and of the Circuit Court.

"The same consideration of the substantial identity between Starr and the waterworks company is of great weight in the determination of the remaining question as to the other 356 coupons. Whatever might be the right of a holder of overdue coupons cut from a bond which is afterwards sold to a *bonâ fide* purchaser, as between such purchaser and the coupon-holder that question does not arise here.

"The case before us is a peculiar one, and must be adjudged on its own facts. As we have already said, Starr was, from a business point of view, substantially the company. Not only was it his object to float the bonds, but to float the company as well. Hence, when he came to sell these bonds, he arranged with his brokers, Beasley & Co., in reference to the July coupons (series No. 2). Under that arrangement, such of the coupons as were attached to, and had been sold with, the bonds sold early in the year 1881, were paid by Beasley & Co., the price was charged to Starr, and the coupons were delivered to him. Such of the coupons as were attached to the bonds not themselves sold until the month of June, 1881, were detached from the bonds before sale, and were not charged to Starr, but were delivered to him as property of the company. The coupons of January, 1881, were all detached from the bonds before they were deposited with Beasley.

"Now, why all this arrangement and management? To use the language of Mr. Beasley: 'It would have been irregular and unbusinesslike to offer for sale or attempt to dispose of the bonds, *not then known in the market*, with overdue coupons attached.' In brief, Starr was engaged in floating these bonds. They were not, as the testimony and the history of the case shews, good bonds. He was very careful to prevent anything from transpiring that would injure their credit. He cut off the coupons that were due and unpaid, so long as the bonds remained in his possession, and put up some money to redeem coupons which fell due on bonds that had been sold, so long as he was still engaged in selling other bonds. It looks very much as if Mr. Starr had dug a pit, and was anxiously keeping the pathway to it in good order. It would be inequitable, in our opinion, to allow him to bring forward these coupons as the basis of any preference over, or of even coequal rights with, those to whom he sold his bonds; and the plaintiff, having taken these coupons when overdue, had no greater rights than he had in this respect. If the courts were to sanction such claims, the commercial securities of the world would be nullified."

In *Hollister* v. *Stewart* (1889), 111 N.Y. 644, Finch, J., in delivering the opinion of the Court, thus refers to two of the earlier cases (p. 663):—

"While it may be that the overdue coupons bought by the contractors before 1875, were purchases and not payments, because the then owner of plaintiff's bonds assented to the arrangement, no such fact is proven as to the purchase of 1875. As to those coupons there is not a word of evidence that those who accepted their money made or intended a sale. (*Union Trust Co.* v. *Monticello and Port Jervis R. Co.*, 63 N.Y. 311.) Those coupons as against the bondholders must be regarded as paid. In *Ketchum* v. *Duncan* 96 U.S. 659, where modifying circumstances were shewn and the transaction was regarded as a sale, there was yet a very formidable dissent."

In *Venner* v. *Farmers' Loan and Trust Co.* (1898), 90 Fed. Repr. 348, Mr. Justice Lurton, with whom were sitting Taft, J., and Severens, Dist. J., in delivering the judgment of the Circuit Court of Appeals, looks to *Ketchum* v. *Duncan* for approval of his statement that it is a "sound principle of law that the holder" (of coupons) "must intend a sale, and consent to a sale, and a mere

ONT.

S. C.

TRUSTS AND GUARANTEE CO. LTD. v. GRAND VALLEY R. CO.

Hodgins, J.A.

transfer of title, when he parts with such preferred coupon, or the transaction will be treated as a cancellation and payment" (p. 359).

He repeats as true doctrine what is said in the case alluded to: "Where a sale with payment is prejudicial to the holder's interest, by continuing the burden of the coupons upon the common security, and lessening its value in reference to the principal of the debt, the intent to sell should be clearly proven" (p. 359). *Wood* v. *Guarantee Trust and Sale Deposit Co.* (*ante*) is also referred to with approval.

The case of *Baker* v. *Meloy* (1902), 95 Md. 1, deals with the cases already cited. The Maryland Court of Appeals treat the *Ketchum* and *Wood* cases as having settled the point that purchase or payment is a question of fact, depending upon the intention of the parties. In discussing the former, it alludes to the reliance placed by the Court on evidence shewing that the circumstances did not defeat the clearly proved intent of the purchasers not to retire and pay the coupons, but to preserve them outstanding.

As I read these cases, and I find no English or Canadian authority inconsistent with them, the real test whether there was a payment in satisfaction or by way of a purchase, lies in the knowledge and intention of both parties to that payment—which knowledge may be inferred from the circumstances; and, in case of doubt, the scale will be turned against the idea of purchase either by the want of proof of mutual intent or by the fact that there is not enough in the security to pay the principal of the debt and the coupons as well, so that a purchase would be prejudicial to the bondholder.

There can be little doubt that when these payments began to be made in 1905 by Pattison, and in 1907 by Dinnick, the dominating idea was to prevent the road or roads from going into bankruptcy, so as to enable them to be amalgamated with a larger scheme which would make the fortunes of those associated with it. In 1902 the idea of beginning the building of a road from Port Dover to Goderich was in contemplation, and the mortgage of that year secured a bond issue of $800,000, which was more than double the amount permitted by statute for the 12 miles then contracted for. It provided that $240,000 of bonds should be issued and re-delivered to the directors for this 12 miles, and the remainder upon proof of actual construction of further mileage. The mort-

gage pledged after-acquired charters and franchises, and provided for further instruments to cover additional properties.

In 1904 Pattison, through his company, the Canadian Homestead Loan and Savings Company, began to be interested in the Grand Valley Railway Company, and in 1906 he was a director, if not president, and made declarations as to construction required for the issue of bonds. He was also president of the Brantford Street Railway Company in 1905 and later. He gives as his reason for furnishing money to the extent of $46,000 the hope that the roads would finally become profitable or that the extensions which would make them profitable could be carried out.

Dinnick began paying for coupons in 1907, after having advanced some $143,000 in like manner. His company purchased the Canadian Homestead Loan and Savings Company, and so acquired its bonds. In short, both personally and financially, Pattison and Dinnick were vitally interested in the success of the scheme eventually carried out in 1907 by the handing over of the whole bond issue of the reorganised road to Verner and Drill. That transaction by these two parties is only consistent with the idea that by paying the coupons they had established a claim on the Grand Valley Railway Company, and not with that of a lien ranking equally with the principal, for the reservation of bonds was only to the extent of the principal of the three bond mortgages, i.e., $125,000, $140,000, and $450,000, these being the bonded indebtedness of the Brantford Street Railway Company, the Thames Valley road, and the Grand Valley Railway Company. When bonds for the $715,000 were to be issued to retire these existing debts, any unpaid interest coupons would consequently have to be met from the proceeds of the bonds issued to Verner and Drill or to these two claimants.

To sum the matter up, there appears to be an absence of satisfactory proof of the independent origin of the transactions which are set up as purchases. None of the *indiciæ* of candour and publicity which are relied on in the cases I have cited are evident here. The payments are made casually and by those having large controlling positions in the companies affected. The trustees of the mortgages are either employed to make the payments or to receive them and transfer the coupons, without any express notice to the bondholders. In the end it is found that those who claim to be

ONT.

S. C.

TRUSTS AND GUARANTEE CO. LTD. v. GRAND VALLEY R. CO.

Hodgins, J.A.

coupon-holders had themselves engaged agents to secure an exchange of bonds of the 1902 issue for other bonds, which issue was to be based, according to their own resolution, on previous provision for the amount outstanding having been made. That provision only reserved bonds for the net amount of principal, and took no account of these large sums now said to be outstanding for interest.

It is fair to observe that, if the proper conclusion is that the transactions amounted to a transfer of the coupons so as to preserve only a right of action against the Grand Valley Railway Company, but without the right to compete with the bonds in ranking on the security, the action of Dinnick and Pattison would not be deserving of criticism. It is the setting up of the lien that necessitates the strict proof of knowledge or acquiescence in those bondholders who presented their coupons and received their money under the impression that they were being satisfied.

Having regard to the importance attached by the Courts in all these transactions to candour, publicity, and fair dealing, I cannot satisfy myself that the view entertained by the learned Chief Justice is erroneous, and I think the appeals of the coupon-holders must be dismissed with costs.

It is, in the circumstances, not necessary to consider the question of the effect of the Statute of Limitations.

If in the class of coupon-holders represented there are any who do not claim either through Pattison or Dinnick, different considerations may apply, but none were mentioned on the appeal, and no evidence was given shewing that any other persons held coupons.

It was, however, pointed out on the argument that the bondholders who claimed a return of their 1902 bonds and the cancellation of the agreement for exchange entered into by them, were not, in this proceeding, entitled to relief *en masse*. The misrepresentation proved at the trial was sought to be made applicable to the whole class there represented. But this cannot be done. Each bondholder who signed the agreement and exchanged his bonds must get relief because he was personally misled, and he cannot take advantage of the wrong done to another. The case must therefore go to the Master to allow the individual bondholders to prove their claims for rescission, and the judgment should specially direct that they may do so, and that the Master must in

ONT.

S. C.

TRUSTS AND GUARANTEE CO. LTD. v. GRAND VALLEY R. CO.

Hodgins, J.A.

each case deal with the claim as if an action for rescission and reinstatement had been brought by each individual bondholder.

In addition to this, the matter is further complicated by the fact that the fund is derived from the sale of two railways, each with a different bond issue upon it, and no division has been made of the sum realised from both undertakings combined.

The point raised by Mr. Ballantyne, to which I alluded at the outset, namely, that, in case of the disallowance of the coupon claims, the bondholders of 1907 come next to the Brantford Street Railway bonds on that undertaking, and in priority to the 1902 bondholders, was not fully argued. If that contention were to prevail, perhaps the holders of 1907 exchanged bonds would not desire to proceed further with their claim for reinstatement under the 1902 mortgage, if that mortgage were confined to the Brantford and Galt section. The amount realised by the sale from each railway may become important if the 1902 bondholders are restricted to the section outside Brantford. These two matters may and should be considered by the parties interested, and if any of them desire it the case may be mentioned again at the opening of the sittings in January, 1919, as to the priority of the 1902 mortgage and the necessity for the division of the amount in Court, when the costs can also be dealt with.

The Corporation of the City of Brantford should be added as a party formally, and the agreement entered into between counsel for the 1902 bondholders and the exchange bondholders may be confirmed, if desired, so far as it is in conformity with the views expressed herein or those developed later if the case is mentioned again.

January 27, 1919. The Court heard counsel upon the matters referred to at the end of the above judgment.

Ballantyne, for the bondholders of 1907.

McMaster and *Fraser*, for the bondholders of 1907 who exchanged bonds.

Brewster, K.C., for the bondholders of 1902.

Ludwig, K.C., and *Roaf*, for coupon-holders.

Henderson, K.C., for the Corporation of the City of Brantford.

February 10. The judgment of the Court was read by HODGINS, J.A.:—Since the delivery of the former judgment in

ONT.

S. C.

TRUSTS AND GUARANTEE CO. LTD. v. GRAND VALLEY R. CO.

Hodgins, J.A.

this case, the matter has been spoken to on the question of the effect of the mortgage of the 30th May, 1902, as regards the franchise within the City of Brantford.

Power to acquire the Brantford Street Railway or the franchise under which it operated was not in fact possessed by the Grand Valley Railway Company until 1906, but reliance was placed upon the mortgage of the 30th May, 1902, as being wide enough to include property afterwards acquired, although there was no power to acquire it at the time the mortgage was given.

I think the words of the mortgage are comprehensive enough, and the principle to be applied is covered by the following statement of Jessel, M.R., in *Collyer* v. *Isaacs* (1881), 19 Ch.D. 342, at p. 351:—

"A man cannot in equity, any more than at law, assign what has no existence. A man can contract to assign property which is to come into existence in the future, and when it has come into existence, equity, treating as done that which ought to be done, fastens upon that property, and the contract to assign thus becomes a complete assignment."

The mortgage in question recites the passing of by-law No. 12 by the Grand Valley Railway Company authorising the issue of bonds which are by sec. 8 to be secured by a mortgage, which mortgage-deed shall create such mortgages, charges, and incumbrances upon the whole of such property, assets, rents, and revenues of the company, present or future or both, as the directors shall see fit to have described in such mortgage-deed. The mortgage then goes on to pledge "the railway owned by the said company constructed or which may hereafter be constructed pursuant to the powers granted by the hereinbefore in part recited statutes of Canada . . . and also all and singular the right, title, and interest of the said railway company, of every kind and nature, in and to its lines of railway in and between the places mentioned in said statutes, including as well that portion thereof which may be hereafter constructed as that which is now constructed, and all charters, franchises, privileges, and immunities now owned or possessed or acquired by it or to be hereafter acquired by it from any town or municipality or county, or from any source whatever; . . . and all property whatsoever which may hereafter be acquired by it; and it is intended that the specific description of

ONT.

S. C.

TRUSTS AND GUARANTEE CO. LTD. v. GRAND VALLEY R. CO.

Hodgins, J.A.

property and rights above written shall in no way be taken as restrictive of the general description herein contained."

The mortgage contained a covenant as follows:—

"The company and the trustee severally agree, upon reasonable request, to execute further instruments and to do such further acts as may be necessary or proper to carry out more effectually the purpose of this mortgage, and the company agrees to execute, acknowledge, and deliver to the trustee from time to time all such deeds, conveyances, and instruments as may be necessary or proper to place under the lien of this mortgage all additional properties, improvements, grants, rights, privileges, franchises, immunities, and exemptions which the company shall hereafter acquire."

These provisions, it seems to me, are wide enough to cover the right of franchise of the Brantford Street Railway Company when that company passed into the control of the Grand Valley Railway Company, and it would be proper to hold that the mortgage in question ranks now in priority to that of 1907 upon the Brantford Street Railway as well as that running from Brantford to Galt.

Lord Westbury in *Holroyd* v. *Marshall* (1862), 10 H.L.C. 191, at 211, 11 E.R. 999 said:—

"If a vendor or mortgagor agrees to sell or mortgage property, real or personal, of which he is not possessed at the time, and he receives the consideration for the contract, and afterwards becomes possessed of property answering the description in the contract, there is no doubt that a Court of Equity would compel him to perform the contract, and that the contract would, in equity, transfer the beneficial interest to the mortgagee or purchaser immediately on the property being acquired."

Mr. Henderson brought up a point not mentioned on the last argument, that is, the rental claimed by Smith for a piece of property not taken over by the City of Brantford when it acquired the railway. The rental for this piece is charged upon the right of way; and, as the statute (4 Geo. V. ch. 63) sets out distinctly the various incumbrances subject to which the City of Brantford was buying the railway, I think this rental charged upon the right of way should be paid or discharged out of the purchase-money, and that this should be referred to the Master to be dealt with in his distribution of the fund in Court.

ONT.

S. C.

TRUSTS AND GUARANTEE CO. LTD. v. GRAND VALLEY R. CO.

Hodgins, J.A.

Upon the question of the costs of the coupon-holders, it was suggested that the learned Chief Justice of the King's Bench had given the parties whom he had directed to represent the classes costs out of the fund, and that they should not on appeal be ordered to pay costs of the other parties in view of the importance of the questions raised and the amount involved.

On the whole, probably, justice will be done by directing that upon the question of the priority of the coupon-holders they should not be required to pay the costs of the other parties. Those costs might fairly be taxed and paid out of the fund, as the whole dispute has arisen owing to the dealing of the company itself, which has produced a good deal of confusion among the respective classes of bondholders. The order for costs therefore out of the fund will cover the costs of all parties other than the two representative coupon-holders, and will include both previous arguments and the one on the 27th January, 1919. The appeal of the coupon-holders will be dismissed without costs. *Judgment below varied.*

MAN.

C. A.

BRUNELLE v. BENARD.

Manitoba Court of Appeal, Perdue, C.J.M., Cameron, Haggart, Fullerton and Dennistoun, JJ.A. April 28, 1919.

BILLS AND NOTES (§ III B—60)—INDORSERS REAL PURCHASERS OF PROPERTY FOR WHICH NOTE GIVEN—MAKER AN ACCOMMODATION MAKER ONLY—LACK OF NOTICE OF DISHONOUR—INDORSERS NOT RELEASED FROM LIABILITY.

When the indorsers of promissory notes are the real purchasers of the property for the purchase price of which the notes are given, and are the real makers of the notes, and the ostensible maker is an accommodation maker only, such indorsers are not released from liability through lack of notice of dishonour.

Statement.

APPEAL by defendants from the judgment of Prendergast, J., in an action on two promissory notes. Affirmed.

A. E. Hoskin, K.C., and *E. R. Siddall*, for appellants; *W. L. McLaws* and *J. T. Beaubien*, for respondents.

Cameron, J.A.
Haggart, J.A.
Perdue, C.J.M.
Fullerton, J.A.

PERDUE, C.J.M., CAMERON and HAGGART, JJ.A., concurred.

FULLERTON, J.A.:—The trial judge has found that the defendant O. Benard signed the promissory notes sued on for the accommodation of his co-defendants Aimé Benard and Auguste Martineau.

I think that the finding is fully supported by the evidence, and it follows that under s. 108 (c) of the Bills of Exchange Act, notice of dishonour is dispensed with.

I would dismiss the appeal with costs.

DENNISTOUN, J.A.:—Judgment has been entered against the defendants in this case for $2,754 and costs upon two promissory notes each for $1,000 made by the defendant O. Benard and endorsed by the defendants Aimé Benard and A. Martineau. These notes were payable at the Bank of Hamilton main office, Winnipeg. The defendants Benard have had no account at that bank at any time. When the first of the notes fell due an attempt was made to protest it for non-payment, but by reason of the illegibility of the signature, notice of protest did not reach the endorsers.

It was argued on behalf of the plaintiffs that this note was duly protested but it is not necessary to decide the point, in view of the findings of the trial judge, Prendergast, J., with which I agree.

The circumstances leading up to the making of these notes, which were part of a series of seven, each for $1,000, have to do with the sale of a hotel property of which the plaintiffs were vendors. The agreement to purchase was signed by the defendant Martineau. The defendant Aimé Benard refused to sign this agreement or to appear on the notes as maker, giving as his reason that he did not wish his name to appear in any transactions having to do with a liquor license in Saskatchewan. He and Martineau endorsed the seven notes. Martineau executed a mortgage on the premises to certain brewers and wine merchants, and Aimé Benard guaranteed payment of the mortgage.

Although Aimé Benard refused to appear as purchaser of the property or maker of the notes, the trial judge finds as a fact that he and Martineau acting for him, were the real purchasers of the property and the real makers of the notes, and that the ostensible maker, O. Benard, was an accommodation maker only. A. Benard and Martineau paid the first five notes of $1,000 each as they came due, and A. Benard promised to pay the first of the notes sued on after dishonour, but subsequently withdrew from that position when he discovered that notice of dishonour had not been given.

MAN.

C. A.

BRUNELLE v. BENARD.

Dennistoun, J.A.

The trial judge had the witnesses before him and was able to observe their demeanour and judge of their veracity in a way that no appellate tribunal can do, and the greatest weight should be attached to his findings of fact for that reason.

Moreover, he draws inferences from the facts so found, with which I agree, and arrive at the same conclusion with regard to the real position and obligations of the defendants. His finding that Aimé Benard and A. Martineau were the makers of these notes, and that O. Benard was an accommodation party is concurred in. *Dominion Trust* v. *New York Life*, 44 D.L.R. 12, [1919] A.C. 254; *Montgomerie & Co.* v. *Wallace-James*, [1904] A.C. 73.

That fact being established, are these makers released from liability through lack of notice of dishonour? I do not think so. S. 108 Bills of Exchange Act, R.S.C., reads as follows:—

> Notice of dishonour is dispensed with as regards the endorser, where,—
> (c) the bill was accepted or made for his accommodation.

These notes were made by O. Benard for the accommodation of A. Benard and Martineau, the endorsers. It was their duty to have had funds ready at the Bank of Hamilton to take up these notes on presentation. The fault was their own that the notes were not paid on the due date, and notice of dishonour was unnecessary. *Bickerdike* v. *Bollman* (1786), 1 T.R. 405, 99 E.R. 1164; *Carter* v. *Flower* (1847), 16 M. & W. 743, 153 E.R. 1390; *Wirth* v. *Austin* (1875), L.R. 10 C.P. 689; Corpus Juris—Bills & Notes, p. 285, s. 447.

I would affirm the judgment appealed from and dismiss the appeal. *Appeal dismissed.*

CAN.

S. C.

JONES v. TOWNSHIP OF TUCKERSMITH.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Idington, Anglin and Brodeur, JJ. May 2, 1917.

HIGHWAYS (§ A—246)—MUNICIPAL BY-LAW AUTHORISING CLOSING AND SALE OF PART OF STREET—INVALIDITY.

The judgment of the Appellate Division (1915), 23 D.L.R. 569, 33 O.L.R. 634, was reversed, and the judgment of Latchford, J., declaring the by-law in question invalid *in toto*, restored.

Statement.

AN appeal by Jones and others, the plaintiffs in an action against the Corporation of the Township of Tuckersmith and one Kruse, and the applicants in an application for an order

quashing a by-law of the township, from the judgment of a Divisional Court of the Appellate Division (1915), 23 D.L.R. 569, 33 O.L.R. 634, allowing in part an appeal by the township corporation from the judgment of Latchford, J., which was in favour of the plaintiffs and applicants both in the action and upon the motion, and holding that sec. 2 of the by-law should be quashed, and the conveyance to the defendant Kruse be set aside and the registration thereof be vacated, and that the action and motion, so far as sec. 1 of the by-law was concerned, should be dismissed.

The appeal to the Supreme Court of Canada was originally only from the order made upon the motion to quash; but the Divisional Court, in February, 1917 (11 O.W.N. 367), made an order extending the time for appealing from the judgment in the action; and the judgment as well as the order was then included in the appeal to the Supreme Court of Canada. The defendants filed a factum in which they contended for the reversal of the part of the judgment Latchford, J. (left untouched by the Appellate Division), which set aside the sale and conveyance to Kruse.

William Proudfoot, K.C., for the appellants.

R. S. Robertson and *R. S. Hays*, for the respondents.

March 12, 1917. The case was mentioned to the Court again, after the extension of time for appealing in the action had been granted by the Ontario Court.

THE COURT allowed the appeal in the action to be inscribed for hearing, and reserved judgment upon both appeals.

The judgement of Latchford, J. is as follows:—

LATCHFORD, J.:—This action came before me for trial at Stratford on September 30, in combination with a motion to quash a by-law of the defendant municipality, renewed pursuant to leave granted by the judgment of the Second Divisional Court of the Appellate Division, 6 O.W.N. 379, setting aside the order quashing the same by-law made by Middleton, J., 25 O.W.R. 680, 5 O.W.N. 759. The evidence then given was recently supplemented at Toronto; and all the evidence was, by consent of the parties, regarded as applying to the motion as well as to the action.

Little was added at the trial to the facts disclosed in the material before my brother Middleton when he quashed the by-law. I accept unreservedly the findings of fact stated in his judgment.

It seems to me beyond doubt that the by-law of 1875 had reference to the plan of 1857, which was the *original* plan, and not to the plan of 1873. It is to Mill street and Water street, "as shewn on the original plan," that the by-law refers. Mill street, according to that plan, did not extend north of Queen street, and the by-law of 1875 cannot be relied on as an acceptance of the extension of Mill street shewn on the plan of 1873 and now in question. There

CAN.

S. C.

JONES v. TOWNSHIP OF TUCKER-SMITH.

was no evidence before me establishing that the dedication of Mill street north of Queen street was ever adopted by the municipality, or that it was ever in actual use as a public street or highway.

It is urged, however, that Mill street north of Queen street became a public highway by s. 44 of the Surveys Act, 1 Geo. V. c. 42, R.S.O. 1914, c. 166, which, so far as material, is as follows: "Subject to the provisions of *the Registry Act*, as to the amendment or alteration of plans, all allowances for . . . streets . . . surveyed . . . in a . . . township . . . which have been or may be surveyed and laid out by companies or individuals and laid down on the plans thereof, and upon which lots fronting on or adjoining such allowances for . . . streets . . . have been or may be hereafter sold to purchasers, shall be public . . . streets. . . ."

The application of this section to townships is first found in 60 Vict. c. 27, s. 20; but the enactment is plainly retroactive, and has been so held: *McGregor* v. *Village of Watford* (1906), 13 O.L.R. 10. *Gooderham* v. *City of Toronto* (1895), 25 Can. S.C.R. 246, is not authority to the contrary. The statute as it now exists differs materially from the provisions then under consideration. See the judgment of Gwynne, J., at p. 259.

The allowance for Mill St. north of Queen St. was "surveyed" and "laid out" on the plan of 1873, and "lots fronting on" and "adjoining" such street "were sold to purchasers."

The plan of 1873 was filed by L. O. Van Egmond. It did not include his land east of Mill St. At his death in 1904, the land passed by will to his executors and trustees, the survivor of whom, his daughter, Margaret Charlesworth, conveyed it in 1908 to her son, W. G. Charlesworth. The description in this conveyance covers an irregular parcel of 68 acres, "except certain village lots on the east side of Centre St. and the west side of Mill St. heretofore sold and conveyed off the said lands."

Van Egmond had at various times sold and conveyed to purchasers, including John Sproat, from whom the plaintiff derives title, lots abutting and fronting on Mill St. For instance, in 1899, he conveyed lots 31, 32, and 33 on the west side of Mill St. to one Collie. Lot 31 had also a front on Victoria St., but the other lots could only be approached from Mill St. or across lot 31. Sproat owned a block of four lots, Nos. 37 to 40. The plaintiff purchased lot 40 on the west side of Mill St. prior to the passing of the by-law now attacked, though, owing to delays accounted for satisfactorily, the conveyance was not completed until after the by-law was passed. Lot 40 fronts and abuts on Mill St. as shewn on the plan of 1873, and cannot be reached except from that part of Mill St. closed by the by-law.

In 1911, W. G. Charlesworth conveyed to James R. Berry the lands purchased from his mother. In this deed the exception is repeated of the lots on the east side of Centre St. and the west side of Mill St. The grantor in his affidavit filed in support of the motion to quash deposes that he informed Berry that Mill St. might be opened up at any time. Berry subsequently conveyed to the defendant Kruse part of the lands acquired from Charlesworth. It is not disputed that the north end of Mill St., in question in these proceedings, was always fenced in and used as part of the Van Egmond farm, now owned by the defendant Kruse.

At the trial an effort was made to establish that Kruse and those—other than the defendant municipality—through whom he derived title had, by

their continuous occupation of the Van Egmond farm, acquired a possessory title to the unopened end of Mill St. McCaa who in April, 1893, bought lot 29 on Mill St. west, from Van Egmond, deposed, subject to objection, that he signed at the same time an agreement in writing that he was to have no rights whatever in Mill St. The writing was not produced, nor was its absence properly accounted for. But, on other grounds also, I consider that the evidence ought to be rejected. It is opposed to the terms of the deed, although no direct testimony in contradiction is available. Van Egmond being dead, I decline to credit the uncorroborated statement of McCaa. He impressed me as one giving evidence that was the result of suggestion rather than memory. Moreover, Charlesworth stated that his grandfather's idea, as he understood it, was that Mill St. was to be opened up. This is consistent with the facts mentioned, that Van Egmond had sold many lots fronting on Mill St., and that such lots were expressly excepted from the conveyance to Charlesworth, and the conveyance from him to Berry, under whom Kruse claims the farm and the street as part of the farm. The Charlesworths never claimed title to Mill St.

Van Egmond, subsequent to the filing of the plan of 1873, could not assert, as against any purchaser to whom he sold lots on Mill St., that he had not dedicated Mill St. to public use, and that therefore, so long as the plan remained unamended in accordance with the provisions of the Registry Act, Mill St., throughout the extent shewn on the plan, was, as against him, to be considered a public street which the municipality might at any time accept formally by by-law, or quite as effectively by expending public moneys upon it: Street, J., in *Sklitzsky* v. *Cranston* (1892), 22 O.R. 590, at p. 594. In reference to the decision in that case, it is to be remembered that sec. 62 of the Surveys Act, R.S.O. 1887, c. 152, then under consideration, did not apply to plans of parts of townships.

I am of opinion that under s. 44 of the Surveys Act the part of Mill St. in question, as shewn on the plan of 1873, though not opened up or accepted by the municipality, became a public street.

The next question is, was the freehold in that part of the street vested in the municipality?

Mill St. north of Queen St. clearly does not fall within the definition of a public highway stated in s. 599 of the Municipal Act of 1903. It is not a road allowance made by a Crown surveyor. It was not laid out by virtue of any statute. No public money had been expended for opening it. No statute labour had been performed upon it, and it had not been altered according to law. It is as to such highways only that the freehold is vested in the Crown by s. 599. S. 601 is much wider in its scope, and vests in the municipality every public street and highway, including streets which have become public streets under s. 44 of the Surveys Act; subject, however, to any rights reserved by the person who laid out such street or highway.

In *Roche* v. *Ryan* (1892), 22 O.R. 107, Street, J., referring, at p. 109, to corresponding sections of the Municipal Act of the time—525 and 550 of R.S.O. 1887, c. 184—says in regard to the conflict of views entertained of the meaning and effect of these sections: "I prefer that which interprets s. 527 as relating only to roads and streets laid out by private individuals, and treat it as vesting not the surface merely but also the soil and freehold in the municipality." He concluded, however, that until the municipality accepted the dedication offered by a private owner, as there was an intermediate stage in which the

CAN.

S. C.

JONES v. TOWNSHIP OF TUCKER-SMITH.

dedication might be revoked and the plan amended with the consent of purchasers of lots fronting on the street, the property in the streets remained in the individual. This opinion was rejected on appeal. Galt, C.J., at p. 115, says: "I consider that when lots have been sold abutting on a street, the property in that street is absolutely vested in the corporation, unless a change in the plan should be made with the consent of the persons to whom the various lots have been sold."

The right so held to be vested could not pass to the original property-owner when the plan was amended. It was, I think, to obviate this anomaly that the Surveys Act was amended in 1900 by 63 Vict. c. 17, s. 22, which added to s. 39 of R.S.O. 1897, c. 181, the provisions now found in sub-s. 6 of s. 44 of the Surveys Act.

Now, a street which became a public highway under sub-s. 1 of s. 44 because laid down on a plan, but which the corporation has not assumed, is, after being closed *by alteration of the plan* under the provisions of the Registry or other Acts, declared by sub-s. 6 to belong to the owners of the land abutting thereon.

There has been no alteration of the plan of 1873, and sub-s. 6 of s. 44 has no application. Upon the authority of *Roche* v. *Ryan, supra*, I am bound to hold that, by s. 601 of the Municipal Act, 1903, the property in Mill St., north of Queen, was, at the time of the passing of the impeached by-law, vested in the defendant township, which therefore was possessed of a "qualified property, to be held and exercised for the benefit of the whole body of a corporation:" *Town of Sarnia* v. *Great Western R. Co.* (1861), 21 U.C.R. 59, at p. 62.

By s. 637 of the Municipal Act, 1903, the council of any township may pass by-laws for selling streets wholly within the jurisdiction of the council.

S. 632 requires that no by-law be passed for selling any public street until notices of the intended by-law have been posted up in six of the most public places in the immediate neighbourhood of such street, and published weekly for 4 successive weeks in some newspaper published in the municipality, or, if there is no such newspaper, then in a newspaper published in some neighbouring municipality, nor until the council has heard, in person or by counsel or solicitor, any one whose land might be prejudicially affected thereby, and who petitions to be so heard.

It is argued that under s. 640, sub-s. 11, the plaintiff and other owners of lands on the west side of Mill St. should have been given the option to purchase the street, and that only upon their refusal to purchase could the street be sold.

Sub-s. 11 provides that townships and other councils have power to sell the original road allowance to the persons next adjoining whose lands the same is situated, where a public road, for the site or line of which compensation has been paid, has been opened in lieu of the original road allowance, and to sell, "in like manner, to the owners of any adjoining land, any road legally stopped up or altered by the council." In case such persons refuse to become the purchasers at such price as the council thinks reasonable, then to sell to any other person for the same or a greater price.

The words "the persons next adjoining whose lands" and "owners" were considered by Street, J., to convey the same idea—that the persons to whom the adjoining lands belong should have the first right to acquire and to add to such lands the accretion formed by the closing up of the highway: *Broun* v. *Bushey* (1894), 25 O.R. 612, at p. 616.

But sub-s. 11 seems not to apply except in cases where a new road or street has been opened in lieu of the old: *Cameron* v. *Wait* (1878), 3 A.R. (Ont.) 175, at p. 180.

The next question is, did the municipality exercise conformably to s. 632 the power to sell conferred by s. 637?

On a motion to quash a by-law affecting a public road, the court, until the contrary is shewn, will presume that the council acted regularly: Robinson, C.J., in *Fisher* v. *Municipal Council of Vaughan* (1853), 10 U.C.R. 492.

The notices were given as prescribed by the statute. They set forth that at a meeting to be held on a date stated, it was the intention of the council to consider, and, if thought advisable, to pass, a by-law closing up and disposing of that portion of Mill St. lying north of the intersection of Queen St.

In 1906, an application had been made for the opening out of Mill St. for its full length, but no action was taken by the council.

At a meeting of the council on February 17, 1912, a largely signed petition for the opening of Mill St. had been supported by the appearance before the council of a number of the persons interested. A petition against the opening of Mill St. prepared by R. S. Hays, solicitor, and signed by James Berry and others, is in evidence. It is dated January 1, 1912, and was probably presented at the meeting held on that date.

On motion of William Berry, a brother of James Berry, who had purchased the lands east of Mill St. from Charlesworth in February, 1911, the council decided to take no action.

Then came, on November 16, 1912, Kruse's application to purchase the street for use as a brickyard.

The name of William Berry appears as seconder of the motion to grant Kruse's request and to employ R. S. Hays as solicitor for the township. Hays was undoubtedly known to be acting at the time for Kruse.

The council heard, at the meeting of December 23, several of the persons prejudicially affected by the closing and sale of the street. Hays was present at this meeting in his dual capacity of solicitor for Kruse and solicitor for the township, and advocated the sale. The plaintiff Robinson understood that it had been previously arranged that after the street was closed James Berry was to get one-half of it and Kruse the other. Van Egmond asked Berry and Kruse at the council meeting if this was not so, and they did not deny that it was.

The only motion adopted was that "no action be taken at this meeting until further consideration of the question be given." But 4 of the 5 members constituting the council were present; and one of the 4, John F. McKay, says that their intention—not indeed very happily expressed in the motion—was that action should be deferred until another meeting of the council should be held, attended by all the members.

Those who desired the street opened and opposed the closing and sale of it were not present at the meeting on January 13. As it was the first meeting of the new council, the principal business expected to be transacted was organisation for the year. The property-owners, other than Kruse and Berry, had no intimation that the question would be taken up at the first meeting. They assumed that they would receive notice of the meeting at which the matter was to be reconsidered. The personnel of the council had slightly changed. There was present and acting on January 13, a new member of the council,

CAN.

S. C.

JONES v. TOWNSHIP OF TUCKER-SMITH.

who had not heard the grounds of opposition to the sale. Kruse and Berry and their solicitor—who was still acting for the township—were however there, and the by-law previously prepared by Hays was pressed through three readings and passed.

It is not, I think, too much to expect that the utmost fairness should characterise a proceeding depriving ratepayers of a right as important as their right of access to property from a street abutting on which they have bought lots. I find that such good faith was not manifested by the council. Their duty was to protect the interest of the ratepayers as a whole against the interest of particular individuals like Kruse and Berry. They should not have employed as their solicitor the solicitor whom they knew to be acting for the two persons who alone desired to purchase the street. Others might object to the opening of the street, but Berry and Kruse were the only persons who desired it closed.

A municipal council is a continuing body under s. 327 of the Municipal Act, notwithstanding any change made by an intervening election, and the council of 1913 was competent to deal with the question of closing and selling the street. The new member, Cameron, could, however, exercise no independent judgment regarding the matter; and, though he seconded the motion to pass the by-law, he did so merely at the instance of another member, McKay, who had throughout been seconding every effort of Berry and Kruse. The latter was known to the reeve and to councillor McKay to be entering into competition with the plaintiff Sproat in manufacturing brick and tile; and McKay cannot but have known that the sale of Mill St., if made as was intended, to Kruse, would, perhaps not immediately, but in the course of time, militate greatly against Sproat, and prejudice at the same time the many other ratepayers who desired the street opened.

The closing of the street is, I think, a violation of s. 473 of the Municipal Act of 1913. Mill St. provided the only means of access to such lots as that owned, at the time the by-law was passed, by such persons as the plaintiff Jones. I do not understand the words "means of access" to express the idea that the means of access must actually exist at the time. It seems to me within the scope of the prohibition that the only means of access which may be afforded in the future by a statutory highway existing, though not opened up, shall not, without compensation, be taken from persons whose lots front on such highway. The only cases cited to the contrary have reference to farm lots which have more than one road affording access.

While I do not desire to impute any want of honesty to Hays, I cannot help observing that he allowed himself to occupy an invidious position. He was acting for Kruse and James Berry, certainly for Kruse, with the knowledge that Kruse intended to divide the street with Berry, as in fact was subsequently done. His interest was to obtain the street for his private client or clients. His duty as solicitor for the council was to protect the interests of the ratepayers generally. He undoubtedly had great influence with the members of the council, several of whom knew that he was anxious to secure the street for Kruse and Berry, and that influence was exerted for the benefit, not of the ratepayers, but of Kruse and Berry. It may be said there is no positive evidence of this. My answer is, that it is plainly to be inferred from facts as to which there is no dispute. A street laid down for forty years which many purchasers of lots fronting on it desired opened, but which only Kruse and

Berry were interested in having closed, was closed at the instance of these two men and their solicitor, who was, as stated, at the same time acting as solicitor for the council.

No transaction carried out in this way should, in my opinion, be permitted to stand.

There will, therefore, be upon the motion judgment quashing the by-law with costs, and in the action judgment in favour of the plaintiffs declaring the conveyances from the defendant corporation to the defendant James Berry, and from the latter to his co-defendant Kruse, null and void, and directing that the registration thereof be vacated. Any buildings or obstructions placed by any of the defendants upon Mill St. north of Queen are to be removed forthwith.

The plaintiffs are to have their costs of the action and motion.

Idington, J.

IDINGTON, J.:—The appellants brought an action to quash a by-law of the respondent township and obtain other relief. The by-law by its first clause pretended to close part of an alleged street called Mill street in an unincorporated village within the township; and by its second clause to authorise the execution of a deed of conveyance of the said portion of Mill street to the highest bidder therefor.

After instituting the proceedings by way of action, the appellants proceeded by way of motion to quash the by-law, and upon that motion Mr. Justice Middleton made an order quashing the by-law: *Re Jones and Township of Tuckersmith* (1914), 5 O.W.N. 759, 25 O.W.R. 680.

Upon appeal that order was reversed, but leave was given to renew the motion before the presiding Judge at the trial of the action: *Re Jones and Township of Tuckersmith* (1914), 6 O.W.N. 379. In that order of reversal there was provision made, amongst other things, that the said presiding Judge was not to be bound by the judgment of Mr. Justice Middleton, and that the respondent was not to be permitted on the trial of the action to raise as a defence therein the question of the right of the appellants to proceed with the action without setting aside the by-law.

On the trial of the action the motion was renewed, and two separate judgments, bearing the same date, were entered by Mr. Justice Latchford. The judgment upon the motion, reciting however the evidence in the action as well as affidavits on the motion, quashed the by-law. That in the action, again reciting both classes of evidence, merely set aside the conveyance made pursuant to the by-law, and declared other relief incidental thereto.

From each judgment the respondent appealed to a Divisional Court, and both appeals were heard together, but separate formal

CAN.

S. C.

JONES v. TOWNSHIP OF TUCKER-SMITH.

Idington, J.

judgments were entered bearing the same date. That in regard to the motion to quash set Mr. Justice Latchford's judgment entirely aside, quashed clause 2 of the by-law, and dismissed the motion to quash clause 1 of the by-law. That in regard to the trial judgment in the action varied that judgment; and para. 2 of this variating judgment, as if it had been determined to establish beyond peradventure clause 1 of the by-law, provided as follows:—

"(2) And this Court doth further order and adjudge that in so far as the plaintiffs sought to impeach the validity of section 1 of the by-law of the defendant corporation in the pleadings mentioned the claim of the plaintiffs be and the same is hereby dismissed."

The appellants, without leave got, launched an appeal here, as if from both judgments, and then applied to the Appellate Division for leave to appeal, but only got a leave limited to the judgment on the motion to quash.

After counsel for the appellants had argued very fully their appeal, without making any observations on the effect of this clause in the judgment in the action, and closed his argument, counsel for the respondents began theirs by contending that the effect of all that had transpired was that the validity of clause 1 of the by-law must be held as between these parties *res judicata*.

When the appellants' counsel replied, he asked, if we thought the point well-taken, to have the matter stand till he had a chance to apply again to the Appellate Division to get the leave expanded to cover that judgment also, so far as it touched the validity of clause 1 of the by-law.

I think this point taken by counsel for the respondents, both in their factum and in argument, is well-founded, and, unless relief is given by further leave to appeal, is fatal to this appeal.

I come to that conclusion most reluctantly, for the appeal seems to me, to say the least, very arguable if we have regard either to the motive for the by-law, or its effect relative to the respective means of access of the respective appellants to their respective lots fronting upon that part of the street attempted to be closed thereby, or to the jurisdiction of a council over a street merely laid down upon a plan, and which it has refused to open or otherwise assume any responsibility for, in law, and which has not been accepted by it in any way.

The second of these grounds is, under all the peculiar circumstances in question, perhaps of minor importance, because the respondent township corporation, if the by-law is *intra vires*, may be made to compensate each party concerned in such a substantial way as to cover the appellants' injuries, and thus teach municipalities doing the like not to meddle with other people's property or rights unless and until the council has at least, in a due and orderly manner, asserted its jurisdiction over that with which it meddles. Had it taken time to do so, ownership by the appellant Jones of the single lot for which he got a conveyance would by that time have formed a barrier to the proceedings questioned herein.

We had an illustration presented to us in the case of *District of West Vancouver* v. *Ramsay*, (1916), 30 D.L.R. 602, 53 Can. S.C.R. 459, argued this term, of how such things work out.

In case, however, it should turn out, upon the appellants resorting to the provisions of the Municipal Act for compensation, and applying to the Courts to enforce that measure of relief, that the respondent should set up that this by-law in clause 1 was *ultra vires* the municipality, and this Court ultimately maintain that objection, would there not be a lamentable failure of justice?

In the *West Vancouver* case this is the very contention set up. In holding, as I did, that the power there exercised was *intra vires* the municipality, it was not necessary to consider the point of *res judicata* discussed in argument therein or to consider the authorities cited. The point raised there, it was argued, was met by the decision of the Judicial Committee of the Privy Council in the case of *Toronto R.W. Co.* v. *Toronto Corporation*, [1904] A.C. 809. The case was not relied upon herein, but it illustrates the legal situation that results or might result herein. It seems, though the converse case, to tend to maintain the position that this judgment of the Appellate Division is *res judicata*, for clearly the Court had jurisdiction to decide this case, whereas in that case the Judicial Committee decided that the Courts below had not jurisdiction to determine the point raised there.

I think the late Mr. Justice Street in the case of *Roche* v. *Ryan* (1892), 22 O.R. 107, was right, and Mr. Justice Middleton in this very case was right, in the construction put upon the statute, and that the decision of this Court in *Gooderham* v. *City of Toronto* (1895), 25 Can. S.C.R. 246, does not require another construction

CAN.
S. C.
JONES v. TOWNSHIP OF TUCKER-SMITH.
Idington, J.

of the statute as it stood when respectively dealt with by either of these learned Judges who passed upon the question raised.

To begin with, the jurisdiction of the council to close a road or street depends upon the following provision of the Municipal Act, 1903, 3 Edw. VII. ch. 19:—

"637. The council of every county, township, city, town and village may pass by-laws—

"1. For opening, making, preserving, improving, repairing, widening, altering, diverting, leasing, selling, or stopping up roads, streets, squares, alleys, lanes, bridges, or other public communications wholly within the jurisdiction of the council."

I need not elaborate now, but state and refer those conversant with the Municipal Act to its provisions, from which it will appear that the words "within the jurisdiction of the council" refer not to any merely territorial jurisdiction, but to the actual jurisdiction conferred by the Act and what has been done pursuant thereto. Every road is, territorially speaking, within the county, but not within its jurisdiction, in the language I quote. Hence we must look to what has by the course of events fallen within its jurisdiction over any road.

Even assuming for a moment, which I do not, that the "public road," etc., referred to in sec. 601 of the Municipal Act, 1903, vested in the municipality, it certainly cannot be said to have jurisdiction over it as a street simply by an Act of the Legislature vesting the legal estate of the soil in it, when, as the enactment presumes, a road has been duly constituted a public highway, unless and until it has assumed its jurisdiction over it as a street.

The municipality, for example, generally has its town-hall vested in it as a property, and often other property; but that would not enable it to sell the same under the above provisions relative to the jurisdiction to sell a street.

It is not the soil of all the public highways within its border which a municipality can have vested in it, but those only to which it has assented to being so vested.

It is elementary law that no real estate can vest in any one against his will and without his assent, unless incidentally to some statutory obligation. It is equally elementary that when a statute has imposed a duty upon any one in relation to real estate and declared that it shall for that purpose or in any event vest in him, it does so vest by operation of law.

But where do we, if we observe these principles, find anything to justify us in maintaining the construction put upon a clause in the Municipal Act that will extend its operation to the language used in another Act for another purpose and defining other rights?

Neither the Surveys Act nor the Registry Act forms part of the Municipal Act, or is incorporated therein in this regard.

The former defines certain roads or streets which may be held to be public highways, and the latter Act provides for the extinction of such roads or streets on certain conditions and consents given by order of a Judge.

It does not provide for the municipality being a party to any such application; but, on the one hand, can any one conceive of a Judge, being moved in such a case, desisting therefrom simply because a municipality did not recognise the street on the plan as its highway, yet claimed the freehold in the soil, or, on the other hand, proceeding to make an order after it had been made clear that the municipality had assumed it as a street, unless and until the latter had stopped it up?

There is in fact often a shifting jurisdiction, as it were, by these rural municipalities, county and township, in relation to roads within their borders. I do not say that it is likely to apply here further than as illustrative of the absurdity of a township corporation owning a highway which it repudiates. And there may be public highways without county or township having jurisdiction over them.

These several provisions do not overlap or conflict, but can be given a construction consistently with each being allowed all the operation it ever was intended to have, by reading the Municipal Act as the late Mr. Justice Street read it and Mr. Justice Middleton reads it in this case.

I need not further elaborate but adopt their respective arguments. I, therefore, cannot avoid coming to the conclusion that we ought to accede to the request of counsel for the appellants.

I had written the foregoing shortly after the argument herein, when, upon the conclusion I had so reached, it seemed to be our duty to give an opportunity to the appellants to obtain leave to appeal also from the judgment which constituted a *res judicata* barring our right to interfere.

That leave has been granted, and the whole matter involved is now presented to us for final disposition thereof.

CAN.
S. C.
JONES
v.
TOWNSHIP OF TUCKER-SMITH.
Idington, J.

I may add to what I have already stated relative to the alleged road allowance on the plan being a highway within the jurisdiction of the council, that it was clearly established at the trial that people presumably interested in having that road allowance opened as one within the jurisdiction, by virtue of the said registered plan and all in law mentioned therein, of the respondent's council to open, petitioned the council to open it, yet the council declined to do so within a few weeks before the passing of the by-law in question.

This circumstance is not only important as a repudiation of that jurisdiction which I hold essential to any exercise of the power to close such a road allowance, but also as indicative of the willingness of the council to lend itself to the promotion of private rather than public interests.

I agree in the conclusion reached by the learned trial Judge that serving private interests, rather than a strict observance of their public duty, was so evident as to vitiate the transaction within the principles upon which the decision in *Re Morton and City of St. Thomas* (1881), 6 A.R. (Ont.) 323, proceeded.

I adopt the conclusion of the learned Judge as having been properly reached, as I understand the facts. It is not necessary to join in his criticism of the solicitor.

I do not, from a consideration of it, see much similarity between what appears therein and what was presented for consideration in the case of *United Buildings Corporation* v. *Corporation of the City of Vancouver*, 19 D.L.R. 97, [1915] A.C. 345.

The by-law being in my view *ultra vires*, and for this latter cause having been improperly passed, I need not enter upon the question of the appellant Jones's ownership of the single lot, which I have already referred to.

I may, however, remark that, if he was the purchaser, and thus at the time of the passing of the by-law owner in equity, as the learned trial Judge holds, of that lot, there would seem to have been a barrier in the way of passing the by-law.

The appeal, I think, should be allowed with costs here and in the Appellate Division, and the judgment of the learned trial Judge restored.

Fitzpatrick, C.J.
Anglin, J.

FITZPATRICK, C.J., agreed with Idington, J.

ANGLIN, J.:—The plaintiffs attack a by-law of the council of the respondent township which closed a portion of Mill street, in

the village of Egmondville, and provided for the sale thereof to the respondent Kruse, on 4 chief grounds: (a) that the portion of Mill street in question was not a public highway, because it has never been opened or assumed expressly or otherwise by the municipal corporation, and that it was therefore not within the jurisdiction of the council; (b) that the by-law was passed in contravention of the spirit, if not of the letter, of clause (c) of sec. 632 of the Municipal Act of 1903; (c) that the failure of the municipal corporation to provide for the plaintiffs, who owned lots abutting on the closed portion of Mill street, some other convenient road or way of access to such lots, as required by sec. 629 (1) of the Municipal Act of 1903, invalidated the by-law; (d) that the provision for sale to Kruse and the conveyance to him were in contravention of clause 11 of sec. 640 of the same Act, and consequently void.

An action to set aside the by-law and the conveyance was begun on the 13th September, 1913, and on the 14th December of the same year a motion to quash the by-law was also launched.

When the motion came on for hearing before Middleton, J., he set aside the by-law on ground (a). His order was vacated on appeal, however, and the motion was directed to stand for disposition by the Judge who should try the action.

Pursuant to this order, both the motion and the action came on before Latchford, J. After taking oral evidence, which it was agreed should form part of the material upon the motion as well as in the action, that learned Judge, while of the opinion that, by virtue of sec. 44 of the Surveys Act (1 Geo. V. ch. 42), the portion of Mill street in question was a public highway subject to the jurisdiction of the defendant council, apparently thought that the plaintiffs should succeed on ground (b), and definitely held that the by-law was invalid on ground (c). It of course followed that the sale and conveyance to Kruse should also be set aside.

The Appellate Division agreed with Latchford, J., that the portion of Mill street in question had become a public highway, but thought that the plaintiffs had failed to make a case either on ground (b) or on ground (c) for quashing the portion of the by-law which provided for the closing of the street. They held the part of the by-law providing for the sale to Kruse and the subsequent conveyance to him invalid, however, because of non-compliance

CAN.

S. C.

JONES v. TOWNSHIP OF TUCKER-SMITH.

Anglin, J.

with clause 11 of sec. 640 (ground (d)), the council having failed first to offer to sell the property to the abutting owners at a price fixed by it.

The vicissitudes of this litigation in the Provincial Courts appear more fully in the reports in 5 O.W.N. 759, 25 O.W.R. 680; 6 O.W.N. 379; and (1915), 23 D.L.R. 569, 33 O.L.R. 634.

Against the portion of the judgment of the Appellate Division which upholds the part of the by-law closing the street the plaintiffs now appeal to this Court. Originally their appeal was confined to the judgment on the motion to quash the by-law. But, having obtained an extension of time from the Appellate Division, they have now appealed to the same extent against the judgment in the action also, and the defendants have filed a factum in which they contend for the reversal of the part of the judgment of Latchford, J. (left untouched by the Appellate Division), which set aside the sale and conveyance to Kruse. It will not be necessary to deal with this phase of the case, because of the conclusion which I have reached on the plaintiffs' appeal.

I am by no means satisfied that in passing the impugned by-law the council conformed to the spirit of sec. 632 (c) of the Municipal Act. It was apparently well understood at the final meeting in December, 1912, when the matter was left over to be dealt with by the new council, that the question of closing Mill street would not be disposed of without giving the persons opposed to that project, who were then before the council, an opportunity of again being heard before the new council; and I incline strongly to think that the passing of a by-law at the inaugural meeting in 1913 was not in accord with that understanding. But I prefer to rest my opinion in favour of the appellants on ground (c), viz., that the by-law contravenes sec. 629 (1), in that no provision is made by it for some other convenient road or way of access to the plaintiffs' lands which abut on the closed portion of the highway.

In the Appellate Division this aspect of the case was dealt with by the learned Chief Justice of Ontario, who delivered the judgment of the Court. [The learned Judge quoted from pp. 659 and 660 of 33 O.L.R., five paragraphs, beginning "The third ground of attack."]

While it is, no doubt, the fact that the plaintiff Jones obtained his deed only on the day after the by-law was passed, the evidence, I think, satisfactorily establishes that he had made an agreement to buy lot 40 some 4 to 6 weeks before, and that he purchased it for the purpose of placing a building upon it. The delay in closing the transaction and executing the deed is accounted for by Jones and his vendor. It was due to some title-deeds having been mislaid. The *bona fides* of Jones's purchase was not doubted by the learned trial Judge. I am, with respect, unable to share the "strong suspicion" of the learned Chief Justice of Ontario that "his purchase was made for the purpose of making it impossible to pass the by-law, or to pass it without providing some other means of access to the lot."

Moreover, such a suspicion, however strong, scarcely justifies the position taken that "the case must be dealt with as if his (Jones's) lot, at the time of the passing of the by-law, had been still owned by the persons who sold to him."

Mill street was the only means of access to lot 40. Jones did not own any adjoining property. *In re McArthur and Township of Southwold* (1878), 3 A.R. (Ont.) 295, relied on by the learned Chief Justice, has no bearing on this state of facts. The complainant in that case was the owner of a farm, which might be entered from two roads, each of which afforded a "convenient way of access." The municipal council closed one of these roads. The Court held that the remaining road afforded a means of access which would have satisfied the requirements of the statute if it had been provided by the council as a substituted or "other convenient road or way of access," and that under such circumstances the statute did not require the council to provide still another road in lieu of that closed.

The situation in which the by-law leaves Jones in regard to his lot, i.e., without any means of "ingress or egress to and from his lands," is, I think, fatal to its validity. I agree with Mr. Justice Latchford's view that the words "any public road or highway," in sec. 629 (1), were not intended to express the idea that such road or highway must have been in actual use as "a means of access." As Burton, J.A., said in the *Southwold* case, at p. 300: "It would be a strange construction that would make a man's

CAN.
S. C.
JONES
v.
TOWNSHIP
OF
TUCKER-
SMITH.
Anglin, J.

rights to the full enjoyment of the advantages of a road abutting upon his land dependent upon such an accident."

An unopened statutory highway, which when opened will afford means of access, is within the scope of the section.

There is evidence to support the view that lot 29 on Mill street, owned by the plaintiff Grieves, is presently occupied by him as one property with the adjoining lot 15 on Centre street, which he also owns, and that the entrance to both lots has been from Centre street, as indeed it had to be while Mill street remained unopened. There is no such evidence of occupation as one property, however, in the case of the plaintiff Robinson, who owns lots 35 and 36 on Mill street and the adjoining lots 21 and 22 on Centre street. Robinson holds the two former lots, he tells us, with the intention of giving them to his two boys, one to each, presumably for residential purposes.

Even in Grieves's case, I question the applicability of the decision in the *Southwold* case. Why should Grieves and his successors in title be compelled to hold and use the Mill street lot for all time in connection with the lot on Centre street? Why should they be deprived of the only means of access to the former which would enable them to deal with and dispose of it as a separate holding? The effect of laying out a property in separate lots after registration of a plan, which has become binding as a result of sales made according to it, was recently much considered in *Canadian Northern Ontario R.W. Co.* v. *Holditch* (1914), 20 D.L.R. 557, 50 Can. S.C.R. 265, *Holditch* v. *Canadian Northern Ontario R.W. Co.*, 27 D.L.R. 14, [1916] 1 A.C. 536. The view there taken seems scarcely consistent with the idea that, merely because two lots on such a plan adjoin one another, they should be treated as one property. Whatever may be thought of Grieves's case by reason of the use which he has heretofore made of his Mill street lot, there seems to be no good reason for holding that the plaintiff Robinson, as well as Jones, has not been "excluded from ingress and egress to and from his lands . . . over such road"—i.e., over the portion of Mill street which has been closed—within the meaning of sec. 629 (1).

For the Jones and Robinson lots—certainly for the Jones lot—Centre street does not afford such "other convenient road or way

of access" as would satisfy the statute and render it unnecessary for the council, on the authority of the *Southwold* case, to provide another convenient road in lieu of that which they have attempted to close.

I am, for these reasons, of the opinion that the by-law in question is invalid, and that the judgment of the learned trial Judge quashing and setting it aside should be restored. The appellants are entitled to their costs in this Court and in the Appellate Division, to be paid by the respondent township. Having regard to the circumstances under which the respondent Kruse was brought before this Court, while he is certainly not entitled to any costs, I would be disposed to excuse him from payment of costs.

Anglin, J.

DAVIES, J., agreed with Anglin, J.

Davies J.

BRODEUR, J., expressed no opinion.

Brodeur, J.

Appeal allowed.

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.

MERCHANTS BANK v. GOOD.

ALTA.

S. C.

Alberta Supreme Court, Walsh, J. 1919.

MOTIONS AND ORDERS (§I—4)—*Alberta Rule* 561—*Affidavit filed in terms of rule—Cross examination on.*]—Motion for an order to compel defendant to attend at his own expense and submit himself for examination on his affidavit filed.

N. D. Maclean, for plaintiff; *H. R. Milner*, for defendant.

WALSH, J.:—Rule 561 as amended reads as follows:—

Unless otherwise directed by the court or a judge no trials shall be held or contested motions heard during vacation and the time of vacation shall not be reckoned in the computation of the times appointed by order or allowed by these rules for amending or delivering any pleading, provided, however, that in default of defence being delivered the plaintiff may proceed as hereinbefore provided unless the defendant files an affidavit stating that in the belief of the deponent the defendant has a good defence on the merits and intends to defend the action.

The defendant has filed an affidavit of his own in the terms of the rule. The plaintiff took out an appointment for his cross-examination upon it. He attended upon it but upon the advice of his solicitor refused to be sworn or to submit himself to cross-examination. The plaintiff now moves for an order to compel him to attend at his own expense and so submit himself.

Upon the argument I was under the impression that it had been held in this court or its predecessor of the North West Territories that a defendant who made the affidavit required by the rules for an order for security for costs that he has a good defence to the action on the merits could not be cross-examined upon it and I thought that there was such an analogy between such a case and this as to make these authorities applicable here. I find, however, that I was wrong in my recollection of the authorities for they are exactly the opposite of what I thought they were. In *Clark* v. *Hamilton* (1901), 5 Terr. L.R. 110, the Supreme Court *en banc* of the North West Territories held that a judge could make an order for the defendant's cross-examination on his

affidavit for an order for security for costs and so far as I have been able to ascertain that decision has been followed ever since. R. 382 says that

> A person who has made an affidavit to be used in any action or proceedings, including an affidavit of documents, may be cross-examined thereon.

This affidavit was certainly made to be used in this action. It was not only so made but was used for the purpose for which it was made. I have examined the English cases to which Mr. Milner referred me, all but one of which are to be found in the notes in the annual practice to English Rule 502 but I have not found them useful to me in my disposition of this case partly because in each of them the affidavit in question was materially different in character from this affidavit and partly because of the difference between the English rule and ours. The former authorizes the cross-examination of a party or witness who has made an affidavit to be used or which shall be used on any proceeding in the cause. Ours as I have pointed out is broader. It permits of cross-examination if the affidavit is made to be used in the action. This affidavit is certainly within it.

I was at first inclined to think that as there is no express provision in the rules for getting rid of the stay created by the filing of this affidavit no good purpose could be served by permitting a cross-examination upon it. I am not so sure, however, that this is right though I do not now so decide. The benefit of the period of vacation is given to a defendant upon the condition of his filing the required affidavit. If to get this time he files one which is proved by his cross-examination to be absolutely false, I should think that the court in the exercise of its inherent power could order its removal from the files and with its removal the stay would be at an end. The words of Wetmore, J., in *Clark* v. *Hamilton*, *supra*, at p. 114, fit this situation very aptly. He said:

> I quite agree that the judge ought not, on an application for security, to try out the merits of the action, but I see no reason why he might not, under certain suspicious circumstances, enquire whether or not there are any merits or whether the alleged merits are not a mere pretence and an abuse of the process of the court.

However, as the affidavit in question is in my opinion within r. 382 the plaintiff is entitled to cross-examination upon it regardless entirely of any use that he may subsequently make of the examination. The order may go as asked and the costs of this application will be to the plaintiff in the cause.

B. C.

C. A.

SCHELKING v. CROMIE.

British Columbia Court of Appeal, Macdonald, C.J.A., Martin, and Galliher, JJ.A. July 15, 1919.

LIBEL AND SLANDER (§II E—58)—*Publication privileged—Statement to solicitor of plaintiff in his character of solicitor.*]—Appeal by plaintiff from the trial judgment in an action for libel. Affirmed.

L. G. McPhillips, K.C., and *H. M. Smith*, for appellant: *S. S. Taylor*, K.C., and *F. R. Anderson*, for respondent.

MACDONALD, C.J.A.:—The sole question in this appeal is as to whether the publication complained of was privileged. There is no evidence of malice which would destroy the privilege if it existed. At all events none upon which I can reverse the judgment. Evidence was introduced on defendant's behalf at the trial which I think could well have been omitted, but I cannot say that this circumstance is sufficient ground for interfering with the findings of the trial judge. The publication complained of was made by the defendant to Mr. Bull, who at the time was the plaintiff's solicitor. He was acting for the plaintiff in several matters, including one in which the plaintiff was threatening action against the defendant's newspaper for libel of a character, in a general way, similar to that complained of in this action. The injurious reflections on the plaintiff's conduct and opinions go further, it is true, in the publication complained of in this action than in that complained of in the threatened action. The trouble arose mainly out of a controversy as to whether plaintiff should or should not have been admitted into Canada. The first alleged libel appears to have been patched up, Mr. Bull acting for the plaintiff, but the threat was not formally withdrawn, though if no further offence had been given by defendant I think nothing further would have been done.

This being the situation, the defendant at their Club shewed Mr. Bull a written memorandum imparting information which defendant had received from immigration authorities containing the libellous matter complained of. Mr. Bull thought it his duty to communicate this to his client, who thereafter instructed his solicitor to take proceedings in the courts against one Zurbrich, a foreign immigration official, and one Balinski, whom plaintiffs suspected to be defendant's informants. It was only when

B. C.
C. A.

defendant declined Mr. Bull's request to volunteer his evidence against these men that plaintiff determined to bring this action. It is I think to the credit of Mr. Bull that he declined in the circumstances to accept the plaintiff's retainer to bring the action. Mr. Bull evidently thought that the information given him by defendant was communicated to him in his character of solicitor to the plaintiff, since he has made an entry in his docket of what took place in the usual form of solicitor's entries against a client. The defendant did not otherwise publish the memorandum except to his stenographer and clerks in the ordinary course of preparing it, and this as the authorities shew is within his privilege. In these circumstances I agree with the trial judge, at all events I cannot say that he came to a wrong conclusion when he held that the publication was made to Mr. Bull in his character of solicitor to the plaintiff. I would therefore dismiss the appeal.

MARTIN, J.A., would dismiss the appeal.

GALLIHER, J.A.:—I agree in dismissing the appeal.

Appeal dismissed.

NORTHERN PACIFIC R. Co. v. FULLERTON.

British Columbia Court of Appeal, Macdonald, C.J.A., Galliher, and Eberts, JJ.A. April 1, 1919.

CARRIERS (§ III E—425)—*Sale of goods—Railway company contracting to deliver—Failure to deliver—Non-performance of contract.*]—Appeal by plaintiff from a county court judgment in an action to recover freight charges for goods carried over plaintiff's railway line. Affirmed.

A. H. MacNeill, K.C., for appellant; *J. H. Senkler*, K.C., for respondent.

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

The plaintiffs sued upon a contract with defendants by which they agreed to deliver the lumber referred to in this action at a named destination to defendants or to their order. The lumber had to be carried on the latter part of the journey on a railway, the Canadian Pacific, other than the plaintiff's railway. By the conditions of the contract between the parties, the plaintiffs were not to be held liable for loss or damage occurring off their own line. The lumber on arriving at its destination was, without the order of the defendants, delivered by the C.P.R. to a third party

B. C.
C. A.

without payment of the freight which by the terms of the bill of lading was to be paid on delivery. The plaintiffs sue for the freight charges over their own line and that of the C.P.R. Co. The defendants deny liability and by the judgment below their defence was sustained. The contention of the plaintiffs' counsel was that because of the conditions of the contract whereby the plaintiffs were not to be liable for loss and damage occurring off their own line plaintiffs are not responsible for the wrong delivery. That may be so, but that is not the issue. The plaintiffs sue on a contract which was not performed on their part. They are not entitled to succeed. The statutes R.S.C., c. 37, ss. 284, 317, and 336, and c. 118, s. 3, have, in my opinion, no bearing on this dispute.

The appeal should therefore be dismissed.

EBERTS, J.A., would dismiss the appeal.

Appeal dismissed.

Re PRUDENTIAL LIFE INSURANCE Co.

MAN.
C. A.

Manitoba Court of Appeal, Perdue, C.J.M., Cameron, Haggart, and Fullerton, JJ.A. July 23, 1919.

COMPANIES (§ VI A—305)—*Winding-up Act*, 1907 *Man.*, *c.* 51, *s.* 1—*Appointment of solicitor to represent the interests of shareholders—Costs incurred prior to presenting of petition for winding-up—Power of court to grant—Rules of court—Distinction between costs taxed to counsel and solicitor for the liquidator and costs taxed to counsel and solicitor for shareholders.*]—Appeal from an order appointing a counsel and solicitor for the shareholders of a company which is being wound up.

A. B. Hudson, K.C., and *H. V. Hudson*, for appellant; *J. H. Leech*, K.C., and *F. J. Sutton*, for respondent.

PERDUE, C.J.M.:—I think, with great respect, that the order appealed from was beyond the powers of the learned judge who made it. I have come to that conclusion upon two grounds. In the first place, under the amendment to the Winding-up Act passed in 1907, c. 51, s. 1, the court is empowered to appoint a solicitor and counsel to represent the interests of the shareholders for the purpose of the proceedings. Prior to that enactment no such power existed. The amendment also enables the court to

provide for the payment of the costs of such solicitor and counsel, either by the order making the appointment or by a subsequent order. It is plain that the services of the solicitor and counsel are confined to the proceedings in the winding-up and that the court or judge has no power to award to the solicitor for the shareholders costs incurred prior to the presenting of the petition for the winding-up order. The order appealed from clearly intended to award to Mr. Leech, as solicitor and counsel for the shareholders, payment for legal services rendered by him prior to the winding-up order. On that ground alone I think the order was beyond the powers of the judge.

In the second place, the order appealed from, although it purports to declare the intention of the orders of 27th December, 1916, and 22nd February, 1916, adds very important provisions to these orders, especially the order of 22nd February. The provision I have already referred to relating to costs incurred prior to the winding-up seems to me to be one which was not contemplated when the order of 22nd February was pronounced. The procedure under a winding-up order is to be carried on as nearly as may be in the same manner as an ordinary suit within the jurisdiction of the court: Winding-up Act, sec. 108. The rules of the Court of King's Bench are therefore to be applied in the present case. Any material variation or alteration in an order made by a single judge, unless it comes within the provisions contained in rules 662-664, can only be made on appeal to the Court of Appeal: rule 672, see *Walker* v. *Robinson*, 15 Man. L.R. 445; *Re Gimli Election* (1913), 13 D.L.R. 121, 14 D.L.R. 414, 23 Man. L.R. 678, 696; *Re St. Nazaire Co.* (1879), 12 Ch. D. 88; *Preston Banking Co.* v. *Allsup* (1895), 1 Ch. 141; *Charles Bright & Co.* v. *Sellar*, [1904] 1 K.B. 6. With great respect, I think that the learned judge exceeded his powers in making the order from which this appeal is brought.

The order of 22nd February, 1916, in the form in which it was pronounced, drawn up, signed and entered appoints Mr. Leech counsel and solicitor for the shareholders and that appointment is declared to date as from the original winding-up order made on 4th August, 1915. No appeal was entered against this order of February, 1916, and it has never been questioned by any judicial proceeding. It may be that the judge in charge of the winding-up

MAN.
C. A.

proceedings had power to make the appointment of Mr. Leech date from the making of the winding-up order, if he thought the justice of the case required that he should do so. In any event, the order stands as drawn up and entered and cannot now be interfered with. The amending Act of 1907, c. 51, gave the judge power to deal with the question of costs. The last two clauses of the order direct that the costs of the counsel and solicitor for the provisional liquidator and of the counsel and solicitor for the liquidator and of the counsel and solicitor for the shareholders, up to the making of the order, and also their subsequent costs, be taxed and paid by the liquidator out of the assets of the company. Nothing is said as to these costs being taxed as between solicitor and client, if in a proceeding like the present there is any difference between "costs" and "solicitor and client costs." In any event the order makes no distinction between the costs to be taxed to the counsel and solicitor for the liquidator and those to be taxed to the counsel and solicitor for the shareholders. The plain intention is that the costs of each should be taxed on the same scale. Probably the interested parties will assist the taxing officer in deciding what that scale shall be.

The order appealed from should be set aside. The liquidator's costs of the appeal should be paid out of the assets of the company in his hands.

CAMERON, J.A.:—I agree with the Chief Justice that the order made by Mr. Justice Prendergast dated April 16, 1918, was beyond his jurisdiction and must be set aside. Moreover, as the liability of the dissenting shareholders to their solicitor could not be imposed on the company and made its liability in any form of action, it would be remarkable if that liability could be made that of the company by a simple order in such a proceeding as that before us.

As to the meaning and effect of the orders of February 22, 1916, and December 27, 1916, neither of which has been appealed against, I say nothing as they are not before us for adjudication in any way.

HAGGART and FULLERTON, J.J.A. concurred.

SMALLMAN v. BATES.

MAN.

C. A.

Manitoba Court of Appeal, Perdue, C.J.M., Cameron, Haggart, Fullerton, and Dennistoun, JJ.A. April 28, 1919.

SALE (§ III A—57)—*Of goods—Contract—Breach of warranty—Promise of adjustment—Acceptance of goods—Evidence for jury—New trial.*]—Appeal from a county court judgment in an action for the price of goods sold and delivered. New trial ordered.

George Moody, for appellant; *E. J. McMurray*, for respondent.

PERDUE, C.J.M., CAMERON and HAGGART, JJ.A., concurred with Fullerton, J.A.

FULLERTON, J.A.:—The contract, in respect of which this action is brought, is evidenced by a memorandum in the following terms:—

Oct. 19th 1918,

Received from C. R. Smallman the sum of $100 to apply on one car of bulk apples to consist of ¼ Spys ¼ Baldwins balance assorted winter apples at the price of $3.65 per 140 lbs. f.o.b. Winnipeg.

Should apples not be shipped the money is to be refunded in full.

It is further arranged and agreed that the said C. R. Smallman is to get 7 cars all told at this price.

Mr. Smallman agrees to pay balance on cars where they are spotted on tracks "subject to inspection."

J. H. Bates
C. R. Smallman.

It was suggested on the argument that the contract binds the plaintiff to accept one car only. I think the contract is for 7 cars.

The action is brought with respect to 2 cars only which arrived in Winnipeg in Nov., 1915, for which plaintiff paid $1,709.45.

The apples in both cars were in poor condition, and neither of the cars contained the proportion of Spys or Baldwins called for by the contract. The evidence shews that instead of containing 120 barrels of Spys the cars only contained 63, and that a loss of $2.00 per barrel would be incurred on this shortage. Only about 15 barrels of Baldwins were found, whereas there should have been about 120.

The county court judge withdrew the action from the jury, being of the opinion that as the contract called for inspection it was the duty of the plaintiff, if the apples were not according to contract, to have rejected them.

The failure of the defendant to send the proportions of Spys and Baldwins would clearly be a condition which would have justified the plaintiff in rejecting.

MAN.

C. A.

He could, however, under s. 13 of the Sale of Goods Act (R.S.M. 1913, c. 174), elect to treat the breach of such condition as a breach of warranty. Moreover, there is some evidence to shew that the plaintiffs were induced to accept the apples by the promise of the defendant's agent that the matter would be adjusted. I think there was evidence which should have been submitted to the jury.

The defendant Lang filed a counterclaim for damages for non-acceptance of 5 cars of apples. He alleges the plaintiffs instructed him to ship one car of apples to Neepawa and one car to Brandon, that plaintiffs refused to accept them, and in consequence he was compelled to sell them at a less price and thereby suffered damages. He also alleges that he shipped the other 3 cars; that plaintiffs refused to accept them, and that in consequence he suffered damages.

The evidence shewed that 6 cars were shipped, 2 to Winnipeg, 1 to Neepawa, 1 to Brandon, and 2 others which were diverted to Mariapolis after the plaintiffs had refused to accept them.

Defendant states that he lost on the Brandon car $286.50, on the Neepawa car $250.45, and on the other two cars $172. The seventh car was never shipped, and no claim is made in respect to it. There is no pretence that either the Neepawa car or the 2 cars sent to Mariapolis were ever inspected by the plaintiffs. They were allowed to remain on the siding, subject to demurrage until the defendant himself disposed of them.

The plaintiffs claim that they inspected the Brandon car and rejected it. A witness, Kennedy, swore that he was sent to Brandon to inspect the car of apples there; that he examined them, and found a shortage of Baldwins and Spys, and a good many apples that were damaged and not fit for sale. The defendant, on the other hand, says that the apples were in good condition.

The amount of the loss on the 4 cars as sworn to by the defendant Lang was $708.95. The jury found a verdict on the counterclaim for $235 only.

As there appears to be no answer to the defendant's claim for damages in connection with either the Neepawa car or the Mariapolis car, and the verdict is less than the loss sworn by the defendant to have been incurred in connection with these cars, I can see no reason for interfering with the verdict on the counter-claim.

MAN.

C. A.

I would allow the appeal and direct a new trial of the action, and dismiss the appeal so far as it relates to the verdict on the counterclaim.

The costs of the trial of the action and of the appeal to be costs in the cause to the successful party.

DENNISTOUN, J.A.:—This is an appeal from the County Court of Winnipeg. The action was tried before Paterson, Co. Ct. J., and a jury. The judge withdrew the plaintiff's case from the jury and took their verdict upon the counterclaim alone. Judgment has been entered in favour of the defendant Lang against the plaintiff Smallman for $235 and costs.

The action arose out of a contract for the sale of apples, which is evidenced by a receipt in writing which reads as follows: (See judgment of Fullerton, J.A.).

Bates was the sales agent of the defendant Lang at Winnipeg.

Under the agreement two cars of apples were shipped to Winnipeg from Ontario, by the defendant Lang, and duly paid for on arrival by the plaintiff Smallman. The apples in these cars were sold by the plaintiff after removal from the cars. The third car was sent to Neepawa. It was not inspected or accepted by the plaintiff. The fourth car was sent to Brandon where it was inspected by the plaintiff's agent and rejected. The fifth and sixth cars were diverted by the defendant to other points in Manitoba upon the plaintiff's refusal to accept any more apples. The seventh car was not shipped.

The plaintiff alleges that the first 2 cars of apples were not according to contract and sues for damages for breach of warranty. The trial judge withdrew the plaintiff's claim for damages from the jury upon the ground that the plaintiff Smallman inspected the apples at Winnipeg, removed them from the cars, sold a portion of them on the track and took the remainder to his warehouse where he disposed of them, and that having done so he had accepted them and had no case for damages.

The evidence given by Smallman as to acceptance is as follows:—

Q. What did you do with this car of apples? A. We started unloading it in the afternoon of the same day that I purchased it, and of course very few apples were taken out, only a few barrels. I then discovered my mistake in accepting the apples. They were in a terrible condition, very rotten, and I did not think the qualities or the grades that I bought.

Q. That was the next day? A. Yes.

MAN.

C. A.

Q. What did you do about that? A. I notified Mr. Bates immediately.

Q. What did he do? A. He came down and examined the car and looked at it and put up his hands this way and he says: "Smallman they are absolutely rotten and I will immediately notify Mr. Lang." He promised me he would do everything, take it up with Mr. Lang and get the matter adjusted. He told me to go ahead and unload the car, which I guess I had to do as I had bought and paid for it. He told me next morning he wired Mr. Lang immediately to the effect that he would have to adjust with me and it was very important he should do so.

Lang admitted when called that he had received this telegram.

With regard to the second car the evidence is as follows:—

Q. And how did they look? A. They looked all right.

Q. What did you do with them? A. Started to unload.

Q. Mr. Bates was there? A. Yes, we accepted the car and paid for them.

Q. How did they turn out. A. Exactly in the same condition as the first car.

Q. You told Bates? A. Yes, I told him.

Q. What did he tell you? A. He told me he would again wire Mr. Lang.

Then follows evidence that a certain portion of the apples were not salable and were destroyed.

The trial judge was of opinion that having accepted the apples the plaintiff had lost his cause of action as it was his duty to have inspected the apples on arrival and to have rejected them, if not up to contract, but I think s. 13 of the Sale of Goods Act (R.S.M. 1913, c. 174), comes to the plaintiff's aid. It reads:—

> Where a contract of sale is subject to any condition to be fulfilled by the seller, the buyer may waive the condition, or may elect to treat the breach of such condition as a breach of warranty, and not as a ground for treating the contract as repudiated.

That is what the buyer has done in this case and I hold there was evidence to go to the jury that there had been a breach of warranty in respect to the apples which were delivered and accepted under the contract. The jury should have had an opportunity of considering the plaintiff's claim in respect to these 2 cars (to which his claim is limited by the pleadings) and there should be a new trial on this part of the case.

The motion against the judgment on the counterclaim on the grounds alleged should not be granted.

I would allow the appeal in part and direct a new trial of the plaintiff's claim, and would dismiss the appeal against the judgment on the counterclaim.

Appeal allowed on main action and dismissed on counterclaim. Costs of appeal and in main action to be costs in the cause to the successful party.

SILVERMAN v. LEGREE.

ONT.

S. C.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee, Hodgins, and Ferguson, JJ.A. January 27, 1919.

PRINCIPAL AND AGENT (§ II A—5)—*Authority of agent to sell land—Authority to obtain offer of purchase and receive deposit—Sale falling through by fault of principal—Right of purchaser to recover deposit—Action against both principal and agent—Repudiation of agent by principal—Uncertainty as to person to be sued—Recovery against principal—Costs of agent—Payment by principal—Right of agent to commission—Deduction from deposit—Agreement to pay commission—Necessity for writing—Statute of Frauds, sec. 13 (6 Geo. V. ch. 24, sec. 19)—Judgment—Appeal—Costs.*]—Appeal by the defendant Mary Legree from the judgment of Denton, Jun. Co.Ct.J., in an action in the County Court of the County of York.

The statement of claim was (in part) as follows:—

2. On or about the 4th June, 1918, the plaintiff, through Dodds Limited, as authorised agents for the defendant Mary Legree, signed an offer to purchase, from the said defendant Mary Legree, premises known as No. 653 Bloor street west, in the city of Toronto, for the sum of $5,000, and gave to the said agents his cheque for $200 as a deposit.

3. On the signing of the said offer to purchase, the plaintiff arranged a mortgage of $2,500, and incurred thereby agent's commission for placing of the said mortgage, solicitor's fees, and other costs in connection therewith.

4. After the deposit of $200 had been paid as aforesaid, and arrangements completed as set out in paragraph 3 herein, the defendant Mary Legree refused to accept the plaintiff's offer.

5. The plaintiff, through his solicitor, has demanded from both the defendant Mary Legree and her agents, Dodds Limited, the return of the said deposit of $200, but they have refused to return the same.

6. That, on account of the refusal of the defendant Mary Legree to accept the said offer, the plaintiff has been unable to find another suitable house, and has incurred costs as set out in paragraph 3 herein, and other expenses and costs.

The plaintiff therefore claims:—

(a) The return of his deposit of $200.

(b) $100 damages.

(c) His costs of this action.

(d) Further and other relief.

ONT.
S. C.

The statement of defence of the defendant Mary Legree was (in part) as follows:—

2. The defendant Mary Legree did not authorise the defendants Dodds Limited to enter into any agreement with the plaintiff, nor did the defendant Mary Legree authorise Dodds Limited to receive any money on her behalf.

3. The defendant Mary Legree did not authorise the plaintiff to arrange a mortgage as set out in paragraph 3 of the statement of claim herein.

4. The defendant Mary Legree did not receive the deposit of $200 from the plaintiff, nor did she receive any portion of the said $200 from the plaintiff, nor did she receive any amount from the plaintiff.

5. The defendant Mary Legree did not give any undertaking to any person to accept the plaintiff's alleged offer, nor did the defendant Mary Legree undertake to procure another house for the plaintiff.

The statement of defence of the defendants Dodds Limited was (in part) as follows:—

2. By instrument bearing date the 16th May, 1917, the defendants Dodds Limited were authorised by the defendant Mary Legree to sell the premises 653 Bloor street west, in the city of Toronto, for $5,000; and, acting upon the said authority, the said defendants Dodds Limited, as agents for Mary Legree, sold the said premises to the plaintiff.

3. The defendants Dodds Limited received from the plaintiff $200 by way of deposit on the said purchase, and immediately communicated to the defendant Mary Legree the fact that they had received the said deposit, and forwarded to her the sum of $75, after having deducted their commission of 2½ per cent. upon the sale price as agreed.

4. The defendant Mary Legree returned to the defendants Dodds Limited their cheque for $75 and refused to carry out or ratify the sale to the plaintiff.

The action was tried by DENTON, Jun. Co.C.J., without a jury; judgment was given against the defendant Legree for $200 and in favour of Legree against Dodds Limited for $75—the difference, $125, being the amount of commission for which the trial Judge considered the defendant Legree liable to Dodds Limited; the

ONT.
S. C.

defendant Legree was also ordered to pay the costs of her co-defendant.

The reasons for judgment of the learned Junior County Court Judge were as follows:—

I find upon the evidence that the written authority which Mrs. Legree gave to Dodds Limited on the 16th May, 1917, to sell the house for $5,000, was not expressly revoked either in writing or verbally. If it can be said to have been revoked by lapse of time, then I find that it was revived or renewed in the spring or summer of 1918, when, I also find upon the evidence, Mrs. Legree instructed and authorised Dodds Limited to procure a purchaser for this property at $5,000; that she authorised Dodds Limited to procure the offer from Silverman at that figure.

I also find upon the evidence that Mrs. Legree verbally agreed with Silverman to sell to him at that figure, and I also find that Mrs. Legree told Silverman to pay the deposit to Dodds Limited.

Dodds Limited did procure an offer from Silverman at $5,000, the first offer being part cash only, and that offer she refused, on the ground that she wanted all cash.

Then, I find, a second offer was obtained from Silverman to pay all cash, and she refused this also, notwithstanding her authority to Dodds Limited to obtain a purchaser at that figure and her verbal agreement with Silverman to sell at that sum.

On this statement of the facts, it seems to me that the plaintiff is entitled to recover from Mrs. Legree the $200 he paid to her agents as a deposit. He is entitled to recover on two grounds: first, that she authorised Silverman to pay the money to Dodds Limited as a deposit on an offer which she subsequently refused to accept; and on the further ground that she did authorise Dodds Limited to obtain a purchaser at that figure, and Dodds Limited, I think, were her agents for the purpose of receiving that money.

There will be judgment for the plaintiff against Mrs. Legree for $200 and the plaintiff's costs of the action.

As between Legree and Dodds Limited, I think the latter earned their commission, and are entitled to it, and that Mrs. Legree should pay their costs of defending this action.

The result then is: judgment against Dodds Limited for $200, less the $125, their commission, which they are entitled to keep. The defendant Legree must pay the costs of the co-defendants, which I fix at $40.

ONT.

S. C.

J. T. Loftus, for the appellant.

T. H. Barton, for the defendants Dodds Limited, respondents, and *D. W. Markham*, for the plaintiff, respondent, relied upon the findings of fact and the conclusions of the learned trial Judge.

The judgment of the court was read by

HODGINS, J.A.:—Appeal by the defendant Legree from the judgment of Denton, Jun. Co.C.J., in an action to recover a deposit of $200 paid to the defendants Dodds Limited on the delivery of an offer for a house, the property of the defendant Legree.

The learned trial Judge gave judgment against the appellant for $200 and also in favour of Legree against Dodds Limited for $75—the difference being the amount of commission for which he considered the appellant liable to Dodds Limited; Legree was also ordered to pay the costs of her co-defendants.

The findings of fact of the learned trial Judge are borne out by the testimony given by the appellant and the respondents. There was authority in writing to sell, and it was never revoked but treated as subsisting when the appellant sent the respondent Silverman to the agents. But, in addition to that, when the respondent Silverman first approached the appellant and discussed the price, he was expressly sent by her to the agents and directed to make this offer through them and to deal with them. I think this does away with the point raised that authority to sell does not confer authority to obtain an offer. The respondents Dodds Limited had both, and were, in my view, entitled to receive the deposit. There was authority to receive an offer, and, as the making of the deposit was a part of that offer, in the sense that a deposit is in the nature of an earnest and guarantee for fulfilment of the offer (*Hall* v. *Burnell*, [1911] 2 Ch. 551), the agents were not going beyond their authority in receiving it. And where there is authority to receive a payment by cheque, express notice that it must be a crossed cheque in favour of the principal is necessary in order to invalidate, as against the principal, payments made by cheque in favour of the agents: *International Sponge Importers Limited* v. *Andrew Watt & Sons*, [1911] A.C. 279.

There can be no doubt that the agents earned the commission. Having authority to sell, and being directed by the appellant to receive an offer from the respondent Silverman, they procured two offers for $5,000, upon terms which, at the respective times they were procured, represented in each case those terms which the

ONT.
S. C.

appellant had previously verbally agreed to. She refused to accept these offers, the first because she insisted on all cash, the last because she wanted more money. But her two refusals were due to afterthoughts; the agents had done what she wanted them to do, and she alone is to blame for the sale falling through.

In such circumstances, the respondent is clearly entitled to his deposit back. The agents received it for and on account of their client, and as against the respondent the agents could not hold it. This would be so even if they were mere stakeholders. The money was not the property of the agents, and, if sued alone, they would have had no defence. The general rule is that the principal and agent are not both liable, but the plaintiff may, when uncertain of his rights, sue both. He had paid the money to one acting as agent in a transaction which fell through, and the litigation itself indicates that he might well be in doubt, for the appellant expressly repudiates the agents' right to receive the money It is not a case in which he should pay the agents' costs.

Is the appellant liable to pay her co-defendants' costs of defending the action? It seems that before action the respondents Dodds Limited had sent the appellant a cheque for the $75, and she had refused to receive it; and, in view of the findings of the learned Judge and her pleadings, I think the order on her for these costs is justified: see *Williams* v. *Lister and Co.* (1913), 109 L.T.R. 699.

A question was raised on the argument as to the effect of 6 Geo. V. ch. 24, sec. 19,* which came into force on the 1st January, 1917. The original authority in writing is dated the 18th May, 1917.

If the respondents Dodds Limited were compelled to sue for their commission, they would probably meet with difficulty in recovering for anything done short of exact performance of their authority. But having, while fulfilling their duty as agents, whether under the writing or the subsequent verbal enlargement

*This section amends the Statute of Frauds, R.S.O. 1914, ch. 102, by adding thereto the following as sec. 13:—

13.—(1) No action shall be brought to charge any person for the payment of a commission or other remuneration for the sale of real property unless the agreement upon which such action shall be brought shall be in writing and signed by the party to be charged therewith or some person thereunto by him lawfully authorised; see also amendment, 1918, 8 Geo. V. c. 20 s. 58.

ONT.
S. C.

of its scope, come into possession of enough of their principal's money, they do not need to sue They can set off against or appropriate to the earned commission enough to pay and satisfy it, and the statute does not apply to prevent it. The contract to pay commission is a good agreement, though, if not in writing, unenforceable by the Court. Here the Court has not to enforce it, but to decide whether what has been done with the deposit as between the appellant and her agents is justified.

I agree with the disposition of the whole matter made by the learned trial Judge, and would dismiss the appeal.

I may add that the alteration in the offer relied on was made before it was issued, and by the respondent Silverman's own solicitors, and in no sense vitiated the document. The sending of the second offer, as late as the 13th June, though it had to be accepted by the 11th, is rendered quite unimportant by the fact that the appellant had previously declined to sign it. It was formally sent by the agents for their principal's information with the cheque for $75.

The appeal should be dismissed.

Appeal dismissed with costs.

PERRY v. VISE.

ONT.
S. C.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee, Hodgins, and Ferguson, JJ.A. January 27, 1919.

LAND TITLES (§ V—55)—*Sale of lot to plaintiff—Conveyance not registered—Sale of lot to defendant—Defendant's lot by mistake described by number of plaintiff's lot—Land brought under the Act—Defendant registered as owner of plaintiff's lot—Rectification of register—Powers of court, R.S.O. 1914, c. 126, sec. 115.*]—Appeal by defendant from a judgment of the King's Bench in an action for rectification of the register in the Land Titles Office at Toronto. Affirmed.

THE following statement of the facts is taken from the judgment of MEREDITH, C.J.O.:—

The action is brought for the rectification of the register in the Land Titles office at Toronto by substituting for the name of the appellant that of the respondent as owner of parcel 1184, free from incumbrances, and for a declaration that the respondent is the

actual owner of lot number 287 (the same parcel) according to plan No. 1742 registered in the registry office for the registry division of the East and West Ridings of the County of York, and an injunction restraining the appellant from entering on or in any wise dealing with that lot "or from transferring or mortgaging" it or otherwise dealing with it; and that relief was granted by the judgment appealed from.

After the land was brought under the Land Titles Act, a plan, No. M. 372, was registered in the Land Titles office, and lot number 287 bears the same number on that plan, but for the purposes of the Land Titles office is called parcel 1184.

The Sterling Trusts Corporation and Nellie McBride were added as defendants, pursuant to leave granted at the trial, and the udgment declares that the appellant purchased lot 285 according to plan M. 372 and that it was intended that the mortgage given by her and now held by the added defendant Nellie McBride should be on that lot, and that the appellant "is and should be the owner of the said lot number 285 subject to the mortgage thereon to the defendant Nellie McBride;" and it was ordered and adjudged that the Master of Titles at Toronto should rectify the register so as to register the appellant as owner of lot 285, and the defendant Nellie McBride as first mortgagee, "under the terms of the mortgage now registered against lot 287."

That relief was not sought by the statement of claim, and no amendment was made asking for it.

There is no serious dispute as to the material facts with regard to lot 287.

The Grand View Realty Company was the owner of the tract of land divided into lots by plan 1742. There was a farm-house on lot 287, and a shed on the adjoining lot to the east, lot 286. The respondent made an offer to purchase these lots on the 25th May, 1912, and his offer was accepted on the same day (exhibit 2).

The respondent subsequently purchased from the company lot 289, paid the full purchase-money for the three lots ($2,623) on the 12th June, 1912, and on the June, 1912 (no doubt the 12th, as the affidavit of execution was sworn on that day), obtained from the company a conveyance of the three lots.

The company, being desirous of putting its land under the Land Titles Act, requested the respondent not to register the

ONT.
S. C.

conveyance to him; and, in compliance with the request, it was not registered.

On the 1st June, 1912, William McBride purchased from the company lot 285, but by mistake the lot was described in the agreement for sale as lot 287. It was, however, described as a vacant lot. There was at this time a fence between lots 285 and 286—no on but near the boundary-line, and after his purchase McBride planted a tree on the north-west corner of lot 285. On the 16th March, 1913, William McBride transferred his interest in the agreement to Robert McBride. On the 17th March, 1913, and after the land had been brought under th Land Titles Act, the company, in intended pursuance of the contract of sale, on the 17th March, 1913, transferred to Robert McBride lot No. 487 according to plan M. 372 filed in the office of Land Titles at Toronto; describing the lot as No. 487 instead of 287 was due to a mistake in the company's office. This mistake having been discovered, the company on the 29th May, 1913, transferred to McBride lot 287, and McBride re-transferred lot 487 to the company.

Robert McBride sold his lot to the appellant on the 29th May, 1913, and in the offer of the appellant to purchase it, the lot s described as lot 287, and on the 13th June following McBride transferred the lot, describing it as No. 287, to the appell nt and she, on the 15th June, 1913, executed a charge upon the lot in favour of McBride for $500. Both the transfer and the charge were registered in the Land Titles office, and the appellant is there registered as the owner of lot 287 subject to the charge. Robert McBride died on the 29th January, 1917; h's executrices, Sarah McBride, the defendant Nellie McBride, and Mabel Carter, transferred he charge to the defendant Nellie McBride, and she has been registered as owner of it.

The Grand View Realty Company afterwards became merge l in the Great Northern Land Company, and that company has transferred its interest to the added defendants, the Sterling Trusts Corporation.

A. Cohen, for the appellant.

V. H. Hattin for the respondent.

The judgment of the court was read by

MEREDITH, C.J.O. (after stating the facts as above):—It is clear that the appellant did not purchase or intend to purchase lot 287.

ONT.

S. C.

What she bought was McBride's lot. McBride did not buy or intend to buy lot 287, but bought and intended to buy lot 285, of which he took possession, and on which, as I have mentioned, he planted the tree.

It is satisfactorily shewn, I think, that the lot which the appellant intended to purchase and did purchase was lot 285. According to her testimony when examined for discovery, she left everything in connection with the purchase to her son David. She admitted that her son told her that he had seen the lot that they were going to buy; and, in the absence of any evidence to the contrary—and there was none, for neither she nor the son was called as a witness at the trial—the proper inference is, I think, that the lot he saw was lot 285. The appellant admitted on her examination that she had no reason to believe that there was any building on the lot. There is, as I have mentioned, a house which has been occupied by a tenant of the respondent practically all the time since he purchased it, and has rented for $11 or $12 a month. The lot bought by McBride was a vacant lot, and was so described in the agreement for sale, and, besides all this, it was proved that, after the appellant's purchase, the son David endeavoured to sell his mother's lot to the respondent, that he described it as a lot he had bought from McBride next to the respondent's lot, that he was "getting cold feet on the deal," and would sell it cheap.

Can it be possible that, these being the facts, the registration of the appellant as owner of lot 287 enables her to hold it against the true owner? I think clearly not, and that the Court is not powerless to undo the wrong that has been done to the respondent.

Section 115 of the Land Titles Act, R.S.O. 1914, ch. 126, provides that:—

"Subject to any estates or rights acquired by registration in pursuance of this Act, where any Court of competent jurisdiction has decided that any person is entitled to any estate, right, or interest in or to any registered land or charge, and as a consequence of such decision the Court is of opinion that a rectification of the register is required, the Court may make an order directing the register to be rectified in such manner as may be deemed just."

I cannot think that the appellant acquired by registration any estate or interest in lot 287. She did not buy that lot from McBride, nor did he buy it from the Grand View Realty Company,

ONT.
S. C.

and neither she nor he ever owned it; and it was therefore, in my opinion, competent for the Court to direct the rectification of the register as to the ownership of lot 287 as it has been directed to be rectified. The statement of claim should be amended by adding a claim for the relief that has been awarded in respect of lot 285; and, upon that being done, I would affirm the judgment and dismiss the appeal with costs. *Appeal dismissed.*

CAMPBELL v. MAHLER.

Ontario Supreme Court, Appellate Division, Riddell and Latchford, JJ., Ferguson, J.A., and Rose, J. January 13, 1919.

APPEAL (II C—65) — *Contract — Sale of goods — Breach — Damages—Judgment for small amount.*]—Appeal by the defendants from the judgment of Falconbridge, C.J.K.B., 43 O.L.R. 395. Affirmed.

R. G. Fisher, for the appellants.

G. S. Gibbons, for the plaintiffs, respondents.

The judgment of the court was delivered by

RIDDELL, J.:—In the fall of 1914, commission agents at Calgary, who had been acting for the defendants, apple-dryers in Ontario, telegraphed the defendants that they had sold for them to the plaintiffs a certain number of car-loads of dried apples, c.o.d., at a price named—delivery on the opening of navigation.

This was accepted by the defendants; and the agents delivered bought and sold notes stating the amount, quality, and price, delivery on the opening of navigation, 1915, "terms usual."

The defendants objected to the sold note, on the ground that "delivery on the opening of navigation" was stated therein; but offered to carry out the contract if the plaintiffs would pay for the apples as soon as boxed. This the plaintiffs refused to do, claiming that payment was to be on the delivery of the apples on board cars.

The defendants refused to supply the apples, and the plaintiffs sued for damages, obtaining a verdict for $5 and County Court costs without a set-off.

We think that the defendants cannot succeed in their appeal.

The contract was complete on the delivery to the plaintiffs of the bought note—the bought note contained the defendants' contract, the usual terms being implied.

ONT
S. C.

On the evidence, the usual terms of payment were payment on delivery of the apples f.o.b.—and the defendants were not entitled to demand payment before delivery.

The Court will not refuse to entertain an appeal by reason of the smallness of the amount in question.

Appeal dismissed with costs.

ASHTON v. TOWN OF NEW LISKEARD.

Ontario Supreme Court, Appellate Division, Maclaren, Magee, Hodgins, and Ferguson, JJ.A. January 27, 1919.

HIGHWAYS (§ IV A—120)—*Non-repair—Snow and ice on sidewalk—Injury to pedestrian—Gross negligence—Municipal Act (Ont.)*]—Appeal by the plaintiffs from the judgment of the Junior Judge of the District Court of the District of Temiskaming dismissing an action brought by a man and his wife against the Corporation of the Town of New Liskeard to recover damages for bodily injuries sustained by the wife by a fall on an icy sidewalk in the town, and consequent loss and expense to the husband.

September 25, 1918. The appeal was heard by MACLAREN, MAGEE, HODGINS, and FERGUSON, JJ.A.

A. G. Slaght, for the appellants, argued that the defendants had been guilty of "gross negligence," within the meaning of the Municipal Act, sec. 460 (3). He referred to *Edwards* v. *Town of North Bay* (1915), 22 D.L.R. 744, 8 O.W.N. 119, *Killeleagh* v. *City of Brantford* (1916), 32 D.L.R. 457, 38 O.L.R. 35. There is no evidence of contributory negligence on the part of the female plaintiff: *Gordon* v. *City of Belleville* (1887), 15 O.R. 26.

Peter White, K.C., for the respondents, the defendants, relied on the judgment of the learned trial Judge, and referred to *German* v. *City of Ottawa* (1917), 39 D.L.R. 669, 56 Can. S.C.R. 80, affirming the judgment of the Appellate Division, 34 D.L.R. 632, 39 O.L.R. 179.

The judgment of the court was read by

MACLAREN, J.A.:—This is an appeal from a judgment of the Junior Judge of the District Court of the District of Temiskaming, of the 10th December, 1917, dismissing an action brought by a husband and wife for injuries sustained by the latter from a fall on an icy sidewalk.

ONT.
S. C.

About 8 o'clock in the evening of the 23rd March, 1917, the plaintiffs were proceeding eastward on the north side of Whitewood avenue, the principal street of the town, on their way to the post office, when the female plaintiff slipped and fell, breaking her arm and receiving other injuries. The street had naturally a considerable downward grade at the point in question. After passing a cross-street, there were two vacant buildings, and east of them the drug-store of one Thorpe. The town had two snow-ploughs, which were drawn by horses, and were used to clear the sidewalks after each snow-fall. Thorpe kept his sidewalk cleaned bare down to the cement. Opposite the vacant lots there was a considerable depth of hard snow and ice all winter, rising in the centre to what some of the witnesses called a "hog's back," and having a less depth on either side. The thickness of the hard snow and ice 3 or 4 feet west of Thorpe's line was variously estimated by witnesses at from 8 to 12 inches, sloping from the above thickness at Thorpe's line. Seeing that it was so icy and slippery and dangerous and that pedestrians fell there from time to time during the winter, Thorpe used to sprinkle ashes on the slope, and sometimes hacked it with an axe. Several of the witnesses had slipped and fallen on this slope shortly before Mrs. Ashton—one of them twice.

For the defence it was urged that there was not the "gross negligence" on the part of the defendant corporation which the statute requires; that the sidewalk was kept reasonably clear of snow; that on the day of the accident there was the first thaw of the season, with a drizzling rain, which towards evening was frozen; that the sidewalk in question had been sanded; and that Mrs. Ashton was guilty of contributory negligence by not taking sufficient care on the icy sidewalk.

An employee of the defendant corporation testified that he had put sand on the sidewalk on the day of the accident, opposite vacant lots, but does not say that he put any sand on the dangerous slope in question, and indeed goes so far as to say that "there was not any slope there," although this is abundantly proved by the witnesses on both sides.

The course of the jurisprudence on this subject in our own Courts has been a singularly fluctuating one, especially since the legislation requiring such cases to be tried by a Judge without

a jury. In the Canadian Municipal Manual of Meredith & Wilkinson, p. 636, there is given a list of 18 reported cases in which, strange to say, success was equally divided: 9 resulting finally in favour of the plaintiff and 9 in favour of the defendant corporation.

The results depend on the facts of the various cases, or perhaps rather on the appreciation of the facts by the various tribunals which have passed upon them. The one which most closely resembles the present case is *Drennan* v. *City of Kingston* (1896), 23 A.R. (Ont.) 406, in which the facts may be said to be almost on fours with those of the present case, and which, after passing through three Courts in this Province, was finally decided by the Supreme Court of Canada: *City of Kingston* v. *Drennan* (1897), 27 Can. S.C.R. 46. This is the first reported case on the subject, the original Act, slightly differing in form from the law as it now stands, but being to the same effect, having come into force on the 1st September, 1894, and the accident having taken place on the 8th February, 1895.

The original clause was in the Municipal Amendment Act 1894, 57 Vict. ch. 50, sec. 13, which amended the Consolidated Municipal Act, 1892, sec. 531, sub-sec. 1, by adding the following words: "Provided, however, that no municipal corporation shall be liable for accidents arising from persons falling, owing to snow or ice upon the sidewalks unless in case of gross negligence by, the corporation."

In the Municipal Act, 1913, this clause was re-enacted in sec. 460 (3) and amended to read as follows:—

"Except in case of gross negligence a corporation shall not be liable for a personal injury caused by snow or ice upon a sidewalk." (Section 406 (3) of the Municipal Act now in force, R.S.O. 1914, ch. 192 is in the same words)

In the *Kingston* case, *supra*, "gross negligence" was defined by the Supreme Court of Canada as "very great negligence." While this gives us an alternative expression, it can hardly be said to be a definition or to throw much light on the subject.

In *Carlisle* v. *Grand Trunk R.W.Co.* (1912), 1 D.L.R. 130, 25 O.L.R. 372, the English cases on the subject of gross negligence are reviewed.

ONT.

S. C.

For a criticism of the use of the term "gross negligence" see Halsbury's Laws of England, vol. 21, p. 361, note (*i*).

I cannot find any evidence whatever of contributory negligence on the part of Mrs. Ashton.

The appeal should, in my opinion, be allowed, and judgment entered for $150, the damages assessed by the trial Judge, with costs.

Appeal allowed.

INDEX.