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ALEXE v. CANADIAN WESTERN LUMBER CO.

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Nov. 5.

British Columbia Court of Appeal, Macdonald, C.J.A., Irving, Martin, and Galliher, JJ.A. November 5, 1912.

1. NEW TRIAL (§ III B—16)—VERDICT AGAINST WEIGHT OF EVIDENCE.

Where a verdict is clearly against the weight of evidence, a new trial should be ordered.

2. MASTER AND SERVANT (§ II A 4—71)—GUARDING MACHINERY—FAILURE TO REPLACE BROKEN GUARD—NEW TRIAL.

In an action for injuries received by reason of the alleged negligence of defendant in failing to provide a guard for a gear, where it is not disputed that the gear should have been securely guarded, that it had been originally guarded, but the guard had been broken but had not been replaced, and that the accident would not have happened if the gear had been guarded, and where there is no evidence of contributory negligence, a verdict by a jury in favour of the defendant will be reversed and a new trial granted.

3. WITNESSES (§ III—55)—UNRELIABLE WITNESS—EFFECT ON VERDICT—NEW TRIAL.

If a jury believes that a witness cannot be relied upon, the only result should be the rejection of his testimony by them in considering their verdict; it should not affect the other legal evidence in the case. (*Per* Macdonald, C.J.A., and Galliher, J.A.)

Statement

APPEAL by plaintiffs from the judgment of Murphy, J., in an action for damages for personal injuries.

The appeal was allowed, MARTIN, J.A., dissenting.

F. J. McDougal, for appellant.

J. A. Russell, for respondent.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—The appeal should be allowed and a new trial ordered. The verdict is clearly against the weight of evidence, in fact it is against all the evidence. It is not disputed that the gear in question should have been securely guarded. It had originally been guarded, but the guard had broken, and had not been replaced. It is not disputed that if it had been guarded, as originally it was, the accident could not have happened. The evidence is all one way as to how the plaintiff came to get his foot into it. There is not a tittle of evidence of contributory negligence, but against all this the jury have found their verdict in favour of the defendants. They seem to have been improperly influenced by the attack which was made on the veracity of one Narain, a Hindu witness, called on behalf of the plaintiff, and who was alleged to have made statements before the trial differing from his evidence. It is not necessary to decide now, whether this witness gave his evidence truthfully or not. Having regard to his ignorance of the lan-

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guage, it is quite easy to see how he could have been misunderstood by the witnesses called to impeach his veracity, but, as pointed out to the jury, by the learned trial Judge, even if they thought that this witness could not be relied upon, the only result would be the rejection of his testimony by them in considering their verdict. It could not affect the other legal, and, as I think, conclusive, evidence shewing how the accident actually occurred.

Irving, J.A.

IRVING, J.A.:—The jury's verdict was against the evidence. The plaintiff, in my opinion, is entitled to a new trial.

Martin, J.A. (dissenting).

MARTIN, J.A. (dissenting):—There is not, in my opinion, with all deference to contrary views, any ground which would justify us in interfering with the verdict of the jury, which being a general one must be taken to be a finding in favour of the defendant company on all points submitted by the learned trial Judge in a charge to which no objection has been taken here or below. The rider added can only in the circumstances be construed as a general precautionary declaration. There are, moreover, some peculiar features in this case, such as the discrediting of the plaintiff's important witness, Narain, a Sihk, by the evidence of Barth and Roden, which would justify the jury in regarding the plaintiff's account of the accident as being a concocted one. I note that on p. 147 of the appeal book there is apparently some error in the transcribing of the notes, because the learned Judge is made to contradict himself in his remarks on contributory negligence, regarding which there was ample evidence to go to the jury.

The appeal should be dismissed.

Galliher, J.A.

GALLIHER, J.A.:—I concur with the judgment of Macdonald, C.J.A.

Appeal allowed, MARTIN, J.A., *dissenting*.

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SAWYER v. MUTUAL LIFE ASSURANCE COMPANY OF CANADA.

(Decision No. 2.)

Manitoba Court of Appeal, Howell, C.J., Richards, Perdue, Cameron, and Haggart, JJ.A. November 18, 1912.

1. INSURANCE (§ III E 2—115)—REPRESENTATION AS TO HEALTH—REFERENCE TO INSURED'S PHYSICIAN—INNOCENT MISSTATEMENT.

Where an applicant for insurance informed the insurer's agent, who had secured the application, that he had been lately under medical treatment and the agent, with the consent of the applicant, consulted the physician who had treated the applicant as to his health, and thereafter the applicant submitted to a medical examination, in which he gave a negative answer to a question appearing therein, in the following form: "Have you now, or have you ever had any disease

or disorder of the heart or blood vessels? Atheroma, palpitation of the heart, varicose veins, etc., aneurism," and the medical examiner failed to explain the meaning of the technical terms therein, and nothing appeared in the evidence to shew that the applicant knew that he had any of the diseases or disorders referred to in the question, such answer was an innocent misstatement not avoiding the policy, even though it was untrue at the time it was made.

[*Sawyer* v. *Mutual Life*, 4 D.L.R. 295, affirmed.]

2. INSURANCE (§ III E 2—115)—DISCLOSURE OF BEING UNDER PHYSICIAN'S CARE—ABSENCE OF INTENTIONAL CONCEALMENT.

Where an applicant for insurance disclosed to the insurer's agent that he had been just prior to the making of the application under medical treatment and the agent communicated this to the insurer's medical examiner, and the latter admitted that he discussed that illness with the applicant at the time of his examination and that it was his own omission and not that of the applicant, that the answer to the question was not correctly written down, there was no intentional concealment or suppression of the fact of the recent medical treatment on the part of the applicant sufficient to avoid the policy.

[*Sawyer* v. *Mutual Life*, 4 D.L.R. 295, affirmed.]

3. INSURANCE (§ III E 2—115)—DECLARATION IN APPLICATION FOR INSURANCE OF TRUTH OF STATEMENTS—WARRANTIES—ABSENCE OF INTENTIONAL MISSTATEMENTS.

Where an applicant for insurance declared, in his medical examination that each of his answers to the questions therein was, to the best of his knowledge, information and belief, complete and true, and was a continuation of and formed a part of his application for insurance, and the application itself contained the statement that the applicant was, to the best of his information, knowledge and belief, in good health and that such statements and the statements made or to be made to the insurer's examining physician should form the basis of the contract of insurance, and if there was therein any untruth or suppression of facts material to the contract, the policy should be void, such statements were no more than statements founded on knowledge, information and belief, and were not absolutely and unqualifiedly warranted to be true, and, unless it could be found that the applicant knowingly misstated the facts and induced the issue of the policy on such facts, as stated, the insurer should not be exonerated from liability under it.

[*Sawyer* v. *Mutual Life*, 4 D.L.R. 295, affirmed; *Confederation Life* v. *Miller*, 14 Can. S.C.R. 330, followed.]

4. INSURANCE (§ III E 2—115)—REPRESENTATION AS TO HEALTH—MEDICAL EXAMINER'S ERROR IS INSURER'S ERROR.

In the medical examination part of an application for a policy of life insurance, where it is the duty of the medical examiner to insert the applicant's answers properly and where he thought he had done so, the error (if any) of that officer is to be attributed to the insurer and not to the assured.

[*Biggar* v. *Rock Life*, [1902] 1 K.B. 516, distinguished; *Confederation Life* v. *Miller*, 14 Can. S.C.R. 330, referred to; *Sawyer* v. *Mutual Life*, 4 D.L.R. 295, affirmed. See also *Strano* v. *Mutual Life*, 5 D.L.R. 719.]

Statement

APPEAL by the defendants from the decision of Macdonald, J., *Sawyer* v. *Mutual Life Assurance Company of Canada*, 4 D.L.R. 295, giving judgment in favour of the plaintiff for $2,000 and interest.

The appeal was dismissed, PERDUE, J.A., dissenting.

J. P. Curran, K.C., for the plaintiff.

A. E. Hoskin, K.C., for the defendants.

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ASSURANCE
CO. OF
CANADA.

Howell, C.J.M.

HOWELL, C.J.M.:—I have had the advantage of reading the judgments of my brother Judges and I agree with the majority that this appeal should be dismissed.

It seems to me, from the evidence of the plaintiff of the treatment which she was administering to the deceased at the time of his visit to Dr. Langrill and from what the deceased told Dr. Wright about what that doctor was treating him for, it is reasonable to suppose that the deceased really believed he was suffering from indigestion, and that if Dr. Langrill did tell him it was heart trouble, the deceased did not believe it, or thought it was mere heart irregularity arising out of indigestion.

There is a wide difference between the facts in the case of *Biggar* v. *Rock Life*, [1902] 1 K.B. 516, and in this case. In that case the agent to solicit insurance filled up the answers, and it was not a part of his duties to do so, in this case it was the duty of the doctor to ask the questions, explain them and properly fill up the answers. I gather from the printed form used that the examination must be private, and the whole matter, consisting of the questions and answers, together with the doctor's answers and report, and the classification of the risk, must be mailed by the defendants' medical examiner direct to the defendants' head quarters.

It was plainly the duty of this examiner to fill up the answers properly, and in this case he thought he had done so. The error was that of an officer of the defendants, and he admits it.

The provision or warranty in the policy is

> any statements made . . . to the company's examining physician shall form the basis of the contract.

This does not distinguish between verbal and written ones, and, in strict reading, the verbal statement as to the deceased's visit to Dr. Langrill complies with the warranty.

I do not think the findings of fact of the learned trial Judge should be disturbed, and I agree with the majority of the Court that upon these facts the case of *Confederation Life* v. *Miller*, 14 Can. S.C.R. 330, and *Joel* v. *Law Union and Crown*, [1908] 2 K.B. 863, justify the judgment for the plaintiff.

The appeal is dismissed with costs.

Richards, J.A.

RICHARDS, J.A.:—The plaintiff brought this action on a policy of insurance issued by the defendants on the life of the plaintiff's husband, William Sawyer, the policy being payable, on its face, to the plaintiff. The application for assurance was dated the 5th February, 1910, and contains a clause, which, omitting words not material to this action, is as follows:—

> I, the applicant for the above assurance, hereby declare that, to the best of my knowledge, information and belief, my health is good; . . . that I usually enjoy good health; . . . that the statements made above are respectively full, complete and true; and I agree that such

statements, with this declaration, and any statements made or to be made to the company's examining physician, shall form the basis of the contract for such assurance; and if there be therein any untruth or suppression of facts material to the contract, the policy shall be void.

On the 28th February the applicant, William Sawyer, was examined by the defendants' examining physician, Dr. Wright. At that examination the doctor filled up the answers to a paper, which had not been in the hands of the applicant, but which the doctor had received from the defendants, or their agent, and which is called, "Answers to be made by the applicant to the medical examiner," and which has the direction that it must be mailed by the examiner direct to the head office of the defendants. The document contains a large number of questions. Dr. Wright read the questions, as they appear on the paper, without explanations, to the applicant, and wrote down, as to some of them at least, not the applicant's exact answers, but what he, the examiner, considered to be their substance. These answers were not read by, or read over to, the applicant, who had no reason to suppose that they were not taken down in his own words, and as fully as he had stated them. As soon as the answers were completed, he signed, at the examiner's request, but without reading it, a statement at the end, of which the following is a copy:—

I, the undersigned applicant, hereby declare, on behalf of myself and of any person who shall have or claim any interest in any policy issued hereunder, that, to the best of my knowledge, information and belief, each of the above answers is full, complete and true, and is a continuation of, and forms a part of, my application for assurance to the Mutual Life Assurance Company of Canada.

The policy, omitting parts not material to this action, reads:—

In consideration of the application for this policy, which is hereby made a part of this contract, . . . the Mutual Life Assurance Company of Canada assures the life of William Sawyer, . . . and promises to pay . . . to his wife Agnes Sawyer . . .

This policy is issued by the company and accepted by the assured upon and subject to the privileges and conditions printed and written on the succeeding pages hereof, which are hereby made a part of this contract.

On the back of the page containing the contract is the following:—

Warranty in Application.

The following is a copy of part of the application for this policy and forms a part of the assurance contract.

Then follows an exact copy of the paragraph above quoted at the end of the application for insurance.

The assured died on the 4th December, 1910. The death certificate, signed by Dr. Langrill, and forwarded to the company, stated that he died from embolus, following heart disease.

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The medical testimony explained that embolus means a clot, or growth, formed in the valve of the heart, and which, getting loose from the heart, gets into the system. In this case it is supposed to have got into the deceased's brain and to have caused his death.

The company resisted payment of the policy on the ground that the applicant made, knowingly, untrue answers to two of the questions in the document of 28th February, 1910, and that such answers were material to the assurance, and that the assurance was, therefore, void. They also claimed that, irrespective of the knowledge, the effect of the policy and the above-quoted paragraph in the application for insurance, and of the also above-quoted paragraph at the end of the medical examiner's questions, was a warranty of the truth of the answers and of full disclosure having been made, and that there had been a breach of such warranty, which rendered the contract void.

Dr. Langrill, who signed the death certificate, was called as a witness by the defendants. He stated that on the 14th of October, 1909, a little less than four months before the application for insurance, Sawyer went to him and was examined by him, and found to be suffering from mitral regurgitation of the heart. The doctor says he then told him that he had heart trouble, and gave him medicine for it. The doctor says that in December, 1909, Sawyer again came to him, and was found to be improving in condition.

The defendant also called as a witness Dr. Moir, who stated that in August, 1910, Sawyer went to see him, and that he told him to go home, and that the next day he, the doctor, went to Sawyer's house and found him suffering from mitral regurgitation of the heart and a mild attack of typhoid fever, and that Sawyer then told him (the doctor) that he had heart trouble.

The questions, as to which it is claimed that Sawyer gave untrue answers, are those numbered 8 (*c*) and 9, in the document of 28th February, 1910. 8 (*c*) reads as follows: "Have you now or have you ever had any disease or disorder (*c*) of the heart or blood vessels?"

Under that, in smaller type, appears the words: "Atheroma, aneurism, palpitation of the heart, varicose veins, etc."

The answer taken down by the doctor to this was "No."

Question 9 is, "When were you last attended by a physician, or when did you consult one, and for what disease?" And the answer is, "Three years ago for fractured rib."

It is claimed, as to question 8 (*c*), that the applicant had been told by Dr. Langrill, and knew, that he had heart disease, and that, therefore, the answer to question 8 (*c*) was knowingly untrue.

It is said, as to question 9 and the answerto it, that he must have been aware in February, 1910, that he had been attended

by Dr. Langrill in the preceding October and December, and that, therefore, in answering, "Three years ago for fractured rib," he was guilty of wilful suppression, or, at any rate, of a suppression of a material fact.

Dr. Wright's evidence, with reference to his examination of the applicant and to these questions in particular, is, in effect, as follows: He read the questions over to Sawyer, but made no explanation as he went along; he took down the answers substantially as Sawyer gave them; he did not repeat the answers as he wrote them down, and Sawyer, so far as he could say, relied on his putting down faithfully what he had told him. He says he made a stethoscopic examination, putting the stethoscope next to Sawyer's skin, and that he found nothing abnormal with his heart, and he thinks he would have found out if anything had been wrong. He says he thinks Sawyer would have given him any information he asked for, and that he believed Sawyer honest in what he said, and that, so far as he could tell, Sawyer might have been suffering from heart trouble and not have been conscious of it.

With regard to question 9, Dr. Wright says that when answering the 14th question, which was as to whether his weight had increased or decreased, Sawyer said that he remembered that he had gone and seen Dr. Langrill, and that Dr. Langrill had told him that he was suffering from a pain in the stomach, and that it was due to acute indigestion, or, at any rate, to indigestion. He says Sawyer further stated that he was all right after he had taken a few doses of the medicine prescribed by Dr. Langrill. The examiner admits that it was through his own mistake that this answer was not taken down, and that it was in no way the fault of the insured. Dr. Wright was the company's regular examiner in that district, and had taken quite a number of examinations for insurance.

In the case of *The Confederation Life* v. *Miller*, 14 Can. S.C.R., 330, the application contained a paragraph which is as follows:—

> I . . . do hereby warrant and guarantee that the answers given to the above questions (all of which questions I hereby declare that I have read or heard read) are true, to the best of my knowledge and belief; and I do hereby agree that this proposal shall be the basis of the contract between me and the said association, and I further agree that any misstatements or suppression of facts made in the answers to the questions aforesaid, or in my answers to be given to the medical examiner, shall render null and void the policy of insurance herein applied for.
>
> I . . . do also hereby agree that this proposal and declaration shall be the basis of the contract between me and the said association.

It was held that the words, "to the best of my knowledge and belief," qualified not only the words which preceded them but also the words which followed them. It seems to me that we are bound by that case to hold that the similar words in

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the paragraphs in question qualify the whole of the paragraphs, and that the result is that, even if there is a warranty in the present case, the warranty is wholly qualified by the words, "to the best of my knowledge, information and belief."

The case of *Joel* v. *Law Union and Crown Ins. Co.*, [1908] L.R. 2 K.B. 863, though not on all fours with this case, was one in which the applicant signed a statement that the answers made to the medical examiner were all true. The statement was not qualified by any words limiting it to the best of her knowledge, information or belief. It was held, in that case, that this statement was not part of the contract; but the question was gone into very carefully as to whether her omission to state that she had been attended by a doctor, named Kinsey Morgan (who, if applied to by the company, would probably have given them information as to matters which the applicant was not aware of, but which were material to be considered on the question of granting the policy) was such a suppression of fact as would amount to fraud and would nullify the contract. The case is of great value as shewing how the Court looked upon the answers to the medical examiner. They held that the document was of no practical value, in the absence of evidence of explanation to the applicant of the meaning of the questions, which are couched, like those of the present case, largely in medical terms, which a layman would not be expected to understand, and, in the absence of explanations of the exact answers made to them by the applicant, they holding that it was patent that what was written down as answers was not the exact answers, but the medical examiner's conclusions from those answers, and that, for the purpose of arriving at the good faith of the applicant, the document was of practically no importance. The question of good faith is, undoubtedly, of the utmost importance, even if, in the present case, there is a warranty.

Now, to deal first with the answer to question 8 (*c*). Two questions arise: First, was Sawyer, in fact, suffering from heart disease when he was examined by Dr. Wright? and, secondly, if so, did he know the fact?

It will be borne in mind that, as decided in the *Joel* case above referred to, the onus is most strongly upon the defendants to prove both of these points. On reading Dr. Langrill's testimony carefully, it appears to me that he does not say that he told Sawyer that he had heart disease. He says he told him he had "heart trouble." Now, it appears from the testimony that severe indigestion will cause temporary heart trouble, and I am not at all satisfied, from Dr. Langrill's testimony, that he told the applicant anything more than that he had heart trouble, caused by indigestion, which the applicant would reasonably think would be temporary, and would not suspect to be due to disease of the heart. It is almost certain, to my mind, that

that is all the doctor would tell him, if doing his duty to him. If he knew that the man had a trouble which could not be cured, but might be alleviated by medicines, he would know that the effect of telling the man that his trouble was incurable, would be greatly depressing, and would probably hasten his end. Viewing, therefore, what seems to me his duty in the matter, together with his cross-examination, I am of opinion that the utmost that he told the man was that he had heart trouble, and that he, directly or indirectly, led him to believe that that would end with the curing of the indigestion. At any rate, the evidence does not seem to me strong enough to meet the heavy onus cast upon the defendants to prove clearly that Sawyer did know he had heart disease. I am also, after carefully considering the testimony, not free from doubt as to whether Dr. Langrill was not, to some extent, unconsciously biassed in his testimony as to what he told Sawyer by the fact that the man appeared to have died from heart disease. The fact that Dr. Wright carefully examined the applicant with the stethoscope seems to me to strengthen this view of the case. I find it difficult to realize that, if the man had mitral regurgitation of the heart in October and December, Dr. Wright would fail to discover that fact in the following February. It appears, from the testimony, to be incurable, and it also appears, from the testimony, to be very easily detected from the murmuring of the heart, and there is nothing in the testimony to shew that Sawyer could, in any way, have concealed it from the examining doctor.

Dr. Moir's testimony, I think, should not have been admitted. He examined this man about six months after the time at which Dr. Wright's examination failed to discover heart disease. To my mind, this testimony, even if admissible, which I doubt, is but a faint circumstance to be considered, and is not of material help to the defence. The man might have had on disease of the heart in February and yet might have it in August following.

It seems to me, therefore, that the defendants have failed to prove that on 28th February, the time of the examination by Dr. Wright, Sawyer knew he had heart disease.

As to the 9th question and answer, I think the contention is sufficiently met by the fact that, although Sawyer did not, at the moment the question was asked him, disclose the fact that he had been attended by Dr. Langrill, he did state that, during the examination, to the medical examiner. The medical examiner admits that it was his duty to take this down, and that he did not do so. Can it be said that this was not disclosed? The medical examiner was the agent of the company, and not Sawyer's agent in any respect. The evidence shews that he did not read the questions over to Sawyer, but immediately, at the close of the examination, got him to sign the statement (which the defendants rely on) at the end of the paper. Sawyer would

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naturally suppose that the doctor had reduced to writing the statements which he, Sawyer, had verbally made to him, and that he was signing his own words put in writing. I think it is impossible to hold that the company, after such disclosure as to Dr. Langrill's attendance, can avail themselves of that which arose from the mistake of their agent, and not from any act of the applicant. But, further, let us consider what the applicant, if he gave a warranty as to the answers to the medical examiner, did warrant as to them.

In the application of 5th February he says:—

> I agree that such statements, with this declaration—meaning those then above written in the application, and which are not complained of—and any statements *made or to be made to the company's examining physician* shall form the basis of the contract. . . .

It is two of these latter statements, those "made or to be made to the company's examining physician," on which the defence is based. These words surely mean no more than what they say. They refer, on their face, only to the statements "made or to be made" to the doctor. If they have any meaning, they refer, and refer only, to what the applicant actually says to the doctor. They do not refer, or pretend to refer, or be limited to, what the doctor may write down as his understanding, or summary, of what the applicant states to him.

The document of 28th February says:—

> each of the above answers . . . is a continuation of and forms a part of my application for insurance.

Taking this document by itself, the words, "the *above* answers," would raise a doubt whether they might not refer, and be limited to, the answers as written down by Dr. Wright. But, taking it by itself, it creates no contractual relation. So taken, it is only a representation of facts, and comes within the same class as the signed statement at the end of the answers to the medical examiner in *Joel* v. *Law Union and Crown*, [1908] 2 K.B. 863, above referred to. Even as a representation of facts it is weaker than the *Joel* one, as it is limited to knowledge, information and belief, while the *Joel* one was not so limited.

To create a contractual relation, it has to be read with, and as part of, the document of 5th February, which describes, in in express words, as above mentioned, what the answers are which the applicant makes part of the basis of the contract. It bears the heading, "Answers to be made by the applicant to the medical examiner." Now, if the answers, as written down by the doctor, are carried into the document of 5th February by the use of the words, "the above answers," in the paper of 28th February, which I cannot think they are, then the applicant warrants the truth of two sets of answers—those he makes verbally to the doctor, and those the doctor chooses to write down. The result would be, that there would be two sets of

answers, which would probably not be co-extensive, as in this case they are not. Could it then be said that, because the necessary disclosure was only made in those actually given by the applicant, its absence in those put down by the company's agent could be relied on as a suppression of fact? The result would be absurd and oppressive, and would, in the great majority of cases of loss, put it in the insurer's power to pay, or not, as they might choose.

Bearing in mind the above, and the fact that the onus is entirely on the defendants, and the rule mentioned in the *Joel* case, and other cases, that such documents are to be construed strongly against the company who prepared them, I am of the opinion that the words, "the above answers," in the paper of 28th February can refer only to the statements to the medical examiner, mentioned and described in that of 5th February—that is to say, the verbal statements of the applicant.

If I am right in the above, it follows that, as Sawyer did tell Dr. Wright of having been attended by Dr. Langrill, and of what he supposed he had been attended for, he properly and sufficiently answered question 9, to the best of his knowledge, information and belief, which is all the document required him to do, and it was not his concern that Dr. Wright did not write that down and inform the company of it.

I would dismiss the appeal with costs.

Perdue, J.A. (dissenting).

PERDUE, J.A. (dissenting):—This action is brought by the beneficiary named in a life insurance policy to recover the amount of the policy from the defendants, the insurers. The defence raised is, shortly, the making of untrue answers to questions and suppression of material facts by the deceased when effecting the insurance.

On 5th February, 1910, the deceased, William Sawyer, the husband of the plaintiff, Agnes Sawyer, made application for the insurance in question. On the 28th of the same month he was examined by the company's medical examiner, Dr. Wright, and the policy, which is dated 24th March, 1910, was issued in due course. By the terms of the policy the application is made a part of the contract, and the conditions printed on the succeeding pages of the policy are also made a part of the contract. On the next page of the policy there appears the following:—

Warranty in Application.

The following is a copy of part of the application for this policy and forms a part of the assurance contract:

I, the applicant for the above assurance, hereby declare that, to the best of my knowledge, information and belief, my health is good, my mind sound and my habits temperate; that I usually enjoy good health and do not practise any habit or habits that tend to impair my health or shorten my life; that the statements made above are respectively full, complete and true; and I agree that such statements, with this

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declaration, and any statements made or to be made to the company's examining physician, shall form the basis of the contract for such assurance; and if there be therein any untruth or suppression of facts material to the contract, the policy shall be void and any premiums paid thereon forfeited.

The paragraph last above cited is contained verbatim in the application signed by the deceased.

The first part of the medical examiner's report contains questions put to the applicant for insurance while he was under examination, and the answers made by him thereto, and taken down by the medical examiner. This part of the report was, as required by the insurers, signed by the applicant. It contains the following declaration made over the signature of the applicant:—

> I, the undersigned applicant, hereby declare, on behalf of myself and of any person who shall have or claim any interest in any policy issued hereunder, that to the best of my knowledge, information and belief, each of the above answers is full, complete and true, and is a continuation of, and forms part of, my application for assurance to the Mutual Life Assurance Company of Canada.

The eighth question in the report contained the following inquiry:—

> Have you now, or have you ever had, any disease or disorder:
>
> (Omitting (*a*) and (*b*) which do not affect the case.)
>
> (*c*) Of the heart or blood vessels?
>
> | | | |
> |---|---|---|
> | Atheroma. | Palpitation of | Varicose Veins, |
> | Aneurism. | the heart. | Etc. |
>
> (Omitting (*e*), (*f*) , (*g*) and (*h*).)
>
> (*i*) Have you had any other serious illness, operation or injury?

To each of these questions, (*c*) and (*i*), the applicant answered "No."

The ninth question was as follows:—

> When were you last attended by a physician, or when did you consult one, and for what disease?

The answer given to this question by the applicant was, "Three years ago for fractured rib."

By the eleventh question the applicant was asked, "Are you now in perfect health?" To this he answered "Yes."

It is proved that on 14th October, 1909, less than four months before the application was signed, the deceased consulted his family physician, Dr. Langrill, complaining of great weakness and of pains in the region of the heart. Dr. Langrill, who was called as a witness, stated that he made a thorough examination of Sawyer, and found that he was suffering from a valvular disease of the heart, technically called mitral regurgitation. The doctor told him that he, Sawyer, had heart trouble, advised rest and abstention from work, and gave him a prescription. This prescription was proved by the medical testimony called

o be a usual and proper one for the disease of the heart from which the patient was believed to be suffering. This prescription was made up by a druggist and taken by Sawyer. The prescription was refilled for him on several occasions, extending over a period of about six months, according to the evidence of the druggist. About seven weeks after his first visit—that is to say, about 1st December, 1909—Sawyer consulted Dr. Langrill again, who found a strong mitral murmur still present. He advised a continuation of the same treatment, and told Sawyer to take at least four or five more botttles of the medicine.

In August, 1910, the deceased, in the absence of Dr. Langrill, consulted Dr. Moir. The last-named physician made an examination and found that Sawyer was then suffering from serious mitral regurgitation. On the following day Dr. Moir attended him at his house, and then told him that he had heart disease. Sawyer said he was aware of the fact; he was aware that he had heart trouble. At the same time the deceased was suffering from a mild attack of typhoid fever, from which he made a rapid recovery.

On 3rd December, 1910, the deceased was attacked with sudden illness, of which he died on the following day. The cause of death was, according to the undisputed medical testimony, embolus or clot on the brain caused by heart disease.

From the above facts it appears that less than four months prior to making application for the insurance the deceased had heart disease, and was treated therefor. His medical attendant swears that he then told the deceased that he had heart trouble, and advised him and prescribed for him as being in that condition. There is no contradiction of Dr. Langrill's statement that he informed the deceased as to the nature of the disease from which he was suffering. The deceased in the following August certainly knew that he had heart disease. How did he acquire this knowledge? After his second visit to Dr. Langrill, which took place about 1st December, 1909, he does not appear to have consulted any physician until August, 1910, when he was attended by Dr. Moir, yet he then told Dr. Moir that he knew he had heart trouble. No source of information is suggested other than what Dr. Langrill told him, and what he learned from Dr. Langrill must have been learned, at the latest, early in the month of December prior to his applying for the insurance. Further, evidence was put in on the part of the plaintiff that Sawyer, on being canvassed by the company's agent in the fall of 1909, said: "Perhaps I would not pass; I have been in to see Dr. Langrill." Bremner, the agent, saw Langrill, and from what the latter said Bremner understood him to be of opinion that Sawyer was "not in a position for insuring at that time." There is a contradiction between Langrill and Bremner as to what took place at subsequent interviews, but I do not consider these important in considering the question

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whether Sawyer knew his true condition or not. The fact that Sawyer had doubts as to whether he was insurable or not, by reason of something Dr. Langrill had told him, is some corroboration of Dr. Langrill's statement that he disclosed to Sawyer the nature of the disease.

The learned trial Judge has not dealt with the positive statement of Dr. Langrill that he informed Sawyer that the latter had heart trouble or heart disease, and he does not deal with the other facts referred to as lending corroboration to the view that Sawyer was aware at the time he signed the application that his heart was in some way affected. I am convinced that the deceased knew he had some disorder of the heart at the time he was examined by the medical examiner. It is true that the valvular disease was not detected when he was examined on 28th February, 1910. It may have been less pronounced at that time as a result of the treatment he had been receiving, but the facts that he felt better and that the medical examiner failed to detect the disease did not in any way justify Sawyer in refraining from giving information that he had been under treatment for heart trouble three or four months previously.

> In policies of insurance, whether marine insurance or life insurance, there is an understanding that the contract is *uberrima fides*—that if you know any circumstance at all that may influence the underwriter's opinion as to the risk he is incurring, and, consequently, as to whether he will take it, or what premium he will charge if he does take it, you will state what you know. There is an obligation there to disclose what you know; and the concealment of a material circumstance known to you, whether you thought it material or not, avoids the policy:

per Lord Blackburn in *Brownlie* v. *Campbell*, 5 A.C. 925, at p. 854. See also *London Assurance* v. *Mansel*, 11 Ch.D. 363, and cases there referred to; Halsbury, Laws of England, vol. 17, sec. 1100; Porter on Insurance, 5th ed., p. 175. In this respect there is a wide difference between contracts of marine or life insurance and contracts relating to other matters. In ordinary contracts there is not the same obligation to make disclosure or the same consequences of concealment: *Brownlie* v. *Campbell*, 5 A.C. 925, p. 954.

The matters covered by questions 8, 9 and 11 of the first part of the medical examiner's report were shewn in the evidence to be material; they are in fact most material, seeking, as they do, information as to the applicant's past and present health, and the diseases, if any, for which he has been treated. By question 8 the direct inquiry was put to the applicant, "Have you now or have you ever had any disease or disorder of the heart or blood vessels?" To this he answered "No," although he must have known at that time that he either then had, or had had within four months previously, some disorder, if not disease, of the heart. I cannot avoid the conclusion that the answer to this question was untrue to the knowledge of the applicant.

Question 9 contains a simple and direct inquiry as to when the applicant was last attended by a physician, or when did he consult one, and for what disease. His answer was "three years ago for a fractured rib." He conceals the fact that he was within the previous three or four months under treatment by Dr. Langrill for some internal disorder, whether he knew or not that it was heart disease, and although he had been, according to the evidence of the druggist and of his wife, continuing to take the medicine prescribed for him up to or in the same month in which he made the answer.

It is urged, by way of excuse, for the answer to question 9, that the applicant thought so lightly of the complaint that he overlooked making any reference to it until he was answering the last question contained in that part of the report. According to the evidence of the medical examiner, the applicant, when considering the answer relating to increase or decrease of weight, stated, as an afterthought, that he had had a pain in the region of the stomach, that Dr. Langrill said it was due to indigestion, and that he was all right after he took a few doses of the medicine prescribed by Dr. Langrill. This statement made as Dr. Wright gives it in his evidence is untrue in fact, in that Dr. Langrill treated the applicant not for indigestion, but for heart disease. For the reasons I have already set forth, I believe that the applicant knew at the time that he had been treated for heart disease and not for indigestion. In the next place, the applicant, in making the statement that he became all right after taking a few doses of the medicine, concealed the fact that he continued taking bottle after bottle of the medicine over a period of several months, and that he twice consulted Dr. Langrill in regard to his complaint, there being an interval of seven weeks between the consultations. In making the statement, therefore, he wilfully belittled and misstated the facts, and endeavoured to conceal and did conceal, even in making the statement, the serious nature of his disorder. If his ailment was as trivial as he made it appear to Dr. Wright, why was he, when Bremner spoke to him, apprehensive as to his ability to pass the medical examination?

The answer to question 9 as entered in the report is untrue in failing to disclose that the applicant had been attended and treated by Dr. Langrill on 14th October, 1909, and again seven weeks thereafter. The answer was untrue to the knowledge of the applicant. But, it is said, he afterwards, in the course of the examination, mentioned to Dr. Wright the fact that he had been treated by Dr. Langrill, and that Dr. Wright, through an oversight, omitted to add this to the answer to question 9. I have already shewn that, even if his statement had been entered in the report as he gave it to Dr. Wright, it would still have been untrue and misleading, but, granting for the moment that the statement was true, honest and complete in so far as the

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knowledge of the applicant went, the fact still remains that the statement was not entered in the report, and was not placed before the defendants when they had to decide whether they would grant the insurance or not. It is argued that the omission of the statement from the report was due to the mistake of the defendant's medical examiner, that it was known to him, and that, if he failed to enter it in the report, the defendants are bound by his knowledge and by his acts as their agent. But the part of the report which contains the questions and answers under consideration was signed by the applicant, who, over his signature, declared that, to the best of his knowledge, information and belief, each of the answers was full, complete and true, and was a continuation of and formed part of the application for insurance. The answers, as written down in the report, formed, along with statements contained in the application, the basis of the contract of insurance. To this the applicant had agreed when he signed the application, and it was his duty to see that his answers were set down correctly before he signed them and gave his warranty that they were, so far as his knowledge and belief extended, full, complete and true. In such a case it will be presumed that the applicant read the answers before signing them, and he must, if he did not take the trouble to read them, be treated as having adopted them: *Biggar* v. *Rock Life Assce. Co.*, [1902] 1 K.B. 516, following *New York Life* v. *Fletcher*, 117 U.S. 519. In the latter case it was held that the signing of an application for insurance without reading or hearing it read was inexcusable negligence, and that a party is bound to know what he signed. As further bearing out this principle, I would refer to *Kniseley* v. *British Am. Assce. Co.*, 32 O.R. 376; *Taylor* v. *Grand Trunk R. Co.*, 4 O.L.R. 357; *Parker* v. *South Eastern Ry. Co.*, 2 C.P.D. 416, 421; *New York Life* v. *McMaster*, 87 Fed. Rep. 63.

The medical examiner was, no doubt, the agent of the defendants for the purpose of putting the questions, but he was not their agent for the purpose of inserting wrong answers or suppressing the true answers to the detriment of the insurers and to the benefit of the applicant. This proposition is supported by *Biggar* v. *Rock Life Assce. Co.*, [1902] 1 K.B. 516, and *New York Life* v. *Fletcher*, 117 U.S. 519, above cited, and they have been approved in *Phœnix Assce. Co.* v. *Berechree*, 3 Commonwealth (Aust.) 946.

In *Joel* v. *Law Union and Crown*, [1908] 2 K.B. 863, Lord Justice Moulton expressed the opinion that the replies of the applicant in that case to the medical examiner were only intended as statements made by her, to the best of her knowledge, for the purpose of assisting the medical referee and the company to judge of the risk they were taking. But in that case there was nothing in the signed documents which made the

accuracy of the answers to the medical examiner a condition of the contract, or the basis of the contract, as was done in the present case.

I have treated the warranty given by the applicant in this case, according to its purport, as one given to the best of his knowledge, information and belief, and not as an unconditional one. But I think that information relating to material matters within the knowledge of the applicant, which he was bound to furnish as the very basis of the contract, was concealed and not transmitted to the company. The company was misled as to facts which would materially affect the risk, and these facts were known to the applicant.

The conversations which took place, before the application was signed, between Dr. Langrill and Bremner, the company's agent, do not, in my view, affect the contract between the applicant and the company. Bremner was an agent to receive and forward applications. It was not his duty to ascertain facts relating to the health of the applicant, and a statement by Dr. Langrill that it was safe to insure the applicant, although he denies having made any such statement, would be irrelevant and would not affect either party to the contract. The only effect of these conversations, which were introduced by the plaintiff, was to shew that there had been some discussion and some doubt as to whether the applicant was in a condition of health to pass examination for life insurance.

In a case like the present, sympathy always runs strongly with the widow who is seeking to recover insurance on the life of her deceased husband, but cases must be decided apart from sympathy and in the cold light of the facts and of the law to be applied to each.

I regret that I must arrive at the conclusion that the appeal should be allowed, and the plaintiff's action dismissed.

Cameron, J.A.

CAMERON, J.A.:—The facts in this case are set out in the judgment of the learned trial Judge, who entered judgment for the plaintiff for the amount of the policy sued upon.

In moving to set aside this judgment, counsel for the defendant company pointed out that the assured, on October 14, 1909, saw Dr. Langrill, who diagnosed his case as one of mitral regurgitation, prescribed for it and told the assured what the trouble was.

> I said it was heart trouble that bothered him and heart troubled him and I gave (told?) him how he could conduct himself so as to benefit from this disease: p. 35.

About seven weeks after that the assured came again, when the doctor continued the same advice he had previously given, and told him to take four or five bottles more of the medicine he had prescribed. The assured continued to get the medicine until late in February.

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The assurance was effected in February, 1910, and the policy actually issued March 24 of that year.

In August, 1910, the assured went to consult Dr. Moir (in the absence of Dr. Langrill), and, on a second interview with him, Dr. Moir diagnosed the case as one of mitral regurgitation also.

On December 4, 1910, the assured died from embolus following heart disease, as the learned Judge finds. The death certificate, which was filed, was signed by Dr. Langrill, and assigned therein as the cause of death, "embolus following heart disease." In this view Dr. Moir seems to concur.

It is urged that the answers of the applicant to questions 8 (*c*), 8 (*i*) and 9 by the medical examiner were untrue; that they are made part of the application and of the policy; and that, whether fraudulently made or not, the policy, being founded on untrue representations, must fall to the ground.

As to these answers, we are referred to Porter on Insurance, p. 183. If an applicant for insurance is required to sign answers to questions which are part of the policy, it is his duty to read them before signing, and it will be presumed that he did. In support of this are cited *New York Life* v. *Fletcher*, 117 U.S. 519, and *Biggar* v. *Rock Life*, [1902] 1 K.B. 516, in which latter case the former is quoted with approval. See also *Phœnix* v. *Berechree*, 3 Com. 946, and *Kniseley* v. *British America Assce. Co.*, 32 O.R. 276. It is the contention that, on these authorities, the assured having answered question 9 untruly, the defendant must succeed. But Dr. Wright admits the deceased did call his attention to the fact that he had been to see Dr. Langrill a short time previously and that he had then been prescribed for. That Dr. Wright failed to get this answer correctly cannot prejudice the beneficiary's right to bring this action. It cannot surely be argued that Dr. Wright became the agent of the deceased in neglecting to set forth with accuracy the information given him. The reasoning applied in *Biggar* v. *Rock Life*, [1902] 1 K.B. 516, that where the agent, whose authority from the company was limited, wrote in untrue answers in the application, he did so, not as agent for the company, but as agent for the applicant, cannot fairly be extended to cover this case, where the information was furnished by the applicant in good faith, but, by an oversight of the medical officer, whose duty it was to put it in writing, was not written down, though he thought he had done so. A question arises whether the condition in the policy applies to written answers and statements only. It does not seem to exclude verbal answers.

It was further argued that the correctness of the answers was warranted by the terms of the policy, and that such warranty was absolute, irrespective of the materiality of the answers, and that, even if there were no fraud or concealment, the plaintiff

must fail. It is the truth and not the materiality of the statements that governs.

In support of this view there was cited to us *Anderson* v. *Fitzgerald*, 4 H.L.C. 484, where it is stated that

> that principle (involved in the distinction between a warranty and a representation) has no application to a case where it is part of the contract, as it is true, that if a particular statement is untrue, then the contract shall be at an end: p. 504.

We were also referred to *Thomson* v. *Weems*, 9 A.C. 671, where Lord Blackburn said, at p. 683:—

> It is competent to the contracting parties, if both agree to it and sufficiently express their intention so to agree, to make the actual existence of anything a condition precedent to the inception of any contract; and, if they do so, the non-existence of that thing is a good defence. And it is not of any importance whether the existence of that thing was or was not material: the parties would not have made it a part of their contract if they had not thought it material, and they have a right to determine for themselves what they shall deem material.

Porter on Insurance, p. 165-166; *Russell* v. *Canada Life*, 32 U.C.C.P. 256, and *Jordan* v. *Provincial Provident*, 28 Can. S.C.R. 554, were also referred to. That a contract of insurance is a contract *uberrimae fidei* demanding full disclosure is well settled. That is the law, apart from any contract: *Joel* v. *Law Union and Crown*, [1908] 2 K.B. 863.

The contention of the plaintiff is that the warranty in the application which forms part of the contract is not absolute and unqualified, and that it is throughout subject to the reservation that the statements therein made and referred to are true to the best of the knowledge, information and belief of the applicant. The learned trial Judge says expressly, "I cannot find that the applicant knowingly made untrue answers," and, after a perusal of the evidence, I must say that, while there are difficulties, nevertheless I can see no adequate reason for reversing this finding of fact. There are contradictions, and the trial Judge had the witnesses in view on their examination and cross-examination. I would say, upon consideration of the evidence, that it seems to me that the applicant, a man of good repute and standing, acted at his interview with the medical examiner and otherwise as an honest man desirous of affording the company full information.

What construction, then, are we to place upon the warranty in the application? It did seem to me, on my first perusal, that the words, "to the best of my knowledge, information and belief," could not, on a strict grammatical construction, be carried forward to the succeeding subdivisions of the paragraph. But the judgment of the Supreme Court in *Confederation Life* v. *Miller*, 14 Can. S.C.R. 330, at 344, gives the rule of construction to be followed:—

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The rule of construction is that the language of the warranty being framed by the defendants themselves, the warranty must be read in the sense in which the person who was required to sign it should reasonably have understood it, and it is impossible to conceive that a person who was interrogated as to his knowledge and belief in respect of the matters enquired into could have understood that, notwithstanding that he should answer the questions put to him truly, according to the utmost of his knowledge and belief, he should, nevertheless, forfeit his policy if through ignorance the facts as stated by him should not prove to be absolutely true, apart altogether from his knowledge and belief.

Where the policy provides only against intentional misstatements, an innocent misrepresentation in the declaration, though the latter is made the basis of the contract, will not avoid it.

Halsbury, Laws of England, vol. 17, sec. 1103, citing *Fowkes* v. *Manchester*, 3 B. & S. 917; *Hemmings* v. *Sceptre Life*, [1905] 1 Ch. 365; and *Joel* v. *Law Union and Crown*, [1908] 2 K.B. 863. In this last case it was held that the answers to the questions by the applicant were not part of the policy, but, nevertheless, there was an obligation to make a full disclosure of material facts. The answers of the applicant to the questions were merely statements

> to the best of her knowledge for the purpose of assisting the medical referee and the company to judge of the goodness of her life, i.e., of the risk they were taking.

Per Lord Justice Fletcher Moulton, 889. It is important to notice that the

> onus of proving non-disclosure or concealment is on the insurance office.

Per Vaughan-Williams, p. 880.

I think the judgment of the trial Judge should stand, and that the appeal should be dismissed.

Haggart, J.A.

HAGGART, J.A.:—The trial Judge gives the facts in detail. He accepts the version of the witness Bremner, where there is a difference between his story and that of Dr. Langrill.

The deceased was not anxious to enter into the contract of insurance. For two years he had been canvassed at different times by the agent Bremner, and, when he finally consented, he frankly told the agent that Langrill had been treating him, and said that he might not pass. The agent saw Langrill, who suggested that they should wait awhile, and, if we believe Bremner, as the trial Judge did, Langrill, after the lapse of a short time, intimated that it would be safe to insure the man.

The application or proposal was signed in the usual way. The applicant was examined by the defendants' regular medical officer; the policy was issued and the premium paid.

The defendants deny liability, on the grounds that the assured did not make an honest disclosure in his application and answers to the medical officer, that the truth of his answers was warranted and expressly made the basis of the contract.

Sawyer certainly did not appear to be eager to make the contract. The witnesses speak of him as an honest, truthful man. I cannot gather from the evidence that Sawyer ever thought he had an incurable disease. The suggestion of Dr. Langrill to wait would mean to him that it was a passing trouble, and that time and treatment would cure it. And the fact that the examining physician did not detect any signs of serious ailment would corroborate the view that the assured considered himself in the enjoyment of good health, and had no thought or reason to think that he was afflicted with a fatal disease, and, when he was answering the many questions of a more or less technical nature, that any past troubles were not present to his mind and that his answers were true to the best of his belief. I can understand that the assured had considered that the trouble for which Langrill had treated him had passed away or that it was not present to his mind, and, as to the answer to the other question as to when he had been last treated, Dr. Wright, the physician, admits that during the examination the proper information had been given him, and it was owing to his neglect or forgetfulness that the correct statement was not written in the formal papers.

At the foot of the list of questions to which answers were made to the medical examiner, there is this declaration:—

> I, the undersigned applicant, hereby declare . . . that, to the best of my knowledge, information and belief, each of the above answers is full, complete and true, and is a continuation of and forms a part of my application for assurance. . . .

There is a similar declaration in the application filled out by the agent, and in the policy it is agreed that the declaration shall form the basis of the contract. In all are the words of limitation "to the best of my knowledge, information and belief."

The defendants contend that this stipulation is an absolute warranty, and that the accuracy of the information contained in the answers goes to the basis of the contract, and *New York Life* v. *Fletcher*, 117 U.S. 519; *Biggar* v. *Rock Life Assce.*, [1902] 1 K.B. 516; *Phœnix Ins.* v. *Berechree*, 3 Com. 946; *Kniseley* v. *British Am. Assce.*, 32 O.R. 376; *Taylor* v. *G.T.R. Co.*, 4 O.L.R. 357; *American Abell* v. *Tourond*, 19 Man. L.R. 660; *Anderson* v. *Fitzgerald*, 4 H.L.C. 484; *Thomson* v. *Weems*, 9 A.C. 671; *Russell* v. *Canada Life*, 32 U.C.C.P. 256, are some of the authorities relied on by the defendants.

Notice the words of limitation, "to the best of my knowledge, information and belief."

In the cases above referred to I cannot find such qualifying words standing in the same relation to the context. They all go to establish the principle that the insurer is entitled to a full and truthful disclosure of all the facts so far as the insured knows them.

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Did Sawyer give truthful answers to the physician's interrogatories?

In *Confederation Life* v. *Miller*, 14 Can. S.C.R. 330, the application contained a declaration in which the applicant warranted and guaranteed that the answers were true according to the best of his knowledge and belief, and agreed that the proposal should be the basis of the contract, and that any misstatement or suppression of facts in his answers to the questions, or in his answers to the medical examiner, should render the policy void. It was held, affirming the judgment of the Court below, that this was not a warranty of the absolute truth of the answers of the applicant, but that the whole declaration was qualified by the words, "to the best of my knowledge and belief." The observations of Mr. Justice Gwynne, on p. 344, are applicable to the present case. He says:—

> Now, this statement being qualified by the words, "to the best of my knowledge and belief," can only be untrue if the contrary to what is stated be the truth—namely, that to his knowledge and belief he had received some other serious personal injury than that stated. Whether that was so or not was for the jury to say, and the learned Judge left to them all the evidence from which they might infer what was the knowledge and belief of the applicant upon the point in question. The rule of construction that, the language of the warranty being framed by the defendants themselves, the warranty must be read in the sense in which the person who was required to sign it should reasonably have understood it, and it is impossible to conceive that a person who was interrogated as to his knowledge and belief in respect to the matters inquired into could have understood that, notwithstanding he should answer the questions put to him truly according to the utmost of his knowledge and belief, he should, nevertheless, forfeit his policy if through ignorance the facts as stated by him should not prove to be absolutely true, apart altogether from his knowledge and belief.

This case was approved and followed in *Metropolitan Life* v. *Montreal Coal Co.*, 35 Can. S.C.R. 266, where it was held that, unless the evidence so strongly predominates against the verdict as to lead to the conclusion that the jury have either wilfully disregarded the evidence or failed to understand or appreciate it, a new trial ought not to be granted. On the application for life insurance the applicant stated, in reply to questions as to insurances on his life then in force, that he carried policies in several life companies, but omitted to mention two accident policies. The policy provided that the statements in the application should be warranties and form part of the contract. The language of the warranty, being framed by the company, should be read in the sense in which the person required to sign it should have reasonably understood, the words should be construed *contra proferentes* and in favour of the assured: *Joel* v. *Law Union and Crown*, [1908] 2 K.B. 863. In this case the proposal contained a declaration that the statements so made were, "to the best of her knowledge and belief," true, and she agreed that the pro-

posal and declaration should be the basis of the contract. Subsequently she answered questions, on her medical examination, which were filled in by the doctor. She was asked to give the names of medical men consulted by her, and whether, among other complaints, she had ever suffered from mental derangement. In answer to the first question, she had left out the name of a doctor she had consulted, and to the second she answered in the negative, while, as a matter of fact, she had been confined for acute mania, although not aware of the fact. The two grounds of defence were—first, it was claimed that the accuracy of the answers was a condition precedent to the validity of the policy; and, second, misstatement and non-disclosure of material facts.

Vaughan-Williams, L.J., at pp. 874-5, says:—

> I do not think there is anything in law to make the truth of the answers a condition precedent to the liability of the defendants on the policy, and if the truth of the answer were not such a condition, it comes within the statement of Willes, J., in his judgment in *Wheelton* v. *Hardisty*, 8 E. & B. 232, 299, where he says: "Unless it were untrue to the knowledge of the plaintiffs, and, therefore, fraudulent, the mere untruth of it would not avoid any policy in which it was introduced, the policy containing no express stipulation to that effect."

And at p. 880:—

> The onus of proving non-disclosure or concealment is on the insurance office.

And, at p. 884, Fletcher-Moulton, L.J., says:—

> But, in my opinion, there is a point here which often is not sufficiently kept in mind. The duty is a duty to disclose, and you cannot disclose what you do not know. The obligation to disclose, therefore, necessarily depends on the knowledge you possess.

And, addressing himself to the interrogatories of the physician, he remarks:—

> I entertain the strongest opinion that the accuracy of the replies to the doctor who examined her was not a contractual limitation or condition of the contract, but that these replies were and were intended by both parties to be only statements by her, to the best of her knowledge, for the purpose of assisting the medical referee and the company to judge of the goodness of her life the risk they were taking.

In Halsbury's Laws of England, vol. 17, sec. 1102, the foregoing propositions are condensed as follows:—

> Although a warranty must be strictly complied with, nevertheless such a construction will be given to it as will give effect to the meaning which the parties must be presumed to have intended, and if a person states in the declaration merely what he believes or is informed that a certain fact is true or that he is not aware of any circumstance tending to shorten his life, the warranty only extends to the state of his belief, information and knowledge, and not to the facts of which he is *bona fide* unaware.

Chief Justice Strong (then Mr. Justice Strong), in *North British* v. *McLellan*, 21 Can. S.C.R. 288, 297, discussing the

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effect of a similar declaration where the limiting words were, "So far as the same are known to the applicant and material to the risk," says:—

> I do not agree in the meaning and construction attributed to this clause at the foot of the application which is relied on by the appellants and which is set forth in their factum. This would make the applicant pledge himself to the truth and materiality of his statements absolutely, which is just what the words, "so far as the same are known and material to the risk," protect him against. It would be impossible to attribute to these words the meaning contended for without perverting the language actually used. It appears to me that the respondent only undertook to affirm the truth of his statements so far as they were known to him, and as they were material to the risk.

I cannot agree with the defendants' contention that the doctor was the agent of the assured when he filled in the answers to the interrogatories administered by him. The doctor was, I assume, the paid servant of the defendants. He took his instructions from them; reported to them direct. It was a confidential relationship. Is he, then, the agent for the company in everything excepting when he makes a mistake to the prejudice of the assured? He admits that he got information during the examination which should have been incorporated in the answers. The defendants ought not to be allowed to set up such a defence.

If I accept the finding of facts of the trial Judge, and take his estimate of the value of the testimony of the respective witnesses, and believe that the assured made truthful answers according to the best of his knowledge, information and belief, at the time he was questioned, then the defendants, upon whom the onus lies, have failed to establish the defence of misstatement and concealment.

The appeal should be dismissed with costs.

Appeal dismissed, PERDUE, J.A., *dissenting.*

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British Columbia Court of Appeal, Macdonald, C.J.A., Irving, Martin, and Galliher, JJ.A. November 5, 1912.

1. TRUSTS (§ I D—24)—RESULTING TRUSTS—CONVEYANCE OF LAND AS CITY HALL SITE—AGREEMENT TO "MAINTAIN" CITY HALL THERE.

> Where the owner of several parcels of land conveys certain of them to a city corporation under a stipulation that the grantee shall "maintain," on the site so granted, its city hall, and where the deed of conveyance makes no provision that the city hall shall be maintained there "for all time" or to any such effect, and where it may reasonably be inferred that the grantor in executing the deed contemplated that a city hall so located near his remaining lots for a limited time would meet his purposes by enhancing the value of his adjacent property, there is no resulting trust in favour of the grantor, in the event of the grantee (owing to rapid city expansion) building a new city hall on a different site, approved by the ratepayers of the city.
>
> [*Smith* v. *Cooke*, [1891] A.C. 297, followed.]

2. DEEDS (§ II E 4—60)—CONSTRUCTION—USE OF WORD "MAINTAIN" IN DEED OF GIFT.

A provision in a deed of gift that the donee municipality was to "maintain" a city hall on the site does not mean "maintain for all time."

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APPEAL by the plaintiff from the judgment of Clement, J. The appeal was dismissed.

Bodwell, K.C., and *Mayers*, for plaintiff.

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

Argument

Bodwell, K.C., and *Mayers*, for appellant:—We submit that the property was given for a specific purpose, and while the corporation could not be compelled to keep the city hall in that location for ever, yet if its situation is changed, the property reverts to the donor.

There is a resulting trust here. They cited and referred to: *Hayes* v. *Kingdome*, 1 Vern. 33; *Johnson* v. *Ball*, 5 DeG. & Sm. 85; *Edwards* v. *Pike*, 1 Eden 267; *Wallgrave* v. *Tebbs*, 2 K. & J. 313; *Hutchins* v. *Lee*, 1 Atk. 447; *Young* v. *Peachy*, 2 Atk. 254; *Rochefoucauld* v. *Boustead*, [1897] 1 Ch. 196; *Haigh* v. *Kaye*, L.R. 7 Ch. App. 469; *Re Duke of Marlborough*, [1894] 2 Ch. 133; *Briggs* v. *Newswander*, 32 Can. S.C.R. 405; *Allen* v. *MacPherson*, 1 H.L.C. 191; *Barnesly* v. *Powel*, 1 Ves. Sen. 283, 287; *Jessup* v. *Grand Trunk R. Co.*, 7 A.R. (Ont.) 128. Here the donees were not only to place the building on the site granted, but also to maintain it there.

W. A. Macdonald, K.C., and *E. J. F. Jones*, for respondent corporation:—The undertaking to maintain the city hall on the site granted must be construed reasonably; it cannot be taken to have been intended to apply to all time. We have made a substantial compliance with the terms or rather understanding on which the gift was made. There has been consideration for the gift. The cases on resulting trust do not apply to a municipal corporation. We rely on the findings of the trial Judge. Further, there has been delay on the part of the plaintiff in taking action. The change in the location of the city hall took place in 1897, and action was not commenced by him until 1910.

Bodwell, in reply:—We protested, but it was not until after various arrangements suggested by us had been declined, that it was finally intimated to us that nothing would be done by the corporation to carry out our understanding of the bargain. Laches must be coupled with acquiescence, actual as inferential. The deed contains evidence of a trust; when the trust could not be continued then there was an end of it. There cannot be part performance; the property was given, not for general municipal purposes, but for a specific purpose, and that having failed, the consideration is gone.

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MACDONALD, C.J.A.:—I would dismiss this appeal. I agree entirely with the trial Judge.

IRVING, J.A.:—I would dismiss this appeal. Mr. Bodwell does not claim that there can be deduced from the language of the conveyance any condition subsequent. He rests his case on the doctrine of resulting trusts, and failure of consideration, and argues that the trust is created by the failure of the intention manifested by the language of the deed.

I am unable to see anything in this deed except a conveyance in fee to the corporation in consideration of something to be done by the corporation; that something, in my opinion, has been done. If it is intended to have a resulting trust, the ordinary and familiar mode of doing that is by saying so on the face of the instrument: *Smith* v. *Cooke*, [1891] A.C. 297, 299. The deed does not contain apt words to the effect that "maintain" shall mean "maintain for all time to come." The words actually used lead me to believe that the vendor might very well have considered it improbable that a new city hall would be required for many years, and that if a city hall were once established upon the lots granted by him, it would remain there a sufficient length of time to give an increased value to his property in that locality. The omission of the words "for all time," etc., in my opinion are sufficient to rebut the presumption that there should be a resulting trust.

It must be remembered that the fixing of a site for a city hall is a matter to be determined by the ratepayers, and not by the council. The knowledge of this fact must have been present to the mind of the grantor's advisers. The promise to maintain the city hall on the lots in question must therefore be read, "subject to removal at the will of the people." The vendor might well have recognized, and yet, speculating on the probabilities of the case, trusted that the people would not alter the character of the building for many years.

Martin, J.A.

MARTIN, J.A.:—I agree that the plaintiff cannot obtain any relief from this Court, in the present form of action at least. It is difficult to distinguish this case in principle from the decision of Mr. Justice Brewer in the United States Circuit Court, in *Berkley* v. *Union Pacific R. Co.* (1888), 33 Fed. Rep. 794.

It is from one point of view important to bear in mind the uncontradicted evidence of the causes that led to the change in site. They are given by the city comptroller, G. F. Baldwin, as follows:—

> Q. Now then when was there any suggestion on moving from that place and what were the circumstances that created that, do you know? A. Well, they made several additions to the building but some years after, ten years or so, the place did not suit, it was unsatisfactory for all offices, there wasn't room and they decided to move to another place.

I mention this because during the argument it was suggested, on behalf of the defendant, erroneously, I think, that the mere fact that the civic authorities had decided to make the change, would support the inference that it was a justifiable one. But a perusal of the evidence generally shews that the business area of the town had been extending very fast and with the increase of general business there would be a corresponding increase of civic business, and the above citation shews that the old location had become too small, and that the cause of the change was a genuine one in the best interests of the community at large. It is not easy to say in the face of such facts and the other circumstances of this case that the object of the donor has not been substantially attained, unless it can be said that that object was a fixed location in perpetuity, which, apart from the strict construction of the deed itself cannot I think be successfully contended, on the evidence before us: it certainly was not so contemplated by the defendant.

Martin, J.A.

GALLIHER, J.A., concurred with IRVING, J.A.

Galliher, J.A.

Appeal dismissed.

EMPIRE SASH & DOOR CO. v. McGREEVY; CANADIAN PACIFIC R. CO. (garnishees).

Manitoba King's Bench, Galt, J. November 6, 1912.

1. GARNISHMENT (§ I C 1—20)—WHAT SUBJECT TO GARNISHMENT—MONEY OWING A CONTRACTOR ON A BUILDING CONTRACT.

Moneys earned by a contractor under contracts for the erection of buildings, and payable by instalments as the work progresses on certificates of the engineer employed by the proprietor, should be deemed to be "accruing due" and therefore attachable by a garnishing order at the suit of a creditor, (*a*) in the case of a completed contract, at the date of completion, (*b*) in the case of a contract abandoned by the contractor before completion and subsequently completed by the proprietor, at the date of the abandonment; provided that, in both cases, the engineer has subsequently given his certificates shewing that the amounts were payable to the contractor, and the garnishee has paid the moneys into court, unless it has been proved affirmatively that the certificate of the engineer was to be a condition precedent to the moneys becoming payable.

2. PAYMENT (§ III—25)—PLACE—RESIDENCE OF PAYEE.

When a contract is silent as to the place of payment, the money will be payable at the residence of the contractor, although the work is done in another Province.

[*Gullivan* v. *Cantelon*, 16 Man. L.R. 644, followed.]

3. GARNISHMENT (§ I C 1—15)—WHAT SUBJECT TO GARNISHMENT.

It is not essential to the binding effect of a garnishing order that the debt to be attached should be one for which action could be brought at the date of the order.

[*MacPherson* v. *Tisdale*, 11 P.R. (Ont.) 263, followed.]

4. GARNISHMENT (§ I D—30)—SITUS OF DEBT—MONEY PAID INTO COURT.

Moneys paid into court in Manitoba by the garnishees could not be affected by any legal proceedings in the courts of another Province.

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Galt, J.

HEARING of proceedings to determine the rights of the plaintiffs as attaching creditors in respect of certain moneys attached in garnishment proceedings which the garnishees had paid into Court.

E. F. Haffner, for plaintiffs.

A. E. Bowles and *W. C. Hamilton*, for claimants.

GALT, J.:—This is a matter in the nature of an interpleader application. The facts as disclosed by the affidavits and orders filed may shortly be stated as follows:—

Under a contract made by the defendant with the garnishees, dated April 14th, 1910, the defendant agreed to construct a railway station in the town of Cornwall for the sum of $4,083, payable in instalments as the work progressed, and on the certificate of the engineer of said garnishees. On April 19, 1910, the defendant agreed with the garnishees to construct certain section houses in the Province of Manitoba for the sum of $11,273, payable as mentioned in the first contract. On the same day, April 19, 1910, the defendant also agreed with the garnishees to construct certain section houses in the Province of Alberta for the sum of $15,500, payable as in the case of the former two contracts. On May 29, 1911, the plaintiff obtained an order before judgment ordering that all debts, obligations and liabilities owing, payable or accruing due from the above named garnishees to the above named defendant be attached to answer a judgment to be recovered by the above-named plaintiff against the above-named defendant up to the amount of $4,900. The defendant apparently completed the work provided for in the first contract and at the date of said order there was accruing due from the garnishees to the defendant the sum of $64 on account of said first contract, which sum was certified by the engineer of the garnishees as the final instalment payable in respect of the said work on the 24th day of August, 1911. After the date of said order, but before the date of the engineer's certificate, James M. Eaton commenced an action against said E. J. McGreevy, and on the 17th day of June, 1911, Eaton obtained a similar garnishing order as against both the Canadian Pacific Railway Co. and the Merchants Bank of Canada as garnishees to the extent of $1,471. The interests of the Merchants Bank of Canada were subsequently settled and released and need not be further referred to.

Under the second contract the defendant made default and the Canadian Pacific Railway Co. completed the work themselves about July, 1911, and subsequently, on August 25, 1911, the company's engineer certified that the sum of $2,136.25 was due under the contract to the defendant.

Under the third contract the defendant also made default and the Canadian Pacific Co. completed the work, and on August 6,

1912, the engineer certified that the sum of $516.19 was due from the garnishees to the defendant.

The plaintiff issued further garnishing orders on the 9th day of October, 1911, the 5th day of January, 1912, and the 6th day of August, 1912, and Eaton issued further garnishing orders on the 10th day of November, 1911, and 14th day of March, 1912.

On or about the 1st day of November, 1911, the defendant McGreevy was sued in the District Court of Calgary, in the Province of Alberta by the Downie Aldrich Lumber Co., and the Canadian Pacific Railway Co. were made parties by a garnishing order served on the last mentioned date. Eaton recovered judgment on 25th June, 1912, for $1,655.40 and the Empire Sash & Door Co. Ltd. recovered judgment on July 10, 1912, for $4,765.47. An application was then made on behalf of the Empire Company against the garnishees, and on September 28, 1912, an order was made by the Referee in Chambers that the garnishees forthwith pay into Court to the credit of this cause the sum of $2,426.44, admitted by the garnishees to be due from them to the defendant; and it was further ordered that J. M. Eaton, Edwin Bell, Downie Aldrich Lumber Co. and Cushing Bros., do appear before the presiding Judge in Chambers on the 10th day of October, 1912, and state the nature and particulars of the claim of each upon the moneys so paid into Court. The motion was from time to time adjourned until the 1st day of November, when it came on before me. It appears that the claims of Edwin Bell, Downie Aldrich Lumber Co. and Cushing Bros. all originated in the Province of Alberta, and none of the claims have been brought to judgment there. The defendant McGreevy, during the period covered by the above transactions, has been a resident of Winnipeg, and still resides here. The contracts made by him with the garnishees do not specify any place of payment.

Having regard to the principle recognized and followed in *Gullivan* v. *Cantelon*, 16 Man. L.R. 644, the moneys are payable in Winnipeg, and the moneys, having been paid into Court here, cannot be affected by any legal proceedings in Alberta. The only difficulty which presents itself appears to me to be the point of time at which the moneys in question became owing, payable or accruing due from the garnishees to the defendant. Under each of the contracts the moneys were payable in instalments as the work should progress, and upon the certificate of the engineer of the garnishees. The material before me does not shew whether or not the certificate of the engineer was to be a condition precedent to the moneys becoming payable. The affidavits of Joseph Halpenny Jeffrey, the accountant of the garnishees, shews that on the 29th day of May, 1911, the date of the Empire Company's first garnishing order, there was accru-

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ing due from the garnishees to the defendant the sum of $64, which sum was certified by the engineer of the garnishees as the final instalment payable in respect of the said work on the 24th day of August, 1911.

In *MacPherson* v. *Tisdale*, 11 P.R. (Ont.) 261, Chancellor Boyd says, at p. 263: "It is not needful that the debt to be attached is one for which an action can be brought in order to bring into play the garnishing process," and various instances are cited by the learned Judge. See also *Tapp* v. *Jones*, L.R. 10 Q.B. 591. Jeffrey's affidavit also shews that the defaults made by the defendant in his second and third contracts were made in the month of April, 1911, so that the defendant had completed all the work which he ever performed under the contracts prior to the date of the first garnishing order issued by the Empire Sash & Door Co. Ltd. The attitude assumed by the garnishees in this matter is also material to be borne in mind. They do not and never did take the position that the defendant was not entitled to any money under his contracts until the garnishees' engineer chose to give his certificate. On the contrary, Jeffrey treats the first item of $64 as being in the position of "accruing due" to the defendant at the date of the Empire Company's first garnishing order, although the certificate for it was not given by the engineer until August 24, 1911. I assume that if the contracts themselves provided otherwise, the parties interested would have produced evidence of this. Under these circumstances, I think that all the moneys earned by the defendant McGreevy under his three contracts with the garnishees were accruing due from the garnishees to the defendant at the date of the order issued by the Empire Sash & Door Co. Ltd., on the 29th day of May, 1911, and inasmuch as the amount in Court is only $2,430.42, while the plaintiff's claim is shewn by their judgment to amount to $4,765.47, the plaintiffs are entitled to all of the moneys in Court.

The plaintiffs are entitled to their costs of this application as against the other claimants.

Judgment for plaintiffs.

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COX v. CANADIAN BANK OF COMMERCE.

Manitoba King's Bench, Galt, J. November 28, 1912.

1. COSTS (§ I—2*d*)—TAXATION—COUNTERCLAIM.

For the purposes of taxation a counterclaim must be regarded as a separate action; and, notwithstanding a statutory maximum of costs taxable in respect of the dismissal of the principal action, the defendant who succeeds on his counterclaim may be allowed separate costs and counsel fees in respect of the latter.

[*Les Soeurs* v. *Forrest*, 20 Man. L.R. 301, applied.]

Statement

THIS was an appeal on behalf of the plaintiff from a taxation by the senior taxing officer at the conclusion of the litigation

between the plaintiff and defendant, which resulted in a dismissal of the action with costs and an allowance of the defendant's counterclaim on a note for $2,000 with costs. The case was finally decided by the Supreme Court of Canada, *Cox* v. *Canadian Bank of Commerce*, 5 D.L.R. 372, 46 Can. S.C.R. 564, affirming the judgment of the Court of Appeal, which had reversed the judgment of the Chief Justice of this Court at the trial.

Statement

J. B. Coyne, for plaintiff.
C. H. Locke, for defendants.

Galt, J.

GALT, J.:—The pleadings have been referred to by counsel on both sides, and it appears to me that several questions were raised in the counterclaim which would not necessarily pertain to the plaintiff's claim. It is very difficult to say, without having the evidence before one, how much of the evidence given at the trial, which lasted two and a half days, appertained to the claim and how much to the counterclaim; but I am quite satisfied that at least a considerable portion of the evidence must have related to the issues set up by the counterclaim.

It has been held in *Les Soeurs* v. *Forrest*, 20 Man. L.R. 301, that for the purpose of taxation a counterclaim must be regarded as a separate action.

In the present instance the defendants, who succeeded, brought in two bills of costs for taxation before the senior taxing officer. These bills of costs are before me, and I see that in the bill of costs of the defence the bill submitted for taxation amounted to $595.50. This included senior counsel fee, 2½ days, $300; junior counsel fee, same time, $200, and some small items of disbursements. Under the statute only $300 and disbursements can be allowed, and the taxing officer has allowed the sum of $300, but does not in any way segregate the items to which he applies it, so that about $250 has been taxed off the bill by reason of the statutory provision.

In the case of the bill of costs of the counterclaim, which contains the only fees objected to, the senior taxing officer has allowed the senior counsel fee of $60 and junior counsel fee of $30 at the trial. It appears to me impossible to say that the taxing officer erred in the discretion he exercised in allowing these two fees by way of counsel fees on the counterclaim, as it was entirely his duty to satisfy himself as to the work performed by counsel in respect of both claim and counterclaim, and I cannot but think that where the successful party was obliged to lose so large a sum as $250 or thereabouts by virtue of the statute applicable to the taxation of the claim, the taxing officer might well take this into account in dealing with the costs of the counterclaim. He might have taken this amount off the counsel fees alone.

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It has been agreed by the parties that any ruling of mine which applies to the allowance of these fees in the King's Bench is equally applicable to the fees allowed in the Court of Appeal. Consequently I decline to interfere with the allowance of the counsel fees that were allowed by the taxing officer in the Court of Appeal. I therefore dismiss this appeal with costs.

Appeal dismissed.

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SNELL v. VICTORIA AND VANCOUVER STEVEDORING CO., Limited.

British Columbia Supreme Court. Trial before Murphy, J. March 11, 1912.

1. MASTER AND SERVANT (§ II A 4—68)—PERSONAL INJURY—STEVEDORE LOADING SHIP.

A stevedoring company is under a duty to its employees engaged in loading a ship by a winch and tackle, to provide against any fouled tackle going over the side of the ship, and to see that some person is on the deck for the purpose of signalling the winchmen to stop on the fouling of the wires supporting the sling board.

2. DAMAGES (§ III J 1—166*a*) — PROSPECTIVE MEDICAL TREATMENT — EXPENSE.

Damages to the amount of $1,750 are not excessive in an action under the Employers' Liability Act (B.C.) where the plaintiff, a stevedore, was struck between the shoulders by the fall of a "sling board" and traumatic neurasthenia resulted, the medical treatment of which is particularly expensive.

[*Toronto R. Co.* v. *Toms*, 44 Can. S.C.R. 268, referred to.]

Statement

ACTION by a stevedore under the Employers' Liability Act (B.C.) against his employers for damages for personal injuries. The plaintiff was struck by the "sling board" while employed in loading a ship, through the negligence of the hatch tender in temporarily leaving his post and consequently failing to signal the winchman to stop the winch when the wires were in danger of getting fouled with the sling board. The empty sling board, which had been swung above the stevedores to be lowered, came in contact with a wire through this neglect and fell upon and injured the plaintiff.

J. A. Russell and *M. A. Macdonald*, for plaintiff.

E. V. Bodwell, K.C., and *D. A. McDonald*, for defendant.

Murphy, J.

MURPHY, J.:—To my mind this is a very simple case; it has been laid down by the Supreme Court in *Ainslie* v. *McDougall*, 42 Can. S.C.R. 420, and followed by the same Court in *Brooks* v. *Fakkema*, 44 Can. S.C.R. 412, that it is the duty of the employer to give his employees a safe place to work. This man was in a position of danger. It was therefore the duty of the defendant company to see that reasonable precautions were taken to protect him. It is alleged that there was defective system and if I were to adopt the argument of the defendants, I think I

would have to so find; but I do not find on the facts there was. It is true that possibly the swivel hook would have been a better hook than the shackle hook, but it is common ground that the fouling of the wires was likely to have occurred in any event. Inasmuch as it is admitted fouling would be dangerous, it was the duty of the defendant company in their system to provide against any fouled tackle going over the side of the ship. That could not be done, in my opinion, by what Mr. Bodwell called a cog in the wheel; if this man McNeill was a cog in the wheel, then I would say this defendant company is liable at common law for having a defective system. Surely these men could not be said to be in a safe place to work unless there was some person on deck whose duty it was to see that fouled tackle did not go over the side of the ship, considering the variety and multiplicity of actions being carried on by the man on the deck. That, I hold, involved superintendence of the winchmen, as I find that it is proven that the system was for the winchmen to continue moving the platform until they were notified by McNeill not to do so.

I find on the facts that the defendants did comply with that; that they had McNeill there and it was McNeill's duty to see that these men were not placed in any greater danger than was necessary. I do not think that amounts to defective system; if McNeill was doing his duty and was not guilty of negligence—it would make no difference whether there was a regular system of signalling or not, so long as the men could notice him—whether the signal was by a whistle or by a nod or what it was—there could have been no accident. There is nothing in the evidence to shew that any defective system can be based on the fact that an improper signal was used. The cause of the accident was, to my mind, the failure of McNeill to perform his duties. His negligence was probably exaggerated by the fact that it was dark, but I find that he had left the hatch and gone to the side of the ship before this fouled tackle came up. In that he failed in his duty as superintendent, inasmuch as I hold the only way that the defendant company can escape common law liability is to shew they had such superintendence and I do so hold. Then I must find they were liable under the Employers' Liability Act and I do so hold.

It is contended on the part of the defendant company that this plaintiff is responsible to a very great extent himself for his unfortunate condition, and I was rather inclined to take that view of it on the medical evidence given on his behalf, but I received a very great deal of enlightenment in the evidence of Dr. Gillies. He is apparently a man who has had considerable experience in matters of this kind. He told me that this man

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was suffering from a definite disease—traumatic neurasthenia it is called. There is no doubt in my mind that this disease was the result of this accident and it is a very serious disease; it is quite true that he may be well to-morrow and it is equally possible he may never be well again, and although probably he will recover if he gets proper treatment, still it is admitted by the doctor that that treatment is costly. Such disease caused by the accident is a ground for damages which ought to be borne by the defendants, as laid down in the *Toronto R. Co.* v. *Toms*, 44 Can. S.C.R. 268. The plaintiff is entitled to recover damages to such an extent as his injuries are the actual result of the accident. I find that his condition is the result of the accident, such accident being the blow between his shoulders by the sling board and for which accident the defendant company is responsible. It is a very difficult thing to ascertain just what the amount of damages should be, but I think I am doing my duty in awarding damages to the plaintiff in the amount of $1,750, and I so award, and the costs.

Judgment for plaintiff.

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PAHKALA v. HANNUKSELA.

(Decision No. 1.)

Saskatchewan, District Court at Moosomin, Judge Farrell. September 7, 1912.

1. APPEAL (§ III E—91)—SERVICE OF NOTICE OF APPEAL—SUMMARY CONVICTIONS.

Upon an appeal from a summary conviction the notice of appeal may be served either upon the justice or upon the respondent under Cr. Code 750 (amendment of 1909), but where the respondent is not served, more must be shewn than service upon a person to whom the witness, called in proof of service, had been directed on enquiry for a man bearing the same surname and initials as the justice; the appellant should prove that the person served was the justice who tried the case.

2. COSTS (§ I—2c)—APPEAL FROM SUMMARY CONVICTION—QUASHING FOR NON-PROOF OF NOTICE—HEARING AND DETERMINING.

Although Cr. Code sec. 755 applies to authorize an order against the appellant for costs of an appeal not prosecuted or entered only in case a valid notice of appeal has been given from a summary conviction, the Court has power under Code sec. 751 to award costs where the appeal is brought on for hearing, but the defendant (respondent) succeeds in having the same quashed or dismissed upon objection taken that notice of appeal had not been served upon him and that there was no sufficient proof of compliance with an alternative method of service available to the appellant, viz., service upon the trial justice.

[*Rex* v. *Edelston*, 17 Can. Cr. Cas. 155, disapproved; *Ex parte Sprague*, 8 Can. Cr. Cas. 109, considered.]

3. COSTS (§ I—2c)—APPEAL FROM SUMMARY CONVICTION—COSTS UNDER RECOGNIZANCE ON QUASHING APPEAL.

Where the appellant has filed his recognizance in the statutory form on an appeal from a summary conviction he thereby submits to an award of costs against him on the quashing of the appeal for failure to prove compliance with the statutory pre-requisites, and this apart from the power given under Cr. Code 751.

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Judge Farrell.

THIS is an appeal from an order of W. T. Blyth, the presiding justice of the peace, dismissing the matter of an information brought before him by the appellant against the respondent.

C. V. Truscott, for appellant.

A. T. Procter, for respondent.

FARRELL, DIST. J.:—This appeal was set down for hearing at the last sitting of the District Court at Esterhazy, and was duly brought on for hearing there. Counsel for the appellant proved that all the preliminary steps required by sec. 750 of the Criminal Code had been properly taken, except as to the service of the notice of appeal. Objection was taken for the respondent that the evidence submitted on that point was not sufficient, and in consequence that I ought to dismiss the appeal. The only evidence as to the service of said notice was that of a witness, who deposed that within the ten days required by said sec. 750, he had served upon a man in Wapella, who he was informed was W. T. Blyth, a true copy of the notice of appeal on file herein.

There was no evidence that this Mr. Blyth was the justice who tried the case and from whose order therein the appellant was here appealing, or that he had any connection with it whatever, or that he was ever a justice of the peace. As the appellant had not seen fit to serve the respondent, I held that it was all the more important that the requirements of the above section should be strictly complied with and among other things, that the appellant must prove beyond doubt that he had served the notice of appeal upon the justice who tried this case. This, I held, he had not done, and dismissed the appeal accordingly for want of jurisdiction, and confirmed the order of the magistrate below. The question of costs then coming up, it was agreed to adjourn the sittings to Moosomin, and argue the question of costs there. This was accordingly done. It was argued on behalf of the respondent that since the amendment of the statutes in 1894, when the words "whether such notice has been properly given or not" were inserted in the sec. 884 (Cr. Code, 1892), now section 755 of the Cr. Code (1906), that the prior decision against the right of the Court to grant costs in such cases were no longer applicable, and that I had jurisdiction to award costs here; that in any event the Court had an inherent jurisdiction to award costs. *Ex parte Sprague*, 8 Can. Cr. Cas. 109; and the notes of the reporter at p. 122, 36 N.B.R. 213; *The King* v. *Doliver Mining Co.*, 10 Can. Cr. Cas. 405, were cited, together with the following cases in our own Courts: *Rex* v. *Brimacombe*, 2 W.L.R. 53; *Scott* v. *Dalphin*, 6 W.L.R. 371; *McNeill* v. *Sask. Hotel Co.*, 17 W.L.R. 7; where in similar cases to the case at bar, costs were awarded. The usual costs were asked for.

Counsel for the appellant quoted no law or cases as bearing

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upon the point at issue, but contented himself in pointing out that all the cases cited above were different from the case before us, that in all of these notice had been duly served on the party entitled to receive it, whereas here this had not been done, that my only authority to grant costs was under sec. 755 of the Code, that under that section I only had such a right "upon proof of notice of the appeal to such Court having been given to the person entitled to receive the same" and that as I had held that it had not been proven that the person entitled to receive the notice of appeal had received it, I therefore had no jurisdiction to award costs.

If my only authority to award costs in this case is confined to that given by sec. 755, I am inclined to think that the contention of counsel for the appellant is right, and since I have held that there has been no proof of service of the notice of appeal, I have here no jurisdiction over costs. At the hearing of this appeal I was inclined to consider I was confined to this section for any jurisdiction I might have in the matter of costs, and on the argument, counsel for both parties seemed to take the same view—but is this so, am I confined to that section? Notwithstanding that some of the cases seem to hold otherwise, there does not seem to be any doubt that in the words of Lord Esher in *London County Council* v. *West Ham* (No. 2), 61 L.J.M.C. 210; [1892] 2 Q.B. at 174:—

> At common law, no Court of common law had jurisdiction to give costs at all, and that the whole power in those Courts to give costs is given them by statute.

This would, I take it, include rules of Court which are founded on statute. In the matter of appeals from summary convictions or orders, four sections of the Criminal Code deal with the question of costs, namely, sec. 751, where the Appeal Court has heard and determined; section 754, where the appeal is heard on its merits, notwithstanding defects in the conviction or order, and sec. 755, where notice has been given and the appeal not prosecuted or abandoned. Each of these sections gives the appellate Court full authority to deal with the question of costs. The fourth section, namely, sec. 760, makes provision on notice for the abandonment of the appeal before the sittings of the Court appealed to, and thereupon the costs of the appeal shall be added to the sum adjudged against the appellant by the conviction or order. The power to grant costs under sec. 755, it has been held in a number of cases, such as *McShadden* v. *Lachance*, 5 Can. Cr. Cas. 43, *The King* v. *Ah Yin* (No. 2), 6 Can. Cr. Cas. 63, only applies to cases where the appellant fails to proceed with his appeal and has not abandoned it according to law. In both of these cases the appeals were dismissed for informalities in launching the appeal, and Bole, Co. J., before whom they came, took the above view of sec. 755 and held he

had no jurisdiction to award costs. It would appear as if, from the wording of his judgment in *Ex parte Sprague*, 8 Can. Cr. Cas. 109, 36 N.B.R. 213, this was also the view of Landry, J. At p. 118 he says: "Sec. 884 (our present sec. 755) authorizes the Court appealed to to deal with costs when the appellant does not prosecute after having given notice of his intention so to do. The authority, therefore, to impose costs in this case, must be looked for outside of any direct statutory authority." In *Ex parte Sprague*, 8 Can. Cr. Cas. 109, 36 N.B.R. 213, the appeal had been dismissed because the recognizance was not in proper form. It is to be noted also that all these cases were decided a good many years after this section was amended by the addition of the words "whether such notice has been properly given or not." It seems to me that to take this view of this section puts a limit to it not intended by the legislature and not warranted by the wording of the section itself.

I think there is no doubt that the section was primarily intended to prevent frivolous appeals, and it is true that the marginal reference to the section is "Costs when appeal not prosecuted," but to confine it to such appeals is going too far and would deprive respondents of much of the benefits, in my opinion, intended by the legislature to be derived from it. The words "and though such appeal has not been afterwards prosecuted or entered" is not in my opinion a condition precedent to the granting of costs, but rather intended to enlarge the scope of the section, and to make clear its wide scope, so that when notice has been given and not abandoned under sec. 760, the Court appealed to has the authority under this section to award costs, no matter how defective the notice may have been and whether the appeal is entered or not or prosecuted or not. Taking this view of this section, I would not have any doubt as to my authority under it to grant costs in the present case, if, however, I did not consider the words of the section I have already quoted, requiring proof of notice of appeal on the person entitled to receive it, to be a condition precedent to the power to grant costs. As far as this case is concerned, I do not see how I can get over those words. The qualifying words of the section, "Whether such notice has been properly given or not," do not affect the question. The question here is not as to whether this notice was properly given or not, but whether any kind of a notice at all was given to the person entitled to receive it. I have held that there was no proof that such person received it, and dismissed the appeal on that point alone. I therefore hold that in this case I have no jurisdiction to award costs under sec. 755.

It is quite clear that the appeal was not heard and dealt with on its merits under sec. 754, so that this section does not

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apply. Then as to sec. 751. The first part of this section enacts:—

> The Court to which such appeal is made shall thereupon hear and determine the matter of appeal and make such order therein, with or without costs to either party, including the costs of the Court below, as seems meet to the Court.

The authority given by this section over costs largely depends upon the interpretation given to the words "hear and determine." In *Re Madden*, 31 U.C.R. 333, there was an appeal to the general sessions; objection being raised to the notice of appeal, the chairman sustained the objection and dismissed the appeal with costs. On motion to set aside an order for prohibition, Wilson, J., practically held that the words "shall hear and determine the appeal" means "shall decide it on the merits," and therefore as this had not been done the chairman had no power to award costs. The words of his judgment on this point are:—

> The question is, what is the meaning of the words "the Court shall hear and determine the matter of the appeal"? They are very similar to those used in the Imperial Act, 3 & 6 Wm. IV. ch. 50, "on hearing and finally determining the matter of such appeal," on which language the Court, in *Regina* v. *Padwick*, 8 E. & B. 704, declared the sessions had no power to adjudge costs when they dismissed an appeal because they had no jurisdiction to try it, or when the case was disposed of not upon the merits.

The wording of the section of the Act under which this decision was given was the same as that of sec. 751 of the Code quoted above.

Re Madden, 31 U.C.R. 333, was followed in *Regina* v. *Becker* (1891), 20 O.R. 676. There an appeal had been dismissed because of a defective recognizance with costs. MacMahon, J., in granting the order for prohibition says in his judgment:—

> There has been no amendment to the statute since *Re Madden*, 31 U.C.R. 333, in which it was held by Wilson, J., upon the authority of *Regina* v. *Padwick*, 8 E. & B. 704, that the sessions had no power to award costs on dismissing an appeal for want of proper notice of appeal, holding that the words of the R.S.C., ch. 178, sec. 77 (*d*) "shall hear and determine the appeal" mean "decide it upon the merits." The respondent's counsel objecting to the recognizance, it was impossible that the appeal should be heard and determined on its merits; and if not so heard, the sessions had no power over costs. See also *Regina* v. *Recorder of Bolton*, 2 D. & L. 510.

It was argued before me that as the section of the Code corresponding to the present sec. 755 had been annulled by the insertion of the words I have already quoted, these cases are no longer applicable. I do not think that contention is well founded. In neither *Re Madden*, 31 U.C.R. 333, nor *Regina* v. *Becker*, 20 O.R. 676, was the question ever raised as to the applicability

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or inapplicability of the section corresponding to said sec. 755 or to the power of the Court to award costs under it, and while in the *Becker* case (*Rex* v. *Becker*, 20 O.R. 676) the section was as applicable then as it is now in its amended form, as there then was no question as to the notice, the irregularity there was in the form of the recognizance. These cases are the decisions of two Judges of the Ontario Court as to whether when an appeal has been dismissed because of non-compliance with the preliminary statutory requirements to such appeals, the Court could award costs under sec. 751 only. In these cases it was held that the Court had no such authority because the appeals must first be "heard and determined," which was interpreted to mean "decided on the merits." No attempt was made to construe the section corresponding to sec. 755 or to decide what authority, if any, the Court had to award costs under it—the point was not even argued. As against the judgment expressed in the last two cases cited, which in each case is the finding of a single Judge, although a very eminent one, we have the later judgment of the full Supreme Court of New Brunswick, composed of the Chief Justice and four other Judges in *Ex parte Sprague* (1903), 8 Can. Cr. Cas. 109, 36 N.B.R. 213. Here the appeal had been dismissed because of the insufficiency of the recognizance filed, and the Judge so dismissing it awarded costs to the respondent. The matter came before the full Court on an order *nisi* to quash the said order, on the grounds that the County Court Judge, not having heard the appeal on the merits, had no jurisdiction to award costs, and that part of the order should be quashed.

Re Madden, 31 U.C.R. 333, and *Regina* v. *Becker*, 20 O.R. 676, were cited on the argument. In the judgment of Landry, J., one of the Judges deciding that case, it may be noted that he says that the judgment of MacMahon, J., in *Regina* v. *Becker*, 20 O.R. 676, was confirmed by Galt, C.J., and Rose, J. A reference to that case will shew that he is mistaken. There was an appeal to the Divisional Court by the appellant from the judgment of MacMahon, J., but it was only as to the appellant's right to a certiorari. Judge MacMahon's judgment as to the right to award costs was not under review, was not referred to in any way by the Divisional Court, and was not therefore confirmed by them. What they did was to allow a certiorari which had been refused by MacMahon, J., but on other grounds than those argued before him. The unanimous judgment of the Court in *Ex parte Sprague*, 8 Can. Cr. Cas. 109, 36 N.B.R. 213, was that the Judge hearing the appeal had the authority to award costs. In this case all the sections of the Code dealing with the question of costs were taken up and considered, as well as the inherent right of the Court to award costs, differing in this

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respect from *Re Madden*, 31 U.C.R. 333, and *Regina* v. *Becker*, 20 O.R. 676, where only one section was dealt with. As I understand the judgment in *Ex parte Sprague*, 8 Can. Cr. Cas. 109, 36 N.B.R. 213, the authority to award costs was decided on two grounds, namely, (*a*) under sec. 751, and (*b*) the inherent right of a Court of appeal to award costs, although all the Judges may not have agreed as to both grounds.

Taking the first ground that in such a case as *Ex parte Sprague*, and the case at bar, the Appeal Court has the authority to award costs under sec. 751, it seems to me that this is the true intention of the legislature when enacting this section. The judgments in *Re Madden*, 31 U.C.R. 333, and *Regina* v. *Becker*, 20 O.R. 676, as to the interpretation of the words "hear and determine" in my opinion go too far, if I may be allowed to differ from the eminent Judges in those cases. To hold that these words mean the hearing and weighing of the evidence pro and con bearing on the subject matter of the appeal is, it seems to me, to put too narrow a construction upon them. Sec. 754 provides specifically for the hearing of the appeal upon the merits, and it seems to me that if the legislature intended the words in sec. 751 "hear and determine" to mean "hear and decide on the merits," it would have used these words in this section as it has in sec. 754.

In *Regina* v. *Lynch* (1886), 12 O.R. 372, it was held by Wilson, C.J., that the giving of notice of appeal although the appeal was not afterwards prosecuted, is "appealing." In *Johnston* v. *O'Reilly* (1906), 16 Man. L.R. 405, Mathers, J., held that "serving notice of appeal is appealing." In *Ex parte Roy* (1907), 12 Can. Cr. Cas. 533, 38 N.B.R. 109, Tuck, C.J., held that when an appeal had been dismissed by the County Court Judge, without dealing with it on the merits, apparently for the want of papers that had been before the justice of the peace, there was an "appealing," and in *Ex parte McCorquindale* (1908), 15 Can. Cr. Cas. 187, it was held by the full Court of New Brunswick that the defendant by giving notice of appeal and afterwards serving reasons for appeal, although the other requirements of the Act do not appear to have been done, had thereby "appealed." In all these cases in consequence of the finding of the Courts that there was in each case an appeal, certiorari was refused. I quote these cases to shew what the Courts have held to be "an appeal," and a sufficient appeal to deprive the appellant from another right he might otherwise have had, because most of the cases refusing to grant costs go on the grounds that in reality there has been no appeal at all. The above cases shew what has been held to be an appeal. If these findings are correct, then, in the case at bar and similar cases, there is an appeal, and if there is an appeal, it must be heard and it must be disposed of, or, to put it in other words,

the appeal Judge must hear it and determine what disposition is to be made of it, and having done so, in my view he has heard and determined the appeal within the meaning of sec. 751, and therefore under that section has the power to award costs. However, whether the argument in this form is sound or not, the judgment of the Court in *Ex parte Sprague*, 8 Can. Cr. Cas. 109, 36 N.B.R. 213, is not open to such objection. There Hannington, J., as to the interpretation of sec. 751 at 115, says:—

> It is too narrow a construction, I think, to say that the matter of appeal is confined to hearing on the evidence or merits of the original conviction; such, I think, was never the intention of the legislature. The matter of appeal is, what is before the Judge, and he can either, on an objection taken to dismiss it for want of a proper bond before hearing on the merits, as is the practice in the Supreme Court, or afterwards on hearing the merits, dismiss or allow it, I cannot conceive how it is possible to suppose that the legislature would intend to provide, if the appellant proceeded rightly and failed, he should pay costs; but if he proceeded wrongly, and neglected to follow the statutory provisions necessary for a successful appeal, he should pay no costs.

He also says at the same page:—

> The Judge of the County Court, the notice of appeal having been given, and the case duly entered, had ample jurisdiction to hear and deal with the appeal upon the motion made by the appellant for its hearing and allowance. The case was before him on the docket, and he had to dispose of it.

The learned Judge then found that sec. 751 was applicable.

In the case before us, notice of appeal and a recognizance was filed and the appeal was set down on the docket to be disposed of. The proceedings on file were regular, and the respondent could not safely remain away as he might when on the face of them the proceedings are defective. He could not tell whether or not the appellant would be able to prove conclusively proper service of the notice. As a matter of fact, the appellant had another appeal at the same sittings in which the respondent in this case was the respondent in it also. In that appeal the appellant, profiting by his experience in the case at bar, by additional evidence was able to prove that the justice of the peace was properly served with the notice of appeal. The appeal here came on to be heard and was strenuously prosecuted and contested at each step, with the result, as I have stated, that I dismissed it for want of proof of the proper service of the notice of appeal. In view of the decision in *Ex parte Sprague*, 8 Can. Cr. Cas. 109, and the reasons I have given, I think I have authority to award costs to the respondent under sec. 751. In addition to that, we have the example of the Court in *The King v. Doliver Mining Co.*, 10 Can. Cr. Cas. 405, and the three cases already cited, where under similar circumstances costs were allowed. In one sense these cases do not help us much, for they

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are not decisions as to the right of the Court under the circumstances reported, to award costs. The question of costs does not seem in any one of them to have been questioned or argued. They are, however, of value as shewing the practice followed by our own Courts. In the *Doliver* case the notice of appeal had been served on the justice of the peace who tried the case, but had not been served on the respondent, as the Code then required, so that case is on all fours with that I am now considering.

In *Rex* v. *Brimacombe*, 2 W.L.R. 53, objection was taken to the form of the notice. The report does not disclose whether it was served on the proper party or not, but it seems to indicate that it was not, but that objection was taken to its form before the appellant got that far. Much the same state of affairs exists in the report in *Scott* v. *Dalphin*, 6 W.L.R. 371; objection was taken there to the notice, because it was only signed by the clerk of the solicitor for the appellant, but the service of the notice does not seem to have been proved. In the *Sprague* case (*Ex parte Sprague*, 8 Can. Cr. Cas. 109, 36 N.B.R. 213) and in *McNeill* v. *Sask. Hotel Co.*, 17 W.L.R. 7, service of the notice was proved. There is only one other case, I think, among our own reports bearing on this subject, and that is *Rex* v. *Edelston*, 17 Can. Cr. Cas. 155, 15 W.L.R. 279. There the learned District Court Judge held that under sec. 755 of the Code he had no jurisdiction to award costs because only one of the two justices, who by statute in that case were required to try it, and had tried it, had been served with the notice of appeal and therefore there was not proper proof that the person entitled to receive the notice had so received it. Here again the question of costs does not appear to have been argued, and the Judge confines himself to sec. 755. With all due deference to the learned Judge, as far as that case deals with the matter of costs, I think he is wrong. The justice who did receive the notice was a person entitled to receive it and to hold that because another person, who was equally entitled to receive the notice, did not receive it, prevents the Court having power to award costs under sec. 755 to the person who appears and contests the motion is, to say the least of it, in my opinion, putting much too narrow a construction on the section. However, I do not think it material in the consideration of the case before us, whether or not there was proof of the due service of the notice of appeal, as it is under sec. 751 I am finding my authority to award costs, and not under sec. 755.

I do not think it is necessary for me here to find as to whether this Court as a Court of appeal from summary convictions and orders, has an inherent authority to award costs outside of any statutory authority. There is a good deal to be said in favour of this doctrine. In *Ex parte Sprague*, 8 Can. Cr. Cas. 109, this

point was very carefully considered and the Court there found that there was that inherent right to award costs. Besides the cases cited there, *Regina* v. *Parlby* (1889), W.N. 190, 53 J.P. 744, and *Mackintosh* v. *Lord Advocate*, 2 A.C. 41 (H.L. Sc.) also are in point. I confess I have some doubts about the doctrine, and it seems to me that if there is any such right it will be found to rest on some statutory enactment or rule of Court founded on statute.

There is another phase of the matter which has not been raised, but which, I think, is worthy of consideration, and that is, has not the appellant here, by entering into and filing his recognizance, expressly given the Court the right to award such costs as they might consider proper? The condition to the bond filed is that the appellant will personally appear at the sittings of the Court, try the appeal against the order made, "and also abide by the judgment of the Court upon such appeal and pay such costs as are by the Court awarded, then the recognizance to be void, otherwise to remain in full force."

In *London County Council* v. *West Ham*, [1892] 2 Q.B. 173, Lopes, L.J., says at 176, as to the jurisdiction of the Courts to deal with costs on proceedings in certiorari:—

> The only jurisdiction they would have would be under a statute or under the recognizance. There is no jurisdiction by any statute; therefore it follows that the only jurisdiction to deal with costs would be under the recognizance. But then the recognizance only applies where the order is affirmed. If the order is affirmed the successful party obtains costs under the recognizance; if the order is quashed, there are no costs. That was the state of things before the Judicature Acts. In my opinion the Judicature Acts have introduced no change.

And as to the same matter, to quote from *Regina* v. *Parlby* (1889), W.N. 190:—

> It is therefore by virtue of the recognizance only, and not by virtue of any order of the Court, that the prosecutor had to pay costs if the order which he sought to quash was affirmed. If he succeeded in quashing it, he got no costs because the Court had no original or statutory jurisdiction to grant them.

The recognizance filed here, and required to be filed under sec. 750 of the Code, goes much further than in the case quoted —the costs are not limited as there, to whether or not the appellant succeeds, but here the appellant covenants to "pay such costs as are by the Court awarded." I am of the opinion that outside of sec. 751 I have authority under the recognizance filed herein to award costs. For the reasons given the appellant shall pay the costs incurred by the respondent in defending this appeal; and I order that such costs shall be paid by the appellant within ten days after taxation thereof to the clerk of this Court, to be paid by him to the said respondent.

Appeal quashed, with costs.

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Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue, Cameron, and Haggart, JJ.A. November 18, 1912.

1. EQUITY (§ I F—35)—CANCELLATION OF INSTRUMENTS—RESCISSION OF CONTRACT UNDER SEAL.

In equity, it is not necessary to the validity of the rescission of a sealed document, that such rescission be effected by an instrument under seal, but rescission may result from the abandonment of the contract by one party and the other accepting the abandonment, and this may be implied from their acts, although there is no writing whatever.

2. SPECIFIC PERFORMANCE (§ I E—30)—SALE OF LANDS—RIGHT TO REMEDY—INSTALMENT PLAN—DEFAULT IN MONTHLY PAYMENTS.

In a speculative purchase of vacant lands where the purchaser on the monthly instalment plan makes a few small monthly payments, and then for some years is neither ready nor willing to make any further payments and makes none, and where the vendor urges him to keep up the payments but without effect, and where, upon a tender subsequently of the balance of the purchase price the vendor refuses to accept it or to carry out the contract, a suit by the purchaser for specific performance or in the alternative a refund cannot be maintained, and this especially where time was expressly of the essence.

3. EVIDENCE (§ II E 5—177)—PRESUMPTION AS TO INTENT—SALE OF LANDS—AGREEMENT — INFERENCE FROM ACTS, SHEWING ABANDONMENT.

Upon an agreement to purchase vacant land on small monthly instalments where the purchaser now seeks specific performance and the vendor pleads abandonment, the intention of the purchaser to abandon the contract may properly be inferred from long continued default on the monthly payments.

[Cyc. vol. 1, p. 7, referred to.]

4. ESTOPPEL (§ III E—75)—LAND PURCHASE ON INSTALMENTS—WAIVER OF PAST DEFAULTS—EFFECT ON FUTURE INSTALMENTS.

Where a purchaser of lands on the small monthly instalment plan makes default in the monthly payments, and where after the occurrence of some of such defaults the vendor condones them and waives the strict condition as to time, that waiver applies to the instalments then overdue and not to those falling due at future dates.

[*Barclay* v. *Messenger*, 43 L.J. Ch. 449, 456, referred to.]

5. SPECIFIC PERFORMANCE (§ I E—30)—RIGHT TO REMEDY—PERSISTENT DEFAULTS IN MONTHLY INSTALMENTS—REPUDIATION.

Where a purchaser buys vacant land on the small monthly instalment plan and after a few monthly payments shews no further intention during a period of three or four years of continuing the payment of the instalments, such conduct on the part of the purchaser not only disentitles him to the equitable relief of specific performance but amounts to a repudiation of the contract.

[*Howe* v. *Smith*, 27 Ch.D. 95, referred to.]

6. CONTRACTS (§ VI A—411)—RECOVERING BACK MONEY PAID—SALE OF LAND—DEFAULT IN PAYMENT OF THE BULK OF THE PURCHASE PRICE.

Under an agreement of sale of lands on the small monthly instalment plan where the purchaser after a few monthly payments abandons the contract by omitting to make any further payment for four years, and where the vendors rescind the contract owing to the purchaser's persistent default, the purchaser by such default disentitles himself to any return of the payments which he did make.

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APPEAL by defendants from judgment at trial dismissing plaintiff's action for specific performance which, however, gave the plaintiff judgment for damages.

The appeal was allowed and judgment below set aside.

E. A. Conde, and *W. W. Kennedy*, for plaintiff.

W. H. Trueman, for defendants.

HOWELL, C.J.M., concurred.

Howell, C.J.M.

RICHARDS, J.A.:—By agreement dated 29th January, 1907, made between the plaintiff and defendants, the plaintiff agreed to buy from the defendants a lot, as per subdivision of part of lot 26 D.G.S. St. James, for $1,000. The cash payment was $25, which was to be followed by three equal monthly payments of $20 each, to be again followed by 32 monthly payments of $10 each, and the balance at a later date.

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The plaintiff continued making payments up to the 1st November, 1907, since which time he has paid nothing.

In October, 1911, the plaintiff caused to be tendered the defendants a sum, apparently sufficient to pay up the whole balance of purchase money and interest. The defendants then refused to carry out the agreement on their part, and the plaintiff brought this action.

The learned trial Judge held the plaintiff guilty of such laches as would disentitle him to specific performance, but he held that the contract still existed, and gave the plaintiff judgment for damages, based on the then excess in value of the lot over the contract price. From that judgment the defendants have appealed.

It is patent that the learned trial Judge believed the plaintiff and his witnesses rather than the defendants, and, in dealing with this case, I shall deal with it only as it appears from the evidence of the plaintiff's witnesses.

The learned trial Judge held, in effect, that there had been no abandonment, or rescission of the contract; but, with every respect, it seems to me that that is merely a conclusion to be drawn from the evidence, and, with regard to such a conclusion, this Court is at liberty to consider the matter as fully as a Court of first instance might.

Reading the evidence it appears that this lot was bought for speculative purposes, and that the plaintiff expected to be able to sell it shortly after making the purchase. He listed it back with the defendants for sale, at the time of purchase. After 1st November, 1907, when the plaintiff ceased making payments, he did nothing whatever with regard to the property until about the summer of 1908. Then he went to the defendants' office and tried to get back the money which he had paid, and to get rid of the liability. He claimed, at this interview, that he had been

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led to make the purchase by misrepresentation. He made no promise to continue his payments apparently, but the defendants told him that they would be lenient with him, and tried to get him to continue his payments. He suggests, in parts of his evidence, that he agreed to do this, but the fact is that he did not go back to the defendants, or make any attempt whatever to continue his payments, and treated the matter as it would be treated by a person who had abandoned the contract.

At a later date, which the plaintiff fixes in the fall of 1910, but which the evidence of one of his witnesses, Mr. Levinson, seems to shew conclusively, was in the fall of 1909, the plaintiff met one of the defendants in the neighbourhood of the lot in question, and again tried to get his money back. The defendant told him to go to the defendants' office and they would settle with him. This he did not do, but he got Mr. Levinson to go there on his behalf. Mr. Levinson interceded with one of the defendants, and was told that he did not recollect the matter, or to that effect, but that the defendants were not inclined to act hardly towards their purchasers, and that, if the plaintiff would come in to the defendants' office, they would treat him leniently, provided he would go on making payments. Mr. Levinson reported this to the plaintiff, but the plaintiff never thereafter went near the defendants' office, and nothing further occurred until October, 1911, when, the property having advanced very considerably in value, the plaintiff caused the balance to be tendered, with the result mentioned.

The agreement contains a provision that time shall be strictly of the essence of the contract, and it seems to me it may well be argued that, with that in the agreement, non-payment at the times of payment would work a forfeiture at law in the nature of a penalty against which the equitable rules might relieve if the action were brought without laches. But the plaintiff in this case has been distinctly guilty of great laches. All that I can see that the defendants ever agreed to as against this position is that if the plaintiff would come in they would endeavour to make a settlement with him, or would be easy with him on his terms of payment. But the plaintiff never so acted as to avail himself of this conditional privilege. He did not go to the defendants, or make any attempt whatever to reinstate the agreement.

But there is another way of looking at the matter. The plaintiff's evidence, and that of his witness Mr. Downey, seem to me to shew beyond doubt that the plaintiff's efforts, in the interviews with the defendants, were not directed to reinstating the agreement, but rather to getting back the money which he had put in, and, of course, any profits which, if there had been a re-sale on his behalf, would have been made on such re-sale.

He had no intention of making further payments, or doing anything further than endeavouring to get out what money he had put in and the profits, if there might be any, in case of such resale.

The plaintiff was several times questioned as to what he wanted at these interviews. I quote from different places:—

> Q. What you really wanted to get out of this was $157, wasn't it? A. I wanted to get my money back and if there was any profit I wanted that. . . .
>
> Q. What you wanted then was to see if you could not get back all of that $157? A. I wanted to see what settlement we could come to . . . . and that is just what I wanted to do about that.
>
> Q. You wanted him to sell the lot and let you have back your $157? A. Yes.
>
> Q. And if there was any profit you wanted that? A. Yes.
>
> Q. You made no offer to pay up the arrearages at that time? A. No.

There are other places in which similar evidence is given, but the above seems to me sufficient to quote.

I can only read such evidence, taken with the fact that, though twice invited to go to the defendants' office and endeavour to make some sort of arrangement for continuing the purchase, the plaintiff did not go, as meaning that the plaintiff had no intention whatever of paying anything further upon the lot, and that he intended to abandon the contract, in so far as further carrying it out went. It is true that he says he did not. But actions often speak more forcibly than words; and I think that principle applicable to this case.

The defendants evidently understood this to be the position and accepted it, because, about the middle of 1909, they sold the lot to one Lawrence. They got the lot back from Lawrence afterwards, so that the sale to him only becomes material as shewing what they understood was the position the plaintiff was taking.

Now, I take it that a contract of rescission can, in effect, be made by one party to a contract abandoning it and the other accepting the abandonment, and that, I think, is what happened here, from the above facts, and it is no answer to say that, the contract being under seal it could only be rescinded under seal. The rules of equity apply, and in equity it was not necessary to the validity of the rescission of a sealed document that such rescission should be effected by an instrument under seal.

Holding the above view, I am of opinion, with every deference, that the contract was ended before action, and before the tender of the money in October, 1911. It is not necessary that the parties should meet to make a contract of rescission. Such a contract may be implied from their acts.

I would, with every respect, set aside the judgment in favour of the plaintiff and enter judgment for the defendants.

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As a result of the above holding the plaintiff would not be entitled to recover back the $157 paid. Mr. Trueman, however, on defendants' behalf, agreed that he would not stand upon his clients' rights in that respect, but would allow it to be ordered to be repaid.

In my opinion, the judgment in the Court below should be set aside and judgment entered there for the defendants with costs, and the plaintiff should pay to the defendants their costs of this appeal, the $157 to be set off against such costs, or applied in reduction thereof.

Perdue, J.A.

PERDUE, J.A.:—The plaintiff has sued for specific performance of the contract and, in the alternative, for damages for breach of its provisions. The learned trial Judge found that the plaintiff had, by his laches, disentitled himself to specific performance, but awarded him damages against the defendants for their refusal to carry out the contract. The trial Judge found that the contract still subsisted and that the defendants were not entitled to treat it as at an end.

The contract was one for sale of land, the purchase price being payable by the plaintiff in monthly instalments of $10 each extending over a period of about three years and a final payment of $595 on 28th January, 1910. The contract was dated 28th January, 1907. By an express term it was provided that "time shall be in every respect the essence of this agreement."

On the plaintiff's own shewing, he made no payment or offer of payment of any part of the purchase money from November, 1907, until 27th October, 1911, on which latter date he tendered the sum of $1,104 as the amount then due and unpaid. The total amount paid by the plaintiff was $157 on a purchase amounting to $1,000 and interest. The excuse he offers is that he saw the defendant Harrison in the summer of 1908 and told him he was hard up and that Harrison said it would be all right. Harrison, he states, at the same time undertook to re-sell the land. In the several inteviews which the plaintiff had with the defendants, or either of them, his purpose was to get back the money he had paid. He shewed no intention of paying any part of the arrears. The defendants shewed an inclination to treat him leniently if he would make his payments, but I think it is clear that he had made up his mind not to part with any more of his money, so far as this transaction was concerned, and to get back, if he could, what he had already paid. The learned trial Judge has not found directly that the plaintiff intended to carry out the agreement although his finding that the contract still subsisted might inferentially carry with it a finding as to such intention. The question of intention is one which

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can, I think, be found as well by a Court of review as by a trial Judge who heard the witnesses.

Intention is a state of mind to be inferred from the facts proven in evidence. Although a party to a suit may, in a case like the present, give evidence of the intention he had in doing or abstaining from doing certain things, little reliance should be placed on that kind of testimony: Phipson, 4th ed., 49. The intention of the party should be elicited from his actions, from facts and circumstances which would aid in the solution of the question and from which his condition of mind might be inferred. It is from the facts and circumstances that the intention to abandon is to be discovered, not from the party's own interested statement afterwards made: see Cyc. L. & Pr., vol. 1, p. 7.

After carefully perusing the evidence, I have, with great respect for the finding of the learned trial Judge, come to the conclusion that the plaintiff had no intention of carrying out the contract, that he had in fact abandoned it, and that he only sought to make the best terms he could in regard to getting back the money he had paid. When we find him allowing four years to elapse without paying anything upon the numerous instalments of purchase money, and the interest and taxes that became payable in the meantime, and failing to see the vendors and account for his delay, I think the reasonable conclusion is that he had made up his mind to pay no more and to relinquish the purchase. Even if the defendants were willing to condone his earlier defaults and waive the strict condition as to time, that waiver would only apply to instalments then overdue and not to those falling due at future dates: *Barclay* v. *Messenger*, 43 L.J. Ch. 449, 456.

I think the defendants were justified, under the circumstances, in treating the contract as having been abandoned by the plaintiff. We find in this case the essentials necessary to enable them so to do, that is to say—"acts on the part of the purchaser which not only amount to delay sufficient to deprive him of the equitable remedy of specific performance, but which would make his conduct amount to a repudiation on his part of the contract," *per* Cotton, L.J., in *Howe* v. *Smith*, 27 Ch.D. 89, 95. If the land, which he clearly appears to have bought as a speculation, had failed to increase in value, we may reasonably conclude that he would never have offered to complete the purchase. It was the increase in the value of the land which induced him, in my opinion, to re-assert a claim which he had already abandoned.

Counsel for defendants expressed, on the argument, their consent to a return of the money paid on account, so that no question arises as to the disposal to be made of it.

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Cameron, J.A.

The appeal should be allowed with costs and the plaintiff's action to be dismissed with costs, the said sum of $157 to be set off against such costs.

CAMERON, J.A.:—The plaintiff (the purchaser) brings this action on an agreement dated January 28, 1907, for the sale by the defendants to the plaintiff of certain land for the sum of $1,000 payable $25 in cash and the balance partly ($380) in monthly instalments and partly in a lump sum ($595) on January 28, 1910, and asks, by way of relief, for specific performance of the agreement, or, alternatively, for damages and a return of the amounts paid. Up to November 1, 1907, the purchaser paid $157. Nothing further was paid by the plaintiff either on account of principal or interest or taxes. On October 27, 1911, the plaintiff tendered the defendants $1,104, and a transfer under the Real Property Act, and, on refusal, brought this action on December 7 following. In the meantime the owners had built on and sold the premises.

The agreement contains an express covenant by the purchaser that he will pay the vendors the purchase price with interest on the days and times therein set forth, and concludes with the covenant that

> time shall be in every respect the essence of this agreement.

There is also a provision in the agreement that interest shall be paid

> on the said sum, or so much thereof as shall from time to time remain unpaid whether before or after the same becomes due,

until the whole of the moneys payable are fully paid, and that interest on becoming overdue shall be treated as purchase money and bear interest. This would lead directly to the inference that the intention of the parties was that the purchaser might not be held to the *ipsissima verba* of the covenant as to time being the essence. There was obviously a contemplation that the payments, both of principal and interest, might be deferred beyond the dates fixed in the agreement. But on default of any payment of principal, interest or otherwise under the agreement it is provided that

> the whole purchase money shall become due and payable.

This would be, of course, at the option of the vendors, who, in no way bind themselves to a postponement of any payments or to divest themselves of any rights or powers accruing to them in the event of default. It is impossible, however, to see how the purchaser could acquire any rights by reason of the forbearance of the vendors in permitting payments to be deferred.

What is the effect of the express covenant making time of the essence?

> Such an express stipulation will be noticed by the Court among other circumstances (including the subject-matter of the contract)

in considering the equity to relief against forfeiture: McCaul, Vendors and Purchasers, p. 88.

And this statement of the law is not inconsistent with the view that the Court may refuse to grant relief in cases of delay or negligence, or where the subject-matter of the contract comes within certain well-recognized classes. The real point to be decided is

> whether the case is, *under all the circumstances*, one in which the Courts should exercise its power to grant relief against forfeiture or not: *Ib.* 89.

The relief that the Court may give to the purchaser in default is similar to that given a mortgagor in the like case

> unless the circumstances, such as great and persistent delay or the subject-matter of the contract, make it inequitable to do so: *Ib.* 97.

Under the terms of the agreement, unless there are extrinsic countervailing considerations, it must certainly be taken that the purchaser has lost his equitable interest in the land, and it is impossible to see what claim he has for the return of moneys paid by him to the vendors which moneys became theirs lawfully, and are their property to-day. But what countervailing considerations are there which the plaintiff can, in reason, invoke? There is nothing in the terms of the contract as we have seen. The total payments made by the purchaser amounted to less than one-sixth of the purchase price, a circumstance which clearly distinguishes this case from that of *Cornwall* v. *Henson*, [1900] 2 Ch. 298, and four years were allowed to elapse after the last payment before the purchaser came forward and offered the amount of his payments in arrears. In those four years he had done nothing in payment of principal or interest or taxes, and the vendors in that time had changed their position. The fact is, the property has increased in value; hence the tender and this action. Under all these circumstances, it does not seem to me that such a case has been made out by the plaintiff that this Court should grant him relief.

If the agreement in question still subsists, the various covenants in it must subsist also, including that making time the essence, to which due weight must be given, as has been stated.

> It is generally laid down that where time is of "the essence of the contract," performance after such time will not be a performance of the contract, unless assented to by the other party. Cyc. IX. 605.

The extension of time for payment does not affect the validity or force of the agreement making time the essence: *Barclay* v. *Messenger*, 43 L.J. Ch. 449, 456. Surely then it cannot be reasonably contended that the tender, made four years after the whole amounts, due and to become due, under the agreement, had become payable (which tender was absolutely refused), was a performance of the obligations of the purchaser entitling

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him to call upon the vendors for a conveyance. There are not here present the circumstances which would prompt the Court to grant relief to the plaintiff against the terms of a contract to which he is a party and in respect of which he is grossly in default.

There is no doubt that a party can effectually abandon his equitable rights to real property. This conclusion is plain from the decision in *Cornwall* v. *Henson*, [1900] 2 Ch. 298. In determining whether there has been an abandonment, the first and most important object of inquiry is to ascertain the intention—for there can be no abandonment without the intention to abandon.

> Upon a question of abandonment, as upon a question of fraud, a wide range should be allowed as to evidence, as it is generally only from facts and circumstances that the truth is to be discovered, and both parties should be allowed to prove any fact or circumstance from which any aid for the solution of the question can be derived. Cyc. I. 7.

Was it not here really the intention of the purchaser to abandon his rights? Did not his request that the vendors should repay him the moneys he had paid under the contract, and from which he had irrevocably parted, involve necessarily the total abandonment of the contract under which he had made these payments? I would say that the answers to these questions must, on the evidence, be made in the affirmative and that there was on the purchaser's part an intention to abandon and an abandonment in fact.

I submit this view as to there being an abandonment, not without some hesitation, as it is not in accord with the finding of the learned Chief Justice. Yet it seems to me a conclusion that can be fairly and reasonably drawn from those conversations, facts and circumstances set forth in the evidence which are not in dispute; that is to say, disregarding such an episode as the interview which the defendant Harrison said he had with the plaintiff (Ev., p. 55), which interview the plaintiff denies (p. 72). What the plaintiff really wanted from the vendors in the interviews he had with them was, as he states, on his cross-examination, to get his money back and to obtain, if he could any profit there might be on a re-sale. This obviously involved his withdrawal from the original contract (so far as one party to a contract can withdraw from it), because the purchaser was then in arrears and his request for a return of his instalments paid was equivalent to a statement of his determination not to comply further with the terms of the agreement and of his intention to continue in default, which unwillingness and intention were further shewn and accentuated by his complete cessation from making payments. What he said to the vendors was,

> Let me have my $157. Let me have it out of a sale of the property, if you can sell it. But let me have it somehow. In any event, I am not going to pay up arrears nor am I going to meet future payments.

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The vendors did not return or agree to return the $157. But they said:—

> Very well, if you wish to throw your contract overboard, we shall not hold you to it.

Looking at the uncontradicted evidence, this seems to me to have been the attitude of the purchaser on the one hand and that of the vendors on the other. How then is it possible to entertain this action?

Moreover, looking at the circumstances attending this transaction from a different standpoint, it would seem to me that there can be inferred, from the facts arising after the plaintiff had ceased to make his payments and not in dispute, the creation of another subsequent contract between the parties. After the plaintiff had ceased to make his payments on the original agreement, and after he had failed to avail himself of the extension of time granted by the vendors, there arose in his mind an intention to disregard the agreement and throw it aside, in fact, to cancel it, which intention was communicated to the vendors by his refusal to make subsequent payments and otherwise, and in this intention, so declared and expressed, the vendors acquiesced. They built upon the property, disposed of it to a purchaser, and otherwise treated the agreement as wholly determined. That is to say, there arose a new agreement between the parties, to be gathered from their acts, words and conduct, an agreement to the effect that the original agreement should be disregarded, and, in fact, discharged and rescinded. And in this Court such a parol agreement to discharge a contract under seal, one established by evidence, is perfectly valid.

As for the plaintiff's claim to be repaid the amounts paid by him on the agreement, it would seem singular if he could, by his own default, put himself in a position to recover these from the vendors, who lawfully own them. But Mr. Trueman expressed a willingness to pay these over, and there is no necessity to consider this aspect of the case.

HAGGART, J.A., concurred.

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Appeal allowed.

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Nov. 18.

Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue, Cameron, and Haggart, JJ.A. November 18, 1912.

1. BROKERS (§ II B—12)—REAL ESTATE BROKERS—COMPENSATION — FAILURE TO COMPLETE TRANSACTION—RESTRICTED SPECIAL AGENCY.

Where the plaintiffs and the defendants are real estate agents, and the defendants to the knowledge of the plaintiffs hold a restricted special contract from the option-holders of certain lands under which the defendants are to receive not a variable percentage commission but

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the lesser lump sum of $1,000 for negotiating at a stipulated price and terms a sale of the lands, and where the defendants agree to pay to the plaintiffs $500 as one-half of the lump sum for negotiating the sale at the price and terms so fixed, and where, under that agreement, the plaintiffs introduce to the option-holders a proposed purchaser, who, however, fails to agree definitely with the option-holders upon the terms or to make the purchase, but instead purchases a few days later directly from the owners at the same price on terms undisclosed in the evidence, the plaintiffs cannot, under such a restricted special contract recover any compensation.

2. BROKERS (§ II B—12)—REAL ESTATE BROKERS—COMPENSATION — SUFFICIENCY OF BROKERS' SERVICES—PRICE AND TERMS—SPECIAL AGENCY.

Where real estate agents agree for a lump sum under a restricted special contract of agency to negotiate at a stipulated price and terms the sale of certain lands, and under the agreement procure a purchaser ready and willing to buy at the price but not on the terms so fixed, this is not such a fulfilment of the contract as will entitle the agents to any compensation whatever.

3. BROKERS (§ II B—12)—REAL ESTATE BROKERS—COMPENSATION — SALE OVER AGENT'S HEAD—AGENTS EMPLOYED BY OTHER AGENTS.

Although vendors of lands may sometimes be held liable to real estate agents where the vendors themselves proceed to sell to parties introduced by those agents on terms other than those on which the agents were instructed to procure purchasers, upon the ground that a vendor may not, after making such a sale and taking the benefit of the agent's services, refuse to pay therefor; such a principle cannot apply in an action by a real estate agent as against his employer, another real estate agent, who derives no benefit whatever and is no party to the change in the terms of sale.

Statement

APPEAL by defendants from the judgment of the County Court of Winnipeg in favour of the plaintiff for $500 in an action brought by one real estate agent against another for procuring a purchaser for certain lands.

The appeal was allowed and judgment below set aside.

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

J. P. Foley, for defendant.

Howell, C.J.M.

HOWELL, C.J.M., concurred in the judgments of Richards and Perdue, JJ.A.

Richards, J.A.

RICHARDS, J.A.:—Plaintiffs and defendants are real estate agents. The defendant, who was then known to the plaintiffs to be such an agent, asked them to get a purchaser for certain lands, at a price, and on terms, which were then stated; and agreed that, if they did so, he would give them half of $1,000, which other parties had agreed to pay him, as a commission, if he procured a purchaser at that price and on those terms.

The parties who had so employed the defendant were not the owners of the land, but held an unexpired option, under which they were entitled to buy the property, at a price less than that at which they had placed it with the defendant.

The plaintiffs introduced Mr. Maddock, as a purchaser. Mr. Maddock had negotiations with the option holders, and it

is claimed by the plaintiffs that he and such holders came, on 21st December, to a definite verbal agreement of sale. By such alleged agreement Mr. Maddock was to purchase, and such holders to sell, the land for the price above named, but on less advantageous terms as to payment of the purchase money. Five days later, on 26th December, Mr. Maddock went to the registered owners, and bought the land directly from them, at the same price, but on terms which do not appear definitely in the evidence. No reason is given for this action on Mr. Maddock's part, except that he seems to have believed that the option holders could not make a good title.

The option was not to expire till some time in the then next month of January. No evidence was given as to the nature, or particulars, of the option, except as to the price per acre. Also, there was no evidence to shew that the option holders could not make title.

The plaintiffs sued the defendant in the County Court of Winnipeg for $500, claiming that they had fulfilled their contract with the defendant by procuring, as the purchaser, Mr. Maddock, who, they alleged, had, on 21st December, been able, ready, and willing to buy at the price named by defendant.

The learned trial Judge upheld the plaintiffs' contention and entered a judgment in their favour for $500 and costs. From that decision the defendant has appealed to this Court.

The defendant, when he contracted with the plaintiffs, was, to the plaintiffs' knowledge, not the owner of the land, or of any estate in it, or of any right which might be turned into such ownership, or estate. He was, as they knew, employed, under a special contract, to procure a purchaser, ready and willing to buy at a certain price, and on certain terms, on the doing of which he was to be paid a fixed sum, which was less than the usual rate of commission that would be paid in connection with a sale of land for that price.

It seems to me that the defendants' contract with the plaintiffs was distinctly understood to be a special one, that, if they procured such a purchaser, as above, he would give them half of the $1,000 which the procuring of such purchaser would have enabled him to earn from the option holders. There is no evidence of any variation of that contract, or of any subsequent, or other, contract between plaintiffs and defendants. If I am right in that, I cannot see how procuring a purchaser, who was willing to buy on any other terms, was a fulfilment by the plaintiffs of the contract on their part.

It is, however, urged by the plaintiffs that if Mr. Maddock, after being introduced by the plaintiffs, agreed with the option holders on other terms of purchase for the same land, that would entitle the defendant to claim the $1,000 commission from those

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option holders, and the plaintiffs to claim their half from the defendant.

It is not, I think, necessary to discuss that proposition. It seems to me that, even if tenable under some circumstances, as to which I express no opinion, it is quite untenable in the case of a restricted special and unchanged contract, such as was made between the plaintiffs and the defendant.

Vendors have often been held liable to agents, where they sell to parties introduced by those agents, on terms other than those on which the agents were instructed to procure purchasers. But that is on the ground that a vendor may not, after making such a sale and taking the benefit of the agent's services, refuse to pay for the benefit thus derived from those services. Because of the knowingly taking of such a benefit the law implies a contract to pay the agent for the services that brought about the benefit. Such a principle can surely have no application where the employer derived no benefit and was no party to the change of the terms of sale.

But there are fatal objections to the argument so advanced for the plaintiffs: Firstly, the evidence does not, on a careful perusal, shew that terms of sale were definitely agreed on between the option holders and Mr. Maddock; secondly, if they were, the fact seems to be that Mr. Maddock, though making the agreement, was really neither ready nor willing to purchase. His unexplained action in buying directly from the registered owners, five days after his alleged agreement with the option holders, proves that conclusively.

With deference to the view taken by the learned trial Judge, I am, for the above reasons, of opinion that the plaintiffs' action must fail.

I would allow the appeal with costs. The judgment in the Court below should, I think, be set aside and judgment entered there for the defendant, with costs.

Perdue, J.A.

PERDUE, J.A.:—Messrs. Fraser, Bender & Co., listed certain property with the defendant Claude Buffet, a real estate agent, to be sold on certain terms. In the event of Buffet procuring a purchaser on these terms he was to receive $1,000 commission. Buffet then went to the plaintiffs, who were also real estate agents, and asked them if they could procure a purchaser upon these terms, promising them one-half of his commission, that is to say, $500, if they were successful. Fraser, Bender & Co. were introduced to the plaintiffs by Buffet and the plaintiffs knew that Fraser, Bender & Co. were not the owners of the property.

When Buffet first sought to interest the plaintiffs in the matter he communicated to them the terms upon which the land would be sold. These terms were contained in a written memo.

(ex. 1), and there is no dispute that a purchaser, if procured at all, should be a purchaser upon these terms. This document shews that the price of the land was $160 an acre for a quarter section, containing 160 acres; $6,000 in cash, $2,000 in three months, and the balance in four payments extending over four years.

The plaintiffs claim that they did succeed in procuring a purchaser, one Maddock, who was ready, willing and able to purchase the land on the terms offered and that Buffet is now liable to pay them the $500 as their commission.

On the plaintiffs' own shewing the terms offered by Maddock, the intending purchaser, were $5,000 when the title was approved, $3,000 in six months and the balance in three equal consecutive annual instalments commencing on the 21st June, 1913.

This offer was never accepted by the defendants' principals, Fraser, Bender & Co. On the day following the furnishing of these terms Maddock proposed the formation of a syndicate to deal with the land, in which syndicate Fraser, Bender & Co. were to join. By this latter proposal the terms of purchase were still further varied, part of the purchase money, $534, was to be paid by a promissory note to F. Bender, and part, $2,666, was apparently to be paid by a share in the syndicate to that amount being allotted to Fraser, Bender & Co.

Negotiations appear to have taken place between the parties extending over some days, but none of the proposals made by the plaintiffs or by Maddock directly to Fraser, Bender & Co. was ever accepted by the latter and carried out.

When Maddock made the first offer, he sent with the offer a cheque for $1,000, as a deposit made upon that offer, but this $1,000 was returned at the request of Maddock's solicitors, they claiming that the title to the property was not good.

During the time these negotiations were going on Fraser, Bender & Co. were not the real owners of the property, they having only an option which expired in a short time.

Some four or five days after Maddock made his proposal in regard to the formation of a syndicate he opened negotiations with the real owners, being the persons from whom Fraser, Bender & Co. held an option, and five days after his proposal to form the syndicate he closed a purchase from the real owners, cutting out Fraser, Bender & Co.

The evidence clearly shews that the plaintiffs never procured a purchaser who was ready, willing and able to buy in accordance with the written terms furnished by the defendant to them when he placed the matter before them. None of the offers made by Maddock or by the plaintiffs to the defendants' real principals, Fraser, Bender & Co., were ever accepted by the

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latter, nor was there any agreement or consensus ever arrived at. The fact that Maddock afterwards bought the property from the real owners from whom Fraser, Bender & Co. merely held an option cannot give the plaintiffs any cause of action against the defendant.

The appeal should be allowed with costs, the judgment in the County Court set aside and judgment entered for the defendant, with the usual counsel fee and County Court costs.

Cameron, J.A.
Haggart, J.A.

CAMERON, and HAGGART, JJ.A., concurred.

Appeal allowed.

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Nov. 11.

McVAUGHT v. McKENZIE.
(Re Claresholm Provincial Election.)

Alberta Supreme Court, Walsh, J. November 11, 1912.

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

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

[*Carstairs* v. *Cross, re Edmonton Election*, 6 D.L.R. 59, applied.]

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

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

[*Carstairs* v. *Cross, re Edmonton Election*, 6 D.L.R. 59, followed.]

3. ELECTIONS (§ IV—93) CONTESTS—WHEN PETITIONER MUST BE A DULY QUALIFIED ELECTOR.

In an application to set aside an election petition under the Controverted Elections Act (Alberta) upon the ground, among others, that the petitioner was not qualified to file a petition, and where, upon the hearing it does not appear that the petitioner was, at the date of the filing, either a defeated candidate or a duly qualified elector, the objection on this ground will be sustained.

[*Carstairs* v. *Cross, re Edmonton Election* (No. 1), 6 D.L.R. 59; *Carstairs* v. *Cross, re Edmonton Election* (No. 2). 7 D.L.R. 192; Controverted Elections Act, 7 Edw. VII. (Alta.) ch. 2, referred to.]

4. EVIDENCE (§ II I—299)—PETITIONER'S ONUS TO PROVE HIMSELF AN ELECTOR—ESSENTIALS—BRITISH SUBJECT.

The onus is upon the petitioner presenting an election petition under the Controverted Elections Act (Alta.) to shew that he is himself a duly qualified elector at the date of filing the petition, and failure to prove himself a British subject, which is an essential element of an elector's qualification, may be given effect to upon the hearing of preliminary objections to the petition.

[*Carstairs* v. *Cross, re Edmonton Election* (No. 1), 6 D.L.R. 59; *Carstairs* v. *Cross, re Edmonton Election* (No. 2), 7 D.L.R. 192; Controverted Elections Act, 7 Edw. VII. (Alta.) ch. 2, referred to.]

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5. EVIDENCE (§ II I—299)—PRESUMPTION OF NATIONALITY—RESIDENCE.

Residence in Canada for several years does not raise a presumption either of law or of fact that the resident is a British subject.

[*Her* v. *Elliott*, 32 U.C.Q.B. 434, considered; *Currie* v. *Stairs*, 25 N.B.R. 8; *Doe dem Thomas* v. *Acklam*, 2 B. & C. 779; *Reg.* v. *Lynch*, 26 U.C.Q.B. 208, distinguished; *Johnson* v. *Twenty-one Bales*, 2 Paine (U.S.) 601, and *State of Vermont* v. *Jackson*, 8 L.R.A. (N.S.) 1245, referred to; see also 7 Cyc. 147.]

Statement

APPLICATION to set aside an election petition under an election petition under the Controverted Elections Act, 7 Edw. VII. (Alta.) ch. 2, on the ground, among others, that the petitioner was not an elector.

Application allowed and petition dismissed.

J. McK. Cameron, for petitioner.

O. M. Biggar, for respondents.

Walsh, J.

WALSH, J.:—The preliminary objections set up by the respondent are identical with those raised in the *Edmonton* case, which have been disposed of by my brother Scott: *Carstairs* v. *Cross, re Edmonton Election*, 6 D.L.R. 59; *Carstairs* v. *Cross, re Edmonton Election* (*No.* 2), 7 D.L.R. 192. I announced at the opening of the hearing that I would adopt his rulings in that case as to the *onus probandi* and upon any points of law that might arise for decision. The respondent offered no evidence in support of the objections, the onus of proof with respect to which rests upon him. When the taking of the evidence presented by the petitioner was concluded, counsel for the respondent stated that there were, upon the facts established here, only two points that were not covered by the rulings in the *Edmonton* case, these being: (1) that the evidence disclosed that the petition was not read over and explained to the petitioner, and he, therefore, is not a petitioner within the meaning of the Controverted Elections Act; and (2) that the petitioner has not shewn that he is a British subject, and, therefore, has not satisfied the onus under which he rests of proving his status as an elector.

I do not think that effect can be given to the first of these objections. It is quite clear from the evidence of Mr. Cameron that the petition was not read over to the petitioner before he signed it. It is equally clear, however, that he knew that he was signing a petition against the return of the respondent at the election in question. The Act does not require that the allegations of the petition shall be verified by affidavit of the petitioner. I do not think that it was at all essential that the petitioner should have known the details of the allegations which were being made in his name. It was sufficient that he should know in general terms the nature of the document which he was signing, and this, I think, he knew. This objection is over-ruled.

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The second objection, however, is not so easily disposed of. A petition can only be filed by a defeated candidate or a duly qualified elector of the electoral district in which the election complained of was held. One of the essentials in the qualification of an elector is that he is a British subject. The onus is upon the petitioner of establishing his status as an elector, and, in doing so, he must, of course, prove, amongst other things, that he is a British subject. The petitioner was not present at the hearing. His qualifications as an elector were, however, fully established by the evidence of others, in every respect, save that of his British citizenship; and as to this no evidence whatever was offered. Mr. McCaul contends that a presumption arises from the fact of his residence in Alberta, which is amply established, that he is a British subject, and, in the absence of evidence to rebut this presumption, it should be acted upon.

The evidence upon which I am asked to make this presumption is that of Mr. D. J. Campbell, sheriff of the Macleod judicial district, and Doctor MacMillan, the defeated candidate at the election in question, the former of whom proves the continuous residence of the petitioner in what is now Alberta for twenty-eight or twenty-nine years, all of which, with the exception of the first year or so, were spent in what is now the electoral district of Claresholm; and the latter of whom proves the petitioner's continuous residence in that electoral district during his entire acquaintanceship with him, extending over the past eight years. In the course of Mr. Campbell's examination-in-chief, this question was asked and answer given: "Q. Do you know what nationality he is? A. No, although I know he came from Montana here. I don't know where he was born. I think he comes from Ontario. He has resided there twenty-eight or twenty-nine years."

I think that the context shews that the "there" referred to in the last sentence is his present place of residence.

The only reference which Mr. McCaul gave me in support of his contention (in addition to a section of Moore on Facts, which does not seem to bear upon the question at all) is the following sentence from vol. 7 of Cyc., at p. 147: "In the absence of proof to the contrary, every man is considered a citizen of the country in which he may reside."

The authorities given in Cyc. for this proposition are all decisions of various Courts in the United States. An extract from the judgment of *Johnson* v. *Twenty-one Bales*, 2 Paine (U.S.) 601, is printed in the footnote in the following words:—

> I think it may be assumed as a principle, that the law of nations, without regarding the municipal regulations prescribed for his admission, views every man as a member of the society in which he is found. Residence is *primâ facie* evidence of national character, susceptible, however, at all times, of explanation. If it be for a special purpose, and transient in its nature, it shall not destroy the original or prior national

character. But if it be taken up *animus manendi*, with the intention of remaining, then it becomes a domicile, superadding to the original or prior character, the rights and privileges, as well as the disabilities and penalties, of a citizen or subject of the country in which the residence is established.

The only report of any of the other American cases noted which has been available to me is *State of Vermont, ex rel. Phelps* v. *Jackson*, 8 L.R.A.N.S. 1245, which is a judgment of the Supreme Court of Vermont. The only reference to this question which this judgment contains is the following:—

> However this may be, we regard it of no importance in this case, as the citizenship of the respondent is presumed. This presumption arises from the mere fact of his residence here. It was this rule which Judge Redfield had in mind when he said, in *Blood* v. *Crandall*, 28 Vt. 400, that "the general presumption is in favour of citizenship."

No authorities upon the question have been cited to me by counsel for the respondent. I assume, therefore, that everything that the well-known industry of the counsel engaged in the case could find upon the subject is the sentence from Cyc. which I have quoted and the authorities noted in support of it. My own examination of the books available for a study of the question has been as thorough as I could make it, but it has been practically fruitless. In none of the standard English textbooks on private International Law or on the Laws of Evidence is such a presumption even suggested or hinted at, and I have been quite unable to find a report of the judgment of any Court in the British Empire in which the question is decided or even discussed. I have found a couple of cases in which obscure passages occur which, at first reading, seem to bear upon it, but in reality do not.

In *Currie* v. *Stairs*, 25 N.B.R. 8, the following passage occurs at p. 8:—

> But, apart from these considerations and even in the entire absence of all evidence of his origin and the place of his birth and that he had ever lived elsewhere than in this province, we think that it ought to be presumed that he was a British subject at the time of his ordination and at the time he performed the marriage ceremony for the plaintiff.

This was a case in which the validity of a marriage depended upon whether or not the clergyman who performed it was a British subject. I think that the presumption to which the Court gave effect arose out of the maxim, *omnia praesumuntur rite esse acta*, for the authority given for it is *Rex* v. *Verelst*, 3 Camp. 433, a report of which I have found in 14 Revised Reports 775, and it does not deal with the question of British citizenship at all, but is simply an authority for the application of the *omnia praesumuntur* principle.

In *Doe dem. Thomas* v. *Acklam*, 2 B. & C. 779, the Chief Justice, speaking of the plaintiff, at 795, says:—

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She was born after the independence of the colonies was recognized by the Crown of Great Britain, after the colonies had become united states and their inhabitants generally citizens of those states, and her father, by his continued residence in those states, manifestly became a citizen of them.

I do not regard this, however, as an exposition of the general law of citizenship as manifested by residence, but as an expression of the view which the Court entertained as to the citizenship of those in the plight of the plaintiff's father, who, having rebelled against the sovereignty of Great Britain, had gained their independence and retained their residence in the United States.

In *Regina* v. *Lynch*, 26 U.C.Q.B. 208, it was held that a body of invaders who came to Canada from a foreign country, with which Canada was at peace, might *primâ facie* be reasonably assumed to be citizens or subjects thereof. This assumption, doubtless, rested on the theory that British subjects would not be engaged in making a warlike invasion of Canada.

In Boot on Evidence, at p. 403, it is said that

> the place where a person lives must be taken *primâ facie* to be his domicile until other facts establish the contrary,

And three old English cases are noted as the authority for this proposition. Domicile, however, is one thing and nationality or citizenship is another. A man may be domiciled in one country and be a citizen or subject of another. Permanency of residence is a material element in settling the question of domicile, and there is reason, therefore, in taking the place in which a man lives as his *primâ facie* domicile.

At p. 188 of Dicey on the Conflict of Laws (2nd ed.) he says, by way of comment, that any one who cannot be shewn to be either a natural-born or a naturalized British subject under some one or more of the rules which precede this comment is *primâ facie* an alien.

The utter lack of authority for it satisfies me that this presumption has no place in British jurisprudence. I labour under the disadvantage of being unacquainted with the reasoning which has led to its adoption by so many of the Courts in the United States. The principle is very broadly stated in the American authorities to which I have referred. According to them, given the fact that a man comes from a foreign land to the United States *animus manendi*, the presumption, which is, of course, rebuttable, arises immediately upon his arrival that he is an American citizen. The very broadness of this proposition makes me doubt its soundness. If the presumption arose after a residence of a certain number of years, it might have something in it to commend it. But to say that such a presumption should arise, and, in the absence of proof to the contrary, be given effect to, immediately upon the new arrival setting foot in what was theretofore to him a foreign country seems absurd.

If this presumption exists, it is one either of law or of fact. It cannot be a presumption of law, for that is defined to be "an arbitrary consequence expressly annexed by law to particular facts," and no such consequence as British citizenship is expressly annexed by Canadian law to residence here. A presumption of fact is defined as "an inference which the mind naturally and logically draws from given facts, irrespective of their legal effect."

What is there in the given fact that a man has made his permanent home in a certain country which impels the mind to draw the natural and logical inference that he is a citizen of it? To my mind there is absolutely nothing, and particularly so in this country, which thousands of aliens are every year coming to and making their homes in.

If the petitioner's right to vote at this election had been challenged at the polls, he could not have cast his ballot until he had sworn to a year's residence in Alberta and to the fact that he is a British subject. This would seem to indicate that the Legislature, in matters affecting the franchise at least, does not presume British citizenship from mere residence in Alberta. And if so high a degree of proof of the right to vote is required when nothing but the franchise of the individual affected is concerned, why should the Court be satisfied with anything short of it in a proceeding which has for its object the setting aside of the entire election?

If this presumption does not arise upon the advent of the newcomer, when is it to be given effect to? Are the Courts, by their decrees, to fix some conventional period of fixed residence after the expiration of which it shall arise? If so, what is that period to be?

The petitioner has undertaken to satisfy the Court that he is a British subject. He attempts to do so by proof by witnesses other than himself of his long residence in Alberta, and then asks the Court to presume from this that he is a British subject, and thus shift the onus to the respondent of proving that he is not. I fancy that this onus is placed upon the petitioner, because the facts to be established are peculiarly within his knowledge. When the onus is thus placed and for this reason, I do not think that the petitioner satisfies it by simply proving his residence and then challenging the respondent to prove that he is an alien. If I was indulging in any presumption in this case, it would be that he is an alien. He lives less than one hundred miles from Calgary; he was seen at Macleod the night before the hearing by Dr. McMillan, as he swears, his counsel knew of the onus that he was under, and yet he absents himself from the hearing with apparent deliberation, and asks me to guess at his nationality, when by coming here he could have put the matter beyond the realm of speculation. Some suggestion was made in Mr. Campbell's evidence which falls far short of proof of the fact that a

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Walsh, J.

homestead has been patented to the petitioner under the Dominion Lands Act. If that is so, the production of the patent from the land titles office at Calgary would have justified the presumption that he was a British subject, for it would not have issued to him until proof of that fact was made to the satisfaction of the department, and the *omnia praesumuntur* maxim would apply. See also *Iler* v. *Elliott*, 32 U.C.Q.B. 434. But no effort was made to prove that, although the motion was heard in Calgary. The absence of all effort to prove affirmatively that the petitioner is a British subject justifies a suspicion that it was not proved because it could not be, and for this reason, if I was dealing in presumptions, that is what I would presume here.

Then, further, Mr. Campbell's evidence is that the petitioner came here from Montana. If the presumption of citizenship following residence is to be applied, I should have to presume that during his residence in Montana he was an alien. Am I, then, to presume that, upon coming to Canada, he became a British subject by naturalization? It seems to me that both of these presumptions must be made if the petitioner's contention is well founded, and this is really asking more of one than can reasonably be expected. It is true that Mr. Campbell said, "I don't know where he was born. I think he comes from Ontario." If it had been proved that he was born in Ontario, this would have helped his position materially, but Mr. Campbell's evidence falls very far short of this, for he says, in so many words, that he does not know where he was born.

With very great reluctance, therefore, I come to the conclusion that effect must be given to this objection. It seems unfortunate in the public interest that an inquiry into the serious allegations contained in this petition should be headed off in this way, but if the petitioner is, as a matter of fact, a British subject, and, with the full knowledge of the onus under which he rested, refused to satisfy it when he could have done so simply by coming to Calgary and giving his evidence, the blame must rest with him alone if any failure of justice results.

I dismiss all of the objections except No. 5, which I allow because the petitioner has not proved that he is a British subject, and, therefore, a duly qualified elector of the Claresholm electoral district. It follows from this that the petition is dismissed and with costs.

If the petitioner wishes to appeal and my leave is necessary, I now give it to him without further application, and he may, if he likes, set the appeal down for hearing at the next sitting of the Court *en banc* at Calgary. In that event, if the respondent desires to cross-appeal and my leave is necessary, I now give it to him without further application.

Petition dismissed.

JOHN DEERE PLOW CO. v. AGNEW.

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Oct. 2.

British Columbia Supreme Court, Murphy, J. October 2, 1912.

1. CONSTITUTIONAL LAW (§ II A 2—178)—PROVINCIAL LICENSE FOR COMPANIES WITH FEDERAL CHARTER.

Those provisions of the B.C. Companies Act, 10 Edw. VII. (B.C.) ch. 7, which impose conditions upon companies incorporated under the Companies Act, R.S.C. 1906, ch. 79, in order to do business within the Province of British Columbia are not *ultra vires*.

[*Waterous Engine Co.* v. *Okanagan Lumber Co.*, 14 B.C.R. 238, followed.]

2. CORPORATIONS AND COMPANIES (§ III—31)—COMPANY WITH FEDERAL LICENSE—EXCLUSIVE AGREEMENT FOR SALES TERRITORY WITH RESIDENT OF PROVINCE—WHEN PROVINCIAL COMPANY LICENSE IS REQUIRED—B.C. COMPANIES ACT.

A contract made between a company carrying on business as implement dealers and holding a federal charter under the Companies Act, R.S.C. 1906, ch. 79, and a merchant in British Columbia whereby the latter was to sell their goods with an exclusive right within a part of the province and with a limitation on his selling prices, and whereby the company also retained title to the goods until paid for and the merchant agreed to take lien notes from customers to the company direct if it so requested, and to hold money received in partial payments from customers as in trust for the company, involves the carrying on of business within the province by the company under sec. 139 of the B.C. Companies Act, 10 Edw. VII. ch. 7, and if the company has not obtained a provincial license under that statute it cannot maintain an action against the merchant upon his promissory notes payable within the province for goods shipped by the company from another province to him in pursuance of such agreement.

Statement

THE plaintiff company was incorporated under the Companies Act of Canada, by a charter authorizing it, amongst other things, to carry on throughout Canada the business of dealing in agricultural implements, carriages and waggons, machinery, and a general agency, commission, and mercantile business.

The defendant was a merchant, residing and carrying on business at Elko, in the Province of British Columbia.

The plaintiff company and the defendant entered into an agreement at Winnipeg, in the Province of Manitoba, under which the company agreed to give the defendant the exclusive right within a certain territory of selling the company's goods. The company agreed to mail to a number of persons within the territory, according to a list to be supplied by the defendant, a newspaper published by the company, in which a full page advertisement was to appear of the defendant as dealer in the company's goods. The defendant agreed to deal exclusively in the company's goods in certain specified lines, and not to sell these goods below certain specified prices. The contract contained a list of prices at which goods ordered by the defendant would be paid for. The property and the title to all goods ship-

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ped were to remain in the company, and not to pass from it until all the obligations given in respect of them were satisfied.

Moneys received by the defendant on account of goods supplied by the company were to be held by the defendant in trust for the company. It was further agreed that, whenever requested by the company, the defendant would obtain, as security for goods sold to customers, lien-notes or other securities payable by the customers direct to the company. Under this agreement, the defendant ordered, at various times, certain goods to be shipped by the company, f.o.b., Calgary, in the Province of Alberta, consigned to the defendant at Elko, in the Province of British Columbia. Some of the goods were ordered by the defendant personally at Winnipeg, and some were ordered by letters posted by the defendant at Elko, directed to the company at Winnipeg, and the orders were fulfilled by the company shipping the goods to Elko. In respect of the goods shipped by the company to the defendant, the defendant gave to the company four promissory notes.

All these notes were dated at Winnipeg, and were payable at Elko, but two of the notes were in fact signed at Elko. The plaintiff company sued upon the notes.

The plaintiff company had not complied with Part VI. of the Companies Act of British Columbia, requiring companies incorporated otherwise than under the authority of the Legislature of British Columbia to become licensed before carrying on any part of their business in British Columbia.

The parties agreed to a statement of facts and concurred in stating the questions of law arising upon the facts for the consideration of the Court.

The questions submitted for the opinion of the Court were as follows:—

(1) Whether the plaintiff company, in the absence of a license under Part VI. of the Companies Act of British Columbia, 10 Edw. VII. ch. 7, was precluded from carrying on business in British Columbia or from maintaining an action in respect of any of the claims or notes aforesaid.

(2) Whether the provisions of Part VI. of the Companies Act were, in so far as they purported to prohibit the plaintiff company from carrying on business in the Province of British Columbia, and to maintain actions in the Courts of the said province, *intra vires* of the Legislature of the Province of British Columbia.

Sir C. H. Tupper, for the plaintiff company.
J. Stuart Jamieson, for the defendant.

Murphy, J.

MURPHY, J.:—As to the question whether the sections of the Companies Act applicable here are *ultra vires* because they seek to impose conditions on a company incorporated by the Dominion and authorized to do business throughout Canada, this has

already been passed upon in *Waterous Engine Co.* v. *Okanagan Lumber Co.*, 14 B.C.R. 238, adversely to the plaintiff's contention. As the decision still stands, I adopt it *pro forma* and hold the legislation complained of to be *intra vires*.

On the second branch of the case, that what was done here does not fall within the disabling sections; putting the plaintiff's case on its strongest ground, it must be conceded that, if sec. 139 has been violated, sec. 168 becomes operative and this action fails. Now, sec. 139 *inter alia* states that

> No company, firm, broker, or other person shall, as the representative or agent of or acting in any other capacity for any such extra-provincial company, carry on any of the business of an extra-provincial company within the province until such extra-provincial company shall have been licensed or registered as aforesaid.

Does the contract in question here provide that the defendant, "as representative or agent of or acting in any other capacity" shall carry on any of the business of the plaintiff? I think it does. The defendant need not be an agent; he need not even be a representative, as required by the Alberta Act. It is sufficient if he acts in any capacity. The contract requires him to insure the goods shipped in the company's name; to sell according to a fixed price-list; on demand, to take notes in the company's name from purchasers and forward the same to the company; to hold in trust for the company proceeds of sales until payment of all obligations; and to do a variety of other things on behalf of the company. It is argued that all these provisions are merely the giving of security for payment of the indebtedness, and not a carrying on of any of the business of the company. But the defendant has to act within the province in providing such security. He must insure here; the contracts of sale are evidently intended to be made here; and, therefore, if demand to take notes in the company's name is made, the defendant must act here in obtaining such notes, and so on with many other provisions of the contract. To put the matter in a nutshell; in my opinion, granting for the sake of argument the plaintiff's contention, the making of security for indebtedness is a part of the plaintiff's business as it would be of any merchant, and the defendant is, in some capacity—it matters not what, under the wording of the section—bound to do various things in this province to obtain such security for the plaintiff. This is a violation of sec. 139, and the present action cannot be maintained. The questions are answered accordingly.

Action dismissed.

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Nov. 28.

Re DE BLOIS TRUSTS.

(Decision No. 2.)

Nova Scotia Supreme Court, Sir Charles Townshend, C.J.
November 28, 1912.

1. COURTS (§ II A 5—172)—CONCURRENT JURISDICTION OF SUPREME AND PROBATE COURTS—ADMINISTRATION OF ESTATES.

In the administration of estates the jurisdiction of the Supreme Court of Nova Scotia is concurrent with that of the Probate Court, and, in matters of difficulty or importance, it is desirable that questions should be dealt with in a summary way under the procedure in the Supreme Court, but where, in the opinion of the court, the application is needless in view of the questions at issue or the smallness of the amount involved, costs will be refused.

2. LIMITATION OF ACTIONS (§ II J—80)—ADMINISTRATION OF ESTATE—STATUTE BARRED CLAIM AGAINST BENEFICIARY.

Executors may retain from the distributive share of the estate to which a beneficiary is entitled an amount in which such beneficiary was indebted to the testator although, at the time of the testator's death, the indebtedness was barred by the Statute of Limitations.

[*Re Akerman*, [1891] 3 Ch. 212, followed.]

Statement

THIS matter came before the learned Chief Justice, at Chambers, under an originating summons taken out on the part of Margaret M. De Blois and Emily C. McCormick, executrices of and trustees under the last will of the deceased testator.

Other questions under the same will were dealt with in *Re De Blois Trusts*, 6 D.L.R. 119.

The points submitted for determination were as follows:—

1. That upon the settlement of the estate of the testator there be brought into account as against the distributive share of the respondent, William M. De Blois (and in priority to any claims of his creditors) any sums owing by him to the testator at the date of the latter's death, with accrued interest thereon, and notwithstanding that any right of action in respect thereof by the testator in his lifetime had been barred by the Statute of Limitations.

2. That directions be given as to the ascertainment of any such sums so owing by the said William M. De Blois to the testator with the accrued interest thereon by reference to a Master or otherwise.

3. That the estate be administered in this Court.

4. That the originating summons issued herein on the 5th day of February, 1912, be amended so far as may be necessary to give effect to this application.

5. That such further and other consideration be given and relief granted as to the Judge may seem meet.

T. S. Rogers, K.C., for the executrices.

W. E. Roscoe, K.C., for certain creditors of William M. De Blois, a son of testator.

Sir Charles Townshend, C.J.

SIR CHARLES TOWNSHEND, C.J.:—This matter came before me under an originating summons in which the executrices and

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trustees under the will of the late Rev. Henry De Blois desire to have certain questions determined relating to the rights of creditors of William De Blois, son of deceased, to rank on his distributive share of the estate.

Mr. Roscoe, representing some of the creditors, contested the application as unnecessary, and claimed that any question of that kind should be left to the decision of the Court of Probate in settling the estate.

I think there can be no doubt, as contended by Mr. Rogers, that the jurisdiction of this Court is concurrent with the Court of Probate in the administration of estates, and in matters of difficulty and importance it is desirable that executors and trustees should have the right to have such questions dealt with summarily under this procedure.

Mr. Roscoe referred to the abuse or expense which might be incurred in every estate if such proceedings can be adopted as of right. I can only say that during the period the Judicature Act has been in force—now over 25 years—the applications have been comparatively few, and only, so far as my experience goes, in cases of importance. So far as expense goes, I doubt if it costs any more, if as much, as where it first comes before the Judge of Probate and then comes before the Supreme Court on appeal. The Supreme Court, moreover, has a remedy which will be exercised of refusing costs where in its opinion the application has been needless in view of the question at issue or the smallness of the amount.

Under the facts before me, I think the executrices are entitled to have the questions submitted decided on this originating summons, and, if necessary, the summons may be amended.

On the question of the right of the executrices to retain so much of the distributive share of William De Blois as will discharge his indebtedness to deceased—even though barred by the Statute of Limitations—there can be no doubt. It is only necessary to refer to the case of *Re Akerman*, [1891] 3 Ch. 212, to find authority for that position, and to Williams on Executors, 10th ed., 1050, and cases cited.

The matter will be referred to a Master to be agreed upon by the parties, otherwise I will appoint one, to take all evidence as to the amount of William De Blois's indebtedness and to report same.

Order accordingly.

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Oct. 8.

MARSHALL v. KINNIBURGH.

Alberta Supreme Court, Stuart, J., in Chambers. October 8, 1912.

1. PARTIES (§ III—124)—BRINGING IN THIRD PARTY—INDEMNITY—BREACH OF WARRANTY ON SALE.

A third party notice cannot be supported as upon a contract of indemnity where the defendants are sued upon a promissory note given for the price of a stallion to the third party and seek to claim against him a breach of warranty of the stallion; any damages to which the defendants may be entitled in that regard as against the warrantor are for breach of contract and not of a contract to indemnify.

2. PARTIES (§ III—124)—BRINGING IN THIRD PARTY—INDEMNITY—CONDITIONAL AGREEMENT NOT TO NEGOTIATE NOTE SUED ON.

A third party notice against the payee of a promissory note will not be set aside in respect of a claim by the makers sued upon a promissory note by the endorsee thereof, that the note should not be used or negotiated by the payee unless and until he had obtained the signature of certain other parties as joint makers thereof.

Statement

MOTION by the defendants for directions as to procedure, a third party notice having been served; and motion by the plaintiff to set aside the third party notice.

A. G. MacKay, for the defendants.

J. B. Roberts, for the plaintiff and the third party.

Stuart, J.

STUART, J.:—The plaintiff sues as the holder of a promissory note given by several defendants to one Butler to secure the purchase-price of a stallion. The defendants allege that there has been a breach of a warranty given by Butler and of a condition that the note was not to be binding until signed by other persons, who in fact never signed, and they obtained leave to serve a third party notice on Butler, claiming contribution or indemnity.

So far as the breach of warranty is concerned, it is clear that this is no ground for bringing in Butler as a third party. It is a case of damages for breach of contract, not of a contract to indemnify.

With respect to the breach of the alleged agreement by Butler that the note should not be binding on the defendants until it was signed by certain other persons, who never did in fact sign, the matter is not so clear. The agreement alleged was, as I conceive it, this. Butler said to the defendants, "If you will sign this note, I agree that it shall not be binding on you until so and so and so and so sign," which the defendants assented to, and so signed their names. That, I think, implies an agreement by Butler that he will not do anything which will make the defendants liable on the note unless the others sign, *i.e.*, that he will not negotiate it to innocent third parties. For a breach of such an implied contract, I have no doubt the de-

fendants would be entitled to recover any damages they might thereby suffer. Whether we can go further and say that there must, from such a relationship of the parties, be implied a contract by Butler to indemnify the defendants against any loss they might sustain by acceding to his proposal and signing the note on a condition, is the real point to be decided. If this question stood by itself, I should have been inclined, though with some hesitation, to hold that a contract of indemnity should be implied.

The result, therefore, is, that I think the third party notice should remain, but that the claim under it should be limited to the breach of the agreement to hold the note unnegotiated until the others signed. The breach of warranty is clearly excluded. With this limitation attached to it, it may be that the defendants would prefer to have the notice struck out altogether; and, if they so elect within five days, there will be an order to that effect with costs in the cause. If the defendants desire the limited notice to stand, then the usual order directing the method of procedure before and at trial may go, with costs in the cause; the exact terms, if not agreed upon, to be spoken to.

Order accordingly.

MURRAY v. EBURNE SAW MILLS CO.

British Columbia Supreme Court. Trial before Hunter, C.J. October 1, 1912.

1. MASTER AND SERVANT (§ II E 6—275)—OMISSION OF FOREMAN TO USE PROTECTIVE MEASURES PROVIDED BY EMPLOYER—INJURY TO WORKMAN—ALLEGATION OF "DEFECTIVE SYSTEM."

No common law liability on the part of the employer is shewn where the foreman in charge was a competent man and the injury to the workman was caused by the failure of the foreman to use certain protective measures for which the foreman had been supplied with adequate materials which he neglected to use either wilfully or by inadvertence.

[*Wilson* v. *Merry*, L.R. 1 H.L. Sc. 326, considered.]

Statement

MOTION by the defendant in a common law action for damages for injuries sustained by an employee for a nonsuit.

The motion was granted.

W. B. A. Ritchie, K.C., and *W. H. D. Ladner*, for the plaintiff.

D. A. McDonald, for the defendant.

Hunter C.J.

HUNTER, C.J.:—I think I must give effect to this motion. For some unexplained reason the plaintiff has seen fit to come here under the common law or supposed common law remedy exclusively, there being no relief sought under the Employers' Liability Act or under the Workmen's Compensation Act.

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If one were to confine himself strictly to the pleadings, as far as I can see, in the way that these pleadings are framed, it would not be open to the plaintiff to argue that in this case a defective system had been established. The pleadings confine themselves to an allegation and a complaint that the materials supplied were defective, and that the rails, plant and ways established by the defendant company were defective and that it was by means of these defects that the accident occurred.

Paragraph 4 of the statement of claim says:—

> The said rails, plant and ways intended for and used for the operation of loading as specified in par. 3 herein, and the system and mode of operation of said cable as aforesaid, were by the negligence and default of the defendant constructed unsafely and with defective and improper materials.

That paragraph, as I understand it, does not contain an allegation that the system used in operating the plant was defective, but for the purpose of argument, I will waive that, and I will assume that the pleadings have been drawn with that in view, to include an allegation by inference that the system established was defective. Even then I cannot see how the plaintiff can hope to succeed in the action.

I would, however, say, in passing, that I am not sure that I understand the attempts made in some of the later decisions to engraft upon the decision in *Wilson* v. *Merry*, L.R. 1 H.L. Sc. 326, a superimposed liability upon employers. The decision in *Wilson* v. *Merry*, L.R. 1 H.L. Sc. 326, is quite plain, to the effect that the master fully discharges his obligation if he selects proper and competent persons to superintend and control the work, and furnishes them with adequate materials and resources for the work.

It does seem, at first sight, that there has been an attempt in later cases to engraft an additional liability, which is known as liability arising from the operation of a defective system. To my mind the existence of a defective system is really only an example of a defective plant. You may have assembled together the proper and adequate materials. If they are assembled in the right way, then they become a safe and suitable plant; if assembled in a defective or an inefficient way, then they become an unsafe and unsuitable plant. So, as far as I can see, the use of the term defective system in this class of case is merely to cloud the issues. The issues always are whether the premises and the plant were adequate and safe, and they are not safe if, by reason of some defect in their arrangement, the operation of it causes accidents. In other words, it becomes an unsafe and unsuitable plant.

I do not see how, in any event, the present case can be twisted into a case of defective system, assuming that such a

distinct additional liability has been successfully engrafted upon the original decision in *Wilson* v. *Merry*, L.R. 1 H.L. Sc. 326. We have no complaint here whatever that the engines used, or that the cables used, were in any sense defective or unsuitable for the purposes for which they were being used. We have no complaint, and the fact is admitted that sufficient blocks were provided for the purpose of using this plant in a safe and proper way. The evidence is clear to the effect that this block, which was here used for the purpose of keeping this cable in proper operation, was within two hundred feet of the person injured at the time of the accident.

It seems to me to resolve itself clearly into a case where the hook-tender, who was the foreman, *ad hoc*, and was admittedly competent, was provided with adequate and suitable materials; but, in the discharge of his duties as he saw those duties at the time, he did not consider it necessary to use the materials which his employers had furnished for the purpose.

I think it would be imposing a new burden on employers if the common law doctrine was extended to include a case where foremen, admittedly competent, neglect either wilfully or by inadvertence to use the materials which were provided and right at hand.

Therefore, unfortunately as it may be for the plaintiff, I am clearly of the opinion that no case has been developed upon the evidence at common law and I must grant the motion.

Motion allowed.

MARCHAND SAND CO. v. CANADIAN PACIFIC R. CO.

Board of Railway Commissioners, October 23, 1912.

1. CARRIERS (§ IV B—521)—INTERSWITCHING ON RAILWAYS—PRIVATE SIDINGS—EMBARGO ON CARS OF ANOTHER RAILWAY.

The Railway Commission may order discontinued an embargo placed by a railway against receiving, for interswitching delivery, upon private sidings of their line, the loaded cars of another railway from stations on such other railway, if taken merely as a means whereby to recover cars of the railway placing such embargo located along the line of the railway from which the shipments originated, where there were at the points of shipment no cars belonging to the railway seeking to enforce such embargo available for the use of the shippers affected thereby.

Statement

COMPLAINT of the Marchand Sand Company of Winnipeg that the Canadian Pacific Railway has embargoed sand loaded in cars other than their own on shipments into Winnipeg from points on the Canadian Northern Railway (File 20345).

Com. McLean.

MR. COMMISSIONER MCLEAN:—The Marchand Sand Company's pit is located at Marchand, Manitoba, on the line of the

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Com. McLean.

Canadian Northern Railway, a distance of forty-seven miles east of Winnipeg.

The embargo complained of was put in force on July 4th of the present year. Mr. Beatty, in his letter of August 16th, quotes Mr. Bury as saying:—

> An investigation made some time ago shewed that dealers in sand, gravel, lumber and other classes of building material were bringing their freight in over the Canadian Northern, and ordering it transferred over to the Canadian Pacific Railway yards to be delivered off our team tracks. This was not in accord with the interswitching order of the Board of Railway Commissioners, and we notified the transfer agency that we would not accept local cars from the Canadian Northern Railway for team track or freight shed delivery.
>
> As I understand the order, it was certainly not the intention of the Board to order that team track and freight shed facilities should be held in common, but merely to provide that where consignees had private siding facilities on one railway, they should not be denied the right to bring their freight into the same city over a competing railway.

The following statement of Mr. Bury, viz.:—

> To prevent foreign cars coming over which we are unable to get back again and to give them an incentive to return our cars, we issued an order some time ago that we would not accept from the Canadian Northern sand, gravel and other building material destined for delivery on sidings on the Canadian Pacific Railway unless loaded in Canadian Pacific cars.

puts the matter on another ground by stating in substance, not that the embargo was due to a congestion of facilities, but to an attempt to recover Canadian Pacific cars.

The Canadian Northern officials state that while the Canadian Pacific contends that the former railway has a large number of Canadian Pacific cars on its line, it is not stated where such cars are located. They further state that under date of October 19th, they have 2,100 Canadian Pacific cars on their line, 396 of which are in Winnipeg, leaving about 1,700 they can use, of which number 1,200 are west of Humboldt, leaving approximately 500 on the Central Division. Of the latter figure 260 are east of Winnipeg under load, leaving about 250, 90 per cent. of which are under load. The Sand Company's loading at the pit affected by the embargo, requires at least 75 cars per day. The Canadian Pacific arranged, on September 26th, that the Canadian Northern would be permitted to use for loading of sand, cars received from the former railway in switching service. This relieved the situation somewhat.

It having been found impossible to obtain any adjustment of the matter by correspondence, the matter has been looked into by an inspector of the Board. He advises as follows:—

On July 24th last, the Canadian Pacific Railway Company notified the Canadian Northern Railway that they would not accept shipments of sand or gravel only when loaded in Canadian Pacific cars. Mr. Scott states as a result of this embargo, his company have been unable to make deliveries according to contracts previously made, and are now obliged to refuse shipments to their old customers because of not being able to deliver to private sidings on the Canadian Pacific Railway. Mr. Scott cites one case where he had a contract with one firm for five hundred cars to be delivered on Canadian Pacific private sidings in Winnipeg, and before signing contract with the firm, he went to the railway officials of both roads to ascertain if there would be any difficulty in obtaining cars for this contract, and also if there would be any difficulty in transferring cars from one road to the other, and they distinctly told him, as long as the switching charges were paid, there would be no question about the transferring of cars, and he would get all the cars required to fill the order, and the shipments would be delivered as promptly as if they were being handled by the first carrying road. He states at the time the embargo was placed, there was in transit on the Canadian Northern Railway for Canadian Pacific Railway points forty-eight cars, which, in consequence of the embargo, had to be unloaded on Canadian Northern Railway team tracks, and hauled to the north-west end of the city. He also states under the present arrangement, unless all of his shipments were handled in Canadian Pacific equipment, he cannot properly supply his customers for the reason, he often orders, say twenty cars to be loaded at the pit intended for delivery at Canadian Northern private sidings, and before the arrival of the shipment, his customers who have private sidings on the Canadian Pacific Railway often run out of material, or come to him with a hurried order, and if he desired to divert the shipments to these customers, he could not do so if they were not loaded in Canadian Pacific cars.

The situation is that the shippers desire to ship to private sidings. Mr. Bury, in the quotation already given, does not contest this right. The shipper located on the Canadian Northern, shipping to a private siding on the Canadian Pacific, should not be subjected to loss and damage because the Canadian Pacific is endeavouring to recover its cars. Whatever may be said as to the justifiability of the Canadian Pacific acting as it did, if it had cars on the Canadian Northern lines available at points of shipment for movement to private sidings in the Canadian Pacific terminals, it is apparent from what has been said, that while there were Canadian Pacific cars on the Canadian Northern lines, they were in no sense immediately, or even proximately, available at the sand pit.

The limitation of the movement on this inter-line traffic to Canadian Pacific cars alone is discriminatory, and should forthwith be removed.

THE CHIEF COMMISSIONER and Commissioners MILLS and GOODEVE concurred.

ALTA.

S. C.
1912
Nov. 9.

Re OKOTOKS MILLING CO., Ltd.

Alberta Supreme Court, Stuart, J. November 9, 1912.

1. SUBROGATION (§ III—10)—COLLATERALS—SUBROGATION BY PAYMENT OF DEBT—INSOLVENT COMPANY—WINDING-UP.

Where certain directors of a company, personally paid off a claim against the company secured by collaterals (the property of the company), but, instead of taking over such collaterals to themselves, had them transferred by the creditor then being paid off to certain other creditors of the company, who were pressing for payment, as collateral security for their claims, in the *bona fide* belief that such arrangement was in the best interests both of the general creditors and of the company, such directors are properly allowed a preferential claim, in subsequent winding-up proceedings taken on the company's insolvency, upon the proceeds of such collateral securities so far as realized by the liquidator in excess of the amount collected in payment of their claims by the creditors who held such collaterals, but are not entitled to any preferential lien upon the general assets of the company in respect of such advances.

Statement

THIS was an application by Mahon and others, who were directors of the Okotoks Milling Co., Ltd., against the Security Trust Co., Ltd., as liquidators of the company in a winding-up proceeding. Two years previously the company was indebted to the Union Bank which held certain collaterals securing the claim. At that time it was hoped winding-up proceedings could be prevented, but the Canadian Fairbanks Company and three other creditors were pressing for payment of their claims or in the alternative for a winding-up order in order to save the company and its general creditors, Mahon *et al.* personally paid off the Union Bank and acquiesced in its collaterals being assigned to the Canadian Fairbanks Company, in trust as security for it and the three other creditors. The directors named (Mahon *et al.*) asked for an order declaring them personally entitled to a preferential claim as to any moneys realized by the liquidator out of the collaterals in question, over and above the amount which had been collected and distributed by the Canadian Fairbanks Company under its trust.

Duncan Stuart, for the liquidator, the Security Trust Co., Ltd.

O. B. Stockford, for the claimants.

Stuart, J.

STUART, J.:—The preferential claim of directors will be allowed. No misconduct has even been alleged against the directors, and the postponement of the liquidation was thought to be in the interests of the company at the time. It was to secure this postponement that the personal payment was made by the directors. The other creditors have been benefited by being freed from any contention with the Union Bank which might have occurred otherwise, and might have caused consider-

able embarrassment. The preference will, of course, only apply to any sums actually realized by the liquidator out of securities surrendered by the bank.

Order declaring preference.

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REX v. PELTON.

N. S.
S. C.
1912
Dec. 2.

Nova Scotia Supreme Court, Graham, E.J., Meagher, Drysdale, and Ritchie, JJ. December 2, 1912.

1. APPEAL (§ III F—95)—TIME FOR TAKING APPEAL—N. S. RULES, ORDER LVII., R. 3—FAILURE TO GIVE WITHIN TIME LIMITED—TELEGRAM AS NOTICE.

The meaning of rule, O. LVII., r. 3 (Nova Scotia), which stipulates that "the notice of appeal shall be served within ten days from the day that the appellant or his solicitor first had notice that the order upon the decision appealed from had been made," is not ten days from the service of the order nor ten days from the filing of the order, but ten days from "notice" of it, and for this purpose notice by telegram is effective.

2. APPEAL (§ III F—98)—EXTENSION OF TIME FOR APPEALING—DISCHARGE OF PRISONER ON HABEAS CORPUS—ACADEMIC QUESTION.

Where the prisoner had since been discharged upon *habeas corpus* by a judge of the Supreme Court having undoubted jurisdiction and any question as to whether a Master of the court had power to discharge would be merely academic, there is no merit that would call for indulgence by extending the time for appealing from a prohibition order in respect of the Master's previous decision upon a similar application made on the prisoner's behalf.

Statement

AN application to quash an appeal from an order granting a writ of prohibition on the ground that the proposed appeal was too late.

The application was allowed and the appeal quashed.

W. E. Roscoe, K.C., moved to dismiss the appeal from the decision of Russell, J., granting an order for the issue of a writ of prohibition on the ground that notice of appeal was not given within the time prescribed by Nova Scotia Orders LVII., R. 3. Service of the order was not necessary. Defendant's solicitor had notice by telegram that the order was granted: *Hopton* v. *Robertson* (1884) W.N. 77; *Land Credit Co. of Ireland* v. *Lord Fermoy*, L.R. 5 Ch. App. 323. As to jurisdiction of a Judge sitting as a Court: *The King* v. *Breen*, 8 Can. Cr. Cas. 147; *The Queen* v. *Bowers*, 34 N.S.R. 550.

J. J. Power, K.C., shewed cause.

The judgment of the Court was delivered by

GRAHAM, E.J.:—This is an application to quash an appeal because it is out of time.

Graham, E.J.

By Order 57, Rule 3, it is provided that the notice of appeal shall be served within ten days from the day when the appellant

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or his solicitor first had notice that the order upon the decision appealed from had been made. In this case the notice of appeal was not given until more than ten days after the party had notice. It was a notice by telegram and effective. The rule does not mean ten days from the service of the order, nor ten days from the filing of the order, but ten days from his having notice of it.

Ordinarily, there would be a case for indulgence extending the time, but there is no particular merit. The prisoner subsequently was discharged upon *habeas corpus* by a Judge of the Supreme Court, and any argument as to whether the Master of the Supreme Court had power to discharge would be merely academic.

The application will be granted. Costs reserved.

Application allowed.

N. S.
S. C.
1912
Dec. 2.

McDONALD v. McKAY.

Nova Scotia Supreme Court, Graham, E.J., and Meagher, Russell, and Ritchie, JJ. December 2, 1912.

1. NEW TRIAL (§ IV—31)—APPLICATION FOR REFUSED—NEWLY DISCOVERED EVIDENCE—LACHES.

A new trial will not be granted on the ground of newly discovered evidence where it appears to the court that due diligence was not used, otherwise the evidence would have been discovered in time for use on the former trial.

2. NEW TRIAL (§ IV—31)—ADDITIONAL EVIDENCE—PROBABILITY OF EFFECT ON RESULT.

A new trial asked on the ground of newly discovered evidence will be refused where the court is of the opinion that, if such evidence were used on another trial, there is no reasonable probability that the result would be different.

Statement

THIS was an application for a new trial on the ground of newly discovered evidence. The action, to recover damages for the loss of a sheep killed by a dog alleged to be the property of defendant, was tried before Drysdale, J., at Antigonish, June 8th, 1911. The sole question at issue on the trial was the ownership of the dog, and as to this the learned Judge, dealing with the case as a juror, found that the weight of testimony was against defendant, who was contradicted on material points by two or three people and, therefore, his story must be discredited. "I have no doubt that the sheep was killed by the dog, and no doubt that the dog belonged to McKay and that his name was 'Tiger.'" For this reason plaintiff's version was accepted, damages fixed at five dollars and judgment entered accordingly.

D. McNeil, K.C., for appellant:—The judgment was against the weight of evidence. Since the trial fresh evidence has been

discovered by defendant which was not known to him previously: An. Pr. vol. 2, p. 46; *Anderson* v. *Titmas*, 36 L.T.N.S. 711.

J. L. Ralston, for respondent:—Defendant did not use due diligence to obtain the evidence for use on the trial: *Young* v. *Kershaw*, 81 L.T.N.S. 531; *Lecky* v. *Stuart*, 34 N.S.R. 140, 186.

The judgment of the Court was delivered by

GRAHAM, E.J.:—This is an application to grant a new trial upon affidavits of newly discovered evidence. Graham, E.J.

In the first place, I think that due diligence was not used or the evidence would have been discovered in time for the trial.

One of the new witnesses had been mentioned in an affidavit of the party, on a motion to change the venue as a necessary witness whom he intended to subpœna, but he did not call him at the trial.

If this witness had been asked about his testimony it would have led to the discovery of the other new witness, who was with him at the time of the incident.

Then I have read the judgment, with which I agree, and have heard the parties on the evidence, and I have come to the conclusion that the proposed testimony would not affect the result.

Even if this testimony were used on another trial, there is no reasonable probability that the judgment would be different.

The application will be dismissed with costs.

New trial denied.

HYATT v. ALLEN.

Ontario Court of Appeal, Garrow, Meredith, and Magee, JJ.A., and Latchford and Lennox, JJ. June 18, 1912.

1. CORPORATIONS AND COMPANIES (§ IV G 4—127)—DIRECTORS AND SHAREHOLDERS—FIDUCIARY RELATIONS.

Under ordinary circumstances no fiduciary relation exists between directors and shareholders of a corporation, but where directors of a corporation were approached with a view of merging or consolidating with similar interests, said merged interests to purchase the assets of the corporation, and the directors of said corporation secured the consent of a majority of the shareholders thereof for the sale and transfer of the plant and property of the corporation, and where said shares were surreptitiously acquired by the directors for their own profit, a trust or fiduciary relation was established between the directors of said corporation and its shareholders.

[*Hyatt* v. *Allen*, 3 O.W.N. 370, affirmed on appeal.]

2. FRAUD (§ II—6)—ACTS OF DIRECTORS—CONCEALMENT.

Fraud may be predicated on the part of directors of a corporation, as against its shareholders, where transfers from the latter were obtained in favour of the directors and the true purpose of the transfers was either concealed or misrepresented or the transfers misapplied.

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3. CORPORATIONS AND COMPANIES (§ IV G 4—127)—AGENCY — DIRECTORS AND SHAREHOLDERS.

Where directors of a corporation were approached with a view of merging or consolidating with similar interests, said merged interests to purchase the assets of the corporation, and the directors of said corporation secured the consent of a majority of the shareholders thereof for the sale and transfer of the plant and property of the corporation, and where said shares were surreptitiously acquired by the directors for their own profit, the directors are agents of the shareholders and cannot personally profit by the transaction in question.

[*Hyatt* v. *Allen*, 3 O.W.N. 370, affirmed on appeal.]

Statement

APPEAL by the defendants from the judgment of a Divisional Court, *Hyatt* v. *Allen*, 3 O.W.N. 370, 20 O.W.R. 594, affirming (with two variations) the judgment of Sutherland, J., *Hyatt* v. *Allen*, 2 O.W.N. 927, 18 O.W.R. 850.

The appeal was dismissed.

J. W. Bain, K.C., for the defendants.

E. G. Porter, K.C., and *J. A. Wright*, for the plaintiffs.

Garrow, J.A.

GARROW, J.A.:—The action was brought by 22 shareholders in the Lakeside Canning Company Limited, on behalf of themselves and all the other shareholders except the defendants, against the defendants other than the company, to obtain certain declarations and accounts in respect of certain transactions whereby, it was alleged, the defendants the directors obtained from the other shareholders transfers of their shares. . . .

The questions with which Sutherland, J., had to deal were chiefly questions of fact, depending upon contradictory evidence and involving the credibility of the witnesses; and, that being so, I am unable to see any satisfactory ground upon which we in this Court could reverse his main conclusions, especially as they have since received unanimous indorsement in the Divisional Court.

The action is essentially one to compel the defendants (other than the company, which, upon the argument of the appeal, was, by consent, dismissed from the record) to account for the proceeds received by them as the alleged agents for the plaintiffs upon the sale or other disposal made by them of the plaintiffs' shares.

The case in no way, in my opinion, turns upon a nice question of the relation ordinarily existing between a director and an individual shareholder, such as was considered in *Percival* v. *Wright*, [1902] 2 Ch. 421, upon which counsel for the appellants relied. It may well be that, under ordinary circumstances, there is no fiduciary relation existing between a director and a shareholder, although the range of the judgment in that case seems to be somewhat wider than the very simple facts required. But there is certainly nothing to prevent a director from becoming the agent of the shareholders under special circumstances,

and thus establishing such a relationship. And that, apparently, is exactly what occurred in this case.

The recital in the option which the shareholders signed reads as follows:—

> Whereas the directors of the Lakeside Canning Company Limited, parties of the first part, have been interviewed by Garnet P. Grant of Montreal representing certain merger interests in connection with the combining of the principal canning plants of Ontario, for the purpose of purchasing the plant of the Lakeside Canning Company Limited; and whereas it becomes necessary for the said directors to secure the consent of the majority of the shareholders of the said company in order that they may transact any business relating to the sale of the plant and property of the said company.

At what time the scheme on the part of the defendants to acquire the shares for themselves originated, is not clear; but that there was such a scheme is, as was found by the learned trial Judge, beyond question. And there are circumstances which suggest that it may even have been at least in their minds before the date of the options. The recital before-quoted, however, in the light of the circumstances, quite justified the shareholders in assuming the contrary, and in believing that the obligation and duty which the defendants were thereby undertaking was simply that of agents, "in order," to quote from the recital, "that they may transact any business relating to the sale of the plant and property of the said company." The options might well, under the circumstances, have been regarded by the plaintiffs as a power and instruction to the defendants to sell the assets of the company at a price to realise for the shareholders at least the sum per share mentioned in the options. And, if that is a proper assumption, and more was realised, the surplus would, of course, in that case also, belong to the shareholders.

Between the giving of the options, and the so-called exercise of them by the defendants in the following month of February, no bargain of any kind had been made between the plaintiffs and the defendants. The transfers then put before the plaintiffs for execution were prepared by the defendants, and were executed in blank as to the purchasers' names. There was nothing, therefore, upon the surface, to indicate to a careful, or even to a suspicious, shareholder, that the options were being exercised otherwise than in pursuance of the original intention.

The defendants' position would have been stronger if they had been less reticent; for, from a perusal of the evidence, it is clear that as little information as possible of the position of affairs was conveyed to the shareholders, who in no sufficient way had it brought home to them that, instead of a sale to the merger, they were selling out to the directors. Did the directors at that

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time know that in all probability the deal with the merger was going through? There is much reason to believe that they did. Negotiations had been steadily in progress from the previous month of November, and had apparently so advanced that in a letter dated the 25th January, 1910, from G. P. Grant, who represented the merger, to the defendant A. Allen, a leading director, he says: "Mr. Drury has been asked to attend to the necessary searches . . . in connection with your agreement with me to enter the cannery merger."

Details may not have been arranged perhaps, and there were titles to be searched and appraisements to be made before the transaction was closed. The option to Mr. Grant on behalf of the merger did not expire until early in March; and, in the meantime, these preliminaries were progressing in apparently regular course. So much so that by the 25th February all the documents necessary to carry out the sale to the merger had been executed ready for delivery over, on payment of the price. Then there is a total absence of any cause whatever, other than the suggested one of obtaining a profit at the expense of the other shareholders, why the defendants should, at that particular time, have taken up the shares belonging to the plaintiffs. They, it is true, did so with money of their own, obtained from the Standard Bank, but the notes which were discounted to raise it were, as was probably anticipated, retired out of the proceeds subsequently received from the merger when the deal went through. So, after all, the transaction was not so bold a financial venture as it might seem to an outsider.

The learned trial Judge found a case of actual fraud against the defendants, a conclusion with which I do not quarrel. But, as was pointed out on the argument, it is not necessary to go quite so far; for the moment it appeared—as, in my opinion, it clearly did—that, under the original option given by the plaintiffs to the defendants, they became agents for the plaintiffs in the transaction, a fiduciary relationship was established which, on well-known legal principles, prevented the agents from obtaining a profit at the expense of their principals. See *Ex p. Larkey*, 4 Ch. D. 566, at p. 580; *Parker* v. *McKenna*, L.R. 10 Ch. 96, at p. 118; and the cases collected in Kerr on Frauds, 4th ed. (1910), p. 155 *et seq.*

It was argued by counsel for the appellants that the action is not a class action; and, perhaps, strictly speaking, it is not; but the record may be so amended as to eliminate that feature, as in effect was done by the judgment of the Divisional Court. It was further objected that there is misjoinder, because the causes of action are said to be several, and not joint. This objection, however, even if well-founded, which I am inclined to doubt, is not one which, in the interests of justice, I feel any call to give

effect to, or even seriously to consider at this stage of the litigation.

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

MEREDITH, J.A.:—For all substantial purposes it is immaterial whether this action was regularly brought and carried on, in name, as a class action; or whether, if regularly brought there should have been individual separate actions. It is quite too late to trouble any one with any such questions at this stage of the case; all that need be said is that if irregular the irregularity has had its uses, needless multiplication of costs has been avoided and the true end, justice to all parties, quite as well reached. The addition of the company as a party was irregularly made and irregularly maintained throughout; no claim was ever made against the company; no defence ever made; the whole thing amounts to nothing more than the interjection of the name of the company into the style of cause; and in truth the company has never been represented in the action. Its name should be struck out; and that counsel on both sides agreed to before the commencement of the argument of this appeal. If the actions had been brought separately an order would, no doubt, have been made staying all but one, or some such step as would have brought about final results in the least costly way possible, would have been taken.

The whole, and the simple question, upon the merits, is whether the transactions in question were out and out sales or were really merely transfers of the stock in question in trust or agency for transferors in regard to any future benefit arising from the stock and above that which they received at the time of the transfer.

The finding in the Courts below was that this was a case of trust or agency and not a sale; and that finding, however expressed, is well supported by the evidence, not only the testimony of the witnesses, but also the writings. Indeed there can be no reasonable doubt, in my opinion, that the shareholders generally were brought into the transaction and concluded it as one of trust or agency not of sale, and relief should be granted accordingly.

The appeal should be dismissed; the name of the company should, as agreed upon, be struck out of the action; the reference to the proper officer should be to ascertain and state what, if any, sum is due from the defendants to each of the plaintiffs in respect of the transactions in question respectively on the footing of a trust or agency except in such cases, if any, as shall appear to have been out and out sales.

The appellants should pay the costs of the appeal.

MAGEE, J.A., and LATCHFORD, and LENNOX, JJ., concurred in the result. *Appeal dismissed.*

Magee, J.A.
Latchford, J.
Lennox, J.

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Nov. 25.

RICE v. SOCKETT.

Ontario Divisional Court, Falconbridge, C.J.K.B., Britton, and Sutherland, JJ. November 25, 1912.

1. EVIDENCE (§ VII A—590)—EXPERT WITNESSES, WHO ARE.

An "expert" is one who, by experience, has acquired special or peculiar knowledge of the subject of which he undertakes to testify, and it does not matter whether such knowledge has been acquired by study of scientific works or by practical observation.

[*Potter* v. *Campbell*, 16 U.C.R. 109, and *State* v. *Davis*, 33 S.E. 449, 55 S.C. 339, referred to.]

2. NEW TRIAL (§ II—7)—WHEN GRANTED FOR DISOBEYING PROVISIONS OF A STATUTE—EXPERT WITNESSES.

Where a statute provides, "that only three expert witnesses may be called by either side, without the leave of the judge or other person presiding, to be applied for before the examination of any such witnesses," a refusal of the judge to obey the provisions of the statute constitutes a mistrial and a new trial will be granted.

Statement

APPEAL by the plaintiff from the County Court of the County of Wellington. Plaintiff sued for $180 as balance of the contract price for the building of a silo on defendant's farm. Defendant denied the allegations in the statement of claim and set up by way of counterclaim that the plaintiff did not build or complete the silo in accordance with the terms of plaintiff's contract with defendant, and that in consequence thereof he suffered loss and damage.

R. L. McKinnon, for the plaintiff.

C. L. Dunbar, for the defendant.

Falconbridge, C.J.

FALCONBRIDGE, C.J.K.B.:—The case was tried before the learned County Judge without a jury. He gave judgment dismissing the plaintiff's action with costs and adjudging that defendant should recover against plaintiff on his counterclaim $130 and costs.

From this judgment the plaintiff appeals on several grounds, only one of which, in my opinion, it is necessary to consider, viz., the refusal of the learned Judge to observe the provisions of 9 Edw. VII. ch. 43, sec. 10, which is as follows:—

"10. Where it is intended by any party to examine as witnesses persons entitled according to the law or practice to give opinion evidence, not more than three of such witnesses may be called upon either side without the leave of the Judge or other person presiding, to be applied for before the examination of any of such witnesses."

The first witness of this class called was A. W. Connor, who is by profession a consulting engineer, and who is admitted by defendant's counsel to be an expert. The second witness was Charles Butler, whose business is that of cement construction. The third witness, who is alleged by plaintiff to be of this character, is Herbert Croft, whose business is concrete work, in which

he has been engaged about nine years. The fourth witness is Charles Strange, who stated that his business was general concrete construction. At this stage the plaintiff's counsel pointed out that Mr. Dunbar, defendant's counsel, was limited to three expert witnesses. His Honour overruled the objection, saying simply, "we will take the evidence," and it was taken accordingly. The next witness called was George Day, and the same objection was raised by plaintiff's counsel. This witness is admitted by defendant's counsel to be an expert. The next witness, William Elliott, is a farmer and cattle dealer, who has a silo and professes to know what the object of a silo is, and what people should strive to obtain in order to get a perfect silo, and he passes an opinion upon this particular one.

If these six witnesses are all experts, three witnesses of that class more than the law allows have been examined. Mr. Dunbar contends that the only experts are Connor and Day, arguing, that the statute applies only to one possessed of science and skill —that is, a man of science having a school of science degree or other special technical education on the subject.

I do not find that this is a correct proposition. No authorities on this branch of the case were cited by either counsel.

It is to be observed that while the section in question is headed "expert evidence," and while the side-note says "limit of number of expert witnesses in action," yet the word "expert" is not used in the section itself: the phrase being, "persons entitled according to the law and practice to give opinion evidence."

The term "expert," from experti, says Bouvier, "signifies instructed by experience."

"The expert witness is one possessed of special knowledge or skill in respect of a subject upon which he is called to testify:" Words and Phrases Judicially Defined, volume 3, page 2594.

Dr. John D. Lawson, in "The Law of Expert and Opinion Evidence," 2nd edition, at p. 74, lays down as Rule 22, "Mechanics, artisans and workmen are experts as to matters of technical skill in their trades, and their opinions in such cases are admissible"; citing numerous authorities and illustrations.

"The derivation of the term 'expert' implies that he is one who by experience has acquired special or peculiar knowledge of the subject of which he undertakes to testify, and it does not matter whether such knowledge has been acquired by study of scientific works or by practical observation; and one who is an old hunter, and has thus had much experience in the use of firearms, may be as well qualified to testify as to the appearance which a gun recently fired would present as a highly educated and skilled gunsmith": *State* v. *Davis*, 33 S.E. 449, 55 S.C. 339, cited in "Words and Phrases Judicially Defined, volume 3, page 2595."

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In *Potter* v. *Campbell*, 16 U.C.R. 109, the Court of Queen's Bench held that a person not being a licensed surveyor is a competent witness on a question of boundary.

It is quite manifest, therefore, that these six witnesses were persons "entitled according to the law or practice to give opinion evidence."

Defendant's counsel, however, contends that even admitting that the statute has been disregarded there has been no miscarriage of justice. There would, of course, be no question about the matter if the case had been tried with a jury, but as it is I find myself unable to accede to this view. It would be impossible to determine the exact effect which the evidence of the three witnesses whose evidence was improperly admitted had on the mind of the Judge. Day, the fifth witness of this class was admittedly an expert, and a very forcible witness; and the learned Judge seems, on both branches of the case, to have attached great importance to the evidence of Elliott, the last witness who was called.

But, leaving out these considerations altogether, the mere refusal of the learned Judge to obey the plain provisions of the statute, in my opinion, constitutes a mistrial, and defendant's counsel (while it appears to have been unnecessary for him actively to oppose the objections), accepted and profited by the rulings of the learned Judge, and, therefore, there must be a new trial, with costs of the last trial and of this appeal to be paid by the defendant.

Britton, J.

BRITTON, J.:—I agree.

Sutherland, J.

SUTHERLAND, J.:—I agree.

Order for new trial.

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Nov. 27.

REX v. BEVAN.

Ontario High Court, Middleton, J., in Chambers. November 27, 1912.

1. INTOXICATING LIQUORS (§ III G—86)—EXHIBITING LIQUOR SIGN OR DISPLAYING BOTTLES AND CASKS AT UNLICENSED PLACE.

To constitute the offence under sec. 111 of the Ontario Liquor License Act, as amended by 2 Geo. V. ch. 55, sec. 9, in an unlicensed place, of keeping up a bar sign or of displaying bottles and casks so as to induce a reasonable belief that liquors are sold there it is essential that what is done should induce a belief that (*a*) premises in fact unlicensed are licensed or (*c*) that liquor, i.e., intoxicating liquor, is "sold or served therein;" the statute requires something more to be shewn than what would be necessary and proper for the sale of non-intoxicating liquors.

2. EVIDENCE (§ II B—113)—MAINTENANCE OF APPEARANCE OF BAR—DISPLAY OF BREWER'S CALENDARS—SUFFICIENCY OF EVIDENCE.

Evidence that in an unlicensed hotel there is a bar, and on the bar a beer pump used to pump a non-intoxicating beverage called "local

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option beer," and that brewer's calendars were there displayed is insufficient to convict the occupant of the offence of keeping up a sign or having a bar containing bottles or casks displayed so as to induce a reasonable belief that the premises were licensed for the sale of liquor, where the former official license sign over the door had been removed, and there was no display of bottles or casks such as are used distinctively for intoxicating liquors nor was there, apart from the brewer's calendars, any display of advertising matter suggestive of the sale of intoxicants in the place.

Statement

MOTION to quash a conviction made by the police magistrate of Hamilton under section 111 of the Liquor License Act, as amended by 2 Geo. V. ch. 55, sec. 9.

The conviction was quashed.

J. Haverson, K.C., for the defendant.

J. R. Cartwright, K.C., for the prosecutor.

Middleton, J.

MIDDLETON, J.:—Section 111 of the Liquor License Act as it stood before the amendment of 1912 was an eminently reasonable and easily understood provision. In effect it provided that the existence of a bar in any unlicensed premises and the display of liquor therein should be primâ facie evidence of unlawful sale.

The amendment makes that which was theretofore evidence of an unlawful sale "an offence against this Act;" and this makes it necessary to examine the statute with great care to ascertain precisely that which is raised from the rank of mere "evidence," and constituted "crime."

I pass by the very awkward and almost unintelligible form of the section, and endeavour to ascertain the real meaning. The section reads: "The fact of any person . . . shall be guilty of an offence against this Act." I assume that this may be read as though it provided that any person who does the thing mentioned shall be guilty, etc.

The things so rendered unlawful are "the keeping up of any sign . . . or having . . . a bar or place containing bottles or casks displayed so as to inducee a reasonable belief that such house or premises is or are licensed for the sale of liquor, or that liquor is sold or served therein . . ."

"Liquor" in this Act means intoxicating liquor; and it is lawful to sell liquors that do not contain more than two and a half per cent. proof spirit, even if such liquors resemble in appearance and taste liquors that ordinarily contain more than the stipulated amount of alcohol. This has led to the manufacture of what in the evidence is called "Local Option beer."

The sole evidence in this case is that in an hotel which was once, but is not now, licensed to sell intoxicating liquor there is a bar, and on the bar a beer pump which pumps Local Option beer, and "all appliances" and "signs," consisting of calendars and advertising matter, that had decorated the bar and premises when the hotel had a license. The hotel still retained its name. The sign "Licensed to Sell" etc. was removed.

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It is essential, to constitute an offence, that what is done should "induce a belief that" (a) premises in fact unlicensed are licensed, or (b) that liquor—i.e., intoxicating liquor—is "sold or served therein."

It is not for me to speculate why the Legislature should make it penal to have a bar so equipped as to induce a "reasonable belief" on the part of the thirsty wayfarer that he could therein obtain a beverage which might intoxicate, when there is in fact nothing to be had but beer containing "less than two and a half per cent. of proof spirits;" it may well be that the lack of the desired percentage can only be discerned by a trained and sensitive palate, and the average man seeking intoxication requires protection from such innocuous beverages; or the desire may be to protect the licensed house whose customers are being deluded by this hollow mockery into the belief that they are in a genuine bar. Be that as it may, it seems clear that there must be more than that which is necessary and proper for the sale of Local Option beer, before an offence is committed; some exhibition of bottles and casks such as usually contain real "Liquor," or some such display of suggestive advertising matter as would lead a reasonable man to the belief that in this unlicensed place liquor was sold. Mere "calendars and one thing or another" is not enough. The bottles, not only were not displayed, but were in the cellar, relics of a departed glory; and the "pump" might indicate the innocent "Local Option beer."

The motion should be granted with costs.

The magistrate should be protected.

Conviction quashed.

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James WASSON (plaintiff, respondent) v. James William HARKER and Lysle J. ABBOTT (added defendant) (defendants, appellants).

(Decision No. 4.)

Saskatchewan Supreme Court, Haultain, C.J., Newlands, and Lamont, JJ. November 23, 1912.

1. MORTGAGE (§ VII B—150)—WHO MAY REDEEM—ASSIGNEE OF EQUITY OF REDEMPTION—FORECLOSURE ORDER.

An assignee of the equity of redemption purchasing after an order *nisi* for foreclosure has been made at the suit of the mortgagee, is bound by the order *nisi*, and, when added as a party defendant, he is limited by the period fixed for redemption by the order *nisi*.

[*Wasson* v. *Harker* (No. 2), 7 D.L.R. 526, affirmed in part; *Re Parbola, Ltd.*, [1909] 2 Ch. 437, followed.]

2. MORTGAGE (§ VI B—75)—ENFORCEMENT — RELIEF AGAINST ACCELERATION CLAUSE.

The words "together with costs to be taxed by the registrar" in sub-sec. 10 added to sec. 93 of the Land Titles Act by 1 Geo. V. (Sask.) ch. 12, sec. 7 (which sub-sec. gives relief against a mortgage acceleration clause in proceedings before the registrar of land titles) have not the effect of limiting the right of relief to a proceeding be-

fore the registrar but the remedy may be had in court proceedings, *ex. gr.*, a foreclosure action.

[*Wasson* v. *Harker* (No. 2), 7 D.L.R. 526, reversed in part; see also *McGregor* v. *Hemstreet*, 5 D.L.R. 301; sub-sec. 10 added to sec. 93 of Land Titles Act, by 1 Geo. V. (Sask.) ch. 12, sec. 7, referred to.]

3. MORTGAGE (§ VII B—150)—REDEMPTION—RIGHT OF PURCHASER PENDENTE LITE TO REDEEM.

A purchaser *pendente lite* of the mortgaged premises added as a party defendant in a foreclosure action has a *locus standi* to apply to redeem without first entering an appearance.

[*Wasson* v. *Harker* (No. 2), 7 D.L.R. 526, affirmed in part.]

4. STATUTES (§ III B—113)—CONSTRUCTION OF REMEDIAL ACT—ACCELERATION CLAUSES—LAND TITLES ACT (SASK.).

A remedial statute, relieving mortgagors in default from acceleration clauses, which covers by the express statutory provision "any mortgage" is not limited to mortgages made subsequent to the passing of the Act.

[Sub-sec. 10 added to sec. 93 of the Land Titles Act by 1 Geo. V. (Sask.) ch. 12, sec. 7, referred to.]

5. STATUTES (§ III B—113)—CONSTRUCTION OF REMEDIAL ACTS—RULES APPLICABLE.

In construing a remedial Act of Parliament the construction should be a liberal one giving effect, if possible, to all parts of the Act.

[Sub-sec. 10 added to sec. 93 of the Land Titles Act by 1 Geo. V. (Sask.) ch. 12, sec. 7, referred to.]

6. MORTGAGE (§ VI B—75)—ENFORCEMENT — RELIEF AGAINST ACCELERATION CLAUSE—CONSTRUCTION OF STATUTE—READING RELIEF CLAUSE INTO MORTGAGE.

The relief against acceleration clauses in mortgages provided for by sub-sec. 10 added to sec. 93 of the Land Titles Act (Sask.), applies to the general law relating to mortgages and not to a particular kind of foreclosure and as soon as enacted it became in effect a part of every mortgage in the same way as if it had been inserted in the mortgage by the parties.

[*Wasson* v. *Harker* (No. 2), 7 D.L.R. 526, reversed in part; Sub-sec. 10 added to sec. 93 of Land Titles Act by 1 Geo. V. (Sask.) ch. 12, sec. 7, construed.]

Statement

APPEAL by the defendant Abbott (added as a defendant by order made the 4th day of October, 1912) from the judgment of Parker, Master-in-Chambers, *Wasson* v. *Harker* (No. 2), 7 D.L.R. 526, dismissing his application to be allowed to pay the amount of the arrears due under a certain mortgage together with interest and costs into Court.

The appeal was allowed.

Haultain, C.J.

HAULTAIN, C.J., concurred with NEWLANDS, J.

Newlands, J.

NEWLANDS, J.:—The defendant Harker was the owner of the west half of 24-15-18 W. 2nd, and mortgaged the same to the plaintiff, who obtained an order *nisi* for the foreclosure of said mortgage. The defendant Lysle J. Abbott became the owner of the said land by purchase, and was added as a

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defendant on the 4th October, 1912. The mortgage was payable by instalments, and contained an acceleration clause making the whole amount due in default of payment of any of the instalments, and the order *nisi* was issued in an action against said defendant Harker for default in payment of one of the instalments, and required the defendant to pay the whole amount secured by said mortgage before the 17th October, 1912, otherwise an order absolute would issue. Upon the defendant Abbott becoming owner of said land he endeavoured to redeem the same by paying the instalment due, but not being able to find the plaintiff, and his solicitors refusing to accept the same, he made this application to the Master-in-Chambers to be allowed to pay said amount into Court, his contention being that sub-sec. 10 of sec. 93 of the Land Titles Act being applicable, he had the right to redeem on payment of the instalment due with interest and costs. This contention is opposed by the plaintiff on the grounds that this sub-section applies only when proceedings are taken in the land titles office before the registrar to foreclose a mortgage, but does not apply when proceedings are taken in Court, as in this case, and that the order *nisi* having been made by a Judge of this Court, the Master had no power to amend the same by allowing the defendant Abbott to redeem for a less amount than that named in the order *nisi*. A further ground was that the defendant Abbott had not appeared and had therefore no standing to make this application.

The sub-section of the statute in question is as follows:—

> (10) In case default has occurred in making any payment due under any mortgage or in the observance of any covenant contained therein and under the terms of the mortgage by reason of such default, the whole principal and interest secured thereby shall have become due and payable, the mortgagor may, notwithstanding any provisions to the contrary and at any time prior to sale or foreclosure under a mortgage perform such covenant or pay such arrears as may be in default under the mortgage, together with costs to be taxed by the registrar, and he shall thereupon be relieved from the consequences of such default.

Section 93 provides the procedure to be adopted for the foreclosure of a mortgage registered under the Land Titles Act. This may be done in one of two ways, either in the Supreme Court, under the practice and procedure of that Court (sub-sec. 1), or before the registrar, under the provisions of sub-secs. (2) to (8) of that section. Sub-sec. (9) deals with the right of the mortgagor to demand an assignment of a mortgage from the mortgagee instead of a discharge upon paying the amount due, and sub-sec. (10) is as above stated.

The construction which the plaintiff puts upon sub-sec. (10) is a very narrow one, and is based entirely upon the words "together with costs to be taxed by the registrar." Without these words the sub-section undoubtedly applies to all mortgages

payable by instalments with an acceleration clause. I have therefore to consider whether by the insertion of these words the legislature intended to confine the relief which was afforded to mortgagors by this sub-section to only such cases where the mortgagee took proceedings for foreclosure before the registrar, or whether those words were put in the sub-section to provide for cases where it would be necessary to ascertain the amount of costs incurred by the mortgagee up to the time of payment and there was no other provision for their taxation.

To adopt the first contention would be to give the mortgagee the right to make this sub-section effective or non-effective, as he saw fit, as by taking his proceedings in Court he would prevent the mortgagor from getting the relief provided by this section, and where he did not want the mortgagor to have this right he would always commence his proceedings in Court. This construction of sub-sec. (10) would therefore render it inoperative except at the will of the mortgagee; and as in construing Acts of Parliament it is necessary that the Courts should, if possible, give effect to all parts of them, I cannot adopt the above contention as the true construction to be given to this Act.

There is no doubt but that this sub-section is remedial, and that it should be liberally construed. And I think the true construction to be put upon it is that the legislature intended this sub-sec. (10) to apply to the general law relating to mortgages and not to a particular kind of foreclosure, and that from the time of its becoming law it became in effect a part of the mortgage in the same way as if it had been inserted in the mortgage by the parties. Now, if such a clause was found in a mortgage there can be no doubt but that the Court would give it effect, and the mere fact that it said that the amount to be paid was "together with costs to be taxed by the registrar," would not make it ineffective. It would give to these words what, I think, is their true meaning, and the only construction that would carry out the intention of the legislature, namely, that in cases where it was necessary to tax costs, and there was no constituted authority to tax them, then they were to be taxed by the registrar. In this case it is not necessary to call this provision into effect, as the costs have already been taxed. For these reasons I am of the opinion that the mortgagor in this case has the right to redeem by paying the arrears with interest and costs.

It was further contended that sub-sec. (10) did not apply to the mortgage in this case, it having been made before the Act was passed, although the default in question occurred since the passing of this Act. The section refers to "any mortgage," which must mean any mortgage in existence at the passing of the Act. To give it the construction the plaintiff contends for it would be necessary to insert after the words "any mortgage"

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the words "made subsequent to the passing of this Act," and this we cannot do.

The only other question is whether the mortgagor, or, in this case, his transferee, has taken the proper steps to get relief in this case. The order *nisi* in question was made by myself as a Judge of this Court, and the Act in question was not brought to my attention; if it had been, the order *nisi* would have allowed the mortgagor to redeem on payment of the arrears as provided by the Act. I do not know of any authority the Master has to amend a Judge's order, nor do I think he has any such power; but this Court would have power to make the necessary amendment, and I think we should do so.

As to the added defendant not having appeared, I do not think that was necessary, as he did not contest the plaintiff's right to foreclosure, but was willing to submit to the order the Judge should have made.

Lamont, J.

LAMONT, J.:—I agree with the conclusion reached by my brother Newlands in the judgment he has just read, that the defendant Abbott is entitled to be relieved from the consequences of the default made by the defendant Harker in the payment of the mortgage money as set out in the mortgage. I also agree that sub-sec. (10) of sec. 93 of the Land Titles Act applies to all mortgages whether made before or after the passing of that sub-section. I, however, am unable to concur in the view that the order *nisi* should be amended by providing for redemption upon payment of the arrears and costs. The relief provided for in the sub-section is made applicable when default has been made under the terms of the mortgage, and by reason of such default the whole principal and interest thereby secured shall have become due and payable, and the mortgagor has come forward before sale or foreclosure and remedied the default. When the mortgagor has remedied his default he is entitled to the relief provided by the statute, which is that he shall be relieved of the consequences of his default. The consequences to him arising from his default are that the mortgagee may enter judgment against him for the full amount of the mortgage money and interest and have foreclosure or sale of the mortgaged premises if this amount is not paid within the time fixed by the Court. In the present case, when the order *nisi* was asked for, neither the mortgagor nor the defendant Abbott, his assignee, had come forward with the arrears. It is only upon payment of the arrears that the mortgagor can obtain the relief provided by the statute. Until the arrears are paid the mortgagee is entitled to enforce all the remedies which are his in consequence of the default having been made. The mortgagor's right upon paying the arrears is to have an order declaring that the action is at an end. This overrides not only the order *nisi*

but any judgment which may have been entered for the amount due. I cannot see that any alteration should be made in the order *nisi*. The defendant Abbott, not being able to pay the arrears to the mortgagee or his solicitor, has made this application to be allowed to pay them into Court. I think he should be so allowed; and upon making the payment, together with costs, he is entitled to an order declaring the action at an end.

Application allowed.

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WASSON v. HARKER AND ABBOTT.

Re THOMAS DOUGLAS SMITH, Deceased.

MAN.

Manitoba King's Bench, Galt, J. December 3, 1912.

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Dec. 3.

1. WILLS (§ III—70)—DEVISE AND LEGACY—BEQUEST—INTENT OF TESTATOR—INSUFFICIENT DESCRIPTION OF BENEFICIARY—TESTS OF THE PROBABILITIES.

Where a testator bequeaths $10,000 to the "Old People's Home" as a charitable institution at or near Winnipeg, and where there is no such institution bearing that identical name but there is "The Old Folks' Home" and until recently there was "La Maison des Vieux" (Roman Catholic) now called "Hospice Youville"; upon the question as to which, if either, of these is the legatee, a test of the probabilities may properly be based upon such facts as the following: (*a*) It is not shewn that the testator had ever contributed or intended to contribute anything to "La Maison des Vieux," nor that he even knew of it; (*b*) it is shewn that he was well acquainted with "The Old Folks' Home," that previously he had contributed to its finances and indicated an intention to bequeath something to it, (*c*) that the Board of "The Old Folks' Home" was largely composed of members of the same Presbyterian church which the testator attended, and (*d*) that "The Old Folks' Home" was commonly called "The Old People's Home."

[*British Home* v. *Royal Hospital*, 90 L.T.N.S. 601, considered; see also *Daggers* v. *Van Dyck*, 37 N.J. Eq. 130; Moore on Facts 1296, and Annotation to this case.]

Statement

THIS is an application on behalf of the executors of the estate of the late Thomas Douglas Smith, for advice under the provisions of the Manitoba Trustee Act. By letters probate issued out of the Surrogate Court on the 13th day of June, 1911, the Prudential Trust Company of Canada and Herbert Patrick Pennock were appointed executors of the last will and testament of the deceased.

G. W. Jameson, for executors and Old Folks' Home.

J. A. Beaupre, for Hospice Youville.

Galt, J.

GALT, J.:—Under the terms of the will the deceased bequeathed the sum of $10,000 to the "Old People's Home," being a charitable institution carried on at or near Winnipeg. It appears from the affidavits that there is no such institution as the Old People's Home in or near Winnipeg; but there is an institution named the Old Folks' Home, situate at Middlechurch, and there is also an institution at St. Boniface, now called the Hospice Youville; but up to one year ago, called La Maison des Vieux,

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which might be translated into English as either Old People's Home or Old Folks' Home or otherwise. The question is which (if either) of the above two institutions is entitled to the bequest.

When this application first came before me on November 28th, the material appeared to be defective, and the application was enlarged until to-day with liberty to both parties to supplement their material as they might see fit.

In support of the claim of the Old Folks' Home the following evidence was given.

John H. Falk, secretary of the Associated Charities of Winnipeg, identifies the two above named institutions, and states that the Old Folks' Home is an institution maintained as a branch of the Women's Christian Temperance Union, while the Hospice Youville is maintained by the Roman Catholic Church.

William Harvey, chairman of the finance committee of the Old Folks' Home at Middlechurch, states that he knew the late Thomas D. Smith as a member of Knox Presbyterian Church in the city of Winnipeg; that the ladies of the board of the Old Folks' Home are largely composed of members of Knox Church; that the late Thomas D. Smith was, to the knowledge of the deponent, a warm and enthusiastic admirer of the Old Folks' Home, having been a donor in his lifetime towards the building fund; and that the Old Folks' Home is frequently referred to as the Old People's Home.

Margaret Thompson, president of the Women's Union, states that the said home is frequently known and referred to in the city of Winnipeg as the Old People's Home; that the union frequently receives donations to the said home under the name of the Old People's Home; and that an instance of this occurred when the last grant to the home was given by the city of Winnipeg in which case the same was addressed to the Old People's Home.

Bella Scott, a member of the said Women's Union, states that she has been on the board of management for about fourteen years; that she well knew the late Thomas Douglas Smith during his lifetime, and that on several occasions he gave her money by way of subscription to the Old Folks' Home; that on the 12th day of July, 1910, the deponent met the late Thomas Douglas Smith on Main street, Winnipeg, on an occasion when she was engaged in selling buttons of the Old Folks' Home, and on that occasion the deceased gave her money for the home and told her, in the course of the conversation, that he would remember the Old Folks' Home in his will.

The only evidence filed in support of the claim of the Hospice Youville, formerly La Maison des Vieux, is the affidavit of M. Ryan, secretary of Les Sœurs de la Charité de L'Hospital General de St. Boniface. The deponent states that until about one

year ago the said institution was called in French La Maison des Vieux, meaning in English the Old People's Home; that the said institution is still commonly known and called by the English-speaking people, the Old People's Home, or the Old Folks' Home, that it is situated on Tache avenue, St. Boniface, near the city of Winnipeg; that during the last ten years there were a total of 357 people received in said institution, of whom 263 were from the city of Winnipeg; and that old people are received in the said institution irrespective of their nationality or creed.

In the case of *British Home and Hospital for Incurables* v. *Royal Hospital for Incurables*, 90 L.T.N.S. 601, the testatrix bequeathed £500 each to the Royal Home for Incurables, Streatham, S.W., and to St. Mary's Orphanage. It appeared that the British Home and Hospital for Incurables was situated at Streatham, S.W., but the Royal Hospital was situated at West Hill, Putney, Heath. The testatrix was shewn to have contributed for some years to both institutions. Kekewich, J., held that the British Home and Hospital for Incurables was entitled to the legacy, but his decision was reversed by the Court of Appeal. In giving judgment, Stirling, L.J., says:—

> The testatrix gives by her will a legacy to the British Home for Incurables. She then recites, by a codicil made nearly five years afterwards, that she had given certain legacies, and, amongst others, one to "the British Home for Incurables, Streatham, S.W., £500." The amount is incorrect, no doubt, but still she had given one to that institution. She proceeds: "I hereby revoke all the said legacies, and instead thereof I give £500 each, subject to duty, to the Royal Home for Incurables, Streatham, S.W." The lady was perfectly well aware of the existence of the two institutions, one called in strictness "the British Home and Hospital for Incurables," and the other "the Royal Hospital for Incurables." She had been in the habit for years of giving donations to both; and we have in a memorandum-book in which she recorded her benefactions, occurring repeatedly and in successive lines, gifts to these two institutions.

In the present case the claim by the Old Folks' Home appears to be much stronger than the claim of the Royal Hospital for Incurables in the case just cited, inasmuch as it does not appear that the testator had ever contributed anything to La Maison des Vieux or had ever heard of the institution, whereas he was well acquainted with the management of the Old Folks' Home, and had contributed to its finances, and had on one occasion gone so far as to indicate an intention to assist the institution by his will.

Under these circumstances, I hold that the Old Folks' Home was intended by the bequest in question and is entitled to the legacy.

The costs of all parties will be paid by the executors out of the fund in question.

Order accordingly.

MAN.

Annotation

Wills—Inaccurate description of beneficiary

Annotation—Wills (§ III—70)—Ambiguous or inaccurate description of beneficiary.

A mere mistake in the name or description of a legatee or devisee will not render the legacy or devise void if the person intended by the testator can be clearly ascertained and distinguished from every other person either from the will itself or from extrinsic evidence, and this rule applies to a devise or bequest to a corporation, association or society, as well as to an individual: *Gillett* v. *Gone*, L.R. 10 Eq. 29; *Garland* v. *Beverley*, 9 Ch.D. 213; *Re Gregory*, 34 Beav. 600. A devise or bequest to a charitable object or purpose is valid, although the beneficiary organization is not named or is misnamed if the object intended can be ascertained with reasonable certainty from the language of the will and the surrounding circumstances as where the devise or bequest is to a corporation or association having a certain described charitable purpose: *In re Alchin*, L.R. 14 Eq. 230.

Lord Bacon has expressed the law in such cases in a maxim, "*Veritas nominis tollit errorem demonstrationis*," and explaining this maxim he says: "There be three degrees of certainty: (1) presence; (2) name; (3) demonstration or reference; whereof the presence the law holdeth of the greatest dignity, the name in the second degree; and the demonstration or reference in the lowest, and allows the error or falsity in the less worthy": *Garland* v. *Beverley*, 9 Ch.D. 213, at 218.

A gift or devise will not fail for a misdescription or an imperfect or inaccurate description of a legatee or devisee if the description is sufficient to designate with reasonable certainty the object of the testator's bounty: *Tyrrell* v. *Senior*, 20 A.R. (Ont.) 156.

Citing the above case, Riddell, J., in *Re Swayzie*, 3 D.L.R. 631, said that "A misnomer of church society will not defeat a devise or bequest to it, if its identity is otherwise sufficiently certain."

In the case of *Van Wart* (executors of J. W. Belyea estate) *et al.* v. *The Synod of Fredericton*, 5 D.L.R. 776, McLeod, J., citing the abovementioned *Swayzie* case, 3 D.L.R. 631, and following the decision in *Jones* v. *St. Stephen's Church*, 4 N.B. Eq. 316, held that "A bequest to an incorporated religious body is not void for uncertainty as to the devisee or legatee, if the person intended to be benefited can be ascertained with reasonable certainty."

A bequest to the "Wesleyan Methodist Superannuated Ministers' Fund" was held to go to "the Connexional Society of the Wesleyan Methodist Church" as the one most nearly answering the description, there being no society of the name used in the will: *Edwards* v. *Smith*, 25 Gr. 159.

But where, in a testamentary bequest, charitable purposes are mixed up with other purposes of so indefinite a nature that the Court cannot execute them, or where the description includes purposes which may or may not be charitable, and a discretion is vested in the trustees, the whole gift fails for uncertainty: *Hunter* v. *Attorney-General*, 68 L.J. Ch. 449, [1899] A.C. 309.

Also a bequest to be "applied for such charitable or public purposes as my trustee thinks proper" is too vague and uncertain for any Court in England or Scotland to administer as a charitable gift: *Blair* v. *Duncan*, [1902] A.C. 37, 86 L.T. 157.

A bequest to trustees to divide a testator's residue among such "charitable or religious institutions and societies" as they might select, was held void for uncertainty: *Grimond* (or *Macintyre*) v. *Grimond*, [1905] A.C. 124.

Annotation (*continued*)—Wills (§ III—70)—Ambiguous or inaccurate description of beneficiary.

But where the legal and illegal provisions are separate and divisible, or when the trustees are given a discretion to apply the fund either to a legal or an illegal object, the trust is valid for the legal object, and its application will simply be restrained within the bounds of the law: 6 Cyc. 948.

Where lands are devised to A., B. and C. as trustees, and C. is incapable of taking, the estate may nevertheless vest in A. and B.: *Doe d. Vancott* v. *Read*, 3 U.C.Q.B. 244.

Where the will disposed of realty and personalty and the devise as to the realty was held void, still the bequest of personalty was allowed to stand: *Fulton* v. *Fulton*, 24 Gr. Ch. 422.

Where a will contained a void devise of lands to charitable purposes, and then a residuary devise of the testator's lands not thereinbefore mentioned or disposed of, it was held that the property comprised in the void devise passed to the heirs-at-law, and the residuary devise was allowed to stand: *Lewis* v. *Paterson*, 13 Grant's Ch. 223.

A devise made in a will "to my wife" was claimed by two women, with both of whom the testator had lived in the relationship of husband and wife. Idington, J., held that, even if the first marriage was assumed to have been validly performed, all the surrounding circumstances shewed that, by the words "to my wife," the testator intended to indicate the woman with whom he was living, in that relationship, at the time of the execution of the will and thereafter, up to the time of his death. Duff, J., held that the woman who claimed to have been first married to the testator had not sufficiently proved that fact, and that the other woman, who was living with the testator as his wife at the time of the execution of the will and up to the time of his death, was entitled to the devise: *Marks* v. *Marks*, 40 Can. S.C.R. 210.

A gift by will of $300 to the three oldest and poorest people in the municipality was valid, being sufficiently certain to be carried out: *Law* v. *Acton*, 14 Man. R. 246 (Richards, J.).

P. K., who left a widow and five children, by his last will directed that his property should be sold in two years after his decease by his trustee, who, in the meantime, should pay the interest and rents to his wife and four of the children who were named. On the death of any one of the four children named, leaving a child or children, the share of such child was to be paid to the offspring. Whenever one of his children should die leaving children, the estate was to be divided equally among his children. Should his wife marry again, her share of the interest money was to be divided among his children and, after her decease, not having remarried, the interest of her share was to be paid to his son W., and on his death to be equally divided among his children. Reading the will literally no share was given to the widow beyond a share of the interest payable to her, until the estate came to be divided, but it was obvious that it was the intention of the testator that the widow should share equally with the four children named, and that, on her death unmarried, such share should go on to his son W., and on his death be equally divided among his children. It was held that the Chambers Judge, on application under O. 55, R. 2,

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Annotation

Wills—Inaccurate description of beneficiary

Annotation (*continued*)—Wills (§ III—70)—Ambiguous or inaccurate description of beneficiary.

was right in disregarding the literal reading of the will and in so construing it as to give effect to the obvious intention of the testator: *Eastern Trust Co.* v. *Rose*, 38 N.S.R. 456.

A testator left certain property to "my wife, J. R.," who had gone through a form of marriage with him in 1902, and had lived with him as his wife till his death in 1906, but who was in fact still the wife of another man, a supposed divorce from the latter being invalid. The Court held that the bequest was good, and J. R. entitled to the property: *Reeves* v. *Reeves*, 16 O.L.R. 588.

A testator gave his residuary estate "to the West Lake Monthly Meeting of Friends (Hicksite) of West Bloomfield, to be applied in charitable and philanthropic purposes, as said Monthly Meeting or Society may direct." The Court held that the gift was not void for uncertainty as to its objects but was valid: *Re Huyck*, 10 O.L.R. 480 (D.C.).

In *Lobb* v. *Lobb*, 22 O.L.R. 15, the testator, dying in 1883, left a wife and children in England, whom he had deserted in 1853. At the time of his death he was living in Ontario with H., a woman whom he called his wife, and by whom he had several illegitimate children, who also lived with him. So far as appeared, there had been no communication between him and his wife and legitimate children since he deserted them. By his will he made specific devises and bequests to H. and his illegitimate children, referring to them by name and as "my wife," "my son," "my daughter." He then directed that the residue should be divided among his "children." It was held, that, *primâ facie*, "children" imports legitimate children only, but that interpretation yields where a contrary intention, which the law is entitled to regard, appears; and in this case, having regard to the surrounding circumstances and the wording of the will, there was so strong a probability of the testator's intention to include only the children of H. in the word "children" wherever used in the will, that a contrary intention could not be supposed; and it was therefore declared that they alone were entitled to share in the residue: *Lobb* v. *Lobb*, 21 O.L.R. 262, affirmed 22 O.L.R. 15.

A testator, dying in 1855, by his will gave to his wife the sole use of his farm "to use as she may think proper until my son (J.) has arrived to the full age of twenty-one years. He is then to get the east of the farm and half of all the property on the farm at that time. They may then work the farm together or if my wife is tired of working the place J. is to have the management of the whole farm and is to support his mother during her widowhood, and his four sisters until they are of age or married, at which time each of the four girls are to get from the proceeds of my estate the sum of," etc. "The real estate to belong to the family as long as any of them are alive and to remain the property of my son's heirs." The Court held that the word "family" in the last clause of the will meant "children," and the five children of the testator took, under the will, a life estate as tenants in common, with a vested remainder to J. in fee under the rule in *Shelley's* case: *McKinnon* v. *Spence*, 20 O.L.R. 57.

An ambiguity in a grant by deed of gift for a church as to which of two ecclesiastical bodies answering to the general description of the grantee or *cestui que trust* was intended to be the beneficiary, may also be determined by the facts and circumstances antecedent to and attending the

Annotation (*continued*)—**Wills** (§ III—70)—**Ambiguous or inaccurate description of beneficiary.**

MAN.

Annotation

Wills—Inaccurate description of beneficiary

issue of the grant: *Zacklynski* v. *Polushie*, [1908] A.C. 65, 24 Times L.R. 152, affirming 37 Can. S.C.R. 177.

The above cases should be distinguished, however, from *In re Mann*, [1903] 1 Ch. 232, which case it was held, that "where a charitable gift fails for imperfect description of the beneficiary the intention of the testator will be carried out as nearly as possible under the doctrine of *cy-pres*." See also *In re Pyne*, [1903] 1 Ch. 83.

Though the Courts are very reluctant in changing a bequest to a charitable institution, still rather than let it fail entirely, they will invoke the doctrine of *cy-pres*. So that under a bequest to "the Protestant Orphans' Home for boys in Toronto," two societies of the kind, known as the Boys' Home and Orphans' Home, were held entitled to share equally, there being no home known by the name used in the will: *Williams* v. *Roy*, 9 O.R. 564.

Under the *cy-pres* doctrine a gift does not lapse when made to a charitable institution which has once existed but has ceased to exist; but equity is always more ready, in the case of a gift to a charitable institution which has never existed, to infer a general charitable intention, than to infer the contrary: *Re Davis* (1902), W.N. 56.

Although property devised to one purpose, such as education, cannot be judicially diverted to another purpose, such as religion, to relieving the poor or the sick, or to general charity, still, rather than to let a charitable devise fail, Lord Eldon, applying the doctrines of *cy-pres*, extended a large bequest for the poor inhabitants of several parishes beyond the purposes expressly pointed out by the will, to wit: "to be applied at times and in proportions, and either in money, provision, physic, or clothes," to the instruction and apprenticing of the children: *Hereford* v. *Adams*, 7 Ves. Jr. 324.

McDONALD v. THE CITY OF SYDNEY.

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Nova Scotia Supreme Court, Graham, E.J., and Meagher, Russell, and Ritchie, JJ. December 14, 1912.

1. EVIDENCE (§ II H 1—265)—PRESUMPTION AS TO NEGLIGENCE OF MUNICIPAL CORPORATION—UNGUARDED EXCAVATION IN HIGHWAY—ABSENCE OF DIRECT EVIDENCE—POSITION OF BODY.

In the absence of direct evidence to shew that the deceased walked into the unprotected portion of an excavation in the street, which was being made by the municipal corporation and which was left with a partial protection only so that as to the remainder it constituted a dangerous trap, an inference to that effect may be drawn from the position in which his body was found and from the fact that deceased had left his house in a hurry to catch a car and that the trench was on his direct route to do so.

2. DAMAGES (§ III J 3—187)—MEASURE OF COMPENSATION—PECUNIARY LOSS—REASONABLE EXPECTATION.

The assessment of damages for negligence causing death must be confined to the pecuniary loss based on the reasonable expectation of pecuniary advantage to the beneficiaries under the statute known as Lord Campbell's Act.

Statement

THIS was an appeal from the judgment of Drysdale, J., in favour of plaintiff in an action brought by plaintiff as widow

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of the late Alexander McDonald, and also as administratrix of the goods, chattels and effects of said Alexander McDonald, claiming damages on her own behalf and also on behalf of the heirs, for loss and injuries sustained through the death of said Alexander McDonald, alleged to have been occasioned by the negligence, misfeasance and non-feasance of the defendant, its servants and agents.

The judgment appealed from, and which was affirmed, was as follows:—

Drysdale, J.

DRYSDALE, J.:—This action is under Lord Campbell's Act brought by the administratrix of the estate of Alexander McDonald for the benefit of the widow and children of the late Alexander McDonald.

The cause of action is alleged negligence of defendants in opening and leaving unprotected, a drain or ditch on Sheriff avenue, in the city of Sydney, into which said McDonald fell and received the injury causing his death.

On May 27th, 1911, defendants' servants dug a ditch 4 feet deep by 2 feet in width across Sheriff avenue, a public street, right up to the edge of the sidewalk, and extending somewhat into the sidewalk. On Saturday night this trench was left with a barricade around the outer end and along each side pretty well up to the sidewalk. The trench was about 28 feet in length; to protect people using the sidewalk there were two tubs turned upside down and a plank laid across the end of the ditch cutting into the sidewalk on the outer or street end of the trench. A lantern was placed and left burning but no light at the sidewalk end on both the north and south sides of the trench. The side barricade of planks did not extend to the sidewalk barricade by about 3 feet in each case. The only protection here for this 3 foot space being the clay or soil thrown out from the ditch forming sort of a bank. This bank on the south being less than 2 feet in height, and sloping to nothing as it reached the tub on the sidewalk. On the north side the bank of clay was a little greater, probably about 2 feet.

It will thus be seen that just off the sidewalk the trench was at that end practically unprotected for about 3 feet between the sidewalk tubs and the side barricades. The deceased left his home about 9 p.m. to go into town; leaving in a hurry to catch a Townsend street car, and was not again seen alive. Early Sunday morning he was found in this trench dead having died from a broken neck. His route to the car would take him past this trench, and the strong probability is that he walked into this unprotected place from the south side; fell into the ditch, and broke his neck. He had been into town in the evening, made some purchases, which he forgot, and on remembering the fact, hastily started to return to town. His direct route

for the car would take him past the trench, and there is no further light on the situation than the facts disclosed by the finding of the body. I think it is fairly apparent that he went in from the south or home side and struck his head on the upper north side and broke his neck thus losing his life.

There was no light on the sidewalk end of the trench as stated, and conditions there amounted to nothing short of a trap to anyone going either up or down and getting slightly off the sidewalk in the dark. Defendant's counsel urges strongly that there is no evidence shewing how the accident occurred. In other words, that it is mere conjecture that the deceased walked into this unprotected place from the south, fell in and struck his head on the north side, breaking his neck. I think, however, the position of the body when found shews fairly clearly that the deceased fell in from the south side striking his head on the north wall; that death was caused by a broken neck is sure and as the passing of this trench was on his direct route to get a Townsend street car, his object, I am led to conclude is in favour of the probability that he fell into the trap or unprotected trench on his way for a car. I am of opinion the defendants were guilty of negligence and that such negligence caused the death of the plaintiff's husband.

I am left without much evidence to guide me on assessing the pecuniary damage caused by the death. I have simply the fact that deceased was a man of 56 years of age, in good health apparently, a carpenter by trade, and earned $2.25 per day, and a sober and steady workman. The assessment must be confined to the pecuniary loss based on the reasonable expectation of pecuniary advantage to these beneficiaries, and that expectation being disappointed. The deceased left a widow and four children at home. One boy 24 years of age; another 19; one girl 22, and another 20. The boys would, I think, have the reasonable expectation of pecuniary advantage; the girls probably the same.

I assess the damages at $1,800, and apportion the same as follows: $1,200 to the widow, and $600 divided between the two girls at home.

Argument

F. McDonald, K.C., in support of appeal:—Liability cannot be fixed on mere conjecture. The facts do not establish that deceased fell into the trench: *Montreal Rolling Mills* v. *Corcoran*, 26 Can. S.C.R. 595, 599; *Wakelin* v. *London and S.W. R. Co.*, 12 A.C. 41; *Smith* v. *Baker*, [1891] A.C. 325; *Messenger* v. *Town of Bridgetown*, 33 N.S.R. 291, 298; *Plouffe* v. *Canada Iron Furnace Co.*, 11 O.L.R. 52. Defendant gave reasonable warning of the danger.

H. Mellish, K.C., *contra*:—The findings are justified by the evidence and the Court therefore will not set them aside. There

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was no contributory negligence on the part of deceased. Sufficient precautions were not taken on the part of defendant to guard against accident: *Williams* v. *Great Western R. Co.*, L.R. 9 Ex. 157.

MEAGHER, J., delivered the judgment of the Court holding that the defendant was clearly guilty of negligence. He agreed with the findings of the trial Judge and would have found the same way himself. The unprotected ditch, insufficiently lighted and lying in the path of the deceased, amounted to nothing short of a trap and the inference was that through it the deceased came to his death. He was of opinion that the conclusions of the learned trial Judge were correct and that the appeal should be dismissed with costs.

Appeal dismissed.

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Re HUNTER.

Ontario High Court, Middleton, J. December 11, 1912.

1. LEVY AND SEIZURE (§ II—30)—EXECUTION—MODE AND SUFFICIENCY OF LEVY—SEIZURE OF CASH.

Where an execution creditor duly placed his execution in the hands of the sheriff, who, instead of proceeding rgularly to sell under the execution the effects of a liquor business belonging to the execution debtor, placed his bailiff in possession of the business itself with directions to take over the daily receipts thereof as a going concern, and where such receipts were actually turned over by the cashier every day to the sheriff, the legal construction of the daily taking over of the money by the sheriff is that each such taking over was a levy thereon under the execution.

2. EXECUTION (§ I—8)—LIEN AS TO MONEYS COLLECTED BY SHERIFF—DECEASED INSOLVENT DEBTOR—EXECUTION CREDITOR'S LIEN—TRUSTEE ACT (ONT.).

Where the sheriff seizes, under an execution, certain moneys belonging to the execution debtor, the execution creditor thereby acquires a lien upon the moneys so received, and such lien is protected on the execution debtor subsequently dying insolvent, and the administratrix of his estate is not entitled to delivery up of the moneys so seized for distribution *pari passu* under sec. 52 Trustee Act (Ont.), the saving clause of which section declares, in effect, that the statutory direction for distribution *pari passu* shall not prejudice "any lien existing in the lifetime of the debtor on any of his real or personal property."

[Trustee Act, 1 Geo. V. (Ont.) ch. 26, sec. 52, construed.]

Statement

APPEAL by the Dominion Brewery from the decision of the Master at Port Arthur.

The appeal was allowed.

W. R. Smyth, K.C., for the Dominion Brewery.

H. E. Rose, K.C., for the administratrix.

Middleton, J.

MIDDLETON, J.:—The proceedings in this matter appear to be in a state of great confusion. An interpleader issue was direct-

ed, and apparently in some way referred to the Master for adjudication. The Master seems to have dealt with the question between the parties in the administration action, and it is very doubtful whether he had any jurisdiction. Counsel, however, shewed their good sense by agreeing that the real question at issue between the parties should now be determined, quite irrespective of questions of form and practice.

On the 5th September, 1908, the Dominion Brewery recovered a judgment against the late George Hunter, who was carrying on business under the name of Hunter & Co. Execution was duly issued and placed in the hands of the sheriff. At that time another execution was in the hands of the sheriff at the instance of the Soo Falls Brewery. That company had also a chattel mortgage upon the property of the debtor. Apparently there was a great deal of difficulty in ascertaining what the position of the Soo Falls Brewery Company was; but this has now disappeared, as the claim of the Soo Falls Brewery Company has been satisfied, its execution withdrawn, and it now makes no claim to the money in question.

Instead of proceeding to sell under the execution, the sheriff placed his bailiff in possession, and the receipts were turned over by the cashier every day to the sheriff. The situation is indicated by this extract from Youill's evidence:

"The sheriff's man took memo. of sales made during the day, and at night he and I took the money from the cash register, and he took the money and gave me receipt. That continued daily until June 25th, date of sale to the Western Liquor Company. I do not know the amount of sale to this company. I went out of possession when the sale to the Western Liquor Company was completed and license transferred."

Youill, whom I have called the cashier, occupied an anomalous position. He was a clerk of Hunter's. An arrangement had been made by which a trustee was placed in possession for the benefit of creditors. This arrangement probably never was operated, owing to the fact that the creditors had not assented. The trustee ceased to act, and Youill purported to succeed him. In reality he was probably the bailiff of the Soo Company under its mortgage.

The one thing which is certain is that the sheriff received this money; and as he then had two executions in his hands, he received it by virtue of his execution; and I do not know whether it is material, but I think that each time that he received the money must be regarded as a levy made upon it.

After the death of Hunter his administratrix claimed this money. The Master by his report has found in favour of her claim. This ignores the provision of the Trustee Act, 1 Geo. V. ch. 26, s. 52, which provides that the distribution among the

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creditors in the case of an intestate, being insolvent, shall be pari passu, "but nothing herein shall prejudice any lien existing during the lifetime of the debtor on any of his real or personal property."

I think it is clear that the execution creditor had a lien upon the moneys received by the sheriff, and that this lien is entitled to prevail over the claim of the administratrix.

Where the Legislature has intended that upon the happening of any event, the right of the execution creditor shall be defeated, it has said so in language free from ambiguity. An assignment and a winding-up order are both given priority over executions not completely satisfied by payment. Here, on the other hand, the statute protects the existing liens.

The appeal should, therefore, be allowed, and the execution creditor should have his costs against the administratrix.

Some question was raised upon the argument as to the exact balance due upon the execution. If this cannot be arranged between counsel, I may be spoken to again about it.

Appeal allowed.

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REX v. STEPHENSON.

Ontario High Court, Kelly, J., in Chambers. November 12, 1912.

1. INTOXICATING LIQUORS (§ III A—55)—CONVICTION—UNLAWFUL SALE—MAGISTRATE REFUSING TO ALLOW ANALYSIS OF LIQUOR, EFFECT OF.

Upon a conviction for selling liquor without a license when the defence has been that only non-intoxicating liquor has been sold, it is a good ground for quashing the conviction that the magistrate refused to allow the liquor found on the premises to be analysed.

Statement

MOTION to quash a conviction for selling liquor without a license.

G. W. Bruce, K.C., for the defendant.
H. S. White, for the magistrate.

Kelly, J.

KELLY, J.:—Defendant was convicted by the Police Magistrate for the Town of Collingwood of selling liquor without a license on July 12th, 1912, and a penalty was imposed of a fine of $250 and $22.15 costs, and on default three months in gaol at hard labour. The information was laid on July 15th and the hearing before the magistrate was begun on July 20th and evidence was then taken. Judgment was given on July 27th.

At the time of the occurrence in respect of which the charge was laid, the police officer seized (in defendant's premises) what he said was a bottle of beer, but which defendant swore was non-intoxicating beer, the same, he swore, as he was selling on that day in his premises. The bottle seized bore, at the time, a label "Salvador," the name of a beer which is said to be intoxicating.

The officer who seized it swore he had "no other reason of thinking it was "Salvador" beer except from the label."

One of the grounds relied upon by defendant for quashing the conviction is that he was not given an opportunity of putting in evidence which he tendered and which the magistrate refused to consider.

On the motion an affidavit of the magistrate was filed wherein it is shewn that immediately after the service of the summons on July 15th, defendant's counsel applied to him (the magistrate) to have the beer which was seized sealed up, and he sealed it up in presence of the counsel; and further that when the case came on for hearing on July 20th, he was asked by the same counsel to send the beer for analysis, it being still in the possession of the police officer, and that he then told defendant's counsel that the case must go on on that day and afterwards the beer could be sent for analysis, and that he would in the meantime withhold judgment. The magistrate says further that after defendant had given his evidence on the 20th his counsel again requested that the beer seized be analysed, in reply to which the magistrate said he did not wish it analysed, but if defendant's counsel wished it, he (the magistrate) would direct the chief of police to send it to the Provincial Analyst; and that after the Court had adjourned he gave directions to that effect.

It is also set out in the affidavit of the magistrate that at the hearing, counsel for the prosecution having argued that defendant having admitted that the label on the bottle seized and the label on other bottles sold was "Salvador," and held out by him to his customers as intoxicating liquor, he was estopped from shewing that the bottles contained non-intoxicating beer; and that he (the magistrate) said he would convict at once if counsel for the prosecution could satisfy him by authority that defendant was estopped.

I am taking the magistrate's version of what took place, though the defendant's counsel puts the case even stronger. The magistrate, however, says, in his affidavit—not in the record of the conviction—that the question of analysis or the doctrine of estoppel had no bearing upon his judgment, as he made the conviction on other grounds.

The analysis was not produced afterwards, and on July 27th, without further reference to it, or further opportunity to defendant to complete that part of his defence, the conviction was made.

Under the circumstances the accused had not a fair trial. In a proceeding involving, as in this instance, a heavy fine and the liberty of the accused, he should have been afforded the fullest opportunity of putting forth his defence, and when he sought to have an analysis made of the liquor which was in posses-

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sion of the police officers, and which on the prosecutor's own shewing was taken from defendant's premises as part of what was there being consumed at the time of the seizure, and defendant contending that what was seized and what was being consumed on his premises was non-intoxicating beer, it cannot be said that he was afforded the opportunity of making a full defence, when the analysis was not proceeded with, especially as the magistrate himself admits that when on July 20th he was asked to have the analysis made, he said the case must go on on that day, that afterwards the beer could be sent for analysis and that he would in the meantime withhold judgment.

The conviction is, therefore, quashed, with costs, and there will be an order of protection to the magistrate.

I have not dealt with the other objection raised by defendant's counsel on the motion.

Conviction quashed.

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WINNIPEG ELECTRIC R. CO. (defendant, appellant) v. HILL (plaintiff, respondent).

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Idington, Duff, Anglin, and Brodeur, JJ. February 26, 1912.

1. STREET RAILWAYS (§ III B—35)—PERSONAL INJURY TO PASSENGER—EXCHANGE OF PLACES BETWEEN CONDUCTOR AND MOTORMAN—NEGLIGENCE.

The fact that the motorman and the conductor exchanged places on a street car in contravention of the company's rules, and that the conductor so permitted to drive the car allowed it to collide with another car either from negligence or incompetence, may form the basis of an action by a passenger for the resulting personal injuries he received.

[*Hill* v. *Winnipeg Electric R. Co.*, 21 Man. L.R. 442, affirmed.]

Statement

APPEAL from a decision of the Court of Appeal for Manitoba, *Hill* v. *Winnipeg Electric R. Co.* (1911), 21 Man. L.R. 442, maintaining the verdict for the plaintiff (respondent) at the trial.

The plaintiff, a physician practising in Winnipeg, was called to another town late at night and hired a special car from the defendant company to bring him back. While returning in this car the motorman, contrary to the rules of the company, allowed the conductor to do the driving, and, through the negligence or incompetence of the latter, a collision occurred with another car by which the plaintiff was injured. On the trial of an action claiming damages for such injury the jury found that the motorman, in exchanging places with the conductor, was acting in breach of his duty, and that the failure of the servants of the company to perform their duties constituted negligence on the part of the company. A verdict was entered for the plaintiff with damages assessed at $2,000.

The Court of Appeal, in maintaining this verdict, held that though the conductor may not have been acting as a servant of the company when the accident took place, the act of the motorman in abandoning his post was negligence for which the company was responsible.

The defendants appealed to the Supreme Court of Canada.

Chrysler, K.C., for the appellants.

E. A. Cohen, for the respondent.

THE COURT after hearing counsel on their behalf, and without calling on counsel for the respondent, dismissed the appeal.

Appeal dismissed with costs.

PAHKALA v. HANNUKSELA.

(Decision No. 2.)

Saskatchewan, District Court, Judge Farrell. September 7, 1912.

1. WITNESSES (§ V—65)—WITNESS FEES—WITNESS ATTENDING IN ANOTHER CASE.

On the dismissal of an appeal from a summary conviction on which there is a re-hearing, the practice in Saskatchewan does not require that the witness fees of a witness called on such re-hearing shall on taxation be divided because he also attended the sittings on the same day as a witness in another case.

[*Hamilton* v. *Beck*, 3 Terr. L.R. 405, followed; *Scott* v. *Dalphin*, 6 W.L.R. 371, considered.]

Statement

HEARING of questions arising on the taxation of appellant's costs on the allowance of an appeal from a summary conviction.

C. V. Truscott, for appellant.

A. T. Procter, for respondent.

Judge Farrell.

JUDGE FARRELL:—Upon the question now raised on the taxation of costs as to whether or not the appellant was entitled under the circumstances to tax full witness fees as though there had been no other case at the same sittings on whose behalf they had also attended, counsel for the respondent contends that all the appellant could tax and is entitled to, is one-half of these fees. In support of this contention he cites *Scott* v. *Dalphin*, 6 W.L.R. 371, a decision of the Chief Justice, but at the same time draws my attention to *Hamilton* v. *Beck*, 3 Terr. L.R. 405, when the same Judge in a considered judgment on the question held that the successful party and his witness were entitled to their full fees in each case no matter how many causes there were at the same sittings at which they attended for the purpose of giving evidence in them. He contended, however, that this judgment being delivered eleven years before that of *Scott*

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v. *Dalphin*, 6 W.L.R. 371, in which the Chief Justice appears to have taken another view, it may reasonably be inferred that he had since changed his mind on the question. It was also suggested as the case here and in *Scott* v. *Dalphin*, 6 W.L.R. 371, are really of a criminal character a different practice should obtain than in *Hamilton* v. *Beck*, 3 Terr. L.R. 405, which was purely civil. As to this last suggestion, I do not think there is sufficient merit in it to warrant me distinguishing between these two cases on that ground.

It was pointed out to me by counsel for the appellant that the Chief Justice in *Scott* v. *Dalphin*, 6 W.L.R. 371, was not deciding the right of the parties to witness fees under our tariff as he did in the former case, but in making certain deductions from the costs allowed because the respondent was concerned in three other appeals he was merely exercising his discretion in the matter. That, in the case at bar, having awarded costs without exercising my discretion at the time by directing that only a proportional part of the witness fees should be allowed the successful party, I could not do so now. That all I could do now, as the taxing officer, was to decide on my bare order for costs what cost the appellant was entitled to under our rules. In this contention, I think the counsel for the appellant is right. If my attention had been drawn at the time to the state of affairs as they were in this matter, I have no doubt I would have settled the matter when making the order for costs by directing that only a proportionate part of the witness fees should be allowed.

From a perusal of the language used by the Chief Justice in *Scott* v. *Dalphin*, 6 W.L.R. 371, I think it could reasonably be inferred that he had changed his opinion on the subject since that expressed by him in *Hamilton* v. *Beck*, 3 Terr. L.R. 405,—for instance, he used the words "he will only be entitled to his proportionate fees for travelling and attendance." However, I am not prepared here to find that there is any such change of opinion. I think there is no doubt that the English practice is only to allow in such cases as that before us, a proportionate part of the witness fees, and their tariff schedule expressly provides for this. Under these circumstances, where our own rules and tariff are silent on the point, it is a question if the English rules under section 15 of the Judicature Act would not govern. In Ontario, with whose practice in the matter I am more familiar, the rules and the tariff make the matter quite clear. There before witness fees are allowed, an affidavit must be filed that the plaintiff was a necessary and material witness in his own behalf that he attended for the purpose only, and in no other cause (or otherwise as the case might be) and that the witnesses subpœnaed by him attended in no other cause.

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Judge Farrell.

Further the tariff provides as in England that where the witnesses attended in other causes, only a proportional allowance of the fees to be taxed.

I would be inclined to think, that such was the proper course here, if I did not feel that the decision in *Hamilton* v. *Beck*, 3 Terr. L.R. 405, was binding upon me, unless altered as I have suggested by the application of the English rules under section 15 of the Judicature Act. As to that, however, I am not prepared at this moment to express an opinion, because I have not been able to give the point sufficient consideration, and feel I must dispose of the matter now. It is, therefore, with reluctance that I find that in view of *Hamilton* v. *Beck*, 3 Terr. L.R. 405, the appellant and his witnesses are entitled to their full witness fees in this case.

Order accordingly.

GORMLEY v. DEBLOIS.

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Dec. 14.

Nova Scotia Supreme Court, Graham, E.J., and Meagher, and Drysdale, JJ. December 14, 1912.

1. LIMITATION OF ACTIONS (§ I D—29)—PARTIES ENTITLED TO SET UP STATUTE—SUBSEQUENT ATTACHING CREDITOR.

Under the provisions of Nova Scotia Practice Order 46, r. 6, which provides that a subsequent attacher may dispute the validity and effect of a previous writ of attachment on the ground that the sum claimed was not justly due, or was not payable when the action was commenced, the subsequent attacher may take the ground that the debt was barred by the Statute of Limitations as an answer to the claim of the previous attacher.

2. ATTACHMENT (§ II B—30)—SUBSEQUENT ATTACHING CREDITOR OBJECTING TO VALIDITY OF PRIOR ATTACHMENT—MOTION TO SET ASIDE.

The proper mode of disposing of an objection by a subsequent attacher that the prior attacher's claim is barred by the Statute of Limitations is by a motion to set aside the prior writ of attachment and not by an order permitting the subsequent attacher to plead to the action was brought upon the prior attacher's claim.

Statement

THIS was an action brought by plaintiff against William M. Deblois, an absent or absconding debtor, seeking to recover out of the assets of the defendant the amount of four promissory notes made by him of which plaintiff was holder. By order of S. H. Pelton, Esq., Judge of the County Court for district No. 3, and Master *ex officio* of the Supreme Court, a number of other creditors of the defendant were permitted to appear and plead, and, having appeared, pleaded that the several notes sued on were barred by the Statute of Limitations.

The cause was tried before Russell, J., who in the first instance, disallowed the claim on the ground that the cause of action arose and was perfect before the debtor absconded and that more than six years had elapsed since the cause of action arose, but, the point having been raised that the Statute of Limi-

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tations, being a personal defence for the debtor, could not be taken advantage of in the interests of a subsequent attacher, a re-argument was ordered and this having taken place, the learned Judge held that an outside creditor, although he might be seriously affected by the failure of the debtor to take advantage of the Statute of Limitations, could not set up the statute as a defence to another's claim, nor compel the debtor to do so, the privilege of protection afforded by the statute being personal to the debtor.

For this he relied on the "overwhelming weight of American authority," distinguishing the case of *Smith* v. *Cuff*, Thoms 3 N.S.R. 12, on the ground that the point of the statute here was not being urged in the interest of the absent debtor.

Argument

D. Owen, for the subsequent attachers, in support of appeal, relied on *Shewen* v. *Vanderhorst*, 1 Russ. & Myl. 347; and *Re Wenham*, [1892] 3 Ch. 59.

W. E. Roscoe, K.C., *contra*, relied on *Margetts* v. *Bays*, 4 A. & E. 489; *Briggs* v. *Wilson*, 39 Eng. L. & Eq. 62, 68; *Waltermire* v. *Westover*, 14 N.Y. 16, 21, and *Hanchett* v. *Blair*, 100 Fed. Rep. 817, 824.

As to whether this was a debt justly due, *Cartwright* v. *Cartwright*, 68 Ill. App. 74; *Re Baker*, 44 Ch.D. 270; *Corbey* v. *Rogers*, 152 Ind. 169.

Under rule 6, it cannot be said that a debt is not "justly due" because it is more than six years old. The plea of the statute is only a personal defence and is not available to an attaching creditor.

D. Owen, replied.

Graham, E.J.

GRAHAM, E.J.:—The plaintiff proceeded against the defendant as an absent and absconding debtor and credits have been attached.

It appears that the debt was barred by the Statute of Limitations when the action was brought, and the sole question is whether other attachers, under the provisions of the rules relating to absent or absconding debtors, can set up that bar.

The learned Judge appealed from held that that defence was a personal defence and the rival claimants to the fund could not make use of it. And, in the result, he assessed the amount due and gave judgment for the plaintiff in this action, although in the case of *Smith* v. *Cluff*, 3 N.S.R. 12, it was decided by Halliburton, C.J., and Bliss, J., Wilkins, J., dissenting,

> That the Court will not allow a judgment to be entered up against an absent debtor for a debt barred by the Statute of Limitations.

The rule, order 46, rule 6, which was the one quoted, provides that a subsequent attacher:—

> May dispute the validity and effect of such writ of attachment (the previous one) on the ground that the sum claimed was not justly due or that it was not payable when the action was commenced.

Rule 7 provides for the form of application of the subsequent attacher.

Rule 8 provides:—

> If it appears that the sum claimed in the action or any part of it is not justly due, or was not payable when the action was commenced, the Court or Judge shall order the attachment therein made to be set aside in whole or in part as justice requires, but the order shall have no other effect in such suit.

In my opinion, these provisions enable a subsequent attacher to make use of the Statute of Limitations as an answer to the claim of a previous one. In bankruptcy the bar of the Statute of Limitations may be set up by the trustee and by the other creditors. It is the duty of the trustee to set it up: *Ex parte Dewdney*, 15 Ves. 479; Banning on Limitations, 3rd ed., 249.

When under our statutes there is a distribution of the assets among creditors, I think the same principle ought to prevail. Of course the right of an executor to be allowed for payment made although the claim was barred, and the cases establishing that right, were relied on. The case of an executor being allowed to pay a debt barred by the Statute of Limitations has not been extended to any other person. It is, as Fry, J., says in the case of *Re Rownson*, 29 Ch. D. 358, 365, "an anomaly, a single exception, and is not to be extended."

In the case of *Ex parte Dewdney*, 15 Ves. 479, just cited, the Lord Chancellor refers to the case of executors, but he adds, speaking of an adminstration action:—

> But the constant course in the Master's office is to take the objection (of the Statute of Limitations) against other creditors and to exclude from the distribution those who, if legal objections are brought forward, cannot make their claims effectual.

Therefore, I am of opinion that the plaintiff's writ of attachment should be set aside and also the judgment. I believe that was the original application of the rival claimants, but by consent an order was taken to allow the rival claimants to plead in this action, setting up the statute. I think this was irregular.

The subsequent attachers will have the costs except of the pleading, trial and judgment. Costs to be taxed on the basis of a motion to set aside the attachment and an appeal.

DRYSDALE, J., concurred. Drysdale, J.

MEAGHER, J. (oral):—I agree, and I have only to add, because of a case sent to us by Mr. Roscoe, that there the question was what was a proper expenditure and in that sense only Meagher, J.

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the question of what is a just debt was discussed. That has no application here because, under our statute, a party can only attach where he has a good cause of action and it cannot be said that he has a good cause of action where the debt is barred by the Statute of Limitations.

Attachment vacated.

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COCKSHUTT PLOW CO., Limited v. MACDONALD.

Alberta Supreme Court, Harvey, C.J., Stuart and Scott, JJ. December 20, 1912.

1. PRINCIPAL AND AGENT (§ III—33)—INDEPENDENT CONTRACTOR—OMISSION OF PRINCIPAL TO PREVENT INJURY TO NEIGHBOUR—PREVENTION OF MISCHIEF—BURDEN ON PRINCIPAL.

Where a principal orders to be done on his premises a work, lawful in itself, but from which, in the natural course of things, injurious consequences to his neighbour must be expected to arise unless means are adopted by which such consequences may be prevented, the principal himself is bound to see to the doing of that which is necessary to prevent the mischief, and he cannot relieve himself of his own responsibility by employing some one else (whether servant or independent contractor) to do what is necessary to prevent the act he had ordered to be done from becoming wrongful.

[*Boxer* v. *Peate*, 1 Q.B.D. 321, 326; *Mersey Docks Co. Trustees* v. *Gibbs*, L.R. 1 H.L. 93, 114; *Pickard* v. *Smith*, 10 C.B.N.S. 480, applied.]

2. MASTER AND SERVANT (§ III B 2—303)—INDEPENDENT CONTRACTOR — OWNER'S ABSOLUTE DUTY TO PREVENT INJURY TO ADJOINING PREMISES.

The act of committing work to a contractor to be executed, from which, if properly done, no injurious consequences can arise, is to be differentiated from the act of turning over to him work to be done from which mischievious consequences will arise unless preventive measures are adopted; and while it may be just to hold the party authorizing the work in the former case exempt from liability for injury resulting from negligence which he had no reason to anticipate, there is, on the other hand, good ground for holding him liable for injury caused by an act certain to be attended with injurious consequences, if safeguards are not provided, no matter through whose fault the omission to take the necessary measures for such prevention may arise; and, where the owner of lands, in the construction of works thereon for which injury to the adjoining premises must be expected to result, himself omits to take the necessary measures to prevent such mischief, he may be held liable upon a plea alleging such omission.

[*Boxer* v. *Peate*, 1 Q.B.D. 321, 326, applied.]

3. NEGLIGENCE (§ I C 1—37)—DANGEROUS PREMISES — NEGLIGENT CONSTRUCTION—DEFECTIVE CONSTRUCTION—RUINOUS BUILDING FALLING ON ADJOINING PREMISES—ABSOLUTE LIABILITY.

Where a person orders to be done on his premises a work, lawful in itself, but from which, in the natural course of things, injurious consequences to his neighbours must be expected to arise unless means are adopted by which such consequences may be prevented; and where he entrusts an independent contractor with the performance of such duty incumbent upon himself, and the contractor neglects its fulfilment, the liability for the resultant injury to the adjoining premises does not depend on the relation of master and servant; and the fact that he entrusted his own duty to another person (whether servant or

independent contractor) who also neglected it, furnishes no excuse in law.

[*Pickard* v. *Smith*, 10 C.B.N.S. 480; *Mersey Docks Co. Trustees* v. *Gibbs*, L.R. 1 H.L. 93, 114; *Quarman* v. *Bennett*, 6 M. & W. 509; *Todd* v. *Flight*, 9 C.B.N.S. 377, 30 L.J.C.P. 21, referred to.]

4. MASTER AND SERVANT (§ III B 2—303)—INJURIES TO ADJOINING OWNER —NEGLIGENCE OF MASTER—OMISSION TO PERFORM SOMETHING IMPOSED AS A LEGAL DUTY—LIABILITY, HOW ABSOLUTE.

The liability of a master for an omission to do something depends entirely upon the extent to which a duty is imposed to cause that thing to be done, and in such a case it is quite immaterial whether the actual actors are servants or not.

[*Quarman* v. *Bennett*, 6 M. & W. 509, referred to.]

5. PLEADING (§ II L—258)—REAL PROPERTY—DUTY TO ADJOINING OWNER.

In an action for damages caused by the falling of the wall of a building erected upon the adjoining premises, by a contractor for the owner of such adjoining premises, the owner or occupant of the property upon which the wall fell should not rest the claim entirely upon negligence in the construction of the building, but should plead substantively the omission of the adjoining owner to see to the doing of that which was necessary to prevent the mischief.

[*Bower* v. *Peate*, 1 Q.B.D. 321, 326; *Mersey Docks Co. Trustees* v. *Gibbs*, L.R. 1 H.L. 93, 114; *Pickard* v. *Smith*, 10 C.B.N.S. 480, applied.]

Statement

APPEAL by the defendant from the judgment at trial dismissing the defendant's counterclaim with costs.

The appeal was dismissed.

J. B. Roberts, for respondent, plaintiff.

E. F. Ryan, for appellant, defendant.

Harvey, C.J.

HARVEY, C.J.:—I concur with judgment of Stuart, J.

Stuart, J.

STUART, J.:—I agree with my brother Scott and for the reasons given by him, that upon the ground of action set forth in the pleadings and upon the contentions and arguments raised before us at the hearing of this appeal, the defendant cannot possibly succeed in his counterclaim. But I hesitate to let the impression go abroad that one adjoining proprietor, whose building becomes ruinous and falls upon the land of his neighbour, can in no case be held liable for the damage caused. There would appear to me to be at least a plausible ground for contending that there is such a liability. See *Todd* v. *Flight*, 9 C.B.N.S. 377, 30 L.J.C.P. 21. That, however, was not the case presented to the Court at all. The defendant rested his claim entirely upon negligence in the construction of the building.

In my view I do not think the defendant should be forever precluded from pressing his claim owing to the misconception of his legal adviser as to the right ground to rest it upon. I think, therefore, while the appeal cannot succeed, that the defendant should be allowed upon payment of all the plaintiff's costs of the appeal to be taxed and of the action and counter-

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claim, to amend his statement of claim, if he is so advised, so as to raise the other ground. If the amendment is not made within one month after the taxation of the costs the appeal should be dismissed with costs.

SCOTT, J.:—This is an appeal by the defendant from the judgment of the trial Judge dismissing the defendant's counterclaim with costs.

The counterclaim is for damages caused by the falling upon premises occupied by the defendant of a wall of a building erected for the plaintiff company upon the adjoining premises. The defendant charges that the plaintiff company erected the building in such a negligent and careless manner that the same fell down upon his premises.

The learned trial Judge found that the plaintiff company employed a reliable firm of contractors to construct the building in accordance with plans and specifications prepared by an architect, and that it was constructed under the supervision of another architect employed by the plaintiff company for that purpose. There is nothing in the evidence to shew that the contractor and architects employed by the plaintiff company were incompetent, and the trial Judge has found as a fact that the falling of the wall which occasioned the damage was due to defective construction, and it is apparent from the evidence that, if it had been properly constructed in accordance with the plans and specifications, it would not have fallen, nor would its construction have resulted in any injury to the adjoining premises. Its falling is shewn to be entirely due to the negligence of the contracting company or its workmen.

In *Mersey Docks Co. Trustees* v. *Gibbs*, L.R. 1 H.L. 93, Lord Halsbury says at 114:—

> It is necessary in considering these authorities to bear in mind the distinction between the responsibility of a person who causes something to be done which is wrongful, or fails to perform something which there was a legal obligation on him to perform, and the liability for the negligence of those who are employed in the work. This distinction is well stated in *Pickard* v. *Smith*, 10 C.B.N.S. 480, by Mr. Justice Williams, who says: "Unquestionably no one can be made liable for an act or breach of duty, unless it be traceable to himself or his servant or servants in the course of his or their employment. Consequently, if an independent contractor is employed to do a lawful act, and in the course of the work he or his servants commit some casual act of wrong or negligence, the employer is not answerable. That rule, however, is inapplicable to cases in which the act which occasions the injury is one which the contractor was employed to do; nor, by a parity of reasoning, to cases in which the contractor is entrusted with the performance of a duty incumbent upon his employer, and neglects its fulfilment, whereby an injury is occasioned. 'If the performance of the duty be omitted, the fact of his having entrusted it to a person who also neglected it, furnishes no excuse either in good

sense or law." Liability for the collateral negligence depends entirely upon the existence of the relation of master and servant, between the employer and the person actually in default, according to the well-known exposition of the law in *Quarman* v. *Bennett*, 6 M. & W. 509, where Mr. Baron Parke says: "Upon the principle that *qui facit per alium facit per se*, the master is responsible for the acts of his servant; and that person is undoubtedly liable who stood in the relation of master to the wrongdoer, he who had selected him as his servant from the knowledge of or belief in his skill and care, and who could remove him for misconduct, and whose orders he was bound to receive and obey; and whether such servant has been appointed by the master directly, or intermediately through the intervention of an agent authorized by him to appoint servants for him, can make no difference. But the liability by virtue of the principle of relation of master and servant must cease where the relation itself ceases to exist. In such a case as the present the liability does not depend on that relation. Liability for doing an improper act depends upon the order given to do that thing; and the liability for an omission to do something depends entirely upon the extent to which a duty is imposed to cause that thing to be done; and in the last two cases it is quite immaterial whether the actual actors are servants or not."

In *Bower* v. *Peate*, 1 Q.B.D. 321, Cockburn, C.J., at page 326 says:—

> A man who orders a work to be executed, from which, in the natural course of things, injurious consequences to his neighbour must be expected to arise, unless means are adopted by which such consequences may be prevented, is bound to see to the doing of that which is necessary to prevent the mischief, and cannot relieve himself of his responsibility by employing some one else—whether it be the contractor employed to do the work from which the danger arises, or some independent person—to do what is necessary to prevent the act he has ordered to be done from becoming wrongful.' There is an obvious difference between committing work to a contractor to be executed, from which, if properly done, no injurious consequences can arise, and handing over to him work to be done from which mischievous consequences will arise unless preventive measures are adopted. While it may be just to hold the party authorizing the work in the former case exempt from liability for injury, resulting from negligence which he had no reason to anticipate, there is, on the other hand, good ground for holding him liable for injury caused by an act certain to be attended with injurious consequences, if such consequences are not, in fact, prevented, no matter through whose default the omission to take the necessary measures for such prevention may arise.

The words I have quoted appear to me to clearly define the extent of the liability of the owner of lands in the construction of works thereon which may cause injury to the owner or occupants of adjoining premises, and I cannot find that the views there expressed have been dissented from in any of the later cases in which the question has arisen.

Applying those principles to the present case, I think it is clear that in this form of action the plaintiff company is not liable to the defendant for the damages he has sustained. The contracting company to which the contract for the erection of

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the building was let, was not, nor was its servants or workmen, in any respect the servants or agents of the plaintiff company, and as the work the latter required to be done was not a work which would in the natural course of things have resulted in injurious consequences to the defendant, and as the damage he sustained was due solely to the negligence of the contracting company or its workmen, the plaintiff company cannot be held responsible for it.

I am therefore of opinion that the appeal should be dismissed with costs.

Appeal dismissed.

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Nov. 13.

KELLY v. NEPIGON CONSTRUCTION CO.

Ontario High Court, Riddell, J. November 13, 1912.

1. EVIDENCE (§ VI A—515)—WRITTEN CONTRACTS—PAROL EVIDENCE AS TO CONTEMPORANEOUS ACTS—DAMAGES.

Though terms cannot be imported into a written contract to vary it, evidence of circumstances surrounding the making of the contract or contemporaneous with its performance in whole or in part, may be taken into consideration in determining the amount of damages for breach of the contract.

2. CONTRACTS (§ IV B—335)—HINDRANCE BY OTHER PARTY—TIME OF COMPLETION DELAYED BY CONTRACTEE'S DEFAULT, EFFECT OF.

Where a term of a contract is that it shall be completed by the plaintiff by a certain time and the defendant by his own act makes it impossible for the plaintiff to complete within the specified time, the contract is impliedly varied and the time for completion is extended for a reasonable time.

3. CONTRACTS (§ IV B 3—335)—PREVENTION BY OTHER PARTY—CUTTING OF RAILWAY TIES, PERMITS FURNISHED BY CONTRACTEE—SELECTION OF TIMBER LIMITS.

Under a contract by the plaintiffs to cut railway ties, the defendant furnishing the permits for cutting such ties, the plaintiffs are not bound to select the timber limits, and are entitled to damages for being prevented from carrying out their contract by reason of the permits not being provided.

Statement

APPEAL by the defendants from the report of the Master at Port Arthur on a reference in an action for damages for breach of contract, etc.

The plaintiffs were a firm carrying on business in Port Arthur, the defendants were a company engaged in building part of the National Transcontinental Railway. In or about November, 1909, the parties agreed for the plaintiffs to do some freighting, etc., for the defendants—and they did so. The action was in part for these services.

On February 9th, 1910, the parties entered into a written agreement for cutting and delivering ties, which with some other matters of minor importance, was considered in the action. At the trial, an order was made that all matters in question in the action should be referred for enquiry and report to the Local Master at Port Arthur, and all questions of costs and further directions were reserved. The Master made his report

on August 24th, 1912, finding the defendants indebted to the plaintiffs in the sum of $12,815.08. The defendants appealed, and the plaintiffs moved for judgment on the report.

H. Cassels, K.C., for the defendants.

Glyn Osler, for the plaintiffs.

RIDDELL, J. (after setting out the facts):—As to the tie contract of February, 1910:—This contains a provision that the plaintiffs shall provide all labour, etc., necessary for the cutting and delivering of the ties required for the 75 miles of railway from a point 19⅛ miles west of the crossing of Mud river, eastward. They were to commence forthwith after the execution of the contract and cut and deliver before June 15th, 1910, 75,000 ties, and unless notified by the company to stop for a time, continue thereafter cutting and delivering ties until the full number should be delivered, and at such a rate as that the work of track laying should at no time be delayed, the company to be the sole judge of this. The ties cut along or near the right-of-way were to be delivered at points on the right-of-way, properly piled. The said piles were to be distributed so as to provide sufficient ties at each pile to carry the steel from that pile to the next, E. or W., so as to make it unnecessary to haul ties by teams. "Any of said ties which the company requires to be delivered at its No. 3 warehouse on Ombabika bay shall be placed in the water and towed to said warehouse and there placed in booms or piled on the shore."

The company were to furnish permits for the cutting of such ties and pay all dues; and the plaintiffs to conform to all the regulations of said permits.

The number of ties necessary is, as is admitted, 3,000 per mile or 225,000 for the 75 miles.

In fact only 3,600 ties were made up to June 15th, 1910, instead of the 75,000 agreed upon—but there can be no complaint on this score, as the defendants requested that the plaintiffs should stop, and the plaintiffs willingly assented. It seems probable that the plaintiffs could have had the 75,000 ties cut had it been desired.

Much complaint is made by the appellants that the Master found as a fact that the 75,000 ties were to be made off the Ombabika limit, the contract being silent in that regard. No doubt it would not be proper to amend the written contract by introducing this term: *McNeely* v. *McWilliams* (1886), 13 A.R. 324; *Betts* v. *Smith* (1888), 15 O.R. 413, S.C. (1889), 16 A.R. 421, and similar cases well known. For example the plaintiffs would not be breaking their contract if they delivered these 75,000 ties from some other limit. Yet while the arrangement to cut on the Ombabika limit cannot be made a term of the contract, it is a circumstance to be taken into consideration in determining the amount of damages, etc., like any other circum-

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stance surrounding the making of the contract, or contemporaneous with its performance in whole or in part—and it is in this view that the Master finds the fact, in which finding I agree.

The direction from the defendants to "go slow" was in March; the licenses expired on the 30th April and the Government had given notice that they would not be renewed; but on and after the 10th June, licenses could have been obtained without any trouble.

The defendants did not procure licenses. From the conduct of the defendants in staying the operations of the plaintiffs it would follow as a natural consequence that the term of the contract requiring delivery of 75,000 at a fixed date was impliedly varied, and a delivery at a reasonable time would be sufficient. And it being the duty of the defendants to supply the permits to cut, all time lost by the non-furnishing of the permits, the plaintiffs could not be held responsible for.

September 14th, 1910, the plaintiffs asked for permits in a letter to the defendants—they replied September 17th, 1910, saying that they had assigned their contract to O'Brien & Co.: September 26th, O'Brien & Co. wrote the plaintiffs saying "We will arrange to get permits for you between mileage 160 and 175 and 225 and 235 on either side of the railway": the plaintiffs replied, October 5th, that they held the defendants on the contract, and had not consented to any assignment, but "without prejudice to our claims against the Nipigon Company," if O'Brien & Co., would send the permits the plaintiffs would at once act on them. O'Brien & Co. answered, placing upon the plaintiffs the responsibility of saying whether there were enough ties on the lands, O'Brien & Co. had preferred, and that if the plaintiffs said there were, O'Brien & Co. would get the permits. "But," they add, "surely you do not expect us to go into the woods and select your timber limits," "As stated before, we wish you would say if this territory is satisfactory to you, for we do not want to ask for permits in a territory where there is no tie timber."

The specific and definite contract of the defendants was to "furnish permits for the cutting of such ties," and I do not think they could cast upon the plaintiffs the duty of finding out where "such ties" could be obtained; but that they undertake that responsibility themselves.

The permits were not furnished, the plaintiffs did not perform their contract accordingly, but were prevented from doing so, and they are entitled to damages.

I cannot say that the Master is wrong in his estimate of damages properly attributable to this head. There are, however, two matters which require consideration.

First, the Master has made a mistake in his figures—he has made the remainder found by subtracting 75,000 from 225,000 to be 155,000 instead of 150,000. His figures must then be re-

duced by $150 (i.e., 5,000 ties at 3 cents = $150). Then he had allowed the plaintiffs $1,000 for "expenditure upon camp buildings, etc., which became useless by reason of the defendants' breach of . . . contract." What the Master says is this:—

"They (*i.e.*, the plaintiffs) had erected the necessary buildings from which to carry on operations and had cut roads as required. These buildings are valued by Mr. Bliss at $700, and the roads at $100 a mile, or for three miles which was the approximate length $300, making together $1,000. They had also bought and forwarded to their camp over $2,000 worth of supplies. Mr. Bliss says that Donnell the plaintiffs' foreman was a good competent man. It never could have been contemplated that the plaintiffs would spend $1,000 in preparation for making 3,600 ties and 800 logs also cut by them on that limit. The work on the roads could be taken away when the tie making was completed. Something might be saved from the buildings, but the loss on both would be spread over 75,000 ties and would be a mere trifle as compared with the loss if it is to be confined to 3,600 ties."

All this, I think, involves a fallacy—the plaintiffs would require to make all these expenditures to carry out their contract, and their reward would be the amount of their net profits, not the net profits plus what they had spent in earning them. They cannot be in a better position than if their contract had not been broken. This $1,000 should be disallowed.

We now come to an item $1,734.24 "for supplies, etc., taken over by the defendants," but the property of the plaintiffs. What the Master says about this item is: "I think the defendants are liable to the plaintiffs for all the damages which the plaintiffs suffered from the refusal or neglect on the part of the defendants or their assignees to have that permit on Ombabika bay renewed and to permit the plaintiffs to carry out and complete their contract as originally agreed upon, and this includes the value of the supplies left at their camp at Ombabika bay, $1,734.24."

It will be seen that this involves the fallacy I have just been discussing. Counsel for the plaintiffs does not pretend to support it on any such ground but bases it as upon a conversion. We must, therefore, examine into the precise facts of the alleged conversion—and here the Master does not help us.

In the opening before the Master, counsel for the plaintiffs said: "When the defendants gave up work they had a good deal of material on hand on the ground . . . about $2,000 worth which we understand was taken over by the defendants' assignees O'Brien & Co."

The contracts between the defendants and O'Brien & Co. are two in number; an assignment of the plaintiffs' contract and an assignment of the contract to build the railway. Neither of these contains any assignment of the plaintiffs' goods—and

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consequently neither can be construed as a conversion. We must look at the facts as they occurred on the ground.

When the plaintiffs ceased work in the spring they left supplies of different kinds on the premises which they had occupied as a camp. The buildings there seem to have been rented. When O'Brien & Co. took over the defendants' contract, they wanted these supplies: Kelly went up and took an inventory of them and he and O'Brien dickered concerning the price, but apparently, could not—or at least they did not—agree. O'Brien took the supplies knowing them to be the plaintiffs', and being willing to pay the plaintiffs for them—not at all by reason of any authorization of the defendants. The plaintiffs must look to O'Brien & Co.; there was no conversion by the defendants.

Item 39 is also attacked. This was $516.55 for oats and hay alleged to have been supplied by the plaintiffs to the defendants. The Master says: "As to the item of accounting in dispute I find that the defendants should pay for the hay and oats of which they were bailees, and which they turned over to O'Brien, McDougall & O'Gorman, and that the price should be what it cost plaintiffs to put these articles at Warehouse 1, if plaintiffs had not consented to accept the lower figure fixed by the defendants—$516.55."

[The evidence was discussed on which the learned Judge disallows this item, his conclusion being that there was no sale, and that on the Master's findings the defendants were bailees, what has been said on the large item of $1,734.24 is applicable. The judgment proceeds.]

The Master has allowed to the plaintiffs also in an indirect way for other "goods supplied by the defendants to the plaintiffs for the purposes of and in connection with the said contract, which expenditure became wholly useless to the plaintiffs owing to the defendants' breach of contract. These amounts appear in items Nos. 100 to 131 inclusive . . . and instead of adding the amount to the damages assessed" he has "disallowed the items in question in dealing with the defendants' account." This is wrong for reasons I have already stated.

The amount of these, reducing No. 112 to $57 and deducting No. 116, $1,500, is $1,030.36.

The report should be amended by allowing to the plaintiffs the following sums in the first column and disallowing those in the second:—

	ALLOWED.	DISALLOWED.
(1)	Nos. 1 to 25—$9,411.60	
	34 11.25	
	35 19.26	
	40 208.40	
(2)	39	516.55

	ALLOWED.	DISALLOWED.
(3)	9,000.00	150.00
		1,000.00
		174.73
		1,734.24
Forward	18.650.51	3,575.52

In the defendants' account there should be added the above amount of $1,030.36, being the real amount of items Nos. 100 to 131 inclusive, making the defendants' total:

Amount found by Master	$9,410.95
Add	$1,030.36
	10,441.31
Balance due to plaintiffs	8,209.20
	$18,650.51

The plaintiffs' balance in other words is reduced by the sum of $3,575.52 and $1,030.36 = $4,605.88. Deducting this from $12,815.08, as found by the report, we have $8,209.20.

It is possible that the amounts really due under items 100-131 of the defendants' account are not exactly right: either party may at their own peril take a reference back upon this point only. If that be done, I will reserve to myself the question of the costs of that reference, but so far as the success has been divided, I think the plaintiffs must have the costs of the action up to and including judgment, and no costs of reference, appeal, or motion for judgment to either party. If my figures are adopted the plaintiffs may have judgment for $8,209.20 with costs up to and including judgment at the trial only.

Judgment for plaintiff.

DART v. TORONTO R. CO.
(Decision No. 2.)

Ontario Court of Appeal, Garrow, Maclaren, Meredith, and Magee, JJ.A., and Lennox, J. November 19, 1912.

1. TRIAL (§ III C—216)—INDEFINITE AND INCONCLUSIVE ANSWERS TO QUESTIONS SUBMITTED TO THE JURY—SENDING JURY BACK.

Where the answers of a jury to questions put to them are indefinite and inconclusive, it is a wise practice for the trial Judge to send the jury back, for the purpose of making their meaning plain.

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2. NEGLIGENCE (§ II A—76)—WHEN CONTRIBUTORY NEGLIGENCE A DEFENCE —WHAT MUST BE FOUND.

In order to disentitle a plaintiff to recover upon the ground of contributory negligence, it must be found distinctly that the accident was attributable to his failure in the duty imposed upon him.

[*Rowan* v. *Toronto Street Railway Co.*, 29 Can. S.C.R. 718, referred to.]

3. NEW TRIAL (§ III B—15)—ABSENCE OF A DEFINITE FINDING BY THE JURY —INCONSISTENT ANSWERS.

Where the jury, in answer to the question whether the defendant could, by the exercise of reasonable care, have avoided the accident, answer, "Yes, to a certain extent," and further state that his want of reasonable care consisted in "lack of judgment," these answers do not amount to a definite finding of contributory negligence, but the proper course is to send the case back for a new trial.

Statement

APPEAL by the defendants from the judgment of a Divisional Court reversing the judgment at the trial before Latchford, J., and a jury, in favour of the plaintiff, and directing a new trial.

The decision on the application for leave to appeal is to be found: *Dart* v. *Toronto R. Co.*, 3 D.L.R. 376.

The action was brought to recover damages said to have been caused to the plaintiffs upon a highway in the city of Toronto by the negligent operation of a street car by the servants of the defendants.

The jury answered the questions submitted to them as follows:—

"Q. Was the accident to the plaintiffs caused by the negligence of the defendants? A. Yes.

Q. If so, in what did such negligence consist? A. Excessive speed, and not proper warning.

Q. Was the car properly under control as it approached the crossing? A. No.

Q. Was the speed of the car excessive as it approached the crossing? A. Yes.

Q. Was proper warning given the plaintiffs by ringing the gong? A. No.

Q. Could Dart by the exercise of reasonable care have avoided the accident? A. Yes, to a certain extent.

Q. Could any of the other plaintiffs, Tassie, Blair, or Norvell, have avoided the accident by the exercise of reasonable care? A. No.

Q. If Dart could have avoided the accident, in what did his want of reasonable care consist? A. By lack of judgment.

Q. What was the want of reasonable care, if any, on the part of the other plaintiffs or any of them? (No. answer.)

Q. After the motorman ought to have become aware of the peril of the plaintiffs, could he, by taking reasonable precautions have avoided the accident? A. Yes.

Q. What damages, if any, do you find the plaintiffs entitled to? A. Dart, $800; Tassie, $250; Blair, $25; Norvell, $15."

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And upon these answers, Latchford, J., directed judgment in favour of the plaintiff.

The Divisional Court set aside this judgment and directed a new trial; holding that there was no evidence to support the tenth answer, and that the answers as to contributory negligence (6th and 8th) were not sufficiently explicit.

The appeal was dismissed.

Statement

D. L. McCarthy, K.C., for the defendants.

D. Inglis Grant, for the plaintiff.

GARROW, J.A., after setting out the facts as above, said that he agreed with the Divisional Court in both positions taken by them, but that from the course of the argument it was apparent that only the second ground taken by them called for further observation. The judgment proceeds:—

Garrow, J.A.

A perusal of the evidence and of the charge amply shews that the jury were well warranted in finding the defendants guilty of negligence causing the accident. And the circumstances would also, I think, have warranted a finding of contributory negligence, of which there was certainly some evidence.

Nor can fault be found, I think, with the learned Judge's charge, in which, with reference to what the plaintiff might have done to avoid the accident, he said:—

"Then, if Dart could have so avoided the accident, that is, by exercising reasonable care, in what did his want of reasonable care consist? Should he have looked out? Should he have approached a crossing of that kind slowly, and when he got to a point where he could see up and down the street, should he have halted his horse before he attempted to cross, where there were two lines of cars, one up and one down? He did not look down, there is no suggestion that he looked down. I want you to answer that question; what was his want of reasonable care? Then, what was the want of reasonable care on the part of any of the other plaintiffs?"

Under these circumstances, and with deference to the learned trial Judge, can one say with certainty that the jury intended to find, or not to find, contributory negligence on the part of the plaintiff Dart? The sixth answer, "yes, to a certain extent," might have passed muster, if the eighth had found the facts upon which the "extent" depended; as, for instance, that Dart did not look in time, or advanced too rapidly, or did not halt when in a place of safety.

But how can such or indeed any safe meaning be reasonably extracted from the words "by lack of judgment"; which, in the circumstances, seem fatally indefinite and inconclusive. The measure of the plaintiff's duty was to exercise the judgment of a reasonable man; and whether he did or did not perform that duty depends upon what he did or failed to do upon that occa-

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sion—as to which we are left by the finding quite in the dark—and not upon whether he has good or bad judgment.

The point is one which is of frequent occurrence but which is usually avoided, wisely, in my opinion, by sending the jury back to further elucidate and make their meaning plain, if possible.

Under the circumstances, where so much depends upon the actual facts, not much assistance can be got, in my opinion, from decided cases—to a number of which we were referred by counsel upon the argument.

Mr. McCarthy admitted that it was necessary for him to maintain that the finding amounted to an absolute finding of contributory negligence. Apart from the cases I could not so construe its language, for the reasons which I have given; but in addition it seems to fall within the rule indicated by Sir Henry Strong, C.J., in *Rowan* v. *Toronto Street R. Co.*, 29 S.C.R. 718, at page 719, where that very learned Judge says that to disentitle a plaintiff to recover, upon the ground of contributory negligence, it must be found distinctly that the accident was attributable to his failure in the duty imposed upon him.

There is in my opinion no such distinct finding in the present case. But as the jury evidently intended to make a finding of some kind, not entirely in exoneration of the plaintiff, upon the subject of contributory negligence, I think the Divisional Court exercised a wise and entirely proper discretion in granting a new trial.

The appeal should be dismissed with costs.

Maclaren, J.A. MACLAREN, J.A.:—I agree.

Meredith, J.A. MEREDITH, J.A.:—I agree with the learned Chief Justice of the Divisional Court in his conclusions that there is nothing in this case sufficient to support a judgment in the plaintiffs favour on the ground of "ultimate negligence"; and that the findings of the jury on the question of contributory negligence are so uncertain that a new trial must be had before justice can be done between the parties.

There is no evidence, nor any finding, of any negligence on the part of the defendants except in the excessive speed of the car, failure to sound the gong so as to give proper warning of its approach, and failure to see the danger and avoid the injury; and there is no ultimate negligence in these things; they are all things which would be offset by contributory negligence of the plaintiff.

There is no evidence, nor any finding, that the motorman did see the danger and might then in the exercise of ordinary care in the circumstances, have avoided the injury; that would be what is commonly called "ultimate negligence"; it would give rise to a later and new duty in the defendants towards the

Meredith, J.A.

plaintiff—the duty, notwithstanding his negligence, to avoid injuring him, if by any reasonable means that could then be done.

But to find that the motorman ought to have seen the man's peril and to have averted it, is to find original negligence only, in not keeping a proper outlook, negligence which would be offset by the plaintiff's negligence in not doing likewise, with, indeed, much easier means of seeing the danger, and either not running into it or else turning away from it.

So that the plaintiff cannot hold his judgment upon the finding of the jury in answer to the tenth question.

It is much to be regretted that the jury were not required to give more definite and understandable answers to questions six and eight; the failure to do that makes the delay, cost, and worry, of another trial unavoidable.

It is quite clear that the jury did not find the plaintiff altogether not guilty of contributory negligence; that they were not able to say that much in his favour; but just what they meant in this respect, it is impossible, with any degree of certainty, to understand from the words used; and, as the Chief Justice remarked, their meaning ought not to be guessed at.

If the jury meant that by the proper exercise of his judgment the plaintiff might have avoided part of the inquiry which was caused by the accident, the damages should have been assessed accordingly, but there is nothing to indicate that they were.

As was held in the Divisional Court, the whole thing is quite too uncertain to support any just final adjudication on the plaintiff's claims.

And I am quite unable to agree in, or give effect to, the contention that, because there is a clear finding in the plaintiff's favour on the question of negligence on the part of the defendants, the plaintiff ought to recover unless there is a clear finding of negligence on his part too; it is not a case in which one or other of the parties must succeed finally now; that is the middle course of trying it over again and taking proper care to get conclusive findings; against which course neither of the parties, nor indeed the Court, can very reasonably complain, because it is only because they all failed in their duty to clear up the uncertainty when they should have done so, and when it could easily have been accomplished with delay or cost, that a new trial is necessary.

I would affirm the ruling in the Divisional Court; the respondents should have their costs of this appeal; but we are not now concerned with what the effect of this affirmance may be under the order giving leave to bring this appeal.

MAGEE, J.A., and LENNOX, J., also concurred in the result.

Magee, J.A.
Lennox, J.

Appeal dismissed.

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Dec. 27.

PIGEON et al. v. PRESTON.

(Decision No. 3.)

Saskatchewan Supreme Court. Trial before Newlands, J. December 27, 1912.

1. LANDLORD AND TENANT (§ II E—36)—BREACH OF COVENANT NOT TO ASSIGN—REMEDY FOR—NOTICE TO QUIT.

If a lease contains a covenant not to assign the lease without the lessor's consent (and that in such event the lessor could re-enter) and such covenant is violated by the lessee, the proper remedy for the lessor is to enter and terminate the lease; and notice to quit at a future date and a distraint made for the rent cannot be said to be evidence of a re-entry, as the lessee was thus recognized as a tenant by the lessor.

[Woodfall on Landlord and Tenant, 15th ed., 337, referred to.]

2. LANDLORD AND TENANT (§ II D—33)—RE-ENTRY—BREACH OF COVENANT NOT TO ASSIGN—WAIVER OF.

Where a lease contains a covenant not to assign without lessor's consent and an assignment of the lessee's interest in the lease is made, and thereafter the lessor assigns his title, and the lessor's assignee, subsequently learning of the prior assignment by the lessee, accepts rent from the party in possession under the lessee, and later distrained on his goods for other rent, and makes no re-entry, the breach of the covenant not to assign is waived.

3. REFORMATION OF INSTRUMENTS (§ I—1)—MISDESCRIPTION—MISTAKE.

Where a lease describes the premises demised as being lot 7 in block 150, according to plan Q2, whereas the true description should be "lot 7, block 152," an action lies to reform the lease.

Statement

ACTION by a tenant to restrain defendant from levying on the goods and chattels in the demised premises for an amount greater than that reserved as rent in the lease to their assignors, and for the reformation of the lease and of the assignment by correcting the description and for damages for unlawful distress.

Judgment was given for the plaintiff for relief asked for.

J. Munro, for plaintiffs.

H. V. Bigelow, for defendant.

E. M. Bill, K.C., for Starland, Limited.

Newlands, J.

NEWLANDS, J.:—Thos. W. Buckley, by indenture of lease, dated August 8th, 1910, leased to The Starland, Limited, certain premises in the city of Saskatoon described in the lease as lot 7, in block 150, according to plan Q2. This description of the property was not the correct one, the proper description being lot 7, block 152. The lease was for three years and contained a provision for renewal for an additional two years, and also contained a covenant that the lessee "would not assign or sublet without leave" with a proviso for re-entry by the lessor on non-performance of covenants. On the 7th of August, 1911, The Starland, Limited, assigned said lease to the plaintiffs, the interest of Thos. W. Buckley in the lease having been previously assigned to the defendant on the 18th February, 1911. The plaintiffs paid the rent to the defendant up to and including

January, and up to this time I must find that there is no evidence that the defendant knew of the assignment from The Starland, Limited, to the plaintiffs. About this time, however, he became aware of the fact and on the 26th of January, 1912, gave the plaintiffs notice in writing to quit and deliver up to him possession of said premises on the 26th of February then next ensuing. The defendant did nothing more at that time and the plaintiff paid him the rent for February and March, and on the 5th of March the defendant gave the plaintiff another notice to quit such premises on the 8th of April, and if they did not do so he advised them that the rent thereafter would be $250 per month. The plaintiffs tendered the rent to the defendant in April at the rate mentioned in the lease, but he refused to accept the same and issued his distress warrant on the 14th of May against the plaintiffs for $250 and levied said amount on their goods and chattels, which amount with the costs of distress the plaintiffs paid under protest. The defendant subsequently notified the plaintiff that he raised the rent to $300 per month and afterwards to $400, and the plaintiffs brought this action to restrain the defendant from levying on their goods and chattels for an amount in excess of the $175 reserved by said lease and for damages for unlawful distress, and to reform said lease and assignment by changing the number of the block in the description thereof from 150 to 152.

The defence is practically that the lease is at an end by the breach of the covenant not to assign without leave, although the defendant has not set up these facts in his defence, relying, I presume, upon what he considers the weakness of the plaintiff's title.

As I have stated, there is no evidence up to January, 1912, that the defendant knew that the plaintiff held said premises under an assignment from The Starland, Limited, but from that time on he knew of it. Now, on a breach of a covenant not to assign without leave, the defendant's remedy was to enter and terminate the lease. His first action was taken on January 26, when he gave the plaintiffs a notice to quit on February 26th. This notice is no evidence of a re-entry, because it allows the plaintiffs to remain as tenants until February 26. On that date he did not re-enter, but accepted the rent due, and he also accepted the rent due in March, in which month he again gave them a notice to quit on April 8, again recognizing them as his tenants until that date. His next action was the distress warrant on May 14, which again recognized them as tenants.

Woodfall on Landlord and Tenant, 15th ed., 337, says:—

> Generally speaking, where a forfeiture has been incurred for breach of any covenant or covenants, the lessor must do some act evidencing his intention to re-enter for the forfeiture and determine the lease, and the lease will be avoided from that time only.

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Now in this case he did nothing to shew his intention to enter for breach of the contract, except to give notice to quit and distrain, both of which acts acknowledged that a tenancy existed.

There being no evidence of a re-entry for breach of covenant with the intention of terminating the lease, and a re-entry not having been pleaded, and there being evidence that the defendant accepted rent after he became aware of the assignment and distrained on the plaintiffs' goods for rent which he claimed to be due, I am of the opinion that he has waived the breach and that plaintiffs are entitled to the relief asked for, including the sum of $76 paid under protest in excess of rent due.

Judgment for plaintiffs.

GAAR-SCOTT v. MITCHELL.

(Decision No. 2.)

MAN.

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1912

Oct. 21.

Manitoba Court of Appeal, Richards, Perdue, Cameron, and Haggart, JJ.A. October 21, 1912.

1. CONTRACTS (§ II D 2—175)—SALE OF MACHINERY—AGREEMENT FOR LIEN ON LAND TO SECURE PRICE—VERBAL MODIFICATION OF CONTRACT.

Upon the sale of certain machinery and accessories where the buyer agreed to give the seller a lien or charge on certain lands for the price, but because of the seller's failure to deliver three of the articles enumerated an allowance was agreed upon in lieu of such articles and their delivery was waived, such does not constitute a substitution of a new verbal contract for the original written agreement, but only a modification of one part of it, to which modification the defendant was a consenting party, and the sellers were entitled not only to judgment for the balance of the original debt but to a lien or charge on the lands referred to and a sale of the buyer's interest therein to realize the amount of the debt and costs.

[*Rustin* v. *Fairchild*, 39 Can. S.C.R. 274, distinguished.]

2. SALE (§ III B—69)—SALE OF MACHINERY—LAND LIEN AS COLLATERAL SECURITY—DELIVERY, CONDITION PRECEDENT—WAIVER.

Where an implement company sells certain machinery and its attachments, taking for the purchase price the buyer's so-called promissory notes, appending to the notes a specific lien agreement as well as an agreement to execute a mortgage against his lands, for the price of the goods, the delivery of all the goods is, by necessary implication, a condition precedent to the operation of the lien and execution of the mortgage against the lands; yet if some of the attachments are missing and their non-delivery is subsequently compromised orally between the seller and the buyer by a stipulated allowance satisfactory to the buyer, the seller is not thereby disentitled to the collateral security by way of lien on the lands, for the price as so reduced.

[*Rustin* v. *Fairchild*, 39 Can. S.C.R. 274, discussed and distinguished; *Gaar-Scott* v. *Mitchell*, 1 D.L.R. 283, affirmed.]

Statement

PLAINTIFFS sued defendants on an agreement to purchase a threshing outfit and brought this action to recover the balance of the purchase price and to enforce a lien for the amount due against the defendant's lands.

The case was tried before Macdonald, J., who entered judgment for the plaintiffs: *Gaar-Scott Co.* v. *Mitchell*, 1 D.L.R. 283, 20 W.L.R. 6.

Defendant appealed, claiming that three of the articles forming a part of the outfit were not delivered to him and that, therefore, plaintiffs were not entitled to enforce the lien.

The appeal was dismissed.

The appeal from the judgment of the lower Court was in one particular only, that is, as to that portion of it declaring the plaintiffs entitled to a lien on the lands of the buyer.

The effect of the decision of the Manitoba Court of Appeal is not to disturb any of the findings of the lower Court: *Gaar-Scott* v. *Mitchell*, 1 D.L.R. 283, 20 W.L.R. 6.

E. L. Howell, for defendant.

D. A. Stacpoole, and *L. J. Elliott*, for plaintiffs.

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PERDUE, J.A.:—The plaintiffs, who are a manufacturing company, sue the defendant on an agreement in writing made by him to purchase a threshing outfit from them. They seek to recover the balance of the purchase price and to enforce a lien for the amount against the defendant's land. This outfit consisted of a traction engine and separator, and a number of attachments and appliances to be used in connection with them, all of these being enumerated in the agreement. The defendant claims that three of the articles forming an essential part of the outfit as ordered were not delivered to him, that the plaintiffs have consequently failed in proving that they performed their part of the agreement and that therefore the plaintiffs are not entitled to enforce the lien.

The agreement contained a provision that the defendant would give the plaintiffs a mortgage on his land at the time of the delivery of the machinery, or thereafter on demand, for the purpose of securing payment of the purchase money. It is shewn that three of the articles forming part of the outfit purchased, namely, one cab for engine, 2 side curtains and two end curtains, were not delivered in accordance with the agreement. The plaintiffs failed to deliver the cab and the end curtains. Side curtains were delivered, but these were incomplete. If the case ended there, the principle enunciated in the case of *Rustin* v. *Fairchild*, 39 Can. S.C.R. 274, would apply and the provision as to the mortgage would only become operative upon the complete delivery being made pursuant to the contract. The subsequent actions of the parties, however, put an entirely different aspect on the case, one which completely distinguishes it from *Rustin* v. *Fairchild*, 39 Can. S.C.R. 274.

The agreement for purchase was dated 28th July, 1906. Delivery of the machinery, with the exception of the above three articles, was made on or about 9th September, 1906, and was accepted by the defendant. An arrangement was made between the parties by which the defendant received a satisfactory allowance for the missing parts. At, or just before, the receipt of the machinery the defendant signed promissory notes payable at the times and for the sums stated in the agreement, and comprising in the aggregate, the whole amount of the purchase money. He also, at the same time, executed a specific lien under his hand and seal whereby he created a charge upon his land for the purchase money, payable in the same manner as the notes. The notes and lien were dated 6th September, 1906. The defendant made several payments on account, but a large portion of the purchase money remained due and unpaid when the action was commenced.

It is clear that the principle set out in *Rustin* v. *Fairchild*, 39 Can. S.C.R. 274, does not apply in the present case. Deliv-

ery of the missing articles was waived by the defendant for a consideration that was satisfactory to him, with the effect of modifying the agreement accordingly. He accepted the machinery and gave notes and a lien on his land to secure the purchase money due under this modified agreement. He retained the machinery for several years and made payments on account. There was ample consideration for the making of the promissory notes and for the giving of the lien upon the land.

The judgment was properly entered for the balance due upon the notes and the plaintiffs are also entitled to have the lien enforced against the defendant's land, as directed by the judgment pronounced at the trial of the action.

The appeal should be dismissed with costs.

Cameron, J.A.

CAMERON, J.A.:—This action was tried before Mr. Justice Macdonald, who gave a written judgment, setting forth the facts, and entered judgment for the plaintiff. The action was brought to recover amounts claimed to be due on an agreement to purchase certain machinery and also to declare the plaintiff entitled to a lien alleged to have been created by the defendant to secure these amounts.

The defendant appeals from this judgment in one particular only, viz: that portion of it declaring the plaintiffs entitled to a lien. It is alleged for the defendant that certain articles specified in the agreement were not furnished the defendant, that certain other articles were substituted for these, that the effect was to substitute a new verbal agreement for the original written agreement and that, therefore, the original agreement, having ceased to exist, there remained for the plaintiff its claim for money only, but no claim for a lien.

We were especially referred to the case of *Rustin* v. *Fairchild*, 39 Can. S.C.R. 274, where the agreement in question was similar to that set up here. The question before the Supreme Court was as to the right of the respondents (the company) to enforce the lien called for under the provisions in the contract sued on. As I understand it, the judgment of the Supreme Court was that the delivery of all the machinery contracted to be delivered to the purchaser by the company was, under the wording of the contract as a whole, a condition precedent to the creation of a lien by the purchaser upon his property for the amount of the purchase money, and that this condition precedent was not performed and that therefore the lien did not arise:—

> I am of the opinion that the said provision (*i.e.*, as to the lien on the lands), will only become operative in the case of a complete delivery pursuant to such a bargain: *per* Idington, J., at p. 277.

Now, if we take it that the condition here had precisely the effect of that in the case of *Rustin* v. *Fairchild*, 39 Can. S.C.R.

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274, it is plain on the evidence that the defendant by his actions waived the performance of that condition. I can arrive at no other conclusion. That seems to me a sufficient answer to this contention.

In my view there was not here a substitution of a new verbal contract for the original written agreement. It was rather a modification of one part of the original agreement to which modification the defendant was an assenting party. The parties had this intention and no other. I have read Mr. Justice Perdue's judgment, and agree that the appeal must be dismissed.

Appeal dismissed.

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Dec. 20.

INGRAHAM v. McKAY.

Nova Scotia Supreme Court, Graham, E.J., and Meagher, Russell, and Drysdale, JJ. December 20, 1912.

1. LEVY AND SEIZURE (§ III C—50)—PRIORITIES—EXECUTION CREDITORS AND LANDLORD.

Where the goods of a tenant are seized upon the demised premises and sold under execution, the sheriff, in order to give a good title, must first apply the proceeds in satisfaction of the landlord's claim for rent, by virtue of the Creditors' Relief Act, R.S.N.S. 1900, ch. 172.

2. LANDLORD AND TENANT (§ III D 2—105)—SET-OFF BY LANDLORD—CLAIM FOR RENT AGAINST PURCHASE PRICE AT SHERIFF'S SALE.

Where a sheriff's sale under a writ of execution against the tenant, with the assent of the landlord, is held upon the demised premises, the landlord himself becoming the purchaser, he is entitled, notwithstanding such assent, to offset his claim for rent against the claim for the purchase price of the goods, and is not driven to an action on the case against the sheriff.

[*Green* v. *Austin*, 3 Camp. 260, distinguished.]

Statement

APPEAL from the judgment of Ritchie, J., dismissing with costs an action brought by plaintiff as sheriff of the county of Cape Breton as holder against the defendant as drawer of a cheque for the sum of $195 payable on demand to the order of plaintiff at the Royal Bank of Canada, Glace Bay, C.B., which was alleged to have been duly presented for payment and dishonoured.

The defence was that the goods of defendant's tenant were with defendant's consent sold on the demised premises and that defendant at the sale became the purchaser thereof for the sum of $455. That at the time of the sale the sum of $195 was due defendant for rent; that a cheque for the sum of $260, being the difference between the amount of the rent due and the purchase price of the goods, was given to plaintiff's deputy and was paid before action brought, and that as to the cheque for $195, being the amount due defendant for rent, it was merely given to plaintiff to hold pending distribution of the proceeds of the sale under the provisions of the Creditors' Relief Act, N.S. Acts 1903, ch. 14.

From this judgment the plaintiff appealed.

J. L. Ralston, for appellant, as to the right of the sheriff to remove goods without payment of rent, referred to *Smallman* v. *Pollard*, 6 M. & G. 1001; *Wharton* v. *Naylor*, 12 Q.B. 673; *Clarke* v. *Farrell*, 31 U.C.C.P. 584; *Riseley* v. *Ryle*, 11 M. & W. 16; *Green* v. *Austin*, 3 Camp. 260; *Re Mackenzie*, [1899] 2 Q.B. 566. If there was a removal defendant had no right of set-off: *Henchett* v. *Kimpson*, 2 Wils. 140; *Arnitt* v. *Garnett*, 3 B. & Ald. 440. As to right to notice, *City of Kingston* v. *Shaw*, 20 U.C.Q.B. 223, at 229. There is no evidence of an implied contract.

H. Mellish, K.C., for respondent:—The Creditors' Relief Act does not apply. The defendant had a right of set-off: Foa on Landlord and Tenant 176; *Thomas* v. *Mirehouse*, 19 Q.B.D. 563. The landlord had a right to retain the amount due him for rent out of the price of the goods, whether the goods were removed or not. The word "removal" as used in the statute refers to removal before the sale takes place: *Rotherey* v. *Wood et al.*, 3 Camp. 24.

The appeal was dismissed.

The judgment appealed from was as follows:—

Ritchie, J.

RITCHIE, J.:—The plaintiff, as high sheriff of the county of Cape Breton, levied upon the stock-in-trade of one McKinnon under an execution at the suit of the Stanfield Smith Co., the goods levied on were at the time of the levy in a shop or building at Glace Bay belonging to the defendant, and McKinnon was his tenant. There was due in respect of the rent $195, which covered a period of less than one year; the deputy sheriff sold the goods under the execution to the defendant for the sum of $455. The goods were not removed from the building. When the defendant came to pay for the goods he proposed in settlement to give his cheque for $260, deducting the balance of $195 in payment of the rent due to him. The deputy told the defendant he did not know whether the plaintiff would do that or not. He rang the plaintiff up at Sydney, and he declined to close the matter on this basis, insisting upon payment of the full amount of the purchase price. This was communicated to the defendant, who then said:—

> I will tell you what I will do, I will give you two cheques. Ask the sheriff to hold the cheque for the $195 rent until he goes to pay it and then he can return me my cheque.

The deputy did not agree to this and told the defendant that he did not know whether the plaintiff would do that or not, and that he (the deputy) had no authority to do it. The defendant asked the deputy to take the cheques to the sheriff. The deputy took the cheques and said he would see the sheriff about it.

The next that the defendant knew about it was that his bankers advised him by telephone that both cheques were presented,

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whereupon he countermanded payment of the $195 cheque, which is the cheque sued on in this action. There is a direct conflict of testimony between the defendant and the deputy. The defendant swears that the deputy said to him, "You give me your cheque so that I can enter it up in the books and I will return your cheque to you at the end of thirty days; we won't cash it." This is denied by the deputy and I think the defendant is mistaken and adopt the deputy's evidence on this point. I do not think there was any positive agreement that the cheque would not be cashed. The deputy had no authority to make such an agreement and he was evidently cautious not to exceed his authority. He admits, however, that he might have said that it was probable that neither of the cheques would be cashed for thirty days.

The question of law which presents itself for consideration is, Had the defendant by virtue of sec. 18, ch. 172, of the Revised Statutes, a legal right to be paid the rent at the time when he proposed to deduct it from the purchase price of the goods? If he had such right then he has the right to set it off in this action. I am of opinion that he had such right, and I do not agree that the plaintiff could legally force him to wait until the proceeds of the sale were distributed under the Creditors' Relief Act. The words of sec. 18 are as follows:—

> No goods being upon any messuage or tenement leased shall be liable to be taken by virtue of any attachment or execution unless before removal of such goods from off the premises the person at whose suit the attachment or execution is sued out pays to the landlord or his bailiff at least one year's rent of such land or tenement, if so much is in arrear and due; and if the rent is not actually due, then a rateable part thereof up to the levy of the attachment or execution.

This is, I think, clear beyond all doubt or question that under the section which I have quoted a sheriff has no right to delay the landlord until the matter is closed under the Creditors' Relief Act or to delay him at all, he must pay before the goods are removed. The general practice, I think, in this Province is that the sheriff takes the goods without payment, giving his undertaking to the landlord that the rent will be paid out of the proceeds of the sale, so far as such proceeds will go. A like practice prevails in England: see *Re Mackenzie*, [1899] 2 Q.B. 566. Speaking of this practice, Lindley, M.R., made the following obvious remark: "Strictly speaking this would be irregular unless the landlord consented."

The practice in the sheriff's office cannot override the statute. I cannot find on the evidence in this case that the landlord consented. I think he was very strongly impressed with the idea that he was entitled to his rent, then and there; he was protesting all along and he gave the cheque with the request that the

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sheriff would hold it, and the deputy told him that he would see the sheriff. Mr. Ralston, for the plaintiff, took the ground that the defendant was not entitled to his rent at all because the goods were not removed. I can not agree with this contention. I agree that the words in the section under consideration "To be taken" do not mean the original taking, and that what is meant is that the sheriff shall not remove the goods unless the rent is first paid, but here, I think, there has been a substantial taking within the meaning of the section; the goods are not removed because there is no necessity for any removal, the defendant being the purchaser; but they are paid for by cash, and the deduction of the rent and the title passes to the defendant. The deputy, the defendant and the solicitor of the execution creditors meet together and all agree that the rent must be paid. The execution creditors are not raising any objection. I think that what took place brings the plaintiff within the statute and that there was a constructive removal or what was equivalent to a removal. I have not overlooked the case of *Clarke* v. *Farrell*, 31 U.C.C.P. 584, but I think the facts of this case make it distinguishable. I dismiss the action with costs.

The judgment of the Court was delivered by

Graham, E.J.

GRAHAM, E. J.:—The plaintiff, the sheriff of Cape Breton, sues the defendant for the sum of $195, being the balance of the price bid by the defendant for goods sold by the sheriff at auction under execution.

The defendant was, however, the landlord of the judgment debtor, and he had a claim for rent due to him and a lien on the goods then being on the landlord's premises.

The goods were sold for $455, and if sold to any other person of course the sheriff would have to apply the proceeds first to the payment of the rent. He was giving a clear title. The defendant was, however, the purchaser. As between these parties that sale cannot be brought in question. It was not questioned before us. Immediately after the sale in the office of the creditor's solicitor the deputy sheriff who sold the goods and the landlord, with the assent of the solicitor, adjusted the amount of the rent of which they had an account after deducting the sum of $5, and it was adjusted at the sum of $195, and it thus became a liquidated amount. The sheriff objected over the telephone to setting off the one sum against the other, or it would have been settled there.

By ch. 172 R.S. 1900, sec. 18 (1), it is provided:—

> No goods being upon any messuage or tenement leased shall be liable to be taken by virtue of any . . . execution unless before removal of such goods from off the premises the person at whose suit the execution is sued out pays to the landlord or his bailiff at least one year's rent of such land or tenement, if so much is in arrear and due; and if the rent is not actually due, then a rateable part thereof up to the levy of the . . . execution, etc., etc.

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It is the same as the English statute of Anne.

The goods were sold, as I have intimated, on the premises and to the landlord, and of course it would be highly inconvenient to remove the goods for the purpose of removing them only to have them moved back. And it would also be very formal for the landlord to pay to the sheriff the balance due on the goods and for the sheriff to pay back the amount due for rent to the landlord. I think the law does not require people to go through such formalities.

The sheriff, in order to release from the lien and to give a title to the goods, had to pay the rent to the landlord and as against the judgment creditor or the judgment creditors would have a complete answer to any claim against him for the money so paid: *Re Neil Mackenzie*, [1899] 2 Q.B. 566; *Re McCarthy*, L.R. 71 Ir. 473. In *Thomas* v. *Mirehouse*, 19 Q.B.D. 563, Lord Esher, M.R., says at 566:—

> When notice has been given by the landlord to the sheriff that rent is due, it becomes the duty of the sheriff under the statute not to sell anything upon the demised premises till the rent has been paid. Even if there are goods upon the demised premises of a value many times exceeding the amount of rent due, his duty is the same. He must refuse to sell the smallest part of the goods until the claim of the landlord is satisfied. Now of course the sheriff is not bound to find money with which to satisfy the claim of the landlord. He must, therefore, before he proceeds with the execution, apply to the execution creditor for the sum which is necessary. If the execution creditor provides it, the sheriff pays the landlord and proceeds with the execution. If the execution creditor does not provide it, the sheriff cannot be called on to infringe the statute. He may either return *nulla bona* and withdraw from possession, or may himself pay the rent, looking to the execution creditor for reimbursement, and proceed to sell. This is the position of the sheriff under the Act. If he commits a breach of duty by a wrongful sale, i.e., a sale which takes place before the rent is paid, the statute appears to me to state by implication that he will be liable to compensate the landlord by paying him the amount of rent which is due. This is the consequence of the enactment which makes the removal without payment of the rent illegal. It is only upon payment of the rent that the sheriff is entitled to remove the goods.

In the case of *Re Mackenzie*, [1899] 2 Q.B. 566, 575, Lindley, M.R., delivering the judgment of the Court of Appeal, says:—

> But now suppose the sheriff sold and deprived the landlord of what was practically his lien on the goods, and then to save himself from an action by the landlord paid him out of the proceeds of the sale, or handed the proceeds of the sale in part discharge of the rent due to him, strictly speaking, this would be irregular unless the landlord consented; but even if he did not, still no one would be damnified if the sale was fairly conducted. The landlord would have nothing to complain of, for he would get his money, so far at all events as the goods seized could be made available for his payment. The execution debtor would not be damnified, for he owed the rent and he could not get his

goods without paying it. The execution creditor would not be damnified, for he could not get paid without satisfying the landlord. Hence it became the practice for the sheriff to sell and pay the landlord, and it was held that if the sheriff sold without paying the landlord, the landlord, instead of bringing an action against the sheriff on the statute, might apply to the Court for and obtain a rule, that is an order, for payment out of the proceeds of sale: *Henchett* v. *Kimpson*, 2 Wils. 140, and *Arnitt* v. *Garnett*, 3 B. & Ald. 440. This mode of procedure became the common practice. And after the sheriff had notice of the landlord's claim before the proceeds of sale were parted with, the landlord could, if in time, obtain payment out of the proceeds: *Yates* v. *Routledge*, 5 H. & N. 249. And if too late he could sue the sheriff for removing the goods without paying him: *Andrews* v. *Dickson*, 3 B. & A. 645. The right of the landlord to be paid out of the proceeds of the sale thus became recognized and established where no bankruptcy intervened.

Then he deals with the bankruptcy provisions and he says:—

> But this section has not in our opinion rendered it wrong for him to pay the landlord that which the sheriff had a right to pay him for his own indemnity, and that which the landlord had a right to have paid him in lieu of his right to sue on the statute of Anne. . . . Nor are the proceeds of the sale of such goods to be handed over free from the rights of the landlord or of the sheriff for his own indemnity. Even if the trustee in bankruptcy can require the sheriff to hand over the goods or proceeds, we see nothing to displace the right of the landlord under the statute of Anne to have those goods kept unremoved, or his right sanctioned by long practice to be paid out of the proceeds if they have been removed and sold contrary to the statute.

Before passing, this case shews conclusively that the creditors under our statute would have no right to question the right of the sheriff and of the landlord to the payment of the rent, and they are not questioning it. There is no question of amount, because after the action was brought the sheriff sent to the landlord a cheque for $195, which was returned.

The question raised is as to the right to set off one sum against the other.

The case of *Green* v. *Austin*, 3 Camp. 260, is relied on to shew that an action for money had and received will not lie by the landlord to recover the rent against the sheriff who has sold his tenant's goods under an execution; that the proper remedy was an action on the case against the sheriff upon the statute. But that was a case where the sheriff had tortiously, I mean in breach of the statute, sold the goods, and the action should have been against him as a wrongdoer. It was not like this case where the sheriff sold with the consent of the landlord and must pay him the proportion of the proceeds he obtained for him. He sold to the landlord, the defendant, and how can he now say, "You must sue me as a wrongdoer in an action for a breach of the statute. That is your remedy"?

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The other remedy in England of applying to a Judge, was solely because the sheriff was an officer of the Court and instead of suing him in an action on the statute a summary application could be made to the Court.

I think that these sums may be set off.

In my opinion the appeal should be dismissed and with costs.

Appeal dismissed.

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Nov. 19.

TROTTIER v. NATIONAL MANUFACTURING COMPANY, Limited.

Saskatchewan Supreme Court, Haultain, C.J. November 19, 1912.

1. JUDGMENT (§ III B—209)—EXECUTION—HOMESTEAD EXEMPTION — DECLARATORY JUDGMENT, WHEN NOT OBTAINABLE.

Where a judgment creditor registers an execution against the debtor in the land titles office during the interval between the debtor's entry for homestead and the grant of the certificate of title, and the land is subsequently acquired as a homestead by the debtor under the Dominion Lands Act, the Court will not, upon application of the judgment debtor, grant a declaratory judgment declaring that the land in question is not subject to any rights of the judgment creditor under the execution, or that the execution is not a charge or lien upon the land, or that it is a cloud upon the judgment debtor's title, since such a declaratory judgment would not establish any rights, inasmuch as the execution only binds the land which is subject to it and under the Exemptions Act (ch. 47, R.S.S. 1909), this land is exempt as long as it remains "homestead."

[*Gilmore* v. *Callies*, 19 W.L.R. 545, followed; *Fredericks* v. *North-West Thresher Company*, 3 S.L.R. 280, 44 Can. S.C.R. 318, distinguished.]

2. HOMESTEAD (§ V—40)—EXECUTION—EXEMPTION OF HOMESTEAD UNDER EXEMPTIONS ACT (CH. 47, R.S.S.)—QUESTION FOR COURT WHETHER LAND IS A "HOMESTEAD."

Whether a piece of land is a homestead under the Dominion Lands Act, and hence exempt from execution under the Exemptions Act (ch. 47, R.S.S. 1909), is a question for the Court and not for the registrar to decide.

[*Re Exemptions Ordinance, Love* v. *Bilodeau*, 7 D.L.R. 175, referred to.]

3. HOMESTEAD (§ V—40) — EXECUTION — REGISTRATION OF EXECUTION AGAINST HOMESTEAD—CLOUD ON TITLE—"APPARENT CHARGE."

Though an execution is registered against land which is really a homestead acquired under the Dominion Lands Act, and hence exempt from execution under the Exemptions Act (ch. 47, R.S.S. 1909), such registration does not constitute a cloud upon title, but is merely an "apparent charge," since the land may at any time cease to be a "homestead" by the act of the debtor and it would then immediately become liable to the execution.

4. HOMESTEAD (§ V—40)—EXECUTION—HOMESTEAD EXEMPTION—EXEMPTION CEASES WHEN LAND CEASES TO BE "HOMESTEAD."

Land acquired as a homestead under the Dominion Lands Act and exempt from execution under the Exemptions Act (ch. 47, R.S.S. 1909), will become liable to execution immediately upon the land ceasing to be a "homestead."

Statement

THE facts in this case are not in dispute. The plaintiff acquired the land in question as his homestead under the Dominion

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Lands Act. Having earned his patent, a certificate of title to the land was duly granted to him by the registrar. In the interval between the entry for homestead and the grant of certificate of title, the defendant obtained a judgment against the plaintiff, issued execution, and had its execution duly registered in the land titles office.

The registrar, upon the grant of certificate of title, endorsed a memorandum of the defendant's execution upon the certificate of title in the register and on the duplicate certificate issued by him to the plaintiff.

The plaintiff now comes in and alleges, as the fact is, that the land in question is and since a date long anterior to the execution in question, has been continuously his "homestead" under the Exemptions Act (ch. 47, R.S.S. 1909), and asks to have a declaration: (a) that the land is not subject to any rights of the defendant under its execution; (b) that the execution is not a charge or lien upon the particular land in question; and (c) that it is a cloud upon the plaintiff's title. He also asks for an order directing the registrar to remove the execution, or memorandum, from the certificate of title and duplicate.

There was judgment for the defendant.

W. W. Livingston, for plaintiff.

M. C. Sparling, for defendant.

Haultain, C.J.

HAULTAIN, C.J.:—In my opinion, the plaintiff is not entitled to any of the remedies he has asked for.

On the question of the declaratory judgment asked for, I follow the decision of Harvey, C.J., in an Alberta case, *Gilmore* v. *Callies*, 19 W.L.R. 545, in which he says, at p. 547:—

> Under our practice, a declaratory judgment may be asked for, but the decided cases on the point, which are found in the Annual Practice, shew that a declaratory judgment which the Court will grant will be one under which some rights may be established; that the Court will not make a declaratory judgment which is, as it is put there, "entirely in the air." Now, as far as any order against the defendant is concerned, there is no question whatever in my mind that the plaintiff, even if he succeeded, could not have any such order. The defendant in this case has registered an execution against the debtor in the land titles office, under the provisions prescribed by the Act. There is no doubt he has a right to do that. He has not done anything more than his right, as far as the evidence goes. He has not directed that it be charged against this land. The registrar enters it, and under the Act it binds all lands of the execution debtor subject to it. If this land is free, it does not bind this land, and the creditor does not get any advantage from it, so long as it does not bind this land. If this land ceases to be free at any time, then it does bind it.

The case of *Fredericks* v. *North-West Thresher Company*, 3 S.L.R. 280, has been cited on behalf of the plaintiff; but that case decides an entirely different question. There the plaintiff, who

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was the wife of the original owner of the land, had obtained a transfer of the land from her husband at a time when it was actually resided upon and occupied by the husband as his "homestead." The defendant had obtained a judgment against the husband and had registered its execution, and when a certificate of title was issued to the wife on her transfer from her husband, it was issued with the execution of the North-West Thresher Co. endorsed. The wife thereupon brought an action for a declaration that the execution was not a charge upon the land and for an order to remove it. Upon a case stated for the opinion of the Court, Mr. Justice Newlands held:—

> That the plaintiff took the property free from any claims of the defendant under its execution and that she was entitled to an order directing the registrar to remove the same from her certificate of title.

This decision was affirmed on appeal by the Supreme Court of Canada, *The Northwest Thresher Co.* v. *Fredericks*, 44 Can. S.C.R. 318.

This case only decided that the plaintiff was entitled to receive a conveyance of exempt land from the debtor as free from the operation of writs of execution as the debtor was to hold them, and that she became entitled to have the certificate of title cleared from "any such apparent charge" as the execution in question.

The present case is quite different. This is not an action by the transferee of exempt land to have his title cleared. The plaintiff is the execution debtor, and so long as the land in question retains its character of "homestead" under the Exemptions Act it is free from the operation of the writ of execution. But on every ground of reason and convenience the "apparent charge" created by the registration of the execution should not be removed so long as the land remains the property of the debtor. The land may at any time cease to be a "homestead" by the act of the debtor and would then immediately become liable to the execution. It would seem ridiculous to suppose that the registrar should from day to day be liable to be called upon to decide whether any particular piece of land at any particular time is of any particular character. That is a question for the Court and not for the registrar to decide: *Re Exemptions Ordinance, Love* v. *Bilodeau*, 7 D.L.R. 175. At this very moment the land in question may have ceased to be a "homestead" under the Exemptions Act, and a judgment in favour of the plaintiff might deprive the defendant of a right which would then have undoubtedly accrued.

It was argued on behalf of the plaintiff that this case differs from *Gilmore* v. *Callies*, 19 W.L.R. 545, as it does not appear that the execution in that case was endorsed on the duplicate certificate of title but was only registered in the execution regis-

ter. This point brings up the question of cloud on title. If the endorsement of the execution on the duplicate certificate is a cloud on the plaintiff's title it is only an "apparent charge," *per* Idington, J., in *Northwest Thresher Co.* v. *Fredericks*, 44 Can. S.C.R. 318. A transferee of the land while it is exempt would have a right to have the charge removed, and *semble*, *per* Scott, J., in *Love* v. *Bilodeau*, 7 D.L.R. 175, a mortgagee of the land while exempt might ask to have his priority over the execution declared. See also *Purdy* v. *Colton*, 7 W.L.R. 820, *per* Lamont, J., at 823. What practical benefit, then, does the plaintiff seek to obtain? So long as the land continues to be his "homestead" he is protected by the Exemptions Act, and his right to sell or mortgage free from the execution seems to be clearly established.

But the moment it ceases to be his "homestead" that protection is withdrawn and those rights disappear. How, then, can the Court be reasonably asked to make a declaration with regard to rights which are dependent upon conditions which may cease to exist by the act of the plaintiff at any moment and which indeed may have ceased to exist at the time the declaration is made? The effect of a judgment in favour of the plaintiff would be to give practically a permanent character to the land in question so far as existing registered executions are concerned. The execution creditor would be put to daily inquiry as to whether the land remained a "homestead." If the land at any time ceased to be a "homestead," the execution creditor would have to take proceedings to have his execution declared to be binding owing to the changed character of the land.

The argument from inconvenience is not as a general rule to be "lightly entertained," but in this instance it is unanswerable. If it arises at all in this case it resolves itself into a question of comparative convenience or inconvenience, and in my opinion it is more desirable that the plaintiff should be exposed to the more or less sentimental inconvenience of a conditionally "apparent charge" than that the rights of execution creditors should be in daily jeopardy.

For the foregoing reasons there will be judgment for the defendant, with costs.

Judgment for defendant.

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Nov. 30.

POLLINGTON v. CHEESEMAN.

Ontario High Court, Middleton, J., in Chambers. November 30, 1912.

1. PARTIES (§ III—120)—THIRD PARTY—BRINGING IN THIRD PARTY IN ACTION FOR DAMAGES BETWEEN EMPLOYEE AND EMPLOYER.

The third party procedure, whereby a third party notice is served by the defendant on the insurance company in which he is insured against loss by reason of the liability imposed upon him by law for damages on account of injuries sustained by his employees, so that the company may if it wishes dispute the plaintiff's claim against the defendant and also dispute its liability to indemnify the defendant, may be invoked for the purpose of making the finding upon the issues as between the plaintiff and defendant binding upon the third party, notwithstanding that the contract between the defendant and the third party is so framed as to preclude the bringing of an action before the defendant has actually paid.

[*Pollington* v. *Cheeseman*, 5 D.L.R. 887, and 6 D.L.R. 875, considered.]

Statement

MOTION by third parties for leave to appeal from the order of Mr. Justice Sutherland in Chambers on the 4th November, dismissing the appeal from the order of the Master in Chambers refusing to set aside a third party notice. See *Pollington* v. *Cheeseman*, 5 D.L.R. 887, 4 O.W.N. 92, and 6 D.L.R. 875, 4 O.W.N. 248.

T. N. Phelan, for third parties.

F. McCarthy, for the defendant.

Middleton, J.

MIDDLETON, J.:—The action is brought by an employee against the employer for damages by reason of injuries sustained, it is said, in the course of the plaintiff's employment.

The defendant is insured in the third party company against "loss by reason of the liability imposed upon him by law for damages on account of injuries sustained by his employees." The policy contains a number of limitations and provisions; inter alia, a stipulation that "no action shall lie aganst the company to recover for any loss . . . unless it shall be brought by the assured for loss actually sustained and paid by him in money in satisfaction of a judgment after trial of the issue."

There is a *bonâ fide* dispute as to the liability of the defendant to the plaintiff. The third party also contends that the liability, if it exists, does not fall within the terms of the insurance, and further contends that by reason of the clause quoted no proceedings can be taken against it until after the litigation between the plaintiff and the defendant has been determined and the plaintiff has recovered and the defendant has paid.

The learned Master took the view that the clause in question could not and did not exclude the application of third party procedure, or at any rate that, having regard to the principles laid down in *Pettigrew* v. *Grand Trunk R. Co.*, 22 O.L.R. 23, and *Swale* v. *Canadian Pacific R. Co.*, 25 O.L.R. 492, this question ought not to be determined upon a summary application, but should be left to be raised by the third party as a defence at the hearing. Mr. Justice Sutherland agreed with this view.

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Upon the argument of the motion I was very much impressed with the view that the third party notice ought not to be allowed to stand, in so far as that proceeding was in reality an action by the defendant against the third party; as from the contract put forward by the defendant as the foundation of his proceedings it clearly appeared that any action would be premature.

On the other hand it was quite plain that to hold that the third party procedure did not apply, where a provision such as this is inserted in the policy, would be to frustrate one of the principal objects of the practice; the securing of one trial, and one trial only, of the issue between the plaintiff and defendant. The difficulty that existed before this practice was devised, viz., the possibility that there might be discordant findings between the tribunals called upon to pronounce between the plaintiff and defendant, and as between the defendant and the third party, was a real difficulty, and the remedy has been found most beneficial.

The true solution of the matter appeared to me to be found in recognition of the dual object of the procedure. The notice served upon the third party indicates this. He is notified, so that he may, if he wishes, dispute the plaintiff's claim against the defendant, and also that he may dispute, if he desires, his liability to indemnify the defendant; and even if it is clear that the contract with the defendant is so framed as to preclude the bringing of an action upon it before the defendant has actually paid, this does not altogether defeat the jurisdiction of the Court, and the third party procedure may well be invoked for the purpose of making the finding upon the issues as between the plaintiff and defendant binding upon the third party.

I, therefore, suggested to the parties the desirability of consenting to a modification of the order on the lines indicated; and I am now notified by counsel that they consent to the order being so modified. This being so, the order will simply provide for the modification suggested and that the costs of the application and of the third party proceedings be reserved to be determined in any litigation that may hereafter take place between the defendant and the third party. If there is no such litigation, then upon an application to a Judge in Chambers. I would suggest to the parties the desirability of further providing that the question of the liability of the third party to the defendant be reserved to be disposed of upon an issue to be directed in this action; this being less expensive than the bringing of a separate action.

Order varied.

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Nov. 19.

MERCER v. BRITISH COLUMBIA ELECTRIC R. CO.

(Decision No. 2.)

Galliher, JJ.A. November 19, 1912.

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

1. PLEADING (§ I N—121)—AMENDMENT—LAPSE OF STATUTORY PERIOD AS TO NEW DEMAND—EMPLOYERS' LIABILITY ACT.

A plaintiff will be allowed to amend his statement of claim in an action for personal injuries by amplifying an alternative claim made therein under the Employers' Liability Act, although the statutory period within which an action under that Act must be brought has expired.

[*Mercer v. B. C. Electric R. Co.*, 7 D.L.R. 405, reversed.]

Statement

APPEAL by plaintiff from an order of Murphy, J., in Chambers, on the 14th of October, 1912, dismissing in part the application of the plaintiff for leave to amend his statement of claim. The action was brought for personal injuries received by the plaintiff while in the employment of the defendant company. The accident in question occurred on the 4th of November, 1911, and the writ was issued on the 13th of February, 1912. On the 20th September the application for the order complained of was heard. One of the amendments asked was that the statement of claim be amended by adding the following:—

4. Alternatively the defendant is liable to the plaintiff for damages suffered by the plaintiff by reason of the said personal injuries under the provisions of the Employers' Liability Act, the particulars of which are as follows:—

(*a*) The said freight train was on the said 4th day of November, 1911, in charge of and under the superintendence of one Frederick Cooper, now deceased, the conductor of the said train in the service of the defendant company, to whose order the plaintiff at the time of the injuries was bound to conform and did conform.

(*b*) The said Cooper negligently ordered and directed the plaintiff to haul five loaded cars on the defendant's line of railway from Vancouver to New Westminster and particularly down the hill in the vicinity of Eighth ave., where the accident in question happened, the hill in question being too steep to take five loaded cars down with safety on the day in question.

(*c*) The plaintiff obeyed the order and direction of the said Cooper so given, and as a consequence the said freight train escaped from control and ran away on the said hill and thereby caused the said personal injuries so suffered by the plaintiff as aforesaid.

This was disallowed by the learned Judge below, on the ground that the six months allowed by the Employers' Liability Act, within which the action might be brought in the circumstances here, having lapsed, to allow the amendment asked for would be merely to permit the plaintiff to bring a statute-barred action.

Argument

Armour, for appellant:—We have already given particulars in our statement of claim sufficient to found an action under

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Argument

the Employers' Liability Act, and we are merely asking to be allowed to amend these particulars. The endorsement on the writ is a general endorsement and under that we could clearly develop an action under the common law and the Employers' Liability Act. No injustice can be done to defendant by allowing the amendment. The cases cited in the reasons for judgment of Murphy, J., dismissing the application, viz.: *Weldon* v. *Neal* (1893), 19 Q.B.D. 394; *Morris* v. *Carnarvon County Council*, [1910] 1 K.B. 159, and *Hosking* v. *Le Roi* (1903), 9 B.C.R. 557, are distinguishable.

L. G. McPhillips, K.C., for the respondent, referred to *Steward* v. *North Metropolitan Tramways Company*, 16 Q.B.D. 178, 556. We deny that this is merely developing the cause of action. It certainly is not giving us particulars, because we have not demanded particulars, and it is rather peculiar that a plaintiff of his own motion should wish to amplify his particulars. He claims $5,000 damages, which is more than he can recover under the Employers' Liability Act, therefore, we took it as a common law action pure and simple, and so pleaded in answer. We have been misled. The onus was on the plaintiff to shew his line of action before the six months expired. We did not move to strike out his plea as embarrassing, because we did not consider it so. A statement of claim, to come under the Employers' Liability Act, should state so; it should not be brought within the statute by an ambiguous clause.

Armour, in reply:—Defendant had a remedy which was not pursued, and there is no wrong done.

The appeal was allowed.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—I think the appeal should be allowed and the amendment made. It is very unfortunate if, as Mr. McPhillips says, motions to strike out pleadings on the ground that they are embarrassing, are discouraged in the Courts below, because it is very useful and very necessary practice. In this case it seems to me that sub-section (J) of paragraph 2 of the statement of claim was intended to raise the rights of the plaintiff under the Act (the Employers' Liability Act). It did not do it artistically and the amendment now sought is to put that claim which is contained in sub-section (J) in the form that it ought to be in when it comes before the Court at trial. I do not think any injustice will be done to the defendant by permitting the amendment.

Irving, J.A.

IRVING, J.A.:—I think the amendment ought to be allowed.

Martin, J.A.

MARTIN, J.A.:—I concur.

Galliher, J.A.

GALLIHER, J.A.:—I agree.

Appeal allowed.

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Dec. 4.

Re STRATFORD FUEL, Etc., CO., Ltd.

Ontario High Court, Middleton, J. December 4, 1912.

1. CORPORATIONS AND COMPANIES (§ VI F—345)—WINDING-UP—LIQUIDATION—DOUBLE RANKING.

Double ranking is not permissible on the liquidation of a company.

2. CORPORATIONS AND COMPANIES (§ VI F—345)—WINDING-UP—RIGHT OF SURETIES TO RANK—SUBROGATION.

The sureties for a debt due from a company to their principal are entitled to rank on liquidation if they pay the claim before the claim is filed by the principal; but if the principal proves his claim, the sureties cannot also prove, but upon payment they would be subrogated to the rights of the principal, at the date of payment.

3. CORPORATIONS AND COMPANIES (§ VI F—345)—WINDING-UP—RIGHT OF SURETIES TO RANK FOR BALANCE DUE CREDITOR OF COMPANY AFTER COMPROMISE.

Where under the terms of a guarantee, a creditor of a company had the right to compromise his claims against the company and still hold the sureties for the balance, the sureties are not entitled to rank on the liquidation of the company, after a compromise had been entered into between the liquidator of the company and the creditor, for a balance for which they are responsible to the creditor, since the creditor himself would not be entitled to rank after the compromise was made, the compromise being in satisfaction of all the claims against the funds in the liquidator's hands, and the rule being that the sureties can have no higher rights than the creditor himself had.

Statement

APPEAL by the liquidator from the report of the local Master at Stratford, of November 12th, 1912, allowing claimants Coughlin and Irwin to rank for the sum of $4,800, being an amount paid by them to the Traders Bank, under a guarantee of the indebtedness of the company.

R. T. Harding, for the liquidator.

R. S. Robertson, for the claimants Coughlin and Irwin.

Middleton, J.

MIDDLETON, J.:—An appeal from the decision of the Master at Stratford, allowing the claimants to rank for the sum of $4,800, being an amount paid by them to the Traders Bank under a guarantee of the indebtedness of the company in liquidation. The claimants are admittedly entitled to rank for a further sum of four hundred dollars.

At the date of the liquidation the company was indebted to the Traders Bank for about forty thousand dollars. The bank held as security for its claim, *inter alia*, a mortgage upon the real estate and certain other assets of the company for $25,000. They also held a bond, executed by the present claimants and others, by which they jointly and severally guaranteed payment of the ultimate balance due by the company to the bank, and by which they agreed that the bank should be at liberty to compound with the company and to take and give up any security without discharging the claimants as sureties; in all of these matters the bank being at liberty to exercise its own discretion.

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After the making of the winding-up order an action was brought by the liquidator attacking the validity of the securities. This action was compromised; and the rights of the parties depend altogether upon the true effect and meaning of this compromise.

At the time of the making of the compromise, by agreement between the parties, the property covered by the mortgage attacked had been sold and had realized $25,000. This sum was held by the bank subject to the litigation. By the compromise the bank repaid $1,000 of this to the liquidator, retaining $24,000. The bank also agreed not to rank upon the estate in the hands of the liquidator; and the bank further reserved its rights against the guarantors of the debt.

The learned Master has held that the effect of this agreement is that the bank retained $24,000 on account of its preferred claim, and that the agreement not to rank was personal to the bank, and that the effect of the reservation of the bank's right against the sureties was to reserve to the sureties the right, upon payment of the balance due, to rank against the estate. He has accordingly allowed the claim.

I do not think that this is the true meaning of the compromise made. It is elementary that there cannot be double ranking in a liquidation. The claim of the bank was entitled to rank once, and once only. If the sureties paid before the claim was filed, they might rank; but after the bank proved its claim the sureties could not also prove, but upon payment they would be subrogated to the bank's rights.

It is true that the agreement is an agreement not to rank; but this is a matter of form only. In substance the transaction was this: The bank had a claim of forty thousand dollars. Of this they claimed a preference to the extent of $25,000, and as to the balance they would be ordinary creditors. They agreed to accept $24,000 in full of all their claims against the liquidator, both as preferred creditors, and as secured creditors. Under the terms of the guarantee they had the right to make this compromise, and the sureties could not complain. The bank reserved its right against the sureties, but upon payment they can only be subrogated to the rights of the bank at the date of payment, and as the bank had agreed to compound the claim against the liquidator, the sureties can have no higher rights than the bank itself had; and as the $24,000 was paid in satisfaction of all of the claims against the funds in the liquidator's hands, to permit the sureties now to rank would be to violate the rule against double ranking.

The appeal should, therefore, be allowed; and the liquidator should be entitled to his costs against the respondent. There should be no costs of the proceedings in the Master's office, as there success was divided.

Appeal allowed.

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Nov. 19.

McCLEMONT v. KILGOUR MANUFACTURING CO.

Ontario Court of Appeal, Garrow, Maclaren, Meredith, and Magee, JJ.A., and Lennox, J. November 19, 1912.

1. MASTER AND SERVANT (§ II B 3—144)—DANGEROUS WORK—ASSUMPTION OF RISK—REASONABLENESS.

A servant who does that which his duty requires him to do, though it may be dangerous, and does it in a reasonable manner, so as not to increase the risk, does not bring himself within the rule *volenti non fit injuria*.

[*McClemont* v. *Kilgour Mfg. Co.*, 3 D.L.R. 462, 3 O.W.N. 999, affirmed.]

2. MASTER AND SERVANT (§ II B 3—144)—DANGEROUS WORK—WHAT AMOUNTS TO VOLUNTARY ASSUMPTION OF RISK.

A master who requires his servant to perform a dangerous service cannot say that it was done voluntarily merely because the servant, in the exercise of his duty, performed the service, instead of refusing to do so at the risk of dismissal.

Statement

APPEAL by the defendants from the judgment of a Divisional Court affirming the judgment at the trial before Britton, J., and a jury in favour of the plaintiff, 3 D.L.R. 462, 3 O.W.N. 446, 999.

The appeal was dismissed.

T. N. Phelan, for the defendants.

W. N. McClemont, for the plaintiff.

Meredith, J.A.

MEREDITH, J.A.:—The jury found that the plaintiff was not guilty of contributory negligence, with which finding their finding that he voluntarily incurred the risk which caused his injury seems to me to be quite inconsistent on the facts of this case.

One subject, and the subject of the greatest controversy at the trial, was whether the plaintiff's manner of doing the work he was engaged in when injured, or some of the other ways deposed to by other witnesses, was the safer and better; and the jury seem to have found in favour of his way, at all events have plainly found that it was not a negligent way, having acquitted him of contributory negligence.

Then it being the fact that the plaintiff was not negligent in getting into the box to do the work, it follows that there was no evidence that he voluntarily incurred the risk: in short he was doing that which it was his duty to do, without incurring any greater risk than that duty made necessary. In doing that which his duty required him to do, and doing it in a reasonable manner, in a manner which did not increase the risk, he did not bring himself within the rule volenti non fit injuria: he was not a volunteer; that which he did was done under the requirements of his service, his duty to his master. A master who requires his servant to perform a dangerous service cannot say that it was done voluntarily, merely because the servant performed the service, did his duty, instead of refusing to do it, at the risk of dis-

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missal or other disadvantage likely to follow such a refusal. If the servant do it in a negligent way he fails because of contributory negligence, not because he voluntarily incurred the risk.

There was therefore, in my opinion, no evidence to support the finding in this respect, and consequently no such question should have gone to the jury, and the case is now to be treated as if there were no such finding; with the result that the verdict and judgment in the plaintiff's favour must stand. Under all the circumstances, the jury's finding in this respect can have meant only that the plaintiff was not compelled to do the work; he might have refused to do it, but did not.

And the jury having found in favour of the plaintiff on the question of the propriety of his method of applying the paste to the belt, a clear case, under the Factories Act, is made out against the defendants; because to anyone getting into the box, that box was rather a snare than a safeguard against the danger caused by the set screw.

I would dismiss the appeal.

Garrow, Maclaren, and Magee, JJ.A., and Lennox, J., concurred in dismissing the appeal.

Garrow, J.A.
Maclaren, J.A.
Magee, J.A.
Lennox, J.

Appeal dismissed.

Re ROBERTSON and TOWNSHIP OF COLBORNE.

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Nov. 12.

Ontario High Court, Riddell, J. November 12, 1912.

1. Municipal corporations (§ II E—152)—Borrowing money—Power as to—Debentures without vote, when.

The power to issue debentures under the Ontario Telephone Act, 2 Geo. V. ch. 38, sec. 17 (1), may be exercised without a vote of the ratepayers.

2. Municipal corporations (§ II C 3—60)—By-laws, validity of—Quashing—By-law purporting to bind lands in adjoining municipality, who may attack.

A ratepayer in a municipality which passes a by-law purporting to bind lands in an adjoining municipality has no status to object to the by-law on that ground.

3. Municipal corporations (§ II E—151)—Power to borrow—Ontario Telephone Act—Debentures, fixing date of issue.

Under sec. 17 (1) of the Ontario Telephone Act (2 Geo. V. ch. 38) a municipality may fix any convenient date as the date of issue of the debentures issued thereunder.

4. Municipal corporations (§ II C—56)—By-laws—Approval of—Signing and sealing of by-law mere routine.

The affixing of a schedule read at the meeting at which a by-law is passed, and the signing and sealing of the by-law, need not be done at the meeting; they are matters of routine only and can be done by the proper officers at a later date.

[*Brock* v. *Toronto, etc., R. Co.*, 17 Gr. 425; *McLellan* v. *Assiniboia*, 5 Man. R. 127, referred to.]

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5. MUNICIPAL CORPORATIONS (§ II C—50)—BY-LAWS—RESOLUTION—BY-LAW BASED ON ILLEGAL RESOLUTION, AS TO COSTS, STATUS OF.

The illegality of a resolution providing for indemnifying a municipal council against the costs of upholding a by-law if attacked, even though such resolution has induced the council to pass the by-law, does not invalidate the by-law.

6. MUNICIPAL CORPORATIONS (§ II A—30) —POWERS—SIGNER OF PETITION TO MUNICIPALITY, RESTRICTION AS TO CANCELLING SIGNATURE.

A signatory to a petition praying a municipal body to exercise statutory powers cannot remove his name from the signature where no statutory provision is made for such removal.

7. MUNICIPAL CORPORATIONS (§ II A—70)—COUNCIL—POWERS—EXERCISE OF STATUTORY POWERS OF COUNCIL NOT SUBORDINATE TO COURTS, WHEN.

A municipal council is a legislative body with certain statutory powers; it is not subordinate to the Courts, and the exercise of its statutory powers is in the discretion of the council; and if there is good faith the Court cannot interfere.

8. MUNICIPAL CORPORATIONS (§ II F 4—193)—MUNICIPAL TELEPHONE SYSTEM—PETITION TO MUNICIPALITY, HOW FAR MUST BE FOLLOWED IF GRANTED.

A municipality may establish a telephone system under 2 Geo. V. ch. 38, upon being properly petitioned to do so, without giving effect to all the prayers of the petition, if the system complies with the Act in question.

Statement

APPLICATION to quash a by-law (No. 2 of 1912) passed by the respondent township on the 27th April, 1912, to raise $4,840 to pay for the cost of construction and installation of a telephone system known as "The Municipal Telephone System of the Township of Colborne"—also to quash a resolution passed on the same day that a by-law be passed providing for payment of law costs or other expenses in connection with said by-law No. 2.

Prior to the month of April, 1910, a joint stock company known as "The Goderich Rural Company," had procured from the said township a franchise to operate a telephone system in the township. In the month of April, 1910, it was understood that said company was not going to take advantage of said franchise and a number of the ratepayers, desirous of having a telephone system established, on May 10, 1910, presented a petition and agreement to the Township Council praying that a telephone system should be established. On that date a resolution was passed that the petition presented be granted with the exception of clause 2. A by-law was thereupon introduced establishing the system and got a first and second reading. The final passing was put off until the next meeting. On the 26th of May the Council again met and passed the by-law. At this meeting a petition signed by applicant E. Maskell and others was presented to the Council, asking that their names should be removed from the petition. The Council passed a resolution that no action should be taken. The system thus created went on and built a system covering various concession lines in the township, and the township borrowed on two by-laws the sum of $3,800 and paid it

over to the promoters of this system. The rural company also went ahead and built their lines. The township has thus two systems, which on various concession lines are both in operation.

The two systems are not in any way connected and the result is that neighbours cannot converse, and considerable ill feeling has been engendered. The individual applicants and several others who signed the petition to remove their names have not taken telephones from the municipal system. The by-law attacked embraces their land and it is claimed an attempt is thereby being made to compel them to pay for something they have not taken and will get no benefit from.

W. Proudfoot, K.C., for the applicants.

G. F. Shepley, K.C., for the Township.

Riddell, J.

RIDDELL, J. (after setting out the facts):—The statute to be considered is the Ontario Telephone Act which is 2 Geo. V. ch. 38, where necessary, with its forerunners, 3 Edw. VII. ch. 19, sec. 331, 8 Edw. VII. ch. 49, 10 Edw. VII. ch. 84, 92; 1 Geo. V. ch. 55.

Taking up the objections in their order:—

1. That the township changed the petition without the consent or authority of the applicants by striking out paragraph 2 thereof; and thereupon passed by-law 15 of 1910, establishing a system.

The petition after reciting that it was desirable to construct a local telephone system in the township; and at the expense equally shared of the subscribers, paid for by debentures, etc., etc., went on to pray (1) the council to pass a by-law establishing such system under the Act of 1908, etc., (2) that the council should take proceedings to secure the right to extend the system beyond the boundaries of the township, or make such alternative arrangements as will secure the same, and (3) that the expense shall be in equal shares borne by the members of the system, etc., etc.

The by-law No. 15 of 1910, did not contain any such provision as is contemplated in the 2nd paragraph of the petition.

I do not think this fatal. 8 Edw. VII. ch. 49, secs. 3, 4, 5, 6 and 9 (=2 Geo. V. ch. 58, secs. 9, 10, 11, 12, 13) give the statutory provisions. A petition is to be presented praying for the establishing of a system, which petition shall set forth such particulars as the council shall require "including a statement shewing the location of the proposed system and the manner in which it is proposed that it shall be constructed and maintained." This was done, and in addition the petition contained clause 2 asking the council to act under sec. 13 (now 9). The council thereupon did provide for the establishment, etc., under sec. 5 (now 11). The extension in sec. 5 (11) is not the extension in 9 (13): the former would be within the township; the latter without. I can see no necessity for the council doing

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everything at once; nor do I think a petition such as this must necessarily be given effect to in all its prayers at once or at all.

The second objection is thus stated:—

"2. Prior to the passing of said by-law No. 15, 1910, the respondent had granted to "The Goderich Rural Telephone System, Limited" a franchise to erect a telephone system in the said township, and it was on the understanding that the said company did not intend to use said franchise that the applicants (other than the said township) signed said petition. At the time said by-law was passed, it was known that the said company intended to proceed. With this knowledge the respondent should not have proceeded as it was not in the interests of either the applicants or the ratepayers to have two systems paralleling each other in said township."

But this is a matter for the discretion of the council—they had the power and, given good faith, the Court cannot interfere. The council is a legislative body with certain statutory powers: it is in no sense subordinate to the Courts and the *bonâ fide* exercise of statutory power should not be interfered with.

"3. The applicants and others (other than the township of Wawanosh) after the said petition had been presented and passed with the said change and with the knowledge that said company intended to proceed, desired to withdraw therefrom and for that purpose, before anything had been done thereunder or expense incurred, presented a request in writing to the respondent to permit them to withdraw therefrom, this the respondent improperly and illegally refused to assent to."

I do not find any provision for a petitioner striking his name from a petition—and in any case there were sufficient petitioners to answer the statute if the objectors' names were removed.

4. "Before passing the said by-law No. 15 of 1910, establishing the said system, it should have had a schedule or list of the petitioners annexed to and forming part of the said by-law and read and passed as part thereof. This was not done nor was the said list in any way attached to or made part of the said by-law."

The statute sec. 8, now sec. 14, provides for the cost of establishing and maintaining the system; and such being the case such an addition to the by-law is not only unnecessary but improper.

"5. The applicants would not have consented to the change made in the said petition and all steps, actions and proceedings thereafter taken by the respondent under the said petition were, so far as the applicants were concerned, illegal and void."

This has been already covered.

"6. The respondent's council, in passing the said by-law

No. 2, of 1912, did not exercise their own will and judgment in doing so. Such by-law having been passed on the illegal resolution and understanding that if any expense was incurred by the township in upholding the same, it would be paid by the Municipal Telephone System, and without the said understanding a majority of the said council would have voted against the passing of the said by-law."

The by-law here spoken of is the by-law really attacked in the present motion. It is based upon by-law 15 of 1910; after reciting that by-law it goes on to provide for the issue of debentures, etc., etc.

A resolution was passed at the special meeting April 30th, 1912, in the following terms "that by-law No. 2, 1912, as read a third time be passed; and that a by-law be passed providing that the Municipal Telephone System of Colborne pay any law costs or other expenses that may be incurred on the township in connection with the passing of by-law No. 2." It is said that the council would not have passed the by-law without such an agreement of indemnity—probably that is so—and the Reeve thought the indemnity illegal though he did not tell the council so.

I do not see that this invalidates the by-law—whatever it was that induced the council to think it in the public interest that the by-law should carry, they did so; and that is enough. I cannot see that anything which is said in *Begg* v. *Dunwich* (1910), 21 O.L.R. 94, or *Re Angus* v. *Widdifield* (1911), 24 O.L.R. 318, has any bearing adverse to this conclusion.

Nos. 7 and 8 are to be dealt with together.

7. "The respondent at the time the said by-law was passed, did not have attached thereto and forming part thereof the schedule shewing the list of names of persons whose property was thereby being bound, nor was the said list read, and although it purports to form part of the said by-law was not produced, nor read at the said meeting, and the respondent only in part, passed the said alleged by-law."

8. "The said by-law had not attached thereto at the meeting of the council when passed the seal of the said corporation attached, said by-law was taken away by the Reeve of the said township from the custody of the clerk where it properly belonged and remained in his possession without being sealed, and if sealed at all was sealed without authority on or about the time that a copy thereof was registered in the registry office for the county of Huron about which said time the said schedule of names was for the first time attached thereto."

These are, in my opinion, rather matters of routine, practice, than of substance—the schedule was lying on the table, everybody knew of it and its contents, the seal is kept at the clerk's office and not at the council chambers, and it was affixed at a

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convenient time after the meeting and before anything was done under the by-law.

It never has been held that the signing and (or) sealing of a by-law must be done at the council meeting: the instances in which this is done are probably rather the exception than the rule. Sec. 333 requires the signing to be done by the person presiding at the meeting but it does not require the signing to be done at the meeting and signature afterwards is quite sufficient: *Brock* v. *Toronto and Nipissing R. Co.*, 17 Gr. 425, at p. 434, *per* Spragge, C.; *McLellan* v. *Assiniboia*, 5 Man. R. 127.

9. "The said by-law provides for the said debentures being issued as of the 21st of December, 1911, which is illegal and improper."

It is argued that the statute does not give any power to the council to issue the debentures as of the 21st December. I find nothing in the statute sec. 11 (1), now 17 (1), to prevent the council fixing any convenient date for the debentures—the statutory authority is given to issue debentures, however, and that is enough.

10. "The respondent in passing the said by-law assumed to bind lands in the township of West Wawanosh. No authority was ever received by the respondent from the said township of Wawanosh to enter into or carry their lines into the said corporation, and the action of the respondents in doing so and in passing the said by-law, whereby an effort is being made to bind lands of ratepayers in the said township, is wholly illegal."

The applicants cannot complain of anything not affecting them—supposing the ratepayers of Wawanosh could.

11. "The resolution passed by the respondents on the 27th day of April, 1912, as hereinbefore fully set forth, was illegal. The respondents having no power or authority to either pass said resolution or to pass the by-law thereby provided for."

This has already been dealt with.

12. "The respondent without a vote of the ratepayers of the township of Colborne had no power or authority to pass the said by-law creating, as it does, a liability for which the credit of the whole township is pledged."

The statute sec. 11 (1) now 17 (1) gives the power and authority so to do.

13. "The Reeve and Councillor Halliday, both being subscribers to said Municipal Telephone System, acted in a partisan manner and had no right to vote on said by-law."

I think they acted in good faith, which is enough—but in any case three of the councillors were beyond suspicion and they acted in passing the by-law.

The attack fails on all grounds taken: and the motion must be dismissed with costs.

Motion dismissed.

MARITIME GYPSUM CO., Limited v. REDDEN.

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Dec. 14.

Nova Scotia Supreme Court, Graham, E.J., and Meagher, Drysdale, and Ritchie, JJ. December 14, 1912.

1. CONTRACTS (§ VI A—411)—RECOVERY BACK OF MONEY—FAILURE OF CONSIDERATION.

A party is not entitled to recover back money paid for a consideration which has failed where the failure has been caused by the party's own default.

2. PLEADING (§ III B—310)—WHAT MUST BE PLEADED—AGREEMENT FOR RETURN OF MONEY.

An attempt to shew an agreement to return the money sought to be recovered cannot succeed where it is neither pleaded nor made a ground of appeal.

3. APPEAL (§ IV C—120)—QUESTIONS NOT IN CASE BELOW.

Items in controversy will not be considered which are not involved in the action in which the appeal is taken.

Statement

THIS was an action brought by the plaintiff company against defendant to recover the sum of $300 paid by plaintiff to defendant on account of a contract made by defendant with plaintiff to quarry a quantity of plaster rock fit for export and shipment and to haul and deliver the same on board vessels at wharf in Windsor at an agreed price per ton. The defence relied upon was neglect and refusal on the part of plaintiff to make advances as agreed, or to provide storage ground for the plaster quarried, or to provide vessels whereby defendant was prevented from further carrying out the agreement. There was a counterclaim on the part of defendant for quarrying and hauling plaster, cash paid for wages, etc.

The cause was tried before Russell, J., who with respect to plaintiffs' claim gave judgment as follows:—

> Plaintiffs are suing to recover the $300 advances as on a consideration that has failed, but I do not think that they can recover on that footing; even if the defendant were not out of pocket at all, I doubt if they could claim the money back. He was ready and willing to carry out his agreement with the plaintiffs and was prevented from doing so by their own failure to provide a vessel. I think this is clear from the correspondence and the negotiations that took place while Newcomb was the plaintiff's manager, although after Hamilton succeeded Newcomb an effort was made to put the responsibility upon the defendant, and make it appear that he was in default.

Judgment was given in favour of defendant on the counterclaim, holding that he was entitled to recover on a *quantum meruit* for his work done, money paid, etc., but on the settlement of the rule there was a re-argument of the case, as the result of which the larger items of the counterclaim were negatived and for this reason and as other points were not made clear by defendant, the counterclaim was dismissed with costs.

W. E. Roscoe, K.C., for plaintiff, appellant.

H. W. Sangster, for defendant, respondent.

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MARITIME GYPSUM CO., LTD. v. REDDEN.

Graham, E.J.

The judgment of the Court was delivered by

GRAHAM, E.J.:—The plaintiff company entered into a contract with the defendant to quarry and haul plaster for the company from a quarry near Windsor for shipment by sea. Under this contract the plaintiff paid to the defendant a sum of $300 on account in the course of the work. The learned Judge at the trial found that there was a breach by the plaintiff of this agreement and on that account it was not proceeded with. This finding was acquiesced in at the hearing. Then he held that the plaintiff could not recover back this sum of money as if there was a failure of consideration. And he dismissed the action with costs.

I agree with him. A party is not entitled to recover back the money paid for a consideration which has failed where the failure has been caused by the party's own default. This action was brought to recover it on that footing, and that only. On the appeal the plaintiff sought to shew that there had been an agreement to return the $300, but that fails both as to proof and because the pleading did not go upon that ground.

The plaintiff has given notice of appeal, but it is from the judgment dismissing the action and is expressly limited to that. But there is a counterclaim. The defendant sought damages for this breach of contract by the plaintiff. The learned Judge dismissed the counterclaim, also with costs. In that counterclaim the $300 paid would come into the reckoning.

In the first judgment the learned trial Judge in mistake took into consideration charges for quarrying and hauling plaster, 124 tons, $93, and 40½ tons, $31, and on the other side of the account a credit of $102, the proceeds of this plaster which the defendant had sold to one Parsons. On the second hearing he came to the conclusion that both debit and credit belonged to an account between the defendant and another company. As a fact each company had the same person for president, and with him the defendant dealt. However, the learned Judge eliminated it as not belonging to this case.

In the first judgment he said:—

> The wages of the men and charges for horses and carts will also be allowed. No doubt the parties can agree upon these amounts, from which must be deducted the amount received for the plaster sold by the defendant.

In the second judgment he says:—

> As to the charge for labour, horses, etc., which was the matter left open to be agreed upon by counsel, my difficulty is to know what portion of that labour, etc., may be applicable to the amount credited in the decision for cleaning the quarry and repairing the road. If these items are additional to the entries for labour there would be a balance in the defendant's favour. If not, the balance would be slightly against him. Seeing that he has not made this point clear,

and that the larger items of this counterclaim have been negatived, I shall have to dismiss it with costs.

As to the judgment the defendant has not appealed, but the plaintiffs, as I said, have appealed from the judgment in the action. There is a matter which the plaintiffs wish to bring into the account. Of the plaster that was quarried the defendant sold to the plaster mill 295 tons at 60c., $177. And on the other side there was a charge for loading and hauling from the siding to plaster mill, 295 tons at 25c., $73.75.

The answer to this claim is that these items cannot be considered, as they were not in the action from which the only appeal is taken, and there is no appeal from the counterclaim and therefore they cannot be considered in that account.

The appeal will be dismissed and with costs.

Appeal dismissed.

Annotation—Contracts (§ I C—15)—Failure of consideration—Recovery of consideration in whole or in part by party guilty of breach.

Annotation.

Contracts—Failure of Consideration

As between failure and want of consideration, there is no substantial line of demarcation or point at which one may be clearly distinguished from the other, as the existence of a failure of consideration imports a want of it; for instance, the proof that a promissory note was given for an article which eventually turned out of no value, will, as a general rule, serve as the basis for a defence, either of failure or want of consideration.

But "want of consideration" is now generally understood to mean the total absence, or original lack of any consideration whatever; and "failure of consideration" to be the non-performance of the act, in whole or in part, which the party had agreed to perform, or of some substantial defect in the article or thing given, and it resulted eventually that nothing of a valuable character in reality passed as between the parties: *Mooklar* v. *Lewis*, 40 Ind. 1, and see Century Dictionary, Title "Consideration"; Am. & Eng. Encyc. Law, vol. 6, "Consideration," 780-782.

The value or worthlessness of the thing given does not depend upon whether it meets the promisor's expectations.

The fundamental rule is that when the promisor gets all he bargained for he cannot complain that the consideration is not valuable. Where a patent is so substantially worthless as to render it void, the fact that the invention is found as of very small practical value, and as such an unprofitable investment, will not create a failure of consideration for a note given for the purchase of it. There must be an entire failure of consideration to defeat a sale or contract, and it seems that where the purchaser gets what he intended to buy, although the thing purchased be of no value whatever, there is not a failure of consideration: *Baker* v. *Roberts*, 14 Ind. 552; *Williamson* v. *Hitner*, 79 Ind. 233; *Chicago, etc., R.R. Co.* v. *Darkes*, 103 Ind. 520; *Scott* v. *Darkes*, 105 Ind. 584; *Jones* v. *Reynolds*, 120 N.Y. 213; Am. & Eng. Encyc. Law, vol. 6, Title "Consideration"; *Midkiff* v. *Boggers*, 15 Ind. 210; *Myers* v. *Turner*, 17 Ill. 180.

The rule of law is well settled that in the absence of fraud or warranty the purchaser of real property takes title at his own risk, and if he has not taken the precaution to secure himself by covenants, he has no remedy

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for his money, even on a failure of title, as this failure of title does not constitute failure of consideration: *Abbott* v. *Allen*, 2 John. Ch. (N.Y.) 519; 7 Am. Dec. 554; *Long* v. *Allen*, 2 Fla. 403; Am. & Eng. Encyc. Law, vol. 6, "Consideration."

Where a note is given for the purchase price of goods or land, the delivery or conveyance of which is a condition precedent to the payment of the note, the failure of the promisee to deliver the goods or to convey a valid title to the land, constitutes a failure of consideration: *Bank* v. *Wood*, 142 Mass. 563; *Sawyer* v. *Chambers*, 44 Barb. (N.Y.) 42; see also *Maxfield* v. *Jones*, 76 Me. 135.

A like principle applies when the consideration of a note is the payee's promise to do some act or perform some service, his non-performance of the act or service is a failure of consideration: *Taft* v. *Montague*, 14 Mass. 282; *Savage* v. *Whitaker*, 15 Me. 24; Am. & Eng. Encyc. Law, vol. 6, page 784, and cases cited.

In the principal case the plaintiff, by the decision of Graham, E.J., was held to have been guilty of a breach of the contract and that he was not entitled, as a matter of law, to recover a part of the consideration he had paid to the defendant, as he was found to be in default himself. In *McEwen* v. *Woods*, 11 Q.B. 13, 17 L.J.Q.B. 206, which is a case in which the element of default on part of the plaintiff also existed, the facts were as follows: Plaintiff instructed defendants, brokers, to purchase for his account railway scrip, which was done. Plaintiff remitted the price, including commission, to the defendant brokers and requested them to forward to him the scrip, which would not be delivered to defendants by the seller until the next account day. Between the purchase by defendants and delivery to them, on the one hand, and subsequent to plaintiff's remittance, the railroad company recalled the scrip for registration, and before it was reissued made a call for £5 per share.

The plaintiff was aware of all these circumstances. The call was necessarily paid, by the party selling, to defendants, who received the shares with the additional demand for the call. Plaintiff repudiated the transaction, defendants declined to accept, and the seller resold the scrip at a loss, which the defendants paid to the sellers:—Held, in an action by plaintiff against defendants, his brokers, that the amount he remitted to defendants was not money had and received to the use of the plaintiff in the first instance; and also, that it had not become such by a failure of consideration through the misconduct or default of defendants, because it was the duty of the plaintiff himself to supply the funds to meet the call. The Court says, in speaking of plaintiff's neglect and default: "If the plaintiff would have enabled them with funds to meet the call with which they had become saddled in the meantime, the defendants must have applied the money received to that purpose; and if they had neglected, it would have become money in their hands to plaintiff's use. But he has wrongfully neglected to do so, and they have been compelled to add their own money to his in order to fulfil their contract." This decision is based squarely upon the proposition that the plaintiff was himself at fault in bringing about the conditions as they existed in that case as regards his right to make any claim against the defendant; that he owed a duty

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to the defendants which he refused, or at least with full knowledge, neglected to perform, and he, the plaintiff himself, being guilty of the default which resulted in a loss, should be obliged to bear it.

The plaintiffs in London ordered from the defendants at Singapore, first 25 tons and then 150 tons, of gum, at 18s. per cwt., all charges included. The defendant sent invoices and bills of lading of these two quantities, as shipped at Singapore, which invoices and bills were handed to the plaintiffs in exchange for their acceptances for the two respective amounts. According to the invoices, and before the arrival of the goods, the plaintiffs paid the said amounts. When the goods arrived they were found to be 4½ per cent. deficient in weight, part of which was attributable to evaporation, and the rest to the fact that the weight of the basket and leaves containing the gum was included in the invoice weight. At Singapore the gum in question is usually purchased by gross weight, including baskets, etc., but in London by net weight, deducting packages. It was held there was a failure of consideration and the plaintiffs were entitled to recover the excess above the price at the net weight of the gum at 13s. per cwt. from the defendant: *Deraux* v. *Cormelly*, 8 C.B. 640, 19 L.J.C.P. 71.

Where the defendant sold to T, through the plaintiffs, as agents, some bark, which he agreed should be same as the sample, drew a bill upon the plaintiffs which they accepted, the bark not being equal to the sample and being refused by the buyer, it was held the consideration of the bill failed and plaintiffs were entitled to recover the amount of it from the defendant. *Hooper* v. *Tuffry*, 1 Ex. 17, 16 L.J. Ex. 233.

Plaintiff held a license from a patentee to use a patented invention, the patentee intending to apply for a prolongation of the patent and also to apply for a new invention of a similar description; plaintiff agreed to pay £150 for the free use of the first patent forever and for the second patent for three years. The money was paid to the patentee, who died almost immediately, and as a result no application was ever made for a renewal of the patent, or the grant of one for the new invention. It was held that plaintiff could maintain an action to recover the money paid as for a failure of consideration, on the ground that he had bought the right to have an application for the patents made, and not merely the right to have the benefit of it if it should happen to be made: *Knowles* v. *Borille*, 22 L.T. 70.

The entire failure of consideration, as matter of law, has the same effect as would result from a total absence or want of it originally, and therefore the contract is void and no rights can issue out of it.

Conforming to the principle that mutual promises are valid considerations each for the other, it was held in the earlier cases that where a promissory note was given for the purchase price of land conveyed by deed containing covenants of warranty and seizure, and the title of the land failed, the covenants in the deed formed a sufficient consideration for the note, and that the purchaser could not plead failure of title as a defence, but must pay the note, and for his relief resort to a cross-action upon the covenants in the deed.

But this rule, savoring more of superfluous refinement than of practical

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wisdom, has now happily passed away; and it is the modern practice, where a total failure of title has occurred, to allow this to be set up as a defence to an action upon the note as a total failure of consideration: *Rice* v. *Goddard*, 14 Pick. (Mass.) 293; *Frisbie* v. *Haffnagh*, 11 Johns. (N.Y.) 50; *Tibbets* v. *Ayer*, Hill & Denio (N.Y.) 174.

In *Cook* v. *Mix*, 11 Conn. 432, where, in an action upon a promissory note, given for the purchase price of land, failure of title was pleaded as a failure of consideration, the Court, by Judge Bissell, said: "We do not assent to the proposition that the covenants in the deed formed any part of the consideration for the note. What, it may be asked, is to be understood by a total failure of consideration? It is very obvious that when the party does not get that which by the terms of the contract he was to receive, and for which his note was given, the consideration of the note fails and fails wholly. On the sale of personal property there is an implied warranty of title, but it turns out that the vendor has no title. Was it ever supposed that he could recover the purchase money and turn the vendee over to his remedy on the warranty? We suppose not, and we suppose it to be perfectly well settled that, where a total failure of a consideration was shewn, it is an answer to the action."

Voluntarily putting it beyond one's power to perform has the effect of justifying the other party in abandoning the contract, and gives him an immediate right of action for the breach and to rescind: *Hochster* v. *De La Tour*, 2 El. & Bl. 678; *Chapin* v. *Norton*, 6 McLean (N.S.) 500; *Howard* v. *Daly*, 61 N.Y. 362.

In executory contracts the performance or execution of the consideration may be a condition precedent to any liability whatever upon the promise, and in such event the failure of the consideration will discharge the promise. If the performance or execution of the consideration does not form a condition precedent to a liability on the promise, in such an event the promise is not affected by the failure of the consideration, but is simply a breach of the promise or contract giving a right to damages. The relation or connection of the promise, on the one hand, to or with the execution of the promise on the other, is generally a question of construction of the terms of the contract. Where money has been paid for a consideration which entirely fails, the money, as a general rule, may be recovered back; and an implied contract arises, in law, to that effect.

Where a person bought goods through a broker and paid the price, and through the default of the broker, in executing the commission, the buyer had no remedy upon the contract of sale, it was held he might recover back the price paid the broker as for a failure of consideration: *Bostock* v. *Jardine* (1865), 34 L.J. Ex. 142, 3 H. & C. 700.

Another case which has a direct bearing upon the default of a plaintiff who attempts to recover money paid as for a failure of consideration, is the case of *Begbie* v. *Phosphate Sewage Co.*, 1 Q.B.D. 679, 35 L.T. 350, where it was held that a plaintiff could not recover as for a failure of consideration money he had paid on a contract, where he paid it for the purpose of defrauding the shareholders of a company that intended purchasing his interests. In this case, his money was paid with the purpose of consummating a fraud; in the principal case the money was paid

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by plaintiff himself, who was at fault and defendant free from fault; and in neither case could plaintiff recover the amount he had paid.

Plaintiff employed an agent to purchase goods, which he did do, but in his own name; the agent invoiced the goods to plaintiff, who accepted; one of these acceptances remained in the agent's possession, and was partly for goods purchased from a third party; the agent went into bankruptcy and the official assignee collected this acceptance; the third party sued plaintiff for the amount of their bill, and he settled the claim. It was held plaintiff could not recover the amount of the bill from the official assignee, as the failure of consideration was only partial and the payment to the third party was voluntary with full knowledge of the facts: *Barber* v. *Pott*, 4 H. & N. 759.

An unstamped bill of exchange, which purported on its face to be drawn at Sierra Leone, was purchased by plaintiff from defendant. Defendant refused to endorse the bill, but allowed plaintiff to take it and satisfy himself as to the solvency of the parties. The acceptor of the bill became bankrupt, and on claim and proof against his estate being made it turned out that the bill was drawn in London, and it was held the plaintiff could recover as for a total failure of consideration: *Gompertz* v. *Bartlett*, 2 El. & Bl. 849, 2 W.R. 43.

Where a sale is made of a specific chattel with a warranty, a breach of the warranty does not entitle the buyer to return the chattel and recover the price paid as for a failure of consideration; his remedy is for damages on the warranty, unless by express terms of the contract of sale he is allowed a different remedy, or if the warranty be fraudulent: Sale of Goods Act, 1893, sec. 53; *Heyworth* v. *Hutchinson* (1867), 36 L.J.Q.B. 270; *Gompertz* v. *Denton* (1832), 2 L.J. Ex. 82.

A case in England where the element of default on the part of the plaintiff existed is that of *Calton* v. *Darrell*, 17 W.R. 672. Plaintiff agreed to take a house at a certain rental and pay a premium on the completion of the lease. He entered into possession and paid part of the premium, but refused to take the lease on the ground of a difference as to the terms of agreement, and it was held he could not recover the part of the premium paid, as there was only a partial failure of consideration. And see *Wright* v. *Newton*, 2 C.M. & R. 124.

Plaintiff agreed to purchase an annuity from the trustees of an annuitant. The annuitant died before the purchase money was paid by the plaintiff, and of which fact he was ignorant and in an action to recover the purchase money, held he could recover, as the money had been paid without consideration: *Strickland* v. *Turner*, 7 Ex. 208, 22 L.J. Ex. 115.

Where a broker was instructed to buy 50 shares, and executed it by including it in a single order for 300 shares with one vendor, it was held there was a total failure of consideration, and money given to broker to pay for the fifty (50) shares could on that ground be recovered: *Bostock* v. *Jardine*, 3 H. & C. 700; *Wilkinson* v. *Lloyd* (1845), 14 L.J.Q.B. 165, 7 Q.B. 27.

And the same general principle exists to recover a deposit for the purchase of land where the vendor makes default and thereby entitles the

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buyer to rescind, as where the vendor fails to make a good title, or where a premium was paid for a lease which the lessor was not able to give, or where the vendor of a lease failed to procure the consent of the landlord to an assignment as required by the lease: *Wilde* v. *Fort* (1812), 4 Taunt. 334; *Wright* v. *Colles* (1849), 19 L.J.C.P. 60, 8 C.B. 150; *Lloyd* v. *Crispe* (1813), 5 Taunt. 249; *Wright* v. *Newton* (1835), 2 Cr.M. & R. 124.

If the contract is mutually abandoned, or is incapable of performance or completion, the purchaser is entitled, at least presumptively, to a return of the deposit. But the claim to the deposit may be excluded by the express terms of the contract, which may, in terms, provide for a forfeiture of the amount deposited, which, in itself terminates the contract. The claim to a return of a deposit may be excluded by the express terms of the contract, declaring it to be forfeited in the event which puts an end to the contract. The deposit implicitly means it is security for completion by the purchaser, which is forfeited if he repudiates the contract, but which goes towards payment of the purchase money if contract is completed: *Gosbell* v. *Archer* (1835), 4 L.J.K.B. 78; *Hinton* v. *Sparks* (1867), 37 L.J.C.P. 81; *Lea* v. *Whitaker* (1872), L.R. 8 C.P. 70; *Essex* v. *Daniel* (1875), L.R. 10 C.P. 538; *Defree* v. *Bedborough* (1863), 33 L.J.C. 134; *Howe* v. *Smith* (1884), 53 L.J.C. 1055; *Smith* v. *Butler* (1900), 69 L.J.Q.B. 521; Leake on Contracts, p. 68, and cases cited.

If there is a valid subsisting contract of sale the purchaser may claim as damages for vendor's breach his expenses incurred in and about the purchase, in addition to the deposit; but if no valid contract exists, or if both parties rescind the contract, he can only claim a return of the deposit as money received for a failure of consideration: *Gosbell* v. *Archer* (1835), 4 L.J.K.B. 78; and see Leake on Contracts, pp. 261, 787; *Hollwell* v. *Seacombe* (1906), 75 L.J.C. 289.

But where a conveyance is accepted by which act the vendor completes the contract, no claim can be made for a return of the purchase money on the ground of a failure of consideration, by reason of defects in the title or in the subject of conveyance or otherwise, the remedy against the vendor being one for damages upon the covenants in the deed; but the contract itself may provide in such a case for a remedy which extends beyond the completion of the contract, as, for example, an express provision for compensation for defect in title: *Early* v. *Garrett* (1829), 8 L.J.O.S.K.B. 76; *Clayton* v. *Leech* (1889), 41 Ch. D. 103; *Box* v. *Helsham* (1866), 36 L.J. Ex. 20; *Palmer* v. *Johnson* (1884), 53 L.J.Q.B. 348; see *Debenham* v. *Sawbridge* (1901), 70 L.J. Ch. 525.

Upon the same principle, where money is paid in the purchase of bills of exchange where sold as valid, in the opinion of both parties, but which are, in fact, forged and void, it may be recovered; as a document purporting to be a foreign bond, but not recognized as such by the foreign state in question, or any unstamped bill of exchange sold as a foreign bill, which is, in fact, an inland bill, or a forged Bank of England note, or forged bills of exchange, with or without endorsement, unless in the hands of a holder for value, or delay in claiming repayment results in holder changing his position: *Young* v. *Cole* (1837), 6 L.J.C.P. 201, 3 Bing. N.C. 724; *Gompertz* v. *Bartlett* (1853), 23 L.J.Q.B. 65; *Leeds Bank* v. *Walker*

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(1883), 52 L.J.Q.B. 590; *Gurney* v. *Womersley* (1854), 24 L.J.Q.B. 46; *Bank* v. *Bank* (1895), 65 L.J.Q.B. 80.

But where the contract is executed and the money paid was in fact the consideration bargained for, the money paid cannot be recovered back merely because it proved of no value, as where money is paid for the use of a supposed patent which was discovered, some years afterwards, to be invalid: *Taylor* v. *Hare* (1805), 1 B.P.N.R. 260; *Begbie* v. *Phosphate Co.*, 1 Q.B.D. 679; see *Lawes* v. *Purser* (1856), 26 L.J.Q.B. 25.

Where the consideration fails by the fault of the party himself, the money paid for it cannot be recovered back, as, for example, the price paid for an annuity where the purchaser neglects to register the memorial as is provided for by statute, or where the buyer of shares on the stock exchange neglects to register them as is required: *Stratton* v. *Rastall* (1788), 2 T.R. 366.

Money paid for a consideration which only partially fails cannot be recovered back, as where a purchaser takes possession of land he buys he cannot recover the amount paid if the vendor fails to make title, because his entry into possession of the land is some consideration he received under the contract; and under a contract for a lease the lessee cannot recover back the premium paid where he takes possession under the lease and where the lessor refuses or neglects to grant the lease; the remedy in both the above cases being for breach of contract, or an action to rescind: *Blackburn* v. *Smith* (1848), 18 L.J. Ex. 187; *Hunt* v. *Silk* (1804), 5 East. 449; *Huggins* v. *Coates* (1843), 13 L.J.Q.B. 46; *Hafnor* v. *Groves* (1855), 24 L.J. C.P. 53.

Mansfield, C.J., in *Tyre* v. *Fletcher*, 2 Cowp. 666, laid down the distinction between a complete and partial failure of consideration, in holding that where a premium paid on a policy of insurance on which no risk be attached, and consequently paid for a consideration which has failed, it may be recovered back as for a complete failure of consideration; but where the risk has begun to exist, and has attached, there can be no apportionment of the premium or consideration, where the risk ceased before the expiration of the policy, as in such an event there is a partial failure only of the consideration.

The situation, as found in the principal case, to have, from the evidence, surrounded the parties therein, and which was held to absolve the defendant from any liability to refund to the plaintiff the amount he had advanced to the defendant, is analogous to the circumstances and situation existing in the English case of *Learoyd* v. *Brook*, [1891] 1 Q.B. 431, 433, 60 L.J.Q.B. 373. There Judge A. L. Smith, in applying the law to the facts as found, said: "Where an apprentice by his own wilful act prevents a master from teaching him, the master can set this up as a defence, when sued on his covenant to keep, teach and maintain the apprentice, irrespective of the question whether the apprentice has performed his covenants under the deed or not. This is settled by the case of *Raymond* v. *Minton*, Law Rep. 1 Ex. 244. The *ratio decidendi* of that case is not that the master is absolved because the apprentice has not performed the obligations imposed upon him by the articles, but because the apprentice by his own acts has put it out of the power of the master to carry out what he had contracted to do

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Apply this reasoning to the present case. The master has contracted to teach the apprentice how to carry on a pawnbroker's trade honestly. That must be the contract by the master. The apprentice by becoming an habitual thief has rendered that impossible. Then why does not the principle laid down in *Raymond* v. *Minton*, Law Rep. 1 Ex. 244, apply?"

The learned Judge in the above case also referred to the case of *Philip* v. *Clift*, 4 H. & N. 168, which apparently holds a different rule, but that that case can be clearly distinguished from the case Judge Smith had in hand was by him clearly shewn.

The case of *Cox* v. *Matthews*, 2 F. & F. 397, was also cited by Judge Smith, that case holding as quoted by him, "if the plaintiff was in the habit of stealing, the defendant would not be bound to have him in his shop to instruct him." Judge Smith then continued: "This ruling is in point. No authority has been cited, and I am not aware of one, either overruling or even doubting this ruling of Byles, J. It is a ruling which commends itself to me. I follow it; and for the reasons above, I hold that the defendant in this case has successfully justified the breach of the covenant alleged against him. But it is further argued that, even if defendant is justified in acting as he did, yet he must return so much of the premium as was not exhausted by keeping, teaching and maintaining the apprentice. There has been no total failure of consideration, and there has been no action for damages maintainable. Then how can the proportionate part of the premium be recovered? It cannot." The Court then referred to and cited the case of *Whincup* v. *Hughes*, Law Rep. 6 C.P. 78, and followed it as establishing the same rule. In the case of *Lumsden* v. *Burton & Co.* (1903), 19 Times L.R. 53, Darling, J., laid down the law that, where plaintiff paid for seats to see the coronation, which seats were erected by defendants, and the receipt read "to view procession on June 26," and defendants incurred expense in erecting stand and decorating it, and providing lunch, and the procession was abandoned, that there had not been a total failure of consideration and the price paid for the seats could not be recovered.

A late case in the Manitoba Court of Appeals applied the rule running through the above decisions, anent the default of a plaintiff in claiming the amount paid by him as whole or part of the consideration paid, that "under an agreement for the sale of lands on the small monthly instalment plan, where the purchaser, after a few monthly payments, abandons the contract by omitting to make any further payments for four years, and where the vendors rescind the contract owing to the purchaser's persistent default, the purchaser by such default disentitles himself to any return of the payments which he did make: *Handel* v. *O'Kelley*, 8 D.L.R. 44.

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Ontario High Court, Sutherland, J. November 15, 1912.

1. INSURANCE (§ IV B—170)—LIFE INSURANCE—CHANGE OF BENEFICIARY—WILL—LEGISLATION NOT RETROACTIVE, WHEN.

Where an attempt is made to change the beneficiary of a policy of life insurance by a declaration in the will of the insured, which is ineffective to make such change under the law as it stands at the date of the death of the testator, an Act which comes into force subsequent to his death cannot be invoked to validate the declaration.

2. INSURANCE (§ IV B—170)—LIFE INSURANCE—CHANGE OF BENEFICIARY—WIDOW—VESTING AT DEATH, HOW LIMITED.

Where policies on the life of the assured are made payable to his widow, her interest becomes vested at the death of the assured, subject to any declaration in the will or elsewhere sufficient to effect a change.

Statement

MOTION by the executors of John Marks Stewart's estate for an order construing his will under Con. Rule 938.

R. S. Cassels, K.C., for the executors.

C. J. Holman, K.C., for the widow.

J. R. Meredith, for the infants.

Sutherland, J.

SUTHERLAND, J.:—One John Marks Stewart was in his lifetime insured under certain policies of life insurance in 16 companies, aggregating a face value of $19,306.65. One of them for $1,000 was by its terms made payable to his mother, Agnes Stewart, and two others for $1,000 each to his estate. All the other policies were made payable to his wife, and in case she predeceased him, to his executors, administrators and assigns. He made a will dated 19th January, 1909, and died on the 25th May, 1912. Letters Probate issued to the executors named in the will on the 20th June, 1912. The testator left him surviving his widow and five sons and daughters, three of whom are infants.

The executors did not include in their inventory of the testator's estate any of the moneys secured by said policies, except the sum of $2,000, representing the amount of the two policies payable to the estate of the deceased; and, in an affidavit filed by one of them, he states that their reason for this was, chiefly, "that the will did not identify the policies," and he thought, "that the will did not make a valid re-appropriation."

The will contains the following clauses: "I give, devise and bequeath all my real and personal estate, including my life insurance policies, of which I may die possessed in the manner following, that is to say:—

"To my executors and trustees hereinafter named and appointed in trust to call in and convert the same into money, in trust to stand possessed of the fund thereby created for the following purposes and trusts, that is to say:—

"(1) To pay to my daughter Rena Stewart the sum of One thousand Dollars which bequest is in addition to all other benefits which she is entitled to receive under this my will.

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"(2) To pay to my mother Agnes Stewart the proceeds of my life insurance policy in the Independent Order of Foresters.

"(3) To invest the balance in first mortgages of real estate in the names of my trustees or in guaranteed investments of the Trusts and Guarantee Company, Limited, with power to vary such investments from time to time, with power to retain investments made by me in my lifetime as long as they shall think proper.

"(4) To pay to my wife Sarah Stewart the income arising from one-half of the said trust fund during the term of her natural life for her own personal use absolutely, which bequest I declare to be in lieu of all dower in my estate.

"(5) To pay the income arising from the remaining half of the said trust fund to my wife for the purpose of being expended by her in the education and maintenance of my infant children."

Two of the companies whose policies were payable to the widow, as already indicated, paid the amounts thereof to her. The other eleven companies, whose policies aggregate in value $13,288.17, required the executors of the estate to receive the insurance moneys under said policies and to discharge the companies from liability. The executors say that they considered these policies to be payable also to the widow, and it was not until the companies required them to receive the money and discharge the policies that they found themselves "compelled to intermeddle with the funds and become responsible for the administration of the same." The moneys payable under said eleven policies, with the exception of one, were paid to them before the 1st August, 1912, and the amount payable under it on the 6th August, 1912.

The executors are asking upon this application for the determination of the following questions:

"1. Do the following words used by the testator, "I give, devise and bequeath all my real and personal estate including my life insurance policies, of which I may die possessed," constitute a variation of the policies of insurance of the testator which, by the express terms of the policies, are made payable to Sarah E. Stewart, wife of the assured and now his widow, and in case she should predecease the assured, then to his estate, and are the words used a sufficient identification of same?"

"2. Has the testator by his will altered the apportionment of the insurance moneys secured by the various policies, or are the moneys payable only as directed by the policies of insurance, and in accordance with the terms of the said policies, and the various indorsements thereon?

"3. Does the said general clause in the will of the testator, or any other clauses therein contained except paragraph 2,

affect or control the disposition of the insurance moneys of the deceased?

"4. Can the executors pay to Mrs. Sarah E. Stewart the proceeds of policies mentioned in paragraph 9, (d) of the affidavit of Charles Julius Mickle filed on this motion, as having been paid to the executors of the estate and the widow, and amounting to $13,288.12?

It is admitted that if the law were still as it was before the passage of the Ontario Insurance Act (1912), 2 Geo. V. ch. 33, the widow would be entitled to receive the moneys: In re Cochrane, 16 O.L.R. 328. It is suggested on the authority of Re Dicks, 18 O.L.R. 657, that regard should be had to the law as it stood at the date of the will and not at the date of the death of the testator. Section 247 of said Act is as follows:

"247. Sections 162 and 201 of this Act shall come into force on the 1st day of August, 1912, and the remaining sections of this Act shall come into force forthwith."

Included, therefore, in the sections which did not come into force until the 1st August, 1912, is a new section numbered 170, which is as follows:

"170. Except in so far as the same are inconsistent with the provisions of this Act relating to contracts made or declared to be for the benefit of a preferred beneficiary or preferred beneficiaries, sections 171 to 182 shall apply to all contracts of insurance of the person and declarations whether made before or after the passing of this Act."

Sub-sections 3 and 5 of section 171 of said Act are as follows:

"(3) The assured may designate the beneficiary by the contract of insurance or by an instrument in writing attached to or endorsed on it, or by an instrument in writing, including a will, otherwise in any way identifying the contract, and may by the contract or any such instrument, and whether the insurance money has or has not been already appointed or apportioned, from time to time appoint or apportion the same, or alter or revoke the benefits, or add or substitute new beneficiaries, or divert the insurance money wholly or in part to himself or his estate, but not so as to alter or divert the benefit of any person who is a beneficiary for value, nor so as to alter or divert the benefit of a person who is of the class of preferred beneficiaries to a person not of that class or to the assured himself, or to his estate.

"5. Where the declaration described the subject of it as the insurance, or the policy or policies of insurance, or the insurance fund of the assured, or uses language of like import in describing it, the declaration, although there exists a declaration in favour of a member or members of the preferred class of beneficiaries, shall operate upon such policy or policies to the extent to which the assured has the right to alter or revoke such last mentioned declaration."

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It is contended on behalf of those interested in the estate other than the widow, that the Act of 1912 was in part passed in consequence of the decision in *Re Cochrane*, 16 O.L.R. 328, and the construction placed on section 160 of ch. 203 of R.S.O. 1897.

Sub-section 5 of said sec. 171, which is a new section, is referred to in this connection. It is argued that the Act is in this respect an enabling one and it should be given a liberal construction. See Maxwell on the Construction of Statutes, 4th ed., p. 360. If said sub-section 5 applies, it would apparently make the declaration in the will effective to alter the previous declaration in the policies. It is also contended on behalf of those other than the widow, that though section 170 and 171 are sections referred to in section 247 as not coming into force until August 1st, 1912, nevertheless on that date they became operative and by virtue of section 171 are retroactively applicable to the declaration in the will made before the passing of the Act. On behalf of the widow it is, however, contended that on the death of the testator her interest became a vested one. The policies by their terms were payable on the death of the insured and to the widow. At that time the only existing declaration which was intended to, or could effect a change was the one in the will. It was, however, under the law as it then stood ineffective for that purpose. I think the contention on behalf of the widow is a sound one and that the Act of 1912 cannot be held to have any application to the policies in question, that the interest of the widow was a vested one and that she is entitled to the moneys in question. Reference may be made to Craies' Statute Law, 2nd ed., 351, 352, 357, 367; "*The Langdale*," 23 Times L.R. 683; *Smithies* v. *National Association of Operative Plasterers*, [1909] 1 K.B. 310 at 319; *Commercial Bank of Canada* v. *Harris*, 26 U.C.R. 594.

The first three questions propounded in the notice of motion must, therefore, be answered in the negative and the fourth in the affirmative.

The two adult children of the testator, viz., Rena Stewart and James Downing Stewart, who were not represented on the motion, have the same interest in the estate as the infants who were represented. The executors on the motion asked that an order should be made appointing some one to represent them for the purpose of the motion. I do not think this is necessary. Under Rules 939 and 940 they are sufficiently represented by the counsel for the infants, whose interests are similar.

It is a proper case, I think in which to make costs of all parties payable out of the fund in question.

Order accordingly.

NILAN v. McANDLESS.

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Manitoba King's Bench. Trial before Macdonald, J. December 9, 1912.

1. FORCIBLE ENTRY (§ I)—LANDLORD AND TENANT—RE-ENTRY—DAMAGES—WANT OF NOTICE.

An owner is not justified in entering upon premises to which he has undisputed title, but which are, at the time of entry, in possession of a lessee under a claim of right, and where such owner removes the lessee's property and locks out the lessee's wife, all without giving the requisite legal notice of 30 days, he is liable in damages to the lessee.

[*Lewis* v. *McInnes*, 17 W.L.R. 309, distinguished.]

Statement

AN action by the plaintiff for damages for forcible entry and breaking into his house, and for assault upon his wife.

Judgment was given for the plaintiff.

C. P. Fullerton, K.C., and *J. P. Foley*, for the plaintiff.

M. G. Macneil, and *B. D. Deacon*, for the defendant.

Macdonald, J.

MACDONALD, J.:—The plaintiff was tenant to the defendant of a house on Home street in the city of Winnipeg, and of the furniture of the defendant contained therein, upon an agreement in writing, which agreement is lost and the terms of which are in dispute.

The agreement was made before the first day of July, 1912, and for some short time prior to that date the plaintiff was allowed into possession free of rent, in consideration of the defendant being allowed to sleep in the house up to that date.

The plaintiff then became tenant to the defendant on the 1st day of July, 1912, at a rental of forty dollars per month.

The plaintiff says that the defendant could, by the terms of the agreement, retake possession by giving thirty days' notice, and paying him (the plaintiff) forty dollars.

The defendant, on the other hand, says that there was no fixed term, but either party could be released from the agreement by giving the other one month's notice, or should the defendant wish to sell his house or gain immediate possession, he could have the same by giving the plaintiff forty dollars, and this seems to me, considering the short term of the lease, the more reasonable agreement, and the one which I accept.

The plaintiff and defendant had been friends for years and no doubt relied upon that relationship, and were not strictly business-like in their arrangements.

At the time of the agreement to leave, the defendant's wife was absent in the east, and the defendant himself had intended moving to the city of Brandon to enter into business there, but the permanency of his stay there was evidently in doubt, hence the provision for immediate possession on payment by him of forty dollars. He returned from Brandon about the end of

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July, and says he then told the plaintiff that he had returned to town to remain permanently and would like possession of his house as soon as possible as he expected his wife back and that the plaintiff then said he would require a month's notice and that he could not vacate before the end of August, but would, if he could. The defendant resumed possession of the room in his house occupied by him by arrangement with the plaintiff prior to his going to Brandon.

The plaintiff denies that there ever was any such conversation as last above related, and says that the only conversation was on Sunday morning immediately preceding the grievance complained of; that on this occasion the defendant said that he expected the plaintiff would be out the following morning, and that the plaintiff then asserted his rights under the lease, which he claimed had not expired. The defendant then intimated that he would have the house, and insisted that he had given plenty of notice. It seems to me incredible that the defendant would have taken the stand he did without a previous intimation to the plaintiff such as he contends for; that the defendant did express his wish for possession some time prior to the Sunday referred to, I am convinced, but whether he gave the notice by law required, I am unable to find.

On Monday, the 2nd September, the defendant called the plaintiff up by telephone, and told him he must leave the house, to which the plaintiff replied that he could not, as he had a lease. On the following day the defendant, with his brother and another man, went to the house and found the plaintiff's wife and a lady friend on the verandah. The defendant asked the plaintiff's wife if she had her clothes packed and clearly intimated his intention of taking possession. The defendant, with his men, then entered and started removing the personal effects of the plaintiff outside, when the plaintiff's wife went outside to recover possession of a gripsack the defendant locked the door forbidding her to re-enter and then proceeded to, and did, remove outside the house all the personal effects, the property of the plaintiff.

The plaintiff brings action claiming damages for forcible entry and breaking into the house, and for assault upon his the plaintiff's wife. I can quite understand the indignation aroused upon a narration by the plaintiff of his grievances and the expectation of securing substantial damages, but unfortunately only one side of the case was heard.

I find that there was no assault, and that the defendant and his assistants acted quietly and with a desire of, and did avoid a breach of the peace.

The damage to the plaintiff, if indeed any, was of a trifling character—the damage was more to his feelings than to his pocket.

The agreement between them in its origin was founded on personal friendship as much as on a business basis, and the plaintiff's change of front and conduct towards the defendant does not appeal to me as evidence of the fact that his feelings would be severely wounded by the conduct complained of.

The defendant acted, I believe, in good faith, in the belief that he had given the necessary notice terminating the lease; but he was relying more on the existing friendship, in the original demand for possession, than upon the strict legal requirements. He was not justified, however, in taking the law in his own hands when he found that he could not get peaceable possession. His proper course was to obtain possession by legal means.

The case of *Lewis* v. *McInnes*, 17 W.L.R. 309, 313, is cited in support of the plaintiff's claim. In that case, however, the defendant had no possible right or color of right in entering upon the premises. I refer to this merely as justifying the departure from the finding there.

There will be judgment for the plaintiff for one hundred dollars, with County Court costs, and without a right of set off.

Judgment for plaintiff.

SMITH v. GRAND TRUNK R. CO.

(Decision No. 2.)

Ontario Court of Appeal, Moss, C.J.O., Garrow, Maclaren, Meredith, and Magee, JJ.A. September 27, 1912.

1. MASTER AND SERVANT (§ III A 4—89)—RAILWAY SWING BRIDGE—NEGLIGENCE.

Where a locomotive driver ignored and passed a semaphore which was against his train proceeding and stopped at a water tank until he had filled his engine, when he signalled the conductor, who, by a rule of the company, had entire control of the train, that he was ready to go ahead, and the conductor signalled him to go ahead, and he, still ignoring the semaphore, ran on to a swing bridge which was then being opened to let a tug pass and the engine ran off into the water and the engineer was drowned, his death was due to his own negligence.

[*Smith* v. *Grand Trunk R. Co.*, 2 D.L.R. 251, reversed; *Smith* v. *Grand Trunk R. Co.*, 3 O.W.N. 379, restored.]

2. MASTER AND SERVANT (§ III A 4—89)—SWING BRIDGE ON RAILWAY—SEMAPHORE AND BRIDGE LIGHTS.

The exception to a rule of a railway company that its trains are entirely under the control of the conductors and that their orders must be obeyed except when they are in conflict with the rules and regulations or plainly involve any risk or hazard to life or property, in either of which cases all participating will be held alike accountable, is applicable where an engine driver passed a semaphore which was against his train proceeding and stopped at a water tank until he had filled his engine, when he signalled to the conductor that he was ready to go ahead and the conductor signalled to him to go ahead and he ran on to an open bridge which was near the tank and the engine ran off into the water and the engineer was drowned, although the jury found

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that the engineer acted reasonably and with proper precaution when he saw that the lights on the bridge indicated that all was right to go across and that he went ahead upon being signalled by the conductor to do so.

[*Smith* v. *Grand Trunk R. Co.*, 3 O.W.N. 379, restored; *Smith* v. *Grand Trunk R. Co.*, 2 D.L.R. 251, reversed.]

APPEAL by the defendants from the order of a Divisional Court, *Smith* v. *Grand Trunk R. Co.*, 2 D.L.R. 251, 3 O.W.N. 659, reversing the judgment of Britton, J., 3 O.W.N. 379, and directing judgment to be entered for the plaintiff upon the findings of the jury at the trial.

The appeal was allowed and judgment of Britton, J., restored.

I. F. Hellmuth, K.C., and *W. E. Foster*, for the defendants.

J. R. Logan, for the plaintiff.

Garrow, J.A.

GARROW, J.A.:—The action was brought by the plaintiff, the widow and administratrix of Charles Franklin Smith, to recover damages caused by his death, under circumstances of alleged negligence, while in the employment of the defendants, as a locomotive engineer. The accident in which the deceased met his death occurred about 10.30 p.m. on the 20th July, 1911, at Port Colborne, where the engine on which he was employed was by some one's fault thrown into the Welland Canal through an open drawbridge, and he was killed.

A special, consisting of 35 freight cars, a caboose, and the engine and tender in charge of the deceased, left Fort Erie about 9.45 p.m., proceeding westerly. When it arrived near the drawbridge, the signals were set against the train. The engineer blew the necessary blasts with the whistle, but did not get a signal to advance. He then said to his fireman—the semaphore remaining set against him—"We will fill the tank up;" and proceeded for that purpose to the stand-pipe, which is situated between the semaphore and the bridge, thus passing the semaphore, which was still set against him. His duty, according to the printed instructions put in, was to detach the engine from the train when of over fifteen cars, as this was, when about to take water. This he did not do, but, instead, advanced with the whole train until the engine was at the stand-pipe, about 70 feet in advance of the semaphore. While engaged in taking water, and apparently without again looking at the semaphore, he signalled to the conductor—who was some 1,200 feet way, at the rear of the train—"I am ready to proceed;" to which the conductor replied, "All right." The train at once proceeded, and in less than five minutes the catastrophe had occurred.

The signals from the engine were given by whistling; those from the conductor by means of the lit-lantern which he carried.

The drawbridge was properly open for the purpose of passing a boat upon the canal.

The rules of the defendants were put in, and Nos. 22, 52, 59, 60, 213, 232, and 233 were specially referred to at the trial and before us.

Rule 22, under the heading "Conductors, Baggageman and Brakemen," says: "The train is entirely under the control of the conductor, and his orders must be obeyed except where they are in violation or conflict with the rules and regulations, or plainly involve any risk or hazard to life or property, in each of which cases all participating will be held alike accountable."

Under the heading "Engine Men," rule 62 says: " . . . they must obey the orders of the conductor of the train in regard to starting, stopping, and switching cars, speed, and general management of the train, unless they endanger the safety of the train or require violation of the rules." Rule 59: "They must obey all signals given, even if they think such signals unnecessary. When in doubt as to the meaning of a signal, they must stop and ascertain the cause; and, if a wrong signal is shewn, they must report the fact to the conductor." Rule 60: "They must always keep a sharp look-out ahead, noting carefully the position of switches, semaphores, and other signals . . ."

Under the heading "Movement of Trains," rule 43 says: "All trains must approach stations, the end of double track, junctions, railroad crossings, at grade, and drawbridge prepared to stop, and must not proceed until the switches or signals are seen to be right, or the track is plainly seen to be clear."

Rule 232 says: "Conductors and engine men will be held equally responsible for the violation of any of the rules governing the safety of their train, and they must take every precaution for the protection of their trains, even if not provided for by the rules."

And rule 233 says: "In all cases of doubt or uncertainty take the safe course and run no risk."

The printed "special instruction" as to detaching the engine before taking water reads as follows: "Freight trains of more than fifteen cars in taking water must stop before reaching the water-tank or stand-pipe, and the engine must be cut off before water is taken. The brakes must not be released on train until the engine is again coupled on and ready to proceed."

At the trial, as appears from the charge of the learned Judge, the plaintiff's case was rested entirely upon two acts of negligence, viz., the act of the conductor in giving the signal to go ahead and the acts of the bridge-tenders after they saw that the train had passed the semaphore and was proceeding towards the bridge.

The learned Judge reserved the defendants' motion of nonsuit, and submitted certain questions to the jury, which, with the answers, are as follows:—

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1. Was the conductor, McNamara, who was in charge of the train on the engine of which the deceased C. F. Smith was engineer, guilty of any negligence by reason of which the engineer, C. F. Smith, lost his life? A. Yes.

2. What was that negligence? and answer that question fully. A. Having passed the semaphore, if the conductor had full authority in the running of the train, he, McNamara, should have signalled the engineer to back up the train again until the semaphore was lowered.

3. Was the deceased, the engineer, guilty of contributory negligence: that is, could the engineer, by the exercise of reasonable care, have avoided the accident? A. Yes.

4. In what respect was the engineer, Smith, so guilty? A. By passing the semaphore without permission.

5. Apart from what may be said of negligence on the part of the conductor or the engineer, was there any negligence on the part of the defendants which occasioned the death of the engineer? (Referring to the bridge tender.) A. No.

6. If so, what negligence do you find these bridge tenders were guilty of? A. Nothing.

The jury upon the question of damages said they were of the opinion that the amount of such damages would be $3,600, but they would only allow one-half of that sum, or $1,800.

Britton, J., afterwards delivered judgment dismissing the action without costs. The view taken by the learned Judge is expressed in the following extract from his judgment: "It is argued that the death of the engineer was caused by the negligence of the person in charge of the train within sec. 3, subsec. 5, of the Workmen's Compensation for Injuries Act. The defendants' rule 22 puts the train entirely under the control of the conductor, and his orders must be obeyed except where they are in conflict with the rules and regulations or plainly involve any risk or hazard to life or property, in either of which cases all participating will be held alike accountable. Rules 52, 60, 213, and 232 were also cited. In view of these, and inasmuch as the deceased knew that the semaphore was up, and not lowered for the train of the deceased, he must be held equally responsible with the conductor; and so I must dismiss this action."

As appears in the learned Judge's charge, he had presented to the jury for their consideration the contention of the plaintiff that the result was brought about solely by the negligent signal to advance given by the conductor, and that any negligence of the engineer in passing the semaphore had then ceased to be operative, and the opposing contention of the defendants, which is thus described by the learned Judge: "It is said in argument, in reference to him, that his signal only meant, and it would only be understood by the engineer, that it was all

right at his end of the train. 'You are on your engine drawing this train. It is for you to see that it is all right for you.' Using the wording of rule 213, 'it has to be plainly seen by you that the track is clear to go upon the bridge and to cross over the bridge, and assuming it is your duty and that that is all right, then it is all right for you to go ahead.' That is the meaning, it is said, so far as this conductor is concerned, in answering from the rear end of the train the signal that was given to him by the engineer. Now, it is for you to say whether this conductor, in your opinion, was guilty of the negligence which caused the engineer, under those circumstances, to go forward with his train."

The Divisional Court adopted the plaintiff's contention and allowed the appeal.

I am, with deference, of the opinion that the view taken by the learned trial Judge was correct. He might very well, in my opinion, even have granted the motion for nonsuit made by the defendants at the close of the plaintiff's case—all the undisputed facts upon which his final judgment was based having then appeared.

But, assuming that the case was one proper to be passed upon by a jury, I am quite unable to agree with the Divisional Court that it was permissible to ignore the finding of the jury as to the engineer's contributory negligence. There is no evidence that they did not fully understand and appreciate the exact situation. The charge had fully instructed them as to the opposing contentions of the parties. Under that of the plaintiff, there was no contributory negligence causing or helping to cause the accident. Under that of the defendants, the engineer's original negligence in passing and ignoring the semaphore continued, while the action of the conductor was a mere incident in bringing about the result.

It is, I think, impossible to regard the findings as a whole as having in any way attributed the advance to the signal of the conductor. On the contrary, the jury's idea of the conductor's negligence is not that he gave that signal, but that he should have given an order to the engineer to back up until the semaphore was lowered. And that the jury were convinced that the engineer was in fault is decisively evidenced by their very unusual method of dealing with the damages.

I would, for these reasons, allow the appeal and affirm the judgment of the trial Judge. And the defendants should have, if they ask, the costs of the appeal to the Divisional Court and to this Court.

MEREDITH, J.A., concurred in result.

Meredith, J.A.

MOSS, C.J.O., MACLAREN and MAGEE, JJ.A., concurred.

Moss, C.J.O.
Maclaren, J.A.
Magee, J.A.

Appeal allowed.

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KELLEY v. HOLLEY et al.

Manitoba King's Bench. Trial before Galt, J. November 30, 1912.

1. CONTRACTS (§ I D 4—62*b*)—OFFERS AND ACCEPTANCE—ACCEPTANCE OF OFFER WHERE MADE BY MAIL WITH REQUEST FOR ANSWER BY RETURN MAIL.

Where one party interested with another in a piece of land makes an offer by mail to sell his interest and requests an answer by return mail, an attempt to accept the offer eight days after its receipt by the offeree is too late, where in the meantime the interest was sold to another.

2. SPECIFIC PERFORMANCE (§ I A—14)—FAILURE OF ACTION WHERE NO CONTRACT EXISTS—NON-ACCEPTANCE OF OFFER WITHIN REASONABLE TIME.

A claim for specific performance must fail where the alleged contract failed to become complete because of failure to accept the offer within reasonable time.

Statement

THIS action was brought by the plaintiff's claim that the defendant Holley was a trustee for the plaintiff and the other defendants of certain lands, being 212½ acres, more or less, in Manitoba, in the vicinity of Winnipeg, and he asked for a declaration of such trust and for an account and that a receiver be appointed, and that an alleged agreement by the defendant Holley to sell to the plaintiff said defendant's share in the property be specifically performed, and for $5,000 damages as against the defendant Holley.

The action was dismissed.

A. G. Kemp, and *W. P. Fillmore*, for plaintiff.

A. E. Hoskin, K.C., *C. P. Fullerton*, K.C., *F. M. Burbidge*, and *H. A. Bergman*, for the various defendants.

Galt, J.

GALT, J.:—The transaction out of which the claim arises originated in an agreement made on May 7, 1907, expressed to be between Arthur Robert Taylor and Thomas William Holley, thereinafter called the trustees, of the first part, and William Chapman Sheldon, John Rollo Forman, and Wellington Clifton Kelley, of the second part. The original agreement was drawn by the plaintiff himself and was for the purpose of buying as tenants in common the lands and premises in question, and reselling the lands at a profit.

The agreement contained, amongst others, the following clauses:—

4. The parties hereto agree to pay, when called upon so to do under the terms hereof, such amounts in respect of the purchase price of the said lands, and in respect of taxes, improvements and solicitors' costs and real estate commissions and other expenses incidental to the management of the said lands as said trustees may call for as hereafter provided, in the following proportions: The said Taylor, one-fourth part of the said sums; the said Holley, a one-eighth part of the said sums; the said Sheldon, a one-fourth part of the said sums; the said

Forman, a one-fourth part of the said sums, and the said Kelley, a one-eighth part of the said sums.

6. Each of the parties hereto hereby charges his interest in the said lands and in the moneys or securities to be derived therefrom under this agreement, with the payment of all moneys payable by him under the terms hereof, together with interest on said moneys from the time when they are demanded by the said trustees as herein provided until the time of payment thereof at 10c per annum, so long as they remain unpaid, and on default of payment by any party hereto for ninety days the said trustee may sell the interest of the party so in default on this agreement and apply the proceeds of such sale in settlement of the amount due by the said party as far as it will go, and the surplus, if any, is to be paid to the party in default.

7. The parties hereto agree that the said trustees for them and each of them, but in their own name, are to take possession of, and to let, manage and improve the said land, and from time to time appoint any agents or servants to assist them in managing the same and to dismiss or remove such agents or servants and to appoint others, and also, as and when they shall think fit and subject to the approval of the parties of the second part, to sell and absolutely dispose of the said lands, either all together or in parcels, for such price or prices, and by public auction or private contract, as to said parties shall seem reasonable and expedient, and to convey, assign, transfer and make over the same respectively to the purchaser or purchasers thereof, with power to give credit for the whole or any part of the purchase money thereof and to permit the same to remain unpaid for whatever time and upon whatever security, real or personal, either comprehending the purchased property or not, as said parties of the second part shall think safe and proper, and upon default being made by the said purchaser or purchasers of said lands, said trustees shall proceed to foreclose the said purchase and to make resales of the said lands in the same manner as if the same had not been sold.

The defendant Arthur Robert Taylor declined to act as trustee in the above agreement, and subsequently another agreement, embodying the same terms, was made between the defendant Holley, as trustee of the first part, and the plaintiff and the other defendants of the second part.

On the 28th May, 1907, an agreement was entered into between one William Cyrenus Hall, as vendor, of the first part, and the defendant Holley, as purchaser, of the second part, whereby said Hall agreed to convey the lands in question to the defendant Holley at the price of $75 per acre, payable as follows: $4,000 on the execution thereof, receipt whereof was thereby acknowledged; $3,800 by the purchaser assuming and paying a mortgage with interest thereon from the 30th March, 1907, now on said lands to the Union Trust Company, and the balance in three equal annual consecutive payments, the first of such payments to be made on the 31st day May, 1908, together with interest thereon, excepting the said mortgage, at the rate of 6 per cent. per annum from the 31st day of May, 1907, to be paid on the

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purchase money, or so much thereof as should from time to time remain unpaid, whether before or after the same should become due.

The original agreement which had been drawn by the plaintiff was executed by the defendant Holley alone; but the subsequent agreement, which took its place, was executed by the defendants Forman, Sheldon and Taylor. The purchase by Holley as trustee was intended to be a joint venture on behalf of the parties, but Holley alone was liable to the vendor in respect of the purchase. The plaintiff did not execute either of the agreements, although the evidence shews that he was urged to do so. Shortly after the purchase a slump occurred in the real estate market, and the parties discovered that land might have been bought for about half the amount which Holley agreed to pay. The initial payment of $4,000 was duly made and contributed to by the parties in accordance with their interests. When the first instalment payable under the agreement of sale fell due in 1908, the plaintiff made default in payment of his share and the defendant Holley was obliged to procure the money from other parties.

In December, 1908, the plaintiff was taken ill with pleurisy, and on March 30, 1909, he left Winnipeg and went to Summerland, British Columbia, where he has resided ever since. The plaintiff states that he continued to be ill in bed at Summerland for fourteen months after his arrival there. When the second instalment of purchase money fell due in 1909 the plaintiff again made default in contributing his share, and also in respect of the third instalment in 1910. The defendant Holley obtained the requisite contribution from the other parties, but had to borrow money at a high rate of interest to protect Kelley's share. The correspondence shews numerous urgent requests by Holley to Kelley to provide for his share, but without avail, until at length, early in 1911, Holley sued Kelley for his overdue payments, and succeeded in obtaining a settlement. Meanwhile the mortgage had twice fallen into arrears and two actions had been brought against Holley for foreclosure, but he managed to raise sufficient money to avoid losing the property.

On the 9th June, 1910, Holley wrote to Kelley, saying:—

> The property is not saleable yet and has now cost considerably over $100 per acre, which is a high figure, and which is, of course, the reason why it could not be sold, because we paid too much for it. But even now, if you can make your payment with the 10 per cent. interest which I have had to pay to carry this along, I would much prefer this to a quit claim. I have no desire to cause you any inconvenience or trouble as you must know, because I have not bothered you for a long time in this matter, and were it not for the fact that I am obliged to do something now before July 1st, I would have been pleased to have carried this further, but if you are not in a position to make your payment, surely the easiest way out of it would be to give a quit claim.

On August 20, 1910, Holley again writes to Kelley:—

> The writer has had no reply to my last letter, and I have been waiting anxiously to get one, as we do not wish to cause any annoyance in the matter of the Hall property; but as you know it must be fixed up in some way, and as it will cost over $50 for solicitors' fees to settle up this matter, I am willing to make this proposition to you. I am enclosing a quit claim and you can send this to Mr. Hugg or anyone you wish, signed, and you can pay over the $50.

The plaintiff considered that $50 was too small an amount, but he was willing to take $125. The proposition, however, fell through, and in January Holley's action against Kelley for the arrears was brought and settled.

On April 22, 1911, Holley writes to Kelley:—

> We have finally succeeded in getting your account settled with your solicitor, Mr. Richards, he having paid over the amount agreed upon to Mr. Haig, and in view of the difficulties we have had and the unpleasant feeling which exists between the parties in this property and yourself, they all feel that we were not treated fairly in this matter, and personally I have had to take the brunt of the blame from the other parties interested because I did not as trustee collect the payment long before I did, I feel that the wisest course for me is to offer to sell my interest to you, or buy yours, and in view of this fact I am enclosing a quit claim for you to sign, and a removal caveat. You can sign this if you wish and return them here through your bank, drawing on me for the sum of $2,100. If you wish to buy my interest I will sell at the same figure. This will relieve me of any further unpleasantness, and the writer would like to hear from you by return mail. If you do not care to sell or buy, I would like to have you sign the trust agreement as the other parties have done. It is unfair to them that they should be called upon to sign this trust agreement, and you refuse to do so. As the trust agreement and the agreement between Mr. Hall and myself was left entirely in your hands, and there seems to be no reason why you should not be willing to sign the agreement, which you drew up yourself, if you thought that it was perfectly fair and just that the others should sign such an agreement. Awaiting your prompt reply, I remain, etc.

Before dealing with the response to this letter it should be here mentioned that on the 7th July, 1910, Holley succeeded in selling a portion of the property to Martin A. Hoover for the sum of $16,456, whereof $4,114 was paid in cash and the balance was to be paid in three equal annual payments of $4,114 each on the 7th day of July in each of the years 1911, 1912, and 1913. On December 11, 1910, the defendant Holley had furnished the plaintiff with an account purporting to shew what was due from the plaintiff, amounting to the sum of $1,624.93; but that statement contained no reference to the Hoover sale. The action which was brought in January, 1911, by Holley against Kelley was for this last mentioned sum. Consequently when Holley made his offer to Kelley on April 22, 1911, Kelley was in ignor-

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ance of the Hoover sale and that his share of the moneys arising therefrom was already in the hands of the defendant Holley. The plaintiff did not reply to Holley's offer until May 5, 1911, when he wrote stating:—

> After thinking the matter over I have decided to accept your offer to sell me your one-eighth interest for $2,100 cash, and I hereby accept same, and am ready to pay over the money at once. Mr. S. E. Richards will act as my solicitor. Kindly take up matter of transfer of title with him, as I would like to get it closed out.

This acceptance of offer was sent by the plaintiff to his solicitor, Mr. Richards, and ought to have reached Winnipeg about May 10th. Upon receipt of Kelley's letter enclosing said acceptance, Mr. Richards made inquiries. Mr. Richards states that he received Kelley's acceptance of the offer and that he then saw Holley and got him to give him a written statement of the Hoover sale, about 21st May, 1911; and after considering the matter he caused Kelley's letter of acceptance to be served upon Holley on May 23rd.

Meanwhile on May 10, 1911, Holley gave an option to one Hugo Carstens to purchase the balance of the property for the sum of $44,000, payable as follows: The sum of $11,000 to be paid in cash on the execution of the agreement for sale, and the balance of $33,000 to become due and payable in three equal consecutive annual instalments of $11,000 each, the first of such instalments to become due and payable on the 15th May, 1912, with interest at 6 per cent., etc.; and it was agreed that the option thereby given should be open for acceptance up to, but not later than twelve o'clock noon on the 15th day of May, 1911. On May 13, 1911, Hugo Carstens accepted the option, and the sale was accordingly carried out. The defendant Holley declined to recognize or comply with the acceptance of the offer which he had made to the plaintiff, dated April 22nd, and hence the present action. The original transaction between the parties appears to have been more a joint venture in which Holley was appointed manager than an ordinary trust for sale.

The plaintiff contends, in the first place, that the lands sold by Holley to Hoover in 1910 were sold at an undervalue and without the plaintiff's consent, and he points out that under clause 7 of the so-called syndicate agreement, the trustee was only entitled to sell "subject to the approval of the parties of the second part," and that he never approved of that sale.

The defendant Holley gave his evidence before me very frankly and satisfactorily. He stated that before Kelley went away to Summerland he had an interview with him and told Holley that he did not intend to put another dollar into the property and that Holley should sell the property for the best advantage he could and he would be satisfied. The whole venture was of a speculative and unpromising character, and it was

most natural that Kelley should make some such statement as Holley says he did when leaving Winnipeg for a prolonged sojourn in British Columbia. Mr. Hugg, then a partner of Kelley in Winnipeg, confirms Kelley's determination to pay nothing further. I therefore accept Holley's testimony upon this point and I also find that the price realized from the sale to Hoover was, upon the evidence, a fair price for that portion of the land which was sold to him.

It may be that the plaintiff's illness necessarily incapacitated him from attending to business or earning any money at Summerland, but it must be borne in mind that he was jointly interested with several other persons, and it was most inconvenient to all concerned that he did not contribute any portion of his share. The reason given by the defendant Holley for not disclosing the Hoover sale to Kelley was that under the terms of the syndicate agreement he was entitled to apply any moneys in his hands coming due to any of the parties towards meeting their obligations to the original vendor, and the mortgagee; and he retained Kelley's share of the Hoover money to apply on Kelley's share of the mortgage obligation, fearing that if Kelley knew of it he would demand payment and continue his defaults.

Under the peculiar circumstances of this case I think the defendant Holley's conduct is not open to serious objection; subject to an observation which I will make later on. Coming now to the offer made by Holley, it must be borne in mind that the whole subject matter was a speculation. Holley writes on April 22, 1911, making his alternative offer and requesting an answer by return mail, and at the end of his letter again urges the plaintiff to be prompt. That letter should in the ordinary course have reached the plaintiff on or about April 27th. Instead of replying promptly the plaintiff waits until May 5th, when he writes an acceptance of the offer and transmits it to his solicitor in Winnipeg. This acceptance should have reached Winnipeg on or about May 10th. By this time the Carstens' option had been given and was subsequently carried out. On May 21st Kelley's solicitor was informed of the Hoover sale, but it was not until May 23rd that the plaintiff's acceptance was communicated to the defendant Holley. I think that, considering the terms of the offer, the nature of the property and the surrounding circumstances, the plaintiff was too late in attempting to accept the offer on May 5th; but if for any reason that date could be considered reasonable, I think it was certainly far too late on May 23rd. The claim for specific performance therefore fails.

With regard to the sale to Hoover, if the plaintiff had promptly accepted the other alternative of selling out his interest to Holley for $2,100 without having been informed of the sale, I do not think Holley could well have justified his purchase. Furthermore, it is impossible to say, if Holley had, in his letter

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of April 22nd, informed Kelley of the sale to Hoover, that Kelley would not have acted promptly in accepting the offer. If Kelley had done so he would have realized substantial profit. I think that when Holley made his alternative offer of April 22nd he was certainly under an obligation to inform Kelley of the facts relating to the Hoover sale, in order to enable Kelley to decide which offer he would accept. By intentionally omitting to do this Holley has placed himself in the wrong, and disentitled himself to the usual protection in the way of costs.

The plaintiff claims that an account should be taken of the defendant Holley's dealings with the land and money of the plaintiff and defendants; and incidentally the plaintiff, in his evidence, disputes Holley's right to charge a commission on sales made by him of the syndicate property at the rate of 10 per cent. I think the evidence given by both Holley and other defendants establishes that a 10 per cent. commission was to be the remuneration to the trustee. It must be borne in mind that Holley alone was bound by the covenants in the original transfer from Hall to Holley, and the trust necessarily involved a large amount of personal attention by the so-called trustee in addition to the anxiety arising out of the obligations which he had incurred on behalf of the syndicate. It is stated, I think by more than one of the defendants, that the plaintiff himself was present when the arrangement as to 10 per cent. commission was approved of. I feel satisfied that the arrangement was in fact made, and that the plaintiff has probably forgotten the incident.

The defendant Holley furnished accounts to the plaintiff on at least two occasions, but he omitted to include anything relative to the Hoover sale. In May, 1911, when the plaintiff's solicitor was settling the action which had been brought by Holley against Kelley, careful inquiries were made as to the trustee's accounts, and the solicitor was permitted to examine the books and otherwise ascertain the figures. Then on May 21st the solicitor was furnished by Holley with a statement containing the figures of the Hoover sale. The only outstanding items of account related to the Carstens' sale, and I understand that there is no dispute about those figures.

The only items objected to on the argument before me in the accounts, apart from the figures of the Hoover sale which were omitted, rendered by the defendant Holley, were a few items of trifling amount, and the facts relating to these ought to be capable of easy explanation between the parties. If they are unable to agree on the figures there may be a reference to the registrar to settle them; in which case the costs of such reference will be reserved to be dealt with after the registrar has made his report.

With the single exception of the omission to inform Kelley of the facts relating to the Hoover sale, I find the conduct of Holley to have been unobjectionable, and beneficial to all the

members of the syndicate. There is no ground upon which to base his removal from the trust, or for the appointment of a receiver. The claim for damages and for an account (other than the account above directed, which the plaintiff will take at his own risk) also fail.

The plaintiff's action will therefore be dismissed, without costs as against the defendant Holley, but with costs as against the other defendants.

Action dismissed.

WASHBURN v. ROBERTSON.

Saskatchewan Supreme Court, Newlands, Lamont, and Brown, JJ. November 23, 1912.

1. FALSE IMPRISONMENT (§ II B—12)—RESTRAINING LIBERTY OF PERSON WITHOUT AUTHORITY OF LAW.

An action for false imprisonment lies when the liberty of a person has been restrained against his will without the authority of law.

[See 19 Cyc. 319, upon the subject of false imprisonment generally.]

2. FALSE IMPRISONMENT (§ III—15)—JUSTIFICATION—BURDEN OF PROOF.

In an action for false imprisonment, as soon as imprisonment is proved, the burden is upon defendant to prove that the imprisonment was not his act or was justified.

[6 Ency. Laws of Eng. 20, referred to.]

3. FALSE IMPRISONMENT (§ III—15)—ACTION AGAINST JUSTICE OF THE PEACE—REASONABLE CAUSE AS JUSTIFICATION—BURDEN OF PROOF.

In an action against a justice of the peace for false imprisonment, where the defendant admits that the warrant under which plaintiff was arrested was his act, the onus is on him to plead and prove affirmatively the existence of reasonable cause as his justification.

[*Baker* v. *Tedford*, 2 S.L.R. 309, referred to.]

4. FALSE IMPRISONMENT (§ III—15)—ACTION AGAINST JUSTICE OF THE PEACE—UNAUTHORIZED WARRANT—BURDEN OF PROVING AUTHORITY.

Where an action for false imprisonment is brought against a justice of the peace on an alleged unlawful warrant, he must shew that he was authorized by law to issue the warrant when he did in fact issue it.

5. JUSTICE OF THE PEACE (§ III—10)—JURISDICTION—NON-PAYMENT OF WAGES TO WORKMEN.

A magistrate has only such jurisdiction as is given him by statute in respect of claims for wages due to workmen and labourers, and his authority to issue a warrant of arrest upon defendant's default of appearance to a summons depends upon there having been before him at the time of the issue of the warrant proper proof of the service of the summons under the Master and Servants Act, R.S.S. ch. 149.

6. FALSE IMPRISONMENT (§ III—15)—ACTION AGAINST JUSTICE OF PEACE—MASTER AND SERVANTS ACT, R.S.S. CH. 149—JUSTIFICATION.

In an action for false imprisonment against a justice of the peace under a warrant issued in pursuance of the Master and Servants Act, R.S.S. ch. 149, the defendant must shew that a complaint was made to him upon oath by an employee of the plaintiff, that he issued a summons commanding the plaintiff to appear at a time stated in the summons, which must be a reasonable time, that the plaintiff did not appear and that service of the summons upon him was proved either by the oral testimony of the person effecting such service or by his affidavit purporting to be made before a justice of the peace.

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7. DISCOVERY AND INSPECTION (§ IV—20)—TRIAL—READING QUESTIONS AND ANSWERS EXPLANATORY FROM EXAMINATION—ADMISSIBILITY.

On the trial of an action, where plaintiff has put in evidence certain questions and answers from the defendant's examination for discovery, and defendant's counsel asks to read and does read certain other questions and answers which he says are explanatory, these questions can only become evidence if they are explanatory of what has already been put in.

8. DISCOVERY AND INSPECTION (§ IV—20)—APPEAL—EVIDENCE BEFORE APPELLATE COURT—EXAMINATION FOR DISCOVERY.

Where, on the trial of an action, defendant's counsel read certain questions and answers from defendant's examination for discovery, in order to explain certain questions and answers from the same examination for discovery which were put in by plaintiff, if the trial Judge, finding that they are not explanatory, does not direct that they be read in evidence, they are not before the Court on appeal and cannot be looked at.

9. FALSE IMPRISONMENT (§ III—15)—ACTION AGAINST JUSTICE OF THE PEACE—JURISDICTION TO ISSUE SUMMONS—PRESUMPTION.

In an action against a justice of the peace for false imprisonment, where it must be shewn by the defendant that he had jurisdiction to issue the summons for non-attendance on which he had issued the warrant of arrest, such jurisdiction will not be presumed.

[*Rex* v. *Crooks*, 4 S.L.R. 333, referred to.]

10. FALSE IMPRISONMENT (§ III—15)—ACTION AGAINST JUSTICE OF THE PEACE—DEFENCE OF 11 AND 12 VICT. CH. 44 (IMP.)—NECESSITY OF PLEADING.

In an action against a justice of the peace for false imprisonment, in order for the defendant to take advantage of 11 and 12 Viet. ch. 44 (Imp.), being "An Act for the Protection of Justices of the Peace from Vexatious Actions," the defence must be pleaded.

[*Baker* v. *Tedford*, 2 S.L.R. 309, referred to.]

Statement

APPEAL by the plaintiff from judgment of Johnstone, J., at trial dismissing plaintiff's action brought for trespass and false imprisonment.

The appeal was allowed.

F. L. Bastedo, for appellant.

H. V. Bigelow, for respondent.

Newlands, J.

NEWLANDS, J., concurred with judgment of Lamont, J.

Lamont, J.

LAMONT, J.:—This is an action for trespass by false imprisonment. On September 19th, 1911, the plaintiff was arrested by a constable of the Royal North-West Mounted Police under a warrant dated the 16th day of September, 1911, signed by the defendant, purporting to be a justice of the peace, and taken to the police station, where he was kept in custody about six hours. During this time his solicitor communicated with the defendant and obtained from him a direction to the police to liberate the plaintiff on payment of $65.50, the amount of an order made against the plaintiff by the defendant the day preceding his arrest. The plaintiff paid the amount under protest, and then brought this action, in which he asks damages, including this sum paid.

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In his statement of defence the defendant, after denying the allegations of fact set up in the plaintiff's statement of claim, alleged that on or about September 13th, 1911, one Minnie Brown laid an information on oath before him in his capacity of justice of the peace, that the plaintiff refused to pay her her wages, and that in pursuance of R.S.S. ch. 149, being the Master and Servants Act, he in his capacity as justice of the peace caused a summons to be issued under the said complaint commanding the plaintiff to appear before him on September 16th. He also alleges that the summons was served on September 15th, but that the plaintiff did not appear, and that, pursuant to the procedure provided by the Magistrates Act he issued a warrant for the plaintiff's arrest. At the trial the plaintiff testified to his arrest and imprisonment, and was corroborated by constable Turner, who made the arrest. He also admitted having been served with the summons on September 15th, and that he had not obeyed it. Counsel for the plaintiff then put in certain questions and answers from the defendant's examination for discovery, in which the defendant admitted that the warrant had been issued by him and that when he issued it the only evidence he had of the service of the summons was a telephone communication from Corporal Meakin at Regina that it had been served. Plaintiff's counsel then rested his case, and counsel for the defendant moved for judgment for the defendant, which was granted. From that judgment the plaintiff now appeals.

An action for false imprisonment lies when the liberty of a person has been restrained against his will without the authority of law. As soon as imprisonment is proved, the defendant must establish that the imprisonment was not his act or was justified: 6 Ency. Laws of Eng., p. 20. In this case the defendant admitted that the warrant under which the plaintiff was arrested was his act. The onus was therefore on him to plead and prove affirmatively the existence of reasonable cause as his justification: *Hicks* v. *Faulkner*, 8 Q.B.D. 167; *Baker* v. *Tedford & Hossie*, 2 S.L.R. 309. For the appellant it was contended that although the defendant pleaded the existence of reasonable cause he did not prove it.

To justify his act the defendant must shew that he was authorized by law to issue the warrant when he did, in fact, issue it. A magistrate has only such jurisdiction as is given him by statute. The Master and Servants' Act, under which the proceedings were taken, provides that a justice of the peace, upon an employee complaining upon oath against his master for non-payment of wages, may summon the master to appear before him at a reasonable time to be stated in the summons. After issuing the summons the procedure to be adopted by the magistrate is provided for in sec. 8 of the Magistrates' Act, R.S.S. ch. 61, which is as follows:—

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> Except it is otherwise especially provided, all the provisions of part XV. and part XXII. of the Criminal Code shall apply to all proceedings before justices of the peace under or by virtue of any law in force in Saskatchewan or municipal by-laws and to appeals from convictions or orders made thereunder.

By sec. 711 of the Criminal Code, which is included in part XV., it is enacted that the provisions of parts XIII. and XIV. relating to the compelling of the appearance of the accused before a justice receiving an information for an indictable offence shall, so far as the same are applicable, except as varied by the sections immediately following, apply to any hearing under the provisions of part XV. Turning to part XIII., sec. 66, sub-sec. 5, we find that provision is made for the issuing of a warrant by a magistrate when the accused does not appear as directed by the summons. It reads as follows:—

> In case the service of the summons has been proved, and the accused does not appear, or when it appears that the summons cannot be served, a warrant in form 7 may issue.

And in sec. 658, sub-sec. 5, we find how the service of the summons may be proved. It reads:—

> The service of any such summons may be proved by the oral testimony of the person effecting the same or by the affidavit of such person purporting to be made before a justice.

Therefore, to justify the issue of the warrant for the arrest of the plaintiff, the defendant must shew that a complaint was made to him upon oath by an employee of the plaintiff, that he issued a summons commanding the plaintiff to appear at a time stated in the summons, which must be a reasonable time, that the plaintiff did not appear, and that service of the summons upon him was proved either by the oral testimony of the person effecting such service or by his affidavit purporting to be made before a justice of the peace.

In this case there is absolutely no evidence that Mrs. Brown made any complaint upon oath to the defendant. After the plaintiff's counsel had put in certain questions and answers from the defendant's examination for discovery, counsel for the defendant asked to read and did read certain other questions and answers which he said were explanatory and from which it did appear that Mrs. Brown had made a complaint on oath. These questions could only become evidence if they were explanatory of what had already been put in, and if, being explanatory, the trial Judge had directed that they should be read as evidence: rule 303. They were not explanatory, and the learned trial Judge did not direct that they should be read in evidence. They are, therefore, not before the Court and cannot be looked at.

It was contended that it should be presumed that the summons was properly issued. But, as pointed out by my brother

Brown in *Rex* v. *Crooks*, 4 S.L.R. 333, nothing will be inferred in favour of giving an inferior Court jurisdiction. The defendant, therefore, in so far as this point is concerned, has failed to shew that he had jurisdiction to issue the summons. This, however, could probably be remedied in case of a new trial.

The next objection taken by the appellant was that not only had the defendant failed to prove service of the summons upon the plaintiff as required by sec. 658, sub-sec. 5, but he had admitted that the only evidence of service before him was a communication from the corporal at Regina that he had been served. This is no proof of service at all. Yet without proof of the service of the summons the defendant had no jurisdiction to issue a warrant for the plaintiff's arrest, because he did not appear.

For the defendant it was argued that, as the warrant had been put in evidence by the plaintiff, and as it contained a recital that proof upon oath of the service of the summons had been made to the defendant, that the plaintiff was bound by the recital. There are cases in which recitals in the warrant may be *primâ facie* evidence of the fact recited, but these have no application where the person issuing the warrant admits that the recitals are not true.

Counsel for the defendant also contended that by virtue of 11 and 12 Vict. ch. 44 (Imp.), "An Act for the Protection of Justices of the Peace from Vexatious Actions," liability would not attach to the defendant. This defence was not pleaded, and the defendant therefore cannot take advantage of it: *Baker* v. *Tedford & Hossie*, 2 S.L.R. 309.

The defendant having failed to prove that he was justified in issuing the warrant, and having admitted that no proof of service of the summons had been made before him, as required by sec. 658, the plaintiff, in my opinion, is entitled to judgment. The appeal should, therefore, be allowed with costs. I would assess the damages at $75. As the plaintiff has not appealed against the order directing the payment of wages, I do not think he is entitled to have this sum added to the judgment.

BROWN, J., concurred. Brown, J.

Appeal allowed.

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OLSON v. MACHIN.

Ontario Divisional Court, Riddell, Sutherland, and Middleton, JJ.
November 13, 1912.

1. ASSIGNMENT (§ II—201) — EQUITABLE ASSIGNMENT — EMPLOYEES' PAY CHECKS—MEALS DEDUCTED FROM CHECKS.

An arrangement between a boarding house keeper and a company that he should charge for meals served to the company's employees, and that the company should deduct the amount owing in respect of such meals from the employees' pay checks and pay it to the boarding house keeper, is not dependent on the law of assignment, as the amount so to be deducted from wages yet to be earned would from time to time be payable to the boarding house keeper as the direct creditor of the company and would never have been legally payable to the employee, although for convenience of accounting the gross wages were placed to his credit and the boarding accounts charged against the same.

[*Lee* v. *Friedman*, 20 O.L.R. 49, distinguished.]

2. CORPORATIONS AND COMPANIES (§ IV G 5—130)—OFFICERS' LIABILITIES—LIABILITY OF DIRECTOR FOR WAGES.

An action against a company on a note given in part settlement of an account stated, the account being partly for wages and partly for goods supplied, is not a prior action for wages against the company under the statute 7 Edw. VII. (Ont.) ch. 34, sec. 94, so as to make the directors of the company personally liable for the amount of the note under that section, where the amount of the note was considered both by the maker and payee as an undivided sum and represents the balance due on the settlement after a payment made generally on the entire indebtedness without apportionment as between the wages and the other claims.

Statement

APPEAL by the plaintiff from the judgment of Latchford, J., of June 24th, 1912, dismissing the action without costs.

H. A. Burbidge, for the plaintiff.

C. A. Masten, K.C., for the defendant.

Riddell, J.

RIDDELL, J.:—This is an appeal from the judgment of Mr. Justice Latchford, and it was strongly urged that the learned trial Judge, had in effect refused to follow *Lee* v. *Friedman*, 20 O.L.R. 49. If this were so it is plain that the judgment could not stand.

I do not think the contention well founded—the learned Judge does not purport to disregard (as of course he could not disregard) the judgment of the Divisional Court in that case, but declines to extend that decision and to apply it to the facts of the present case.

The facts in *Lee* v. *Friedman*, 20 O.L.R. 49, were different—there the employees of a company were customers of a store-keeper who declined to give them credit until they had got the consent of the company to pay to the store-keeper out of the wages coming to them at the end of the month the amount of their purchases from the store-keeper. The company agreed and the arrangement was carried out for some time, when the company made default. The store-keeper (in an action in which others were joined as plaintiffs in respect of other claims also

for wages) sued for the amount owed to him and obtained judgment, claiming specifically as assignee of wages due to labourers, etc.

The Divisional Court held (1) that the arrangement was an equitable assignment of a certain part of the wages; (2) that an assignee of wages stands in the shoes of his assignor and is entitled to the benefit of the statute 7 Edw. VII. ch. 34, sec. 94. I think both conclusions were good law.

No difficulty arises from the assignment of part of a claim where the assignment is equitable and not under the statute: *Smith* v. *Everett* (1792), 4 Br. Ch. C. 64; *Lett* v. *Morris* (1831), 4 Sim. 607; *Watson* v. *Duke of Wellington* (1830), 1 R. & M. 602, where Sir John Leach, M.R., says at p. 605: "In order to constitute an equitable assignment, there must be an engagement to pay out of the particular fund." See also *Marton* v. *Naylor* (1841), 1 Hun N.Y. 583, and cases cited. In *Shaw* v. *Moss* (1908), 25 Times L.R. 190, an assignment of 10% of salary and moneys to accrue due was supported as an equitable assignment.

I do not enter into the many curious and difficult questions arising out of the precise wording of the statute. The cases range from *Brice* v. *Bannister* (1878), 3 Q.B.D. 569 (C.A.) or before, to *Foster* v. *Baker*, [1910] 2 K.B. 636 (C.A.) or after.

In *Lee* v. *Friedman*, 20 O.L.R. 49, it was indicated that the result would (or might) be different "under a slightly different state of circumstances"—at p. 55. And in my view, the circumstances here are not slightly, but materially different.

Here the arrangement originated with the plaintiff and the company—the company gave him premises rent free and kept them insured, they gave him free electric light for 3 months and supplied him with wood for cooking purposes free, he agreeing to "keep the fires going and the house heated without further charge to the company." It was agreed that he should "charge the sum of 25 cents per meal served to employees," that he should "have the money due him by the men collected through the mine office and before any man receives his time check from the mine manager," the plaintiff should "notify in writing to the said manager the amount due by the man to the "plaintiff" and the company shall only be liable for the amount so written. Every man living in the boarding house shall live rent free, and he shall furnish his own blankets, towels and soap," while the company was to put up ice each year and allow the plaintiff the free use of the same.

When men were employed they had no option but to board at the house kept by the plaintiff—they were told that "the board so much per day or week would be deducted from them." A pay roll was made out, the entry for each man containing his

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nominal wages—and a deduction was made from this amount for the amount of the claim of the boarding-house keeper.

I am unable to see how the amount so deducted ever was due to the employee at all. He knew from the beginning that a certain (or perhaps uncertain but if so, he could make it certain) amount would be due and payable, not to him, but to the boarding house keeper under an arrangement with which he had nothing to do and against which he was powerless to contend. It seems to me that out of the sum which represented the supposed value of the labour of the employee, and which would have been "wages" under other circumstances, a part never became due to the employee at all—It would, I think be an abuse of language to speak of the transaction as an equitable assignment: the relation of debtor and creditor subsisted from the beginning.

But even if this difficulty be got over another remains:

The total sum payable to the plaintiff was..	$2,396.55
there was also due for provisions.....	70.00
and for other goods.....	62.55
In all	$2,529.10

The parties get together, the amount is made up and settled as an account stated at $2,529.10—$500 is paid generally on account, and a note for $2,029.10 given for the balance. By this transaction, as it seems to me, even if originally the amount due under the agreement had been "wages," the character was changed. If not, how much was now due for wages? Is the $500 a payment on account of wages? or partly so? How much is only in part?

At this stage if not earlier, all parties looked upon the amount due as one sum, not as composed of two sums differing in quality.

And the action was not, as in *Lee* v. *Friedman*, 20 O.L.R. 49, brought for wages at all, but upon a promissory note which had been given as part settlement of an account stated. This is made even the more manifest as Machin is sued as an endorser.

The Statute, 7 Edw. VII. ch. 34, sec. 94, is very plain that a director shall not be liable to an action for wages "unless the company has been sued therefor." I do not think it can fairly be said that the company has ever been sued for wages.

For these reasons I think the appeal fails and should be dismissed with costs.

Sutherland, J. SUTHERLAND, J., concurred in the judgment of RIDDELL, J.

Middleton, J. MIDDLETON, J., concurred in dismissing the appeal.

Appeal dismissed.

BRANDON GAS & POWER CO. v. BRANDON CREAMERY CO.

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Nov. 25.

Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue, Cameron, and Haggart, JJ.A. November 25, 1912.

1. CONTRACTS (§ I 5—95)—CONSTRUCTION — LETTERS—REFERENCE TO ALL LETTERS, PURPOSE OF.

Where a contract is made by correspondence between the parties, even though the final letters of both parties are under seal, any letter in the series of correspondence may be read in evidence for the purpose of explaining any ambiguity or doubt which might exist in the contract. (*Per* Howell, C.J.M., Richards, and Perdue, JJ.A.)

[See Phipson on Evidence, 5th ed., 580.]

2. CONTRACTS (§ II A—127)—AGREEMENT TO SUPPLY ALL THE GAS WHICH OTHER PARTY MAY USE—CONSTRUCTION.

An offer by a gas company that it would supply gas at a certain reduced rate for a certain period of years to a manufacturing company for power purposes, and would extend its system and install apparatus so as to be able to make such supply, when accepted by the manufacturing company, is an agreement that the gas company would manufacture and supply to the manufacturing company all the gas which it would use for power purposes in its factory during that period at that reduced rate, and that the manufacturing company would take all the gas which it would use for that purpose during that period. (*Per* Howell, C.J.M., Richards, and Perdue, JJ.A.)

[*The Queen* v. *MacLean*, 8 Can. S.C.R. 210; *Kenney* v. *The Queen*, 1 Can. Ex. R. 68, referred to.]

3. CONTRACTS (§ II A—127)—AGREEMENT TO SELL ALL GAS WHICH OTHER PARTY REQUIRES—INFERENCE.

Where the agreement between the parties is that the one shall supply all the gas which the other may use for power purposes, though there is no express agreement that the other would take all the gas which it needed, yet the Court will infer an agreement on the part of the latter to do so. (*Per* Howell, C.J.M., Richards, and Perdue, JJ.A.)

[*The Queen* v. *MacLean*, 8 Can. S.C.R. 210, referred to.]

Statement

AN appeal by the plaintiffs in an action brought to recover $4,630 for gas supplied to the defendants, or, in the alternative, for damages for breach of the contract made between the parties.

The defence raised was that the interpretation put upon the contract by the plaintiffs was not the correct one, and defendants brought into Court the amount which they considered was owing.

The case was tried at Brandon before Judge Macdonald, who entered a verdict for the plaintiffs for the moneys paid into Court with the costs up to the time of such payment into Court. Costs to defendants subsequent to such time to be set off against the plaintiff's claim.

The appeal was allowed. CAMERON, and HAGGART, JJ.A., dissenting.

J. P. Curran, K.C., for the plaintiffs.

C. Blake, for the defendants.

Howell, C.J.M.

HOWELL, C.J.M.:—This case depends solely upon the construction of a contract in writing which is to be gathered from certain letters between the parties, and as this involves a careful

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consideration of many expressions, I think it well to set out all the letters in full. They are as follows:—

Brandon, Man., March 3rd, 1910.

The Brandon Creamery Co'y, Ltd.
City.

Gentlemen,—In response to your request we have pleasure in submitting the following figures on power. We will supply you with gas in quantities desired, the supply being continuous and unintermittent in quality, at 85 cents per 1,000 cu. feet. This price is based on the nominal figure of 16 cubic feet per indicate horse power, so that with a 65 h.p. engine on the basis of sixteen hours per day, full load, would bring the cost per month to approximately $425. This figure would probably vary somewhat with an engine of power mentioned, the variation being in all likelihood in your favour. We would extend our

We will be glad to enter into any further conference and give any further figures you may desire.

Yours very truly,
THE BRANDON GAS & POWER CO'Y, LTD.
Geo. H. Harper,
Chief engineer.

Brandon, Man., March 15th, 1910.

The Brandon Creamery Co. Ltd.,
City.

Gentlemen,—Regarding our telephonic conversation of this morning, we now confirm our price of seventy-eight (78) cents per one thousand (1,000) cubic feet for gas consumed. I proposed a 65 h.p. engine. This price is based upon a more or less intermittent development of the full horse power of the engine, in other words an inconstant load. In the event of the engine running at full load for ten hours a day and continuously on every working day we could, in all probability, reduce the above price to seventy-five (75) cents per one thousand cubic feet.

Yours very truly,
THE BRANDON GAS & POWER CO'Y LTD.
Per Geo. H. Harper,
Chief engineer.

Brandon, Man., April 1st, 1910.

The Brandon Creamery Co'y,
City.

Gentlemen,—Confirming our letter of March 15th, we will supply your firm with all artificial gas for power purposes at the rate of seventy-eight (78c.) net per one thousand cubic feet. The above price is based upon a minimum consumption of four hundred thousand (400,000) cubic feet per calendar month, the average consumption per month for the whole year being the basis of computation.

Should the consumption of gas during any one month fall below four hundred thousand (400,000) cubic feet the total amount of gas consumed, in any, and every such month, shall be charged at the rate of one dollar ($1.00) net per thousand cubic feet, but without prejudice to adjustment at the end of each year, upon the basis of the minimum average consumption per month for the year as already provided for.

Should the average consumption per month for any year reach five hundred thousand (500,000) cubic feet or over the price charged will be seventy-five cents (75c.) per one thousand cubic feet, and if in any month in any year of the lifetime of this contract, the consumption of gas shall reach five hundred thousand (500,000) cubic feet or over, such gas shall be charged at the rate of seventy-five (75c.) per one thousand cubic feet subject to final adjustment, as already provided for.

All bills for gas to be paid on or before the fifteenth day of the month next succeeding that for which such bills are rendered.

This company will install all necessary mains, service pipes and meters free of charge and guarantee an adequate and continuous supply of gas.

The time during which the terms above set forth shall—if accepted—be the basis of agreement between your firm and this company, shall date from the first day of May next, and be in continuous and uninterrupted effect for a period of five (5) years, when its terms would be subject to review and modification to meet the then existing conditions.

IN WITNESS WHEREOF, the company hereto affixes its name and seal this the first day of April, A.D. nineteen hundred and ten.

(Seal) THE BRANDON GAS & POWER CO'Y, LTD.

Witness: *Per* Geo. H. Harper,

A. Edna Laidlaw. *Chief engineer.*

Brandon, Man., April 7th, 1910.

The Brandon Gas and Power Co. Ltd.,

City.

Gentlemen,—We beg to acknowledge your letter of the 1st inst. quoting rates on gas for power purposes, for a period of five years.

We hereby accept your offer to supply gas for power at the rates and under the conditions named therein.

IN WITNESS WHEREOF, the company hereto affixes its name and seal, this the seventh day of April, A.D. nineteen hundred and ten.

(Seal) THE BRANDON CREAMERY & SUPPLY CO. LTD.,

Per L. A. Race, *President.*

Brandon, Man., April 7th, 1910.

The Brandon Gas and Power Co. Ltd.,

City.

Gentlemen,—Herewith we enclose acceptance of your offer to supply gas for power purposes as per your letter of the 1st inst.

We expect to be ready for connection with your mains by May 10th next, and would thank you to make preparation for the same.

Yours truly,

THE BRANDON CREAMERY & SUPPLY CO., LTD.,

L. A. Race, *Manager.*

The plaintiff's letter of the 1st April, and the defendant's letter of the 7th April, are really executed under seal and with a certain amount of formality, which would lead one to conclude that they were the final letters constituting the contract. The

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letter of the 15th March, being referred to in the plaintiff's letter, it seems to me may be read as explaining, if explanation is required, some of the terms of the final contract. The letter of the 3rd of March, being really in the series of which the 15th March was one, it seems to me, is as much involved in this case as the advertisements and tenders were involved in the case of *The Queen* v. *MacLean*, 8 Can. S.C.R. 210, and I think this letter might be read for the purpose of explaining any ambiguity or doubt which might exist in the contract.

The plaintiff's letter of the 1st April sets forth clearly what the parties were contracting for, or, in other words, what the plaintiff wished to sell, and what the defendant wished to purchase. It is described in the following language: "We will supply your firm with all artificial gas for power purposes." Reading those words in the light of the environment, it seems to me that the plaintiff says: "You have informed us that you intend to work your plant by artificial gas. We offer to sell you all the artificial gas you will require, and if you will take from us all that gas, we will lay down pipes to convey the same to your factory, and will so enlarge our own plant that we shall be able to meet all your requirements, and we undertake and agree to continue this arrangement for five years, and will charge you the reduced prices set out in the letter."

The defendant's position is that "while you made that offer, all we agreed to do was to take that gas if we chose. You are to incur all that expenditure and to be ready to supply us, but we reserve to ourselves the right to take gas for power purposes from a rival concern, or make it ourselves, and we never agreed and did not intend to agree ever to take one foot of gas from you."

In each of the three letters of the 3rd March, 15th March and 1st April, the plaintiff states that the reduced prices are based upon a certain consumption of gas, and it is plain by a perusal of these letters that the plaintiff, at all events, expected and intended that the defendant would use a very considerable quantity of gas during the whole of that period.

One can hardly understand why the plaintiff would incur the large initial expense of connecting their works with the defendant's factory and of greatly reducing the price below what they were getting from other customers, if they did not expect and intend to secure a customer who would continue to use their gas to the exclusion, at all events, of all other gas, for the period of five years. And it almost shocks one's common sense to think that they would enter into a contract to supply gas commencing at a future date, and to incur a large initial expenditure, without the defendant being bound to take one cubic foot of gas, for if the defendant's contention is correct, then immediately after the

plaintiff had made the connection and had gone to the expense for manufacturing this extra supply, they could have then said:

> We have changed our minds; we will not take any gas from you at all. We intend to manufacture gas ourselves, or we intend to take it from a rival concern.

It is argued that, suppose the defendant company went out of business, then were they bound to take this gas; or, suppose they changed their mind and concluded to operate their power by steam or electricity, were they, in that event, bound to take gas under the contract? The answer to these arguments is that the plaintiff chose to take that risk, and did not provide for the contingency. They might have felt so secure in their idea that gas would be used for motive power that they were willing to take the other risks.

In *The Queen* v. *MacLean*, 8 Can. S.C.R. 210, above referred to, the Queen's printer called for tenders for printing. MacLean tendered for the whole printing. An agreement was executed between him and the Queen's printer, whereby he agreed to do all the work; but there was no covenant or agreement on the other side that they would give him all the work to do. It was decided that MacLean was entitled to do all the work over which the Queen's printer had control. In giving judgment in that case, Chief Justice Ritchie used the following language:—

> Where words of recital or reference manifest a clear intention that the parties should do certain acts, the Court would infer from them an agreement to do such acts, just as if the instrument had contained an express agreement to that effect.

In *Kenney* v. *The Queen*, 1 Can. Ex. R. 68, the advertisement calling for tenders was simply for the handling and moving of steel rails, without stating whether it was for the whole or for any part of the work. The plaintiff's tender was accepted, and a document was drawn up between an agent of the Minister of Public Works and the plaintiff, and in that contract, the plaintiff agreed to remove all steel rails that were landed from sea-going vessels on the wharves in Montreal for the Dominion Government, to a certain place on the Lachine canal. There was no corresponding agreement by the Government or its agent that they would permit him to move all those rails; but, without hesitation, the Court held that the Government was bound to allow him to remove all those rails, and damages were given in his favour because, after removing part of the rails, he was not allowed to remove the remainder.

In the case of *Wood* v. *Copper Miners*, 7 C.B. 906, the plaintiff agreed that all the small coals required in their manufactory during the term of 12 years should be purchased from the defendant company,

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provided the said company can and shall supply him with a quantity that shall from time to time be required by him, or to such extent as the said company can supply.

The defendants, after supplying this coal for a time, refused to further supply it, and there was no agreement in the contract upon their part that they would so supply the coal; but the Court had no difficulty in holding that they would imply in that contract an agreement that the defendants should supply that coal up to their ability.

In that case, at page 935, Wilde, C.J., uses the following language:—

> There must be two parties to a transaction to make it enure as a purchase. When two persons mutually agree that one of them shall purchase goods of the other, that amounts to a contract that one shall sell and the other shall buy.

This principle is also referred to in *Thorn* v. *Commissioners of Works and Public Buildings*, 32 Beav. 490.

I think the true agreement between the parties in this case was that during the period of five years thereafter the plaintiffs agreed with the defendants that they would manufacture and supply to the latter all the gas which the defendants would use for power purposes in their factory, and that the defendants agreed that they would take from the plaintiffs all the gas which they would use for that purpose during that period.

In breach of their agreement the defendants have set up on their premises machinery for making, and have made, artificial gas, and have used, and are using, that artificial gas for power purposes. I think the defendants have committed a breach of their contract, and that the plaintiffs are entitled to the damages they have sustained thereby.

The verdict entered for the defendants by the trial Judge should be set aside and judgment entered for the plaintiff. The matter should be referred to the Master at Brandon to find what damages the plaintiffs have sustained by reason of the breach of this contract. The plaintiff should have the costs of the trial and of this appeal, which will be costs in the cause to the plaintiff in any event of the cause. The costs of the reference to the Master will be reserved to be disposed of on further directions after the Master's report.

RICHARDS, J.A. PERDUE, J.A.

RICHARDS, and PERDUE, JJ.A., concurred with HOWELL, C.J.M.

CAMERON, J.A. (dissenting).

CAMERON, J.A. (dissenting):—The signed and sealed letters of April 1st from the plaintiff to the defendant (with the unsealed letter of March 15, incorporated therein) and of April 7th from the defendant to the plaintiff comprise the contract between the parties.

Under that contract the gas company agrees to supply the defendants with gas:—

A. If the minimum consumption be at the rate of 400,000 feet per month (the average per month for the year being the basis) the charge is to be 78c. per 1,000 feet.

B. If the consumption fall below 400,000 feet per month, the charge is to be $1.00 per 1,000 feet.

C. If the consumption exceed 500,000 feet per month the charge shall be 75c.

Bills are to be paid monthly, and in the event of either B. or C. happening, a final adjustment is to be made at the end of the year on the basis of the average consumption per month during the year.

So far all this seems perfectly reasonable and intelligible. There is a fixed minimum. If the consumption per month exceed this the cost is less, if it fall below that the cost is greater. In either event a final adjustment is to be made each year.

But there is to be found in the second line of the plaintiff's letter the word "all" before the words "artificial gas" and it is urged that this involves and conveys the idea that the plaintiff was to furnish all the gas the defendant might use for power purposes, and in return the defendant agreed to take all the gas it might use for those purposes from the plaintiff. But if such was the intention of the plaintiff company when entering into the contract, it might readily have stated in its letter that

> This offer is made on the understanding that you take all the gas you may use for power purposes from us.

It is urged that this omitted term must be implied from the documents and the circumstances of the case.

No mention whatever is made in the letter of April 1, of the possible event of the defendant ceasing to take gas from the plaintiff. So far as the writings go that contingency was not considered or contemplated. The conclusion naturally to be drawn from the absence of an express condition would be that the defendant would not be called upon to pay for gas it did not get. If the plaintiff or the parties had a different intention, it may reasonably be contended that it should have been conveyed clearly to the defendant, and not left to be extracted by implication.

No doubt uncertainty in the interpretation of this contract largely arises from the use of the word "all" referred to above. It is, however, at least as readily susceptible of meaning "all that you may actually take from us" as "all that you may use from any source." The letter of April 1 was the offer of the plaintiff company, prepared after deliberation. If it means what the plaintiff contends, that meaning does not appear on its face, and it does not appear from the reply that the defendant so

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understood it. "We accept your offer to supply gas" is a different thing from saying "We accept your offer to supply, and we agree to take from you, all the gas we may need or use in our business."

In any event, it seems to me difficult to give the document of April 1 the construction contended for by the plaintiff without reading into it words that are not there. And I think I can fairly say that the defendant was justified in taking the plaintiff's offer in the sense that it (the defendant) was to pay for what it actually got and no more. The ordinary man reading the offer would hardly, without some further suggestion, think that upon acceptance of it he might be binding himself to pay for gas at the rate quoted whether he took it or not. If that suggestion were made to him he would probably say:—

> They cannot really mean that, or they would positively say so. They say no such thing in this letter of April 1.

From the authorities cited to us, I quote the following as bearing on the subject before us:—

> Where parties have entered into written engagements with express stipulations, it is manifestly not desirable to extend them by any implications: the presumption is that, having expressed some, they have expressed all the conditions by which they intend to be bound under that instrument. It is possible that each party to the present instrument may have contracted on the supposition that the business would, in fact, be carried on, and the service, in fact, continued, yet neither party might have been willing to bind themselves to that effect. *Per* Denman, C.J., *Aspidin* v. *Austin*, 5 Q.B. 671, 684.

The rule of construction is thus laid down by Lord Esher, in *Hamlyn* v. *Wood*, [1891] 2 Q.B. 488, 491:—

> I have for a long time understood that rule to be that the Court has no right to imply in a written contract any such (implied) stipulation, unless, on considering the terms of the contract in a reasonable and business manner, an implication necessarily arises that the parties must have intended that the suggested stipulation should exist.

In his judgment in the same case Lord Bowen comments on the futility of examining decisions in cases of this kind. Lord Justice Kay says, at p. 494:—

> When parties have put into writing the terms upon which they agree, it is a dangerous thing lightly to imply what they have not expressed,

which is a repetition of Lord Denman's remark quoted above.

The subject is dealt with in Halsbury's Laws of England, vol. VII., sec. 1035. A condition not expressly stated may be implied if it is clear the parties must have intended such a condition to be a part of the agreement. Such an implication must be founded on the presumed intention of the parties and on reason.

> It is not enough to say that it would be reasonable to make a particular implication, for a stipulation ought not to be imported into a

> written contract unless on considering the whole matter in a reasonable manner it is clear that the parties must have intended that there should be the suggested stipulation,

citing Lord Esher in *Hamlyn* v. *Wood*, [1891] 2 Q.B. 488, 491.

Each case depends on itself, however, and it is neither possible nor desirable to lay down hard and fast rules on the subject.

The covenant sought to be implied here is one that the defendant shall take all the gas to be required and used for power purposes for the term of five years from the plaintiff. It is quite reasonable to suppose that both parties were under the impression that the defendant would take all its gas for power purposes from the plaintiff during the entire term, and yet the defendant might have been, for various reasons, unwilling to bind itself in that respect:—

> It is one thing for the Court to effectuate the intention of the parties to the extent to which they may have, even imperfectly, expressed themselves, and another to add to the instrument all such covenants as upon a full consideration the Court may deem fitting for completing the intentions of the parties, but which they, either purposely or unintentionally, have omitted. The former is but the application of a rule of construction to that which is written: the latter adds to the obligations by which the parties have bound themselves, and is, of course, quite unauthorized, as well as liable to great practical injustice in the application. *Per* Denman, C.J., *Aspidin* v. *Austin*, 5 Q.B. 671, 684.

Here the plaintiff offered to supply the defendant with gas, at prices based on the estimated consumption, for a term of five years. The basis of the contract is the actual consumption of gas estimated beforehand. The plaintiff undertook to make necessary expenditures to put itself in a position to carry out its side of the contract. Yet it was amongst the possibilities that the defendant at any time during the five years might dispose of its business and plant, or might find the business unprofitable and cease to carry it on, or might become insolvent, or for some other reason, might wholly discontinue the use of gas. These possibilities of the future are in the nature of business chances common to all similar transactions, and are risks the importance of which is lessened as the business is extended. They were such chances as the plaintiff might reasonably take if it wished to develop its business. What the plaintiff practically said was:—

> You accept our offer and that is enough for us. We will then incur the necessary initial expenditure and furnish you with the gas you wish to take from us, and we will assume any further risks in the matter there may be. All we ask is that you pay for the gas consumed at the rates given.

To this the defendant assented; but what would have been the answer if it had been informed by the plaintiff:—

> In addition to your liability to pay the bills for gas used you also become liable, when you accept this offer, to pay $312 every month, if

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you use gas for power purposes, but do not take it from us; or you will be liable to that extent every month if you use electricity for power purposes, or if you give up the use of gas for power purposes altogether.

It can be readily imagined that the defendant, in such circumstances, would refuse to accept the offer. How then can it be said that such a condition can be implied?

Taking it that the contract is based wholly upon the actual consumption of gas as estimated, and that no provision is made for the contingency which has arisen in which no gas whatever for power purposes is consumed by the defendant (and it does not matter whether this omission is intentional or inadvertent), the contract is, nevertheless, effective as it stands. The defendant then remains liable for whatever gas it consumes at the rates fixed. And that the actual consumption of gas is the basis and the whole basis of the contract appears to me clear enough. In the first paragraph of the letter of April 1, we have the "minimum consumption" and the "average consumption" referred to, in the second we have "consumption of gas" and "gas consumed" and in the third "average consumption" and "consumption of gas." There is no provision whatever for a total cessation of consumption by the defendant. But, without any conditions on the defendant's part to continue in business for the whole term and to be responsible in any event for a minimum consumption even if there be no consumption at all, there is a perfectly good and effective contract.

> If the contract is effective without the suggested term, and is capable of being fulfilled as it stands, an implication ought not to be made.

Halsbury, Laws of England, vol. 7, sec. 1035, citing Bray, J., in *Consolidated Goldfields* v. *Spiegel* (1909), 25 Times L.R. 275, 277, 100 L.T. 351, 14 Com. Cas. 61.

It is contended that inasmuch as the plaintiff agreed "to go to considerable expense to install all necessary mains," etc., and offered to supply gas to the defendant according to a scale of prices based upon the large quantities that would be used under the contract, it must follow that the plaintiff, on its part, bound itself (not expressly, but impliedly), if it did use gas for power purposes, to take it from the plaintiff and from no other source.

This contention, however, is, to my mind, undermined by the consideration that, if it be correct, then, if the defendant utilized any other motive power than gas, there would and could be no breach of the implied contract. And yet all the considerations of initial expense agreed to be incurred and of low prices quoted based upon the assumption of the use of large quantities apply with just as much force in the case of the defendant's use of another motive power than gas, as in this case, where the de-

fendant manufactures its own. And it seems to me, further, that these considerations would apply with equal force if it were contended that there must be implied a covenant on the part of the defendant that it should continue in business during the existence of the contract for the purpose of fulfilling its part thereof. That is to say, the arguments derived from the agreement to undertake the necessary expenditure and the fixing of a scale of prices founded on the assumption of the consumption of large quantities of gas contemplated by the contract, apply as strongly in favour of (a) an implied covenant to use no other motive power than gas supplied by the plaintiff, and (b) an implied covenant to continue in business so as to be able to take the gas supplied by the plaintiff, as in favour of (c) an implied covenant that, if gas is used by the defendant as a motive power, no other than that of the plaintiff's shall be used by it.

The fact is that such an implied covenant as that to continue in business would be "tremendously strong" and "beyond all bounds," as was said of a similar contention by Lord Esher in *Hamlyn* v. *Wood*, [1891] 2 Q.B. 488, 493. Nor do I consider that either (a) or (c) would be assumptions, in any material degree, less strong than (b). They are based upon the same grounds as (b), and, to my mind, neither of them, at the time of the contract, was in the contemplation of the defendant, and it does not seem to me reasonable to hold that the plaintiff was or is entitled to assume that either of these unexpressed conditions was in the defendant's contemplation.

The essence of the contract in question is not a covenant, on the one part, to deliver all the gas required and a covenant, on the other, to take it, but a covenant, on the one side, to supply gas as required on the terms mentioned and a covenant, on the other, to pay for gas actually taken on those terms. In this view I cannot help thinking that there was a complete and effective contract in writing for all the purposes the parties had in contemplation. Therefore, there is no need to resort to conjecture to supply any supposed missing terms.

It is to be noted that the contract on the part of the plaintiff to supply gas is absolute. From destruction of plant by fire or from some other cause the plaintiff might at any time be incapacitated from fulfilling its contract. No provision is made to provide for this contingency. Were such a contingency to arise would the Court be called upon to insert in the contract a term safeguarding the plaintiff in this respect? I think that would not be seriously advocated. The parties chose to omit that term from the agreement and they must stand by that document.

Upon the best consideration I have been able to give this matter (which I find of no little difficulty) my conclusion is that it is not clear, from the documents and the circumstances of the

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case, that the parties must necessarily have intended that the suggested stipulation should exist, and that, therefore, it should not be imported into the written contract. There is no breach here of that written contract, and it is a dangerous thing to imply what has not been expressed, and it will not be implied unless "the Court is necessarily driven to the conclusion that it must be implied."

HAGGART, J. A. (dissenting):—It is the business of the plaintiffs to procure gas consumers and offer inducements.

With deliberation, in a carefully considered letter, over the signature of the chief officer and the corporate seal, the offer is made, and after the lapse of a week, in an equally formal way, that offer is accepted.

Does that written offer and acceptance express the intention of the parties, or must we imply a promise by the defendants to purchase not less than a certain quantity of gas every month?

In construing a contract, a term or condition not expressly stated may be implied by the Court, but it must be clear that the contracting parties intended such terms or conditions to be a part of the agreement.

The absence of such a stipulation in this offer may have been the inducement to give the acceptance.

Observe the terms, "we will supply your firm with all artificial gas for power purposes at the rate of, etc." This is the offer accepted. "All . . . gas for power purposes." All the defendants want? All they may take from the plaintiffs? All the defendants may demand? Does this express or imply a prohibition against getting gas from other sources, or manufacturing it? There is not an express promise to take any certain quantity. Must we imply a promise or prohibition?

The price is fixed by the quantity taken. If more than 500,000 cubic feet, 75c. per 1,000; if more than 400,000, 78c.; if less than this $1. It seems to me that the increased price for the smaller quantity is all the plaintiffs can rely upon. This is the provision in anticipation of the defendant's future increasing or decreasing necessities or demands.

Under the circumstances, I do not think it is for the Court to reform the agreement. It is for the Court to interpret what the parties themselves carefully and deliberately put in writing.

The appeal should be dismissed.

Appeal allowed, CAMERON *and* HAGGART, JJ.A., *dissenting.*

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Nov. 21.

Ontario High Court, Middleton, J. November 21, 1912.

1. PARTIES (§ II A 1—67*b*)—PROPER AND NECESSARY PARTIES—NUMEROUS PARTIES—CONSTRUCTION OF INSTRUMENTS.

Ont. Con. Rule 201 as to class representation orders can only be invoked where the right of the class to be represented depends upon the construction of an instrument, and those rights are sought to be ascertained.

2. PARTIES (§ II A 1—67*b*)—PROPER PARTIES DEFENDANT—NUMEROUS PARTIES—TORTS.

Ont. Con. Rule 200 as to class representation orders cannot be invoked by a plaintiff to have one member of a voluntary association appointed to represent all the other members, in an action for trespass and assault committed at the instance of that defendant on behalf of the association.

[*Bedford* v. *Ellis*, [1901] A.C. 1, referred to.]

Statement

MOTION for an order under Con. Rule 201 (Ont. Consol. Rules of Practice, 1897), appointing the defendant Seagram to represent all the members of the Canadian Racing Association.

The motion was dismissed.

J. P. McGregor, for the plaintiff.

C. F. Ritchie, for the defendants.

Middleton, J.

MIDDLETON, J.:—The action is brought by a "bookmaker," who alleges that he was ejected from the grounds of the Hamilton Jockey Club by a private detective employed by the Canadian Racing Association; which is a voluntary association that had undertaken to police the grounds of the club during a race meeting. The plaintiff charges that this ejecting was a trespass and assault, and he claims damages for it.

I think the motion is entirely misconceived. Rule 201 can only be invoked where the right of the class to be represented depends upon the construction of an instrument. It is probable that the application intended to refer to Rule 200, which sanctions the making of an order authorizing any party to defend an action on behalf of all "numerous parties having the same interest."

It is quite impossible to say that all the members of the Canadian Racing Association have the same interest. The plaintiff seeks to make them responsible for what he charges to be a tortious act committed at the instance of Seagram. The interest of the other members would be to cast upon Seagram the responsibility for any tortious act committed by or for him, and he would not be a fitting representative to defend them. Of course, if Seagram's act was not tortious, then this action will fail, and the class will need no protection.

If the plaintiff is correct in thinking that he has been injured by a body of tort feasors, as he swears, he must either

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content himself by suing those whom he selects from this body, or must give each an opportunity of defending himself.

No case has gone so far as to justify an order such as sought, where the action is really a common-law action for trespass.

Temperton v. *Russell* (No. 1), [1893] 1 Q.B. 435, has been much qualified by what was said in *Bedford* v. *Ellis*, [1901] A.C. 1; but it is as yet an unheard of thing that a pecuniary verdict should pass against a person without his being in fact sued.

Motion dismissed, with costs to defendant in any event.

Motion dismissed.

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Re SEATON.

Ontario High Court, Riddell, J. November 11, 1912.

1. WILLS (§ III B—80)—DEVISE AND LEGACY—DESCRIPTION OF BENEFICIARIES.

The words "the recipients of this will" may be construed as "the beneficiaries under the will."

2. WILLS (§ III B—80)—DEVISE AND LEGACY—DESCRIPTION OF BENEFICIARIES—TESTS.

For the purpose of ascertaining the persons intended to be benefited by a will, evidence of the names by which the testator habitually called certain persons is admissible.

[See Annotation, 8 D.L.R. 96, on the subject of inaccurate description of beneficiaries.]

3. WILLS (§ III F—115)—DEVISE AND LEGACY—PARTIAL INTESTACY—BALANCE OF LIFE INSURANCE.

When a testator purports to dispose of the proceeds of a life insurance policy by specific legacies to named persons, and the legacies do not exhaust the face value of the policy, the legacies are not increased, and there is an intestacy as to the balance undisposed of.

4. WILLS (§ III G—120)—REAL PROPERTY—ESTATES OR INTERESTS CREATED BY WILL.

A devise of the testator's "real estate at 62 Muir avenue" has a wider meaning than a devise of "his house at, etc.," and will include a shop built on part of a garden adjoining and formerly used with the house known as No. 62, the shop being erected close against the house and requiring the house for its support.

Statement

MOTION by the executors of the estate of the late Herbert Alfred Seaton for an order construing his will, under Con. Rule 938.

J. H. Spence, for the executors.
W. N. Tilley, for Mrs. Hunt.
E. C. Cattanach, for several parties.
J. R. Cartwright, K.C., for the Attorney-General.

Riddell, J.

RIDDELL, J.:—The late Herbert Alfred Seaton left his last will and testament dated March 19th, 1912, which I am now

asked to interpret. I had the original will sent for and find that it is written on a law-stationer's blank—all the blanks have not been filled up—and the following is how the document appears:—

"This is the last will and testament of me Herbert Alfred Seaton of the City of Toronto, 62 Muir Avenue, in the County of York, and Province of Ontario made this nineteenth day of March in the year of our Lord one thousand nine hundred and twelve.

I revoke all former wills or other testamentary dispositions by me at any time heretofore made, and declare this only to be and contain my last will and testament.

I direct all my just debts, funeral and testamentary expenses to be paid and satisfied by my executors hereinafter named as soon as conveniently may be after my decease. Peter Humphrey and John McIntosh each of the City of Toronto.

I give, devise and bequeath all my real and personal estate of which I may die possessed in the manner following that is to say:—1. To Mrs. Hunt and her two sons my real estate at 62 Muir Ave., Toronto. 2. All the household furniture except the two parlors and the fast and loose fixtures of the store including show cases, refrigerators, etc., to be sold by auction and after all expenses being paid to be divided equally among five children of Mrs. James Hussy.

3. The sum of $2,000 insurance in the United Workmen as follows:—

(1) Five hundred dollars ($500) to Olivet Baptist Church through the trustees of Olivet Baptist Church, Toronto, (2) To Peter Humphrey $100, (3) To John McIntosh $50, (4) To Mrs. Hunt $100, (5) To William Hatch $50, (6) To Maggie Hatch $50, (7) Hatch, Jr., $50, (8) To Olivet Baptist Sunday School, Toronto, $100 for enlarging and building of Sunday School in connection with Olivet Baptist Church.

4. The sum of $1,000 of the Sons of England as follows:—I leave in the hands of the executors to carry out all payments of any money outstanding otherwise not specified in the estate and to divide the balance if any equally among the recipients of this will.

All the residue of my estate not hereinbefore disposed of I give devise and bequeath unto

And I nominate and appoint
to be execut of this my last will and testament."

Then follow signature of the testator, a somewhat imperfect attestation clause, and the signature of two witnesses.

1. The first question is as to the "real estate at 62 Muir Ave., Toronto."

The facts are that Seaton for many years owned a lot at the corner of Muir and Sheridan Avenues with a frontage of some

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46 ft. on Muir and a depth of 109 ft. 4 in. on Sheridan. At first he had a two-story brick building, a dwelling house at the N.W. corner of the two streets and known as 42 Muir Avenue, and he there resided—On the lot there was also a rough cast stable and the rest of the lot he used as a vegetable garden. In 1907 he made up his mind to open a store on Muir Avenue, having theretofore been carrying on a grocery business on Yonge St. He borrowed $2,000 on the whole lot and proceeded to build a one-story rough cast building adjoining his house which by that time had become 62 Muir Avenue: this he used as a store till the time of his death. The new building was erected close against his dwelling house, the only material dividing them being a sheeting of wood nailed against the outside wall of the dwelling. The dwelling he continued to occupy till his death. The store was built on part of his former vegetable garden, but the rest he continued to use as a vegetable garden till the time of his death. The store was at the date of the will and is now known as 64 Muir Avenue. The stable is in the rear of part of 62 and part of 64: it was used by him for stabling his horse, and if the two numbers were divided according to the dwelling wall between house and store the stable would be cut in two. Photographs have been furnished me which shew that the two buildings are in fact very closely connected: although it cannot fairly be said that the buildings are one, the store would be in evil plight if the dwelling house were to be removed, not having any eastern wall of its own. I am satisfied that I must give effect to the words used by the testator (a) "my real estate" (b) "at." If it had been the intention to devise only the house, the word "house" would have been used—in clause 2 when he has to speak of the store he uses the word "store"—and I can see no reason for supposing that had he intended to devise the house as distinguished from the store he would not have used the word "house." Then if he had intended to devise only No. 62 there would have been no need to employ the word "at." The devise is not "my real estate 62 Muir Ave." but "my real estate at 62 Muir Ave."

It is contended that the word "at" in a will is synonymous with "in"—sometimes it is, but more often not. For example a devise of "all the estate . . . I have . . . in any lands . . . at Coscomb in the County of Gloucester" could not cover lands the manor of Farmcott but only lands in Coscomb: *Doe* v. *Greening* (1814), 3 M. & S. 171, so "lands situate at Dormstone" does not mean anything but lands situate within the parish and manor of Dormstone, *per* Fry, J., in *Homer* v. *Homer* (1878), 8 Ch.D. 758, at p. 764. "At or near" may mean "in or near": *Ottawa* v. *Canada Atlantic R. Co.*, 2 O.L.R. 336, 4 O.L.R. 56, 33 Can. S.C.R. 376.

But it is common knowledge that "at" very frequently indeed is not synonymous with "in"—it is not precisely synonymous with "in" in the present instance, but even if the argument of the Deputy Attorney-General be adopted, it means "that is" or something of the sort. "At" means often "near" e.g. in *Wood* v. *Stafford Springs*, 74 Com. 437; *Howard* v. *Fulton*, 79 Tex. 231; *Harris* v. *State*, 72 Miss. 960; *Annan* v. *Baker*, 49 N.H. 161; *O'Conner* v. *Nadel*, 117 Ala. 595; *Bartlett* v. *Jenkins*, 22 N.H. 53; *W. Chicago St. R. Co.* v. *Manning*, 70 Ill. App. 239. And its original meaning is rather "near" than "in."

In any use of the word, colloquial or scientific, I think it broad enough to cover the "real estate," not only 62 Muir Avenue, but also that adjoining which is substantially one with 62 Muir Avenue. The ordinary presumption against intestacy helps in the same direction. I shall therefore declare that all the "real estate" in the block passes by this devise.

2. The second question is what is excepted from the sale directed in clause 2?

In the will it reads thus: (2) All the household furniture except the two parlors, and, the fast and loose fixtures of the store including show cases . . ." a comma appearing after "parlors" and another after "and." The punctuation rather assists the conclusion to which I had come without it, namely that all that is excepted is "the two parlors." The regimen of "except" does not extend beyond "the two parlors" but is exhausted at the comma following these words—and the following noun "fixtures" is in the same construction as "furniture." In other words the word "except" is not understood and is not to be supplied after the conjunction "and." The presumption against intestacy may perhaps be considered to help in the same direction.

3. In clause 3 the sum of $2,000 insurance in the A.O.U.W. is spoken of but only $1,000, is disposed of. What of the balance?

As the sums are specifically mentioned which the beneficiaries are to receive I can find no reason for increasing them in any respect. There is consequently an intestacy as to $1,000.

4. "Hatch Jr." is given $50.

Mr. John Hatch has only two sons, William Hatch who is admittedly the William Hatch or legatee of $50 in the same clause 3—and Nelson Hatch now about 18 years old and eight years younger than his brother. The testator was in the habit of referring to Nelson as "young Mr. Hatch" and "Hatch Junior." There can be no doubt that Nelson Hatch is the beneficiary named: *Lee* v. *Pain* (1844), 4 Hare 201 at p. 251; *Dowset* v. *Sweet*, Amb. 175 and note; Theobald, 4th ed., p. 221; *Re Patrick Moran* (1910), 17 O.W.R. 578; *Re Catharine Gordon* (1911), 20 O.W.R. 528.

5. What does clause 4 mean?

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One cannot congratulate the draftsman, whoever he may have been, in making his meaning plain. The best I can do is to find that the $1,000 is to be applied in making all payments for and out of the estate which are not specified but which are necessary. Such payments are not specified as have no fund specifically provided for them—e.g. debts, funeral and testamentary expenses, costs of solicitors, etc., in administering the estate, executors' commission, etc., etc.

6. And who are the "recipients of this will?"

Literally speaking, the only recipients of the will are those who receive the will itself, the officers of the Surrogate Court: but no doubt what is meant is "beneficiaries under the will"—and that means all who receive any benefit under the will: 1. Mrs. Hunt; 2. and 3 Her two sons; 4 to 8 Mrs. Jas. Hussey's five children; 9. Olivet Baptist Church; 10. Peter Humphrey; 11. John McIntosh; 12. William Hatch; 13. Maggie Hatch; 14. Nelson Hatch; 15. Olivet Baptist Sunday School.

7. There is an intestacy as to (a) the household furniture of the two parlors (b) $1,000 of the A.O.U.W. insurance (c) any property not specifically mentioned. It is not known that the deceased had any next of kin. An enquiry will be directed by the Master in Ordinary as to this.

Costs of all parties, those of executors between solicitor and client, out of the residue in the first instance, but in any event out of the estate.

Judgment accordingly.

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Nov. 19.

REX v. MURRAY and FAIRBAIRN.

Ontario Court of Appeal, Garrow, Maclaren, Meredith, and Magee, JJ.A., and Lennox, J. November 19, 1912.

1. NEW TRIAL (§ II—7)—CONVICTION OF ONE OF TWO DEFENDANTS AGAINST WEIGHT OF EVIDENCE—JOINT CONVICTION.

That the conviction of one of two defendants tried jointly for burglary and theft was against the weight of evidence is no reason for granting a new trial to both under sec. 1021 of the Criminal Code; but the rule is otherwise if the defendants have been jointly convicted of conspiracy, or if a new trial will tend to the administration of justice.

[*R. v. Fellowes*, 19 U.C.Q.B. 48, distinguished.]

2. DEFINITIONS (§ I—1)—MEANING OF "VERDICT."

The word "verdict" in sec. 1021 of the Criminal Code is confined to the findings of a jury.

Statement

MOTION by the defendants, on consent of the Junior County Judge of Middlesex, who tried the case, under sec. 1021 of the Code, for a new trial.

A new trial was granted the defendant Fairbairn.

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REX v. MURRAY AND FAIRBAIRN.

Maclaren, J.A.

J. R. Cartwright, K.C., for the Crown.

P. H. Bartlett, for the defendants.

MACLAREN, J.A.:—The two appellants were tried together in the county Judge's Criminal Court at London before the Junior Judge, for burglary and theft, and were both convicted. He granted them leave under section 1021 of the Criminal Code to appeal to this Court for a new trial on the ground that the verdict was against the weight of evidence.

It was strongly argued on their behalf before us that if the conviction of either of the accused was against the weight of evidence, they should both have a new trial, and a dictum of Robinson, C.J., in *Regina* v. *Fellowes*, 19 U.C.Q.B. 48, 54, was cited in support of this proposition. It is to be observed, however, that that was a case of conspiracy, as was also *Regina* v. *Gompertz*, 9 Q.B. 824, where Lord Denman, C.J., laid down the same rule. No authority was cited to us, nor have I found any for such a rule in a case of burglary like the present. If this had been a case of conspiracy it would have necessarily been applicable to them both. In my opinion the general rule is that laid down by Lord Kenyon, C.J., in *Rex* v. *Mawbey*, 6 T.R. 619 (also a case of conspiracy), at 638, where he says that the Courts will grant or refuse a new trial according as it will tend to the advancement of justice. I do not find anything in the law or in the facts of the present case to prevent the cases of these two appellants being considered separately, each on its own merits, and if the evidence warrants it, different conclusions being arrived at.

According to the evidence the Arva Mill, a short distance north of London, was broken into on the night of March 27th, 1912, the safe blown open and two small cheques and $178.15 in cash stolen. The empty cash-box was found in a field close to the road leading to London. Fairbairn gave evidence and said he was a pedler who had sold out his stock in Sarnia and Watford, and had beaten his way to London on a freight train arriving on Monday, March 26th, and that he slept in a barn in London West on Tuesday night, got two cups of tea at the house of the owner about 9 on Wednesday morning, having his own bread; that he met Murray for the first time in the public library; and that they were drinking in different hotels. When arrested on Wednesday afternoon he had $3.86 on his person. His story about his breakfast was corroborated and he was seen about 9 o'clock on his way to the city alone. The two prisoners were seen together several times during the day at hotels, a barber shop, etc. At one of the hotels Fairbairn put his hand into Murray's pocket and took out $115 in bills which were taken from him and delivered to the landlady for safekeeping. When arrested late in the afternoon Murray had $17 additional in bills and $22.42 in silver and coppers. When on his way to

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the police station he said several times that he had $18 when he came to London, but he was in a drunken condition when he said it. The denominations of the bills and the silver corresponded generally with that taken from the cash-box, but none of it was identified except two silver coins—one a ten cent. piece worn smooth, with a very small hole near the edge, and an English threepenny piece, both of which had lain in the mill cash-box for some weeks. Murray did not go into the witness-box nor produce any evidence as to where he had come from, or where he had got these two coins or any of the money, and there was no evidence of his having been in London until the day after the robbery. In my opinion he has made out no case for a new trial, and I think his appeal ought to be dismissed.

As to Fairbairn there is no evidence that the $3.86 found on him formed part of the money stolen, nor is there any evidence that he had ever seen Murray until the forenoon of the day after the burglary. It is difficult to accept his story as to his doings on the day in question, as a considerable part of it is inconsistent with the evidence of the other witnesses, but that may be due in part to the drunken condition in which he then was. He appears to have suffered a prejudice from his familiarity with Murray during the day after the burglary. No special reasons have been given for the granting of the leave to appeal, but it is probably on account of the weakness of the evidence against Fairbairn. On the whole, I am of opinion that a new trial should be granted to Fairbairn alone.

I am aware that in entertaining the appeal in this case we are giving to the word "verdict" in section 1021 of the Code a meaning that it does not usually bear. While the general dictionaries, both English and American, mention its use in the popular or philological sense as when one speaks of "the verdict of the people," yet they all, so far as I have seen, confine its legal meaning to the findings of a jury. The same may be said of the English Law Dictionaries, and also of the American so far as I know, except that of Rapalje & Lawrence, which defines it as "the opinion of a jury or of a Judge sitting as a jury on a question of fact." This last definition has been approved in *Carlyle* v. *Carlyle*, 31 Ill. App. 338. On the other hand some of the American Law Dictionaries not only define the word as the finding of a jury, but add that it is inapplicable to the findings of a Judge. Black's Law Dictionary says, "It never means the decision of a Court or a Referee or a Commissioner;" and Abbott's says, "The decision of a Judge or referee upon an issue of fact is not called a verdict, but a finding, or a finding of fact." In *Bearce* v. *Bowker*, 115 Mass. 129, Gray, C.J., says, "None but a jury can render a verdict"; similar language is used in *Otis* v. *Spencer*, 8 How. Pr. (N.Y.) 172; *Kerner* v.

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Peligo, 25 Kan. 652; *McCullagh* v. *Allen*, 10 Kan. 154; and *Froman* v. *Patterson*, 24 Pac. Rep. 692.

I do not know of any English statute in which the word has any other meaning than the finding of a jury, nor any Canadian statute where it can be otherwise construed, unless it be in this sec. 1021 of the Code, which we are now considering. Nor am I aware of its being used in any other sense by any English or Canadian Judge or legal writer except by the Master of the Rolls (Jessel), in *Krehl* v. *Burrell*, 10 Ch.D. 420, where in a civil case tried by him without a jury he says, "I give a verdict for the plaintiff, and reserve my judgment for a fortnight." This was said thirty-five years ago, but such use of the word does not appear to have been folllowed unless it be in the section which we are now construing (possibly because Jessel was more distinguished for his legal acumen than for his exact scholarship). It would have been much more satisfactory if Parliament had used unambiguous words that could not have given rise to the present difficulty. A further argument in favour of confining it to the verdict of a jury might be that in a case in which the Judge had sufficient doubts to justify him in allowing an appeal, he would ordinarily give the benefit of the doubt to the accused and not convict him. However, as this point was not taken by the Crown, we do not now pass upon it, but reserve the right to do so hereafter in case Parliament should not see fit to change the language of the section, and it should come before us for decision.

LENNOX, J.:—I agree. Lennox, J.

GARROW, MEREDITH, and MAGEE, JJ.A., also concurred in the result. Garrow, J.A. Meredith, J.A. Magee, J.A.

New trial ordered.

TORANGUE (plaintiff, appellant) v. THE CANADIAN PACIFIC RAILWAY CO. (defendants, respondents).

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Saskatchewan Supreme Court, Newlands, Lamont, and Brown, JJ. November 23, 1912.

Nov. 23.

MASTER AND SERVANT (§ II E—210)—NEGLIGENCE OF FELLOW WORKMEN WHILE ROLLING UP LOGS ON FLAT CAR.

Where an employee, while engaged with fellow workmen in rolling up timbers on flat cars, which timbers were similar to telegraph poles, being larger at one end than the other, and the only inference to be drawn from the evidence as to the cause of the accident is one of three alternatives: (1) the small end was rushed up too fast; or (2) the fellow employees of the plaintiff let go the big end when they should and could have held it; or (3) there were not sufficient men on the job to hold the timber up, a judgment by the trial Court in favour of the defendant will be reversed on appeal and judgment entered for the plaintiff for his damages sustained.

[*Rostrom* v. *C.N.R.*, 3 D.L.R. 302, 21 W.L.R. 225, distinguished.]

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Statement

APPEAL by the plaintiff from a judgment of the learned District Court Judge for the judicial district of Regina in an action for the recovery of damages. The facts, briefly, are that the plaintiff, with other fellow-employees, was engaged on behalf of the defendants in rolling up timbers on flat cars. The timbers were similar to telegraph poles, being larger at one end than the other, and were about the length of a car. They were rolled up on two skids, and the plaintiff's position in the work was at the larger end of the timber. While one of these timbers was thus being rolled up it slipped back, striking the plaintiff on the leg, knocking him down, and causing a fracture of the large bone of the leg between the knee and ankle.

The appeal was allowed.

H. E. Sampson, for appellant.

J. F. Bryant, for respondent.

Newlands, J.
Lamont, J.

NEWLANDS, and LAMONT, JJ., concurred with BROWN, J.

Brown, J.

BROWN, J.:—It is clear under the evidence that the cause of the accident is to be found in one of three alternatives: (1) the small end was rushed up too fast; or (2) the fellow-employees of the plaintiff let go the big end when they should and could have held it; or (3) there were not sufficient men on the job to hold the timber up. I am of opinion that the real cause is found in the evidence of Nick Dulski, where he says:—

> Boss Stark said, "Hurry up" to Martin (who was foreman on the job), said, "Quick, come on, come on!" I saw timber slip. The men at little end went too fast. The men at big end could not lift so fast and could not hold timber, it was so heavy. The men at little end held the timber to place and the men at big end start to jump away. Plaintiff did not get time to get away, as he was close to end which came first and caught him. . . . I let go and jumped when the timber starting to slip. Plaintiff did not let go. He was caught too quickly.

I am forced to this conclusion under the evidence notwithstanding the fact that a number of logs had previously been rolled up in a similar manner and without accident. There must have been just sufficient difference in the speed with which this log was rolled up, or in the number of men at the larger end, as to cause it to slip in the manner in which it did. I am satisfied that the plaintiff was not in any way to blame—that the accident occurred through no fault of his. He did his utmost to hold the log up, as was his duty, but when eventually he let go he was unable to get out of its way. Under our law the defendants would be liable, no matter which of the three suggested alternatives was the real cause of the accident. There was negligence either on their own part or on the part of the plaintiff's fellow-employees. The learned trial Judge gave judgment for the defendants without making any findings of fact

and without giving any reasons except that in his notes he says, "for similar case see *Rostrom* v. *C.N.R.*, 3 D.L.R. 302, 21 W.L.R. 225." With deference, I think this case is distinguishable from that one. There the accident was caused by the springing of a rail, and the appellate Court found that the springing of the rail under the circumstances was an exceptional and wholly unexpected occurrence, something that could not be foreseen. In this case that cannot be said. The natural tendency of running the small end up hurriedly was to greatly increase the weight at the large end and cause it to slip back; it was something which should have been anticipated. I am of opinion that the appeal should be allowed, the judgment of the trial Judge set aside, and judgment entered for the plaintiff for the amount of damages as follows:—$54 for hospital bill; $40 for doctor's bill, and $300 as general damages, making a total of $394, and his costs of action.

Appeal allowed.

NIGRO v. DONATI.

(Decision No. 2.)

Ontario Divisional Court, Clute, Sutherland, and Kelly, JJ.
December 11, 1912.

1. MASTER AND SERVANT (§ II B 6—170)—LIABILITY OF MASTER—NEGLIGENCE OF FOREMAN—WORKMEN'S COMPENSATION FOR INJURIES ACT, R.S.O. 1897, CH. 160.

Where a foreman in charge of blasting operations charges a drill hole with dynamite, and, forgetting that he has done so, orders one of the workmen to clean out the hole, and the workman is injured by an explosion of the dynamite, the foreman's employer is responsible to the workman for such injuries under sub-section (2) of sec. 3 of the Workmen's Compensation for Injuries Act, R.S.O. 1897, ch. 160.

[*Nigro* v. *Donati*, 6 D.L.R. 316, affirmed.]

2. EVIDENCE (§ II H—810)—ADMISSION—PAYMENT OF MEDICAL AND HOSPITAL EXPENSES—WORKMEN'S COMPENSATION ACT (ONT.).

Contributions made by the employer before action towards the medical and hospital expenses of an employee who afterwards sued him for damages alleging that he has been injured by the negligence of the employer's foreman and that the employer was liable therefor under the Workmen's Compensation Act (Ont.) should not, in a subsequent action for the injuries, be taken as evidence of the payer's liability, unless expressly made upon that basis, but should count to his advantage in assessing the damages.

[*Nigro* v. *Donati*, 6 D.L.R. 316, affirmed.]

3. EVIDENCE (§ XI F—794)—ESTIMATED EARNINGS—WORKMEN'S COMPENSATION ACT (ONT.).

Evidence that the workman was earning a certain sum per day at the time of the injuries complained of is not relevant for the ascertainment of the "estimated earnings" during the three years preceding the injury which is an element in fixing the workmen's compensation for the injury under the Workmen's Compensation for Injuries Act, R.S.O. 1897, ch. 160, sec. 7.

[*Nigro* v. *Donati*, 6 D.L.R. 316, affirmed.]

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4. MASTER AND SERVANT (§ II B 6—171)—COMPLIANCE WITH COMMANDS—LIABILITY OF MASTER—NEGLIGENCE OF FOREMAN.

Where a foreman in charge of blasting operations charges a drill hole with dynamite, and, forgetting that he has done so, orders one of the workmen to clean out the hole, and where the workman had been told by his employer to obey the orders of the foreman, and did obey, the employer may be held liable in damages under sub-sec. 3 (as well as under sub-sec. 2) of sec. 3 of the Workmen's Compensation for Injuries Act, R.S.O. 1897, ch. 160.

[*Osborne* v. *Jackson*, 11 Q.B.D. 619; *Cox* v. *Hamilton Sewer Pipe Co.*, 14 O.R. 309; *Lefebvre* v. *Trethewey Silver Cobalt Mine*, 5 D.L.R. 195, 3 O.W.N. 1535; *Evans* v. *Astley*, [1911] A.C. 674, 678, referred to.]

5. MASTER AND SERVANT (§ II E 5—256)—SUPERINTENDENT AS FELLOW SERVANT—R.S.O. 1897 (ONT.), CH. 160, SEC. 3, SUB-SEC. 2.

Under sub-sec. 2 of sec. 3, Workmen's Compensation for Injuries Act, R.S.O. 1897, ch. 160, giving to workmen the same right of compensation and remedies against the employer as if the workman was not in the service of the employer for personal injuries caused by reason of the negligence of any person in the service of the employer who has any superintendence intrusted to him whilst in the exercise of such superintendence, it is not necessary that such superintendence should be exercised directly over the workman injured, or that the workman should be acting under immediate orders of such superintendence, and it is enough if the superintendent and the workman are both employed in the furtherance of the common object of the employer, although each may be occupied in distinct departments of that common object; but the case is much stronger where the plaintiff was under the orders of the foreman doing the work in question.

[*Darke* v. *Canadian General Electric Co.*, 4 D.L.R. 259, 3 O.W.N. 817; *Kearney* v. *Nichols*, 76 L.T.J. 63, followed.]

Statement

APPEAL by the defendant from the judgment of Lennox, J., at the trial, *Nigro* v. *Donati*, 6 D.L.R. 316, 4 O.W.N. 2.

The appeal was dismissed.

C. A. Moss, for the defendant.

N. W. Rowell, K.C., for the plaintiff.

Clute, J.

CLUTE, J.:—The action was tried at Port Arthur by Lennox, J., without a jury, on the 5th June last, and judgment in favour of the plaintiff for $1,446 was given on the 10th September, from which judgment the defendant appeals.

The defendant was a contractor engaged at the time of the accident in blasting rock for a sewer in one of the streets at Port Arthur. The plaintiff was in his employ assisting at the work. It would appear that the defendant with some care had selected one Galzarino who had had a long experience in the handling of dynamite, and placed him in charge of the work.

Five holes were drilled to receive the dynamite. Numbers 1 and 2 were charged with dynamite by the foreman Galzarino. These two charges were exploded without injury. Number 3 was also charged (it is alleged, also by Galzarino) with a small amount of dynamite. This was left unexploded, and without notice to the men. The plaintiff, without knowledge that the hole contained dynamite, proceeded with the defendant personally to drill the hole deeper. A short drill was used; a longer drill was required. This was sent for. The defendant, fortun-

ately for him, turned away from the hole when the plaintiff struck another blow. The charge exploded, and the plaintiff received the injuries complained of.

It was strongly urged by Mr. Moss that Galzarino, although foreman in a sense, and having the right to dismiss the men then engaged upon this job, yet did not have superintendence intrusted to him within the meaning of sec. 3, subsec. 2, of the Workmen's Compensation for Injuries Act.

The trial Judge found as a fact that the evidence did bring the case within the Act.

We think the evidence is clear upon this point. The defendant says: "I engaged a competent foreman of twelve years' experience, Galzarino. On the morning of the accident I had men working there. I said to them, "This is your foreman. If this man sends a man home I stand by him.'"

"Q. Did you tell Joe that? A. Yes, I said to Joe, 'You have nothing to do with the loading or the unloading of the dynamite. I pay a man more wages than you to do that.'

Q. Who looks after the cleaning out of the holes? A. The foreman.

Q. He is the person who superintends that? A. Yes, that is his duty.

Q. He was on hand with you and superintended Joe in the cleaning out of these holes? He was there? A. Yes, he was there with the dynamite. He was standing behind."

The foreman stated that he had acted as foreman for seven years in the handling of dynamite. That he was foreman for Donati and was hired because of such experience. That he was in charge of the work that day, and Donati was there also. That he loaded the two holes and exploded them. That he put a cover on the other holes. That five holes were drilled altogether, and two others were covered. He further states that the holes were 2½ feet deep, and 1¼ sticks of dynamite was put in, or 1½.

The trial Judge has found, and we think the finding is amply supported by the evidence, that the five holes were drilled on the morning of the accident, and the drilling was only completed a few minutes before the explosion of this hole No. 3, that the hole in question was deliberately, or at all events, intentionally, charged by someone. There was only one person who had the right to do this. This was Galzarino, the foreman, who came upon the works that morning, and who was expressly and distinctly put in superintendence of the works being carried on, and particularly of the blasting operations, and which included as incident thereto, drilling, plugging, cleaning out, loading, covering, and firing. The defendant put the plaintiff under the charge of the foreman as his assistant. He assisted in exploding the first and second holes, and the foreman then set him at work cleaning out the third hole and watched him for at least part of

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the time he worked at this. The defendant came along and assisted the plaintiff in this work, and had only temporarily stepped aside to look for, or speak to the foreman in possession of the dynamite, and swears that no one else at the works that morning had dynamite.

He further says upon the undisputed facts and circumstances given in the evidence in this case, "I am not prepared to accept Galzarino's statement that he did not put dynamite in the hole in question, although it is possible that he is saying what he believes to be true, but on the contrary, I think that the only reasonable conclusion to be reached is, and I find it as a fact, that Frank Galzarino did place dynamite in hole No. 3."

This we think the only proper inference to draw upon the evidence, and that doing so, we have the simple case of the foreman himself partially filling the hole No. 3, and giving no warning that the same was only partially filled or contained dynamite; and having forgotten the fact, set the plaintiff to work to clean out the hole, from which work, and while so doing, the accident occurred.

It seems to us the clearest kind of case against the defendant. It was negligence of the grossest kind by a person having superintendence within the meaning of the Act. The case also clearly falls within subsec. 3 of sec. 3 of the Act, as the plaintiff had been expressly told to obey the orders of the foreman, at whose instance he did the work: *Osborne* v. *Jackson*, 11 Q.B.D. 619; *Cox* v. *Hamilton Sewer Pipe Co.*, 14 O.R. 300. In *Kearney* v. *Nichols*, 76 L.T.J. 63, it was held that it is not necessary that such superintendence should be exercised directly over the workman insured, or that the workman should be acting under the immediate orders of such superintendence. It is enough if the superintendent and the workman are both employed in furtherance of the common object of the employer, though each may be occupied in distinct departments of that common object. This principle was applied by this Court in *Darke* v. *Canadian General Electric Company*, 4 D.L.R. 259, 3 O.W.N. 817.

The present case is a very much stronger case. Here the plaintiff was under the orders of the foreman doing the work in question. Of course there must be reasonable evidence from which the inference may be drawn. Here, in our opinion, the evidence was such as to raise a necessary inference that the hole in question was charged by the foreman. See *Lefebvre* v. *Trethewey Silver Cobalt Mine, Limited*, 5 D.L.R. 195, 3 O.W.N. 1535; *Evans* v. *Astley*, [1911] A.C. 674, at p. 678.

The appeal should be dismissed with costs.

Sutherland, J. SUTHERLAND, J.:—I agree.

Kelly, J. KELLY, J.:—I also agree.

Appeal dismissed.

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Ontario High Court, Kelly, J., in Chambers. November 25, 1912.

1. INTOXICATING LIQUORS (§ III E—78)—SALES TO INTEMPERATE PERSONS—"PUBLIC PLACE" DEFINED.

An hotel is not a "public place" within the meaning of sec. 13 of 2 Geo. V. ch. 55, amending the Liquor License Act (Ont.); such a "public place" must be a street, square, park or other open place.

[*Case* v. *Story*, L.R. 4 Ex. 319, referred to.]

Statement

MOTION by the defendant for an order quashing a conviction for being found upon a street and in a public place, in an intoxicated condition owing to the drinking of liquor in a municipality in which what is known as a local option by-law was in force.

The conviction was quashed.

J. Haverson, K.C., for the defendant.

Colin S. Cameron, for the magistrates.

Kelly, J.

KELLY, J.:—Two of the grounds relied upon in support of the motion are: (1) that the information shews no offence under the statute, and, (2) that the accused was not found in an intoxicated condition upon a street or in a public place.

The form of information as returned is that the accused "between June 30th and July 30th, 1912, at Lions Head did unlawfully, was intoxicated contrary to the provisions of the Liquor License Act, upon a street or in a public place in the Township of Eastnor." It bears upon its face evidence of having been amended, and it is clear that as first drawn it read, "was intoxicated contrary to section eighty-six of the Liquor License Act," and that the amendment made was by striking out the words "section eighty-six" and substituting therefor the words "the provisions," and by adding after the words "Liquor License Act," the words, "upon a street or in a public place in the Township of Eastnor."

From the appearance of the document the conclusion might be reached that the amendment was made after the accused had pleaded "not guilty." If the only objection to the conviction were that it does not shew an offence, I should feel disposed to quash the conviction on that ground; but I do not rest my judgment upon that, but on the other ground mentioned.

Three different forms of conviction have been returned, one being "that said John H. Cook was intoxicated on a street and in a public place in the Township of Eastnor on July 8th, 1912," another: "That said defendant did get intoxicated in the Williams hotel in the Township of Eastnor on July 8th, 1912," and the third: "That the said J. H. Cook on the 8th day of July, 1912, in the Township of Eastnor in the county of Bruce was found upon a street and in a public place at Lions Head in the

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Township of Eastnor in the said county in an intoxicated condition owing to the drinking of liquor contrary to the Ontario Liquor License Act and amendments thereto, there being then in force in the municipality of the township of Eastnor a by-law passed by the municipality of Eastnor under section 141 of the Liquor License Act commonly known as the local option by-law."

While there is quite sufficient evidence that the accused was intoxicated, there is no evidence that he was found intoxicated on a street or in a public place, unless effect be given to the contention set up on behalf of the magistrates that the Williams hotel in Lions Head, in which the accused was intoxicated, is a public place.

The intention of the amendment to the Liquor License Act made in 1912, 2 Geo. V. ch. 55, sec. 13, was to protect the public from being met by the sight of intoxicated persons on streets, and in public places of a character similar to streets, where the public generally have a right to be; and in making use of the words "any public place," it was no doubt intended that it should apply to a place ejusdem generis with a street, and not to a place such as the hotel in question.

The words used in the judgment of the Divisional Court in *Regina* v. *Bell*, 25 O.R. 272 (at p. 273), are apt to this case, viz.: "To be within its provisions an offence must have been committed in a public place such as a street, square, park or other open place." Another case which is strikingly like the present one is *Case* v. *Story*, L.R. 4 Ex. 319. That was a case where a hackney carriage driver, standing on the premises of a railway company by their leave, for the purpose of accommodating passengers by their trains, was requested by a party to drive him, and refused; and it was contended that he was bound to do so under the statute which provides that every carriage which shall be used for the purpose of standing or plying for hire in any public street or road in any place within a distance of five miles from the general Post Office in the City of London shall be obliged and compellable to go with any person desirous of hiring such hackney carriage.

Kelly, C.B., in his judgment, at page 323, says: "We have to consider the subsequent words of the definition 'in a public street or road.' It is clear to me that railway stations are not either public streets or public roads. They are private property; and although it is true they are places of public resort, that does not of itself make them public places. The public only resort there upon railway business, and the railway company might exclude them at any moment they liked, except when a train was actually arriving or departing. For the proper carrying on of their business they must necessarily open their premises, which are, nevertheless, private, and in no pos-

sible manner capable of being described as public streets or roads." And at page 324, when referring to the contention of counsel that "place" is a large term, he says: "We must take it as only meaning a place ejusdem generis with a street."

A perusal of the report of *Curtis* v. *Embrey* (1872), L.R. 7 Ex. 369, is helpful in arriving at the meaning to be given to "a public place." There Bramwell, B., in defining the meaning of "road" which was referred to in the statute then under consideration, and which was used in giving the interpretation of the word "street" used in that statute, said that it "must be a road over which the public have rights."

"Public place" in section 13 above, especially when taken in connection with the word "street" which precedes it, must mean a place over which the public have rights as over a street, and not a place where, as a hotel, persons are permitted to go for accommodation such as a hotel affords.

I am unable to agree with the contentions set up that the hallway and rooms of the hotel, where alone the accused was found intoxicated at the time in question, is a public place within the meaning and intention of section 13 of the amending Act, and the conviction on that ground alone, apart from any others, must be quashed with costs.

Though giving protection to the magistrates, I must draw attention to the loose and unsatisfactory manner in which the papers in this case, such as the information and conviction and amended convictions, were prepared.

Conviction quashed.

FRANKEL v. CITY OF WINNIPEG et al.

Manitoba King's Bench, Galt, J. November 29, 1912.

1. MANDAMUS (§ II A—76)—PROCEDURE—MOTION FOR, HOW MADE.

A motion for a mandamus should be made on behalf of the Sovereign *ex rel.* the prosecutor.

2. MANDAMUS (§ I A—4)—OTHER REMEDIES—WHAT IS ESSENTIAL TO ENTITLE APPLICANT TO WRIT.

To entitle an applicant to a mandamus he must have a legal right to the performance of some duty of a public and not merely of a private character, and there must be no other effective, lawful method of enforcing the right.

[8 Encyc. Laws of England, 526, 529, 546, referred to.]

3. BUILDINGS (§ I A—7)—BUILDING PERMITS—PROCEEDINGS TO COMPEL ISSUANCE OF BUILDING PERMIT—BURDEN OF SHEWING RIGHT TO PERMIT—MANDAMUS.

In a mandamus proceeding to compel the issuance of a building permit, the onus is upon the applicant to shew that he is in all respects entitled to the permit in question.

[As to the subject generally of "Municipal regulation of building permits," see Annotation, 7 D.L.R. 422.]

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4. BUILDINGS (§ I A—7)—BUILDING PERMITS—NECESSITY FOR WRITTEN APPLICATION UNDER BY-LAW OF THE CITY OF WINNIPEG.

The application for a permit provided for in paragraph 9 of the building by-law of the city of Winnipeg (by-law No. 4283) before a permit will issue, means a written application.

5. BUILDINGS (§ I A—7)—BUILDING PERMITS—TENDER OF WRITTEN APPLICATION NOT EXCUSED BY PREMATURE REFUSAL OF OFFICER TO ISSUE PERMIT.

A refusal on the part of a municipal officer to grant a building permit before a written application is made therefor, pursuant to a by-law, does not excuse the necessity for a tender of such written application as a condition precedent to the applicant's right to compel the issuance of the permit.

6. BUILDINGS (§ I A—7)—BUILDING PERMITS—RIGHT OF CITY TO CHARGE FEE FOR ISSUANCE OF BUILDING PERMIT.

A city has a right to charge a moderate fee for the issuing of a building permit.

[*City of Montreal* v. *Walker*, Montreal L.R. 1 Q.B. 469, followed.]

7. BUILDINGS (§ I A—7)—BUILDING PERMITS—APPLICATION FOR MANDAMUS TO COMPEL ISSUANCE OF PERMIT—MOTIVE OF APPLICANT IMMATERIAL WHERE LEGAL RIGHT ASSERTED.

On a motion for a mandamus to compel the issuing of a building permit, where the applicants are asserting a purely legal right, their motives cannot be inquired into. (Dictum *per* Galt, J.)

8. BUILDINGS (§ I A—7)—BUILDING PERMITS—BONA FIDES OF APPLICANT—PURPOSE OF BUILDING, MATERIALITY OF.

Where applicants for a building permit were not acting *bonâ fide* in respect of their building, but were following out a system of selecting lots of land in portions of the city where high class residences prevailed, and threatening to build apartment blocks on such lots, with a view to being bought out by the residents of the neighbourhood, such a course of conduct, though it might be termed reprehensible from a strictly moral point of view, is nevertheless within their legal rights. (Dictum *per* Galt, J.)

9. ESTOPPEL (§ I A—9)—MUNICIPAL BUILDING PERMITS—CONDITIONS PRECEDENT.

The rule of law that where one party to a contract refuses to perform his part, the other party is freed from the obligation to perform any conditions precedent before he can maintain an action for the breach thereof, does not apply to wrongs independent of contracts, so as to waive the necessity for performing conditions precedent required in order to obtain a permit issuable by a public authority (*ex. gr.* a building permit), although the permit was refused upon other grounds.

Statement

MOTION for a mandamus to compel the issuing of a building permit.

The motion was refused.

A. E. Hoskin, K.C., and *P. J. Montague*, for applicants.

T. A. Hunt, and *J. Prudhomme*, for defendants.

Galt, J.

GALT, J.:—This is an application for a mandamus. The proceedings are of a somewhat unusual nature. On October 10, 1912, Frank Frankel and Maurice Frankel obtained an order from Mr. Justice Macdonald, granting them leave to proceed with an application for mandamus against the city of Winnipeg and E. H. Rodgers, building inspector thereof, commanding and requiring the city of Winnipeg and the said building inspector,

otherwise called inspector of buildings, to issue to the said Frank Frankel and Maurice Frankel, or to the said Maurice Frankel, a certificate required under, and provided for in, the by-laws of the city of Winnipeg, in such case made and provided, in order that said Frank Frankel and Maurice Frankel, or the said Maurice Frankel, may commence the erection of a house, building, or apartment block upon lot 52, according to a plan of part of lot 86, according to the Dominion Government survey of the parish of St. James, registered in the Winnipeg land titles office, as plan No. 1352; excepting out of said lot the most easterly 13 feet in depth thereof, according to the plans and specifications for such building submitted to the said building inspector, by way of motion, notice of which motion shall be given in the ordinary manner to the city of Winnipeg and the said building inspector, and the said motion may be prosecuted upon affidavit or other evidence.

Pursuant to said order a notice of motion was served upon the city of Winnipeg and E. H. Rodgers, and affidavits were read by both parties in support of their respective contentions. No action has been commenced by the applicants, and, in the absence of pleadings, I am left to spell out the rights of the parties as best I can from their affidavits and arguments. It appears that shortly prior to October, 1912, the applicants prepared plans of their proposed building and submitted the same to the building inspector. The applicants say that the building inspector approved of the plans on a Saturday and promised to issue the requisite permit on the following Monday.

On the following Monday the applicants say they attended on the said building inspector and requested the issue of the said permit, when the inspector stated to them that he had been directed by the Fire, Water and Light Committee, not to issue any further permits, and he refused to grant the same, although he stated that the plans and specifications were perfectly satisfactory in every respect, and the applicants were given to understand that the refusal was on account of some dispute between the city and certain residents of Armstrong's Point, with reference to a sewer on Assiniboine avenue, etc.

In a subsequent affidavit the applicant, Frank Frankel, says that on the 2nd day of November, 1912 (many days after service of the notice of motion herein), he attended on the building inspector and delivered a letter to him, and offered to pay him whatever fee was required for the issue of a permit, and then tendered him the money; which he refused to accept; and that he also offered and requested to be allowed to sign any application or other form which the city of Winnipeg might require in connection with the issue of a building permit.

David W. Bellhouse, the applicants' architect, says that on the Monday morning referred to, when he attended at the office

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of the building inspector, he was ready and willing, on behalf of the applicants, to pay whatever the proper fee was for the said permit; but immediately upon his entering the office of the said building inspector, the latter told him that he could not issue the permit, and had been instructed not to do so, and he (Bellhouse) did not therefore pay or tender the said Rodgers the fee.

Mr. Bellhouse's affidavit also contains the following statement:—

> (3). That the only document in the nature of an application for the issuing of a building permit which, to the best of my knowledge, information and belief, is ever signed by or on behalf of the applicant for such permit, is a document which is prepared by or in the office of the building inspector after the plans and specifications have been approved; such document containing general particulars of the said building, and the said document is signed by or on behalf of the applicant at the actual time of the issue of the permit, and in this case, the building inspector had all the necessary information for filling in the said document and the applicants were ready and willing to sign the same, and I was ready and willing to sign the same on their behalf.

The building inspector himself says that neither the said Frank Frankel nor Maurice Frankel, nor either of them, has paid or offered to pay him any fee in respect of, or for, a building permit for said building, and he points out that the permit fee is fixed by a sliding scale set forth in the building by-law, and that Frankel could not tell him the cost of the proposed building.

The inspector also denies the receipt of any written application for a permit, except a letter from the applicants' solicitors, which says nothing as to cost.

From the affidavits and exhibits, I gather that the applicants duly submitted their plans, but omitted to make any written application for a permit, and did not tender any definite fee for such permit, apparently considering that the inspector's refusal to grant a permit rendered any further application or tender useless.

The Winnipeg charter, as amended by the statutes of Manitoba for 1906, ch. 95, sec. 7, provides, under the heading "By-laws":—

> 703. The city may pass by-laws not inconsistent with the provisions of any Dominion or Provincial statute,
>
> (28) for regulating the erection of buildings, verandahs and other structures external to buildings, etc.

On April 29, 1907, the city of Winnipeg passed by-law No. 4283, "to regulate the construction, alteration, repair, removal and inspection of buildings in the city of Winnipeg, and to prevent accidents by fire."

The following extracts from the by-law relate to the matters in dispute upon this motion:—

Sec. 1. There shall be in the city of Winnipeg a department to be called the department for the inspection of buildings, which shall be charged with the enforcement of the provisions of this by-law as hereby enacted for the survey and inspection of buildings and the protection of the same against fire or accident.

2. The staff of said department shall consist of a chief, to be known as the inspector of buildings, and as many assistant inspectors as may be found to be necessary from time to time.

7. It shall be the duties of the inspector, as chief of his department, to issue permits for the erection, enlarging or alteration of buildings, in accordance with the provisions of this by-law; keep a record of the same, with a description of the construction, sanitary appliances, heating apparatus, electric apparatus, elevators, fire escapes, and all matters relating to the construction or alteration of buildings in the city.

9. It shall be the duty of the inspector, on receipt of an application for a permit, accompanied by the plans and specifications for the proposed building, or alteration, to carefully examine the same, and ascertain if the supports, beams, and construction of the proposed building are properly shewn in said plans and described in the said specifications, and that they are in accordance with the provisions of this by-law. If the inspector is satisfied that they conform to this by-law he shall, within a period of three days from the date of application, issue a permit as hereafter provided for. If they do not conform to this by-law, he shall refuse to issue such permit.

20. If the inspector of buildings for the city of Winnipeg shall, contrary to the provisions of this by-law, permit or wilfully neglect or refuse to prevent the erection, placing or repair or alteration of any building or any erection, wholly or in part put up, erected, repaired or altered or placed contrary to the provisions of this by-law, he shall be liable to the penalties of this by-law.

21. Should any question arise between the inspector and the owner or his legal representatives, or should the said party object to any order or decision of the inspector, he or they shall have the right within three days after the giving of such order or decision to appeal from the same to the board of appeal hereafter referred to.

24. The board of appeal shall consist of three members of the city council. The appointment of said board of appeal to be made annually by the city council.

35. There shall be levied and collected from every applicant for a building permit, whether the application is for a new building or for repairs, alterations or additions to a building, when the cost of such building, repairs, alterations, or additions, does not exceed the sum of $500, the fee shall be 50c.; over $500 and not exceeding $1,000, $1; over $1,000 and not exceeding $5,000, $2. With an extra charge of 50c. for each additional $5,000 or fractional part thereof.

Under paragraph 35 the fee for building permits is fixed on a sliding scale, depending upon the cost of the building, repairs, alterations or additions.

A portion of the material read upon the motion on behalf of the respondents went to shew that the applicants were not acting *bonâ fide* in respect of their building, but were following out a

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system of selecting lots of land in portions of the city where high class residences prevailed, and threatening to build apartment blocks on such lots with a view to being bought out by the residents of the neighbourhood. Such a course of conduct might well be termed reprehensible from a strictly moral point of view; but in this case the applicants are asserting a purely legal right, and their motives cannot be inquired into. On the other hand, the onus of establishing their legal position necessarily rests upon the applicants.

The first point which arises for decision relates to the procedure adopted by the applicants.

The rules relating to the granting of a mandamus are rules Nos. 875 to 888 inclusive. Prior to these rules the English procedure in force in Manitoba provided for two separate kinds of mandamus; firstly, the prerogative writ, which did not require the bringing of any action; and secondly, a mandamus to be obtained by action pursuant to the Common Law Procedure Act, 1854, and subsequently amended by the Judicature Act.

No argument was addressed to me with reference to these separate forms of mandamus, as the parties seemed to consider that the order made by Macdonald, J., was conclusive as to the right of the applicants to frame their motion as they have done.

I find it difficult to give effect to the procedure adopted by the applicants for the following reasons:—

Rule 875 enables the plaintiff to issue a statement of claim asking for a mandamus commanding the defendant to fulfil any duty in the fulfilment of which the plaintiff is personally interested. Rule 877 provides that no writ of mandamus shall hereafter be issued in an action; but a mandamus shall be by a judgment or order, but shall have the same effect as a writ of mandamus formerly had. Rule 879 provides that nothing in the preceding rules contained shall take away the jurisdiction of the Court to grant orders of mandamus, nor shall any order of mandamus issued be invalid by reason of the right of the prosecutor to proceed by action for mandamus; but in all cases the claim for a mandamus shall be proceeded with by action under the preceding rules, unless leave is granted by the Court or a Judge to proceed otherwise.

Rule 885 provides that in all cases in which application for mandamus is made by motion the application for the said order may be made to the Court on affidavit upon leave being granted as provided in rule 879, and upon notice in the ordinary manner to any person who may, in the opinion of the Court or Judge, be affected by the order, if made.

The draftsman of the above rules appears to have had a vague idea that the remedy previously given by prerogative writ of mandamus was to be preserved in our procedure, but modified by enabling the applicant to move by way of notice of

motion in lieu of the usual order *nisi*, and to obtain the requisite relief by an order instead of by the usual writ. The two modes of relief, widely differing in their incidents and applicability, are confused in our present rules.

Under the former practice the proper procedure was to apply to the Court for an order *nisi* in the name of the Sovereign *ex relatione* the applicant against the defendant. An instance of this may be seen in *Reg. ex rel. Pacaud* v. *Dubord*, 3 Man. L.R. 15. I see no reason why the parties to a notice of motion (if that be now the proper method) should not be the same as under the former procedure by way of order *nisi*. That is to say, the motion should be on behalf of the Sovereign *ex rel.* the prosecutor. The motion as framed is therefore improper.

Then again, the applicant must have a legal right to the performance of some duty of a public and not merely a private character, and there must be no other effective lawful method of enforcing the right. See Encyc. Laws of England, vol. 8, pp. 526, 529, 546. In the present case the applicants are asking for relief in respect of what appears to be a merely private right.

It is just possible that the applicants read rule 879 as entitling them, with leave of the Court or a Judge, to serve a notice of motion and commence an action at some later stage. I am not aware of any practice which permits of such a proceeding, and inasmuch as no action was commenced upon which the notice of motion could be founded, it is impossible to treat this case as in any sense an action for a mandamus.

There is an additional point which was carefully argued before me, which seems equally fatal to the application.

The applicants are enforcing a strictly legal right and the onus is upon them to shew that they are in all respects clearly entitled to the permit in question. Paragraph 9 of the building by-law provides that it shall be the duty of the inspector on receipt of an application for a permit, accompanied by the plans and specifications for the proposed building or alterations carefully to examine the same, etc. It appears to me that the words "on receipt of an application for a permit" clearly contemplate a written application, which, it is admitted, was never handed in.

Then paragraph 35 provides that there shall be levied and collected from each applicant for a building permit a fee, based upon the sliding scale therein set out. The application for a permit would naturally contain a statement of the proposed cost of the building. But, whether that be so or not, the building inspector states in one of his affidavits that the applicant could not tell him the cost of the proposed building.

The applicants answer this objection as to the omission to furnish a written application and the proper fee therefor by

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stating that when they went, with their architect, to the office of the building inspector on the Monday morning, he refused to grant a permit, and gave a different reason for his refusal, namely, that he had been so instructed by the Fire, Water and Light Committee. If this were a case of contract, there is no doubt the applicants would have been freed from the obligation to comply with any conditions precedent by reason of the refusal of the opposite party to perform his part of the contract; but I was not referred to any authority, nor have I been able to find any, in which this rule of law has been held applicable to wrongs independent of contract. Nothing could have been easier than for the applicants to place themselves in a position to demand their legal right by tendering a written application with all its necessary contents together with the proper permit fee calculated in accordance with paragraph 35. This they did not do, but launched their motion with a simple offer to sign any application and pay any fee which might be necessary.

A question was raised on behalf of the applicants as to whether any fee was properly chargeable by the building inspector for the permit. The fees set forth in paragraph 35 of the building by-law appear to be only moderate fees, probably fixed with a view to covering the cost of issuing the permits and of inspecting and regulating buildings in the city. The right of the city to such a fee is strongly supported by the *City of Montreal* v. *Walker*, reported in Montreal Law Reports, 1 Q.B. 469; and in the absence of any conflicting authority in our own Courts, I am content to follow it.

Upon the whole case I think the language of the Chief Justice of this Court expressed in *Holmes* v. *Brown*, 18 Man. L.R. 48, is *mutatis mutandis* appropriate:—

> If the plaintiffs have a legal right to the payment of the moneys in question, they have an adequate remedy therefor by action against the town. If they have not a legal right to this payment, then they have no right to a mandamus.

The motion must be dismissed with costs.

Mandamus refused.

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CLEMENT v. McFARLAND.

Ontario High Court. Trial before Kelly, J. December 11, 1912.

1. PLEADING (§ I N—114)—AMENDMENTS, ON THE TRIAL—PLEA OF STATUTE OF FRAUDS.

Where the plaintiff sues for specific performance of an alleged agreement for the sale of lands, and where the agreement as to price was in writing and as to terms oral, the defendant may, at the trial, be allowed to amend his statement of defence so as to plead the Statute of Frauds.

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2. CONTRACTS (§ I E—105)—STATUTE OF FRAUDS—CONTRACT FOR SALE OF LANDS—INSUFFICIENT MEMORANDUM—TERMS OF PAYMENT OMITTED.

An agreement in writing for the sale of lands in which the price is shewn, but the terms of payment are not inserted, is insufficient to satisfy the Statute of Frauds.

[*Reynolds* v. *Foster*, 3 D.L.R. 506, 3 O.W.N. 983, applied.]

3. CONTRACTS (§ I E—105)—SALE OF LANDS—TIME OF PAYMENT—STATUTE OF FRAUDS.

To satisfy the requirements of the Statute of Frauds as to the formalities of a written contract for the sale of lands, it is essential that the manner and time of payment, as well as the amount to be paid, should be set out with such particularity and certainty as would enable the Court to ascertain and define whether or not payment was to be made in cash, and if not in cash, then on what dates and in what amounts the payments are to be made.

[See also *Fenske* v. *Farbacher*, and its Annotation, 2 D.L.R. 634.]

Statement

ACTION to enforce specific performance of an alleged contract for the sale of the property known as No. 33 Chestnut Avenue, Hamilton, for $1,600.

The action was dismissed.

J. L. Counsell, for the plaintiff.

W. A. Logie, for the defendant.

Kelly, J.

KELLY, J.:—At the opening of the trial a motion was made by defendant's counsel for leave to amend the statement of defence by pleading the Statute of Frauds, and I allowed its amendment.

Plaintiff was for some years prior to the alleged sale the tenant of the defendant of the lands in question.

On April 5th, 1912, defendant wrote plaintiff as follows:

"I do not like to trouble you, but I think I will have to put up a house beside you. I have been trying to get one in the west for a friend of mine but property up here is almost out of reach."

Plaintiff then approached defendant about buying the property, following which defendant wrote the following to the plaintiff:—

"Hamilton, April 8th, 1912.

"Dear Sir:

If the house and lot is worth $1,600 to you, you can have it: if not, it is all right.

"Yours truly,
"James McFarland
"158 Canada Street."

On the face of this letter it was not addressed to any one, but it was sent to plaintiff by post in an envelope addressed to him at 33 Chestnut Street. This latter document is the memorandum of agreement now relied upon by the plaintiff.

According to the plaintiff's own evidence he then wrote defendant that he thought it would do, but he would let defend-

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ant know on the following Saturday night. This letter is not produced. On the Saturday night, defendant went to plaintiff's house, when a discussion took place about the terms of payment. Plaintiff says that he informed defendant he would pay all cash, that is, that he would pay $150 at that time and that he expected some more money soon, and that defendant expressed himself as satisfied with the proposal, that he was satisfied if he got 6 per cent.

Plaintiff's wife, who was present, says $150 was mentioned.

Defendant, on the other hand, says that plaintiff proposed to pay $150 down and $50 every six months, and that if he made default in the payments he would surrender the property, but that he (defendant) expressed dissatisfaction at this proposal, and said he would see his solicitor. He did see his solicitor, Mr. Chisholm, but denies having given him any instructions. Following this, defendant by letter requested plaintiff to go to Chisholm's office, which he did, and there further discussion took place between Chisholm and plaintiff regarding the terms of payment; particularly as to what amount plaintiff would be able to pay annually on account of principal; plaintiff saying, in answer to the solicitor's inquiry if he could pay $100, that he would not like to state, but would undertake to pay at least $50 per year. The solicitor was not satisfied with this, and plaintiff says he proposed giving an undertaking to stand any loss that might be occasioned by default in keeping up the payment. Plaintiff appears to have got the impression that this was satisfactory to the solicitor, and that the solicitor had authority to complete the agreement on defendant's behalf. I cannot find that there was any such authority.

I do find, however, that on the Saturday night mentioned, the plaintiff and defendant agreed upon $1,600 as the purchase price, but that the terms of payment were not then agreed upon, and that down to the time that plaintiff and the solicitor met in the latter's office, these terms were still open.

On the evidence, and especially in view of defendant's denial of instructions to the solicitor, I do not find that there was any agreement on the part of the defendant as to the terms of payment.

The manner and time of payment were a material part of the agreement, which, in order to satisfy the requirements of the Statute of Frauds, should have been set out with such particularity and certainty as would enable the Court to ascertain and define first, whether or not payment was to be in cash, and secondly, if not in cash, on what dates and in what amounts the payments would be made.

What happened in this case falls short of supplying these terms.

As was said by Mr. Justice Teetzel, in *Reynolds* v. *Foster*, 3 D.L.R. 506, 3 O.W.N. 983: "while the Court will carry into effect a contract framed in general terms where the law will supply the details, it is also well settled that if any details are to be supplied in modes which cannot be adopted by the Court, there is then no concluded contract capable of being enforced."

Here it was necessary for the parties to have gone a step further than they did, and definitely to have agreed upon the terms of payment; that not having been done, the plaintiff cannot succeed.

The negotiations were carried on somewhat loosely, and to hold that an enforceable contract was made would mean going further than the facts warrant.

The action will therefore be dismissed with costs.

I have come to this conclusion somewhat reluctantly, for, though in my opinion the defendant did not render himself legally liable to plaintiff, the evidence indicates that at the very time he led plaintiff to believe he would be given the opportunity of purchasing, he was negotiating with other parties, with whom he did eventually enter into an agreement for the sale of this same property.

Action dismissed.

OTTAWA WINE VAULTS CO. v. McGUIRE.

Ontario Court of Appeal, Garrow, Maclaren, Meredith, and Magee, JJ.A. November 19, 1912.

1. FRAUDULENT CONVEYANCES (§ VII—35)—VOLUNTARY CONVEYANCE—SETTING ASIDE AT INSTANCE OF SUBSEQUENT CREDITORS.

A voluntary conveyance may be set aside at the instance of a creditor who became such after the date thereof, though it was made with intent to affect future creditors alone, and there are no creditors remaining whose debts arose before the date of the conveyance.

[*Jenkyn* v. *Vaughan*, 3 Drew. 419, discussed; *Mackay* v. *Douglas*, L.R. 14 Eq. 106, followed.]

2. TRIAL (§ II C 4—88)—QUESTION OF FACT—SETTING ASIDE A VOLUNTARY CONVEYANCE—IMPRESSION CREATED ON TRIAL JUDGE BY PARTIES.

The question involved in an action to set aside a voluntary conveyance is one of fact, and, therefore, much depends in such an action upon the impression made upon the mind of the trial Judge by the parties when in the witness box.

[*Fleming* v. *Edwards*, 23 A.R. 718, distinguished.]

Statement

APPEAL by the plaintiffs from the judgment of a Divisional Court (FALCONBRIDGE, C.J.K.B., dissenting) reversing the judgment of MULOCK, C.J.Ex.D., at the trial in favour of the plaintiffs, setting aside the settlement in question: *Ottawa Wine Vault Co.* v. *McGuire*, 27 O.L.R. 591.

The appeal was allowed.

W. D. Hogg, K.C., for the plaintiffs.

G. H. Watson, K.C., and *F. B. Proctor*, for the defendants.

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GARROW, J.A.:—There was a consensus of opinion by all the learned Judges that the settlement was voluntary, and that, at least upon paper, the debtor had, when the settlement was made, sufficient other assets to have paid his debts in full.

An objection urged by the defendants before us is not apparently dealt with in any of the judgments; that is, that as the plaintiffs' present claim is in respect of a debt arising subsequent to the settlement, and there being no sufficient evidence of an existing prior creditor's claim, the plaintiffs have no standing to attack the settlement; for which proposition *Jenkyn* v. *Vaughan*, 3 Drew. 419, and the cases following it in our own Courts, were cited.

The evidence shews beyond question that the account of the debtor with the plaintiffs was continuous from a time anterior to the settlement until the assignment, although payments were from time to time made, sufficient in amount, to wipe out the debt actually owing at the date of the settlement. In *Ferguson* v. *Kenny*, 16 A.R. 276, this circumstance was held by two of the learned Judges (Hagarty, C.J., and Osler, J.), to be sufficient to maintain the action in respect of a debt subsequently incurred. Maclennan, J., based his judgment upon other grounds; and Burton, J., while agreeing in the result, withheld his assent to that proposition; so that the point cannot be said to be established by that decision.

It is not, I think, necessary here to express any opinion upon that part of the defendants' contention, farther than to say that the defendants' proposition is not, I think, sufficiently supported by the decisions to which counsel refers, which clearly recognise what is otherwise well established, that a voluntary conveyance made with intent to affect future creditors alone is within the statute and will be set aside.

Jenkyn v. *Vaughan*, 3 Drew. 419, was referred to and commented upon by Malins, V.-C., in *Crossley* v. *Elworthy*, L.R. 12 Eq. 158. That learned Judge also subsequently delivered the judgment in the well-known case of *Mackay* v. *Douglas*, L.R. 14 Eq. 106; approved by the Court of Appeal in *Ex parte Russell, In re Butterworth*, 19 Ch. D. 588.

Mackay v. *Douglas*, L.R. 14 Eq. 106, was a case of subsequent creditors attacking the settlement where there were no prior unsatisfied claims. The headnote in part says: "A voluntary settlement whereby the settlor takes the bulk of his property out of the reach of his creditors, shortly before engaging in trade of a hazardous character, may be set aside in a suit on behalf of creditors who become such after the settlement, though there are no creditors whose debts arose before the date of the settlement, and though when the settlement was made it was doubtful whether the arrangements under which the settlor was to engage in the business would take effect."

This language seems to me to be exactly applicable to the facts which we have here, and to supply the proper rule by which we should be guided. The debtor here was not merely about to engage in a new business, but had actually been engaged in it for about three months before the settlement was made. He had, it is true, been in the hotel business more than once, some time before, in country places; but he knew nothing about the trade of the city of Ottawa, which was to him an entirely unknown field of operation. His assets, outside of what was invested in the Ottawa business and of the settled property, were then of little or no account; and much even of the so-called value put into the Ottawa business was intangible, consisting of the price of the license and goodwill, and could not, while the business was being carried on, be made available to pay creditors. Part of the purchase money even (two thousand dollars) was unpaid, and was secured by promissory notes, to be paid, if at all, out of the profits, if any. The business was carried on largely upon credit for some eighteen months, and then an assignment for the benefit of creditors was made. The property which came to the hands of the assignee was of comparatively trifling amount, going to shew that at the time of, and for some considerable time before the assignment, the business had been hopelessly insolvent. That such a business was, as was said by Falconbridge, C.J., a hazardous one, did not require the event to prove. And that the female defendant at least so considered it is evident by her admitted importunities to obtain the settlement. These were for a time withstood by her husband; but after the three months' experience at Ottawa he yielded.

What had occurred in the meantime to change his mind? Had the three months' experience affected his hopefulness, or shewn him some of the perils which were so soon to overwhelm him? These are questions which I do not find satisfactorily answered in the evidence. I do, however, find that it is stated by a creditor, and not denied by the debtor, that shortly after the date of the settlement—within a very few days in fact—this creditor, alarmed at the amount of the debtor's account, was making enquiries from the debtor about his property and was then told by the debtor that he still owned the Madoc property; and, in apparent harmony with that idea—that is, that he still owned it—is the undisputed fact that he continued to receive the rents for some time after the settlement. It is true he says he did so as agent for his wife; but in the light of all the circumstances that explanation ought not to be accepted. Then there is the important circumstance that the learned trial Judge, with opportunities which we have not, came to the conclusion that the intent to defeat creditors had been established.

The question is really one of fact, and much must always depend upon the impression made upon the mind of the trial Judge by the parties when in the witness-box.

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In *Fleming* v. *Edwards*, 23 A.R. 718, cited by counsel for the defendants—a case in its outlines somewhat resembling this—the trial Judge had found against the fraudulent intent: a circumstance apparently not without weight in inducing this Court to reverse the judgment of the Divisional Court and restore that of the trial Judge.

Upon the whole I am, with deference, clearly of the opinion that the judgment of Mulock, C.J., was right, and should be restored.

Garrow, J.A.

I would allow the appeal with costs.

Maclaren, J.A. Magee, J.A.

MACLAREN, and MAGEE, JJ.A., agreed with GARROW, J.A.

Meredith, J.A.

MEREDITH, J.A., concurred in the result.

Appeal allowed.

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H. C. J.

1912

Nov. 11.

Re GIBBONS v. CANNELL.

Ontario High Court, Riddell, J., in Chambers. November 11, 1912.

1. JUDGMENT (§ II C 2 A—91)—JURISDICTION—STATUTORY PROVISION SUBSTITUTING "FAIL" FOR "ABATE," EFFECT OF—PROHIBITION.

The amendment of the Division Courts Act (Ont.) substituting the words "fail for want of jurisdiction" for the words "abate for want of jurisdiction," in 10 Edw. VII. (Ont.) ch. 32, sec. 79 (1) does not give a Division Court jurisdiction to try an action which should have been brought in the court of another Division.

2. COSTS (§ I—19)—RIGHT TO RECOVER—APPORTIONMENT—COSTS AFFECTED BY WAIVER OF OBJECTION.

The fact that the material upon a motion was defective and that the moving party would in consequence have had to submit to a dismissal or have asked a postponement to supplement the material had not the opposing party by his counsel admitted the material fact which the affidavits did not shew, will be taken into consideration on the disposal of the costs when the motion is allowed.

3. COURTS (§ I B—10)—JURISDICTION—NON-RESIDENTS—SEC. 79 DIVISION COURTS ACT (ONT.) CONSTRUED.

Where it appears that an action brought under sec. 72 of the Division Courts Act (Ont.) should have been entered in some other Court of the same or some other county, the provision of sec. 79 of the Act that the action "shall not fail for want of jurisdiction," but may be transferred to "any Court having jurisdiction in the premises," does not give the Court in which the cause was improperly brought any jurisdiction to hear and determine the case, even where no objection is taken or if taken is wrongly passed upon or not tried.

[Division Courts Act, 10 Edw. VII. (Ont.) ch. 32, sec. 79, construed; *Watson* v. *Woolverton*, 22 O.R. 586*n*; *Re Hill* v. *Hicks*, 28 O.R. 390; *Re Thompson* v. *Hay*, 22 O.R. 583, 20 A.R. 379, referred to.]

Statement

MOTION by defendant for an order of prohibition to the 10th Division Court of the County of York.

An order for prohibition was made.

E. G. Long, for the defendant.

J. F. Boland, for the plaintiff.

RIDDELL, J.:—A special summons issued out of the 10th Division Court of the County of York, on an advertising agreement whereby the defendant a hotel-keeper at Port Carling agreed on certain terms and conditions to pay the plaintiffs $50. The summons having been served September 21st, 1912, the defendant on September 26th filed a notice: "the defendant disputes the plaintiff's claim herein and also the jurisdiction of the within Court to try the same." I take this to be a "notice . . . that he disputes the jurisdiction of the Court" within the meaning of 10 Edw. VII. ch. 32, sec. 78.

The plaintiff served notice of motion for judgment under sec. 100 at the same time as the special summons, i.e., on the 21st September, 1912—and on the 27th September on the return of the notice of motion, judgment was directed to be entered for the plaintiff for the amount of the claim and costs. The defendant was not represented at the motion: he swears that he instructed his solicitor to oppose the motion, furnishing him with an affidavit for that purpose, and that his solicitor, as he says, arranged with the plaintiff's solicitor for a hearing of the motion during the week beginning the 30th September. The defendant denies also on oath the execution of the document.

The defendant now applies for prohibition. Upon the argument it was pointed out that there was no affidavit specifically denying that the defendant resided or carried on business within the 10th Division Court Division, etc. (sec. 72): but the plaintiff's counsel most generously waived that objection, and I assume that the action was not properly triable in that Division under sec. 72, but that it should have been entered in another Division Court: sec. 79 (1).

The wording of sec. 79 (1) of the present Act is not quite the same as that of the former Acts: "79 (1) If it appears that an action should have been entered in another Court . . . it shall not fail for want of jurisdiction but etc., etc."—the former legislation was "shall not abate as for want of jurisdiction but etc., etc." Under the former legislation, it had been decided that the section in part quoted did not give the Court jurisdiction to try simply if no objection had been taken, or if taken either not tried or wrongly passed upon: *Watson* v. *Woolverton*, 22 O.R. 586 (*n*); *Re Hill* v. *Hicks*, 28 O.R. 390; *Re Thompson* v. *Hay*, 22 O.R. 583, 20 A.R. 379.

A tempting argument is based upon the change in the language of the enactment—thus—the Act says that the "action . . . shall not fail for want of jurisdiction . . . ." This by implication gives the Court jurisdiction: and if the Court has jurisdiction, no mistake made by the Court is a ground for prohibition.

It may be at once admitted that if the Court had jurisdiction prohibition does not lie: *Long Point Co.* v. *Anderson* (1891), 18

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A.R. 401; *Ameliasburg* v. *Pitcher* (1906), 13 O.L.R. 417; but I am unable to convince myself that the slight change in the language of the legislation has wrought such a great change in the law.

A provision that an action shall not abate as for want of jurisdiction seems to me to imply a grant of jurisdiction to the Court as a provision that the action shall not fail for want of jurisdiction. The Courts which have jurisdiction in a particular case are as well and clearly specified now by sec. 72 as formerly when *Re Thompson* v. *Hay*, 22 O.R. 583, 20 A.R. 379, was decided. Had the Legislature intended that a Court other than those named in sec. 72 should have jurisdiction it would have been easy to say so.

I think I am bound by authority to hold that prohibition must go.

As to costs, the applicant would under ordinary circumstances have been entitled to his costs: but his material was defective, fatally defective, and it was only by reason of the generosity of his opponent that he was able to get on at all. Had the respondent's counsel insisted on his strict rights the motion would have had to be adjourned to enable him to complete his material; this enlargement would, of course, have been at his expense. This is saved him by the eminently reasonable and proper conduct of opposing counsel and I think the order must be without costs.

Prohibition ordered.

QUE.

K. B. 1912

DEMERS v. MOFFET.

Quebec King's Bench, Archambeault, C.J., Trenholme, Cross, Carroll, and Gervais, JJ. February 26, 1912.

1. SCHOOLS (§ III A—55)—OFFICERS AND ELECTIONS—ELECTION OF CHAIRMAN BY TWO OUT OF THREE MEMBERS.

At a meeting of school commissioners (Que.) regularly opened with only three members present, a motion by one to appoint another of them chairman of the meeting is carried by the concurrence of the person so nominated, and is not subject to reconsideration or repeal by the whole meeting on the late arrival of two other members opposed thereto.

[*East* v. *Bennett Brothers, Ltd.*, [1911] 1 Ch. 163, 80 L.J. Ch. 123, 27 Times L.R. 103, referred to.]

Statement

APPEAL from the judgment of the Superior Court, Cannon, J. The appeal was allowed, TRENHOLME, J., dissenting.

Bédard, Chaloult, Lavergne and Prévost, for the appellant.

Pelletier, Baillargeon and Alleyn, for the respondent.

Cross, J.

The judgment of the majority of the Court was delivered by CROSS, J.:—The question for decision is whether or not the

appellant was elected chairman of the school commissioners of the parish of St. Nicholas, in Levis, on the 21st July, 1910. On that date a quorum of the commissioners, namely, Ephrem Genest, Ophiade Dubois, and the appellant, were present at the appointed hour and place, and proceeded to dispatch the statutory business of the meeting, namely, to elect a chairman. The appellant took the chair. Genest proposed that the appellant be chairman for the school year. Dubois declared himself against. The chairman sustained the motion. That is what the appellant relies upon as an election. The respondent pleads that it did not constitute an election, but was a sort of snap proceeding; that the motion was not declared carried, but, on the contrary and before the matter was settled, two other commissioners arrived and thenceforth the majority was against the motion; that what may have been done was forthwith undone; that a motion was made to appoint the respondent chairman, which latter motion was adopted at an adjournment of the meeting, on the 31st July; that the attempt to appoint the appellant was a trick, rushed through at the beginning of a meeting, in violation of a long standing custom in the parish, to await the arrival of tardy commissioners, before proceeding to business. The respondent proceeded in six sub-divisions of paragraph 9 of his defence to set out certain matters of anterior school board administration as constituting reasons why the appellant desired to be chairman. Though the matter of this lengthy paragraph (No. 9) was no more relevant to the case stated in the action than was the war in Mexico, it was permitted to remain in the pleading, though demurred to. I infer that this must have been by some accidental oversight in disposing of the inscription in law. The evidence in support of the alleged custom to delay business, until arrival of belated commissioners, amounts to nothing. The witnesses whose testimony was relied upon to prove the alleged custom, have proved that there was no custom. The charge of trickery is not sustained by the testimony. The meeting did not proceed to business till over a quarter of an hour after the hour fixed for business. The two tardy commissioners arrived half an hour after the hour of meeting. The case, therefore, resolves itself into the question whether, or not, what was done upon the motion to elect the appellant at the outset of the meeting, as established by the record, constitutes an election of the appellant to the chairmanship.

The recital in question is as follows:—

> Proposé par M. Ephrem Genest que M. Alcide Demers soit nommé président des commissaires d'école de la municipalité pour l'année 1910-1911;—contre M. Ophiade Dubois, M. Alcide Demers maintient la proposition de M. Ephrem Genest.

This appears to me to have been a complete manifestation of the mind of every commissioner present and also a complete

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disposal of the question. The matter fell to be decided by three commissioners. One made the motion, the second voted or declared himself against it, and the third sustained it.

In certain circumstances one man may constitute a "meeting:" *East* v. *Bennett Brothers Ltd.*, [1911] 1 Ch. 163, 80 L.J.Ch. 123, 27 Times L.R. 103.

It was suggested that a majority could lawfully reconsider the question and decide it differently, especially at the same meeting. Many questions can no doubt be so reconsidered, but not a question such as the election of a chairman, which is to take effect in immediate action. Here the person elected was in the chair, and the meeting over which he was presiding, was proceeding to deal with the next order of business, when the two dissentients arrived. At that stage it was perhaps still possible for the chairman to have declined the appointment, but, short of such an event as that, what had been done could not be undone by resolution of a majority. The pretended election of the respondent, made afterwards, was consequently void. We, therefore, maintain the appeal and the action.

Trenholme, J.

TRENHOLME, J., dissented.

Appeal allowed.

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S. C.
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Nov. 23.

STYLES (plaintiff, respondent) v. **LASHER** (defendant, appellant).

Saskatchewan Supreme Court, Newlands, Lamont, and Brown, JJ. November 23, 1912.

1. APPEAL (§ VII L 3*a*—485)—FINDINGS OF COURT—REVIEW ON APPEAL.

In an action for the recovery of wages for the services of the plaintiff and his wife, where the defendant appeals from the trial Judge's finding as to a certain alleged payment to the wife purporting to be in accord and satisfaction of the debt, the appellate Court will properly consider among suspicious circumstances: (*a*) that the wife has separated from her husband and is working for the defendant under a new arrangement; (*b*) that the wife, after her husband's action was brought, took at the defendant's suggestion a long-date promissory note without interest (ante-dated) as in settlement of the action; (*c*) that the wife apparently lent herself to help the defendant in the action; (*d*) that the evidence for the defence was conflicting and unsatisfactory.

Statement

APPEAL by defendant in an action to recover wages.

The appeal was dismissed.

H. V. Bigelow, for appellant.

H. C. Pope, for respondent.

Newlands, J.
Lamont, J.

NEWLANDS, and LAMONT, JJ., concurred with judgment of Brown, J.

Brown, J.

BROWN, J.:—This is an action brought in the District Court for the judicial district of Moose Jaw for the recovery of wages.

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Under a written agreement dated August 6th, 1910, the plaintiff, on behalf of himself and his wife, Annie E. Styles, agreed to enter the service of the defendant as farm help for a period of one year at the sum of $450 for both. Pursuant to such agreement, the plaintiff and his wife did at that time so enter the employ of the defendant; and in view of the subsequent illness of the plaintiff's wife, the time of service was extended until the 1st November, 1911, the amount of wages to be the same. The plaintiff claims a balance due under this contract for the services of himself and wife of $347. The defendant, on the other hand, sets up that he has paid the full amount of the wages before action brought. The learned District Court Judge before whom the action was tried found in favour of the plaintiff for $178. In arriving at this amount he credited the defendant with goods supplied to the amount of $117.11 (this amount being agreed upon); with $50 for board and nursing of the plaintiff's wife for one month in the year 1910; with $25 for board and nursing of the plaintiff's wife for two weeks in the year 1911; and with $40 paid to Dr. Wickware for professional services in attending upon the plaintiff's wife during such illness. He disallowed the amount of $8 alleged to have been paid to one E. Rutherford, and $170 which was alleged to have been paid to Annie E. Styles, the plaintiff's wife. It is clear that the trial Judge made a mistake in arriving at the balance due. The total of the credits which he allows the defendant would be $232.11; and this would leave a balance due the plaintiff of $217.89. It is evident that he disregarded the 11 cents, and by mistake credited the defendant twice with the $40 paid Dr. Wickware. The defendant appeals from the judgment of the District Court Judge upon the following grounds, as set out in his notice of appeal:—

(1) That the evidence shewed that the plaintiff's claim was paid and satisfied before action brought.

(2) That the Judge erred in not holding that payment to the wife of the plaintiff was in accord and satisfaction of the debt.

In giving judgment the trial Judge felt it necessary that Annie E. Styles should be made a party to the action; and as she, in his opinion, was not willing to assist the plaintiff, but rather shewed a disposition to collude with the defendant, he added her as a party defendant. It was contended on appeal by the learned counsel for the appellant that the claim was a joint one, that the plaintiff could not in consequence recover without his wife being made a party to the action, and that the trial Judge had no jurisdiction to add her as a party defendant until she refused to be joined as a party plaintiff and until indemnity had been offered. It is, however, in my opinion not necessary that we should consider this point. The notice of appeal does not raise any such point; and although counsel for

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the respondent took the objection that the notice did not raise the point in question, no application was made to us to amend the notice in this respect, and I am doubtful if an amendment of this character at that stage could have been successfully made. The only question raised by the notice of appeal is as to payment, and the only item of payment concerning which it was contended before us that the trial Judge had erred was the alleged payment of $170 to the plaintiff's wife. We are asked to reverse the trial Judge's finding with reference to this item; and it therefore largely becomes a question of considering the evidence on which he based his finding in this respect.

The plaintiff's wife, Annie E. Styles, continued in the defendant's employ for some time after the term of employment had expired, and after action was brought by the plaintiff for the recovery of this claim. The defendant in giving his evidence at the trial stated that he paid the plaintiff's wife $170 on the contract above referred to, and he produced a receipt signed by the plaintiff's wife, which reads as follows:—

> Craik, Sask., November 12th, 1911.
>
> Received from W. J. Lasher the sum of $170 (one hundred and seventy dollars) for wages.
>
> (Sgd.) MRS. ANNIE ELIZABETH STYLES.

This receipt is in the handwriting of the plaintiff's wife, and as originally drawn it was dated "December" 12th, 1911. The defendant says he got her to alter the month from "December" to "November." There is no explanation offered, either by the defendant or the plaintiff's wife, as to how she happened to write "December" in the first instance, or as to why the change to "November" was made. A reason, however, can be surmised when we remember that this action was launched on the 30th November, 1911. The defendant admitted on cross-examination that he paid this $170 by note, that the note was for twelve months without interest, and that it was not paid at the time of the trial, February, 1912. He says the reason he gave her the note was that she was at that time going to leave. Mrs. Styles, who was called as a witness for the defence, in giving her evidence at the trial on this point (and it appears that she was excluded from the court room while the defendant gave his evidence) says:—

> This (referring to the receipt above set out) is my signature . . . There was a settlement of the contract, and exhibit 2 (being the receipt) was made up and I got a note and some cash.
>
> Cross-examined by MR. POPE: The note I got was for $150. I did not ask my husband if I should take a note. Note is payable to me. I consented to take the note. Don't know why. Got about $20 in cash. Could not say how much. I agreed to it all. Could not tell exact date I got note. Think it was after Christmas. I think it was after I last saw my husband. I signed exhibit 2. Exhibit 2 is all in my handwriting. My husband left me. I did not want to go where he went.

Re-examination by MR. ROUTLEDGE: Threshing was finished just before Christmas. Can't say definitely whether it was before or after Christmas exhibit 2 was signed.

By COURT: I had no intention of leaving Lasher's when I signed exhibit 2. Defendant came to me to settle his account, after threshing was over. I did not ask him for a settlement. Had no intention of leaving Lasher's after my husband.

The trial Judge, in dealing with this phase of the transaction in his judgment, says as follows:—

> The defendant admits a liability of $170, but says that the amount was paid to plaintiff's wife by note. The evidence as to the giving and receiving of this note was most unsatisfactory, and I find that the note was never given. No note was produced, nor was its absence accounted for. The demeanour of both defendant and plaintiff's wife when giving evidence as to this point was such as to satisfy me that it never was given, and I so find.

In view of the evidence to which I have referred, I am of opinion that the finding of the trial Judge with reference to this point was justified. Apart altogether from the demeanour of the defendant and Annie E. Styles in the witness-box, which evidently greatly influenced the Judge in his finding, the evidence itself, as it appears on its face, is of a most suspicious character. It seems clear that this so-called settlement did not take place until after this action was brought, that the receipt was given some time in December, and then, at the defendant's request, altered to November to suit his purpose. The defendant says that the settlement of the $170 was made by note. Mrs. Styles says that the note was for $150 and that she was paid about $20 in cash, although she was not quite certain as to the amount. The defendant says the reason he gave the note was because Mrs. Styles was leaving. She, on the other hand, says that she had no intention of leaving at that time. She claims to have taken the note for a year *without interest*, and yet does not know why she did so. I do not wonder, in view of such evidence, that the trial Judge found that no note was given and no payment or settlement made.

I am of opinion, therefore, that the appeal should be dismissed with costs, and that in view of the evident clerical error of the trial Judge in arriving at the amount due, his judgment should be increased from $178 to $217.89.

Appeal dismissed.

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ADAMSON v. VACHON.

Saskatchewan Supreme Court, Newlands, Lamont, and Brown, JJ.
November 23, 1912.

1. EVIDENCE (§ IV K—444)—TELEGRAM—ADMISSION OF COPY.

Before a copy of a telegram is admissible in evidence it must be first proved that it was sent and that the original, if it cannot be produced, was lost or destroyed.

2. EVIDENCE (§ IV K—444)—TELEGRAM—COPY—LOSS OR DESTRUCTION OF ORIGINAL—SUFFICIENCY.

The testimony of a telegraph agent that the original of a telegram, if it ever existed, would have been destroyed long before the trial, but since he had never seen the original of the telegram, he could not say that that particular document had been destroyed, is not sufficient as a foundation for the admission in evidence of the copy received by the addressee.

3. EXECUTORS AND ADMINISTRATORS (§ IV A 2—80)—PROOF OF CLAIM—STRICT ADHERENCE NECESSARY—VERBAL STATEMENTS AND ACTS OF DECEASED.

In an action against executors on a contract of option alleged to have been entered into between plaintiff and the executors' decedent, the plaintiff must be held strictly to the proof of his claim, especially where he bases that claim on verbal statements and acts of the deceased.

4. CONTRACTS (§ V A—377)—MODIFICATION BY PAROL—STATUTE OF FRAUDS—EXTENSION OF OPTION—NECESSITY OF WRITING.

Where plaintiff relies on an extension of an existing option to purchase land, or the making of a new option, and a plea of the Statute of Frauds is entered by defendants, it is necessary for the plaintiff to shew that the alleged new agreement was in writing.

5. CONTRACTS (§ I C—12)—CONSIDERATION—CONTRACT OF OPTION—EXTENSION—CONSIDERATION FOR NEW OPTION.

Where the plaintiff relies on an extension of an existing option to purchase land, or the making of a new option, it is necessary for the plaintiff to prove that he gave consideration for the same.

Statement

Appeal by the plaintiff from the judgment at trial dismissing action ought to recover the difference between the amount for which certain lands were sold by the deceased (the defendants being the executors of his estate), and the price at which the said deceased had given the plaintiff an option to purchase the said lands, which option has expired, the plaintiff alleging an extension of the same.

The appeal was dismissed.

J. A. Allan, for appellant.

T. P. Morton, for respondents.

Newlands, J.

NEWLANDS, J.:—The plaintiff in his statement of claim sets out a written option, dated 8th October, 1906, made by James Flanagan, deceased, with the plaintiff, whereby the said James Flanagan agreed to sell certain lots therein set out to the plaintiff for the sum of $30,000, payable $10,000 on the acceptance of the said option and the balance in six and twelve months, with interest at six per cent.; the option to be good for three months, and might be accepted by a letter addressed to the said

James Flanagan and delivered to him or mailed postage prepaid and registered addressed to him or his solicitors at Saskatoon. The statement of claim further sets out that the said James Flanagan at the request of the plaintiff extended the time for purchasing the said land to the 8th day of April, 1907, and that on the 7th of March, 1907, the plaintiff accepted the same, and with the consent of the plaintiff, and subject to the said agreement, the said James Flanagan sold the land for $40,000, and it was agreed between him and the plaintiff that the sum of $30,000, being the price mentioned in the option, should be paid to the said James Flanagan out of the proceeds of the sale, and the balance, $10,000, should be paid to the plaintiff; that the said James Flanagan made certain payments on account thereof to the plaintiff, and he claims the balance with interest, being $9,106.83.

The defendants, who are the executors of the last will and testament of the said James Flanagan, deceased, deny all the above statements, and by amendment made by order of the trial Judge, plead the Statute of Frauds to the last-mentioned agreement.

At the trial evidence was admitted of a verbal agreement made at the same time (as held by the trial Judge) as the said written option was signed, but subsequent thereto, as claimed by the plaintiff; and a considerable part of Mr. Allan's argument on the hearing of the appeal was directed to this verbal agreement, all parties being apparently of the opinion that it was the agreement set out in clause 5 of the statement of claim. This is not, however, the fact, as the agreement there set out has no reference to an agreement made at the time the option was signed, but to one made at the time the plaintiff says he accepted the same, namely, the 8th March, 1907; so that all the evidence as to there being consideration given by the plaintiff for this agreement on the part of James Flanagan, as well as Mr. Allan's argument, are beyond the case entirely, as the plaintiff must rest his case on his statement of claim, there having been neither an amendment nor an application for the same.

Now the plaintiff's claim is that the written option was extended for three months; that on the 7th March, 1907, within the time to which the agreement was extended, he accepted the option; and that it was then verbally agreed between James Flanagan and himself that James Flanagan should sell the land for $40,000, retain $30,000 as payment for the same, and pay the plaintiff the balance of $10,000.

The first question, therefore, is as to the extension of this agreement. To prove this the plaintiff put in a telegram which he alleges he received from James Flanagan. This telegram was admitted subject to the defendant's objection, which objec-

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tion the learned trial Judge did not rule upon, although he expressed his doubts as to its admissibility. I will therefore deal first with the admissibility of the telegram produced. It is not the original, the original being the one handed in by James Flanagan at Saskatoon, and this was a copy handed out to the plaintiff by the telegraphic authorities at Winnipeg. Now before this copy would be admissible in evidence it would first have to be proved that James Flanagan sent him this telegram, and that the original was lost or destroyed. The telegraph agent at Saskatoon was called, and he proved that the original, if it ever existed, would have been destroyed long before the trial, but as he had never seen the original of this telegram, he could not say that that particular document had been destroyed. As to a telegram ever having been sent by James Flanagan to the plaintiff, the only evidence was the copy produced, and as it could not be used until the plaintiff had first proved that James Flanagan had sent him the same and that it was destroyed, the plaintiff had no evidence of such a telegram being sent, and therefore the copy could not be received in evidence. Now apart from this telegram, what evidence was there that the option had been extended? As far as I can see, only the fact that James Flanagan and the plaintiff continued to deal with this land as if the option had been extended, and the payment by James Flanagan to the plaintiff of the sums of money for which he has given him credit.

There is, however, apart from this telegram, absolutely no evidence as to when this option was extended, if it ever was, and the evidence which I have referred to does not go to shew that there was a binding agreement on James Flanagan's part to extend this option, and as he died before the commencement of this action the plaintiff must be held strictly to the proof of his claim, especially when he bases that claim on verbal statements and acts of the deceased.

Now, whether the written option was extended, as set out in the statement of claim, or a new option entered into, as the defendants have pleaded the Statute of Frauds, it would be necessary for the plaintiff to shew that the alleged agreement was in writing signed by James Flanagan, it being an agreement in relation to land, and further, the fact of any such agreement being made having been denied, it would be necessary for him to prove that he gave consideration for the same; and he has been able to prove neither, as apart from the copy of the telegram, which I have shewn should not have been admitted, there was no writing extending the agreement, and I can find no evidence on the part of the plaintiff that he gave any consideration for the alleged extension, unless it might be contended that his not having exercised his option within the time originally limited was consideration; but before this could be con-

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sidered it would have to be shewn that the agreement to extend the time was made during the life of the original option, and there is no evidence of this.

It might be contended that as far as the Statute of Frauds was concerned there was part performance to take the same out of the statute, the alleged agreement being carried out by James Flanagan selling the land and making payments on account to the plaintiff. But none of these acts is referable entirely to any such agreement. The fact that James Flanagan sold the land is as much evidence that he considered the original option was at an end as that he was carrying out a new agreement entered into between them; and as all the evidence goes to shew that James Flanagan was endeavouring to do the plaintiff a good turn, to, in fact, make a gift to him, the payments go no further than to shew that he was carrying out his good intentions towards the plaintiff.

There is, in my opinion, therefore, no evidence that the written option was extended, nor, if it had been extended, was any consideration given by the plaintiff for such new agreement, nor any memorandum in writing to satisfy the Statute of Frauds. And though I am convinced from all the evidence that the late James Flanagan intended that the plaintiff should have the benefit of the sale made by him to the extent of the increased amount for which this land was sold over $30,000, there was no legal obligation on his part nor anything binding on his executors to carry out such intention.

The appeal should, therefore, be dismissed with costs.

LAMONT, and BROWN, JJ., concurred.

Lamont, J.
Brown, J.

Appeal dismissed.

Re ONTARIO BANK. MASSEY AND LEE'S CASE.

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Sept. 30.

Ontario Court of Appeal, Moss, C.J.O., Garrow, Maclaren, Meredith, and Magee, JJ.A. September 30, 1912.

1. BANKS (§ II—9)—STOCKHOLDERS—SEC. 125 OF BANK ACT—LIABILITY OF SHAREHOLDERS FOR DEFICIENCY ON WINDING-UP—EFFECT OF TRANSFER OF SHARES AFTER PROCEEDINGS BEGUN.

Under sec. 125 of the Bank Act, R.S.C. 1906, ch. 29, making shareholders liable upon a deficiency in the property and assets of the bank to pay its debts and liabilities, to an amount equal to the par value of the paid-up shares held by them, the holders of fully paid-up shares on the date of the commencement of the proceedings are liable as contributories notwithstanding a subsequent transfer by them of their shares and the fact that a judgment was obtained against the transferees by the liquidator.

2. BANKS (§ II—12)—STOCKHOLDERS—RELEASE FROM LIABILITY—WINDING-UP BY LIQUIDATOR—PLACING NAMES OF TRANSFEREES OF STOCK ON LIST OF CONTRIBUTORIES—ELECTION.

Where a liquidator on winding up the affairs of a bank places the

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names of transferees of stock made after the proceedings were begun upon the list of contributories, who are liable upon a deficiency in the property and assets of the bank under sec. 125 of the Bank Act, R.S.C. 1906, ch. 29, instead of the names of the holders of the stock on the day the proceedings were commenced, such action upon the part of the liquidator, does not constitute an election on the part of the liquidator to accept the transferees instead of the original holders as contributories, even though the liquidator had obtained a judgment against such transferees.

3. JUDGMENT (§ II A—60)—ESTOPPEL—EFFECT AND CONCLUSIVENESS OF JUDGMENT—WINDING-UP BY LIQUIDATOR—PLACING NAMES OF TRANSFEREES OF STOCK ON LIST OF CONTRIBUTORIES.

Where a liquidator on winding up the affairs of a bank places the names of the transferees of stock made after the proceedings were commenced upon the list of contributories, who are liable upon a deficiency in the property and assets of the bank, under sec. 125 of the Bank Act, R.S.C. 1906, ch. 29, instead of the names of the holders of the stock on the day the proceedings were begun, he is not estopped from later placing the names of the original holders of stock on the list, though he had already obtained judgments against the transferees.

4. BANKS (§ II—12)—STOCKHOLDERS—RELEASE FROM LIABILITY—WINDING-UP ACT—EFFECT OF TRANSFER ON BOOKS OF BANK OF STOCK DURING PENDENCY OF WINDING-UP PROCEEDINGS.

Under sec. 21 of the Winding-up Act, R.S.C. 1906, ch. 144, providing that all transfers after the commencement of winding-up proceedings, except transfers made to or with the sanction of the liquidator under the authority of the Court, shall be void, the mere entry in the transfer book of the company of a transfer of stock, after the commencement of the winding-up proceedings, will not shift the responsibility as contributories under sec. 130 of the Bank Act, R.S.C. 1906, ch. 29, from the transferors to the transferees. (Dictum *per* Garrow, J.A.)

5. ESTOPPEL (§ III G—85)—STOCKHOLDERS — RELEASE FROM LIABILITY—COMPULSORY WINDING-UP—LACHES OF LIQUIDATOR.

Since a liquidator in proceedings for the compulsory winding-up of a bank has no right under sec. 36 of the Winding-up Act, R.S.C. 1906, ch. 144, to accept less than full payment from stockholders under sec. 130 of the Bank Act, R.S.C. 1906, ch. 29, on a deficiency in the assets and property of the bank, an estoppel by reason of his laches cannot be asserted against him where he places upon the list of contributories the transferees of the stock instead of the holders on the day the proceedings were commenced, since the liquidator cannot accomplish by mere laches that which he could not do with deliberation and intention. (Dictum *per* Garrow, J.A.)

[*In Re National Bank of Wales*, [1907] 1 Ch. 298, distinguished; *Re East India Cotton Agency (Limited), Sand's Case* (1875), 32 L.T.R. 299, referred to for different view.]

Statement

AN appeal by John Massey and W. C. Lee from an order of BOYD, C., of the 4th December, 1911, dismissing their appeal from an order of George Kappele, Esquire, an Official Referee, in a reference for the winding-up of the Ontario Bank, settling them upon the list of contributories for 338 shares of the stock of the bank.

The reasons for the order of the Referee, in which the facts are stated, were as follows:—

This matter came before me on the 9th December, 1910, and the 7th July, 1911. Certain evidence was taken and certain admissions of fact made by counsel.

It is an application made on behalf of the liquidator to place John Massey and W. C. Lee on the list of contributories in respect of 338 shares standing in their names at the date of the suspension of payment by the bank, namely, the 13th October, 1906.

After the suspension of the bank, Massey and Lee transferred these shares, as follows—

On the 24th October, 1906, to William Lehman.....	50 shares
On the 26th October, 1906, to A. E. Webb & Co., in trust for J. L. Dawkins.....	10 shares
On the 26th October, 1906, to A. E. Webb & Co., in trust for James Phillips	8 shares
On the 26th October, 1906, to A. E. Webb & Co.....	270 shares
	338 shares

In bringing in the list of contributories, the liquidator proceeded against the transferees from Massey and Lee in respect of these shares, namely: William Lehman, 50 shares; J. L. Dawkins, 10 shares; James Phillips, 8 shares; A. E. Webb & Co., 270 shares; and recovered judgment against them respectively.

Massey and Lee were not placed on the original list of contributories by the liquidator in respect of these shares. The liquidator had no reason for not placing them on, but they were left off through an oversight.

The proceedings against the contributories by the liquidator continued against all the shareholders whom the liquidator claimed to hold liable; but Massey and Lee were not proceeded against in respect of these shares; and, as the admissions shew, it was not until after the litigation against the general list of contributories was disposed of, and until the call had been made, that the liquidator commenced this application in or about the month of November, 1910, to place Messrs. Massey and Lee on the list.

It appears from the admissions and evidence that A. E. Webb & Co., who, as between Massey and Lee and themselves, were liable to Massey and Lee for 270 of the shares in question, were, up to the time of the date of this application, solvent and financially able to pay the liability on the shares in question; but that, on or about the 29th November, 1910, while this application was pending, A. E. Webb, who traded as A. E. Webb & Co., realised on his assets in Ontario, and went to Los Angeles, California.

The contention of counsel for Massey and Lee is, that the liquidator elected to look to the persons primarily liable to Massey and Lee; and that, as a result of the proceedings against those primarily liable, and the omission to proceed against Massey and Lee along with the other shareholders on the general list of contributories, the liquidator has released Massey and Lee from all liability, and is now estopped from proceeding against them.

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He also contended that, if the liquidator had proceeded originally against Massey and Lee along with the general list of shareholders, they could have recovered against A. E. Webb & Co., who were at that time solvent; and that, as a result of the action of the liquidator in delaying proceedings against them until after the general list was settled, and after A. E. Webb had absconded from the Province, their position was altered.

There is no doubt whatever that Massey and Lee should have been placed on the first list of contributories brought in pursuant to sec. 130 of the Bank Act, R.S.C. 1906, ch. 29. They were shareholders of the bank within sixty days before the commencement of the suspension, and as such were liable as in that section provided.

There is no such thing as a settled list of contributories. It is the duty of the liquidator and of the Court to see that all those shareholders who are liable under sec. 130 of the Bank Act are placed on the list; and, if omissions are made, they should be remedied. There can be no such thing as an election by the liquidator of the shareholders whom he is going to hold responsible. It is his duty to place on the list all persons liable under sec. 130 of the Bank Act. No question of estoppel or election can arise as against the liquidator under that section, as all shareholders within that section are liable.

The transfer by Massey and Lee to the persons primarily liable to them after the date of the suspension of the bank does not release them. It amounts to nothing more than shewing the position of the shares as between Massey and Lee and their transferees.

I refer to *Re Central Bank, J. D. Henderson's Case* (1889), 17 O.R. 110, judgment of Mr. Justice Robertson, at p. 120: "Questions may arise between the transferor and transferee as to the validity of the contract, and it might be prejudicial to the transferee if he allowed the finding of the Master to go unimpeached, as to which, however, I pass no opinion; but it is clearly in the interests of the creditors of the bank that all persons liable as shareholders should be on the list of contributories, and although the liquidators have acquiesced in the report of the Master, it must be borne in mind that they are the officers of the Court, and when the matter is brought to the notice of the Court, as it has been by this appeal, I think it the duty of the Court to protect the interest of the creditors and all parties concerned, and to see that all are charged who are legally chargeable, and being of opinion that all persons who were stockholders within the month next before suspension, no matter for how long a time, are either primarily or secondarily liable, their names should be placed on the list of contributories."

Also *In re Central Bank of Canada, Baines's Case* (1888), 16 O.R. 293, judgment of the Chancellor at pp. 304 and 305: "'Per-

sons who having been shareholders in the bank have only transferred their shares or registered the transfer thereof within one month before the commencement of the suspension of payment by the bank shall be liable to all calls on such shares as if they had not transferred them, saving their recourse against those to whom they were transferred.' This, however, is to be read with sec. 70, which shews that the last shareholder, or the one who appears in the record of shares to be a holder *in præsenti* at the time of failure is liable. Section 77 is cumulative so as to make also liable those who have been holders during the month preceding the suspension. These should all be on the list of contributories, leaving them to discuss among themselves their respective liabilities: *Humby's Case* (1872), 26 L.T.N.S. 936. Section 45 of the Winding-up Act may also be read in this connection. Even if the statute had the effect contended for as to primary liability (with which opinion I do not agree), it would be still proper to put the name of this appellant on the list of contributories."

The liquidator is an officer of the Court, and has no power in winding-up proceedings to release any one (except under the authority of the Court) without the approval and sanction of the Court. Massey and Lee knew the facts in regard to their own position, and they were bound to know the law. They were always liable under sec. 130 of the Bank Act; and the mere fact that the liquidator omitted to place them on the list originally, and that in the meantime they did not pursue their remedies, thinking they were not going to be proceeded against, does not operate so as to release them.

A reference was also made by counsel for Massey and Lee to sec. 21 of the Dominion Winding-up Act, R.S.C. 1906, ch. 144, as affecting the question; and *In re National Bank of Wales, Taylor, Phillips, and Rickards' Cases*, [1907] 1 Ch. 298, was referred to. In that case the question arose under the provision of sec. 131 of the English Companies Act, 1862. The head-note of the case reads as follows: "The power of a voluntary liquidator under sec. 131 of the Companies Act, 1862, to sanction a transfer of shares made after the commencement of the winding-up, involves the power to alter the register of members; and the transferor is thereupon released from the liability which he was under at the commencement of the winding-up to contribute as a present member, and the transferee alone is the person to be placed on the A list of contributories. Where successive transfers are sanctioned by the liquidator under sec. 131, the ultimate transferee only is liable to contribute as a present member, the transferor and prior transferees being liable as past members."

Section 131 of the English Companies Act, 1862, provides that whenever a company is wound up voluntarily the company shall, from the date of commencement of such winding-up, cease

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to carry on its business, except in so far as may be required for the beneficial winding-up thereof, and all transfers of shares, except transfers made to or with the sanction of the liquidators, or alteration in the status of the members of the company taking place after the commencement of such winding-up, shall be void. . . ."

The section is somewhat on the lines of sec. 21 of the Dominion Winding-up Act.

Section 21 of the Dominion Winding-up Act, however, is not at all applicable here. The Ontario Bank suspended payment on the 13th October, 1906. The petition for winding-up under the Dominion Winding-up Act was served on the 16th October, 1906, and the order appointing the liquidator was made on the 29th September, 1908.

While the transfers of the shares in question were made with the sanction of the curator, they were not made with the sanction of the liquidator or under the authority of the Court. Even if they were, the transfers could have no greater effect than to make the transferees the owners of the shares in question, but could not release the liability created under sec. 130 of the Bank Act against all persons who held the shares within sixty days before the commencement of suspension of payment by the bank; so that, in no view of the matter, can the transfers of the shares by Massey and Lee, even with the consent of the curator, after the suspension of the bank, affect the liability of Massey and Lee under sec. 130 of the Bank Act.

For these reasons, I find that Massey and Lee must be settled on the list of contributories for the 338 shares in question, with costs of this application.

The order of the Referee was affirmed by BOYD, C.; and Massey and Lee appealed.

Argument

M. K. Cowan, K.C., for the appellants. The liquidator elected to look to the persons primarily liable to Massey and Lee, and as a result of the proceedings against those primarily liable, and the omission to proceed against Massey and Lee along with the other shareholders on the general list of contributories, the liquidator has released Massey and Lee from all liability, and is now estopped from proceeding against them. If the liquidator had proceeded originally against Massey and Lee along with the general list of shareholders, they could have recovered against A. E. Webb & Co., who were at that time solvent; and because of the action of the liquidator in delaying proceedings against them until after the general list was settled, and after A. E. Webb had absconded, their position was altered. The liquidator sanctioned the transfers. "Sanctioned" means not only authorised, but ratified. The liquidator was appointed by the Court,

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and all the powers which the Court had authority to give to the liquidator were given by the order of the Court. Under such order, the liquidator had the authority of the Court to do all acts authorised by the Winding-up Act. When such authority of the liquidator is not limited, sec. 21 of the Winding-up Act gives the liquidator power to sanction transfers of shares and to alter the status of members after the commencement of winding-up proceedings. If the interpretation of sec. 21 requires the active authorisation by the Court to the sanction of the liquidator, the Official Referee gave such authority when the list of contributories was placed before him as drawn and sanctioned by the liquidator. Under the Winding-up Act, contributories become liable only when calls are made upon them; the transfer of the shares in question was made after the commencement of winding-up proceedings, and by such transfer all liabilities of the transferors were transferred to the transferees, and the liquidator so elected to rely upon Lehman and Webb & Co. respectively solely for any calls to be made. I refer to the following authorities: *In re National Bank of Wales, Taylor, Phillips, and Rickards' Cases*, [1907] 1 Ch. 298; *Aikins* v. *Dominion Live Stock Association of Canada* (1896), 17 P.R. 303, at p. 309; *In re National Bank of Wales, Massey and Giffin's Case*, [1907] 1 Ch. 582; *In re Joint Stock Discount Co., Fyfe's Case* (1869), L.R. 4 Ch. 768.

James Bicknell, K.C., and *G. B. Strathy*, for the liquidator. At the date of the suspension of the Ontario Bank, the appellants were shareholders, and their liability to contribute to the assets was thereupon fixed. They were shareholders at the date of the commencement of the winding-up, and as such are liable as contributories, and they have not been released from their liability. Their liability has not been barred by any statute of limitations, and so delay does not matter. All the facts constituting the liability of the appellants as contributories were known to them; and any failure upon their part to protect themselves against the legal consequences cannot be visited upon the respondent. In the absence of an order made by the Court releasing the appellants from liability, they cannot escape. They are not entitled to set up an estoppel against the Court. The effect of the transfers to Lehman and Webb & Co. was to enable the appellants to obtain a summary remedy in the liquidation against such transferees, but such transfers could not and did not relieve the appellants from their own liability. The liquidator never elected and had no power to rely upon Lehman and Webb & Co. as the only parties liable as contributories in respect to the shares in question. I refer to *Boultbee* v. *Gzowski* (1897 8), 24 A.R. 502, 29 S.C.R. 54.

Cowan, in reply.

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September 30. GARROW, J.A.:—Appeal by John Massey and W. C. Lee from an order of the Chancellor dismissing an appeal from the order of an Official Referee placing the appellants upon the list of contributories in winding-up proceedings.

No written judgment was delivered by the learned Chancellor; but the facts are very fully stated and discussed in the judgment of the learned Referee: with whose conclusions I also agree.

The shares in question having been fully paid-up, the liability now sought to be imposed upon the appellants arises under the provisions of sec. 125 of the Bank Act, making shareholders liable upon a deficiency in the property and assets of the bank to pay its debts and liabilities, to an amount equal to the par value of the paid-up shares held by them.

It is admitted that the appellants were the holders of the shares in question on the 13th October, 1906, when the winding-up proceedings began. The subsequent transfers by the appellants were made after the winding-up proceedings began, and, therefore, clearly fall within the prohibition contained in sec. 21 of the Winding-up Act. This difficulty in the appellants' way is, in my opinion, quite insuperable. That section provides that all transfers after the commencement of the winding-up proceedings—except transfers made to or with the sanction of the liquidator, under the authority of the Court—shall be void. It is not claimed, and it could not be, that the mere entry in the transfer books of the bank of such transfers was effective to relieve the appellants. That was done while the curator was in charge, long before the winding-up order was made—which, for some reason, was not actually made until the 29th September, 1908, or nearly two years after the proceedings began.

What is claimed, as I understand counsel for the appellants, is, that the effect of the subsequent action of the liquidator in preparing and having settled the first list of contributories, in which the names of the transferees were inserted and the names of the appellants omitted in respect of these shares, was to bring the case within the exception to be found in sec. 21, as that of transfers made with the authority of the Court, or at all events it amounted to an election to accept the transferees in the place and stead of the appellants; which in itself, or as coupled with the alleged laches of the liquidator in making the present claim, amounted to an estoppel.

In his judgment the learned Referee says: "Massey and Lee were not placed on the original list of contributories by the liquidator in respect of these shares. The liquidator had no reason for not placing them on, but they were left off through an oversight." How the oversight occurred is not explained; but it is not improbable that the long interval between the initiation of the winding-up proceedings and the winding-up order had

something to do with it. When the books of the bank passed into the hands of the liquidator, the shares in question apparently stood in the names of the transferees of the 24th and 26th October, 1906, and it was not observed that these dates were subsequent to the 13th October, 1906, when the winding-up proceedings began. But, however, the mistake occurred, that it was anything more than a mistake or oversight on the part of the liquidator is entirely unsupported by the evidence. There is not from beginning to end a particle of evidence that what was done was the result of intention or design on the part of the liquidator or the learned Referee. The liquidator alone was powerless to accept the transfers or to release the appellants without payment. And, in the total absence of facts or circumstances indicating intention or even consideration of the matter by the learned Referee, to ascribe to his act in approving of the first list the wide effect contended for, seems quite out of the question.

Nor, in my opinion, is there in the alleged estoppel sought to be set up any answer to the liquidator's claim to add the appellants. He asserts and relies upon a legal cause of action arising under the provisions of the statute. To such a claim mere delay in asserting it is no defence. But, in addition, there is no reasonable evidence that what delay there was was prejudicial to the appellants. Their transferees, to whom they look for indemnity, were upon the list, were proceeded against, and judgments against them obtained, apparently in due course. And there is a total absence of anything but suggestion that the appellants could have done more to compel payment if they had themselves been originally upon the list.

And, finally, there is, in my opinion, grave doubt if estoppel could be successfully pleaded to such a claim, under any circumstances. The proceeding is a compulsory winding-up under the direction and control of the Court. The liquidator was appointed by the Court, is an officer for the time being of the Court, and except in minor matters acts entirely under its direction. See *In re Contract Corporation, Gooch's Case* (1872), L.R. 7 Ch. 207. So limited are his powers that it has been said that he cannot even make a formal admission (sometimes said to be the foundation of an estoppel *in pais*) which will bind the creditors and contributories. See *Re Empire Corporation (Limited)* (1869), 17 W.R. 431. Under sec. 36 of the Winding-up Act, he may, with the approval of the Court, compromise calls, etc., "upon the receipt of such sums . . . as are agreed upon;" but, without the consent of the Court, he could not lawfully accept less than payment in full.

It would certainly be an odd result to hold that he could by mere laches accomplish that which he could not with deliberation and intention do.

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I do not overlook what was said by Parker, J., in *In re National Bank of Wales, Taylor, Phillips, and Rickards' Cases*, [1907] 1 Ch. 298, cited among other cases by the learned counsel for the appellants. That, however, was a very different case. It was, to begin with, a voluntary winding-up, and the liquidator's powers were larger than in a compulsory winding-up. Then the liquidator was there asserting a claim based upon an equity, and was met by the equitable answer of his laches; which was held by the learned Judge to be a good answer. Upon the decision itself I express no opinion. It is enough to say that, in my view, it has no application to the circumstances of this case.

See for a different view as to the effect of the lapse of time in the case of a compulsory liquidation, *Re East India Cotton Agency (Limited), Sand's Case* (1875), 32 L.T.R. 299, 301.

I would dismiss the appeal with costs.

Meredith, J.A.

MEREDITH, J.A.:—When it is admitted, as it was upon the argument of this appeal, that, at the time when the winding-up order was made, the appellants, as well as their transferees, were severally liable for the payment of the calls in question in this matter, this appeal, as it seems to me, becomes hopeless.

In what manner have the appellants become discharged from that liability?

By an election, it is said, to seek payment from their transferees. But the case never was one calling for any election: it is a case of liability of each, not of only one or the other.

Then, it is said, by delay. But the debt is a legal, statute-imposed, one, which it was the duty of the debtors to pay; so how can delay, short of bringing the case within some statute of limitations, relieve the appellants from that which they delayed, as well as those who ought to have enforced payment sooner, delayed?

I am unable to see any way of escape, even under the law favouring sureties, from the extraordinary liability in question, which the statute-law of the land has imposed upon the appellants, as well as their transferees, leaving the appellants to seek relief from such transferees.

But I am unable to agree in the finding, if such it be, of the Referee, that the delay in enforcing payment from the appellants was the result of mere oversight; I have no doubt that the liquidator's faith in the ability of the transferees to pay, until it was shocked by the absconding of one of them, was the real cause of it.

None of the cases relied upon by the appellants are at all applicable to this case; in which there was no breach of any duty owed to the appellants: and in which there is, as it seems to me,

really little, if anything, more to complain of—from the legal point of view— on the appellants' part, than that they were not compelled to pay the debt—which they ought to have paid without compulsion—sooner.

I would dismiss the appeal.

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

Appeal dismissed with costs.

NAVARRO v. RADFORD-WRIGHT CO.

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Dec. 6.

Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue, Cameron and Haggart, JJ.A. December 6, 1912.

1. JURY (§ I B 1—10)—TRIAL BY—PERSONAL INJURY ACTION.

Where a plaintiff satisfies the Court by his material on a motion for a trial by jury that the personal injuries he suffered by being hit by something falling from defendant's building were of a serious character, an order for trial with a jury should be made under the Manitoba King's Bench Act, R.S.M. 1902, sec. 59, without requiring an affidavit also from the plaintiff's physician and thereby submitting the physician to cross-examination thereon before the trial.

2. JURY (§ I B 1—10)—TRIAL BY—DISCRETION OF JUDGE—MATERIAL FOR MOTION.

It is discretionary, and not a matter of right, to order a trial by jury in cases of a class not specially designated for jury trial under the Manitoba King's Bench Act, R.S.M. 1902, sec. 59, where that statute provides that cases not so designated shall be tried by a Judge without a jury "unless otherwise ordered by a Judge."

Statement

AN application was made in this matter before the referee for an order to have the cause tried by jury. The referee refused the motion and, on appeal, Metcalfe, J., also refused to grant the order. Plaintiff appealed and the appeal was allowed.

E. A. Cohen, for the plaintiff.

L. J. Elliott, for the defendants.

The judgment of the Court was delivered by

Howell, C.J.M.

HOWELL, C.J.M.:—An application was made in this matter before the referee for an order to have the cause tried by a jury. The referee refused the motion, and by appeal, it was brought before Mr. Justice Metcalfe, who also refused to grant the order. The learned Judge did not give a written judgment, but there being some difference between counsel as to the reason why the Judge refused the order, I consulted him with reference to it. The learned Judge informed me that he thought it was a case which might well be tried by a jury if the plaintiff had satisfied him that the injury which he sustained was of a serious character. It appears that the plaintiff was injured by some-

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thing falling from the defendants' building, whereby his head was injured. The material in favour of the motion consists of an affidavit of the plaintiff upon which he had been fully cross-examined, and an affidavit of the plaintiff's solicitor. In his affidavit the plaintiff stated that the injury to him consisted of a wound in the head by which the skull was fractured; that he was knocked insensible and remained unconscious until he found himself in the hospital; that he remained in the hospital for some 20 days and that a semi-paralysis was affecting his arm and leg. He was cross-examined fully upon this affidavit, and although he was a foreigner and had to speak through an interpreter, he made out a case of considerable and, to my mind, serious injury.

The solicitor's affidavit was simply a statement of what the doctor who attended the plaintiff told about the case. The Judge suggested to the solicitor on the argument that he get an affidavit from the doctor, but as the plaintiff's solicitor did not wish to submit that doctor to a cross-examination on the affidavit, he did not do so.

With great deference to the learned Judge, I think a fair and reasonable case of serious injury was made out by the affidavit and by the examination. His confinement in the hospital was a matter which the defendants could have verified very easily. I agree with the learned Judge that this is a case which might well be brought before a jury. This is not a case of reversing the order of a Judge where he has exercised a discretion in a matter of this kind for apparently he thought it a case where it would be expedient to have trial by jury. The only reason for his refusing the order was that he was not satisfied that the plaintiff had set forth such facts that if he succeeded the damages would be substantial. I think the learned Judge should have been satisfied with the material before him in this case.

I would not wish to hold that in all cases the affidavit of the plaintiff and his solicitor are quite sufficient to obtain an order in matters of this kind. It may well be that a Judge should require further material in many cases, but I think in this case the plaintiff's affidavits are sufficient on the question of the substantiality of the injury.

I think the orders of the learned Judge and of the referee should be set aside and an order should issue for the trial of this cause by a jury. This appeal is allowed with costs to be costs in the cause to the plaintiff in any event of the cause. The costs of the motions before the referee and the Judge to be costs in the cause.

Appeal allowed.

Re WISHART.

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Dec. 24.

Ontario High Court, Middleton, J. December 24, 1912.

1. WILLS (§ III H—170)—VESTED LEGACY WITH PAYMENT IN FUTURO—WHEN VESTING NOT TO BE DEFERRED.

Where a will contains a provision to pay the gifts *in futuro*, such provision will merely postpone the possession and will not defer the vesting of the gift, if the payment is postponed merely for the convenience of the fund.

Statement

PETITION by executors for advice under Con. Rule 938.

R. L. McKinnon, for executors, and appointed to represent those opposed in interest to the infants.

F. W. Harcourt, K.C., for the infants.

Middleton, J.

MIDDLETON, J.:—At the time of the death of the testatrix in March, 1904, she owned a certain parcel of land charged with an annuity in favour of her brother John. She directed her executors to sell this land as soon after her death as convenient, should she survive John: if she predeceased her said brother, then as soon after his death as convenient. The executors were out of the proceeds of the sale to pay certain legacies, inter alia, $200 to Dick Lister, $100 to William Bowley.

The brother died on the 7th December, 1911. Lister survived the testatrix, and died on the 31st May, 1904. Bowley also survived her, and died on the 1st September, 1909. The question is, do these legacies lapse?

Jarman, 6th ed., 1904, thus states the law: "But even though there be no other gift than in the direction to pay or distribute in futuro, yet if such payment or distribution appear to be postponed for the convenience of the fund or property, vesting will not be deferred until the period in question."

This rule has on numerous occasions received judicial sanction. It is, however, contended that the case is governed by *Bolton* v. *Bailey*, 26 Grant 361. The will, though similar to the will in question here, is different: as there the wording is "After the sale of my said real estate I give" etc.

I do not think that the learned Vice-Chancellor intended to lay down any new exception to the well-established rules relating to the vesting of legacies. I think that, properly looked at, the case depended upon the particular words used, and that in his view there was no gift until after the sale had taken place.

Here the postponement of payment was clearly for the convenience of the fund: and, to quote again from Jarman (p. 1405) the words used "do not postpone the vesting of the gift to the posterior legatee until the death of 'A,' but merely shew that that is the period at which it will take effect in possession." This statement is based on *Benyon* v. *Maddison*, 2 Bro. C.C. 75—a decision of Lord Kenyon's—where the testator gave all

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the income to his mother for life, and after her decease "I then give to 'A' " etc. The Master of the Rolls there thought that to multiply decisions of the kind suggested "seems reproachful to the law."

The amount of the legacies may be paid into Court, and the executors may be discharged. As the amounts are so small, upon an affidavit being filed that the legatees left no creditors the money may be distributed among those now beneficially entitled.

Costs will be out of the estate.

Order accordingly.

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Dec. 18.

BRAND v. ROSS BROTHERS.

Alberta Supreme Court, Scott, Stuart, Simmons, and Walsh, JJ. December 18, 1912.

1. MASTER AND SERVANT (§ III B 8—180)—NEGLIGENCE—FELLOW SERVANT'S NEGLIGENCE.

It is actionable negligence when defendant's servants placed a plank in a weak and insecure position for the workmen to walk up so that it tilted while the plaintiff was turning over a box of bolts end over end upon it in loading a dray, alongside his employer's warehouse, with the result that the plaintiff, who did not know that it was insecure, fell and was injured, particularly where by statute the employer is held liable for the negligence of a fellow workman of the injured party (N.W. Ord. (Alta.) 1911, ch. 98).

Statement

APPEAL by the defendants from the judgment of Harvey, C.J., at trial in an action for damages for personal injuries.

The appeal was dismissed, Simmons, J., dissenting.

O. M. Biggar, for the appellant.

Geo. O'Connor, for the respondent.

Scott, J.

SCOTT, J.:—I concur with judgment of Walsh, J.

Stuart, J.

STUART, J.:—I think this appeal should be dismissed. It is clear to me upon a perusal of the evidence that the real cause of the accident was this, that the plank which had been placed by one of the defendant's servants for the workmen to walk up was not placed firmly and securely in position, and that as a consequence it tilted while the plaintiff was turning the box of bolts end over end upon it with the result that the plaintiff fell and was injured. In my opinion it was negligence not to place a plank which was to be used for such a purpose in a firm and secure position. If the plaintiff had already gone over the plank several times while it was in this insecure position there might then be some ground for the argument that he had knowingly taken the risk. But there is no evidence to shew that the plaintiff had any knowledge of the insecure condition of the plank and he was, I think, entitled to assume that it would not move or tilt under his feet.

I rest nothing upon the position of the adjoining plank which was only half way across from the platform to the dray because it is not clear to me that the plaintiff was misled by its position or that he did not know that it was only half way across. In any case I do not think the position of that second plank was the real cause of the accident. Clearly the plaintiff was not attempting at first to use it and we cannot be certain that the accident either would or would not have happened if it had been all the way across. The real cause of the accident was the condition of the first plank. It is true that other witnesses say that the plaintiff swayed with the box, but it is manifest that they were not in anything like as good a position to perceive what it was that caused the fall as was the plaintiff himself. He says it was because the plank tilted, and I think we are bound to accept that, in the circumstances, as the real cause of the accident.

Simmons, J. (dissenting).

SIMMONS, J. (dissenting):—The plaintiff was employed in defendant's wholesale warehouse in the work of loading hardware on to a dray. While engaged in this way the plaintiff was injured by a box falling on him. Under instructions of the defendant's foreman the dray had been partly loaded with iron pipe at one entrance to defendants' warehouse and was then brought to another entrance in order that other hardware merchandise might be loaded. On account of the condition of the lane at this second entrance, coupled with the fact that the iron pipe on the dray extended over and beyond the rear end of the dray the driver of the dray was unable to bring his dray up close to this second entrance, and as a consequence a temporary gangway was improvised under the instructions of defendants' foreman by using two planks each about 10 inches wide to bridge the intervening gap of about four feet between the dray and the entrance to the store. There is no direct evidence as to how close the planks were placed to each other but one witness speaks of them as making together a gangway about 20 inches wide. (Witness Alfred J. Moir, page 52 case); and it seems a reasonable conclusion that they were close enough to be considered as together forming a gangway. The platform of the dray and the door-sill of the entrance to the store were on about the same level when loading began. When loading was nearing completion one plank was withdrawn from the dray some distance and rested on one end only on the floor of the store. The other plank was elevated at the end resting on the dray and this end was placed on a box about twelve to fourteen inches higher than the platform of the dray. This was done apparently while the plaintiff was in the warehouse with another workman, Moir, getting a box of goods to load on the dray. Moir assisted the plaintiff to bring this box to the door

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and on to the inclined plank and then the plaintiff proceeded to trundle the box up the inclined plank to the dray. While doing so the plaintiff fell off the plank and the box fell on him causing serious bodily injuries. When the plaintiff found he was falling or about to fall he tried to save himself by stepping on the other plank but as the outward end of this plank was no longer resting on the dray it went down under the plaintiff's weight. There is no evidence that the plaintiff was relying on this second plank as supplying an element of safety when he proceeded to trundle the box up the inclined plank, and I think it is a reasonable inference that up to the time that he lost his balance he would have done just what he did do if the second plank had not been there at all.

The action was tried by the learned Chief Justice without a jury and he found

> that when there was only one plank left on a slope such as there was in this case, particularly the other plank having been drawn away without the knowledge of the plaintiff, the provisions were not such as ought reasonably to have been made.

There is no conflict of evidence in the case and we may therefore draw inferences therefrom as to the facts to the same extent as the trial Judge. There does not appear to me to be any doubt as to the law applicable to such a case.

The acceptance in *Smith* v. *Baker* [1891] A.C. 325, 60 L.J. Q.B. 683, of the proposition that

> A master is responsible in point of law not only for a defect on his part in providing good and sufficient apparatus, but also for his failure to see that the apparatus is properly used,

has settled the law in that regard. Before this proposition can be applied against the defendants it is necessary to find that they did not provide proper appliances and see that they were properly used with the result that the injury to the plaintiff was caused by such failure. With great respect to the finding of fact of the learned Chief Justice in this regard I am not able to come to the conclusion that there was such a failure or neglect on the part of the defendants. The loading of merchandise of the kind in question on a dray, using a plank about ten inches wide over an intervening gap of about four feet wide and about the same distance from the ground does not seem to me to involve any inherent danger different from that involved in the ordinary conduct of such a class of work. The plaintiff says (case, p. 23),

> as I was trundling the box of bolts over this plank, the plank tilted and let me over and I went over and the box of bolts came on top of me.

It is quite true that if the other plank had not been withdrawn the plaintiff might have saved himself, just as it is quite

true that if a solid platform had been constructed in the whole intervening space between the dray and the warehouse the plaintiff would probably have saved himself from falling. The plaintiff says, "It (the plank) was placed on the box on the dray and it could not have been level or firm otherwise it would not have swayed." It is quite clear that plaintiff is in this drawing conclusions and is not relating what did actually take place.

Moir, a witness for the plaintiff, on cross-examination (case, p. 56), says that the plaintiff was up-ending the box and as he got it up to turn it over he lost his balance a little and pulled it over on top of him; and on re-examination by plaintiff's counsel, this witness said "just the box seemed too heavy and overbalanced him."

It appeared that the box weighed about 120 lbs., also that the plaintiff was small of stature and not physically strong (see case, p. 14) and the only conclusion I can come to is that the plaintiff was attempting to do work which he was not physically competent to do, and this or his own negligence, or both, caused the accident. I am unable to conclude that a man of ordinary physical ability and accustomed to that class of work would have allowed the box to fall upon him under the circumstances, unless through his own contributory negligence or inefficiency. While the duty of an employer is to furnish reasonably safe appliances for his workman, yet it would be going far beyond the rule above laid down to require an employer to guarantee absolute immunity from danger to the servant.

> The obligation of the master to provide reasonably safe places and structures for his servants to work upon does not oblige him, as towards them, to keep the work, which they are actually engaged in constructing, in a safe condition through all its stages and at every moment of their work: 1 Beven on Negligence, 3rd ed., 613.

I would, therefore, allow the appeal with costs.

The plaintiff has claimed relief under the Workmen's Compensation Act, if his action herein should not be sustained, and his claim under that Act will, therefore, be referred back to the Chief Justice who tried the action.

WALSH, J.:—I would sustain the judgment of the learned Chief Justice, although not upon the precise ground upon which he put it. A careful reading of the evidence satisfies me that the accident with which the plaintiff met was due to the tilting of the plank up which he was trundling the box and this tilting must have resulted from the negligence in the placing of the plank one end of which rested upon the top of a box on the dray and the other end of which rested on the platform of the warehouse. Walsh, J.

The plaintiff's own version of the affair gives this most unreservedly as the origin of the trouble. He says, "as I was

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trundling the box of bolts over this plank, the plank tilted and let me over," a statement which he repeats two or three times practically without variation. It is true that his witness Moir says that the plaintiff "seemed to over-balance himself" and that he did not see the plank tilt, but he immediately qualified this by saying that it was possible that the plank could have tilted without being seen by him. Miller, another witness for the plaintiff, says that the plank was not wide enough "and whether it shifted on the wagon or not I couldn't say." Dawson, a witness for and employee of the defendant under whose directions the dray was being loaded, says,

> the box gave a side balance and Brand to save himself had to put out one leg, dropped one leg on the other plank when he fell and that is how the accident was caused.

And this is all the evidence that there is on the subject. I can see no inconsistency between the story of the plaintiff and those the other witnesses tell. He certainly of all of them was in the best position to know exactly what happened for the others were concerned about their own parts of the work in hand and it would, I think, be so that their attention would be fixed on the man when he first gave signs of falling rather than on the plank.

This work was supervised for the defendant by its proper employee. The shifting of the plank to the part of the dray where it was when the accident happened was done under his instructions at the request of the driver of the dray but the placing of one end of the plank on the box was done by the driver according to Mr. Dawson's evidence. It was, however, the duty of the defendant to see that this was not negligently done and the fact that it was the hand of the driver (who was an employee of the Cartage Company that owned the dray and not of the defendant) that placed it on the box cannot relieve the defendant from responsibility if that work was negligently done.

I would have great difficulty in holding the defendant liable if this plank had rested so securely upon its supports that it could not have tipped as I find that it did. But being satisfied as I have already said that the defendants' negligence in the respect mentioned caused the plaintiff's injury I would dismiss the appeal with costs.

Appeal dismissed, SIMMONS, J., *dissenting.*

REINHARDT BREWERY, Limited v. NIPISSING COCA COLA BOTTLING WORKS.

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Ontario Court of Appeal, Garrow, Maclaren, Meredith, and Magee, JJ.A., and Middleton, J. November 19, 1912.

Nov. 19.

1. FRAUDULENT CONVEYANCE (§ VI—30)—FORMAL TRANSFER TAKEN IN NAME OF ANOTHER THAN THE DEBTOR AS GRANTOR.

Where a newly incorporated company claimed title to goods which up to its incorporation were in the possession or control of one of its shareholders as their apparent owner, but a formal transfer to the company was made by a bill of sale from a brother of the person so in possession to the company, and the company set up title solely under such bill of sale as against a levy made on the goods at the instance of an execution creditor of such apparent owner, the Court will, in interpleader proceedings, on being satisfied that the transfer made by the bill of sale in the name of the brother to the company in exchange for shares was a part of a fraudulent attempt between the brothers and the company to put the goods out of the reach of creditors of the execution debtor, declare such goods to be still the property of the debtor and exigible under the execution.

Statement

APPEAL by the defendants from the judgment of a Divisional Court reversing in part the judgment at the trial of Riddell, J., in an interpleader issue between the parties.

The plaintiffs were execution creditors of one Abraham David, and under their execution had seized the goods in question while in the possession of the defendants.

The appeal was dismissed, MEREDITH, J.A., dissenting.

C. H. Porter, and *G. F. McFarland*, for the defendants.

W. R. Smyth, K.C., for the plaintiffs.

Garrow, J.A.

GARROW, J. A. (after stating the facts):—In giving judgment, Riddell, J., said among other things:—

> Remembering that the onus is upon the plaintiffs to prove that the property is not the property of the defendants, I do not think there is sufficient before me to entitle me to find that the onus has been met . . . The case is full of suspicion, etc.

The learned Judge declined to place reliance upon the evidence of the Davids, of which family three members were called. The other witnesses upon both sides were evidently regarded as equally credible; at least nothing to the contrary is said.

No notes of the judgment delivered in the Divisional Court appear in the printed appeal book, but it is apparent from the formal judgment that the Court regarded the situation of the goods purchased from Zahalan as different from the other goods seized since it is only as to the latter that the appeal was allowed. As to the latter the Court must have been satisfied that the plaintiffs had satisfied any onus originally resting upon them.

The case is certainly, as was said by Riddell, J., one of great suspicion. Discarding the evidence of the family of David, as I think must be done, there is the evidence of several witnesses,

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Mr. Heaney, Mr. Bradley, Mr. Comfort, especially the latter, all tending towards the same conclusion, that not long before the organisation of the joint stock company, the execution debtor was in possession of the goods now in question, apparently as owner, that he was holding himself out as the proprietor of the business and the owner of the goods, and that upon their removal, he placed them in charge of the witness Comfort as his agent, that Comfort afterwards left because of interference by Albert David, and that the latter whom Comfort left in charge afterwards disclaimed the business, saying it belonged to his brother Abraham, and subsequently on an execution in the Division Court against the latter coming in, abandoned his former disclaimer, and claimed the business as his own.

The bill of sale under which the claimants alone pretend to make title is only from Rashada and Albert; Abraham is no party to it. And it follows that if the goods really belonged to Abraham, and not to Rashada his wife, or Albert his brother, the claimants never had any title to them.

Under all the circumstances I am wholly unconvinced that the Divisional Court erred in the conclusion arrived at. The case looks to me very much like an attempt by the three Davids to put the goods in such a position that the creditors of Abraham could not reach them. The judgment now appealed against thwarts that intention, and we are not, I think, called upon under the circumstances to be astute to find reasons for reversing it.

I would dismiss the appeal with costs.

Maclaren, J.A.
Magee, J.A.
Middleton, J.

MACLAREN, J.A., MAGEE, J.A., and MIDDLETON, J., concurred.

Meredith, J.A. (dissenting).

MEREDITH, J.A. (dissenting):—The judgment pronounced at the trial was, in my opinion, quite right; and the reversal of it a mistake caused mainly by overlooking two of the most material facts of the case, facts which are incontrovertible; I mean the fact that the defendants are a legal entity entirely separate and distinct from any of the Davids; and the fact that the defendants had the property in and the possession of the goods in question at the time of the seizure. The defendants are a duly incorporated company; Abraham David is, as far as the evidence shews, no more than a mere shareholder in the company.

That the goods were in the possession of the defendants at the time of the seizure was admitted by the plaintiffs at the trial; the statement of their counsel was: "They were seized in the premises of the company at Cochrane"; and the form of the issue, putting the onus of proof upon the plaintiffs, shews it. That possession was evidence of ownership; but, in addition to that, all of the Davids are by their acts and their evidence precluded from asserting any other ownership; and it is not sug-

gested that any one else could be the owner of them; and if anyone else were, the plaintiffs must likewise fail upon this issue.

Then the defendants being the owners as against Abraham David, how can the plaintiffs succeed in this issue? In one way only, by proving that the goods were the property of Abraham David, and that they were acquired by the company with intent, on their part, to defeat his creditors; I say on their part, because the acquisition was not a voluntary one; the company's stock was given in consideration for the property it acquired.

Neither of these things—each of which is necessary to the plaintiffs' success—is proved. One may be suspicious as to Abraham David's ownership before the company acquired the goods; but suspicion is not proof, and the onus of proof was on the plaintiffs, an onus which was very far from being fairly and reasonably met by a lot of loose, rambling, and wholly inconclusive evidence. And as to any fraudulent intent on the part of the company, there is really no evidence. Beside Abraham David there were at least four shareholders, one of them being the solicitor, Mr. Porter; and there is no evidence of Abraham David being any more than a mere shareholder.

I can find no warrant in the evidence for the assertion that the defendants make no pretence of title except through Albert and Rashada David; they were not called upon to make proof of title; that obligation was on the plaintiffs; the defendants' possession alone was proof of their title at the time of seizure, and could not be disturbed by the plaintiffs except on satisfactory proof that, at the time, Abraham David was really the owner.

Nor can I at all agree to the succeeding assertion that if the goods really belonged to Abraham, and not to Rashada or Albert, the defendants could not have acquired title to them; for surely even acquiescence only by Abraham in a transfer by the others to defendants would carry any right he might have in the goods to the defendants by way of estoppel; and as I have said, all the Davids are, upon the facts of the case and the evidence in it, precluded from ever asserting any title to the goods against the defendants.

I, therefore, quite agree with the trial Judge in his finding that there was not sufficient evidence to satisfy the onus of proof that the goods in question were not Albert's, but were Abraham's; and, in addition to that, there can, I think, be no reasonable finding that, even if the goods had been Abraham's, the title and possession of them had not passed from him to the company before the seizure was made.

I would allow the appeal, and restore the judgment at the trial, which ought not in any case to have been lightly disturbed.

Appeal dismissed, MEREDITH, J.A., *dissenting.*

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KRZUS v. CROW'S NEST PASS COAL COMPANY.

Judicial Committee of the Privy Council, Lord Macnaghten, Lord Atkinson and Lord Shaw of Dunfermline. June 18, 1912.

1. DEATH (§ II B—11)—NON-RESIDENT ALIEN—DEATH RESULTING FROM INJURIES ARISING OUT OF COURSE OF EMPLOYMENT—B.C. WORKMEN'S COMPENSATION ACT, 1902.

An alien non-resident dependent of a workman who lost his life as the result of an accident arising out of and in the course of his employment while resident in the province, is entitled to compensation under the B.C. Workmen's Compensation Act, 1902, 2 Edw. VII. (B.C.) ch. 74, now R.S.B.C. 1911, ch. 244.

2. ALIENS (§ III—19)—DEATH OF WORKMAN—ALIEN DEPENDENT'S RIGHT TO RECOVER COMPENSATION ALTHOUGH NON-RESIDENT—LEGAL PERSONAL REPRESENTATIVE—WORKMEN'S COMPENSATION ACT (B.C.).

Upon an application for an award of compensation for the death of a workman under the Workmen's Compensation Act, 2 Edw. VII. (B.C.) 74, now R.S.B.C. 1911, ch. 244, where the dependent of the deceased workman is an alien non-resident, the personal representative may claim such compensation although he would hold it if recovered, for the benefit of such alien non-resident dependent.

[*Krzus* v. *Crow's Nest Pass Coal Co.*, 16 B.C.R. 120, 17 W.L.R. 687, reversed; *Jefferys* v. *Boosey*, 4 H.L.C. 815, and *Tomalin* v. *S. Pearson & Son, Ltd.*, [1909] 2 K.B. 61, distinguished; *Baird* v. *Birsztan* (1906), 8 F. 438 and *United Collieries Co.* v. *Simpson*, [1909] A.C. 383, referred to. See advance report of the present case, 4 D.L.R. 253.]

3. ALIENS (§ III—19) — NON-RESIDENT — REPRESENTATIVE OF DECEASED SUING—WORKMEN'S COMPENSATION ACT (B.C.).

In an application for an award for compensation upon the death of a workman, under the Workmen's Compensation Act (B.C.), 2 Edw. VII. ch. 74, now R.S.B.C. 1911, ch. 244, while an alien dependent, whether resident or non-resident, has the same status as a resident British subject for recovery of the compensation, the legal personal representative of the deceased, or other person suing in a representative capacity for the dependent's claim, is required to be a resident of the province.

4. STATUTES (§ II B—110)—CONSTRUCTION OF STATUTES—CONJECTURE AS TO POLICY OF ACT—IMPLICATION FROM TEXT OF STATUTE.

If the liability expressly imposed upon the "employer" or "undertaker" by the Workmen's Compensation Act, 2 Edw. VII. (B.C.) ch. 74, now R.S.B.C. 1911, ch. 244, for injury to a workman by accident arising out of and in the course of employment is to be cut down at all, or if the "employer" or "undertaker" is to be relieved from it to any extent, this must be done either by some statutory provision express or implied, and not by any conjecture as to the policy of the Act which its language does not suggest, even where that conjecture may be that the purpose of the Act in question is a shifting from the province to the employer as a quasi duty to provide for the destitute.

Statement

APPEAL from a judgment of the Court of Appeal of British Columbia (April 28, 1911), reversing a judgment of Clement, J. (November 23, 1910), upon a case stated by an arbitrator in an award made under the British Columbia Workmen's Compensation Act, 1902.

The appeal was heard on May 15 and 16, 1912, and the question to be decided was whether that Act extends to dependents who are aliens residing in a foreign country.

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The complete text of the decision of the Privy Council is now given as supplementary to the advance report of the same case, *Krzus* v. *Crow's Nest Pass Coal Co.*, 4 D.L.R. 253.

Statement

The appellant as the legal personal representative of Albert Krzus, a workman employed by the respondents in their mine in British Columbia, who was killed by an accident in the course of his employment, applied for compensation under the Act on behalf of the widow of the deceased, who resided in Austria at the time both of the accident and of the application and was not a British subject. The arbitrator, to whom in accordance with the Act the claim was referred, submitted the questions set out in their Lordships' judgment. Clement, J., decided in favour of the claim, but the Court of Appeal by a majority reversed this decision.

Macdonald, C.J., and Galliher, J., held that alien dependents resident abroad were not within the purview of the Workmen's Compensation Act. They considered that the scheme of the Act was to shift the onus of providing for the destitute from the state to the employer, and, as non-resident aliens could not become a burden on the state, it ought not to be inferred, notwithstanding the general language of the Act, that the Legislature intended to impose an obligation on the employer to compensate aliens.

Irving, J., who dissented, held that the Act applied. It was sufficient that the accident occurred within the jurisdiction to a workman employed there by an employer subject to provincial legislation; and no distinction could be drawn between the present case and that of a workman leaving dependents who are British subjects resident in an adjoining province.

Argument

Joseph Martin, K.C., and *L. P. Eckstein*, both of the Canadian Bar, for the appellant, contended that the policy of the Act in question was primarily to benefit the workman by relieving him from the burden of providing against some of the consequences to himself and his family of serious accidents and by transferring that burden to the employer. There is no reason for distinguishing between those workmen who have and those who have not wives or other dependents resident in British Columbia. No such distinction is contained or implied in the Act, and the legislature must have known that aliens as well as British subjects work in the mines, and if it had intended the distinction to be made would have so directed in express words. Sec. 4 of the Act provides that the appellant as the legal personal representative of the deceased should receive the payment of the compensation due.

Sir R. Finlay, K.C., *Rowlatt*, and *S. Herchmer*, of the Canadian Bar, for the respondents, contended that on its true con-

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struction the Act of 1902 did not cover the case of a dependent residing out of the province of British Columbia. It did not apply to the case of an alien workman leaving alien dependents resident abroad. Compensation was directed by the Act (see sec. 2, sub-sec. 1) to be paid in accordance with the first schedule thereto; and the provisions in the second schedule (see sec. 8 thereof), for the registration of a memorandum of award on their true construction shew that only the case of dependents actually resident in the province was contemplated by the Act. Reference was made to *Jefferys* v. *Boosey* (1854), 4 H.L.C. 815, as to a foreigner's interest in copyright and the extent to which his rights therein are protected by 8 Anne ch. 19; *Tomalin* v. *S. Pearson & Son, Ltd.*, [1909] 2 K.B. 61, a case under the Workmen's Compensation Act, 1906; *Gyorgy* v. *Dawson* (1906), 13 O.L.R. 381, a case under sec. 2 of R.S.O. 1897, ch. 166, where the administrator of a foreigner was held entitled to sue on behalf of deceased's family. It was contended that in the absence of express words in the Act of 1902, the appellant could not sustain and enforce his claim in this case.

Counsel for the appellant were not heard in reply.

The judgment of their Lordships was delivered by

Lord Atkinson.

LORD ATKINSON:—This is an appeal from a judgment of the Court of Appeal for British Columbia dated April 28, 1911, reversing a judgment of Clement, J., upon a case stated by an arbitrator under the provisions of the British Columbia Workmen's Compensation Act, 1902.

The facts of the case are few and simple. The defendant company had in their employment at Fernie, in the province of British Columbia, a workman who was an alien, an Austrian subject named Albert Krzus. While in this employment he met with an accident by which he lost his life. It is admitted that this accident was an accident "arising out of and in the course of his (the deceased's) employment," within the meaning of the above-mentioned statute. He was a married man. His wife, now his widow, resided at the time the accident occurred, and still resides, in Austria, and was, like her deceased husband, an Austrian subject.

The appellant is the legal personal representative of the deceased, and resides in the province of British Columbia. As such representative, he, in the interest of the widow, as a dependent of her deceased husband, made an application for compensation under the above-mentioned statute. The arbitrator before whom the application came, in exercise of the powers conferred upon him by the 4th section of the second schedule to the Act, submitted on September 28, 1910, in the form of a

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case stated, for the decision of a Judge of the Supreme Court of British Columbia, the three following questions:—

1. Can the applicant, who is the legal personal representative of the deceased workman, and who is resident in the province of British Columbia, obtain an award for compensation under the Workmen's Compensation Act, 1902, the dependent of the deceased being an alien residing in a foreign country, at the time of the accident out of which the claim for compensation arose and at the time of the death of the deceased workman and ever since?

2. Can such legal personal representative in such circumstances enforce payment to him of compensation so awarded by an action on the award?

3. Can such legal personal representative in such circumstances enforce payment of the award pursuant to section 8 of the second schedule of the Workmen's Compensation Act, 1902?

Clement, J., answered the first of these questions in the affirmative, and declined to answer the others. The statute with which he was dealing is practically identical with the Statute of the United Kingdom, the Workmen's Compensation Act of 1897, save that the duties imposed upon the registrar of friendly societies by sec. 3 of the latter are imposed upon the Attorney-General of the province by sec. 4 of the former. The widow of the deceased admittedly comes within the definition of dependents contained in both statutes; and the sole question for decision on this appeal, therefore, is, whether the fact that the widow is an alien resident in Austria prevents the plaintiff, as legal personal representative of the deceased, from recovering compensation under the Provincial Act, since he would hold it, if recovered, for her benefit. It is not disputed that if the widow had been resident in British Columbia at the time of the accident and up to the date of the inquiry before the arbitrator this objection could not have been raised. It is her present residence outside the province, not the fact that she is an alien, that it is urged disqualifies her. Their Lordships did not understand it to be contended that if she had been resident at the periods above mentioned, and compensation had been awarded in respect of the loss she had sustained, she would have been bound to refund any of the sum awarded if she had subsequent to the award gone to reside outside the province. Nor was it contended that if the workman had been injured only, not killed, the compensation in the shape of a weekly sum payable to him during his total or partial incapacity for work would have been forfeited, or should be terminated, upon his going to reside in Austria. Yet, if the principle upon which the decision of the majority of the Court of Appeal, consisting of the Chief Justice and Galliher, J., appears to be based was sound, these results should logically follow from the change of residence by the widow and her husband respectively. That principle was, by the Chief Justice, thus stated:—

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The Workmen's Compensation Act is in its nature domestic or municipal, and it may be regarded as a shifting of what one might call (though strictly not one) a duty, namely to provide for the destitute, from the state to the employer. This province owes no such obligation to aliens abroad; these could not become a burden upon the state or upon private charity in the state; hence, I think, no intention ought to be inferred to impose obligations on employers beyond that essential to accomplish what would appear to be the legislature's intention. Or to put it in another way, that the general words used in the Act relied upon as including foreign dependents must be limited by reference to what the legislature may fairly and reasonably be considered to have had in contemplation.

Further on in his judgment, the learned Chief Justice said:—

There is very little internal evidence of the legislature's intention in this behalf to be found in the Act, but I think that sec. 8 of the second schedule furnishes some, although perhaps only slight, evidence that those who enacted this legislation never had in contemplation as a person entitled to be awarded compensation any one other than a resident in the province.

The provision to which the learned Chief Justice referred in this latter passage is that requiring that when the amount of compensation under the Act is ascertained, or any weekly payments varied, or any other matter decided under the Act by a committee, an arbitrator, or by an agreement, a memorandum thereof is to be sent to the registrar of the county for the district in which any person entitled to such compensation resides, who on being satisfied of its genuineness shall record the memorandum in a special register without fee, and thereupon the memorandum shall for all purposes be enforceable as a County Court judgment. This provision is copied from the corresponding section of the second schedule of the statute of the Imperial Parliament of 1897. The words supposed to indicate that the benefits of the Act are to be confined to residents, namely, the words "for the district in which any person entitled to such compensation resides," are omitted from the corresponding section of the second schedule of the latest statute of the Imperial Parliament dealing with the subject, the Workmen's Compensation Act of 1906. Nothing is stated as to the applicability of this provision of the Act of British Columbia to the condition of things existing in the province, nor is it stated whether any rules of Court have been made prescribing how the provisions of the section are to be carried out; but in any event these provisions constitute merely the machinery for making the memorandum mentioned enforceable as a County Court judgment, and, strange to say, this itself is immediately followed in the schedule to the Act of 1897, by a section which appears to be somewhat inconsistent with it.

Sec. 9, not copied into the schedule to the statute of the province, requires that when any matter under the Act is to be done in a County Court, or by or before the Judge or registrar of a County Court, then, unless the contrary intention appear, it is to be done in or by or before the Judge or registrar of the County Court of the district in which all the parties concerned reside, or, if they reside in different districts, the district in which the accident occurred. In addition, the words "any person entitled to such compensation resides," occurring in sec. 8 of this schedule, may well only apply to the legal personal representative of a deceased workman where there is one, because, in the definition clause, it is provided that any inference to a workman when he is dead shall include a reference to his legal personal representative or his dependents or other person entitled, to whom compensation is payable; and sec. 4 of the first schedule of the statute of 1902 enacts that "the payment shall, in case of death, be made to the legal personal representative of the workman, or if he has no legal personal representative to or for the benefit of his dependents," etc.

If there be a personal representative he is the person to whom the compensation must be paid as trustee, no doubt, for those entitled to it beneficially, the dependents. If there be several dependents, as there often are, they may be resident in different districts, some within and some without the province to which the statute applies. In such a case some person must sue in a representative capacity, and it would appear to be sufficient if the person who sued was resident within the province, since the words of the section are not "every person entitled to the compensation," but "any person entitled to such compensation." No one person could, in such a case, be entitled to all the compensation unless it be the person claiming as representative of all those entitled to share in it.

Again, the principle adopted by the Chief Justice would, where there were several dependents, only one of whom was resident within the province, exclude those resident elsewhere from any share in the compensation, since none of them could become a burden on the public or private charity of the province—a result, one would think, greatly opposed to the intention and purpose of the Legislature.

The only authority upon which the learned Chief Justice relied is the passage from Maxwell on the Interpretation of Statutes, 4th ed., 213, cited by the Master of the Rolls in his judgment in *Tomalin* v. *S. Pearson & Son, Ltd.*, [1909] 2 K.B. 61, 100 L.T.R. 685, and the case of *Jefferys* v. *Boosey*, 4 H.L.C. 815. This latter was a case on the law of copyright and dealt with the exclusive right claimed by the assignee of the assignee of the composer Bellini to print, for sale in England, copies of this composer's opera of "La Sonnambula." The case has not,

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in their Lordships' view, any application to the present case. The passage cited from Maxwell on Statutes, runs thus:—

> In the absence of an intention clearly expressed or to be inferred from its language, or from the object 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.

The principle embodied in the passage was directly applicable to the case in which it was cited, because there it was sought to apply a statute of the United Kingdom to an accident happening in Malta, arising out of an employment carried on in Malta. So to apply the statute would, indeed, amount to making it operate beyond the territorial limits of the United Kingdom; and the Court of Appeal held, quite rightly in their Lordships' view, that this statute did not apply to such an employment; but no attempt is made in the present case to do anything of that kind.

Here it is not insisted that the provincial statute shall operate extra-territorially. It is insisted that by its express words it imposes on the employer a liability to compensate his workmen for personal injuries by accident arising out of and in the course of the employment which he carries on, and in which they work. Where that employment is carried on in the Province of British Columbia, one of the results of this intra-territorial operation of the statute may, the respondents admit, possibly be that in some cases a non-resident alien may derive a benefit under it, but their Lordships think that if the liability thus expressly imposed is to be cut down at all, or if the employer is to be relieved from it to any extent, this must be done either by some provision of the statute itself or of the schedules attached to it, either expressed or to be clearly implied, and not by conjectures as to the policy of the Act not suggested by its language.

It is admitted that this case does not come within the expressed exceptions contained in the statute. If so the employer is, by the terms of the statute, made liable to pay the compensation in accordance with the first schedule. When one turns to that schedule one finds that, in cases where death results from the injury and the workman leaves behind him dependents wholly or partly dependent upon his earning, the amount of the compensation not exceeding in any case $1,500 is to be paid. In one case and only one case is this limit of the compensation cut down or altered, namely, where he leaves no dependents. Then the reasonable expenses of his medical attendance and burial not exceeding $100 are alone to be paid.

In *Baird* v. *Birsztan* (1906), 8 F. 438, it was assumed that the widow of an alien workman who was herself an alien resi-

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dent abroad was entitled to recover; and, as Irving, J., pointed out in his dissenting judgment in the Court of Appeal, it was decided in the case of *United Collieries Co.* v. *Simpson*, [1909] A.C. 383, 101 L.T.R. 129, that where the workman's death resulted from the accident, and he left as his sole dependent a mother who died before she made any claim, her executrix was entitled to recover the compensation to which she became entitled on her son's death. On the principle adopted by the Court of Appeal in the present case this decision should have been otherwise, as the dependent being dead she never could become a burden on the public or private charity of this country.

On the whole case then their Lordships are of opinion that the judgment of the Court of Appeal was erroneous and should be reversed, and that the answer given by Clement, J., was correct in law, and they will humbly advise His Majesty accordingly. The respondents must pay the costs of the appeal.

Appeal allowed.

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Ontario Court of Appeal, Garrow, Maclaren, Meredith and Magee, JJ.A. November 19, 1912.

1. RAILWAYS (§ II D 1—32)—NEGLIGENCE—DUTY TO OPEN VESTIBULE DOORS AT STATIONS.

It is the duty of a railway company operating a vestibuled passenger train to open the vestibule door of the day coach at which passengers may expect to alight at their points of destination, or to direct the passengers as to the mode of exit, so that they may get off the train while it is standing at the station.

2. CARRIERS (§ II K 1—210)—FAILURE OF RAILWAY COMPANY TO OPEN VESTIBULE DOOR AT STATION—PASSENGER ALIGHTING FROM MOVING TRAIN—RATE OF SPEED.

Where a railway company negligently omitted to open the vestibule door of a day coach on arrival at a passenger's destination and the passenger in his efforts to get off the train went to the next coach to find an open vestibule from which to alight, and the train was, by that time, pulling away from the station at a speed of three or four miles an hour, there was nothing in the rate at which the train was proceeding to make it manifestly dangerous for the plaintiff to attempt to get off, and such course on his part was not contributory negligence.

[*Keith* v. *Ottawa and New York R. Co.*, 5 O.L.R. 116, applied.]

3. APPEAL (§ VII L 2—476)—REVIEW OF FINDING AS TO NEGLIGENCE—CONFLICTING EVIDENCE.

Upon a question of fact, as to whether the rear vestibule and trap doors of a day car of a railway train, on which car the plaintiff was riding, were closed while the train was standing at a certain station; where the jury balances the probabilities, (*a*) on the testimony of the defendant company's conductor and brakeman for the negative and (*b*) on that of the plaintiff and a disinterested witness for the affirmative, and finds on that point for the plaintiff, such finding is within the jury's province and will not be disturbed.

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4. CARRIERS (§ II K 1—212)—ALLOWING PASSENGER TIME TO ALIGHT—STARTING TRAIN PREMATURELY—CLOSED EXITS.

Where a railway company negligently closes a passenger's natural means of getting off a train, without notice to him, such company is guilty of negligence in starting the train before the passenger has sufficient time to get off by the means he adopts, provided such means be reasonable.

5. CARRIERS (§ II G—100)—DUTY TO HOLDER OF FIRST OR SECOND CLASS TICKET—USE OF PULLMAN FOR PURPOSE OF GETTING OFF TRAIN.

A passenger in a day coach who finds the ordinary mode of exit at the rear vestibule closed at his destination, and who thereupon enters the adjoining Pullman car in search of an opened vestibule, is not a trespasser as to such Pullman coach so as to disentitle him to damages for personal injuries received in alighting therefrom.

6. NEGLIGENCE (§ II A—78)—PASSENGER ALIGHTING FROM TRAIN—EMERGENCY—QUICK DECISION.

Where the negligence of a railway company, operating a passenger train, forced a passenger into an emergency as to getting off the train at his destination, the fact that the means or method of exit which he, in such emergency, adopts, is not the wisest possible under the circumstances, does not necessarily imply contributory negligence on his part.

Statement

APPEAL by the defendants from the judgment in an action tried by Meredith, C.J., and a jury. The plaintiff was a passenger from Toronto to Weston, where, on descending from the train, he fell and was run over by the rear car and lost an arm. The jury awarded him $2,500.

The appeal was dismissed, MEREDITH, J.A., dissenting.

D. L. McCarthy, K.C., for the defendants.

F. E. Hodgins, K.C., and *A. C. Heighington*, for the plaintiff.

Garrow, J.A.

GARROW, J.A.:—Appeal by the defendants from the judgment at the trial before Meredith, C.J., and a jury in favour of the plaintiff. The action was brought to recover damages caused to the plaintiff while a passenger on the defendants' railway, by reason of insufficient provision to enable him to properly and safely alight from the train upon which he was travelling, upon its arrival at Weston station.

The plaintiff and his friend, John Gibney, had left Toronto together, bound for Weston, a station a few miles to the west of that city, where the train arrived a little before midnight. They were seated in a passenger coach of the ordinary description, so far as appears, connected at its rear end with a Pullman coach, the whole being what is called a vestibuled train. There was a door of exit at each end of the passenger coach. The forward door was open, but there was conflicting evidence whether the rear door also was open.

The plaintiff and his friend tried the rear door near which they had been sitting, and finding it as they say locked, they passed through the Pullman coach, and alighted from the rear platform of that coach after the train had commenced to move; Mr. Gibney, who was first, alighted without difficulty, but the plaintiff in alighting immediately afterwards fell and was

severely injured. In passing through the Pullman coach they met the porter, who was apparently in charge. He asked if they desired to get Pullman accommodation, and getting a negative reply did not order them out or attempt to turn them back or otherwise prevent them from proceeding to the rear platform as they did.

It is not claimed that the stop at the station was not of sufficient length to have enabled the plaintiff and his friend to alight under ordinary circumstances.

At the close of the evidence for the plaintiff, counsel for the defendants moved for a nonsuit, which was reserved, and renewed at the close of the whole case, when this took place:—

Mr. Hellmuth:—I would submit that on the whole case——

HIS LORDSHIP:—I am entirely against you. I think the defendants are liable. You put them on this train; you invited them to alight; when they went to the proper place to alight they could not get exit from the car. They were not bound to remain on the car. They went to see if they could find some place of exit, and finding none, they made their best way out.

Mr. Hellmuth:—I think, with great respect, that all the cases proceed on the ground of invitation, and where they find, as they say they did, a closed door and trap-door down, there was no invitation.

HIS LORDSHIP:—I will rule the other way. What question of fact is there in this case to submit to the jury?

Mr. Hellmuth:—The time the train stopped.

HIS LORDSHIP:—Is there any other important question than whether Gibney and the plaintiff are right as to the condition of the vestibule between the second day car and the first Pullman? What I propose to do, unless there is some objection that strikes me as formidable to it, is to ask the jury just the one question, whether the vestibule was closed, as the defendants say, or whether it was as the plaintiff and Gibney say—and as to the damages—and any other question I will determine without the aid of the jury.

Mr Hellmuth:—I suppose those are questions of law more than of fact.

HIS LORDSHIP:—Yes, largely. Of course, the evidence as to the time the train stopped there varies very much from a minute and a half to three minutes. I suppose nobody could say—I do not know how that is—nobody could say that these men had not time enough to get off.

Mr. Heighington:—No, I do not think we will contend we had not time to alight if the doors were open.

HIS LORDSHIP:—Does not the whole case turn on whether the door was closed, and then the question of law as to whether in the circumstances the men were justified in doing as they did? The only question there that might be asked the jury is whether they did what was right under the circumstances; but I think I will pass upon that. I will just ask the jury to assist me on one question of fact and the damages.

Mr. Hellmuth:—I do not know that I can object to that. Of course, my accepting your Lordship's doing that does not mean that I would be bound by the findings as to this.

HIS LORDSHIP:—Certainly not.

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Accordingly the only questions submitted to the jury were (1) was the rear door closed, to which they answered "Yes," and (2) the amount of the damages, which they fixed at $2,500, for which amount the plaintiff has judgment.

The case involves one or more rather nice questions, but upon the whole I do not see any good ground upon which we can interfere. The defendant cannot complain of the somewhat unusual course adopted at the trial, because counsel assented. All that now seems open is the question whether there was reasonable evidence to justify the inferences and findings made by the learned Chief Justice, and I find it impossible to say that there was not. The plaintiff had in the absence of timely information to the contrary a right, it seems to me, to expect to find the rear door of the passenger coach open, in which case he could easily have alighted there in the time allowed. He might even have gone after finding the rear door closed, to the front door which was open—and still have alighted in plenty of time. Instead, he proceeded through the Pullman coach, into which, it may be conceded, he had no right under his ticket to enter. But that is not the real question. He had a right to alight from the train, and having at last reached an opening from which he could alight, the real question must, I think, be, might he then alight, the train having commenced to move—in other words, was what he did under all the circumstances reasonable? In the opinion of the learned Chief Justice it evidently was, and I am not prepared to differ from that conclusion. It is easy to say after the event that the plaintiff would have escaped injury if he had gone to the front door instead of the rear door, or to the front door after finding the rear door fastened, as upon the findings of the jury it must now be assumed it was. But the time allowed for deliberation was at the best very short, and finding the rear door closed, it was almost as easy to reach the rear of the Pullman coach as to return to the front door of the passenger coach. It is not to be forgotten that it was the act of the defendants' servants in failing to open or to keep open the rear door which put the plaintiff in the difficulty. Nor is it an answer in law to say that the train being again in motion the invitation to alight was thereby cancelled. Allowance must be made for the very natural desire of a passenger not to be carried beyond his destination, especially at so late an hour. It must, therefore, always in such cases and under such circumstances be a question of the reasonableness of what was done, a question which was rather recently considered in this Court in *Keith* v. *The Ottawa R. Co.*, 5 O.L.R. 116.

I, therefore, see no alternative but to dismiss the appeal with costs.

Maclaren, J.A.

MACLAREN, J.A.:—The chief dispute was whether the vestibule doors at the rear of the day car, in which the plaintiff

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and a friend were riding, were open or closed while the train was standing at the Weston station. It was assumed throughout, that if these doors were closed it would be negligence on the part of the company. The conductor and the brakesman of the train swore that they had remained open as usual from Toronto, and were only closed after the train started from Weston. Plaintiff and his companion, Gidney, swore that they were in the rear seat of the rear day car, that when "Weston" was called out, and the train was slowing down they arose and went into the rear vestibule, and finding all the doors closed, Gidney tried first to open the doors at the rear of the day car, and finding them "stuck" he next tried those at the front of the first Pullman with a like result. He then rushed into the Pullman car followed by the plaintiff, and passing the porter hurried into the rear vestibule, reaching it just as the train was starting. Gidney opened these vestibule doors and descended safely to the ground east of the station platform. Plaintiff following him closely tried to do the same, but stumbled and fell under the rear car near the eastern end of the platform with the result stated.

The learned Chief Justice, with the acquiescence of counsel, submitted only two questions to the jury, reserving to himself the decision of the other points in the case. The two questions and the answers of the jury were: "(1) Were the trap doors down and the vestibule doors closed between the car upon which the plaintiff was a passenger and the Pullman car in rear of it, when the train came to a stop at Weston? A. Yes. (2) At what sum do you assess the plaintiff's damages? A. $2,500."

Meredith, C.J., thereupon held that the plaintiff had acted reasonably in what he did, and that there was nothing in the rate at which the train was proceeding to make it manifestly dangerous for him to attempt to get off the way he did, and entered up judgment for $2,500. The evidence was that the train was going at the rate of three or four miles an hour when the plaintiff fell. The finding of the Chief Justice as to the danger is quite in accord with the principles laid down by this Court in *Keith* v. *Ottawa and New York R. Co.*, 5 O.L.R. 116, which is some respects is similar to this case, and the correctness of his decision on this point was not challenged by the defendants either in their reasons of appeal or the oral argument before us.

Counsel for the defendants, however, claimed that on the evidence the jury should not have found that the rear vestibule and trap-doors of the day car in which plaintiff was riding were closed during the time the train was standing at Weston station. On the one hand they had the conductor and brakes-

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man (two interested witnesses) swearing they were not; while on the other they had the plaintiff and Gidney (only one of them interested) swearing the opposite, and giving particulars of Gidney having actually tried to open them before the train started. They believed the latter, as it was their privilege to do, and no sufficient reason has been given to us to interfere with their verdict on this point.

While the counsel for the defendants as just stated did not criticise the holding of the trial Judge as to the speed of the train not making it manifestly dangerous or negligent for the plaintiff to attempt to alight, he did urge very strongly that, as the plaintiff had only a first class ticket he had no right to enter the Pullman at all, that he was a mere trespasser to whom the company owed no duty (probably the first time on record in which such a claim was put forward), and that the vestibule and trap doors being closed, there was not only no invitation to him to alight that way, but an express prohibition to attempt it.

I do not think the fact of the plaintiff being only a first class passenger has anything to do with the present case. A first class, or even a second class passenger, may have a right under certain circumstances to pass through a Pullman car in embarking upon, or alighting from, or in simply passing through a train. The question is, did he act reasonably? It may be noted here that there is no evidence that the plaintiff knew this car was a Pullman until he had got some distance inside and saw the berths made up, and by that time he was much nearer the exit in the rear and would know that he could reach it much sooner than that in front, if such a thought as turning back had then occurred to him.

Bearing in mind that the only point on which there was a conflict of evidence has been disposed of by the verdict of the jury, what are the proved facts that are material to the case? The plaintiff after the brakesman called out "Weston" as the train was slowing down, went to the proper place for him to alight, no notice having been given to him to go elsewhere. Finding all the doors closed, his companion who was in front tried first to open the vestibule doors of the day car, and finding them "stuck," next tried those of the front of the Pullman with a like result. Then they started to go through the Pullman car. It was agreed that he could have turned back and gone to the front of the day car. He did not know that that was open to him any more than the place they had just tried. It was perhaps even more natural that they should continue to press on in the direction in which they had started, rather than retrace their steps. But plaintiff from his experience knew that the train stopped only one or two minutes, and he had now only some seconds to make his exit. A man who in such an emerg-

ency comes to a decision that may not be the wisest is not on that account necessarily negligent. It was quite natural that he should follow his friend where the way was apparently clear, and where the friend made his way out in safety. Although the defendants had negligently closed him in, it was his duty to make all reasonable efforts to get off, rather than to remain passive and then seek damages from the company for having carried him beyond his destination. The company having negligently closed his natural means of getting off the train, without notice to him, were guilty of negligence in starting the train before he had sufficient time to get off by the means he adopted, which under the circumstances was not a negligent or unreasonable or improper way or method, and the injury he sustained was the direct result of such negligence. I can find no sufficient ground for reversing the finding of the trial Judge.

The appeal in my opinion should be dismissed.

Meredith, J.A. (dissenting).

Meredith, J.A. (dissenting):—The learned trial Judge, with the expressed assent of the defendants, and the tacit assent as well, no doubt, of the plaintiff, withdrew this case from the jury and determined it altogether himself, with the exception of the single question: "Was the trap-door down and the vestibule door closed between the car upon which the plaintiff was a passenger and the Pullman car in rear of it, when the train came to a stop at Weston?" and the assessment of damages; and so the case stands in a very different position upon this appeal now than it would stand if the case had been tried in the more usual way—if the jury had been required to find, and had found, upon all the material questions of fact involved in the case.

The jury's answer to the one question was "Yes"; and they assessed the damages at $2,500; findings which must stand, because there was evidence adduced at the trial upon which reasonable men might so find; and there is no appeal against a jury's finding.

But in regard to all other material facts, there is an appeal; and this Court is bound now to consider such facts, and if they prove to be, plus the findings of the jury, insufficient to support the judgment directed at the trial, to be entered in the plaintiff's favour, it cannot stand.

There is no finding of negligence on the part of the defendants, by the jury, nor indeed, expressly by the Judge; nor, if such negligence, that it was the proximate cause of the plaintiff's injury. The mere fact of this particular door being closed "when the train came to a stop" might be evidence of care rather than lack of care. It may be that the jury, if asked, would have found that it was not open at all during that stop. But they have not done so. The evidence of the plaintiff and that of his companion at the time is not very clear in regard to

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this. They say that they rose from their seats before the train had quite stopped, and went to the platform and found the outer doors closed; that the plaintiff's companion made an effort to open them but could not, and that they then went on through the next car, a Pullman, reaching its rear doors and opening them and getting off when the train was again in motion: the time during which the train was actually stopped is variously put at from one minute and a half to three minutes, the plaintiff's companion testified to about a minute and a half; and so it seems difficult to account for the plaintiff's movements during that time, unless it was nearly all spent in vain efforts to open the doors, though neither testified to anything pointing to more than a few moments' stay there. If it were proper that a way out through that door should have been provided, that duty would have been performed if the doors were opened after the train stopped and kept open long enough to enable passengers having ordinary diligence and care to alight. But it may be that if the jury were right in their finding, then those doors were not open at any time during the stop; and the evidence of the conductor, as well as that of the brakeman, respecting them is untrue, and yet it might have been better if the question had not been limited to the time "when the train came to a stop."

Assuming, however, that the finding ought to be that no reasonable means of alighting from the train was afforded at those doors, during that stop, was there negligence on the part of the defendants in that respect?

Any finding upon the whole evidence upon this question is that there was. The defendants did not at the trial take the position that it was not their duty to passengers to provide a way out by the doors in the rear of the car in which the plaintiff was; the whole of the testimony in their behalf points in the other way; it was to the effect that those doors are always kept open for that purpose until that train leaves the station at which the accident occurred, and that they were to open so that the plaintiff might and should have passed through them in alighting on the occasion in question.

Then was the neglect of the trainmen to open them, or to have them open, the proximate cause of the plaintiff's injury? I am unable to say that it was; feeling constrained to find that the want of ordinary care on the part of his companion and himself, on the contrary, was the cause of this most regrettable accident.

Finding no way out by the rear doors, and that some of those doors were so fastened that they could not be opened, which need have been the work of a few seconds only, their course seems to me very plainly to have been, to pass through the car they had occupied, and in which they had a right to be, and find a way out at its front door; all of which might have been done

more than five times over even at the lowest estimate of the duration of the stop—a minute and a half. That car they had a right to be on and to pass through; the sleeping car they had no right to be on or to pass through under ordinary circumstances. They had not paid for passage in it; those only who had, had a right to be there; and had a further right not to be disturbed by those who had not; and especially not to be disturbed when they had retired or were retiring; only an invitation or an emergency would justify that which the plaintiff and his companion did. What excuse have they for invading that car at that hour of the night? The right to alight might justify it if that were the only reasonable way of alighting; but that is not so; the contrary is the fact; as all who travel upon our railways must know. Sleeping cars are generally if not invariably "vestibuled" as it is called; and the vestibules are more generally closed than in ordinary cars because those travelling short distances are not in the habit of travelling in sleeping cars. The protection of those occupying sleeping cars requires vestibuled cars; and the safety which the closed vestible affords might be converted into a trap if passengers from any part of the train were permitted to open them, at their will or for their convenience, without the knowledge of any of the train's crew.

In addition to all this the plaintiff and his companion saw and passed by the porter of the sleeping car in going through it, but without asking from him to be afforded means of alighting, as I think, even if they had had a right to be there, they should have done. It was within the power of any of the train hands to stop the train and afford a means of alighting and that should and would be done, doubtless, in a proper case; the mere pulling of a signal cord with which all train hands are familiar would have stopped the train.

But having had time enough to go through their own car many times over and so far as the evidence shews not having attempted to go that way at any time, but, instead, having invaded the sleeping car at almost the last moment, and opened its closed doors, and so far as the evidence shews properly closed doors, and got off when the train was in motion, I am quite unable to see how the plaintiff can justly recover damages from the defendants for injuries sustained through a mis-step in attempting so to alight.

To say that the plaintiff was imprisoned is, of course, drawing the long bow; with one door of a sixty-foot car wide open the imprisonment is imaginary. Nor can it be said that the defendants failed to have their train sufficiently manned; four persons to aid possibly hardly more than eight or ten persons to alight ought to be sufficient.

I am unable to see any just ground upon which the judgment

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in the plaintiff's favour can be supported. Whether it could have been supported if the jury had found sufficient facts to sustain a judgment is a question which it is not necessary to consider.

MAGEE, J.A., concurred in the result.

Appeal dismissed, MEREDITH, J.A., *dissenting*.

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TRETHEWEY v. MOYES.

Ontario High Court. Trial before Lennox, J. December 11, 1912.

1. SALES (§ II C—35)—WARRANTY—QUALITY—SALE OF GOODS BY SAMPLE—MOTOR CAR—SELLER BEING A DEALER IN MOTOR CARS, EFFECT OF.

Where a dealer in motor cars contracts to supply a car which shall be in all respects (except upholstering) the same as a certain car previously sold to a specified third party, the seller is bound to furnish a car duplicating such sample in appearance, equipment, and method of construction, and as efficient and satisfactory in operation, and in all other respects as good, as the sample, with the qualification mentioned as to upholstering, there being in the circumstances an implied warranty that the car should be fit for use in the manner in which such a car ordinarily would be used.

[*Drummond* v. *VanIngen*, 12 A.C. 284; *Mody* v. *Gregson*, L.R. 4 Ex. 49; *Randall* v. *Newson*, 2 Q.B.D. 102, applied.]

2. CONTRACTS (§ IV B 1—328)—FAILURE TO MAKE TEST—SALE OF MOTOR CAR BY DEALER—EXPERT KNOWLEDGE OF REQUIREMENTS IN MANUFACTURE—ONUS ON SELLER.

Where a dealer in motor cars sells a car unfit for ordinary use, due in part to a defective battery resulting from the want of a proper primary charge, that is, in this instance from a failure to properly saturate the cell plates of the battery, without which a car could not be expected to work properly; it was the duty of the seller in the circumstances to have had a proper primary charge made, and in this respect there was no obligation whatever upon the buyer, who neither knew nor could be expected to know of such requirements.

3. CONTRACTS (§ IV B 1—325)—EXCUSE FOR BREACH—SALE OF MOTOR CAR BY DEALER—SUBSTITUTING BATTERY DIFFERENT FROM THAT STIPULATED, EFFECT OF.

Where a dealer in motor cars sells a car with a stipulation to equip it with a certain kind of battery and without the buyer's knowledge substitutes a different kind of battery, such variance constitutes a breach of contract notwithstanding the seller's opinion that the substitute may be better than the stipulated appliance.

[*Forman & Co.* v. *The Ship "Liddesdale,"* [1900] A.C. 190, applied.]

4. CONTRACTS (§ IV E—368)—WAIVER OF BREACH—SALE OF MOTOR CAR BY SAMPLE—SILENCE OF BUYER AFTER DISCOVERING DISPARITY, EFFECT OF.

Where the buyer of a motor car by sample incidentally learns after its delivery of a certain disparity in the car as to the number and sizes of its cells, and where pending further tests he maintains silence with respect to such discovery, he is not necessarily estopped thereby from setting up such disparity to establish the seller's non-compliance with the contract, especially where the seller's agent lulled him into security by giving a false reason for the difference.

[*Adam* v. *Richards*, 2 H. Bl. 573; *Heilbutt* v. *Hickson*, L.R. 7 C.P. 438, referred to.]

ACTION for rescission of a contract of sale by the defendant to the plaintiff of an electric motor car at the price of $4,300, on the ground that it was not in accordance with specifications, and for the return of $3,300 paid on account thereof, and of the Babcock motor car, given in part payment, or in the alternative for $3,000 damages.

Statement

Judgment was given for the plaintiff.

R. McKay, K.C., for the plaintiff.

W. C. Chisholm, K.C., for the defendant.

LENNOX, J.:—There will be judgment:— Lennox, J.

(a) Rescinding and setting aside the contract in the pleadings mentioned;

(b) Directing the defendant to deliver up to plaintiff, upon demand, the Babcock car in the pleadings mentioned; and

(c) For payment by the defendant to the plaintiff of the sum of $3,300 and the costs of this action.

The defendant, amongst other things, is a dealer in motor cars. In consideration of the payment of $3,300 in cash, and the delivery to him of the plaintiff's Babcock motor car, the defendant agreed to furnish and deliver to the plaintiff on or about the 15th of January, 1912, a Detroit Electric Brougham motor car, the same in all respects (except upholstering) as a car which the defendant had previously sold to Dr. C. J. O. Hastings.

The Hastings car is equipped with a 60 a 4 Edison battery and motor to correspond. It is admitted that the car furnished by the defendant, in alleged pursuance of the contract, is equipped, not with a 60 a 4, but with a 40 a 6 Edison battery and a motor to suit this battery. It is also admitted—or is not denied—that in several minor points the car in question does not correspond with the Hastings car.

It is hardly denied by the defendant, and at all events it is abundantly clear upon the evidence, that for some cause or other the car in question has never worked properly—has never been shewn to be an efficient, workable car of the class to which it belongs. And it is shewn by the defendant's own evidence, and by the evidence of his brother, that the defendant deliberately determined, without the knowledge of the plaintiff, to substitute the 40 a 6 for the 60 a 4 battery provided for by the contract. The defendant's alleged reason is that he considered a 40 a 6 battery better than the other.

The defendant's evidence was, I thought, in the main straightforward and candid. Yet at the trial the defendant was, I think, entirely mistaken as to the motive which actuated him in making this substitution. A battery is worth about a thousand dollars.

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This one was in stock when Burke came to work for the defendant, some two years ago.

The evidence of William Wilkie Moyes as to what took place when he was in Detroit, the correspondence put in, particularly the letter from this witness to the Anderson Company on his return to Toronto, and the whole trend of circumstances, clearly convinced me that, consciously or unconsciously, the defendant's real motive was to get rid of a battery in stock and thus avoid the purchase of a new one. Motive, however, or even merit or result, is not the question. The defendant has not done what he bargained to do: *Forman & Co.* v. *The Ship "Liddesdale,"* [1900] A.C. 190.

I judge, too, from the circumstances—although I may easily be mistaken as to this—that the defendant intended to keep the plaintiff in ignorance of the difference in the equipment of the two cars. It is a fact, however, that before the car was tried the plaintiff knew that the batteries were not exactly the same; but it is not suggested that, except by an actual trial and demonstration, he would be able to judge at all as to the relative merits of the two batteries.

It happened in this way. In looking at the car in presence of the plaintiff, Dr. Hastings said to the man representing the defendant that there were not so many cells as there were in his car—or that they were larger—or some words to this effect. This circumstance has given me a great deal of anxious consideration; although, of course, at most it only touches one of the causes upon which the plaintiff bases his action. The difficulty I have felt is as to whether the silence of the plaintiff at that time, pending the trial, prevents him from now setting up this difference in the two cars as a specific answer, in itself, to the defendant's contention that he has complied with the contract.

Upon the whole, I do not think it should. Even if in some cases it would have that effect, the answer of the man in charge in this case should, I think, prevent such a conclusion. This man's statement was not correct. As I said, there had been no trial. This man in charge said, in substance: "The builders of this car have discontinued the use of the 60 a 4 battery; they think they get better results from this battery; this is a better battery"; whereas the only reason for the change was that it served the defendant's purpose to make a sale of a battery which he had carried in stock for a very long time. As to the time for rejection see *Adam* v. *Richards*, 2 H. Bl. 573; *Heilbutt* v. *Hickson*, L.R. 7 C.P. 438.

Aside, then, from the relative merits of the two batteries and the motors in conjunction with them, and without reference to whether the car is a good workable and serviceable car or not, I am of the opinion that upon the ground of non-performance

alone the plaintiff is entitled to the judgment above set out: *Bowes* v. *Shand* (1877), 2 App. Cas. 455, *per* Lord O'Hagan, at pp. 479, 480, and Lord Blackburn, at pp. 480, 481; *Allan* v. *Lake*, 18 Q.B.D. 560.

But the battery is only one point. Under the specific terms of the contract, the plaintiff had not only the right to receive a car duplicating the Hastings car in appearance, equipment, and method of construction, but he had the right to have delivered to him a car equally as good in all respects—as efficient and as satisfactory in operation—as the Hastings car. He was to have a car "like the car . . . sold to Dr. Hastings."

He did not get such a car. A car that will not climb a hill, that must be re-charged every 25 or 30 miles, and that gives constant trouble, is not like Dr. Hastings's car. I have not overlooked the circumstance that towards the end of the trial, the defendant made a half-hearted suggestion that the Hastings car gave trouble too; but there was nothing specific, and I give no weight to this casual interjection, seeing that this was not at all the line of defence throughout the trial, that Dr. Hastings was not even asked as to the working of his car, and that upon the argument it was not even suggested that the Hastings car was not efficient and satisfactory in every respect.

Again, the vendor, as I said, is a dealer in motor cars. This transaction was in a sense a sale by sample—the Hastings car. It is not enough, even if the defendant had been able to do this, to shew that the car furnished was a copy or duplicate of the car sold to Hastings. The defendant was bound to supply a car reasonably fit for the purposes for which it was intended: *Drummond* v. *VanIngen* (1887), 12 App. Cas. 284; *Mody* v. *Gregson*, L.R. 4 Ex. 49; *Randall* v. *Newson*, 2 Q.B.D. 102.

What was the cause of this car not running properly does not clearly appear. The defendant, who was, I think, more competent to speak as an expert than any other witness, said he could not even hazard a guess as to the cause. William Burke, called by the defence to give expert testimony as well as evidence of fact, said that a car of this class should run in cold weather sixty or eighty miles without being recharged, that such a car if half-charged should climb any hill in or about Toronto, and that if the car shewed the lack of power and other deficiencies complained of, there must be something radically wrong.

A good deal of evidence was directed to shewing that the battery was the cause of the trouble, and to controverting this. It does not greatly matter what was the cause. The case is not the weaker for the plaintiff if the battery were not the cause. But a point developed by the defendant himself, late in the trial, is important, viz., that the car probably never had a proper

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primary charge—that to properly saturate the cell plates of the battery would take at least from eighteen to twenty-four hours, and that without this it could not be expected that the car would work properly. Who should have seen to this? The plaintiff was not even advised of the need of it. The excuse for not properly charging it is that the plaintiff was in a hurry to have possession of the car. How could this be an answer in any case? The time when the plaintiff is said to have been in a hurry was many weeks after the time stipulated for delivery.

Judgment for plaintiff.

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Re WILLIAM STAGGS.

(Decision No. 2.)

Alberta Supreme Court, Walsh, J. November 30, 1912.

1. EXTRADITION (§ I—3)—PERSONS SUBJECT TO EXTRADITION—CRIME UNDER LAWS OF BOTH COUNTRIES.

Extradition will be ordered under the extradition treaties and conventions with the United States of America, only upon its being established that the extradition offence is a crime against the law of the demanding country, and if it had been committed in Canada would be a criminal offence there.

[*Re Latimer*, 10 Can. Cr. Cas. 244, followed.]

2. FALSE PRETENCES (§ I—6)—FAITH IN THE FALSE REPRESENTATION—ELEMENTS OF FALSE PRETENCES.

To make out a charge of obtaining money by false pretences it is not sufficient to prove that the false representation was made, and that the person making it got money from the person to whom he made it, but it also must be shewn that it was upon the strength of the representation thus made that the person wronged was induced to part with his money.

3. EVIDENCE (§ XI A—761)—RELEVANCY AS TO CONCURRENT DATES—OWNERSHIP OF GOODS AT FIXED DATE—FALSE PRETENCES CHARGE.

On a charge of obtaining money under false pretence of ownership of certain chattels, the testimony of a witness taken nearly a year after the alleged offence, stating merely that such witness "was" the owner, is insufficient to negative the alleged pretence, unless such deposition by its context or otherwise indicates the date of the offence as the time at which he was the owner.

Statement

HEARING of an extradition case against the defendant on a charge of having obtained certain money by false pretence.

The accused was discharged.

A prior extradition matter upon a different charge is reported *sub nom. Re William Staggs* (No. 1), 1 D.L.R. 738.

Frederick S. Selwood, for the State of Kansas.

J. McKinley Cameron, for the accused.

WALSH, J.

WALSH, J. (oral):—Section 18 of the Extradition Act imposes upon me the duty of issuing my warrant for the commit-

ment of the fugitive if such evidence is produced as would, according to the law of Canada, justify his committal for the crime if committed in Canada and sub-sec. 2 makes it my duty if such evidence is not produced to order the fugitive to be discharged.

The evidence which is offered here in support of the committal for the extradition of this man is that of Fred P. Spraul, T. C. Van Dusen and W. O. Knight. I have carefully read these depositions and, in my opinion, they do not make out such a case against this accused as would, if the alleged offence had been committed in Canada, justify his committal for trial, and I will, therefore, have to discharge him. I do so on two grounds. There are some minor difficulties in addition which the depositions present. I have not considered these with any degree of care at all as I did not think it necessary to do so in view of the opinion which I have arrived at on the main grounds. It may possibly be that on investigation these might be serious, but I am making no more than a passing reference to them now. The false pretence which is alleged against Staggs is his fraudulent representation that he was the owner of the goods in question and as such owner had the right to mortgage them. The evidence which is offered in support of this branch of the charge is that of Spraul alone. Mr. Van Dusen in his deposition winds up by saying that he verily believes that Staggs was never at any time the owner of the property and that he had not the right to mortgage it, but of course I need not waste time in pointing out that that affords absolutely no proof of the fact that he was not the owner and had not the right to mortgage. That is a mere statement of the belief of the deponent for which no reason is given in the deposition so that proof of this part of the case rests entirely upon the evidence of Spraul. I admitted this deposition very reluctantly and against my own view as to its admissibility, but my view of the authorities which I examined with some degree of care was that it was a deposition or a statement under oath which, under the authorities, was admissible in evidence and for that reason, I let it in. It is a deposition taken in a civil action in which Spraul himself was the plaintiff and in which he was asserting his ownership and title to these very goods and the action was against the bank which was claiming these goods under the mortgage which Staggs is said to have made to it. Spraul's own interest, of course, could best be served by proving his ownership and Staggs's lack of ownership of these goods and from what Sheriff Decker very candidly said about Spraul's reputation in the community in which he lives, I think that he would not hesitate to make the best case he could for himself. The depositions by which this deposition of Spraul is proved are calculated to give the impression that what is produced as Spraul's deposition is all the evidence that he gave

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at the trial of that action, but it is patent on the face of Spraul's deposition that this is not so. I think it is quite clear from reading the deposition itself of Spraul that there has simply been extracted from his evidence such portions of it that serve best the purposes of this prosecution and that has been placed before me as Spraul's deposition. If that is so, I think in fairness the people who have verified this deposition by their oaths should have made it quite clear that such was the case. I doubt very much the propriety of placing before the Court certain questions and answers to them which have been culled out from the whole of the testimony of the deponent and representing that as the testimony of this man. It might be open to serious question as to whether or not such a deposition as that should be received at all. Notwithstanding all of these objections I have carefully read Spraul's deposition and if I found in it sufficient to establish the lack of ownership of Staggs of these chattels I would have to give effect to it no matter how repugnant that might be to my sense of justice, but on reading the deposition of Spraul I am utterly unable to find that it establishes with the slightest degree of certainty that Staggs was not, on the 8th of June, 1911, the owner of these chattels. There are only three questions and the answers to them in the whole of Spraul's deposition which bear on this question of ownership. The first of them is this question and answer:—

> Q. This bay mare, six years old, weighing 1,400 pounds, whose property is this? A. Mine.

That question relates to the date upon which Spraul's evidence was given which was the 18th of March, 1912, several months after Staggs is said to have alleged his ownership of the horses so that all that question and answer will establish is this: that on the 18th of March, 1912, Spraul swore that that horse was, on that day, his property. There is absolutely nothing inconsistent with Staggs's ownership of that same horse in June preceding. It may well be that Staggs owned the horse in June, 1911, and between that date and the 18th of March, 1912, his ownership ceased and Spraul became the owner of the horse. The next question is:—

> Q. And whose property was the roan mare, seven years old? A. Mine.

Now, there is nothing in that question to indicate the period of time at which the ownership of the roan mare is fixed. The question is: "Whose property was the roan mare? To what period of time does that relate? It may relate to any period anterior to the 18th of March, 1912. It certainly does not fix the ownership of the roan mare as being in Spraul on the 8th June, 1911. The third question is this:—

Q. I will ask you whether or not, on the 8th of June, 1911, W. M. Staggs was the lawful owner and that he had full power to sell or mortgage the bay mare, the roan mare and the new Studebaker wagon you have been testifying about? A. No, sir, not that I know of.

Now, I do not think it can be contended for a minute that such an answer as this is even *primâ facie* proof of the fact that on the 8th June, 1911, Staggs did not own these goods and had not the right to mortgage them. It is not an absolute, straight, positive denial of Staggs's ownership and right to mortgage, but it is a qualified one and simply amounts to this, that so far as Spraul knew Staggs did not own these things then and did not have the power to sell them and what the extent of his knowledge was and information is left quite in the dark. The other questions and answers to them do not bear at all upon the question of ownership and upon the reading of the whole of Spraul's deposition or the portion of it that is before me, I have no hesitation in finding that there has not been established even *primâ facie* that the representation which Staggs made to Van Dusen on the 8th June, 1911, was a false and fraudulent representation.

The other ground in respect of which, I think, the evidence in support of this application is deficient is this. Before a man can be committed for extradition it must be established that the offence with which he is charged is one against the law, not only of the demanding country, but also of Canada. That has been settled by several decisions, one in our own Court by the late Chief Justice Sifton, *Re Latimer*, 10 Can. Cr. Cas. 244, and that is, I think, borne out by sub-sec. (*b*) of sec. 18. Now the charge as alleged against this man is what is commonly known as obtaining money by false pretences and it is a material ingredient in that offence according to the law of Canada that the person who has been wronged must have parted with his money in reliance upon the truth of the representations made to him by the accused. I do not think it is sufficient in this jurisdiction, at any rate to simply prove that the false representation was made and that the person making it got money from the person to whom it was made. I think the connecting link must be forged between these two ingredients by shewing it was upon the strength of the representation thus falsely made that the person wronged was induced to part with his money. Now there is absolutely nothing in the deposition of Van Dusen to shew that that is the case here. All that he says in effect is this, that Staggs came to his office on the 6th of June, 1911, and represented that he owned and had in his possession the property that is in question, that he wanted to borrow from the bank the sum of two hundred and fifty dollars and that he wanted to give the property as described in the chattel mortgage

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as security for the loan on the same; that he had the sole right to execute the mortgage; that he then made, delivered and executed the said mortgage and received therefor the money of the said bank, the sum of two hundred and fifty dollars. That is the entire statement of Van Dusen with reference to the transaction itself. There is not a word to indicate that it was because of this representation of Staggs that he owned these goods and had a right to mortgage them that the sum of two hundred and fifty dollars was advanced and for that reason I think his deposition lacks the element of proving that the bank's money was parted with on the strength of the statement which was made by Staggs. The necessity for proving that is, I think, quite appreciated by those who seek Staggs's extradition for, in the information upon which the warrant was issued by Mr. Justice Stuart it is alleged that then and there, and by means of the said false pretences the said Van Dusen, the cashier and managing officer of the said banking corporation then and there, believing the same and being deceived thereby he, the said Staggs, did obtain from the bank the said sum of two hundred and fifty dollars. This is the second reason which leads me to the conclusion that there is not a *primâ facie* case made out against this man which would justify his committal for trial if the offence was committed in Canada. I might say in passing that a very material part of Mr. Van Dusen's deposition in these words, "and received therefor of the money of the said bank the sum of two hundred and fifty dollars," is interlined in his deposition with pen and ink, the rest of the deposition being typewritten. That interlineation is not initialed either by Van Dusen or by the justice of the peace before whom it was taken and, I think, that even if the deposition was sufficient in other respects I would hardly be justified in giving effect to a deposition the most material part of which is interlined in this way.

For these reasons I order the discharge of Staggs under this warrant.

Prisoner discharged.

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(Decision No. 2.)

Alberta Supreme Court, Harvey, C.J., Stuart and Simmons, JJ. June 29, 1912.

1. CONTRACTS (§ I E 5—98)—STATUTE OF FRAUDS—TERMS NOT INCLUDED.

A writing shewn by parol not to include the entire contract and which does not purport to contain all the terms of agreement is insufficient as a memorandum under the Statute of Frauds to establish a sale of lands.

[*Rogers* v. *Hewer*, 1 D.L.R. 747, reversed in the result.]

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2. SPECIFIC PERFORMANCE (§ I E 1—30)—ABSENCE OF TERMS OF PAYMENT —OFFER TO PAY WHOLE.

Where the only written evidence of an agreement for the sale of lands is in the form of a receipt for part payment of the purchase price which does not purport to contain all the terms of the agreement made by the parties and does not state the time when the balance of the purchase price shall be payable, specific performance cannot be ordered if a plea of the Statute of Frauds is raised by the vendor, even though the purchaser offers to pay cash instead of deferring any payments.

[*Rogers* v. *Hewer*, 1 D.L.R. 747, reversed; *May* v. *Platt*, [1900] 1 Ch. 616, 622, applied.]

3. SPECIFIC PERFORMANCE (§ I E 1—30)—SALE OF LAND—TERMS OF SALE—PARTIALLY EVIDENCED BY WRITING.

Where the written evidence of a contract for the sale of lands is a mere receipt, and where the terms including interest on deferred payments are missing therefrom and were oral only, if the defendant is not obliged to seek any special equitable favour in defending himself against the plaintiff's claim for specific performance, the court, under its equitable jurisdiction, cannot impose terms upon him to prevent effect being given to his plea of the Statute of Frauds.

[*Rogers* v. *Hewer*, 1 D.L.R. 747, reversed; *Green* v. *Stevenson*, 5 O. W.R. 761, applied; *Martin* v. *Pycroft*, 2 DeG. M. & G. 785, 42 English Reports 1079, distinguished.]

4. EVIDENCE (§ VI G—551)—CONSIDERATION FOR SALE OF LAND—TERMS OMITTED FROM THE WRITING.

Where the document relied upon by the plaintiff to make out a contract for sale of lands under the Statute of Frauds does not purport to contain all of the terms of the bargain, it is open to the defendant to shew either by a cross-examination of the plaintiff or by other parol evidence, that the writing does not in fact contain all the terms of agreement and is therefore an insufficient memorandum under the statute.

Statement

THIS is an appeal by the defendants from a judgment of Mr. Justice Scott, *Rogers* v. *Hewer*, 1 D.L.R. 747, 19 W.L.R. 868, given in favour of the plaintiff in an action for specific performance of an agreement for the sale of land.

The appeal was allowed, SIMMONS, J., dissenting.

Jones, Pescod & Adams, for the plaintiff.

Aitken & Wright, for the defendants.

Harvey, C.J.

HARVEY, C.J.:—I concur with judgment of Stuart, J.

Stuart, J.

STUART, J.:—The defences raised were, first, that there was not a sufficient memorandum in writing to satisfy the Statute of Frauds, and secondly, that the agreement was made by an agent who was not duly authorized to make it.

In the view I take of the case, it will not be necessary to deal with the second ground of defence, because I am of opinion, with much respect, that the appeal must succeed upon the first ground.

There were two parcels of land involved and there was a separate agreement in regard to each parcel. The memorandum relied upon by the plaintiff with regard to the first parcel consisted of a receipt in the following form:—

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Calgary, 26th July, 1910.

Received of H. H. Rogers twenty-five dollars deposit on lots 37-40, block 27, South Calgary. Price $85 each. Terms, one-half cash, balance three and six months. Subject to confirmation by the owner.

Eureka Real Estate Co.
GEO. T. BROCKBANK.

A cheque passed at the same time which was endorsed by the signers of the receipt, and which, as the learned Judge held, I think correctly, removed any uncertainty as to the identity of the property, the subject matter of the agreement.

The memorandum relied upon with regard to the second parcel reads as follows:—

Calgary, 29th Aug., 1910.

Received of H. H. Rogers twenty-five dollars' deposit on lots 35-36, block 27, South Calgary. Price $85 each, subject to confirmation by the owner.

Eureka Real Estate Co.
GEO. T. BROCKBANK.

In his evidence at the trial the plaintiff stated upon cross-examination that at the time of making the agreement it was agreed that interest at 8 per cent. per annum should be paid on the deferred payments, and that in regard to the second parcel there should be some payments deferred, namely, for three and six months, that in each case the first payment of one-half cash was to be made when a proper agreement was drawn up, and that the three and six months' payments should each cover one-half of the balance. He indicated his willingness, however, to pay the whole amount with interest in each case, and it was admitted that the full amount had been tendered before action was brought.

The learned trial Judge held, following *Martin* v. *Pycroft*, 2 DeG.M. & G. 785, 42 English Reports 1079, that inasmuch as the plaintiff had agreed to fulfil the terms as to payment omitted from the two memoranda, he was entitled to succeed in his action.

In my opinion the present case is not distinguishable in principle from the case of *Green* v. *Stevenson*, 5 O.W.R. 761. The facts in that case are in all essentials practically the same as in the present case and, although the case is not binding upon us, I think the reasoning of the judgment delivered by Anglin, J., wherein he distinguishes *Martin* v. *Pycroft*, 2 DeG. M. & G. 785, 42 English Reports 1079, is sound, and is conclusive in favour of the present appellant. In that case Anglin, J., said:—

> The document before us is merely a receipt, which cannot be said, except *primâ facie* perhaps, to purport to contain all the terms of the contract to which it refers. Some of these terms it, no doubt, does set forth. But it is quite consistent with the receipt, serving all the purposes for which, as a receipt, it was designed, that there should be terms of the contract to which it relates not embodied in it. Evidence of such additional terms in no wise conflicts with the receipt,

and their omission from the receipt cannot be urged as a ground for rejecting parol testimony adduced to prove them. Reformation of a written instrument is not in question. Neither can it be said that the omission of the terms as to taxes and interest is shewn to be a mistake. Their inclusion in a mere receipt may well have been deemed quite unnecessary.

The learned Judge, again after referring to *Martin* v. *Pycroft*, 2 DeG.M. & G. 785, 42 English Reports 1079, and expressing some doubt as to its correctness, goes on to say:—

> Here, however, we are dealing with a mere receipt. The defendant is not obliged to seek any special favour from a Court of equity in defending himself against plaintiff's claim. The receipt, not purporting to contain the whole terms of the bargain, offers no legal impediment to the introduction of parol evidence to prove terms which it omits. The contract was, for aught that appears to the contrary, designedly left in part parol. Its special equitable jurisdiction not being invoked by defendant or requisite to his defence, the Court is not in a position to impose terms upon him. He defeats plaintiff's claim without any indulgence which it is peculiarly the province of a Court of equity to afford. By evidence admissible in any Court he shews a parol contract of which only some of the terms are evidenced as required by the Statute of Frauds. His defence is thus complete. By no known process can those terms not so evidenced be put in a writing signed by defendant. Nothing less can constitute an enforceable agreement so long as the Statute of Frauds prevails. There is no fraud, no mistake, even if that would suffice, to enable the Court to avoid the effect of the statute; nor part performance to satisfy it in the absence of a sufficient memorandum.

These considerations seem to me to apply here, and it is therefore evident that it is not necessary to challenge the decision in *Martin* v. *Pycroft*, 2 DeG.M. & G. 785. In that case the plaintiff had an agreement which on its face purported to be the full and complete agreement between the parties, which was quite enforceable, and which he could have enforced at law as it stood by simply objecting, as he had a right to object, to the admissibility of any evidence to vary or add to it. He did not object to the admission of such evidence, because he was quite willing to comply with the omitted term. In the exercise of its equitable jurisdiction the Court allowed proof of the omitted term, provided the defendant would submit to specific performance with that term added.

In the present case the defendant introduced evidence (by cross-examination of the plaintiff, it is true, but it was no less evidence adduced by the defendant than it would have been had it been reserved to be adduced in the defence) to shew that the receipt did not contain the complete bargain. As Anglin, J., points out, owing to the special nature of the document, which did not "purport to contain the whole terms of the bargain," the defendant was quite at liberty to do this. He was not pre-

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vented by any rule of law from doing so. This reduces the matter to the simple case of a memorandum not containing all the terms of agreement made by the parties, and leaves the statute as a bar to the action. See also judgment of Farwell, J., in *May* v. *Platt*, [1900] 1 Ch. 616, 622.

The appeal should be allowed with costs and judgment entered dismissing the plaintiff's action with costs.

Simmons, J. (dissenting).

SIMMONS, J. (dissenting):—The last named three defendants were owners in June, 1910, of the land in question in this action, consisting of certain lots in a plan of subdivision of Calgary No. 4479P, and on the 7th of June, 1910, Robert T. D. Aitken and John Tennant executed a power of attorney to I. B. Hewer, authorizing Hewer

> to make, sign and execute agreements of sale for lots 1-40 in block 27, etc., either singly or in groups, and do and perform all things necessary towards the carrying out of the powers herein contained, and we hereby confirm and ratify all things done hereunder by our said attorney.

On July 21st, 1910, Hewer verbally authorized the Eureka Real Estate Company to sell lots 5 to 40 at $85 per lot, Hewer to receive $80 net cash (see case, p. 56). This was made by Brockbank, who was a partner in the Eureka Real Estate Company, and acting for it in dealing with Hewer, and on the following Monday Hewer stated he would give a longer time, but no period was mentioned. The price was arranged at $85 per lot and the agents were to have $5 per lot commission. Hewer said to arrange the terms as to deferred payments and arrange the best terms possible. (See case, page 57.)

On the 27th or 28th of July Hewer and Brockbank had another interview, and Brockbank mentioned to Hewer certain reports Brockbank had heard to the effect that there was trouble about the title. Brockbank says Hewer opened the safe and shewed him the title, saying, "I can't tell you any more and won't tell you any more; if you go much further into the matter there will likely be trouble." Brockbank then asked Hewer to sign an exclusive listing in order to protect the Eureka Real Estate Company, and Hewer called up Aiken on the telephone, and shortly after went out of the office.

Hewer subsequently returned and said he had been up to see Aitken and then gave Brockbank the authority in writing asked for by Brockbank, which is as follows:—

> Calgary, 28th July, 1910.
>
> To Eureka Real Estate Co., Calgary, Alberta.
>
> You are hereby authorized to sell the following described property at the price and terms stated below. I agree to pay you a commission of five dollars per lot out of the first payment made.
>
> Lots five to forty inclusive, block twenty-seven.

Sec..... Sec..... Tp..... Range.....
Mer..... Improvements.....Plan 4479 P.
South Calgary. Exclusive listing I. B. H.
Price $85 per lot. Terms cash or terms.
Signature: "I. B. HEWER."
Address 235 17th Ave. West.
Phone 1767.
Witness: "GEO. W. BROCKBANK."

The Eureka Real Estate Co. had already on July 26th sold lots 37, 38, 39 and 40 to plaintiff under the verbal listing which Hewer had given them, and the plaintiff gave them a cheque on account of deposit on same, as follows:—

Calgary, Alta., July 26, 1910.
No. 87. THE DOMINION BANK.
Pay to Eureka Real Estate Co. or order twenty-five dollars.
Paid July 28, 1910.
$25.00. "H. H. ROGERS."
Deposit on lots 37, 38, 39, 40, block 27, South Calgary.
On reverse side: "Eureka Real Estate Co. Per Geo. W. Brockbank."
The Bank of British North America, July 28, 1910, Calgary, Alta. 1st Teller.

And the Eureka Real Estate Co. gave the plaintiff the following receipt:—

Calgary, 26th July, 1910.
Received of H. H. Rogers twenty-five dollars deposit on lots 37-40, block 27, South Calgary. Price $85 each. Terms, one-half cash, balance three and six months. Subject to confirmation by owner.
$25.00. EUREKA REAL ESTATE CO.
"Geo. L. Brockbank."

About the first of December Hewer informed Brockbank that the owners were not going to deliver title. Brockbank says that in the period intervening Hewer used to come into the office every three or four days and ask what had been sold, and that "he knew what he had on deposit as well" and he raised no objection to these sales.

Hewer says (page 122) that he went into the office of the Eureka Real Estate Co. to list some real estate, the lands in question, and verbally listed with them this property, but does not remember very well the price or terms, but he thinks the terms were cash. He admits that he knew sales were made before he gave the written listing. Hewer says that after he gave the Real Estate Company the written listing he told Aitken, who made no objection to it, and Tennant had gone to Ontario and he did not tell Tennant till late in November, when the latter returned from Ontario, and Tennant then objected to the sales.

Brockbank says he had a conversation with Aitken just after he got the written listing, and told Aitken Hewer had given him a written listing, and Aitken raised no objection. He also saw him two or three weeks afterwards and received assurances

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from him as to the title, and also says that he saw Mr. Aitken in the latter's office about the end of August and told him of the Rogers sale and he made no objection.

Brockbank says that when Hewer announced that they were not going to deliver the property, Hewer said

> they had not received any money on account of it and that they were not going to pay out another thousand dollars in January and deliver title, as the property had gone up very much in value at that time.

Aside from the questions of law that are raised as to whether there was a contract sufficient to satisfy the Statute of Frauds and also as to whether there was an authority in the power of attorney for Hewer to sell through an agent, it is quite clear that the defendant's desire to repudiate in November and December was on account of the increase in the price.

The learned trial Judge has found that the receipts and cheques read together sufficiently describe the property, the parties and the price to satisfy the requirements of the statute. The defendants say if on the face these are sufficient to meet the requirements of the Statute of Frauds, the plaintiff cannot succeed because he admits that there were terms as to deferred payments and interest thereon which have not been specified in the writing, and the plaintiff is asking for specific performance of a written contract with a parol variation which he is not entitled to do.

The defendant Hewer had authority to make sales under the power of attorney from his co-defendants Tennant and Aitken, and to fix the terms of sale. The land in question consisted of lots forming part of a subdivision, and in authorizing the Eureka Real Estate Company to sell on terms fixed by him it does not seem that he exceeded the powers given to him in the power of attorney by his co-defendants. Advertising the property and bringing it to the attention of purchasers is a usual incident in making sales, and in giving the Eureka Real Estate Company an exclusive listing, and therefore an exclusive right to make sales, he conferred the business of getting purchasers to them alone, but he fixed the price and terms. Assuming that the cheques and receipts are a sufficient memoranda to satisfy the statute, there still remains the question of how far the defendants are bound by their agent the Eureka Real Estate Co.

The statute says (sec. 4) that writing and signature by the party to be charged or his agent are necessary to make a contract for the sale of land. The authority of the agent need not be in writing: *Sims* v. *Landray*, [1894] 2 Ch. 318.

Hewer admits that he knew there were sales made under the verbal listing when he gave the written listing (case, p. 124). He says that under this verbal listing the price, he thinks, was agreed on at $85 per lot, and the agent was to get a commission of $5 per lot.

It is true Hewer says (case, p. 126) that he was listing this property for his co-defendants at their approval. He does not suggest that he said anything to Brockbank as to approval of sales by his co-defendants Tennant and Aitken. He had a power of attorney from them authorizing him to make agreement for sale and do all things necessary for carrying out of same. He also admits he saw Mr. Aitken and told him the price at which he had listed and also says Aitken made no objection.

In view of Brockbank's statement, which the trial Judge believed, that Hewer knew of the sales made by the Eureka Real Estate Co., and the acceptance of moneys on account of the purchase price (case, page 72), I do not think that the discrepancies between the evidence of Brockbank and Aitken in regard to the interviews they had is very material, for the reason that Hewer had a power of attorney authorizing him to act for Tennant and Aitken, and he held himself out as having authority to make sales, and his acts in that regard are binding upon his associates. As to the second phase of the action, namely, whether the writings contained in the cheque and receipts are sufficient to fulfil the requirements of the statute, I agree with the findings of the trial Judge that they were.

The actual owners need not be named in the memorandum where the contract is made by their agent as such. In the present case the receipt says, "subject to confirmation by the owner." In *Rossiter* v. *Miller*, 3 A.C. 1124, 1138, it was held that a memorandum signed by the authorized agent, which referred to the owners as "the proprietors," was a sufficient description to satisfy the statute. The receipts and cheques in the present case then identified the parties sufficiently to satisfy the statute, gave the description of the property so clearly that there is no dispute in that regard, and it named the price.

The dictum of Lord Westbury, in *Chinnock* v. *The Marchioness of Ely*, 4 DeG.J. & S. 638, 645, quoted by the Lord Chancellor in *Rossiter* v. *Miller*, 3 A.C. 1124, seems to me very applicable: "I entirely accept the doctrine contended for by plaintiff's counsel, and for which the cases cited, of *Fowle* v. *Freeman*, 9 Ves. 931; *Kennedy* v. *Lee*, 3 Mer. 441, and *Thomas* v. *Dering*, 1 Keen 729, which establish the fact that if there had been a final agreement and the terms of it are evidenced in a manner to satisfy the Statute of Frauds, the agreement shall be binding although the parties may have declared that the writing is to serve only as instructions for a formal agreement, or although it may be an express term that a formal agreement shall be signed by the parties."

Having come to the conclusion that the memoranda sufficiently established a contract on their face, and that there was ratification by the defendant Hewer on his own behalf and on behalf of his co-defendants Tennant and Aitken, it seems to me that the

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rule of law so well established in *Martin* v. *Pycroft*, 2 DeG.M. & G. 785, must be applied. The defendant contends and the plaintiff confesses that a term of the agreement as to interest is not referred to in the memoranda.

The defendant says you can not have specific performance of a written contract with a parol variation. But they are confronted with a contract complete on its face without the parol variation, and have to obtain the equitable relief of the Court to the extent of admitting parol evidence affecting a written contract in order to establish their contention.

The Lord Justice Bruce observes in *Martin* v. *Pycroft*, 2 DeG. M. & G. 785:—

> The law prohibits generally, if not universally, the introduction of parol evidence to add to a written agreement, whether respecting land or not respecting land, or to vary it. How can a man say that a written contract is bad at law for omitting a term verbally agreed upon—we exclude cases of fraud. It happens not very infrequently that a plaintiff obtains decree for specific performance, the specific performance of which could not be compelled against them as defendants. And an opinion is that when persons sign a written agreement upon a subject obnoxious or not obnoxious to the statute that has been so particularly referred to, and there has been no circumvention, no fraud nor (in the sense in which the term "mistake" must be considered as used for this purpose) mistake, the written agreement binds at law and in equity, according to its terms, although verbally a provision was agreed to which has not been inserted in the document, subject to this, that either of the parties sued in equity upon it may perhaps be entitled in general to ask the Court to be neutral unless the plaintiff will consent to the performance of the omitted term.

Williams, on Vendor and Purchaser, vol. 11, page 701, draws the following distinction:—

> If the parties really assented to such a contract and had also a common intention of reducing or giving effect to all the terms of that contract to or by writing, and this intention were frustrated owing to the omission or mis-statement by mistake of some material term of the contract, it would be giving countenance to fraud to allow the defendant to repel proof of the mistake under cover of the statute. (But) if, however, the writing purport to contain the contract, but omit some material part thereof, *and there was no* common intention to put the whole contract into writing, the document can not be rectified.

Mr. Justice Anglin draws this distinction in *Green* v. *Stevenson*, 5 O.W.R. 766, and refused specific performance on the ground that the case came under the second head, namely, that the receipt in question purported on the face of it not to contain the whole terms of the bargain. In the case under consideration it seems to me impossible to get away from the conclusion that the documents fully support the inference that on their face they

contain all the terms they contain of the agreement, and it therefore comes under the first class of cases referred to by Williams on Vendor and Purchaser, and the Court may grant specific performance with the added term if the plaintiff is willing to take specific performance on these terms.

See also Fry on Specific Performance, 4th ed., pages 352, 353.

I would therefore dismiss this appeal.

Appeal allowed, SIMMONS, J., *dissenting*.

DUNN v. GIBSON.

Ontario Court of Appeal, Garrow, Maclaren, Meredith, and Magee, JJ.A., and Lennox, J. November 19, 1912.

1. EVIDENCE (§ XII A—920)—SUFFICIENCY—CORROBORATION — RAPE — CIVIL ACTION—RULES OF CRIMINAL EVIDENCE NOT WHOLLY APPLICABLE.

The rules of evidence applicable to a criminal prosecution requiring corroboration of the testimony of the complaining witness as to the fact of rape and requiring disclosure by her of the alleged act, do not apply to a civil action for damages for assaulting and ravishing the plaintiff without her consent.

2. DAMAGES (§ III E—142*a*)—SEDUCTION—UNBORN CHILD—RAPE—MEASURE OF DAMAGES.

Where, in an action to recover damages for assaulting and ravishing plaintiff without her consent, the plaintiff's counsel, without objection, was allowed to urge upon the jury large damages on account of the expense plaintiff would be put to for the bringing up of a then unborn infant, while as a matter of fact the infant when born lived only a day, a new trial will not be granted, since the jury must have had in mind the possible contingency of an early death.

3. DAMAGES (§ III E—142*a*)—SEDUCTION, MEASURE OF DAMAGES FOR—CIVIL ACTION FOR RAPE.

A new trial will not be granted where the trial jury awarded $5,000 damages to the plaintiff in an action for damages for assaulting and ravishing plaintiff without her consent, on the ground of excessive damages, where by reason of the outrage plaintiff became pregnant.

Statement

APPEAL by the defendant from the judgment of a Divisional Court, dismissing an appeal from SUTHERLAND, J., in an action tried before him with a jury, for damages for assaulting and ravishing the plaintiff without her consent. The jury awarded $5,000 damages, and the verdict was affirmed by the Divisional Court.

The appeal was dismissed.

E. F. B. Johnston, K.C., for the defendant.

W. A. Logie, for the plaintiff.

Maclaren, J.A.

MACLAREN, J.A.:—The plaintiff a young woman of 22 years of age was a servant in the house of the defendant's mother, a grand-daughter being the third member of the family. The defendant, who is about forty years of age and unmarried, lived

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with a relative near by. He was in the habit of going to his mother's frequently, and bringing in water and doing other chores. From an accident in childhood his mentality was arrested, and he could not be taught, but he developed physically. He was examined for discovery, and as a witness sometimes he answered intelligently and at other times not, but nearly always in monosyllables. He denied the charge. Plaintiff said the offence was committed in the morning when he and she were alone in the house. She said she screamed but was not heard. She did not tell any person about it until nearly two months after the alleged outrage when she went to the hospital and her pregnancy was discovered.

Counsel for the appellant argued that the action should fail because her testimony required corroboration, and because there was no disclosure by her for nearly two months. This is not a criminal case, and the rules of evidence in the Criminal Code on these points do not apply, and these were questions for the jury.

It was also claimed for the appellant that the trial Judge improperly allowed the plaintiff's counsel to urge upon the jury large damages on account of the expense she would be put to for the bringing up of the then unborn infant, whereas in the result it lived only one day. The defendant's counsel did not raise any objection at the trial, and there is nothing to shew that any improper appeal was made. The possible early death of the child was a contingency that would be present to the minds of the jury, and the actual result could be no ground for a new trial.

A new trial was also claimed on the ground of excessive damages. The damages are much larger than are ordinarily allowed in such cases; but this is a matter peculiarly for the jury. The offence was a very grievous one, if the evidence of the plaintiff was true, and the jury believed her. The Divisional Court were evidently not shocked by the amount, and I do not think it is a case in which we can properly interfere.

In my opinion the appeal should be dismissed.

Garrow, J.A.
Magee, J.A.
Lennox, J.

GARROW, J.A., MAGEE, J.A., and LENNOX, J., concurred.

Meredith, J.A.

MEREDITH, J.A., concurred in the result.

Appeal dismissed.

CITY OF TORONTO v. WILLIAMS.

(Decision No. 2.)

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Ontario Divisional Court, Boyd, C., Latchford and Middleton, JJ. September 28, 1912.

1. BUILDINGS (§ I A—9*a*)—STATUTE PROHIBITING ERECTION OF APARTMENT HOUSES—MEANING OF TERM "LOCATION."

The mere getting of a permit to erect an apartment house without doing work in pursuance thereof does not amount to a "location" of the house within the meaning of the statute 2 Geo. V. (Ont.) ch. 40, sec. 10, giving municipalities having a population of not less than 100,000 the right "to prohibit, regulate and control the location on certain streets to be named in a by-law of apartment or tenement houses and garages to be used for hire or gain."

[*City of Toronto* v. *Williams* (No. 1), 5 D.L.R. 659, reversed.]

2. BUILDINGS (§ I A—7)—ESTOPPEL OF MUNICIPALITY TO REVOKE PERMIT—PREPARATION OF PLANS NOT A LOCATION OF BUILDING.

Where a statute gives a municipality the right to prohibit the location of apartment houses on certain streets and a by-law is passed pursuant to this statute and revoking former permits, the municipality is not estopped where the only acts that were done under the former permit and prior to the passage of the by-law were the preparation of the plans and specifications from enforcing the new by-law as to the property covered by such permit.

[*City of Toronto* v. *Wheeler*, 4 D.L.R. 352, 3 O.W.N. 1424, distinguished.]

3. BUILDINGS (§ I A—7)—REVOCATION OF BUILDING PERMIT.

A permit by a municipality to build is merely a license revocable by the city where nothing has been done by the builder after the granting of the permit, to change the situation, and no outlay has been incurred by him under it.

4. MUNICIPAL CORPORATIONS (§ II C 3—66)—ABSENCE OF JURISDICTION—REVOCATION OF A PERMIT ALREADY GIVEN—RETROACTIVE EFFECT OF BY-LAW—2 GEO. V. (ONT.) CH. 40, SEC. 10.

The City of Toronto has power under section 6 of its building by-law, No. 4861, to revoke a building permit already given, where the erection of the building in question would be an infringement of such by-law passed under the authority of clause (*c*) of section 541*a* of the Ontario Municipal Act, 1903, as enacted by 2 Geo. V. (Ont.) ch. 40, sec. 10, if the permit previously granted has not been followed up by acts as constituting a "location" of the building in question, *ex. gr.* the actual construction, in whole or in part, of the building for which the permit was granted.

[*City of Toronto* v. *Williams* (No. 1), 5 D.L.R. 659, reversed.]

Statement

APPEAL by the plaintiffs, the corporation of the city of Toronto, from the judgment of Britton, J., *City of Toronto* v. *Williams*, 5 D.L.R. 659, refusing an injunction restraining the defendant from erecting an apartment house upon her lot on Brunswick avenue.

The appeal was allowed and an injunction granted.

Argument

Irving S. Fairty, for the plaintiffs. There was no "location" of the proposed apartment house. The first work done, the excavation and bringing of stone for the bungalow cannot be considered in reference to the apartment house: *Travis* v. *Coates* 5 D.L.R. 807, 27 O.L.R. 63. Therefore, the erection of such a

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structure can be prohibited under 2 Geo. V. ch. 40, sec. 10 "Location" in the statute is used in its ordinary sense, and means "a placing." See Murray's Dictionary and Latham's Johnson's Dictionary, *sub voce*. The intention of both the statute and the by-law is to forbid the placing of an apartment house on the site. The permit to build was only a license, which the plaintiffs had the right to withdraw.

G. C. Campbell, for the defendant. The granting of the permit amounts to a "location," and all prior work done on the property is referable to this. "Location" means only the choice of a site, the ascertaining of the place where the structure is to be erected. See the Century Dictionary, *sub voce*. It would be unfair to the defendant to stop the work which she is doing on the land on the strength of the permit given her by the plaintiffs: *City of Toronto* v. *Wheeler*, 4 D.L.R. 352, 3 O.W.N. 1424.

Fairty in reply. The by-law is a declaration of public policy.

Boyd, C.

September 28. BOYD, C.:—This lot was purchased by the defendant in May, 1911, for $10,000, at the rate of $100 a foot. Land in the neighbourhood is now held at $200 per foot.

On the 1st October, 1911, a permit was obtained for building on it a two-storey and attic dwelling (a bungalow); and, for the purpose of that project, a cellar was dug, 26 by 60 feet and 4 feet deep, and a small load of stone hauled there in the latter part of that month.

On the 31st January, 1912, a permit was obtained to erect an apartment house on the same lot (which would supersede the other permit); but no work was done in pursuance of this scheme till the 18th July, 1912, when a new excavation was begun on the north side of the lot, and more or less work done.

Before this last work on the lot, the defendant knew of a by-law being passed by the city on the 13th May, 1912, forbidding the erection of apartment houses on residential streets, which included this locality, and that former permits would cease and become invalid; and there was a letter received by him from the City Architect notifying him that the permit was withdrawn. Prior to this, the only work done on the place was referable to the abandoned bungalow scheme.

This by-law was pursuant to the powers given to cities by the statute 2 Geo. V. ch. 40, sec. 10 (assented to 16th April, 1912); and it follows the words of the Act. The prohibition is against "the location" on the street named of apartment houses.

The argument before us was, that the location of this apartment house (coupled with the defendant's intention to build thereon) had attached or had been completed when the permit was obtained, and that all the prior and subsequent work done on the lot was referable thereto, and, having been so acted upon, it was inequitable and incompetent for the city to recede or to revoke the location.

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But it is to strain the meaning of the word "location" to give it this scope. No doubt, the word is used with a technical or conventional import when used in connection with lines of railway and other undertakings, as pointed out by Strong, C.J., in *The Queen* v. *Farwell* (1887), 14 S.C.R. 392, 426. But there is nothing in the statute to interfere with its etymological and ordinary meaning: *City of Toronto* v. *Ontario and Quebec R.W. Co.* (1892), 22 O.R. 344.

The word "location" is used in the statute in its primary and proper import, as given in Latham's Johnson's Dictionary (*sub voce*), namely: "Situation with respect to place; act of placing; state of being placed." Read the clause with this substitution of words: "Prohibit the situation with respect to place of an apartment house on the street." "Prohibit the act of placing a house on the street." "Prohibit the site of house being placed on the street." Any of these substitutes brings out the meaning, which is forbidding the *locus* being used for the purpose of putting an apartment house thereon.

The context and intent of the statute and by-law is to forbid the placing of an apartment house on that site. The preparation of the plans and specifications was no more than a preliminary to the application for a permit; and the permit, when granted, was merely to erect the proposed building, *i.e.*, to locate it on the site. No outlay has been incurred since the granting of this permit up to the date of its revocation, and no case of estoppel can be made out. The permit to build may be regarded as a license to build; but that the owner might withdraw from, as might also the city, in case the situation was not changed, in pursuance of the license. No such change is proved here; the only change appears to be a steady increase in the value of the land.

We cannot mistake the policy of the Legislature; the plaintiffs, as a public body, are called on to enforce it in proper residential neighbourhoods. While it may bear hardly on the individual owner, who is hampered in the free enjoyment of his property, still it is one of the effects of advancing civic life and amenity that, for the sake of preponderating advantages to the whole locality, one proprietor may have to suffer deprivation.

This is said to be a test case, involving a score of other permits; and, this being so, and the point being without authority, it seems fitting, while we reverse the decision in appeal, to do so without costs.

The injunction is continued indefinitely while the prohibition continues.

LATCHFORD, J.:—"Location" is a word which in our day is used with many meanings. I think, however, that in the statute and by-law under consideration it is used only in its primary and etymological sense of "the act of placing." The

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mere design or intention which the defendant had of erecting an apartment house is not what is prohibited and penalised, but the actual placing of such a building. The by-law was enacted and in force before the defendant had done anything whatever in furtherance of her intention beyond obtaining the permit. What she had done previously was *alio intuitu;* and was, moreover, not the "location," in the sense in which the word is used in the by-law, of an apartment house upon his property.

I agree that the appeal should be allowed without costs.

Middleton, J.

MIDDLETON, J.:—In *City of Toronto* v. *Wheeler*, 3 O.W.N. 1424, matters had so far advanced that when the by-law was passed the building had been begun—the defendant had given "to airy nothing a local habitation" as well as a "name."

I fully appreciate that any prohibition of the owner's common law right to use his land as he sees fit, so long as no nuisance is committed, may in individual cases be regarded as a hardship; but this case must be determined upon the construction of the statute and the by-law, which is in the words of the statute.

It must not be forgotten that there is another side to the question of hardship. The statute is remedial, and is for the protection of those who, in residential districts, have built houses and laid out gardens which would be much depreciated by the erection of large and often unsightly buildings completely overshadowing them.

Even if it be admitted that the word "location" might mean something less than an actual placing upon the ground, and that it might be used to indicate the choice of a site for a projected building, it is clear that this is not what the Legislature meant to prohibit. That which is prohibited and rendered penal is not the mental process, the intention to use the land for the prohibited purpose, but the actual use of the land for that purpose. The extent of the prohibition may be gauged by the liability to the penalty.

The permit cannot be regarded as an estoppel, as at the time it was issued the city officials had no option. The statute, not then passed, could not be deprived of its effect by their action.

For this reason, the appeal must be allowed. It is not a case for costs.

Appeal allowed.

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Ontario Court of Appeal, Moss, C.J.O., Garrow, Maclaren, and Magee, JJ.A., and Lennox, J. ad hoc. September 27, 1912.

1. EMINENT DOMAIN (§ III C 1—143)—COMPENSATION FOR LAND TAKEN FOR WIDENING OF STREET—PROPER ELEMENTS OF DAMAGE ON AWARD.

"Due compensation" under sec. 437 of the Consolidated Municipal Act (Ont.) 1903, providing for "due compensation" being made to owners of land taken for the purpose of widening streets, simply means a full indemnity in respect of all pecuniary loss suffered, and the only subjects of such pecuniary loss are (1) the lands actually taken, and (2) the injury to the lensing or selling value of what is left.

[*Wadham* v. *North Eastern R. Co.* (1884-5), 14 Q.B.D. 747, 16 Q.B.D. 227; *The Queen* v. *Moss* (1895), 5 Ex. C.R. (Can.) 30, specially referred to.]

2. EMINENT DOMAIN (§ III C 1—143)—DUE COMPENSATION FOR WIDENING STREET—PROSPECTIVE INJURY FOR USE OF STREET AS RAILWAY.

Where a city corporation under a by-law took for the purpose of widening a street ten feet from the front of a building lot, and the owner of the land has been sufficiently compensated by an award of arbitrators for the value of the land taken and for the consequent injury to the rest of the land by reason of the bringing of the street line nearer to the house, the fact that a street railway is to be placed on the widened street is not an element of damage to be considered, under sec. 437 of the Consolidated Municipal Act, 1903, providing for "due compensation" in a case of that sort.

3. EMINENT DOMAIN (§ III C 1—143)—COMPENSATION FOR WIDENING STREET —ASSESSMENT OF CLAIMANT FOR IMPROVEMENT NOT AN ELEMENT OF DAMAGE.

Under sec. 437 of the Consolidated Municipal Act, 1903, providing for "due compensation" being made on the taking of land for the purpose of widening streets, where an award is made by arbitrators for land taken from a building lot upon which there was a dwelling, for the purpose of widening the street, compensating the owner for the land taken and for the consequent injury to the rest of the land by reason of the bringing of the street nearer to the house, the fact that the claimant would be assessed for a portion of the cost of widening the street under a local improvement plan by which the city and the adjacent owners share the cost, does not constitute an element of damage to be considered by the arbitrators.

[*Re Pryce and City of Toronto*, 20 A.R. 16, distinguished.]

4. EMINENT DOMAIN (§ III C 1—143) — COMPENSATION FOR WIDENING STREET — DEPRECIATION CAUSED BY CHANGE IN GENERAL CHARACTER OF STREET.

Where a city corporation under a by-law took for the purpose of widening a street ten feet from the front of a building lot and the owner of the land has been sufficiently compensated by an award of arbitrators for the value of the land taken and for the consequent injury to the rest of the land by reason of the bringing of the street line nearer to the house, an item for injuries for "depreciation caused by the change of the general character of the street" need not be considered by the arbitrators, under sec. 437 of the Consolidated Municipal Act, 1903, providing for "due compensation" in cases of that sort.

Statement

APPEAL by the Corporation of the City of Toronto, contestants, and cross-appeal by Mary Pringle Macdonald, claimant, from an award of the Official Arbitrator for the City of Toronto, in an arbitration, under the provisions of the Municipal Act, to

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fix the compensation to be paid by the contestants to the claimant for the taking, under a city by-law, of certain lands required for the widening of St. Clair avenue.

Statement

The award gave to the claimant three sums, namely: $587.40, the value of the land taken; $750, for injuriously affecting the remainder of her land (a building lot upon which there was a dwelling-house), by reason of the loss of a tree on the land taken and the bringing of the street line ten feet nearer to the house; and $250, for injurious affection, for "depreciation caused by the change of the general character of the street."

Only the last item was appealed against.

The cross-appeal was confined to two matters: (1) the dismissal by the arbitrator of a claim for a further allowance because of a supposed intention on the part of the city authorities to place upon St. Clair avenue a street railway; and (2) an omission to entertain as an element of compensation or give effect to the circumstance that the city corporation were proceeding under the local improvement clauses of the Municipal Act, by virtue of which the claimant would be assessed for a portion of the cost of the street widening in question.

May 3 and 6. The appeal and cross-appeal were heard by MOSS, C.J.O., GARROW, MACLAREN, and MAGEE, JJ.A., and LENNOX, J.

Argument

H. L. Drayton, K.C., and *C. M. Colquhoun*, for the city corporation, argued that no evidence had been adduced before the Official Arbitrator that any depreciation would be caused to the property of the respondent by the widening of St. Clair avenue; and that, even if such depreciation should arise, the corporation would not be liable to the claimant for damages, not arising out of the execution of the work, but by reason of the subsequent use of the street. They referred to the following authorities: *Caledonian R.W. Co.* v. *Ogilvy* (1856), 2 Macq. H.L. 229; *City of Glasgow Union R.W. Co.* v. *Hunter* (1870), L.R. 2 H.L. Sc. 78; *Horton* v. *Colwyn Bay and Colwyn Urban District Council*, [1908] 1 K.B. 327, *per* Lord Alverstone, C.J., at p. 332 *et seq.*; *Canadian Pacific R.W. Co.* v. *Gordon* (1908), 8 Can. Ry. Cas. 53; *Ontario and Quebec R.W. Co.* v. *Vallières* (1909), 11 Can. Ry. Cas. 1; *Rex* v. *Mountford*, [1906] 2 K.B. 814; *Powell* v. *Toronto Hamilton and Buffalo R.W. Co.* (1898), 25 A.R. 209; *In re Devlin and Hamilton and Lake Erie R.W. Co.* (1876), 40 U.C.R. 160.

J. S. Fullerton, K.C., and *H. C. Macdonald*, for the claimant, argued that the taking of the land by the corporation was for purposes not called for by the claimant, and was for the general benefit of the citizens of Toronto, other than the residents on St. Clair avenue, to whom it does not appear that any benefit is to accrue from the proposed work, the result of which is to bring

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the claimant's premises into greater proximity to the highway, and thereby to cause her to be submitted to greater noise, dust, and disturbance, for which the sum awarded by the learned arbitrator is but small compensation. They relied upon the cases cited on behalf of the contestants, and also upon the following authorities: *Duke of Buccleuch* v. *Metropolitan Board of Works* (1871-2), L.R. 5 H.L. 418, at pp. 442, 444-446; *In re Stockport, etc., R.W. Co.* (1864), 33 L.J.N.S. Q.B. 251; *Cowper Essex* v. *Local Board for Acton* (1889), 14 App. Cas. 153; *Re Pryce and City of Toronto* (1889-92), 16 O.R. 726, 20 A.R. 16; *London and North Western R.W. Co.* v. *Reddaway* (1907), 23 Times L.R. 279; *City of Norfolk* v. *Chamberlain* (1892), 89 Va. 196, at pp. 236, 244, 249.

GARROW, J.A.

September 27. GARROW, J.A. (after setting out the facts as above):—It is convenient, I think, to dispose of the cross-appeal first. And as to both my opinion is, that the learned arbitrator was right.

As to the first, there is no evidence that a street railway is immediately about to be placed upon that portion of St. Clair avenue adjoining the claimant's lands, and certainly none that it is to be placed upon the lands taken from her under the by-law. The ten feet strip taken from her is to be added to the now existing highway. The whole, including the ten feet taken on the other side of the street, will be highway under the control of the civic authorities, and may, I think, be used as any other highway may, as in fact the narrower St. Clair avenue might have been, without complaint from any of the adjoining proprietors. So that, in the end, even if it is decided to place a street railway upon the widened street, that alone can give the complainant no right to a special allowance because of that. What does she get the second item of the award for? She has in the first been paid for the land actually taken, and the second is given solely because of the extension of the highway. Must the city, in addition, pay because it intends to use or uses the widened street for any lawful purpose for which in the public interest it might have used the narrower avenue? See *Rex* v. *Mountford*, [1906] 2 K.B. 814.

As to the other item, the widening of the street is proposed to be done under the local improvement plan, the city paying a part and the proprietors a part; and, if one proprietor may be allowed what the claimant asks, all should be allowed the same, with the result that it would not be a local improvement at all, but a charge upon the general funds of the city. It is one thing to say that, if the claimant is being charged with a benefit, she may offset the amount of such benefit with the amount of the assessment which she is compelled to pay, which was the case of *Re Pryce and City of Toronto*, 20 A.R. 16, to which we were referred, and a totally different thing to say that the tax

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thus imposed is the proper subject of all allowances as part of the "due compensation" for which the statute provides.

I would, for these reasons, dismiss the cross-appeal as to both items.

And I would allow the appeal of the city. I am wholly unable to see any fact or principle upon which the third item can rest. Section 437 of the Consolidated Municipal Act, 1903, provides for "due compensation" being made to persons in the position of the claimant. And "due compensation" simply means a full indemnity in respect of all pecuniary loss by reason of the exercise of the powers of the corporation. And the only subjects of such pecuniary loss are: (1) the lands actually taken; and (2) the injury to the leasing or selling value of what is left. See, among the numerous cases on the subject, *Wadham* v. *North Eastern R.W. Co.* (1884-5), 14 Q.B.D. 747, 16 Q.B.D. 227, a case of special value, owing to the premises being a hotel; *Duke of Buccleuch* v. *Metropolitan Board of Works*, L.R. 5 H.L. 418, a residence; *In re Stockport, etc., R.W. Co.*, 33 L.J.N.S. Q.B. 251, a mill; approved in *Cowper Essex* v. *Local Board for Acton*, 14 App. Cas. 153; and *The Queen* v. *Moss* (1895), 5 Ex. C.R. (Can.) 30, at p. 36. The injury must be to the land itself, and must be such as affects its value; otherwise no claim can be made—nothing is allowable upon merely sentimental or asthetic grounds or any other ground which does not affect value. Now, assuming, as I do from the course of the evidence and the wording of the award, that the arbitrator intended in the second item to include all that tends to depreciate the value of the parcel retained by the claimant, what is there left capable of being reduced to a money basis? Nothing that I can see. The claimant may not like a wide street, or a wide pavement, or she may like a shady street or a street with boulevards or without them; but all these things, which apparently from his judgment are the basis of the allowance in question, have really nothing to do with the matter, in my opinion. Nothing has been altered so far by the city. The wide pavement and the other matters are all in the future, and all seem to involve the same principle as the street railway question. If it was right to disallow a claim in respect of that very palpable, even if ill-founded, objection, it was, I think, with deference, quite illogical to allow for what in the future the city may do in changing the general character of the street. As I have before said, the widened part for which the city pays becomes a part of the highway for all purposes. And no one can lawfully complain of the changing of a sidewalk or the widening of a pavement or the removal of a tree from the highway so under civic control.

I would, therefore, allow the appeal of the city with costs, and dismiss the cross-appeal with costs.

MACLAREN, J.A.:—Mrs. Macdonald is the owner of a lot on the north side of the avenue between Yonge street and Avenue road, and the by-law in question moves the northern line ten feet further to the north, and there is a like widening on the south side, making that portion of the avenue 86 feet wide instead of 66. Three-fourths of the expense of the improvement is to be borne by the city generally, and one-fourth raised by local assessment.

By her notice of arbitration, the claimant demanded compensation for the land taken and for the lands and property injuriously affected by the taking. At the close of the evidence, she was allowed to amend her notice so as to include a claim for injuriously affecting her remaining lands by the taking and user thereof and the proposed construction of a street railway along and upon the said highway.

The arbitrator awarded her $587.40 for the land taken, $750 for injuriously affecting by reason of the loss of a shade tree which was on the land taken and the bringing of the street line ten feet nearer the front of her house; and $250 for depreciation caused by the change of the general character of the street—in all, $1,587.40.

It is against this last item of $250 that the city appeals.

It appears from the award that this was allowed under the added claim, nothing being allowed for the proposed construction of a street railway, the $250 being "for depreciation caused by the change of the general character of the street." The learned arbitrator was of opinion that, if a residential street like this was widened, and the widening converted into a green grass boulevard, the value of the property along the street would be decidedly increased; but, if the widening was given up to a dusty expanse of roadway, it would have a depreciatory effect.

I am of the opinion that all the damages which could be properly awarded in this case are included in the two first items, and that these cover the whole ground for which compensation may be given under the provisions of sec. 437 of the Municipal Act. The claimant should receive compensation for any damage necessarily resulting from the taking of her land and the widening of the street, beyond the advantage, if any, which may accrue to her from such widening. In arriving at such result in a case like the present, I do not think one can estimate it as, for instance, in the case of a farm where the land is worth so much per acre, and one can begin by reckoning the value of the land taken at so much per acre, and then go on to estimate the damage done to the remainder of the farm from its being injuriously affected. Where, as here, the front of a city lot is taken for the widening of a street, the intrinsic value of the land taken for the if it can properly be said to have an intrinsic value, may be an unimportant or even an insignificant element. There are city lots

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that would be just as valuable if they were not so deep, and where the widening of the street might increase instead of diminishing their value. A proper result would be arrived at by taking the value of the whole property immediately before the widening was determined upon, and its value immediately after, with a proper allowance for the forcible taking, and the difference should represent the proper amount of the award, due allowance being made for appreciation or depreciation from any other cause. Although it was not arrived at by this simple method in the present case, yet I am of opinion that substantially the same result was reached by the arbitrator in the first two items, and the whole ground covered; and that, after he has exhausted the elements on which these are based, he has no right to go on and award an additional sum for the alleged changing of the character of the street. The city authorities might widen the paved part of the street without a widening of the street, and the owners would not be entitled to compensation on that account; and they may increase or reduce from time to time the width of such *via trita*. There is no certainty that the plans which were before the arbitrators represent what will be the actual width of the paved portion, and I do not think this should form the basis of a third element of damage in the present arbitration.

In my opinion, the appeal as to this third item should be allowed.

The claimant has cross-appealed on three grounds. The first is, that interest should have been allowed from the date of the by-law on the full amount of the award and not merely on the first item, as was done. This was conceded by counsel for the city, so it is not now in issue.

She also claims that she should have relief over against the city for what she may have to pay towards the twenty-five per cent. of the total expense of the improvements to be levied by local assessment from those specially benefited. This is rather a novel claim, and I can find no shadow of support for it in the case of *Re Pryce and City of Toronto*, 16 O.R. 726, cited in support. It is quite startling to think that a by-law passed in accordance with the Municipal Act could be got rid of in this way and practically nullified by a side-wind. In other words, that the twenty-five per cent. assessed on the properties specially benefited can be unloaded upon the city generally by a kind of jugglery. In my opinion, the arbitrator was quite right in disallowing this claim.

The third ground of cross-appeal is, that the claimant should have been allowed damages, her property being injuriously affected by the construction and operation of a municipal street railway on St. Clair avenue. In my opinion, this claim was

properly disallowed. The question of the railway is quite separate and distinct from the widening of the street, and no land of the claimant was taken for the railway, nor does the question of the railway in any way arise in connection with the present arbitration. The cross-appeal on this point should be dismissed.

MOSS, C.J.O., MAGEE, J.A., and LENNOX, J., concurred.

Contestants' appeal allowed, and claimant's cross-appeal dismissed.

Re BAYNES CARRIAGE CO.

(Decision No. 2.)

Ontario High Court, Riddell, J., in Chambers. October 15, 1912.

1. JUDGMENT (§ II A—60)—RES JUDICATA—WAIVER OF PRELIMINARY OBJECTION—PRIOR DECISION.

A prior judgment dismissing a motion on behalf of the company to set aside an appointment to examine certain company directors in support of an application for a winding-up order and holding such witnesses to be compellable witnesses for examination under sec. 135 of the Winding-up Act, R.S.C. 1906, ch. 144, supplemented by Con. Rules 1897 (Ont.) 489, 491, 492, is conclusive as against the company so as to bar or waive any preliminary objection to defects of form in the petition raised by their subsequent motion to dismiss, if such defects were of such a character as might have been given effect to had they been raised on the prior motion and if the prior judgment implies the validity of the form of petition.

[*Re Baynes Carriage Co.* (No. 1), 7 D.L.R. 257, referred to.]

2. CORPORATIONS AND COMPANIES (§ VI A—313)—APPLICATION FOR WINDING-UP—COMPELLING PRODUCTION OF BOOKS AND DOCUMENTS IN SUPPORT.

The petitioners for a winding-up order are not entitled to a preliminary order that certain of the company's officers should produce on their examination, not yet entered upon, as compulsory witnesses in support of the petition, the books of the company and the auditor's reports, as the extent to which the petitioner may be entitled to use such books and documents cannot be decided until the course of the cross-examination is known.

[*Re Emma Silver Mining Co.*, L.R. 10 Ch. 194, referred to.]

3. DISCOVERY AND INSPECTION (§ I—2)—COMPELLING PRODUCTION OF BOOKS AND PAPERS BY PARTY TO CAUSE.

Under the Con. Rules 1897 (Ont.), it is the duty of a person under examination for discovery to produce (if called upon) all books, papers, and documents which he would be bound to produce at the trial. (Dictum *per* Riddell, J.)

[Con. Rules 448 *et seq.* 490, 491, 492, referred to.]

4. WITNESSES (§ II B—36)—PRODUCTION OF BOOKS ON CROSS-EXAMINATION.

Where a party to a proceeding puts forward a witness who makes certain statements under oath, and where it is desired to shew by his own books or those of the person who puts him forward that his statements are not true, the production of such books may be compelled so as to test his accuracy; and when the witness is under cross-examination, the books may be used for that purpose, and to prove that his evidence is not to be relied upon. (Dictum *per* Riddell, J.)

[*Alexander* v. *Irondale, Bancroft and Ottawa R. Co.* (1898), 18 P.R. 20; *Russell* v. *Macdonald* (1888), 12 P.R. 458, referred to.]

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Statement

MOTION on behalf of the petitioners in a winding-up proceeding for an order that the vice-president and secretary of the company should, upon their examination as witnesses on the pending motion to wind up the company, produce the books of the company and the statements, etc., of the auditors of the company, and "all other documents and papers in writing of the said company which may be called for on their examination, and that the said company do produce such books, papers, and documents;" and motion by the company to dismiss the petition.

The petition was enlarged *sine die*.

Grayson Smith, for the petitioners.

H. A. Burbidge, for the witnesses and the company.

Riddell, J.

RIDDELL, J.:—Upon the argument, much was said by counsel opposing the motion as to the want of good faith on the part of the petitioners or one of them, the fatal defects in the petition, etc., etc. But with all that I have nothing whatever to do. The Chancellor has decided that these witnesses may be examined in this proceeding (*Re Baynes Carriage Co.*, 7 D.L.R. 257, 27 O.L.R. 144); and, so long as that order stands, it must be held that the examinations are proper. See also *Re McLean Stinson and Brodie Limited* (1911), 2 O.W.N. 435.

Whatever may be the rule in England, our Con. Rules make it the duty of a person under examination to produce (if called upon) all books, papers, and documents which he would be bound to produce at the trial: Con. Rules 448 *et seq.*, 490, 491, 492. These Rules have been in existence, in substance, for years.

I do not think that the order can be made as asked.

Alexander v. *Irondale Bancroft and Ottawa R.W. Co.* (1898), 18 P.R. 20, relied upon by the applicants, is against them. The Divisional Court there reversed a judgment of Mr. Justice Rose, first in form, saying that the subpœna should not be set aside save in exceptional cases, and second on the merits, because they "differed from Rose, J., in their view of the facts disclosed by the affidavits, from which they drew the inference that the railway company had kept no books of their own, but the accounts of the company were kept in the private books of Pusey," the president, then under examination. This does not at all decide that the president could be compelled to produce the books of the company, but rather the reverse is indicated.

Nor does *Russell* v. *Macdonald* (1888), 12 P.R. 458, advance matters. It simply follows the principle of *In re Emma Silver Mining Co.* (1875), L.R. 10 Ch. 194.

In the *Emma* mine case, the secretary, W. H. Tooke, had been put forward by the company in a winding-up proceeding

to make an affidavit in answer to the petition, which he did. He was cross-examined on his affidavit, and on his cross-examination was served with a notice to produce the books of the company—this he refused to do. A motion was made before Malins, V.-C., and that learned Judge ordered "that the . . . company, by Mr. W. H. Tooke, their secretary, produce before the special examiner . . . upon the cross-examination of the said W. H. Tooke on his affidavit made in these matters on behalf of the said company, and as their secretary . . . all the books and papers mentioned in the notice to produce . . . or such of the said books and papers as may be in the possession or power of the . . . company." An appeal was had to the Lord Justices. They sustained the order on a simple ground. James, L.J., said: "It is not a question of discovery at all. It is an ordinary order for the production of documents on the cross-examination of a witness. . . . The power of making such an order exists in this Court in the same manner and with the same restrictions as in a Common Law Court in an action at *nisi prius*. A witness having been called, it is desired to test his evidence by cross-examination, and for that purpose it is desired to put in his hand, books, papers and documents, either in his own control or in that of the party to the cause in whose behalf he is examined. The Vice-Chancellor has made an order in this case, that the books must be produced that they may be dealt with as if before a Judge and jury at *nisi prius*. It is clear that there is to be a limit to the power of inspection . . . they are to be dealt with as at a trial at *nisi prius*." Mellish, L.J., said: "It is impossible to say . . . that none of the books can be of any use in the cross-examination of this witness. In his affidavit he has sworn to some things which he cannot know except from the books. He is cross-examined as to them; he appeals to the entries in the books. It is idle to contend that what he has said is not to be tested by the books. . . . To what extent he" (*i.e.*, the petitioner) "is entitled to use them cannot be decided till the course of the cross-examination is known."

The principle is obvious—a party to a proceeding puts forward a witness, who makes certain statements under oath; it is desired to shew by his own books, or those of the person who puts him forward, that his statements are not true. Such books must be produced to test his accuracy; when he is under cross-examination, they will be used for that purpose, and to prove that his evidence is not to be relied upon.

The case before Mr. Justice MacMahon (*Russell* v. *Macdonald, supra*), was similar. On a motion being made for an injunction to restrain Macdonald from receiving moneys in

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respect of his interest in the firm of A. F. M. & Co., an affidavit by his partner, A. F. M., was filed on behalf of the defendant. A cross-examination was had of A. F. M. upon his affidavit, and he "was unable to answer a number of the questions because he had not the firm's books, which could alone explain the defendants' position in regard to the partnership assets and liabilities." The learned Judge made an order for the production of such books on the cross-examination.

These cases are far from deciding that where a party desires to obtain evidence upon a motion, and subpœnas a person to give such evidence, he may also compel him to produce books, etc., to add to what he is to say—or to enable him to become possessed of facts not now within his knowledge.

I think the motion must be refused, with costs payable forthwith as the witnesses are not parties to the petition.

I am, by the company, asked to dismiss the petition. This I cannot do. The Chancellor's judgment implies the validity of the petition. If the petition were of such a character as that it could be dismissed for the reasons advanced now by the company, it was so when the matter was before the Chancellor. If the grounds were not taken or brought to the attention of the Chancellor, the fault does not lie with the Court.

I do not dismiss the petition, but enlarge the hearing of it *sine die;* either party to bring it on, on two days' notice. Costs of this enlargement to be to the petitioners in any event.

Petition enlarged.

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SWAN v. EASTERN TOWNSHIPS BANK.

Quebec Court of King's Bench, Archambeault, C.J., Trenholme, Lavergne, Carroll and Gervais, JJ. October 31, 1912.

1. VENDOR AND PURCHASER (§ I D—21)—RESCISSION FOR DEFICIENCY—DEFECT IN TITLE—OBTAINING GOOD TITLE.

In cases of sales of immoveables the purchaser may, in case he is evicted, repudiate the sale tainted with a cause of eviction, but, until judgment is rendered declaring the sale set aside, the vendor may prevent the setting aside by furnishing the purchaser with a good title or causing the eviction to cease, and the purchaser is presumed at law to consent to remain proprietor until the sale is annulled; so where, in an action in vacation of a sheriff's sale based upon defects in title, the vendor before judgment is granted obtains a good title to the property sold, the buyer must accept the same and the sale will not be set aside.

Statement

APPEAL by the plaintiffs from the judgment rendered by the Superior Court on April 29, 1911, Archibald, J., allowing the respondent to offer a new title to the appellants to property sold by it to such appellants at sheriff's sale, which sale had been previously annulled; but a record seizure of the same

property was practised by the bank which therefore claimed it could properly convey the same to the appellant's purchasers.

The appeal was dismissed, LAVERGNE, and GERVAIS, JJ., dissenting.

T. Brosseau, K.C., for appellants.

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

The opinion of the majority of the Court was delivered by

CARROLL, J. (translated):—The facts of this case may be summed up as follows:—

The Beet Root Sugar Co. owed the Eastern Townships Bank a considerable amount. To secure the payment of a portion of this amount, to wit, a sum of $15,000, the bank had a hypothec on the company's property, but as regards another sum of $23,000, it had apparently no security; so the bank brought action for this amount and obtained judgment by default on February 25th, 1882. On the same day this judgment was registered as affecting the property of the company.

On October 21st, 1882, another creditor of the company, Fairbanks & Co., seized the property in virtue of a judgment, and this property was to have been sold on the 12th of January, 1883. This seizure and sale, however, would have prejudiced one Beard, who had leased the property; so Beard paid the claim of Fairbanks & Co., and then addressed himself to the sheriff to stop the sale. The latter was unable to accede to this desire, inasmuch as other creditors had had their judgments noted on the writ of seizure, and the sheriff was, therefore, unable to discontinue.

Beard then addressed himself to the Eastern Townships Bank. A contract was entered into between Beard and McDougall, on the one hand, and the bank on the other hand. The latter was to buy the property from the sheriff and to resell it to Beard and McDougall. On January 12th, 1883, the sheriff sold the property for $1,400. On January 19th, 1883, the bank resold it to Rough, *prête-nom* of Beard and McDougall, for $49,439; $9,439 were paid immediately, leaving a balance of $40,000.

On April 28th, 1883, the Bank of Hochelaga, another creditor of the Beet Root Sugar Co., took action in vacation of this sheriff's sale. The Eastern Townships Bank filed a defence to the action; Rough (Beard and McDougall) *mis-en-cause*, did not plead. They were then in possession of the property. On May 18th, 1884, whilst the suit between the two banks was pending—regarding the validity of the sheriff's title—the Eastern Townships Bank brought action against Beard, McDougall and Rough for the balance of the purchase price now due. Rough, in turn, brought action to have the sale of the Eastern Townships Bank to him annulled, and the amount paid by him reimbursed.

In 1890 the Superior Court annulled the sheriff's sale, and the action of the Eastern Townships Bank was maintained on

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the ground that the bank, in all these transactions, had been but the agent of the buyers. The judgment of the Superior Court was reversed by the Court of Appeal; the case was then carried before the Privy Council, where the judgment of the Court of Appeal was affirmed. The bank claimed from Rough the payment of the purchase price; Rough, by his action, asked for the cancellation of the sale made to it by the bank and the restitution of the sums paid. The Court of Appeal, although the judgment annulling the sheriff's sale had been pronounced, refused to allow the same to be filed in the record. It maintained the action of the Eastern Townships Bank against Rough for $31,717, and suspended the execution of the judgment until it should cause the cessation of trouble and danger of eviction or furnish security according to the terms of art. 1535 C.C.

The danger of eviction and the trouble resulted from the action in vacation of sheriff's sale brought by the Bank of Hochelaga. Adjudicating, then, on the proceedings in vacation of the sale, brought by Rough, the Court admitted that there was danger of trouble, and declared that this action should only be adjudicated upon later, and in order to allow the parties to proceed later, the record was sent back to the Superior Court.

The Court says:—

> Considérant, dans l'espèce, que cette action de l'appelant Rough que l'intimé a jugé à propos de contester devait nécessairement avoir le même sort que ladite demande en nullité de décret et que, par conséquent, il y avait lieu à surseoir sur cette action de garantie jusqu'à la décision finale sur la demande formée par la Banque d'Hochelaga, pour ensuite la maintenir, dans le cas où le décret aurait été annulé, ou la rejeter, dans le cas où le décret aurait été maintenu.

If this litigation comes anew before the Courts, the cause thereof lies in the impropriety of the terms and the *obiter dicta* used.

> Et faisant ce qui aurait dû être sur l'instance de l'appelant Rough contre l'intimée (Eastern Townships Bank), la cour adjuge et ordonne que les parties soient renvoyées et elles sont renvoyées ainsi que le dossier devant la Cour de première instance pour y être de nouveau procédé à l'instruction et au jugement final en icelle cause et à y faire ce que de droit, suivant les obligations et les droits respectifs des parties tels que définis ci-dessus par la présente sentence, après l'introduction régulière en icelle cause du jugement définitif qui a été rendu sur la demande en nullité de décret formée comme susdit par la Banque d'Hochelaga.

What does this *dispositif* mean? Rough's representatives (Swan *et al.*) say that the sole object of this phraseology is to allow the record to be sent back to the Superior Court in order that the judgment vacating the sheriff's sale may be filed therein and that the Court may adjudicate finally thereafter. The Eastern Townships Bank answers: No, the Court intended upholding the deed of sale since it has condemned, although it

knew of the judgment vacating the sheriff's sale, the purchasers to pay the purchase price under the reserve that the bank should cause the cessation of the trouble or give security. Interpreting the judgment in this manner, the bank caused a curator to be named, had the immovable sold on him and offers title to the representatives of the deceased buyers. On June 5th, 1896, the plaintiffs *par reprise d'instance* inscribed the case for proof and hearing for June 16th. On June 25th judgment was rendered by the Superior Court annulling the sale and condemning the bank to refund the amounts paid to it.

The bank inscribed in Review from this judgment, but desisted from this inscription to attack the judgment by *requête civile*. This petition was dismissed by the Superior Court, the Court of Appeals affirmed this judgment of the Superior Court but the Supreme Court reversed on the ground that no notice of inscription on the roll had been given the adverse party. The *requête civile* was, therefore, allowed, as well as a plea of *puis darrein continuance*, containing substantially the same grounds on the merits as those urged by the bank in anterior proceedings, with the exception of the allegations of certain facts that happened since the judgment of the Privy Council, and more especially the fact that a second seizure and a valid seizure had been made. The Superior Court (Archibald, J.) thereupon was called upon to interpret the judgment of the Court of Appeal, and declared that the effect of this judgment of the Court of Appeal was to allow the bank to have the trouble cease or to give security, and, therefore, allowed the bank to seize the property *de novo* (after the judgment vacating the sheriff's sale), and to offer a new title to the appellants.

Under the circumstances, I consider the judgment well founded. It is a true principle that a purchaser may, when the eviction is consummated, repudiate the sale tainted with a cause of eviction, but Rough's action in nullity had not been adjudicated upon when the title was offered for the second time. But the facts of the case must not be lost sight of: Rough and McDougall, both personally and through their representatives, have been in possession of this property since 1883; they have drawn the revenues thereof, have acted as the owners thereof, and have sold two lots of a substantial value. Through their act the property has diminished in value. Would it be proper that these purchasers, who have had uninterrupted possession of the immovable, could compel the bank to retake the same when the bank tenders them a perfect title? The suit had not yet been decided when the plea of *puis darrein continuance* was filed, and the vendor was still in good time to complete his title or to offer a new and valid title.

"Faut-il maintenir cette décision dans le cas où le vendeur n'acquiert la propriété de la chose qu'après l'introduction de l'instance?"

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In our opinion, yes. We are met with the objection that in this case there is no longer any meeting of the minds, since the buyer, by provoking the vacation of the sale, withdraws his consent. Let us understand one another. The buyer who sues in vacation does not say he refuses to be proprietor of what he has bought; he states that, as the vendor is unable to transfer the property sold, he wants the sale annulled, and this necessarily implies that if the vendor did transfer to him the property he would ask for the maintenance of the sale. Therefore his consent to become proprietor lasts until the sale is annulled. We must, therefore, conclude that the action in vacation falls the moment the vendor has become proprietor: 24 Laurent, No. 1216. Besides, the Code Napoléon does not contain as wide a provision of law as that enacted by art. 1488 of our Civil Code:—

"The sale is valid if the seller afterwards become owner of the thing."

This article is one of general application, and, if there be among French authors a divergence of opinion regarding the time at which the vendor must ratify or become owner of the thing belonging to another, there can be no such divergence under our law, which on this point relies on the wisdom of our Courts.

The appeal is dismissed.

Lavergne, J.
Gervais, J.

LAVERGNE and GERVAIS, JJ., dissented.

Appeal dismissed.

N.B.—Leave to appeal to the Privy Council was granted by the Court of King's Bench.

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O'CALLAGHAN v. COADY.

Prince Edward Island Court of Chancery, Fitzgerald, V.-C. March 13, 1912.

1. DEEDS (§ I B I—7)—DELIVERY—WHAT CONSTITUTES DELIVERY.

The efficacy of a deed depends on its being sealed and delivered, and delivery may be inferred of a deed of gift notwithstanding the retention of possession of the document by the grantor, if it appears that it was executed in the presence of the grantor's legal adviser as an attesting witness with a full knowledge of its contents after the whole deed including the attestation clause had been read over to the grantor and that the deed was drawn at the grantor's request in furtherance of a previously expressed intention to make the gift evidenced by it.

[*Zwicker* v. *Zwicker*, 29 Can. S.C.R. 527, applied.]

2. DEEDS (§ I B I—6)—DELIVERY — GRANTOR RESERVING LIFE ESTATE, EFFECT OF NON-DELIVERY OF DEED.

The mere fact of the grantor retaining possession of the deed does not render the grant inoperative, particularly where the grant contained a reservation of a life estate to the grantor.

[*Xenos* v. *Wickham*, L.R. 2 H.L. 296, referred to.]

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3. WILLS (§ III L—192)—DEVISE AND LEGACY—ADEMPTION—ADVANCE BY WAY OF PORTION.

Where a testatrix being in *loco parentis* to her legatee makes provision by will by way of "portion," either by legacy or by share in residue to such legatee, and afterwards makes an advance in the nature of a portion to such legatee, it will be presumed that the subsequent advance by the testatrix in her lifetime is meant to satisfy the legacy in whole or in part, and will be held an ademption of it.

[*Pym* v. *Lockyer*, 5 My. & C. 29; *Montefiore* v. *Guedalla*, 1 D. F. & J. 93; *Meinertzhagen* v. *Walters*, L.R. Ch. 670; *Fowkes* v. *Pascoe*, L.R. 10 Ch. 343, referred to.]

4. WILLS (§ III L—192)—DEVISE AND LEGACY—ADEMPTION — PORTION AS BETWEEN CHILD AND STRANGER.

The doctrine of ademption by subsequent portion will not be applied in favour of a stranger against a child taking a share of residue as well as legacy.

[*Re Heather*, [1906] 2 Ch. 230.]

Statement

HEARING of questions arising upon the administration of the estate of a decedent under a will.

Donald McKinnon, for claimants.

J. J. Johnston, K.C., and *J. A. Mathieson*, K.C., for defendants.

Fitzgerald, V.-C.

FITZGERALD, V.-C.:—The contention of one of the defendants in this case (Angelina McPherson) is, that the testatrix Ann Connolly, put herself in *loco parentis* in relation to one other of the defendants, viz.: Mary Alice Murphy, and that consequently a gift of money made to her between the date of the will and the death of the testatrix should operate as an ademption in part, or in whole of what the said Mary Alice Murphy would receive as her share under a residuary devise in Mrs. Connolly's will in these words: "to my sister Bridget Coady, my nephew John Callaghan, and my nieces Mary Alice Murphy and Angelina McPherson, all the rest, residue and remainder of my said property share and share alike."

I have no desire to go more fully into the law than is necessary to decide this case, and I consequently admit to the full the general rule which declares, that where a testatrix being in *loco parentis* to her legatee makes provision by will by way of "portion," either by legacy: *Pym* v. *Lockyer*, 5 My. & C. 29; or by share in a residue: *Montefiore* v. *Guedalla*, 1 D. F. & J. 93; to such legatee, and afterwards makes an advance in the nature of a portion to such legatee, it will be presumed that the subsequent advance by the testatrix in her life-time is meant to satisfy the legacy in whole or in part, and will be held an ademption of it: *Meinertzhagen* v. *Walters*, L.R. 7 Ch. 670, 41 L.J. Ch. 801.

It is, however, necessary in this case to examine somewhat closely the principle upon which that rule is based before determining whether under the circumstances disclosed here, such rule is applicable.

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This principle is thus stated by Lord Justice James in the case last cited:—

> The principle is that it must be presumed that a father intends equality between the children; and if he leaves the residue to the children, and afterwards makes an advance to one of the children, the general rule is that such advance must be brought into hotchpot, so that the disposition of his fortune, by which he intended to produce equality among the children, may not be altered.

The same Judge in *Fowkes* v. *Pascoe*, L.R. 10 Ch. 343, at 351, speaking of this rule and the ademption of residuary legacies, thus refers to the previous decision of the Court of Appeal in *Meinertzhagen* v. *Walters*, L.R. 7 Ch. 670, 41 L.J. Ch. 801, "in that case we came to the conclusion that it could only be applied between children, against a child in favour of a child, not in favour of a stranger." And Jessel, M.R., five years later in *Stewart* v. *Stewart*, 15 Ch. Div., at p. 547, says:—

> I call to my aid the general law as expressed by Lord Justice James in *Meinertzhagen* v. *Walters*, L.R. 7 Ch. 670, 41 L.J.Ch. 801, that the whole doctrine only applies to children: the object is to make children bring into account advancements.

In 1906, Swinfen Eady, J., in *Re Heather*, [1906] 2 Ch.D. 230, 75 L.J. Ch. 568, followed these cases, saying "that no authority has been produced where a residue is given between a child and a stranger, and the doctrine has been applied against the child."

Now the result of the application of that principle to the cases cited was, that in *Meinertzhagen* v. *Walters*, L.R. 7 Ch. 670, 41 L.J. Ch. 801, where the testator gave the income of one moiety of his residue to his widow for life, and divided the other moiety among his children in equal shares, and after the date of the will advanced marriage portions to some of his children, the Court of Appeal held that the advances could only be brought into account for the benefit of the children *inter se*, and that the widow was not entitled to have her income increased thereby.

In *Fowkes* v. *Pascoe*, L.R. 10 Ch. 343, 44 L.J. Ch. 367, the principle was even more strikingly applied. In it the Court of Appeal held, that even admitting that the testatrix had placed herself in *loco parentis* to a son of her daughter-in-law, and that she had advanced to him consols to the amount of £7,000, after the date of her will, wherein this son with his sister were made residuary legatees, yet that there could be no ademption, as under such conditions "it would be necessary to shew, not only that the testatrix had placed herself in *loco parentis* to the defendant (the son of the daughter-in-law), but to his sister of which there is no trace."

In *Re Heather*, [1906] 2 Ch. 230, 75 L.J. Ch. 568, the same rule was applied where a testator bequeathed a legacy to an

adopted child to whom he stood in *loco parentis*, and divided his residue between that child and a stranger, and made a subsequent advance to the child. It was there held that the doctrine of ademption by subsequent portion could not be applied in favour of a stranger against a child taking a share of residue as well as a legacy, and that neither the legacy, nor the share of residue would be adeemed.

These cases leave no room for doubt that the ademption sought here cannot be ordered in this administration as the testatrix Mrs. Connolly, certainly did not place herself in *loco parentis* to any of the other three residuary legatees. I, therefore, hold that the $3,000 given by the testatrix to the defendant Mary Alice Murphy was not an ademption of her share of the residue, and is not to be brought into account in this administration. Lord Justice James in one of these cases expresses his opinion strongly as to the shocking injustice of holding

> That if a father leaves his residue between a child and a stranger, and then makes a large advance to the child, and also a large advance to the stranger, there being nothing more but the will and those advances, that the child is obliged to bring what he has received into the residue only, and that the stranger is not to bring in what he has received, but is to have it enlarged by that which has been given to the child.

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It is just that which is contended for here. I have nothing more before me, but the will and these advances made by testatrix between the date of her will and her death, viz., to Mrs. Coady in cash $5,000, to John Callaghan cash and bond $1,000, to Angelina McPherson cash $500, and to Mary Alice Murphy cash $3,000, and it would indeed "be shocking to my common sense and to my sense of justice," to order that Mary Alice Murphy because she was an adopted daughter of the testatrix Ann Connolly, must now bring into the residue the $3,000 received by her so that it be equally divided between her and the three other devisees who stand to the testatrix in no such relationship. I am glad that I have not so to interpret a rule designed to produce equality among children as to reduce a child's share for the benefit of a stranger. I have treated the relationship of Mrs. Connolly to Mary Alice Murphy as being one in *loco parentis*. I by no means decide so. It is not necessary to adjudicate upon the fact in view of the law as I find it. One other question was raised in this administration namely, whether a certain deed dated and executed by Mrs. Connolly some three years before her will, wherein certain premises were granted to Bridget Coady, in fee—the grantor reserving to herself a life estate—was as a fact delivered. The evidence satisfies me that this deed was executed by the testatrix with a full knowledge of its contents, and at her request, after an expressed intention by

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her to convey the lands mentioned in it to her sister Mrs. Coady. That it was executed by her in the presence of her own attorney as an attesting witness, the whole of the deed including the attestation clause being read over to her by him, who swears that he complied with all the requirements necessary to make it an executed document. Such evidence of execution is unquestionably sufficient to infer a delivery, and raises a presumption in favour of the due execution and delivery of the instrument: *Zwicker* v. *Zwicker*, 29 Can. S.C.R. 527.

It was sought to rebut this presumption by proof that this deed remained in possession of Mrs. Connolly up to the time of her death, and that by her will there is a general devise of all her real property to trustees—this being the only real property she possessed. If the deed was duly executed, as I think it was previous to the making of the will, this general devise is simply inoperative. Indeed in this general form of a devise it is not indicative of serious intention on the part of the testatrix; and it is now well settled law that the mere fact of the retainer by the grantor of possession of the deed does not render the grant inoperative.

The efficacy of a deed depends on it being sealed and delivered not on the maker ceasing to retain possession of it: *Xenos* v. *Wickham*, L.R. 2 H.L. 296. In this case she might indeed have retained possession in view of the life estate which she reserved to herself. I think under the evidence the deed to Bridget Coady must be held to convey the property therein described, and consequently direct that it is not to be considered an asset in the administration of Mrs. Connolly's estate. There was also a suggestion that the testatrix stood in *loco parentis* to her sister Mrs. Coady. There is no evidence to support such contention.

On receiving the report of the Master to whom the accounts of the estate were referred, a final order in administration will be made in pursuance of this judgment.

Judgment accordingly.

REX v. CAMPBELL.

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Nov. 12.

British Columbia Supreme Court, Gregory, J. November 12, 1912.

1. INTOXICATING LIQUORS (§ III A—55)—LIQUOR TAX LAW—CERTIORARI—SUFFICIENCY OF INFORMATION.

An information for selling liquor without a license authorizing such sale under the Liquor License Act, ch. 142, R.S.B.C. 1911, sec. 66, need not describe the offence in the exact words of the statute, if the defendant, from the form of the information, receives particulars of the charge such as he himself might ask for if the information had been in the words of the statute.

2. INTOXICATING LIQUORS (§ III A—55)—RETAIL LICENSEE SELLING IN QUANTITY IN EXCESS OF LICENSE LIMIT.

A licensed retail liquor dealer making a sale of liquor in a larger quantity upon a single sale than his license permits, is properly convicted under the Liquor License Act, R.S.B.C. 1911, ch. 142, of selling liquor without having first obtained a license authorizing him so to do.

3. CERTIORARI (§ II—24)—CONVICTION WITH SUPPORTING EVIDENCE—WEIGHT OF EVIDENCE NOT CONSIDERED.

Where there was some evidence before the magistrate to support his findings of fact such findings will not be reviewed in certiorari proceedings.

Statement

MOTION to make absolute a rule *nisi* for a writ of certiorari to bring up and quash a conviction. The grounds urged are (1) neither the information nor the conviction describe any offence known to the law; and (2) the evidence does not warrant a conviction.

The motion was discharged.

J. A. Aikman, for the appellant.

W. C. Moresby, contra.

Gregory, J.

GREGORY, J.:—As to the second objection, it is only necessary to say that there was some evidence on which the magistrate could make the finding he did, and this is not a proper method of attempting to review a magistrate's finding of fact, even if I disagreed with it. As to the first objection, it is urged that the Liquor License Act does not prohibit the offence alleged to have been committed. It certainly does not in the exact words in which it is described in the information, but I think it does nevertheless prohibit the offence committed, and for which Campbell has been convicted, which is, in short, selling liquor in a manner not authorized by his license. Sec. 22 of the Act authorizes the superintendent of provincial police to issue hotel licenses empowering the licensee to vend liquor by retail in quantities not exceeding one Imperial quart in any one act of vending. That is the license Campbell had, and the only license he could have had. Therefore he was only licensed to sell liquor in that way, for sec. 66 of the Act prohibits any person from vending in any manner whatsoever any liquor without having first obtained a license authorizing him so to do.

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It seems to me that this section contains all the prohibition necessary, and that Campbell cannot complain because in the information he is furnished with the particulars which he, being a licensee, might reasonably ask for if proceeded against for selling liquor without a license. As a matter of fact, he had no license to sell liquor in the manner in which the magistrate has found he did, and he has been convicted of it, and I do not see how I can make the rule absolute herein. It will therefore be discharged.

Motion discharged.

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Nov. 23.

Re APPLICATION OF THE MOOSE JAW SECURITIES, Ltd.

Saskatchewan Supreme Court, Newlands, Lamont, and Brown, JJ. November 23, 1912.

1. LAND TITLES (§ VI—60)—PLAN REGISTERED UNDER SEC. 79 OF LAND TITLES ACT (SASK.)—HOW ALTERED OR AMENDED.

A plan registered under sec. 79 of the Sask. Land Titles Act is the official description of the property and cannot be altered or amended, after registration, except by a Judge's order under sub-sec. 2 of sec. 80 of that Act.

2. LAND TITLES (§ VI—60)—PLAN UNDER SEC. 76, LAND TITLES ACT (SASK.)—FUNCTION OF PLAN.

The plan, provided for under sec. 76 of the Sask. Land Titles Act, to the effect that the registrar may require anyone transferring land to furnish him with a plan having the several measurements of the land to be transferred marked thereon and certified by a Saskatchewan land surveyor, is only for the information of the registrar, to enable him to see upon the plan how the piece of property in question is laid out and that its boundaries do not conflict with any other parcel of land, but is not for registration.

3. LAND TITLES (§ VI—60)—PLAN UNDER SEC. 79, LAND TITLES ACT—FUNCTION OF PLAN.

A plan required under sec. 79 of the Land Titles Act (Sask.) is for the purpose of shewing the boundaries of lots staked out in town plots and to provide a short and convenient description of the same, and is for registration, so that thereafter the lots are described according to that plan, and it becomes the official description of the property.

4. LAND TITLES (§ VI—60)—WHAT CONSTITUTES AN ALTERATION OF PLAN FILED UNDER SEC. 79 OF LAND TITLES ACT (SASK.)—TRANSFER OF PART OF LOT.

A transfer of a part of a lot, for which lot a plan has been already registered with the registrar as required by sec. 79 of the Land Titles Act, does not of itself constitute an alteration of the plan and does not require an alteration of the plan by a Judge's order under sub-sec. 2 of sec. 80 of that Act.

5. LAND TITLES (§ VI—60)—REGISTERED PLAN—TRANSFER OF PORTION OF CORNER LOT WITH SIDE FRONTAGE ONLY.

Where land is sub-divided by a registered plan under sec. 79 of the Sask. Land Titles Act, R.S.S. 1909, ch. 41, and a corner lot is shewn as fronting on a certain street with a side street as one of its lateral boundaries, a new plan of sub-division of such lot is not required on a sale of the middle portion thereof fronting upon the side street only, but a conveyance or transfer may be recorded as of such part of the lot, with or without an easement of right-of-way over the remaining portions.

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RE APPLICATION OF THE MOOSE JAW SECURITIES, LIMITED.

APPEAL by the Moose Jaw Securities, Limited, the applicants for the registration of a transfer of certain lands, from the decision of the Master of Titles, refusing registration of the transfer on the ground that it would constitute an amendment or alteration of the plan requiring an order of a Judge.

The appeal was allowed.

J. F. Frame, for appellant.

J. N. Fish, for respondent (the registrar of the Saskatoon land registration district).

Newlands, J.

NEWLANDS, J.:—The appellants sent in to the land titles office at Saskatoon a transfer from R. W. Davis *et al.* to them of the most easterly 35 feet of the most westerly 70 feet of lots 13 and 14, block 12, plan "D E," Saskatoon.

The registrar refused to register this transfer because

> the registration of a portion of the lots contained in this transfer changes the facing of these lots from 8th avenue to King street, and as the registration of this transfer would also deprive the remaining portions of these lots from access to a lane.

He also said:—

> It will be necessary to provide a plan of the sub-division duly approved by the city authorities for registration here before any action can be taken by me.

From this ruling the applicant appealed to the Master of Titles, who decided that the approval of the city authorities under sub-sec. 6 of sec. 79 of the Land Titles Act was not required to subsequent divisions of lots after the plan laying the same out in a town plot had been registered. He further held that the registration of this transfer would constitute an amendment or alteration of the original plan, and that under sub-sec. 2 of sec. 80 of the Land Titles Act such amendment or alteration could only be made effective by an order of a Supreme Court Judge. From this latter ruling the applicant appealed to this Court.

There is no question that a plan registered under sec. 79 of the Land Titles Act can only be amended by an order of a Judge, but nowhere in the Act is there any provision that before a part of a lot as shewn on a registered plan can be transferred that such plan must first be amended to comply with the transfer.

Two kinds of plans are provided for by the Land Titles Act: 1st, sec. 76 provides that the registrar may require anyone transferring land to furnish him with a plan having the several measurements of the land to be transferred marked thereon and certified by a Saskatchewan land surveyor; and 2nd, where the owner of land subdivides it and lays it off into a town plot he must register a plan under the provisions of sec. 79. The first mentioned plan is for the information of the registrar, to enable

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him to see upon the plan how the piece of property in question is laid out and that its boundaries do not conflict with any other parcel of land, but it is not registered. The second (*i.e.*, plans under sec. 79) is to shew the boundaries of lots staked out in town plots and to provide a short and convenient description of the same. This plan is registered, and thereafter the lots are described according to that plan and it becomes the official description of the property. This plan, once it becomes binding on the owner registering the same by a sale, mortgage, etc., cannot be altered or amended excepting by an order of a Judge. The alteration or amendment referred to in the Act means an alteration or amendment of the plan itself, either by changing the numbers of the lots or the boundaries of the same as shewn thereon. But as long as the plan itself is not altered no Judge's order is necessary. The transfer of a part of a lot does not alter the plan, nor can I see any reason why the transfer of a part of a lot should require any alteration of a plan. For instance, if in the present case the south half of lot 14 had been transferred, it would certainly require no alteration of the plan. Lot 14 on the plan would remain exactly as it was before, and the description of it as shewn on the registered plan would not be changed. The only change would be that instead of one person owning the whole lot there would be two persons each owning a half. Now if half a lot can be transferred, I can see no reason why any other part of it cannot be so transferred. If the registrar thinks that the description is such that he requires a plan of it to identify the boundaries, he may demand a plan of it under sec. 76.

The further fact upon which the Master of Titles has based his decision, that the piece sold does not abut on the lane, does not, in my opinion, make any difference, as there is nothing in the Land Titles Act to prevent the sale and transfer of land either with or without an easement, as the parties may agree.

I have not considered the effect of sub-sec. 6 of sec. 79, which was referred to on the argument, as the Master of Titles' decision upon this point has not been appealed from.

In my opinion the appeal should be allowed.

Lamont, J.
Brown, J.

LAMONT, and BROWN, JJ., concurred.

Appeal allowed.

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Nov. 4

Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue, Cameron and Haggart, JJ.A. November 4, 1912.

1. DISCOVERY AND INSPECTION (§ IV—20)—EXAMINATION VIVA VOCE—IRRELEVANCY OF QUESTION—PAID-UP SHARES.

Where the issue raised is whether, as charged by the plaintiff, a purchase contract for land had been assigned by way of loan to enable the assignee to pledge the same to a third party, such assignee concurrently transferring to the assignor of the land contract certain company shares as security for the return of the purchase contract, or whether, as claimed by defendant, the transfer of the latter was made absolutely in exchange for the shares, but no concealment, misrepresentation or fraud is charged against the defendant, the value of the shares as known to the parties at the time of the transaction may be relevant so as to form a subject of examination of defendant for discovery, but the fact of whether or not the shares were fully paid up and whether the defendant had paid anything on the shares is not relevant and the defendant will not be compelled to answer on discovery in regard to the latter points, although his pleading described the shares as "fully paid up."

2. DISCOVERY AND INSPECTION (§ IV—20)—EXAMINATION — DISPLACING OPPONENT'S CASE.

On examination for discovery under the Manitoba King's Bench Rules of 1902, rules 387, 395, the plaintiff may question the defendant under oath not only as to facts which would go to prove the plaintiff's case, but by way of cross-examination to obtain statements or admissions from the defendant which would tend to displace the defence pleaded.

[*Hopper* v. *Dunsmuir* (No. 2), 10 B.C.R. 23, and *Kennedy* v. *Dodson*, [1895] 1 Ch. 334, referred to.]

Statement

APPEAL from an order of Mathers, C.J.K.B., reversing an order of the referee ordering defendant to attend at his own expense and answer certain questions put to him on his examination for discovery.

On the pleadings as they stood the plaintiff's case was that he had, at the request of the defendant and for his accommodation, assigned to the defendant an agreement of sale of land securing the sum of $1,500 in order that the defendant might borrow money from a bank on the security of the agreement, that subsequently the defendant voluntarily transferred to him certain shares in a company as security for the return of the agreement and that the defendant had refused to re-assign the agreement, although the plaintiff was willing to return the shares, whilst the defendant denied that the transaction was a loan and set up that he had actually purchased the agreement from the plaintiff, giving him 15 fully paid-up shares in the company as a consideration for it.

The Court of Appeal (HAGGART, J.A., dissenting) held that the defendant should not be compelled, on his examination for discovery, to answer questions as to whether the shares referred

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to were or were not fully paid up in fact, or as to what, if anything, had been paid by him on the shares, such questions not being relevant to the issues raised.

J. H. Leech, for plaintiff.
J. C. Collinson, for defendant.

PERDUE, J.A.:—The case which the plaintiff sets up in his statement of claim is, that he assigned a certain agreement of sale to the defendant at the request of the defendant by way of loan in order to enable the defendant to raise money; that subsequently the defendant voluntarily delivered to the plaintiff certain shares of capital stock in a company as security for the return of the agreement, and that the defendant had refused to re-assign the agreement, the plaintiff being willing to return the shares. The defendant denies that the transaction was a loan and sets up that he actually purchased the agreement from the plaintiff giving him 15 fully paid-up shares in the capital stock of the above company as a consideration for the assignment of the agreement.

On the examination of the defendant for discovery the plaintiff sought to ask him a number of questions for the purpose of ascertaining whether the shares in question were or were not fully paid up in fact. The referee in Chambers ordered the defendant to answer the questions, and this order was reversed on appeal by Mathers, C.J.

It is clear that the issue between the parties is, was the transaction in regard to the agreement a loan to the defendant or not? Anything that will throw light upon the real transaction between the parties would be relevant to the issue and might be made the subject of inquiry on an examination of the defendant for discovery.

If it could be shewn that the answers to the questions under consideration in this case would in any way assist the plaintiff in proving his case or in meeting the defence set up, the defendant should, in my opinion, be ordered to answer them.

In England discovery is obtained by securing answers to interrogatories administered to the opposite party. It has been held by the Court of Appeal that unless the interrogatories are strictly relevant to the question at issue they should be excluded: *Kennedy* v. *Dodson*, [1895] 1 Ch. 334. In that case A. L. Smith, L.J., said:—

> The legitimate use, and the only legitimate use, of interrogatories is to obtain from the party interrogated admissions of facts which it is necessary for the party interrogating to prove in order to establish his case; and if the party interrogating goes further, and seeks by his interrogatories to get from the other party matters which it is not incumbent on him to prove, although such matters may indirectly assist his case, the interrogatories ought not to be admitted.

It is necessary to briefly point out the difference between the English practice and our own. In England the only means of obtaining discovery from the opposite party is by means of interrogatories, and these can only be administered for the purpose of discovery in its strict sense. The examination provided for by our rule 387, although usually referred to as an examination for discovery, goes much beyond pure discovery. The rule provides that a party may be examined:—

> touching the matters in question in the action, by any person adverse in point of interest and may be compelled to attend and testify in the same manner, upon the same terms, and subject to the same rules of examination as any witness, except as hereinafter provided.

Rule 395 provides that any party orally examined under the rule shall be subject to cross-examination and re-examination "and the examination, cross-examination and re-examination shall be conducted as nearly as may be in the mode in use on a trial."

By rule 405 any party may at the trial of an action or issue use in evidence any part of the examination of the opposite party, subject to the provision that the Judge may look at the examination and allow other parts of the examination to be put in, if they are so connected with the part already put in that the one should not be used without the other.

These rules shew that a party examining the opposite party before trial may go much further in regard to the questions asked than would be allowed in England under the practice of administering interrogatories.

In *Kennedy* v. *Dodson*, [1895] 1 Ch. 334, above referred to, it is pointed out that although interrogatories might be ruled out as irrelevant, questions to the same effect might be asked of the party in cross-examination. A clear distinction is drawn in that case between what might be allowed on cross-examination and what would be proper for interrogatories. Under our rules cross-examination of the opposite party upon a so-called examination for discovery is clearly provided for, and the party examining is not confined to asking questions which would merely go to proving the plaintiff's case. He may also by cross-examination endeavour to obtain statements or admissions from the defendant relating to the matters in question which would tend to displace the defence set up. The difference between the English practice and that provided by the King's Bench rules is very clearly pointed out by Hunter, C.J., in *Hopper* v. *Dunsmuir* (No. 2), 10 B.C.R. 23.

It is urged by the plaintiff that because the defendant alleged that the stock was fully paid up he should be allowed to elicit from the defendant facts relating to the issue and payment for the stock, and as to whether it is fully paid stock or may involve

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a liability for calls. This, however, is not one of the issues before the Court as the pleadings are framed. Even if the plaintiff could shew that the stock was not fully paid up, that in no way assists him in the case he seeks to make out, namely, that the agreement was retransferred to the defendant simply as a loan for the accommodation of the defendant. In order to make the questions material, some case of concealment, misrepresentation, or fraud on the part of the defendant would have to be made out, and this would involve the admission by the plaintiff that the stock had been sold to him, or transferred to him in exchange for the agreement, a totally different transaction from what is actually set up by the plaintiff.

I think the greatest latitude should be allowed to a party who is examining an adverse party, so that the fullest inquiry might be made as to all matters which can possibly affect the issues between the parties; but in the present case I think the plaintiff has failed to shew that obtaining answers to the questions might assist him in proving the case he is seeking to establish against the defendant.

I think the appeal should be dismissed with costs to the defendant in any event of the cause.

Cameron, J.A.

CAMERON, J.A.:—This is an appeal from an order of the Chief Justice of the King's Bench reversing an order of the referee ordering the defendant to attend at his own expense and answer certain questions put to him on his examination for discovery.

It is alleged in the statement of claim that the plaintiff, holder and owner of a certain agreement of sale of land under which a sum of money was payable to him, assigned the agreement to the defendant purely for the accommodation of the defendant and to enable him to raise money thereon for his own purposes. The defendant, it is further alleged, voluntarily delivered to the plaintiff as security for the return of the agreement certain certificates of shares in the Killarney Lakeside Park Company, Limited. The plaintiff offered to re-transfer said shares and asked for a re-assignment of the agreement of sale. The defence set up is that the transfer of the agreement was absolute in exchange for the shares, which are described in the statement of defence as "fifteen fully paid up shares." The questions which the defendant refused to answer are directed to ascertaining what, if anything, had been paid by the defendant upon the shares.

On behalf of the appellant it was contended that a party in examination for discovery has as wide a range as when cross-examining at the trial, and that the question as to what was paid upon the shares was relevant to the issue between the

parties inasmuch as it is alleged in the defence that the shares were fully paid up, and inasmuch as the answers would throw some light on the transaction, it being argued that, if there were nothing paid on them, and if the holders were still liable in proceedings taken by creditors, it would be a strong element to shew that the plaintiff did not consider the transaction an exchange.

As to the point that the wording of the statement of defence puts the question of the amount paid on the shares directly in issue, I would consider that the words "fully paid up" are really descriptive and, therefore, not essential in the pleading. There is, therefore, no issue on the point.

As to the question of the scope of counsel on an examination, which includes the point that the questions here refused to be answered were and are relevant, various authorities were cited from Ontario and the North-West Territories and British Columbia, whose statutory provisions respecting such an examination resemble our own, viz.: *Colter* v. *McPherson* (1888), 12 P.R. (Ont.) 630; *Adams* v. *Hutchings*, 3 Terr. L.R. 181; *Ings* v. *Calgary Hospital*, 4 Terr. L.R. 58; *Bank of British Columbia* v. *Trapp*, 7 B.C.R. 354; *Hopper* v. *Dunsmuir* (No. 2), 10 B.C.R. 23, and *McInnes* v. *B.C. Electric R. Co.*, 13 B.C.R. 465.

The *Colter* case, *Colter* v. *McPherson*, 12 P.R. 630, is at once distinguishable, as the transactions therein in question clearly tended to throw light on the whole fraudulent scheme alleged. These cases really lay down the principle that an examination for discovery is in the nature of a cross-examination, but limited to the issues raised by the pleadings. Such is the rule as stated in Ross on Discovery, Canadian edition, p. 99, where these cases are cited.

It is only the value of the shares at the time of this transaction, the value as then known to the parties, that could have any bearing on, or tendency to influence, their probable actions or conduct. Shares partly, or wholly, unpaid may have a great value. Shares that are wholly paid up may have no value whatever. Therefore, I would consider that the answers to these questions put to the defendant on his examination cannot be said to be relevant, or, rather, can be said not to be relevant, to the issues herein. In my opinion the view of the Chief Justice should be upheld and I would dismiss this appeal with costs to the defendant in any event.

HAGGART, J.A. (dissenting):—This is an appeal from an order of the Chief Justice of the King's Bench discharging an order of the referee which directed the defendant to answer certain questions which he had, on advice of his counsel, refused to answer on his examination for discovery.

Haggart, J.A. (dissenting).

The statement of claim avers that to assist the defendant in

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getting an advance from his banker the plaintiff, at the defendant's request, transferred to him the plaintiff's interest as vendor in a certain agreement of sale and purchase of lands which shews the original consideration to have been $2,500, and upon which there was still a balance owing of $1,500 and some interest, that the defendant expected to be able to repay the banker in six or seven months, when he, the defendant, would re-transfer the agreement to the plaintiff: that subsequently the defendant voluntarily delivered to the plaintiff as security for the return of the agreement of sale of land certain certificates for shares in the Killarney Lakeside Park Co., that the plaintiff has offered to return the shares and asks for a re-transfer of the agreement of sale.

The statement of defence denies that the transaction is such as set out by the plaintiff, and that it was only a loan of the security to raise money, and alleges that it was an absolute transfer, and in exchange for fifteen fully paid shares of capital stock of the said company of the par value of $100 each, which he at the time transferred to the plaintiff, and he claims to be the absolute owner of the agreement for sale.

The question to be tried is in substance whether the transfer of the agreement was absolute or only by way of loan.

On the examination the defendant admits that he was one of the original incorporators, gives the names of the original promoters or stock holders, states the objects of the company, and that he got his shares direct from the company. A series of questions is then propounded with a view of eliciting the information as to whether the defendant had paid for the stock, and if so, how much (it is not necessary to give the questions in detail), and the defendant refuses to answer on advice of counsel.

Now, it is true that the manner of his acquiring the stock or the price he paid for it is not a fact in issue, but that does not conclude the matter. The right to interrogate is not confined to the facts directly in issue, but extends to any facts which may be relevant in the determination of the questions to be tried.

The defendant alleges a concluded agreement, an exchange of properties. The nature and character of the properties forming the subject-matter of the transaction may be relevant. As to the agreement of sale, there appears to have been paid $1,000 and there is a balance of $1,500 owing. Both parties want it. It is probably worth the full amount unpaid. As to the stock, neither wants it. It is not a company apparently whose stock is listed, and which has a stable market value. Its value would depend upon the honesty and ability of the executive, the amount of its assets, the fact as to whether the stock was duly paid for in money or money's worth, and as to whether part of

the stock was presented to the stock holders. This is information that might be relevant and useful to the Judge or jury on the trial.

In *Marriott* v. *Chamberlain*, 17 Q.B.D. 154, Lord Esher, M.R., concludes his judgment in these words:—

> The law with regard to interrogatories is now very sweeping. It is not permissible to ask the names of persons merely as being the witnesses whom the other party is going to call, and their names not forming any substantial part of the material facts; and I think we may go so far as to say that it is not permissible to ask what is mere evidence of the facts in dispute, but forms no part of the facts themselves; but, with these exceptions, it seems to me that pretty nearly everything that is material may now be asked. The right to interrogate is not confined to the facts directly in issue, but extends to any facts the existence or non-existence of which is relevant to the existence or non-existence of the facts directly in issue.

Nash v. *Layton*, [1911] 2 Ch. 71, is a recent case. It was an action brought to enforce a charge given by a borrower to secure a loan, and the defence was that the plaintiff was a money-lender. The interrogatories were as to what other loans the plaintiff had made previously on promissory notes and what securities had been taken, and what rate of interest was charged. Cozens-Hardy, M.R., quoted with approval the dictum of Lord Esher set out above and said that it seemed to him that the facts which were the subject of the interrogatory were substantially relevant to the existence or non-existence of the fact whether the plaintiff was a money lender, and Lord Justice Buckley agreed with the Master of the Rolls.

Mr. Justice Rose in *Colter* v. *McPherson*, 12 P.R. (Ont.) 630, gives a wide interpretation to the procedure for discovery. It was an action for malicious prosecution in preferring two charges, one of forgery and the other of obtaining a security by false pretences. The defence averred a conspiracy between the plaintiff and one Jones to obtain two promissory notes (given for hay forks), which were delivered to Jones in pursuance of the alleged fraudulent scheme. On examination for discovery the plaintiff refused to exhibit any entries in his bill book relating to any notes given for forks excepting the notes obtained from the plaintiff. Mr. Justice Rose thought

> that the defendant should be permitted to enquire into the dealings between the plaintiff and Jones fully and freely to ascertain whether Jones and the plaintiff were acting in concert, and that the investigation of transactions with others than the defendant might throw much light on the transaction with the defendant and shew whether or not the whole scheme was not bottomed in fraud . . . and in the interests of justice that there should be a full investigation of the plaintiff's conduct so that the jury may know what manner of person he is who comes before them asking for damages. If he were honest, no injustice would be done, and he would have an opportunity of explaining what may appear equivocal.

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I think the plaintiff should be allowed to shew the real nature of the bargain the defendant is seeking to establish. It might prove to be an exchange of something of substantial value for something that is worse than valueless. It is true the price or cost is not a fact directly in issue, but it is relevant to the existence or non-existence of the facts directly in issue. It is material, pertinent and relevant to the proof of the questions in dispute. If the matter as to which discovery is sought may be directly or indirectly material for arriving at a decision the party examined ought to give the discovery.

I think the questions are in the direction of seeking information that may be useful to the tribunal which will finally decide the matters in dispute. I think the questions should be answered. The appeal should be allowed.

Howell, C.J.M.
Richards, J.A.

HOWELL, C.J.M., and RICHARDS, J.A., concurred with PERDUE and CAMERON, JJ.A.

Appeal allowed.

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Oct. 31.

LONDON AND LANCASHIRE FIRE INS. CO. v. HART et al.

Quebec Court of Review, Tellier, DeLorimier, Archibald, JJ. October 31, 1912.

1. ACCOUNTS (§ I—5)—INSURANCE COMPANY AND ITS AGENTS—CHARGES AND CREDITS—RUNNING ACCOUNTS.

An account between an insurance company and one of its agents, wherein the agent is charged with each premium due by him on policies he has obtained and where credits are given him for specific premiums paid, is not a running account within the meaning of the law, even though extensions of time may have been afforded the agent to make his remittances.

2. PRINCIPAL AND SURETY (§ I A—8)—BOND—INSURANCE AGENT—APPLICATION OF PREMIUMS.

Where an agent has become bonded after he was in the company's debt and subsequent payments are applied in payment of specific premiums due prior to and not covered by the bond, and this to the knowledge of the debtor, the bondsmen or sureties cannot complain of such imputation of payment and be relieved from liability under the bond on the ground that if the imputation had been made against premiums covered by the bond they would be clear.

[*Morgan* v. *Western*, 3 Que. K.B. 51, explained.]

THIS was an appeal from the judgment of the Superior Court rendered at Montreal, Guerin, J., on April 12, 1911, condemning the defendants, appellants, to pay the amount of a guarantee bond to the company, respondent.

The appeal was dismissed.

E. Lafleur, K.C., for the appellant Hart.
Peter Bercovitch, K.C., for the appellant Aronson.
A. G. Brooke Clarton, K.C., for the company, respondent.

The opinion of the Court was delivered by

DeLorimier, J.

DELORIMIER, J.:—This is an inscription in review from a

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judgment of the Superior Court at Montreal (Mr. Justice Guerin), dated the 12th April, 1911, condemning defendants to pay plaintiff the sum of $876.78, with interest and costs.

Plaintiff's action is on an indemnity bond to recover from Louis A. Hart and B. Aronson, the bondsmen of Claude B. Hart, sums of money received and collected for premiums and which the said agent C. B. Hart failed to pay over to plaintiff.

The said Claude B. Hart was a special agent for plaintiff and as such he, and the defendants, on September 23, 1908, signed the bond of indemnity which plaintiff has filed. The statement for the specific premiums claimed amounting to $876.78 was also filed by plaintiff with his action. The bond in question, among other matters, recites that the parties are

> severally held and firmly bound unto the London and Lancashire Fire Insurance Company each in the sum of one thousand dollars.

It also declares that if Claude B. Hart

> shall upon the fifth day of each month in each and every year pay and satisfy unto the London and Lancashire Fire Insurance Company and their successors, such sum or sums of money as shall or may from time to time be received by the said C. B. Hart as such agent as aforesaid, or to the use and benefit of the said company in any way whatever, and shall at all times whenever thereunto required, well and truly account for and deliver unto the said company, or unto such person or persons as the said company shall appoint to receive the same, all such sum or sums of money, books, papers, writings, receipts, vouchers, matters and things which he, the said C. B. Hart, has received, or shall from time to time be entrusted with, or shall come into his hands, for or on account of, or to the use of the said company and their successors, and do and shall pay and satisfy to the said company and their successors, all, each and every indebtedness or liability of all and any nature whatsoever due or owing by him to them.

The last clause declares that it shall be lawful for the company

> to extend and give to the said C. B. Hart time for the payment of all or any of the said monthly or other payments, or any other thereof, without giving notice to or obtaining the consent of the above named Lewis Alexander Hart and B. Aronson.

The defendants have appeared separately and have filed separate pleas which nevertheless are substantially the same. By their pleas defendants deny their liability and contend: 1, that the company plaintiff did not insist on C. B. Hart making his payments on the fifth of each month, and that by granting Hart delay to pay, the bond became null; 2, that the bond is a several bond, not a joint and several bond; 3, that during the period that the bond was in force, C. B. Hart paid in to the company more money than he had collected or received, and that the company allowed Hart to run a regular credit and debit account, and having done so the company would have no right against C. B. Hart, to prosecute him for theft as an agent and

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could not subrogate them in such a right, which, say they, should have been preserved.

The judgment *a quo* maintains plaintiff's action, dismisses defendants' pleas and condemns the defendants severally to pay plaintiff the sum of $876.78 with interest and costs of action as instituted.

1. As to defendants' first contention that plaintiff did not insist on C. B. Hart making his payments on the fifth of each month and that by granting Hart delay to pay, the bond became null, I consider that the same was properly dismissed by the judgment *a quo*. By the bond itself it was agreed that it shall be lawful for the said company, their successors or assigns, to extend and give to the said C. B. Hart time for the payment of all or any of the said monthly or other payments or any part thereof, without giving notice to or obtaining the consent of the above named Louis Alexander Hart and B. Aronson.

2. As to defendants' second contention that the bond is a several bond, not a joint and several bond, I consider the same well founded, the word "firmly" adds nothing, and plaintiff's conclusions for a joint and several condemnation was properly refused by the judgment *a quo*.

The bond itself reads as follows:—

> The parties are severally and firmly held, each in the sum of one thousand dollars.

I consider that the judgment *a quo* which condemned the defendants "severally" to pay plaintiff the amount claimed is perfectly legal under the terms of said bond (Dem. vol. 26, pp. 100 *et seq.*; Laurent, vol. 17, pp. 251 *et seq.*; Aubry and Rau, pp. 4, 15 *et seq.*; Larombière, vol. 2, pp. 542 *et seq.*

3. As to defendants' third contention that during the period that the bond was in force C. B. Hart paid in to the company more money than he had collected or received, that the company had allowed Hart to run a regular credit and debit account, and having done so, the company would have no right against C. B. Hart to prosecute him for theft as an agent and could not subrogate them in such a right, which, say they, should have been preserved, I consider that plaintiff's case has been fully made out by its local manager, M. Thomas F. Dobbin. This witness swears that the detailed statement of premiums attached to the summons, shewing an indebtedness of $1,114.95 for specific premiums was correct at the time the action was brought. Since the action commissions that had been earned by C. B. Hart had reduced the account to $876.78.

Describing Hart's business, Mr. Dobbin said that Hart

> would come into the office and ask if he would take insurance for a certain amount on a certain property, and if we would take it we would issue a receipt to him. Then later on, sometime within thirty days, a policy would be issued and Mr. Hart had to pay us that premium within sixty days, as these were the usual terms; but it was

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> not a hard and fast rule, and we generally allowed him that time without any charge, that is to say, any time within sixty days he could bring in that policy, and say that he was unable to collect it, and no charge would be made to him.

The detailed statement shews that plaintiff is suing for a number of specific premiums and is not suing for a balance of account.

This evidence as to specific payments is entirely borne out on referring to defendants' exhibits, wherein will be found cheques paid by Hart and attached thereto the accounts of premiums for which the cheques were paid.

In cross-examination Mr. Dobbin swore that he had filed a statement shewing on the first page the various premiums entered up in the premium receipt book each month from September 23, 1908, the date of the bond, till the action, which with commissions and rebates amounted to $3,862.25, against which there were specific payments and rebates, made by agent Hart amounting to $2,747.30.

In answer to a question as to how Mr. Dobbin knew agent Hart had received or collected the gross sum of $3,862.25, Mr. Dobbin said that "he told me that he did so."

Plaintiff has also filed a statement shewing Hart's premium account and the payments from the date of the bond, September 23, 1908, until the trial. The amount due, the premiums entered up in the premium receipt book and the payments, are with few exceptions the same as set out in defendants' statement.

It is in evidence that Claude B. Hart had been the company's agent for some months previous to the bond, and as his agency was a large one, the business prior to the bond overlapped that done after the bond, and while some of the premiums of the prior business were received at the date when the bond was signed, and during the pendency of the bond, these moneys were imputed by Hart and the company to the premiums for which they were received and such imputation was made by the consent and at the instance of plaintiff and agent Hart. This is proved not only by the testimony of Mr. Dobbin, but also by the statements filed and by exhibits of defendants.

Defendants contend that notwithstanding that on certain days—on and slightly after—the signing of the bond, when agent Hart paid the company, he handed in with his cheques, statements shewing to what premiums the cheques were to be applied, and notwithstanding that the company, by its books, applied these payments to the discharge of certain particular and specific premiums, yet as the payments were made during the pendency of the bond, the sureties are entitled to impute these payments, although made

> specifically, and in advance of any indebtedness contracted by them

against any liability which might exist under the bond.

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Articles C.C. 1158 and 1160 cover the point raised by defendants. They are as follows:—

C.C. 1158. A debtor of several debts has the right of declaring when he pays what debt he means to discharge.

C.C. 1160. When a debtor of several debts has accepted a receipt by which the creditor has imputed what he has receipted in discharge specially of one of the debts, the debtor cannot afterwards require the imputation to be made upon a different debt, except upon grounds for which contracts may be avoided.

Defendants pretend that the bond went into force on the 23rd September, 1908; true it is that no debt for which we were responsible was contracted by Hart until some time after that date, yet we claim you must credit us with all moneys received after the bond was signed, even those definitely imputed to anterior debts.

Plaintiff's answer is based on C.C. 1158 and 1160, viz., that Hart had several debts, some of them prior to the bond, that he personally applied his payments to definite debts and received receipts for the same, and further he accepted receipts from the company by which the company (and that with his knowledge and consent) imputed what it received in discharge specially of these prior debts and that Hart (and his sureties are equally bound) cannot afterwards require the imputations to be made upon a different debt except upon grounds for which contracts may be avoided.

The company kept a premiums account book for Hart wherein was entered each policy as it was issued and as each premium was paid that particular policy was marked paid in that book.

I consider as unfounded in law defendants' contention that all that as securities they had to see to was that C. B. Hart should remit, during the existence of the bond, as much money as would represent the premiums issued by him as agent. Hart was credited with every amount he paid to the company (C.C. 1161). It is not pretended nor established that company plaintiff acted fraudulently. Plaintiff's factum contains a substantially correct enunciation of the law, in matters of imputations of payment and we simply quote the same in support of the company's pretension.

In support of their contention defendants rely entirely upon the heading and the following lines taken from the case of *Morgan* v. *Western*, 3 Que. K.B. 51:—

Les cautions n'ont rien à voir dans l'imputation des argents que Fraser a remis, c'est la remise même de ces argents qui les intéresse, c'est elle qui les libère de toute responsabilité.

From the report of the *Morgan* case as decided in the Superior Court (25 Que. S.C. 92) we find that Fraser's was a

current account and that neither Fraser nor the Western made any imputations of payments, the various payments were from time to time credited against a balance of a current account. Such being the case, the King's Bench applied the law, that where there is a current account, where no special imputations of payments were made either by debtor or creditor, or by both, then all that the sureties were concerned with were the remitting of moneys. The formal judgment does not go so far as the "holdings" at the beginning of the Official Report, or the words attributed to the Chief Justice indicate. This puts an entirely different complexion on the matter. The judgment as rendered does not make new law, but is one based on facts.

> Now the Chief Justice intended to say, either that in all cases sureties have nothing to do with the imputation of payments, or that the *Morgan* case (Fraser's) fell under the one exception mentioned in all the authorities, viz., that where no definite imputations of payments have been made either by creditor or debtor, or both, and there is a current account, then all that the sureties are concerned with is the remitting of the money.

In making an examination of the authors treating on the Code (the French and Quebec Codes are similar) we find that sureties are bound by the imputations of payments made by creditor or debtor, or both, but where no imputation has been made or where there is a current account then legal imputation will be made.

> We cite:—Lorsque l'imputation a été faite par concours de volontés (cr. and dr.) elle est inattaquable, c'est dire qu'il y a paiement définitif, donc extinction totale ou partielle de la dette sur laquelle le paiement a été imputé.

Laurent, Obl., vol. 17, pars. 613, 614 and 619, takes up the question of imputation of payments where there are sureties. In our case there is a special definite imputation which Laurent says binds the sureties (613). To make our case even stronger Laurent declares:—

> L'imputation légale ne doit pas nuire au créancier elle ne doit pas lui enlever une garantie sur laquelle il comptait, ce serait porter atteinte à ses droits ce qui est en opposition avec le principe de l'imputation légale (619).

Beaudry, 1587, Obligation, vol. 2:—

> A côté de l'imputation faite par le débiteur seul et de celle émanant du créancier seul, il faut mentionner celle qui serait faite par le débiteur et le créancier agissant d'un commun accord. Cette imputation, effectuée au moment du paiement, devrait être respectée, alors même qu'elle causerait préjudice à des tiers, sauf le droit qui appartiendrait à ceux-ci de l'attaquer par l'action paulienne au cas de fraude.
>
> La cour de cassation a décidé que, lorsqu'il existe deux créances dont l'une seulement est cautionnée, le créancier et le débiteur principal peuvent, pourvu qu'ils soient de bonne foi, imputer le paiement sur

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la créance non cautionnée, sans avoir besoin à cet effet du consentement de la caution: Civ. cass. 23 juillet 1883, D.P. 84.1.180.

Il est de doctrine et de jurisprudence que les règles sur l'imputation ne sont pas applicables au compte courant, notamment la règle d'après laquelle les paiements s'imputent sur la dette la plus onéreuse ou la plus ancienne. On peut donc extraire d'un compte courant certaines dettes pour y imputer telle remise, à moins que la remise n'ait été affectée spécialement à une dette déterminée: Laurent 629.

To what obligations imputations of payments do not apply: Laurent 627; Beaudry, Obligations, vol. 2, p. 619, sec. 1588:—

En matière de compte courant, les règles de l'imputation des paiements ne sont pas applicables. Dans celui-ci, les articles du débit ne constituent pas aurant de dettes distinctes. Avant la clôture du compte, il n'est point fait, du moins en principe, de paiement proprement dit, mais des remises. Celles-ci, alors, même qu'elles sont faites à un correspondant qui au moment où il les reçoit, se trouve créditeur, ne constituent point des paiements, car elles n'ont pas pour but d'éteindre le compte, mais, au contraire, de l'alimenter: Laurent, Obligations 629.

In the present cases Hart and the companies both imputed specifically certain definite payments to definite premiums (C.C. 1158 and 1160). There can be no doubt that the statements attributed to Hon. Mr. Lacoste, C.J., on page 51 of 13 K.B. do not contain all he said. What he might have said is that inasmuch as Fraser's account was a current account and inasmuch as no definite imputations of payments were made, legal imputation cannot be applied and that all that the sureties have to see to in the present case (*Morgan* v. *Western*) was the remission of moneys.

Again from the case of *Martin* v. *Gault*, K.B. 13, L.C.J. 257, we cite the following:—

It was held that the payment of money secured by a guaranty is not to be presumed to have been made in discharge thereof.

Badgley, J., for the Court, p. 240-1. He cites a case of *Plumes* v. *Long*, 1 Starkie N.P. cases, p. 101, which was an action on a bond in which it was contended that the payments made by the principal subsequent to its execution ought to be appropriated to the bond in favour of the surety, *sed per* Lord Ellenborough, C.J.: "The plea is payment, and the question is whether the payment was made *animo solvendi*." The general rule is that where nothing is directed as to the application, the person who received may apply it (C.C. 1160). In a Court of law this cannot be considered a payment in discharge of the bond without some circumstances to shew that it was so intended. Here the payments were not made or applied to discharge the guaranty, etc. Our case is even stronger as the payments were applied by both debtor and creditor specifically.

Pitman, Principal and Surety, p. 92, says:—

A guarantee being a contract of indemnity to make good, is therefore not an absolute debt, but an engagement to pay what shall be found due from the principal and until the fact of what shall be found due is known, it is in the nature of a claim for unliquidated damages.

As to the cases cited by defendants, *Brookes* v. *Clogg*, Q.B. 1862, 12 Can. S.C.R. 461, needs no distinguishing as it is in accord with our contention. It was held that "payments made without imputation" must be deducted preferably from the debt for which there is security and which debt bears interest. The payments were definitely imputed to premiums for insurance issued prior to the bond. The other authorities do not apply. We claim that it has been clearly established that the debts are not one but many. That the agency account since its conception shews that each separate cheque was a payment not on account of a current account but for certain debts, various premiums on various policies of insurance for various persons. That the payments were definite and were specially imputed by both agent Hart and the company. The citations made by defendants refer to instances where no imputations had been made. Article 1160 C.C. determines the issues.

Laurent, par. 611:—

Pothier dit que si le débiteur, en payant, ne fait pas imputation, le créancier à qui il est dû pour différentes causes, peut le faire par la quittance qu'il lui donne. L'article 1255 consacre implicitement de droit.

Pothier y met deux conditions. Il faut d'abord que l'imputation ait été faite dans l'instant.

In the middle of the paragraph we copy the following:—

Quand le débiteur de diverses dettes ne déclare pas laquelle il entend acquitter et que le créancier, dans la quittance, a imputé ce qu'il a reçu sur l'une des dettes spécialement, c'est au débiteur à voir s'il veut accepter cette imputation ou la refuser. S'il consent à l'imputation du créancier tout est consommé, la dette sur laquelle l'imputation a été faite est éteinte jusqu'à concurrence de la somme payée. Or, le débiteur approuve en acceptant la quittance. Il ne peut plus, dit l'article 1255, demander l'imputation sur une dette différente. La loi y ajoute une restriction: A moins qu'il n'y ait eu dol ou surprise de la part du créancier.

I am of opinion that the judgment *a quo* should be confirmed with costs.

Appeal dismissed.

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Dec. 10.

HERBERT v. VIVIAN.

Manitoba King's Bench. Trial before Metcalfe, J. December 10, 1912

1. BROKERS (§ II B 1—12)—COMPENSATION—WHAT CONSTITUTES "READY, WILLING AND ABLE"—FAILURE BY LESSEE TO CONSUMMATE SALE OF UNEXPIRED LEASE.

Where a broker was authorized to find a purchaser by the lessee of a hotel for the unexpired lease and the chattels contained in the building, and he found one who was willing to buy at the terms laid down by the principal, and a deposit was made on the purchase price and a receipt therefor issued by the principal setting forth the terms of the sale, but the sale was not consummated because the lessor of the premises refused to consent to an assignment of the lease unless the lessee carried out the terms of a previous arrangement with him, whereby the lessor was to get a certain percentage of the purchase price in the event of a sale of the unexpired term, which arrangement was not disclosed to the broker or the prospective buyer, the broker has found a purchaser, ready, willing, and able, and is entitled to his commission.

[As to claims of brokers to commission generally, see *Haffner* v. *Grundy*, 4 D.L.R. 529, and Annotation, 4 D.L.R. 531.]

2. SALE (§ III C—74*a*)—PERSONAL PROPERTY—DEFAULT OF SELLER NOT PROCURING CONSENT OF NECESSARY THIRD PARTY—NON-DISCLOSURE—RESCISSION.

Where a purchaser of an unexpired lease of a hotel and the chattels contained therein pays part of the purchase price for which a receipt is issued by the seller setting forth the terms of the contract and the seller told the buyer that the lessor of the premises would have to be satisfied with the new tenant, but did not disclose to him or to the agent that there was an arrangement between him and his lessor by which the lessor was to get a certain percentage of the purchase price in the event of the sale of the unexpired term and it subsequently developed that the lessee refused to carry out this arrangement but tried to get the purchaser to pay all or part of this sum to the lessor, the purchaser is justified in rescinding the contract.

Statement

ACTION by business brokers for a commission on making a sale of a hotel business.

C. R. Wilson, K.C., and *W. C. Hamilton*, for plaintiffs.

H. M. Hannesson, for defendant.

Metcalfe, J.

METCALFE, J.:—The defendant is the lessee from one Graves of the building and premises known as the "Vivian Hotel" situate in the city of Winnipeg, and is the owner of the chattels contained in the building. The plaintiffs are business brokers.

Prior to the 9th January, 1910, the plaintiff Herbert had occasionally spoken to the defendant about selling his hotel. The defendant was aware of the business of the plaintiffs.

About the 9th December, 1910, one John T. Hanna called at the office of the plaintiffs, with a view to purchasing a hotel. Herbert called to his attention several hotels listed in their office. None of these being suitable, he went to the Vivian Hotel and saw Mr. Vivian for the purpose of getting a price. Vivian quoted a price of $20,000. The commission on that sum would be $1,000.

Herbert subsequently saw Hanna and for the first time told him about the Vivian Hotel. Thereupon he and Hanna interviewed Vivian, and Hanna said that he would buy the hotel if Vivian would take Hanna's equity in certain house property at $3,800. Vivian knew that Hanna did not have the cash himself, but he knew that certain wholesale men would advance cash to Hanna to purchase the hotel. He made enquiries as to the value of the equity in the house property, and subsequently told Vivian that he was satisfied to take this property at $3,800 on the hotel price.

At some time in the negotiations Hanna saw his brother, E. W. Hanna, a hotel-keeper, Joseph Carroll, manager of the wine and spirits vaults, and Patrick Shea, a brewer, and they were willing to advance the money necessary to complete the payments on the hotel, all of which was known to Vivian.

The parties being satisfied, Vivian told Herbert and Hanna that Graves, the lessor, would have to be satisfied with him as a tenant. Thereupon Herbert and Hanna attended and saw Graves, who told them that he was satisfied with Hanna as a tenant, but that there was a little matter which he did not explain further, between Vivian and Graves, that would have to be arranged before he would consent to an assignment. Herbert and Hanna went back to Vivian and told Vivian that Graves was satisfied with Hanna as a tenant. Herbert also referred to the other little matter, and Vivian told him that it was a personal matter and was none of Herbert's business.

Vivian thereupon signed a document as follows:—

December 9th, 1910.

Received from John T. Hanna, by my agents "The Locators of Winnipeg" a deposit of $1,000 on the purchase price of the contents of the "Vivian Hotel" at $20,000, I agreeing to accept as part payment on such a residence at 168 Walnut street at $5,000, subject to encumbrance of about $1,20[illegible]nd balance, about $15,200, to be paid me in cash on date of posse[illegible] which is to be on or about January 20th, 1911. Stock of liquors and cigars to be settled for by notes of equal amounts without interest at 30, 60 and 90 days from date of possession.

(Signed) ALBERT VIVIAN.

It appears that the little personal matter between Graves and Vivian was some agreement between them that in the event of the sale of the hotel business Vivian was to pay Graves a percentage on the price; that such arrangement had been made between them on the execution of the lease and was a consideration by reason of which Vivian had obtained a lease for a considerable term, the unexpired term being of considerable value. All this, however, was not then disclosed either to Hanna or Herbert.

Graves, being about to leave for Ontario, left a consent to an assignment of the lease from Vivian to Hanna with his partner,

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such assignment to be delivered up only upon Vivian's carrying out his arrangement with Graves. Before Graves went east Vivian saw him. Under the arrangement Vivian had to pay Graves some $3,400, and, as Vivian puts it, "This was more than I expected."

Shortly after this Vivian told Herbert that he was not able to pay Graves, who wanted a large amount to assign the lease, and that he did not see how he could carry the deal through, considering the amount he had to pay Graves.

About this time Mr. Hubbard, a lawyer, was brought into the deal on behalf of Vivian. Hubbard at once tried to get Hanna to put up all, or some portion of this $3,400. This Hanna refused to do. Hubbard admits that he did considerable "bluffing" in connection with the matter.

On the 22nd December Messrs. Phillipps & Whitla, who were acting for Hanna, wrote to Hubbard as follows:—

Re Vivian and Hanna.

In reference to our telephone message of last evening, in which you stated that Mr. Vivian had not signed any agreement with Hanna and that he was being held up by the landlord for a bonus before the assignment in favour of Hanna could be approved, we beg to state that so far as we are concerned, acting for Mr. Hanna, we rely upon the agreement signed by Mr. Herbert of The Locators, who acted as Mr. Vivian's agent, acknowledging receipt of $1,000.00 and setting forth the terms of the sale. We have also seen a letter signed by Mr. Vivian, in which he acknowledges that Mr. Herbert was his agent in connection with this sale. This being the case, we have paid a deposit and we have received an agreement in writing which is enforceable. We therefore look to Mr. Vivian to carry out his agreement. With Mr. Graves we have nothing whatever to do.

On the 23rd of December Hubbard wrote to Phillipps & Whitla, as follows:—

Re Vivian and Hanna.

Your letter of the 22nd inst. duly received.

Mr. Vivian, we are instructed, never gave Mr. Herbert or The Locators any authority to sell, or in any event only on terms which were specified to them, and which must have been brought to the notice of your client, if, as you claim, you have seen a letter signed by Mr. Vivian. Our client never gave any authority to Mr. Herbert to sign any agreement, and will of course refuse to ratify any agreement that Herbert may have made, and we are to-day notifying The Locators, who are the only persons with whom Mr. Vivian has had any dealings whatsoever in the matter, to the effect that any authority that may have been received by them is rescinded. The only dealing which our client had with Mr. Herbert was as a member of "The Locator" firm, and he well knew that Mr. Vivian was not the owner of the hotel in question, and that any sale of the business was subject to the approval of the lessor.

On the same day Vivian, by his solicitor, Hubbard, wrote to The Locators, as follows:—

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Metcalfe, J.

Take notice that any authority which may ever have been given by me to you to sell the chattels and effects of the Vivian Hotel, or to act as my agents in any connection therewith, is hereby determined and at an end, and that I will refuse to recognize any act of yours done or purporting to be done as my agent.

I am inclined to the view that the acts of Vivian and Hubbard were such as justified Hanna in coming to the conclusion that they did not intend to carry out the contract. Although they subsequently intimated that they would carry out the contract, Hanna, in the meantime, had made other arrangements, and the deal went off.

It is true that the plaintiffs did not disclose to Vivian that the $1,000 was not received in cash. They took Hanna's note for that amount, and justify this on the ground that that $1,000 was the amount of their commission, and that they took their own chances on the payment of the note. In any event, the defendant has not set up any misconduct on the part of the agents by reason of this act or its non-disclosure.

I think the plaintiffs found for the defendant a purchaser ready and willing and able. The purchaser was satisfactory to the defendant. Subsequently, through the fault of the defendant, and through no fault of the plaintiffs, the deal went off.

There will be judgment for the plaintiffs for $1,000 and costs.

Judgment for plaintiffs.

TURNBULL v. CORBETT.
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New Brunswick Supreme Court, Barker, C.J., Landry, McLeod, Barry, and McKeown, JJ. April 19, 1912.

1. NEGLIGENCE (§ II C—96)—DAMAGES—CONTRIBUTORY NEGLIGENCE.

Where bricks are piled upon a street by a contractor in the course of erecting a building, and the obstruction so created is insufficiently protected at night, both as to the number of lights thereon and as to the location or position of such lights, the contractor is liable in damages to one who drives into such obstruction at night without seeing it, where such driving cannot be said to be reckless or unusually fast, in an action of negligence based upon the failure to warn travellers by protecting lights, apart from any right or permit which the contractor may have had to pile the bricks on the street.

2. APPEAL (§ VII L 3a—485)—FROM FINDINGS OF FACT WITHOUT A JURY—RE-CONSIDERATION OF INFERENCES—INDIRECT EVIDENCE.

An appellate court, hearing an appeal from the findings made by the court below, trying a personal injury action without a jury, should reconsider the whole evidence, and particularly where the case depends upon the inferences or conclusions to be drawn from facts not substantially in dispute.

[*Boggs* v. *Scott*, 34 N.B.R. 110; *Papageorgiou* v. *Turner*, 37 N.B.R. 449 and *Coghlan* v. *Cumberland*, [1898] 1 Ch. 704, referred to.]

Statement.

APPEAL by defendant against the verdict entered for the respective plaintiffs in two actions for damages against a builder

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for injuries received by the plaintiffs while driving at night upon a public street by running into a quantity of building material left insufficiently lighted or protected on the street in proximity to the new building.

The appeals were dismissed.

W. B. Wallace, K.C., for plaintiffs.

J. King Kelley, K.C., for defendant.

The judgment of the Court was delivered by

Barker, C.J.

BARKER, C.J.:—These two cases depend upon the same evidence and involve precisely the same question except as to damages. They were tried before White, J., without a jury, and judgment was entered in favour of the plaintiffs, in the one case (*Turnbull* v. *Corbett*), for $60, and in the other (*O'Brien* v. *Corbett*), for $99.

It is contended here that these findings are altogether at variance with the evidence and the conclusions to be drawn from it. The actions arise from an accident which occurred to the plaintiffs when driving in their carriage through one of the public streets of Fairville one night about ten o'clock. The defendant, Corbett, was at the time carrying on some building operations in that vicinity, and for that purpose had a quantity of bricks deposited on the street. In driving the plaintiffs came in contact with these bricks and sustained injuries for which the learned Judge assessed the amounts I have mentioned. There are only two questions involved in these cases: (1) was the defendant guilty of negligence in having or leaving the bricks inadequately lighted, and (2) were the plaintiffs in driving the horse guilty of negligence which contributed to the accident. The Judge found both these questions in the plaintiffs' favour.

In *Boggs* v. *Scott*, 34 N.B.R. 110, and in *Papageorgiour* v. *Turner*, 37 N.B.R. 449, this Court laid down the rule by which in cases of appeal on questions of fact decided by a Judge without a jury, this Court should be governed, and we pointed out the distinction between such a case and an appeal where the facts had been decided by a jury. And in *Coghlan* v. *Cumberland*, [1898] 1 Ch. 704, the Court of Appeal is thus reported:—

> The case was not tried with a jury, and the appeal from the Judge is not governed by the rules applicable to new trials after a trial and verdict by a jury. Even where, as in this case, the appeal turns on a question of fact, the Court of Appeal has to bear in mind that its duty is to rehear the case, and the Court must reconsider the materials before the Judge with such other materials as it may have decided to admit. The Court must then make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it; and not shrinking from overruling it if on full consideration the Court comes to the conclusion that the judgment is wrong. When, as often happens, much turns on the relative credibility of witnesses who have

been examined and cross-examined before the Judge, the Court is sensible of the great advantage he has had in seeing and hearing them. It is often very difficult to estimate correctly the relative credibility of witnesses from written depositions; and when the question arises which witness is to be believed rather than another, and that question turns on manner and demeanour, the Court of Appeal always is, and must be, guided by the impression made on the Judge who saw the witnesses. But there may obviously be other circumstances, quite apart from manner and demeanour, which may shew whether a statement is credible or not; and these circumstances may warrant the Court in differing from the Judge, even on a question of fact turning on the credibility of witnesses whom the Court has not seen.

In these present cases it was pointed out that there was no contradiction in the evidence, and, therefore, the advantage which Judges are said to derive from observing the manner and demeanour of witnesses, in determining as to their credibility, does not exist here.

Questions of negligence such as those involved here are not determined by direct evidence. They are inferences or conclusions drawn from the act or omission complained of and the particular circumstances under which it took place. The question then for us to decide, is whether under the facts, as to which there does not seem to be any substantial dispute, the learned Judge was wrong in finding as he did. If we think so, it is our duty to say so and substitute our finding for his and enter a judgment accordingly. It was suggested at the trial and mentioned on this motion, that the defendant had no right to deposit bricks on the road, or at all events that his depositing them there, as the evidence shewed he had done, was an unreasonable user of the road, in either of which cases he would be liable. The Judge expressed no opinion on that point as he was of opinion that the defendant had been guilty of negligence which caused the accident.

The negligence of the defendant consists in the inadequate lights upon the bricks to warn persons of the obstruction. The inadequacy consisted not only in the location of the lights on the pile, but also the number of lights required for that purpose. The alleged contributory negligence of the plaintiffs consisted in their fast driving. It does not seem to me that the driving can be said to have been reckless or unreasonably fast—much less that the rate of speed had anything to do with the accident or in any way contributed to it. I think the Judge's conclusions were quite correct on both points, and that the appeals should be dismissed with costs.

Appeals dismissed.

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H. C. J.
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Dec. 13.

Re MITCHELL.

Ontario High Court, Latchford, J. December 13, 1912.

1. WILLS (§ III G—120)—BEQUEST TO LEGATEE WITH SICKNESS AND DISTRESS CLAUSE, REMAINDER TO CHILDREN.

An absolute gift is not created by a bequest of money to a legatee with restrictions added whereby the money is to be invested by the executor and the interest only paid to the legatee during her lifetime, with power to the executor if he thought more was required by the legatee because of sickness or distress to make advances out of capital, where the will provides that the remaining part of the principal sum should go to the legatee's children at her death; she has no power to assign the corpus of the fund under such bequest.

Statement

MOTION by the executors under the will of Louisa C. Mitchell to determine questions arising between them and C. W. Mitchell, the husband of the testatrix, claiming as assignee of his daughter, Mrs. Hawkens, to be entitled to five thousand dollars bequeathed to Mrs. Hawkens under the will.

A. E. Lussier, for the executors.

W. C. McCarthy, for C. W. Mitchell.

A. C. T. Lewis, for the official guardian.

Latchford, J.

LATCHFORD, J.:—The application I considered too wide to be disposed of summarily, and it was accordingly restricted to the construction of the will of the deceased, so far as the will affects the rights of Mrs. Hawkens and her children.

Mrs. Mitchell, who died on the 17th January, 1912, left an estate of $112,000. After leaving to her children certain specific bequests and legacies—only one of which it is necessary to consider—she bequeathed the residue of her property to her husband. He after her death procured an assignment from the legatees of all their interest under the will, and claims that under this assignment he is entitled to $5,000 bequeathed to Mrs. Hawkens in the terms following:—

"I give and bequeath to my daughter Louisa Caroline Mitchell Hawkens, wife of George J. Hawkens, of Ottawa, insurance agent, the sum of five thousand dollars for her own separate use, but free from the control of her husband, and without right to her to anticipate the same in his favour, such sum to be invested by my executor and trustee and the interest thereon only paid to my said daughter each six months, but with power to my said executor and trustee in case my said daughter shall need and be in want, or in case of sickness and distress, to pay her out of the capital sum, such sum or sums from time to time as my said executor in the discretion of their manager at Ottawa for the time being shall consider right for her under the circumstances to satisfy her said need or want or expenses in case of sickness and distress, for herself and children and family. The said principal sum, or such part as shall not have been paid

to my said daughter as above provided, shall upon her death be paid to her children then living, share and share alike, and in case she should die without children living at her death, the said sum or such part thereof as shall be left as above provided, I bequeath to her sisters Estelle and Bonnie or the survivor of them, share and share alike."

Mrs. Hawkens had two children living at her mother's death; and these children are still living. Both are infants, and are represented by the Official Guardian, who also represents under an order of the Court any now unborn children of Mrs. Hawkens who may be living at the time of her death.

Effect cannot be given to the claim of Mr. Mitchell if any interest in the five thousand dollars is given by the will to the children of Mrs. Hawkens who may survive her. Quite clearly, such an interest is, I think, conferred. Upon principles not open to question, the whole clause must be considered—not the words which standing alone would constitute an absolute gift—and effect must be given, if possible, to all its provisions. The general words bequeathing to Mrs. Hawkens the five thousand dollars cannot alone be regarded. They are expressly connected with the subsequent directions as to investment and the payment of interest *only* to the legatee during her life-time, except in circumstances of need, illness, or distress.

The further direction as to what is to become of the residue of the fund upon the death of Mrs. Hawkens, again establishes that the intention of the testatrix was that her daughter should have only the interest of the fund, in all but exceptional circumstances, and that what remained should inure upon her daughter's death to the children of her daughter then living.

There is in addition the further gift over in case Mrs. Hawkens should leave no children surviving her at her death.

It is impossible to disregard, as I am asked to do, all the limitations which are placed upon the gift, in clear and unambiguous words, and to hold that Mrs. Hawkens took the five thousand dollars absolutely. This is not a case of inconsistent words engrafted upon a clear and express bequest. There is no inconsistency or repugnancy between the general words bequeathing the five thousand dollars, and the specific directions which are given for the investment of it, and for the disposal of the remainder of the fund after the death of Mrs. Hawkens. Nor is it a case where mere directions as to enjoyment are attached to an absolute gift. It is simply a case where general words are clearly governed by restrictions unequivocally expressing the intention of the testatrix to limit the bequests in a particular and proper manner.

Mrs. Mitchell in the clause under construction plainly stated her intention that Mrs. Hawkens should enjoy for life the inter-

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est only of the five thousand dollars, with a right to part of the fund itself in certain circumstances, and then only to the extent the manager of the Royal Trust Company might in his discretion deem proper. Upon the death of Mrs. Hawkens her children, if any survive her, take the fund or so much of it as may remain in the hands of the executor. Should Mrs. Hawkens leave no issue, the fund will pass to her sisters Estelle and Bonnie. There will be judgment accordingly.

It may be added—though the point may not properly be one for determination here—that as a consequence of the interpretation I have given, the assignment from Mrs. Hawkens to her father cannot affect the rights of her children, and the executors cannot safely transfer to him the fund which he has claimed.

Costs of all parties out of the estate of the deceased.

Judgment accordingly.

MAN.

K. B. 1912

Dec. 13.

TREMBLAY v. DUSSAULT.

Manitoba King's Bench. Trial before Curran, J. December 13, 1912.

1. CONTRACTS (§ I E 5 C—106)—SUFFICIENCY OF WRITING—DESCRIPTION OF PARTIES—STATUTE OF FRAUDS.

It is essential that a contract for sale of lands should express the names of the contracting parties or of their agents authorized to act in the matter of the sale.

[*Maber* v. *Penskalski*, 15 Man. L.R. 236; *Miller* v. *Rossiter*, 3 A.C. 1124, referred to.]

2. CONTRACTS (§ I E 5 c—108)—SUFFICIENCY OF WRITING—SIGNATURE "PER" ONE OF SEVERAL JOINT OWNERS—STATUTE OF FRAUDS.

A receipt for the deposit on a sale of land expressed to be "subject to owners' approval" and containing a statement of the price and terms of sale will not satisfy the Statute of Frauds where it is signed "per" one of several joint owners and was repudiated by the co-owners who declined the deposit and had it returned to the proposed purchaser.

3. SPECIFIC PERFORMANCE (§ I A—11)—SALE—ENFORCING PARTIAL PERFORMANCE—ONE OF SEVERAL JOINT OWNERS.

Where the proposed purchaser knew that the vendor was not the sole owner and the vendor did not assume to contract as such on taking a deposit and giving a receipt embodying the terms of sale expressed to be "subject to owners' approval," the purchaser, on the co-owners' rejection of the agreement, is not entitled to specific performance *pro tanto* for even the partial interest which his vendor had.

Statement

THIS action is brought by the plaintiff to remove a caveat filed by the defendant in the Winnipeg land titles office against lot 9, in block 4, according to a plan of survey of the Roman Catholic mission property, registered in the Winnipeg land titles office as plan No. 433; and for a declaration that there is no contract or agreement between the plaintiffs and defendant for the sale of this land to the defendant, and for damages.

Judgment was given vacating the caveat.

H. P. Blackwood, and *A. Bernier*, for plaintiffs.
A. Dubuc, and *J. Mondor*, for defendant.

CURRAN, J.:—The defendant alleges a valid sale to him of the land and counterclaims for specific performance, and in the alternative, if it be found that all of the plaintiffs are not bound by the alleged sale, for a declaration that the plaintiff Deniset is so bound as to his interest in the land, and for specific performance in that alternative against him.

The plaintiffs set up defences to the counterclaim, denying the alleged sale to the defendant; that specific performance is impossible, owing to a sale of the land having been made to third parties, and the Statute of Frauds.

The statement of claim was issued on the 27th September, 1912, and at that date the plaintiffs were the registered owners of the lands in question under certificate of title No. 190152 of the Winnipeg land titles office in the following interests: the plaintiff company, an undivided one-half interest; the plaintiff Gevaert, an undivided one-quarter interest, and the plaintiff Deniset, the remaining one-quarter interest—subject to a certain mortgage, and to the defendant's caveat, which was registered on the 16th July, 1912, as No. 60992, and this is the caveat which the plaintiffs seek to have removed.

By consent of parties copies of the certificate of title, the caveat, and of the plan were put in. The certificate of title is exhibit 1, the caveat is exhibit 3, and the plan is exhibit 12.

The plaintiffs, as the registered owners, under the Real Property Act, of the land in question, are entitled to succeed unless the defendant can make good his position as a purchaser of this land under a valid agreement of sale from the plaintiffs.

The caveat complained of is based upon, to quote from the caveat itself, "a short agreement in writing (by way of receipt) dated the 10th day of May, 1912," etc. This is the receipt, exhibit 5, referred to in the pleadings, and is the agreement of sale relied upon by the defendant. For convenience, I set out the receipt in full:—

St. Boniface, Man., May 10th, 1912.

Received from J. Camille Dussault, the sum of Twenty-five dollars. Deposit on purchase price of lot 9, block 4, block 314, R.C.M.P., plan 433. Price $1,063.70—Cash 1/4. Balance, proposed plan of sub-division of lot 314, R.C.M.P., plan 433. Balance 6, 12, 18, 24, 30 and 36 months.

This receipt subject to owners' approval.

$25. *Per* F. DENISET.

The plaintiffs allege that this receipt is not binding on them and does not comply with the Statute of Frauds, and, in any event, that it is, by its terms, subject to the owners' approval, and not binding unless and until the owners do approve.

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As a matter of fact it was not approved by the plaintiff, the J. H. Tremblay Co., and the plaintiff Gevaert. The evidence shews that almost immediately after their becoming aware of the defendant's offer for the land, embodied in this receipt, they rejected it, and in due course notice of this fact was communicated to the defendant verbally and also by letter, and the cheque for $25, received by the plaintiff Deniset as a deposit on the land was returned to the defendant.

The facts leading up to the giving of exhibit 5 are briefly as follows: The plaintiffs purchased a large tract of land in St. Boniface some time in January, 1912, for the purpose of subdivision and sale. They caused a survey and plan to be prepared and registered, and appointed the firm of Sanford, Evans & Co. of Winnipeg, sole agents for the sale of lots. According to the evidence, these agents were required to submit to the plaintiff, J. H. Tremblay & Co., for approval any propositions for purchase of lots received by them. If Tremblay & Co. approved, the sales were proceeded with and closed out in the usual way. These agents assumed to appoint the plaintiff Deniset, a sub-agent, and allowed him a commission of five per cent. on all sales he might make, subject, of course, to the same conditions as to approval as applied to their own agency.

It appears from the evidence of one Black, an employee of the Sanford, Evans & Co., that the usual custom was to telephone to, or notify by letter, J. H. Tremblay & Co. of any propositions received by them for the purchase of lots, and that Tremblay & Co. were supposed to consult with their co-owners as to acceptance of such propositions, but that in every case they did not do so and assumed to authorize sales in some cases without consulting their co-owners.

The defendant argues from this that if J. H. Tremblay & Co. had the right to authorize sales, this right was equally exercisable by the other plaintiffs as joint owners of the property. I took it from the argument of the defendant's counsel that he contended that the plaintiffs were in reality partners in this purchase; but I cannot give effect to that view—if that was in reality what counsel contended for. I take it that the plaintiffs were nothing more than joint owners of the property in question and that there would be no implied authority existing between the owners whereby one owner might approve a sale without consultation with his co-owners, although the individual plaintiffs appear to have permitted the plaintiff company to so approve without complaint on their part.

It does not seem to me material to decide upon this question as, in any event, the plaintiff Deniset, in issuing the receipt, exhibit 5, took the precaution to make it in express terms subject to owners' approval, and as this document is put forth

by the defendant as the sole ground of his title, I take it, that he must abide by it in the terms in which he received it.

Whether or not the plaintiff Deniset had the right to sell without consulting his co-owners, he did not in this case assume to do so. The defendant must rely upon the receipt, exhibit 5, in the form in which it was issued to him by Deniset, it is the only evidence of the sale in existence, and he cannot add to or detract from its terms in any particular.

According to the evidence of the plaintiff Deniset, the defendant met him in Deniset's office in the city of St. Boniface, and had some talk about buying the lot in question. As the result of this the defendant made an offer for the lot, which was accepted by the plaintiff Deniset conditionally upon his partners, as he expresses it, consenting to the sale. Defendant denies that there was any condition imposed, and disclaims any knowledge of the words found in the receipt—"This receipt subject to owners' approval"—until sometime afterwards.

I accept the evidence of the plaintiff Deniset upon this point, if indeed the evidence is admissible at all in view of the written document. It seems to me immaterial what knowledge the defendant then had, as he now comes into Court with this document, puts it forth and relies upon it to establish his title to the property.

What force or effect had exhibit 5 until approved by the owners of the property? In my opinion clearly none. It conferred no legal right whatever upon the defendant as against the plaintiffs or the land therein referred to until the plaintiffs had in some way expressed their approval of it, or the proposed sale to which it referred. As I said before, this approval two of the plaintiffs, J. H. Tremblay & Co. and Gevaert, have refused, and they promptly rejected the defendant's offer as soon as they learned of it, and caused a notification to this effect to be given to the defendant and his cheque for the deposit of $25 returned to him.

I hold that the receipt, exhibit 5, was not a completed memorandum of agreement sufficient to satisfy the Statute of Frauds, but that it was no more than a proposal by the defendant which required acceptance by the plaintiffs to render it binding upon them, and without acceptance it had no validity. On the other hand, a memorandum of agreement supposes the two parties to have verbally made a contract with each other, and when the terms of such contract are reduced into writing and signed, that is sufficient to bind the parties signing: Fry, on Specific Performance, 5th ed., p. 139, par. 283.

Again, it is essential that the contract should express the names of the parties. The receipt in question does not contain the names of the vendors. This appears to be essential:

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Fry, on Specific Performance, 5th ed., p. 181, par. 368; *Maber* v. *Penskalski*, 15 Man. L.R. 236, unless, indeed, such receipt is signed by an agent clothed with authority to act for and represent the owners in the matter of the sale: *Miller* v. *Rossiter*, 3 A.C. 1124, 1140.

A reference to the receipt, exhibit 5, will shew that it is signed "*per* F. Deniset." For whom Deniset intended to sign does not appear. He was not the sole owner to the defendant's knowledge, as the defendant admits in his evidence that he knew the plaintiff Gevaert had an interest in the land.

I hold upon the evidence that Deniset was not an authorized agent of the plaintiffs having authority to bind them to a sale of this land. Had Deniset possessed such authority, and the receipt had been free from the condition as to approval by owners, it is possible that it might satisfy the requirements of the statute, and constitute a binding contract of sale; but, as Deniset had not such authority, I am of opinion that the receipt does not comply with the statute, and that it amounted to nothing more than an offer to purchase upon the terms mentioned, which, of course, required acceptance by the owners before it became binding upon them.

In his capacity as a sub-agent acting under Sanford, Evans & Co., and assuming that this firm had authority to so appoint him, the plaintiff Deniset could not commit his principals irrevocably to any sale, but could only sell subject to approval, and as he had no authority to approve for them, I hold that his signing of the receipt in the way in which he did in no way binds them.

The position is, therefore, this: The receipt in question is not signed by the plaintiffs, as owners, nor is it signed by the plaintiff Deniset, as their duly authorized agent, and in no way does the name of the owner appear in the document, and I think this is essential. As there was, therefore, no completed agreement binding upon the owners to carry out a sale of the lands in question to the defendant, there can be no legal ground upon which the defendant can uphold his caveat. He has, in fact, no interest in the land in question which entitles him to file a caveat at all.

Next as to the defendant's contention that he is entitled, in any event, to specific performance against the plaintiff Deniset to the extent of his interest in the land, I do not think I can give effect to it. The principle of law applicable is laid down in Fry, on Specific Performance, 5th ed., 616, par. 1258:—

> If a man, having partial interests 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 jurisdic-

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tion, the person contracting under these 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.

This case does not fall within the principles of law above laid down. The defendant knew that Deniset was not the sole owner of the property, but that Gevaert, at least, was jointly interested with him. It is not shewn that Deniset held out or represented to the defendant that he was the sole owner of the property, or, indeed, what interest in it he had, and the defendant knew that in whatever capacity Deniset was acting it was not in that of sole owner.

I think that all that Deniset can be held to in consequence of the receipt which he issued to the defendant is this: that if the proposed sale was satisfactory to his co-owners it would be satisfactory to him; but that, in any event, it must be approved by his co-owners before it becomes binding upon anyone.

The defendant, therefore, having failed to establish his purchase of the property, is not entitled to maintain his caveat based upon the alleged purchase. There will be judgment for the plaintiffs vacating and setting aside the defendant's caveat and declaring that the defendant has no claim upon or interest in the lands in question as a purchaser thereof from the plaintiffs, and that the agreement for sale set up by the defendant is invalid and of no legal force or effect. The defendant's counterclaim will be dismissed with costs, and the plaintiffs will have their costs of the action as against the defendant.

Judgment vacating caveat.

ELLIS v. FRUGHTMAN.

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Alberta Supreme Court, Stuart, Simmons, and Walsh, JJ.
December 19, 1912.

1. DAMAGES (§ III A 7—95)—PENALTY OR LIQUIDATED DAMAGES—WRONGFUL DISMISSAL—STIPULATED DAMAGES.

Where a contract contains a provision that either party to it may terminate it on payment of $500 to the other party, said amount may be either a penalty or liquidated damages; such question is one of law to be determined by taking into consideration the intention of the parties from the language used and the circumstances of the case taken as a whole as at the time the contract was made.

[*Law* v. *Local Board of Redditch*, [1892] 1 Q.B. 127, referred to.]

Statement

APPEAL by the defendants from the judgment of Harvey, C.J., at the trial in favour of the plaintiff in an action for damages for wrongful dismissal.

The appeal was dismissed, STUART, J., dissenting.

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Stuart, J.
(dissenting)

C. C. McCaul, K.C., for the appellant.
C. A. Grant, for the respondent.

STUART, J. (dissenting):—I must, with respect, confess to considerable dissatisfaction with the judgment in this case. I feel the more free to say this in view of the fact that the Chief Justice himself expressed a "great deal of doubt" as to which story to accept. I agree that the stipulation in the contract should not be construed as a penalty, but as giving power to either party to purchase the right of cancellation on payment of $500. But upon the facts as they are presented to me in the evidence I should have felt much more inclined to accept the defendant's story. I think that it was antecedently extremely improbable that men of the defendant's occupation and character would deliberately incur the liability to pay so large a sum by discharging the plaintiff without any just cause. In the next place, the reasons given by the learned Chief Justice for believing the plaintiff rather than Griesdorf seems to me to be based on some misapprehension. As to the small payment of money made by Amelia Bankol, I cannot find that either of the defendants definitely denied that she had made it. Griesdorf did not, I think, refer to it, and all that Frughtman said was that he did not remember it.

With regard to the false affidavit, it seems to me that when it is remembered that it was Griesdorf's veracity, and not Frughtman's, which was really in question, and that it was Frughtman, and not Griesdorf, who made the false affidavit, this circumstance was given too much importance in deciding between the story of Ellis and the story of Griesdorf.

These were the two circumstances that seem to have turned the balance in the mind of the learned trial Judge in the plaintiff's favour, and with regard to the former the payment of the money by the witness Bankol he seems, I think, quite properly to have considered it of very slight importance in any case.

When the case is in this position, I think the Court should feel free to form its own conclusions upon the facts. Ellis is contradicted upon some points which seem to me very material by independent witnesses. One of his own witnesses, indeed, Wills, says that he heard Griesdorf tell Ellis that he, Ellis, had insulted him. I cannot find that Ellis is frank enough in any part of his evidence to tell of this statement of Griesdorf, although his own witness tells of it.

For these reasons I should have myself felt inclined to accept even on this appeal, the story of the defendant Griesdorf, but as the other members of the Court are of a different opinion, I do not propose to make any further dissent.

Simmons, J.

SIMMONS, J.:—The defendants carried on business as dealers in furniture, clothing, etc., in the city of Edmonton.

The plaintiff and defendants entered into an agreement in writing whereby the defendants engaged the plaintiff for the term of one year as sales agent and to receive ten per cent. on all cash sales as his remuneration.

The agreement further recites that

> By this agreement the relation of master and servant is created between the parties of the first part and the party of the second part, and the money or moneys collected by the said party of the second part remains and is the money of the said parties of the first part. It is further agreed by and between the parties hereto that this agreement shall remain in force for a period of twelve months from the date hereof, and that in the event of either party desiring to cancel or put an end to this agreement, they shall pay to the other party the sum of five hundred ($500) dollars by way of compensation for the cancellation and determination of said agreement.

The agreement also provided that the plaintiff had the right to devote a portion of his time to the plaintiff's own business of enlarging, framing and selling pictures. The agreement is dated May 6th, 1911, and the plaintiff entered upon his employment with the defendants on or about that date, and continued in their employment until July 25th, 1911, when a quarrel took place between the plaintiff and one of the defendants. The defendants admit they discharged the plaintiff and uphold their action on the ground that the plaintiff their servant misconducted himself in such a manner as to justify the dismissal. The plaintiff then brought this action to recover the $500 which he claims under the terms of the agreement. The evidence is very contradictory, but the learned Chief Justice at the trial accepted plaintiff's version of their differences as the more truthful one and found that the defendants had wrongfully dismissed the plaintiff, thereby terminating the agreement and entitling the plaintiff to recover the $500. From this judgment the defendant appeals. I see no reason for disturbing the finding of the learned Chief Justice as to the wrongful dismissal. He had the opportunity of hearing the witnesses and observing their demeanor. It cannot be seriously disputed that the defendants by an indirect method put an end to the agreement, and the only question necessary to be determined is whether the $500 was an amount predetermined by the parties as the liquidated damages to be paid by the party terminating the agreement, or was it a penalty which covers the loss if proved, but does not assess it, and therefore cannot be recovered as such? It seems quite clear that it was the intention of both parties that the sum mentioned should be treated as coming within the first class as constituting the liquidated damages agreed upon.

The question is one of law for the Judge alone, and in deciding this question he must take into consideration the intention of the parties as evidenced by their language and the cir-

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cumstances of the case which, however, must be taken as a whole and viewed as at the time the contract was made.

Vide Halsbury's Laws of England, Vol. 10, p. 329. Where the sums agreed to be paid as liquidated damages were payable on a single event only, viz., non-completion of the works, they were to be regarded as liquidated damages, not as penalties: *Law* v. *Local Board of Redditch*, [1892] 1 Q.B. 127.

The contract itself, as well as the evidence of defendants, disclose that plaintiff's position as sales agent and canvasser for purchasers brought him in very close touch with defendant's customers, and the plain inference follows that it was of material advantage to defendants to provide against the plaintiff taking advantage of this circumstance and leaving their employ and engaging with a rival in business of the defendants or starting business on his own account and in opposition to their mercantile business. In contemplation of this the parties estimated the damages to be payable by either party for their respective release from the further carrying out of the contract. The sum seems clearly to come within the class of liquidated damages. The appeal should, therefore, be dismissed with costs.

Walsh, J.

WALSH, J.:—Although if I had tried the case I might not have arrived at the same conclusion upon the facts as that which the learned Chief Justice has reached, there was, in my view of it, ample evidence before him to justify his findings of fact, and they should not be disturbed.

I think that the agreement was put an end to by the acts of the defendants, and that is what is provided for by the clause of it which is under consideration. The agreement was one of hiring and the plaintiff was dismissed from the employment covered by it. I cannot fancy anything which could more effectually "put an end to this agreement" (to quote the words of the clause) than the refusal of the defendants to carry it out themselves, and the placing by them of the plaintiff in a position in which he could not perform it.

In my opinion the sum of $500 mentioned in the clause in question is not a penalty. The word "penalty" as applied to an agreement means, I think, a punishment for committing a breach of it. This agreement specially reserves to either of the parties the right to terminate it, and the sum which is mentioned is the price agreed upon for the exercise of that right.

The defendants exercised the right thus reserved to them, and they should therefore be made to pay the agreed price.

I would dismiss the appeal with costs.

Appeal dismissed, STUART, J., *dissenting*.

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(Decision No. 2.)

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Alberta Supreme Court, Harvey, C.J., Scott and Simmons, JJ. December 18, 1912.

1. SPECIFIC PERFORMANCE (§ I E—30)—RESCISSION OF CONTRACT—FAILURE TO PAY PURCHASE INSTALMENT, EFFECT OF—SUBSEQUENT TENDER.

Where, under an executory contract for the sale of land providing for the payment of the purchase price in instalments, the vendee made default in the payment of an instalment when due, though it was expressly agreed that time should be of the essence of the contract, and notice was given by the vendor to the vendee declaring that the agreement was terminated pursuant to the terms of the contract, yet a forfeiture will not be allowed by the court where it appears that a substantial amount, both absolutely and relatively to the whole purchase price, has been paid and the default had continued for only two months after the notice was given, at which time the vendee tendered the amount in which he was in default, and the vendee may notwithstanding be declared entitled to specific performance of the contract.

[*Chadwick* v. *Stuckey* (No. 1), 6 D.L.R. 250, reversed. *Labelle* v. *O'Connor*, 15 O.L.R. 519, distinguished. *B.C. Orchard Land Company* v. *Kilmer*, 2 D.L.R. 306, 20 W.L.R. 892, specially referred to.]

Statement

APPEAL by the plaintiff from the judgment of Stuart, J., *Chadwick* v. *Stuckey* (No. 1), 6 D.L.R. 250, dismissing the plaintiff's claim and ordering the removal of the caveat filed, upon payment into Court of the purchase money paid by the plaintiff.

The appeal was allowed.

Jones, Pescod & Adams, for the appellant.

McCarthy, Carson, & McLeod, for the respondent.

Harvey, C.J.

HARVEY, C.J.:—On the 18th of January, 1911, by agreement in writing, the plaintiff agreed to buy and the defendant agreed to sell a half-section of land for $25,280, of which $4,201.75 was to be paid by the assuming of a mortgage, securing that amount on the land, $2,000 on the 1st days of August and November, 1911, and February, May, August, and November, 1912, and February, May, and August, 1913, with interest at 7 per cent. The plaintiff paid the instalments due in August and November, 1911, with interest, and on the 9th of February, 1912, he paid $600 on account of the instalment of $2,000 due on the 1st day of that month. A short time after, the plaintiff went away, and the defendant could not ascertain his whereabouts, but the defendant swears that he had also promised him faithfully, before leaving, that he would pay up the balance of the instalment then past due. The agreement contained the following clause:—

> Time is to be considered of the essence of this agreement and if the purchaser makes any default in the payment of the said mortgage money, or interest or of the purchase money called for under this agreement, or the interest thereon, the vendor may immediately, or at any time after the happening of such default notify the pur-

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chaser in writing, that this agreement has, by reason thereof, been determined and put an end to, which notice may be effectually given by depositing the same in the post office at Calgary, in an envelope addressed, John N. Chadwick, Esq., Calgary, Alta., and prepaid and registered, and immediately upon the giving of the said notice, all of the rights of the purchaser under this agreement shall be thereby determined and put an end to, and the vendor may re-enter upon the said premises and hold them to his own use free from all claim of the purchaser thereupon, and may re-sell the same, or otherwise deal with it as though this agreement had not been made and may retain to his own use all sums of money paid to him in respect thereof, by the purchaser.

On the 10th of April, 1912, notice was given in pursuance of, and in accordance with the foregoing provisions, which notice was as follows:—

John N. Chadwick, Esq.,
Calgary, Alberta.

With reference to the agreement in writing, dated the 18th day of January, A.D. 1911, under which I agreed to sell and you agreed to purchase the west half of section two, (2), in township twenty five (25), range two (2), west of the fifth meridian in the Province of Alberta (of which land the plans have subsequently been registered in the land titles office for the South Alberta land registration district, as plan 4059, A-N, and which plan comprised lots 1 to 16, in block A, lots 1 to 16 in block 8-A in block B, and lots 1 to 16 in block C, and lots 1 to 16 in block D).

Take notice that you made default in the payment to me of the instalment of purchase money payable thereunder on the 1st day of February, A.D. 1912, (you having paid me only $600 out of the instalment due on 1st of February, 1912, of $2,000 and interest), by reason of which default I hereby notify you that the said agreement has been determined and put an end to.

Dated at Calgary, Alberta, the 10th day of April, A.D. 1912.

WILLIAM STUCKEY.

Witness: J. M. CARSON.

On June 18th a tender was made on behalf of the plaintiff to a member of the firm of the defendant's solicitors of the sum in default, including the amount of the instalment of May 1st, and interest, which was refused on the ground that another member of the firm was attending to the matter. On the same day the tender was made to the defendant personally, who refused to accept it, but offered to reinstate the agreement for a further sum of $20,000. On the following day the balance due on the mortgage, which was assumed by the plaintiff under the agreement, which balance amounted to $2,159.18 was paid to the same firm of solicitors who, in acknowledging receipt promised to procure a discharge as soon as they could get into touch with the mortgagees. It is stated, though it does not appear in evidence, that these solicitors were also solicitors for the mortgagees.

The case came before my brother Stuart by way of originating summons issued on June 19th, to support a caveat which the plaintiff had filed in the land titles office and which the defendant had given him notice to remove. On the return of the summons it was agreed that the learned Judge should treat the case as if it were an action for specific performance. The evidence is all given by affidavit and is not of the most satisfactory character. It is evident that more than $2,000 had been paid by the purchaser on account of the mortgage sometime prior to the 19th of June, since it amounted at the time of the agreement to $4,201.75, and the balance on June 19th was only $2,159.15, but there is no evidence whatever on this. There is no affidavit of the plaintiff and consequently no explanation of his default. On these facts the learned Judge dismissed the plaintiff's claim and directed the removal of the caveat upon the defendant paying into Court, as he had offered to do, without interest the purchase money paid by the plaintiff, including that paid to the mortgagee. The question involved in this case has been before the Courts in several of the provinces within the last few years, and probably has caused more difference of decision and opinion than almost any other question.

In *Labelle* v. *O'Connor* (1908), 15 O.L.R. 519, the plaintiff had agreed to purchase some land for $290, of which $100 was paid down. The next payment $75 was due on 15th November, 1905, and was fixed so as to enable the vendor to use it to pay the instalment which he owed to the person from whom he had bought, as the plaintiff was made aware. Time was made the essence of the agreement and the vendor was given the right to resell on default. The payment was not made when due, nor was any extension made though asked. In February a letter was written by the plaintiff, asking for his deed, and stating that he was ready to pay the balance in full. No reply was received. In April, the defendant told the plaintiff he would keep the lot and the $100. A formal tender was then made and refused. The trial Judge, Teetzel, J., gave judgment for the plaintiff. On appeal, the Divisional Court, consisting of Meredith, C.J.C.P., and MacMahon and Anglin, JJ., reversed this judgment, the Chief Justice dissenting, but ordered the return of the $100 paid.

In *Steele* v. *McCarthy* (1908), 1 S.L.R. 317, 7 W.L.R. 902, the full Court of Saskatchewan, Lamont, J., dissenting, went even further. In that case the agreement was for the sale of a section of land for $9,600 to be paid in annual instalments of $3,200. The agreement was made on 22nd May, 1905, and the first instalment fell due on 1st November, 1907. Interest at seven per cent. was to be paid on the 1st November each year

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to be computed from 1st November, 1905, and paid in advance. The plaintiff also agreed to pay taxes and to break 400 acres in 1905, and 220 acres in 1906. Time was declared to be of the essence of the agreement and it was provided that in default the defendant was to be at liberty by sending a notice in the manner prescribed to determine the agreement and retain any sums paid under it. The plaintiff paid the interest due on 1st November, 1905, which would be $672. He broke 325 acres of land in the year 1905, and paid $300 as compensation for the 75 acres which he did not break, or at the rate of $4 per acre, so that the value of the breaking done would be $1,300. In 1906, the plaintiff broke 100 acres, the equivalent of $400, but did not pay the interest on November 1st and on November 2nd a notice of cancellation was given. This did not reach the plaintiff until about the end of the month when he immediately telegraphed and had a tender of what he thought due made, which was refused. The Court held that the parties having made time of the essence of the agreement must stand by it, and refused to relieve against the forfeiture, other than to confirm the order of the trial Judge directing the return of the $300 paid in lieu of breaking. I have found no other decision that has gone the length of this.

In *Whitla* v. *Riverview Realty Company* (1910), 19 Man. L.R. 746, we find something nearly approaching unanimity on the part of the Judges in that they unanimously dissent from the principle laid down in *Steele* v. *McCarthy* (1908), 1 S.L.R. 317, 7 W.L.R. 902. The agreement was dated 7th September, 1906, the purchase price was $850 payable $212.50 in cash and the balance in three yearly instalments of $212.50. The agreement provided that upon default the vendor should be at liberty with or without notice to cancel the contract and declare it void. After a default of more than a year and a half, the vendor did give a notice by which he declared the contract void and cancelled. The purchaser subsequently brought action for specific performance and the trial Judge and the Court of Appeal unanimously decided that the forfeiture should be relieved against. Howell, C.J.M., was of opinion that plaintiff should not however have specific performance owing to his laches, but as the only question raised by the pleadings was as to the effectiveness of the cancellation, the other Judges did not consider it necessary to consider that aspect. Richards, J.A., in expressing dissent from *Steele* v. *McCarthy* (1908), 1 S.L.R. 317, 7 W.L.R. 902, points out that while it carries the principle of the right of parties who are *sui juris* to bind themselves by contract to its logical conclusion, yet the principle of relief against penalties however illogical is too firmly settled by decision to be now questioned.

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The latest provincial case to which I will refer is *B.C. Orchard Land Company* v. *Kilmer* (1912), 2 D.L.R. 306, 20 W.L.R. 892. In this case the sale was for $75,000, of which $2,000 was paid down. The first instalment of $5,000 and interest was to be paid upon 14th June, 1910. Time was declared to be of the essence of the contract, and it was agreed that in default of payment of any instalment the contract should become null and void, and all sums theretofore paid should be forfeited. Plaintiff did work on the property to the value of about $3,000, and was unable to meet the instalment due 14th June, 1910, and asked for time which was granted until 7th July. He defaulted again but said he would pay on the 12th. The vendors then notified him that they "considered the deal off," and they made another sale on the 12th at an advance of $25,000. On an action to declare the agreement cancelled the trial Judge dismissed the plaintiff's claim, and directed specific performance on the counterclaim. On the appeal, the Court of Appeal, by a majority of two to one, Galliher, J.A., dissenting, reversed the judgment and directed judgment for the plaintiff.

In all the cases in which the forfeiture was not relieved against, in *Re Dagenham (Thames) Dock Company* (1873), L. R. 8 Ch. 1022, was referred to and distinguished, although in *Steele* v. *McCarthy* (1908), 1 S.L.R. 317, 7 W.L.R. 902, the learned Chief Justice who delivered the judgment of the majority stated that if it were not distinguishable, he declined to recognize its authority. The last mentioned case is a decision of the Court of Appeal. There is no suggestion that it has been disapproved by that Court or any higher Court, and I take it therefore that it is binding on this Court. In that case the purchase price was 4,000 pounds sterling, of which 2,000 pounds sterling was paid down.

Some extensions were given for the payment of the balance, it being provided by the last, that it should be paid on the 1st November, 1869, and it was declared that time should be of the essence of the contract, and in default, the vendors might re-enter and repossess the land, and that all moneys paid should be forfeited. The money was not paid when due, the company then being in process of winding-up, the order for which was made on 11th December, 1869. In May, 1870, the vendors commenced an action for ejectment and by consent, judgment was signed, the vendors undertaking not to issue execution without order. On 26th March, 1873, they applied for leave to issue execution. This was refused by the Master of the Rolls, Lord Romilly, and on appeal to the Court of Appeal, his decision was sustained. Sir W. W. James, L.J., at p. 1025, said, "I agree that this is a penalty from which the company are entitled to be relieved on payment of the residue of the purchase money with interest," and Mellish, L.J., expressed the same opinion. Anglin, J., in

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Labelle v. *O'Connor* (1908), 15 O.L.R. 519, distinguished that case from *Re Dagenham*, L.R. 8 Ch. 1022, on two grounds, viz., that in the former there was no provision that the instalments paid be forfeited on default, or any provision for re-entry and repossession. The case at bar is similar to *Re Dagenham*, L.R. 8 Ch. 1022, in both of these respects.

In *C.P.R.* v. *Meadows* (1908), 1 A.L.R. 344, this Court held that it was competent for a Judge to relieve against the forfeiture under an agreement in default, though time was declared to be of its essence, and that in an action by a vendor the Court might properly protect the purchaser in default, by ordering a sale of the property, the proceeds of which sale would belong to the purchaser after the balance due on the agreement was satisfied. That decision recognizes that the interest of the vendor is to have his purchase money only and that the land is security for that purpose, but that any advance in the value of the land belongs properly to the purchaser, who is likewise liable in case of any decrease in value for any deficiency on a sale, and it seems only fair that if he should have to assume the liability in case of decrease he should have the benefit of any advance. In *Steele* v. *McCarthy*, 1 S.L.R. 317, 7 W.L.R. 902, it was pointed out that there was no such law in force in Saskatchewan, as sec. 8(8) of our Judicature Ordinance as amended by 7 Edw. VII. ch. 7, sec. 2, which provides that:—

> Subject to appeal as in other cases, the Court shall have power to relieve against all penalties and forfeitures, and in granting such relief to impose such terms as to costs, expenses, damages, compensations, and all other matters, as the Court sees fit,

and that that provision might make a difference. It appears to me that the decision in this case should be as it was in *Whitla* v. *Riverview Realty Company*, 19 Man. L.R. 746, viz., that effect should not be given to the notice of cancellation, but that on the contrary the agreement should be considered as still in effect and it is necessary to consider whether the plaintiff should have specific performance of it, or whether on the contrary it would be inequitable as working an injustice to the defendant to grant that relief. If, as in *C. P. R.* v. *Meadows*, 1 A.L.R. 344, the interests of the purchaser are to be protected by the Courts in his absence and without his request, and without explanation of his default, then surely it would require some good reason why those interested should be allowed to be sacrificed when he does appear and asks to have his interests protected.

The learned Judge attaches considerable importance to the fact that there is no explanation of the delay by the plaintiff. It appears to me that in the circumstances of this case too much importance should not be attached to that fact. The proceedings were of a most informal character. They were begun for no other purpose than to maintain the caveat as a notice to

possible purchasers and others and it was only on the argument and after all the evidence was in that it was decided to deal with the matter so as to determine the ultimate rights of the parties. This fact, it seems to me, should be an excuse for the silence of the plaintiff though perhaps it ought to have been considered by his counsel before giving his consent to the final disposition of the matter in this way.

The defendant states that he was put to great inconvenience and expense in not receiving the payment when it fell due, but that is a condition which frequently arises in the ordinary cases of creditor and debtor, and the Courts have considered that the only compensation that could be allowed for that is interest on the money. There is no suggestion that the plaintiff knew of the importance it was to the defendant to receive the instalment promptly. If there had been, the case, in this respect would have been similar to *Labelle* v. *O'Connor*, 15 O.L.R. 519, and the Court would have had to consider whether on that ground it would have been equitable to relieve against the forfeiture at all, or if so, whether such relief should be granted on terms, as for instance, of making good the defendant's loss.

Then the defendant states that the property was of speculative value and that it has increased in value from $79 an acre, the selling price, to $400 or $500 an acre. It is true that in some of the cases the fact that the purchase was speculative in character is looked at as telling against the purchaser, but it seems that it should go no further than to determine the real intention of the parties as to time being of the essence of the agreement on which it might have an important bearing. As to the large increase, as already pointed out, in equity that belongs to the purchaser, and the greater it is, the greater will be the forfeiture if the defendant were permitted to take it for himself. It may be noticed in this connection that the defendant had protected himself against a fall in value by taking independent collateral security, thus preventing any risk to himself. As already shewn, $600 of the $2,000 due on February 1st was paid on February 9th and the defendant says that subsequently the plaintiff promised to pay the remainder indicating that the defendant was not merely willing to accept the amount after it became due, but was probably pressing for it.

In *Hunter* v. *Daniel*, 4 Hare 420, Vice-Chancellor Wigram in giving judgment said at p. 432:—

> I agree with the defendants, that each breach on the part of the plaintiff, in the non-payment of money, was a new breach of the agreement; and that, time being of the essence of the contract, each breach gave the defendants a right to rescind the contract; but that right should have been asserted the moment the breach occurred. The defendants were not at liberty to treat the agreement as still subsisting, and to take the benefit of it at the expense of the plaintiff, if they meant to insist that it was at an end. They were at

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liberty to rescind it, but were not imperatively bound to do so. There is no stronger reason for holding that the forfeiture of a lease is waived by the acceptance of rent subsequently accruing, than there is in this case for holding that the acceptance of an instalment of purchase money (which was not due unless the agreement was to be continued) is a waiver of the right to rescind the agreement. The defendants had no right to accept the money, but upon the principle that the agreement was still subsisting.

It would appear from this that the defendant may in fact have waived his right to consider time of the essence of the agreement in respect of this instalment, but I do not rely on that view, but it does appear to me that it would be most inequitable to permit the defendant to receive the money which would only be paid on the supposition that the defendant was not insisting on his right to cancel, and then immediately, or as soon as he saw fit, to cancel the agreement in respect to that default.

The plaintiff had paid the defendant $4,600 on account of principal, and the interest would amount to more than $1,000 in addition. He had apparently paid the mortgagee more than $2,000, making in all something over $7,600, a most substantial amount both absolutely and relatively to the whole purchase price. His default had continued for only a little more than two months when the notice was given. He was then, as the evidence shews, in California, and there is nothing to warrant the conclusion that the notice reached him, and it would be probably some weeks later at least before he would learn of it. Only a little more than two months after the notice, he tendered the full amount of the arrears up to that time, and at the same time paid the balance on the mortgage through the defendant's solicitors, who had prior to that been acting for him. Perhaps too much importance ought not to be attached to this last fact in view of the statement that they were also solicitors for the mortgagees, and also of the fact, that on the preceding day, the vendor had refused to recognize the agreement as subsisting.

I can see no reason on the facts shewn for concluding that an injustice would be done the defendant in giving effect to the agreement by way of specific performance. He will thereby get all the agreement contemplates that he should get, and I can see no good equitable reason why he should get more. In my opinion, therefore, the appeal should be allowed with costs, and judgment entered below in the plaintiff's favour with costs, declaring that he is entitled to have the agreement specifically performed. If there is any difficulty about settling the terms of the judgment, it may be settled by a Judge.

There will be no costs of the appeal books and factums owing to this illegibility.

Scott, J.
Simmons, J.

SCOTT, and SIMMONS, JJ., concurred.

Appeal allowed.

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CHARETTE-KIRK CO. Ltd. v. McKITTRICK.

Manitoba King's Bench. Trial before Curran, J. December 13, 1912.

1. CONTRACTS (§ II D 4—188)—BUILDING CONTRACTS—ENTIRE CONTRACT NOT PERFORMED BECAUSE OF FIRE—RIGHTS OF BUILDER.

Under a contract, whereby plaintiff agreed to perform certain work and supply materials in connection with the erection of a building for defendant, for a definite sum, a certain per cent. of which was payable at stated periods during the performance of the work and the balance after the completion of the work, plaintiff is not entitled to recover more than the sums which had accrued due at the stated times where the work was not completed by reason of the destruction of the building by fire from causes not attributable to either party.

[*Collins Bay Rafting Co. v. New York and Ottawa R. Co.*, 32 Can. S.C.R. 216, applied.]

Statement

THE plaintiff company sued to recover from the defendant the sum of $608 as the balance due upon a contract in writing with the defendant to perform certain work and supply certain materials in connection with the sheet metal work and roofing on a certain building in the city of Winnipeg, and in the alternative the same amount for work done and materials provided by the plaintiff to the defendant and at his request, and for goods sold and delivered by the plaintiff to the defendant. The defendant denied all liability.

The contract is contained in two letters (exhibits 1 and 2). The first was as follows:—

St. Boniface, May 8/12.

Mr. M. T. McKittrick,
Winnipeg.

We agree to supply and put up the sheet metal work and gravel roofing as per plans and specifications as follows: The main and lower cornice as per details supplied by us and as per understanding we had together. Gravel roof five plies felt, flashing around gables, three hoppers with wire guard for gravel, one fireproof door, metal ceiling for boiler room. We will do all the work above-mentioned for the sum of nine hundred and ninety-two dollars ($992.00) payable as follows: eighty per cent. (80 %) every two weeks as the work progresses, the balance payable twenty days after the work is completed.

Hoping this to be satisfactory to you,

THE CHARETTE-KIRK CO., LTD.,
Per J. A. Charette.

The acceptance of this tender (exhibit 2) is as follows:—

Winnipeg, May 9, 1912.

The Charette-Kirk Co.,
St Boniface.

I hereby agree to accept your tender for metal cornice, roofing and flashing, hoppers, fireproof door and metal ceiling for boiler room; all work to be done according to plans and specifications and details supplied by you and accepted by me.

M. T. McKITTRICK.

MAN.

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CHARETTE-KIRK CO. v. MCKITTRICK.

Statement

The plaintiff began work on May 15th, 1912. All of the work contracted for was done excepting the fireproof door and some 625 feet of metal ceiling in the boiler room, admitted by both parties to be worth only $68, and to this extent only was the contract unperformed on the night of June 24th, 1912, when a fire occurred, which totally destroyed the building, and incidentally the plaintiff's work. It was admitted that such work as had been actually done was properly done and in accordance with the contract.

On June 12th, 1912, the plaintiff company rendered the defendant a statement of material and labour to date (exhibit 4), at $400, deducted 20 per cent. as provided by exhibit 1, and was paid by the defendant the remaining 80 per cent., namely $320. This was the only payment made.

The action was dismissed.

H. P. Blackwood, and *A. Bernier*, for plaintiff.

A. E. Hoskin, K.C., and *W. E. Hamilton*, for defendant.

Curran, J.

CURRAN, J.:—The building in question was a three storey brick building and the work the plaintiff company was to do formed only a small part of the work of constructing the entire fabric. There was some conflict between the parties as to what specifications governed the performance of the contract; whether long and formal specifications put in at the trial (exhibit 3), or merely what was contained in exhibit 1. In the view I take of the case, it is not material which contention is correct. It is to be noted that the plaintiff by its statement of claim charges that the fire which destroyed the work was caused by the defendant's negligence. This is specifically denied by the statement of defence. No evidence of negligence was given at the trial and I understood the plaintiff's counsel to abandon the charge altogether. So that, for the purposes of this case, the fire may be treated as wholly accidental in its origin and not in any way attributable to the acts or negligence of either party.

The question then to be decided is wholly one of law. What liability, if any, against the defendant exists under the contract in view of the work not having been wholly completed by the plaintiff owing to the destruction of the building by fire from causes not attributable to either party to the action.

Admittedly considerable work had been done and materials supplied, which had not been paid for at the time the fire occurred. Who, then, should bear this loss? The plaintiff contends that the contract is not one to pay on completion only, that it is not entire and that 80 per cent. of the contract price is legally payable as the work progresses. The defendant, on the other hand, contends that the contract is entire and the fact that the contract price is payable by instalments does not

destroy its entirety. He refers to *King* v. *Low*, 3 O.L.R. 234; *Sherlock* v. *Powell*, 26 A.R. (Ont.) 407; *Appelby* v. *Myers*, L.R. 2 C.P. 651. The principle of law affirmed in these cases was that where there is a contract to do work for a specific sum payable on completion there can be no recovery until the work is completed, and the plaintiff cannot recover for the portion done as upon a *quantum meruit*.

The facts in the case of *Sherlock* v. *Powell*, 26 A.R. (Ont.) 407, above referred to, are almost identical with this case, except in this that due completion of the work was alleged by the plaintiff but denied by the defendant. The finding of the Court, however, was against the plaintiff upon that point, and he was therefore held not to be entitled to recover the balance due as upon the contract, nor could he recover upon a *quantum meruit*. It is to be noted that in *Sherlock* v. *Powell*, 26 A.R. (Ont.) 407, payments before action practically equal to the 80 per cent., as provided for in the contract, had been made, so that the dispute was entirely over the balance which could only be referable to the work not completed.

The plaintiff cites numerous cases in support of his contention that the contract is divisible. I need only refer to one which is binding upon me—*Collins Bay Rafting Co.* v. *New York and Ottawa R. Co.*, 32 Can. S.C.R. 216, where the contract was in effect to remove spans from a wrecked bridge in the St. Lawrence river. The contractor agreed

> to remove both spans of the wrecked bridge and put them ashore for the sum of $25,000. We to be paid $5,000 as soon as one span is removed from channel and another $5,000 as soon as one span is put ashore, and the balance as soon as the work is completed.

The Court held that the contract was divisible and the contractor having removed one span from the channel and put it ashore was entitled to the two payments of $5,000 each, notwithstanding the whole work was not completed within the time agreed upon. The principle underlying this case is, I think, similar to that involved here, namely, that on certain contingencies happening, a present right to receive part of the contract price arose, and could not be divested by a subsequent default with respect to the remainder of the work. This decision in no way conflicts with the cases cited by the defendant's counsel, and, applying it here, I find that the plaintiff was entitled to be paid his 80 per cent. of the value of the work and labour done at the expiration of each period of two weeks computed from the 15th of May, 1912, up to the last period preceding the fire. On this basis the plaintiff became entitled to his first estimate on May 29th, the second on June 12th, and no further estimates thereafter. The plaintiff, as before stated, rendered a statement for the first two estimates at $400, being for labour

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and material to June 12th, deducted the 20 per cent. according to exhibit 1, and was paid $320 by the defendant. This payment fully satisfied all moneys payable under the contract at that date, namely June 12th, 1912. The next estimate or periodical payment could not become due, according to the contract, until the 26th day of June, 1912, and unfortunately for the plaintiff the fire occurred on the 24th of June, just two days before an estimate for a further 80 per cent. could be demanded under the contract.

Applying the principle of law affirmed in the cases I have before referred to, and which in no way conflict with the judgment of the Supreme Court in *Collins Bay Rafting Co.* v. *New York and Ottawa R. Co.*, 32 Can. S.C.R. 216, I must hold that the plaintiff cannot recover for the value of the work done and material supplied since the date of his last estimate on June 12th, either upon the special contract, or upon a *quantum meruit*, as there is no evidence to shew a new agreement to pay for the work already done. There is nothing in the contract between the parties to take the case out of the principle of law as stated by Blackburn, J., in *Appelby* v. *Myers*, L.R. 2 C.P. 651, 660:—

> We think that on the principle of English law laid down in *Cutter* v. *Powell*, 6 T.R. 320, and other cases, the plaintiffs having contracted to do an entire work for a specific sum can recover nothing unless the work be done, or it can be shewn that it was the defendant's fault that the work was incomplete or that there is something to justify the conclusion that the parties have entered into a fresh contract.

This principle would, of course, be controlled in the present case by the express stipulations in the contract as to payments and would not disentitle the plaintiff to recover from time to time his periodical estimates as they became due; but it seems to me that it does apply to the plaintiff's claim in this action and prevents his recovery.

There is no suggestion in the evidence, nor is it contended by the plaintiff, that the defendant was responsible for the non-performance of the plaintiff's contract.

I hold, therefore, that the plaintiff cannot recover, and dismiss the action with costs.

Action dismissed.

CARSTAIRS v. CROSS.
Re EDMONTON ELECTION.
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Alberta Supreme Court, Harvey, C.J., Stuart, Simmons, and Walsh, JJ. December 20, 1912.

1. ELECTIONS (§ IV—90)—CONTESTS—JURISDICTION—CONTROVERTED ELECTIONS ACT (ALBERTA)—QUALIFICATIONS OF PETITIONER.

Under section 3 of the Controverted Elections Act (chapter 2, Alberta, 1907), providing for the bringing of a petition to set aside an election by "any duly qualified elector of the electoral district in which the election was held," the fact that the evidence of the qualification of the petitioner offered before the court was directed to his qualification existing at the time of the election instead of the date of the filing of the petition, is no objection, since there is nothing in the section which directly specifies the exact time at which the qualification of the petitioning elector must exist and it is therefore open to the court to put such an interpretation upon the section as is most consonant with the spirit and general intention of the Act. (*Per* Stuart, J.)

[*Carstairs* v. *Cross, Re Edmonton Election* (Decision No. 2), 7 D.L.R. 192, affirmed on an equal division.]

2. ELECTIONS (§ IV—90)—CONTESTS—JURISDICTION—ELECTIONS ACT (ALBERTA)—PRIMA FACIE RIGHT OF PERSON WHOSE NAME IS ON LIST TO VOTE—BURDEN OF SHEWING DISQUALIFICATION.

Under section 103 of the Elections Act (Alberta), providing that "every voter shall be entitled to vote whose name is on the voters' list and has not been erased therefrom in accordance with the foregoing provisions of sections 88 to 104, both inclusive, of this Act," when once it is established that a person's name is on the list and has not been erased therefrom, his qualification to vote is at least *primâ facie* established and the burden of proof is on the person contending that he is not duly qualified to establish that contention. (*Per* Stuart, J.)

[*Carstairs* v. *Cross, Re Edmonton Election* (Decision No. 2), 7 D.L.R. 192, affirmed on an equal division.]

3. ELECTIONS (§ IV—90)—CONTESTS—JURISDICTION—CONTROVERTED ELECTIONS—CONTROVERTED ELECTIONS ACT (ALBERTA)—APPLICATION TO SET ASIDE PETITION AGAINST ELECTION ON PRELIMINARY OBJECTIONS—BURDEN OF PROVING DISQUALIFICATION OF PETITIONER.

On an application under section 10, of the Controverted Elections Act (ch. 2 of Alberta, 1907) to set aside a petition against the applicant's election, on preliminary objections, the burden of proving the disqualification of the petitioner is upon the applicant. (*Per* Stuart, J.)

[*Carstairs* v. *Cross, Re Edmonton Election* (Decision No. 2), 7 D.L.R. 192, affirmed on an equal division.]

4. EVIDENCE (§ IV—90)—APPLICATION TO SET ASIDE PETITION AGAINST ELECTION UNDER CONTROVERTED ELECTIONS ACT (ALBERTA)—JUDICIAL NOTICE THAT PETITIONER IS NOT JUDGE OF SUPREME COURT OR OF DISTRICT COURT.

On an application to set aside a petition against the applicant's election on preliminary objections, where one of the grounds of objection provided for by the Controverted Elections Act, section 10 (chapter 2 of Alberta, 1907) is that the petitioner is a judge of the Supreme Court or of one of the District Courts, the court is entitled to take judicial notice of the fact that the petitioner is not the holder of such an office. (*Per* Stuart, J.)

[*Carstairs* v. *Cross, Re Edmonton Election* (Decision No. 2), 7 D.L.R. 192, affirmed on an equal division.]

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5. ELECTIONS (§ IV—90)—CORRUPT PRACTICES—PRESUMPTION—CONTROVERTED ELECTIONS ACT (ALBERTA).

On an application to set aside a petition against the applicant's election on preliminary objections, where one of the grounds of the objections provided by the Controverted Elections Act, section 10 (chapter 2, of Alberta, 1907), is that the petitioner was guilty of corrupt practices under the Act, there is a presumption of innocence in favour of the petitioner. (*Per* Stuart, J.)

[*Carstairs* v. *Cross, Re Edmonton Election* (Decision No. 2), 7 D.L.R. 192, affirmed on an equal division.]

6. ELECTIONS (§ IV—90)—CONTROVERTED ELECTIONS—CONTROVERTED ELECTIONS ACT (ALBERTA)—APPLICATION TO SET ASIDE PETITION AGAINST ELECTION ON PRELIMINARY OBJECTIONS—INSANITY OF PETITIONER—PRESUMPTION OF SANITY.

There is a presumption of sanity in the petitioner's favour, on an application to set aside a petition against the applicant's election on preliminary objections, where one of the grounds of objection provided by section 10 of the Controverted Elections Act (chapter 2 of Alberta, 1907) is that the petitioner is an inmate of an insane asylum, and the petitioner is not called upon to prove that he was not suffering from such a disability. (*Per* Stuart, J.)

[*Carstairs* v. *Cross, Re Edmonton Election* (Decision No. 2), 7 D.L.R. 192, affirmed on an equal division.]

7. ELECTIONS (§ IV—90)—CONTROVERTED ELECTIONS ACT (ALBERTA)—SUFFICIENCY OF DEPOSIT BY SOLICITOR.

Under section 5 of the Controverted Elections Act (chapter 2 of Alberta, 1907) providing that the person bringing a petition to set aside an election shall at the time of filing such petition deposit with the clerk the sum of $500, a deposit of the money by his solicitor is sufficient. (*Per* Stuart, J.)

[*Carstairs* v. *Cross, Re Edmonton Election* (Decision No. 2), 7 D.L.R. 192, affirmed on an equal division.]

Statement

APPEAL from the judgment of Scott, J., *Carstairs* v. *Cross, Re Edmonton Election* (Decision No. 2), 7 D.L.R. 192, dismissing the respondent's application to set aside the petition against his election on preliminary objections.

The appeal was dismissed by an equally divided Court.

O. M. Biggar, for the respondent.

C. F. Newell, for the petitioner.

Harvey, C.J.

HARVEY, C.J.:—I agree with the conclusion reached by my brother Simmons that the petitioner did not satisfy the burden that was on him of proving his qualification as a voter. I have no doubt that the qualification has reference to the actual election which was held but, under sec. 104, there are both positive and negative elements necessary to establish such qualification. The learned Judge below held that he had satisfied the burden that was on him because it was not necessary for him to prove the absence of the disqualification. The petitioner in the appeal argued strenuously that this view was correct. Such being the view of a Judge and a counsel, the Court surely could not infer that when the petitioner stated that he was qualified he meant to include that he was not disqualified and if he did not there is nothing it appears to me to shew that he was not disqualified and the proof therefore lacks an essential element.

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I have some doubt as to whether the petitioner should be offered the right to supplement the evidence by further evidence as was done in the *Morris Election* case (1907), 17 Man. L.R. 330, 6 W.L.R. 742, because he did not ask for such privilege either below or here. In view, however, of the opinions of the other Judges it is not necessary for me to decide this point.

I also have considerable doubt on the point of whether the petitioner has satisfied the burden raised by the 3rd objection, namely, that the deposit was not made in accordance with the requirements of the section.

The contention is that, owing to the terms of the section, it must be shewn that the deposit was made by the petitioner by being made by his authority. If no question had been raised I think it would be assumed that having been made by his agent and solicitor it was made by his authority but that would be only *primâ facie* evidence which the respondent would be at liberty to meet. He was refused the right to meet this by cross-examination. If the petitioner had stated that he knew nothing about the deposit and had given no authority to make it I question whether it could be said to be made by him. It is not perhaps difficult to suppose the case of a political organization preparing a petition and giving it to an elector and asking him to sign it, telling him it is a mere matter of form and that he will have nothing further to do with the matter. Under these circumstances it is doubtful whether it could be said that the petitioner makes the deposit. It is true the primary purpose of the deposit is security for the respondent's costs but likewise the primary purpose of the petition is to contest the respondent's right to the seat and the Legislature has seen fit to say that only certain persons are at liberty to do that. There are laws against champerty and maintenance and it may be that the Legislature in framing the section as it did had in view the intention of making the petitioner a real rather than a nominal contestant.

For the same reason, however, as mentioned with respect to the other ground of objection it is not necessary for me to reach a definite conclusion on this point.

I agree that none of the other grounds of appeal should be sustained.

Stuart, J.

STUART, J.:—With regard to the objection that the evidence of the qualification of the petitioner offered before Mr. Justice Scott was directed to qualification existing at the date of the election instead of at the date of the filing of the petition I am of opinion that such an objection is untenable. Section 3 of the Controverted Elections Act says that "any duly

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qualified elector of the electoral district in which the election was held may petition." There is nothing in the section which directly specifies the exact time at which the qualification of the petitioning elector must exist. In such a case I think it is open to the Court to put such an interpretation upon the section as is most consonant with the spirit and general intention of the Act. The public proceeding into the validity of which an enquiry is to be instituted by means of the petition was the election itself. It seems to me to be beyond all question that the date of that public proceeding should be taken as the date for fixing the qualification of a person who is given the right to attack its validity. So far from Form A. of the schedule being inconsistent with the statute it appears to me to be quite in accord with the most natural interpretation of the statute itself.

With respect to proof of qualification I am content to rest my judgment upon the words of section 103 of the Elections Act which says:—

> Every voter shall be entitled to vote whose name is on the voters' list and has not been erased therefrom in accordance with the foregoing provisions of sections 88 to 104 both inclusive of this Act.

The enumerators' list as finally revised at the polling was produced and it bears the following entry:—

> Carstairs, W. F. W., Broker—Windsor—B. L.—Sworn.

In the first place I think the identity of the petitioner with the person described in this entry is sufficiently established. Counsel for the respondent at the hearing before Mr. Justice Scott stated that he was satisfied that the petitioner's name was on the list. The initials are peculiar and correspond to those of the petitioner. The petitioner gave his residence for the past four years as the Windsor block in Edmonton and we have in the entry the word "Windsor" apparently describing the residence of the voter referred to. I think it would be mere quibbling to refuse to be satisfied as to the identity of the petitioner with the person referred to in this extract from the list.

Now, owing to the wording of sec. 103 which I have quoted, it seems to me that, when once it was established that the petitioner's name was on the list and had not been erased therefrom, his qualification to vote was, in reality, established. Certainly it was established at least *primâ facie* and sufficiently to shift the burden of proof upon the respondent in the petition. I am not overlooking the fact that sec. 103 uses the words

> whose name is on the list . . . in accordance with the foregoing provisions of section 88 to 104 both inclusive of this Act,

and it may be argued that it must still be shewn affirmatively that the petitioner's name was on the list *in accordance with the provisions* of sec. 104 which sets forth the general qualifi-

cations of voters and concludes with the words, "and who are *not disqualified under any of the provisions of* this Act." But it is to be observed that what sec. 103 refers to are "the *foregoing* provisions" and sec. 104 is not a foregoing provision at all. It is a subsequent one.

There *are* no "foregoing provisions" of sec. 104.

If, however, this be thought to be in itself an approach to quibbling I have now no hesitation though for some time I did entertain considerable doubt, in saying that I concur with the view of Mr. Justice Scott that the burden of proving the disqualifications was in any case upon the applicant, the respondent in the petition. I have looked very carefully through all the sections of the Elections Act and I find but very few disqualifications which are not the result of an act which is made an offence. The disqualifications generally are set forth in sec. 10 of the Act which I think applies to the election in question although sec. 11 does not. Speaking generally, the disqualifications consist in being either (1) a Judge of the Supreme Court or of one of the District Courts; (2) an Indian; (3) a person in prison for a criminal offence or who has been guilty of corrupt practices under the Act; (4) an inmate of an insane asylum. I think Mr. Justice Scott was entitled as we are entitled to take judicial notice of the fact that there is no one by the name of William Frederick Wallis Carstairs who was on the 27th of May last, a Judge of this Court or of any of the District Courts of this province. The petitioner swore he was not an Indian. With regard to disqualification on account of corrupt practices or for an infringement of the provisions of section 277 it is to be observed that very severe penalties are imposed by the Act for a violation of the provisions I speak of. In many cases imprisonment for a fairly long term is imposed. Now, for myself, I think there should be a presumption of innocence in such a case and that no petitioner should be called upon to disprove *seriatim* his guilt under all these various sections. I think this rule should also apply in his favour so as to relieve him of the burden of proving that he was not in gaol for a criminal offence at the date of the voting or during the preparation of the list. This covers every disqualification in the Act except that of being an inmate of a lunatic asylum. Here too, I think there is at least a presumption of sanity in the petitioner's favour and that he was not called upon to prove that he was not suffering from such a disability. With respect to the question of corrupt practices I observe also that the applicant raised this matter directly as his 6th ground of objection and then withdrew it which to some extent, at least, must have put the petitioner off his guard even if it could not be taken as an admission.

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On the argument I had some doubt as to whether the question of the petitioner's age had been properly covered by the evidence. He only gave his age as being more than 21 years at the time of giving his evidence. But I think the learned Judge who heard the evidence was entitled to take account of the appearance of the petitioner in the box and to infer from that that he had attained his majority some years before. The matter is not mentioned in his judgment and the particular objection was not really pressed on the argument before us. I think that we are entitled to assume that he did derive assistance from the appearance of the petitioner and that effect should not now be given to the objection.

Another objection taken was that it was not proven that the petitioner had made the deposit of $500 in accordance with the requirements of the Act. The Act, in section 18 provides that

> the petition and all proceedings thereunder shall be deemed a cause in the Court in which the petition is filed and all the provisions of the Judicature Ordinance or of any Act hereafter passed or rules of Court hereafter promulgated . . . so far as they are applicable and not inconsistent with the provisions of this Act shall be applicable to such petition and proceedings.

This, I think, gives the petitioner a right to do by his solicitor any act during the progress of the cause which he is required to do to as full an extent as such an act could in a similar case be done by a party's solicitor in an ordinary action. Mr. Newell swore he was the petitioner's solicitor and that when he filed the petition he deposited $500 with the clerk. To say that this is not a compliance with the terms of sec. 5 which says that the petitioner shall at the time he files such petition deposit with the clerk the sum of $500 would seem to me to be as absurd as to say that when a plaintiff is ordered to give security for costs by a bond or by depositing a certain sum in Court the security is not "given by" the plaintiff if his solicitor goes and deposits the required amount. I can discern no logical distinction between the two cases. This objection therefore cannot, in my opinion, be sustained.

With regard to the remaining objections I think they may properly be disposed of by an application of the maxim *de minimis non curat lex.*

The appeal should, in my opinion, for these reasons be dismissed with costs.

Simmons, J.

SIMMONS, J.:—This is an appeal against the judgment of Mr. Justice Scott, *Carstairs* v. *Cross, Re Edmonton Election* (Decision No. 2), 7 D.L.R. 192, dismissing the respondent's application against the petition on preliminary objections. Sec. 10 of the Controverted Elections Act. ch. 2 of Alberta, 1907, provides that within twenty days after service upon the respon-

dent of a petition to set aside his election, that he may apply to a Judge to set such petition aside on any of the following grounds:—

(1) That the petitioner is not qualified to file a petition.

(2) That the petition was not filed within the prescribed time.

(3) That the deposit has not been made as provided in sec. 5 hereof.

(4) That the petition does not, on its face, disclose sufficient grounds or facts to have the election set aside, or declared void.

(5) That service of a copy of such petition has not been made on him, as herein described.

In the application under this section, before Mr Justice Scott, the following grounds, in addition to those above set out were taken by the respondent.

(6) That the petitioner was guilty of corrupt practices at and during said election, and is, therefore, unqualified to file a petition.

(7) That the returning officer has not returned the respondent as being duly elected, and therefore no petition lies.

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

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

On the return of the summons, it was held that in regard to the first, second, third, and fifth objections, the onus was on the petitioner, and that as to the seventh, eighth, and ninth, the onus was on the respondent. The sixth objection was abandoned by the respondent. By sec. 3 of the above Act, any duly qualified elector of the electoral district in which the election was held may petition under the Act against the undue return, or undue election of a candidate. Sec. 104 of ch. 3, of 1909, Alberta, prescribes the qualifications of an elector as follows:—

All male persons of the full age of twenty-one years, who are British subjects by birth, or naturalization, who are not Indians, and who have resided in Alberta for at least one year and in the electoral division in which they seek to vote for at least three months immediately preceding the date of the issue of the writ of election and who are not disqualified under any of the provisions of the Act.

The grounds taken in the appeal from the judgment herein are under three heads, namely:—

(*a*) That qualification, at the date of issue of the writ, did not imply qualification at the time of signing the petition by the petitioner, and qualification at the latter date must be established.

(*b*) That the deposit was not paid by the petitioner of the sum of five hundred dollars as security for respondent's costs, as required by sec. 5 of the Controverted Elections Act, and

(*c*) That the petitioner must establish not only that he is qualified to vote, but also that he was not disqualified under any of the provisions of the Act.

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In regard to the grounds raised under (*a*), it may be observed that the second section of schedule "A" of the Controverted Elections Act sets out that: "The petitioner was a duly qualified elector at such election." Sub-sec. 9 of sec. 2, of ch. 3, 1909, defines an elector as follows:—

> An *elector* or *voter* means any person entitled to vote at an election under the provisions of this Act.

It seems quite obvious that sec. 3 of the Controverted Elections Act, when read with sec. 4 of the same Act and sec. 2 of schedule "A" of said Act, cannot mean anything else than a qualified elector at the time the writ of election was issued. Sec. 4 enumerates the requirements of the petition as follows:—

> (*a*) The right of the petitioner to the petition.
>
> (*b*) The holding and result of the election in general terms.
>
> (*c*) In a brief form, the facts and grounds relied on to sanction the prayer.

It seems clear that the words "qualified elector" in sec. 2, must relate to "(*b*), the holding and result of the election in general terms," in sec. 4 of the Act. As to the second contention, that the petitioner must himself make a deposit, the objection is set out by Mr. Biggar on page 13 of the case:—

> In case your Lordship is under any misapprehension, my contention shortly is this; that the petitioner must himself provide the money, make the deposit.

On the argument before this Court, counsel for the respondent modified this somewhat by holding that the petitioner must personally authorize the deposit. The object of the deposit is to secure the costs of the respondent if the petition fails or costs are awarded against the petitioner. Section 18 of the Controverted Elections Act provides that

> The said petition and all proceedings thereunder shall be deemed to be a cause in the Court in which the said petition is filed and all the provisions of the Judicature Ordinance, or of any Act hereafter passed, or rules of Court hereafter promulgated by competent authority in substitution for or amendment of the Judicature Ordinance, or of the rules of Court therein contained, in so far as they are applicable and not inconsistent with the provisions of this Act, shall be applicable to such petition and proceedings.

If the Legislature intended to make a special exception in regard to sec. 5, having in view the exclusion of a solicitor from acting for the petitioner in matters of procedure, it would have been clearly set out. As an instance, take sec. 8 of the Act, which says:—

> The petitioner shall endorse on the petition filed with the clerk and on the copies thereof, served on the respondent, an address for service, etc., etc.,

and it is not seriously contended that this may not be done by the petitioner's counsel. Then why cannot his counsel make the deposit for him? To contend anything less, would be to put an arbitrary, restricted interpretation on sec. 5 quite inconsistent with the practice applied in other sections of the Act. As to the third objection taken on this appeal, the judgment appealed from is as follows:—

> The petitioner testified that he was qualified and entitled to vote at the election and in view of that statement, and, in view of the fact that he has also shewn affirmatively that he was possessed of the qualifications referred to in sec. 104, I am of the opinion that it was not incumbent upon him to negative his disqualifications under any of the other 299 sections of the Act. The statement that he was qualified in itself negatives any such disqualifications and the onus of proving such disqualifications was thereby shifted to the respondent.

I agree with the contention that it was not required of the petitioner to go through all the sections of the Act *seriatim* and allege that he was not disqualified under each one. But the grounds on which the conclusions above recited are based, seem to me to be entirely inconsistent with the conclusion arrived at. I refer particularly to the statement:—

> In view of the fact that he has also shewn affirmatively that he was possessed of the qualifications referred to in sec. 104.

Why should qualifications and disqualifications be severed when they are so completely knitted together in sec. 104?

Why are qualifications to be put in a class of their own and disqualifications to be relegated to such a secondary position that they are to be presumed in favour of the petitioner? The reading of sec. 104 plainly warrants no such separation and no such qualification as to their relative value. The fact that the last qualification is put in the negative form does not detract from its importance. Nor does it take away the necessity of its assertion and proof. The petitioner was bound to declare he was not disqualified under any of the provisions of the Act. If he had made this declaration, he would have completed his proof of qualification under the Act in so far as the onus was on him, but his failure to do so is fatal to his contention, that he has satisfied the requirements of this section. For this reason I am of the opinion that the appeal should be allowed with costs.

The proceedings were in accordance with the provisions of the Act, on the return of a summons to set aside the petition, but it seems to me they are analogous in a considerable degree to an application by way of summons in a civil action, to strike out a part or a whole of the pleadings of either party and in such cases, although the application is successful, it does not follow as a matter of course that the action is dismissed. If

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the successful party can be compensated in costs an amendment is usually allowed to enable the unsuccessful party to properly set out his claim or defence. I think the same procedure should be followed in this case, and on the petitioner paying the costs of this appeal and of the application appealed from he should have leave to adduce further evidence to support his qualification and the hearing of the respondent's application should, in the event of payment of said costs, be referred back to the Honourable Mr. Justice Scott for this purpose.

Walsh, J.

WALSH, J.:—I concur in the result with the judgment of Stuart, J.

Appeal dismissed by an equally divided Court.

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Nov. 5.

MURRAY v. COAST STEAMSHIP COMPANY.

British Columbia Court of Appeal, Macdonald, C.J.A., Irving, Martin, and Galliher, JJ.A. November 5, 1912.

1. MASTER AND SERVANT (§ I D—15)—ABLEBODIED SEAMAN—DUTY TO WORK ON SUNDAYS.

It is the duty of an ablebodied seaman in service on a ship to obey the master of the ship, and he cannot refuse to work at cargo on Sundays simply to vindicate a principle against Sunday work.

[Lord's Day Act, R.S.C. 1906, ch. 153, sec. 6, referred to.]

2. MASTER AND SERVANT (§ I C—13)—SERVANT'S WAGES—DISCHARGE FOR DISOBEDIENCE—RESULT AS TO WAGES NOT YET ACCRUED.

A contract for service contains an implied condition that if faithful service is not rendered the master may elect to determine the contract, and where that right is properly exercised by the master during the currency of the servant's salary, the servant has no remedy, that is to say, he cannot recover salary which is not due and payable at the time of his dismissal, but which is only to accrue due and become payable at some later date, and on condition that he had fulfilled his duty as a faithful servant down to that later date. (Dictum *per* Irving, J.A.)

3. SUNDAY (§ III B—23)—EMERGENCY—MEANING OF WORD AS APPLIED TO WORK ON A SHIP—LORD'S DAY ACT.

As to "cases of emergency in connection with transportation," as applied to an ablebodied seaman at cargo work on a ship, the word "emergency" must be given an elastic and varying meaning according to the circumstances, especially in the case of vessels engaged in the coasting trade in dangerous waters where conditions of wind, tide, and weather must be carefully considered beforehand and duly provided for by the master, so as to insure, as far as possible, the safety of the vessels and those on board.

[Lord's Day Act, R.S.C. 1906, ch. 153, secs. 6, 12 (*h*), referred to.]

4. SUNDAY (§ III B—15)—LORD'S DAY ACT—SUNDAY WORK—SUBSTITUTED HOLIDAY.

Where the substituted holiday provided for by the Lord's Day Act is being claimed, it is the duty of the employee to do the work and then demand the substituted holiday during the next six days.

[Lord's Day Act, R.S.C. 1906, ch. 153, sec. 6, referred to.]

APPEAL by the plaintiffs from the judgment of McInnes, County Court Judge, in an action to recover the balance due for wages.

The appeal was dismissed.

McCrossan, for appellant.

Harold Robertson, for respondent.

MACDONALD, C.J.:—I would dismiss this appeal.

IRVING, J.A.:—The plaintiff sues for $12.20, being the balance due him for wages.

The plaintiff shipped on the 26th August with the defendants as able bodied seaman at $45 a month and board, to serve on the defendant's S.S. "British Columbia."

The amount, 12.20, is the difference between 25 days' wages at $1.50, less $12.20, that being the amount deducted by the master on discharging the plaintiff on 19th September, for moneys paid to longshoremen hired by the master to perform the plaintiff's work on three separate occasions when the plaintiff refused to work. The occasions as charged are: 9th September (Saturday) 6 hours at 50c.—$3.00; 10th September (Sunday), 17th September (Sunday). On the 9th September plaintiff says he refused to work after 6 p.m., he was tired; that he thought as he had been employed all day he had done enough. On the 10th (Sunday) when the ship arrived at Sechart at 3 p.m., he refused to assist in discharging cargo because it was Sunday. On the 17th (Sunday) when the ship arrived at Victoria at 10 or 11 a.m., he again refused to assist in discharging cargo because it was Sunday.

This vessel was in the coasting trade. Its home port appears to be Vancouver, B.C. According to the evidence for the defence, which seems to have been accepted by the learned trial Judge, the plaintiff had been notified when he signed the articles as an able bodied seaman, that his duties would be those of a deck hand, handling cargo when required. It was night and day work, and Sunday work.

The plaintiff seems to have accepted this view of his duties at first, but afterwards to vindicate a principle, viz., that he was not required to work on Sundays or after six o'clock, declined to work. The Lord's Day Act, ch. 153, of Rev. Stats. of Canada, was relied upon as justifying the plaintiff's refusal to work on Sunday. The 6th section seems to contemplate the employment of men on Sundays on any work "in connection with transportation," and provision is made for making up to the employee so working, a holiday during the week. This section does not seem to have been considered by the plaintiff until after he left the defendants' service, because we have no suggestion that he would work if promised the statute-given holiday.

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He undertook to refuse to work on Sundays regardless of the commands of his employer. He arrogated to himself the right to say whether it was necessary for him to work. I do not think the law of Master and Servant, or The Lord's Day Act ever contemplated such a step. It is the duty of the employed to obey the master of the ship. It may be that masters may make themselves liable to the penalties of the Act if they do not give the statutory holiday, but I can see nothing to justify the action of the able bodied seaman or deck hand in refusing to work at cargo in order to vindicate a principle. The learned County Court Judge thought the defendants were justified in deducting from the plaintiff's wages the sums they had paid to others who did the work he had undertaken to do, and that in paying him for his actual time they had done all that they were required to do.

It is, I think, well to point out that the law of Master and Servant does not contemplate any such liberal settlement with a servant who has been guilty of disobedience of such a character as to justify his discharge. In my opinion the plaintiff's conduct amounted to that. The refusal to work was the result of a conspiracy. Where a person employed is guilty of disobedience, such as to justify his discharge, he cannot recover by action for the time of his actual service. Even a contract of service contains an implied condition that if faithful service is not rendered the master may elect to determine the contract. If that right is properly exercised by the master during the currency of the servant's salary, the servant has no remedy, that is to say, he cannot recover salary which is not due and payable at the time of his dismissal, but which is only to accrue due and become payable at some later date, and on the condition that he had fulfilled his duty as a faithful servant down to that later date.

Martin, J.A.

MARTIN, J.A.:—The plaintiff shipped at Vancouver as a deck hand on the S.S. "British Columbia" on a coasting voyage from Vancouver to Victoria, west coast of Vancouver Island, Prince Rupert and way ports back to Victoria, as we are informed though it is not exactly shewn on the evidence. The learned trial Judge has found, on evidence which supports his finding, that the contract was that plaintiff agreed "to handle cargo on Sundays, and after 6 p.m. if required," but that he broke his contract for no valid reason, and, therefore, the defendant company was entitled to make a deduction from his wages.

It is clear that the plaintiff cannot succeed in any event as regards his refusal to work on week days after 6 p.m., but as regards Sundays he relies on sec. 6 of the Lord's Day Act, and contends that as the cases in question were not ones "of emer-

gency" he should have been allowed "during the next six days of such week twenty-four consecutive hours without labour."

I remark first, as to the word "emergency" that in the case of ships it obviously will have to be given an elastic and varying meaning according to the circumstances, especially in the case of vessels engaged in the coasting trade in dangerous waters where conditions of wind, tide, and weather must be carefully considered beforehand and duly provided for by the master, so as to insure, as far as possible, the safety of the vessels and those on board.

Irving, J.A.

The evidence herein has been so confusedly and insufficiently brought out on behalf of the plaintiff that it is difficult to form an exact and satisfactory opinion of its legal consequences but in one of the instances complained of I should be inclined to think that there was an "emergency" on his own shewing; and clearly with respect to another of them the exception (*h*) in sec. 12, as to a vessel already "in transit when (*i.e.*, on or before), the Lord's Day begins," applies.

But even if the whole matter were within sec. 6, the position the plaintiff finds himself in is that though he had agreed to work on Sunday yet he comes to this Court and asks for this relief under said section, viz., that the Court will invoke it to direct his employer to return him money properly deducted under his contract. In my opinion it is clear he cannot do so and the Court will no more assist him in such circumstances than it would the defendant if it brought an action to recover an amount which it claimed against him under a prohibited contract. If he wished to rely upon the section the proper course for him to have taken, in a case not of emergency, was to have made a request for the 24 hours' substituted holiday, but he did nothing of the kind, and simply relied upon his deliberate intention to break his contract without, as he erroneously thought, any consequences to himself. It has been overlooked, I think, that the true effect of sec. 6 is to recognize that it is "lawful" for the employer to require the employee to work if the substituted holiday is subsequently "allowed." Unless and until that holiday is refused, the prohibition does not arise. Beyond doubt the employee may waive his right to this "allowance." I am unable to discover any merits, legal or equitable, to support this action.

GALLIHER, J.A., concurred in dismissing the appeal.

Galliher, J.A.

Appeal dismissed.

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Annotation

Master and servant—Justifiable dismissal

Annotation—Master and servant (§ I C—10)—Justifiable dismissal—Right to wages (a) earned and overdue; (b) earned but not payable.

In general, where a contract of employment between a master and his servant is for a specific period, dismissal is warranted on the part of the master for any act of the servant that is prejudicial to the interests of the master, or that is likely to become so, or to his reputation. Actual loss is not necessary, it being sufficient, from the view-point of the law, that damage is likely to result from the act complained of.

A servant is bound to act with good faith and to consult the interests of his master, and may be dismissed for misconduct injurious thereto, though such misconduct does not relate to the servant's particular duties. It resolves itself into a question: "Has the servant so conducted himself that it would be manifestly injurious to the master's interests to retain him?"

In the case of *Taylor* v. *Kinsey*, 4 Terr. L.R. 178, the plaintiff remained in the employ of defendant for four months and twenty-four days, the whole period of hiring being for seven months; he then left the defendant's employ without justifiable cause or excuse, and he was held entitled to recover all wages remaining unpaid that had accrued up to and including the last preceding wage period, a right of action accruing to the plaintiff at the end of each period for any wages thereof remaining unpaid. Judge Wetmore, in the course of his opinion, said: "The plaintiff is not entitled to recover for the twenty-four days from Aug. 13. The authorities are quite clear on that point, but under the authority of *Johnston* v. *Keenan*, 3 Terr. L.R. 239, the plaintiff is entitled to recover for the four months down to and including Aug. 13, unless the conversation between the parties, the result of which defendant refused to accept, takes it out of the decision in *Johnston* v. *Keenan*, and of the cases upon which that case was decided. I am of the opinion it does not take it out of the decision referred to": *Taylor* v. *Laird*, 25 L.J. Ex. 329, and *Button* v. *Thompson*, 38 L.J. C.P. 225.

And where a person was hired for a stated period at a stated sum per month, and he left without justifiable cause before the period for which he was engaged had expired, but after one or more months had elapsed, a right of action accrued at the end of each month, which was not taken away by his leaving.

The facts in the case of *Johnston* v. *Keenan*, 3 Terr. L.R. 239, are about parallel with those in the principal case, with the infinitesimal distinction, if there is any at all, in regard to the period of hiring. In the princial case the hiring seems to have been for a voyage from Vancouver to Victoria, and after stopping at way ports, back to Victoria. In the cited case the period for hiring was for "the herding season," and Judge Wetmore held that it made no difference whether no time was agreed upon or not at which the contract was to expire, as under either state of facts on that point, plaintiff was entitled to recover for the wages remaining due and unpaid at the expiration of each and every wage period preceding his leaving defendant's employ; and the plaintiff could have left at the end of any month and recovered unpaid wages to such time of leaving, and such right would not be forfeited by the plaintiff's subsequent desertion or abandonment of his contract.

In the principal case the plaintiff was employed at $45 per month for a certain voyage, and before his first full wage period of a month had

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expired he refused to do his allotted work, assigning reasons which formed no valid excuse for his refusal to work; on three different occasions the master was obliged to hire a stranger to do plaintiff's work, and the master very generously paid plaintiff up to the time of his justifiable discharge, deducting the amount the stranger received for the work done by him. In the words of Irving, J.A., quoted from his opinion therein, "the law of master and servant does not contemplate any such liberal settlement with a servant who has been guilty of disobedience of such a character as to justify his discharge. In my opinion the plaintiff's conduct amounted to that."

If a person engaged to serve for salary or wages payable at regular intervals, and he wrongfully leaves the service during a current salary or wage period, he may, by action, recover the periodical sums which have already accrued, but he cannot recover for any services rendered during the broken period and up to the time of leaving: *Taylor* v. *Laird* (1856), 1 H. & N. 266, 25 L.J. Ex. 329, and *Button* v. *Thompson*, 38 L.J.C.P. 225; *Boston Deep Sea Fishery and Ice Company* v. *Ansell*, 59 L.T. 345, 39 Ch. D. 339.

Charges of misconduct were made against a managing director and he was dismissed by the company, which brought an action against him, alleging the misconduct and claiming damages and certain accounts. The defendant counterclaimed for damages for wrongful dismissal. The original charge was not proven upon the trial, but the company did prove the defendant received a commission from a ship-building firm on ships built for his company, which was only discovered after defendant's dismissal. Defendant superintended the building of the ships, and it was held that he was guilty of such misconduct as entitled the company to dismiss him, and the company was not liable in damages, even though he was dismissed for other causes which were not proven, and the commission had been received before dismissal and was an isolated case of misconduct on his part: *Boston Deep Sea Fishing Co.* v. *Ansell*, 39 Ch.D. 339, referred to in *Taylor* v. *Kinsey*, 4 Terr. L.R. 178; *Clark* v. *Capp*, 9 O.L.R. 192; *McGeorge* v. *Ross*, 5 Terr. L.R. 116.

In the case of *Goold Bicycle Company* v. *Laishley*, 35 Can. S.C.R. 184, the Supreme Court of Canada dismissed a motion for leave to appeal from the judgment of the Court of Appeal reversing the lower Court, and ordering judgment for wrongful dismissal arising from the following facts: plaintiff was employed as selling agent by defendant at a fixed salary and commission. He was dismissed before his term ended without cause and after large sales had been made, and sued as for wrongful dismissal. It was held he was entitled to damages as sued for, and could include commissions on prospective sales; and see *Allcroft* v. *Adams*, 38 Can. S.C.R. 365.

In contracts of employment for continuous service at salary or wages for fixed periods, as yearly, quarterly or monthly, a wrongful dismissal during a current period gives a right to compensation during the broken period up to time of dismissal, as part of damages in an action for breach by wrongful dismissal, or as a debt for a consideration executed; but an

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action for breach for wrongful dismissal is a bar to a claim for debt: *Goodman* v. *Peacock* (1850), 19 L.J.Q.B. 410; *Routledge* v. *Hyslop* (1860), 29 L.J.M.C. 90; Leake on Contracts, 6th ed., 37-38, 541, 769; *Re Sucanick and Kotinsky*, 19 O.L.R. 407.

A teacher who has been wrongfully dismissed, may treat his discharge as a rescinding of the contract of hiring on the part of the trustees, and if he adopts the rescission, he is entitled to his salary *pro rata*, up to the time of his discharge and from thence to the time of bringing the action: *McPherson* v. *Trustees, etc.*, 1 O.L.R. 261, referring to *Lilley* v. *Ervein* (1848), 11 A. & E.N.S. 742; and see *McDougal* v. *Van Allen Co., Ltd.*, 19 O.L.R. 351; *Scott* v. *Mewberry*, 3 O.L.R. 252.

No express words are necessary to create a dismissal. In *Brace* v. *Calder*, [1895] 2 Q.B. 253, the plaintiff was employed by four partners, and during the period, two of them retired, and the business was carried on by the other two, who were willing to employ the plaintiff for the remainder of the period. Plaintiff declined, and the Court of Appeal held that the change in partnership amounted to a wrongful dismissal, although awarding only nominal damages, the offer of the continuing partners to renew the employment on the same terms being considered in mitigation of damages. This case is referred to in *Burgess* v. *St. Louis*, 6 Terr. L.R. 451.

In *Gourmany* v. *Manitoba Club*, 1 W.L.R. 175, plaintiff was employed as chef by defendant; about the middle of the term he gave notice he would resign at the end of the month, but a few days thereafter, and before the end of the month, he was summarily dismissed. He brought an action for wages and damages for dismissal and secured a verdict for amount claimed. On appeal by defendant it was held the dismissal was justified, as it was shewn plaintiff had taken articles for his own use and accepted presents from merchants dealing with the club.

It is not necessary, in an action for wrongful dismissal for plaintiff to allege that he was ready and willing to continue to serve the defendants: *Beaucage* v. *Winnipeg Stone Co.*, 14 W.L.R. 575, referring to Odgers on Pleading (1906), forms 15 and 19.

Must a master be aware of misconduct that would justify dismissal at the time of the dismissal? On this point the decisions are, or were, conflicting. In *Cussons* v. *Skinner*, 11 M. & W. 161, 12 L.J. Ex. 347, Baron Parke said that it would be necessary for defendant, to justify the discharge, to shew that, at the time of the discharge, he knew at least of the act of misconduct: this was in 1842, and is supported by other cases down to 1850. In this year, however, a different view began to prevail, and in *Willets* v. *Green*, 3 C. & K. 59, it was laid down that, if an employer discharge his servant, and at that time a good cause for dismissal exists, the employer is justified, although, at the time of dismissal, the employer did not know of the cause. The matter was finally set at rest in 1888 by the far-reaching case, above referred to, of *Boston Deep Sea Co.* v. *Ansell*, 39 Ch.D. 339. In this very strong case it is emphatically laid down that improper acts previous to the dismissal and then unknown justify it, though the acts may have occurred months or years previously; this may

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now be considered the law and obtains at least in Ontario and Saskatchewan: *Goby* v. *Gordon Ironsides Co.*, 15 W.L.R. 258.

As to the disobedience of the servant the authorities are very clear. Starting with the English case of *Spain* v. *Arnott*, 2 Stark. 256, down, the rule has been, without exception, followed, that a servant guilty of deliberate disobedience may be discharged by the master, and it is not required to shew a loss to the master. In *Turner* v. *Mason*, 14 M. & W. 112, Parke, B., said: "It was laid down by Lord Ellenborough in *Spain* v. *Arnott*, 2 Stark 256, and by me in *Callo* v. *Brouncker*, 4 C. & P. 518, and confirmed by the Court of Queen's Bench in *Arnor* v. *Fearon*, 9 A. & E. 548, that the wilful disobedience of any lawful order of the master is a good cause for discharge."

In 8 Encyc. of the Laws of England the case of *Callo* v. *Brouncker*, 4 C. & P. 518, is cited as laying down the proposition that a discharge without notice cannot be justified by a single act of disobedience, trifling in character, but this conclusion is criticised by Judge Wetmore in *Youngnash* v. *Saskatchewan Automobile Co.*, 16 W.L.R. 268, and who says therein that "it does not bear out what the learned author has stated." The decision in *Cussons* v. *Skinner*, 11 M. & W. 161, 12 L.J. Ex. 347, is explained by Judge Wetmore and *Manson* v. *McKen*, 4 W.L.R. 545, is referred to.

Where incompetency and insolence of the servant were set up as defences to an action for wrongful dismissal, and no sufficient proof was given as to incompetency, but it was shewn that a week after the engagement began and when plaintiff applied to the defendant for $25 to reimburse him for fare from Toronto, and the employer remarked, "it was another case of paying a man who wasn't worth it," the plaintiff replied that defendant would have to prove it before a Court and jury, or similar words, whereupon defendant dismissed plaintiff; the expression of plaintiff regarded as a disrespectful retort made in an isolated case, and without any unbecoming conduct on any other occasion being shewn, did not justify a dismissal: *Williams* v. *Hammond*, 42 C.L.J. 574, appeal herein dismissed, 43 C.L.J. 75, 16 Man. L.R. 369; *Clark* v. *Capp*, 9 O.L.R. 192 (D.C.), 41 C.L.J. 293; *Clouston* v. *Corry*, [1906] A.C. 122, 41 C.L.J. 310.

A manager of a restaurant who is employed by the month is not entitled to a month's notice of dismissal; in the absence of custom or agreement the notice must only be reasonable, and in order to recover damages for wrongful dismissal without reasonable notice the servant must shew an effort to obtain and failure to get, other employment: *Lamberton* v. *Vancouver Hotel Co.*, 41 C.L.J. 230; *Marks* v. *Dartmouth Ferry Co.*, 38 N.S.R. 386, 40 C.L.J. 271.

A bartender was employed by a hotel-keeper at a monthly salary from December first, and on June 5, following he became temporarily incapacitated, and, getting a substitute, left the hotel, but returned June 10, when he was discharged, receiving wages up to June 5, when he left through illness. On an information laid under the Master and Servants Ordinance (C.O. 1898, ch. 50), he was awarded five days' further wages from June 5 to June 10, the date of dismissal, and an additional month's wages in

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lieu of notice. On an appeal from this order the Court held the discharge without notice was unwarranted and the servant was entitled to wages up to time of dismissal, but there was no jurisdiction under the Ordinance to order an extra month's wages, which could not be said to be wages due, but were the measure of damages for improper dismissal: *Goode* v. *Downing*, 5 Terr. L.R. 505, 40 C.L.J. 719; *Denham* v. *Patrick*, 20 O.L.R. 347; *Sims* v. *Harris*, 1 O.L.R. 445 (C.A.).

Where plaintiff was employed as manager, under salary and commissions, and was dismissed upon defendants selling their business before his contract expired, the plaintiff was entitled to damages for the amount of his salary for the unexpired term of his contract, and for commissions on proceeds of sales received after his dismissal and which were made before dismissal: *Laishley* v. *Goold Bicycle Co.*, 38 C.L.J. 649, 4 O.L.R. 350, reversed; *Hopkins* v. *Gooderham*, 10 B.C.R. 250, 40 C.L.J. 164.

A salesman entered into a contract for so long a time as his employer's contract with third persons might remain in force; the employer's contract came to an end by the dissolution of the firm he contracted with. In an action for wrongful dismissal the plaintiff obtained substantial damages on the theory that the dissolution of the firm operated as a wrongful dismissal of the plaintiff under his sub-contract: *Glenn* v. *Rudd*, 3 O.L.R. 422, 38 C.L.J. 169; *Jones* v. *Lende British Refrigerating Co.*, 2 O.L.R. 428 (C.A.); *Scott* v. *Memberry*, 3 O.L.R. 250; *McDougall* v. *Van-Allan Co.*, 19 O.L.R. 351; *Pepin* v. *Turner Lumber Co.*, 5 Que. P.R. 178; *Milan* v. *Dominion Carpet Co.*, 22 Que. S.C. 234; *Landry* v. *Hurdman*, 25 Que. S.C. 378; *Marion* v. *Roberts*, Q.R. 14 K.B. 23; *Bruheau* v. *Carerhill*, 37 Que. S.C. 271.

A somewhat curious case is that of *Turner* v. *Sawdon*, [1901] 2 K.B. 653, where plaintiff was employed for four years as a salesman and after serving two years defendants refused to provide him with further work, but notified him to call for salary for following month, when further instructions would be given him; defendants also notified customers that plaintiff had no authority to further represent them. Plaintiff then entered business upon his own account, and brought an action for wrongful dismissal, and secured a judgment, but, on appeal, it was held that there was no case for a jury as it was within the power of the master, under the facts of this case, to continue and pay the wages of plaintiff without providing him with work. Stirling, J., however, distinguished cases in which the contract was to "employ," and that such a contract may imply that work is to be provided by the employer, as in the instance of an actor or a commission agent.

Where the contract for hire was for a year, and the servant brought an action for wrongful dismissal, the defendant master, resting on the defence that the servant voluntarily left the service, the burden of proof of such defence is upon the master: *McInnes* v. *Ferguson*, 32 N.S.R. 516, 35 C.L.J. 459 (N.S.).

Where the master had the right, under the agreement, to cancel it after six months from date, and was made the sole judge as to the manner in which the servant did his work, and had the right to dismiss at any

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time for incapacity or breach of duty, and the servant was dismissed within three months for incapacity and disobedience, the master was held justified in dismissing the servant at any time for incapacity or breach of duty, without notice; that such right was absolute and only required to be exercised in good faith: *McRae* v. *Marshall*, 19 Can. S.C.R. 10, 27 C.L.J. 501.

Addis v. *Gramaphone Co.*, [1909] A.C. 488, 78 L.J.K.B. 1122, 101 L.T. 466, was an action by a servant for wrongful dismissal, the only question on the appeal being the proper measure of damages. It was held by the House of Lords, reversing the Court of Appeal, that damages in such a case cannot include compensation for injured feelings on account of the dismissal or for anticipated difficulty by reason thereof of obtaining employment after the expiry of the original term: *Beckham* v. *Drake*, 2 H.L.C. 666; *Sawdon* v. *Mills*, 30 L.J.Q.B. 176; *Ouimet* v. *Fleury*, Q.R. 19 K.B. 301; *Pouilot* v. *Dussault*, 10 Que. P.R. 71; *Rosquet* v. *Nellis*, 35 Que. S.C. 209; *Cook* v. *School Commissioners, Halifax*, 35 N.S.R. 405; *Allcroft* v. *Adams*, 38 Can. S.C.R. 365; *McGeorge* v. *Ross*, 5 Terr. L.R. 116.

The onus is on the defendant who seeks to shew, in reducing damages for a wrongful dismissal of plaintiff, that plaintiff might have obtained other employment with reasonable effort, and a discharged employee is not bound to take a position of a lower grade even at the same wages, nor need he abandon home or place of residence and go to another country to seek employment; and in arriving at the damages in such a case, speculation may be resorted to, on the chance of the servant getting a new place, and to arrive at the best conclusion possible in view of all the circumstances, as to the probable time that will expire before another similar engagement, in any ordinary branch of industry, can be obtained by a person competent for the place: *Armstrong* v. *Tyndall Co.*, 20 Man. L.R. 254, 47 C.L.J. 114, citing *Costigan* v. *Mohawk*, 2 Denio 616; see also *Burgess* v. *St. Louis*, 6 Terr. L.R. 451; *Bewell* v. *Wheat City Flour Co.*, 8 W.L.R. 273 (Man.); *Parsons* v. *Chandler*, 1 E.L.R. 176 (N.S.); *Allmann* v. *Yukon Consolidated Gold Fields Co.*, 7 W.L.R. 318 (Y.T.); *Doherty* v. *Vancouver Ice Co.*, 1 W.L.R. 252 (B.C.); *Goby* v. *Gordon Co.*, 15 W.L.R. 258 (Sask.).

A company incorporated under the Manitoba Joint Stock Companies Act to carry on a quarry business will be liable for a wrongful dismissal of an employee, although the contract is not under seal, following *McEdwards* v. *Ogilvie*, 4 Man. L.R. 1, and by the law of England and Canada, a general hiring, no other time being specified nor implied, will be presumed to be for a year, especially at a yearly salary: *Buckingham* v. *Surrey Co.*, 46 L.T.N.S. 885; *Rettinger* v. *McDougal*, 9 U.C.C.P. 487, followed; *Armstrong* v. *Tyndall Co.*, 20 Man. L.R. 254, 47 C.L.J. 114.

The case of the *General Bill-posting Co.* v. *Atkinson*, [1908] 1 Ch. 537, 44 C.L.J. 350, was one this time brought by the master to restrain the defendant, its former employee, from entering into trade within certain limits, after his dismissal by plaintiff, about which undertaking there was no denial by defendant, who set up his wrongful dismissal as a defence, and that by such act plaintiff repudiated the contract, and released him,

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Master and servant—Justifiable dismissal

Annotation (*continued*)—**Master and servant (§ I C—10)—Justifiable dismissal—Right to wages (a) earned and overdue; (b) earned but not payable.**

defendant, from the undertaking restricting his right to trade on termination of his engagement. The lower Court thought that even in face of a wrongful dismissal, the plaintiffs were entitled to enforce the undertaking, but the Court of Appeal were of a different opinion, and reversed the holding below, and dismissed the action. The latter decision was affirmed by the House of Lords, *General Bill-posting Co.* v. *Atkinson*, [1909] A.C. 118, 78 L.J. Ch. 77, 25 Times L.R. 178, 45 C.L.J. 237, on the two defences set up by defendant, that the dismissal was a repudiation of the contract by the plaintiff and hence a release of the defendant from the undertaking restricting his right to trade when his engagement terminated.

Where an agreement, between an insurance company and its agent, provides that a breach would occur if the said agent did not fulfil conscientiously all the duties assigned to him, and in all things look to the best interests of his employer, and such agent acts for a rival company, such violation is sufficient cause for his dismissal: *Eastmure* v. *Canada Accident Ins. Co.*, 25 Can. S.C.R. 691; *Bain* v. *Anderson*, 28 Can. S.C.R. 481; *Hopkins* v. *Goodcrham*, 10 B.C.R. 250; *Varrelmann* v. *Phoenix Brewery Co.*, 3 B.C.R. 135; *Municipality of North Vancouver* v. *Keene*, 10 B.C.R. 276; *Green* v. *Wright*, 1 C.P.D. 591; *Pearce* v. *Foster*, 17 Q.B.D. 536; *Guilford* v. *Anglo-French S.S. Co.*, 9 Can. S.C.R. 303; *Blake* v. *Kirkpatrick*, 6 A.R. 212; *Sash* v. *Meriden Brittania Co.*, 8 A.R. 680; *Priestman* v. *Broadstreet*, 15 O.R. 558; *McIntyre* v. *Hockin*, 16 A.R. 498; *Wilson* v. *York*, 46 U.C.Q.B. 289; *Burnet* v. *Hope*, 9 O.R. 10.

Plaintiff was engaged as a surveyor. Defendant furnished the instruments; defendant's son came to plaintiff while he was engaged in the course of his work (the son having power to act for defendant) and asked plaintiff for the key of the instrument box. During the time the plaintiff was unoccupied and unable to get the instruments, the defendant's son did not object to plaintiff's idleness, nor offer him the instruments, but told plaintiff to go and see defendant, miles away; under the above facts plaintiff was justified in considering himself dismissed, and no form of words was necessary to that end; the amount earned may be recovered where the hiring was for a definite time and wages paid monthly, although the servant be subsequently dismissed for misconduct: *Feneron* v. *O'Keefe*, 2 Man. L.R. 40.

Where a choir-master was engaged by defendants and on the first meeting of the choir for rehearsal he was unable to perform his duties owing to being drunk, such conduct on plaintiff's part was justifiable cause for dismissal: *Martin* v. *Lane and Churchwardens of All Saints' Church*, 3 Man. L.R. 314; *McEdwards* v. *The Ogilvie Milling Co.*, 4 Man. L.R. 1; *McEdwards* v. *The Ogilvie Co.*, 5 Man. L.R. 77; *Giles* v. *McEwan*, 11 Man. L.R. 150; *Crabbe* v. *Hickson, Duncan & Co.*, 14 P.R. 42.

A clerk who knowingly carries a challenge to fight a duel is guilty of such an act as to justify his employer in dismissing him: *Dolby* v. *Kinnear*, 1 Kerr 480, 3 N.B.L.R. 480.

Where a clerk, being employed for a two years' term by his employer, enters into a partnership for the purpose of carrying on the same business as his employer, he is properly dismissed by his employer, and if another cause of dismissal exists the employer may avail himself of it at the

Annotation (*continued*)—**Master and servant (§ I C—10)—Justifiable dismissal—Right to wages (a) earned and overdue; (b) earned but not payable.**

B.C.

Annotation

Master and servant — Justifiable dismissal

trial, though he was not aware of it at time of dismissal: *Tozer* v. *Hutchinson*, 12 N.B.R. 548 (1 Han.).

The defendant agreed to hire plaintiff for three years, at an annual salary, but dismissed him without cause before the end of the second year. An action for damages was immediately available to the plaintiff for the loss sustained by the breach of the entire contract, and was not limited to the amount due at the time of the dismissal: *Mead* v. *Doherty*, 7 N.B.R. 195 (2 All.).

A master of a ship is only entitled to reasonable notice that his employment will be terminated, and what is reasonable notice is a question of fact for the trial Judge. In an action *in rem* for wages in lieu of dismissal, the Court may condemn the ship on its bail for such wages, and this to be in the nature of damages for wrongful dismissal, and the fact that the vessel grounded, and the master did not inform the owners as he deemed it unimportant was no cause for dismissal, but as he procured other employment in a week his damage was reduced by the Court: *Kane* v. *The Ship "John Irwin,"* 1 D.L.R. 447, 13 Can. Ex. R. 502.

A professional man is not obliged to look for menial work if he cannot find a position equal in importance to that from which he has been dismissed wrongfully, and in such case the employer is responsible for payment of the salary for the entire period of the contract, up to the date of its expiry, and may also obtain damages in lieu of housing expenses for the balance of the contract, where such is one of its provisions: *Silver* v. *Standard Gold Mines Co., Ltd.*, 3 D.L.R. 103; *Tebb* v. *Baird*, 3 D.L.R. 161, 3 O.W.N. 952.

Where a gang of labourers, employed to work on an irrigation ditch, lay off work for a day in extremely cold weather, and for that reason alone, as they had not prepared for it by providing the necessary clothing, such act is not an abandonment of the contract, and in an action for wages, bonus and transportation charges, plaintiff was allowed to recover: *Wakuryk* v. *McArthur*, 6 D.L.R. 66.

The principal case was one in which the agreement contemplated that work in all probability would be required to be done on a Sunday, and if under such a contract the servant refuses to work on Sunday when necessary under the requirements of the nature of the employment, the master may be justified in dismissing him: *McCurdy* v. *Alaska Co.*, 102 Ill. App. 120.

For a complete exposition of the law defining the rights of a master or of a servant under the varying conditions surrounding any particular case that may arise, and the corresponding reciprocal rights of the other, see 26 Cyc. 965 to 1017, article on Master and Servant.

For American cases on the termination of the relation of master and servant by dismissal from the master or by abandonment by the servant, and the effect on the servant's compensation, see *Van Winkle* v. *Satterfield*, 58 Ark. 617, 23 L.R.A. 853; *R.R. Co.* v. *Schaffer*, 65 Ohio St. 414, 62 L.R.A. 931; *McMullen* v. *Dickinson Co.*, 60 Minn. 156, 27 L.R.A. 409; *Hull* v. *School District*, 82 Iowa 686, 10 L.R.A. 273; *Fisher* v. *Walsh*, 102 Wis. 172, 43 L.R.A. 810; *Van Heyne* v. *Tompkins*, 89 Minn. 77, 5 L.R.A. (N.S.) 524; *McKenzie* v. *Minis*, 23 L.R.A. (N.S.) 1003, 132 Ga. 323.

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EISLER v. CANADIAN FAIRBANKS CO.

Saskatchewan Supreme Court. Trial before Lamont, J. December 27, 1912.

1. CONTRACTS (§ V C 3—402) — RESCISSION — MISREPRESENTATION — GOOD FAITH, EFFECT OF.

Rescission of a contract will be allowed for a material misrepresentation made by the other party, although the misrepresentation may have been made in good faith in a belief of its truth.

[*Derry* v. *Peek*, 14 A.C. 337, applied.]

2. EVIDENCE (§ VI A—515)—PAROL EVIDENCE AS TO WRITTEN CONTRACTS—VERBAL REPRESENTATION.

Verbal representations, not contained in a written contract, cannot be relied upon to defeat it where the contract plainly provides that no representation not contained in the contract shall be binding, but in such a case the language of such proviso must be so clear that the average man entering into it would know that he was debarring himself from relying upon the outside representation.

3. EVIDENCE (§ VI A—515)—PAROL EVIDENCE AS TO WRITING—CONTRACTS—ESTOPPEL.

Where a "satisfaction slip" is signed by one party to a contract for the purchase of an engine, which slip states that the "work done and supplies furnished" are accepted and satisfactory, such party is not thereby estopped from setting up that the engine purchased was defective and unsatisfactory, where the party signing did not read the slip, nor was it read to him, and his signature was obtained by defendant's agent stating to him that it was a certificate of the time spent by the seller's expert at his place in fitting up the engine.

4. CONTRACTS (§ V-C 3—407)—RESCISSION OF CONTRACT—BREACH OF CONTRACT—DAMAGES.

Where a contract for the sale of an engine is rescinded for a false representation of a material character made by the defendant's representative as to the sufficiency of the engine to do a certain class of work, and the contract itself provided that if the engine was not of sufficient horse-power to do such work the sellers would forthwith supply him with a more powerful engine which would do the work, the plaintiff cannot, in addition to rescinding, obtain damages as for a breach of the contract.

5. CONTRACTS (§ I-E 5*b*—103)—EXECUTION—SIGNATURE NOT AT END OF INSTRUMENT, EFFECT OF.

Where a writing relied upon as an acknowledgment or waiver is a printed form with intervening blanks between the various clauses thereof, a signature placed in one of such blanks is not equivalent to a signature placed at the end of the document, and cannot be considered as an authentication of a clause which follows the signature so placed.

Statement

TRIAL of an action for the rescission of a contract and for the return of money and notes given thereunder and also for damages.

Judgment was given for the plaintiff for rescission only.

C. E. D. Wood, for the plaintiff.

J. A. Cross, for the defendant.

Lamont, J.

LAMONT, J.:—The plaintiff alleges that he was induced to buy the engine in question by certain representations made by

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the defendants' agent, Smith, which representations were untrue to the knowledge of the defendants. He also alleges that at the time he purchased the engine it was expressly agreed between himself and the defendant company that if the engine purchased was not of sufficient horse-power to do the work required they would immediately supply him with a more powerful engine; that the engine was not of sufficient horse-power to do the work required; and that he requested the defendants to furnish him with a more powerful engine, and that they neglected and refused to do so, whereupon he returned the engine purchased. At the trial the plaintiff amended his statement of claim by adding a paragraph alleging that the defendants had re-possessed the engine.

The facts are that in July of 1910 the plaintiff, being desirous of purchasing a threshing engine, went to Winnipeg Fair and there interviewed Robert Smith, the representative of the defendant company, in reference to the purchase of an engine suitable for threshing. The defendants had three portable gasoline engines on exhibition, a 15 h.p., a 20 h.p. and a 25 h.p. The 15 h.p. was attached to a 22-inch Nichols and Shepard separator. The plaintiff stated to Smith that he knew nothing about an engine but he wanted one that would run either an Avery 24-inch separator or a Nichols and Shepard 22-inch separator and have three or four horse-power to spare. Smith said that their 15 h.p. engine would run either of these separators. He further stated that it only took 12 h.p. to run a 22-inch Nichols and Shepard separator, and that the defendants' little engine would run it satisfactorily and have 3 h.p. over. The plaintiff told Smith that he lived in a bluffy country and that the straw was long. Smith again assured him that their 15 h.p. engine would be sufficient. He said that if the engine did not do the work the company would at once give him a more powerful one in its place. The plaintiff relied upon the representations made by Smith, and signed an order for a 15-h.p. engine. He says he signed this order because Smith was the only one who would give him the assurance contained in the representation. After buying the engine the plaintiff purchased the 22-inch Nichols and Shepard separator, which at the time was attached to the engine. The engine was delivered, and was started on September 16. When it was tried it was found that it was not sufficiently powerful to satisfactorily or adequately operate the separator. This was admitted by the defendants' expert, who stated, when at the plaintiff's on one occasion, endeavouring to make the engine work satisfactorily, that Smith should not have sold the plaintiff a 15-h.p. engine but should have sold him a 20-h.p. one. On October 1 the plaintiff wrote to the defendants as follows:—

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Manor, Sask., Oct. 1, 1910.

Canadian Fairbanks Co., Winnipeg, Man.

The 15 h.p. engine I purchased from you at the fair will not drive the separator I have fast enough to do good work. It didn't do too bad in oats and barley, but when it has come to the wheat, which is long straw, it will not develop enough of power to drive it, and I have shut it down and quit running. The grain has never been drier or in better shape for threshing than this year, and the rig is no good to me. It is simply a waste of time. I would like you to send your Mr. Smith out, as I want a larger or at least a more powerful engine to drive the separator, and will pay the difference to get one, but would like to have this adjusted at once, as I have had to shut down. Please send out Mr. Smith as soon as possible.

SAM EISLER.

Mr. Smiley, the defendants' local agent, wrote the above letter for the plaintiff. On October 11 the defendants wrote that they had arranged to have their expert visit the plaintiff promptly and make a thorough investigation of the engine. Between October 1 and October 11 the plaintiff, through the defendants' local agent, had arranged to have Mr. Smith come down on October 12. Smith admits he agreed to go, but he did not put in an appearance. The plaintiff waited for Smith until the 14th, when he returned the engine to Manor, from which place he had received it, and wrote the defendants that he had returned it, and on the same day ordered another engine from another company. The defendants' local agent notified the company that the engine had been returned, and on the 17th Smith went down to see the plaintiff. He tried to persuade the plaintiff to take his engine back and try it with a new pulley. The plaintiff refused. Smith then offered to exchange it for a 20 h.p. The plaintiff says Smith's offer was to supply a heavier engine the following year. Smith in his evidence says his offer was to supply it at once, subject to the approval of the company, as he did not know if they had any 20-h.p. engines left. Cameron, who was also present, testified that he did not think any time was stated for the delivery of the new engine. I accept the plaintiff's statement, and find that Smith's offer was to deliver the 20 h.p. next year. I do not see how he could offer to make the exchange at once if he did not know whether or not the company had a 20-h.p. engine on hand. The plaintiff, having already ordered another engine, refused the offer for an exchange. Subsequently the defendants re-possessed the engine, as appears by their letter of January 19, 1911. On these facts is the plaintiff entitled to succeed?

The contract, as I find, was induced by a representation made by Smith that the defendants' 15-h.p. engine would satisfactorily operate a Nichols and Shepard 22-inch separator. The representation was material and was false. In *Derry* v. *Peek*, 14 A.C. 337, at 359, Lord Herschell said:—

> Where rescission is claimed, it is only necessary to prove that there was misrepresentation. Then, however honestly it may have been made, however free from blame the person who made it, the contract, having been obtained by misrepresentation, cannot stand.

It was, however, contended on behalf of the defendants that the contract entered into contained a clause which prevented the plaintiff from obtaining the benefit of the rule of law as laid down in *Derry* v. *Peek*, 14 A.C. 337, above quoted. That clause is as follows:—

> Said machinery is purchased upon and subject to the following mutual and independent conditions, and none other, namely:—
>
> Except as hereinafter provided it is warranted to be made of good material and in a workmanlike manner, and if any part of said machinery shews defective material or workmanship, within one year from date of shipment, the company agrees to furnish a new part free of charge on receipt of part claimed defective, freight charges prepaid, if after inspection claim be proved; but no liability is assumed, nor is the company responsible for damages or delays caused by such defective material; nor will any allowances for repairs or alterations be made, unless same are made with the written consent and approval of the company. Second-hand machinery or goods not manufactured by this company are not warranted.
>
> The company assumes no liability for non-shipment, delay in shipment or transportation. Acceptance by a purchaser is a full waiver of any claim for delays in filing this order, arising from any cause, and the retention of the above machinery without notice in writing delivered to the Canadian Fairbanks Company, Limited, at Winnipeg, within ten days after receipt thereof, or any lack of completeness thereof, shall be conclusive evidence that the same is complete in all parts.
>
> Failure to fully settle on delivery as above provided, or any abuse, misuse, unnecessary exposure in the field, or waste committed or suffered by the purchaser, discharges the company from all liability whatever.
>
> The property or title to the above machinery shall not pass to the purchaser until the purchase money hereinbefore mentioned, and the notes given therefor, or by way of renewal (if any), and interest thereon, shall be fully paid.

Counsel for the defendant argued that the representation relied upon by the plaintiff was a condition precedent, and was expressly excluded by the above quoted clause; and in support of his argument he cited *Sawyer-Massey* v. *Ritchie*, 43 Can. S.C.R. 614. In that case it was held that where the contract contained a provision that "there are no other warranties or guarantees, promises or agreements than those contained herein," such provision excluded the application of an implied warranty of fitness upon which alone the counterclaim was based. Where a man enters into a written agreement which plainly sets out that he cannot rely on any representation made outside of the writing itself, he must be held to have precluded himself from relying upon any verbal representation; but to deprive a man of the legal rights which such representation would give

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him, the language of the written agreement must be sufficiently clear that the average man entering into such contracts would know, if he gave it reasonable consideration, that he was debarring himself from relying upon the representation. The words used must not be reasonably capable of another meaning consistent with the retention of his legal rights. In the present case we have to consider whether the language used in the clause relied on by the defendants is such that the plaintiff must be held to have known when he signed the order that he was agreeing not to rely on the representation made by Smith. I am of opinion it is not. It is true that in one sense the fulfilment of a material representation inducing a contract is a condition precedent to the enforcement of the contract, but primarily and in ordinary language what the plaintiff relies upon is a representation made by the defendants' representative. This, in my opinion, the ordinary man would not understand as being included in the term "condition." To exclude that representation from the operation of the contract it seems that express language to that effect must be used, and that a general negativing of conditions other than those expressed is not sufficient. In this case the plaintiff bought this particular engine because Smith was the only one of all the machine agents he saw who "would give him the guarantee."

It was also argued on behalf of the defendants that the plaintiff had signed a "satisfaction slip" which contains the following clause:—

> I hereby accept the work done and supplies furnished as satisfactory to me,

and was therefore estopped from saying the engine was not satisfactory. On the evidence I find that this slip was not read over by the plaintiff, nor was it read to him, and that at the time it was placed before him for signature the defendants' agent stated that it had nothing to do with a settlement for the machine, but was merely a certificate that the expert had spent so much time at his place. Further, the signature of the plaintiff is above, and not below, the above-quoted clause, and therefore cannot be said to authenticate it.

I am therefore of opinion that the plaintiff is entitled to succeed. The contract will be declared rescinded. The order included a grinder as well as the engine, but as no evidence was given in reference to the grinder, and nothing was said about it in argument, I take it that it goes with the engine.

The plaintiff also claimed damages. I do not think he is entitled to these, as it was agreed that if the engine did not work the remedy was to be a new engine and not damages.

There will therefore be judgment for the plaintiff for $297; the notes will be delivered up to be cancelled, and the defendants will pay the plaintiff's costs.

Judgment for plaintiff.

LEPAGE v. BOUCHARD.

QUE.

Quebec Court of Review, Davidson, C.J., Tellier, and DeLorimier, JJ. December 24, 1912.

C. R. 1912

Dec. 24.

1. INTOXICATING LIQUORS (§ II A—39a)—SALE OF LICENSE—RIGHT TO LICENSE DEFINED.

A hotel or restaurant license is a right personal to the original licensee, and such license cannot be effectively sold and transferred to a third party without the approval of the License Commissioners.

[*Wollenberg* v. *Merson*, 1 D.L.R. 212, referred to.]

2. BROKERS (§ III—30)—BROKERS GENERALLY—COMPENSATION—SALE OF LIQUOR LICENSE.

Where the licensee of a license transferable only with the consent of the License Commissioners agrees to sell this license to a purchaser, the negotiations being carried on by a real estate agent, and where the transfer cannot be effected owing to the refusal of the License Commissioners to approve the same, there is no sale at all for lack of object to the contract, and the agent who negotiated the transaction is not entitled to any commission.

[See Annotation to *Haffner* v. *Grundy*, 4 D.L.R. 531.]

Statement

THIS was an appeal from the judgment of the Superior Court at Montreal, Greenshields, J., rendered on February 26, 1912, whereby the defendant was condemned to pay to the plaintiff a commission of $300.

The appeal was allowed, DAVIDSON, C.J., dissenting.

J. O. Lacroix, for plaintiff, respondent.

Paul St. Germain, for defendant, appellant.

Davidson, C.J. (dissenting)

DAVIDSON, C.J. (dissenting):—By the judgment under review, defendants were jointly and severally condemned to pay plaintiff, as transferee of Johnson and Grace, real estate agents, the sum of $300 for commission on the sale by defendants to Moreau of their restaurant.

Defendants plead that plaintiff is a *prête-nom*; that the pretended sale was made subject to the transfer of the license to Moreau; that the license commissioners refused to allow the transfer, as Johnson and Grace well knew would be the case; that defendants had to retake possession and thereby lost money; that Moreau was well known as a speculator in licenses, and, in fact, re-sold even before the refusal of the commissioners.

Plaintiff answers that Johnson and Grace were in no wise responsible for the execution of the contract and the payment of their commission did not depend on the decision of the commissioners.

By a writing, dated January 5, 1907, defendants consented to sell their restaurant, situate on the corner of St. Dominique and Craig streets, to Johnson and Grace or to one of their customers (*ou à un de leur clients*) for the sum of $10,000, payable as follows: On taking possession, $2,000; on the transfer of the license, $8,000; in all, $10,000. Opened stock of liquors and

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cigars to be included in the sale; non-opened stock to be inventoried at wholesale prices, and paid for in four monthly instalments.

The writing further declared that they, the defendants, promised to pay to Johnson and Grace the sum of $300 as commission, but they would not be responsible for any other sum which the buyer might promise to Johnson and Grace. The offer was to stand open for thirty-six hours. With respect to these stipulations the exact words of the writing are these:—

> Nous consentons de vendre à MM. Johnson & Grace ou à un de leurs clients notre Restaurant situé coin St. Dominique & Craig pour la somme de dix mille dollars payable deux mille dollars en prenant possession et huit mille dollars lors du transfert de la licence. Le stock ouvert de Boissons et Cigares est compris dans cette vente.
>
> Le stock de Boissons et de Cigares outre le stock ouvert à être inventorié au prix du gros et payable et quatre versements mensuels égaux et consecutifs.
>
> La possession a être donnée au moment du dépot de deux mille dollars. Nous paierons à MM. Johnson & Grace comme commission la somme de trois cents dollars et ce que l'acquéreur leur promettra nous nous en tenons pas responsables et c'est à dire que M.M. Johnson & Grace pourront prendre les moyens de se faire payer par l'acquéreur tout autre somme sans que nous soyons responsables.
>
> Cette offre est bonne pour acceptation dans les trente six heures.
>
> (Signé)
>
> BOUCHARD FRERES.

On the back of the writing appears an undated memorandum signed by defendants, which declared they would accept:—

On possession being taken	$1,000 00
On January 7th	1,000 00
On transfer of license	7,000 00
30 days after such transfer	1,000 00
	$10,000 00

On the same 5th of January, one Moreau, by a private writing offered to buy the restaurant, through the intervention of Johnson and Grace, for the sum of $10,200, payable as follows:—

On taking possession	$1,000 00
On January 7th	1,000 00
On transfer of license	7,000 00
30 days after transfer	1,200 00

Another condition stipulated for the transfer of the liquors and cigars on the same terms as appear in defendants' offer. The addition of $200 to the price appears to have covered an additional commission or other benefit which Moreau was to pay to Johnson and Grace. This is the feature apparently guarded against by defendants in declaring that they were not to be held responsible for anything which Moreau might promise to pay to Johnson and Grace.

It is noticeable that Moreau took care to guard against paying the $200 until after transfer of the license had been obtained.

Two days later defendants, by notarial deed, sold and transferred the restaurant for the price and on the terms of judgment stated in Moreau's offer. The following other conditions were inserted:—

1. Moreau was to conduct the restaurant properly.
2. Never to keep open during prohibited hours.
3. Not to permit gambling in the premises.
4. To pay to the landlord the rent as well of the restaurant as of the residence of defendants.

On the other hand, the defendants undertook, in case the commissioners refused to permit the transfer of license, to pay back the $2,000, less the net profits made, in the interval, by the buyer, and to cancel the sale of the restaurant.

Johnson and Grace were not parties to this deed; nor had they knowledge, so far as appears by the evidence, of its contents.

On January 28th the license commissioners refused to transfer the license to Moreau on the ground that he was a speculator in licenses. It is not shewn that Johnson and Grace had any knowledge of Moreau being so engaged—or that it would prove a cause for refusal—and in any event the fact would not have affected them.

In *Wollenberg* v. *Merson*, 1 D.L.R. 212, the action was to resiliate the lease of a stall in a building which contained twenty-eight stalls, on the ground that the plaintiff had been refused a license from the city authority. I dismissed the action. The Court of Review (Pagnuelo, Charbonneau, and Dunlop, JJ., 1911) 40 Que. S.C. 283, reversed my judgment. It was restored by the King's Bench (December, 1911), 21 Que. K.B. 310.

Take this further example: A property was leased for the establishment of musketry range; during the lease a civic municipal ordinance forbade its use as such. The lessee took action to obtain resiliation of the lease for default of enjoyment. His claim was dismissed: Dalloz, 1875, vol. 1, 203.

In the present instance the sale represented an absolutely legal transaction. Moreau had the right to sell the equities in the license. If the sale had had for its object an immoral condition, the case would have been different, as, for example, if the sale had been of a market-place for harlots. But all that Johnson and Grace had to do was to find a person who would comply with the conditions required by the defendants, and this was accomplished. They had neither to see to the transfer of the license, nor to the making of the payments or the fulfilment of any of the other conditions of the sale.

French and English authorities are in harmony. They are unanimous in asserting that under such circumstances the com-

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mission has been earned at the moment the transaction is completed. I would confirm the judgment under review.

The opinion of the majority of the Court was delivered by

TELLIER, J. (translated):—The plaintiff Lepage is the transferee of Johnson and Grace, and as such claims a commission of $300 on the sale of a licensed restaurant.

On January 5th, 1907, the defendants signed the writing which had just been read by the Chief Justice.

To this writing which was signed by the defendant, certain modifications were brought relatively to the payment; a sum of $1,000 was to be paid at a certain date, $7,000 after the transfer of the license, and the balance thirty days later. Johnson and Grace prepared a document for the buyer, one Moreau, reading as follows:—

> J'offre d'acheter (in the other writing the defendants said *nous consentons de vendre*), par l'entremise de Messrs. Johnson & Grace le restaurant de Bouchard Frères, situé au coin des rues St. Dominique and Craig, pour la somme de $10,200, payable $2,000 en prenant possession, et $8,200 lors du transfert de la licence. Le stock ouvert de boisson, etc.

The parties being thus bound by these writings passed a deed on January 7th, 1907, whereby Bouchard and Bouchard sold to Ovide Moreau the restaurant in question. Certain conditions are imposed on the purchaser after entering in possession, the price is stipulated in accordance with the previous writing and then follows this:—

> Il est convenu entre les parties que les dits vendeurs subrogent l'acquéreur dans tous leurs droits à la licence. De plus, que dans le cas où le transfert ou transport de la dite licence serait refusé, pour aucune raison quelconque, les vendeurs seront tenus de remettre au dit acquéreur la dite somme de $2,000, and l'acquéreur sera tenu de remettre et payer aux vendeurs les recettes par lui faites dans le dit restaurant, déduction faite des dépenses du dit restaurant, desquelles recettes l'acquéreur sera tenu de fournir un duplicata aux vendeurs, et alors les présentes seront nulles et de nul effet.

Subsequently to this deed Moreau took the necessary steps to obtain the confirmation of the transfer of this license to him, but unfortunately for him the License Commissioners rejected his application and refused to confirm the transfer made to him by the defendants. In what position did Moreau find himself? He was left with nothing, he had bought nothing, he had no license, as he could not obtain the transfer thereof.

Now, in the present case we are not dealing with the sale of an immoveable, but with the sale of a right and nothing more, with the cession of a mere right made by the defendants in favour of Moreau. The defendants were not the owners of the building in which this restaurant was being operated; they were the les-

sees of the restaurant and of the dwelling over it, and they were transferring their rights in the license, in the licensed restaurant with obligation on the purchaser to pay the rent both of the restaurant, and of the dwelling above it.

What was the object of this sale? The object was the transfer of the license, the license itself, the right to keep a licensed restaurant.

It is well to consult the License Act to ascertain what a license really is. And the Act shews that it is a right personal to the licensee or person mentioned in the license.

Sec. 10 of the License Act says (R.S.Q. 923):—

> Subject to the provisions of this section as to removals and the transfer of licenses, and as to voluntary or judicial abandonments made by *bonâ fide* insolvents, every license for the sale of liquor shall be held to be a license to the person therein named, only and for the premises therein described, and shall remain valid only so long as such person continues to be the occupant of the said premises, and the owner of the business there carried on.

From the moment the defendants had signed the deed in question they ceased to be proprietors of this business and the license itself became null; so that the sale agreed to by the defendants lacked any object, and was void by the mere fact of the transfer. Now there was an essential condition for maintaining the validity of this license; the necessary procedure to obtain the confirmation of the license commissioners must be followed. And so well was this understood that this is what Moreau did. And it must have been equally well understood by Johnson & Grace, since the purchaser they offered to defendants was to pay $1,000 on taking possession and $7,000 after the license had been transferred. It is objected; but the agents in such cases are not responsible for the payment of the price. No, nor do we go as far as that, but we say they are responsible for the sale. The defendants wished to effect a sale and this sale could only be effected on condition that the license commissioners approved thereof at Moreau's request. Now Moreau did demand this confirmation and it was refused. Therefore the license remained the property of the defendants and therefore Johnson & Grace never sold it. They cannot claim a commission for a sale which the defendants desired to make and a purchase which Moreau wished to effect when such sale and purchase never took place. The sale did not go through and the commission is not due.

The *Wollenberg* case (*Wollenberg* v. *Merson*, 1 D.L.R. 212) is cited. That was an action by a lessee against his lessor in cancellation of his lease. Wollenberg, the owner, had leased a stall in his market to the plaintiff but the plaintiff on requesting the city treasurer to give him his butcher stall license had been refused. And the Court said to the plaintiff: You are not

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entitled to any such cancellation. Why? Because the owner never agreed to obtain this license for you from the municipal authorities; it is for you to get it and there is no liability on the part of the owner in the event of your failure to get it.

True, in that case the city refused to give the required license to allow this butcher to keep his stall and sell his goods and marketable articles authorized by by-law; but the city was in the wrong. The lease in question was not illegal, the business to be carried on was not illegal; quite the contrary, it was formally authorized by law.

But here we are dealing with the transfer of a license. Such transfer is forbidden by law unless approved of by the commissioners, and unless approved of by the commissioners the business carried on in such restaurant is an illegal business. That is the distinction between the *Wollenberg* case (*Wollenberg* v. *Merson*, 1 D.L.R. 212) and the present one.

In the present instance the transaction was cancelled or called off, and it was so covenanted in the deed.

But it is said: This stipulation was made without Johnson & Grace's knowledge. Quite so, but Johnson & Grace must be presumed to have known that this was the sale merely of a right to a license; and they must or should have known that to make of this sale a real and valid sale the consent of the license commissioners was absolutely necessary; and by adding in the deed that in the event of the confirmation of the transfer not being secured the sale would be inoperative, the parties were adding only what the statute decrees and were stipulating a nullity pronounced by the law itself.

For these reasons the majority of this Court finds there is error in the judgment under review. The judgment is set aside and the action dismissed with costs.

Appeal allowed.

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Dec. 13.

DULAC v. LAUZON.

Quebec Court of Review, Tellier, DeLorimier, Greenshields, JJ.
December 13, 1912.

1. CONTRACTS (§ IV D 4—360)—BUILDING CONTRACTS—EXTRAS.

A builder or contractor who agrees to build according to plans and specifications for a fixed price cannot recover for alterations and extras unless such alterations and extras and the price to be paid therefor are stipulated in writing, and parol evidence of such additional contract alleged to have been made verbally is inadmissible.

2. CONTRACTS (§ IV D—360) — BUILDING CONTRACTS — SUBSTANTIAL PERFORMANCE.

Where a builder's contract calls for payment as the work progresses, the owner of the building is not entitled to retain in his hand a large amount of the contract price on the ground that the work has not been properly done, when it is established that the work of a value of $8,000 is all finished saving a few trifling imperfections (e.g., $15.40), and in such case the owner will be condemned to pay the balance of the contract price less the value of such imperfections.

THIS was an appeal by the plaintiff from the decision of the Superior Court, Bruneau, J., on June 23, 1911, dismissing with costs his action to recover $200 balance of contract price and $100 value of extras.

The appeal was allowed.

J. A. Robillard, K.C., for plaintiff, appellant.

N. U. Lacasse, for defendant, respondent.

TELLIER, J. (translated) :—The plaintiff inscribes for review a judgment rendered by the Superior Court on June 23, 1911, Bruneau, J., dismissing his action for $300 with costs. Tellier, J.

Plaintiff alleges that he agreed to build for the defendant two semi-detached houses of three storeys each, for $8,000 as per contract under private writing; that he did this work and that defendant accepted the same by taking possession thereof; that the defendant owes him a balance of $200 on the contract price. And he also claims an additional hundred dollars as follows: $11 for alterations to the two front doors and $39 for alterations to the six rooms of the ground floor, these alterations having been made at the defendant's request after agreement, and that this was the true price and value thereof; and a sum of $50 price and value of two balconies on the first storey of the said building done at the defendant's request under verbal agreement.

The defendant made a partial demurrer which was dismissed by judgment of the Superior Court.

The defendant admits he gave the plaintiff the contract aforesaid for a fixed price of $8,000, and then pleads:—

> That he never took real possession of these buildings, but that he only occupied them temporarily at a time when a considerable amount of work yet remained to be done . . . that his possession was partial and precarious, and that he does not owe the $200 claimed, inasmuch as the said buildings are incomplete and unfinished, seeing that at least $300 worth of work remains to be done (e.g., a coat of paint on the two fronts, six cupboards, the refection of part of the rear foundation, etc.); that plaintiff even offered to allow him, the defendant, $25 on the unpaid balance if he would undertake to do such works himself. That according to the custom under such contracts the proprietor is entitled to withhold 20 per cent. of the contract price until thirty days after the work is completely finished; that the work above mentioned which is unfinished forms part of the said building work and of the ordinary obligations of a contractor working for a fixed price; that the alterations were made with the plaintiff's consent, without the defendant's authorization in writing and without any agreement as to price; that the plaintiff did these according to the contract and without extra charge; that the alterations for which claim is made form part of the buildings which the plaintiff agreed to build (e.g., the balconies, etc.) and that to buy his peace the defendant offered to pay $100 and to assume the completion of the said

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work on condition that the plaintiff give him a final discharge, which offer is repeated with the plea. The defendant therefore prays that such tender be declared sufficient and the action dismissed.

The plaintiff answered in brief that as regards the foundations complained of they are of no importance and that it was the defendant himself who prevented the repair thereof; that the brick casing was properly done; that the sum offered him was tendered under the pretence that he was making too large a profit with his contract.

After the parties had gone to proof on the contestation so joined the trial Judge dismissed that part of the claim dealing with the $100 for alterations in the work done by applying 1690 C.C., inasmuch as there had been no agreement nor stipulation as to price arrived at beforehand. And as to the claim for $200 balance of contract price, the judgment dismissed the same and the trial Judge based himself on the well-known jurisprudence on the subject, as, for example, in the case of *Rhéaume* v. *School Commissioners of St. Jérome*. But such is not the question arising in this case. The plaintiff contends he has completed his work and he demands the payment of the balance of his contract price, $200. The defendant likewise appears anxious to liquidate the situation, for he alleges that $300 worth of work remains to be done—this is the amount of the action—but to buy his peace he offered and tendered $100, deposited this amount with his plea and prayed that his tender be declared sufficient, that he be given a final discharge and, further, formally declares he will himself complete and repair the work done by the plaintiff.

The whole controversy must therefore be definitely and once and for all settled. Were the buildings finished? The proof of record shews that everything was done saving a few imperfections, a few trifling finishing touches. (The learned Judge examined the evidence on this score regarding the putting in of shelves in cupboards worth $5.40; the addition of knobs or handles to the windows, 60 cents; the filling in of a small hole, $4; the placing of blinds, etc., the utility or necessity of which was contested by several witnesses. The total amount of these trifling things would run up to $15.40.)

Under the circumstances should the judgment be reformed as regards the $100 claimed for alterations? I do not think so. It is quite true that all of these were done with the defendant's consent, but the defendant says that these were done in exchange for other things mentioned in the contract and which were not done. No price was ever agreed upon for these alterations and no notice ever given to the defendant that he would be called upon to pay therefor; so that article 1690 must be applied as far as this $100 is concerned. Now as regards the claim for $200. I am of opinion that the work was completed, save a few

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small imperfections. Are we to refuse payment of the price to the plaintiff? The price was to be paid as the work progressed. The contract says: "Le prix se paie en marchant," and witnesses were called to explain the meaning of this terminology. The witnesses state that the price was payable as the work went ahead, so that after deducting the value of these imperfections amounting to $15.40, we find that $184.60 worth of work should have been paid by the defendant as the work went on. Therefore, the judgment must be reversed in this regard and $184.60 awarded to the plaintiff.

The defendant states that he wishes to be rid of this and I think that the case should be settled once and for all. The defendant offers $100 and is prepared to assume the task of completing the work. The offer, in our opinion, is insufficient; in order that his offer be sufficient it must be increased to the sum of $184.60. And such is the judgment.

Appeal allowed.

PEDEN v. ABRAHAM.

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Nov. 20.

British Columbia Supreme Court, Trial before Gregory, J. November 20, 1912.

1. WILLS (§ IB—21)—SIGNATURE OF TESTATOR—ATTESTING WITNESSES.

Under a statute (Wills Act, R.S.B.C. 1911, ch. 241, sec. 6), which provides that "no will shall be valid unless it is signed by the testator or by some other person in his presence and by his direction, and such signature shall be made or acknowledged by the testator in the presence of two witnesses," the will, although signed by one holding testator's hand, and acknowledged by two witnesses in the testator's presence, but when the testator was in such physical condition that he could neither object, consent, nor even see the witnesses, such will was not executed according to the provisions of the statute.

[*Reeves* v. *Grainger* (1908), 52 Sol. J. 355; *Carter* v. *Seaton* (1901), 85 L.T.N.S. 76.]

2. COSTS (§ I—16*a*)—UNSUCCESSFUL PROPOUNDING OF WILL—COSTS OUT OF ESTATE.

Where an action to establish a will is dismissed as the statutory requirements as to the mode of execution required by the statute (Wills Act, R.S.B.C. 1911, ch. 241, sec. 6) had not been fully complied with, but the plaintiff's conduct as regards the defective execution was held to be exemplary, the Court may allow him his costs out of the estate.

Statement

THIS is an action to establish a will made by the deceased in favour of the plaintiff. It is opposed on the grounds that

(*a*) The will was not executed according to the provisions of the Wills Act.

(*b*) The deceased at the time of the making of the will was not of sound mind and memory.

(*c*) That he did not know or approve of its contents.

H. A. Maclean, K.C., for plaintiff.

H. B. Robertson, for defendant.

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GREGORY, J.:—It is only necessary for me to deal with the first defence set up, although I think it only right that I should say in justice to the plaintiff that I am satisfied that the deceased did intend to benefit him and not his relatives, and that he was, up to a very short time before his death, quite competent to make a will. I am unable to resist Mr. Robertson's argument against the will, and it is unfortunate that Mr. Maclean found it necessary on account of another engagement to ask leave to retire before Mr. Robertson commenced his argument.

The Wills Act, R.S.B.C. 1911, ch. 241, sec. 6, provides that

> No will shall be valid unless it is signed . . . by the testator or by some other person in his presence and by his direction, and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses, etc.

It is quite clear that the testator never signed this will nor at the time it was actually made did he express any desire to make a will. He unquestionably wished shortly before to make a will and sent for Mr. Peden for that purpose, but by the time Mr. Peden arrived he was too weak to any longer take any interest in it, and, as Dr. Thomas says, he died ten or fifteen minutes after the so-called signature was affixed. As to the signature, Dr. Raynor is the person best entitled to speak. He says he asked the deceased if he could sign it himself, and he signified that he could, but on taking the pen in his hand his fingers relaxed and he was unable to do so; but the doctor then put his fingers over the deceased's and traced his name. The deceased could not sign. The deceased said nothing to him, and did not ask him (the doctor) to sign the will for him (the deceased). After the signature the deceased did not speak, and so, of course, there was no acknowledgment of it before the witnesses. I would hesitate to hold that a person could not direct another to sign his name in any other way than by direct communication, but surely if a sign is sufficient there must be some clear indication not only of a consent to the other's signing it for him, but a direction or request that he should do so. There was absolutely nothing of the kind in this case. Dr. Raynor says:—

> I think the deceased knew I was writing his name on his will.

The statute requires something more than this. It seems clear to me that the deceased's physical condition at the time was such that he was unable to either object or consent. Both doctors agree that at the time they signed the will as witnesses the deceased took no interest whatever in the proceeding. He had, I think, apparently collapsed, and from his recumbent position was unable to see the doctors when they signed as witnesses. Dr. Thomas says: "I do not think he was cognizant of the fact that I was witnessing his will." And Dr. Raynor says:—

> He did not speak after the signing. I could not say he was sensible when I was signing it as witness. His eyes were closed all the time.

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In these circumstances, therefore, I must pronounce against the will, but, as I am perfectly satisfied that Mr. Peden's conduct was exemplary in every respect, and that the doctors only took the part they did because they desired to carry out the dying man's wishes, I am of the opinion the plaintiff should not be mulcted in costs, but he should have his costs out of the estate and there will be an order accordingly.

As to the signature of the testator, see *Re Goods of Thomas Marshall* (1866), 13 L.T.N.S. 643; *Reeves* v. *Grainger* (1908), 52 Sol. J. 355. Both of these decisions are under 1 Viet. ch. 26, sec. 9, which is identical with sec. 6 of our Wills Act. See also *Wright* v. *Price* (1779), 1 Doug. 241; *Carter* v. *Seaton* (1901), 85 L.T.N.S. 76; *Windsor* v. *Pratt* (1821), 2 Brod. & Bing. 650, as to the meaning of "in the presence of." It must be a visual and a mentally appreciative presence.

Judgment for defendant.

ALABASTINE COMPANY, PARIS, Ltd. v. CANADA PRODUCER AND GAS ENGINE CO., Ltd.

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Ontario High Court. Trial before Clute, J. December 17, 1912.

1. SALE (§ II C—35)—FITNESS — DEALER SELLING GOODS FOR PURPOSE, WARRANTY IMPLIED, WHEN.

Where a manufacturer or dealer contracts to supply an article which he manufactures or produces, or in which he deals, to be applied to a particular purpose, so that the buyer trusts to the judgment or skill of the manufacturer or dealer, there is in that case an implied term or warranty that it shall be reasonably fit and proper for the purpose for which it was designed.

[*Canadian Gas Power and Launches, Ltd.* v. *Orr Brothers, Ltd.*, 23 O.L.R. 616, applied.]

2. SALE (§ II C—35)—DEALER SELLING GOODS FOR SPECIFIC PURPOSE—IMPLIED WARRANTY—JOINT EFFORT BY BUYER AND SELLER TO CURE DEFECTS—EFFECT AS TO ESTOPPING BUYER FROM ASSERTING WARRANTY.

Where the plaintiff bought from the defendant an engine with a distinct understanding as to the purpose for which the engine was to be used, that it was to be applied to a particular purpose which required particular qualities, and the defendants represented to the plaintiffs that they could supply the engine required, and the plaintiff trusted to the defendant's judgment and skill in doing so; there is in such a contract an implied term or warranty that the article shall be reasonably fit and proper for the purpose for which it was designed; and the fact that upon the engine shewing defects from time to time the plaintiff and the defendant for several months made joint efforts to put it into running order does not estop the purchaser from insisting upon the warranty against inherent defect and weakness.

3. SALE (§ II C—35)—SALE OF GOODS FOR SPECIFIC PURPOSE — IMPLIED WARRANTY OF FITNESS—CLAUSE FOR REPLACING DEFECTIVE PARTS, EFFECT ON IMPLIED WARRANTY.

Where dealers sell an engine with an implied warranty as to fitness for a particular purpose, with certain provisions in the contract for replacing defective parts, such provisions have not the effect

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of impairing the obligations of the implied warranty but are in law considered as quite distinct therefrom.

[*Canadian Gas Power and Launches, Ltd.* v. *Orr Brothers, Limited*, 23 O.L.R. 616, 26 Can. S.C.R. 614, followed; *Sawyer and Massey Co.* v. *Ritchie*, 43 Can. S.C.R. 614, distinguished.]

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4. EVIDENCE (§ XI O—855)—SALE OF ENGINE—IMPLIED WARRANTY AS TO FITNESS—TESTS—RELEVANCY.

Upon the question of breach of implied warranty as to fitness on the sale of an engine the following are tests: (*a*) would the engine properly govern; (*b*) were the castings unfit for use to seller's actual or presumed knowledge; (*c*) was the crank case defective; (*d*) were the frequent breaks due to inherent defects; (*e*) was one of the pistons defective and secretly plugged by the seller before delivery; (*f*) was it deficient in power; (*g*) was its workmanship of inferior grade.

5. SALE (§ III C—74*a*)—SALE OF GOODS—BREACH OF WARRANTY—RESCISSION—JUDGMENT FOR RETURN OF PURCHASE MONEY—REFUND CONDITION PRECEDENT TO DELIVERY UP OF GOODS.

Upon breach of warranty by a seller of goods the court on giving a judgment for the return of the purchase payment to the buyer will direct that upon such refund being made the goods be returned to the seller.

[*Canadian Gas Power* v. *Orr Brothers*, 4 D.L.R. 641, applied.]

6. DAMAGES (§ III P 2—340)—BREACH OF WARRANTY—QUANTUM OF DAMAGES—SUBSEQUENT CONTINGENCIES NOT READ INTO AGREEMENT, WHEN.

In awarding damages for breach of warranty as to fitness of an engine for certain work a loss of additional profits which the plaintiff anticipates he would have made had the engine been available for his work by reason of certain competing firms going out of business subsequent to the date of the contract of sale, will not be presumed to have been in the contemplation of the parties and will not be allowed.

Statement

ACTION to recover $5,500 paid by the plaintiffs on account of purchase money for an engine bought from the defendants and alleged to be useless for the purpose intended, for $20,000 damages for loss of business, and for rescission of the agreement for sale and purchase of the engine, etc.

Judgment was given for the plaintiff.

G. H. Watson, K.C., and *F. Smoke*, K.C., for the plaintiffs.

I. F. Hellmuth, K.C., and *W. A. Boys*, K.C., for the defendants.

Clute, J.

CLUTE, J.:—The plaintiffs manufacture gypsum products—plaster of paris, hard wall plaster, etc., at Paris and Caledonia, Ont. The defendants manufacture gasoline engines at Barrie.

The plaintiffs desired to increase their power, and Mr. Haire, their manager, got into communication with one, Cooper, who was acting as sales agent (though in the employ of another company), for the defendants. The result of this was that the defendants' manager, Greaves, Haire and Cooper, negotiated for the sale of the engine and other appliances in question. It was fully made known to the defendants, through their manager, what was required. He visited the plaintiffs' works, and it was pointed out to him that it was necessary to have an engine that

could be well-governed, inasmuch as at one time there was a heavy load and then the engine would run light. This and other special requirements were pointed out to him.

According to Cooper's evidence, Greaves impressed upon Haire that their engine was the one they ought to purchase. Greaves further stated that their engine would easily develop 250 H.P., and that they were prepared to guarantee the proper operation of the machine.

I do not mention this part of the evidence, which was objected to, as in any way varying the contract, but with a view of shewing, what was made manifest throughout the evidence, that the plaintiffs required and the defendants agreed to furnish a particular engine suitable for a particular purpose.

After a good deal of negotiation and after all parties understood what was required, an agreement was entered into on the 5th of May, of which the attached specifications, together with a guarantee and special agreement mentioned in the specifications, were made a part. It provides that the purchaser is to place the engine on the foundation and to furnish help to erect it, the vendors to furnish engineer to superintend the erecting and starting of the machinery, and to give instructions for ten days after the plant is started.

I will refer later to some of its provisions.

The engine was delivered early in August and set up by defendants' engineer about the 8th of September and started to run on the 10th. It was stopped owing to the pistons being too tight; they had to be filed down. This took some time, two or three weeks. After it was started again one of the bearings gave trouble and the engine would not govern properly. It would race without a load, and with a heavy load would stop. The balance wheel also gave trouble, causing vibration. This was attributable, I think, to the weakness of the crank case, of which I will speak later.

I may mention here that a crack had been discovered by Parkhurst, superintendent of plaintiffs' mill, before the engine was removed from Barrie, but he was assured by the defendants' manager, Greaves, that it was a trivial matter and could be made perfectly secure; and castings were prepared and bolted on to that end. A second crack, however, appeared in October about a foot long, opening and closing as the engine moved, with oil oozing out. The weakness of the crank case, according to the evidence, which I accept, caused the crank shaft to vibrate dangerously. This occurred early in October. The effect of this was to make the bearings run hot and melted out the babbitt; that is, the metal in which the shaft turns. The effect of this was to break the gear, which was found to be cast iron instead of steel, as it should have been. This occurred about the middle

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of October. The engine had only run a few days during this period. About the 22nd of October the air cylinder cracked, owing to an original flaw in the cylinder, which had been known to the defendants, and had been drilled out and plugged before the engine was shipped. It was from this point of weakness that the cracks which caused the break started. I regard this as impugning the defendants' integrity in sending out the engine. The defect was in a vital part where the greatest pressure was applied, and where the cylinder should have been perfect; yet, knowingly, a very defective cylinder was put in by the defendants. The effect of this break of the cylinder and the gear caused a delay of some weeks.

The plaintiffs' manager says that the engine was practically out of business for two months, the new bearings and the cylinder not being obtained from the defendants until December.

After these parts were finally replaced and the engine started up again, it ran for a few days and another bearing gave out. The babbit melted out. This is attributed by the plaintiffs' manager to the balance wheel not running true and the weakness of the crank case, causing the bearings to run hot. One Berg was sent down. He rebabbitted the bearing and put it in some kind of running order, and it was again started some time early in January. The babbitt broke again and the engine worked very little until February. It would run part of the time and then stop. It operated at times fairly well during the early part of March, but on the 25th of that month it "went to smash," as the witnesses express it.

The crank case forming the body of the engine, was broken beyond repair, and other parts of the engine were so broken and destroyed as to make the engine, in the opinion of a number of witnesses whose evidence I accept, not worth repairing.

The evidence shews that an engine of this kind ought to be set up and running properly in about two weeks, possibly three. This engine, after seven months from the time it was taken in hand by the defendants to install, never was made to run properly, although the defendants had charge of the installation and repairs during the whole period.

The correspondence during all this period between the parties, upon which I lay great weight, shews clearly, I think, that from first to last the engine was never in proper running order. It never would properly govern, which was a very essential prerequisite for doing the plaintiffs' work. The castings were unfit for use, and this fact was either known or should have been known to the defendants before the engine was sent out. The crank case upon which the whole strain of the engine would come was so defective that the witnesses for both plaintiffs and defendants concurred in the view that it was not fit for the

purposes for which it was intended. I find that the frequent breaks and final wreck of the engine were due to its inherent defects, and not owing to any want of care on the part of the plaintiffs or their servants in charge of the engine. I find the crank case was not oil tight and was not so arranged as to lubricate all moving parts within it on the oil-splash principle. I find that it was defective in form and material, that there were cold shots through it; it was spongy, thicker upon one side than upon the other and was unfit to be sent out and used for the purposes intended. I find that the governor did not comply with the guarantee and did not control the admission of gas and air proportionate to the load, and did not maintain a constant speed of the engine. I find that one of the pistons was defective to the knowledge of the defendants before it was sent out, and was plugged, which had a tendency to weaken it and make it unfit for the use intended. I find that the engine was never capable of continuously carrying 250 H.P., or so adjusted as to start properly without the assistance of the smaller engine. I find that the material and workmanship were not of the very best class of their respective kinds, but on the contrary were such, having regard to the parts defective, as to render the engine wholly unfit for the work required of it as intended by both parties.

As to the defendants' witness Hindle, the erecting engineer, he was acting as selling agent for the defendants during the time of his erecting the engine in question and was interested in speaking well of the engine. His evidence was unsatisfactory and I do not give full credit to it.

Stanley Moore, who ran the engine for a time and then went to the defendants, was wholly discredited, so much so that Mr. Hellmuth very frankly stated that he would not rely upon his evidence.

I think it clearly made out in this case that this contract was entered upon by both parties with a distinct and clear understanding as to the purpose for which the engine was to be used, that it was to be applied to a particular purpose which required particular qualities, and the defendants represented to the plaintiffs that they could supply the engine required, and the plaintiffs trusted to their judgment and skill in doing so, and I think this is a case where there is an implied term or warranty that the article shall be reasonably fit and proper for the purpose for which it was designed. It was not, I think, within the contemplation of either party that where there was a wreck, such as occurred in this case, and the principal parts of the engine destroyed and smashed, that that came within that part of the guarantee which limited the remedy to a replacement of the injured parts. Many injured parts during the six months were over and over again replaced, and every endeavour was made

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both by the plaintiffs and defendants to get the engine in running order. The result of six months' experiment was that the whole thing practically collapsed, and I am satisfied that this breakdown was from its inherent defects and weakness. I cannot but feel that the defendants were guilty of fraud in putting this engine off as they did, and so find. I think it was clear that defendants had knowledge of the defect in the crank case and did not bring it to the attention of the plaintiffs. The plaintiffs' manager having discovered it, he was assured that it was of no moment.

The defence did not see fit to call the defendants' manager, Greaves, although he was in Court, and no contradiction was offered as to what was said by the plaintiffs' witnesses in regard to the defect of the crank case.

There was certainly wilful concealment in regard to the plugged cylinder, the most important part of the engine. The defendants also withheld from the plaintiffs that they had never built an engine of this size before, but rather represented themselves as having full knowledge of what was required and of their capability to produce the article. I think the defendants knew, or should have known, that the engine was unfit for the purpose for which it was intended.

The defendants' counsel strongly relied upon the case of *Sawyer & Massey Co.* v. *Ritchie*, 43 Can. S.C.R. 614, and that there could be no implied warranty that the engine should be fit for the purpose for which it was used, because there were certain provisions in the contract for replacing defective parts. In my opinion the two things are quite distinct, and I think this case falls within the principle laid down in *Canadian Gas Power and Launches, Limited* v. *Orr Brothers, Limited*, 23 O.L.R. 616. In that case there was a guarantee that the engine should be in perfect running order when shipped, and also that in the event of any part breaking within twelve months by reason of material therein having been defective, the purchaser might return the same and be furnished free of charge with a duplicate part. It further provided that no agent was authorized to make any contract or promise differing in any way from that written and contracted in the order. In that case, as here, the vendors had knowledge of that which the defendants desired and required of the engine. The question as to when an implied condition or warranty may arise is carefully considered in the Orr case, and the cases referred to.

The rule is thus laid down by the late lamented Chief Justice Sir Charles Moss, page 621, where he is reported as saying:—

"But, in order to get at what was present to the minds of the parties, the circumstances connected with and surrounding the transaction may be looked at. If, for instance, a purchaser speci-

fically describes the article he requires, or selects what he wants, relying on his own judgment as to its fitness for the purpose to which he intends to apply it, the mere fact that the vendor is aware of the use for which it is designed will not raise an implied condition or stipulation or warranty on his part that it is fit for that purpose. An example of this class is *Chanter* v. *Hopkins*, 4 M. & W. 399. But many cases decided in the English Courts, both before and since the passing of sec. 14(1) of the Sale of Goods Act, 1893 of which it has been said that it only formulates the already existing law on the subject—per Collins, M.R., in *Clarke* v. *Army and Navy Co-Operative Society*, [1903] 1 K.B. 155, at p. 163, and in *Preist* v. *Last*, [1903] 22 K.B. 148, and in our own Courts, have clearly affirmed the rule that where a manufacturer or dealer contracts to supply an article which he manufactures or produces, or in which he deals, to be applied to a particular purpose, so that the buyer trusts to the judgment or skill of the manufacturer or dealer, there is in that case an implied term or warranty that it shall be reasonably fit and proper for the purpose for which it was designed."

In my opinion, this rule is applicable to the present case upon the facts and evidence disclosed, and there can be no doubt in my mind whatever, that the engine was wholly unfit for the purpose for which it was designed and intended to be used by both parties.

The plaintiffs are entitled to recover back the $5,500 purchase money paid, with interest upon $1,000 from the 8th of August, 1911, and upon $4,500 from the 17th of January, 1912. They are also entitled to recover the expenses to which they were put in the installation, which amounts to $500, the expense in disbursements, repairs and changes, $272, and also the expense incident to installing a temporary engine to keep the works running, less the present cost of such engine (the total cost of which amounts to $2,300), from which must be deducted the present value of the temporary engine, which was placed by the plaintiffs at $1,500, leaving $800 to be allowed on that item. This would make a total of $7,072.

There is also a claim for loss of business. There is no doubt that the plaintiffs suffered considerable loss directly traceable to the defective operation of the engine installed, but the greater part of this claim I do not think can be sustained. There was evidence that there was a loss of $75 a day for 200 days, making a claim of $15,000. The greater part of this, I think, cannot be sustained. It appeared from the evidence that the supposed profits which were said to have been lost would have accrued from the fact that two competing firms had gone out of business during the fall and winter of 1911 and 1912. This, of course,

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was not in the contemplation of either party when the engine was ordered, and cannot, therefore, be considered as forming any part of the damages to which plaintiffs would be entitled. As a matter of fact the plaintiffs' business and profits largely increased during this very period, owing to increased demands; I think, however, a certain amount of loss is properly traceable to the defective running of the engine. In addition to the allowances above made, I think $300 would be a fair allowance, making a total of $7,372, for which the plaintiffs are entitled to judgment.

As in *Canadian Gas Power* v. *Orr Brothers*, 4 D.L.R. 641, 3 O.W.N. 1362, 22 O.W.R. 351, I think the order may provide that the defendants shall be entitled to a re-delivery of the engine, conditional on the repayment of the balance of the price.

Plaintiffs are entitled to costs.

Judgment for plaintiff.

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Ontario Divisional Court, Riddell, Kelly, and Lennox, JJ. November 5, 1912.

1. LANDLORD AND TENANT (§ III D—95)—RENT—ACCELERATION PROVISO IN EVENT OF TERM BEING SEIZED—PROCURING SEIZURE.

Where there is a proviso in a lease that if any of the goods of the lessee shall be at any time during the term seized and taken in execution by any creditor of the said lessee, the then current and next ensuing year's rent shall immediately become due, the landlord cannot give himself any rights under the proviso by procuring the seizure of the tenant's goods either by an execution of his own or that of another.

2. DAMAGES (§ III K—210)—MEASURE OF COMPENSATION FOR ILLEGAL DISTRESS.

The measure of damages for illegal seizure is not only the value of the goods distrained and sold, but also damages for being deprived of the use of them, if thereby the tenant is thrown out of employment or is prevented from engaging in his ordinary business; the value of the goods is the "fair value to the tenant."

Statement

APPEAL by the defendant from the judgment of Mulock, C.J. Ex.D., in an action for illegal distress, tried before him with a jury.

The judgment below was varied, by reducing the damages or in the alternative a new trial.

W. T. J. Lee, for the defendant.

J. Fraser, for the plaintiff.

Riddell, J.

RIDDELL, J.:—The trial of this case took a very long time: but many of the matters in controversy were eliminated, and before us the argument was not complicated by much contention as to the facts.

It will be sufficient to set out the facts now material.

The plaintiff was a tenant of the defendant under a written lease not too skilfully drawn—it contains a clause: "Provided . . . that if . . . any of the goods . . . of the said lessee shall be at any time during said term seized and taken in execution . . . by any creditor of the said lessee . . . the then current and next ensuing year's rent . . . shall immediately become due. . . ."

Rent becoming in arrear, a seizure was made for rent: but this resulted in no damage to the plaintiff, and, irregular as it was, need not be further considered.

There was a judgment against the plaintiff brought by transcript to the Division Court of the plaintiff's district from Burke's Falls, the previous residence of the plaintiff—this was done by one Hutton acting for and on the instructions of the defendant. Hutton was instructed by the defendant to find out if there was such a judgment; and, "if there was such a judgment, I was to have an execution or transcript issued, the execution issued and then issue a warrant," he says. He did this and had the goods of the plaintiff seized accordingly, as the defendant contends. The plaintiff says that there was no taking in execution, that the Division Court bailiff accepted a payment on account, and went away without seizure. The landlord then issued his warrant to his bailiff for the current year's rent, which he claimed to be due by virtue of the acceleration clause, under which the goods of the plaintiff were seized and sold.

The tenant sued, and the action came on for trial before the Chief Justice of the Exchequer Division and a jury at Brampton.

Cases of this kind in recent years have almost invariably been tried by a Judge without a jury; but, as no motion was made to have the jury dispensed with, the learned Chief Justice indulged the parties in their apparent desire to have a jury pass upon the questions in issue.

The jury found answers to a great many questions submitted to them, most of which are not now in controversy. On the question of damages the jury ultimately found $522 in respect of goods, $20 for board of one Smith, and $600 because of interruption to the plaintiff's farming business. They found the defendant, however, entitled to a counterclaim of $378, and judgment was accordingly directed to be entered for the difference ($522+20+600=$1,142—$378.) $764 and costs.

There can be no doubt that the landlord cannot give himself any rights under the acceleration clause in a lease by procuring the seizure of the tenant's goods either by an execution of his own or that of another. It is consequently quite immaterial whether there was or was not an actual seizure by the Division Court bailiff before the warrant of the landlord: in any case, the seizure by the landlord was illegal. But I see no sufficient ground

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for saying that the jury were wrong in finding, as they did, that the landlord's seizure was first.

No rent being due otherwise, it is plain that the seizure was wholly illegal.

In addition to the $20 for board, the plaintiff has been found entitled to the value of the goods and also to special damages. The findings on both these heads are disputed: and it becomes necessary to examine the evidence.

First, as to the value of the goods—it cannot be contended that the plaintiff is not entitled to their value. The goods seized on the first occasion were valued by the plaintiff at $825. Of these the following do not seem to have been seized on the second occasion—

Buckwheat	$150.00	
Wheat	98.35	
		$248.35
Balance		$576.65

But the following, not seized on the first occasion, were seized on the second (I give the values as fixed by the bailiff)—

3 loads buckwheat in stook, $15 ..... $591.65

This amount should be also diminished (as only 150 bushels of oats were seized instead of 200) by ¼ of $78...$19.50

Valuation $572.15

Upon that evidence, the jury were justified in finding the value $522. No doubt, the "fair value to the tenant" would be much more; and that is the value to be allowed according to Parke, J., in *Knotts* v. *Curtis* (1832), 5 C. & P. 322.

There is no complaint as to the $20 allowed for Smith's board.

In an action of this kind special damage may be recovered in addition to the value of the goods: *Bodley* v. *Reynolds*, 8 Q.B. 779; *Reilley* v. *McMinn* (1874), 15 N.B.R. 370.

The latter case says: "In trespass for seizing and selling tools under an illegal distress, the plaintiff may recover not only the value of the goods distrained and sold, but also damages for being deprived of the use of them, if thereby he is thrown out of employment, and in estimating the damages, the jury have a right to take into consideration the circumstances in which the plaintiff was placed and the difficulty of obtaining employment . . . without tools."

The plaintiff at the trial claimed $300 for damages in addition to the amount he claimed for the value of his goods.

This is how he puts it in answer to his own counsel:—

"A. I claim $825 all told, besides the $300 damages.

"Q. Besides the $300 damages? A. Yes.

"Q. What is $300 damages for? A. Well, they put me out

of business and I have been out of business ever since; I have never been able to do anything. I couldn't go on with my work because they seized everything and sold it. I have nothing to work with, and my son was out of work until Christmas time.

"Q. Was your son farming with you? A. Yes. And we were both out of work from the time of the seizure until Christmas time, and I have been out of work ever since.

"Q. Have you work now? A. I am out of work yet.

"Q. Are you in a position to buy other goods, and go farming again? A. No, because I have got nothing to farm with."

He was cross-examined at great length (some 56 pages of the notes are taken up), but this particular matter of damages was left untouched—and no one else says anything about it.

In *New Hamburg Manufacturing Co.* v. *Webb* (1911), 23 O.L.R. 44, at p. 55, the Court pointed out that a party to an action need not complain if a statement made by his opponent or his opponent's witness is taken as accurate if he allows it to go without cross-examination or contradiction at the trial. The judgment of the House of Lords in *Bowne* v. *Dunn* (1893), 6 R. 67, may be referred to as cited in the *New Hamburg* case, *New Hamburg Manufacturing Co.* v. *Webb*, 23 O.L.R. 44.

There is evidence then which would justify the jury in finding a verdict for $300 damages on this head—but no more. I can find nothing to support the extra amount.

If then the plaintiff will accept a reduction of his judgment to $464 and costs on the High Court scale, he may have it. In that event, there being partial success only, he should have only half the costs of the appeal. If the plaintiff declines this, I think there must be a new trial. All the matters in controversy being now removed, but the simple question of damages, these should be determined by the Master—and if the plaintiff is to have the privilege of increasing his special damages above what the evidence justifies, the defendant should have an opportunity of diminishing the damages on the head of the value of the goods seized.

If this alternative be preferred by the plaintiff, the judgment will be set aside and the matter referred to the Master to assess the damages: (1) the value of the goods seized; (2) board of Smith, about which there is no dispute, and which the Master will assess at $20; and (3) special damages. Upon the Master's report becoming absolute, the costs of the former trial, appeal, report, etc., may be disposed of by one of us in Chambers.

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KELLY, J.:—I am of opinion that on the evidence, plaintiff is entitled to the $522 allowed him as the value of the goods seized, and $20 for board. He is also entitled to damages for interruption to and interference with his farming business, and the evidence supports this claim to the extent of $300, which he

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made as damages for trespass, and for being deprived of his goods and chattels (over and above their value). The jury, however, awarded him $600 for this damage; this should be reduced to $300, thus reducing the judgment in plaintiff's favour from $764 to $464.

I agree with the manner of disposing of the appeal adopted by my brother Riddell.

Lennox, J.

LENNOX, J.:—The second distress, the only one we are now concerned with, was made on the 22nd day of September, 1911, and the goods were sold on the 6th October following. There was no rent in arrear or due either at the time of the distress or sale, and both were illegal.

For such an illegal distress and sale a tenant was entitled to recover from his landlord "double the value of the goods or chattels so distrained and sold, together with full costs of suit," under R.S.O. ch. 342, sec. 18, sec. 2; 2 W. & M., sess. 1, ch. 5, sec. 4. And the jury must be directed to give this amount: *Masters* v. *Farris*, 1 C.B. 715.

The plaintiff did not sue for double value; but it was assumed upon the argument that he would be entitled to it if properly claimed; and he now asks to amend his pleadings and claim it. This is a case for stiff damages. The defendant's action was not only illegal, but deliberately dishonest. But there is no object in allowing an amendment. The Court has now power to double the damages assessed; the jury must find the value and assess the damages at double that amount.

And there is another reason. Before the wrongs complained of were committed, namely, on the 1st September, 1911, the section referred to was repealed by 1 Geo. V. (Ont.) ch. 37, and sec. 54 of this Act was substituted therefor. Under the section now in force the plaintiff is not entitled to double damages, but "to recover full satisfaction for the damage sustained by the distress and sale." This may be either more or less than double value, but it eliminates the requirement of a specific claim in the pleadings.

The $522 allowed in respect of the goods is well sustained by the evidence. The $20 for board is not disputed. It was argued that the $522 award exhausted the plaintiff's right to damages. I do not think so. Without reference to cases at all, the language of sec. 54 referred to is broad enough to cover any damages naturally resulting from the defendant's act. And even where the seizure is not illegal, but only irregular, deprivation of the use of chattels or goods is a basis for damages: *Piggott* v. *Brittes* (1836), 1 M. & W. 441 at 449 to 451. This is recognized, too, in *Hessey* v. *Quinn*, 21 O.L.R. 519 at 521. See also *Sherman* v. *Dutch*, 16 Ill. 283.

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But the plaintiff is not entitled to the whole $600. He only asked for $300 in respect of this matter in his statement of claim, and only a total of $1,035. The jury doubles this item, and allows a total of $1,142. The plaintiff has not asked to amend as to this part of his claim, and, having been definitely limited himself to $300 by his evidence at the trial, I think he should not be allowed to recover more.

I agree that the appeal should be disposed of in the way stated by my brother Riddell.

Verdict reduced or in the alternative a new trial ordered.

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LACHUTE SHUTTLE CO. v. FROTHINGHAM & WORKMAN, Ltd.

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

1. SALE (§ II C—35a)—CONTRACT FOR GOODS AS "SAMPLES SUBMITTED."

A contract made by correspondence for a carload of specified articles of a specified grade "to be the same size and quality as samples submitted" is a sale by sample, and not a sale of a quality or grade.

2. SALE (§ II D—40)—WHAT AMOUNTS TO AN ACCEPTANCE OF GOODS—IMPOSSIBILITY OF INSPECTING IN CAR—UNLOADING—NOTICE TO SELLER.

The unloading of such merchandise as shovel handles by the buyer and taking them into his store, where it is shewn that inspection in the cars would not be practical and would entail payment of demurrage or storage charges, does not constitute acceptance of the goods, where, after examination of the goods and discovery of defects, the buyer promptly notifies the seller of his refusal to accept the same; under such circumstances the buyer need not bring a redhibitory action under 1530 C.C. (Que.), but has the right to bring an action for rescission of contract for non-fulfillment of the vendor's obligation (C.C. 1065), and therefore the buyer is not obliged to bring suit immediately.

3. TENDER (§ I—2)—NOTICE TO SELLER THAT BUYER INTENDS TO RETURN GOODS—NECESSITY OF MAKING FORMAL TENDER.

Where the buyer, by letter, advises the seller of his refusal to accept merchandise bought, informing him, at the same time, that, unless the vendor sends shipping instructions, the car will be forwarded to him, and the vendor replies "we positively will refuse delivery if you should decide to return them," the buyer is not obliged to cart the goods to the railway station to make a formal tender; it is sufficient if, in his plea, he renews his declaration that the goods are at the vendor's disposal.

Statement

APPEAL from a judgment of the Superior Court, Sir M. M. Tait, C.J., rendered on June 12th, 1911, setting aside and annulling a contract for the manufacture of one carload of shovel handles at the request of the respondent.

The appeal was dismissed with costs.

Argument

J. L. St. Jacques, for the appellant:—This is a sale by correspondence and is the sale of a certain grade of goods and not a sale by sample, and the grade required was shipped although

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a certain number of handles may not have been exactly similar to the sample shewn. The mere fact of exhibiting a sample at the time of the sale does not make the sale one by sample: Am. & Eng. Encyc., 2nd ed. Vo., Implied Warranties, p. 1225. For respondent to be entitled to ask for the cancellation of the sale he should have acted with due diligence, 1530 C.C., and should have had the goods inspected at the time of delivery. Instead it brought them into its warehouse, thereby accepting them: *Marchand* v. *Gibeau*, 1 Que. S.C. 266; *Fraser* v. *Major*, 1 Que. S.C. 543; *Vipond* v. *Findlay*, M.L.R. 7 S.C. 242; *Joseph* v. *Morrow*, 4 L.C.J. 288; *Guilmette* v. *Langevin*, 13 R.L. N.S. 154. More especially can no such action lie after a delay of eleven months: *Buntin* v. *Hibbard*, 10 L.C.J. 1; *Bessette* v. *Lyall*, 38 Que. S.C. 474; *Dominion Lumber Co.* v. *Auger*, 40 Que. S.C. 184. The reason given by the respondent that it had been notified by the appellant that suit would be taken to recover the price and therefore was awaiting this to file a cross-demand is futile.

J. H. Rainville, for the respondent:—The sale is one by sample and the buyer has the right to exact absolute conformity of the goods to the sample, otherwise he can refuse to accept the goods. Beaudry-Lacantinerie, Vente, 3rd ed., p. 179. Inspection could not be made in the cars; unloading was necessary and the goods were placed in a shed not fifty yards from the C.P.R. tracks. Besides all the correspondence shews that any delays were due to the appellant and not to the respondent which kept continually asking for instructions.

The present action is not a redhibitory action for latent defects governed by 1530 C.C.; it is an action based on 1065 C.C.: *Odell* v. *Lavigueur*, 32 Que. S.C. 99, 110.

CROSS, J.

The opinion of the Court was delivered by Mr. Justice Cross.

Montreal, June 15, 1912. CROSS, J.:—This is an action to set aside a contract for the purchase of a carload of shovel handles.

The respondent was the buyer, and its complaint is that the handles did not conform to sample.

The appellant's defence was in substance as follows:—

First: that its contract was to supply "X" grade handles and that the handles supplied were not "X" grade;

Second: That the plaintiff (respondent) took delivery of the handles and, having done so is too late to sue to rescind, the action having been taken eleven months after delivery; and

Third: that the plaintiff has failed to validly tender back the goods.

The Superior Court has maintained the action and set aside the contract. The defendant, the seller, has brought up this appeal.

In support of the first ground of defence, the defendant complains that the sale was substantially a sale of a quality or grade of shovels known in the market as "X" grade and was not a sale by sample. If that interpretation of the contract were the correct one, it no doubt would tell strongly in defendant's favour, for as pointed out in Beaudry-Lacantinerie et Saignat, Voule, No. 312 (1), p. 314:—

> Quand la vente a été faite sur échantillon la règle est plus rigoureuse. L'acheteur a le droit d'exiger des marchandises entièrement conformes à l'échantillon, et il peut refuser celles qui n'auraient pas cette conformité.

The contract was effected by correspondence and I find it to have been made "for a carload of D. shovel handles 'X' grade, handles to be the same size and quality as samples submitted." It appears to me that this language is clear enough to leave no room for doubt about what was intended to be sold.

There are four grades of shovel handles known to the trade, the best are known as "XX", the next best are "X" handles.

The appellant agreed to supply handles of the second grade, but handles of the same size and quality as samples submitted. That agreement gave the buyer the right to test the handles by comparing them with the samples and to refuse acceptance of them if they were not of the same size and quality and to that extent the sale was a sale by sample. The appellant is therefor in error in saying that the sale was a sale by grade and not a sale by sample. The reference to the sample was intended to have some effect and must not be disregarded.

Then, as to the quality, I agree with the learned Chief Justice of the Superior Court that the proof shews that the handles did not conform to sample. The evidence tendered in a contrary sense by the appellant is not strong. It was directed mainly to proving that the two samples were taken from the same lot of handles in the appellants' storehouse from which half the handles shipped were themselves taken, and that the other half of them were turned out of the same stock of wood by the same workman and from the same machine. That establishes plausibility for the ground taken by the defendant, but does not destroy the testimony put in by the plaintiff specifically bearing upon the quality of the handles tendered to the buyer.

It follows that there was ground for non-acceptance of the carload of handles.

The next and more serious question is whether the action was brought in time. The appellant's contention is that the respondent received and took delivery of the handles, and thereby came under the rule of article 1530 C.C. which provides that the action based upon the seller's warranty against latent defects must be brought with reasonable diligence. There is no

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doubt that this action could not be held to have been brought with such diligence as is contemplated by article 1530. It was taken only in December, 1910, whereas the respondent took the handles out of the car into its warehouse in January, 1910: The respondent answers that it never agreed to accept the handles.

The handles were deliverable f.o.b. Côte St. Paul. They arrived there at the end of December, 1909, and were unloaded and taken into store by the respondent, but about ten days afterwards, on the 11th January, the respondent wrote to the plaintiff as follows:—

> We are in receipt of our carload of "D" handles which we are holding to your order as they are not up to sample furnished us by you the timber being of very poor quality.

A lengthy correspondence followed but I do not find in it that the appellant at any time complained that the original rejection of the handles had come too late.

The appellant relies upon the fact that the respondent unloaded the car and took the handles into store notwithstanding that if there were defects in the handles such as were alleged they could have been discovered by examination as the handles were taken out of the car.

On the other hand testimony has been given to the effect that the handles could not be inspected inside of the car and if they had not been unloaded the carrier would have claimed demurrage or storage.

The learned Judge of the Superior Court came to the conclusion that in the circumstances the unloading of the car and removal of the goods was an act done in the interest of both parties and should not be held as importing an acceptance of delivery as in implement of the contract. The main question in the case is whether or not this act of unloading and taking into store did not amount to such an acceptance of the goods as made it necessary for the respondent, if it wished to be relieved upon the ground of defective quality of the goods to have brought this action very much sooner that it did.

In the treatise already quoted from, I find it said at No. 312 (2).

> Lorsque la marchandise livrée par le vendeur ne réunit pas les qualités promises ou quand elle n'est pas conforme à l'échantillon, l'acheteur est-il tenu de la refuser au moment même où elle lui est livrée? A-t-il pour le faire un délai limité? La loi ne fixe aucun délai. Sans doute l'acheteur doit refuser la marchandise assez promptement pour que son silence ne puisse pas être considéré comme une acceptation de la marchandise "malgré" ses défectuosités: mais il lui faut le temps nécessaire pour en faire la vérification. Il peut, en principe, refuser la marchandise défectueuse tant qu'il ne l'a pas acceptée expressément ou tacitement." . . . L'exécution ou l'inexécution du contrat doivent s'apprécier d'après le droit commun; l'acheteur est

fondé à se plaindre de la non conformité des choses livrées, tant qu'il peut prouver leur identité et que du reste il n'en a pas fait un usage tel quil soit présumé les avoir acceptées malgré leur non "conformité" aux conditions du marché.

A number of decisions in that sense are cited in the note.

I agree with the learned Chief Justice in holding that the unloading and removal to the warehouse was an act which the buyer could reasonably do with the view of facilitating an inspection of the handles and did not impart an acceptance in view of the fact that a letter of refusal of acceptance was written on this 11th January.

That being so, the case was not one of redhibitory action under article 1530 in which the buyer had not only to complain but to bring suit with diligence but it was a case which fell under the common -law rule of article 1065 which gives one party a right of action to rescind in case of non-fulfilment of contract by the other party. This view agrees with the conclusion recently arrived at by the Court in *Leduc* v. *Belanger* (not reported).

It follows that the appellant's objection, to the effect that the action was commenced too late, is not well taken.

There remains for consideration the appellant's objection to the effect that the goods have not been properly tendered back.

The place of delivery was Côte St. Paul. The delivery there made was from the car at the railway station. The appellants' contention is that the goods should have been tendered back at the railway station, whereas in fact they are in the respondents' warehouse. In announcing its refusal of acceptance, the respondent more than once asked the appellant for shipping directions in order to get rid of the handles. In a letter of the 23rd February, 1910, the defendant said, "unless we receive your immediate shipping instructions, we will forward the car back to you at once." The same thing was repeated in a letter of the 13th of June and in answer of the following day the appellant proposed that the respondent should keep them in stock pending the decision of a suit for the price, which it said it was about to take, and added, "we positively will refuse delivery, if you should decide to return them. . . . "

It would obviously have been a barren formality to have carted the handles back to the railway station. The appellant itself dispensed with any more definite tender of return of the handles. By its action the respondent repeated its offer of return of the handles, and that offer has been declared good and valid. In our opinion the appellant does not establish its ground of appeal on this point.

On the whole the judgment is confirmed.

Appeal dismissed.

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Re FALSE CREEK FLATS Arbitration.

(Decision No. 2.)

British Columbia Court of Appeal, Macdonald, C.J.A., Irving, Martin, and Galliher, JJ.A. June 28, 1912.

1. EMINENT DOMAIN (§ III E 2—176*a*)—OBSTRUCTING ACCESS TO WATER —SETTING OFF BENEFITS AGAINST DAMAGES.

Where arbitrators dealing with an objection to the admissibility of evidence of increased value to set off against damage in eminent domain proceedings under the Railway Act (Can.) stated that they would take the evidence, but would specify separately in their award the increased value and the gross amount of damages against which it was set-off, and thereby enable the objecting party to have reviewed by the courts the application of the "set-off" provisions of the Railway Act, but no two of the three arbitrators could agree on the amounts on the basis of excluding the benefits, but concurred in awarding one dollar damages for lands injuriously affected but not expropriated, but without specifying how the amount was arrived at, the arbitrators' statement as to separate findings will be held to be equivalent to a promise to exercise their discretionary power to state a case for the opinion of the court, a reliance upon which may have prejudiced the objecting party in the conduct of his case, and the arbitrators' non-fulfilment, although unintentional, of the promise given is such misconduct on their part as will justify setting aside the award.

[*Re False Creek Flats Arbitration* (No. 1), 1 D.L.R. 363, affirmed on an equal division.]

2. DAMAGES (§ III L 6—284)—EMINENT DOMAIN—SETTING OFF SPECIAL BENEFITS—RAILWAY.

Upon an arbitration in eminent domain proceedings in reference to damage to land by railway construction, in cases in which sec. 198 of the Railway Act (Can.) requires the amount of benefit to be "set-off" against the amount of damage it is necessary that the arbitrators should specify the amount of each in their award.

[*Re False Creek Flats Arbitration* (No. 1), 1 D.L.R. 363, affirmed on an equal division.]

3. ARBITRATION (§ III—17)—REVIEW AND SETTING ASIDE—FAILURE TO DECIDE ALL MATTERS REFERRED.

If an award of arbitrators fails to decide on all matters referred to them, the award will be set aside by the court, whether the omission appears on the face of the award or by affidavit.

[*Re False Creek Flats Arbitration* (No. 1), 1 D.L.R. 363, affirmed on an equal division.]

4. ARBITRATION (§ II—12)—MISCONDUCT OF ARBITRATORS—IRREGULAR PROCEEDINGS—MOTIVE.

Misconduct of arbitrators, in its legal sense as regards the power of the court to set aside an award, does not necessarily imply any improper motive to the arbitrators.

[*Re False Creek Flats Arbitration* (No. 1), 1 D.L.R. 363, affirmed on an equal division.]

Statement

APPEAL by the Victoria Vancouver and Eastern Railway and Navigation Company from the decision of Gregory, J., *Re False Creek Flats Arbitration* (Decision No. 1), 1 D.L.R. 363, 20 W. L.R. 387, setting aside an award of arbitrators under the Railway Act.

A. H. MacNeill, K.C., for the appellant company.

Douglas Armour, *J. R. Grant*, and *A. W. V. Jones*, for the land-owners, respondents.

MACDONALD, C.J.A.:—During the course of the proceedings before the arbitrators, a question was raised as to whether or not sec. 198 of the Railway Act could be applied to the facts of this case. No land had been taken from the owners claiming compensation. The railway did not touch their land, but they claimed that their lands were injuriously affected because of the construction of the railway between these lands and the sea. During such discussion it was suggested that the question of the applicability of the section be referred to the Court. This suggestion was not acted upon, because the arbitrators promised the land-owners that they would make it appear on the face of the award whether or not they had applied the section. This promise was not kept. There is no suggestion of bad faith on the part of the arbitrators, but the result was, that the land-owners refrained from taking advantage of their right, and relied upon an equivalent, namely, to move, if necessary, after the award was made, which they could do if it appeared on the face of the award that the arbitrators had applied the section. Evidence was offered to shew that the arbitrators did apply the section.

It was objected to, on the ground that arbitrators are not permitted to give evidence as to what took place amongst themselves. In my view of the case, it is not necessary to decide this question. The evidence shewing the promise is that of one of the solicitors in the proceedings before the arbitrators, and the award itself shews that that promise was not carried out. It does not, therefore, seem to me essential to shew either that the arbitrators did or did not apply the said section. They may have done so; and that, in my opinion, is sufficient to invalidate the award, if, in fact, the section is inapplicable. In terms the section deals only with "lands through or over which the railway will pass."

The increased value is that created "by reason of the passage of the railway through or over the same or by reason of the construction of the railway." These two disjunctive clauses refer to lands through or over which the railway will pass. Farther along in the section reference is again made to the lands with which the section deals. The arbitrators are to set off the increased value against the loss or damage that may be suffered or sustained by reason of the company "taking possession of or using said lands." To arrive, therefore, at the conclusion that sec. 198 applies, it is necessary to delete from the section the words "through or over which the railway will pass," and to disregard the plain and ordinary meaning of the words "taking possession of or using the said lands." As against what I conceive to be the plain and grammatical construction and meaning of the clause, it is urged that the word "such" in the phrase "such value or compensation" at the beginning of the section, refers to the antecedent sections relating to arbitration, and

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properly includes both classes of claims, namely, those where land is taken, and those where land is not taken or entered upon. This contention is correct; but, I think, the word "such" must be confined in its meaning by the rest of the section.

It was also contended that it is not reasonable to suppose that Parliament intended to make one rule for one class of claims and another for another class, when there is no apparent reason for doing so. While that is a circumstance not to be overlooked, it does not appear to me to outweigh the obstacles in the way of the construction which the appellants contend for.

It was also strongly pressed upon us in argument that the railway company actually entered upon and took possession of "land" of the respondents, within the definition of land in the interpretation clause of the Act; that the respondents' rights to access to the sea are hereditaments, within the meaning of that definition; and that, when the appellants built their line along the foreshore in front of the respondents' property, they in effect took an interest in land by destroying that which was an incident to the enjoyment of the land.

The respondents' right to access to the sea may be an hereditament; if so, it is an incorporeal one. The railway company are given by the Act the right to enter in and upon the lands of other persons; and, looking at the whole purpose and context of the Act, I am of opinion that, assuming the right in question to be an hereditament, the definition of land above referred to must be confined to corporeal hereditaments.

I think that the language of Lord Watson in *Great Western R. Co.* v. *Swindon and Cheltenham R. Co.* (1884), 9 App. Cas. 787, 800, is applicable to this case. He says, speaking of the English Land Clauses Act, which contains a definition of land practically identical with that in the Railway Act:—

> Now, it is perfectly true that the word "lands," as it occurs in many of the leading clauses of the Act of 1845, is, by reason of the context, limited to corporeal hereditaments. Taking that Act *per se*, and irrespective of the terms of any other statute, these clauses do not appear to be applicable to the compulsory taking of an easement, at least in the sense in which the respondents are by their Act empowered to purchase and take such a right. The only easements which these provisions, read by themselves, seem to contemplate are servitude rights burdening the corporeal lands taken by the company, which are destroyed or impaired by the construction of the railway. The company are not dealt with as being either entitled or bound to purchase and take such easements, but as liable to make compensation in respect of their having by the construction of their authorized works injuriously affected the dominant land to which the easements are attached.

The appeal should be dismissed.

Martin, J.A.

MARTIN, J.A.:—While I have reached the same conclusion as the learned Chief Justice, I am far from being free from doubt

about the true construction of this difficult section, 198, and think it desirable to add that, in my opinion, the definition of "lands" is sufficient to cover the right of access in question, which is a "natural right" and a species of easement: Goddard on Easements, p. 3; Halsbury's Laws of England, vol. 11, p. 238; and clearly an incorporeal hereditament according to the authorities, e.g., *Great Western R. Co.* v. *Swindon and Cheltenham R. Co.*, 9 App. Cas. 787, 53 L.J. Ch. 1075; *The Queen* v. *Cambrian R. Co.* (1871), L.R. 6 Q.B. 422, 9 App. Cas. 787; *Lyon* v. *Fishmongers Co.*, 1 App. Cas. 662; *North Shore R. Co.* v. *Pion* (1889), 14 App. Cas. 612; which also shew that there is no difference in principle between the rights of access of riparian owners on tidal waters or navigable and non-navigable streams.

But it would appear from the judgment of Lord Watson in *Great Western R. Co.* v. *Swindon, etc., Co.*, 53 L.J. Ch. 1075, that, unless the corresponding English Land Clauses Act "is incorporated with enactments which expressly confer upon the promoters powers to purchase and take incorporeal hereditaments by compulsion," it does not apply to hereditaments of that nature; and, in view of the fact that opinion of Lord Watson has been applied by the Court of Appeal in *In re City of South London R. Co.* and *United Parishes of St. Mary, etc.*, [1903] A.C. 728, I think it is a safe guide to follow in this case in considering the effect that is to be given to the crucial words in sec. 198, viz., "any lands of the opposite party through or over which the railway will pass."

Though the expression in our interpretation clause, sub-sec. (15) of sec. 2, is at first blush somewhat broader than the corresponding interpretation of "lands" in sec. 2 of the English Land Clauses Act of 1845 (8 & 9 Vict. ch. 18), because it says that land "includes real property, messuages, lands, tenements, and hereditaments of any tenure," whereas the English Act omits "real property," yet that really does not carry the matter any further, because, although in the broad conveyancing sense all property must be either real or personal, yet the decision of the Queen's Bench Division in *Laws* v. *Eltringham* (1881), 8 Q.B.D. 283, shews that, where the sense of the matter and the context require it, the wide term "any real or personal property whatsoever" will be applied to tangible property only, and not to incorporeal rights.

I, therefore, agree that the appeal should not be allowed.

IRVING, J.A.:—Gregory, J., set aside the award on the application of the owners. Irving, J.A.

Section 198 requires the arbitrators to ascertain what amount should be allowed to the owner for inconvenience, loss, or damage suffered or sustained by reason of the railway company taking possession of or using his land. Although I am of opinion

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that sec. 198 does not apply to this case, yet I do not see why the arbitrators should not, in ascertaining the compensation payable to the land-owner in respect of the incorporeal hereditament, adopt for their guidance the principles indicated by sec. 198. Incorporeal hereditaments are deemed to be in the possession of him who is entitled to them.

In this case the railway companies do not take possession of or use any of the land the property of the respondents. How then can anything be set off against something which cannot be ascertained? Section 198, therefore, in my opinion cannot apply to this case.

That being so, can this award be set aside? Mr. Armour contended that, as the arbitrators had taken sec. 198 into consideration, they were guilty of that technical misconduct which is included in sec. 11 of the Arbitration Act—misconduct only in the sense that they made a mistake as to the scope of the authority conferred on them. There is no doubt that an award will be set aside if an arbitrator has gone wrong in point of law, and the error in law appears upon the face of the award. This was decided many years ago: *Hodgkinson* v. *Fernie* (1857), 3 C.B.N.S. 189; and was acted upon by this Court in *Humphreys* v. *City of Victoria*, 5 D.L.R. 294, 21 W.L.R. 555.

The principle is this: Courts are unwilling to interfere with the decision of those whom the parties have selected to be the judges of the law and the fact; so, for a mistake in law, the award will not be ground for setting it aside, unless it appear on the face of the award: see cases collected in Redman on Awards, 4th ed., 276.

As pointed out by Parks, B., in *Phillips* v. *Evans*, 12 M. & W. 309:—

> Although we may possibly do some injustice in particular cases, I think it is better to adhere to the principle of not allowing awards to be set aside for mistakes, and not to open a door to inquire into the merits, or we shall have to do so in almost every case.

It has always been the inclination of the Courts to uphold rather than set aside awards: *In re Templeman*, 9 Dowl. 962; *Cock* v. *Gent*, 13 M. & W. 364, 15 L.J. Ex. 33; *In re Falkingham*, [1900] A.C. 452; *Adams* v. *Great Northern R. Co.*, [1891] A.C. 39; *The Hohenzollern*, 54 L.T.N.S. 596.

Hodgkinson v. *Fernie*, 3 C.B.N.S. 189, is instructive on other points raised in this case. It lays down the rule that there is no difference whether the award is by a professional man or a layman; and it also deals with the question as to an award being sent back for a mistake in law not apparent on the face of the award, but disclosed in a separate writing; and in the case of *Jones* v. *Corry*, 5 Bing. N.C. 187, was mentioned as an authority to send the case back on the strength of a letter written by the arbitrator after the award had been made.

In 1861, in *Holgate* v. *Killick*, 31 L.J. Ex. 7, 7 H. & N. 418, the Court refused to look at a letter written by a Master to whom the case had been referred.

In 1875 *Dinn* v. *Blake*, L.R. 10 C.P. 388, was decided; the application to remit was based upon a verbal statement made by the arbitrator as to the grounds on which he had decided. The application was refused because it was not shewn that the arbitrator had admitted that he had decided erroneously—following *Lockwood* v. *Smith*, 10 W.R. 628. There was nothing to indicate to the Court that the selected tribunal was desirous of the assistance of the Court (*per* Archibald, J., at p. 391) and willing to review his decision on the point on which he believed himself to have gone wrong (*per* Brett, J., at p. 390—Denman, J., expressed the same opinion).

In the interval the opinion had been given by Mr. Baron Cleasby, in advising the House of Lords in *Duke of Buccleuch* v. *Metropolitan Board of Works*, L.R. 5 H.L., at 436, that in an application to set aside an award on the ground of mistake or misconception of the arbitrator, the Court would probably reject no means of informing itself whether the arbitrator had proceeded upon such a mistake or misconception.

The rule is summed up by Strong, J., in *McRae* v. *LeMay*, 18 Can. S.C.R. 280, as follows: that the Court will interfere on the ground of mistake in law: (1) where the mistake appears on the face of the award, or in some paper which forms part of the award, and is by reference incorporated with it; (2) where the arbitrator has himself shewn that he is not satisfied with the award and is desirous of the assistance of the Court on the point on which he believes he has gone wrong.

Having reached this conclusion, we may now read what the arbitrators have said or written. The letter written by His Honour Judge Lampman (one of the arbitrators) cannot be regarded as an official act: (see sec. 197 (2)), so as to amount to an expression of opinion by or a request on behalf of the majority that the Court should lend its assistance and advice to the board. The land-owners, therefore, have not satisfied the onus which is cast on them, that there should be an expression from a majority of the board of a willingness to reconsider the matter. Judge Lampman's letter amounts to nothing more than this: "We may have been wrong; and, therefore, you are in a position to carry it further;" but it is to be noted that, although requested —in terms—to do so, he does not request nor consent to the application being made.

Then there remains the point put before us by Mr. Armour, that the counsel for the land-owners were misled by a remark made at the hearing by the presiding member of the board, and that as a consequence the land-owners have been deprived of their right of appeal. It has been truly said that the surest way to

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have a misunderstanding is to have an understanding. The usual and proper way to take the opinion of the Court as to the scope of a submission to arbitration, when you are dissatisfied with the course being taken at the hearing, is to apply to revoke the submission or to ask for a special case: *Hart* v. *Dyke*, 32 L.J.Q.B. 55. In this case no request was made to the board for a stated case, nor was there any application to revoke. It is true that certain evidence was objected to, but the record does not shew that the objection was pressed or that any agreement was made between counsel, or between the board and counsel. In fact, as already mentioned, there was no request for, and, therefore, no refusal of a stated case. The counsel for the land-owners chose to rely on what the presiding member said was his intention, but it seems that the presiding member was not able to carry out this intention.

I do not see that the other members of the board were bound by the presiding member's declaration of intention, as the submission were to two. The promise of the presiding member, if promise is the proper word, must be understood as being subject to the speaker's ability to get another to agree with him. I do not think either of the other two members of the board was called upon to express approval or dissent from the proposed course; nor was counsel for the railway company bound to object. An obligation to speak by no means arises from a mere challenge.

I would allow the appeal.

Galliher, J.A.

GALLIHER, J.A.:—This is an appeal from the order of Gregory, J., setting aside an award dated the 9th December, 1911, made by His Honour Peter S. Lampman and Howard J. Duncan, two of the arbitrators appointed to act in an arbitration respecting certain lots, between the Vancouver Victoria and Eastern Railway and Navigation Company and J. J. Banfield and Evans B. Deane. The award simply fixes the damage sustained at $1 per lot, and is valid on its face. The parties attacking the award contend that it was agreed between the arbitrators and all parties concerned, during the arbitration proceedings, that the arbitrators should, in their award, set out the amount which they considered the lots in question were damaged by the construction of the railway, and also the amount to which they considered such lots were benefited. Had this been done, the claimants would have been in a position to apply to the Court to set aside the award, on the ground that the arbitrators proceeded upon a wrong principle, provided sec. 198 did not apply, which was the claimants' contention. There is nothing on the face of the award which shews whether or not the arbitrators dealt with sec. 198; but, in correspondence which took place subsequent to the award being made between the chairman, Judge Lampman, and the solicitors for the claimants, it appears that the two arbitrators who made the award considered that sec. 198 did apply, and the

only reason why they did not shew on the face of the award the amount of damages and the increased value was because no two of them could agree as to the damage to any particular lot, but two of them did agree that the damage was fully compensated by the increase in value, and awarded the nominal sum of $1 in respect of each parcel.

Objection was taken that this correspondence is not admissible; and I agree that it is not admissible in so far as it may be sought to shew matters included in or excluded from the award by the arbitrators: *Duke of Buccleuch* v. *Metropolitan Board of Works*, L.R. 5 H.L., at 436.

But we have in the arbitration proceedings the opinion expressed by the chairman, Judge Lampman, and Mr. Duncan, another of the arbitrators, that sec. 198 did apply; and evidence was taken of increased value, subject to objection by the claimants. In looking at the award itself, and having in view the evidence, I think we must reasonably assume that, in making their award, the arbitrators did apply sec. 198. It then becomes necessary to inquire as to whether the agreement as contended for was entered into; and, if so, have the respondents been prejudiced in the non-fulfilment of the same? I think we must assume from all the evidence before us (and in this respect I consider the correspondence admissible) that the agreement was entered into or the promise given, as it is styled. When the question of the applicability of sec. 198 came up, the plain and proper course for the respondents to have taken was to have asked for a reference to the Court under the Arbitration Act, and is the one which I think counsel should have pursued; but, on the other hand, had the arrangement been carried out as promised, they would have had their remedy, as I have above pointed out. We have then to consider whether the failure to carry out the arrangement amounted to legal misconduct; and, if so, have the respondents been prejudiced? Under the authorities, a request made to refer and a consent given, but not acted upon by the arbitrators, and an award made without such reference, has been held to be legal misconduct, and the award in such a case has been set aside. I can see no distinction between such a case and the one under consideration; but, as Courts of law should favour the upholding of awards, unless some manifest injustice would be done, we should, I think, consider whether the respondents have been prejudiced by reason of the failure of the arbitrators to carry out their agreement. Admittedly, if sec. 198 applies, they could not be prejudiced, as, under the course the respondents chose to pursue, had the arbitrators carried out their promise, the only ground open would be that sec. 198 did not apply; and, therefore, the arbitrators had proceeded upon a wrong principle.

Section 198 is as follows:—

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> The arbitrators or the sole arbitrator in deciding on such value or compensation shall take into consideration the increased value beyond the increased value common to all lands in the locality that will be given to any lands of the opposite party through or over which the railway will pass by reason of the passage of the railway through or over the same, or by reason of the construction of the railway, and shall set off such increased value that will attach to the said lands against the inconvenience, loss, or damage that might be suffered or sustained by reason of the company taking possession of or using the said lands.

The short point in regard to this section is: does it apply where the company constructing the railway does not use or take possession of any of the lands of the applicants? The respondents' contention is, that, because the company do not use or take possession of any of the lands of the applicants, no set-off under this section can be applied, although they may claim damages in respect of such lands for injurious affection by reason of the construction of the railway. Under the section, the arbitrators, having decided that, by reason of the construction of the railway, an increased value beyond that common to all lands in the locality has been given to the lands in question, shall take into consideration such increased value. "Shall take into consideration" clearly implies for some purpose; and the respondents say that that purpose is qualified by the latter words of the section, "and shall set off such increased value," etc., to the end. I think we should endeavour to get at what was the intention of Parliament in framing this section.

The first part of the section directs that the arbitrators shall take into consideration, etc., not only increased value by reason of the passage of the railway through or over the lands, but by reason of the construction of the railway as well—this latter is wide enough to include lands not touched by the railway; and, since the arbitrators are directed to consider increased value in respect of such, direction in this respect would be useless if it can only be applied to lands actually entered upon. There are no words in the section directly forbidding such application; and it should not be presumed that Parliament legislates uselessly.

It seems to me that Parliament could not have intended (in a case where compensation for damage is sought in respect of lands not taken, but injuriously affected by the construction of a railway), after directing that increased value to the lands by reason of such construction should be considered, that such increased values could not be set off. If necessary, I would read in at the end of the section the words "or by reason of the construction of the railway." I think that sec. 198 is applicable; and, if I am right, the respondents are in no way injured by the failure of the arbitrators to carry out the agreement. The order of Gregory, J., should be reversed, and the award restored.

The Court being equally divided, appeal dismissed.

HOUDE et al. (plaintiffs, appellants) v. MARCHAND (defendant, respondent).

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Quebec King's Bench (Appeal Side), Archambeault, C.J., Trenholme, Cross, Gervais, and Roy, JJ., ad hoc. February 6, 1912.

1. HUSBAND AND WIFE (§ II E—80)—MARRIAGE CONTRACT—COMMUNITY PROPERTY—SURVIVORSHIP—SUBSTITUTION.

Where a marriage contract provides that the community property of the proposed husband and wife shall during the marriage be used for their joint benefit, and that upon the death of either, the use and benefit shall go to the survivor for life, and that after the survivor's death the property goes in moieties to the two families of the proposed husband and wife; such a marriage contract creates a substitution in moieties in favour of the heirs of the two families of the contracting parties as to the community property.

2 HUSBAND AND WIFE (§ II E—80)—MARRIAGE CONTRACT—COMMUNITY PROPERTY—SUBSTITUTION—TESTAMENTARY DISPOSITION TO DEFEAT THE SUBSTITUTION, EFFECT OF.

Where a marriage contract creates a substitution, as to the community property of the proposed husband and wife, under which such property goes to the heirs of the two families of the husband and wife, upon the death of the survivor of them, such substitution prevents either the husband or wife from disposing of any of such property by will in derogation of the rights of the heirs of the two families, and any such testamentary disposition will be declared null and void.

3. CONTRACTS (§ II E—80)—MARRIAGE CONTRACT—BINDING EFFECT UPON HUSBAND AND WIFE AFTER MARRIAGE—ATTEMPT TO VARY OR RESCIND, HOW REGARDED.

Where a marriage contract provides that the community property of the proposed husband and wife shall, during the marriage, be used for their joint benefit, and that, upon the death of either, the usufruct goes to the survivor, and that, after the survivor's death, the property shall go in moieties to the two families of the proposed husband and wife; it is beyond the power of either of the parties, after the marriage, to make any change in the marriage agreement contained in the contract.

4. PLEADING (§ III D—333*w*)—JOINT OWNER—PLEADING JOINT OWNERSHIP WITHOUT DEMANDING DISTRIBUTION, WHEN.

A plaintiff joint owner, whose rights are contested by a person who is in possession of the joint property, may properly plead that the courts shall declare him entitled to an undivided share in such property, and such plaintiff (while not compelled to continue in the joint ownership) is not obliged to demand distribution, he can have an interest in the estate without proceeding to a distribution, and indeed may prefer to remain in joint ownership.

[*Armitage* v. *Evans*, 4 Q.L.R. 300; *Cannon* v. *O'Neil*, 1 L.C.R. 160; Pothier tit. Petition of Heirship, 9 Bugnet, p. 234, applied.]

5. PLEADING (§ III D—333*w*)—ACCOUNTING—DISTRIBUTION—HEIRS—SUCCESSION COMPRISING PROPERTY ESSENTIALLY DIVISIBLE.

Where the plaintiffs, as some of the joint heirs of an estate, proceed against the defendant, as a person wrongfully in possession of the joint property, in an action to compel the defendant to render an accounting without in the same action demanding distribution, and where the property in question is essentially divisible in its nature, the action is well taken in this respect, and the plaintiffs may be apportioned their respective shares in the whole estate, without being forced to a distribution.

6. PARTIES (§ I—13)—NON-JOINDER—JOINT HEIRS—OBJECTION TOO LATE, WHEN.

Where the plaintiffs, as some of the joint heirs of an estate, proceed against the defendant, as a person wrongfully in possession of the

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joint property, without adding as co-plaintiffs the other joint heirs, and where the plaintiffs in their action demand an accounting and a declaration of their right to undivided shares in the estate, a dilatory objection by the defendant against the non-joinder of the remaining joint heirs will not defeat the plaintiffs' action, when it clearly appears that the objection was taken too late, and that the remaining joint heirs will not be prejudiced by the declaration in favour of the joint heirs who are already parties to the action.

7. APPEAL (§ VII L 3a—495)—FINDINGS OF COURT—VALUATION—CONDITIONAL VALUATION—WRONGFUL HOLDER OF PROPERTY, WHEN ESTOPPED—ACCOUNTING.

Where a person, wrongfully in possession of property, has wrongfully refused to render to the joint owners an accounting of the property in question, upon proper proceedings for that purpose, the value of the property may be estimated and fixed by the Court, and the amount so fixed may be made binding as against the person wrongfully refusing to account, unless he shall, within a fixed period after judgment, duly render a detailed and verified accounting, upon which a different valuation may fairly and reasonably be adjudicated.

Statement

THE judgment on which appeal is taken, which is annulled, was rendered by the Superior Court sitting in review, Sir F. Langelier, Cimon, and Pouliot, JJ., 5th November, 1910.

Bernier, Sevigny & Bernier, for the appellants; *Hon. L. P. Pelletier*, K.C., counsel.

Belleau, Belleau & Belleau, for respondent.

The judgment in appeal was delivered by

Archambeault, C.J.

ARCHAMBEAULT, C.J.:—The appellants in this cause were plaintiffs in the Court of first instance. The judgment there sustained their action, but that judgment was carried to the Court of Review and was annulled by that Court on a division of two Judges against one.

The appellants cite the respondents for a substitution by virtue of the marriage contract entered into between Celina Houde, their sister, and Remy Marchand, the respondent's father; and the appellants seek to be declared entitled each to a one-tenth share of the property under the substitution, and that the respondent be ordered to render an accounting of the property or, in the alternative, to pay to each of the applicants the sum of $200, as the value of his share in the estate.

The facts of the cause are simple. In 1880 Remy Marchand and Celina Houde contracted marriage under the law of community property by agreement. The marriage contract contains the following clause: "And in consideration of the love and affection pledged between the said proposed husband and wife, the one for the other, and in testimony thereof, they have mutually agreed to grant and by these presents do grant all the community property which may be held by them jointly in their lifetime to the survivor of them, such survivor to enjoy during his lifetime the use and benefit thereof, with the proviso, however, that the said property, real and personal, shall go intact

to the heirs of their two families, after the death of the said proposed husband and wife, and this by moieties between the said two families. Provided always that on the day of the death of the first deceased, there is no child or children born or to be born issue of the said proposed marriage, it being agreed that in case of any such child or children the present donation shall be null, with the further provision that it shall have the same force and effect subsequently if all of such children shall die under age and without leaving them surviving lawful heirs of the body."

No child was born of this marriage. Celina Houde died 2nd September, 1905, after having made a will by which she bequeathed all her property, real and personal, separate and community, to her husband Remy Marchand, whom she made her sole legatee. After the death of his wife Remy Marchand took possession of all the community property and retained possession until his death, which took place on the 7th November, 1907. He too died after having made a will, by which he constituted the respondent, his son by a former marriage, his sole legatee. After the death of Remy Marchand, the respondent took possession of all the property left by his father, among which was the community property which had been held between his father and Celina Houde. He has ever since refused to render any accounting of this property, claiming absolute ownership, by virtue of the two wills the effect of which is now in question. Hence the appellants have instituted the present action.

Celina Houde left at her death six brothers and four sisters, who would have been her nearest lawful heirs, in the absence of a will. The two appellants, plaintiffs in the Court of first instance, are among the number of these heirs. They allege, in their action, the facts above mentioned, and add: The marriage contract between Remy Marchand and Celina Houde created a substitution in favour of the latter's brothers and sisters, to take effect upon the death of her husband, if he survived her. Celina Houde could no longer, after her marriage contract, dispose of the property in question in favour of any persons other than her brothers and sisters. The part of her will by which she constitutes her husband sole legatee, as to the ownership of the property in question, is therefore null and void.

The estate of Celina Houde, at the death of her husband, was valued at the sum of $2,000, and the appellants are entitled each to one-tenth of that sum, that is, $200. Then the appellants ask that the judgment in intervention shall declare:—1. That the marriage contract between Celina Houde and Remy Marchand created a substitution, in favour of the heirs of her family, as to the community property; 2. That the provision of the will of the said Celina Houde, which bequeaths the property in question absolutely to Remy Marchand, her husband, is abso-

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lutely null, illegal and of no effect; 3. That the respondent is in possession of said property illegally and unjustly and that he be ordered to deliver up the same and to turn over to the appellants their shares in the said property. The action then demands that the respondent may be ordered to render to the appellants a full and detailed accounting of the property, comprising that portion of the community property belonging to Celina Houde, at the time of the death of the latter, and of the management and administration of the estate since that time; and, in case of his default to render an accounting within fifteen days from judgment, with documentary exhibits in support thereof, that he be ordered to pay to each of the said appellants the sum of $200, as representing one-tenth of the value of said property.

The respondent has pleaded to this claim, denying generally the allegations of the declaration, and alleging that the marriage contract and the will speak for themselves. This pleading of the respondent goes on to say that the marriage contract of Celina Houde and Remy Marchand did not create a substitution in favour of the brothers and sisters of Celina Houde, covering the community property; and that all the allegations of the declaration are false except what can be shewn by the written instruments mentioned.

As I have stated above, the Court of first instance sustained the appellants' action; but the majority of the Court of Review reversed that judgment and denied the claim. The ground invoked by the Court of Review for denying the claim is that the appellants should have proceeded by an action for an accounting in a distribution, concerning the heirs of Celina Houde as well as the respondent, in order to determine what community property there was, and to establish the respective accounts between the co-owners, and to make distribution of the property, if any.

I am of opinion that the judgment of the Court of Review is erroneous, and that the judgment of the Court of first instance was well founded, except as to the amount of the judgment, which we shall consider later. The action for distribution necessarily presumes that there is some property held in common.

"There is an issue in an action for distribution between the co-heirs and their successors," says Pothier. "so that the property of the estate, or part of it, is presumed to be held as community property." (Treatise on Successions, 8 Bugnet, p. 150). Here there has not been possession in common. The respondent claims sole ownership of the property, by virtue of the will of Celina Houde and of that of his father. As long as the will of Celina Houde stands, the respondent has the right to reject any demand for distribution. Hence, the first thing which the appellants should have demanded was the annulling of her will. That is what they claim by the present action, and I do not see how this part of their demand could have been rejected.

As to the question of the validity of the testamentary disposition which is attacked, there can be no doubt that it is null. After the marriage it was impossible to make any change in the marriage agreement contained in the contract. The marriage contract of Celina Houde and Remy Marchand gives to the survivor the use of all the community property, the ownership of such property, at the death of the survivor, to go to the heirs of the two families in moieties. There was no longer any power in the parties to the contract, after their marriage, to deprive the heirs of their rights. The action of the appellants is then well taken, when they demand the annullment of the clause of the will of Celina Houde, which gives to her husband absolute ownership of her part of the community property.

The action demands, in the second place, that the appellants be declared heirs each of a one-tenth interest in the property. The respondent sets up that this demand cannot be allowed, because it assumes an executory judgment, and that the appellants should have demanded the distribution of the property to receive their share in the distribution, but not to be declared joint owners of the property. This plea does not seem to me well founded. A joint owner, whose rights are contested by a person who is in possession of the property in question, may plead that the Courts declare that he is entitled to an undivided share in such property. Nobody is compelled to continue in the joint ownership; nor is any person obliged to demand partition. He can have an interest in the estate without proceeding to a partition, and a joint owner may prefer to remain in the joint ownership. If anyone contests his right in the joint ownership, he ought to have the means to establish it in a Court, without being obliged to demand a distribution. This doctrine was approved in the case of *Armitage* v. *Evans*, 4 Q.L.R. 300, and in the case of *Cannon* v. *O'Neil*, 1 L.C.R. 160. This is also the doctrine laid down by the text writers. See Pothier, on Petitions of Heirship, 9 Bugnet, p. 234, Nos. 365, 371, 372, 414.

The appellants had then the right to claim, as they did claim, to be declared heirs of each a one-tenth part of the share of Celina Houde in the community property. Their action in this respect is by way of petition of heirship, and they had the right to bring it without demanding a distribution of the property.

In short, the appellants demand that the respondent be adjudged to render an account to them, or to pay to each of them the sum of two hundred dollars. It is especially this part of the decision which the Court of Review has reversed, in declaring that the appellants should have proceeded by way of action for distribution, instead of so demanding an accounting.

I ought to say here that there is a difference of opinion between the Court of first instance and the Court of Review as to the interpretation of the clause of the marriage contract upon

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which the question has arisen. The former Court decided that this clause constitutes, in favour of the heirs of Celina Houde, a substitution of her part of the community property. The Court of Review, on the contrary, is of opinion that all the community property comprises a single estate, and that the appellants, their brothers and sisters, and the respondent, are joint co-owners of the entire property, the respondent for one moiety, and each of the others in interest for one-twentieth. That Court reaches the conclusion that the respondent is not in the position of a third party who is in possession of property not belonging to him, but that he is a joint co-owner, against whom the other co-owners cannot proceed by an action for the rendering of an account, but only by an action for distribution. I confess that I should have been disposed to adopt the view taken by the Court of Review, if the property held by the respondent had not been property essentially divisible. But it is in evidence that all the community property in question is composed of money owing, with the exception merely of some household furniture and some household and personal linen valued at only $77. It is proper to state in reference to the furniture and linen, *de minimis non curat prator*. Hence, the property in question here is money owing, money deposited in bank, or obligations. There was some real estate at the death of the respondent's father, but that was sold, and the price of it has been collected in, less a balance of $400, which is still due. Under the circumstances I believe that the appellants have the right to claim their proportionate share of the money owing, unless the respondent elects to make an accounting of the property of which he has been in possession as owner since his father's death, and of which he has already disposed in part.

The respondent has entered into the contest with the appellants upon their claim as pleaded. He did not raise objection to the form of the action. He has not demanded that the other heirs should be added in the cause. His objection at this time is too late. Moreover, his co-heirs have no interest in his motion. It is a question of assets to be divided under the law. The amount which will be paid to the appellants could not affect the rights of their brothers and sisters. Further, it is to the interest of all parties to the cause, that everything may be determined definitely between them by the judgment which we render.

It only remains to fix the amount which the respondent shall pay to the appellants upon default in accounting. The appellants have claimed each $200. Whether the appellants are entitled each to one-tenth of the moiety of the community property, or to one-twentieth of all the community property, matters little: it is six of one and half a dozen of the other. The share of each is the same in the one case as in the other. If the property is worth $4,000, one-twentieth of the entire estate amounts to $200, and one-tenth of the moiety of it is likewise $200.

However, I do not find in the record proof of the value of the community property which was held between Celina Houde and the respondent's father. There has never been any inventory made of the property. All we know is that Celina Houde died in 1905, and the respondent's father died in 1907. After his father's death, the respondent made a declaration, in the Provincial Treasurer's office, of the value of the estate, and that valuation was $2,231.10. A parcel of real estate, estimated in that declaration at $600, has been sold since for $800. The value of the property may have increased in the interval. It is also possible that the respondent's father increased the value of the estate after his wife's death.

Under the circumstances, to put an end to litigation between the parties, I should be disposed to fix the value of the community property at the sum of $2,000, and accordingly to award to each of the appellants the sum of $100, as his share of the property. If this amount is too high, the respondent need only render an accounting and thus himself establish the value of the property which he holds without right as owner, and concerning which he refuses to acknowledge the right of the appellants in the undivided ownership in the property.

Judgment accordingly.

FOSS LUMBER CO. v. THE KING; and THE BRITISH COLUMBIA LUMBER, ETC., CO., Limited (intervenants, respondents).

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., Idington, Duff, Anglin, and Brodeur, JJ. October 29, 1912.

1. DUTIES (§ I—1)—CUSTOMS TARIFF (CAN.)—LUMBER, WHEN "FURTHER MANUFACTURED," AFTER SAWING AND DRESSING.

Under the customs tariff (Can.) 1907, the lumber of wood sawn, split or cut and dressed on one side only, but not "further manufactured," is entitled to free entry into Canada and this applies where the lumber is in the first place sawn on four sides in the sawmill and is subsequently sized on one side by a saw in a planing mill where it was in the same process also dressed on one side; the sizing effected by the second sawing does not constitute a "further manufacture" within the meaning of the provision.

[Item 504, schedule A, customs tariff, 1907, 6-7 Edw. VII. (Can.) ch. 11, referred to.]

2. STATUTES (§ II B—119)—CUSTOMS AND REVENUE STATUTES—CONSTRUCTION OF.

In construing customs and revenue laws, the intention of the legislature, in the imposition of duties, must be clearly expressed, and, in cases of doubtful interpretation, the construction should be in favour of the importer, nor are duties or taxes to be imposed upon terms of vague or doubtful interpretation.

[*The Queen* v. *J. C. Ayer Co.*, 1 Can. Ex. C.R. 232, 270, 271; *Cox* v. *Rabbits*, 3 A.C. 473; *Partington* v. *Attorney-General*, L.R. 4 H.L. 100, applied.]

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Statement

APPEAL from a judgment of the Exchequer Court on a reference by the Minister of Customs, arising out of these facts: A carload of fir lumber was entered at the custom house at Winnipeg, on the 2nd of April last by the appellants, on the value of which duty at the rate of 25 per cent. was collected. The question referred is: Was that lumber subject to the duty levied upon it? The Judge of the Exchequer Court held that it was.

The appeal was allowed, DUFF and ANGLIN, JJ., dissenting.

W. D. Hogg, K.C., and *R. C. Smith*, K.C., for appellants.

E. Lafleur, K.C., for the B.C. L. & S. Manufacturers, Ltd.

T. Lewis, K.C., for the Crown.

Fitzpatrick, C.J.

SIR CHARLES FITZPATRICK, C.J.:—The value of the lumber is admitted at $308, and the amount of duty paid at $77. The several pieces of the planks, produced at the trial and here, were taken from the carload in dispute, and are accepted as fair samples of the kind and quality of lumber which is the object of this reference. The answer to the question must largely depend upon the meaning and effect to be given to the word "sawn" in item 504 of schedule "A" of the Customs Tariff of 1907 (6-7 Edw. VII. (Can.) ch. 11). That item reads as follows:—

> Planks, boards and other lumber of wood, sawn, split or cut, and dressed on one side only, but not further manufactured—Free.

On the evidence it appears that the lumber in question was cut from the original log in the mill, where it was sawn on four sides; it was then removed to the planing mill and there dressed on one side, and again sawn on another side. So that, on one side, the lumber was sawn twice—once in the sawmill and a second time in the planing mill—and the whole question is: Does that second sawing in the planing mill constitute a "further manufacture" within the meaning of the item of the Customs Tariff above quoted?

Speaking of the way in which the revenue laws are to be interpreted, Sir William Ritchie said, in *The Queen* v. *The J. C. Ayer Company*, 1 Can. Ex. 232, 270 and 271:—

> In the first place let us see how the revenue laws are to be interpreted. There is a general provision in the Customs Act, 1883, that all the terms of that Act, or of any customs law shall receive such fair and liberal construction and interpretation as will best insure the protection of the revenue and the attainment of the purpose for which that Act, or such law, was made, according to its true meaning, intent and spirit. But I do not understand from this that laws imposing duties are to be construed beyond the natural import of their language, or that duties or taxes are to be imposed upon terms of vague or doubtful interpretation.

And he adds later, quoting Lord Cairns in *Cox* v. *Rabbits*,

3 A.C. 473, and *Partington* v. *Attorney-General*, L.R. 4 H.L. 100:—

> But it is clear that the intention of the Legislature, in the imposition of duties, must be clearly expressed and, in cases of doubtful interpretation, the construction should be in favour of the importer.

To this I would add what Lord Taunton said, when speaking of the "Stamp Duty":—

> The stamp law is *positivi juris*. It imports nothing of principle or reason but depends entirely upon the language of the Legislature.

Taken literally and giving to each word used its natural meaning the section we are asked to construe says that planks of lumber "sawn" on three sides and dressed on the fourth side (not further manufactured), should be admitted free of duty. The planks in question come, if we are to judge from their physical appearance, in all respects within that description. It is, however, argued on behalf of the Crown that, notwithstanding their outward aspect, the planks having been sawn a second time, with a special saw in the planing mill, at the same time as they were dressed, for the special purpose of what is called "sizing," this second sawing for that purpose constitutes a "further manufacture" within the meaning of those words in item 504, and takes the lumber out of the operation of that section.

I understand that "sizing" is admitted, by both sides, to be a process by which the lumber is reduced to a uniform width and thickness. I cannot agree that the second sawing is, in the circumstances, a further manufacture. Whatever may be the object or purpose of those who subject the plank to the process of a second sawing in the planing mill, the effect is to produce a piece of plank sawn on three sides. If this second sawing had been done in the sawmill, when the log was originally sliced into lumber, for the same purpose, viz., "sizing"—assuming that I have given to this word its accepted meaning—would, or could any question of further manufacture arise? I fail to understand how the second sawing, if done in the planing mill, makes a difference; the result of that operation, in whichever mill executed, is the same in so far as the outward physical appearance of the plank produced is concerned. Perhaps my meaning may be more clearly expressed in these words: "The second sawing process to which the plank is subjected is not the less a sawing because it is done in a planing mill to which the plank was admittedly properly taken for the purpose of being dressed. And, when put through that process, the only way in which the plank can be accurately described is to call it a plank sawn on three sides and dressed on a fourth." The colloquial as well as the dictionary meaning of the verb "to saw" is "to cut with a saw." One can, of course, imagine, as

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argued by the respondent, a variety of ways in which, by the aid of a saw, the process of manufacture might be very considerably advanced, but we are now called upon to ascertain the intention of Parliament from the words used in this item, as applied to the facts in this case, and we are not concerned with interesting speculations as to the possibility of that intention being defeated by ingenious devices. "Words, like certain insects, take their colour from their surroundings." Here the word "sawn" is used in the adjectival sense and must be read in connection with the noun "plank" of which it expresses a quality. The dictionary meaning of the word "plank" is a "board piece of sawn lumber," in familiar speech, a plank may fairly be said to be a more or less regularly shaped oblong board; and a "sawn plank" is a board reduced to that shape by the aid of a saw. A piece of ornamental wood produced by a fret saw may be a piece of furniture or wood for decorative purposes, but it would not be described as a "plank."

In conclusion, I am of opinion that the particular carload of lumber with which we are concerned, when presented for entry to the customs official, was made up of "planks" which came, in so far as he could gather from their outward appearance, within the words of description contained in the section of the tariff item 504; and it was no part of his duty to inquire into the purposes or uses to which those planks might subsequently be applied. If I had any doubt, which I have not, I would adopt the principle of construction laid down by Elmes, in his Law of Customs, page 26, section 60. In cases of serious ambiguity in the language of an Act, or in cases of doubtful classification of articles, the construction should be in favour of the importer, for duties and taxes are never imposed on the citizen upon vague or doubtful interpretation.

The appeal is maintained with the usual recommendation as to costs.

Idington, J.

IDINGTON, J.:—The questions which are involved in this appeal must be determined by the interpretation and construction of item No. 504 of the tariff, which reads as follows:—

> Planks, boards, and other lumber of wood, sawn, split or cut and dressed on one side only, but not further manufactured.—Free.

The literal meaning of these words in their plain grammatical and ordinary sense, which is said to be the golden rule of interpretation, is to my mind just what appellants contend for; that is, planks sawn on three sides and dressed on one side. And, when we go beyond such literal meaning, we depart from the long established mode of reading a taxing or revenue Act.

The interpretation of the Customs Act, subdivision 2 of section 2, does not seem to me to carry us any further. If I

could read the Act as the learned trial Judge does when, in the passage quoted from his judgment in the respondent's factum, he says:—

> I think the whole scope of the statute and the tariff is to prevent completely manufactured articles being entered free of duty,

then I might see my way to a different reading, first of the said interpretation clause, and next, as a consequence thereof, of the above quoted item of the tariff.

With the greatest respect for the learned Judge, I submit that lumber in any shape is clearly, for the greater part of its uses, a completely manufactured article and yet is admitted free. Whether quite as large as ninety per cent. of the whole importation of lumber, as one witness states, is so or not I cannot say, but obviously a very large percentage thereof goes into consumption without being dressed on one side. This latter work preparatory to use of the lumber which may be so treated widens the field wherein it can be used as completely manufactured.

Evidence put forward by the Crown shews that usually sawmills do not contain the machinery that would enable the sawing to be done so evenly as to produce as straight an edge as appears in one of the edges of each of the pieces put in evidence as exhibits herein. Indeed, some of the witnesses go very far and seem to state no sawmill does, but that is, as some of these witnesses point out, an obvious error as a statement of what no witness can be likely to know. Counsel for the intervenants put the matter fairly that, even if a sawmill did contain such machinery and appliances as would enable this to be done, then, according to the claim made herein by the Crown, it must be held in using same to be engaged in a process of manufacture within the meaning of the words "but not further manufactured."

That view presents the case and the claim in its fairest light. If that contention is right, then and not otherwise can the claim of the Crown be made good. Let us test that. How many times has a piece of lumber to be turned round and set and then to be passed through by a saw before it is fit to fill the commercial uses and demands for lumber of various lengths and dimensions and yet be clearly duty free? The first cutting admittedly is to be free of duty. But that will not fit for the market all that which is just as clearly duty free as that dropped from a first cut. Indeed a second or even third cutting of the same saw may be involved in the production of what admittedly is duty free. Nay, more, much of it, but not of necessity all, has to go to the edger and be trimmed by that saw. It is admitted an edger can properly be used without rendering the produce thereof dutiable. But why? Surely it is only to produce out of

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boards that sort of lumber the other saw would not produce, yet by a wasteful process could have produced, and to make by a sawing process a more completely manufactured article.

Two different kinds of saws can thus, it is admitted, be used in succession on the same material in a variety of ways to put it through a process of completely manufacturing it and yet leave it free of duty. Why permit two saws to be thus used when planks could be turned out with one? Better work, greater economy, cheaper production are the objects sought by the use of two saws. And, if a third can produce in a higher degree such results, or like thereto, wherein lies the objection? So far as I can see the objection might as well be made to the use of the edger and supported by the like train of reasoning as to a third saw. And, if you say, "Oh! an edger has been used for ever so long," I answer there is no satisfactory evidence that the use of the third saw was not in actual operation long before this tariff item was framed, and, possibly, it was so framed to meet such possibilities of production.

But again, if the necessary clamps, clutches, levers and other devices that would hold the board first sawn were used to hold it in place to apply an improved edging saw to the work, then that sawing cannot be permitted if this claim of the Crown's is well founded. Yet, in my humble judgment, such a thing is physically possible and, according to the reasoning of the Crown, a legitimate proceeding to produce what item No. 504 admits free of duty.

It has often been said that a protective tariff tends to lessen the mechanical ingenuity to be applied to cheapen production, but I never heard imputed to it that such mechanical ingenuity as it might accidentally develop cheapening production was not only to be despised and set aside but also, when discovered, declared unlawful. If the sawmill can conceivably be equipped in the way I suggest to produce the sawing desired with two saws, then I hardly think it was intended to prevent the use of three or more saws. If that was the purpose of this legislation, then it can easily be enacted that only one saw can be used in the process of manufacture, or if two, then only two, and thus make the item clear.

If the third sawing is, as I think, permissible, then the accidental circumstance of its taking place under the same roof or on the same table as the permissible dressing is of no consequence. I think the appeal should be allowed with costs. The order made on the consent of all parties to the record permitting the intervention of third parties but reserving for the full Court the question of its validity or propriety I do not think should be treated as a precedent to be followed hereafter under our rule No. 60.

DUFF, J. (dissenting):—The question on this appeal is whether a certain carload of lumber imported by the appellants from the United States is liable to customs duty. This lumber admittedly falls within the item of the Customs Tariff numbered 506, unless it is embraced within the exemption created by the item numbered 504. For convenience I set out in full these two items as well as the items numbered respectively 503 and 505, which are *in pari materia*:—

503. Planks, boards, clapboards, laths, plain pickets and other timber or lumber of wood not further manufactured than sawn or split, whether creosoted, vulcanized, or treated by any other preserving process, or not . . .—Free.

504. Planks, boards and other lumber of wood, sawn, split or cut, dressed on one side only, but not further manufactured—Free.

505. Sawn boards, planks and deals planed or dressed on one side or both sides, when the edges thereof are jointed or tongued and grooved—17½ per cent.

506. Manufactures of wood, n.o.p.—17½ per cent.

The appellants' contention is that lumber in question consisted of "planks" and "boards sawn, etc. . . . and dressed on one side only but not further manufactured." This is disputed on behalf of the Crown.

The facts bearing on the question are really not in dispute. The shipment with which we are concerned comprised several parcels of what is known in the lumber trade as "sized lumber" suitable for use in the construction of buildings as "joisting" and "studding." To adapt them for this purpose it is essential that the pieces in any given parcel should be of uniform width and it was admitted at the trial that the required uniformity of width cannot be secured by any machinery which is part of the ordinary equipment of a sawmill.

It was further admitted that machinery adapted to secure that uniformity—machinery, that is to say, for performing the operation of "sizing"—is never found in a sawmill. The cutting instrument commonly used in "sizing" is a knife. The instrument used in this case was a saw. The ingenuity at the command of the persons engaged in manufacturing lumber for export from the United States into Canada has produced a machine which not only does the office of dressing on one side by planing but performs also the function of "sizing." As in this latter process the cutting is done by saws alone it was supposed that the lumber subjected to it would fall within the category of "planks sawn" and "dressed on one side only" and thus, by way of the exemption provided for in item 504, would escape the incidence of the duty imposed by item 506. This method of reducing a parcel of lumber to a uniform width is in itself more expensive than the methods usually employed; but the additional expense so incurred would be more than

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offset by the advantage of free admission to the Canadian market.

In these circumstances, have the appellants established the proposition upon which they base their appeal that this carload of lumber falls within the description "planks, boards, sawn, split or cut and dressed on one side only, but not further manufactured?" I think they have not. Each one of the parcels in question comprises, it is true, only pieces of lumber which answer the description "planks or boards sawn and dressed on one side only" but it cannot, I think, be affirmed of these pieces of lumber that they are "not further manufactured." After having been completely manufactured as "planks" or "boards" they have been subjected to a further process—a process which forms no part of the procedure by which "planks" and "boards" as such are produced from timber and which is a special process that is designed to fit the "planks" and "boards" so produced for certain special purposes; and did, in fact, fit them for those purposes. It is true that this special process consisted in part in applying a saw to each of these pieces. But that was not the whole of the process; in addition to that there was manipulation by special machinery which reduced the pieces comprised in any parcel to the uniformity of dimension which was necessary to make them suitable, did, in fact, make them suitable for use as "joisting" and "studding" and by which they were converted into a commercial commodity having, in the lumber trade, a distinctive designation. Before they were subjected to this process they were "sawn" boards and planks simply; but I see no escape from the conclusion that by the operation of "sizing" they were "further manufactured," and, consequently, were excluded from the category of articles falling within the exception which the appellants invoke.

Anglin, J. (dissenting)

ANGLIN, J. (dissenting):—The simple question before us is whether sawn planks and boards which, in addition to being dressed on one side, have also been "sized" by a sawing process are "further manufactured" so as to exclude them from the exemption allowed by item No. 504 of the Canadian Customs Tariff of 1907. It was conceded at bar that if the lumber in question had been "sized," as was formerly the custom, by the use of a knife or plane that process would have been such a further manufacture. The planks or boards would then be sawn *and* cut—not sawn *or* cut. The evidence is conclusive that the sizing now accomplished by the use of fine saws run comparatively slowly and attached to the planing machinery used to dress the planks or boards on one side is equally effective and answers the same purpose as that formerly done by the use of the knife or plane—the "side-head" of the planing machine. In both cases it is essential to the operation that the

board or plank which is to be sized should be held firmly in place by such devices or spring guides, a straight-edge and rollers. A rigidity unattainable in ordinary sawmill machinery is required. The board or plank produced by the sawmill is only approximately uniform in width throughout its own length and with the other boards or planks with which it is classed as assorted dimension lumber. The exact uniformity necessary for some purposes can be obtained only by subjecting these planks or boards to the further process of "sizing." Solely because this latter result has been attained, in the case now before us, by the use of saws the appellants insist that the board or plank is still merely "sawn" and is, therefore, "not further manufactured" within the meaning of that phrase in item No. 504. If that position were tenable it would follow that a piece of lumber which has been subjected only to sawing processes, however numerous or varied, would not be so "further manufactured" so long as it might still properly be described as a plank or board. It seems to me to be only necessary to state this proposition to demonstrate its fallacy.

If an order were given to a lumber manufacturer for sawn boards or planks of certain dimensions he would deliver the product of the sawmill—not sized lumber. The latter is a different and a more expensive product and is supplied only when specially ordered. The evidence makes it clear not merely that it is the ordinary practice to "size" lumber in the planing mill after it has left the sawmill, but that "sizing" cannot be performed by the machinery of the sawmill. The sawn plank or board produced by the latter, known as an article of commerce to the lumber and building trades, must be subjected to a further manufacturing process before it will answer the description of a sized board or plank—equally well known as a distinct article of commerce to the lumber and building trades. The uses to which the latter may be put are different from those for which the former is employed. The difference in cost is material. The articles are distinct in fact and are so recognized as articles of commerce—and this is the result of a further process of manufacture to which one of them has been subjected. The sawn board or plank has been "further manufactured" and it is, in my opinion, immaterial whether, in effecting such further manufacture, saws or knives have been employed.

I would dismiss the appeal.

Brodeur, J.

BRODEUR, J.:—We are called upon to decide whether the "sizing" process on planks and boards exempts them from duty under item 504 of the Customs Tariff. That article reads as follows:—

> Planks, boards and other lumber of wood sawn, split or cut and dressed on one side only, but not further manufactured—Free.

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It is stated on behalf of the respondent that the process in question constitutes a manufacturing process more advanced than the sawing operation. On the other hand it is contended by the appellants that sizing is simply a sawing process and that the planks and boards so manufactured do not lose their qualification of sawn wood. What is that "sizing" process? It consists in giving the planks a uniform size. Of course, that result could be reached through the saws of the edging machine with which all sawmills of some importance are equipped. But some planks might not have the same width. Then they are passed through the saws of a sizing machine that renders the planks absolutely uniform. After that sizing process is through the planks are put on the planer to be dressed, sometimes on three sides and sometimes only on one side. It is the usual process followed in Canadian mills. In the United States a new machine has been found by which the dressing of the planks on one side and the sawing or sizing of the edges is all done at the same time. It is a cheaper process. The honourable Judge of the Exchequer Court decided that the item of the tariff in question contemplated pieces of lumber that had been simply sawn once and that the sizing of the lumber which required the plank to pass through a second process constituted an article "further manufactured" than what the legislature had in view. He stated that the sizing machine not forming part of the ordinary equipment of a sawmill constituted the further manufacturing process contemplated by the statute. His conclusions are based on two grounds: First, that the law contemplates one single sawing process; and, second, that the work should be done in a sawmill.

I am unable to agree with those conclusions. As to the second sawing operation I may say that the gang-saw or circular saw that cuts the logs is not the only one that is used in the sawmills, as every one is aware. The planks, after having been concerted as such by the gang-saw, have to pass through the butt-saws and edge-saws. By the latter process the edges of the planks are removed in order to give them the same width. So the several sawing processes are made in order to manufacture the plank and, if you are not satisfied with the width of your planks, if you find them too wide you can also pass them through the saws of the sizing machine and have an absolute uniform width.

Of course, that uniformity could be reached by simply passing the planks through the saws of the edging machine. It appears that, generally speaking, this sizing process is made in the planing mills and the machine is not very often found under the roof of the sawmill. Nothing prevents it, however, from being part of the sawmill equipment; quite the reverse. It is a sawing process all the same and the plank, when it has passed through the operation, should be called a sawn plank.

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The fact that the size is absolutely accurate in one case and that the same uniformity would not exist in the other does not alter the nature of the plank. It is a piece of wood having the dimensions of a plank and which has the appearance of being sawn purely and simply.

Then, what is the meaning of the words "not further manufactured"? It means that a plank that is further manufactured than sawn on three sides and dressed on one side is subject to duty. If it is dressed on two sides; if the edges are dressed also, or if they are grooved or bored, then they become "further manufactured"—and must pay the duty. It has already been decided that pieces of oak which had been cut and so could be used more easily in a certain manufacturing process than if imported in the ordinary length should not be taxed under a statute that required that oak to be duty free should not be shaped: *Magann* v. *The Queen*, 2 Can. Ex. C.R. 64.

We should take into consideration also the fact that a statute imposing a tax should always be strictly construed and that, in case of doubt, the tax should not be levied. Maxwell, "Interpretation of Statutes," 5th ed., p. 461; *Ayer* v. *The Queen*, 1 Can. Ex. C.R. 276; *Cox* v. *Rabbitts*, 3 A.C. 473.

I do not find in this case very grave doubts. But if our interpretation is not in accordance with the intention of the legislator, if the sizing process was to be eliminated in his intention, then he should have said so. But as the sizing process is, after all, simply a sawing process, and that it does not constitute any difference with the edging process, I am unable to come to any other conclusion than that this appeal should be allowed, with a recommendation that the Crown should pay the costs of this appeal and of the Court below.

Appeal allowed with costs, DUFF *and* ANGLIN, JJ., *dissenting.*

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Dec. 24.

LEE v. JACOBS.

Quebec Court of Review, Tellier, DeLorimier, and Greenshields, JJ. December 24, 1912.

1. BROKERS (§ III—30)—MINING PROSPECTOR.

Where a mining prospector at the request of a prospective purchaser of mining property examines a mine and reports favourably thereon, he is not entitled, if the purchaser buys such mine, to remuneration on the basis of a commission on the purchase price in the absence of an agreement to that effect; the custom existing in the Cobalt district which allows mining commissions to "grub-stakers" who discover and stake out for another a claim on land of the Government open for discoveries does not extend to such a case.

Statement

THIS was an appeal by the plaintiff from the judgment rendered by the Superior Court on February 29th, 1912, Demers,

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J., dismissing his action whereby he claimed from the defendant an accounting of the Kerr Lake Mine operations and in default of such accounting the payment of $200,000 as his share or commission on the sale of the mine to the defendant.

The appeal was dismissed.

Paul St. Germain, for plaintiff, appellant.

G. C. Papineau-Couture, for defendant, respondent.

The judgment of the Court was delivered by

Greenshields, J.

GREENSHIELDS, J.:—By this action the plaintiff asks that the defendant be ordered to render him an account of the profits realized by him in the development and operation of a mining property situated in the Cobalt district, in the Province of Ontario, and known under the name of "Kerr Lake," the whole according to law, with vouchers, etc., and in default of defendant rendering the account, that he be condemned to pay to the plaintiff $200,000 or such other balance as may be found due.

By his amended declaration, the plaintiff alleges in effect:—

That on or about the 8th of February, 1905, the defendant engaged the services of the plaintiff, as a prospector, to acquire mining properties in the district of Cobalt, in the Province of Ontario, at the price or salary of $100 per month, and ten per cent. on the profits which the defendant might realize from properties which the plaintiff should purchase for him; that in the month of February, 1905, the defendant, through the agency of the plaintiff, who had examined the property of one Wright, in the district of Cobalt, bought from the said Wright his property, at the sum of $30,000, which property he has since operated, as well by himself as by an incorporated company, of which he is the principal shareholder, and which company is capitalized at $600,000, but which shares are really worth $6,600,000; that the defendant has realized in profits to him from said property, the sum of at least $2,000,000; that the plaintiff received two letters from the defendant, one dated the 18th, and the other the 20th of February, 1905, which confirmed the engagement as above alleged; that on or about the 8th of March, 1905, in execution of the engagement, the defendant, while at the mine in question, declared to the plaintiff that in addition to the $100 a month for his services as prospector he would give him a percentage of ten per cent. on the profits which defendant might receive from the operation of the property; that the plaintiff had requested, at different times, the defendant to render an account of the profits which he had made on the said mine, and to pay him his percentage, and particularly by a letter from his solicitors addressed to the defendant; that the defendant has made no answer to the repeated demands; that the plaintiff, who is a prospector by occupation, had been requested from the commencement of the month of February, 1905, to examine the mine in question, and to make a report thereon, which he did; that the plaintiff was selected by the defendant by reason of his knowledge of such matters, and it was upon the result of his examination and his report that the defendant bought the property for $30,000; that according to the usage of trade in such matters, a prospector who discovers that a mine can be oper-

ated or exploited to advantage, and who is the intermediary for the purchase, has the right to a percentage or commission of ten per cent. on the profits of the operation or exploiting of the mine; that by reason of the work done and the discovery made by the plaintiff, from which the plaintiff has profited, the plaintiff is entitled to his percentage of ten per cent. in the profits realized by the defendant.

The defendant answers by way of defence, stating that the letters referred to by plaintiff speak for themselves, and denying the other allegations of plaintiff's declaration, and adding that the plaintiff was in his employ for a very short period, and before leaving defendant's employ any sum or sums which were due to him were paid and satisfied, and plaintiff since February, 1905, when he left the defendant's employ, never pretended to have a claim, or make any demand upon the defendant until recently, to wit, in the month of March, 1910, when for the first time his pretended claim was brought to the defendant's attention, and was repudiated, and if the plaintiff ever had any claim it is long since prescribed.

The learned Judge found in favour of the defendant and dismissed the plaintiff's action.

It should be remarked at the out-start, as a significant fact, which would greatly, in my opinion, make against the claim of the plaintiff, that, according to his own statement, he was dismissed from the defendant's employ on the 6th of March, 1905, at an interview between him and the defendant, which took place in a hotel in the Cobalt district. The plaintiff admits that he was then told by the defendant that he would not further employ the plaintiff, and that he would not carry out the agreement that he had made. Apparently the plaintiff accepted his dismissal without protest. He says that the whole interview did not last more than five minutes. After this, the first time the defendant hears anything about a pretended claim by the plaintiff is in February, 1910, almost five years after he was discharged. And during all this time, apparently, the plaintiff knew of the dealings with the mine, and the successful result of its operations. Surely, if the plaintiff had a firm agreement, which would entitle him to such a substantial sum of money, he would not have delayed the enforcement of his rights for nearly five years.

In support of his action the plaintiff alleges two things in effect; first, an agreement made in the month of March, 1905, by which he was entitled to ten per cent. of the profits on the venture; and secondly, he alleges, a custom or usage which, in the absence of an agreement, would entitle him to ten per cent. To dispose of the latter ground first, it can be asserted with confidence, that there is absolutely no proof of the existence of any such a custom. The plaintiff himself does not prove it, and apparently he has confounded the position of a prospector or grub-

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staker with the occupation that he follows. . . . Where a person goes into a mining country entirely undeveloped and unopened, and selects a mining lot and stakes it out, he might be entitled by custom to an interest in the property staked even if he staked it out for another; but in the present case this was not done. The mine had been staked out and was owned by one named Wright.

Now, as to the other ground,—the plaintiff says that, returning from the mine to Haileybury, sitting on the rear part of a sleigh, this agreement was arrived at. He says that he prepared an agreement in writing, that defendant did not, or would not look at, much less sign it, but promised to return in a week, which he did not do; and the plaintiff destroyed this prepared agreement, and apparently never presented another to the defendant to sign, and he never asked the defendant to give him any agreement whatever in writing. Now, the defendant absolutely denies any such agreement, and unless the plaintiff can find support and corroboration for his statement his action must fail. He seeks corroboration and confirmation of his statement in two letters. I can see no corroboration of his statement in these letters; and the subsequent acts of the plaintiff would go to weaken, if not entirely destroy the strength of his testimony. On the 6th of March he accepted $50 from the defendant and signed a full and complete discharge. He admits his signature to the document, but has no recollection of it; he says he signed something—which was a receipt for his wages. His account of the interview at which he signed this, is, that it lasted about five minutes, and he never asserted any right or claim to any commission or percentage on the profits, and remained silent for five years.

I have no hesitation in coming to the same conclusion as the learned trial Judge, and the judgment is confirmed.

Appeal dismissed.

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Dec. 18.

REX ex rel. Sovereen v. William EDWARD et al.

Manitoba King's Bench, Curran, J. December 18, 1912.

1. INTOXICATING LIQUORS (§ I C—33)—LOCAL OPTION—LIQUOR LICENSE ACT—PETITION TO SUBMIT FOR REPEAL—MANDAMUS.

Where a petition, to a rural municipal council, is presented for submission to the electors of the municipality, for the repeal of a local option by-law, and the petition complies with the requirements of sec. 74 of the Liquor License Act, ch. 101, R.S.M. 1902, the petitioners have a legal right to have the by-law submitted as directed by the statute, and mandamus will issue to compel such submission.

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2. INTOXICATING LIQUORS (§ I C—33)—LOCAL OPTION—ELECTION TO REPEAL —PRESUMPTION OF LEGALITY OF VOTERS' LIST—ONUS PROBANDI.

Where a petition is filed to submit a by-law to the electors for repeal of a local option by-law, and a petitioners' name also appears upon the voters' list, it is to be presumed that the municipal officer, in preparing said list, properly performed his official duty, and that every name thereon is that of a duly qualified voter, and the burden is upon the opponents of the petition to shew the contrary.

3. ELECTIONS (§ I A—8)—RIGHT TO VOTE—PRINTED VOTERS' LISTS—MISNOMER.

The fact that the voter's name is misspelled upon a printed voters' list of municipal electors will not deprive him of the right to vote, if he takes the form of oath provided by statute.

4. ELECTIONS (§ IV—91)—ELECTION FRAUD—MUNICIPAL BY-LAWS—FRAUD ON PROCURING SIGNATURES TO PETITION.

Where objection, supported by affidavits, is made to a petition to submit a municipal by-law that some of the signers' names were procured by fraud, such names will be disregarded by the court hearing a mandamus application in which the regularity of the proceedings is questioned, when it finds such charge established, but there should be corroborating evidence besides that in the affidavits, especially when such affidavits are not made by the voters affected by the charge.

[*Re North Renfrew*, 8 O.L.R. 359, referred to.]

5. INTOXICATING LIQUORS (§ II A—37)—PETITION TO SUBMIT—EXTRINSIC EVIDENCE.

Where a petition to submit a liquor by-law is presented to a municipal council, and objection is made to such petition for any reason which requires proof by evidence *aliunde* the petition, the council cannot go back of the petition, except for the one purpose of ascertaining if the petition and affidavit, on their face, comply with the statute.

[*Re Williams and Town of Brampton*, 17 O.L.R. 398, referred to; R.S.M. 1902, ch. 101, sec. 74, construed.]

Statement

THIS is an application for a prerogative writ of mandamus to compel the council of the rural municipality of Swan River to submit a by-law to the electors of that municipality for the repeal of a local option by-law of that municipality now in force, and numbered 98, under the provisions of the Liquor License Act, ch. 101, R.S.M.

The application was granted.

F. M. Burbidge, for plaintiff.

J. B. Hugg, for defendants.

Curran, J.

CURRAN, J.:—The legal right to have the repealing by-law submitted to the electors is based primarily upon sec. 74 of the Liquor License Act, which reads as follows:—

> After a by-law has been passed under the thirteen last preceding sections of this Act, the council of any such municipality, if a petition of twenty-five per cent. in number of the resident electors, whose names appear on the last revised municipal voters' list, asking them to do so, is received by the clerk not later than the 1st day of October in any year, shall submit a by-law to repeal such by-law, and it shall be the duty of such council at its first regular meeting after the receipt of such petition by the clerk, or at a special meeting to be called by the clerk, if necessary, to pass the first and second readings of such by-law before the 1st day of November following.

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This section was amended in 1910, by adding the following:—

> But no such petition shall be received by the clerk at any time prior to the expiration of two years after the taking of the vote of the electors upon a local option by-law, or on a by-law to repeal a local option by-law in pursuance of the provisions of this Act.

A further amendment in 1911, provided that all the provisions of sections 62 to 73 inclusive of this Act shall apply to such repealing by-law and to the voting thereon.

In 1910, another important amendment to such section 74 was enacted in the form of secs. 74(*a*) and 74 (*b*), the substance of which sections is as follows: 74(*a*) requires that any petition, either for a local option by-law, or for a repeal of such a by-law, which may be received by the clerk of the municipality, must be signed by all the petitioners within the calendar year in which it is filed with the clerk, and no petition, when filed, or any portion of it, shall afterwards be refiled. 74(*b*) requires that a petition for either submission or repeal shall be verified by affidavit or statutory declaration of a witness present when the petition was signed by the persons signing the same, setting forth his name, place of residence, calling and proving the following facts: (*a*) that he personally saw the petition signed by the persons whose names appear thereon and which are set forth in such affidavit, etc.; (*b*) that the said persons are resident electors of the municipality; (*c*) that he has made a personal examination of the last revised municipal voters' list of the municipality and (*d*) that from such examination and his personal knowledge of the petitioners, he can positively state that the names of the petitioners appear in such last revised voters' list.

The Act further provides that every such affidavit, etc., shall be *primâ facie* proof before the council of the municipality and before all Judges, Courts and other bodies and elsewhere, of the facts stated therein. It then goes on to provide a form of affidavit which may be used.

Now, the facts are, that a petition, praying for the submission of a by-law to the electors of the rural municipality of Swan River to repeal local option by-law No. 98, was received by the clerk of the municipality on the 28th September, 1912, and brought before the council at a regular meeting on the 2nd October, 1912. The reeve and all members of the council were present. The reeve read the petition to the council and all of the names appearing upon it. A deputation of persons opposed to the submission of the repealing by-law was present, and by leave of the council, looked over the petition and pointed out certain alleged discrepancies. Certain of the council also pointed out what were claimed to be objections or irregularities in

the petition. I need not go into these matters in particular; suffice it to say that the council did assume to investigate the number and *bona fides* of the names appearing in both the petition and affidavit, and the question of certain petitioners being non-residents of the municipality. The upshot of the matter was that the council refused to submit the by-law to the electors, and this application is now made for a mandamus to compel the council to do so.

There can be no doubt that a sufficient request to submit the by-law in question was made to the council and that there was a definite refusal on the part of the council to submit such by-law. If the petition complies with the requirements of the statute, the applicants have a legal right to have it given effect to in the manner directed by the statute, and the writ should be granted.

A number of objections were argued by counsel for the defendants, among which were the following: (1) that the petition presented to the council was not the identical document in its identical form and plight signed by the petitioners; (2) that there was no evidence accompanying the petition that it had been signed by the petitioners within the calendar year in which it was filed with the clerk; (3) that the affidavit of the witness Crawford to the petition had been shewn to be so grossly untrue that it should be entirely disregarded by the Court, and that a new onus was placed upon the petitioners to verify its contents and the *bona fides* of every single signature appearing upon it; (4) that fraud was shewn to have been perpetrated in the procuring of some nine signatures to the petition; (5) that three names appearing on the petition are not in the voters' list; (6) that five names appearing on the petition are the names of aliens; and (7) some fourteen names appearing on the petition were non-residents of the municipality at the time they signed the petition, although their names appeared upon the last revised list of electors.

The petition, including the affidavit, is contained in 14 sheets of paper, with an additional sheet for cover, all fastened together at the top by means of four ordinary brass paper fasteners; the heading is typewritten and occupies one whole page, the first, and extends over upon the second page. Apparently the 10 following sheets were left blank for the signatures, and the document was in this plight when it left the hands of the draftsman. The affidavit of the witness was manifestly prepared after the names had been secured to the petition and was afterwards affixed to the petition, together with a new cover, and in doing so it was necessary to release the fasteners which formerly held the separate sheets of the petition together, and insert the affidavit and the cover and re-fasten the whole. The

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petition bears no date. I do not think there is any doubt but what the petition, subject to these minor changes, which did not at all affect the actual plight of the document, was the same petition which had actually affixed to it the signatures of the petitioners, and I therefore overrule the first objection.

Before dealing with the other objections, it will be necessary to discuss certain facts which are admitted by both parties. 246 names appear in the petition, but only 238 in the affidavit. The total number of resident electors appearing in the last revised list is 904, from which should be deducted 53 names of repeaters and 14 names of persons who are now non-residents, and were such when the petition was signed, thus reducing the total number of names of resident electors to 837.

The defendants' counsel contends that this number should be further reduced by 5, on the ground that 5 persons appearing in the list of electors are aliens. The names of these persons are William H. H. Garland, William J. McConnell, John McConnell, John Egilson and Arnar Egilson. These parties were all examined as to their nationality and I will deal with them individually.

It does not appear where Garland was born. He had lived in the United States, and had not been naturalized in Canada. His name is on the voters' list. I think it ought to be presumed that the officer of the municipality charged with the duty of compiling a municipal voters' list properly performed that duty, and that he would put no man on the list who did not possess the qualifications required by law, one of which is that the voter must be a British subject. It is for the opponents to the petition to shew affirmatively that these men are disqualified by reason of being aliens. In Garland's case I hold that they have failed to do this.

Next, as to William J. McConnell. This man would appear to be a British subject, as he swears he was born in Canada, and it has not been shewn that he ever divested himself of his British citizenship (if a man can do that) by taking allegiance to any foreign state. I hold that the objection to him fails also.

As to John McConnell, no evidence was submitted to shew where he was born or what his nationality was. It appears that before coming to Canada he lived in the United States and has not been naturalized in Canada. This evidence does not go far enough in my opinion to disqualify him, and I hold that the objection to him also fails.

John Egilson and Arnar Egilson, the remaining two of the five objected to, both say they were born in the United States and have lived in the Swan River Valley for 13 years, that neither of them has ever been naturalized in Canada, and both

swear their names are on the voters' list. I am asked, on this evidence, to disqualify these two men as signatories to the petition. The applicant's counsel argues that this evidence is not sufficient, that it should have been shewn, in addition, that the parents of these men were not British subjects, and I think, under the circumstances, that he is right. I should be loth to disqualify these men, who for 13 years have been actual residents of Swan River, and whose names appear in the voters' list as properly qualified voters, except upon very clear evidence, and the evidence produced does not, in my opinion, justify me in so holding. I therefore overrule the objection as to these two men.

Now, as to the petition itself. Of the 238 names verified by the witness Crawford, admittedly 14 were non-residents and must be struck off. The defendants' counsel claims that 3 more should be struck off on the ground that 3 persons who signed the petition (viz. S. Josephson, J. Sundbaum and Arnar Egilson) are not in the voters' list; 5 more on the ground that they were aliens (the parties above referred to) and that 9 of the petitioners (viz. Harry C. Gray, Herbert N. Harvey, Thomas Latimer, Charles Reid, D. A. Thomas, L.D. Edmonds and L. R. Ostrum) appearing on the petition were procured by misrepresentation and should be struck off.

I will now deal with the three names alleged not to be in the voters' list. If this is a fact, these names will of course have to be eliminated. Upon looking at the voters' list, I cannot find the names of S. Josephson and J. Sundbaum, and the municipal clerk, Armstrong, swears that these names are not to be found in the list. I disallow these names as petitioners.

As to Arnar Egilson, it is by no means certain that he is not the person appearing in the voters' list for polling subdivision No. 8, as No. 792, under the name of E. Egilson. He himself swears that he is, and I find opposite to his name (four names from the bottom of page 4 of the petition) in the column devoted to addresses of signatories, a description of land which tallies with the land appearing in the voters' list opposite the name E. Egilson, No. 792, in the column devoted to property qualifications of voters. Misnomers and misspelled names frequently occur in printed voters' lists, and to prevent such errors from disqualifying a man from voting the law provides a form of oath for electors, which, if taken by a voter, entitles him to vote notwithstanding a misnomer or misspelling of his name, and I think I should here give effect to the man's own oath in this respect rather than the other evidence offered upon this point. I allow the name of Arnar Egilson as one in fact appearing upon the list of electors, although under a misnomer.

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This brings me to a consideration of the 9 names alleged to have been procured to the petition by misrepresentation. This contention opens up a rather uncertain field of investigation. Section 254 of the Liquor License Act deals with this matter, and provides that signatures cannot be withdrawn from a petition except fraud be shewn. It is a position sometimes easy to take and ofttimes difficult to refute. I think, apart from a consideration as to whether the facts contained in the affidavits disclose misrepresentation or fraud, there should be some corroborating evidence in addition to these affidavits: *Re North Renfrew*, 8 O.L.R. 359.

The remarks of Garrow, J.A., in that case, at page 365, are, to my mind, pertinent. Have these men come forward of their own volition promptly after learning the real nature of the petition they had signed and complained of the fraud alleged to have been practised upon them, and have they asked of their own accord to have their names struck off this petition? If they did, it does not so appear; but their complaints are brought before the Court by others, namely those opposed to the petition; and I think this is significant. Let me analyze each affidavit separately and the reasons given.

H. C. Gray says, in effect, that he signed for the purpose of having the sentiment of the electors ascertained on the question of local option. I can see nothing wrong in this. Surely the taking of a vote on this question by the whole body of the electors was the best way of finding out what this sentiment was.

Harvey, Latimer, Reid, Thomas, Edmonds, McIvor, Dowling and Ostrum all say, in effect, that it was represented to them that the petition was for the purpose of changing the law so that a man could have liquor in his own house without breaking the law. Now, I cannot see that the canvasser was very far out if he got signatures to the petition on the strength of such a statement. It is popularly understood, I think, that under local option law the keeping of liquor in one's house is unlawful and it is certainly unlawful to bring liquor into local option territory from any point within the province. The reasonable deduction, I think, from such a statement as was alleged to have been made, is this: repeal the law, that is the local option law, which stands in the way of your having liquor in your house and the desired result will be attained. I cannot find, even if such representations or statements were made, as are said by these men to have been made to induce them to sign the petition, that these representations or statements were untrue or fraudulently made, and I hold against the defendants with respect to this objection.

Counsel for the applicant argued that the municipal council had no right to go behind the petition and affidavit and investi-

gate as to the *bonâ fides* of the petitioners and their status. If I followed the decision in *Re Williams and Town of Brampton*, 17 O.L.R. 398, and which was followed in this Court in *Adams v. Woods*, 19 Man. R. 285, although on another point, I should hold that a municipal council has no such discretion. See the judgment of Anglin, J., in *Re Williams and Town of Brampton*, 17 O.L.R. 398, at 407:—

> The statute confers no discretion upon the council and it cannot escape the duty imposed by erroneously deciding that the petition is in any respect insufficient.

Again at page 408:—

> Here the statute gives an unusual effect to a petition presented in compliance with its terms. It operates as a command to the council whose ordinary discretion in dealing with petitions is in this case entirely superseded.

And again at page 409:—

> The statute in my view, entitles the council to require the assurance and guarantee of authenticity which the filing of the actual papers to which the signatures of the electors were affixed by themselves alone can afford. The legislature did not intend that municipal councils should be required in cases such as this to weigh the sufficiency of affidavits, or to pass upon the credibility or reliability of deponents.

And again, Mulock, C.J., on page 406, says:—

> The statute does not contemplate the council ascertaining by extrinsic evidence what documents the electors signed, but entitles the council to have filed with the clerk the actual paper containing the very words to which the electors appended their signatures.

The Ontario Act does not contain the provision found in section 74(*b*) of our statute, and I think this section still further circumscribes the right of the council to look at extrinsic evidence by providing definitely just what evidence, apart from the petition itself, the council might regard.

I think under the existing law the council is prohibited from any investigation beyond that of ascertaining if the petition and affidavit *ex facie* are in accord with the statutory requirements.

The main objection, taken by the defendants, was that the petition was not shewn to have been signed within the calendar year in which it was filed, and he relies upon sec. 74(*a*), being the amendment of 1910, to support this objection.

It is to be noted that this section is followed by another section which requires that the petition shall be verified by the affidavit or statutory declaration of the witness or witnesses present when the petition, or part, or section of petition was signed by the persons respectively signing the same, setting forth his name, place of residence and calling and proving the facts set forth in the sub-clauses following. This is followed by

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the provision, before referred to,—every such affidavit, etc., shall be *primâ facie* proof before the council of the facts therein stated.

The Court of Appeal in *Re North Cypress*, 18 Man. L.R. 315, at p. 318, held that where the power to bring into force such an Act (that is the local option clauses of the Liquor License Act) requires certain preliminary steps to be taken, the Courts should require a strict performance of them. I think the converse of this is equally true, that the Court will not require further or other proofs of compliance with such preliminary steps than are specifically stated in the statute itself to be requisite.

Here the petitioners have complied with the provisions of sec. 74(*b*), which is the only section dealing with what proofs of the petition are necessary. If the Legislature had intended that the affidavit of the witness should affirmatively shew that the petition had been signed by all of the petitioners within the calendar year in which it is filed with the clerk, it would have been easy to have said so, and to have enumerated this as one of the clauses appended to sec. 74(*b*). That it has not done so is, to my mind, evidence that it did not intend this statement to form part of the proof of preliminary steps necessary to accompany the petition and to seize the council of jurisdiction to deal with it.

I hold that it was not incumbent upon the petitioners to supplement the prescribed statutory proof with the further proof as to the time when the petition was signed. There is no evidence to shew that any of the signatures to the petition were not obtained within the calendar year, 1912. If such proof had been produced, it could be considered by the Court and any signatures obtained outside of the prescribed time would, of course, have to be struck off.

I think I have now dealt with all of the objections taken by the defendants' counsel, except No. 3. As to this the defendants' counsel cited an American case from the State of Oregon, *State* v. *Olcott*, 125 Pac. Rep. 303. Even if I thought the principles laid down in this case applicable to our statute, I do not think the two cases are parallel. In the Oregon case, wholesale forgery of names to a petition was shewn to have occurred, and to have been so widespread as to destroy in the opinion of the Court the credibility of the attesting witness. Such a condition of things has not been shewn to exist in this case. At most some 14 names, all of which are *bonâ fide* and appeared in the voters' list as residents, have been shewn to be non-resident. There is some excuse for this error. The names of the rural municipality and of the village municipality are the same. The village municipality was carved out of the rural municipality, and these men, who had formerly been residents in the rural

municipality, subsequently, some time in the year, 1912, became residents of the village, whether by actual removal or by their homes being included in the newly incorporated area does not appear. I cannot find that the mistake of residence was otherwise than a *bonâ fide* mistake, and that it does not generally impair the reliability of the affidavit attesting the petition.

Upon the whole, I have come to the conclusion that the petition was sufficiently signed, and that the petitioners have done all that sec. 74(*b*) of the Liquor License Act required of them, and have established a legal right to have effect given to the petition, and to have the by-law prayed for submitted to the electors.

The order for mandamus will go in the terms asked for in the notice of motion, with costs to the applicant. The notice of motion asks for costs, and the defendants have advisedly opposed the application and put the applicant to considerable expense, and I see no reason why he should be deprived of his costs.

Order for mandamus granted.

BERGERON v. FORTIER.

Quebec Superior Court, Lemieux, A.C.J., and Dorion, J., sitting as an Election Court. Quebec, September 12, 1912.

1. ELECTIONS (§ IV—92)—TRIAL OF PETITION—WANT OF NOTICE OF TRIAL—STATUTE AND RULES, STRICT CONSTRUCTION OF.

When notice of the time and place fixed for the trial of an election petition is not given as required by R.S.C. 1906, ch. 7, sec. 38 (3), the order for the trial becomes null and void, and the Court has no jurisdiction to proceed therewith, the statute and the rules thereunder being construed strictly.

2. ELECTIONS (§ IV—92)—ELECTION PETITIONS AND HEARINGS UNDER DOMINION CONTROVERTED ELECTIONS ACT—STATUTES OF PUBLIC ORDER.

Election petitions and hearings thereof, under the Dominion Controverted Elections Act, R.S.C. 1906, ch. 7, are matters of public order, that is, matters connected with the conduct of good government, and statutory regulations as to the time limitation of the proceedings are to be construed under the rules applicable to statutes of public order.

3. ELECTIONS (§ IV—92)—ELECTION PETITIONS AND HEARINGS UNDER DOMINION CONTROVERTED ELECTIONS ACT—FRAUD AND COLLUSION PREVENTED BY GIVING ELECTOR RIGHT TO INTERVENE.

The right given to any elector to intervene and be substituted at any stage of the proceedings in an election petition is prescribed by the Dominion Controverted Elections Act, R.S.C. 1906, ch. 7, sec. 38, sub-sec. 3, for the purpose of providing against any possible collusion or fraudulent arrangement between the original petitioner and the candidate whose election is being contested; and it is therefore essential to advise all electors, in strict compliance with the statute and practice rules passed thereunder, of the time, status and place of the proceedings under the petition.

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HEARING of an election petition under the Dominion Controverted Elections Act, R.S.C. 1906, ch. 7.

The statutory notice not having been given, the petition was dismissed.

Moreau & Savard, for the petitioners; *E. J. Flynn*, K.C., counsel.

Taschereau, Roy, Cannon, Parent & Fitzpatrick, for the defendant.

Lemieux, A.C.J.

LEMIEUX, A.C.J.:—An election petition or contest of a parliamentary election and the trial of such petition are matters of public order, that is, matters connected with the conduct of good government. The law allows parliamentary elections to be contested and annulled, and the commissions of candidates elected by means of corrupt practices, intimidation, or certain other causes, to be set aside. This law prescribes the qualifications of the petitioners and the conditions under which such contests are received by the Courts.

The law-maker has also provided for the possibility of collusions or fraudulent arrangement between the petitioner and the candidate whose election is being contested, with respect to such contest, and, in order to prevent any such fraud or collusion, it is enacted that any elector may intervene in the election petition or be substituted for the petitioner (sec. 39, sub-sec. 2; sec. 80, sub-sec. 4).

It is clear that such substitution or intervening by electors will be possible only in so far as they shall have been advised of the place, status, and date, of the hearing on the petition.

Moreover, the law prescribes (sec. 38) that the notice of the time and place of the trial of the election petition shall be given in the manner specified at least fourteen days prior to the day on which the trial is to take place (sec. 38, sub-sec. 3).

The English version of this sub-sec. reads: "Notice of the time and place at which an election petition will be tried shall be given."

Practice rule 21 conformable to the law just cited is as follows:—

> 21. The time and place for trial of any election petition shall be fixed by the Court, and notice in writing shall be given by the prothonotary of the Court by posting it in a conspicuous place in his office and by transmitting one copy by mail to the petitioner, another to the respondent, and a copy to the sheriff of the district in which the election petition is to be heard, fifteen days prior to the day fixed for the trial. The sheriff shall immediately publish said notice in the electoral district.

Practice rule 23 contains the form of the notice to be given.

The English version of the rules of practice is in the following mandatory form: "Notice thereof shall be given in writing."

The wisdom of the law and of the explicit rule that a public notice shall be given to the electors of the date of the trial of the petition is manifest. It is, as already stated, in order to prevent collusion and fraud, and, also, to give an opportunity to the electors and to the public to give information relative to the election petition and to shew cause in Court, if any there be, in support of or against the validity of the election.

The law and the rule are not a mere formality, but a strict ordinance for public order, and it is the duty of the Courts to see to the strict enforcement of those precise enactments.

The law and the rules read: "Public notice shall be given."

The Interpretation Act of the Statutes of Canada, ch. 1, sec. 34, sub-sec. 24, reads: "'Shall' is to be construed as imperative," and the French version is still more expressive: "Whenever it provides that anything is to be done or ought to be done, the obligation to do it is made absolute," that is to say, the failure to comply with any strict formality in a proceeding, prescribed by the law, renders null the whole proceedings, especially in a matter of public order, when the formality has been prescribed in the public interest. But, no such notice has been given; the record contains no mention whatever of it.

The onus is on the petitioner to compel compliance with the law and the rule in such a case, by requiring the prothonotary, in writing, to give the required notice and also by depositing in his hands the necessary disbursements to carry out those provisions of the law.

The law and the rules not having been complied with, the Court is without jurisdiction to proceed with the hearing on the trial of the election petition, for the reason that the order fixing the trial of the petition has become null and void.

It was so decided by Sir François Langelier, ex-Chief Justice, and myself in the case of Chicoutimi Federal Election contest, No. 2465, *Pednaud* v. *Girard*, in 1910.

The question submitted was identical with that now presented, the required notice not having been given. It was in that case decided that the Judges had no jurisdiction to proceed with the trial of the petition.

Mr. Justice Malouin, consulted, concurs in this decision. The Courts should not encourage dilatory proceedings designed to impair the effect of the election laws, but, on the other hand, they cannot make light of the rules enacted by the law-maker in the public interest.

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BODNER v. WEST CANADIAN COLLIERIES.

Alberta Supreme Court, Harvey, C.J., Stuart, and Walsh, JJ.
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1. MASTER AND SERVANT (§ V—340)—ALBERTA WORKMEN'S COMPENSATION ACT—RIGHT OF DISTRICT JUDGE ACTING AS ARBITRATOR TO AUTHORIZE TAKING OF EVIDENCE BY COMMISSION.

Under the Alberta Workmen's Compensation Act, a District Court Judge acting thereunder as the statutory arbitrator, has the power to direct the issue of a commission to take the evidence of witnesses in order that the evidence so taken may be used before him as part of the evidence on which to base his award.

[*Sutton* v. *Great Northern R. Co.*, [1909] 2 K.B. 791, distinguished; *Jessop* v. *Maclay*, 5 B.W.C.C. 139, considered.]

Statement

APPEAL from judgment of Crawford, District Court Judge, acting as arbitrator under the Alberta Workmen's Compensation Act, deciding that he had no power to authorize the taking of evidence otherwise that before himself.

The appeal was allowed.

L. M. Johnston, for appellant.

Colin McLeod, for respondent.

Harvey, C.J.

HARVEY, C.J.:—The point which arises is whether a District Court Judge acting as arbitrator under the Workmen's Compensation Act has the power to authorize the taking of evidence otherwise than before himself. It comes to us by way of appeal from His Honour Judge Crawford who decided that he had no such power. He based his decision on the English decisions which seem to hold that under the corresponding English Act, the County Court Judge is *persona designata* and acting as he does as an arbitrator he has no powers which do not belong to an arbitrator unless they are given by the Act. The Act does not in express terms say that a Judge shall have such powers; on the other hand there is no express authority in the English Courts that evidence cannot be taken in this way though it has been expressly decided as pointed out by the learned Judge that there is no authority to direct discovery by way of interrogatories in *Sutton* v. *Great Northern Railway Company*, [1909] 2 K.B. 791, and also that a mere arbitrator cannot take evidence on commission: see *Re Shaw and Ronaldson*, [1892] 1 Q.B. 91. A very recent case, however, to which the learned Judge's attention was not directed seems to raise some doubt as to the comprehensiveness of the earlier cases in limiting the Judge's powers. I refer to *Jessop* v. *Maclay*, 5 B.W.C.C. 139, decided on 23rd October, 1911. In that case a seaman had been injured on the ship at Rio de Janiero. After the ship arrived in England he received a certificate of injury and was paid off. He subsequently made a claim and the defendants in preparing their defence had papers sent abroad so that depositions might be taken from persons on the ship, which had gone abroad again, and returned to England. The County Court Judge decided

the case without waiting for the return of the depositions and the Court of Appeal consisting of Cozens-Hardy, M.R., and Fletcher, Moulton, and Farwell, L.JJ., unanimously directed a new trial. No questions appear to have been raised as to the right to give the depositions in evidence but the decision could have no meaning unless the right existed. It is suggested by counsel that this is provided for in the English Act as regards seamen but the only section to which reference is made is subsec. 6 of sec. 7, which provides that

> Where an injured master, seaman, or apprentice is discharged or left behind in a British possession or in a foreign country, depositions respecting the circumstances and nature of the injury may be taken, etc.

It is quite clear that that case does not come within that provision and must therefore depend on the general provisions of the Act. But be that as it may, there are two important distinctions between our Act and the English Act, which deprives the English decision restricting the Judge's power of much of its authority. Under both Acts the arbitration may be by a committee representing both employer and workmen, a single lay arbitrator, or a Judge. Under the English Act, by paragraph 3 of the second schedule of both the Act of 1897 and the Act of 1906 it is provided that a single arbitrator appointed by the Judge shall have all the powers of the Judge. I have been able to find no such provision in our Act. The Court might well think that the Legislature could not have intended to confer on a person inexperienced in and unfamiliar with judicial procedure the powers which a County Court Judge would exercise in ordinary Court matters but such a consideration would not apply to our Act. Then the English Act provides in paragraph 2 of the same schedule that in default of the other methods "the matter shall be settled by the Judge of the County Court," while our Act provides that, under the same circumstances, "the matter shall be settled by the Court."

The English Acts are, of course, the model of the later Acts and these distinctions must be deemed to have been made for some purpose.

Under the English Act the Judge is the person designated by the Act and therefore the rules that apply in such cases are applicable to him, while under our Act he is not designated at all but simply acts because the matter is assigned to his Court. There are certain other provisions which are pointed out as being inconsistent with this view and reference is made to the latter part of paragraph (3) of the second schedule which is as follows:—

> And the Court shall, for the purposes of proceedings under this Act, have the same powers of procuring the attendance of witnesses and the production of documents as if the proceedings were an action in the Court.

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It is contended that under the well-known maxim the mention of this method of procuring evidence excludes all other methods. To my mind the maxim does not go that far. The greatest effect it could have would be to restrict the powers of the arbitrator in procuring the attendance of witnesses, etc., to the powers he would have in an action in the Court. This, of course, would be no restriction. The forcible argument to be deduced from this provision it appears to me is that it is unnecessary if the view I have suggested is the correct one, since he would have these powers. This provision is taken from the English Act in express terms. It may be that with regard to this as well as certain other suggested inconsistencies the draftsman did not notice that the changes to which I have already called attention rendered them unnecessary or required change, or it may be that the draftsman did not indeed make these changes but that they were made in the course of the bill's progress through the Legislature where it might easily have escaped notice that these provisions should be struck out or altered or it may indeed be that this was not considered superfluous. Though the proceeding is in Court it does not therefore necessarily, or indeed apparently at all, become an action and it may have been considered that the power to obtain witnesses in a matter might not be as extensive as in an action. In *Lowe* v. *Dorling*, [1906] 2 K.B. 772, at 785, Farwell, L.J., quotes with approval, Lopes, L.J., as saying in another case:—

> The maxim *expressio unius exclusio alterius* has been pressed upon us. I agree with what has been said in the Court below by Wills, J., about this maxim. It is often a valuable servant, but a dangerous master to follow in the construction of statutes or documents. The exclusion is often the result of inadvertence or accident and the maxim ought not to be applied when its application, having regard to the subject-matter to which it is to be applied leads to inconsistency or injustice.

I think that for the reasons I have mentioned little importance should be attached to this provision.

For the reasons stated, I am of opinion that a Judge of the District Court acting as an arbitrator under the Workmen's Compensation Act has power to direct the issue of a commission to take the evidence of witnesses in order that the evidence so taken may be used before him as part of the evidence on which to base his award.

The appeal should be allowed with costs and the learned Judge advised in accordance with this conclusion.

Stuart, J.
Walsh, J.

STUART, and WALSH, JJ., concurred.

Appeal allowed.

MILLER v. HAND.

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Ontario High Court. Trial before Britton, J. November 8, 1912.

1. BROKERS (§ II A—7)—REAL ESTATE AGENT'S PURCHASE IN OWN NAME—LIABILITY TO ACCOUNT FOR PROFITS.

An agent selling land cannot make a profit for himself at the expense of his principal; and so if the agent fraudulently purchases the land himself, and afterwards makes a profit on the re-sale he is accountable to his principal for the amount of his profit less the commission on such profit.

Statement

ACTION for an account of profits received by the defendant in respect of certain lands of the plaintiff sold by the defendant.

Judgment was given for the plaintiff for $1,608.75.

G. H. Kilmer, K.C., for the plaintiff.

J. E. Irving, for the defendant.

Britton, J.

BRITTON, J.:—The plaintiff was the registered owner of the west half of original lot 35 on the north side of Queen street in the city of Sault Ste. Marie, having a frontage on Queen street of 55 feet. The defendant was well known to the plaintiff as a dealer in real estate and as an agent for the purchase and sale of real estate in the city of Sault Ste. Marie. The plaintiff employed the defendant to act for him in the sale of the above lot.

The defendant accepted such employment, and in due course represented to the plaintiff that he had found a purchaser for the said lot, namely, one Neil McDougall, who, as the defendant said, was willing to purchase and pay at the price of $100 per foot frontage. The sale was carried out with McDougall at that price, viz., $5,500—and the usual commission for such a sale at Sault Ste. Marie was

5% on 1st $1,000.....	$ 50.00
2½% on balance of $4,500.....	112.50
In all the sum of.....	$162.50

This amount was demanded by the defendant—and was paid to the defendant by the plaintiff's solicitor in this transaction.

The agreement for sale between the plaintiff and McDougall, made at the instance and upon the representation of the defendant, acting, as the plaintiff supposed, as agent for the plaintiff, was made on the 6th day of December, 1910. On the 8th day of December, 1910, the plaintiff's solicitor paid to the defendant, by cheque on the Traders Bank of Canada, the sum of $162.50, commission above-mentioned.

This cheque is made payable to the defendant as the "commission on Miller sale;" and there was no other transaction between the parties to which the money received upon that cheque was or could be applied. On or about the 29th day of June,

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1911, the defendant again sold the said land to one Edwin Stubbs for the price of $160 a foot. This sale was carried out in the name of Neil McDougall as vendor—but at the request and for the advantage of the defendant.

As a matter of fact and beyond all question, the defendant represented to the plaintiff, and at the time of the sale to McDougall the plaintiff believed, that McDougall was a real purchaser for himself, and that the defendant was not as a purchaser interested in the property. It was not until after the sale to Stubbs that the plaintiff found out otherwise. I find that the defendant purchased this lot for himself—that McDougall merely acted at the defendant's request, and that, although a conveyance was accepted by McDougall and a mortgage given by him for part of the purchase-money—all was at the instance of the defendant and for his supposed benefit. The sale by McDougall to Stubbs was at the request of the defendant and for his benefit. The defendant made all the profit. Mr. McDougall did not make any or claim any benefit from this transaction.

McDougall merely represented the defendant, and acted at the defendant's request.

It will, perhaps, assist in dealing with the evidence to see what defendant attempted to do. It was stated by plaintiff, and not denied by defendant, that defendant wanted to get an option on plaintiff's lot 34, at $90 a foot. The plaintiff refused, but told defendant to make it $100 a foot, and upon a sale of 34 at that price he, the plaintiff, would pay defendant full commission even if he, the defendant, could get full commission or split commission from another real estate man as well. The full commission, understood as I have stated, would be 5 per cent. on first $1,000 and 2½ per cent. on the additional amount. Shortly after, the defendant told plaintiff that he had sold 34 for $90 a foot. Plaintiff said he "would not stand for that." Defendant replied it had gone, plaintiff then went to his solicitor about the matter.

It was ascertained that the defendant had given on behalf of plaintiff a receipt for $100 on account of the purchase of lot 34. The defendant had no authority from plaintiff to sign such a receipt or to make such a sale, for price named. Under threats from plaintiff's solicitor that matter was supposed to have been adjusted, by the purchaser of 34 making no further claim to 34, and that the plaintiff should accept from a purchaser introduced by defendant $100 a foot for 35. That is my interpretation of the evidence. Then the plaintiff found another person ready to buy 34 at a price which plaintiff was willing to accept, and then it was found that the defendant and McDougall would not withdraw the receipt or give a release of any claim to lot 34. An action was then commenced by the plaintiff against

McDougall in reference to lot 34, and it was in that action upon examination of McDougall for discovery that the plaintiff found out that there was no sale of 35 to McDougall, but that the whole purchase from plaintiff in the name of McDougall was a scheme of the defendant. I find that the allegations in the statement of claim have been established and the only thing remaining is as to the plaintiff's remedy.

I find that the allegations in the statement of claim have been established; and the only thing remaining is as to the plaintiff's remedy.

The plaintiff asks that an account be taken of the profit realised by the defendant out of the sale of the plaintiff's land, nominally to McDougall, but really taken by the defendant himself for his own profit.

This was a fraud upon the plaintiff. Had the plaintiff known the facts before the sale to Stubbs, he, the plaintiff, could have had the sale to McDougall rescinded.

So far as appears, so far as known to the plaintiff and as represented by the defendant, Stubbs is an innocent purchaser—a purchaser for value and in good faith.

The plaintiff simply asks that the defendant pay the profit money received by him and which belongs to the plaintiff as principal. There is no dispute about the amount, and there is no need of a reference.

It was argued that, by reason of the negotiation which followed after plaintiff ascertained that defendant had without authority given to McDougall a receipt for money on a pretended sale of 34, a settlement was arrived at. McDougall gave up any claim to 34, and got half of 35, at $100 a foot. The answer to that satisfactory to me is: (1) McDougall did not really then give up 34. He gave it up subsequently as the result of an action brought by plaintiff against him. This action was commenced by writ issued on 30th March, 1910, and (2) whatever plaintiff did, he did in complete ignorance of the part defendant was playing, until the examination of McDougall for discovery in the action last mentioned. Until that examination the plaintiff did not know that defendant was acting all for himself while pretending to act as agent for plaintiff.

It was argued that in an action of this kind the measure of damages is not the difference between what the plaintiff got from McDougall and what the defendant got from Stubbs, but the difference between the real value on the date of the sale to McDougall and the price paid by the defendant for the McDougall transaction.

The cases cited by counsel for the defendant are, I think, distinguishable—but it is not unfair to the defendant to say that the real value, even at the time of McDougall's deed, was about

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the sum that Stubbs paid. I would rather accept a real transaction such as the sale to Stubbs than the opinion evidence of real estate agents as to the real value. The defendant did not give evidence on his own behalf. It may well be that the defendant knew that the real value at the time of the McDougall deed was practically what Stubbs paid a little later on.

In any event, the defendant should not complain if asked to pay only what he received.

The defendant's profit was $60 a foot for 55 feet—$3,300. As against the small cost of carrying this property from December, 1910, to the 29th June, 1911, the defendant may be allowed the 2½% commission. If sold in ordinary course by an agent, the owner would have to pay that. This would amount to $82.50, and would leave $3,217.50.

It appeared upon the trial that the plaintiff was pecuniarily interested only to the extent of an undivided half of the part of lot 35 in question. Then Mr. Hearst was in equity the owner of and entitled to the other half. Mr. Hearst was a witness at the trial on behalf of the plaintiff. No application was made to join Mr. Hearst as a party plaintiff, or to add him as a party defendant, and no claim was put forward by Mr. Hearst for damages.

As the matter stands, the plaintiff is personally entitled to only one-half of the above amount, namely, $1,608.75, with interest at 5 per cent. from the 1st July, 1911. There will be judgment for the plaintiff for that amount with costs and without prejudice to any claim Mr. Hearst may make or to any action he may bring by reason of any interest he has in the land in question.

Judgment accordingly.

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REX v. WHISTNANT.

Alberta Supreme Court, Harvey, C.J., Scott, Stuart, Simmons, and Walsh, JJ. December 20, 1912.

1. EVIDENCE (§ II E 8—204)—GUILT—PRESUMPTIONS AND INFERENCES — STATEMENT OR ADMISSION OF ACCUSED—INTERPRETATION BY SURROUNDING CIRCUMSTANCES.

The statement or admission of the accused in the words, "I won't do it again," may constitute an implied admission of guilt of the particular crime of which he is charged, by inferences drawn from the circumstances under which the statement was made to identify what it was that his promise had reference to and to shew, in the absence of direct evidence, that the person to whom the exclamation was addressed must have charged accused with the crime immediately prior to the making of such statement.

2. EVIDENCE (§ XII A—920)—CORROBORATION REQUIRED BY STATUTE—EVIDENCE OF CHILD NOT UNDER OATH—CR. CODE (1906), SEC. 1003.

As sec. 1003 of the Criminal Code (1906) specifically requires that the "testimony admitted by virtue of this section" *i.e.*, a statement

taken in court from a child of tender years not understanding the nature of an oath upon the trial of certain sexual crimes, must be corroborated by "some other material evidence in support thereof implicating the accused," the testimony so taken from one child of tender years cannot constitute the kind of corroboration required by the Code of the testimony similiarly taken from another child of tender years. (Dictum *per* Harvey, C.J.)

[*R.* v. *Pailleur*, 15 Can. Cr. Cas. 339; *R.* v. *Daun*, 11 Can. Cr. Cas. 244, 12 O.L.R. 227; *R.* v. *Iman Din*, 18 Can. Cr. Cas. 82, referred to.]

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QUESTION reserved by Stuart, J., after the trial and conviction of defendant for indecent assault as to whether there was any corroboration as required by section 1003, Criminal Code, 1906. Statement

The question was answered in the affirmative and the conviction was affirmed.

L. F. Clarry, for the Crown.

W. S. Davidson, for the defendant.

HARVEY, C.J.:—The accused was convicted by my brother Stuart of indecent assault on one Lillian Scott. The complainant, who was 12 years old, and her sister, aged 9, gave the only direct evidence of the offence. The evidence of both was taken without the administering of an oath, under section 1003 of the Criminal Code, but each gave direct evidence of the act. Harvey, C.J.

The learned Judge has reserved the question of whether there was any corroboration as required by that section.

I am of opinion that the evidence of the sister is not such corroboration as the section requires.

In *Rex* v. *Pailleur* (1909), 15 Can. Cr. Cas. 339, two children gave evidence, not under oath, under section 16 of the Canada Evidence Act which authorizes the reception of evidence not under oath but provides that, "No case shall be decided upon such evidence alone, and such evidence must be corroborated by some other material evidence." It seems to have been taken for granted by the Ontario Court of Appeal in that case that there must be evidence to corroborate that of both children, which the Court found did exist. However, in *Rex* v. *Iman Din* (1910), 18 Can. Cr. Cas. 82, two of the Judges of the Court of Appeal of British Columbia directly held that the evidence of one child given under that section could be sufficiently corroborated by the evidence of another child so given. The other two Judges apparently held the same view, but decided that the evidence was not, in fact, corroborative.

It would appear to be a question of deciding whether the expression "such evidence" meant "evidence so given" or "evidence of such child." Section 1003, however, differs in terms from the section of the Canada Evidence Act. It provides that in the cases specified the evidence of the complainant or any other child of tender years may be given on the conditions specified, but with the following consequences:—

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2. But no person shall be liable to be convicted of the offence, unless the testimony admitted by virtue of this section . . . is corroborated by some other material evidence in support thereof implicating the accused.

The learned trial Judge has stated that he received the evidence of both children under this section. The evidence of both was, therefore, "testimony admitted by virtue of this section" and that is what requires corroboration. It seems clear, therefore, that no matter how many children gave evidence under that section their total evidence would be testimony under the section and, therefore, would require corroboration. There was, however, other evidence which, in my opinion, satisfies the section.

The reserved case states that a Mrs. Henson, a neighbour of the complainant, gave evidence to the effect that the complainant came to her home shortly after the time when she states the offence occurred and made a complaint of what the accused had done to her; that she and a man named Butler who was with her at once returned with the child to her home where they found the accused. Nothing was said about the matter in the house but Butler asked the accused to go outside. After they had gone out she heard a scuffle or fight as of one man pounding another and heard the accused cry out, "I won't do it again; I won't do it again." Butler was not available as a witness. In my opinion, under the circumstances of the case the inference that Butler had charged the accused with the offence and was berating him for it and that the accused's statement had reference to it is a perfectly justifiable one. It contains an implied admission of guilt and therefore constitutes evidence implicating the accused. It appears to me much stronger evidence than existed in the case of *Rex* v. *Daun* (1906), 11 Can. Cr. Cas. 244, 12 O.L.R. 227.

Coming to the conclusion I have regarding the effect of this evidence it is not necessary to consider whether the other evidence to which the learned Judge refers was corroborative. I think the question should be answered in the affirmative and the conviction affirmed.

Scott, J.
Stuart, J.
Simmons, J.
Walsh, J.

SCOTT, STUART, SIMMONS, and WALSH, JJ., concurred.

Conviction affirmed.

UNITED MOTOR CO. v. SLINN.

SASK.

S. C. 1912

Dec. 4.

Saskatchewan Supreme Court, Parker, M.C. December 4, 1912.

1. WRIT AND PROCESS (§ I—6)—AMENDING PLAINTIFFS' CORPORATE NAME AS STATED IN WRIT.

An application made after service of the writ of summons to amend by correcting the corporate name of the plaintiff company where the name used in the writ was that of another corporation, will only be dealt with on notice to the defendant.

[*Tildesley* v. *Harper*, 3 Ch.D. 277, referred to.]

Statement

THIS is an application under rule 32, made *ex parte*, to substitute the Saskatchewan Motor Company, Limited, for the United Motor Company, Limited, as plaintiffs in the action.

The application was refused.

A. F. Sample (*Wood & Turnbull*), for the applicant (plaintiff).

Parker, M.C.

PARKER, M.C.:—The solicitor for the plaintiff is also solicitor for the Saskatchewan Motor Company and was instructed by the latter company to collect by suit from the defendant the sum of $948.09 for goods sold and delivered. Purely by mistake the writ was issued in the name of the United Motor Company, which has no claim at all against the defendant, and was served on the defendant on November 21, 1912. I regret that I cannot deal with the application, as it should have been made by notice of motion, and not *ex parte*: Annual Practice, 1912, p. 207, *Tildesley* v. *Harper*, 3 Ch.D. 277. The defendant has been served with the writ and the time for appearance has not yet expired. If, therefore, the plaintiff wishes to have the correction made before the time for an appearance expires, the notice of motion should be served personally on the defendant. If the defendant does not appear within the time limited for appearance the notice of motion may be served in the usual way by filing.

Motion refused.

J. J. GIBBONS, Ltd. v. BERLINER GRAMAPHONE CO., Ltd.

ONT.

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Nov. 21.

Ontario High Court, Middleton, J., in Chambers. November 21, 1912.

1. COURTS (§ I B—10)—JURISDICTION—SERVICE OF PROCESS OUT OF JURISDICTION—ASSETS WITHIN.

Although Ont. C.R. 162 (Ont. Practice Rules of 1897) gives power to the Ontario courts to allow service of process out of the jurisdiction under certain conditions if the defendant has "assets of $200" within the jurisdiction, the court, in its discretion, may stay proceedings in an action upon which the right to proceed depends on such assets within the jurisdiction and where the court of an adjoining province of Canada, where the contract is made and was to be performed, is the more convenient forum, particularly where the "assets" within

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the jurisdiction consist solely of debts due to the defendant by residents within the jurisdiction.

[*Sirdar, etc.* v. *Rajah of Faridkote*, [1894] A.C. 670; *Comber* v. *Loyland*, [1898] A.C. 524; *Kemerer* v. *Watterson*, 20 O.L.R. 451, referred to.]

APPEAL from an order made by George S. Holmested, Esq., K.C., sitting for the Master in Chambers, on the 11th November, 1912, dismissing an application of the defendant to set aside an order made by the Master in Chambers on September 20th, 1912, permitting the issue and service of a writ of summons out of Ontario.

An order was made staying proceedings.

R. C. H. Cassels, for the defendant.

J. F. Boland, for the plaintiff.

Middleton, J.

MIDDLETON, J.:—The appellant contends, not only that the case is not one falling within the provisions of Rule 162, but that as in the exercise of discretion the plaintiff ought not to be permitted to sue within Ontario.

The plaintiff seeks to bring this action within the terms of sub-section (*e*) and of sub-section (*h*) of Rule 162.* It is said that the action is founded on a breach within Ontario of a contract which is to be performed within Ontario; and in the second place it is said that the defendant has assets within Ontario of the value of more than two hundred dollars which may be rendered liable to the satisfaction of the judgment.

The action is founded upon a verbal agreement made in Montreal, subsequently confirmed by writing. The plaintiff's letter of June 6th states, "We hereby confirm your verbal agree-

*Rule 162 of the Ont. Con. Practice Rules (1897) as amended is as follows:—

162. (1) Service out of Ontario of a writ or notice of a writ may be allowed by the Court or a Judge wherever:—

(*a*) The whole subject-matter of the action is land situate within Ontario (with or without rents or profits);

(*b*) Any act, deed, will, contract, obligation, or liability affecting land or hereditaments situate within Ontario, is sought to be construed, rectified, set aside, or enforced in the action;

(*c*) Any relief is sought against any person domiciled or ordinarily resident within Ontario;

(*d*) The action is for the administration of the personal estate of a deceased person who at the time of his death was domiciled within Ontario, or for the execution (as to property situate within Ontario) of the trusts of a written instrument of which the person to be served is a trustee, which ought to be executed according to the law of Ontario;

(*e*) The action is founded on a judgment or on a breach within Ontario of a contract wherever made, which is to be performed within Ontario or on a tort committed therein;

(*f*) An injunction is sought as to anything done or to be done within Ontario, or any nuisance within Ontario is sought to be prevented or removed, whether damages are or are not claimed in respect thereof; or

(*g*) A person out of Ontario is a necessary or proper party to an action properly brought against another person duly served within Ontario.

(*h*) Service may also be allowed where the action is for any other matter, and it appears to the satisfaction of the Court or a Judge that the plaintiff has a good cause of action against the defendant upon a con-

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ment with our Mr. Tedman." This verbal agreement was made in Montreal.

According to the law of Quebec, if no place of payment is expressly or impliedly indicated by the contract, payment must be made at the domicile of the debtor. There was no term, express or implied, for payment elsewhere; and payments under this contract are, therefore, to be made in Montreal.

It is not enough that payment or performance of the contract might be well made within Ontario. The rule as it now stands does not differ widely in meaning from the former rule, which contained the words, "according to its terms." These words were probably omitted so as to make the rule apply to implied as well as express terms of contracts. The theory of the rule is that the stipulation requiring performance within the jurisdiction amounts to an attornment to the local jurisdiction of our Court: *Comber* v. *Loyland*, [1898] A.C. 524.

More difficult is the question as to the application of clause (*h*). The defendant company carries on business at Montreal. It has customers throughout Canada. Customers in Ontario are indebted to it. No doubt much more than two hundred dollars was owing at the date of the bringing of this action. The contracts with the debtors call for monthly settlement. If the litigation runs its normal course the property which the company had at the bringing of the action will have disappeared long before judgment can be recovered. These debts will, no doubt, be replaced by other debts; but the company has no fixed or tangible assets within the province.

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tract or judgment, or in respect of a claim for alimony, and that the defendant has assets in Ontario of the value of $200 at least, which may be rendered liable for the satisfaction of the judgment, in case the plaintiff should recover judgment in the action; but in such case if the defendant does not appear, the Court or a Judge shall give directions from time to time as to the manner and conditions of proceeding in the action, and shall require the plaintiff, before obtaining judgment, to prove his claim, before a Judge or jury or in such manner as may seem proper: 58 Vict. ch. 12, sec. 124.

(2) Service out of Ontario of any order or notice in the winding-up of a company may be allowed by the Court or a Judge.

(3) Service out of Ontario of a petition or notice of motion in an action or matter relating to the administration of the estate of a deceased person or to the execution of a trust, or, praying for an order dealing with any funds in Court and in interpleader proceedings may be allowed by the Court or a Judge.

(4) Where, under Rule 203 or 659 or otherwise under the practice of the Court, it is necessary or proper to serve persons, not already parties to an action, with an office copy of any judgment or order, or notice to prove claims thereunder, service of the same out of Ontario may be allowed by the Court or a Judge.

And by statute 3 Edw. VII. (Ont.) ch. 8, sec. 13, the following statutory definition was added:—

In Consolidated Rule 162 the word "writ" shall be deemed to include any document by which a matter or proceeding is commenced, and service of any such document heretofore or hereafter made, if in other respects proper, shall be deemed good service as against the objection that such document was not included in the said rule.

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Apart from authority, I would have thought that the fiction by which the situs of a debt is the residence of the debtor ought not to be imported into the consideration of this rule, which would be abundantly satisfied if confined in operation to cases where the debtor has assets which can be reached under the ordinary writs of execution. But I am precluded from so holding by the case of *Kemerer* v. *Watterson*, 20 O.L.R. 451, where Meredith, C.J., has given the wider meaning to the rule. I have, therefore, to consider the question whether as a matter of discretion the order should be made.

Accepting the principles laid down in *Sirdar Gurdyal Singh* v. *Rajah of Faridkote*, [1894] A.C. 670, as a guide, the normal course is to require resort to the domicile of the defendant, particularly in the case of contracts entered into at the domicile and to be there performed. No doubt the jurisdiction of our Courts to entertain an action where the writ is served abroad is to be determined by our Courts upon the terms of Rule 162. The question whether this rule in any particular case transcends the limits fixed by comity and amounts to an assertion of extra-territorial jurisdiction entitled to international recognition, is one for the foreign Court whose assistance is invoked to enforce our judgment.

Nevertheless, the more recent cases seem to indicate that in the exercise of discretion in permitting an action to proceed the Court ought to have regard to somewhat the same principle.

Reference may be made to *Société Générale de Paris* v. *Dreyfus Bros.*, 29 Ch.D. 239, 37 Ch.D. 215; *Logan* v. *Bank of Scotland* (No. 2), [1906] 1 K.B. 141; *Egbert* v. *Short*, [1907] 2 Ch. 205; *Norton* v. *Norton*, [1908] 1 Ch. 471.

It is, I think, a sound exercise of discretion to hold that where the defendant is resident in Montreal, and where the Quebec Court is certainly a convenient forum, and the contract was made in Quebec and is to be interpreted according to the laws of Quebec, and the defendant's assets were all substantially within that Province, the plaintiffs should be compelled to resort to the Courts of that Province for their remedy, when our Courts only acquire jurisdiction by the mere accident of residence within Ontario of a debtor to the defendant.

The order will, therefore, go, staying all proceedings in this action upon the service made in Quebec, until after the conclusion of any action which the plaintiff may bring in that Province.

Order staying proceedings.

HOSEASON v. LENNON.

QUE.

K. B.
1912

Quebec King's Bench (Appeal Side), Davidson, C.J., Saint-Pierre and Chauvin, JJ. December 14, 1912.

Dec. 14.

1. LANDLORD AND TENANT (§ II D—34)—LEASE—RESILIATION OF.

Where the landlord does not comply with the covenant in the lease to heat the premises, and where the evidence shews that there was no undue interference on the part of the tenant with the heating apparatus, the lessee will be allowed to resiliate the lease.

Statement

APPEAL by the defendant from the judgment of Sir Melbourne Tait, C.J., rendered January 10, 1910, in favour of the plaintiff in an action brought for cancellation of a lease for breach of a covenant to heat the demised premises.

The appeal was dismissed with costs.

E. R. Perkins, for the plaintiff.

R. G. DeLorimier, K.C., for the defendant.

The opinion of the Court was delivered by

Davidson, C.J.

DAVIDSON, C.J.:—It was a condition of the lease from defendant, acting through his attorney, James Howley, to plaintiff of the flat, 34 Green avenue, Westmount, that the premises were to be heated. Because of the alleged persistent breach of this condition, plaintiff instituted the present action for the cancellation of the lease. By the judgment under review it was so ordered.

It was found by the Court *a quo* that the defendant, although required on a number of occasions to do so, failed to suitably heat the premises; that the opening of windows during mornings did not account for the coldness of the pipes, and that the pretension that air in the pipes blocked the entrance of heat could not avail, because the plaintiff had been forbidden to meddle with the pipes, and, in fact, had no key wherewith to let the air escape.

We concur in these findings. They are amply supported by the evidence.

Date after date in October and November is given on which the pipes were absolutely cold. People who visited the plaintiff on occasional evenings had sometimes to keep their wraps on; one of them caught a severe cold. Plaintiff's wife also suffered in health. Of the twenty-two or twenty-three tenants in the building, only one appeared to testify that his flat, heated from the same battery of boilers, was comfortable.

We confirm the judgment, with costs, as well of the Superior as of this Court.

Appeal dismissed.

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Nov. 19.

BANK OF NOVA SCOTIA v. HARVEY.

Alberta Supreme Court, Harvey, C.J. November 19, 1912.

1. BILLS AND NOTES (§ V A 1—105)—NOTE—BONA FIDE HOLDER FOR VALUE —RIGHT TO RECOVER—BANK AGAINST ITS OWN DEPOSITOR AS MAKER.

A bank taking a promissory note, in the regular course of business, as collateral for an overdraft and without notice of any arrangement between the maker thereof and the payee, who is the depositor of the bank, is entitled to recover on the note from the maker; although as between the original parties to the note there could be no recovery against the maker by the payee by reason of failure of consideration.

[*Glegg* v. *Bromley* (1912), 81 L.J.K.B. 1081, and *Bank of Commerce* v. *Wait*, 1 A.L.R. 68, distinguished.]

2. BILLS AND NOTES (§ V A 1—113*a*)—FAILURE OF CONSIDERATION—OVERDRAFT AS CONSIDERATION FOR TRANSFER OF COLLATERALS TO BANK.

An overdraft in a depositor's bank account is a sufficient consideration to constitute the bank a "*bonâ fide* purchaser without notice" of promissory notes payable to its customer and transferred by the latter to the bank as collateral security for such overdraft.

Statement

AN action to recover the amount due on a promissory note. Judgment was given for the plaintiff.

L. M. Johnstone, for the plaintiffs.

W. C. Ives, for defendant.

Harvey, C.J.

HARVEY, C.J.:—I do not think it is necessary for me to reserve this. On the point of the law as between the original parties I have no hesitation in coming to the conclusion that if the Gas Traction Co. were suing they could not recover. This note was given in pursuance of the arrangement made with the maker and set down in writing that the engine by spring should be put into proper running order and that the expert should be there to see that it ran all right. Early in the spring, apparently as early as February, their attention was called to this by Mr. Harvey who asked to have it done as he wanted to get to work as early as possible. They, like many other companies, instead of doing things in time, delayed and not until the end of April did what they agreed to do, and I have no doubt that the agreement meant that the engine should be put in order so that the operations for the next year could be undertaken by it, that it would be in proper condition, and it was not, and I think on that issue the defendant has succeeded, but that does not settle the point. The bank in this case is not in the position of the Gas Traction Co. and, as far as the evidence has proved, acted in good faith, as it had notice of no such arrangement between the parties, but took the note in the regular way of business and as collateral to the company's indebtedness. Now, I have already intimated, with reference to the *Bank of Commerce* v. *Wait*, 1 A.L.R. 68, that I find great difficulty in seeing any difference between an indebtedness which is in the shape of an overdraft and an indebtedness which is secured by the debtor's own note

as consideration for collateral security though *Glegg* v. *Bromley* (1912), 81 L.J.K.B. 1081, suggests a distinction, but I do not think there is any necessity for me to express an opinion on the decision given in that case because this case is different in the particulars in which that case indicates the principle involved. I think there was clearly an agreement between the Gas Traction Co. and the bank that such notes as this should be handed into the bank, the evidence of Mr. Watson satisfies me on that point. It is true he says the arrangement was put down on this hypothecation, and that arrangement has all of that except the obligation to hand these notes in, but Mr. Watson says when this business was opened with them the arrangement was

> we were to furnish funds for the manufacture of engines, for the purchase of parts, and that we were to receive cash or notes that may be given when these engines were delivered to purchasers.

First, we have a note that Mr. Harvey was one of the makers of and Mr. Englart was the other maker. That was only for $1,000 and this note given subsequently was for $2,000. I would suppose from that there was another note for $1,000 which had not been handed in under this hypothecation but at all events this note was given in substitution for the first note and under the terms of the arrangement with the Traction Co. the company were under an obligation to hand it to the bank and I think the bank could have made them deliver it over. In the *Bank of Commerce* v. *Wait*, 1 A.L.R. 68, Mr. Justice Beck finds that there was no such arrangement in existence there and, therefore, that accounts for the operation of the principles that he lays down. It appears quite clear to me also that he would have decided on the facts of this case differently from what he did there because an overdraft existed on that day and under the English authorities that would be a sufficient consideration even though, in his opinion, if the indebtedness had been secured by note payable in the future it would not have been. The statement that, on that day, there was $900 odd balance against the company means, I think, that there was an overdraft. I think the plaintiff is entitled to succeed, therefore, on the note. It is unfortunate for the defendant, but purchasers who wish to avoid such results should not give promissory notes but make their agreement to pay in some other form. If the purchasers would refuse to give notes at all and make the machine companies rest on their agreements or promises to pay under the agreements they might save themselves a good deal of risk that they run as in this case.

There will be judgment for the plaintiff for the amount of the note with general costs of the action. The defendant will have the costs of the issue as between the original parties to the note to be set off.

Judgment accordingly.

ONT.

H. C. J. 1912

Dec. 9.

ROYAL TRUST CO. v. MOLSONS BANK.

Ontario High Court. Trial before Falconbridge, C.J.K.B. December 9, 1912.

1. BANKS (§ IV A 2—53)—DEPOSITS—DEPOSITOR — SET-OFF OF DEPOSIT AGAINST OTHER INDEBTEDNESS.

A bank holding notes upon which a depositor is liable as endorser may, at any time after the notes became due, apply *pro tanto* the money so on deposit at the credit of the endorser upon his indebtedness under the notes.

2. BANKS (§ IV A 2—53)—DEPOSITS—APPLICATION OF—REFUSAL TO HONOUR CHEQUE—ACTION AGAINST.

The application by a bank of a customer's credit balance on his deposit account against his indebtedness to the bank, is a complete answer to an action by the depositor against the bank for damages in refusing to honour a cheque drawn by the depositor, where, after such application by the bank, no balance remains to the credit of the depositor.

3. DEBTOR AND CREDITOR (§ IV A 1—45)—DEPOSITS—RELATION OF BANK WITH DEPOSITOR.

The relation existing between a bank and its depositor as regards the cash deposited is that of debtor and creditor.

4. BANKS (§ IV A 1—48)—SET-OFF OF DEPOSIT AGAINST DEBT DUE BANK.

As a general deposit in a bank is the property of the bank, the bank's right to apply the same upon its contra account against the customer is one of "set-off" rather than one of "lien," the latter term being specially applicable to the right of retention of documentary securities or specific articles.

Statement

ACTION by the plaintiffs, the executors of T. W. A. Lindsay, for a judgment directing the defendants to hand over to the plaintiffs the two notes for $50,700, on which Mr. Lindsay was endorser, and to assign to the plaintiffs the collateral securities held by the defendants, who counterclaimed for $885.10, the balance claimed to be due by the plaintiffs.

J. Bicknell, K.C., and *A. G. F. Lawrence*, for the plaintiffs.

W. L. Scott, for the defendants.

Falconbridge, C.J.

FALCONBRIDGE, C.J.K.B.:—The facts are admitted. They appear from the correspondence produced, and for the present purpose may be very briefly stated.

The plaintiffs are the executors of T. W. A. Lindsay, who died on the 15th September, 1909. A few days after Lindsay's death two promissory notes upon which he was endorser became due and remained unpaid in the hands of the defendant bank, namely, one for $3,700 on 25th September, and one for $47,000 on 27th September.

The admitted liability of the estate on these notes amounted January, 1910, the manager of the plaintiff company wrote to (with interest at 5% per annum) on 5th January, 1910, to the sum of $51,405.60.

At his death Lindsay also had money on deposit with the bank bearing interest at 3%, repayable on demand, and on 5th the bank as follows:—

"The executors desire to invest the funds now held by the Molsons Bank at credit of the above estate, and we shall feel obliged if you will be good enough to advise us as to the exact amount against which the executors may issue their cheque."

In reply the manager of the bank wrote on 6th January, 1910:—

"The amount at the credit of the late Mr. T. Lindsay to the 31st of December, 1909, is $33,882.67.

"I note that you wish to draw this amount, but I regret having to advise you that our Head Office cannot allow this money to be withdrawn until some settlement has been made relative to the overdue notes of the Metropolitan Electrical Co. on which the late Mr. T. Lindsay is an endorser."

The plaintiffs now claim that on this date interest at 3% per annum to 6th January should be added to the amount at the credit of the estate in the deposit account, making a total of $33,899.37 principal and interest as at that date, and that this sum should be deducted from the amount then due on the notes, leaving a balance of $17,506.23 as the net indebtedness of the estate to the bank.

The bank on the other hand claims that after 6th January, 1910, the notes continued to bear interest at 5% and the deposit account at 3% only, until 29th April, 1911, when a cheque upon the deposit account was given by the executors to the bank, and received by the bank without prejudice to the rights of the parties.

The bank's position is explained in its manager's letter of 14th February, 1912, as follows:—

"I am in receipt of your letter of the 12th instant, asking me to advise you as to the grounds upon which the bank's claim for interest is based. I would have thought that these grounds sufficiently appeared from the correspondence that has passed between us. It is shortly that, until receipt of the cheque for $35,240 enclosed in your letter of the 28th of April, 1911, the bank has never received any authority or even request, to apply the amount standing to the credit of the estate of the late Thomas Lindsay on account of the indebtedness to the bank on the notes of the Metropolitan Electrical Company. You will observe that although on January 6th, 1910, I wrote to you stating that the bank could not allow the amount standing to the credit of the late Thomas Lindsay to be withdrawn until some settlement had been made relative to the overdue notes of the Metropolitan Electrical Company, the bank had no right at that time to apply the amount on account of the indebtedness in question and was not in a position to do so, and was not even requested to do so until receipt of the cheque enclosed in your letter of the 28th of April, 1911."

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The amount of this cheque with other payments made by the executors was sufficient to discharge the whole indebtedness of the estate, according to the plaintiffs' method of calculation, i.e., $17,508.23, with interest at 5% from 6th January, 1910, but according to the defendants' method of calculation, there is still a balance of $885.10 with interest since the issue of the writ (18th June, 1912).

The plaintiffs ask that the bank be directed to deliver up to the plaintiffs the notes in question, and to assign to plaintiffs the collateral securities held by the bank in connection with the debt.

The bank denies plaintiffs' right and counterclaims for the $885.10 and interest.

In my opinion the plaintiffs' view is the correct one. At any time after the notes became due the bank would have been entitled to apply the deposit on account of the indebtedness, or in other words, to set off its indebtedness to the depositor against the depositor's indebtedness to the bank pro tanto, as was done in *Jones* v. *Bank of Montreal* (1869), 29 U.C.R. 448. In that case it was held that this application of the deposit was an answer to an action by the customer for refusing to honour the customer's cheque, because there were no funds left upon which a cheque might be drawn.

On 6th January, 1910, the bank was placed in the same position as if it had refused to honour the plaintiffs' cheque—it either applied the deposit on account of the note indebtedness, or it did not do so, and in either case the result seems to be the same. If it so applied the deposit, then the unpaid balance of the indebtedness continued to bear interest at 5%, and on this basis was ultimately paid. If no application of the deposit was made, then the bank wrongfully refused to allow the amount on deposit to be withdrawn, and the plaintiffs are entitled to interest at 5% on the deposit, instead of 3% as theretofore.

No doubt it has been said that the ordinary banker's lien extends to money on deposit with a bank (*vide, e.g., Misa* v. *Currie* (1876), 1 App. Cas. 554, at p. 569.

But the word "lien" is used in this connection only as a façon de parler, "A lien is the right of a person having possession of the property of another to retain it until some charge upon it or some demand due him is satisfied" (Century Dict.).

Wharton's definition, sub verb., does not differ materially from this.

But it is well known that in the case of a deposit of money with a bank the relation between the customer and the bank is that of creditor and debtor.

There is no specific property of the customer in the possession of the bank upon which the bank can assert a lien.

The distinction is drawn very accurately in a passage from

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ROYAL TRUST CO. v. MOLSONS BANK.

Falconbridge, C.J.

Morse on Banking, quoted with approval in Hart on Banking, 2nd ed. (1906), p. 742: "It is often stated that the lien attaches to money; but inasmuch as, quite apart from any question of lien, a banker is only bound to pay to, or to the order of, his customer the amount of the balance due to the latter after deducting what is due to the banker himself from the customer, the lien will not normally have any effective application to moneys."

"Indeed, as is well said in the treatise of Mr. Morse on the American Law of Banking, Boston, 4th ed., 596: 'The word "lien" cannot properly be used in reference to the claim of the bank upon a general deposit, for the funds on general deposit are the property of the bank itself. The term "set off" should be applied in such cases, and "lien" when a claim against paper or valuables on special or specific deposit is referred to. In the cases the words are used very loosely, and sometimes the true force of a case has been mistaken by text-writers through failure to keep in mind this distinction. The practical effect of lien and set off is much the same. They result in balancing opposing claims, and since transfers of a general deposit are subject to the equities between the bank and the depositor, until notice to the bank, its right of set off is as good in respect to a general deposit as its lien in respect to a specific deposit for collection or as collateral.' "

It follows, in my opinion, that the argument which was advanced on behalf of the bank is not well founded, viz., that there was a lien on plaintiffs' account in favour of the bank, and that the only effect of the letter of 6th January, 1910, was to assert the lien, but that otherwise the deposit was not affected until the plaintiffs themselves chose to apply it on account of the indebtedness.

There will be judgment for plaintiffs as prayed with costs. The counterclaim will be dismissed with costs—all on the High Court scale.

Judgment for plaintiff.

ROSENFELT v. BIRON et al. and CITY OF MONTREAL (mis-en-cause).

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Nov. 22.

Quebec Court of Review, Tellier, DeLorimier, and Greenshields, JJ. Montreal, November 22, 1912.

1. MARKETS (§ I—1)—WHAT IS A PUBLIC MARKET—PAYMENT OF FEES.

A public market is a place to which any one having goods to sell, which may be properly sold upon such market-place, may go, provided he pays the fees imposed by the municipality for such privilege.

2. MARKETS (§ I—4)—PRIVATE MARKETS—SEVERAL STALLS LEASED TO DIFFERENT PERSONS CARRYING ON SAME BUSINESS.

A building containing under one roof different shops or stalls, all of which are rented to different persons carrying on the trade of butchers, is not a public market.

[*Wallenberg* v. *Merson*, 1 D.L.R. 212, followed.]

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3. LICENSE (§ II C—46)—PRIVATE MARKET—CONDITIONS TO BE COMPLIED WITH—COMPELLING GRANTING OF LICENSE—MANDAMUS.

Once an applicant for a butcher's license establishes that the locality where he proposes to open a private stall is at the required distance from any public market, that it is a proper place for such private stall, and that he is ready to pay the necessary license, the municipal authorities are bound, in the absence of any by-law limiting the number of such private stalls, to issue this license and have no discretion in the matter; and they will be compelled to fulfil this duty by mandamus.

Statement

THIS appeal by the petitioners for a writ of mandamus against the respondents was from the judgment of the Superior Court at Montreal, Demers, J., rendered on 5th May, 1911, which dismissed their demand.

The appeal was allowed and the writ maintained.

E. Pélissier, K.C., for the plaintiffs, appellants.

J. L. Archambault, K.C., for the defendants and *mis-en-cause*, respondents.

November 22, 1912. The opinion of the Court was rendered by

Greenshields, J.

GREENSHIELDS, J.:—On or about the 26th day of November, 1910, the plaintiff-petitioner presented a petition to a Judge of the Superior Court praying for the issue of a writ of mandamus against the respondents, J. A. Biron, a superintendent of markets of the city of Montreal, and William Robb, treasurer of the city of Montreal, ordering and enjoining the respondent, Biron, to furnish to the petitioner a certificate establishing that the space rented by him in the immovable No. 572 St. Dominique street is situated more than 500 yards from any public market, and that this building is proper for butcher stalls; and that the other respondent, William Robb, be ordered to issue upon the presentation of such certificate, signed by Biron, a license or permit in favour of the petitioner to occupy a butcher stall in the said premises; and subsidiarily, ordering the *mis-en-cause* to cause the respondents to do the acts prayed for.

The petitioner alleges, in support of his demand, that he leased from one Abel Wallenberg, a stall in the building situated at 572 St. Dominique street, in the city of Montreal, for the term of two years and six months, to count from the first of November, 1910, to sell meats, fowl and other provisions authorized by the by-laws of the city; that the respondent, Biron, is the superintendent of markets of the city of Montreal, and William Robb is the treasurer of the city of Montreal, and it is their duty by law, and by the by-laws, the first to furnish, to those who ask, a certificate in writing establishing that the locality in which it is proposed to keep a butcher stall, is, at

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least, 500 yards from any public market, and that it is a proper place to keep a butcher stall; and it is the duty of the other respondent to issue, upon presentation of such certificate, and the payment of $50, a permission, or license, authorizing the carrying on of such butcher business; that at the beginning of November the respondent, Biron, and one of his inspectors visited the petitioner's premises and established that this building was at least 500 yards from any public market and that it was a proper place to have a butcher stall; that after having established these facts the respondent, Biron, and his inspector advised the petitioner to go to the treasurer's office and take out his license; that he went, on or about the 24th of November, 1910, to the office of the treasurer, the other respondent, to pay his $50 and obtain his license, but the treasurer required him to produce a certificate in writing from the superintendent, the other respondent; that the petitioner presented himself at the office of the superintendent to obtain a certificate, but the superintendent refused to give him such certificate, although he had previously established that the premises were more than 500 yards from any public market and were a fit and proper place; that the two respondents persisted in refusing, the one to give the certificate and the other to give the license; that the petitioner is threatened with proceedings from the Recorder's Court and exposed to a fine for carrying on business without a license; that the refusal of the respondents is unjust, arbitrary and illegal and unauthorized by law, or by any by-law of the city of Montreal; that the respondents have already issued certificates and licenses to keep butcher stalls in the same building to Zinzellet and Cohen.

The city contested this petition in writing, and in effect alleged that the establishment of a large number of butcher stalls under one roof or in one building was contrary to the by-laws of the city of Montreal and constituted in reality a public market, which would not be under the control and supervision of the city; that the regulation of private butcher stalls was within the discretion of city council, and that the exercise of such discretion cannot be interfered with by a mandamus.

Upon hearing the petition the writ was ordered to be issued, and was issued, and was contested by the respondents and by the city upon the same grounds as alleged in their answer to the petition.

The learned trial Judge refused the order, basing his judgment on the provisions of the city by-laws, and referred to in the judgment, and on the considerant of fact that the building of Wallenberg with a large number of butcher stalls constituted in reality a public market.

Sub-section 38 of section 300 of the charter of the city of Montreal, being 62 Viet. ch. 58, provides that the city council

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shall have authority to establish, license or regulate markets and market houses, to change, enlarge or diminish the site of any market or market place, or to establish any new market or market place, or to abolish any market or market place now in existence, etc., and to fix the rate to be levied on persons selling in the said markets any provisions or commodities whatsoever.

This clearly refers to the establishment and control of what may be called: "public markets," of which there are four in the city of Montreal.

A public market is a place to which anyone having goods to sell, which may be properly sold upon such market place, may go, provided he pays the fees imposed by the city, for such privilege. This description would clearly not apply to what has been called in the case, the "Wallenberg market." It is not open to the public, but only to those who have a rented space in the building to carry on trade and commerce therein.

By sub-sec. 88 of sec. 309 of the city's charter, it is provided "that the council may provide for empowering any person to sell, offer or expose for sale, beyond the limits of the said markets, meat, vegetables and provisions usually bought and sold on public markets, and for granting a license for that purpose, upon the payment of such sum and the performance of such conditions as shall be fixed by law."

In virtue of the powers conferred by this section, on the 26th of January, 1903, the city passed a by-law, known as by-law No. 296, by sub-sec. 52 of which it was provided:—

> That no person should sell or expose for sale in any private stall or shop in the city outside of the meat markets, meat, fish, vegetables, or other provisions ordinarily bought and sold on the public markets, unless and until he had obtained a license from the city treasurer, who could only grant the same provided that the locality was not at a distance less than 500 yards from the centre of any of the public meat markets; and, further, that such license would not be granted by the city treasurer unless and until a certificate, signed by the superintendent of markets, had been furnished him, establishing that the locality in which it was proposed to open and maintain a private butcher stall is convenient for that end.

Under this by-law, in order to obtain a license to open a private stall in any place in the city of Montreal outside of the public markets, the person so desiring must obtain a certificate from the inspector of markets establishing:—

> (*a*) That the locality where it is proposed to open the private stall is not less than 500 yards from the centre of a public market; and
> (*b*) That it is a proper place for such private stalls.

The superintendent of markets, being satisfied upon these two points, must issue a certificate to that effect. So far as I can see, no discretion is left him to refuse to issue it. The applicant for a license, being in possession of this certificate,

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upon its presentation to the city treasurer, and the payment of a license fee of $50, is entitled to his license, and the city treasurer is bound to issue that license. He has no discretion to exercise.

In the present case the premises for which the petitioner seeks license, was visited by the superintendent of markets and one of his inspectors, and his report, supplemented by the evidence in the case, clearly shews that the place is not less than 500 yards from any public market, and is a fit and proper place for a private stall. Why did he not grant a certificate? Simply and solely because he was told by the city authorities that Wallenberg had erected a building in which he proposed to rent a large number of stalls in which butchers could carry on their business.

It will be observed that, by its charter, the city has no power to limit the number of private stalls in the city of Montreal. The city has passed no by-law limiting the number. A butcher's business is a legitimate business and can be carried on by anyone who so decides. There is no by-law of the city preventing the opening of one hundred private stalls, provided always such stalls shall not be less than 500 yards away from a public market. What provision of law, or what provision of any by-law is violated by the establishment of twenty private stalls under one roof, providing the roof is large enough, instead of under twenty separate roofs, each similar in size, but collectively covering as great, but possibly no greater, space than one roof? I find none. It may be argued that the city might by by-law enact that all meats, vegetables, fowls and fish, should be brought to and sold upon the public markets, but it has not done so. On the contrary, it has sanctioned the licensing of private stalls upon terms and conditions prescribed by itself and the applicant fulfilling these conditions is entitled to his license.

The Court of Appeals has decided that this very building, known as the "Wallenberg market," is not a public market; has found by its judgment that there is no violation of any law or any by-law in the establishment in this very building of a greater or less number of private stalls, and I have no hesitation in agreeing with that judgment: *Wallenberg* v. *Merson and City of Montreal*, 1 D.L.R. 212.

I am of opinion that the applicant is entitled to his certificate from the inspector of markets, as prayed for, and to his license or permit from the city treasurer, as prayed for. I am of opinion that the officers of the city, the respondents herein, are compelled by mandamus to issue to him his certificate and permit. I am of opinion that there was error in the judgment quashing the writ of mandamus, and that the judgment should be reversed, and the writ of mandamus maintained.

Appeal allowed.

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Dec. 27.

DAVIS v. SMITH.

Quebec Court of Review, Tellier, DeLorimier, and Greenshields, JJ.
December 27, 1912.

1. MORTGAGE (§ VI A—72)—FORECLOSURE—TAKING OFF TIMBER.

A mortgagee is not entitled under Quebec law to foreclose on a mortgage on the ground that the mortgage debtor has cut down timber on the property mortgaged, unless he can establish that the timber was cut to defraud him and for the purpose of diminishing or deteriorating his security.

Statement

THIS was an appeal by the defendant from the judgment of the Superior Court for the district of St. Francis, Hutchinson, J., rendered at Sherbrooke on November 11, 1911, condemning him to pay $127.65.

The appeal was allowed and the confession of judgment of the appellant maintained.

J. P. Wells, K.C., for plaintiff, respondent.

P. A. Jurieau, K.C., for defendant, appellant.

Greenshields, J.

GREENSHIELDS, J.:—The judgment presently rendered by this Court condemns the defendant to pay $107.65, and orders that a sum of $20 included in the judgment of the Court below be deducted from the amount due by the defendant.

The plaintiff sued for $195—$120 being for interest due on a notarial obligation creating a hypothec in favour of the plaintiff, and the balance, $75, by reason of the fact, as alleged by the plaintiff, that the defendant had cut and taken away and sold trees standing on the property, and thus diminished his security to that amount.

The defendant admits the amount of $120 as being due, but pleads an indebtedness of $32.25 due by plaintiff to him for goods sold and delivered, and files a confession of judgment for $91.35, being the balance due, with interest, which confession of judgment the plaintiff refused.

With respect to the claim of $75, the defendant alleges that he did cut wood on the property, and alleges that the house on the property was burned down, and the plaintiff received $400 of insurance; that the wood was cut with the intention of rebuilding the said house, and it is still, says the defendant, his intention to rebuild the house when he can realize on other property that he has, and the defendant states that he never had any intention of defrauding the plaintiff, and that the wood was cut with the knowledge and consent of the plaintiff.

The learned trial Judge found that $20 worth of wood had been cut from the mortgaged property, and gave judgment against the defendant for that amount.

There is error in the judgment.

The plaintiff sold the property in question to the defendant

on the 4th of November, 1909, for $2,500; he received $500 in cash, and retained his *bailleur de fonds* claim for $2,000. The house on the property was insured for $400 and was burned down. The plaintiff collected the insurance, thereby reducing his claim to $1,600. Now, I have no doubt whatever that the defendant asked the plaintiff to allow the insurance money to be used in the rebuilding of the house which had been destroyed, and I have no doubt whatever that the defendant cut the wood in question with the intention of using it in the construction of the house. I believe that the plaintiff originally consented to allow the $400 to be used, but subsequently changed his mind.

The defendant's good faith, in my opinion, is manifest, inasmuch as he cut and hauled to the mill to be sawn some 10,500 feet of lumber, of which only 5,000 feet was cut on the mortgaged property; the balance being cut on other property owned by the defendant, and which was not covered by the mortgage. If his intention had been to deteriorate or damage the mortgaged property, he certainly would have cut the whole of the wood on that property. A part, at least, of the lumber, when sawn, was hauled to the property in question, and is still there. Part of the balance is still at the mill, and a small quantity was taken to Waterville, where the defendant was obliged to move in consequence of being unable, owing to lack of funds, to rebuild the house.

I do not believe that the spirit of the law is, that a man shall cut no wood whatever upon mortgaged property. I should lay down as my opinion of the law, that he is entitled to cut sufficient for the up-keep of his property. Art. 2054 of the Civil Code decrees that neither the debtor or other holder can, with a view of defrauding the creditor, deteriorate the immovable charged with the privilege by destroying or injuring or carrying away the whole or any part of the buildings, fences or timber thereon. And art. 2055 prescribes that in the event of such deterioration the creditor may sue for the whole amount of the claim, although not due, and obtain damages occasioned by such deterioration. This law is found in other terms in ch. 43 of the Revised Statutes of Lower Canada, 1861, which clearly demonstrates that the intention was to give a recourse to a hypothecary creditor in case of a fraudulent deterioration of the property.

In the present case no intention to defraud is alleged or proven, and the contrary appears from the evidence.

The judgment must be reversed, and the confession of judgment maintained, with costs in both Courts against the plaintiff.

Appeal allowed.

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Oct. 31.

CITY OF WESTMOUNT v. HICKS.

Quebec Court of King's Bench, Archambeault, C.J., Lavergne, Cross, Carroll, and Gervais, JJ. October 31, 1912.

1. ACTION (§ I B 3—17)—STATUTORY NOTICE OF ACTION—VALIDITY OF, WHEN GIVEN BY PLAINTIFF'S ATTORNEY—SERVICE.

Where a statutory enactment requires notice of suit to be given to a city corporation before an action in damages can be instituted, such notice, in the absence of any contrary stipulation, may be given by the plaintiff's attorneys and may be validly served by bailiff.

2. APPEAL (§ VII K 2—451*a*)—FAILURE TO SERVE AMENDED DECLARATION.

Where on an exception to the form raising want of production of notice of action the plaintiff is allowed to amend his declaration to allege the giving of the notice, and a copy of the notice is produced, and the exception subsequently dismissed as being without further object, and the case goes to trial by jury and judgment is rendered therein, such judgment will not be interfered with by an appellate Court on the ground that the amended declaration was never served.

Statement

APPEAL by the city defendant from the judgment of the Superior Court, Guerin, J., assisted by a jury, who found for the respondent in the sum of $1,000 damages.

The appeal was dismissed.

F. S. Maclennan, K.C., for appellant.

H. J. Trihey, K.C., for respondent.

Lavergne, J.

October 31. LAVERGNE, J. (translated):—This is an action in damages for the sum of $25,000. On the 26th December, 1910, between ten and eleven o'clock in the evening, plaintiff fell on one of the sidewalks of the company defendant. He alleges that the sidewalk was in a dangerous condition—very slippery, and that the corporation neglected to keep it in good order. As a result of the fall he fractured his right leg near the ankle.

The action was heard before a jury who brought in a verdict against the appellant and fixed the amount of damages suffered by respondent at the sum of $1,000, and judgment was rendered accordingly by the Judge presiding at the trial.

The defence of the appellant to the merits of the action is that the sidewalk in front of the residence of the respondent slopes downwards, a fact which the respondent knew very well before the date of the accident; that the appellant had taken all necessary precautions to maintain the sidewalk in question in good order (spreading ashes over it from time to time); that on the 26th December, 1910, if the sidewalk was slippery it was not on account of any want of care or negligence of the appellant, but due to a sudden change in the temperature, heavy snowfall or other climatic conditions, on or before the 26th of December, over which the defendants could have no control and for which it is not responsible; that the plaintiff passed over the sidewalk on the same day and well knew the condition in

which it was, and that his fall in the evening was due to his own want of care and to his own negligence.

Before, however, producing this defence, the appellant filed an exception to the form which it thinks sufficient to dispose of the case and to have the action of respondent dismissed. The respondent had not mentioned in his declaration that he had given a notice of the action to the appellant as required by art. 5864 R.S.Q., within sixty days from the date of the accident. The action was returned on the 19th April. The appellant appeared the same day. On the following day, the 20th, it served a motion in the nature of an exception to the form. By its exception it set up the absence of an allegation in the declaration setting forth that notice of the action had been given. On the same day, the 20th of April, the respondent gave notice of a motion to amend. On the 24th April, both the exception and the motion to amend were heard. At the same time as the motion the respondent produced a duplicate of the notice which he had caused to be served on the appellant on the 16th February, 1911, that is to say within sixty days following the accident.

On the 25th April judgment was rendered as well on the exception to the form as on the motion to amend. The Court declared that the exception to the form had become without object and dismissed it, but with costs against respondent. The motion to amend and the duplicate of the notice produced had evidently satisfied the Judge that the notice required before suit had been regularly given, and he considered the incident closed.

The notice produced is signed by the attorneys for respondent and was served by a bailiff on the 16th February, 1911. I consider this notice sufficient and as having been sufficiently proved. The signature of attorneys in all proceedings in the absence of attack makes proof of its authenticity. This notice is part of the procedure in the case as the action cannot be instituted unless it be given. It is not indispensable that it should be given by the party himself because the law says that the party injured shall "give or cause to be given a notice." A lawyer is certainly qualified to give this notice for his client. It is easy to see that the lawyers who gave the notice are the same as those who represented the respondent both in the Court of first instance and on the appeal. It is true that after having obtained permission to amend, and having included in the motion the amendment which he wished to add to the declaration and having duly served the motion, respondent did not cause the amendment to be served after the judgment permitting it. The appellant now pretends that this irregularity is fatal. I do not believe it, for if we consider that it has been sufficiently established that the notice was given and that the

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notice was produced in order that the adverse party might not be taken by surprise, it must be held that all that was necessary has been done. It would even seem that if the duplicate of the notice had been annexed to, or produced with, the return of the action, an exception to the form should have been dismissed with costs. The Court was satisfied that the notice had been regularly given and dismissed the exception to the form. It is no longer open to re-argue the exception to the form once it has been disposed of, and moreover the appellant does not complain of the judgment which was rendered on its motion in the nature of an exception to the form. The appellant in its appeal does not say that the notice was not given. It contents itself with saying that it is not alleged in the declaration. It cannot urge this reason for the second time when it was once disposed of on the exception to the form. This ground cannot be pleaded by a defence to the merits.

On examining the record it is to be noted that piece 14 shews that one of the questions suggested by respondent to be submitted to the jury was the following: "Did plaintiff give to the corporation defendant due notice of the said accident, and, if so, when?" This question is not included in those authorized by the Court. Evidently it was and with reason considered useless because the proof of the notice was sufficient (it was proved by the writing produced), and it was simply taking up the time, uselessly, of both the Court and jury to submit the question. Is it to be believed that under the circumstances a Court of appeal after a verdict of a jury can re-open this question? It is rather a question of procedure than a question of law. Two Judges in the lower Court considered the incident closed. If the appellant had not received the notice it might have suffered prejudice; but it never pretended that it had not received it. It does not even dare to deny that it did receive it and it is only in its grounds of appeal that it urges that the respondent had not proved he had given or had been prevented from giving the notice in question. If at the time the case was heard before the jury the appellant had complained that it had not received the notice and that it thereby suffered prejudice —in a word, if it raised the point in any manner justice would evidently have been done and the question would have been specially determined. The appellant contends in its argument that the notice could not be served by a bailiff and that the signature of the bailiff does not make proof of itself. This pretension has not been pleaded in any way and if this notice is to be considered as part of the procedure in the case it is easy to arrive at the conclusion that the service was sufficient. For these reasons I believe that, especially after trial before a jury and a verdict has been found, it would not be just to reverse the judgment unless it were clearly established that a prejudice had been suffered.

Having thus disposed of the exception to the form, it but remains for me to discuss the case on its merits. In its grounds of appeal the appellant once again invokes the fact that the respondent in his declaration does not allege that he had given the notice within the delay fixed by law, and that without such an allegation his declaration does not shew a right of action. I have disposed of this point. By its other grounds of appeal the appellant pretends the verdict is against the weight of evidence and is of such a nature that the jury on examining all the proof could not reasonably have rendered it. These grounds of appeal also are not well founded. At the time of the accident the respondent was accompanied by his wife and daughter. From their evidence it is clear that they took all necessary precautions to avoid an accident; that the respondent did know that the sidewalk in front of and near his house was very slippery, but that, fearing to fall, he considered it more prudent to go in by one of the side doors of his house rather than by the front, and that it was as he was about to leave the sidewalk to proceed towards the side door that he fell. The sidewalk was in a very bad condition. There is no doubt about that. Three witnesses swear that no ashes had been spread on the sidewalk for several days and that there had not been any spread after the accident either. The appellant attempted to contradict this proof by evidence of its employees. It does not deny that on account of climatic conditions the sidewalk might have been slippery that day, but says that it cannot be held responsible for that. That cinders had been spread over the sidewalk on the day before the accident. The respondent had given notice of action on the 16th February, 1911, that is to say, about fifty days after the accident, and it was after this date that the appellant must have taken steps to ascertain what had been done in order to establish its defence. Part of the evidence it offered is very vague. Two witnesses who pretended to be positive that ashes were spread on the sidewalk the day before the accident were not in a position to positively affirm this. Witnesses Ratelle and Lascelle say that they are positive. The officials of the corporation only spoke to them about it the day before the case was heard. How can they recollect and be able to declare so positively that they spread ashes on the sidewalk in question on the 25th and 26th December. They were in the habit of doing this from time to time, but not every day. In order to justify them in swearing so positively it would have been absolutely necessary to shew that they had to do this work every day, because they certainly did not keep any record of how or when they had done it. This proof, according to me, is not as satisfactory as that which results from the evidence of the three people who were present at the moment of the accident, interested witnesses though they may be. These witnesses are very

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positive as to the date. The accident happened on the 26th December in the evening. The doctor was called to treat the respondent and to give his instructions for the night, and on the following day went to see his patient, whom he afterwards attended for several weeks. There can be no doubt as to the date of the accident, and from the evidence of the witnesses for the respondent there can be no doubt as to the bad condition of the sidewalk. No ashes had been spread in that neighborhood for several days, and there were none spread for several days afterwards. At all events, the jury who heard the proof and who took all the evidence into consideration came to the conclusion which I have already mentioned, and it seems to me impossible to say that the verdict was of such a nature that the jury on examining all the proof could not have reasonably found it. The jurisprudence of our Courts of appeal on this point is well known and this Court cannot intervene to put this verdict aside.

For all these reasons, I believe that the judgment should be confirmed and the appeal dismissed with costs.

Appeal dismissed.

EDGE v. SECURITY LIFE INSURANCE CO.

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Quebec Court of King's Bench (Appeal Side), Trenholme, Cross, Carroll, Gervais, and Roy, JJ. Quebec, June 17, 1912.

1. PLEADING (§ I S—149)—STRIKING OUT—GROUNDS FOR—FRIVOLOUS AVERMENTS.

The superficially frivolous appearance of grounds of action in a plaintiff's declaration does not constitute ground to have them struck out on demurrer, if the matter of such allegations amount to legal grounds of action when read together with the other averments of the declaration.

2. CORPORATIONS AND COMPANIES (§ V B—177)—CONDITIONS ATTACHED TO SUBSCRIPTION FOR SHARES—VALIDITY OF.

An applicant or subscriber for shares in a joint stock company may validly stipulate that his subscription will only take effect in the event of the company finding other *bonâ fide* subscribers for a given number of shares.

Statement

APPEAL from a judgment of the Superior Court, Cannon, J., January 22, 1912, maintaining a partial demurrer against three averments of the plaintiff's declaration.

The appeal was allowed.

L. S. St. Laurent, for appellant.

J. E. Bédard, K.C., for respondent.

The opinion of the Court was rendered by

Cross, J.

CROSS, J.:—The grounds of the appellant's action may be summarized under five heads, as follows:—

Firstly: That he was induced to take five shares of stock in

the respondent company by one Cerveau on the representation, promise and agreement that, though he would in form undertake to pay in $45 per share, he would in reality have nothing to pay in, because he would be a medical examiner and would make, in medical examinations and fees, more than enough to pay up the shares.

Secondly: That he was induced to take one hundred other shares upon being told by one Desnoyers, an organizer of the company, and by Cerveau, that it was intended to appoint him revising medical examiner of the company at a salary of $5,000; that to be appointed revising physician it would be necessary that he should take 100 shares; that the calls on 50 of these could be paid out of his salary, and that Desnoyers would sell the other 50 for his account, and that the appellant would not have to pay out a cent.

Thirdly: That the representations were false.

Fourthly: That the company and Desnoyers and one Wilder (Wilder and Desnoyers being referred to as *les fac-totums de la Compagnie*) now refuse to fulfil the conditions.

Fifthly: That it was specially agreed that the appellants' subscriptions would be null if 2,000 shares would not be taken in good faith before the first of June, 1911, and such number of shares have not been taken

> la plus grande partie des souscriptions obtenues, l'ayant été sous de fausses représentations, et étant entachés de fraude, d'erreur, de défaut de considération légale, elles sont nulles et annulables et ne constituent pas l'accomplissement de cette condition essentielle.

Three averments of the declaration have been struck out on inscription in law, by the judgment now appealed from, namely:—

First: An averment in paragraph No. 10 to the effect that the subscriptions for shares in the stock of the company in the city and Province of Quebec were obtained upon the like false representations.

Second: An averment in paragraph No. 12 to the effect that the company obtained its license to do business on the faith of subscriptions so obtained; and

Third: The above quoted averment in paragraph No. 14, to the effect that the greater part of the subscriptions were obtained on false representations and by fraud and mistake.

The superficially frivolous appearance of the grounds of the action as set out in the plaintiff's declaration, does not constitute a ground for striking out the three allegations objected to, if the matter of such three allegations can, with the other parts of the declaration, amount to legal grounds of action.

In law there is nothing to prevent an applicant or subscriber for shares after incorporation from stipulating that his subscription shall not take effect unless there be other *bonâ fide* subscrib-

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ers for a stated number of shares: Lindley, Law of Companies (ed. of 1889), pp. 16 and 778.

I consider that the plaintiff has sufficiently alleged such a stipulation and non-compliance therewith. After alleging the non-compliance in paragraph No. 12, the plaintiff, in the clause inscribed against, goes on to set forth that the greater portion of the subscriptions obtained are null because of having been obtained by fraud, error and without lawful consideration. I consider that this last mentioned averment should not have been struck out. I would therefore modify the judgment so as to restore it. This conclusion being arrived at, the part of paragraph No. 10 inscribed against may as well be reinstated also, as it can avail as a particularization of the false representations relied upon.

I, however, consider the judgment well founded as regards the part of paragraph No. 12 inscribed against.

The declaration does not shew that the obtaining of the license, whether legally or illegally accomplished, is a fact which can affect the plaintiff's right to rescission of his subscription contracts.

I would modify the judgment accordingly.

Judgment varied.

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Dec. 24.

BESNER v. LEVESQUE.

Quebec Court of Review, Tellier, DeLorimier, and Greenshields, JJ. December 24, 1912.

1. BROKERS (§ B I—14*a*)—REAL ESTATE AGENT—TAKING OFFER AND CONTRACT IN HIS OWN NAME.

A real estate agent who without disclosing that he is a real estate agent obtains in his own name a contract of sale of a property at a fixed price and disposes of it to a third party is not entitled to charge the vendor with any commission on the sale of such property inasmuch as there is no contract of agency whatsoever.

[*Stratton* v. *Vachon*, 44 Can. S.C.R. 395, referred to; and see *Haffner* v. *Grundy*, 4 D.L.R. 529, and Annotation, 4 D.L.R. 531.]

Statement

THIS appeal was from the judgment of the Superior Court, Davidson, J., rendered on December 16, 1910, dismissing the plaintiff's action for a commission on a real estate transaction.

The appeal was dismissed.

E. Pélissier, K.C., for the plaintiff, appellant.

T. E. Walsh, K.C., for the defendant, respondent.

The judgment of the Court of Review was delivered by

DeLorimier, J.

DELORIMIER, J. (translated):—This is a review of a judgment rendered by the Superior Court at Montreal (Davidson, J.) on December 16th, 1910, dismissing the plaintiff's action.

The plaintiff took action as the transferee of the Gross Real Estate Agency, claiming from the defendant the sum of $312.50 commission alleged to be due on the sale of a property belonging

to the defendant. This action was contested on the ground that never had the Gross Real Estate Agency or anybody else been authorized by the defendant to sell this property, and that never had the defendant undertaken to pay commission. The trial Judge found no proof that the property sold had ever been placed in the hands of the Gross Real Estate Agency, directly or indirectly, to be sold on commission or otherwise, and dismissed the action.

The plaintiff urges, as against this judgment, that even in the absence of any agreement, the defendant must, under the circumstances, be condemned to pay the usual 2½ per cent. commission obtaining in Montreal whenever the sale is effected through a real estate broker, and he quotes in support C.C. 1735:—

> A broker is one who exercises the trade and calling of negotiating between parties the business of buying and selling or any other lawful transactions.

And he quotes also Marcadé and Pont, vol. 8, Nos. 883 and 884, p. 491.

Aubry and Rau, vol. 4, par. 410, p. 638, note 8:—

> Le salaire est censé tacitement stipulé et promis dans les mandats relatifs à des affaires dont le mandataire se charge par état ou par profession, par exemple, dans les mandats confiés à des avoués ou à des agents d'affaires, et dans les commissions données à des courtiers ou à des commissionaires de commerce.

And, adds the plaintiff, this rule has been recognized in a Manitoba case of *Barteaux* v. *McLeod*, 19 W.L.R. 138, and by the Supreme Court in *Stratton* v. *Vachon*, 44 Can. S.C.R. 395.

The plaintiff's claim has no foundation in our opinion, and the authorities above cited do not apply to the special facts of this case.

It appears from the evidence that the defendant, directly or indirectly, never dealt with the Gross Real Estate Agency for the sale of this property. A man by the name of Wiselberg called on the defendant at her home and asked her whether she would sell her property. After *pour parlers* she consented to sell and finally signed the offer to sell, dated 9th March, 1910, on which the present action is based.

There is nothing of record to shew that the defendant ever saw or knew of this man Wiselberg before these visits, nor that she was ever informed that he was a real estate agent. Wiselberg never mentioned to the defendant that he was acting for the Gross Real Estate Agency, and there was not a word spoken as to the defendant having to pay commission. This offer to sell is in the following terms:—

Montreal, March 9th, 1910.

> We, undersigned, offering to sell our property No. cadastre 58, situated on St. Catherine street, 110 feet, and 30 feet on Desire street,

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more or less, for the sum of twelve thousand and five hundred dollars. Conditions two thousand and five hundred dollars cash by signing the deed of sale. Balance ten thousand dollars with interest of six per cent. per year. . . . The purchaser should have the right to pay the ten thousand dollars any time during the two years. This option stands good till the first of April.

JOSEPH LÉVESQUE,
ALMA LÉVESQUE.

This document, it is evident, is but a simple promise of sale conditioned as to the price and terms of payment, and as to the duration of the offer. It contains no mention of the name of any agency. The fact that this document was thus signed at the defendant's domicile without the question of commission being raised and the absence of any proof that the defendant even ever suspected that Wiselberg was a real estate agent, precludes any possibility of this document being interpreted as a mandate given to a real estate broker with the tacit understanding that in the event of the offer being accepted the defendant would pay a commission to a real estate agency the name of which does not even appear in the document.

The plaintiff alleges that it was agreed that the defendant would pay the Gross Real Estate Agency as commission the sum of $312.50. There is not a word of record to sustain this allegation. It is of evidence that when the parties were ready to sign the deed of sale the defendant was requested to attend before a notary whom she did not know, but she refused and insisted on going before her own notary. The plaintiff alleges that the defendant sold this property to a Mr. Girard by deed before Beaudry, N.P., on March 24th, 1910, and that this Mr. Girard was a purchaser obtained by the agent of the Gross Real Estate Agency. The defendant did, it is true, consent to sell her property to this Mr. Girard just as she would have consented to sell to any one else; provided she received the price contained in her offer she had no objection. And the evidence also shews that she did not know, when this offer to sell was signed, whether Wiselberg was buying for himself or for some one else.

It is evident that, under the circumstances, were we to oblige the defendant to pay a commission on this purchase price that we would be illegally altering the terms of this offer to sell and that we would be reducing the amount of the sale price therein mentioned. We are, therefore, of opinion that the rules applicable to commercial mandate which allow the agent to demand, in certain cases, a salary tacitly agreed upon, can have no application in the present case.

We concur in the findings of the trial Judge and his judgment is affirmed with costs against the plaintiff.

Appeal dismissed.

LARUE and CLOUTIER, Ltd. v. BASTIEN.

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Dec. 31.

Quebec Court of Review, DeLorimier, Archibald, and Lane, JJ. December 31, 1912.

1. ARREST (§ II—15)—AFFIDAVIT FOR WRIT OF CAPIAS, ESSENTIAL ELEMENTS.

An affidavit for *capias* must on its face shew every element to justify the condemnation of the defendant to imprisonment, and failure to mention in the affidavit the place of origin of the alleged indebtedness is a fatal irregularity.

2. ARREST (§ II—15)—AFFIDAVIT FOR WRIT OF CAPIAS—ESSENTIAL ALLEGATIONS—PLACE OF ORIGINAL INDEBTEDNESS.

Where costs due upon a judgment obtained in Quebec are alleged in an affidavit to be due, but the place of the original indebtedness is not mentioned therein, such allegation regarding costs cannot justify the issue of a *capias* inasmuch as the judgment obtained did not operate as a novation of the debt and the costs incurred on such judgment are but an accessory of the debt.

[*Rochelcau* v. *Bessette*, 3 Que. Q.B. 96, followed.]

Statement

THIS appeal was from the judgment of Tellier, J., April 7th, 1911, quashing a writ of *capias* against the defendant.

The appeal was dismissed.

J. A. Robillard, K.C., for plaintiff, appellant.

Edmond Brossard, for defendant, respondent.

Archibald, J.

ARCHIBALD, J.:—This case comes in review from a judgment quashing a writ of *capias* in consequence of the insufficiency of the affidavit.

The affidavit alleges that the defendant was personally indebted to the plaintiffs in the sum of $329, being $172 for the amount of a judgment and various other smaller sums for the amount of costs upon the said judgment and upon another.

The place of origin of the original indebtedness was not mentioned in the affidavit.

The jurisprudence of our Courts has always interpreted strictly the sufficiency of affidavits for *capias*, and they, I think without exception, hold that an affidavit must shew on its face every element to justify the condemnation of the defendant to imprisonment. This was not done in connection with this case, and by the first judgment in the case the amount of the principal debt and the interest on the principal debt are held as excluded by the failure of the plaintiffs to allege the place of the origin thereof. However, the *capias* was maintained with respect to the costs which had been awarded and taxed against the defendant upon suits in connection with that debt within the jurisdiction of this Court.

The judgment now under review has held that these costs are an accessory of the debt, and that their nature must be held to be the same as that of the debt upon which the judgment was based. There might be something said upon that point were it

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not for a judgment of the Court of Appeals in *Rocheleau* v. *Bessette*, 3 Que. Q.B. 96, where it was expressly held:—

> That a judgment does not operate novation of the debt upon which it is based. It follows that, where a debt is created in the United States and the debtor subsequently moved to the province of Quebec, where judgment for the debt is obtained against him, the creditor has no right to issue a writ of capias founded on such judgment. The interest and costs exigible under such judgment, being accessories only, follow the nature of the principal debt and do not constitute a new indebtedness having its origin within the province of Quebec, for which a writ of capias could issue.

The question arises in this case whether a capias can be issued upon a demand of assignment made by a creditor upon an insolvent debtor when the debt was created outside of the old province of Canada. The articles relating to capias, as they existed in the original Code of Civil Procedure, differ somewhat widely in form, though not so widely in reality, from those which are in our present Code of Procedure.

Art. 797 of the old Code provided:—

> When the amount claimed exceeds $40, the plaintiff may obtain from the prothonotary of the Superior Court a writ of summons and arrest against the defendant if the latter is about to leave immediately the province of Canada, or if he secretes his property with intent to defraud his creditors.

Art. 799 provided that:—

> The writ may also be obtained if the affidavit establishes, besides the debt, that the defendant is a trader, that he is notoriously insolvent, that he has refused to arrange with his creditors or to make any assignment of his property to them or for their benefit, and that he still carries on his trade.

Art. 806 provides that a writ cannot issue

> for any debt created out of the province of Canada, nor for any debt under $40.

It is plain that art. 799 referred to the Insolvent Act of Canada, which was then in force, but has since been repealed, and that article would, consequently, lose all its application at the present time.

The first revision of the Code made changes in the order and wording of the articles and combined art. 806 with the article authorizing the issue of a capias, but broadening it somewhat, as follows:—

> Art. 895. The plaintiff may obtain a writ of summons and arrest against the defendant whenever a personal debt amounting to $50 or upwards is due him, and such debt has been created, or is made payable, within the limits of the province of Quebec, in any case where the defendant . . . is a trader who has ceased his payments and has refused to make a judicial abandonment of his property for the benefit of his creditors, although duly required to do so.

This is a replacement of art. 799, which referred to the Fed-

eral Insolvent Act, with such alterations as to make it applicable to Act 48 Vict. ch. 22, relating to abandonment of property, and which Act provides as follows:—

> Art. 763. Any debtor arrested under a writ of capias *ad respondendum* and every trader who has ceased his payments, may make a judicial abandonment of his property for the benefit of his creditors.
>
> In the absence of capias, no abandonment can be made if the debtor has not been so required as hereinafter provided.
>
> 763*a*. Every trader who has ceased his payments may be required to make such abandonment by a creditor whose claim is unsecured for the sum of $200 and upwards.

So that there appears now no doubt that a writ of capias can issue against a trader who has ceased his payments, upon the demand of a creditor whose claim originated outside of the provinces of Quebec and Ontario. The result is that a foreign creditor can demand an assignment, but he has no means whatever to force a debtor to make it. But it is said: Supposing the original debt was created outside of the old province of Canada, the costs upon the action and upon the demand of assignment have been incurred in this district, and therefore would constitute a sufficient ground for the issue of a writ of capias so far as such costs were concerned.

As I have before said, that position is destroyed by the judgment above cited. It is true that that judgment was rendered before the amendment in our law with regard to costs which gives the attorney of the litigant distraction of his costs *de plein droit*, practically making the attorney the owner of these costs, in which case the party can only become owner of them by paying his attorney, whereupon he would be subrogated, also *de plein droit*, in the attorney's rights.

I am not prepared to say that this alteration in the law relating to costs would be sufficient to change the decision with regard to these costs as related to the principal debt, given by the King's Bench as above. In any event there is no absolute proof in this case that the plaintiff has paid these costs. It is true a witness swears that they have been paid, and that a receipt was given for them. But that receipt is not produced in the record. It seems to me that, in accordance with the preponderating jurisprudence of this Court, the failure to file the receipt in question vitiates the proof.

The result is that the judgment under review must be confirmed.

Appeal dismissed.

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Nov. 30.

HAMPSON v. DUPUIS et al. and CITY OF MONTREAL (mis-en-cause)

Quebec Court of King's Bench, Archambeault, C.J., Lavergne, Cross, Carroll, and Gervais, JJ. Montreal, November 30, 1912.

1. EMINENT DOMAIN (§ II C—94*a*)—POWERS OF ARBITRATORS TO AMEND AWARD PRIOR TO FILING.

The powers of the expropriation commissioners of the city of Montreal do not cease until their final report is filed and published, and until such publication they may revise their awards, decrease or increase the indemnities to be allowed to expropriated parties, and reconsider their decisions, and a mandamus will not lie to compel them to make a return on a resolution which they had reconsidered before the publication of their report.

Statement

THIS was an appeal from the judgment of the Superior Court at Montreal, Saint-Pierre, J., dismissing the writ of mandamus issued at the appellant's request to compel the respondents, commissioners in expropriation, to disposit their report in accordance with a special resolution passed in July, 1911, and to set aside their decision of October, 1911, on the ground that at such later date the commissioners where *functi officio*.

The appeal was dismissed.

Argument

Arnold Wainwright, K.C., for the appellant, and with him *Aimé Geoffrion*, K.C., as counsel, submitted the following authorities in support of their right to a mandamus: High, on Extraordinary Legal Remedies, par. 235: Spelling on Injunctions, vol. 2, par. 1395, p. 1214; Tapping on Mandamus, p. 111. After their resolution of July fixing the amount of the indemnities the commissioners became *functi officio*: *Snetinger* v. *Peterson*, Coutlée, Supreme Court Digest, p. 146; *Kelly* v. *MacDonald*, 2 P.E.I. Rep. 173; Boucher, Manuel des Arbitres, p. 361, Nos. 745-6. The refusal to fyle a report according to the first resolution gives the Court the power to issue a mandamus: *The King* v. *Directors of East India Co.*, 4 B. & Ad. 530.

J. A. Jarry, K.C., for the respondents, contended that under city charter the only report having any value was that filed with the city clerk and published, 429, 430, 434, 438, 439, city charter. The authorities cited by the appellant do not apply.

Geoffrion, K.C., in reply.

Archambeault, C.J.

ARCHAMBEAULT, C.J. (translated):—This appeal is from a judgment refusing a mandamus.

On June 23rd, 1911, the respondents were appointed commissioners for the purpose of proceeding with the expropriation of certain properties situated in Longue Pointe ward.

The judgment appointing these commissioners ordered them to make their report on or before July 25th.

The commissioners immediately began their work: they visited these properties, received the claims of the interested parties and proceeded with their enquête. On July 13th the interested proprietors declared their enquête closed, and the city of Montreal,

when called upon to examine its witnesses, declared that it had no evidence to offer and that it submitted to the decision of the commissioners. Thereupon the commissioners immediately fixed the indemnities to be granted to the different interested parties and drew up a declaration containing their decision, to which they appended their signatures:—

> Attendu que l'évaluation portée au rôle de cotisation municipal ne représente pas la valeur réelle des propriétés expropriées, les commissaires s'autorisant de la clause 434 de la charte de la cité telle qu'amendée, fixent comme suit le montant des indemnités, etc.

The appellant was to receive as its share, for diverse properties, the sum of $66,070.

After the indemnities had been fixed the commissioners declared that as regards the Canada Cement Co. they would adjourn the matter pending the decision of the city on an application of this company for permission to have railway switches left on the street and a tunnel underground. And the commissioners adjourned to July 18th.

On July 18th the secretary of the commissioners reported to them that the application of the Canada Cement Co. had not yet been passed upon, and it was therefore resolved to have the delay within which the report was to be made enlarged. The demand for enlargement was made and granted. The delay was extended to September 12th.

This delay proved insufficient, and was again enlarged to October 20th.

On September 25th the city of Montreal made application to reopen the enquête. The majority of the commissioners granted this application on September 26th, and then adjourned to October 2nd. On this day the city examined its witnesses and then declared its enquête closed, and the hearing was adjourned to October 4th.

On October 4th the commissioners decided to reconsider their resolution of July 13th, fixing the indemnities, and adjourned till the next day to fix anew the indemnities.

On October 5th the resolution of July 15th was replaced by a new one granting different indemnities, and that granted to the appellant by this new resolution was only $43,236.30, instead of $66,070, as formerly.

These are the facts which gave rise to the appellant's demand of "mandamus," whereby he prays the Court to order the commission to report to the city of Montreal according to their resolution of July 13th, and to annul and quash the resolution of October 5th, inasmuch as the commissioners were then *functi officio* as regards the properties mentioned in the resolution of July 13th. The Superior Court dismissed this demand. I am of opinion that the judgment is well founded.

The charter of the city of Montreal enacts that the commis-

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sioners shall, after taking what steps they may deem advisable to fix the amount of the indemnities, prepare and sign a report, which is to be filed with the city clerk. The latter thereupon gives public notice thereof, mentioning the day on which the report shall be submitted to the Superior Court for homologation. It is the filing of their report in the office of the city clerk, that is to say, the publication of their judgment, which puts an end to the functions and powers of the commissioners.

Until then they may take all the means they may deem advisable, as provided by law, to establish and fix the proper and precise amount of the indemnities to be paid to the interested parties. They may, after having a first time fixed the indemnity, reconsider their decision as often as they see fit, reopen the case, cancel resolutions previously adopted; in a word, they may do everything which, in their opinion, is just and reasonable as regards the parties in the case, the expropriated persons on the one hand and the city on the other.

The resolution adopted by the commissioners on July 11th is not a report, but a mere proposed report or draft report. By cancelling this resolution on October 5th and in fixing new awards the commissioners acted within the scope of their attributions, and the Court has no power to order them to make a report which would be at variance with their present appreciation of the true value of the lands to be expropriated.

The authorities cited by the appellant do not apply to this case. In all these cases it was held that the arbitrators or commissioners had become *functi officio* because they had, in some way or other, rendered their award public. It is this publication of the arbitration award which rendered such award definitive and final.

In the present case the commissioners deliberated between themselves behind closed doors on July 11th, and the amounts they found on that day cannot be considered as their final decision.

I am therefore of opinion that the appeal must be dismissed.

Appeal dismissed.

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LIDDELL, LESPERANCE & CO., Limited v. LACROIX.

Quebec Court of Review, Tellier, DeLorimier, and Greenshields, JJ. December 31, 1912.

1. EVIDENCE (§ II E 9—205)—PRESUMPTION FROM SILENCE—SETTING ASIDE CONTRACT.

Where reticence is accompanied by such circumstances as to give it an exceptionally misleading aspect, it can be assimilated to an affirmative false statement, and a contract entered into as the result of such reticence will be voided and set aside.

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2. FRAUD AND DECEIT (§ II—5)—FAILURE TO DISCLOSE FACTS—RIGHT TO RESCIND COMPROMISE AGREEMENT.

Where a debtor transfers all his assets, consisting of his stock-in-trade and of an immoveable property, to a third party in payment of such third party's claim on the latter, assuming all of such debtor's liabilities, and the third party calls on a business creditor of the debtor ostensibly as the debtor's agent, and obtains a compromise agreement of fifty cents on the dollar on the representation that the debtor is insolvent and that his stock-in-trade is insufficient to meet his liabilities, but without disclosing that he is the transferee of the debtor's property, or mentioning the deed of transfer and the conditions therein mentioned, and without disclosing the fact that the debtor had an immoveable property, such creditor on discovering the true state of affairs can have the deed of settlement he entered into with such third party set aside as being vitiated by fraud.

Statement

APPEAL by the plaintiff from the judgment rendered by the Superior Court on February 15, 1911, Laurendeau, J., which dismissed his action to have a deed of compensation set aside as being vitiated by fraud.

The appeal was allowed.

J. Lamarche, K.C., for plaintiff, appellant.

J. L. St. Jacques, for defendant, respondent.

DeLorimier, J.

DELORIMIER, J. (translated):—The plaintiff inscribes in review from the judgment rendered by the Superior Court on February 15th, 1911, dismissing his action with costs.

By this action the company plaintiff claims from the defendant the sum of $216.37, due under the following circumstances: One Maurice Drolet, dry goods merchant, was its debtor in the sum of $432.74 for goods sold and delivered. On April 5, 1910, Drolet made in favour of the defendant a *dation en paiement* on his stock and of an immoveable on Parthenais street, in settlement of what he (Drolet) owed him (Lacroix), and the defendant, on the other hand, assumed all the liabilities of Drolet as regards his creditors as per a statement annexed to this deed, which statement shews that Drolet owed his creditors, amongst whom was the plaintiff, the sum of $567.62. After this deed had been signed the defendant called at the plaintiff's office, and claiming he was acting in Drolet's name and interest represented that Drolet's sole asset consisted of his business stock on Ontario street, that he was unable to pay off his creditors in full, that he had disappeared and that he (Lacroix) did not know where he had gone to.

Before accepting any compromise the plaintiff had one of its employees verify whether such stock was really insufficient to pay off Drolet's liabilities, and on said employee's report the plaintiff, which did not know of the existence of the obligation assumed by the defendant by the aforesaid deed of April 5, 1910, accepted a compromise of fifty cents on the dollar in settlement.

On April 11 the company received the first instalment of $70.75, and on April 25 a second instalment of $70.50.

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It was after receiving this second payment that the plaintiff company learned of the deed of April 5 between the defendant and Drolet. It was Drolet who enquired of the plaintiff if it had been paid by the defendant.

Thereupon the plaintiff immediately instructed its solicitors to claim from the defendant the full amount due and a letter was sent to that effect on April 29, 1910. Subsequent to the sending of this letter, an employee of the plaintiff, ignorant of these facts, received from the defendant on May 23, 1910, the third instalment due in accordance with the composition agreement. The plaintiff itself, ignorant of this third payment, had its solicitors write to the defendant a second time on June 18, 1910, claiming the full amount. The letter remaining unanswered, the present action was instituted.

By its action the plaintiff demands the balance of its claim and prays for the annulment of its acceptance of the compromise as being vitiated by the fraud and fraudulent manœuvres of the defendant.

The defendant pleads that the plaintiff agreed to discharge Drolet on payment of the sum of $216.37; that in April, 1910, Drolet was unable to continue his business; that by the deed of April 5, 1910, the defendant, himself a creditor of Drolet, undertook to obtain discharges from all of his creditors; that the compromise agreed to by the plaintiff was absolutely necessary; that when the last instalment was paid the plaintiff knew of the deed of April 5, 1910, and that this final receipt absolutely binds the plaintiff, and the plaintiff, in any event, obtained more under the compromise than he could have got had Drolet made an abandonment of his property.

The plaintiff joined issues on these facts. The last receipt signed by the plaintiff's employee having been revealed by the defendant at the trial only, the plaintiff obtained permission to amend its declaration by adding another paragraph. The trial Judge dismissed the action with costs, and the judgment says:—

> Considérant qu'après la passation du dit acte du 5 Avril, 1910, et lors du compromis, le défendeur n'était pas le débiteur de la demanderesse; qu'il n'était pas obligé de faire connaître à la demanderesse l'existence du dit acte, que Drolet et lui pouvaient annuler, si la demanderesse eut refusé le compromis; qu'il n'a fait aucune représentation à la demanderesse qui fut de nature à l'induire an erreur ou à la frauder; que la demanderesse n'a demandé maintenant, et que la répresentation faite par le défendeur que Drolet était incapable de payer ses créanciers était vraie.

(The learned Judge reviewed the evidence shewing the facts to be practically as alleged by the plaintiff, and proceeded:—)

The fact that the defendant did not disclose to the plaintiff the passing of the deed of April 5, 1910, whereby he was being given in payment all of Lacroix's assets (stock, moveables and

immoveables) on his assuming the payment of the plaintiff's claim, constitutes, in our opinion, not only an incorrectness, but a fraudulent reticence on the part of the defendant. The plaintiff was evidently led into error by this fraudulent reticence. The defendant considered that it was to his advantage to accept Drolet's assets and to assume the plaintiff's claim. He withheld this most material fact from the plaintiff and left it under the impression not only that Drolet was insolvent, but that he had disappeared; and, furthermore, the defendant never disclosed the fact that Drolet had an immoveable property which had been transferred to him. Concealment of these facts constitutes fraudulent manœuvres which influenced the plaintiff's decision."

These principles of our law are firmly established and recognized by authors and jurisprudence alike. When reticence is accompanied by such circumstances as to give it an exceptionally misleading aspect, it can be assimilated to an affirmative false statement: Pothier, Oblig., Nos. 28-31; Larombière, on art. 1116 C.N.; Beaudry, Lacantinerie, 2nd ed., Obl. vol. 1, No. 102 *et seq.*; 3 Aubry and Rau, 343 bis, note 22; 24 Demolombe, No. 178; Fuzier-Herman, C.C., ann. vol. 2, on art. 1116 C.N. p. 975 *et seq.*; Beauchamp, art. 993, C.C.; DeLorimier, Bibl. C.C. on 993 C.C. As to the acceptance of the delegation of payment by the plaintiff, a question which is hardly seriously contested, there can be no doubt of the sufficiency thereof under the circumstances of this case: C.C. 1169, 1173, 1174, 1180; *Poirier* v. *Lacroix*, 6 L.C.J. 302; *Bedell* v. *Smart*, 6 Que. S.C. 336; *Moore* v. *Smart*, 6 Que. S.C. 432; *Ward* v. *Royal Can. Ins. Co.*, 2 Que. S.C. 229; *Fry* v. *O'Dell*, 12 Que. S.C. 263; *Dupuis* v. *Cédillot*, 10 L.C.J. 338. There is no need to have Drolet called into this suit, as we are only concerned with the plaintiff's claim and its relations with the defendant.

For these reasons we are of opinion that the judgment *a quo* must be reversed with costs and the defendant condemned to satisfy in full the balance of the plaintiff's original claim and the deed of composition is declared null and void.

Appeal allowed.

Re VINE.

Ontario High Court, Sutherland, J. November 29, 1912.

EXECUTORS AND ADMINISTRATORS (§ IV C 1—100)—DISTRIBUTION—RETENTION OF MONEY PAID INTO COURT—DETERMINATION OF VALIDITY OF CLAIM.

On an application to the court for an order for payment out of the money deposited in court by the administrators of an estate, under Rule 1258 (Ont. C.R., 1897) of the shares of certain heirs, where it appears that there is a claim against the estate by one who alleges himself to be an heir, a sufficient amount will be ordered to be retained in court to cover that claim and an issue directed to determine the fact of whether or not the claimant is a lawful heir.

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1912

RE VINE.

MOTION by the administrators of the estate of Frances Penton Vine and by William Vine and William Connon for payment out of Court of the shares of the said Vine and Connon.

J. M. Godfrey, for administrators and two beneficiaries.

R. U. McPherson, for Mary Seagriff.

T. Hislop, for Ellen Agnes Haughton.

E. C. Cattanach, for the infants.

Sutherland, J.

SUTHERLAND, J.:—On the 22nd January, 1910, Frances Penton Vine died intestate in Toronto owning certain real estate on Broadview Avenue, and leaving the following persons alleged by the applicants to be all the heirs entitled to share in the administration of her estate, viz., a son, William Vine; a daughter, Mary Seagriff; the following children of a deceased daughter, Sarah Ann Hibbitt, viz., Henry Hibbitt, George Hibbitt, James Hibbitt, Florence Crump, Edward Hibbitt, Frances Waring, and Edith Robertson, and three infant children of Charlotte Sorace, a deceased daughter of the said Sarah Ann Hibbitt, whose names are not mentioned in the material filed upon the application, but who were represented on the motion by the Official Guardian.

One William Connon has purchased the shares of the said George Hibbitt, James Hibbitt and Florence Crump in the estate. The Trusts & Guarantee Company, Limited, were appointed administrators of the estate.

It is said that all the assets of the estate have been realized and the accounts passed by the Surrogate Court of the County of York. The administrators have paid into Court to the credit of the estate under Rule 1258 the sum of $5,418.35.

This is an application for an order for payment out to William Vine and William Connon of their shares of the said estate.

A difficulty has arisen as to the amounts to which the respective heirs are entitled. It appears that in addition to the heirs hereinbefore mentioned one Ellen Agnes Haughton claims to be a daughter of the intestate and entitled to a one-fourth share in the estate. It was suggested on the application that one-quarter of the said $5,418.35 be allowed to remain in Court together with an additional $500, and that the balance be paid out to the parties claiming to be entitled, other than the said Ellen Agnes Haughton, and that an issue be directed to determine whether she is a lawful heir. I think that perhaps for the present all the money above $3,000 may well be retained in Court and that that sum may be paid out as follows:—

$1,000 to William Vine.

$1,000 to Mary Seagriff, and

$1,000 among the representatives of Sarah Ann Hibbitt in the proper proportions to which they are entitled, the applicant Connon to be paid the shares of the said George Hibbitt, James Hibbitt and Florence Crump.

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I direct an issue to determine the fact of whether or not the said Ellen Agnes Haughton is a lawful daughter of the intestate, and in such issue she will be the plaintiff.

The contest now is really between her and the heirs. If the latter can agree upon some one of them to appear and represent all of such heirs, such person may be appointed for that purpose. If not, then all the heirs will be the defendants. The money being now in Court the administrators have practically no further interest in the matter. If it were not for the contention of Ellen Agnes Haughton, the difficulty in the way of the administration of the estate and distribution of the money would not have arisen and the other heirs would be entitled to receive the money. Under these circumstances the costs of the application may well, and properly should be left, I think, until the determination of the issue and then disposed of by the Judge who tries the same.

Order accordingly.

FLEMING v. TORONTO R. CO.

ONT.

C. A. 1912

Nov. 19.

Ontario Court of Appeal, Garrow, Maclaren, Meredith, and Magee, JJ.A. November 19, 1912.

1. EVIDENCE (§ II H 1—251)—ELECTRIC RAILWAY—EXPLOSION IN CONTROLLER OF CAR—EVIDENCE OF WANT OF CARE.

Where an explosion occurs in the controller of a car, which controller was entirely under the management of the defendant carrier, and the resulting accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords of itself sufficient evidence that the accident arose from want of care, in the absence of explanation by the carrier.

[*Scott* v. *London Dock Co.*, 3 H. & C. 596, followed.]

2. EVIDENCE (§ II H 1—251)—REPAIR OF APPARATUS—BURDEN OF SHEWING PROPER REPAIR.

Where a controller of a car is shewn to have been "overhauled" by the defendant carrier shortly before an explosion occurred resulting in injury to a passenger, the burden is upon the defendant to shew that it had been properly done.

3. CARRIERS (§ II G 1—111)—VEHICLE—NEGLIGENCE—PROPER INSPECTION AND REPAIR—QUESTION FOR JURY.

Whether there had been proper inspection and rebuilding of a defective controller of a car under the management of the defendant carrier so as to negative want of due care on its part in an action for resulting injuries to a passenger, are proper questions for a jury.

Statement

APPEAL by the defendants from the judgment at the trial before Meredith, C.J., and a jury, in favour of the plaintiff. The action was brought by the plaintiff to recover damages said to have been caused to him while a passenger upon the defendants' railway, owing to the defendants' alleged negligence. The case has been twice tried, resulting each time in a judgment in

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favour of the plaintiff. The jury, in answer to questions, found that the plaintiff's injuries were caused by the negligence of the defendants, such negligence consisting in using a rebuilt controller in a defective condition, and not properly inspected; the motorman was guilty of negligence in not applying the brake, which would have prevented the accident; and there was no contributory negligence.

Statement

The appeal was dismissed.

D. L. McCarthy, K.C., for the defendants.

H. D. Gamble, K.C., for the plaintiff.

Garrow, J.A.

GARROW, J.A. (after stating the facts):—The only question which we are called upon to determine upon this appeal is, was there sufficient evidence proper for the jury upon which they might reasonably find as they did, and in my opinion there was, except perhaps as to the motorman's negligence, and particularly as to its bearing upon the result. The latter, especially, I, upon the evidence, greatly doubt; so much so that if the case depended upon that finding alone I could not approve. But as the earlier findings are in themselves, if sustained, sufficient, I do not further discuss that aspect of the case.

The full and careful charge of the learned Chief Justice was not objected to.

In opening his address the learned Chief Justice said: "The main facts are simple. Any difficulties there are in the case arise from the view you take of the somewhat conflicting evidence by expert witnesses, and how far you give credit to the testimony generally of the witnesses who have been called."

This extract seems to furnish the keynote, not only of the charge, but of the case itself. It is not in dispute that something unusual occurred on the occasion in question, the outward manifestation of which was a loud explosion followed by flame and smoke, and by panic on the part of the passengers, in the course of which the plaintiff fell, or was forced out of the car, and received severe injuries.

Nor is it, I think, in serious dispute that the seat of the defect was in the controller, resulting in the formation of a short circuit. Both Mr. McCrae and Mr. Richmond seem to agree upon that, the former saying: "In my opinion if you take the area of the controller—confined in the controller, is the area in which the accident occurred," and the latter, that the controller must have been in a defective condition or the accident would not have happened. The latter, it is true, also criticised the original construction of the controller. But he admitted that it was of standard make, and of a type in general use, and was quite unable to point to a case in which his ideas had been carried out. So that if the controller had been otherwise perfect this criticism would, I think, have been harmless.

But the controller was not as originally built, but had been "overhauled" by the defendants, which is explained as, taking it apart and putting in new parts in the place of parts which had become worn.

The circumstances seem to me to bring the case within the principle often acted upon, laid down in *Scott* v. *London Dock Co.*, 3 H. & C. 596, at p. 601, that "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 defendant, that the accident arose from want of care." There is, as I have pointed out, practical agreement in the evidence of the experts that the accident was a very unusual one, and one that could not have happened if the controller had been in proper condition. It was certainly under the care and management of the defendants' servants. It had at one time, not long before the accident, become so worn out that it had to be rebuilt, and the onus under the circumstances was, I think, upon the defendants to shew that that had been properly done, an onus not in my opinion discharged by the evidence which was given.

Then as to the inspection—inspection from time to time of the controller is admittedly necessary, and inspection of a kind was, upon the evidence, probably had not long before the accident. But it, too, as in the case of the evidence as to the rebuilding of the controller, was of an unsatisfactory, general, nature, quite insufficient to convince that such an inspection had recently been had as would probably have discovered the defects if there were any.

Under these circumstances it seems to me that both questions were properly for the jury, and that the appeal should be dismissed with costs.

MACLAREN, MEREDITH, and MAGEE, JJ.A., concurred.

Maclaren, J.A.
Meredith, J.A.
Magee, J.A.

Appeal dismissed.

QUE.

C. R.
1912

Dec. 31.

GERVAIS v. COSTELLO.

Quebec Court of Review, Tellier, DeLorimier, and Greenshields, JJ.
December 31, 1912.

1. LANDLORD AND TENANT (§ III C—55)—BUILDINGS—LIABILITY OF LANDLORD TO BOARDERS FOR INJURY BY DEFECTS IN.

The proprietor of a building which burns down owing to a defect in construction (*e.g.*, a single brick chimney, one side of which is placed right along wood), which by law he is bound to know, is responsible in damages to his boarders for the value of their effects destroyed as a result of such fire.

Statement

THIS was an appeal from the judgment of the Superior Court for the district of St. Francis, Hutchinson, J., rendered on December 26, 1911, maintaining the plaintiff's action in damages to recover the value of her effects burned as a result of a fire that destroyed the defendant's premises.

The appeal was dismissed, Tellier, J., dissenting.

Hector Verret, for plaintiff, respondent.

P. Q. Juneau, for defendant, appellant.

Greenshields, J.

The opinion of the majority of the Court was delivered by

GREENSHIELDS, J.:—The facts in the present case are as follows:—

The defendant, in January, 1910, bought a hotel at Windsor Mills. This was a three storey wooden frame building, encased with brick. It had been built for about three or four years previous to its purchase by the defendant. In the interior of the building, leading from the cellar up to and through the roof, was a single brick chimney, one side of which was placed almost against the wooden planking or the frame of the building, and no protection was placed between the brick and the wood.

The plaintiff had been a boarder in the hotel for some three or four years previous to the purchase by the defendant, and continued as a boarder after the defendant acquired the building. She occupied one room.

On the 4th of January, 1911, the building was almost completely destroyed by fire.

The fire was first noticed about twenty minutes past six in the afternoon, in the second storey of the building—the smoke coming out of the ceiling and walls. Property belonging to the plaintiff to the value of $672 was completely destroyed, and upon which the defendant had no insurance. The defendant's building was insured.

The plaintiff brings action, alleging the fact that she had been a boarder in the defendant's hotel for some years; alleging the occurrence of the fire; the complete destruction of the hotel; the loss of her personal effects; their value; her freedom from fault in connection with the fire; the cause of the fire as being

due to a defect in the chimney, which defect was known to the defendant, who neglected to have it repaired.

By his first plea, the defendant admits the proprietorship of the hotel; admits the plaintiff was a boarder; admits that his hotel was destroyed by fire, and alleges his ignorance of the cause of the fire, and denies the other allegations of plaintiff's declaration.

By a second plea the defendant alleges: That on the 10th of January, 1910, he purchased the hotel, which was then new, and everything was in good order; that he acted in the operation of the hotel and its conduct as a prudent administrator; that the fire was a fortuitous event, and no blame could be imputed to him; that he used every precaution possible in the safe-keeping and care of the hotel, and that its destruction was the result of *force majeure;* that if the defendant had the effects mentioned, the same were not necessary, as the hotel was well furnished, and moreover, the plaintiff never declared to the defendant that she had such property in the hotel; that he (defendant) lost heavily by the said fire, and asks for the dismissal of plaintiff's action.

Answer is made to the plea by the plaintiff, denying the allegations thereof; denying that the defendant acted as a prudent administrator in leaving the chimney of the said building in a defective condition; and further alleges the incompetency of the furnace man employed by the defendant; that the defendant admitted in a declaration which he signed in order to recover insurance; that the bad state of the chimney was the cause of the fire, and reiterates the responsibility of the defendant towards her, a boarder.

The learned trial Judge maintained plaintiff's action, principally upon the following considerants:—

"Considering that there was defect in the construction of the chimney, and that the fire apparently arising from or near the chimney, the presumption is, that it was caused from a defect in the chimney;

"Considering that the defendant was the owner of the hotel, and under art. 1055 of the Civil Code was responsible for the damage caused by its ruin when it has happened through the want of repairs or from an original defect in construction."

A careful examination of the proof leads to the conviction, that in the construction of this chimney, there was manifest negligence. There was a defect in its original construction. As above stated, it was a wooden frame building, encased with brick. The chimney itself was a single brick chimney. One side of the chimney was placed—the defendant himself admits—right along the wood. The wood was in no way protected from the heat that might develop in the chimney, nor was any pro-

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vision made, in case the chimney cracked, to prevent fire or sparks while passing up the chimney to escape and thereby from igniting the wood. Here it is of interest to remark, that although the hotel was heated by a furnace, and that a coal-burning furnace, some days previous to the fire the furnace grate had broken, necessitating the use of wood. Now, this is of importance only in that a fire made from wood develops and allows the escape of sparks to a much greater extent than a coal fire. The manner in which the chimney was constructed of single brick could have readily been ascertained by the slightest examination. The removal of a very small part of the plaster in the walls would have shewn the manner in which the chimney was constructed.

I am of opinion that there was a defect in construction; I am of opinion that the defendant, as proprietor, was bound to know of that defect; I am of opinion that the fire resulted from a defect in the construction of the chimney. The defendant was of the same opinion at one time, when he made a claim, not against one, but against several insurance companies, he stated under oath, when asked to assign a cause for the fire, that the cause was a "defective chimney."

I should maintain the judgment *a quo*, under both art. 1053 and art. 1055 of our Code. Under art. 1053 I say that the plaintiff's damages resulted from the fault and negligence of defendant. Under art. 1055 I say that the ruin or destruction of the plaintiff's property was due to a defect in the original construction, for which the defendant is responsible; whether he knew or knew not of that defect at the time, in my opinion, is indifferent, and in any case he is responsible.

Tellier, J.

TELLIER, J., dissented.

Appeal dismissed.

VINEBERG v. JONES.

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Quebec Court of King's Bench, Archambeault, C.J., Lavergne, Cross, Carroll, and Gervais, JJ. Montreal, October 31, 1912.

1. EVIDENCE (§ VI F—540)—PAROL EVIDENCE AS TO PROMISSORY NOTE—GUARANTEE OF DEPRECIATION IN VALUE OF SHARES.

Where a loan is made which is evidenced by a promissory note and a cheque is produced shewing payment of the alleged amount of the loan (less discount) bearing the endorsement of the borrower, he is not allowed by parol testimony to prove that he only signed this note as "additional security" at the request of another party to guarantee or secure any depreciation in the value of shares transferred or sold by this latter party to a stranger, the alleged agent of the party who loaned the money, with a right of redemption under the provisions contained in a deed, as this would be varying by parol testimony a written contract.

2. EVIDENCE (§ VI F—540)—PAROL EVIDENCE TO VARY THE CONDITIONS ON WHICH A PROMISSORY NOTE IS DELIVERED.

Parol testimony is only allowed under sec. 40 of the Bills of Exchange Act to prove "conditional" delivery or delivery "for a special purpose only and not for the purpose of transferring the property in the bill," but these words have only a limited application, and when the note is delivered and the property in it has passed, even if only for purposes of security, then parol evidence is inadmissible to vary or explain the contract, and secs. 40 and 41 of the Act do not in fact change the law as to the admissibility or inadmissibility of parol evidence.

[*Burke* v. *Dulaney*, 153 U.S. 229, referred to; *New London Credit Syndicate* v. *Neale*, [1898] 2 Q.B. 487; *Chamberlain* v. *Ball*, 5 L.C.J. 88, followed.]

3. EVIDENCE (§ VI F—543)—ADMISSIBILITY OF PAROL EVIDENCE CONNECTED WITH THE MAKING AND ENDORSEMENT OF A BILL.

Verbal testimony upon facts and circumstances connected with the making and endorsement of a bill, not objected to at trial or hearing can be taken into account by the Court, and such facts and circumstances might be sufficiently cogent to render the defendant's pretensions plausible and constitute a groundwork for the admission of verbal testimony which would, standing by itself, be inadmissible; but the mere assertion of a contemporaneous verbal agreement is one which, being in contradiction of a written contract, cannot be put forward in verbal testimony.

[*Macdonald* v. *Whitfield* (1883), A.C. 733, explained.]

Statement

ACTION on a promissory note for $4,000, amount of a loan to the defendant, who was accommodating one Lubin.

The plea was that prior to the signing and delivering of the note the plaintiff had agreed to advance to the said Lubin the sum of $13,600 on the security of certain shares belonging to the said Lubin, and that the promissory note for $4,000 was simply as collateral security against loss by depreciation of these shares, and that it had been agreed between Lubin, the defendant and the plaintiff that the note should only be used in case any deficiency arose after realizing on the other security—the shares; that the plaintiff had not realized on the shares and had not suffered any loss by depreciation in the market value thereof, and that he had not given any value for the note and that the action was premature.

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Statement

At the trial the cheque which plaintiff gave to the defendant, representing the proceeds of the note, less discount, was produced; the defendant claimed that he had only endorsed this cheque and handed it to Lubin in order to please the plaintiff, who wanted things done that way.

Plaintiff's counsel objected to any parol testimony in support of this plea as tending to vary the written document and proving by parol a different contemporaneous agreement.

The defendant relied on a notarial agreement between Lubin and one Bilsky, whom he thought was a *prête-nom* of the plaintiff. This agreement read as follows:—

Herbert Lubin, of the said city of Montreal, insurance agent, of the first part; and Alexander M. Bilsky, of the said city of Montreal, financier, of the second part, who declared to me, the said notary, as follows:—Whereas, the said Mr. Lubin has this day sold to the said Mr. Bilsky four thousand eight hundred shares in the capital stock of Dobie Mines, Limited, of the par value of five dollars ($5.00) each; Whereas, the said Mr. Bilsky has paid to the said Mr. Lubin for such stock the sum of thirteen thousand five hundred and ninety-one dollars and twenty-seven cents ($13,591.27), which said Mr. Lubin acknowledges to have received from the said Mr. Bilsky previous to the execution hereof; Whereas, said Mr. Bilsky desires to grant to the said Mr. Lubin a right of redemption or taking back said stock upon the terms and conditions hereinafter mentioned; Now, therefore, these presents and I the said notary witness: That the said Mr. Bilsky doth hereby grant to the said Mr. Lubin a right of redemption of said four thousand eight hundred shares of stock so sold to him as hereinbefore recited, at any time before the twenty-fifth day of June next (1911), upon payment to him, the said Mr. Bilsky, of the said sum of thirteen thousand five hundred and ninety-one dollars and twenty-seven cents ($13,519.27) without interest; and in default of the said Mr. Lubin repaying the said sum to the said Mr. Bilsky before the said twenty-fifth day of June next (1911), the said right of redemption will *ipso facto* become null and void and the said Mr. Lubin will forfeit all right or claim whatsoever in or to the said stock without any notice or demand of any kind being necessary by the said Mr. Bilsky, who will be and remain as and from said date, the absolute owner and proprietor of the said stock; that the present agreement is thus made by the said parties subject to the following conditions, to which they and each of them bind and oblige themselves, namely:—1. That should the said stock at any time within the said delay hereinbefore mentioned, sell on the open market at two dollars and seventy-five cents per share or less, the said Mr. Lubin hereby obliges himself within one day from that date, to pay to the said Mr. Bilsky any deficiency therein, so that the said stock shall never stand the said Mr. Bilsky at a less figure than two dollars and seventy-five cents per share, and should the said Mr. Lubin make default in such payment within the said one day, all his right and interest herein shall *ipso facto* become null and void and said stock shall be forfeited to the said Mr. Bilsky in the same manner as hereinbefore set forth. 2. That should the said Mr. Lubin at any time elect to sell the whole or any portion of said stock during the

said delay, he may do so by paying to the said Mr. Bilsky a sum of money equivalent to three dollars ($3.00) per share of said stock, upon payment of which Mr. Bilsky agrees to retransfer to said Mr. Lubin any or all of said shares from time to time upon receiving twenty-four hours' notice. 3. The costs of this deed and two copies thereof shall be paid by the said Mr. Lubin and any expenses of transfer of said stock shall also be paid by the said Mr. Lubin, who undertakes and agrees to have the same properly transferred in the books of the company. The present right of redemption is given by the said Mr. Bilsky in consideration that the said Mr. Lubin doth hereby transfer and assign to him all his right, title and interest in and to five hundred shares of the capital stock of the par value of one hundred dollars ($100) each, in a company which is now being incorporated under the name of the Empire Tobacco Stemming Machine Company, of which company he is one of the incorporators and immediately upon the shares being in condition to be issued, Mr. Lubin agrees that he will transfer such shares to the said Mr. Bilsky and will sign any other documents or deeds of any nature which may be necessary in order to vest said stock in the said Mr. Bilsky absolutely.

Statement

Whereof Acte:—Thus done and passed at the said city of Montreal, on the eleventh day of April, nineteen hundred and eleven, and remains of record in the office of the undersigned notary under the number eleven thousand and three; and after due reading hereof the parties signed in the presence of the said notary.

(Sgd.) HERBERT LUBIN.
A. M. BILSKY.
R. B. HUTCHESON, N.P.

A true copy of the original hereof remaining of record in my office.
R. B. HUTCHESON, N.P.

Judgment was rendered by the Superior Court on November 17, 1911, Saint-Pierre, J., who dismissed the action with costs. The plaintiff inscribed in appeal against this judgment.

The appeal was allowed.

Argument

A. Rives Hall, K.C., and with him *Aimé Geoffrion*, K.C., as counsel, for the appellant, submitted that respondent's case rested on a misapprehension as to Bilsky being Vineberg's agent. No proof of this was made. The relation between the parties is simply that of lender and borrower, and any conventions between Lubin and Bilsky, or Jones and Bilsky, could not affect the rights of the appellant.

The trial Judge was in error in finding that the appellant was to take up the whole stock in Bilsky's name, and in inferring that the appellant was a party to the notarial deed between Bilsky and Lubin. Verbal evidence is admissible to prove want of consideration to a note, but once it is admitted that the note was to operate as a contract, then the respondent could not establish by parol evidence a contract different from that evidenced by the note and cheque.

The contract was not a commercial contract, but a contract of loan or guarantee. Reliance is placed on the leading case of *Abrey* v. *Crux*, L.R. 5 C.P. 37, 46; *Young* v. *Austen*, L.R. 4 C.P.

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553; *Foster* v. *Jolly*, 1 C. M. & R. 703; *Bowerbank* v. *Monteiro*, 4 Taunt. 844; Wigmore on Evidence, Canadian ed., vol. 4, secs. 2435, 2444; *New London Credit Syndicate* v. *Neale*, [1898] 2 Q.B. 487; *Macdonald* v. *Whitfield* (relied on by respondent), 8 A.C. 733, does not contradict the rule that the terms of a written instrument may not be varied or added to by parol. The ruling Quebec case of *Chamberlain* v. *Ball*, 5 L.C.J. 88, likewise favours appellant's contention.

M. A. Phelan, for the respondent, relied on the verbal evidence given as proving that the note had been given as additional or collateral security against depreciation in the value of the stock during the period granted to Lubin to redeem it.

This evidence was legal to prove accommodation and that the note was given in escrow and no consideration received: Halsbury's Laws of England, vol. 2, secs. 817, 818; *New London Credit Syndicate* v. *Neale*, [1898] 2 Q.B. 487; *Bell* v. *Lord Ingestre*, 12 Q.B. 317; *Davis* v. *Jones*, 17 C.B. 625, 633; *Chalmers*, p. 40; *Hébert* v. *Poirier*, 40 Que. S.C. 405. The transaction in this case is a commercial one: *Town of Maisonneuve* v. *Chartier*, 20 Que. S.C. 518; 4 *Pothier, Bills of Exchange*, No. 124; *Hamilton* v. *Perry*, 5 Que. S.C. 76; *Crépeau* v. *Beauchesne*, 14 Que. S.C. 495; *McLaren, Bills and Notes*, p. 47.

Parol testimony is admissible to impeach the consideration of the contract: *Northfield* v. *Laurance*, 21 Révue Légale 359; Storey on Promissory Notes, No. 479; *Macdonald* v. *Whitfield*, 8 App. Cas. P.C. 733; *Abrey* v. *Crux*, L.R. 5 C.P. 37.

Hall, K.C., in reply.

The opinion of the Court was delivered by

CROSS, J.

CROSS, J.:—This is an action taken by the appellant Vineberg against the respondent Jones to recover the amount of a promissory note of which the respondent was maker and the appellant payee.

The defence is in substance that the note was delivered to the appellant subject to the condition that it was to be available as a note only to secure the appellant against loss in the event of a fall in the price of certain shares of stock in the Dobie Mines, Ltd., on which the plaintiff was to realize; that the plaintiff has not realized on the shares or suffered any loss, and that the action is premature.

In his answer to plea the plaintiff denied that the shares had anything to do with the note.

The defence was maintained by the Superior Court, and the plaintiff has brought up this appeal from the judgment by which his action has been dismissed.

The question for decision is whether legal proof of the defence has been made or not.

(The Judge here proceeded to a review of the evidence, from which it appeared that the note was given for accommodation of

one Lubin under the following circumstances. Lubin was owner of 480 shares of stock of the Dobie Mines, Ltd., which he had pledged to his brokers for advances amounting to $13,563, and the brokers had given him notice that they would sell the shares unless they were paid an additional sum by way of margin. Lubin sought to borrow money from one Bilsky, a mining agent, so as to be able to provide the margin and save his shares. Bilsky agreed to assist Lubin, not by way of paying further margin-money to the brokers, but by paying off the brokers and taking over the shares and allowing Lubin a stated delay in which to reimburse him (Bilsky) and redeem the shares. Lubin consented to this and assigned the shares to Bilsky, and a notarial deed was drawn up wherein it was recited that Lubin had sold the shares to Bilsky and that the latter had paid him $13,591.27 for them and it was covenanted that Lubin would have the right to redeem the shares at any time before the 24th June, 1911, on repaying the $13,591.27 without interest, but that in default of such repayment the right to redeem would lapse. There was a further covenant to the effect that if the market price of the shares should at any time within the above mentioned delay fall to $2.75 per share or lower, Lubin would within one day pay Bilsky any deficiency so that the shares "shall never stand the said Mr. Bilsky at a less figure" than $2.75 per share, and that if Lubin should fail to do this within one day his right to redeem should likewise lapse. It further appeared that Bilsky called upon the plaintiff to whom he explained the matter and said that the shares would be a safe investment, or, as he expressed it, "a good buy," at $2 per share. At $2 per share the price of the 4,800 shares would amount to only $9,600, whereas $13,563 were needed to pay off the brokers. Lubin, being applied to for the difference of about $4,000, induced the defendant to consent to give his note for that sum. To this end the defendant called upon the plaintiff and after discussion of the matter went away and later on came back and delivered the note now in question to the plaintiff, but did so after having read the draft of the notarial deed and in his testimony he said that he was willing to give his note in view of the purport of the deed. Under reserve of objection by counsel for the plaintiff the defendant testified that the note was given as "additional security" against fall in the price of the shares and Lubin testified that it was given as

> additional security against depreciation of the stock during the course of the transaction.

They both testified that Bilsky was acting for the plaintiff in the matter, but the plaintiff's name was not mentioned in the deed. Neither was it recited that a promissory note had been given nor was any provision made in it for sale or disposal of the shares in case of lapse of Lubin's right to redeem. After the deed had been signed the plaintiff made out his cheque for the

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$4,000 (less discount) to the defendant's order and sent it to the latter. The defendant did not expect to receive the cheque and at first objected to take it, but, on being assured by Bilsky or Lubin that there would be "no trouble," decided to take it. He specially endorsed it to Lubin and the proceeds of it went with other money to pay off the brokers. It further appeared that Lubin failed to redeem the shares.)

We have now to consider the legal effect of the facts thus put in evidence upon the question to be decided.

In law, the undertaking of any party to a promissory note is inchoate or ineffective until there has been a delivery of the signed note. Then, as declared in sec. 40 of the Act:—

> As between immediate parties, and as regards a remote party, other than a holder in due course, the delivery . . . (*b*) may be shewn to have been conditional or for a special purpose only, and not for the purpose of transferring the property in the bill.
>
> 2. If the bill is in the hands of a holder in due course, a valid delivery of the bill by all parties prior to him, so as to make them liable to him, is conclusively presumed.
>
> And it is declared in sec. 41 that: "When a bill is no longer in the possession of a party who has signed it as drawer, acceptor or endorser, a valid and unconditional delivery by him is presumed until the contrary is proved."

I infer from the argument made for the defendant that he takes the ground that the note sued on falls under the application of clause (*b*) of sec. 40, in other words, that the note was delivered for "a special purpose only, and not for the purpose of transferring the property" in it.

We have been referred to decisions given under the corresponding sec. 21 of the English Act.

I consider that clause (*b*) cannot apply in the circumstances in which the defendant parted with this promissory note. The decisions shew that the words "conditional or for a special purpose only" have a limited application. They arise out of the English-law idea that in order to perfect any contract evidenced by writing there has to be not merely signing but also delivery. Delivery being a necessary step, it follows that a conditional or controlled delivery prevents the contract from taking its proper effect, and a party charged with having entered into a contract is at liberty to shew, even by verbal testimony, that for want of due delivery a contract, though it may purport on the face of the writing to be perfect in form, in reality never took effect or came into existence as a contract. Instances of such can be found in *Pattle* v. *Hornibrook*, [1897] 1 Ch. 25; *Brown* v. *Howland*, 15 A.R. (Ont.) 750, and *Semple* v. *Kyle* (1902), 4 F. 421. I also think that the decision of the Supreme Court of the United States in *Burke* v. *Dulaney*, 153 U.S. 228, to which the Chief Justice has called attention, falls into the same class.

though perhaps it may be said to go farther than do the decisions given in Great Britain and here. A person may sign his promissory note and leave it on his desk. If it were to be stolen or blown into the street and picked up and passed on, it would not take effect as a contract for want of delivery.

That is not the case before us.

The note here in question, on the contrary, was delivered and the property in it was parted with. That, I think, is shewn even by the defendant's own plea that it was to avail the plaintiff as a security.

The note therefore was evidence of a contract actually entered into. That being so, the defendant fell under the operation of the rule that oral testimony is not admissible to vary the contract. In endeavouring to prove a plea to the effect that he was under obligation to pay the note only in the event of a fall in the price of the shares, he was attempting to vary his written obligation to pay absolutely and at all events. In *New London Credit Syndicate* v. *Neale*, [1898] 2 Q.B. 487, evidence was offered by the maker of a bill to prove that he delivered it upon an agreement that it would be renewed at maturity if he should apply for renewal. The evidence was rejected and in the decision in appeal, [1898] 2 Q.B. 487, it was said at 490:—

> If the evidence be to the effect that the document is only delivered as an escrow, or that it is not to take effect as a contract until some condition is fulfilled, it is admissible. But that is not this case. This document was signed and handed over as a bill of exchange, but there was an oral agreement that at maturity it should be renewed, if the defendant required it.

Sections 40 and 41 of the Act do not purport to change and do not in fact change the law as to admissibility or inadmissibility of verbal testimony. As pointed out in the work of Chalmers in the comments upon the corresponding section of the English Act, 2nd ed., at 62:—

> A bill or note must be in writing, and so too must the supervening contracts thereon, such as acceptance or indorsement. It follows that the contracts of the various parties, as interpreted by this Act and by the law merchant, are subject to the ordinary rule as to written contracts. Oral evidence is inadmissible in any way to contradict or vary their effect. But it is admissible (*a*) to shew that what purports to be a complete contract has never come into operative existence; (*b*) to impeach the consideration for the contract; (*c*) to shew that the contract has been discharged by payment, release or otherwise.

The cases there cited as well as those mentioned in Falconbridge, Banking & Bills (1907), p. 421, may be referred to for illustrations. The work of Byles on Bills (1911) may also be cited to the same effect. It seems to me to be clear that, in this case as in the case of *New London Syndicate* v. *Neale*, the proof sought to be made was mainly and in the first instance directed towards proving a varying of the contract. The two cases are in principle undistinguishable.

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If that be so, it appears to me that the recital in the judgment of the Superior Court to the effect that

> verbal evidence was admissible to prove what the consideration of said note was, as well as the circumstances under which it was given and the particular object for which the same was given,

does not meet the difficulty which the case presents. That recital, I consider, is to be taken as a proposition which must be subject to the observance of the rule against making verbal evidence to vary or contradict a written contract. Section 41 of the Act in the words "until the contrary is proved" obviously contemplates the making of proof in negation of a valid or unconditional delivery, but it should be proof made in compliance with the rules of law.

I regard the decision of this Court in *Chamberlain* v. *Ball*, 5 J. 88, as authoritative, and observe that it was followed in *Letellier* v. *Cantin* (1897), 11 Que. S.C. 64.

The same view also appears to prevail elsewhere: *Smith* v. *Squires*, 13 Man. L.R. 360; *Emerson* v. *Erwin*, 10 B.C.R. 101.

The conclusion above indicated may appear to be in some respect in disagreement with what was decided in *Macdonald* v. *Whitfield* (1883), 8 A.C. 733, 6 L.N. 278, in which the head-note reads thus:—

> Where several persons mutually agree to give their endorsements on a bill or note as co-sureties for the holder who wishes to discount it, they are entitled and liable to equal contribution *inter se* irrespective of the order of their endorsements.

That view involved a reversal of the judgment of this Court which had held that the facts proved did not warrant the conclusion that there had been any agreement that the ordinary rule of liability of a prior endorser to a subsequent endorser had been departed from and that, instead, the agreement between the endorsers was one for joint contribution. It was held that the directors (endorsers) had entered into an agreement that they would jointly guarantee the discounting bank repayment of its advances and that in carrying out that agreement they adopted the medium of a promissory note on which they became endorsers. The plaintiff in warranty, who sought to have Macdonald held to indemnify him in entirety, had given answers to articulated questions, presumably with the ordinary legal consequence resulting under our law from such answers in the way of having them avail instead of proof by writings.

In the report of the decision of the Judicial Committee, after a reference to the rules of the law merchant, it is said:—

> He who is proved or admitted to have made a prior endorsement must, according to these principles, indemnify subsequent endorsers. But it is a well-established rule of law that the whole facts and circumstances attendant upon the making, issue and transference of a bill or note may be legitimately referred to for the purpose of ascer-

taining the true relation to each other of the parties who put their signatures upon it either as makers or as endorsers; and that reasonable inferences, derived from these facts and circumstances, are admitted to the effect of qualifying, altering or even inverting the relative liabilities which the law merchant would otherwise assign to them.

But the part of the decision which relates to the question of admissibility of verbal testimony is at page 748 where, commenting on the Scotch case of *Steele* v. *McKinlay*, 5 A.C. 754, which was an action by D. a drawer against the heirs of A., an endorser of a bill based upon the allegation that A. had signed as a co-acceptor or at all events as a surety of the acceptors (his sons), it was said:—

Parol evidence was led, not only in regard to the making and issue of the bill, but also in regard to statements made at various times by the deceased, tending to prove a separate and independent engagement by him to guarantee payment of the bill by his sons. The admissibility of the evidence so far as it bore upon the facts and circumstances connected with the making and endorsement of the bill, was not questioned either at the Bar or by the House. On the contrary, the House did take that evidence into account, although it was ultimately held that the claim preferred by D. was neither supported by the principles of the law merchant nor by any inference derivable from these facts and circumstances. But the House rejected the parol evidence adduced by D. in order to establish an independent contract of guarantee, upon the ground that such a contract could only be proved by a writing properly signed under the 6th section of the Mercantile Law Amendment (Scotland) Act, 1856, which extends to Scotland the provisions of the English Statute of Frauds with respect to mercantile guarantees.

What actually was decided then in *Macdonald* v. *Whitfield*, 8 A.C. 733, so far as respects admissibility of verbal testimony, was that verbal testimony upon the facts and circumstances connected with the making and endorsement of the bill, not objected to at trial or hearing, could be taken into account by the Court, and that, where a rule of law forbade proof of an independent contract of guarantee being made otherwise than by writing, verbal testimony of the making of such independent contract would be rejected.

That is all that purports to have been decided though it may be inferred that verbal testimony of the facts and circumstances was considered admissible.

I think that there is no conflict between that decision and the decision of *New London Syndicate* v. *Neale*, [1898] 2 Q.B. 487, and I take it that the rule applicable here is the general rule stated in the work of Best, Evidence (1911) at p. 216, as follows:—

Generally speaking, where there is a contract in writing, evidence of what passed between the parties by word of mouth at the time of that contract cannot be received, as is well shewn by the decisions both before the Bills of Exchange Act, 1882, and after it, that a contemporaneous oral agreement to renew a bill of exchange is inadmissible.

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Proceeding then upon what has commonly—though perhaps without sufficient ground—been considered to have been decided in *Macdonald* v. *Whitfield*, 8 A.C. 733, we are brought to consider whether or not it results from "the whole facts and circumstances attendant upon the making" and delivery of the note here sued on that the "true relation" of the defendant to the plaintiff, instead of being the ordinary or law-merchant relation of a maker to a payee of a note was something different, namely, a legal obligation of a maker to a payee, which was only to take effect in a certain event which had not happened at the time of action brought. In considering that question, I think, in view of the rules of our law respecting commencement of proof by admission of the adverse party and what may properly be inferred by analogy therefrom, that it may be assumed in favour of the defendant that if the "facts and circumstances" disclosed are sufficiently cogent to render the defendant's pretensions plausible, such facts and circumstances can constitute a groundwork for the admission of verbal testimony which, on the grounds above stated, would, standing by itself, be inadmissible.

It appears to me that the facts and circumstances put in evidence in this case do not support the conclusion at which the learned Judge of the Superior Court has arrived.

I consider that any plausibility of inference favourable to the defendant's pretension which might be asserted, could not extend beyond the inference that it was understood that if Lubin had redeemed or realized upon the shares before the note fell due and by doing so had recouped the plaintiff or Bilsky, the plaintiff should not in that event collect the $4,000 from the defendant. That condition of affairs did not arise and I see no plausible ground to infer, from the facts and circumstances as proved, that the plaintiff agreed not to exact payment from the defendant when the note fell due without anything having been done. If Bilsky be taken to have been plaintiff's agent, then in view of Lubin's failure to redeem the shares, the shares have cost the plaintiff about $4,000 more than he was willing to risk upon them, and on that footing the inference would be that the defendant should pay his note.

Taking the evidence of attendant "facts and circumstances," my conclusion is that, in the view of them most favourable to the defendant, their effect is simply neutral, in other words, they are as consistent with the conclusion that the defendant simply borrowed money from the plaintiff with which to help Lubin, and made himself liable as the maker of a promissory note ordinarily does, as they are with the conclusion that the note was given as a mere additional security in the way alleged by the defendant. My own view, however, is that, instead of being neutral in result, they make in favour of the plaintiff.

The effect of that conclusion is that the defendant's plea is without support other than the simple assertion of the defendant and Lubin, made in verbal testimony, to the effect that it was verbally agreed that the note was given only as additional security. That is an assertion of an inference or legal result and not a "fact" or "circumstance" such as the Judicial Committee had in mind when their Lordships decided *Macdonald* v. *Whitfield*, 8 A.C. 733.

For the reasons above stated, that assertion of a contemporaneous verbal agreement is one which, being in contradiction of the written agreement, could not be put forward in verbal testimony.

I consider that it follows that the presumption, declared in sec. 41, that the making and delivery of this note were "valid and unconditional" has not been displaced.

It would be quite destructive of that character of commercial stability which should belong to bills and notes if the right of a contract creditor were exposed to be explained away into nothing by such loose and vague testimony as that here put forward by the defendant and Lubin. A creditor who held a promissory note would be in much the same position as if he had none.

While I consider that this case falls to be decided by the question of admissibility or inadmissibility of the verbal testimony, it may appropriately be pointed out that the evidence of the defendant and of Lubin is too vague to shew definitely what is to be understood by "additional security" and that there is no evidence at all to support the averment in the defendant's plea to the effect that the plaintiff agreed to realize upon the shares before calling upon the defendant to pay the note.

My conclusion therefore is that the appeal should succeed and that there should be judgment for the plaintiff.

While, in making the foregoing detailed observations, I speak for myself only, I may add that it is our unanimous opinion that there was error in the admission of verbal testimony to shew the making of a verbal agreement contemporaneous with the giving of the note and in contradiction of the purport of the note, and that the judgment should be reversed.

Appeal allowed.

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FEE v. TISDALE.

Ontario Divisional Court, Clute, Sutherland, and Kelly, JJ.
November 19, 1912.

1. CONTEMPT (§ I A—2)—INTERFERING WITH PROPERTY—SUPPLEMENTARY PROCEEDINGS—COMMITTAL ORDER.

Where an appointment was obtained for the examination of defendant as to her estate and effects, and it appeared thereon that the plaintiff's share of an estate had never been received by defendant, and that she did not obtain it and pay it over to plaintiff, as she had an outlawed set-off in excess of the amount of said share, and would not assist the plaintiff by bringing the fund into Canada; a motion to commit the defendant, or, in the alternative, to re-examine, for not disclosing her property, or for having concealed or made away with the same, should be dismissed if it appears that the estate in question, for a share in which the plaintiff had recovered judgment, was never within the jurisdiction.

[*McKinnon* v. *Crowe*, 17 P.R. (Ont.) 291, distinguished.]

2. LIMITATION OF ACTIONS (§ I C—20)—PLEADING—COUNTERCLAIM.

A counterclaim for a simple contract debt cannot be successfully pleaded as such, where it could be met by the Statute of Limitations.

[Pollock on Contracts, 8th ed., 685, referred to.]

3. EXECUTION (§ II—20) — RETURN OF — EXAMINATION OF JUDGMENT DEBTOR—PROCESS OF COURT ABUSED.

On an examination of a judgment debtor, where it does not appear that an execution had issued and had been returned by the sheriff *nulla bonâ*, an objection on that ground to the examination is without force, unless it is affirmatively shewn by the debtor that the process of the court has been abused.

[*Grant* v. *Cook*, 17 P.R. (Ont.) 362, referred to.]

Statement

APPEAL from the judgment of the Junior Judge of the County of York dismissing a motion to commit the defendant, or in the alternative for an order for her re-examination for not disclosing her property, or for having concealed or made away with the same, and insufficient answers upon her examination.

The appeal was dismissed.

Grayson Smith, for the plaintiff.
A. B. Armstrong, for the defendant.

Clute, J.

CLUTE, J.:—The plaintiff recovered judgment against the defendant for $412.40 for debt and $27.60 for costs. It does not appear that execution was placed in the sheriff's hands, or that there was a return nulla bona. An appointment, however, was obtained for her examination as to her estate and effects and her means of paying the debt in question. She attended and was examined. It would appear from the examination that the defendant and the plaintiff were two of a family of seven who were entitled to receive as the next of kin some $2,800 from a deceased brother, who had resided in or near Seattle. One J. G. Trenholm, of Seattle, had charge of the business. A portion of the money was paid over to the defendant and she paid out four

shares, amounting to $1,600. The plaintiff's action was brought to recover his share. This never actually came to her hands. It is still in the hands of Trenholm, who has charge of the estate. The defendant's own share was paid to her. She states that the reason why she has not obtained the plaintiff's share from Trenholm and paid it over to him is because the plaintiff owes her and has owed her for many years an amount exceeding the share in question, and that the same is outlawed, and she thinks she is entitled to retain this money under her control, that at all events she is not bound to assist him by bringing it to Canada, it still being in the hands of Trenholm.

On reading defendant's examination it leads one to think that the defendant stated the exact facts of the case. It further appears that the money had never come to her hands or under her control, that there is a debt due from the plaintiff to the defendant, that a right of action therefor is barred by the statute. She could not successfully plead this debt due her as a set-off against the plaintiff's claim. This could be met by the statute: Pollock on Contracts, 8th ed., 685.

Mr. Smith relied upon the case of *McKinnon* v. *Crowe*, 17 P.R. 291. I think that case quite distinguishable from the present. There the judgment debtor, hearing the judgment had gone, or was about to go, against her, turned all the property she had into money and sent it to a friend in a foreign country, where it remained, and upon her examination she refused, or professed to be unable, to give any information as to where it was. After she had ample opportunity to become aware of its position and had done nothing towards satisfying the plaintiff's claim, an order was made for her committal to gaol for three months. Here the case is quite different. This money never came to the hands of the defendant, although a judgment for the same has been recovered against her. It still remains in the hands of the person who had the division of the estate, with the view of inducing the plaintiff to sign a discharge and so authorize the person holding the money to pay over the same to the defendant, whom the plaintiff owes, as her two brothers had done.

His Honour Judge Denton dismissed the motion, and in doing so we think he was right.

The answers of the defendant were frank and full, giving all the information she had and the reasons for her act. See *Herdman* v. *Fewster*, [1901] 1 Ch. 477. The objection by defendant's counsel that it did not appear that an execution had been placed in the sheriff's hands and nulla bona returned, relying upon *Ontario Bank* v. *Trowern*, 13 P.R. 422, is not, we think, well taken inasmuch as a judgment creditor is primâ facie entitled to issue an appointment for the examination of his judgment debtor; and, upon a motion to commit the latter for refusal to

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be sworn, it is for him to shew affirmatively that the issue of the appointment was an abuse of the process of the Court: *Grant* v. *Cook*, 17 P.R. 362.

Under all the facts in this case, this motion should be dismissed with costs.

SUTHERLAND, J.:—I agree.

KELLY, J.:—I agree.

Motion dismissed.

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BUCKLEY v. FILLMORE.

Nova Scotia Supreme Court, Graham, E.J., and Meagher, Russell, and Drysdale, JJ. December 20, 1912.

1. VENUE (§ II—10)—ORDER CHANGING VENUE—AFFIDAVITS IN SUPPORT.

An order changing the venue will not be set aside on appeal on the ground that the affidavit on which it was made was upon information and belief only without disclosing the grounds for the belief, if the court considers that the circumstances of the case justify the order, as notwithstanding the Judicature rules (N.S.) order 36, it is not essential upon such application to disclose the source of information which the practice prior to the Judicature Act (N.S.) did not require. (*Per* Meagher and Drysdale, JJ., on an equal division of the court.)

[*Young* v. *Young Mfg. Co.*, [1900] 2 Ch. 753; *Lumley* v. *Osborne*, [1901] 1 K.B. 532, referred to; and see Chitty's K.B. Forms, 13th ed., 349.]

2. APPEAL (§ V—230)—RAISING QUESTION IN LOWER COURT—OBJECTION NOT RAISED BELOW.

An objection to an interlocutory order that it was made on an affidavit of information and belief which did not disclose the source of such information (N.S. Judicature rules, order 36, rule 3) is too late if first raised in appeal.

Statement

APPEAL from the order of Ritchie, J., made at Chambers, on defendant's application changing the place of trial in the action from the county of Halifax to the county of Cumberland. The action was brought by plaintiff claiming damages on the ground that defendant, at Amherst in the county of Cumberland, in or about the month of May, 1912, maliciously and without reasonable cause, preferred a charge of theft of a stock certificate book against plaintiff before one of the justices of the peace in and for the county of Cumberland and caused the plaintiff to be arrested and imprisoned upon such charge, of which plaintiff was subsequently acquitted.

The order appealed from was made on reading the affidavit of defendant's solicitor, which contained the following among other paragraphs:—

3. Upon the instructions which I have received I verily believe that the defendant has a good defence to this action on the merits. The facts herein deposed to are based on the information and knowledge I have obtained during the course of this action.

Jas. Terrell, in support of appeal:—The affidavit does not shew the source of the information deposed to: *Greenwood* v. *Briggs*, 41 Sol. Jo. 409; *Bidder* v. *Bridges*, 26 Ch.D. 1; *Quartz Hill Cons. Mining Co.* v. *Beall*, 20 Ch.D. 501; *Young* v. *Young Mfg. Co.*, [1900] 2 Ch. 753.

F. L. Milner, contra:—The Court will not interfere with the Judge's discretion: *Munro* v. *McNeil*, 29 N.S.R. 79; *Levy* v. *Rice*, L.R. 5 C.P. 119.

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Argument

GRAHAM, E.J.:—This is an action for malicious prosecution upon a charge of stealing a stock certificate. And on an application made by the defendant to a Judge the venue was changed to another county.

Graham, E.J.

The learned Judge was in my opinion right on the merits in making the order, but it is contended that the affidavit of the defendant's solicitor upon which the application was founded does not state the grounds of the deponent's belief. Under O. 36 r. 3 (N.S. Judicature Act) affidavits shall be confined to such facts as the witness is able of his own knowledge to prove except in interlocutory motions, on which statements as to his belief with the grounds thereof may be admitted. It is in the same words as the English rule and there are very strong cases which leave one no alternative: *Young* v. *Young Mfg. Co.*, [1900] 2 Ch. 753; *Lumley* v. *Osborne*, [1901] 1 K.B. 532.

The important fact is as to the witnesses to be called and what they are likely to prove. The 6th and 7th paragraphs there depend on "I am advised and verily believe" for their effectiveness. Preceding this, in the 3rd paragraph, the deponent says:—

> The facts herein deposed to are based on the information and knowledge I have obtained during the course of this action.

This is the only compliance with the terms of the rule. I am very sorry, but I think it is not sufficient and the objection is insisted on. With us, as formerly in England, the rule has not been always regarded and the old practices was convenient and very suitable for us. Indeed this affidavit follows a form in Chitty's Forms, 13th ed., 349, so closely that it is difficult to distinguish them except that this one has a paragraph which shews the basis of the knowledge and information and that is insufficient. But it may be said that the author contemplated another affidavit to be used shewing actual knowledge. If the deponent had but stated that he had interviewed the witnesses or his client or some one else had done it for him, or had given the sources of his information and knowledge I think that would have probably been sufficient.

I think that this particular objection or any objection to the use of affidavits ought to be taken before the Judge who would, almost as a matter of course, subject to costs if any, allow a

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supplemental affidavit to be filed. And on the authority of *Bidder* v. *Bridges*, 26 Ch.D. 1, I think that leave ought to be given now. That was a purely interlocutory application. It was an affidavit for leave to take the examination of aged witnesses. The supplemental affidavit will be submitted to the learned Judge who heard the application to dispose of the matter.

The costs of the appeal to be the plaintiff's costs in the cause.

Russell, J.

RUSSELL, J.:—In view of the very strong and clear language of the Court in the first of the two cases referred to by Mr. Justice Graham, I think the appeal will have to be allowed. But I think the language so used must have seemed at the moment a little startling, and in view of the latitude that has heretofore been allowed, and sanctioned apparently by one of the forms in Chitty, and the looseness of the practice among the best practitioners as measured by the standard set in the case referred to, the appeal might well be allowed without costs. I agree otherwise with the opinion of my brother Graham.

Drysdale, J.

DRYSDALE, J.:—I am of opinion this appeal should be dismissed with costs.

The affidavit used for change of venue here followed the practice laid down by Chitty (Chitty's K.B. Forms, 13th ed., 349) and I think was sufficient. At all events the point raised on the appeal as to its insufficiency was not taken below when the affidavit was used, when, had it been taken, the alleged defect could have been promptly cured. Not having so taken the point, I think, ought to be held fatal to success before us.

Meagher, J.

MEAGHER, J.:—There is nothing in the Nova Scotia Judicature Act to change the old practice with respect to change of venue. On the facts the order was properly made and plaintiff having failed on the merits must abide the result. Costs should follow the result.

THE COURT being equally divided, the appeal was dismissed without costs.

Appeal dismissed.

Re HAMILTON.

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Dec. 10.

Ontario High Court, Boyd, C. December 10, 1912.

1. WILLS (§ III H—170)—DEVISE AND LEGACY—CONSTRUCTION — LEGACY VESTING ON ATTAINING TWENTY-ONE, IGNORING TRUSTEES' DISCRETION—PAYMENT.

Where a testator by his will gives a share of his estate to his daughter on attaining twenty-one, with the proviso that if the trustees should think it undesirable for any reason that such share should be paid they may defer the payment of the whole or any part to such time or times as they may think best, and in the meantime pay only the annual income arising therefrom to the child; the daughter has a present right on attaining twenty-one to payment in full of the corpus, ignoring the discretionary power granted to the trustees; the law being settled that a sum cannot be given absolutely, coupled with a direction that a trustee of the money is to exercise a discretion as to the time and manner of payment, but such a scheme can be carried out effectively only by making the gift or legacy entirely dependent on the discretion of the trustee, or by means of a gift over to some other beneficiary.

[*Re Johnston*, [1894] 3 Ch. 204; *Re Rispin*, 2 D.L.R. 644, 25 O.L.R. 633, 46 Can. S.C.R. 649, referred to.]

2. EXECUTORS AND ADMINISTRATORS (§ IV C—102)—TIME FOR PAYMENT OF LEGACY—VESTED LEGACY—PAYMENT IGNORING TRUSTEES' DISCRETION.

It is a necessary consequence of the conclusion that a gift has vested, that the enjoyment of it must be immediate on the beneficiary becoming *sui juris*, and cannot be postponed till a later day unless the testator has made some other destination of the income during the intermediate period; a trustee's discretion to defer payment will be ignored in the absence of such a provision.

[*Wharton* v. *Masterman*, [1895] A.C. 186, applied.]

3. WILLS (§ III G 4—138)—DEVISE AND LEGACY—CONSTRUCTION — RESTRAINT ON ENJOYMENT OF LEGACY DURING COVERTURE.

Where the testator provides by a clause of his will for a vested legacy to his daughter, which would entitle her to payment over of the corpus notwithstanding certain trustees' discretion to defer such payment, and where by a later clause of the same will there is a restraint on the enjoyment of the corpus during coverture, the later clause will prevail, the words of the will being satisfied if the restraint is limited to the contemplated coverture, so that when discovered she may dispose of the corpus as she pleases.

[*Tullett* v. *Armstrong*, 1 Beav. 1, 4 M. & Cr. 377.]

4. WILLS (§ III G 4—138)—DEVISE AND LEGACY—CONSTRUCTION—LEGACY TO MARRIED WOMAN WITH RESTRAINT ON ANTICIPATION DURING COVERTURE—"PAID TO HER"—"SETTLED UPON HER."

A bequest to a married woman for her separate use absolutely with a clause restraining her from anticipation during coverture, does not depend upon whether it is a lump sum in cash or an income-bearing fund, but upon whether the testator has shewn an intention that the trustees should keep the property and pay only the income to the beneficiary; and in construing such a clause it is material whether the money is to be "paid to her" or "settled upon her."

[*Re Bown, O'Halloran* v. *King*, 27 Ch.D. 411, referred to.]

5. WILLS (§ III G 4—136*a*))—DEVISE AND LEGACY—CONSTRUCTION—CY PRES DOCTRINE.

The use of the words "I wish" by a testator may carry an obligatory import and suffice to create a trust.

[*Re Bunting*, [1909] W.N. 283; *Liddard* v. *Liddard*, 28 Beav. 266; *Parker* v. *Bolton*, 5 L.J.N.S. Ch. 98, referred to.]

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6. WILLS (§ III G 4—139a)—RESTRAINTS DURING COVERTURE—PROPER AND PRACTICAL FORM OF SETTLEMENT.

Upon an absolute bequest to a married woman creating a trust to restrain anticipation during coverture, the property should be so dealt with that the income of the corpus should for the joint lives of wife and husband be paid to her for life without power of anticipation; that if she should die in the lifetime of her husband, then the corpus should go as she should by will appoint, and in default of appointment to her next-of-kin exclusively of her husband, and that if she should survive her husband, then the corpus should belong to her absolutely; and to practically carry this out the court may appoint a trustee of the settlement and direct that proper conveyances be made as settled by the court or a conveyancing counsel.

[*Loch* v. *Bagley*, L.R. 4 Eq. 122, applied.]

Statement

MOTION by trustee for an order construing the will of the Hon. Robert Hamilton under Con. Rule 938.

G. H. Watson, K.C., for the trustee.
R. A. Hall, and *S. T. Medd*, for legatees.

Boyd, C.

BOYD, C.:—By the will the testator intends and directs that distribution shall be made of part of his estate when his youngest child attains 21 and his widow remains unmarried, but this was apparently frustrated by the income of the whole estate being required for the use of the widow during her life, and only upon her death in May, 1912, has the opportunity for making a division of the estate among the beneficiaries arisen.

By the will the daughter on attaining 21, and after making provision for the widow, is to be paid one fourth part of the remainder of his estate, with this proviso, that if the trustees should think it undesirable for any reason that the share should be paid, the testator authorises them to defer the payment of the whole or any part to such time or times as they may think best, and in the meantime to pay only the annual income arising therefrom to the child.

The testator then provides for a further division upon the death of the widow of that part of the estate set aside for her (which in the result proved to be the whole of the estate), and to dispose of it as mentioned in the paragraph preceding, and closes with a repetition of the provision that the trustees shall have the right to defer the payment of the shares of the children as in the preceding clauses mentioned.

If these clauses stood alone, the situation would be that the trustees are directed to pay to the daughter her fourth share, subject to their discretion in deferring the payment, and meanwhile paying only the income to the beneficiary.

Upon this part of the will the question was raised whether the daughter has a present right to payment in full of the corpus, ignoring the discretionary power committed to the trustees.

The other question raised arises upon the consideration of

a later clause in which the testator thus expresses himself: "I wish all my money that my daughter Annie Seaton may inherit from me should be settled upon herself so that in the event of her marriage it will be impossible for her or her husband to encroach upon the same."

And the further question is still whether notwithstanding this "wish," the money shall still be paid without restriction or condition to the daughter, who is now a married woman.

The will of the testator was made in October, 1866; he died in January, 1893; the widow died in May, 1912. The daughter Annie Seaton was born in May, 1873; attained majority in 1894 and married H.C. Hill in December, 1905. (Whether there is any offspring does not appear).

Upon the early clauses of the will as framed and standing per se, I think, contrary to my first impression, that the better view is that they are inoperative so far as regard any discretionary control of the trustees to defer or withhold the corpus of the daughter's share. The law appears to be settled that a sum cannot be given absolutely, coupled with a direction that the trustee of the money is to exercise a discretion as to the time and manner of payment. Such a scheme can be carried out effectively only by making the gift or legacy entirely dependent on the discretion of the trustee, or by means of a gift over to some other beneficiary. The matter was discussed as if it were a new point by Stirling, J., in *Re Johnston*, [1894] 3 Ch. 304; a decision followed in *Re Rispin*, 2 D.L.R. 644, 25 O.L.R. 633, at 636, which was affirmed in the Supreme Court, *Re Rispin, Canada Trust Co.* v. *Davis*, 46 Can. S.C.R. 649.

But the foundation of the rule is of older standing. The Court of Chancery has always leant against the postponement of vesting in possession, or the imposition of restrictions on an absolute vested interest (*per* Lord Davey in *Wharton* v. *Masterman*, [1895] A.C. 186, at 198, and in the same case, at 192, Lord Herschell deals thus with the doctrine: "That it was regarded by the Courts as a necessary consequence of the conclusion that a gift had vested, that the enjoyment of it must be immediate on the beneficiary becoming sui juris, and could not be postponed till a later day unless the testator had made some other destination of the income during the intermediate period."

The next point discussed was whether the married daughter was entitled to receive her full share, irrespective of the provision that "the money inherited" from her father should be "settled upon herself," etc. This later discretion, if it conflicts with the earlier one, must prevail according to the usual rule. It perhaps does not so much conflict as deal with this testament of his bounty in another point of view; i.e., the element of marriage is introduced, and the desire is expressed to protect

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the wife from the control or influence of the husband. And what is arrived at is a partial restriction on the enjoyment of the legacy so that it shall not "be encroached upon," i.e., alienated or anticipated during coverture. In this view this clause may well stand with and modify the other. That is to say, both yield this meaning: this money representing the share of the estate is to be given to her as her own absolutely, provided only that during coverture she shall enjoy it to her separate use (i.e. settled upon herself), and so that it shall not be encroached upon by her or her husband during coverture. After coverture, the restriction ends and she has it as if unmarried.

The restraint is annexed to the separate estate only, and the separate estate has its existence only during coverture: Lord Langdale in *Tullett* v. *Armstrong*, 1 Beav. 1, and 4 M. & Cr. 377. The words of the will are satisfied if the restraint is limited to the contemplated coverture which is now actually existing, and it may well end therewith: so that when discovered, she may dispose of the corpus as she pleases.

Of the cases cited for the daughter *Re Hutchinson*, 59 L.T. 490, is really in support of the view that the clause is valid. The gift was in that case to a daughter unmarried with a request that she should not sell or dispose of any part, and it was held that this request did not act in derogation of the absolute gift to the daughter. There was no intention from the words used to indicate "that a restraint upon a relation was meant that would operate" only during coverture—there was no reference to the possible marriage of the daughter in that will. And the Court held that no such limited restraint was in the mind of the testator, but we find just the contrary as to this testator. So *Re Fraser* (1897), 45 W.R. 232, is a case decided with much doubt by Kekewich, J., who held that where a legacy was to be paid to a married woman for her separate use without power of anticipation the cases compelled him to reject these last words and to order the corpus to be paid to her in the peremptory words of the will. He was giving effect to *Re Bown*, 27 Ch. D. 411.

The rule there laid down (*Re Bown*, 27 Ch.D. 411) was that when the bequest is to a married woman for her separate use absolutely, with a clause restraining her from anticipation, the question whether that restraint is effectual does not depend upon whether it is a lump sum in cash or an income-bearing fund, but upon whether the testator has shewn an intention that the trustees should keep the property and pay the income to the beneficiary. And the whole decision turned upon the words of the trust which were *to pay* to the married woman. If these words were found in the later clause of this will, as they do appear in the earlier one, I should be bound by this case also.

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But the words are different in the later clause, and they are the prevalent words: viz. the money is (not to be paid to her) but "settled upon her," which in my opinion completely differences the present will from the others in the citations. Comment has been made on the word used, "I wish," as not being sufficient to create a trust: it may carry an obligatory import, and it has been used by the testator in the context of the will in that sense: *Re Bunting*, 1909, W.N. 283, *per* Joyce, J., and *Liddard* v. *Liddard*, 28 Beav. 266; *Parker* v. *Bolton*, 5 L.J.N.S. Ch. 98, is by no means as strong a case as this. The other words "settled upon herself" have a well-known testamentary significance. For instance the form of settlement involved is shewn by *Loch* v. *Bagley*, L.R. 4 Eq. 122, where the discretion was to "settle" the daughters' shares upon themselves "strictly." That was extended by the Court to mean that the property should be so dealt with that the income of the share should for the joint lives of wife and husband be paid to her for life without power of anticipation: that if she should die in the lifetime of her husband, then her share should go as she should by will appoint, and in default of appointment to her next of kin exclusively of her husband, and that if she should survive her husband, then the share should belong to her absolutely.

Some such form is applicable to the present case: there should be a trustee of the settlement provided, and proper conveyances settled by the Court or a conveyancing counsel if the parties cannot agree: to whom the trustee of the will may discharge himself by a transfer of the fund.

This is a proper case for the estate to bear the costs to be taxed.

Judgment accordingly.

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Nov. 22.

Quebec Court of Review, Tellier, Archibald, Martineau, JJ.
Montreal, November 22, 1912.

1. EVIDENCE (§ II K—317)—MEANING OF "CHILD"—QUE. C.C., ART. 980.

Although the word "child" in C.C. 980 means not only child in the first degree, but all descendants, this presumption of law may be rebutted by other proof of the intention of the testator in making the will.

2. WILLS (§ II H—170)—TIME FOR EXPIRY OF EXECUTORSHIP—MEANING OF "CHILDREN."

Where a testator fixes the date of expiry of executorship of his will as "at the age of majority of the eldest of my said children up to which date my property will remain in the hands and under the administration of my testamentary executor," this clause cannot be interpreted as extending the word "child" to the grand-children in case the eldest child should be dead.

[*Amyot* v. *Dwarris*, [1904] A.C. 268, followed.]

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APPEAL by the plaintiff from the judgment of the Superior Court, DeLorimier, J., rendered at Montreal on March 10, 1911, dismissing his action to compel the defendant to render an account of her administration as testamentary executrix and to give up possession of all the property which the defendant held under such executorship.

The appeal was allowed.

J. C. Lamothe, K.C., for the plaintiff, appellant.

J. Adam, K.C., for the defendant, respondent.

Archibald, J.

ARCHIBALD, J.:—This is an appeal from a judgment which has dismissed the plaintiff's action.

The plaintiff's grandmother, Dame Azilda Ledoux, wife of Zotique Ledoux, made her will at Montreal on the 14th September, 1895, and died on the 16th September, 1905. In her will she made a clause as follows:—

> I give and bequeath to all my children, born and to be born of my marriage with Zotique Ledoux, all my goods of every description, to be divided between them in equal portions, making them my universal legatees, but to take possession only at the age of majority of the eldest of my said children, up to which date my property will remain in the hands and under the administration of my testamentary executor, but the revenues are to be employed for the education of my children.

It was then provided that, if it should happen that any of her said children should die before attaining the age of majority and without legitimate descendants, it was her intention that the part of such one deceasing should accrue to the others, and so on, until the last one should die without leaving any legitimate heirs; but in case of all dying without leaving legitimate heirs, she willed the property to her mother, Dame Marie Cardinal, the defendant, whom she also constituted her testamentary executrix, and whose power she continued beyond the year and a day, and until the eldest child of the testator should become of age or be married.

It seems that when the will was made, although several children are mentioned, there was only one then born, viz., Blanche Ledoux, who was born in 1883 and died in August, 1905, at the age of 21 years and some months; but she had previously married the plaintiff and they had a daughter, Jeanne, to whom plaintiff was appointed tutor and who brings action for his daughter, alleging that the condition extending the right of the defendant to act as testamentary executrix became *caduque* by the death of Blanche Ledoux before her mother, and that, at the death of the mother, if the defendant had any right to become testamentary executrix at all, it was only during the time allowed by the will for the execution of the will, viz., one year, which has expired, and the action seeks to compel the

defendant to render an account and to give up to the plaintiff in his quality all the property of which defendant took possession as such testamentary executrix.

The defendant claims that the execution of the will has not yet been finished in accordance with its terms; that defendant has a right to remain as testamentary executrix until the majority of Jeanne Trahan, and she cites art. 980 of the Civil Code to indicate that the word "child" in law means not only child in the first degree but all descendants. Art. 980 is as follows:—

> In matters of prohibition to alienate as well as in substitutions and in donations and legacies in general, the term "child" or "grandchild" employed alone, whether in the disposition itself or in a condition, applies to all descendants.

Indeed, there is no doubt of that at all; that is to say, that if the bequest in the will was worded, "to the child of such and such a person," in case of the death of this child leaving heirs, it would extend to the heirs, grandchildren or great-grandchildren as the case might be. But this is only a presumption of law and may be rebutted by other proof of the intention of the testator in making the will. In this instance, the words used are "the eldest of my children," and they are used, not for the purpose of making a disposition, but for the purpose of establishing a date when the execution of the will will cease.

Now, as a matter of fact, the child in question did attain the age of majority before she died, but, at that time the testatrix was not dead nor had the defendant, as a matter of course, entered into possession as testamentary executrix. When the testatrix died there was only living the young child, daughter of Blanche Ledoux, who at that time was some three or four years of age. The whole question in this case is, whether the terms of the will containing the executorship of the defendant to the time when the eldest child of the testatrix shall have attained the age of majority, are to be interpreted as extending to the grandchildren in case the eldest child should be dead. The judgment has held that that course is to be followed.

I cannot think it possible that that could have been the intention of the testatrix. The testatrix was speaking of her mother. She could scarcely have thought she would live from generation to generation so as to be able to execute the will during the life of her great-grandchildren and up to the time of their attaining the age of majority.

But the article of the Code speaks of the word "child" used alone. But it does not speak of the same word used in connection with limitative words, such as "oldest child," as in this case. I don't see how it is possible to suppose that the testatrix could have had in her mind anything else than the child which was then living, and which she called the "eldest child." This matter has been determined by the Privy Council, not in con-

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nection with a case which came from this province, but in connection with a case which came from Jamaica. As it refers to the proper interpretation to be given to words, it may be said that the judgment of the Privy Council upon similar language to that used in this case, would be of the same force as if the case had actually come from this province. It was the case of *Amyot* v. *Dwarris*, [1904] A.C. 268. Sir Fortunatus Dwarris made his will, in which he bequeathed a property known as "Golden Grove," to his wife during her lifetime. Then follows this clause:—

> But immediately from and after the decease of my said wife, to the eldest son of my sister, Frances McKeand Gibney, and his heirs forever, he and they taking and bearing the name of Dwarris.

The will did not create any residuary legatee of this property. It happened that the eldest sons of the testator's sister were twins and were both living at the date of the will, but both dead when the testator died, before the will came into operation. But when the testator died, there was another son born, John Gibney, but he, again, died before the testator's wife, who had the use of the property during her lifetime. The property then went into the hands of the fourth son, who survived the testator's wife. The question, then, which the Court had to decide there was, whether the eldest sons to whom the bequest was made, having died without issue before the testator died, the property had been willed at all, or whether it was in the general estate of the testator, to come to his heir-at-law. The judgment of the Privy Council was pronounced by Lord Macnaghten. He said:—

> The point raised on this appeal is a very short one, and, in their Lordships' opinion, free from difficulty. The question, such as it is, turns on one passage in the will of Sir Fortunatus William Dwarris. After certain limitations which have failed or determined, he disposed of a property called "Golden Grove" by giving it in these words: "to the eldest son of my sister, Frances McKeand Gibney, and his heirs forever." It appears that, when the testator made his will, Mrs. Gibney had two sons. There was, therefore, in existence at that time a person answering the description of the "eldest son" of his "sister Frances." It was contended that the word "eldest" was not properly applicable to the elder of two persons, and that, if the testator had really meant Mrs. Gibney's first-born son, he would have said "elder," not "eldest." In their Lordships' opinion, that objection savours of hypercriticism. If a man has two sons, and only two, the ordinary way of speaking of the first-born, if not designated by name, is to call him the eldest son of So-and-so. There being then a person in existence at the time, answering the description in the will, their Lordships are of opinion that that person, though he died afterwards, in the testator's lifetime was the object of the testator's bounty. There is nothing in the context to warrant any departure from the proper and ordinary meaning of the words employed.

It seems to me that that decision, indicating as it does what

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the opinion of the Privy Council would be upon this case if it went there, constitutes really a decisive ground for holding that the word "eldest child," as used in the will in this case, means the child who was then living and was the eldest child of the testatrix.

I am of opinion, therefore, that the judgment under review has erroneously interpreted the clause of the will in question, and that, instead of dismissing the action, it ought to have maintained it and condemned the defendant to make a final account of her administration, and to turn over to the plaintiff, as tutor for his minor child, the whole of the property received by the defendant under the testament of Azilda Ledoux.

Plaintiff to have costs in both Courts.

Appeal allowed.

QUESNEL v. EMARD and CITY OF MONTREAL. COTE v. EMARD and CITY OF MONTREAL.

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Nov. 22.

Quebec Court of Review, Tellier, DeLorimier, and Bruneau, JJ. Montreal, November 22, 1912.

1. MUNICIPAL CORPORATIONS (§ II G 2—223)—LIABILITY FOR NEGLIGENCE IN FIRE DEPARTMENT.

A municipal corporation is not liable at law for damages resulting from the destruction of the property of its ratepayers by fire as a result of an inefficient fire department, unless such fire were the direct result of a tort formally authorized by such municipality.

2. FIRE DEPARTMENT (§ I—5)—NECESSITY OF ESTABLISHING FIRE DEPARTMENT—QUEBEC STATUTES, 1903.

The power given to cities and towns (Que. statute of 1903) to establish and maintain a fire department, is a faculative power and does not compel them to protect the property of its ratepayers in case of fire or make it responsible for fire losses.

3. WATERS (§ III B 2—190)—DUTIES AND LIABILITIES OF WATER COMPANIES —QUANTITY—ORDINARY NEEDS—EXTINGUISHING FIRES.

A company or other person obtaining a franchise from a municipality to supply it with electric lighting and all the water "necessary for the needs of the town," undertakes a supply of what is necessary for the ordinary needs of the ratepayers, and not the water required to put out any fire breaking out in the municipality; and hence is not liable in damages for fire losses occurring as the result of an insufficient water supply.

4. CORPORATIONS AND COMPANIES (§ I A—3)—MUNICIPALITY GRANTING FRANCHISE—POWER OF GRANTEE.

A person to whom a franchise to supply water to the citizens of a town is granted by a municipal corporation cannot have any larger or greater responsibility than the corporation would have had, had it itself exercised the powers delegated.

[*Brousseau* v. *City of Quebec*, 42 Que. S.C. 91, followed.]

Statement

THESE were actions in damages for fire losses directed against the municipality of Ville Emard and the St. Paul Electric Light and Power Co. The case was heard by Green-

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shields, J., assisted by a jury, and he referred them to the Court of Review for decision on June 23, 1911.

The actions were dismissed.

J. A. Robillard, K.C., for the plaintiffs.

J. L. Cédras, for Ville Emard.

R. Genest, for the St. Paul Electric Light and Power Co.

In both cases the same judgment was delivered by the Court.

November 22, 1912. DELORIMIER, J. (translated):—This is an action for $1,756.50 damages alleged to have been suffered by the destruction of a building belonging to the plaintiff within the limits of Ville Emard as a result of a fire which occurred on March 14, 1910.

The action was brought against Ville Emard, against L. J. Marchand, the original grantee of a franchise for the lighting and pumping of water in Ville Emard and also against the St. Paul Electric Light & Power Co., the transferee of Marchand.

The case was tried before a jury, which brought a verdict of $700 in favour of the plaintiff, but the trial Judge, owing to the importance of the legal questions raised by the parties, reserved the whole case for the decision of this Court according to the terms of C.P. 491.

The plaintiff alleged that he was a ratepayer of Ville Emard when the building wherein he dwelt was burned and caused him damages in the sum of $1,756.50; that these damages were due to the negligence of the defendants, who failed to fulfil their obligation to furnish the necessary quantity of water for the needs of the ratepayers; that Ville Emard had a fire system, but at the time of this conflagration there was no water in the reservoir of the aqueduct belonging to the St. Paul Electric Light & Power Co., and it became impossible to fight the fire; that this negligence was known to the Ville Emard, and that it ought to have compelled the owners of the aqueduct, who had a thirty-year franchise in virtue of a by-law, to fulfil their obligations. . . . .

The three defendants pleaded separately. In order to properly understand and appreciate these defences, the following facts should be remembered:—

On December 11, 1903, the village of Boulevard St. Paul, to-day known as Ville Emard, passed a by-law providing for the building of an aqueduct and of a tariff for water rates. . . .

In 1907 the village of Boulevard St. Paul, in virtue of by-laws later sanctioned by the Provincial Legislature, conceded to the defendant Marchand, in consideration of $2,000 per year, a thirty-year franchise for the supplying of electricity to the town and for the pumping of water. . . . .

On April 25, 1908, by 8 Edw. VII., ch. 103 (Que.), the village was erected into a municipality, according to the provisions

of the Cities and Towns Act, 1903, and amendments, under the name of "Ville Emard."

This statute contains the foregoing by-law granting to Marchand the said franchise. Section 28 of this statute provides that Ville Emard shall enter into a contract according to the provisions of this by-law with Marchand. Section 22 of the by-law reproduced in the statute states that the said Marchand may cede and transfer all the rights and privileges to him conceded by the by-law, provided the transferee oblige himself to fulfil all the obligations thereof. Section 23 of the by-law defines the obligations of Marchand as follows:—

> Durant le terme de trente années plus haut mentionné, le dit Laurent-Justinien Marchand, ses successeurs ou ayants-cause, devra ou devront fournir à ses ou leurs frais, le pouvoir électrique, la main d'oeuvre et les autres accessoires nécessaires au pompage de l'eau de l'aqueduc du dit village, et le dit village paiera, de ce chef, chaque trois mois, au dit L. J. Marchand, ses successeurs et ayants-cause, une somme équivalente à $2,000 par année, savoir: $500 par trois mois.

This section then adds:—

> L'eau dont il est question dans la presente clause est toute l'eau qui pourrait se dépenser dans la municipalité.

Accordingly, Marchand and the said Ville Emard entered into a contract based on the said by-law on June 17, 1908, before notary. Later on, Marchand ceded his rights and obligations to the St. Paul Electric Light & Power Co., and it was this company which, on March 14, 1910, supplied light and pumped water for Ville Emard. . . . .

The three defendants pleaded as follows:—

> The Ville Emard admitted that . . . at the time of the fire it was the owner of a fire department, but that this department was not complete, although as complete and efficient as the municipal finances allowed; that the men in charge of this department are mostly volunteers paid by the municipality according to its means; that under the circumstances neither the defendant nor its employers were guilty of any neglect; that the fire and the damages resulting therefrom were due to irresistible force; and that the defendant cannot be held responsible for any damages resulting from any defect in its fire system, inasmuch as it is not bound and cannot be bound and obliged to maintain any fire department. . . .

As the plaintiff has not persisted in his demand against the defendant Marchand we need not take up his position in the present appeal.

The St. Paul Electric Light & Power Co. for defence denied the allegations of the plaintiff, denied it was responsible for the damages suffered and averred that when the fire broke out the reservoir was full of water and that if the water failed later it was due to irresistible force and to the destruction of the connecting wires of the company defendant.

Since the institution of the present action Ville Emard has

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become annexed to the city of Montreal, hence the appearance of the city of Montreal in the record as defendant by *reprise d'instance*.

After hearing the evidence the jury brought a verdict in favour of the plaintiff in the sum of $700.

Thereafter the defendants moved, amongst other things, that the action be dismissed on the ground that the evidence could not justify this verdict inasmuch as no *lien de droit* existed between the plaintiff and the defendants. . . . . The trial Judge, as already stated, reserved the case for our decision.

We do not deem it necessary to examine the questions raised regarding the proceedings before the jury nor to express an opinion as to whether this case was susceptible of being tried by jury; the important question is as to whether there is a *lien de droit* between the parties such as to render the defendants legally responsible, towards the plaintiff, for the damages claimed. It is evident that in the absence of such a *lien de droit* the action must fail whatever may be the verdict (C.P. 459).

As regards the responsibility of the defendant, Ville Emard, and of the city of Montreal by *reprise d'instance*. . . . . it is evident that there can be no other responsibility than that which may have existed at the time between the plaintiff and Ville Emard.

If we refer to the Cities and Towns Act of 1903 and amendments which, at the time of the fire, governed the obligations of the municipality, we find therein no provisions which might compel it to protect the property of the ratepayers in case of fire or which might make it liable in damages to the ratepayers for the losses they might suffer as the result of fires. Nothing in the law or in the statutes imposed on Ville Emard the obligation of becoming an insurance company for the purpose of protecting the property of its ratepayers or for that of paying them fire losses. Under the law as it stands, the municipality had the right of adopting by-laws for the organization of a fire department. When such power is exercised it is exercised only as a facultative power and does not impose on the municipal corporation the obligation of indemnifying its ratepayers for fire losses.

The taxes which may then be levied are only levied for the purpose of defraying the cost and expenses of such fire department. If municipal corporations were to be responsible for fire losses, these small taxes could not begin to suffice to cover the possible loss of a large fire, and the law would, in such a case, have to authorize municipal corporations to enter into the insurance business.

The fire department of Ville Emard was similar to that of many other localities in the province. The system was as

efficient as the town finances would allow, but none the less was absolutely incomplete. When a fire broke out in the town the citizens united in their efforts to fight it. The two or three firemen then in the town's employ were not experts, nor was their only duty that of fire fighting.

It is our opinion that the jurisprudence has established it that the imperfections of these fire departments cannot give rise to a liability in damages on the part of a municipal corporation sued by a ratepayer as a result of the burning or destruction of his property. Naturally, this jurisprudence does not cover the case of the liability of a municipal corporation by reason of a tort formally authorized by it which could be the cause of a fire.

On March 16, 1897, Jetté, J., in *Lépine* v. *Town of Maisonneuve*, rendered a judgment on the following grounds:—

> Attendu que bien que par certaines dispositions de la Charte de la ville défenderesse et du statut contenant les clauses générales des corporations de ville la défenderesse ait le pouvoir d'établir un service spécial pour la suppression des incendies et pour fournir l'eau à la dite municipalité aucune obligation légale ne lui est néanmoins imposée à cet égard.
>
> Attendu que si, en règle générale l'omission comme la commission peut imposer responsabilité, l'omission ne devient cependant légalement imputable que lorsq'il y a obligation d'agir.
>
> Attendu que cette obligation n'existant pas dans l'espèce, la défenderesse ne saurait être tenue responsable de la perte éprouvée par le demandeur.

In the case of *Roy* v. *City of Montreal* (2 Que. S.C. 305) it was held that:—

> Le pouvoir accordé à une corporation municipale de faire des règlements pour une certaine fin est une attribution législative, qui n'impose aucune responsabilité civile, si elle n'est pas exercée et que le fait d'avoir passé un règlement ne change pas la position d'une corporation municipale et ne la laisse pas moins libre soit d'en exiger l'exécution, soit même d'en décréter le rappel pur et simple, si elle le juge à propos.

On June 28, 1912, in the case of *Brousseau et al.* v. *The City of Quebec*, 42 Que. S.C. 91, the Court of Review at Quebec, McCorkill, Malouin and Cannon, JJ., laid down the very same principles. This was an action in damages for $14,500 brought against the city of Quebec by reason of the death of a person asphyxiated in a fire that occurred by night in his house. The trial was had with a jury, who returned a verdict of $2,000 against the city. The plaintiffs based their right of action on the following allegations: That the city of Quebec could and should do everything necessary for the protection of the life and property of its citizens and levied taxes for this purpose; that it had not provided itself with the most modern and effective means of salvage; that the firemen did not respond to

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the alarms rung in as promptly as they should; that those who came did not bring the necessary appliances and apparatus which elementary prudence commanded; and that the fire stations were not even provided with life saving nets, although such had been bought long before the fire, but had been allowed to remain in a vault in the office of the city clerk. The trial Judge referred the case for the decision of the Court of Review. Malouin, J., in review, spoke in part as follows:—

> La charte de la défenderesse ne lui impose pas l'obligation d'organiser un système de protection contre le feu, elle lui en donne simplement le pouvoir; ce pouvoir est facultatif. Si elle en use, peut-on raisonnablement dire que l'imperfection de son système de protection peut donner ouverture contre elle à une réclamation en dommage? Je ne le crois pas. Dans la cause de *Bélanger* v. *La Ville de Saint Louis*, 41 Que. S.C. 366, l'Hon. Juge Charbonneau s'exprime comme suit, à ce sujet: La protection des bâtiments contre les incendies a toujours été considérée, par notre jurisprudence comme un pouvoir facultatif des corporations municipales, ne créant pas pour elle une obligation dont l'inéxecution entrainerait la responsabilité pour les dommages. . .
>
> Et dans la cause de *Authier* v. *La Corp. de la Ville de l'Assomption* (9 Rev. de Jur. p. 380), le Juge DeLorimier s'est exprimé comme suit: La corporation défenderesse est réglée par les dispositions du Code Municipal. Il n'y a, en loi, aucune obligation pour la défenderesse d'avoir un aqueduc pour préserver de l'incendie les propriétés des contribuables, ni même d'avoir des pompes, un corps de pompiers réguliers, ni un système spécial pour éteindre les incendies. La corporation défenderesse n'était pas en faute de laisser s'éteindre le privilège qu'elle avait accordé en 1871, lorsqu'elle agissait dans l'exercice d'un pouvoir purement discrétionnaire, et, n'était pas aux obligations d'une compagnie d'assurance, à l'égard du demandeur, et des puits, ou toutes autres choses connexes à un système d'aqueduc, propres à prévenir les incendies.

We have therefore come to the conclusion that there is no *lien de droit* between the plaintiff and the defendant and that, the verdict to the contrary notwithstanding, the action must be dismissed with costs.

Now, as regards the St. Paul Electric Light & Power Co.: In order to hold this company responsible for the fire the plaintiff must establish a *lien de droit* between him and the company. . . . . We fail to see how a party who has undertaken to pump water into a specified reservoir and who has undertaken nothing else, can be held responsible for damages resulting from a fire in the house of a ratepayer of the municipality which is supplied from this reservoir. In order to hold the company liable, as being in the rights of Marchand, the plaintiff would have to shew that the municipal corporation of Ville Emard was itself bound to protect him against a fire occurring at or near his place and that the defendant Marchand had assumed such obligation both as regards him, the plaintiff and the corporation of Ville Emard. Ville Emard was in no wise

bound to put out a fire in plaintiff's premises. And the company defendant, in assuming Marchand's obligation of pumping the water necessary for the needs of the town, must be presumed to have understood this as meaning the water necessary for the ordinary needs of the ratepayers, and not the water required to put out any fire breaking out in the municipality. The company defendant cannot be presumed to have assumed an obligation which did not exist as regards Ville Emard. We have cited authorities on this point, and to this effect: that municipal corporations are not obliged to protect property against fire; that they have in this regard merely a facultative power which does not create an obligation, the inexecution of which would entail their liability in damages for fire losses: *Vallières* v. *City of Montreal*, 33 Que. S.C. 250; *Brousseau* v. *City of Quebec*, *supra*; C.C. 1074.

For these reasons we are of opinion that there is no *lien de droit* between the plaintiff and the defendant company, and that, *non obstanter veredicto*, the action must be dismissed, with costs.

Actions dismissed.

JACOBS v. WENER.

Quebec Superior Court, Mercier, J. Montreal, November 25, 1912.

1. SOLICITORS (§ II C—30)—COMPENSATION OF SOLICITOR BY CLIENT—QUEBEC PRACTICE.

The tariff of advocates for the Province of Quebec does not apply as between solicitor and client, but only as between the successful attorney and the losing party.

2. SOLICITORS (§ II C—30)—ADVOCATE ACTING AS ARBITRATOR—RECOVERY OF FEES—QUANTUM MERUIT.

Where an advocate acts as arbitrator and mediator at the request of his client, and without being appointed by authority of the Court, he is entitled to recover his fees from his client on a *quantum meruit* basis irrespective of the tariff for advocates.

3. SOLICITORS (§ II C—30)—ACTING AS ARBITRATOR AT CLIENT'S REQUEST.

Services rendered by an advocate as an arbitrator at the request of his client are professional services of an advocate and are recoverable as such.

Statement

THIS was an action for $500 for professional services rendered by the plaintiff, who was a practising advocate in connection with an arbitration.

The action was maintained.

G. C. Papineau-Couture, for plaintiff, referred to *Cherrier* v. *Titus*, 7 L.C.R. 402; *Christin* v. *Lacoste*, 2 Que. Q.B. 142, and annotations; *Pattle* v. *Holt*, 32 Que. S.C. 323.

J. R. Whelan, for defendant.

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MERCIER, J.:—The defendant contested the suit, alleging that the plaintiff and one of his colleagues, Mr. Maxwell Goldstein, K.C., had been jointly named as arbitrators and mediators to decide certain difficulties existing between him, the defendant, and one Ginsberg, his partner, arising from the dissolution of a partnership business which they had carried on under the name of "A. M. Wener and Company"; that the plaintiff and Mr. Goldstein had rendered their award on April 15th, 1912, and that no other services were rendered other than those of arbitrator and mediator.

It is therefore claimed by the defence that the plaintiff's action for professional services is unfounded, his only recourse being an action to recover fees due him as arbitrator.

The plaintiff answered that the services referred to covered a period extending from the 9th of February to the 4th of May, 1912, and that all such services were rendered at the defendant's personal request and solicitation.

The defendant in his plea admits that the plaintiff is a member of the Bar of the Province of Quebec, and it appears of record that the plaintiff is one of His Majesty's counsel for this province.

I am of the opinion that the defendant's claim that the plaintiff has no right in this case to sue in his quality of attorney, but only as arbitrator, is unfounded in law.

It appears from the statement of account that the plaintiff acted for the defendant, not only as arbitrator, but also as attorney, and that in acting as arbitrator in the interests of the defendant he was also acting in his professional quality of advocate.

The plaintiff did not render his services in the present case in virtue of the provisions contained in arts. 411-413 C.P., nor in virtue of the provisions of arts. 1431-1444 C.P., and if any provisions of the Code of Procedure could apply to this case we should rather look to arts. 413 (*a*) to 413 (*j*), which were introduced by the statutory amendment known as 9 Edw. VII. ch. 74, sec. 2.

It follows, therefore, that the duties which the plaintiff fulfilled as regards the difficulties between the defendant and his partner, cannot be assimilated to those of ordinary arbitrators appointed by the Court, or appointed by consent of the parties under the authority of the Court.

According to art. 413 (*a*) C.P., in matters of arbitration by advocates, as provided therein, the demand made in writing by the interested parties for the appointment of such arbitrators should mention the amount which the parties have agreed to pay to each arbitrator.

This proves conclusively that a lawyer acting in such capacity is not subject, as regards his fees, to the general tariff of advocates, and therefore the defendant's claim, put forward at the

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hearing (although it was not raised in the written pleadings), to the effect that the plaintiff could only base his suit on art. 77 of this tariff, is ill founded.

Besides art. 77 of the tariff of advocates' fees must be interpreted restrictively. It cannot, in any case, be extended beyond the cases which it covers, and cannot prevail against the provisions of art. 413 (*a*), which are special provisions, and which were enacted subsequently to the promulgation of this tariff.

Moreover, this tariff is not applicable as between solicitor and client, but only as between the losing party and the attorney of the successful party.

The circumstances proved of record, which preceded the arbitration in this case, and the contents of the documents referred to as "agreement of dissolution" and "submission to arbitration" shew that the intention of the parties was to leave the settlement of their difficulties to their attorneys rather than to their own personal settlement, and shew, moreover, that the Court or tribunal which was then constituted for this purpose was rather a Court of mediators and *amiables compositeurs*, than a regular Court of arbitration, constituted under the sanction and authority of the Superior Court.

I am of opinion that the plaintiff in this case was in nowise restricted by the provisions of the tariff or advocates' fees as regards the value of his services, and that he is entitled to claim from the defendant the entire amount of the fees due him in his qualities of advocate and arbitrator.

The defendant does not plead that the professional services rendered him, as detailed in the statement produced, were exaggerated as to their quantum.

The plaintiff has fully proven the services covered by his account, and consequently I hold that the action must be maintained and the defendant condemned to pay to the plaintiff the sum of $500 as prayed for.

Judgment for plaintiff.

BERNARD v. PELISSIER et al.

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Quebec Court of King's Bench, Archambeault, C.J., Trenholme, Lavergne, Cross, and Carroll, JJ. Montreal, October 31, 1912.

1. PARTNERSHIP (§ VI—27)—LAW FIRM—EFFECT OF APPOINTMENT OF MEMBER OF TO OFFICIAL POSITION—RIGHT OF CO-PARTNERS TO EXECUTE ON A JUDGMENT.

A law firm is a civil partnership and when one of the partners retires from the firm on his appointment to an official position, his co-partner may execute on a judgment in the name of the partnership, but only for his share, unless the retiring partner's interests have been properly transferred to him.

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2. LIMITATION OF ACTIONS (§ IV C—167)—INTERRUPTION OF STATUTE—REMOVAL OF BAR—LETTER FROM SOLICITOR TO CLIENT.

A letter written by a client to his solicitor requesting him to look after his affairs once more and enquiring as to the amount of his the client's past indebtedness constitutes an interruption of prescription as regards such indebtedness, but does not constitute a renunciation to prescription acquired.

3. GARNISHMENT (§ I C—23)—SEIZURE OF MONEY OF CLIENT IN SOLICITOR'S HANDS—PROOF OF INDEBTEDNESS OF GARNISHEE TO DEBTOR.

Where a creditor seizes in the hands of solicitors moneys alleged to be due and owing to his debtor and the solicitors declare that such debtor is their client and owes them more than they owe him, the seizing creditor can have no more rights than his debtor, and in order to have such seizure maintained must bring certain and conclusive proof that the garnishees are really indebted to his debtor.

Statement

APPEAL from the judgment of the Superior Court for the district of Montreal, Bruneau, J., rendered on June 30th, 1910, dismissing the plaintiff's contestation of the garnishees' declaration.

The appeal was dismissed.

E. Lafleur, K.C., and *A. Geoffrion*, K.C., for appellant.
G. Lamothe, K.C., for respondents.

Carroll, J.

CARROLL, J. (translated):—The appellant, a creditor of one Carbonneau, in his quality of attorney *distrayant* in a case of *Baumar* v. *Carbonneau*, issued in 1904 a *saisie-arrêt* against money in the hands of the Royal Trust Company.

This company had gone security for Carbonneau in the Court of Appeal at the request of his attorneys, Messrs. Pélissier, Wilson & St. Pierre, firstly on April 14th, 1903, for $300, and again in June 25th, for $700. The attorneys had deposited an amount equal to that of the bond.

The company declared that it owed nothing to Carbonneau and then, when its declaration was contested, it alleged that the amount of the deposit was to be refunded to the attorneys with whom it had contracted. This plea prevailed in the Superior Court, the judgment of which was confirmed by this Court.

The appellant then turned against these attorneys and issued a seizure in their hands.

They declared they did not owe anything.

This declaration is contested and at paragraph 29 of his contestation the appellant says that the partnership garnished "a crédité, ou a eu à créditer Carbonneau de $6,600, et l'a débité, ou a eu à le débiter de $6,537, laissant non affecté un reste de $62 des sommes reçues, lequel reste, ajouté aux dépôts du dit Carbonneau, remboursés ou remboursables à leur société, formait un reliquat d'au moins $1,600 dont ils auraient du déclarer devoir conjointement et solidairement le remboursement à leur mandant, défendeur saisi en cette cause."

The garnishees answered this contestation by saying that

they owe an accounting only to their principal, Carbonneau, and that in any event Carbonneau is their debtor and not their creditor.

Both parties went to proof. Mr. Bernard produced an account "B," which he claims is taken from the ledger of the partnership garnisheed. On the other hand the partnership has filed several accounts, one of which, account "A," shews the debits and credits as regards the old firm of St. Pierre, Pélissier & Wilson. This account, according to Mr. Pélissier, shews the transactions from 1891 to 1902, the period at which Mr. Justice St. Pierre was appointed to the Bench.

According to Mr. Bernard, Carbonneau left the country in 1897, and since that date the firm of St. Pierre, Pélissier & Wilson has taken no action against Carbonneau. And if any fees and disbursements were due they have become prescribed.

The garnishees invoke interruption of and also renunciation to prescription by Carbonneau. This renunciation occurred in the following manner: In 1902, Carbonneau wrote asking Mr. Pélissier to look once more after his affairs and at the same time enquired how much he owed. In 1903 another letter came from Carbonneau asking for a list of costs due. Mr. Pélissier sent this list and in reply Carbonneau sent money. Mr. Pélissier adds that Carbonneau was satisfied with the account.

Does this constitute renunciation to prescription? I am of opinion that it constitutes an interruption of prescription, but not a renunciation to acquired prescription. For these letters certainly constitute a commencement of proof in writing; as this is a civil contract proof of interruption of prescription may be made with a commencement of proof in writing, but there is no renunciation to the five years' prescription enacted by the Civil Code.

A renunciation to prescription is a new contract which must contain the elements thereof—in this case a promise to pay the debt due. Carbonneau's long silence, and the fact that he never complained, are evidence that he recognized his indebtedness, but the elements of a new contract which would revive the debt do not exist.

Nevertheless the letters interrupted the prescription running and I am of opinion that Mr. Pélissier can claim for the five previous years, to wit, back to 1897. He cannot claim his partner's shares, as there is no evidence that such shares have been transferred to him. Parol testimony of this fact could not be admitted. No doubt when a partner is appointed to a position his co-partner may execute in the name of the partnership, but only for his share.

The account between an attorney and his client may sometimes comprise the elements of a running account, but in this

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case such elements do not exist. What is a running account? The best authors define it as follows:—

> Un contrat par lequel l'un des contractants remet à l'autre contractant ou reçoit de lui de l'argent ou des valeurs non spécialement affectés à un emploi déterminé, mais en toute propriété et même sans obligation d'en tenir l'équivalent à la disposition de celui qui reçoit, en un mot, à la seule charge par celui-ci d'en créditer le montant, sauf règlement par compensation et due concurrence, des remises respectives, sur la masse entière du débit et du crédit: Delamarre & Poitevin, vol. 3, No. 329.

Lyon Caen and Renault (Précis, vol. 1, No. 1421), give a definition which is even clearer:—

> Le compte courant peut se définir contrat par lequel deux personnes, en prévision des opérations qu'elles feront ensemble et qui les amèneront à se remettre des valeurs, s'engagent à laisser perdre aux créances qui pourront en naître leur individualité en les transformant en articles de débit ou de crédit, de façon a ce que le solde final résultant de la compensation de ces articles, soit seul exigible.

Here, there is no express agreement as to a current account and the contract must be inferred from circumstances.

The authors teach us that the running account results from the conditions under which the remittances are made by the parties, the one to the other and of the continuance of such remittances. Now for five years Carbonneau made no remittances at all. In any event, since 1897, he practically ceased to have the attention of the Courts, and we cannot say that the relations between solicitor and client continued.

Taking into account the debits and credits since 1897 can it be said that Mr. Pélissier—for he is entitled to his share only from 1897 to 1902—and the firm of Pélissier, Wilson & St. Pierre owed anything to Carbonneau, when the *saisie-arrêt* was practised in 1907.

The onus of proof lies on the seizing creditor, for he stands in the rights of Carbonneau, the alleged creditor of the garnishees.

If Carbonneau were to take action against the garnishees as a creditor of theirs, he would have to prove his claim.

Now that it is established that the account cannot go farther back than 1897 we must examine the figures on which the applicant bases his claim. According to his account "B" the grand total of the credits would be $8,156.68; and the grand total debit would be $6,537.09; and the balance to be refunded, $1,619.59.

These figures are calculated from the ledger entries. According to this ledger there would be a balance of $52.91 due to Carbonneau, and this amount, added to that of some $1,500 odd deposited with the Royal Trust Co., would form the grand total of $1,619.59.

Mr. Pélissier has filed, however, account "A" comprising

the period from 1891 to 1902, accounts "B" and "C" and account Z-6, which includes accounts "B" and "C," the latter being a supplementary account for the sum of $216.55.

According to account Z-6, Carbonneau owed Pélissier, Wilson & St. Pierre, $1,444.81.

Account Z-6 comprises an account for $860 due by Carbonneau (October 3rd, 1903, to August 19th, 1908), for his nephew Chabot, and also an account for $186.00; the details of the two last accounts do not appear on the ledger. So that if these accounts are correct and if we accept the testimony of Mr. Pélissier, who is not contradicted, if these two amounts appeared in the seizing creditor's account, there would remain due by the garnishees a balance of some $600. But Mr. Pélissier is entitled to be remunerated for his services from 1897 to 1902, and he swears that he was corresponding with Carbonneau during this period.

For instance, on November 23rd, 1898, Mr. Pélissier settled for Carbonneau a judgment of $1,200 for $550.

It also appears that judgment was rendered against Carbonneau in 1900—*Grothé* v. *Carbonneau*—and that in 1903 a settlement for $300 was arrived at after considerable negotiations. The costs and fees of this case are not mentioned in the account Z-6.

But the appellant claims there is an error of $1,000 in account Z-6; that on August 31st, 1903, a cheque for $1,500 was handed to the garnisheed partnership instead of a cheque for $500; and as a matter of fact account "B" mentions a sum of $1,500. But even if we were to deduct this amount and the advances made in behalf of young Chabot, after service of the seizure, the claim of the seizing creditor would still be vague and uncertain.

For, how are we to appreciate the value of the services rendered by the garnishees? Mr. Pélissier swears that his client owes him more than he owes his client, and he is uncontradicted. If $1,600 were owed to Carbonneau is it reasonable to believe that this man, who had paid over more than $6,000, would have waited for years without a murmur and would not have asked for the rendering of an account?

The evidence of the seizing creditor rests on inferences from the figures in the ledger from 1903, but between 1897 and 1902 there was no ledger in the office.

As Carbonneau made no claim whatsoever a strong presumption arises that he recognized he had nothing to claim, and the appellant, who stands in his rights, should have brought certain and conclusive proof in order to succeed.

We are of opinion that he has not made such proof. The appeal is dismissed.

Appeal dismissed.

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Dec. 6.

Re McMICKEN.

Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue, Cameron, and Haggart, JJ.A. December 6, 1912.

1. MAGISTRATES (§ II—20)—DUTIES—FINDING GUILT OF ACCUSED—GATHERING FACTS SURROUNDING CRIMINAL ACT TO FIX PENALTY.

The duties of a magistrate who undertakes to dispose of a matter brought before him are two-fold: first, to find if the party is guilty or not guilty of the charge, and secondly, to gather the facts and circumstances surrounding the criminal act, so that he may judicially find what penalty should be imposed. (*Per* Howell, C.J.M.)

2. CRIMINAL LAW (§ II A—30)—RIGHT OF PRIVATE PROSECUTOR TO BE HEARD AT TRIAL.

Where a prosecution for a criminal offence was instituted by a private prosecutor and he is still in charge of the prosecution, he has the same right to be heard on the trial, both as to the question of guilt and the quantum of punishment as the Attorney-General would have on a Crown prosecution.

[Stephen's History of the Criminal Law, 419, 495, referred to.]

3. CRIMINAL LAW (§ II A—33)—CRIMINAL INFORMATION AGAINST MAGISTRATE—DISCRETION.

It is within the discretion of the Manitoba Court of Appeal to order a criminal information to be exhibited against a magistrate for alleged unlawful conduct in the discharge of his duties.

[As to proceedings by criminal information generally, see Annotation to this case.]

4. CRIMINAL LAW (§ II A—33)—CRIMINAL INFORMATION AGAINST MAGISTRATE FOR ILLEGAL ACTS—CORRUPT MOTIVE ESSENTIAL.

Though it appears that a magistrate was guilty of illegal acts in the performance of his duties, a criminal information will not be ordered to be exhibited against him unless it is made to appear that he did such acts from corrupt motives.

5. CRIMINAL LAW (§ II A—33) — PROCEDURE — MAGISTRATE — EXCESS OF AUTHORITY.

A magistrate has no right to dispose of a case before the hour set for trial in the absence of the prosecutor, although the accused appears before him and pleads guilty.

6. MAGISTRATES (§ II—20)—RIGHT OF MAGISTRATE TO HEAR EVIDENCE IN MITIGATION OF OFFENCE WHERE PLEA OF GUILTY ENTERED BUT WHERE PROSECUTOR NOT PRESENT.

A magistrate before exercising his discretion as to the extent of the penalty to be imposed, within the limits provided by law, even where the accused pleads guilty to the crime charged, has no right to hear evidence in mitigation of the punishment without giving the private prosecutor having charge of the prosecution an opportunity to hear that evidence and cross-examine the parties giving it, and, if necessary, meet it with evidence on his own part in aggravation of the offence, or in contradiction of the alleged mitigating circumstances. (*Per* Richards, J.A.)

7. MAGISTRATE (§ II—20)—MISCONDUCT—BRINGING ON CASE BEFORE HOUR SET—CORRUPT MOTIVE.

Though a magistrate acts beyond his jurisdiction in bringing a case on before the hour fixed, such action will not be taken as indicative of a corrupt motive if it appears that the magistrate did not know the hour for which the trial of the case had been fixed and had taken the case at the earlier hour for the convenience of counsel for the accused, where the magistrate erroneously supposed that it was not necessary to have the prosecutor represented at the hearing, as defendant's counsel had informed the magistrate that the accused person would plead guilty and the accused did so plead at the hearing.

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RE MCMICKEN.

MOTION to make absolute two rules *nisi* calling upon Alexander McMicken, provincial police magistrate for the province of Manitoba, to shew cause why a criminal information should not be ordered to be exhibited against him for certain alleged misdemeanours charged as having been committed by him while acting as such police magistrate.

W. H. Trueman, for the applicant.

C. P. Fullerton, K.C., for the magistrate.

HOWELL, C.J.M. Howell, C.J.M.

HOWELL, C.J.M.:—Mr. McMicken is a police magistrate for the province and holds regular, and, I gather, daily Courts in Winnipeg. He has a regular Court room and a clerk who appears from the affidavits to perform the ordinary business pertaining to that office. The affidavits shew that the clerk knew that the cases in question were to come on for hearing at 11.00 a.m., on the 16th of October, and the day previously he granted subpœnas to one of the prosecutors returnable at that hour. Bain, the constable who made one arrest, referred to in the affidavit of the magistrate, told one of the prosecutors the day before that the cases would come on for hearing at the hour above mentioned. The clerk of the Court knew when the matters were to come up, the constable who brought the informations to the magistrate to be disposed of also knew this fact. The magistrate's affidavit alone was filed, none was filed of the clerk or constable. It seems strange that the magistrate did not ask his clerk how those matters happened to come before him, and equally strange why the constable did not tell him.

The magistrate in his private room took the plea of guilty from each of these two parties, who apparently came in separately in the absence of the private prosecutor, and apparently at separate times heard each explain that he was intoxicated and inflicted on each the same minimum sentence.

Where a magistrate undertakes to dispose of such a matter, his duties are two-fold: 1st, to find if the party is guilty or not guilty of the charge; 2nd, to gather the facts and circumstances surrounding the criminal act, so that he may judicially find what penalty should be imposed.

In this, as in most criminal cases, a wide range is given for judicial discretion, the accused might have been punished anywhere between the minimum of $50—that which was imposed—and two years' imprisonment with a fine also of $200. The decision on this question and the consideration of the facts is as much the magistrate's duty as that of finding the prisoner guilty or not guilty.

The prosecutor had as much right to be heard on this trial as the Attorney-General, and the clear language of Stephen in vol. I., pp. 419 and 495, of the History of Criminal Law, on this subject is interesting.

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The prosecutor had gone to the expense and trouble of issuing subpœnas and of employing counsel, and when they appeared at the time when the clerk of the Magistrate's Court told them the cases would be heard they were told by the same clerk that the cases had been disposed of, but the magistrate refused to tell them when the cases had been heard or what punishment had been imposed. Apparently there were hot words and the magistrate refused to allow the proceedings to be looked at. The rights of the prosecutor had been invaded and his feelings can be imagined.

The accused persons had been caught red-handed in the commission of a crime, and each received the same minimum sentence. According to the magistrate both claimed they were drunk on election day. One might think it interesting to ask from what source the liquor came on a day when it cannot be sold, also to enquire why they chose the names which they sought to vote upon and possibly, who suggested these names; it might be pertinent to ask how many times they had previously voted that day, and generally if they were criminals or were they simply thoughtless young men committing a first offence. Apparently nothing of this kind was enquired into by the magistrate, and he deprived the prosecutor of his legal right to bring out such facts.

After carefully looking into the whole matter, I cannot get rid of the impression that assumed names have been used and that the guilty parties have not a record of conviction against them, and the gross irregularities shewn by the papers filed fill one with suspicion of corrupt intent somewhere.

In the course the magistrate took I think he acted highly improperly and perhaps I might say unlawfully; but he has denied any improper or corrupt intention, and claims that it all arose from want of knowledge of the course to be taken under such circumstances. His course of conduct after the disposition of the case has been urged upon us as evidence of a bad mind and improper or corrupt intent and there is some authority for this proposition.

I think, however, in the face of the direct statement by the magistrate, above referred to, I cannot hold that such a case has been made out that we should order the issue of a criminal information, which is in the Court's discretion, and particularly so as the prosecutor's rights, if any, are not thereby judicially disposed of.

The rule must be refused, but I have no hesitation in saying that it should be without costs.

Richards, J.A.

RICHARDS, J.A.:—This is a motion to make absolute two rules *nisi* calling upon Alexander McMicken, provincial police magistrate for the Province of Manitoba, and having his office and

Court at the city of Winnipeg, to shew why criminal information should not be ordered to be exhibited against him for certain alleged misdemeanours, charged as having been committed by him while acting as such police magistrate.

These matters first came before this Court in pursuance of notices of application for rules *nisi*. On that application rules were refused, no one appearing for the magistrate, and the Court not being satisfied that the service of the notices at the magistrate's residence, though apparently sufficient according to the English practice, had, under the circumstances shewn by the affidavits, given the magistrate six days' actual personal notice of the application.

Afterwards other notices of application for rules *nisi* were served upon Mr. McMicken personally. He did not attend personally or by counsel upon the return of those notices, and the Court granted the rules, making it a condition that it should be open to him on their return to take any objections which he might have taken on the return of the notices.

The facts appear to be: On 12th October, 1912, at each of two polling subdivisions, at an election held to elect a member to represent the electoral district of Macdonald in the House of Commons of Canada, a party was, on the complaint of an agent of one of the candidates, arrested by order of the returning officer, on a charge of having committed the crime of personation.

The parties so charged were taken in custody and lodged in a lock-up at St. James. Apparently they were there admitted to bail by a justice of the peace, and the proceedings against them were, by a justice of the peace, in some way enlarged to come up before Mr. McMicken at his Court in Winnipeg, on the 16th of October.

It is alleged that the hour fixed by the justice of the peace, who so transferred the matters to be heard at Winnipeg before Mr. McMicken, was 11 o'clock in the forenoon. There is no record before this Court shewing that fact. In each case the private prosecutor was informed of the fact upon inquiry at St. James, or from a St. James constable. It appears that the clerk of the Magistrate's Court, at Winnipeg, was aware of that being the hour, though how he learned it is not shewn.

There is no evidence that Mr. McMicken knew that these charges existed, or had been transferred, to be heard before him, until he heard of them from Mr. Sullivan, which will be referred to later. There is also no evidence to shew that he was aware of the hour at which the transferring justice of the peace had ordered them to come up before him, Mr. McMicken, till after he, Mr. McMicken, had disposed of them as hereinafter mentioned.

On the morning of the 16th at 11 o'clock the two private prosecutors, with their counsel, attended at the Winnipeg Court

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and were informed that the cases had already been disposed of; that the parties had pleaded guilty and that, extenuating circumstances having been shewn, each of them had been punished by a fine of $50, and that the fines had been paid.

Thereupon a wrangle took place, and the magistrate refused to permit the private prosecutors and their counsel to take copies of documents in connection with the matter.

The magistrate's own affidavits say that he knew nothing whatever of these cases having been transferred to him for trial or of the hour set for their so coming before him. His story, which has not been contradicted, is that early in the morning of the 16th, Mr. Sullivan, a barrister practising at Winnipeg, telephoned him stating that he would be unable to attend his Court at the usual hour, and that he would therefore like to have two cases in which he represented the accused, and in which the parties were prepared to plead guilty, dealt with before the usual Court hour.

The magistrate further swears that, acting upon Mr. Sullivan's request, and knowing nothing of the facts as aforesaid, he attended his Court at an earlier hour than his usual one, and that the two cases were brought before him in his private room off the Court room, and that the parties there pleaded guilty and claimed that they had been drunk when committing the crime and had not been aware of the enormity of their offence, and that he thereupon fined each of them $50, which is the smallest punishment which, according to law, he was at liberty to inflict.

He swears that he had no corrupt or improper motive in acting as he did, and that he believed that in dealing with the cases beforehand and in his private room he was acting within his powers, and that he often took cases in that private room where parties pleaded guilty, and that he supposed that where parties were prepared to plead guilty, it was not necessary that the prosecutors should be present when the case was dealt with.

It is in the discretion of the Court to order the exhibiting of a criminal information such as applied for; but such order will not be made unless it appears that the magistrate was guilty of an illegal act or acts, and that he did such act or acts from corrupt motives.

Sec. 272 of the Dominion Elections Act defines what shall constitute the crime of "personation," and makes the guilty party

> liable to a penalty not exceeding $200, and not less than $50, and to imprisonment not exceeding two years, and not less than three months.

When the matter was first mentioned to this Court (that is to say on the return of the notices which the Court did not think properly served) counsel for the informants urged, as an illegal act by the magistrate, that the statute compelled not only the

imposition of a fine but also of a term of imprisonment which should be not less than three months, and not more than two years; but, when moving for the rule, he abandoned this ground because of a decision by Mr. Justice Wurtele in *The Queen* v. *Robidoux*, 2 Can. Cr. Cas. 19, in which that learned Judge held that, although both fine and imprisonment are provided by statute as a penalty yet, because of sec. 1028 of the Code, the Judge may impose one of these penalties only.

The Dominion Elections Act, by sec. 296, says, as to a charge of personation, that the deputy returning officer may, on the polling day, issue his warrant for the arrest of the person charged in order that he may be brought before the magistrate therein named, to answer to the information and to be further dealt with according to law.

Sec. 300 of that Act provides that the magistrate named in the warrant shall be one having jurisdiction under part XVI. of the Criminal Code, and sec. 301 says that the provisions of said part XVI. of the Code shall apply to all proceedings under the Act against persons accused of personation under the seven preceding sections. Those seven preceding sections relate to cases where the accused is charged at the polling station with having committed the crime of personation and is arrested pursuant to the warrant of the deputy returning officer then issued.

Part XVI. of the Criminal Code is one relating to the summary trial of indictable offences, and Mr. McMicken is a magistrate who has power under part XVI. to try such cases as are therein provided for.

Sec. 787 of the Code, which is included in part XVI. says:—

> Every Court held by a magistrate for the purposes of this part shall be an open public Court.

Sec. 680 of the Code, which is included in part XIV., referring only to preliminary inquiries in the case of charges for indictable offences, says that:—

> The justice may order the accused person to be brought before him . . . at any time before the expiration of the time to which such person has been remanded, and the gaoler or officer in whose custody he then is shall duly obey such order.

That only refers to the case where a person is in custody, and probably is only for the purpose of enabling bail to be taken. I can see in it nothing to justify the justice's hearing and dealing with the matter in the absence of the private prosecutor in a case under Part XVI. of the Code.

If there are other provisions of the Code under which the magistrate might suppose he had power to act as he did, they were not called to our attention by his counsel, and I do not know of them. Secs. 644 and 645, providing for the exclusion

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of the public at trials in certain cases, have no bearing on such a case as this.

There can be no doubt, I think, that, in dealing with the matter as he did, the magistrate exceeded his authority. In addition to the provision of sec. 787, as to the Court being an open public Court, there is no question that a private prosecutor has a right to be heard, not only as to the commission of the crime, but as to the question of aggravating or mitigating circumstances, to be considered by the magistrate in deciding what punishment he will inflict.

In Stephen's Criminal Law of England, vol. I., p. 494, it says:—

> If, as is often the case, there is a private prosecutor, he can and does manage the whole matter as he might manage any other action at law; . . .
>
> The course pursued is precisely the same in all cases, and whoever may be the prosecutor. A prosecution for high treason, conducted by the Attorney-General, differs in no one particular in matter of principle from the prosecution of a servant by his master for embezzling half-a-crown.

And at page 495, it is said:—

> Every private person has exactly the same right to institute any criminal prosecution as the Attorney-General or any one else.

It is of the utmost importance that Courts should be held openly, and that parties, preferring charges, should have a right to be present when the same are dealt with. In the present case the magistrate should have waited for the arrival of the private prosecutor, at least until the hour fixed for the hearing, and if he did not know the hour, as he says he did not, he should have ascertained it and have seen that it had gone past before dealing with the case in the prosecutor's absence.

The magistrate endeavours to meet this by saying that he did not suppose that when parties were prepared to plead guilty it was necessary to have the prosecutor present. It was stated by counsel for the magistrate, although not proved by affidavit, that it is customary to deal, in Magistrate's Courts, with cases where a party is willing to plead guilty, by accepting that plea before the hour fixed for the hearing of the case. If cases are so dealt with in the absence of the private prosecutor, the so doing ahead of the time fixed for the hearing is a wrongful act on the part of the magistrate. It seems to me that if there have been such cases they must have been cases where the police had laid informations and were acting as the prosecutors, and where someone representing the police was present at the time the cases were so brought on in advance of the fixed hour.

In any case, the magistrate, before exercising his discretion as to the extent of the penalty to be imposed, within the limits

provided by law, had no right to hear evidence in mitigation of the punishment without giving the private prosecutor a chance to hear that evidence and cross-examine the parties giving it, and, if necessary, meet it with evidence on his own part in aggravation of the offence, or in contradiction of the alleged mitigating circumstances.

But, as stated above, the fact that the magistrate has acted beyond his jurisdiction and committed an illegal act does not, of itself, empower this Court to grant the extraordinary remedy here asked for. The evidence must be such as to make at least a *primâ facie* case of corrupt motive. We can only act on the material in the affidavits and papers before the Court. There is nothing in that which suggests any reason why the magistrate should try to favour the accused or that he acted from fear.

What appears from that material to be relied on as evidence of corrupt motive is, first, the fact of the magistrate having acted beyond his powers in hearing the case before the hour fixed for hearing, and secondly, the wrangle which took place after the prosecutors and their counsel arrived at the Court room.

Dealing first with the question of the wrangle. That took place, not at the trial of the case, but after it was over and the matter had been dealt with by the magistrate. I have been unable to find any case which shews that a wrangle under such circumstances is evidence of a corrupt motive.

It is stated in Archbold's Criminal Pleading that in the case of *The King* v. *Manley*, Rowe, Interesting Cas. 646, a corrupt motive was found by the Court from the magistrate abusing the prosecutor. The report of that case is not available here; but I can only think that it must refer to unprovoked abusive language used by the magistrate during the trial or hearing. If so, it is not an authority in a case where the wrangle does not occur until after the case has been disposed of.

I am unable to find a corrupt motive from the bringing the case on before the hour fixed, though the magistrate, I think, acted beyond his jurisdiction in doing so. As above stated, he says that he knew nothing of the particulars of these cases until spoken to by Mr. Sullivan, and until he came into the Court, and that he never knew the hour at which they had been adjourned to come up before him. I have been unable to find in the meagre records of the case that were before him anything shewing this hour; so that, when the matter was brought hurriedly before the magistrate, there was, apparently, nothing to draw his attention to the hour, and his action in the hurry of the moment, if he believed he had the power to act as he did cannot be held to shew a bad mind.

Magistrates are not expected to know the law as certainly as

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Judges would be expected to know it, and where, in spite of their appearing to have acted wrongfully, it is not shewn that their motives were corrupt, Courts will not assume that corruption on their part merely from the fact of their having made mistakes in the law.

In dealing with cases of this kind Courts have always laid a good deal of weight on the magistrate's statement of the absence of improper motives. Where the case is otherwise not strong, and, particularly, where it is possible that the magistrate has made a *bonâ fide* mistake as to his powers, Courts have held that no information shall be ordered to be exhibited, as the remedy sought is an extraordinary one, and the informants have the right to proceed by indictment in the ordinary way if they choose.

I am of opinion, therefore, that the rules should be discharged.

It has been argued that the magistrate should be ordered to pay the costs. As in my opinion the application fails, I do not think that he should.

On the other hand, as the magistrate acted beyond his powers, no costs should, in my opinion, be awarded him. Besides, it was in his power, when served with the notices prior to the issue of the rules, to appear personally or by counsel upon the return of those notices, and to there raise all questions that by his counsel he afterwards did on the return of the rules *nisi*. He chose to not follow that course. If he had there given the explanation and denial of corrupt motives that he afterwards gave on the return of the rules, those rules would not, I think, have been granted.

Perdue, J.A.

PERDUE, J.A.:—A rule *nisi* was granted on 4th November, 1912, calling upon Alexander McMicken, a police magistrate of this province, to shew cause why a criminal information should not be exhibited against him. The charge contained in the rule *nisi* is that he unlawfully, maliciously, wickedly and corruptly, and contrary to his duty as said police magistrate, dealt with and disposed of a certain information laid by one Hugh MacKenzie against a person then unknown to the informant, charging such person with the crime of personation at an election of a member to serve in the House of Commons, at a time prior to that fixed for the hearing of the charge, and in the absence of and without the knowledge of the informant. A similar rule *nisi* was also granted against the same magistrate, making a similar charge in reference to the disposition by him of another information laid by one Richard H. McDonald, charging one Tom Morris with the crime of personation at the same election. A motion has been made in each case to make the rule absolute and the magistrate has, by his counsel, ap-

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peared and shewn cause, the two motions being argued together.

The facts as they appear to me to be important are as follows:—

On 12th October, 1912, an election was being held in the electoral district of Macdonald for the election of a member for that district to serve in the House of Commons of Canada. Hugh MacKenzie, of Winnipeg, barrister-at-law, was the agent of one of the candidates at one of the polling divisions. A person whose name and identity were unknown to him attempted to personate one of the qualified electors on the list by applying for a ballot paper in the name of such qualified elector. MacKenzie thereupon swore out an information before the deputy returning officer, charging the party in question with the offence of personation, and a warrant was issued under which the alleged personator was arrested and lodged in the jail at the police station at St. James.

At another polling division a similar charge was laid by McDonald against another alleged personator, who gave his name as Tom Morris, and he also was arrested and lodged in the same jail. Both of the accused persons were on the same day released on bail by S. D. Richardson, a justice of the peace. The recognizances of bail accepted by Mr. Richardson and on which the accused were released were produced, attached to the informations. These shew that no time or place was specified at which the accused were to appear and the offence with which they were charged was not mentioned. The recognizances appear to have been hurriedly and negligently prepared. One is headed Re "George Stout." The quotation marks appear in the original and apparently indicate doubt whether the name was real or assumed. In this recognizance it is declared that Fred Adams and John Nolan, both of Winnipeg, were bound in the sum of $250 each, said sums to be levied to the use of the King,

> if he, the said Tom Morris fails in the condition hereunder written (or endorsed hereon).

The other recognizance is headed Re "Tom Morris," again using quotation-marks, and the same sureties bind themselves in similar sums to be levied "if he the said George Stout fails, etc." The pretended recognizance taken in the Stout case was for the due appearance of Morris, and that in the Morris case was for the due appearance of Stout.

No condition was underwritten on either of the recognizances. In each case there is a form printed on the back of the recognizance and intended to be filled up, to shew the offence charged, the day to which the case was adjourned and when and where the accused is to appear, in default of which appearance

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the recognizance is to be enforceable against the sureties. This form was left completely blank, nothing whatever being written into it. There was, therefore, no time or place specified at which either of the accused persons was to appear, and there was no condition in either recognizance for the breach of which the sureties could be held liable. For all purposes the pretended recognizances might have been mere blank paper.

On Monday, 14th October, McDonald was informed by James Bain, chief of police for the municipality of Assiniboia, and keeper of the jail at St. James, that Morris had been admitted to bail and had been remanded to be tried on 16th October, at 11 o'clock in the forenoon, and he was on the 15th October again told by Bain that the *Morris* case would come up for trial before police magistrate McMicken at the Police Court, Winnipeg, on the following day at 11 a.m. On 15th October, Bain informed MacKenzie and his counsel, Mr. Trueman, that Stout had been remanded for trial before Alexander McMicken, police magistrate, at the provincial Police Court at Winnipeg, on 16th October, at 11 o'clock in the forenoon. On the 15th October, MacKenzie and his counsel were informed by the clerk of the said Police Court that the case against Stout was coming before that Police Court on the 16th October, at the hour above mentioned. At the request of MacKenzie and his counsel subpœnas were issued for witnesses who were required to give evidence on the charge, and these subpœnas were prepared by said clerk commanding the attendance of witnesses at the said Court on 16th October, at 11 o'clock in the forenoon.

On the morning of 16th October, MacKenzie and McDonald appeared at the said Police Court about fifteen minutes before 11 o'clock and were then informed that the magistrate, Alexander McMicken, had already disposed of the cases. The accused persons had appeared before Mr. McMicken in his private room shortly after ten o'clock and had pleaded guilty to the charge in each case. The magistrate had then imposed a fine of fifty dollars upon each offender, this being the lowest penalty permitted by the statute. At or soon after 11 o'clock Mr. Trueman, counsel for the prosecutors, stated to the magistrate, who was then on the bench, that he appeared on behalf of the informants, and was ready to proceed with the charges. The magistrate told him that he had already tried the cases. A conversation then took place between Mr. Trueman and the magistrate and between the latter and MacKenzie, which is set out in full in the affidavits made by MacKenzie, McDonald and Fairlie, a newspaper reporter who was present. The magistrate has filed an affidavit in which he denies two of the statements attributed to him, but states that it was impossible for him "to remember verbatim what took place on the occasion in question." He ad-

mitted that he was very angry at the time. The clerk of the Court and other persons appear to have been present during the conversation, but no affidavit has been produced from any of these persons to corroborate the magistrate's statement as to what took place. The weight of evidence, therefore, is that the magistrate made all the statements attributed to him in the affidavits of MacKenzie, McDonald and Fairlie.

It is clear that the magistrate refused to furnish to the prosecutors or their counsel information as to the amount of the fines he had imposed on the offenders, or to give the reason why he had disposed of the cases before the time fixed for the trial, and in the absence of the prosecutors. When MacKenzie, one of the prosecutors, persisted in asking why his case had been heard in his absence and before the time fixed for trial, the magistrate ordered him to "shut up" and threatened him with arrest. The account given in the affidavits filed by the applicants shews that the magistrate used unseemly language during the above conversation, and acted improperly in withholding information to which the prosecutors were entitled. The conversation took place so soon after he had dealt with the charges that it may be regarded as part of the same transaction, for the purpose of shewing the magistrate's state of mind and of enabling us to form an opinion as to whether he was influenced in his judicial determination of the cases by any improper motive, such as prejudice against the prosecution or a desire to favour the accused.

The charge against the magistrate is that he acted

> unlawfully, maliciously, wickedly and corruptly and contrary to his duty as said police magistrate,

in hearing and disposing of the aforesaid informations and charges at a time prior to the time fixed for hearing and at a time unknown to the informants and in the absence and without the knowledge of the informants. The question raised upon this application is,

> not whether the act done might upon full and mature investigation, be found strictly right, but from what motive it had proceeded; whether from a dishonest, oppressive or corrupt motive, under which description fear and favour may generally be included, or from mistake or error;

per Abbot, C.J., in *Rex* v. *Borron*, 3 B. & Ald. 432, 434; see also *Regina* v. *Badger*, 4 Q.B. 468; *Re Fentiman*, 4 Nev. & M. 126; 2 A. & E. 127. A criminal information has been granted where a magistrate has been shewn to have acted from political prejudice or resentment: *Rex* v. *Williams*, 3 Burr. 1317; *Rex* v. *Hann, et al.*, 3 Burr. 1716. It is the duty of the magistrate to act fairly between the parties, and if he shewed partiality, in the sense of giving an unfair advantage to one litigant party over another, he would be guilty of a breach of duty: *Regina* v.

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Badger, 4 Q.B. 468, 473. But whenever it appears that the magistrate acted honestly and uprightly, even though he mistook the law, no information will be granted against him.

The excuse that the magistrate offers for his action is that on the morning of 16th October, a telephone communication was sent to him by Mr. Sullivan, a lawyer, who appears to have been acting for the accused parties, requesting the magistrate to attend at his Court room at about nine o'clock, as he, Sullivan, had some important cases he wished to get disposed of. The magistrate arrived at the Police Court at about twenty minutes after nine o'clock. He then received the papers relating to the cases from Bain, the chief of police. The accused persons soon after appeared, accompanied by Mr. Sullivan, and the magistrate then disposed of both cases in the absence of, and without notice to the prosecutors. The entry of conviction in each case purports to have been made at 10.30 o'clock.

The only explanation offered by the magistrate for proceeding in this hasty and unusual manner was, that Mr. Sullivan said he had another appointment and was anxious to have the cases disposed of as speedily as possible. The magistrate states that he had no knowledge of the cases until the papers were handed to him on the morning of the 16th October, and that he did not know that the hearing had been fixed for eleven o'clock on that morning. He further states that he

> had no reason to suspect or believe that either the said Richard H. McDonald or the said Hugh MacKenzie had any personal desire, or were in any way interested in being present when the convictions were made, inasmuch as both the accused were pleading guilty.

The magistrate had no reason to believe that the prosecutors were aware that the accused would plead guilty. He knew that both the accused persons were charged with the offence of personation at a Dominion election held a few days previously. The informations shewed that the charge in each case was laid by a private prosecutor before the deputy returning officer at a polling division, so that the inference was plain that the accused had been detected in the very act of committing the offence and had been then and there apprehended. It should have occurred to the magistrate that the parties in charge of the prosecution might desire to shew that the accused should be dealt with severely as having deliberately planned and knowingly committed the offences. The private prosecutor in each case had a right to be present and take the conduct of the prosecution he had instituted and the magistrate had no right to proceed in his absence: Stephen, Hist. of Crim. Law, vol. I., pp. 494-495. The private prosecutor had a right to be present in order to identify the accused and to rebut, if he could, any evidence offered in extenuation of the offence. The minimum pen-

alty was imposed in each case, the reason given by the magistrate being that the accused stated that they were under the influence of liquor at the time. The applicants very justly contend that they were entitled to contradict and disprove this allegation, and to ask for the imposition of a greater punishment.

The magistrate could have ascertained from the clerk of his own Court the hour for which the trials were fixed. He should have ascertained this and he had no right, without the consent of the prosecutors, to deal with the cases before the proper time had arrived. The offences were of a serious nature. They should have been disposed of in open Court and not secretly in the magistrate's private room.

While I am impressed with the view that the magistrate acted improperly, there is still the all important element to be considered, did he so act from a dishonest or corrupt motive such as favouring or shielding the accused? If he had discharged the accused without inflicting any punishment, I would have had no hesitation in deciding that the application for a criminal information should be granted. But he did impose a penalty and, although it was the lowest he could impose under the statute, that was a matter left to his discretion. I am not satisfied that it has been sufficiently shewn that he so favoured the accused, or was so prejudiced against the prosecutors, that there was not, in fact, an exercise of judicial discretion upon his part, and that he had a fixed intention to treat the offenders as leniently as the law would permit. His improper conduct in disposing of the cases before the time fixed for hearing them, and in the absence and without the knowledge of the prosecutors, may have arisen from a want of knowledge of the legal procedure to be observed, or from a mistaken idea of his powers. Again, the magistrate may have acted honestly and may unwittingly have allowed himself to be used as an instrument in the hands of persons who were aiding, abetting and protecting the offenders.

It is incumbent upon the applicants to shew that the magistrate acted from a dishonest or corrupt motive. As Lord Denman pointed out in *Re Feutiman*, 4 Nev. & M. 126, 2 A. & E. 127, there must be sufficient proof of corruption to warrant the Court in granting a rule for a criminal information against a magistrate, though there may be much that is reprehensible and suspicious in his conduct. I am not satisfied that the applicants have clearly established a case for the granting of a criminal information against the magistrate, and I think the Court should, in the exercise of its discretion, refuse the application.

The rule in each case should be discharged, but without costs.

Cameron, J.A. (dissenting)

CAMERON, J.A. (dissenting):—Magistrates, like other subjects, are answerable to the law for the faithful and upright

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discharge of their trust and duties. When their conduct is impugned the question is, from what motive the act done has proceeded,

> whether from a dishonest, oppressive or corrupt motive, under which description, fear and favour may generally be included, or from mistake or error: *R.* v. *Borron*, 3 B. & Ald. 432.

That the motive does not spring from interest is not material for if they (the magistrates) acted from passion or opposition, that is equally corrupt as if they acted from pecuniary considerations: *R.* v. *Brooke*, 2 T.R. 190, 196.

> Every public officer commits a misdemeanour who, in the exercise of the duties of his office, does any illegal act, or abuses any discretionary power with which he is invested by law from an improper motive, the existence of which motive may be inferred either from the nature of the act or from the circumstances of the case. But an illegal exercise of authority caused by a mistake as to the law, made in good faith, is not a misdemeanour within this article. (Article 148 of Burbidge's Digest of Criminal Law (Can.)).
>
> Note in Can. Crim. Cas. 344, and cases there given.

Lord Mansfield said in *R.* v. *Cozens*, 2 Doug. 427:—

> No justice of the peace ought to suffer for ignorance where the heart is right. On the other hand, when magistrates act from undue, corrupt or indirect motives, they are always punished by this Court.

That is to say, if the magistrate makes a mistake honestly from misapprehension of the law, he is answerable to no one. But if he acts in the execution of his duties from any indirect or improper motive, any motive that has not in view the due administration of justice, then he is punishable by the Court.

There are two cases before us, practically identical in circumstances with each other, in which the conduct of a provincial police magistrate is called in question. I deal first with that in which the information was laid by Mr. MacKenzie, agent for one of the candidates at poll No. 2 in the electoral district of Macdonald at the election there held on October 12th last.

On Saturday, October 12, 1912, at polling booth No. 2, in the said electoral district at an election held on that day in that district there appeared before Harry V. Vincent, the deputy returning officer at said booth, a person, who applied to the returning officer in the name of Allan W. Craigie, for a ballot giving the name of Allan W. Craigie and his residence and occupation. Mr. MacKenzie thereupon asked the deputy returning officer to place this person in custody of the poll constable, drew up and swore to an information for personation, upon which the deputy returning officer issued his warrant and placed it in the hands of provincial constable James Bain, who took the said person into custody.

Now, it is not here contended that it was by an accident that this person happened to know the name of an absentee voter,

stumbled fortuitously into the polling booth of the polling division where this absentee voter was entitled to vote and, without knowing what he was doing, asked for a ballot paper giving the name of the absentee voter. The natural inference is that the person so attempting to personate an absentee voter was doing what he did at the instigation of some interested parties who furnished him with the information and directed his movements. It was a matter of design, not accident.

Afterwards on the same day a justice of the peace, named S. D. Richardson, released the person so taken into custody. We find amongst the papers returned by the magistrate, A. McMicken, Esq., with his affidavit, and attached to Mr. MacKenzie's information, a form of recognizance of bail, headed "Re Tom Morris" but containing the name of "George Stout" signed by said Richardson. Inasmuch, however, as the condition of the recognizance is in blank, the recognizance is worthless, and the parties mentioned therein, Fred Adams and John Nolan, were bound to nothing.

So that here we have the accused person referred to as an "unknown person" afterwards identified as Woods in MacKenzie's affidavit, and referred to as "Tom Morris" and as "George Stout" in the alleged recognizance of bail, released upon the bail of no one, not even of himself. All this without notice to the prosecutor.

These papers were produced for the first time on this motion. So that no question has been raised whether the party guilty of personation was designedly or inadvertently released by magistrate Richardson without bail and without notice to the prosecutor.

Mr. MacKenzie went with his counsel, Mr. W. H. Trueman, on Tuesday, October 15th, to St. James, and there saw Police Constable Bain, who told them that Magistrate Richardson had on the evening of October 12th, ordered the release of the accused and remanded him for trial before A. McMicken, Esq., provincial magistrate, at the provincial Police Court in the city of Winnipeg on Wednesday, October 16th, at 11 o'clock in the forenoon.

It is not shewn why Magistrate Richardson remanded the case to another magistrate in the absence of the prosecutor. He does not come forward to tell us that he did this of his own motion, nor does he say that he did it at a suggestion from outside. It would not, however, be difficult to draw the inference that he did not act in so extraordinary a manner spontaneously.

Mr. MacKenzie, with Mr. Trueman, went to the provincial police office on October 15th, at 3 o'clock, and they were there told by the clerk of the Court, that the case against the accused would be on at 11 o'clock in the forenoon of the next day. Sub-

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pœnas for three witnesses were then prepared, commanding their attendance at 11 o'clock on Wednesday, October 16th.

Mr. MacKenzie attended at the Police Court at 15 minutes to 11 o'clock that day, but was informed that the case had been already disposed of. The clerk of the Court informed Mr. MacKenzie and Mr. Trueman of this also and shewed the written information upon which was endorsed:—

> Wpg. October 16th, 1912.
> 10.30 A.M.
> Pleads guilty with extenuating circumstances.
> Fined $50. pd.

According to Mr. MacKenzie, whose affidavit is corroborated by Mr. Fairlie, there then ensued the various questions and answers and statements between Mr. MacKenzie, Mr. Trueman and the magistrate, set out in paragraph 14 of his affidavit, in which he says positively that the magistrate declared that Mr. Sullivan, barrister, had appeared for the prosecution when the case was disposed of.

In Mr. Fairlie's affidavit it is further stated that when the clerk of the Court was about to shew some paper to Mr. Trueman the magistrate said to him:—

> Why, you are giving things away. God Almighty, don't shew anything to them.

We are not here and now asked to believe that any of the circumstances antecedent to the trial before magistrate McMicken, viz., the asking by the accused for a ballot paper, the secret release of the accused without bail, or the secret remanding of the case to be heard before magistrate McMicken, was an occurrence wholly accidental in its nature. But we are asked to take it as the truth that the extraordinary action of the magistrate was purely accidental, that it was due to the singular fact that Mr. Sullivan, counsel for the accused, had an engagement at the Court House and wanted to have the case disposed of as speedily as possible. The whole defence comes down to this, that it was owing to Mr. Sullivan's appointment that the magistrate took the arbitrary and improper course he did in dealing with the information (which charged the accused with a most serious offence) summarily, secretly, in the absence of the prosecutor and before the time fixed for the trial.

It is to be noted that we have not been furnished with affidavits from Magistrate Richardson, from Police Constable Bain, from the clerk of the Court or from Mr. Sullivan. All these parties should be produced for examination before this matter can be finally cleared up. At whose request did Magistrate Richardson release the accused without notice to the prosecutor, and remand the case for trial before Magistrate McMicken? How did the police constable acquire his information as to the

date of the remand and other matters and what information did he actually afford to the sympathetic ear of the magistrate on the subject of "extenuating circumstances"? On what facts in his knowledge was it that the clerk of the Court informed the prosecutor of the hour fixed for the trial and issued subpœnas returnable at that time? By what reasoning did counsel for the accused persuade the magistrate to dispose of these cases without embarrassing publicity? These and other pertinent questions might have been answered, but they are not.

I must say that I am impressed with the unreality of the names of "George Stout" and "Tom Morris." So inextricably are they confused in the alleged recognizances of bail that there is ground for the suspicion that they may be both fanciful designations for one and the same man.

The law provides that the Magistrate's Court shall be an open Court. See sec. 714 of the Code, with reference to trials before a justice in case of summary convictions, and sec. 787, in the case of summary trials for indictable offences. "Every Court held by a magistrate for the purposes of this part shall be an open public Court." This was the law before the Code and for obvious reasons.

Criminal matters must be disposed of in the presence of the public and the prosecutor. And even if the accused pleads guilty the prosecutor has a right to be present to adduce evidence bearing upon the question of the severity of the penalty to be inflicted.

Sec. 272 of the Dominion Elections Act provides that

> Every person is guilty of personation and liable to a penalty not exceeding two hundred dollars and not less than fifty dollars and to imprisonment for a term not exceeding two years and not less than three months who at an election
>
> (a) applies for a ballot paper in the name of some other person, whether such name is that of a person living or dead, or of a fictitious person.

The variable nature of the punishment that can be inflicted indicates that the magistrate has a discretion to be exercised on the evidence before him. Obviously if the accused offers evidence the prosecutor must be at liberty to controvert it if he can and wishes to do so.

The powers of a private prosecutor are as great as those of the Attorney-General.

> No person has any legal power for the collection of evidence, or for its production before the magistrate, or in appearing before the Court by which the matter is finally determined in the one case which the person placed in a corresponding position has not in the other: Stephens, Hist. Criminal Law, vol. 1, 195.

That the prosecution has the right to produce evidence in

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aggravation appears absolutely clear: *R.* v. *Bunts*, 2 T.R. 683; *R.* v. *Dingnam*, 7 A. & E. 593.

It was argued in reply that the proceedings of the magistrate were at most irregular only; that there was no legal evidence of the adjournment until 11 o'clock and that the applicant had failed to make the strong *primâ facie* case, based on direct evidence, required by the authorities: *R.* v. *Stanger*, L.R. 6 Q.B. 352; *R.* v. *Willett*, 6 T.R. 294. It was contended that there was here no corrupt motive shewn and there could not have been such because the magistrate could have waited until 11 o'clock and inflicted the same penalty, and it cannot be said that the magistrate acted either illegally or corruptly. Counsel for the magistrate referred to *Ex parte Fentiman*, 2 A. & E. 127, amongst other cases.

In the other case, in which Mr. R. H. McDonald laid the information, a similar state of facts is shewn. Mr. McDonald, acting as agent at the poll No. 4 in said district at the said election, caused the arrest of one Thomas Morris for applying for a ballot paper in the name of Valentine G. Quinn, under a warrant issued by the deputy returning officer. Mr. McDonald saw Police Constable Bain on Monday, who then informed him that the accused had been released on bail. Here the recognizance is headed "Re George Stout" while in the body of it appears the name of "Tom Morris," and there is no condition endorsed. On Tuesday evening Mr. MacDonald was informed by Bain that the case would come up before Police Magistrate McMicken at the provincial Police Court, Winnipeg, on October 16, at 11 o'clock, before which time he was in attendance at that place. The rest of the affidavit of McDonald deposes to substantially the same facts as those set forth in the affidavit of Mr. MacKenzie.

The two cases must obviously be dealt with together.

The following points appear to me of importance:—

1. The magistrate says that one case was disposed of by him shortly after 10 o'clock in the forenoon—the other about 20 minutes past 10. In this he is contradicted by his own memoranda on the papers, which shew that both cases were heard at 10.30 a.m.

2. It appears that the magistrate altered Mr. MacKenzie's sworn information in the absence, and without the consent of the informant. Of this there is no explanation.

3. The statement, positively made by Mr. Fairlie and Mr. McDonald, that the magistrate said to the clerk,

> Why are you giving things away? God Almighty, don't shew anything to them

is denied by him though he admits he did say that the clerk had no right to give information without consulting him. The weight

of evidence on this point is against the magistrate, who admits in his affidavit that it was impossible for him to remember verbatim what took place.

4. The magistrate denies that he said Mr. Sullivan appeared for the prosecution, but that the other deponents misunderstood him. But that he did say that Mr. Sullivan appeared for the prosecution is positively sworn to by Mr. MacKenzie, Mr. Fairlie and Mr. McDonald. Here again the weight of evidence is against the magistrate.

5. The other statements ascribed to him in the affidavits are practically admitted by him.

6. The magistrate arbitrarily and improperly refused to let the prosecutor have a copy of the information and record. The reason he gives for this refusal was no reason at all. His real motive is left to inference.

7. In answer to the charge that he failed to impose imprisonment as well as a fine, the magistrate says, in his affidavit: "I am not aware, and I deny that it was my duty to sentence the said accused to a term of imprisonment," which may be true, but is irrelevant and disingenuous, as he should have sworn to his knowledge as of the date when he imposed the fine, and not as of the date when he made his affidavit.

8. We have not before us affidavits from Constable Bain, Magistrate Richardson, the clerk of the Police Court, or Mr. Sullivan, all of whom could shed much light on the questions here raised. The absence of these affidavits affords ground for legitimate comment.

9. The fact that there were two cases, not apparently related to each other, disposed of by the magistrate in precisely the same way, practically simultaneously, gives rise to serious considerations. That the magistrate should secretly dispose of one is hard enough to explain and defend, but that he should thus hurriedly get rid of two cases is a difficult matter indeed to apologize for. It is singular that it should have occurred to each of these two offenders to plead the astonishing plea of drunkenness and that such a futile matter of alleged excuse should have been entertained without question. It is likewise singular that each of these two self-confessed criminals should have had with him the sum of fifty dollars, being the exact amount of the fine to be inflicted.

10. In his memorandum in the *Morris* case the magistrate says that the excuse of inebriety there pleaded before him was substantiated by the police authorities; but this he does not repeat in his affidavit. Mr. MacKenzie swears that the magistrate said in the Court room that Constable Bain had told him that the accused was drunk, and that he (MacKenzie) told the magistrate: "But Constable Bain told me that he was sober, and

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gave no evidence of having been drinking," and that Constable Bain, who was present, said he had made no statement whatever with reference to the accused having been drinking. It is to be observed that we are here without the evidence of Constable Bain. The evidence is against the magistrate on this point.

11. The conduct and language of the magistrate, as set forth in the affidavits, were so violent and tyrannical as to lend some colour to the view that his action in these two matters was dictated by improper motives. Certainly to contend such action was prompted with a view to the due and proper administration of justice seems to me inconsistent with his treatment of the men who were attempting to bring violators of the law to justice.

In addition to the foregoing considerations and conclusions, I think it clear that the real charge against the magistrate, that of disposing of these cases secretly and in the absence of the prosecutor, is not met by him with any explanation whatever, except the fatuous one of Mr. Sullivan's appointment at the Court House on the morning in question, to which I have alluded.

After a careful perusal and consideration of the material filed, I have come to the conclusion that, in the result, the proceedings before the magistrate were a travesty on the administration of justice, and that there has been made out a *primâ facie* case of connivance on his part, by acquiescence and otherwise, and with knowledge of the material facts involved. Upon the material, it is not going far afield to draw the inference that it was the intention of the magistrate to deal with these cases with a minimum of publicity, and with as little damage as could possibly accrue to the self-confessed criminals and their accessories. The evidence before us is such that a grand jury might readily find a true bill upon it. Not until the various parties who have made affidavits and others I have mentioned have been examined in open Court can the issues here raised be finally and satisfactorily determined. The questions involved, viz., that of the sanctity of the ballot and that of the integrity of the magistracy, are of the highest importance and it is in the public interest that the matters in issue should be authoritatively dealt with by a jury.

In my opinion the evidence before us points to a conclusion that the magistrate in the extraordinary and arbitrary course he adopted in these two cases was animated by an indirect and improper motive; that is to say, by a motive having in view something other than the due and impartial administration of justice. This conclusion, however, may be rebutted and overthrown by further evidence. Therefore, there seems good reason why the magistrate himself, whose conduct has been so sharply and so publicly assailed, should, if fully conscious of his own uprightness, have no hesitation in submitting to the test of a trial before a jury of his fellow-countrymen.

In my opinion the rules in these cases should be made absolute.

HAGGART, J.A.:—I have read the reasons of my brother Richards, and I agree with him that the rule should be discharged.

I thought on the original motion that the rule *nisi* should have been refused. Subsequent argument on the motion to make the rule absolute confirmed me in my first opinion.

In a serious proceeding like this stronger evidence than was offered should have been submitted.

One of the grounds of illegality urged on the *ex parte* motion for the rule *nisi* was that under the statute the magistrate was bound to impose imprisonment in addition to the fine. Judicial interpretation, however, supports the decision of the magistrate and on the argument this ground was abandoned by counsel for the informant.

In my opinion there was no evidence of any corrupt or improper motive, nor was there any illegality in the proper sense of the term, unless a mistaken view of an official's duty is an illegal act.

It is true the magistrate lost his temper in the altercation set out in the informant's affidavit, but I cannot say there was no provocation. This altercation, however, took place subsequent to the disposition of the cases in question.

The rule should be discharged.

Rule discharged; CAMERON, J.A., *dissenting.*

Annotation

Proceedings by criminal information

Annotation—Criminal law (§ II A—33)—Leave for proceedings by criminal information.

A criminal information is a written suggestion of a misdemeanour, made either, (1) *ex officio* by the Attorney-General, or (2) filed in the Crown Office by special leave on the relation of a private prosecutor proceeding in the name of the Crown.

In Blackstone's Commentaries, vol. IV., 308, such informations are divided into two sorts:—

(1) Those which are partly at the suit of the King and partly at that of a subject, and which are usually brought upon penal statutes. These are limited as to time by 31 Eliz. ch. 5, and are scarcely ever heard of: Bowen-Rowlands on Criminal Proceedings, 2nd ed., 351.

(2) Those which are only in the name of the King, and which are of two kinds:—

(*a*) Those which are truly and properly his own suit, and filed *ex officio* by his own immediate officer, the Attorney-General.

(*b*) Those in which, though the King is the nominal prosecutor, yet it is at the relation of some private person or common informer, and they are filed by the King's coroner and attorney in the Court of King's Bench, usually called the Master of the Crown Office.

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Annotation

Proceedings by criminal information

Annotation (*continued*)—Criminal law (§ II A—33)—Leave for proceedings by criminal information.

A "criminal information" must be distinguished from an "information" laid under Summary Jurisdiction statutes or the Criminal Code where the term is used as synonymous with complaint.

The object of the King's own prosecutions filed *ex officio* are properly such enormous misdemeanours as peculiarly tend to disturb or endanger his government, or to molest or affront him in the regular discharge of his royal function. The objects of the species of information filed by the Master of the Crown Office upon the complaint or relation of a private subject are any gross and notorious misdemeanours, riots, batteries, libels, and other irregularities of an atrocious kind, not peculiarly tending to disturb the Government, but which deserve the most public animadversion: (*R.* v. *Labouchere*, 12 Q.B.D. 320, where it was held that a criminal information for libel can only be granted at the suit of persons who are in some public office or position, and not at the suit of private persons). See also *R.* v. *The World*, 13 Cox 305; Bowen-Rowlands on Criminal Informations, 2nd ed., 352.

Information differs from an indictment in little more than this: that the one is found by the oath of twelve men, and the other is not so found, but is only an allegation of the officer who exhibits it: Shortt on Informations, p. 3. The term "indictment" will not, apart from a statutory meaning expressly given, include "information": *R.* v. *Slator*, 8 Q.B.D. 267; but by sec. 5 of the Criminal Code of Canada 1906, finding the indictment includes also exhibiting an information and making a presentment.

In practice, a criminal information will only lie in the King's Bench Division of the High Court (in England) and not in Courts of assize or quarter sessions, but it may be sent by a Divisional Court (K.B.D.) for trial in a Court of Assize: *R.* v. *Russell*, 93 L.T. 407. The proceedings are similar to those on indictment, except that the junior counsel for the prosecution "opens" the pleadings as in a civil case (see *R.* v. *Russell*, *ibid.*) And in England there may be an appeal to the Court of Criminal Appeal therefrom.

A criminal information on relation will only be granted in a case of serious misdemeanour, *e.g.*, libels against magistrates, offences against public justice or the public peace. Though theoretically a criminal information will lie in respect of any offence other than treason, or felony, in practice it is only granted in England in cases of misdemeanour; and the English Crown Office rule 372, now expressly declares that an information by the Attorney-General shall not be for treason *or* felony, and rule 375 declares that informations may be ordered by the King's Bench Division on the application of a private individual in respect of a misdemeanour.

The granting of a criminal information is discretionary with the Court under all circumstances; the application is not to be entertained on light or trivial grounds. In dealing with such an application, the Court has always exercised a considerable extent of discretion in seeing whether the rule should be granted, and whether the circumstances are such as to justify the Court in granting the rule for a criminal information: *R.* v. *Wilkinson* (1877), 41 U.C.Q.B. 1, 29.

A party who wants a criminal information must place himself entirely in the hands of the Court. If it appear that the party has put himself

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Proceedings by criminal information

Annotation (*continued*)—Criminal law (§ II A—33)—Leave for proceedings by criminal information.

into communication with the publisher of the libel, for the purpose of retorting, or with the view of obtaining redress, or has in any way himself attempted to procure redress, or take the law into his hands, the remedy by criminal information will be refused: *R.* v. *Wilkinson* (1877), 41 U.C.Q.B. 1, 25, citing *Ex parte Beauclerk*, 7 Jur. 373; *R.* v. *Heastis*, 1 James 101.

A person alive to the vindication of his character when assailed and entitled to the remedy of criminal information must apply with reasonable promptitude. The general rule is stated by Lord Mansfield in *R.* v. *Robinson* (1765), 1 W. Bl. 542, where he said: "There is no precise number of weeks, months, or years; but, if delayed, the delay must be reasonably accounted for. The party complaining must come to the Court either during the term next after the cause of complaint arose, or at so early a period in the second term thereafter as to enable the accused, unless prevented by the accumulation of business in the Court, to shew cause within the second term; and this, regardless of the fact whether an assize intervened or not: *R.* v. *Kelly*, 28 U.C.C.P. 35; *R.* v. *Wilkinson*, 41 U.C.Q.B. 1, at 24.

It is of the highest importance that the relator should in all cases lay before the Court all the circumstances fully and candidly, in order that the Court may deal with the matter: *R.* v. *Wilkinson* (1877), 41 U.C.Q.B. 1, 25 (citing *R.* v. *Aunger*, 28 L.T.N.S. 634, s.c. 12 Cox 407).

There are two things principally to be considered in dealing with such an application: (1) To see whether the person who applies to conduct the prosecution, the relator or the informer, has been himself free from blame, even though it would not justify the defendant in making the accusation; (2) To see whether the offence is of such magnitude that it would be proper for the Court to interfere and grant the criminal information. Both these things have to be considered, and the Court would not make its process of any value unless they considered them and exercised a good deal of discretion, not merely in saying whether there is legal evidence of the offence having been committed, but also exercising their discretion as men of the world, in judging whether there is reason for a criminal information or not: *R.* v. *Plimsoll* (1873), noted in 12 C.L.J. 227; *R.* v. *Wilkinson* (1877), 41 U.C.Q.B. 1, 29.

The Court always considers an application for a criminal information as a summary extraordinary remedy depending entirely on their discretion, and therefore not only must the evidence itself be of a serious nature, but the prosecutor must apply promptly or must satisfactorily account for any apparent delay. He must also come into Court with clean hands, and be free from blame with reference to the transaction complained of; he must prove his entire innocence of everything imputed to him, and must produce to the Court such legal evidence of the offence having been committed by the defendant as would warrant a grand jury in finding a true bill against the defendants: *Per* Quain, J., in *R.* v. *Plimsoll* (1873), noted, 12 Can. Law Jour., p. 228, cited by Hagarty, C.J., in *R.* v. *Kelly* (1877), 28 U.C.C.P. 35.

The Court confines the granting of criminal informations for libel to the case of persons occupying official or judicial positions, and filling some

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Annotation.

Proceedings by criminal information

Annotation (*continued*)—**Criminal law (§ II A—33)—Leave for proceedings by criminal information.**

offices which gives the public an interest in the speedy vindication of their character, or to the case of a charge of a very grave or atrocious nature; leave was therefore refused to the manager of a large railway company to file a criminal information for libel, on the ground that he did not come within the description of persons referred to. *Per* Armour, J.: "I think the practice of granting leave to file criminal informations in this country, having regard to the social conditions of its inhabitants and the liberties which they enjoy, is, to say the least of it, of very doubtful expediency, and should, in my opinion, be discontinued, and, if necessary, abolished by legislative enactment. The very rule adopted in England, that it will only be granted to what I may call 'a superior person' is the strongest reason, to my mind, why in this country it should never be granted at all. Whatever may be deemed desirable in England, I do not think it desirable that in this country there should exist a remedy for the superior person which is denied to the inferior": *R.* v. *Wilson* (1878), 43 U.C.Q.B. 583. In that case Cameron, J., said: "There is no real necessity, so far as I am aware, for anyone seeking this remedy. Any person libelled has a right to lay an information before a magistrate charging anyone who may have libelled him with the offence, and may then by his oath deny the truth of the slanderous charges or imputations." Hagarty, C.J., added that it was not to be understood that the Court laid down any absolute rule as to future applications for criminal informations, or that they meant to fetter their discretion in dealing therewith: *Ib.* reporter's note: *R.* v. *Wilson* (1878), 43 U.C.Q.B. 583.

Where the libel charges the person libelled with having, by a previous writing, provoked it, the latter by his affidavit on which he moves for a criminal information is bound to answer such charge, otherwise the affidavit will be held insufficient: *R.* v. *Edward Whelan* (1863), 1 P.E.I. Rep. 220, *per* Peters, J.

In Trinity Term, 1876, an application was made for a criminal information for libel in newspapers published on 23rd and 30th March and 25th May. The delay in not applying to the Court during Easter Term, or until 30th August, was not satisfactorily accounted for, and the Court refused the application, but, in view of the virulent language of the article, without costs: *R.* v. *Kelly* (1877), 28 U.C.C.P. 35.

In answer to an application for a criminal information for libel the defendants filed an affidavit stating that they had no personal knowledge of the matter contained in the alleged libels, but received the information from persons whom they trusted to be reliable and trustworthy; that the Globe newspaper was controlled by the applicant, who was an active politician, and had published a number of articles violently attacking one S., who was a candidate for a public office, and the libels in question were published with a view of counteracting the effect of these articles, and believing them to be true, and without malice. This was held to be no ground for the Court refusing to the applicant leave to file a criminal information for the reiterated publication in a newspaper of matter not pretended either to be not libellous, or to be true in fact: *R.* v. *Thompson* (1874), 24 U.C.C.P. 252.

Quære, whether a criminal information is the course to be adopted for

Annotation (*continued*)—Criminal law (§ II A—33)—Leave for proceedings by criminal information.

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Annotation

Proceedings by criminal information

wilful and corrupt misconduct of a Judge holding an inferior Court of record: *R.* v. *Ford* (1853), 3 U.C.C.P. 209, 218.

Where there is foundation for a libel, though it falls far short of justification, an information will not be granted: *The Queen* v. *Biggs*, 2 Man. L.R. 18.

A party seeking a criminal information against another must himself be free from blame, or he will not be granted leave to take that method of procedure, and will be left to his recourse by indictment or action: *R.* v. *Edward Whelan* (1863), 1 P.E.I. Rep. 223, *per* Peters, J.; *R.* v. *Lawson*, 1 Q.B. 486; *R.* v. *Biggs*, 2 Man. L.R. 18.

Every public officer commits a misdemeanour who, in the exercise, or under colour of exercising the duties of his office, does any illegal act, or abuses any discretionary power with which he is invested by law from an improper motive, the existence of which motive may be inferred either from the nature of the act, or from the circumstances of the case. But an illegal exercise of authority caused by a mistake as to the law made in good faith is not a misdemeanour: Burbidge Digest of Crim. Law (1890), article 148; *R.* v. *Wyat*, 1 Salk. 380; *R.* v. *Bembridge*, 3 Doug. 327, and 22 St. Tr. 1-159; Bacon Abridgment, tit. "Office and Officer," N.; *R.* v. *Borron*, 3 B. & Ald. 434; Annotation, 11 Can. Cr. Cas. 344. If the illegal act consists of taking under colour of office from any person any money or valuable thing which is not due from him at the time when it is taken, the offence is called "extortion": *R.* v. *Tisdale*, 20 U.C.Q.B. 272; *Parsons* v. *Crabbe*, 31 U.C.C.P. 151.

The statutory provisions of the criminal law relating to offences against the administration of law and justice are to be found in Part IV. of the Criminal Code of Canada, 1906, secs. 155-196.

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Ontario Court of Appeal, Garrow, Maclaren, Meredith, and Magee, JJ.A. November 19, 1912.

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1. DEEDS (§ II C—33)—ERRORS AS TO QUANTITY, OCCUPANCY, NAME, LOCALITY—IDENTITY AS TO PROPERTY INTENDED TO BE CONVEYED.

In construing a deed purporting to assure a property, if there be a description of the property sufficient to render certain what is intended, the addition of a wrong name, or erroneous statement as to quantity, occupancy, locality, or an erroneous enumeration of particulars, will have no effect.

[*Sinclair* v. *Peters*, 3 D.L.R. 664, affirmed.]

2. HIGHWAYS (§ I A—7)—DEDICATION INTENTION MUST BE SHEWN.

In order to establish the dedication of land as a public highway, an intention to dedicate must be shewn, and, though there may be facts indicating a dedication, yet, if, in the light of all the circumstances, there appears to have been an absence of any intention to dedicate, dedication is not established.

[*Sinclair* v. *Peters*, 3 D.L.R. 664, affirmed.]

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SINCLAIR v. PETERS.

3. DEDICATION (§ I B—10)—WHAT AMOUNTS TO—MAP SHEWING STREETS ATTACHED TO REGISTERED DEED—NON-COMPLIANCE WITH REGISTRY ACT.

The registration with a deed of land of a sketch of the land attached to the deed, without the formalities required by the Registry Act, in the registration of a plan, does not constitute a dedication as public highways of those parts of the land which are shewn in the sketch as streets or roads.

[*Sinclair* v. *Peters*, 3 D.L.R. 664, affirmed.]

4. DEDICATION (§ II—23)—WHAT CONSTITUTES ACCEPTANCE—ASSESSMENT OF LAND AS STREET.

Where a strip of land used as a street but privately owned was treated by the assessor of the municipality as a street and was not assessed for nine years, but there was no direct assertion by the municipality of any claim to dedication of the land, nor were any municipal improvements made thereon, such facts do not establish a dedication thereof as a highway.

[*Sinclair* v. *Peters*, 3 D.L.R. 664, affirmed.]

Statement

APPEAL by the defendant from the judgment of Sutherland, J., in an action for trespass on certain lands, which is reported in *Sinclair* v. *Peters* (No. 1), 3 D.L.R. 664, 3 O.W.N. 1045, where the facts are fully set forth.

The appeal was dismissed.

E. D. Armour, K.C., and *J. D. Montgomery*, for the defendant.

M. H. Ludwig, K.C., for the plaintiff.

Meredith, J.A.

The judgment of the Court was delivered by MEREDITH, J.A.:—I agree with the learned trial Judge in his conclusion as to each of the issues joined between the parties in this action: I differ from him only in this, that I have no hesitation, such as he expressed, on the question of dedication, of which I can indeed find no reasonable evidence.

The "street" or "place" in question was never a thoroughfare, but was merely a cul-de-sac for the convenience of but a few persons whose property abutted upon it, who were expressly granted a right of way over, or were the owners of it. Everything that was done regarding it, from first to last, was at least as consistent with its being a private, as with its being a public, way: and some things, as, for instance, granting rights of way, and granting or receiving power to make it a public way, were quite inconsistent with the defendant's contention; there is in my opinion no reasonable evidence of any intention to dedicate, or of any dedication and acceptance of the street or place as a public way; and no evidence whatever of its having become a public way by reason of the expenditure of public money in opening it, or by the usual performance of statute labour upon it.

No grant of any right of way to the defendant is proved; nor does there appear to be any ground for claiming a private right in any such manner.

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Nor has title been acquired by user, as the trial Judge made plain in the reasons for his judgment against the appellant.

But it is said that there is power to convert this private way into a public one: the obvious answer to which, however, is, whether or not such power exists, it has not in fact been exercised, and so the plaintiff yet has this right of action. It will be time enough to deal with any such question when it can be properly, and is, raised.

So, too, the amendment of the statement of claim—setting up a deed given for the purpose of correcting an obvious misdescription merely—as I think, was quite properly allowed; and I also agree with the trial Judge in the view expressed by him that the new deed was not essential to the maintenance of this action, that the old deed covered sufficiently the place in question.

The appeal, in my opinion, should be dismissed.

Appeal dismissed.

DOMINION REGISTER CO. v. HALL and FAIRWEATHER.

N. S.

S. C.

1912

Nov. 7.

Nova Scotia Supreme Court, Ritchie, J. November 7, 1912.

1. SALE (§ I C—16)—NECESSITY OF RECORDING CONDITIONAL SALE AGREEMENT—N.S. STATUTES 1907, CH. 42.

Where the plaintiff sold an account register to a purchaser under a hiring and purchase agreement within the meaning of ch. 42, of the Acts of Nova Scotia, 1907, and where such agreement was neither accompanied by an affidavit nor filed in the registry of deeds, the agreement although valid as between the parties is null and void as against the creditors, purchasers, and mortgagees claiming under the purchaser in question.

[Ch. 42 of the Acts of Nova Scotia, 1907, referred to.]

2. CHATTEL MORTGAGE (§ II C—15)—AFTER-ACQUIRED PROPERTY—EJUSDEM GENERIS.

Where a chattel mortgage conveys the stock in trade, shop, contents, including shop and office fixtures, scales and appurtenances, which had been purchased by the mortgagor from a specified seller with a further provision purporting to cover and include "not only all and singular the present stock of goods and all other the contents of the mortgagor's shop, but also any other goods that may be put in said shop in substitution for, or in addition to, those already there, as fully and to all intents and purposes as if said added or substituted stock were already in said shop and particularly mentioned"; such provision to cover other or after-acquired property is aimed at "stock in trade" and requires clear words in order to cover other property sought to be held, the legal principle of construction being that general words following specific words are ordinarily construed as limited to things *ejusdem generis* with those before enumerated.

[*Moore* v. *Magrath*, 1 Cowper 9, referred to.]

Statement

ACTION to recover the value of an account register delivered by the plaintiff to one McDade under a hire and purchase agreement.

Judgment was given for the plaintiff.

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DOMINION REGISTER CO. v. HALL AND FAIRWEATHER.

Ritchie, J.

J. L. Ralston, for plaintiff.

F. L. Milner and *V. B. Fullerton*, for defendants.

RITCHIE, J.:—The plaintiff company sold to one E. C. McDade an account register, McDade entering into a hiring and purchase agreement within the meaning of ch. 42 of the Acts of the Province of Nova Scotia, for the year 1907. This agreement was not accompanied by any affidavit nor was it filed in the registry of deeds. As against the creditors, purchasers and mortgagees of McDade the agreement was therefore null and void, but good as between the plaintiff company and McDade. This agreement is dated the 31st of August, 1911. Prior to this, namely, on the 17th day of March, 1911, McDade had given a bill of sale or chattel mortgage covering after acquired property to secure the sum of $3,000 due to the defendant company. The price of the account register was $110 and there is now due to the plaintiff company in respect thereof the sum of $88. The defendant company do not rely upon their chattel mortgage having been filed, in fact it was not proved that the chattel mortgage ever was filed in the registry of deeds. What the defendant company rely on is that McDade being in default as to his payments they took possession pursuant to the terms of the chattel mortgage. The plaintiff company deny that McDade was in default and therefore say that the defendant company had no right to take possession. I find that McDade was in default as to payment of interest, the payment which is relied on to avoid default was made by cheque which was returned for lack of funds in the bank to meet it and this I do not regard as payment. The interest therefore was overdue and the defendant company had a right to take possession under their chattel mortgage. The remaining question for consideration is whether or not this account register is within the language of the chattel mortgage. I am of opinion that upon the true construction of the language used, the account register is not caught up by the chattel mortgage. I think that what was in the contemplation of the parties was that the chattel mortgage should cover after acquired stock in trade brought into the shop in substitution for or addition to the stock on hand at the time the chattel mortgage was given. The chattel mortgage conveys the stock in trade, contents of the shop, including shop and office fixtures, scales and appurtenances, which were purchased by McDade from one McLaughlin and it then provides as follows:—

> These presents shall not only cover and include all and singular the present stock of goods and all other the contents of the said shop so owned by the said Ernest C. McDade as aforesaid, but any other goods that may be put in said shop in substitution for, or in addition to those already there as fully and to all intents and purposes as if said added or substituted stock were already in said shop and particularly mentioned herein, to which the parties hereto agree.

I think stock in trade is what this clause is aimed at and I hold that this account register is not covered by the words used. Where it is sought to hold after acquired property, I think there must be clear words covering the property sought to be held. Following the clause of the chattel mortgage which I have quoted there is a clause conveying the goods in the warehouse and after acquired goods which may be brought into the warehouse and then comes the following:—

> Also two horses, two waggons, sleds gear and all other property of any kind, nature, or description owned by the said Ernest C. McDade and in said warehouse where the said horses, sleds and waggons now are, it being understood and fully agreed, that the said property mentioned herein and every part thereof and said added or substituted property shall be included in and bound by these presents whether the same is, or remains, or shall be placed or kept in said shop and warehouse or any other shop, place or building, the same to be covered hereby wherever the said goods, property, chattels and effects may be or may be placed.

This clause seems to be an attempt to cover after acquired property wherever it may be placed without designating the place, but it may be contended that the "added or substituted property" which may hereafter be placed or kept in said shop covers the account register. The word "property" is of course large enough to do so, but I am of opinion that it must be restricted to the class of property mentioned in the clause first hereinbefore quoted, viz., stock. The rule is that general words following specific words are ordinarily construed as limited to things *ejusdem generis* with those before enumerated. In *Moore* v. *Magrath*, 1 Cowper 9, Lord Mansfield said:—

> It is very common to put in a sweeping clause and the use and object of it in general is to guard against any accidental omission, but in such cases it is meant to refer to estates or things of the same nature and description with those that have been already mentioned.

The plaintiff company will have judgment for $88 and costs.

Judgment for plaintiff.

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Ritchie, J.

CHARLEBOIS v. MARTIN.

ONT.

Ontario High Court, Middleton, J., in Chambers. December 4, 1912.

H. C. J.

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Dec. 4.

1. EXECUTION (§ II—16)—SUPPLEMENTARY PROCEEDINGS—EXAMINATION OF JUDGMENT DEBTOR, REQUIREMENTS—COMMITMENT OF DEBTOR.

On an examination of a judgment debtor, although it is the normal course for a judgment creditor to have a full explanation in answer to his questions, yet, if as a result of the whole examination one is able to glean the history of what has been done, it would appear to suffice, and a motion to punish the judgment debtor for contempt because his answers are not satisfactory should be denied.

[*Graham* v. *Derlin*, 13 P.R. (Ont.) 245, referred to.]

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CHARLEBOIS v. MARTIN.

2. EXECUTION (§ II—16)—SUPPLEMENTARY PROCEEDINGS—MOTION TO COMMIT DEBTOR FOR CONTEMPT ON GROUND OF DEFRAUDING CREDITORS—REQUISITES.

Upon a motion by a judgment creditor to commit a debtor for contempt upon the ground that on his examination as a judgment debtor it appears that he had concealed or made away with his property in order to defeat and defraud his creditors, the court should not commit the debtor merely on a reasonable suspicion but must be prepared to find as a fact that the debtor is guilty of the act charged.

[*Wallis* v. *Harper*, 7 U.C.L.J., O.S. 72, distinguished.]

Statement

MOTION by the judgment creditor to commit the debtor or for a writ of attachment or ca. sa. against him, upon the ground that on his examination as a judgment debtor he refused to disclose his property and his transactions, and did not make satisfactory answers, and that it appears that he had concealed or made away with his property in order to defeat and defraud his creditors in general and the plaintiff in particular.

The motion was dismissed.

Harcourt Ferguson, for the judgment creditor.

A. J. R. Snow, K.C., for the judgment debtor.

Middleton, J.

MIDDLETON, J.:—The defendant was examined; and upon the first return of this motion it was admitted on his behalf that his examination was unsatisfactory. The matter stood, with the direction that the defendant should in the meantime submit to further examination. The further examination has now been had, and the motion is renewed; the judgment creditor contending that satisfactory answers have not yet been made, and that from the examination it appears that the debtor has concealed or made away with his property.

The examination is in one sense not satisfactory. This is accounted for partly by the fact that the debtor is a foreigner, partly by the fact that he is an old man and garrulous, partly because he is suspicious of the examining counsel and is not over-candid, and partly by the fact that he does not appear to have the details of his transactions clearly in his mind.

One cannot read the examination without being impressed by the idea that it is quite probable that Richardson was not a creditor and that Richardson holds the money paid to him in trust for the debtor. Nevertheless, the judgment debtor has sworn to his indebtedness and that the payment made to Richardson was in satisfaction of that indebtedness; and whatever suspicions one may entertain, and whatever view one might be inclined to give effect to, if this evidence were the sole evidence upon the trial of an issue, I do not think it would be safe to say that from the statements made by the debtor it appears that a fraudulent disposition had been made of this property.

In the written argument handed in by counsel for the judgment creditor he says that what appears is "at least sufficient to raise a reasonable ground for the suspicion that the debtor

has concealed his property or made away with it in order to defeat or defraud his creditors." This is fully as far as the evidence goes, and is not what the rule requires. I cannot commit because I have a reasonable suspicion; I must be prepared to find the fact.

The Richardson transaction appears to me to go beyond the others. Upon the examination I cannot find enough to lead me to a reasonable suspicion of the Douglas transaction.

I have a good deal more doubt as to the payment on the chattel mortgage; and this falls in my mind in the same category as the Richardson transaction.

In reference to the two other transactions I am not able to say—adopting the words in *Re Caulfield*, 5 I.L.R. 356—that "the statements are of such a nature that no reasonable man could believe them."

The only case cited which goes to indicate a different rule is *Wallis* v. *Harper*, 7 U.C.L.J., O.S. 72. This case was decided at a time when imprisonment was a common method of enforcing payment of a debt; and the line of interpretation there suggested has long since been departed from. Robinson, C.J., states the object of the statute as being "not to punish as for a contempt but to place in the power of the creditor such means of coercion as an execution against the person may confer."

The rule as it now stands is for the purpose of discovery; and when discovery is refused, or where as the result of the discovery a fraudulent disposition of the property is disclosed, then the imprisonment follows as a means of punishing contempt.

Then, are the answers satisfactory within the meaning of the rule? Certain answers clearly are not; but when the defendant falls into the hands of his own counsel he does give—it is true with the aid of leading questions and with the aid of a statement which had been prepared for him—a fairly clear account of what has become of his money. Taking the examination as a whole, there is no difficulty in ascertaining what the debtor has done with his property.

I am not prepared to accede to the proposition of the judgment creditor that he is entitled to have a full explanation in answer to his questions. This is the normal course; but if as the result of the whole examination one is able to glean the history of what has been done, that appears to me to suffice. As is said by more than one authority, no arbitrary rule can be laid down, and each case must be determined upon its own circumstances. I think, as was said in *Graham* v. *Devlin*, 13 P.R. (Ont.) 245, a full disclosure has been made, which is the thing to be aimed at. Whether the transactions disclosed can be successfully impeached is not the test.

I dismiss the motion, but give no costs.

Motion dismissed.

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Sept. 30.

ATKINSON v. FARRELL.

Ontario Divisional Court, Boyd, C., Latchford, and Middleton, JJ.
September 30, 1912.

1. LANDLORD AND TENANT (§ II D—30)—LIFE ESTATE—DEATH OF LIFE TENANT—TERMINATION OF LEASE FOR YEARS.

A lease for a term of years in land in which the lessor had only a life estate is terminated by the death of the lessor.

2. LANDLORD AND TENANT (§ III E—118)—LIFE ESTATE—RIGHT TO EMBLEMENTS ON TERMINATION OF LEASE FOR YEARS.

Where a lease for a term of years of land in which the lessor had only a life estate has terminated by the death of the lessor, the wheat previously sown by the tenant and in the ground at the time of death of lessor becomes emblements and belongs to the tenant or his assignee, as against the remainderman.

3. LANDLORD AND TENANT (§ III B—51)—LIFE ESTATE—RIGHT OF TENANT FOR YEARS TO STRAW AND MANURE ON DEATH OF LIFE TENANT.

Where a lessee of a term for years in land in which the lessor had only a life estate, covenants not to remove from the premises, but to use and spend thereon, the straw and manure made upon the land, the straw and manure do not become emblements on the death of the lessor and the consequent termination of the lease, but belong to the remainderman, as "accessories of the soil."

[*Gardner* v. *Perry*, 6 O.L.R. 269, disapproved.]

4. LANDLORD AND TENANT (§ III B—51)—FARM LEASE—IMPLIED PROVISION—USE OF FARM IN HUSBANDLIKE MANNER.

In a farm lease there is an implied provision, unless the contrary is expressed, that the tenant will till and manure in a good husbandlike and proper manner, and will spend, use and employ in a proper husbandlike manner, all the straw and manure which shall grow, arise, or be made thereon, and will not remove or permit to be removed from the premises any straw or manure.

[*Brown* v. *Crump* (1815), 1 Marsh 567, 569, referred to.]

5. LIFE TENANTS (§ III—25)—LIFE ESTATE—USE OF LAND BY LIFE TENANT.

While the life tenant is entitled to the use of the land during his term and to the receipt of all the income and profits, he is in such fiduciary relationship to the remainderman that he is not allowed to injure or deal with the estate to the latter's detriment.

Statement

APPEAL by the defendant from the judgment of the Junior Judge of the County Court of the County of Simcoe, in favour of the plaintiffs, for the recovery of $125 damages, in an action in that Court.

The judgment below was varied.

The Junior Judge's reasons for judgment were as follows:—

This is an action brought by the executors of one Patrick Farrell, deceased, to recover the value of certain wheat, straw, and manure alleged to have been the property of the plaintiffs and converted by the defendant to his own use. The wheat, straw, and manure were produced on the north-east quarter of lot number 3 in the 3rd concession of the township of Tecumseth, county of Simcoe. This land formerly belonged to one Mary Farrell, who died, and by her will devised to the said Patrick

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Farrell what for the purposes of this action may be considered a life estate in the said land, with remainder over to the defendant, Thomas Farrell. Patrick Farrell entered into possession of the said land, and, by indenture of lease dated the 23rd March, 1909, leased the said land to one Joseph Hanley for a term of five years from the 1st March, 1909. The said Joseph Hanley went into possession under the lease; and, while so in possession, on the 18th February, 1911, the said Patrick Farrell died, whereupon the said land vested in the defendant Thomas Farrell, in fee simple, subject to certain charges under the will of the said Mary Farrell, deceased, which do not affect the question herein to be determined.

In the summer and fall prior to the death of the said Patrick Farrell, the said Joseph Hanley had ploughed some of the said land, had done summer-fallowing, and put in fall-wheat; and, at the time of the said Patrick Farrell's decease, the said fall-wheat was growing on the said land, and there was also on the said land at the same time a quantity of manure and straw.

Probate of the will of Patrick Farrell was granted to the plaintiffs on the 3rd March, 1911.

On the 9th March, 1911, the said Joseph Hanley signed a memorandum endorsed on the lease, purporting to cancel the lease and to give up all his claims under the lease, for the express consideration of $20. This memorandum was not under seal. On the same day, namely, the 9th March, 1911, but some hours after the signing of the memorandum of cancellation, the said Joseph Hanley signed, under seal, a document, referred to as exhibit 5, purporting to be an assignment of the lease and all his claims thereunder to the plaintiffs, the consideration therein named being the sum of $20. Then, on the 4th April, 1911, the defendant entered into an agreement to sell the said land to one Timothy Maher, and on the 20th July, 1911, by deed, conveyed the said land to Timothy Maher, who went into possession on the 5th or 6th of April, 1911, of the said land, and reaped the said wheat crop and received the said straw and manure and the benefit of the said fall-ploughing, summer-fallowing, seeding down, etc. Joseph Hanley went out of possession of the said land on or about the 4th April, 1911.

This action is now brought by the executors of the said deceased Patrick Farrell to recover from the defendant the value of the said crops, straw, manure, ploughing, etc., alleging that the defendant converted them to his own use by selling the same to Maher.

It is, I think, a well-settled rule of law that, upon the death of a tenant for life, his representatives, or where he had a subtenant, then the subtenant, are entitled to what are known as emblements, which consist of some crop which may be standing and growing

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on the land at the death of the tenant for life, and which is the result of his own planting, such as wheat and other similar grain. In this case there can be no doubt that the crop of wheat growing at the time of the death of Patrick Farrell would come under the head of emblements and would belong to the subtenant Hanley, and not to the plaintiffs, unless properly assigned to them by Hanley. The plaintiffs claim the benefit of the assignment (exhibit 5), and the defendant contends that, as this was executed after the memorandum of cancellation was endorsed on the lease, it could have no effect. A memorandum of cancellation of a lease, not being under seal, could not have any force without being accompanied by the actual giving up of possession, and in this case the subtenant did not give up until long after the assignment (exhibit 5) had been signed. In any event, the lease had been determined by the death of Patrick Farrell; and, the memorandum of cancellation being given at the request of the plaintiffs, I should consider that, if it could be regarded as giving up any claims to emblements, it was intended to give them up to the plaintiffs; and, in furtherance of this intention, the assignment (exhibit 5) was signed for the purpose of completing the transfer. I would, therefore, hold that the assignment conveyed to the plaintiffs such property as Hanley was entitled to on the 9th March, 1911, by way of emblements, and also any property he might have in straw and manure, and any other rights arising out of the lease and his tenancy of the said lands. And I further hold that, as the assignment transferred the emblements, etc., to the plaintiffs, before any sale by the defendant to Maher took place, and, therefore, before any conversion by the defendant, the plaintiffs took the property in them, they being goods and chattels, and not merely a right to sue; and, therefore, notice of the assignment was not necessary before the plaintiffs could bring this action.

The plaintiffs' right to the straw and manure can also be based upon another view of the facts. The lease to Hanley contained the usual clause found in farm leases that the manure and straw should not be removed by him, but should be expended by him on the farm. Under the authority of *Gardner* v. *Perry*, 6 O.L.R. 269, 2 O.W.R. 681, where the identical words found in the lease herein were used, I am bound to hold that the straw and manure belong to the plaintiffs. I am of opinion, therefore, that the plaintiffs were entitled to the crop of wheat and straw and manure left on the farm by Hanley at the time of his giving up possession of the farm.

It was also contended that the plaintiffs were entitled to compensation for the fall-ploughing and other benefits of the summer-fallowing to the land under the head of tenant's rights. I do not agree with this. Tenant's rights such as these depend

on custom or agreement; and it has not been shewn that there is any such custom in this country, nor is there anything in any agreement entitling the plaintiffs to succeed on this part of their claim.

It is further contended by the defendant that, even if the emblements, etc., were the property of the plaintiffs, he did not convert them to his own use, and that, if the plaintiffs have any cause of action, it is not against him, but against Maher, the man who purchased the farm. I feel that, on the evidence, I am bound to hold that the defendant did, as far as he could, sell the said goods and chattels along with the farm to Maher, and that he intended to do so. The evidence of Atkinson, Joseph McLaughlin, Joseph Hanley, John McLaughlin, and A. W. Burke, all clearly shewed that the defendant was repeatedly told that the plaintiffs or Hanley claimed to be allowed for the wheat, straw, manure, etc., and that he continually asserted that the place and everything passed to him under the will. Maher's evidence was to the effect that he gave $50 more for the farm because he was given to understand by the defendant that he was to get the benefit of the ploughing and fall-wheat.

There are also the letters of Mr. Fraser to the defendant making claims in regard to these matters, and the defendant's letters of the 13th March and the 30th May, all indicating the defendant's contention. In his letter of the 13th March, he says: "I hold the fall-wheat and ploughing until such time as it is sold or rented.' In addition to all this, he had the farm advertised for sale in the bill issued advertising for sale the chattels belonging to the deceased Patrick Farrell, and the fall-wheat, ploughing, and seeding down, were all referred to by way of inducement to intending purchasers. All this evidence is conclusive, to my mind, that the defendant did sell the wheat, straw, and manure to Timothy Maher, notwithstanding all the claims made on behalf of the plaintiffs; and the defendant's constant assertions that these chattels passed to him with the land, in answer to the plaintiffs' claims, made any other or further demands unnecessary.

I, therefore, hold that the defendant did convert the said chattels to his own use on or about the 4th April, 1911, by selling the same to Maher, and that the plaintiffs are entitled to damages for such conversion.

The value of the chattels at the time of the conversion should be the amount of such damages. The evidence of Maher shews that there were about three loads of straw in stack and in the barn, worth about $5 per load, and about forty loads of manure in the barn-yard, worth $1 a load to the owner of the land. I do not think this manure would be worth $1 per load to the plaintiffs, because they would have the expense of hauling it

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away from the farm. I would put it at 50 cents per load. The value of the wheat should be taken at what it was worth at the time of the conversion, namely, on the 4th April, 1911. No evidence was given as to what its value was then. All the evidence was directed to the cost of the summer-fallowing and putting in of the wheat and to the amount the crop yielded and the price it was worth after being threshed. The entire crop turned out 160 bushels; this would be an average of about 18 bushels to the acre, there being in the neighbourhood of 9 acres. This is hardly up to the average crop, and is not considered a large crop. The price ranged from 85 cents to 95 cents at the time it was ready for market, and of course there would be the straw from this crop. The cost of harvesting, threshing, cleaning, and hauling to market, besides the risk from April to harvest-time, and probably rent of land, should be considered. I think if I put the value at $10 per acre, in all $90, on the 4th April, 1911, it would be fair and reasonable. This would be $15 for straw, $20 for manure, and $90 for wheat, making a total of $125.

There will be judgment for the plaintiffs for this amount with costs.

Argument

J. E. Jones and *E. W. Clement*, for the defendant. The action is not maintainable, because no notice in writing of the assignment by the tenant Hanley to the plaintiffs was given to the defendant prior to the bringing of this action: *McMillan* v. *Orillia Export Lumber Co.* (1903), 6 O.L.R. 126; *McCormack* v. *Toronto R.W. Co.* (1907), 13 O.L.R. 656; *Cohen* v. *Webber* (1911), 24 O.L.R. 171. The covenants in the lease with respect to the straw and manure were made for the benefit of the land. Such covenants and the benefit thereof run with the land; and, in the circumstances, such straw and manure became the property of the defendant as reversioner. If and in so far as the case of *Gardner* v. *Perry*, 6 O.L.R. 269, is an authority against this contention, such case is wrongly decided, and the cases cited as authority therefor do not warrant the conclusion which the learned trial Judge finds to have been arrived at in that case upon this point. By virtue of sec. 42 of the Settled Estates Act, R.S.O. 1897, ch. 71, the deceased Patrick Farrell had power to grant a lease for the term granted by the lease; and if, as would appear, the lease is not a good and valid exercise of that power as against the defendant, then, by virtue of sec. 24 of the Real Property Act, R.S.O. 1897, ch. 330, which section is now sec. 11 of the Landlord and Tenant Act, 1 Geo. V. ch. 37, the lessee Hanley had the right to call for a grant of a valid lease under such power, of like purport and effect, save so far as any variation thereof might be necessary in order to comply with the terms of such power. The existence of this right is clearly inconsistent with, and is given by statute in lieu of, any right to

emblements which the lessee, in such circumstances, would otherwise have had. Therefore, on the death of Patrick Farrell, the estate (if any) of Patrick Farrell and his tenant Hanley came to an end; in Hanley there remained, not the right to emblements, but the right to call for a new lease under the statute; instead of which, Hanley, having, as he admits, no desire to continue for the remainder of the term, released his rights and surrendered possession of the land. Neither Hanley nor the plaintiffs, claiming as his assignees, can, therefore, maintain any action for the value of the things in question as emblements.

A. E. H. Creswicke, K.C., and *J. Fraser*, for the plaintiffs. By the assignment from the tenant Hanley, the plaintiffs took the emblements as goods and chattels, and not merely a right to sue; and, therefore, notice of the assignment was not necessary. The defendant admits that the death of Patrick Farrell put an end to the estates of Farrell and his tenant Hanley. Therefore, the wheat in the ground became emblements which were transferred by Hanley to the plaintiffs; and the defendant is liable for their conversion. The lease stated that the manure and straw should not be removed by the tenant, but should be expended by him on the farm. Therefore, under the authority of *Gardner* v. *Perry*, 6 O.L.R. 269, 2 O.W.R. 681, these things passed to the executors of the lessor.

Jones, in reply.

The judgment of the Court was delivered by

Boyd, C.

BOYD, C.:—The appellant's contention that the lease for five years from March, 1909, was operative for that period despite the death, in February, 1911, of the tenant for life, who made it, is answered, apart from its legal aspect, by his admission in the defence that the tenancy ended at the death of the lessor: paragraph 2. He admits that, "upon the death of Patrick Farrell, the estates of the said Farrell and his tenant (Hanley) became determined and at an end." This being so, the wheat then sown and in the ground became emblements belonging to the tenant Hanley. These emblements were purchased by the executors of the lessor, Patrick Farrell, and an assignment thereof obtained under seal on the 9th March, 1911. The reversioner, the defendant, assumed to deal with as his property and make sale and conveyance of the land and these crops in July, 1911, to one Maher, whereby he became liable for their conversion under the circumstances and evidence set forth below.

The action is well-founded in this regard, and the judgment as to them in favour of the executors is right.

The other branch of the appeal is as to straw and manure on the farm at the determination of the lease. By the terms of the lessee's covenant, these were to be kept and utilised on and for the land; and, according to the authorities, they were

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not the property of or removable by the tenant. So that the neat point is, whether this straw and manure passed to the reversioner with the land freed from the demise, or did they pass to the executors of the lessor? The judgment in appeal decides in favour of the plaintiffs, the executors, grounded on the decision of Osler, J.A., to that effect in a like case, *Gardner* v. *Perry*, 6 O.L.R. 269, 2 O.W.R. 681. The correctness of that decision is impeached by this appeal.

The straw-stacks and the manure-piles are the chattels of the tenant to be used in a particular way; the straw as bedding and fodder for the cattle is to be turned into manure, and the manure is to be turned into the land so as to enrich the soil and become part of it. While the tenant may be called the owner in one sense, the effect of his covenant not to remove from the premises, but to use and spend thereon, the straw and manure, is, that he has no right to take these things away from the place, nor when left on the place has he any right to be paid for them: *Beaty* v. *Gibbons* (1812), 16 East 116, 118; and *Roberts* v. *Barker* (1833), 1 Cr. & M. 808.

The law is obscure on the precise point. The dung made on the farm is spoken of as "belonging to the farm" in *Hindle* v. *Pollitt* (1840), 6 M. & W. 529, 533. To remove this stuff, even apart from the covenant, would be a failure to work in a husbandlike manner, and would be an injury done to the inheritance: *Cheetham* v. *Hampson* (1791), 4 T.R. 318, 319; *Walton* v. *Johnson* (1848), 15 Sim. 352; *Powley* v. *Walker* (1793), 5 T.R. 373. The tenant, being unable to remove because of his covenant, is to leave the straw and manure on the farm for the landlord; so it is put in *Massey* v. *Goodall* (1851), 17 Q.B. 310, 316. The provision is with a view to benefit of the land: *Richards* v. *Bluck* (1848), 6 C.B. 437, 441. In the last case I have found, Vaughan Williams, L.J., deals with the situation in this way: the provisions in the lease are intended for the purpose of ensuring proper cultivation of the land according to the rules of good husbandry. One thing which is clearly for the advantage of the land is that the crops should be dealt with in such a manner that the land may not become impoverished. The straw and manure clauses relate to things which have existence on the farm and which can be dealt with actively or left passively for the benefit of the farm: *In re Hull and Lady Meux*, [1905] 1 K.B. 588, 590.

Now these chattels are the tenant's, but he cannot avail himself of them in any way, because, by the death of the life-tenant, the tenancy is at an end, and these are not emblements. But not only is the tenancy at an end—the estate and interest of the lessor as landlord is at an end. No title was in him during his life which could at his death pass to his executors, as was held

by the learned County Court Judge in this case, following the decision under consideration of *Gardner* v. *Perry*. In the case of a living landlord, the straw and hay at the end of the tenancy would be left on the land, and would fall under the control of the landlord by virtue of his ownership of the land. The straw and manure may be regarded as constructive fixtures, the destiny of which is to be incorporated in the soil. That points the way to the proper conclusion in this appeal, viz., the death of the life-tenant ended his interest in the land and everything lying upon it that could not be legally removed; but his death brought, forthwith and *eo instanti*, into virtual possession the estate in fee of the remainderman, who, as lord of the land, takes the farm with the straw and manure thereon as "accessories of the soil." (See Amos and Ferard on Fixtures, 3rd ed., p. 215, n.)

I think the decision in 2 O.W.R. is not to be followed on this point, and that the judgment in appeal should be varied by restricting it to the value of the wheat in the ground, $90, and dismissing it as to the straw and manure on the ground ($35), which passed to the defendant as remainderman, to the exclusion of any claim on the part of the executors of the life-tenant.

This conclusion is fortified in another way. The provisions of the lease to till and manure in a good husbandlike and proper manner, and to spend, use, and employ in a proper husbandlike manner, all the straw and manure which shall grow, arise, or be made thereon, and not to remove or permit to be removed from the premises any straw of any kind, manure, etc., are usual and customary provisions for the right farming of the land, which apply generally, not only when expressly set out, but as of course, in farming leases, unless the contrary is expressed. Such is the law of England, and is alike applicable to the farm lands of this Province: *Brown* v. *Crump* (1815), 1 Marsh. 567, 569, quoting the language of Buller, J.

This rule of proper use of the land applies as between landlord and tenant and also between tenant for life and remainderman. To neglect these precautions against the deterioration and impoverishment of the land savours of waste. While the life-tenant is entitled to the use of the property and to the receipt of all the income and profits, he is in such fiduciary relationship to the remainderman that he is not allowed to injure or to deal with the estate to the detriment of the inheritance. To allow the executors of the life-tenant to take away from the land, after death has freed the estate for the remainderman, the straw and manure left on the land for its nourishment, would be to reduce unduly the rights of the land-owner.

As to the costs, perhaps the best disposition of them would be to give costs on the Division Court scale to the plaintiff without set-off, and no costs to either party of this appeal.

Judgment varied.

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Ontario Court of Appeal, Moss, C.J.O., Garrow, Maclaren, and Magee, JJ.A., and Lennox, J. September 27, 1912.

1. STATUTES (§ II B—110)—WORKMEN'S COMPENSATION FOR INJURIES ACT, SUB-SEC. 5, OF SEC. 3—HOW CONSTRUED.

Sub-section 5 of sec. 3 of the Workmen's Compensation for Injuries Act R.S.O. 1897, ch. 160, making the employer liable where the injury is caused "by reason of the negligence of any person in the service of the employer who has the charge or control of any points, signal, locomotive, engine, machine or train upon any railway, tramway or street railway," should receive a liberal construction in the interests of the workman.

[*Gibbs* v. *Great Western R. Co.*, 12 Q.B.D. 208; *McCord* v. *Cammell & Co.*, [1896] A.C. 57, referred to.]

2. MASTER AND SERVANT (§ V—340)—WORKMEN'S COMPENSATION FOR INJURIES ACT—LIABILITY OF MASTER—"PERSON IN CHARGE OR CONTROL OF ENGINE."

A master is liable, under sub-sec. 5 of sec. 3 of the Workmen's Compensation for Injuries Act, R.S.O. 1897, ch. 160, making the employer liable where the injury is caused "by reason of the negligence of any person in the service of the employer who has the charge or control of any points, signal, locomotive, engine, machine, or train upon any railway, tramway or street railway," where a yard foreman is injured by being struck by an engine engaged in shunting operations and under the control of his assistant by reason of the negligence of the assistant in failing to carry out an order of the foreman.

3. MASTER AND SERVANT (§ V—340)—"CONTROL OF ENGINE" WITHIN MEANING OF WORKMEN'S COMPENSATION FOR INJURIES ACT—FINDING OF JURY.

Where a yard foreman, engaged with his assistant upon their duties in the yard, was struck and injured by an engine which was being used for shunting purposes, a finding by the jury that the accident was caused by reason of the negligence of the assistant and that the latter had the charge or control of the engine, within the meaning of sub-sec. 5 of sec. 3 of the Workmen's Compensation for Injuries Act is supported by reasonable evidence where it appears that the engine was being run by an engineer who was subject to the orders of the assistant, who failed to carry out the orders he received from the yard foreman.

Statement

AN appeal by the defendants upon the consent of the plaintiff, direct to the Court of Appeal from the following judgment of Mulock, C.J.Ex.D.

Mulock, C.J.

MULOCK, C.J.Ex.D.:—The plaintiff was, at the time of the accident, yard-foreman of the defendant company's railway yard at the city of Brantford, and as such foreman it was his duty to control the movements of trains within the yard. McNaughton was his assistant and subject to his orders.

On the morning of the 16th October, 1910, the plaintiff and McNaughton were on duty. A loaded car was standing on Ryerson's siding, and the plaintiff required this car to be moved to the south side of the yard. The south side of the yard is a place lying to the south of all the railway tracks at this station. In the yard are a number of tracks running easterly and westerly;

two of them are main line tracks, the southerly one being the east-bound main line track, and the one lying immediately to the north of it being the west-bound main line track. North of this track are a number of sidings, the most northerly one being called Ryerson's siding, which runs in a southerly direction. To carry out the plaintiff's order to McNaughton, to place this car at the south side of the yard, it was necessary to move the car easterly on Ryerson's siding until it reached a point where it could be switched on to the east-bound main line. Then it would proceed by the east-bound main line westerly until it reached a siding called "the south lead," which led off the east-bound main line in a southerly direction to the place indicated by the plaintiff, viz., the south side of the yard.

Having given McNaughton the order, the plaintiff proceeded westerly along the west-bound main line for the purpose of stopping trains from the west until the car had taken the south lead, and thus was clear of the east-bound main line; and, whilst thus walking westerly, he was overtaken and struck by the engine which was pulling the car, causing the injury complained of in this action.

The following are the questions submitted to the jury with the answers:—

1. Q. Were the defendants guilty of negligence causing the accident? A. Yes.

2. Q. If so, in what did such negligence consist? A. Mr. McNaughton failing to carry out his orders from the plaintiff Martin.

3. Q. Was McNaughton competent for the position he filled as yard-helper? A. No.

4. Q. Was the accident caused by reason of the negligence of any person in the service of the defendants who had any superintendence intrusted to him, whilst in the service of such superintendence? A. Yes.

5. Q. If your answer is "yes," who was the person and what was the negligence? A. (*a*) Mr. McNaughton; (*b*) in not carrying out his instructions from the plaintiff in taking the west-bound track instead of the east-bound track.

6. Q. Was the accident caused by the negligence of any person in the service of the defendants who had the charge or control of any locomotive or engine upon the defendants' railway? A. Yes.

7. Q. If your answer is "yes," who was such person? A. Mr. McNaughton.

8. Q. Could the plaintiff, by the exercise of reasonable care, have avoided the accident? A. No.

9. Q. At what sum do you assess the damages? A. Common law, $4,000; Workmen's Compensation Act, $2,600.

McNaughton being a fellow-workman, the plaintiff cannot recover at common law; but the case comes, I think, within the

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provisions of both sub-secs. 2 and 5 of sec. 3 of the Workmen's Compensation for Injuries Act.

For the work then in hand McNaughton was in superintendence over the engineer who controlled the movement of the engine. This brings the case under sub-sec. 2. For the like purpose, McNaughton had charge or control of the points or switch whereby the engine could take the proper track, and also had control (through the engineer, a servant under him) of the engine, which brings the case within sub-sec. 5.

In *Gibbs* v. *Great Western R.W. Co.* (1883), 11 Q.B.D. 22, affirmed in appeal (1884), 12 Q.B.D. 208, which was an action against a railway company for injury caused by negligence of a man alleged by the plaintiff to have charge of the points of a railway, Field, J., dealing with the section of the English Act which in its general language corresponds with sub-sec. 5, says that it "provides that the common master shall be liable for the negligence of the particular persons who have charge—that is, who have the directing hand to carry out the general instructions of the master—with respect to specified things."

On receiving the plaintiff's order, McNaughton proceeded to carry it out. He got on the foot-board of the engine and directed the engineer to move the car easterly. On reaching a certain point, the engine and car stopped in order to proceed westerly, when McNaughton turned the switch; but, instead of setting it for the east-bound main line, he made a mistake, setting it for the west-bound main line, along which the engine proceeded, overtook the plaintiff and injured him.

The defendant company is, I think, liable under the statute for McNaughton's negligence, unless the plaintiff has been guilty of contributory negligence.

For the defence it was argued that the plaintiff by walking between the two tracks would have escaped injury. He had no reason to suppose that the engine would come along the northerly track, which, therefore, was, in his judgment, a place where he might safely be. The only danger that he supposed it necessary to guard against was from the engine, which he expected on the southerly track. Thus, in his opinion, he was safer when walking along the northerly track than along the space between the two tracks. The jury have found him not guilty of contributory negligence, and there is ample evidence, in my opinion, to support this view. I see no common law liability.

The judgment will, therefore, be entered for the plaintiff for $2,600, with costs of action.

Argument

I. F. Hellmuth, K.C., and *W. E. Foster*, for the defendants, argued that the trial Judge erred in finding that the defendants were under liability by reason of any negligence of McNaughton, who was not a person having any superintendence intrusted to him, within the meaning of the Act, but was a fellow-workman of

the plaintiff, in a lower grade than he was; and the accident happened while he was carrying out the alleged orders of the plaintiff. The negligence, if any existed, was not such as is contemplated by the Act, nor was it the negligence of a person in charge or control of any points upon the defendants' railway. *Gibbs* v. *Great Western R.W. Co.*, 11 Q.B.D. 22, affirmed 12 Q.B.D. 208, does not bear out the view that McNaughton was in charge of the engine, and is an authority in favour of the defendants. As to his being in control of the points, the jury has made no finding. Reference was made to *Warren* v. *Macdonnell* (1908), 12 O.W.R. 493.

Argument

W. S. Brewster, K.C., for the plaintiff, argued that the judgment appealed from was justified by the law and the evidence, and that McNaughton was in charge or control of the locomotive, and of the points, in such a way as to make him a person intrusted with superintendence, and exercising such superintendence, as regarded the plaintiff. He referred to *McCord* v. *Cammell & Co.*, [1896] A.C. 57, *per* Lord Halsbury, L.C., at p. 63; *Toronto R.W. Co.* v. *Snell* (1901), 31 Can. S.C.R. 241.

Hellmuth, in reply, argued that no case can be found in which the negligence of a subordinate has made the employer liable for an accident to his principal under the Act.

The appeal was dismissed, LENNOX, J., dissenting.

GARROW, J.A.:—The action was brought by the plaintiff to recover damages from the defendants, said to have been caused to him by the negligence of one John McNaughton.

GARROW, J.A.

The plaintiff and McNaughton were both in the employment of the defendants: the former as yard-foreman at the city of Brantford, and the latter as his helper. Early on the morning of the 16th October, 1910, the plaintiff, while engaged upon his duties in the yard, was struck and severely injured by an engine which was being used for shunting purposes. The collision was, it is said, brought about by the negligence of McNaughton in carrying out a shunting order given by the plaintiff, by taking the engine along the west-bound track instead of the east-bound track. The plaintiff, after the order, assumed that the engine which was following behind him would proceed on the east-bound track, and, in consequence, was walking forward so near the west-bound track that he was struck by the buffer of the engine.

The evidence shewed that the portion of the yard which it was desired to reach could be reached by both tracks, but that the east track was much the more direct, and in fact the only natural one to use on the occasion in question.

The order given to McNaughton by the plaintiff was verbal, and was called to him from a distance. It must now, however, be assumed that the order was heard and was understood by

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McNaughton, who, although apparently available, was not called as a witness. No question, apparently, was raised at the trial concerning the sufficiency of the order or as to McNaughton's understanding of it. McNaughton accompanied the engineer upon the engine, and personally, without any further order or instruction from any one, opened the switch to admit the engine upon the wrong track, where afterwards the mischief was done.

There were allegations of incompetence on the part of McNaughton and also of contributory negligence on the part of the plaintiff.

A motion for a nonsuit was denied by the learned Chief Justice; and the case was submitted to the jury, who, in answer to questions, found as follows (as set out in the judgment of MULOCK, C.J., *supra*).

Judgment for $2,600 was afterwards directed to be entered in favour of the plaintiff; the learned Chief Justice being of the opinion that the plaintiff was not entitled to recover as at common law, but was entitled, under sub-secs. 2 and 5 of sec. 3 of the Workmen's Compensation for Injuries Act, to judgment for the amount found by the jury.

Nothing, I think, turns upon the alleged incapacity of McNaughton. Indeed, the sole point in the case—as counsel upon the argument admitted—is: Are the defendants responsible, under the circumstances, for the negligence of McNaughton in sending the engine along the wrong track?

That responsibility must, I think, rest, if at all, upon an affirmative answer to the further question: Was he—or, rather, is there reasonable evidence that he was—on the occasion in question, a person in charge or control of the engine, within the meaning of sub-sec. 5 of sec. 3 of the Workmen's Compensation for Injuries Act?

That sub-section, it has been said, should receive a liberal construction in the interests of the workman.

In *Gibbs* v. *Great Western R.W. Co.*, 12 Q.B.D. 208, at p. 210, Lord Coleridge, C.J., said: "I entirely agree that it would not be proper for the Court to give a narrow construction to an Act of Parliament which was intended to do away with what many persons felt to be rather a blot on the law." And in the same case, Brett, M.R., at p. 211, says: "The Act of Parliament having been passed for the benefit of workmen, I think it is the duty of the Court not to construe it strictly as against workmen, but in furtherance of the benefit which it was intended by Parliament should be given to them, and therefore as largely as reason enables one to construe it in their favour and for the furtherance of the object of the Act."

In *McCord* v. *Cammell & Co.*, [1896] A.C. 57, a similar view was taken in the House of Lords—Lord Halsbury, at p. 63, saying: "I cannot help thinking that the Legislature meant in a very

wide way to protect workmen who are engaged in such dangerous employments, and they said, as an exception to the ordinary rule of law, that if the person in charge of a locomotive or of a train shall be guilty of negligence, then, quite apart from any question of superiority of employment, and quite apart from the necessity of superintendence, the employer may be liable."

And, bearing in mind the authorative views upon the question of construction thus expressed—in which I hope it is not presumptuous to say that I entirely agree—I am of the opinion that there was in this case such reasonable evidence.

The question is not one merely of superintendence in the ordinary sense, nor of physical control of the mere mechanism of the engine, but rather the question, who, in the course of his duties and employment, had, at the time, the direction and control of its movements upon the tracks? And that that person was McNaughton the evidence leaves little room to doubt. The engineer, Robert Hay, who had been in charge of the yard-engine operating under the direction of the plaintiff as yard-foreman, with the assistance of McNaughton as his helper, for two weeks before the accident—and who was, therefore, familiar with the mode of carrying on the work—said, in answer to questions by his Lordship:—

"His Lordship: Q. In operating your yard-engine, do you take instructions from McNaughton? A. Yes, sir, if he gives them to me. Sometimes the yard-foreman gives the instructions to him, and he delivers them to me.

"Q. And, if McNaughton gives you instructions how to move your engine, it is your duty to obey his instructions? A. It is my duty to take his signals, or to go where I am told, as long as I am going right.

"Q. Was McNaughton on that engine with you? A. He was on the foot-board of the engine.

"Q. Who, in fact, opened the switch to let you in on the west-bound track? A. McNaughton, I think.

"Q. And you took the track he turned you in on? A. Yes, sir.

"Q. If he had turned you in on the east-bound track, would you have taken it? A. I would have had to have taken to the east-bound.

"Q. Did he give you any verbal instructions? A. No, sir, not that I am aware of.

"Q. You simply ran your engine as directed by McNaughton? A. Yes, sir.

"Q. Then you place the responsibility upon him for the route you took on that occasion? A. Oh, yes.

"Q. You were just working the engine, and he was selecting the track? A. Yes.

"Q. So that you yourself were not governed by the signal Martin gave? A. No.

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"Q. So that, in fact, whatever you did, you did, as you assumed, in compliance with McNaughton's orders? A. Yes."

In the face of such plain uncontradicted evidence, it seems idle to say, as is said by the defendants, that McNaughton was a mere messenger, having no power or control over the movements of the engine.

All, however, that we have to decide is, that there was here some reasonable evidence proper for the jury upon which to base their sixth and seventh findings; and, as I have said before, in my opinion there was.

The appeal should, in my view, be dismissed with costs.

Moss, C.J.O.
Maclaren, J.A.
Magee, J.A.

MOSS, C.J.O., and MACLAREN and MAGEE, JJ.A., concurred.

Lennox, J.
(dissenting)

LENNOX, J. (dissenting):—Taking the finding of the jury that the injury complained of resulted from the negligence of John McNaughton, a yard-helper working under the plaintiff as his assistant or as one of his assistants, are the defendants liable to the plaintiff under the Workmen's Compensation for Injuries Act, R.S.O. 1897, ch. 160?

At the time of the accident, the plaintiff was the yard-foreman on night duty; that is, he was the person intrusted by the company with the superintendence, charge, and control of the operation of shifting and shunting cars and making up trains in the Brantford yard; a position undoubtedly requiring, amongst other qualifications, experience, discretion, promptness, judgment, and the like. He was selected because of his supposed fitness; and he is the class of servant for whose negligence, whilst acting within the scope of his employment, the company is responsible to his fellow-servants. No other servant can usurp his functions, and thereby create or enlarge the company's liability. The foreman cannot, of course, through want of care, want of instruction, imperfect or careless instruction, or otherwise, effectually commit to the chance action of a subordinate the superintendence, charge, or control mentioned in the statute; and to attempt to do this would be an attempted delegation of the worst kind.

The jury find that the accident was caused by the negligence of McNaughton, a person who had superintendence intrusted to him, whilst in the exercise of such superintendence. There is no evidence whatever that the company intrusted McNaughton with superintendence of any kind. It is not even pretended that the company empowered him to initiate anything; to exercise judgment or discretion, to decide anything, or to take independent action of any kind. He was a workman, to do what he was directed to do by the plaintiff; and, whenever he stepped outside this line, intentionally or otherwise, he was not acting for the defendants. He was not, as a matter of fact, intrusted with superintendence by the defendants; and he could not be intrusted with superintendence by the plaintiff. It follows from this, also, that in

moving the switches in question McNaughton was not acting in the exercise of superintendence, within the meaning of sub-sec. 2 of sec. 3.

There was, therefore, no evidence to support the answers to questions 4 and 5.

Questions 6 and 7 are framed with reference to sub-sec. 5 of sec. 3, which provides for the responsibility of the employer where the injury is caused "by reason of the negligence of any person in the service of the employer who has the charge or control of any points, signal, locomotive, engine, machine or train upon any railway, tramway or street railway."

The jury were asked only as to a locomotive or engine, and they find that McNaughton had the charge or control of a locomotive upon the defendants' railway. The plaintiff admittedly was the person appointed by the defendants to have the mental charge and control of the operations of the yard; that is to say, he was from time to time to determine what should be done and to do it or direct the doing of it. Others might be called on to execute the work. He had helpers, but no deputies.

The person in immediate physical control of the engine that night was Hay, the engineer. Immediately preceding the accident, McNaughton was the person who had actual physical control of the switch leading from the north to the west-bound track; but there was no finding as to any "points," "signal," or "machine"—the only terms which could be argued to embrace a switch. But, waiving this, does the statute mean mere physical control? *Gibbs* v. *Great Western R.W. Co.*, 11 Q.B.D. 22, 12 Q.B.D. 208, shews that it does not.

The provisions of the English Employers' Liability Act, on the questions here involved, are practically identical with our Act. In the *Gibbs* case, Fisher was the cause of the accident. His duties were to clean, adjust, oil, and repair at various places on the defendants' line of railway. He was subject to the order of an inspector, Saunders, who was responsible for the condition of the works. The work of Fisher was executed in the absence of the inspector; and Fisher negligently failed to replace a certain cover which he had removed in the course of his work. It was held by the unanimous decisions of the Divisional Court and Court of Appeal that there was no evidence for the jury that Fisher had "charge or control" of the points, within the meaning of the Act. Field, J., said (11 Q.B.D. at p. 26) that the Act "provides that the common master shall be liable for the negligence of the particular persons who have charge—that is, who have the directing hand to carry out the general instructions of the master—with respect to specified things. I am of opinion that there was no sufficient evidence upon which the jury could properly find that Fisher had charge of the points within the Act." In the Court of Appeal, the defendants were not called upon. During

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the argument, Brett, M.R., said (12 Q.B.D. at p. 209): "According to the evidence called for the plaintiffs, Fisher worked under Saunders. How can he therefore be the person who had the charge of the locking apparatus or points? It is not enough that he should say he had the charge. It must be shewn that his duties were such as that he should have the charge of the points within the meaning of the enactment." Lord Coleridge said (p. 210): "Then had he (Fisher) the charge or control of any points? He certainly had to do something from time to time to the machinery connected with the points, but he himself said he worked under the direction of Saunders, and Saunders was called and he proved, I think, that he was the person who had apparently both the charge and the control of the points, and that Fisher was only a workman under him, and was not a person who had either the charge or the control of any points connected with the railway. . . . Here, as my brother Mathew put it in the Court below . . . Fisher, who acted under the orders of the person who had the charge and control of these points, was held by the jury to be a person who had the charge and control of the points himself. To hold this, would be to extend the words of the Act of Parliament."

The Master of the Rolls and Bowen, L.J., in deciding that the plaintiff could not recover, both put their judgment distinctly upon the ground that, although Fisher had to do his work from time to time in the absence of Saunders, yet, as he had no independent power of action—as he was controlled and directed by Saunders—he could not be said to be in charge or control at any time. The following sentences from the judgment of the Master of the Rolls are exceedingly pertinent (p. 212): "Now I cannot think that there is any colour for saying he (Fisher) had the control of the points, and the only question is whether he is a person who had the charge of them within the meaning of the statute. I think that to be such a person he should be one who has the general charge of the points, and not one who merely has the charge of them at some particular moment. Now what evidence is there that Fisher was a person who had such general charge? It is true that he himself said he had the charge, but to act upon such evidence would be to make him the judge of the law not the witness of facts."

Again, the plaintiff did not cease to be the person in charge and control by merely going to another part of the yard whilst operations which he had directed, or in substitution of what he had directed, were being performed. This was the primary ground taken by Lords Herschell, Macnaghten, Morris, Shand, and Davey, for holding the defendants liable in the case of *McCord* v. *Cammell & Co.*, [1896] A.C. 57, viz., that, although the engineer had uncoupled the train and gone away with the engine, and the negligent act was performed by the fireman in his absence, yet

the engineer must, in contemplation of law, be held to be still in charge of the train.

I am, therefore, of opinion that there was no evidence proper to be submitted to the jury in support of the answers to questions 6 and 7.

If I am right in the foregoing conclusions, they dispose of the plaintiff's case; but, in any event, whatever may have been the scope of his employment, at the threshold of this inquiry is the question, was there any evidence at all to be submitted to the jury of negligence on the part of McNaughton causing the injury? I do not think there was. The negligence found by the jury is failure to carry out the plaintiff's instruction. Failure to hear or failure to understand is not negligence.

The plaintiff says that he "hollered" to McNaughton to bring the engine over to the south side of the yard, that he pointed with his thumb to the south side, and that McNaughton held up his hand to signal that he understood. It is, perhaps, clear that McNaughton did not do what the plaintiff intended, or, rather, all that he intended him to do; but, upon the vital question as to whether McNaughton heard what was called out and saw the plaintiff pointing with his thumb, or that any signal was given indicating a definite specific destination, there is no evidence at all. True, the plaintiff swears that McNaughton understood, for he threw up his hand. But understood what? Understood that he was to do something—was to make a movement of some kind. The plaintiff called out and pointed at the same time. The holding up of the hand as an answer is utterly indefinite. It would evidence comprehension if it repeated the signal or if the words used were repeated. Here the answer is the same answer, whatever the direction to be taken; and it may either have meant that he saw *and* heard or that he saw *or* heard; with the manifest contingency that he may not have heard aright.

Did he hear at all? The engine was moving; and, although Hay saw the thumb movement, neither Hay nor the fireman, both on the same engine with McNaughton, heard a word. With McNaughton sitting in the court-room with his lips sealed—in the absence of any evidence whatever pro or con—is it to be inferred, is it in effect to be taken as a presumption of law, that McNaughton must have heard, and heard correctly? It is not enough that he thought he heard, or thought he understood, and acted in error. At best, the alleged verbal direction was indefinite and misleading. The engine was on the north side of the yard. The plaintiff said, "Bring it to the south side;" but he wanted it taken down the south lead. That was a definite point, equally easy to express. Why didn't he say so? And the west-bound track is on the south side of the yard, too, though not at the extreme south.

Then as to the so-called signal, used indiscriminately—as Hay and Graham swear, and the plaintiff by silence admits,

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although he was subsequently in the witness-box—a signal which Hay, experienced in the plaintiff's methods, interpreted just as McNaughton did. Can it be said to be some evidence of McNaughton's negligence because, on a momentary view of a man's thumb, held up at a distance of a hundred feet, he failed accurately to discriminate between two lines of track running in the same general direction, parallelling each other at a distance of ten feet apart?

One other circumstance I must refer to. The evidence stops short of shewing that McNaughton failed at all. Doing exactly what the plaintiff intended him to do, his first duty was to open the west-bound track and let the engine in on it. He did that. His next duty was to restore the west-bound track by turning the rails back to their former position: I think they call it "throwing the switch." He did that. His next act *would be* to pass the engine, go east of George street, open the switch, let the engine out from the west-bound track, restore the track, and so on until he got to the east-bound track. But is there any evidence that when he performed the second act he suspended operations and gave the signal to go west? No. On the contrary, Hay swears that McNaughton gave no signal; and the inference is irresistible that Hay, having interpreted the plaintiff's signal to run around the yard, as he says—and as he states he had often done before—immediately moved west when the switch was thrown. *Non constat*, McNaughton would have taken Hay to the east-bound track had he waited; but, as to leaving the question to the jury, the point is, that there is no evidence at all.

These, then, are grounds for the dismissal of the action, and, if there was nothing more, with costs. But, to my mind, the trial was unsatisfactory, and the plaintiff should be granted a new trial if he desires it. Having a new trial in view, it is not well to discuss minutely the evidence suggesting it. Questions 6 and 7 would appear to be framed rather on the idea of the negligence of Hay than of McNaughton. It is enough to say that, in my judgment, there was evidence upon which a jury could reasonably find that Hay was negligent and that his negligence was the immediate cause of the accident. Whatever may have been the circumstances when he began to move west on the west-bound track, at all events before he had proceeded far, and in ample time to prevent difficulty, he knew, by seeing the plaintiff turn the switch to the south lead, that that was where he was expected to go, and that the plaintiff would not be expecting him on the west-bound track. Seeing the plaintiff proceeding on the south instead of the north of this track would confirm this. He did nothing; he let the plaintiff pass out of sight, with the result that the plaintiff was run down.

With a finding that Hay was negligent, the plaintiff would not, perhaps, be confronted with the breaks in the evidence or

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the difficulties of construction—hereinbefore discussed. When the emergency presented itself, and continuously thereafter until the injury occurred, Hay was a person in charge and control of a locomotive. The minds of the jury were not directed to this view of the case. I know that the plaintiff said that he did not claim that Hay was negligent. That does not matter at all. He is a witness to facts, not a judge of the law. The same must be said of some of Hay's answers to the learned trial Judge.

I think that there should be a new trial, if the plaintiff desires it, and decides upon it within two weeks; and that, in that event, the costs of the former trial and of the appeal should be left for the decision of the trial Judge.

In the event of the plaintiff not desiring a new trial, the action should be dismissed without costs.

Appeal dismissed; LENNOX, J., *dissenting.*

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Quebec Court of Review, Charbonneau and Dunlop, JJ.
January 19, 1912.

1. WATERS (§ III B 2—197)—WATER SUPPLY—RATEPAYERS' ACTION FOR DAMAGES AGAINST WATER COMPANY UNDER MUNICIPAL CONTRACT.

Where a water company contracted with a municipality to furnish a supply of water of a particular pressure for fire purposes, and some pressure existed but not enough to put out the fire, the water company is not liable to a property owner in the municipality for the loss occasioned by the fire.

2. WATERS (§ III B 2—197)—WATER SUPPLY—MUNICIPAL CONTRACT OF WATER COMPANY TO SUPPLY FOR FIRE—LIABILITY FOR FIRE LOSS.

Where a contract is entered into between a water company and a municipality to the effect that the water company is to furnish water of a particular pressure for fire purposes, the water company is no insurer against a ratepayer's loss by a fire through lack of sufficient pressure to extinguish the fire.

[*Allan & Curry Mfg. Co.* v. *Shrieveport Water Works Co.*, 68 L.R. A. 650, 113 La. R. 1091, followed; *Planters' Oil Mill Co.* v. *Munro*, 52 La. Ann. 1248.]

3. MUNICIPAL CORPORATIONS (§ II F 2—175)—FRANCHISE TO WATER COMPANY—LIABILITY FOR BREACH—PENALTY.

Where a contract is made between a municipality and a water company to furnish water for fire purposes and of a particular pressure, and a violation of the contract is committed by the water company, the liability for such violation is limited to the penalty in the contract, and to be enforced only by the municipal council.

4. DAMAGES (§ III A 1—40)—MEASURE OF COMPENSATION FOR BREACH—ABSENCE OF FRAUD.

Damages that may be recovered by an injured party, are only those which have been or might have been foreseen when the obligation is contracted, provided the breach is not tainted with fraud.

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5. PROXIMATE CAUSE (§ II A—15)—LOSS BY FIRE—WATER COMPANY FAILING TO FURNISH SUFFICIENT PRESSURE.

Breach of a contract to furnish water for the extinguishing of fires cannot be said to be the cause of a loss by fire, as it may have been caused by any one or more of a number of causes; and if the loss, as a fact, is not the direct result of a breach by the water company of its contract to furnish water for extinguishing fires, it is not liable for the loss resulting from the fire.

[Farnham on Water and Water Rights 848, referred to.]

Statement

APPEAL by way of review from the judgment of the Superior Court, Curran, J., delivered on the 9th day of February, 1909.

The appeal was allowed.

The material portions of the decision appealed from were as follows:—

Curran, J.

CURRAN, J.:—Considering that plaintiff has made good all the essential allegations of his demand in damages against the other defendant, the Montreal Water and Power Company; that the said company, under section 8 of the said by-law and article 8 of the said contract, undertook and obliged itself as follows:—

> The said waterworks shall, at all times, except whenever and so long as absolutely necessary repairs must be made, be of a sufficient capacity to throw upon the flames, in case of fire, from three hydrants simultaneous streams of water from a hose, 300 feet long and 2½ inches in diameter with a 1-inch nozzle, to a height of not less than 75 feet;

Considering that, on the day in question, the said Montreal Water and Power Company, the defendant, totally failed to fulfil its obligations in respect of the said pressure of water; that the proof clearly establishes that there was insufficient capacity to throw the said water on the flames of the fire;

Considering that the immediate cause of the fire that destroyed the plaintiff's property was the lack of sufficient pressure and power of water; that if the pressure required by the contract, or even half the pressure, had been available, the fire could have been extinguished in a few minutes, and that the gross fault of the said Montreal Water and Power Company was the cause of the spreading of the flames and the destruction of the plaintiff's property;

Considering that the fact of the fault of the Montreal Water and Power Company has been established by the plaintiff through eye-witnesses; that the Montreal Water and Power Company has not sought to contradict the testimony by any witness present at the fire, but has contented itself with producing one expert witness as to what might have been done by means of Babcock extinguishers, the expert having no personal knowledge of the conditions existing on the occasion of the fire;

Considering the provisions of article 1053 of the Civil Code;

Considering that the plaintiff has proved that he had paid his water rates to the Montreal Water and Power Com-

pany, and that the evidence produced by the company to contradict the proof is not of a positive but of a negative character, and is not at all conclusive;

Considering that the town of St. Louis, in making the contract, was acting on behalf of the plaintiff, and that the plaintiff was obliged to submit to the conditions and provisions of the contract, as one of the ratepayers, and that there can be no reasonable doubt that the fire occurred through the failure of the company to supply the pressure of water required by the contract, and that, under the law, the plaintiff is entitled to bring his present action against the company;

Considering that, in view of the manner in which the fire originated, it could not have spread to the properties of the plaintiff if the company had furnished the pressure and power of water stipulated for in its contract;

Considering that the contention of the company that the present action could be instituted solely by the town, and that the plaintiff's recourse against it is confined to the lack of supply of water for domestic purposes, is unfounded, more especially in view of the terms of the by-law and contract.

The Court of Review reversed the judgment appealed from, Mr. Justice Pagnuelo, who sat on the hearing in review, taking no part in the judgment, having resigned while the case was under advisement.

The following opinion was handed down:—

Dunlop, J.

DUNLOP, J.:—The present inscription in review by the defendant, the Montreal Water and Power Company, is from a judgment rendered by His Lordship, the late Mr. Justice Curran, on the 19th February, 1909, condemning it to pay to the plaintiff $16,712, with interest and costs.

The plaintiff, by his action, sued the town of St. Louis and the Montreal Water and Power Company, jointly and severally, for $27,618.63, damages which he alleged to have been caused to him through the destruction by fire of certain buildings and their contents, owned by him in the town of St. Louis, as the result of a fire which took place on the 26th September, 1906.

The plaintiff, by his declaration, alleged that under a contract, authorised by by-law, the municipality of the village of St. Louis du Mile End, which subsequently became the town of St. Louis, granted the Montreal Island Water and Power Company, acting at that time for the Montreal Water and Power Company, which was not then incorporated, the exclusive right and privilege, for a period of twenty-five years, of supplying water to the municipality and its inhabitants, and the right of erecting, maintaining and operating a system of waterworks in the municipality, and the right of obliging every proprietor, tenant or occupant, to pay

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to the company a compensation for water, according to certain rates, whether they used the water or not.

The plaintiff further alleged that this exclusive privilege was granted to the company for, among other reasons, the protection from fire and the damages which would thereby result to the ratepayers of the municipality; that, under the terms of the contract, the company bound itself towards the municipality and its ratepayers to furnish, during the period of twenty-five years, a certain and sufficient supply of water for public and domestic use; that it was specially stipulated that the water-works should, at all times, except for the time absolutely necessary for repairs, have a sufficient capacity to throw upon the flames, in case of fire, from three hydrants, three simultaneous streams of water from a hose of 300 feet long and 2½ inches diameter, with a 1-inch nozzle, to a height of not less than 75 feet, and that the hydrants be provided with a special coupling for suction use by the fire engine of the municipality; that this exclusive privilege was granted to the company on condition that the municipality should have the right of using, at all times, water from the water-works, for the extinguishing of fire; that the town of St. Louis, by its by-laws, provided for the organisation of a fire department for the protection of its citizens and their property against fire, and that, for that purpose, it purchased the necessary apparatus and maintained a fire department.

The plaintiff alleged that on the 26th September, 1906, he was a ratepayer, as well as a proprietor, in the municipality; that he had paid his municipal taxes and his water rates; that on that date a fire took place in the property opposite to his, on St. Lawrence street, was communicated to his property, and as a result his property was destroyed.

The plaintiff asked that the defendant company should be held liable for the damages which he had suffered, on the ground that, as regards the company, the fire could have been extinguished if the water pressure had been sufficient, and, as regards the town, on the ground that they were negligent in not having used the fire engine to increase the water pressure.

The company defendant, by its plea, denied any liability to the plaintiff, and especially alleged that it was not bound by law, or by the by-law, or contract, to protect the plaintiff or his property against fire, and that the damages alleged to have been caused were not caused through any fault or negligence of the company, but occurred either through the fault, imprudence or negligence of the plaintiff, or of the town of St. Louis.

The material clauses of the contract between the Montreal Water and Power Company and the town of St. Louis are contained in articles 1, 5 and 8.

The consideration of the contract is set forth in article 1, and is expressed as follows:—

In consideration of the public benefit to be derived by the municipality and the tax payers of the village of St. Louis du Mile End, from the supply of water to be provided for them by the company, the exclusive right and privilege is hereby granted unto the company, etc.

Article 5 provides that the pipes shall be of certain dimensions of cast-iron and of best quality; the hydrants and valves also to be of the best quality, and of a pattern approved by the engineer of the corporation, and provided with a special coupling for suction use by the fire department of the municipality at places where the water will not have enough pressure to throw water to a height sufficient to give proper fire protection for the buildings in the municipality.

From this clause it will at once be seen that it was contemplated that, in some places, there would not be a sufficient pressure of water, and the defendant company points out that no proof has been made that the hydrants in question were not provided with a special coupling. This clause also provides that the hydrants shall have a double discharge nozzle, and, placed on the line of distribution, pipes at a distance, the one from the other, of not more than 500 feet, the municipality having the right to require a larger number to be furnished, on payment of $50 per annum for each additional hydrant, and that if a manufacturer desired to have, for himself, one or more hydrants, he could have them laid for him at his expense by the company, in which case water would be supplied to him through a meter and charged at the rate fixed for manufacturers under the by-law.

This clause also provides that water from hydrants shall only be used for the extinguishing of fires and the practice of fire engines, for watering the roads and streets, and for the ordinary requirements of the police and fire stations, and strictly for all corporation purposes, the whole gratuitously.

This provision merely indicates that the municipality shall have the right to use water for corporation purposes gratis.

The facts of the case are as follows: On the 26th of September, 1906, a fire took place, about 2 o'clock in the afternoon, in a shed at the rear of the house occupied by one widow Bélanger, against which was piled a quantity of timber, and adjoining the shed was a wooden fence. The weather was very dry and a high wind was blowing from the south-west. In a few minutes the whole thing was in a blaze. The evidence as to how long it took the firemen to arrive there is rather contradictory, some saying that they arrived in four or five minutes, and others longer, but from the evidence of witness Paquette it is clear that when he arrived there a number of people had had time to gather and were watching the blaze without making any attempt to put out the fire. The firemen on their arrival had to connect their hose, during which time the fire was gaining progress, and, although there is no doubt that there was water at a certain pressure, it is not proved how

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much pressure there was. The firemen and other witnesses for the plaintiff merely state there was not sufficient pressure to put out the fire. It is established that in addition to their Babcocks the firemen had a chemical engine, but no attempt was made by them to use this engine. The plaintiff examined a number of witnesses, the majority of whom were employees of the town, including a number of firemen.

The Court below found that the company defendant was liable to the plaintiff under article 8 of the contract.

The Judge, by his judgment, seems to have assumed that the company had agreed to extinguish fires. The agreement of the company was to furnish water for public and domestic use, and, to use the words of Mr. Farnham, in his well-known work on "Water and Water Rights," vol. 1, p. 848:—

> In most cases it would be impossible to say that failure to furnish water was the cause of the loss. Fires occur constantly in which, not only buildings and their contents, but whole sections of cities are consumed, although all the water that can be used is at hand and thrown upon the flames. With all the uncertainty which exists as to what is the particular cause responsible for a fire loss, a water company cannot be held liable for the loss, unless it is held to assume the responsibility of an insurer. Mere breach of a contract to furnish water for the extinguishment of a fire, cannot be said to be the cause of the loss, because such cause may have been the negligence of the owner, the criminal act of a stranger, the atmospheric conditions, or any one of the numerous other things which may be mentioned. Unless the loss can be said to be the result of the breach of the water company's contract (which could never be said because the influences and other unknown quantities could not be determined), it is not liable for the loss caused by the fire. Keeping in mind the fact that the contract of the water company is to furnish water and not to extinguish fire, the rule with respect to damages precludes holding the company liable. Damages must be such as were within the contemplation of the parties, and it certainly cannot be claimed that for the meagre remuneration received, the water company undertakes to make good the loss which would result from the destruction of a modern city by fire, and the principle applied equally to the destruction of any part of it. For there is no place to draw a line, short of absolute non-liability, if liability for loss of the entire city is denied.

The legislative enactment regarding water supply is of a special nature, inasmuch as it enables the municipality to transfer its rights and powers, regarding water supply, to a contracting party, and the municipality having, by contract, subrogated the company in all its rights and privileges, the company defendant stands in the same position to a citizen as does the municipality.

By the contract in question penalties are imposed on the company defendant for non-fulfilment, and those are the only ones which were contemplated by the parties, and to which the company defendant agreed.

It was not the intention of the parties, when the contract in

question was made, nor was it contemplated by the contract, that the company defendant should be the actual insurers of individual ratepayers, or of the company's insuring individual ratepayers against any damage which might result by failure of the company in its contractual relations.

In making the contract with the company defendant the municipality arranged with the company as its agent to supply a commodity which it had the power, but not the obligation, to give to the ratepayers.

The present action is based entirely on the contract existing between the town and company, and damages asked for are sought to be obtained solely in connection with the company defendant's contractual position, and not under the article of the Civil Code 1053, as regards actions for damages.

The important question to my mind is whether the parties to the contract intended that the company defendant should be, so far as the carrying out of its obligations is concerned, the insurer both of all the ratepayers, as well as of the insurance company holding the risks on the property of those ratepayers. There are three essential facts: (1) that hydrants and a stipulated water-supply, through them and their use, are provided for by the contract for all corporation purposes; (2) that the use of the company defendant's system and public supply, as stipulated for, are given gratuitously; (3) article 16 defines what shall be the penalty to be suffered by the company defendant if it should neglect or refuse to perform any of the obligations imposed by this agreement. The penalty being contractually imposed, the company's liability is limited to that penalty, exercisable only by the municipal council or its successors, though, of course, this does not withdraw it from liability under article 1053 of the Civil Code, which would lay it open to damages for any accident at the hands of any one ratepayer, whether the company defendant was carrying out its contractual obligations or not, who suffered damage through the neglect of the company in the course of its operations.

These points clearly shew that there was no intention by the parties to the contract that, at least as regards public supply, the company should be held responsible to private individuals for the results of, and failure in, carrying out its contractual obligation, and a study of the water tariff shews clearly that the ratepayers pay the company for one thing only, that is, for water for their domestic or manufacturing purposes.

Article 1074 C.C. provides that the debtor is liable only 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.

It seems to me going very far to say that the company, when it entered into the contract in question, intended or did, in effect, insure all the buildings in the municipality, in consideration of

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the very small rate that was received. The contract provides the penalties to be imposed for any default or violation of its terms, and the municipality can collect such penalties in case of any violation of the terms of the contract, or can take the necessary steps to cancel the contract. Provision is made by the contract for domestic supply and for public supply, for fire extinguishing purposes. The supply for fire extinguishing purposes is given gratuitously. Provision is made for the penalties to be imposed in the event of non-fulfilment by the company of its obligations.

A great number of cases decided in the United States have been cited by the defendant in its factum, and the decisions are overwhelmingly in its favour, shewing that, in cases like the present one, water companies are not liable as insurers. A very important case is the case of *The Allan & Curry Manufacturing Co.* v. *The Shrieveport Waterworks Co.*, 113 Louis. Rep. 1091, 68 L.R.A. 650. The defendant relies strongly on this decision in support of the principle for which it is contending, the only apparent difference in the facts being that in this case the loss by fire was caused apparently not so much from lack of water supply as it was through alleged neglect of the company in failing to keep its hydrants in good order, and that, owing to the time lost in connecting the hydrants, the fire made headway that could not be checked.

Two features of this case make it of special interest. The first one is: that the decision is based upon a system of law more nearly akin to that of the Province of Quebec, being, as it is, a case in the State of Louisiana, which is a Code State, and the reference of the learned Judge to the French authorities, as well as French decisions, makes it unusually significant.

The judgment contains a lengthy decree on the theory of contracts made *pour autrui*.

The second interesting feature of the case is that it criticizes strongly and overrules the decision of that very Court to the opposite effect, viz., the case of the *Planters' Oil Mill Co.* v. *Munro Waterworks and Light Co.*, 52 La. Ann. 1248, 27 So. 684, which latter case together with the *Paducah Lumber Co.* v. *Paducah Water Supply Co.*, 7 L.R.A. 77, frequently referred to, constitute the only two important cases in which judgments have been rendered of a nature contrary to that contended for by the present company defendant.

Mr. Justice Provosty in effect states:—

> We have discussed the case so far, as if the question it involved was *res nova*, but the exact question is being decided repeatedly in other jurisdictions, and, once already, by this Court. Upon the latter decision, *Planters' Oil Mill Co.* v. *Munro*, the plaintiffs place much reliance, but for the reasons hereinbefore given we are not satisfied with the conclusions therein reached and we have concluded to overrule it.

Further on he states:—

Analyzing this contract, we find that the waterworks it provides for are to be erected for the double purpose of furnishing water to the city of Shrieveport and its inhabitants, and we find, accordingly, that there are, in the contract, two sets of stipulations and engagements, one in favour of the city of Shrieveport (that is, in favour of the corporation), and the other in favour of the inhabitants (that is, the inhabitants individually). The city stipulates that the company defendant engages that the inhabitants individually shall be supplied with water at a fixed maximum rate for private use, including individual fire protection, and the city stipulates and the company engages that there shall be leased to the city certain fire hydrants and that, in consideration of rental to be paid by the city, there shall be supplied through the hydrants and to the city, their lessees, all the water necessary for the extinguishment of fires, flushing sewers, engine houses, etc.

He goes on to say:—

This suit is upon the second of the hereinbefore mentioned stipulations, that is, it is upon the engagement of the defendant to supply the city with water for the use of her fire department. It would seem to be perfectly plain that the engagement is distinctly in favour of the city in her corporate interest, and is not a stipulation *pour autrui*. An engagement to furnish water to the city is not an engagement to furnish water to the inhabitants individually. The inhabitants could neither demand its performance, nor demand the nullity of the contract, because of its non-performance. They could not pay any part of its consideration, for it is futile to say that payments made by the city, out of her treasury, are payments made by the inhabitants individually.

Though the stipulation is thus made by the city distinctly in her own favour, in the interest of one of the branches of her administration, and though the engagement is thus distinctly to the city for supplying her fire department with water, nevertheless, the plaintiffs contend that the stipulation is made in favour of the inhabitants individually, and that the engagement of the defendant company is to the inhabitants individually. All we can say is that the contention is in the teeth of the plain terms of the contract.

In this case it was held, among other things, that no liability to damages in favour of its inhabitants or corporators lies by the city for the non-performance or negligent performance of the duty to furnish water to its fire department for protecting the property within its corporate limits; hence no duty rests upon it to impose such a liability upon a contractor stepping into its shoes for performing such duty; and it was further held that the city of Shrieveport, being without authority to make itself liable to its inhabitants for any losses suffered by them, as a result of its negligent discharge to furnish water for the protection of their property against fire, it necessarily is likewise without authority to hire some one else to assume such liability. Such assumption of liability would have to be paid for out of the corporate treasury, and the city would only be doing indirectly what it could not do directly. It

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was also held that the decision of the same Court in the *Planters' Oil Mill* v. *Munro*, 89 Ky. 340, was overruled. This case is an important one, based on laws very similar to laws in force in this Province, where constant reference is made to the code of Louisiana. The present case appears to be the only one which deals with the liability of the water company to ratepayers whose premises have been destroyed by fire, and where the loss is alleged to be due to the lack of water supply for the extinguishing of fires. But there are very numerous cases on this very point in the United States, for the reason that private water companies such as the defendant company, exist there in great numbers, and therefore questions such as the present one are by no means rare, and, as stated before, the overwhelming number of decisions are to the effect that the private ratepayer has no right of action against the water company having a franchise contract with the municipality where his property has been destroyed by fire owing to the lack of pressure or fire extinguishing supply called for by that franchise.

The American cases are cited at great length in the defendant's factum, where it is also stated that, while in twenty-two States of the Union, they are, by their jurisprudence, unanimous upon the principles which the defendant company has laid down, only in three States, so far as can be gathered, had the opposite opinion been maintained by judgment of the Court, and of these cases two based themselves on the third, and in that third case there exists an element wholly lacking in the present case, *viz.*, a private contract for fire protection between the water company and the consumer, outside of, and beyond, the obligations of the company to the municipality. Of course there is no such obligation in the contract in question. There is nothing in the contract in question which intimates that any breach of the contract between the municipality and the company defendant was to enure to the benefit of the ratepayer who might consider himself aggrieved.

One of the well-known rules of construction of contracts by Courts is to ascertain, as nearly as possible, the intention of the parties at the time they entered into the contract. It can be hardly contended that either the municipality or the water company intended or contemplated the assuming by the water company of such liability as the contention of the plaintiff would throw upon it.

I am, therefore, of opinion that the company defendant never intended to assume, or did assume, any liability to the plaintiff in the event of the plaintiff's property being destroyed by fire—in other words, to insure him from loss by fire. There was no adequate consideration given for such a serious responsibility, and capital would not readily seek investment in companies involving a public service exposed to such claims, risks and hazards.

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I am of opinion that there is error in the judgment of the Superior Court in condemning the defendant to pay damages in the present case, and that the judgment should be reversed and the plaintiff's action dismissed with costs in both Courts, because the company defendant never assumed or intended to assume any liability to pay the plaintiff damages in the event of his property being destroyed by fire; and further, because the damages claimed are not such as were foreseen, or might have been foreseen, at the time the contract in question was entered into.

Appeal allowed.

REX v. McKEOWN.

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Nov. 30.

Quebec Court of King's Bench, Archambeault, C.J., Lavergne, Carroll and Gervais, JJ. November 30, 1912.

1. VENUE (§ II B—20)—CRIMINAL CASE—INFORMATION IN ONE DISTRICT—ARREST IN ANOTHER DISTRICT—TRIAL IN EITHER.

The Court of Sessions at Montreal has jurisdiction to try a charge for which the accused was arrested in Montreal and committed for trial there, although upon an information laid in another judicial district of the same province; it is not essential that the accused shall, on his arrest, be sent for trial to the local venue at which the information was laid.

Statement

THIS was a petition for leave to appeal from a conviction for theft pronounced by the Court of Session at Montreal. The complaint was laid in Victoriaville but the accused was arrested in Montreal, and tried and convicted in Montreal. The accused contended that the Courts of the district of Montreal had no jurisdiction, that he should have been sent to Victoriaville for trial.

Jas. Crankshaw, jr., for the accused.

J. C. Walsh, K.C., for the Crown.

THE COURT was unanimous in the opinion that the Courts of the Montreal district had jurisdiction to try an accused arrested within their judicial district, that the accused had had a fair trial and could shew no prejudice.

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Quebec Court of Review, Tellier, DeLorimier, and Demers, JJ. June 28, 1912.

1. CONTRACTS (§ II D 4—193) — WHAT ACTIONABLE—CITY DIRECTORY—SUBSCRIBER—OMISSION OF SUBSCRIBER'S OFFICE ADDRESS, WHEN ACTIONABLE—CUSTOM—DAMAGES.

Where the defendants have for several years been publishing an annual city directory, and the plaintiff, a practising barrister, gives the defendants a written order for a copy of the directory for a certain year, and where it was and had been the custom of the defendants to publish in large, heavy type the names, callings, and office addresses of all subscribers, and where all this was omitted from the directory in respect of the plaintiff, the omission is actionable.

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2. CONTRACTS (§ II D 4—193)—WHAT ACTIONABLE—PUBLISHING FIRM PUBLISHING A CITY DIRECTORY—RESPONSIBILITY FOR UNINTENTIONAL OMISSIONS.

Where a publishing firm publishes from year to year a directory of the names and addresses of the inhabitants of a city, and sells copies thereof to any residents who may choose to become subscribers, under a custom that the names and business addresses and callings of such subscribers shall be published in large, heavy type, the enterprise being a private one in the publishing firm's own interest, it is presumed to take all the risks of oversights and omissions in respect of any such subscriber, and may be held responsible in damages therefor.

3. EVIDENCE (§ II K—311) — PRIVITY—DIRECTORY—PRESUMPTION—NOTICE OF CONTENTS OF CONTRACT.

Where a publishing firm, which publishes annually a residence and business city directory, sells under a written contract to the plaintiff, a practising barrister, a copy of the directory, and is bound by custom to insert in the directory in large, heavy type the subscriber's name, calling, and office address, and where the contract specifies the name and office address, but where the publishing firm by custom (for its protection) gives public newspaper notice to all citizens to call or write and see to the correctness of their names and addresses in the proof leaves of the directory, the subscriber may safely rely upon the specific mention of his name and address contained in his contract, and need not call or write to ensure accuracy.

4. DAMAGES (§ III A 1—45)—WHAT ASSESSABLE—UNINTENTIONAL OVERSIGHT, WHEN DAMAGES ENFORCEABLE UNDER CONTRACT.

While the policy of the law is against making actionable certain classes of slight omissions, yet where a publishing firm contracts to publish, in a city directory issued by it from year to year, the name and calling and office address of a business man in the city, the publishing firm will be answerable in damages for the omission, although it was entirely unintentional and furthermore was against the firm's own general business interests, where the omission by its very nature must have caused loss to the other party to the contract, and that without proof of specific damages.

Statement

APPEAL by inscription in review from the judgment of the Superior Court, Archibald, J., delivered on April 29, 1911, in favour of defendants.

The appeal was allowed and judgment entered for plaintiff for nominal damages.

C. A. Archambault, for plaintiff.
H. A. Hutchins, K.C., for defendant.

Tellier, J.

TELLIER, J. (translated):—The plaintiff sets up negligence in his claim and we must determine whether he should suffer the loss he did suffer without legal redress. Of what negligence has he himself been guilty? As we read the record, he executed his contract and that contract clearly indicates the address both of his office and of his residence. Why should he have written to the defendant's office to inform the defendant of these facts, when they were already in writing and under the plaintiff's own signature in the defendant's office? Why should he be held bound to give the defendants notice of his name and address, when in the preceding year, in the directory for 1908-09, the defendants had published in large type his name, his rank

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as a barrister, and even the rooms 28 and 29, at No. 20 St. James street, and his office, for evenings, at his residence at 559 Berri? Moreover, in 1909-10, they gave his residence and office on Ontario street east, No. 669; and, if we look at the other entries which have been made, we see that they have confused the plaintiff with another Mr. Archambault who was associated with Mr. Lachapelle.

Now, I understand that the defendant carries on the publication of his directory in its own private interest, and this enterprise is so carried on with all its risks. If in the carrying on of this enterprise the defendant allows omissions to take place, if it does not publish my name although I reside in Montreal, I do not see how I can claim any damages for that, because there is no contract between it and me; but if it takes upon itself, even without having any contract, to publish my name with a false address, and if that by its very nature causes me damages, it is responsible for it.

Now, in this case, the plaintiff is a practising barrister and his office address is suppressed. This is in its nature such an omission as must cause loss to the plaintiff, and that is why we award him damages.

DeLorimier, J. (dissenting)

DELORIMIER, J. (dissenting, translated):—This is an action in damages for $150 brought by Mr. Archambault, barrister, against the firm of Lovell & Sons, which publishes, at Montreal, the calendar of addresses or directory.

The plaintiff alleges that on the 1st February, 1909, he gave his name as a subscriber to that publication for the year 1909-10. His subscription is in the ordinary form:—

> John Lovell & Sons, Ltd.: Please enter my name as subscriber to Lovell's Montreal Directory, for which I agree to pay $6, upon delivery of a copy of same.
>
> C.ᵉ AUGUSTE ARCHAMBAULT,
> 759 Berri.

And below is given this other address, 20 St. Jacques.

The plaintiff claims that the defendants caused him damage. He states: I was a subscriber, I had a right to expect that this directory would be delivered to me in the month of July; I did not receive it until the 10th August, and I was obliged to go and look it up myself.

I complain further that in the calendar for 1909-10, my address is not published, as I set it out in my subscription. The number of my office is not given, and in the index of streets and of names, my address is confused with that of M. Archambault of the partnership Lachapelle & Archambault. This is a case of too much Archambault in Montreal. This is one of the points raised by the defence.

There was undoubtedly an error. The Lovell company in-

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serted only: "A. Archambault, 759 Berri," it omitted to enter the office address, 20 St. James street.

Moreover, Mr. Archambault's name was printed in ordinary type, instead of large, dark type, heavier than the names of non-subscribers, and Mr. Archambault claims that this caused him damage.

Mr. Archambault was an old subscriber; he alleges that he had subscribed for the previous two or three years, and that unfortunately there were in these earlier publications also certain inaccuracies which slipped into his address, although in the preceding years the name had been printed in large type.

The plaintiff has proved no specific damages, not a penny. He comes into this Court and asks for damages under these circumstances.

Against this claim, the defendants have pleaded: We have acted in good faith. Following our invariable custom, we published a notice in the newspapers, calling the attention of the public to the fact that our agents had finished their run over the streets of Montreal, listing the names of the people for the make-up of the directory. It is a work of great trouble to co-ordinate all these, considering that our work is done at a season of many changes of residence in the month of May, and, as it is almost impossible not to make some errors, unavoidable errors, we invariably publish in the newspapers a notice to the public, advising them that the names and addresses have been taken by our agents, and asking them to give us the necessary instructions to correct errors.

This notice was published in two newspapers, one in French, the other in English, under the signature of Messrs. John Lovell & Sons.

The defendants state: We have for the year 1909-10, as we do every year, published this notice, asking everybody to examine and see if any errors had been made in reference to his name, and to advise us by letter to our office. We have done all this, and we have acted in good faith. If we should be held strictly responsible for the many trifling mistakes, whether in printing, or in names or addresses, which inevitably slip into a publication of this nature, it would be practically impossible to continue such a publication as we issue in the public interest. It is a publication of public utility.

The plaintiff has proved, beyond doubt, that there was the mistake complained of in the 1909-10 volume, the only volume we need consider. We find the defendant's name, as already stated, with particulars as to his private residence, 759 Berri, but there is no mention of his office, nor are his name and address printed in large, heavy type.

Is this an oversight for which the defendants can be proceeded against, for which there is a remedy in civil damages?

The Court of first instance found in the negative and dismissed the action. I am of the same opinion. I consider that this is an action which never should have been instituted against the Lovell firm, because their publication is a publication of public utility, which all citizens should heartily support and encourage and since it is impossible to publish a work of this nature without the slipping in of some errors.

The plaintiff has alleged that the defendants acted maliciously, but has not a word of proof of malice and has not urged in the argument that the omission was malicious or wilful. It was, I consider, an unavoidable error.

There is a contract. If we interpret the contract with all the strictness and precision which are applied to an ordinary civil contract, it is possible to reach the conclusion, considering that the conditions of the contract have not been precisely fulfilled, that the plaintiff can shew *damnum*. To me it appears a case of *damnum absque injuria*, it amounts to nothing.

But there is more than this. The plaintiff pleads custom, and this is his chief ground. The contract does not say that the Lovell firm shall publish, in big type, the names and addresses of subscribers; there is no mention of that; merely it is custom; the public know that the Lovell firm, in the directory which it publishes, always inserts the names of subscribers in big type. Why? In the first place, it is a mere matter of courtesy to their subscribers; but it is also a matter of profit to the firm. Surely it was not by design that the defendants omitted to print the plaintiff's name in big type, since they have the greater interest in publishing his name in that manner, in big type, in order to shew the considerable number of subscribers whom they have in their work. Their interest was to print the plaintiff's announcement in big type, and it was against their own interest to have printed it in the way they did. Can it be presumed, under the circumstances, that this omission was wilful?

The plaintiff pleads custom. I accept his plea, and taking the viewpoint of custom, I say to him: Since it is to be custom, and since you have been a subscriber for three or four years, you ought to know that it was the custom for the editors of the directory to publish a notice in the newspapers. Have you fulfilled your part of the obligation? No, you have not fulfilled it in the strict terms of the notice given.

It is said that this year they have not followed the custom which they followed previously, and that they had not on the counters of the Lovell firm the leaves which they had been in the habit of placing there to make corrections. What of it? Why did he not write to the firm, I should like to know.

It is said: But he had the contract. I admit it, he had the contract in which are the words: "Office 20 St. James." They omitted this. But is that an omission which can give a

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right to redress in damages? Certainly when there is loss and if it can be proved that the omission was intentional; if it is proved that it was malicious, I could understand how the plaintiff should perhaps have redress; but unless under circumstances such as suggested, as the text-writers say it was a careless oversight which everybody commits, such as we all commit every day, for which there is no cause of action. There are such cases beyond number. Suppose one could take all such oversights occurring without any malicious intention, and make of them causes or grounds of action there would be no end to it all; if rights of action were given for example to all those whose names or addresses have been omitted or inserted by oversight. Even if he had a contract, this contract ought to be interpreted subject to the conditions and conformably to the custom under which it was accepted and entered into; and it was entered into and accepted under this condition of the notice published every year in the newspapers, advising each subscriber to see without unreasonable delay to the correct insertion of his name and address.

It is said: But the volume was not yet published. Go and inform yourself before it is published. If you are not satisfied at the counter, write to the firm saying, I draw your attention to such or such a thing.

The plaintiff complains that there were mistakes in his preceding addresses. All the more reason for him to take all the means given him by the notice. It seems to me it was his duty to write to the firm promptly, saying in effect: You have not fulfilled the contract according to its provisions. This he did not do.

I cannot concur in a judgment holding the defendants liable even for $5.

Demers, J.

DEMERS, J. (translated):—The facts of this cause have been already set up by the learned dissenting Judge and I have no need to repeat them here.

Custom is pleaded in this action. It is said: Under the custom you should have inserted my name in large type and indicated my office address. That is what was done in the preceding years. In the preceding years the directory shews the name of Mr. C. A. Archambault, 20 St. James, and following that his residence, and his name was in large type; and we see in 1909-10 not only that his name is not inserted in large type, this is not of such importance, but also that his office address is not inserted at all. He testifies that that omission by its very nature causes him special damage, and the majority of the Court is of the opinion that, in fact, this omission by its very nature did cause him special damage. The public might draw, from this absence of his office address, all sorts of conclusions.

They might say: Archambault, he no longer has any office. His office is at 759 Berri. He is a barrister carrying his office in his pocket.

The company itself admits that, according to custom, it was bound to insert the name of Mr. Archambault in large type; hence the company was bound, at the time of the make-up of the directory, to take note of the lists of subscribers. It pleads the contrary; its counsel argues that all the make-up of the directory was carried on independently of the subscription lists; that in preparing the directory they do not use the subscription lists. This is false, because the company says that it is according to this custom to insert in large type the names of the subscribers, and it must therefore take note of the subscription lists; they cannot get away from that. Now the address of Mr. Archambault, his office address, was mentioned on the list of subscriptions. The company has caused it to vanish.

It is said: But he had a notice in the newspapers saying to the public: For fear of errors in your address, or even in the spelling of your name, please call at our office. Quite so, for the public in general who have not already turned in their addresses; but, and this is the point, Archambault had furnished his address. They ought to consult it, that address was furnished. So that it is beyond question that there was negligence and that there was a default.

Whether we take this negligence as contractual negligence or as contractual default, or whether we take it as a default *in delicto*, it makes no difference, the principles involved are absolutely the same. As soon as there was a default and as soon as that default resulted in damage, and the majority of the Court finds that there has been damage, then that default was prejudicial, he ought to have redress.

We shall not order payment back of the subscription to Mr. Archambault; he took the directory and has not returned it. He did have the right to rescind his contract, but has not done so, and he has kept the directory; he cannot now claim anything back in that respect. Likewise we shall allow nothing for damages resulting from the delay in the delivery of the directory; but we consider that the plaintiff has suffered actual damages because his office address was omitted from the directory; we find that there was special damage caused in that respect.

All the reasons which the learned dissenting Judge has advanced are reasons which the text-writers give in discussing the question of responsibility for torts. If we consult Sourdat, we see that the author asks whether there should be legal liability for human frailty in the decisions, whether a defendant should respond in damages for extremely trifling defaults, whether such would not be really a great hardship; but when we read the entire chapter with its conclusion, we see that all

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that Sourdat urges is that when the default is very trifling, when the person who is to blame has committed only an involuntary act, then the Judge should be very light with the damages.

Demolombe writes in the same strain: "The article is formal, and the default very trifling calling for redress; but when the default is very trifling the Judge ought to be very easy with the damages." He cites the discussion which took place in the State Council during the codification of the Code Napoleon: "It is a great hardship, they say, to hold a man liable for a default which is due not to his heart nor his will; but still as between him who suffers and him who causes an injury by carelessness, the position is not equal; yet when the default is very slight, the Courts are to make the damages light."

Adopting these principles, we find that there has been negligence on the part of the defendants and we award to the plaintiff nominal damages, fixed at the sum of $25.

Appeal allowed,

DELORIMIER, J., *dissenting.*

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REDFERNS Limited v. INWOOD.

Ontario Divisional Court, Falconbridge, C.J.K.B., Britton, and Riddell, JJ. September 30, 1912.

1. HUSBAND AND WIFE (§ I—16)—REPRESENTATION THAT WOMAN IS WIFE —LIABILITY OF HUSBAND FOR NECESSARIES—ESTOPPEL.

Where a man represents a woman to be his wife, and a third party acts upon that representation to the extent of selling necessaries to the alleged wife, the man is estopped from saying that she is not his wife, in an action to recover the purchase price of the goods.

[*Munro* v. *De Chemant* (1815), 4 Camp. 215, 216; *Hawley* v. *Ham* (1826), Tay. 386, followed; Bowstead on Agency, 4th ed., p. 38, and 21 Cyc. 1233, cl. 12, referred to.]

2. EVIDENCE (§ IV J—435)—ACCOUNTS AND ACCOUNT BOOKS—CUSTOM — SALE—PARTY TO WHOM CREDIT GIVEN—METHOD OF BOOKKEEPING.

Where the bookkeeping entries for goods supplied are made as in the name of the wife of the defendant in respect of goods supplied to a woman introduced by the defendant as his wife, the defendant will be held liable for the price of the goods notwithstanding that the book account was not in his name, where the goods were in fact supplied on his credit and in faith of his representations and not on the woman's credit, if the method of charging was made in like manner as in the ordinary case of a wife buying as agent of her husband.

Statement

APPEAL by the defendant Zimmerman from a judgment of the County Court of the County of York.

The following statement of the facts is taken from the judgment of RIDDELL, J.:—

Mrs. Zimmerman, one of the defendants, a widow from Pittsburg, became acquainted, in Ottawa, with the other defendant, F. G. Inwood Jr., manager in Toronto of a motor sales com-

pany; she came with him to Toronto in May, 1911, and went and lived with him here as his wife, continuing so to do for some six months, when, as we are told, he absconded.

In May, 1911, she was told by Inwood that he had business dealings with the plaintiffs, and he would like her, if she bought anything in Toronto, to buy it from them; he took her into the plaintiffs' premises and introduced her to the manager, no doubt, as his wife; Mrs. Zimmerman said she wanted to buy a coat, and was turned over to the saleswoman. Nothing was said as to credit or as to charging, etc., between Mrs. Zimmerman and the saleswoman; but, as the saleswoman's custom was to charge goods bought to the person actually buying, the goods were charged to "Mrs. F. G. Inwood." The custom was not to charge the husband unless the husband himself asked it, or the wife asked it in the presence of her husband; even if the wife did ask that the goods should be charged to the husband, unless the husband was there, they were charged to the wife.

The trial Judge finds, on a conflict of evidence, that there was no direction to the saleswoman to charge to Mr. Inwood—and the witness whom he believes says that nothing was ever said about giving credit to him. As I have already said, there was nothing said between saleswoman and purchaser about credit at all. The account was opened in the name of "Mrs. F. G. Inwood;" and the goods were sent out addressed in the same way.

Mrs. Zimmerman went again and again to the plaintiffs' place of business, at least twice with Inwood, and bought articles of attire as she needed them. Nothing was said about credit, and the goods bought were debited in the ledger and sent out in the same way—a statement being rendered to her, in her assumed name, each month.

In July the motor sales company rendered an account to the plaintiffs, and, by arrangement with Inwood, the plaintiffs charged the account standing in their books against Mrs. F. G. Inwood, against the motor sales company; and the same kind of transaction took place in September. On the 20th November, there was a debit against the account of $104; and this the plaintiffs charged to the motor sales company. Inwood absconded on the 15th December, and at the end of that month the amount was retransferred against Mrs. F. G. Inwood.

All the articles bought were what may fairly be considered as necessary for a woman in her apparent station in life.

On the 8th December, the plaintiffs "dunned" Inwood for the amount of an account "representing goods purchased by Mrs. Inwood"—and afterwards placed the matter in the hands of their solicitors. To a letter of the solicitors, Inwood answered,

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"I expect to take care of same at an early date and send cheque." It is said that "Mrs. Inwood," on being telephoned to on two occasions, said that Mr. Inwood would attend to the matter.

Statement

An action was brought in the County Court of the County of York in January, 1912, against F. G. Inwood Jr. and Mrs. F. G. Inwood Jr., for $119.25; and, the style of cause being amended by substituting Mrs. Zimmerman's real name, the statement of claim set out that she bought the goods, and Inwood agreed with the plaintiffs that, if she did not pay, he would. The action was discontinued against Inwood: Mrs. Zimmerman denies pledging her personal credit, and says the purchases were on the credit and authority of Inwood.

At the trial before His Honour Judge Denton, he gave judgment against Mrs. Zimmerman for the full amount, and she now appeals.

Argument

T. N. Phelan, for the appellant, argued that she had implied authority to pledge Inwood's credit for the purchase of the goods, as a reputed marriage is a sufficient basis for the husband's liability: *Watson* v. *Threlkeld* (1798), 2 Esp. 637; 21 Cye. 1233. The presumption is in favour of the agency of the wife, although it may be rebutted: *Paquin Limited* v. *Beauclerk*, [1906] A.C. 148; and see, at pp. 149-152, note of the judgment of Collins, M.R., in the Court of Appeal. There must be an express contract by the wife to pledge her own credit, otherwise the presumption is the other way. The *Paquin* case is not so strong in favour of the appellant as the case at bar. He also cited Bowstead on Agency, 4th ed., p. 38.

M. L. Gordon, for the plaintiffs, argued that the authority of a wife to pledge her husband's credit for articles of clothing does not extend to all kinds of dresses, however expensive, and that a person who is not a legal wife cannot make the husband liable even for necessaries. He referred to *Debenham* v. *Mellon* (1880), 5 Q.B.D. 394, affirmed, 6 App. Cas. 24; *Kendall* v. *Hamilton* (1879), 4 App. Cas. 504, 514; Smith's Mercantile Law, 11th ed., p. 193. The *Paquin* case is distinguishable. He also cited *Seaber* v. *Hawkes* (1831), 5 M. & P. 549.

Phelan, in reply, referred to *Griffin* v. *Patterson* (1881), 45 U.C.R. 536.

Riddell, J.

September 30. RIDDELL, J. (after setting out the facts as above):—The essence of the learned County Court Judge's reasons is perhaps to be found in the following extract therefrom: "I think the case must be looked at as a case where two people, not married, go into Redferns, and she orders goods for herself. The only importance that can be attached to the fact that the plaintiffs believed that the two persons were husband

and wife is on the question whether they gave credit to him, and to him alone. If this is the only matter to be considered, and the whole case must be treated as one coming under the ordinary head of principal and agent, I think the evidence fails to shew that the plaintiffs gave credit to any one except the person who bought the goods—that is, to Mrs. Inwood. They were bought by her, they were charged to her, an account was opened in her name, the goods were billed to her, and she did not pledge his credit. I think upon that state of facts it must be held that she is liable."

With the utmost respect, I am unable to agree with this conclusion.

The rule is laid down baldly in Bowstead on Agency, 4th ed., p. 38: "Where a man lives with a woman as his wife, she has implied authority to pledge his credit, during the continuance of the cohabitation, to the same extent as if she were legally married to him."

This is, in my view, quite too broad a statement, and the cases cited in support of it do not go so far: *Watson* v. *Threlkeld* (1798), 2 Esp. 637; *Ryan* v. *Sams* (1848), 12 Q.B. 460; *Blades* v. *Free* (1829), 9 B. & C. 167. Nor do I think the statement in Cyc. quite accurate: "It is the cohabitation of a man and woman as husband and wife that is the basis of his presumed liability for her support:" 21 Cyc. 1233, cl. 12.

But it is not necessary in the present case to consider this. The facts are amply sufficient to bring the case within what I consider the true rule—a rule that has not been controverted in any of the cases and which is sound on principle. Where a man represents a woman to be his wife, and a third party acts upon that representation, the man is estopped from saying that she is not his wife. "His representation that she was his wife would have been conclusive against him:" *per* Lord Ellenborough in *Munro* v. *DeChemant* (1815), 4 Camp. 215, at p. 216. And where the defendant, having been married before, went through a ceremony of marriage with another woman (his wife living), "he was estopped to set up bigamy . . . he had given the woman . . . every appearance of being his wife:" *per* Lord Ellenborough in *Robinson* v. *Nahon* (1808), 1 Camp. 245, at p. 246. See also *Watson* v. *Threlkeld*, 2 Esp. 637.

A case in our own Courts is to the same effect, *Hawley* v. *Ham* (1826), Tay. 385, in which Campbell, C.J., says (p. 390): "The woman having been recognised by the defendant as his wife . . . renders him liable."

The learned County Court Judge, in his considered judgment, does not dissent from this view: but, assuming that the defendant Inwood would be in precisely the same position as

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though he and Mrs. Zimmerman had been lawfully husband and wife, he thinks credit was not given to Inwood but to the woman.

I can find no evidence to justify this view. There can be no doubt that the woman was thought by the plaintiffs to be Inwood's wife and was treated as such by them. It was just as in the ordinary case of a wife buying necessaries for her own use. Then we have the visit of Inwood to introduce her, his accompanying her at least twice on her purchasing visits, his paying the account twice and promising to pay the balance—and also the fact that no inquiry was made as to the woman's means, no establishing of a line of credit for her—no one swears that the goods were furnished on her credit—the book-keeping entries, the charges, etc., are just such as, in the practice of the plaintiffs, are made in the ordinary case of a wife buying as agent of her husband; and so (even if not self-serving evidence) do not assist in shewing that the woman was the person credited.

In all the case I can find nothing to indicate that the defendant was buying or the plaintiffs selling on any but the credit of Inwood.

Paquin v. *Beauclerk*, [1906] A.C. 148, may be looked at on this question.

I am of opinion that the appeal should be allowed with costs, and the action dismissed with costs.

Falconbridge, C.J.

FALCONBRIDGE, C.J., concurred.

Britton, J.

BRITTON, J., agreed in the result.

Appeal allowed.

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RUDD v. CAMERON.
(Decision No. 2).

Ontario Court of Appeal, Garrow, Maclaren, Meredith, and Magee, JJ.A., and Lennox, J. November 19, 1912.

1. LIBEL AND SLANDER (§ II F—85)—WHAT CONSTITUTES A PUBLICATION—PUBLICATION OF SLANDER BY DETECTIVE AGENCY TO THEIR EMPLOYEES.

One who, finding that slanders concerning him are being circulated, and not knowing who is responsible, places the matter in the hands of a detective agency, but does not tell or ask them to go to any particular person, may recover damages for a publication of the slanderous statements to employees of the detective agency.

[*King* v. *Waring*, 5 Esp. 15, and *Smith* v. *Wood*, 3 Camp. 323, distinguished; *Rudd* v. *Cameron*, 4 D.L.R. 567, affirmed on appeal on different grounds. See also Annotation, 4 D.L.R. 572.]

Statement

APPEAL by the defendant from the judgment of a Divisional Court, *Rudd* v. *Cameron* (No. 1), 4 D.L.R. 567, dismissing an

appeal from the judgment of Britton, J., at the trial, awarding the plaintiff $1,000 for slander.

The appeal was dismissed.

W. M. Douglas, K.C., for the defendant.

E. F. B. Johnston, K.C., for the plaintiff.

MACLAREN, J.A.:—The plaintiff, a merchant and building contractor, was awarded by a jury $1,000 for damages sustained by him on account of the defendant having slandered him in his business and calling. On appeal to the Divisional Court the judgment was upheld.

The ground of appeal most strongly urged before us was that the defendant was entrapped by the plaintiff into using the language he did, and induced to utter the alleged slanderous words by detectives employed by the plaintiff and sent for that purpose, and that under the circumstances it was the same as if he had spoken the words to the plaintiff himself and at his request, and that consequently there was no publication of the slander and that the occasion was privileged. Counsel relied upon *King* v. *Waring*, 5 Esp. 15, and *Smith* v. *Wood*, 3 Camp. 323, and upon a number of American cases and authorities which had adopted and followed the rule laid down in England in the above cases.

As to the question of publication, the Divisional Court relied largely upon the case of the *Duke of Brunswick* v. *Harmer*, 14 Q.B. 185, where it was held that the purchase of a single copy of the newspaper containing a libel by the agent of the plaintiff sent for that purpose was sufficient proof of publication. They also refer to the fact that Odgers (5th ed.) at pp. 179 and 180 says that so far as the question of publication is concerned *King* v. *Waring*, 5 Esp. 15, and *Smith* v. *Wood*, 3 Camp. 323, must be taken to be overruled by the *Duke of Brunswick* case. It is also pointed out that Sir Frederick Pollock in his note to *Smith* v. *Wood*, in 14 R.R. 752, says that the ruling in that case does not seem consistent with the *Duke of Brunswick* v. *Harmer*, 14 Q.B. 185.

I am of opinion however, that in this case we do not need to discuss whether the two English cases first named and the American cases in which they have been followed are or are not good law. The evidence in the present case does not come up to the requirements of these authorities. The detectives were not sent by the plaintiff to the defendant. The evidence is that the plaintiff, finding that such damaging reports were being circulated in the town, and not knowing who were doing so, placed the matter in the hands of a detective agency who sent two of their employees to investigate. They were not told or asked by the plaintiff to go to the defendant. In speaking of the plain-

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tiff to the detectives as he did, the defendant in my opinion both in fact and in law published the slanders he uttered and he is not in the same position as if he had spoken the words to the plaintiff himself. It may be noted that it has been held that a publication induced by the prosecutor is sufficient in a criminal case: *Regina* v. *Carlile*, 1 Cox C.C. 229.

Maclaren, J.A.

I think the defence of privilege also fails. The defendant was under no obligation, and owed no duty that justified him in using such language as he did. He did not go into the box and testify that he believed what he said to be true or that he uttered it in good faith. He went far beyond what was suggested to him or what he was invited to say by the detective. His own examination for discovery shews that he had no ground for making the statements he did. There is abundant evidence of malice, and this would be sufficient to destroy any such qualified privilege as is claimed, even if it had existed. Further it would not in any case apply to the slanders voluntarily uttered to the plaintiff's stenographer.

The jury gave a verdict that included a finding of malice, after a charge that was not objected to by the defence either at the trial or in the argument before us. As pointed out to the jury it was a case in which they might give exemplary damages if they found certain facts. Having found these facts they exercised their discretion and I am not aware of any proper ground on which we can declare it to be excessive.

Garrow, J.A.
Magee, J.A.
Lennox, J.

The appeal in my opinion should be dismissed.

GARROW and MAGEE, JJ.A., and LENNOX, J., concurred.

Meredith, J.A.

MEREDITH, J.A.:—If the plaintiff had by subterfuge induced the defendant to speak defamatory words of him merely for the purpose of having an action for damages, I cannot think that such an action would lie: where one gets no more than he seeks, asks for and induces, what great right has he to $1,000 in addition? If one by a trick induces another to arrest or imprison him, can he recover damages in an action complaining of that which his own fraud brought about, and which he designed? The general rule is that one cannot take advantage of his own wrong; neither can he recover damages for that which had his leave and license. And that which one procures another to do for him, may be said, very properly, to be done by himself, in fishing for actions as well as in other things. But that is not this case; it was the case referred to by Lord Avanley in his ruling in *King* v. *Waring*, 5 Esp. 15.

It is quite a different thing for one who has been defamed by a secret enemy, and who in honest and not unusual or unreasonable endeavours to discover the wrong-doer, is again defamed—by one whom he suspected of the secret defamation—

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to bring such an action as this—even though the new slanders were published only to detectives employed by him and under false statements made by them in such an endeavour. And that is this case: and was very like the case of *Duke of Brunswick* v. *Harmer*, 14 Q.B. 185; see also *Griffiths* v. *Lewis*, 7 Q.B. 61.

The plaintiff was not seeking a new defamation of his character with a view to recovering damages because of it; he was seeking knowledge with a view to putting a stop to the secret slanders which he neither desired nor had induced: and so, in this action, is not taking advantage of his own wrong, or answered by a defence of leave and license.

The action therefore lies; but the defendant has, I think, a right to stand upon the same ground as if the statements of the plaintiff's detectives had been true; another instance of the rule against anyone taking advantage of his own wrong; and that being so the words uttered would have been privileged but for the actual malice of the defendant found by the jury on evidence upon which reasonable men could so find.

This was the view of the case taken, and acted upon, by the trial Judge; and confirmed in the Divisional Court, and, having regard to all the facts and circumstances of the case, it cannot be considered that the damages are so great as to warrant the granting of a new trial on that ground.

Appeal dismissed.

CHESLEY v. BENNER et al.

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Nova Scotia Supreme Court, Ritchie, J. October 29, 1912.

1. JUDGMENT (§ I F—45)—ENTRY—RECORD — ORDER FOR LEAVE TO ENTER —PERIOD AFTER JUDGMENT, HOW COMPUTED.

Under order 46, rule 1 of the rules of the Supreme Court of Nova Scotia providing for an order of arrest in certain actions and that the defendant be imprisoned until final judgment in the action and for thirty days thereafter, if the final judgment is against him, and further providing that within thirty days after final judgment an order may be made under the Collection Act for his appearance at a further examination, the period of thirty days in which such order may be obtained runs from the time of the entry of the judgment and not from the time of the order for leave to enter judgment.

2. JUDGMENT (§ I F—45)—ENTRY — RECORD — ORDER FOR JUDGMENT, EFFECT OF.

An order obtained under Order XIV, Rule 1 (*a*) of the Rules of the Supreme Court of Nova Scotia for leave to enter final judgment is not in itself a "final judgment" though it is a final order deciding the rights of the parties and one from which an appeal may be taken.

Statement

ORDER XLVI., rule 1, of the rules of the Supreme Court of Nova Scotia provides that where the plaintiff in any action in which, if it had been brought before the first day of October,

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A.D. 1884, the defendant would have been liable to arrest, by affidavit of himself or some other person proves to the satisfaction of a Judge or of a commissioner that the plaintiff has a good cause of action against the defendant to the amount of $20 or upwards and that the deponent has probable cause for believing and does believe that the defendant unless he is arrested is about to leave the province, such Judge or commissioner may, without requiring in such affidavit any statement of the ground for such belief, make an order directing that such defendant shall be arrested and imprisoned until final judgment in the action, and if such final judgment is against him until the expiration of thirty days thereafter unless and until he sooner gives the prescribed security not exceeding the amount sworn to, and with $40 for costs, conditioned that if within thirty days after such final judgment an order is made under the Collection Act for his appearance at an examination to be held thereunder and the said order for his appearance has been served upon him or upon his sureties or either of them or his solicitor at least thirty days before the time fixed in the order for his appearance, then he will appear at such examination in obedience to such order or at such adjournment of such examination as is granted upon the application of his sureties or solicitor in his absence or of the plaintiff and will surrender himself to prison in case of an adjudication of imprisonment.

The defendant was arrested under this rule and gave a bond in which his co-defendants joined as sureties conditioned as required by the above rule. The plaintiff applied under Order XIV. for and obtained an order giving him leave to enter final judgment and final judgment was subsequently entered pursuant to such order. The plaintiff then obtained an order for the examination of the defendant under the Collection Act, but this order was not obtained within thirty days after the making of the order for leave to enter final judgment, but within thirty days after judgment was actually entered. In an action by the plaintiff upon the bond the question was raised whether the order for his examination under the Collection Act had been made within thirty days after final judgment, the defendants contending that the order giving leave to enter judgment was the final judgment.

J. L. Ralston, for the plaintiff.
C. R. Smith, K.C., for defendants.

Ritchie, J.

RITCHIE, J.:—In this case Mr. Justice Drysdale made an order under Order XIV., Rule 1(*a*), giving the plaintiff liberty and empowering him to enter final judgment in this action. I was not furnished a copy of this order, but I assume it follows the rule to which I have referred. Both counsel are agreed that the only question in dispute is as to whether or not this order

made by Mr. Justice Drysdale is the "final judgment" referred to in the bond given by the defendants under the provisions of chapter 16 of the Acts of the Province of Nova Scotia for the year 1901—the bond is in the form provided by the statute.

If this question is answered in the affirmative the plaintiff's action fails, but if it is answered in the negative the defendants are liable on the bond. I am of opinion that the order in question is not the final judgment referred to in the bond. Chapter 16 of the Act of 1901 is in amendment of the Rules of the Supreme Court, in these rules we find orders dealt with as one thing, and judgments as another. It is true that this is a final order, it decides the rights of the parties and from it an appeal may be taken, but that does not make it the final judgment in the action which may or may not be entered. I cannot hold it to be the final judgment referred to in the bond without doing violence to the language of Order XIV., Rule 1(*a*), under that rule application is made "for liberty to enter final judgment," and the order is made empowering the plaintiff to enter final judgment. It is, therefore, clear that the order is not the "final judgment" mentioned in the rule or in the statutory form of bond. It is the thing which gives the plaintiff liberty to enter final judgment—having this liberty we may enter the judgment or we may not do so.

There will be judgment for the plaintiff for the amount due on the bond with costs.

Judgment for plaintiff.

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WILSON v. SHAVER.

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Ontario Divisional Court, Riddell, Middleton, and Lennox, JJ. September 30, 1912.

1. SALE (§ II A—27)—CONTRACTS — IMPLIED WARRANTY — REPRESENTATION THAT COW WAS "DUE TO CALVE" NOT A WARRANTY.

A representation by a seller that a cow was "due to calve" on a certain day, does not amount to a warranty that the cow was "in calf"; all that the expression imports is a representation that the cow had been bred to a bull at a time from which it was expected the cow would calve on the day specified.

Statement

AN appeal by the defendant from the judgment of the County Court of the County of Halton.

The action was brought to recover damages for breach of an alleged warranty upon the sale of a cow, which was that she was "due to calve" on a day stated. The plaintiff bought the cow at an auction sale of the defendant's stock, and it turned out that the cow was not in calf.

Argument

H. H. Shaver, for the defendant, argued that the statement that a heifer was "due to calve" at a certain time did not amount

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to a guarantee that it was "in calf;" and referred to *Craig* v. *Miller* (1872), 22 C.P. 348, which was a stronger case in favour of the plaintiff than the present case. It was expressly stated at the sale that the defendant guaranteed nothing. Reference to *Hopkins* v. *Tanqueray* (1854), 15 C.B. 130.

W. Laidlaw, K.C., for the plaintiff, argued that the expression "due to calve," taken in connection with the different descriptions in the catalogue and the conversation at the sale, constituted a representation that the heifer was "in calf," on which a purchaser was reasonably entitled to rely: *Gee* v. *Lucas* (1867), 16 L.T.N.S. 357.

Riddell, J.

September 30. RIDDELL, J.:—The facts, so far as they are material, are as follows. The defendant is a breeder of Holstein and other cattle; and he advertised a sale of some of his stock. In the catalogue furnished to intending purchasers, a certain young cow was described as "due to calve" on a day stated. The plaintiff had, a short time before, visited the defendant's stock, and had been told by the defendant that this cow was "due to calve" on the said day. It is said that the auctioneer, at the opening of the sale, stated openly that the vendor did not give any guarantee; the plaintiff does not admit that such a statement was made, and we do not consider the alleged statement as a ground for this judgment.

The plaintiff bought the cow, and it turned out that she was not in calf. He brought an action for damages for breach of warranty, alleging that the representation "due to calve" was a warranty that the cow was in calf.

The County Court Judge gave effect to this contention, and caused judgment to be entered for the plaintiff. The defendant now appeals.

I think the appeal must succeed.

I do not at all say that the words "due to calve" on a day named cannot import a warranty that the animal is in calf, if both parties understood it in that sense—or if the defendant knew that the plaintiff understood it in that sense—and the sale was made on that understanding. Nor could it be said that these words might not have such meaning in the business of dealing in such animals. But there is no evidence that either the defendant understood the words in that meaning, or knew that the plaintiff did, or that the expression has any technical meaning. We must then decide upon the words themselves.

I think all that the words imply is similar to what is found in the New English Dictionary, vol. III., p. 704, col. 2 (10), "reckoned upon as arriving," that is: "I expect the cow to calve on the day named; the male was admitted to her at a date which, in the ordinary course of nature, would, if she became pregnant, bring about parturition on that day named; I think she is pregnant, and reckon upon her having a calf upon that day."

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The cow had been covered by the bull at the proper time, it is admitted that the defendant honestly thought she was in calf; the plaintiff and defendant had the same opportunity of judging of her condition; no one but a veterinary surgeon or other expert, and probably not even such person, could have told with anything like certainty whether the cow was in calf or not. I do not think that there was any such warranty as is contended for. While in all such matters good faith must be kept, purchasers, if they desire a warranty of pregnancy upon which they can rely, must look for one in different terms from the present.

The appeal must be allowed with costs and the action dismissed with costs.

Middleton, J.

MIDDLETON, J.:—It has been said that the decisive test in determining whether an affirmation was intended as a warranty is, whether the seller assumes to assert a fact of which the buyer is ignorant, or merely states an opinion or judgment upon a matter of which the seller has no special knowledge, and on which the buyer may equally exercise his own judgment. Applying this to the statement in this case, it may well be a warranty that the cow was bred to a bull at such a time that in the ordinary course a calf might be expected at the date given; but, if it is attempted to carry the meaning beyond this, then the fact of pregnancy became a matter of opinion only, and there was no warranty.

Lennox, J.

LENNOX, J., concurred.

Appeal allowed.

WALLER v. CORPORATION OF SARNIA.

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Nov. 29.

Ontario High Court, Trial before Leitch, J. November 29, 1912.

1. MUNICIPAL CORPORATIONS (§ II G 2—222)—LIABILITY FOR ALLOWING INDEPENDENT CONTRACTOR TO PLACE DANGEROUS IMPLEMENT IN STREET —ATTRACTION TO CHILDREN.

Where a municipal corporation allowed an independent contractor, engaged in repairing a street, to negligently place a caldron of boiling pitch in a busy street without taking any precautions to protect the public, and where it might be an attraction to children, the municipal corporation is liable in damages for injuries sustained by a child who, while playing in the street, was splashed with the boiling pitch, by reason of the breaking of the wooden handle of a ladle used by an employee of the independent contractor in handling the pitch.

Statement

ACTION by William Waller and Reginald Waller for damages for injuries caused to the latter through the negligence of the defendants' servants.

Judgment was given for the plaintiffs.

R. V. Le Sueur, for the plaintiffs.

J. Cowan, K.C., for the defendants.

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Leitch, J.

LEITCH, J.:—On the 30th December, 1908, the corporation of Sarnia entered into a contract under seal with Frank Gutteridge for paving Front Street from the north limit of George Street to the south limit of Wellington with three-inch creosote wood-block pavement on a concrete foundation.

The work was to be done to the satisfaction and under the supervision of the town engineer.

The contractor, Gutteridge, covenanted with and guaranteed the corporation that the pavement would continue in perfect condition for five years from the date of completion. The contractor further agreed with the corporation that he would repair and make good all settlements, defects or damage to any portion of the pavement occasioned by defective material or workmanship during the said period of five years, upon notification by the Chairman of the Board of Works or by the Town Engineer. The contractor also agreed to give, and did give the town a guarantee surety's bond to the satisfaction of the solicitor for the corporation, guaranteeing the repair and condition of the work for five years.

On the 29th November, 1909, the corporation passed a by-law under the local improvement clauses of the Consolidated Municipal Act to raise $24,405 for the payment of the pavement.

The pavement in the winter of 1909, by reason of defective workmanship and material heaved and became out of repair to such an extent that the defective spots interfered with the street cars.

On the 11th March, 1910, the corporation notified Gutteridge of the defects in the pavement and the necessity for repair. The corporation also notified the United States Wood Preserving Company, who had furnished the blocks to Gutteridge, and who entered into a bond with the corporation of Sarnia, dated 20th February, 1909, guaranteeing the pavement for five years and that the blocks were made of good material and would be in as good condition at the end of five years as they were when the pavement was completed.

The United States Wood Preserving Company undertook the repairing of the pavement, and supplied the plant, labour and material necessary to do the work. A Mr. Sutton was their foreman.

The work of repairing was being done on Front Street near the corner of Lochiel Street. Asphalt pitch, which required to be heated anywhere from 212 to 300 degrees, was poured in the spaces between the blocks and over them. The pitch was heated in a large caldron which formed part of a furnace. The furnace was located on Lochiel Street about eight or ten feet from Front Street, and two or three feet from the sidewalk. The furnace was just such an object as would naturally attract the attention of a child and arouse his curiosity. Other children were attracted as well as the Waller boy.

The molten asphalt was essentially dangerous.

Byron Spark, the man who was handling the pitch, had had no experience in such work. No precaution was taken to prevent any one from going near the furnace and boiling pitch, or to protect children from accident.

The pitch was ladled out of the caldron and poured into pails with a ladle with a wooden handle which had been made out of a piece of pine board. When the ladle got partially filled with pitch, Sparks put it in the furnace to melt it out. This practice necessarily burned the handle of the ladle and weakened it.

The evidence is that the handle of the ladle should have been made of iron.

In pulling the ladle out of the fire the handle broke off, the ladle was dashed upon a heap of sand, and the boiling pitch was splashed on the child Reginald Waller, whose face was burned severely.

The accident took place on the 12th April, 1912. At that time the boy was under seven years of age.

Front Street near where the furnace was placed and where the pavement was being repaired is a very busy street.

I think the corporation was guilty of negligence in allowing the furnace to be placed on Lochiel Street so close to Front Street with its busy traffic. The corporation should have seen that there was a fence or some barrier to prevent children from going near the furnace and the hot pitch. They should have seen that the ladle with which the pitch was ladled into the pails had an iron handle, so that it could not be burned off or weakened by fire, and that the handling of such dangerous material as boiling pitch was done with a proper implement and by a skilled man.

I do not think that the corporation can absolve themselves from liability by the contention that the work was being done by an independent contractor. They permitted a dangerous implement to be placed in the street and permitted an essentially dangerous substance to be handled in the street without a proper ladle and without adopting any precaution to protect the public. Neither the city engineer nor the road commissioner nor any other official of the corporation paid any attention to the work, or did anything to guard the public.

The evidence is that the injury to the eye, mouth and nose of the boy, Reginald Waller, is permanent. The sight of the eye is not affected, but the lid will not close, so that the eye, when the boy is asleep, remains open. The nose is injured so that his breathing is affected. The doctor did good work in repairing the boy; by skin-grafting he managed to give the face a fairly good appearance, considering the extent of the burn.

There being no injury to his sight or hearing or to his hands, or feet, the boy will be capable of making himself a useful man, even if his looks have been marred.

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The father of the boy, William Waller, who sues on his own behalf and as next friend of his son, Reginald Waller, expended $128 for medical attendance and for medicine and hospital fees. In addition to this was the attention to the burns for a considerable time, while they were healing.

I think if the father, William Waller, recovers $200, and Reginald Waller $1,000, the justice of the case will be met.

I, therefore, direct that judgment be entered for William Waller for $200, and for Reginald Waller for $1,000, with costs of suit.

Judgment for plaintiffs.

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DEMERS v. HEBERT.

Quebec Court of Review, Tellier, DeLorimier, and Archibald, JJ.
June 5, 1912.

1. OFFICERS (§ I A—10)—ELIGIBILITY—PROPERTY QUALIFICATIONS—PETITION TO SET ASIDE—OFFICE OF MAYOR.

Where a candidate for the mayoralty of the city of Sherbrooke, at the time of his nomination and election, was the owner of an undivided one-half of an immovable, the total value of which was $10,000, and against which undivided one-half no hypothecation or claim existed of record, such undivided ownership is a sufficient property qualification for said office under the charter of said city as "real estate" of the value of $1,000 or more, over and above any mortgage.

[7 Edw. VII. ch. 66, sec. 10, referred to.]

2. ELECTIONS (§ IV—90)—OFFICE OF MAYOR—PROPERTY QUALIFICATIONS—CONTEST OF TITLE.

Where, at the time of his nomination and election as mayor of Sherbrooke, a candidate for said office had the property qualification required by the charter of said city, but a day or two subsequent to his election encumbered his property to such an extent as to bring it below the amount required as a qualification to take or hold said office, his right or title to said office cannot be attacked in a proceeding to set aside his election on a petition by one elector alleging lack of property qualification at the times mentioned.

[Art. 3 of the Cities and Towns Act, 3 Edw. VII. ch. 38, referred to.]

Statement

APPEAL by way of inscription in review from the judgment of the Superior Court, Globensky, J., delivered on April 19, 1912.

The appeal was dismissed.

L. C. Belanger, for petitioner.

Panneton and *LeBlanc*, for respondent.

The opinion of the Court was delivered by

Archibald, J.

ARCHIBALD, J.:—This is an appeal from a judgment of the Superior Court in the district of St. Francis, rejecting the petitioner's demand to have the respondent's election, as mayor of the city of Sherbrooke, set aside, and himself declared elected mayor.

The grounds of the petitioner's proceedings are that, at the

date of the nomination and of the election, and of the declaration of election, the respondent was not qualified under the terms of section 10, ch. 66 of 7 Edw. VII. being the charter of the city of Sherbrooke, which requires that no one should hold office of mayor of the city, who, at the date of nomination and election, was not possessed as owner, in his own name, of real estate in the city, of the value of $1,000, over and above any mortgage, which appears registered against his property at the registry office, such qualification to be judged of by the valuation roll in force at the date of the nomination, and the petitioner alleges that the respondent was not possessed of that qualification at that date, and he claims that the nomination and election of the respondent are therefore illegal and null.

Then, he proceeds to allege that at the election, D. O. E. Deneault, who had also been placed in nomination, was duly qualified to be elected mayor, and that he was in reality the only candidate put in nomination, and that he was in consequence really elected as mayor, and that he should be so declared, and the petitioner prays that the respondent should be declared to have been disqualified for nomination, and that his election should be declared illegal and set aside, and that Donat Oscar Deneault should be declared to have been elected mayor of the city of Sherbrooke, on the 1st of February last.

The petition does not, on its face, make any reference to the question as to what property the respondent had qualified himself for nomination, under art. 170 of the Cities and Towns Act, 3 Edw. VII. ch. 38, but in an affidavit attached to the petition and presented with it, the petitioner swore that on the 20th of January last, and the 1st of February last, the respondent only possessed, as proprietor, in his name, in the city of Sherbrooke, one immoveable which was entered on the valuation roll of the city for the sum of $3,800, and that there was then enregistered against that immoveable, the obligation due by him to the company called "The Sherbrooke Loan and Mortgage Company," for the sum of $3,000 with interest, as appears by the valuation roll of the city, then in force, and by the registration office of the division of Sherbrooke.

The respondent answers that, in addition to the property mentioned in the petitioner's affidavit, he possessed together with another, as proprietor in his own name, the undivided half of an immoveable property in the city of Sherbrooke, which he describes and upon which, no hypothec or other charge was enregistered, and that he was fully qualified in virtue of that property.

At the hearing of the case, the respondent declared that if he could not be qualified in virtue of the property of $10,000, of which he owned one half in his name, that he could not succeed in this contestation of the petition.

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The whole case then resolved itself into this: Under the clause requiring the ownership of property on the part of the candidate for the mayoralty of the city of Sherbrooke, in the sum of $1,000, can a property held in undivided ownership be taken into consideration? For my part, I have no doubt that it can. The Judge below decided in that sense. There must be some useful reason why a candidate for the mayoralty of the city should be obliged to be, and remain, qualified upon real estate. That could only be as a consequence of some supposition, that a man who had some status in the community and something to lose, would fill the office of mayor and secure the confidence of the public in a greater degree, than a man who did not possess that status. The ownership by indivision is by its nature temporary, and an undivided owner has always a right to obtain division of the property, so that he will enjoy the share that belongs to him alone. The creditor of the undivided owner can always secure payment upon the undivided property, so that in the present instance, there was no reason by which property owned *par indivis*, should be any less effectual for the purposes for which the qualification was required, than that held in his own name alone. In other matters, by the law of the city of Sherbrooke, it is provided that ownership *par indivis* is equally effectual to secure the qualification of electors, as if it were held by the elector alone. It seems to me only reasonable to apply the same principle to the qualification of the mayor. I have no doubt at all that the petition upon that point is wholly baseless, and no point is made in the petition as to what property had been offered as qualification in support of the respondent's nomination paper; nothing of course can be said in reference to that.

At the argument, the statement was made that within a day or two after the election, a mortgage for a sum exceeding the value of the property in question was enregistered against that property, but that manifestly cannot now be taken into consideration.

Article 109 of the Cities and Towns Act, which applies to the city of Sherbrooke, provides that any person, who, while acting as mayor of said city, becomes incapacitated while in office, loses his office, and his place becomes vacant; and art. 3 provides that, in case the mayor has ceded, or in any manner made over, the property upon which he is qualified, or has mortgaged or encumbered the same so as to affect the amount required for his qualification, it shall be lawful for any two duly qualified electors to present a petition to the council, requiring the said mayor to produce his title as proprietor of such other immoveable property, as he may qualify upon, together with the sworn declaration establishing the value of said

property, and in default of his so doing, within a delay of thirty days, his seat *ipso facto* becomes vacant. With regard to this, it is only necessary to say that the petitioner has not made any claim, in his petition, under which he could have the right to bring in proof of the subsequent mortgage of the property upon which the respondent is qualified, and it would seem that, in any event, it would have required two electors to present such a petition and that it ought to be presented to the council, and that it would result, not in the immediate disqualification, but in the necessity of the mayor producing another qualification within thirty days.

I am, therefore, of opinion that the judgment below is perfectly sound and ought to be confirmed.

Appeal dismissed.

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CITY OF GUELPH v. JULES MOTOR CO. et al.

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Ontario High Court, Boyd C. November 28, 1912.

1. PRINCIPAL AND SURETY (§ I B—10)—SURETYSHIP—LIABILITY OF SURETY—EFFECT OF SEVERAL PROCESSES ON SEVERABLE COVENANTS—MUNICIPALITY—MANUFACTORY—SURETY COMPANY.

Where a municipality under a special contract conditionally agrees to sell and convey certain lands to a manufacturing company; and where among other conditions of the grant the company stipulated to maintain in the manufacturing establishment so purchased from the city a plant up to a certain standard in capacity and value; and where this stipulation was guaranteed by the bond of a surety company and the manufacturing company; the fact, that, pending action on such bond for its breach, the municipality proceeds, on the default of certain other covenants of the grantee, to resume possession of the lands in question, does not necessarily affect the liability of the obligors on the bond, where the breaches of the different covenants give rise under the express terms of the contract to different and appropriate remedies; such covenants being severable, and the one independent of the other.

2. PLEADING (§ I N—110)—AMENDMENTS—DISALLOWING—INCONSISTENCY AND TECHNICALITY CONSIDERED IN DENYING APPLICATION.

In an action, upon a bond, by a municipal corporation against a manufacturing company and its surety, where the defendant company seeks to amend its pleadings to dispute its execution of the bond, proper tests are (*a*) whether the fact is admitted by the record, (*b*) whether the defect in execution is at best of a most technical character; and, governed by such tests, the application, in a proper case, will be denied.

3. PRINCIPAL AND SURETY (§ I B—11)—SURETYSHIP—LIABILITY OF SURETY—RELEASE BY CHANGE OF CONTRACT, WHEN.

In an action upon a bond, where the surety resists upon the plea that the contract guaranteed by the bond had been varied to the prejudice of the surety by a subsequent agreement between the principal and the obligee, the court will consider whether the alleged variance was a matter contemplated and provided for in the guaranteed contract itself, and well known to the surety from the outset.

Statement

ACTION by the city of Guelph against the United States Fidelity Co., as guarantors on a bond for $4,000 for security

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for the payment by the Jules Motor Co. to the city of $13,000 under an agreement.

Judgment for plaintiffs.

H. Guthrie, K.C., for the plaintiffs.

R. L. McKinnon, for the defendants.

BOYD, C.:—The written agreement contains promises by the Jules Motor Co. to do a number of things, and the breach of the contract as to any of them gives rise to an appropriate action for relief. Then the company failed to make payment of the first instalment of purchase money, and the City of Guelph could sue to recover that, and not insist on a revocation of the whole under the special power conferred by the agreement. The company also failed to keep up and maintain in the manufacturing establishment purchased from the City an adequate quantity and value of plant as provided for by the contract. This term was secured and guaranteed by the bond of the Fidelity company: and it is open to the City to sue for the breach of this contract, independently of the other. The mere fact that the City determined to put an end to the purchase under sec. 14 of the agreement and regain possession of the premises, and gave notice to this effect after the action was begun, does not interfere with the right to recover damages for breach of the bond, or disqualify the City from seeking that method of relief from the Court in addition to the other method of relief as to the property provided for in the mutual written agreement. The one does in no way conflict with the other: the termination of the contract as to the land does not discharge the vested right of action for damages on the bond against the principal and the surety. These two terms of the contract are severable, and the principal debtor has not attempted to defend but lets the claim go by default.

The 14th paragraph of the contract provides that the effect of giving notice to terminate the grant in 30 days declares that thereupon all rights and interests thereby created or then existing in favour of the company shall cease and terminate: but it does not follow that all rights and interests in favour of the City of Guelph, e.g. as to damages for breach, shall also end.

The other defences raised I practically disposed of at the hearing. The application to amend by setting up that the bond was not executed by the Jules Motor Co. should not be entertained, in view of the admission on the record that it was so executed, and when the defect at best is of a most technical character. The other question raised was that the contract between the principal and the City had been varied to the prejudice of the surety. This alleged variance was a matter contemplated and provided for in the original agreement of which

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the benefit is claimed by the Fidelity Company and of which that company was cognisant. The property had been mortgaged to the City and had come to its hands by reason of the liquidation of another manufacturing company; all the plant attached to the free-hold passed under the mortgage, but there was a claim as to "disputed machinery" about some articles, alleged to be chattels not important in value but enough to wrangle about. There was mention in the writings about having the claims between the city and the liquidator "adjudged," but with good sense the parties adjusted the matter out of Court at an outlay of $250 paid by the city to the liquidator. The property was sold by the City to the Jules Motor Co. subject to this claim for "disputed machinery" which was then outstanding. The word "adjudged" used by the parties in the agreement and bond is loosely used as contemplating some friendly determination, for in one of the last paragraphs of the agreement it is said that the "disputed machinery" shall be kept in store for the liquidator until such time as "the dispute regarding the same has been settled or disposed of."

The settlement was that the liquidator was owner of the articles and they were bought by the City for $250 and turned over to the Jules Motor Company at the same price. This was no variation of the original agreement: in the adjudication the claim was settled and the transaction is thus set out in the agreement of 23rd November, which is set up as a variation.

The extent of damages recoverable on the breach of the bond was fixed at the trial at $1,370. This is to be paid with costs of action by both defendants, and the Fidelity Company will have the right to recover as much as it can from the Jules Motor Co., which has since gone into liquidation.

Judgment for plaintiffs.

MUNICIPALITY OF SAANICH v. FRENCH.

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British Columbia Supreme Court. Trial before Gregory, J. November 21, 1912.

1. MUNICIPAL CORPORATIONS (§ I A—7)—INCORPORATION — TERRITORY — STATUTORY LIMITATION, HOW CONSTRUED.

The prohibition contained in sec. 3, sub-sec. (*d*) of the Municipalities Incorporation Act, ch. 143, R.S.B.C. 1897, against a district municipality including, at its incorporation, land sub-divided into town lots, etc., is not absolute, but such lands may be included if all the conditions and provisions of sec. 3, except sub-sec. (*c*) of that Act have first been complied with.

2. MUNICIPAL CORPORATIONS (§ I A—7)—INCORPORATION — TERRITORY — PRESUMPTIONS AS TO COMPLIANCE WITH STATUTORY REQUIREMENTS.

In a proceeding collaterally attacking the validity of the incorporation of a district municipality, on the ground that it included within

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its area at the time of incorporation land sub-divided into town lots, in violation of sec. 3, sub-sec. (*d*) of the Municipalities Incorporation Act, ch. 143, R.S.B.C. 1897, it will be assumed in the absence of evidence to the contrary that all the conditions and provisions of sec. 3, except sub-sec. (*c*), making such inclusion valid, have been complied with and that therefore the land in question, whether town lots or not, are properly included in the municipality.

3. MUNICIPAL CORPORATIONS (§ II C—50)—POWERS—BY-LAWS — EXERCISE OF POWER IN CONFLICT WITH EXISTING BY-LAW.

A municipality cannot issue a license for the exhibition of wild animals within the municipality where there is an existing by-law of the municipality prohibiting the keeping of wild animals within its boundaries.

4. MUNICIPAL CORPORATIONS (§ II C 1—50)—POLICE POWER — IMPOSING LICENSE FEE FOR WILD ANIMAL SHOW—AUTHORITY.

Before a municipality can establish a claim that a license fee is payable to it, it must shew that it had intended to make such claim either by the production of the collector's roll, or by evidence of a demand upon the defendant for the amount or a notice to him that it would be exacted.

[*City of Victoria* v. *Relyea*, 13 B.C.R. 5, referred to.]

5. EVIDENCE (§ II A—95)—PRESUMPTIONS — REBUTTAL—PRIMA FACIE EVIDENCE BY STATUTE.—LICENSE FEES TO MUNICIPALITY.

Though under the statute, sec. 303 of the Municipal Act, ch. 170, R.S.B.C. 1911, providing that licenses, taxes, rates or rents payable to a municipality shall be a debt due to the municipality recoverable by action, a certified copy of the collector's roll is made *primâ facie* evidence of the debt, such evidence may be rebutted.

Statement

THIS is an action of debt brought under the provisions of sec. 303 of the Municipalities Act to recover a daily license fee of twenty dollars from the 18th day of March until the 4th day of July, 1911, for exhibiting wild animals within the municipality, etc. The license fee is claimed under sec. 12 of the license and road tax by-law passed the 24th day of July, 1909, under the authority of sec. 175, sub-sec. 27 of the Municipal Clauses Act, 1906.

The action was dismissed.

J. A. Aikman, for plaintiff.

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

Gregory, J.

GREGORY, J.:—The plaintiff was incorporated under the Municipalities Incorporation Act, ch. 143, R.S. 1897. Defendant says the incorporation is invalid if a city or town municipality, because it contains an area of more than 2,000 acres: see sec. 3, sub-sec. (*b*) of the Act; or if a district municipality, and I think it is (as is shewn by the recital in the letters patent, under the great seal of the province), because it included within its area at the time of incorporation land subdivided into town lots, etc.: see sec. 3, sub-sec. (*d*) of the Act. But the prohibition against including such lands is not absolute; in fact, they may be included if "all the conditions and provisions of sec. 3 except sub-sec. (*c*) have first been complied with. In the absence of evidence to the contrary I must assume that such

conditions and provisions have been complied with and that therefore the said lands, whether town lots or not, are properly included in the municipality. I express no opinion as to whether the by-law upon which the action is founded is or is not reasonable, but it is worthy of note, although the statute distinctly authorizes such a by-law generally, that statute is intended for the regulation of all kinds of municipalities, from city municipalities of many thousands of inhabitants to rural municipalities of very small population, and the plaintiff municipality which is rural and of comparatively small population, has imposed the highest possible license fee that a city municipality of 150,000 or more population could impose. It seems to me that a person attempting to exhibit wild animals in the plaintiff municipality under the provisions of this by-law would be lacking in common sense and the defendant's evidence is that his total receipts were not sufficient to even pay the license fee, to say nothing of cost of help, food or profit. If I am allowed to consider what is common knowledge to everyone living in this community, I would have no difficulty in finding that the plaintiff is not acting *bonâ fide* in this matter and that it is in reality endeavouring to prevent the defendant from keeping wild animals within the municipality.

I do not think the plaintiff can succeed because he has not proved his case. Sec. 303 of the Municipal Act, ch. 170, R.S. 1911, provides as follows:—

> Notwithstanding anything contained in this Act, the license, taxes, rates or rents payable by any person to any municipality shall be a debt due to the municipality recoverable by action, with interest and costs, in which case the production of a copy of so much of the collector's roll as relates to the license, taxes, rates or rents payable by such person, purporting to be certified as a true copy by the clerk of the municipal council, shall be *primâ facie* evidence of the debt, and any judgment obtained under this section and registered shall have the same priority over all other charges as ordinary taxes.

It is only the license, etc., which is payable by any person that can be recovered in an action of debt and the section provides that the production of the collector's roll shall be *primâ facie* evidence of the debt.

On the 18th day of March, 1911, the date from which the plaintiff claims the license fee as a debt due it, it reconsidered and finally passed a by-law prohibiting the keeping of wild animals within its boundaries and with such a by-law in force it could not therefore issue a license to the defendant, and it must be assumed that it never intended to. If it could not and never intended to, how can it be said that any license fee was payable? Surely it is competent to the municipal council to say that it will not in certain circumstances exact certain fees or certain penalties (it is done every day), and having done that and induced

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persons to act on that belief, it cannot afterwards turn around and say they will be exacted and enforced, which is what the plaintiff is trying to do in this case. This was the position of affairs up to the 18th May, when the objectionable sections of the by-law regulating the keeping of wild animals were quashed by the Supreme Court, and there was thereafter no difficulty about issuing a license to the defendant, but before the plaintiff can claim in such circumstances that a license fee was payable by the defendant, it seems to me that it must shew that it was intended to make such claim either by the production of the collector's roll, which, under the statute is only *primâ facie* evidence and might be rebutted, or by evidence of a demand upon the defendant for the amount or a notice to him that it would be exacted. No such evidence has been offered here, and the defendant's admission does not go that far. The report of *City of Victoria* v. *Belyea*, 13 B.C.R. 5, does not shew whether such evidence was offered or not, but I remember the case very well and have a personal knowledge that the claim and demand of the city was repeatedly made upon Mr. Belyea, and I presume it was so proved.

The action will be dismissed with costs.

Action dismissed.

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WARREN, GZOWSKI and CO. v. FORST and CO.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Idington, Duff, and Brodeur, JJ. May 7, 1912.

1. EVIDENCE (§ X J—740)—TELEPHONE CONVERSATIONS—ADMISSIBILITY—WEIGHT.

Where an alleged telephone conversation is set up and the defendant tenders the evidence of his stenographer who heard the defendant's end of the talk, the stenographer's evidence is admissible, such elements in the problem as (*a*) the fragmentary nature of the testimony; (*b*) the possibility of a dishonest party talking into a telephone in the hearing of his witness without having any connection with the person to whom he was purporting to talk and giving answers to questions that were never asked, merely go to the weight, not to the admissibility, of such evidence.

[*Warren* v. *Forst*, 24 O.L.R. 282, affirmed on appeal.]

Statement

APPEAL from a decision of the Court of Appeal for Ontario, *Warren, Gzowski & Co.* v. *Forst & Co.*, 24 O.L.R. 282, affirming the judgment of a Divisional Court, *Warren, Gzowski & Co.* v. *Forst & Co.*, 22 O.L.R. 441, by which a verdict for the plaintiff was set aside and a new trial ordered.

The action in this case arose out of a stock transaction which was initiated by a telephone conversation between the plaintiff Gzowski and a member of defendants' firm. There was a dispute as to the date and terms of this conversation and, at the

trial, the defendants tendered the evidence of their stenographer, who was in their office where the telephone was when it took place. The trial Judge refused this evidence on the ground that the stenographer could not know who the other party to the conversation was. The verdict for the plaintiff was set aside and a new trial ordered on account of the rejection of this evidence.

Nesbitt, K.C., and *Arnoldi*, K.C., for the appellants.

Macdonnell, K.C., for the respondents.

THE COURT, after hearing counsel for both parties, reserved judgment, and on a subsequent day dismissed the appeal with costs.

Judgment

Appeal dismissed with costs.

CITY OF TORONTO v. FOSS.

(Decision No. 2.)

Ontario Divisional Court, Falconbridge, C.J.K.B., Britton, and Riddell, JJ. October 21, 1912.

1. BUILDINGS (§ I A—9c)—MUNICIPAL REGULATION — ROOM IN DWELLING USED FOR LADIES TAILORING—"MANUFACTORY."

The use of a room in a dwelling-house as a sewing-room for three or four persons who make up clothes for customers who furnish the material, does not constitute the premises a "manufactory" within the meaning of by-law No. 4469 of the corporation of the city of Toronto, prohibiting the location, erection or use of manufactories upon certain property.

[*City of Toronto* v. *Foss*, 5 D.L.R. 447, reversed.]

2. BUILDINGS (§ I A—9c)—MUNICIPAL REGULATIONS—ROOM IN DWELLING-HOUSE USED FOR LADIES TAILORING—SALE OF CLOTH—STORE.

A family residence used by a tailor who makes clothes on the premises from material supplied to him by his customers, but who does not sell any cloth from the roll or cut it into lengths, and which premises are not fitted up with counters or shelving and has no sign on the outside to indicate the nature of the place, is not a "store" within the meaning of by-law No. 4469 of the corporation of the city of Toronto, prohibiting the location, erection or use of manufactories upon certain property.

[*City of Toronto* v. *Foss*, 5 D.L.R. 447, reversed.]

Statement

APPEAL by the defendant from the judgment of Middleton, J., *City of Toronto* v. *Foss*, 5 D.L.R. 447.

The appeal was allowed, RIDDELL, J., dissenting.

Argument

W. C. Chisholm, K.C., for the defendant. The question for decision is as to the construction of a by-law of the City of Toronto, which enacts that no building shall hereafter be erected or used as a store or manufactory within an area including the property in question. The learned Judge held that the use made of the property by the defendant does not constitute it a "manufactory," but that it is a "store" within the meaning

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of the by-law. It is submitted that the latter conclusion is not justified by the evidence. The defendant occupies the premises as a residence, but carries on, during a few months of the year, what may be called a ladies' tailoring business, in a manner similar to that in which an artist or photographer pursues his vocation. The word "store" is here equivalent to what is called in English usage a "shop," and does not come within what is defined in American cases as a "store:" *The State of Canney* (1848), 19 N.H. 135; Words and Phrases Judicially Defined, vol. 7, p. 6672 *et seq.* If this defendant is restrained from carrying on business in this way, every dressmaker in Toronto will be under the same liability. The plaintiffs have not enforced the by-law in similar cases heretofore.

C. M. Colquhoun, for the plaintiffs, stated that his clients were not aware of prior breaches of the by-law, if any such existed; and, as to the position of a photographer's shop, referred to *Wilkinson* v. *Rogers* (1864), 2 De G. J. & S. 62. The defendant exhibits the cloth which he sells, has it ticketed, and makes a profit on it. The defendant carries on both a store and a manufactory within the meaning of the by-law; and, as to the former contention, the plaintiffs rely upon the reasoning and judgment of the learned Judge below.

Chisholm, in reply.

Falconbridge, C.J.

FALCONBRIDGE, C.J.:—It was agreed by counsel that the word "stores" in by-law 4469 was used in its American sense, as equivalent to "shops."

My brother Britton in his judgment sets out the facts more fully than they are stated in the judgment appealed from. The question is, whether the defendant is using the house on Avenue road as a "store or manufactory" within the meaning of the by-law.

I agree with the learned Judge appealed from that the use of the room in a dwelling-house as a sewing-room for three or four persons does not constitute the premises a manufactory.

Nor do such use and the business practice of the defendant, in my opinion, make the place a "store," *i.e.*, a shop for the sale of goods by wholesale or retail. No goods are sold by the defendant until after he has made them up for customers, and he also makes up goods brought in by customers. Gilchrist, C.J., in *The State* v. *Canney*, 19 N.H. 135, at p. 137, says: "Thus we do not call the place where any mechanic art is carried on a *store*, but we give it the name of *shop*, as a tailor's shop, a blacksmith's shop, a shoemaker's shop." If we accept this definition of an American word by an American Judge, it will be observed that the only "shop" prohibited by the by-law is a butcher's shop.

I do not think that the intermittent use of this house, as described, constitutes it a *store*.

In my opinion, the appeal should be allowed with costs and the action dismissed with costs.

BRITTON, J.:—The action is for an injunction to restrain the defendant from using the building and premises No. 78 Avenue road as a store or manufactory, in breach of by-law No. 4469 of the Corporation of the City of Toronto.

The motion for an injunction was, by consent, turned into a motion for judgment, and the learned Judge held, upon the evidence, that the use of the building did not constitute it a manufactory, within the meaning of the statute, but that the use of the building did constitute it a "store."

The defendant appeals.

The by-law was passed on the 4th January, 1905, and it enacts that "no building shall hereafter be located, erected, or used for laundries, butcher shops, stores, or manufactories upon property. . . . Nor shall any person locate, erect, or use for laundries, butcher shops, stores, or manufactories any such building . . ."

There is no question about the prohibited area. The sole question is, Is the use the defendant makes of this building such as to constitute the building a store, within the meaning of the by-law or of the statute authorising the by-law?

With great respect, I am unable to agree with the learned trial Judge. I think he was absolutely right, and for the reasons stated, in his conclusion that the use of the building did not constitute it a manufactory. He says: "I do not think that this use of the building constitutes it a manufactory, within the meaning of the statute. It is true that the word 'manufactory' or 'factory' has a dictionary meaning wide enough to cover the case; but I think that the word, as used by the Legislature, contemplates operations on a larger scale than this, and that the use of a room in a dwelling-house by three or four persons as a sewing-room falls short of what is required.

I am, however, of opinion that what is done does constitute the premises a 'store.'"

To apply the reasoning of the learned Judge in reference to factory, to the word "store," it seems to me that the word "store," as used by the Legislature, contemplates operations on a larger scale than merely purchasing a comparatively small quantity of material for ladies' dresses in skirt lengths and making these up by measure and to order, charging for the finished article.

The defendant is what is called a ladies' tailor. He keeps no general assortment of goods or commodities. His premises are not fitted up with counters or shelving. When he purchases

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material to be made into dresses, he places this upon the piano or a chair or chairs. He now has no sign. He did have a sign, but, finding out, by proceedings against him in the Police Court, that the sign was objectionable, he removed it before the commencement of this action. The sign, as it was, was not that of a "store."

The place is not a factory. It has been held, and quite rightly, that he may have three or four persons in a sewing-room doing work.

This defendant has only two at most—a man and woman—helpers to make up work.

The facts must be as stated by the defendant himself. The plaintiffs rely upon these. He says that it is a small business—he does not advertise—but, all the same, does a fairly large business for those who wear "a lot of clothes," as he says, and of excellent quality, no doubt; but his principal business in making these clothes is only for three months in spring and three months in autumn, and he gets only about a living for himself and family. This house is his family residence. Fifty per cent. of all his work is when ladies bring in their own material. Ladies bring goods bought in Europe to the defendant to be made up. Of the other fifty per cent. of work, a part is where ladies choose a dress at a store in the city, and the defendant is authorised to purchase the cloth and make it up. The defendant gets a discount on such a purchase, and that he claims as part of his profit. He buys it for the customer; he makes it up for the customer, charging for the work, and charging for the material what the customer would be obliged to pay for it at the store in the city. He shews what he has in suit lengths, and if a customer is not satisfied to have a dress made up, upon a description from the customer he endeavours to find in some store what will be satisfactory. He does this for the sake of the profit to him in the manufacture, and in the discount, if he gets a discount. He does not sell any cloth from the roll, or cut into lengths. No doubt, there is in a sense a sale of the cloth, when he sells the made up article, but there is the broad distinction that this man makes his living by his skill and taste and labour in making dresses for society ladies, who require first-class work.

I do not think the residence of this defendant any more a store than it is a factory—it is no more a store than is the house of a lady who makes marmalade and puts it in jars for those who order and pay for it. There are ladies who make and sell cake to their friends; others who make underwear and sell it to well-to-do friends; others who make and sell to professional gentlemen bands and ties. Industrious persons who require money to aid in support of the family have a sewing-room or other room where their labour is put upon raw material, and profit derived therefrom.

It is a wrong use of words to say that such houses are either factories or stores. A store is well-understood by every person to be a place "where merchandise is kept for sale," as a grocery store, a dry goods store, a hardware store, etc.

The defendant's place may be called a dress-making establishment—it is that, in a small and select way—but it is not a store, as the word is generally used, and not so within the meaning of the statute or by-law. The word "shop" may sometimes mean a "store," and is used in that way, whether with or without a prefix; but the word "store" can never be properly used in reference to places that are in reality and are called shops. That is recognized in the Act, when butcher shops are specified. Any enlarged meaning of the word "shop" cannot be invoked in this case, to make the defendant's place a store, when not a store according to the well-understood meaning of the word "store" as ordinarily used.

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

RIDDELL, J.:—I am of opinion that my learned brother Middleton is right, and I have nothing to add to his judgment. The appeal should, in my judgment, be dismissed with costs.

Appeal allowed; RIDDELL, J., *dissenting.*

NASSAR v. EQUITY FIRE INSURANCE CO.

(Decision No. 2.)

Ontario High Court, Riddell, J. November 14, 1912.

1. APPEAL (§ VII L 4—510)—FINDINGS BY REFEREE—MASTER IN ORDINARY—WEIGHT OF REFEREE'S FINDINGS RELATIVELY—TESTS—COMPARED WITH SCOPE OF TRIAL JUDGE.

Upon a reference to the Master in Ordinary from the trial court as to the quantum of damages in a claim for a fire loss, the findings of the Master (within the scope of such reference) are in certain respects on the same footing as the findings of the trial judge himself; and while upon appeal from such findings the appellate court does not and cannot abdicate its right and its duty to consider the evidence; yet where the Court of Appeal is asked to set aside the Master's findings it will give special weight to the following tests of their probable correctness: (a) careful statement of reasons by the Master, (b) his personal inspection of the property involved, (c) his opportunity of seeing the witnesses on the stand.

[*Nassar* v. *Equity Fire Insurance Co.*, 1 D.L.R. 222; *Beal* v. *Michigan Central R. Co.* (1909), 19 O.L.R. 502; *Booth* v. *Ratté* (1892), 21 Can. S.C.R. 637, 643; *Re Sanderson and Saville* (1912), 6 D.L.R. 319, 26 O.L.R. 616, 623, referred to.]

2. WITNESSES (§ IV—60)—MASTER'S FINDINGS—CONCLUSIVENESS OF FINDING AS TO CREDIBILITY BY TRIAL TRIBUNAL.

Upon a reference to the Master in Ordinary, the Ontario practice, which tends to give him final discretion as to the credibility of the

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witnesses appearing before him on the reference, is tempered by the circumstances, including such tests as whether there be some unmistakable document or something of the kind which shews the contrary or which the Master has failed to take into consideration; and in the absence of any such circumstances the rule of practice will be given effect.

[*Nassar* v. *Equity Fire Insurance Co.*, 1 D.L.R. 222; *Re Sanderson and Saville* (1912), 6 D.L.R. 319, referred to.]

3. APPEAL (§ VII L 4—510)—FINDINGS BY REFEREE—MASTER IN ORDINARY—QUESTION OF CONFLICT WITH FINDINGS OF TRIAL JUDGE.

Where in a claim for a fire loss the plaintiff sets up a $3,000 valuation and the defendant pays into court as sufficient to pay the plaintiff's entire claim $1,250, and where the trial judge determines in the plaintiff's favour the question of fraud in the plaintiff's proofs of loss, but refers the quantum of damages to a Master, and where the Master assesses the loss at only $400, upon an application by the plaintiff to set aside the findings of the Master upon the ground that he thereby, in effect at least, reversed the findings of the trial judge and thereby in substance though not in form found fraud in the proofs of loss, the objection basing such an application cannot be given effect, the decision of the trial judge merely having negatived at the time of the trial a fraudulent over-valuation, not an actual over-valuation, and not limiting the right to weigh the evidence to be thereafter given on the reference.

[*Nassar* v. *Equity Fire Insurance Co.*, 1 D.L.R. 222, referred to.]

4. COSTS (§ I—19)—RIGHT TO RECOVER—APPORTIONMENT BY COURT—SUCCESS DIVIDED.

Where the success is divided in an action by the plaintiff against an insurance company setting up a claim for a fire loss, the court will apportion the costs, each case being governed by its circumstances, under judicial discretion.

[*Nassar* v. *Equity Fire Insurance Co.*, 1 D.L.R. 222, referred to.]

Statement

APPEAL from the report of the Master in Ordinary of June 25th, 1912, by the plaintiff and motion for judgment on the report by the defendants.

The appeal was dismissed.

G. W. Mason, and *F. C. Carter*, for the plaintiff.

W. E. Raney, K.C., and *E. F. Raney*, for the defendants.

Riddell, J.

RIDDELL, J.:—This case is an action against a fire insurance company for a fire loss at the plaintiff's billiard-room in Toronto. The case came on for trial before Mulock, C.J.Ex.D., in November, 1911: the trial Judge passed simply upon the issue as to the fraud in the proofs of loss, and directed the amount of the loss to be determined by the Master in Ordinary.

An appeal from this judgment was (with a trifling variation as to costs) dismissed by the Divisional Court (1912), *Nassar* v. *Equity Fire* (No. 1), 1 D.L.R. 222, 20 O.W.R. 898, 3 O.W.N. 551.

The claim was for $3,000: the defendants, while disputing that the plaintiff's loss was so much, paid the sum of $1,250 into Court as sufficient to pay the plaintiff's claim. The Master has found the actual loss $400, which with interest $14.46 from

October, 1911, to the date of the report, 25th June, 1912, makes $414.46 due upon the last mentioned day.

The plaintiff now appeals and the defendants' move for judgment on the report.

The case was presented on both sides most earnestly, exhaustively and ably. I have also the advantage of elaborate and carefully prepared reasons of the Master in Ordinary for his judgment: while the Master had himself the advantage of a careful personal inspection of the premises and a detailed examination of the goods in the presence and by the consent of counsel for both parties: (it is said that this was at the instance of the plaintiff; but that I do not consider of any consequence). The Master had also the inestimable advantage of seeing the witnesses, which of course I have not: and I must approach the appeal bearing that handicap in mind—and must remember that according to the well-established practice in Ontario, the Master is the final judge of the credibility of the witnesses he has seen, unless indeed there be some unmistakable document, or something of the kind, which shews the contrary, or which the Master has failed to take into consideration. The findings of a Master are on the same footing as the findings of a trial Judge, for which *Beal* v. *Michigan Central R.R. Co.* (1909), 19 O.L.R. 502, may be looked at; *Booth* v. *Ratté* (1892), 21 Can. S.C.R. 637, at 643, and like cases, *e.g.*, *Re Sanderson and Saville* (1912), 6 D.L.R. 319, 26 O.L.R. 616, at 623, and cases there cited. I note the complaint of the plaintiff that the Master has, in effect at least, reversed the findings at the trial, and has in substance found fraud in the proofs of loss. Of course he has not done so in form—no such issue was open before him—and I do not think that a finding of fact as to value, upon which an argument could be based tending to shew that the real value of the goods had been misrepresented in the proofs of loss, can at all be said to be a reversal of the decision at the trial. The decision was that there was no fraudulent over-valuation at the time in the proofs of loss—not that there was no over-valuation, or that the plaintiff or any of his witnesses would not at some future time lie about the value.

I have read all the material, most of it more than once, and with care, and I am unable to find that the Master has made a mistake.

The appeal will be dismissed with costs.

As to the motion for judgment, the costs have been reserved till now except the costs up to trial occasioned by charges of fraud, which the defendants have been by the Divisional Court ordered to pay. Leaving aside these costs, the case stands: Claim for $3,000: payment into Court of $1,250: judgment for $400 and interest: there is no plea of tender, so as to entitle the

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defendants to all their costs as in some cases: and it seems to me that the costs are in the discretion of the Court.

I think the proper order to make is that the plaintiff shall have his costs up to the delivery of the statement of defence, and the defendants their costs thereafter, including the reference, the appeal therefrom, and motion for judgment, with a set off of such costs against the amount of damages and costs awarded to the plaintiff. The plaintiff to be declared to be entitled to receive from the defendants the sum of $414.46 and interest thereon at the Court rate from June 25th, 1912, as damages—and the amount paid into Court to be paid out to the parties as their interest appears on the above basis. If the amount of costs payable to the defendants exceed the amount of damages and costs payable to the plaintiff, the defendants will have judgment against him for the balance. The report of the Master is confirmed.

Appeal dismissed.

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Dec. 12.

BECK v. DUNCAN et al.

Saskatchewan Supreme Court. Trial before Haultain, C.J. December 12, 1912.

1. SPECIFIC PERFORMANCE (§ I B—15)—VERBAL CONTRACT—PART PERFORMANCE—STATUTE OF FRAUDS.

Where plaintiff made a verbal arrangement for the purchase of land for $4,000, as follows: assuming a mortgage thereupon, paying $1,000 "as soon as I could," and two payments of $750 each in one and two years respectively, and no time was fixed, nor rate of interest agreed upon, the contract is too indefinite upon which to decree specific performance upon acts of part performance referable thereto, which, had they referred to a definite contract, might have taken it out of the operation of the Statute of Frauds.

2. HUSBAND AND WIFE (§ I B—40)—AGENCY OF HUSBAND—POWER TO SELL LAND—RESTRICTION OF.

Where, in a verbal agreement for the purchase of land between plaintiff and the husband of the owner, loose and general language of the owner is relied upon by plaintiff to shew the agency of the husband and his power to make and enter into a contract for his wife, these general terms must be restricted by the positive and definite statement of the wife that she never gave her husband power to sell, but only to lease: and under such facts the husband is not the agent of the wife to sell.

Statement

ACTION for specific performance of a verbal contract, on the ground that there have been acts of part performance sufficient to take it out of the Statute of Frauds.

The action was dismissed without costs and amendments allowed, so that judgment may be given against Mrs. Duncan for the repayment of the money paid by the plaintiff, together with interest and taxes.

C. D. Livingstone, and *F. C. Wilson*, for the plaintiff.
W. R. Parsons, and *J. K. Sparling*, for defendant.

HAULTAIN, C.J. (oral):—This is one of the unfortunate cases in which it would have been better for all parties if they had not come into Court at all. It is the old story of a very long standing friendship endangered by a lamentable lack of ordinary business methods. The unfortunate part of the whole case is, that on the finding which I am forced to make on the evidence it is not only a case of lack of business methods or of, possibly, legitimate differences of opinion with regard to the more or less complicated details of an arrangement five or six years old, but it comes down to point blank contradiction of facts, which, I am sorry to say, cannot be attributed to anything else than that some one is not only mistaken, but is making statements that I do not think the rest of the story warrants.

The action is for specific performance of a verbal contract. With regard to the question of agency, I will say nothing at present. The claim for specific performance rests, as it must rest, absolutely on the further claim that there have been acts of part performance which would be sufficient to bring it out of the statute. The acts of part performance must, in the first place, be referable to the contract, and, in the second place, they must be done with the knowledge and the consent or the concurrence of the parties sought to be charged. I will examine briefly what the contract is to which these acts of part performance are made referable.

The statement of claim as amended states the contract to be for the sum of $4,000, that amount to be paid by the assumption of a mortgage for $1,500, a cash payment of $1,000, and two deferred payments of $750 each. Mr. Beck's evidence with regard to the verbal contract was, that the amount of the purchase price was to be $4,000; that the mortgage was to be assumed; that a first payment of $1,000 was to be made—in the language of his evidence—"as soon as I could"; and that the two following payments of $750 each were to be made respectively one year and two years from that date. I come to the conclusion with a great deal of regret and very reluctantly, but in my opinion there is not a contract, there is no definite contract to which I can refer the acts of part performance. There is no rate of interest fixed. Mr. Beck himself says that he does not know whether it was seven per cent. or seven and a half per cent. There is no time fixed. These acts of part performance might have taken place, in fact some of them did take place, before the first payment of $1,000 was made; and the payment of $1,000 might have been postponed indefinitely because the date for payment was no more definite than that the money was to be paid, as Mr. Beck said, "when I could." Consequently the other payment would have been subject to a similar indefinite postponement, and it is impossible for me to say, even if I came to the conclusion

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that other things made it desirable that I should enforce this contract, what the contract is I should enforce.

But I find against the contract on the other ground, that in my opinion the evidence does not establish agency. I come to this opinion reluctantly, too, and a little later on I will mention the reasons for my reluctance with regard to both these subjects. Counsel for the plaintiff has called attention to Mrs. Duncan's evidence, in which she deals in large and broad language with the power and authority she gave to her husband, and the reliance which she placed upon him, but throughout her evidence these general terms must be restricted by her definite statement that the authority she gave to her husband was to lease and not to sell. Her evidence is point blank. She says distinctly:—

> I never intended to sell; I did not give any authority to sell; when I was asked to sell I said I did not want to sell, and my only authority was to lease.

Reluctantly I have to read these broad expressions in the light of the restriction which has been proved and cannot be contradicted. There is no evidence to contradict it, so on that point I find that there was no agency and that practically settles the case.

While I come to the conclusion that there was no agency, and while I come to the conclusion that there is not a remedy of specific performance in this case, I do so reluctantly on account of some of the evidence and on account of my consideration of the other facts of the case. It is not necessary for me to make a finding of fact on this occasion, and seeing that there is a possibility of this matter coming on later in another form, I will not make a finding of fact any more than to say I am quite convinced from the evidence that there was a sale made, so far as Mr. Duncan was concerned. I am driven conclusively to that opinion from the evidence which he gave himself, from the contents of the memorandum book, exhibit "E," from the facts surrounding all the payments and in general from the evidence which has been given. I believe that Mr. Beck believed that he was buying that land at that time, and I believe from the evidence that Mr. Beck made these payments on account of a proposed agreement for sale. I believe that the sale purported to be made was made, so far as Mr. Duncan had the power, or thought he had the power to make it at that time, and I believe that he accepted these payments as payments on a sale of property sold to Mr. Beck, and not as rent. I believe—although my belief or my finding on these matters does not make any material difference to the case—that there is only one bit of evidence that points the other way, and that is the very minor and unimportant fact that a certain amount of wire was bought at a certain date. And if, as alleged by counsel for defendant, it was bought before the alleged transaction was made, it might be referable to something else.

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Under these circumstances, while I have to come to the conclusion that the plaintiff must fail, I propose to make some provision by which the plaintiff may be put into a position which he ought to put into and which the defendants ought to put him into on account of the circumstances of the case.

It may be urged that Mrs. Duncan is not responsible for what her husband did. I say that Mrs. Duncan is responsible for what her husband did, and I find under the evidence. It is quite natural and perfectly reasonable that any wife should depend to a very large extent on her husband for looking after her affairs. It would be quite impossible to convince me that this sort of thing could be going on for something like six years. There is absolutely no request for any rent, no request for any accounting for crop, and practically as far as the evidence goes no request for money except on one occasion. It is very hard for me to believe that Mrs. Duncan was sitting down relying on her husband, and more than that, if she was sitting down relying on her husband, Mr. Beck at least should not suffer any more than he has to suffer by circumstances of that sort. I make allowance for the fact that she is a married woman living with her husband and depending on him. On the other hand, I have to assume, and more than that, I have to require a certain amount of business interest even on the part of a woman; and I think that the fact that she did not take any interest in this, that she sat down for six years, that she went away leaving the property for the sixth of a series of years, would justify me in saying that even if she did not know what position Mr. Beck was in—and I cannot say from the evidence that she did—that she has put herself in such a position as not to be entitled to any more consideration in this case from the Court than the Court feels bound under the evidence to give to her.

My judgment will be that the action for specific performance under the contract must be dismissed; that on the other hand—and I will allow the necessary amendments to provide for it—Mrs. Duncan will pay to Mr. Beck such amounts as are found to have been paid by him on this transaction—the amount paid in cash, the amounts paid for interest, the amounts paid for taxes and the amounts paid on the mortgage. Further, I will not allow the defendant any costs; and if I had had all the facts before me this morning that were subsequently brought to my notice in the trial of this case, while I had to dismiss the action as against the defendant William Duncan, I certainly would not have dismissed it with costs. If I were quite sure I had the right to review my judgment given this morning, I would review it and dismiss the action as against him without costs. I think that in order to arrive at these amounts it may be necessary to make a reference, unless counsel can come together and save that trouble and expense.

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The defendant will pay back to the plaintiff the $1,000 paid by cheque dated February 1, 1907, $187.50 paid the same day, $500 paid 1st February, 1909, and I will refer to the local registrar the question of the payment of $500 alleged to have been made in 1907, the amounts paid by the plaintiff on account of the mortgage on the land in question, the amounts paid by the plaintiff for taxes, with interest at five per cent. from dates of payment.*

Judgment accordingly.

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Dec. 19.

EVANS v. NORRIS.

Alberta Supreme Court, Scott, Stuart, Simmons, and Walsh, JJ. December 19, 1912.

1. CONTRACTS (§ I E 5—95)—STATUTE OF FRAUDS—SALE OF LAND—SUFFICIENCY OF MEMORANDUM UNDER STATUTE.

Proof of the existence of a written memorandum of an agreement for the sale of land without proving what were the terms of payment is insufficient to satisfy the Statute of Frauds. (*Per* Stuart, J.)

2. CONTRACTS (§ I E 5—95)—STATUTES OF FRAUDS—SALE OF LAND—LETTING INTO POSSESSION—COMPLIANCE WITH STATUTE.

Proof of the mere letting into possession of an alleged vendee of land is not sufficient to satisfy the Statute of Frauds. (*Per* Stuart, J.)

3. CONTRACTS (§ I E 5—95)—STATUTE OF FRAUDS—SALE OF LAND—UNEQUIVOCAL ACT OF POSSESSION.

An act of possession by an alleged vendee of land under a parol contract, in order to satisfy the Statute of Frauds, must be an unequivocal act. (*Per* Stuart, J.)

[See *Thomson* v. *Playfair*, 6 D.L.R. 263, reversing 2 D.L.R. 37, and see Annotation, 2 D.L.R. 43, on possessory acts under the Statute of Frauds.]

4. CONTRACTS (§ I E 5—95)—STATUTE OF FRAUDS—SALE OF LAND—CUTTING HAY OR RESTRAINING CATTLE NOT ACTUAL POSSESSION.

The facts that the alleged vendee of land under a parol contract of sale entered the land and cut the natural hay thereon and put out the stray cattle and repaired the fences so as to keep the cattle out, does not constitute such an unequivocal act as would take the case out of the Statute of Frauds, where those acts were explained by the alleged vendor on some other theory than that of a contract of sale. (*Per* Stuart, J.)

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*N.B.—A note was directed to be made that plaintiff's counsel asked to be allowed to make an amendment to the pleading in the alternative that if the defendant Elizabeth Duncan did not at the time of the sale authorize William Duncan to make such sale, she subsequently ratified his having made the sale.

The Chief Justice stated that he would allow such an amendment to be made, but that it would not alter his decision, as there was not any evidence to fix knowledge of the alleged sale on Mrs. Duncan at the time of any of the subsequent transactions between her husband and Mr. Beck. Her action, or rather inaction, throughout was very unbusinesslike and unsatisfactory, but there was no evidence to shew that she knew that Mr. Beck was acting under or realizing on a supposed sale.

It was ordered that the counterclaim of William Duncan might stand over for trial as an original action at the next sittings with liberty to make such amendment as he may be advised, and that the plaintiff be allowed to defend the counterclaim and to counterclaim to it if so desired.

5. CONTRACTS (§ I E 5—95)—STATUTE OF FRAUDS—SALE OF LAND—ACT OF POSSESSION.

In order for possession of land to take a case out of the Statute of Frauds, the act of possession must be incapable of explanation on any other theory than that of the existence of a contract of the nature alleged by the plaintiff, and where the alleged act of possession involved no permanent interest in the land and was, from its nature, capable of explanation in the manner sworn to by the defendant, the plaintiff cannot succeed even where such plausible explanation is disbelieved by the trial judge. (*Per* Stuart, J.)

[*Maddison* v. *Alderson*, 8 A.C. 467; *Ungley* v. *Ungley*, 5 Ch. D. 887, and *Bodwell* v. *McNiven*, 5 O.L.R. 332, specially considered.]

6. DAMAGES (§ III M—290)—INJUNCTION PROCEEDINGS — DETERMINATION ON COUNTERCLAIM.

Where, in an action for specific performance there is a counterclaim for damages caused by the plaintiff's injunction restraining the defendant from using the land during the pendency of the action, and the plaintiff's action is dismissed, the proper practice is to apply in Chambers for a determination of damages on the counterclaim. (*Per* Stuart, Walsh, and Scott, JJ.)

[*Albertson* v. *Secord*, 1 D.L.R. 804, referred to.]

7. SPECIFIC PERFORMANCE (§ I A—1)—COMMENCEMENT OF ACTION—EAGERNESS OF PLAINTIFF TO PERFORM.

In an action for specific performance, the plaintiff's readiness and eagerness to perform his part of the contract must be judged as of the time the action is commenced. (*Per* Walsh, and Scott, JJ.)

Statement

AN appeal by the defendant from the judgment of Harvey, C.J., at the trial in favour of the plaintiff in an action for specific performance of an agreement for the sale of certain lands near St. Albert.

The appeal was allowed and the action dismissed with costs. SIMMONS, J., dissenting.

S. B. Woods, for appellant (defendant).

C. A. Grant, for respondent (plaintiff).

Scott, J.

SCOTT, J.:—I concur with the judgment of Walsh, J.

Stuart, J.

STUART, J.:—This is an appeal by the defendant from a judgment of the Chief Justice delivered at the conclusion of the trial whereby he directed specific performance at the instance of the purchaser of an agreement for the sale and purchase of certain land near St. Albert.

The learned Chief Justice found that there had been in fact an agreement between the parties of the nature alleged by the plaintiff. With this conclusion I do not feel disposed to disagree after two careful perusals of the evidence.

The Statute of Frauds, however, was pleaded and the plaintiff was unable to produce any memorandum in writing. He stated that one had been drawn up and signed by himself and by one Andrews as agent for the defendant, that this had been left with Andrews, that Andrews had several times promised to let him have a copy but had eventually said that the memor-

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andum was mislaid. Andrews denied that any such document as the plaintiff described had ever existed although he did admit that he had made a note on a sheet of paper of certain suggested terms of sale. This sheet of paper he said in his evidence had been lost. He had searched for it and couldn't find it. He declared that nothing had ever been signed by anyone. The Chief Justice found as a fact that a signed memorandum had existed though he did so with some hesitation. I am bound to say that I share in that hesitation although in view of my conclusion upon the question of the contents of the memorandum and their sufficiency to satisfy the statute it is not necessary for me to make up my mind whether I should dissent or not from the conclusion he arrived at.

The contents of the memorandum had to be proved by oral evidence. But before speaking of the proof of the contents of this document it is best to state what the oral agreement was which the Chief Justice found to have been made. He began his judgment by saying:—

> I have no difficulty in coming to the conclusion that there was an agreement between the parties for the sale of the land in question at the price of $16 per acre making a total of $1,888 payable in four annual instalments. The first a payment of $472 which *would* be a cash payment and the three subsequent payments at intervals of a year each with interest at six per cent., *and that there was also an arrangement that the cash payment could be deferred*, the plaintiff leaving as security his title, or when he obtained title his certificate of title with the defendant; *that this could be deferred until he could have an opportunity of taking off the hay and paying for it in that way.*

I have italicized what I conceive to be the serious portion of this finding as to facts so far as the evidence of the contents of the lost memorandum is concerned. Later, at the close of his judgment, the Chief Justice in response to a question by the defendant's counsel fixed the date at which the agreement was entered into and from which the yearly periods were to run as July 31, 1910.

Now, with regard to the contents of the memorandum the following is the evidence given:—

First, the plaintiff in his examination in chief was asked as to his recollection of its contents and he replied:—

> My recollection of it was: Memorandum of agreement made this day of so and so. John Norris agrees to sell and Edward Evans, Jr., agrees to buy the whole of lot 17 and the easterly 6 chains of 16 less the portion—for the sum of sixteen dollars per acre—I think the description came after the sixteen dollars per acre at six per cent.; payment divided into four yearly payments of $472 each, first payment secured by deposit of deeds for the acre lot at Hempriggs and the description was—this here land contained 392 acres and it was less the

portion that had been sold before; really the land I was getting was one hundred and eighteen acres.

Q. Did the memorandum state that? A. Yes, I think it stated that, the whole amount.

Q. You say 390 acres? A. 393 or something.

Q. Approximately 392 acres? But the balance after what you say was deducted? A. The balance what I was getting was one hundred and eighteen acres.

Q. You don't remember the description of the part that was deducted? A. No, I didn't take much notice of what was deducted nor the quantity. I only paid attention to what I was getting.

This was the evidence as to the contents given by the plaintiff on the trial on November 18 and 20, 1911. He had been examined for discovery on October 31, 1911, and he had then been asked to write out his best memory of the contents of the memorandum. He did so and what he wrote was this:—

Memorandum of agreement made this ———, 1909, whereby the said J. Norris agrees to sell and the said Edward Evans agrees to buy the whole of river lot 17 and part of 16 of St. Albert in the sum of $1,888 with interest at 6 per cent. on four instalments $472 by deeds of one acre lot at Hempriggs and $472 each year.

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Then there was the evidence of Wm. Pratt, a solicitor employed in the office of the plaintiff's solicitors who stated that on January 30, 1911, the plaintiff and he went down to see Andrews, that they had met him on the street and had had a conversation with him about the memorandum and had then separated, that then the plaintiff had dictated to him the terms of the memorandum which he wrote down from such dictation, that on the next day he went to Andrews' office and read this to him and that Andrews agreed that what was read was substantially correct.

Now, what Pratt read to Andrews was as follows:—

An agreement made between J. Norris of the one part and Edward Evans, Jr., of the other part. The said Norris agreeing to sell part of the land situated at St. Albert river, lot 16 and 17 for the sum of $16 per acre with interest at 6 per cent.

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Pratt stated that in reading this to Andrews he had made a break to shew that Evans had not remembered the description of the land.

The document as filed in Court had the following further memorandum upon it:—

Read to Mr. Andrews on 31st January, 1911, when he admitted that it was substantially correct. Terms of sale on other side copied from Mr. Andrews' pocket book, Bickerton Pratt, 6-2-11. Contract price $1,888.

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Mode of payment: Four yearly instalments of $472, together with interest at 6 per cent. Deeds to be deposited of the acre lot till first payment was made.

Pratt stated that the final clause of the above, beginning "mode of payment" was written afterwards by himself and was given to him by Evans as a term of the agreement made but not as part of the written memorandum which Andrews had.

The endorsement on the back which Pratt stated in his evidence he had copied from the notebook of Andrews at the interview of January 31, was as follows:—

Terms of sale	.....	118
$16.00 per acre	.....	16
3 years' interest, 6 per cent.	.....	708
$472 cash down	.....	118
$472 in twelve	.....	1,888
$472 in twelve	.....	equals 472
$472 in twelve	.....	4

Now this is the entire evidence as to the contents of the signed memorandum. It will be observed that in no one of the three versions given at different times by the plaintiff does he say that the memorandum contained any reference to the fact that the time for the payment of the first instalment had been fixed as the time when he should have disposed of his hay. No version of the memorandum makes any reference to hay at all. Yet the trial Judge has found that the agreement was that the first payment was to be made when the plaintiff had had an opportunity of disposing of his hay. Now I can quite understand how it might happen that in an agreement for sale of land a certain cash payment might be stipulated for, and how, after that had been agreed upon and inserted in the memorandum, subsequently a period of credit might be given; and, although the memorandum having been previously drawn up and completed there would consequently be no mention of the extension of credit in the memorandum, I can understand how the memorandum in such a case might be considered a perfectly sufficient one. But these are not the facts in the present case. The learned Chief Justice in speaking of the terms of the agreement said with reference to the first payment, "This *would* be a cash payment." He does not find that it was *agreed* that there should be a cash payment because that would be contrary to what the plaintiff swore. Obviously what the Chief Justice meant was that it was recognized by the parties that there *ought* to be a cash payment but that the *agreement* was that first payment should be deferred until the

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plaintiff's hay was sold. In other words there was an agreement that there should be no cash payment at all. This is exactly what the plaintiff stated again and again in his evidence and he stated that it was so agreed between him and Norris long before they went to Andrews' office and had the memorandum drawn up.

What, therefore, is the result? It seems to me that the time at which the first payment of $472 was agreed to be made was an essential term of the agreement. Yet no version of the contents of the written memorandum refers to this matter at all. The agreement for security was indeed referred to but that is quite a different thing from the agreement as to the time of payment. (I conclude, therefore, that even assuming that there was once in existence a signed memorandum at all its contents were not sufficient to satisfy the statute.)

(It was, however, further argued that there was sufficient part performance to take the case out of the statute.)

The evidence of the plaintiff shews that after making the agreement he, with the knowledge and assent of Andrews and of Norris, went out to the place, drove some stray cattle out of it and nailed up some wire fences; that he let the contract of cutting the hay upon the land to some one and then eventually sold this hay for $500, and that he had watched the place to see that stray cattle were not disturbing the hay.

The learned trial Judge said that he felt great doubt as to whether these acts were sufficient to take the case out of the statute. After some examination of the authorities I confess that I feel no surprise that the Chief Justice entertained a doubt. If, for instance, such a case as *Bodwell* v. *McNiven*, 5 O.L.R. 332, were well decided there would be no question that we have here sufficient part performance. So also if the statement of the law by Jessel, M.R., in *Ungley* v. *Ungley*, 5 Ch.D. 887, is conclusive the only question would be as to what does or does not constitute possession. The Master of the Rolls there said:—

> The law is well established that if an intended purchaser is let into possession in pursuance of a parol contract that is sufficient to prevent the Statute of Frauds being set up as a bar to the proof of the parol contract. The reason is that possession by a stranger is evidence that there was some contract and is such cogent evidence as to compel the Court to admit evidence of the terms of the contract in order that justice may be done between the parties.

Now, if bare letting into possession is sufficient it is quite easy to understand how, in the case of land with no buildings of any kind upon it but merely some fencing it might not unreasonably be argued that really nothing more could be done in the way of taking possession than fixing the fences excluding

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the stray cattle and cutting and selling the hay crop growing upon the land. Any actual residence would have involved making improvements in the way of building which would be another matter.

But the doctrine of *Ungley* v. *Ungley*, 5 Ch.D. 887, is clearly anomalous. The Statute of Frauds specifies a certain kind of evidence which alone will be sufficient to give grounds for an action to enforce a contract with relation to land. Yet the Court in *Ungley* v. *Ungley*, 5 Ch.D. 887, says that if a certain other kind of evidence exists then we may disregard the statute. In *Maddison* v. *Alderson*, 8 A.C. 467, at 475, Selborne, L.C., points out the true ground upon which the Court should proceed. He said:—

> In a suit founded on such part performance, the defendant is really "charged" upon the equities resulting from the acts done in execution of the contract, and not (within the meaning of the statute) upon the contract itself. If such equities were excluded, injustice of a kind which the statute cannot be thought to have had in contemplation would follow . . . It is not arbitrary or unreasonable to hold that when the statute says that no action is to be brought to charge any person upon a contract concerning land, it has in view the single case in which he is charged upon the contract only and not that in which there are equities resulting from *res gestæ* subsequent to and arising out of the contract.

That the doctrine of part performance rested originally upon the principle that a Court of equity will interfere to prevent fraud and injustice is shewn also by the remarks of Lord Cottenham in *Mundy* v. *Jolliffe*, 5 My. & Cr. 167, 41 English Reports 334. The principle of *Ungley* v. *Ungley*, 5 Ch.D. 887, however, rests entirely upon the matter of evidence. The distinction between the "fraud" theory and the "evidence" theory is well discussed in Cyclopædia of Law and Procedure, vol. 36, at p. 646, where it is stated that the "evidence" theory has been finally adopted by the House of Lords. This statement no doubt rests upon the judgment of Lord Blackburn in *Maddison* v. *Alderson*, 8 A.C. 467, at p. 489, where he says:—

> There are cases that for the purpose of enforcing a specific performance of a contract for the purchase of an interest in land a delivery of possession of the land will take the case out of the statute. This is, I think, in effect to construe the 4th sec. of the Statute of Frauds as if it contained these words "or unless possession of the land shall be given and accepted." Notwithstanding the very high authority of those who have decided these cases I should not hesitate if it was *res integra* in refusing to interpolate these words, or put such a construction on the statute. But it is not *res integra* and I think the cases are so numerous that this anomaly, if, as I think, it is an anomaly, must be taken as *to some extent at least*, established. If it was originally an error it is now, I think, *communis error* and so makes the law.

No doubt *Ungley* v. *Ungley*, 5 Ch.D. 887, which was a decision in 1877 of the Court of Appeal consisting of Jessel, M.R., and James and Bramwell, JJ., is one of the cases to which Lord Blackburn here referred.

Now, in the present case it makes all the difference in the world which principle you adopt. If the "fraud and injustice" doctrine of Lord Selborne be adopted then the application of the strict rule of the statute can do the plaintiff no possible injustice because he has not merely not altered his position to his disadvantage as for instance by moving his family on the land and expending money upon it but he has actually received a benefit. He has got the hay and has sold it; that is all. Any slight trouble he took with the fences and the stray cattle was only such as he would naturally take to protect the hay and was not taken in order to permanently benefit or improve the property. He obviously intended the money proceeds of the hay crop to cover any trouble of this kind.

The only ground on which refusal to perform after bare possession is taken and nothing more can be considered a fraud, as indeed it is distinctly called in some of the cases, is that it is a fraud if a man does not perform his oral agreement. This, of course, is to disregard the statute completely.

We are left therefore entirely to the "evidence" principle. Just why the Court should not disregard the statute when a dozen independent and credible witnesses who have heard the bargain give evidence as to what it was and yet disregard it on the ground of the existence of some "*cogent evidence*" in the way of a visible possession is quite beyond my comprehension.

To me, however, it seems difficult for this Court to disregard entirely the view expressed in *Ungley* v. *Ungley*, 5 Ch.D. 887, especially after considering the remarks I have cited from Lord Blackburn's judgment in *Maddison* v. *Alderson*, 8 A.C. 467. Yet even as the cases stand I do not think we are yet bound down to any rule of thumb. In the first place I think we are still justified in distinguishing between one kind of possession and another and to say that in any particular case the possession must at least be such as to furnish "cogent evidence" of the existence of an agreement of the general nature of that alleged. Even Lord Blackburn said that the anomalous rule "must be taken *as to some extent at least*, established." And I think if Lord Blackburn's judgment is to control us the other judgments rendered in *Maddison* v. *Alderson*, 8 A.C. 467, must be regarded as well. For instance, Lord O'Hagan said:—

> But there is a conflict of judicial opinion and in my mind no ground for reasonable controversy as to the essential character of the act which shall amount to part performance in one particular. It *must*

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be unequivocal. It must have relation to the one agreement relied upon and to no other. It must be such, in Lord Hardwicke's words, "as could be done with no other view or design than to perform that agreement." It must be sufficient of itself and without any other information or evidence to satisfy a Court *from the circumstances it has created and the relations it has formed that they* are only consistent with the assumption of the existence of a contract the terms of which equity requires, if possible, to be ascertained and enforced.

The former part of this declaration points, indeed, to the "evidence" theory but I think in its practical application the idea expressed in the last sentence would be found to be identical with the "fraud" theory. But even taking the first part of the statement it is clear that it is still left open to the Court to distinguish between one kind of "taking possession" and another.

In the present case the plaintiff said that at the time of making the bargain he promised to let the defendant have eight tons of the hay for which the defendant was to pay him though no price was mentioned. The defendant's story is that there were negotiations for an agreement and that pending the final settlement of the business between them he agreed that the plaintiff should cut and sell the hay for that summer provided he gave the defendant eight tons of it as his share. These two explanations of the apparent possession are, in my opinion, equally plausible. Now, it is important, I think, to observe how the learned trial Judge dealt with these conflicting stories. After stating his conclusion upon the main question of the existence or non-existence of an agreement of sale in the words which I quoted above he immediately proceeds to say "that of course, *involves* the conclusion that the arrangement for the hay was not an arrangement to cut the hay made with Mr. Norris but that it was the plaintiff's own right to take the hay on his own property." Now, observe the peculiar position that arises if we attempt to apply here the "cogent evidence" theory as laid down in *Ungley* v. *Ungley*, 5 Ch.D. 887. The possession found here is only *involved* in the decision arrived at on the main issue according to the trial Judge. Are we then to take possession so found as "cogent evidence" of the facts in the main issue? It seems to me our logic would be involved in a vicious circle if we were to attempt in this case to apply the rule in *Ungley* v. *Ungley*, 5 Ch.D. 887.

With regard to the particular character of the act set up as part performance I am unable to see how it can, in this case, be said in the words of Lord O'Hagan to be "unequivocal and to have relation to the agreement relied upon and to no other." The cutting of the hay was just as consistent with the defendant's story as with the plaintiff's. It is true we have here no other extraneous or collateral admitted title in the plaintiff or

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contract between the plaintiff and defendant such as a current lease by which the temporary occupancy can be explained in which case, of course, the doctrine of possession as part performance is never applied. But, whatever may be the situation in an old and thickly settled country like England, it seems to me that in this country with its immense amount of land probably owned but unoccupied it is impossible to say because a man is found cutting the natural hay upon certain land of another (and I think I am correct in assuming this to have been natural hay) that, therefore, such an act is unequivocal and must necessarily refer to a contract of sale of the land upon which the hay is growing.

The views expressed by Lord O'Hagan in *Maddison* v. *Alderson*, 8 A.C. 467, are repeated and adopted by the Court of Appeal in *Humphreys* v. *Green*, 10 Q.B.D. 148 (an earlier case) by Kekewich, J., in *Hodson* v. *Heuland*, [1896] 2 Ch. 428, and by Byrne, J., in *Miller and Aldsworth, Ltd.* v. *Sharp*, [1899] 1 Ch. 622, at p. 626. In the latter case the Judge said that the act proven could only refer to a lease and therefore the case was taken out of the statute and the terms of the lease could be proven. In the case before us the act of cutting hay was otherwise explained by the defendant, and his explanation was plausible. It is no answer to say that the trial Judge disbelieved him. That is not the point. I take it from the authorities quoted that the principle is that the act must be incapable, from its nature, of explanation on any other theory than that of the existence of a contract of the nature alleged by the plaintiff, *i.e.*, in this case a contract to convey some definite interest or estate in the land. The Court will then inquire into its terms. But here it is obvious that a perfectly good explanation of the act which involved no permanent interest in the land was given and was, therefore, possible, although in fact, not believed. On this ground its *cogency* as evidence is clearly gone.

There are expressions in a number of the cases which indicate the desirability of not extending the application of the doctrine of possession as being part performance. For myself I should like to see the doctrine so restricted as to confine it to cases where substantial injustice amounting to fraud would arise, but whether that is possible now or not is very doubtful. In any case I am convinced for the reasons I have given that we have here a case where the doctrine of possession should not be applied.

I am quite aware that there are many authorities which would seemingly justify me in holding that what was done here constituted sufficient possession to take the case out of the statute and it may be that any attempt to introduce some principle or reason into the matter is now too late but I am content

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to rest the case upon an application of a principle enunciated clearly in the House of Lords than which I know of no higher authority.

I may add that I concur also in the reasons given by Mr. Justice Walsh for refusing specific performance in this case.

The appeal should be allowed with costs and the action dismissed with costs.

In view of the finding of the trial Judge as to the question of the hay I think the counterclaim for the value of eight tons of hay should be dismissed.

With regard to the counterclaim for damages caused by the plaintiff's injunction I think it is settled that the proper practise is not to begin an action for such damages (which the counterclaim really is, but to apply in Chambers for an assessment of the damages; see *Albertson* v. *Secord*,, 1 D.L.R. 804. In Holmested and Langton, 2nd ed., p. 92, it is said that the application for an enquiry as to damages should be made at the hearing or when the injunction is dissolved, and *Smith* v. *Day*, 21 Ch.D. 421, is referred to. Inasmuch as the trial Judge gave oral judgment for the plaintiff there was no reason at the trial for applying for an enquiry as to damages. The injunction is now for the first time dissolved, and I think, therefore, that the defendant should have leave reserved to make such application within a reasonable time and that the counterclaim should be dismissed generally with costs without prejudice to such an application. The money in Court should remain in Court to satisfy the defendant's judgment for costs and the balance, if any, after these are paid should remain for one month and then be paid out to plaintiff unless the defendant has in the meantime made an application for an enquiry as to damages in which case it should remain until such application is disposed of.

Simmons, J. (dissenting)

SIMMONS, J. (dissenting):—The plaintiff claims that on or about the 30th June, 1910, he purchased from the defendant river lots 17 and the 16 most easterly chains of river lot 16 of the settlement of St. Albert in the Province of Alberta containing 118 acres at $16 per acre payable in four yearly instalments of $472 each with interest on the unpaid instalments at 6 per cent. per annum, and that it was agreed that the cash payment of $472 should be secured by plaintiff depositing with the defendant plaintiff's title for certain property in the city of Edmonton known as the Hempriggs lot. The plaintiff says that in July of the same year the defendant and plaintiff incorporated this agreement in a writing signed by the plaintiff and signed by one Andrews, for the defendant at defendant's request, or in the alternative signed by Andrews as agent of defendant. The plaintiff says that, in pursuance of said agreement he entered into possession of said lands, cut the hay there-

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on, and disposed of it; gave defendant the title to the Hempriggs lot and also a note for $500 received by plaintiff on the sale of the hay which defendant agreed to apply on the purchase price. The plaintiff says further that the defendant agreed to postpone the payment of the cash instalment of $472 till the plaintiff disposed of the hay conditional upon the plaintiff giving the defendant the title to the Hempriggs lot as security for said payment.

The plaintiff says that, at the time of the alleged sale he had not paid the last instalment of $472 on the Hempriggs lot. It appears he had also purchased the Hempriggs lot some time prior to this from the defendant and the title to the same was still in the name of the defendant. In October of the same year he made this last payment and Andrews obtained registration of his transfer and got his certificate of title for the Hempriggs lot and gave it and also the note for $500 to Mr. Short, defendant's solicitor. The plaintiff says that when the title to the Hempriggs lot was registered in his name the defendant wanted him to execute a mortgage to defendant to secure the first payment on the St. Albert land, and the plaintiff went to Mr. Short to execute the mortgage and Mr. Short submitted to him a document which was an option from the defendant to purchase said lands and plaintiff refused to execute it, alleging he had already purchased the lands. Shortly after this and in the month of November, 1911, the plaintiff and defendant met at Andrews' office and a dispute took place about the hay, the defendant claiming that plaintiff was to deliver to defendant 8 tons of the hay. The defendant at this conversation said if the plaintiff would give him half the hay he would call the deal off.

The plaintiff says that the defendant at this conversation said if plaintiff would not sign the option he would call the deal off and give him half the hay. On February 2nd, 1911, plaintiff filed a caveat in the land titles office at Edmonton claiming as purchaser of said lands and on April 7th, 1911, brought this action for specific performance of the alleged agreement. The defendant and Andrews deny there ever was such an agreement and deny there was a signed memorandum. They admit an offer by Evans which corresponds in terms with the agreement he sets up and this is important as bearing on the question of the sufficiency of the agreement to satisfy the Statute of Frauds, for the property, the parties and the terms are not in dispute, but they say the matter never reached any further stage than that of negotiation. They say the hay transaction was a separate and distinct transaction and a separate agreement whereby the plaintiff bargained with the defendant for the hay on the said lands in 1910, for the consideration that the plaintiff should deliver to the defendant 8 tons of said hay. Andrews

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says that at the time of meeting of plaintiff and defendant in his office in July, 1910, when plaintiff alleges the memorandum was signed, that plaintiff made an offer to purchase at $16 per acre payable one-fourth cash and balance in three yearly payments at 6 per cent. per annum on unpaid instalments and that he made a memorandum in his notebook of these terms and also made a memorandum on a sheet of paper which he placed on his file but which he has not been able to find. He produces the memorandum made in his notebook, exhibit 8. The plaintiff says the memorandum was executed by him and executed by Andrews for the defendant and at his request.

The plaintiff says that at the time the memorandum was signed Andrews agreed to give him a copy and plaintiff had to leave hurriedly to get back to his work and Andrews was to have a copy prepared for him. He says he asked Andrews on more than one occasion subsequently for the copy but Andrews always said he could not find it.

The learned Chief Justice has found on the evidence that Norris' statements are of little or no value on account of his defective memory. Norris' age was apparently close to 90 years and he admits he cannot remember one day what took place or what was said on the preceding day. He admits Andrews was his business agent at the time these transactions occurred. The evidence of the other witnesses on each side do not lend much assistance and that especially of Mr. Short, the solicitor for Norris, who drew up the option is not definite enough to warrant the view that he ever knew the facts as to what the transactions were that took place between the plaintiff and defendant in July, 1911. The determination of what took place then lies in the credence to be attached to the story of the plaintiff on the one hand and Andrews on the other hand. The learned Chief Justice believed the former and rejected the latter. He heard them and there is evidence which, if believed, fully substantiates his finding. It does not seem that this Court can go behind or vary his findings of fact, supported as they are by evidence.

The only question then remaining is whether the law will attach to his findings of fact an enforceable contract and one which the plaintiff is entitled to have specifically performed.

The judgment in effect finds that the memorandum was sufficient to satisfy the Statute of Frauds, that its loss was proved and that the plaintiff is entitled to specific performance on making the payment of the first instalment with interest. He finds there was outside the memorandum a collateral agreement to defer the cash payment till the plaintiff could dispose of the hay conditional upon the plaintiff giving the defendant his title for the Hempriggs lot as security in the meantime. On

May 1st, 1911, the plaintiff, after action commenced, tendered the defendant's solicitor $495 on account of the first payment of $472 and interest, and at the trial expressed his readiness and willingness to perform his part of the agreement.

The defendant sets up in his statement of defence a complete denial of the contract of sale, and does not plead in the alternative the plaintiff's failure to perform, if it is found there was a contract of sale. Notwithstanding this I think the Court in dealing with a claim for specific performance should consider the plaintiff's acts in regard to his readiness to perform when the plaintiff seeks equitable relief by way of specific performance. It appears that about the 10th of November, 1910, the defendant repudiated the claim set up by the plaintiff and the plaintiff was silent until about the end of January, 1911. The plaintiff says, however, that at this meeting in Andrews' office when the defendant said he would call the deal off, that the plaintiff declared he could not call the deal off. The defendant retained plaintiff's title to the Hempriggs lot and the note for $500 until January 20th, 1911, on which date Andrews wrote plaintiff to come to his office and get them. In arriving at a correct result to be attached to plaintiff's silence for a period of about two months I am of the opinion that the defendant's acts in the meantime must be considered. Andrews, when pressed to give a reason for retaining the note and title of plaintiff, in the meantime could give no explanation (see case, p. 184). At that time the defendant had an agreement signed by plaintiff to purchase the land. He also had the note for $500 the proceeds of which were to be applied on the first payment and he had also the title to the Hempriggs lot as security for this payment. He says the deal that he called off was not the agreement to sell the land but related solely to the purchase of the hay by the plaintiff. He did not offer then to return to plaintiff either the note or the title deed. He had lost the agreement in writing on which the plaintiff founded his claim and had then denied its existence. It may very well be contended for the plaintiff that a delay of two months in asserting his rights was not such a delay, considered in view of the defendant's acts, as to disentitle him to specific performance. It seems to me that to hold the plaintiff disentitled to relief would, in the result, allow the defendant the benefit of his own wrongful acts in denying the existence of the agreement as a ground for repudiation, and of his own negligence (if not something worse) in the loss of the agreement. It does not seem necessary, in view of the findings of fact of the trial Judge as to the existence of the agreement, and the conclusion in law of its sufficiency to satisfy the Statute of Frauds to deal with the question of part performance as a ground for supporting the agreement.

I would dismiss this appeal with costs.

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WALSH, J.:—I would allow this appeal upon the ground that the plaintiff had not before the commencement of this action shewn that readiness and eagerness to perform his part of the contract which is necessary to entitle him to the relief which he seeks.

A very careful reading of the evidence satisfies me of the correctness of the finding of the learned Chief Justice that there was in fact an agreement arrived at between the parties for the sale of this land to the plaintiff. I share, however, the doubts which my brother Stuart has expressed as to the sufficiency of the written memorandum of this contract but I am inclined to think that there was such part performance of it as takes it out of the statute. But I do not see how this Court can compel specific performance of this agreement at the suit of this purchase consistently with its own judgment in *Dunlop* v. *Bolster* (No. 2), 6 D.L.R. 468.

This action was commenced on the 7th of April, 1911. All that was required of the plaintiff under the contract up to that date was the payment by him of one-fourth of the purchase money amounting to $472. It is not disputed that he had not then paid this sum or any part of it and there is absolutely no evidence that he had ever offered or attempted to do so or that he had even expressed a willingness or possessed the ability to pay. The contract was entered into in July, 1910. According to the plaintiff's version of its terms he was not to be called upon to pay anything under it until he sold the hay which was then growing on this land, but that upon such sale being made he was to pay $472. The hay was sold not later than the 14th of October, 1910, for the note of the purchaser of it for the full amount of his purchase money is in evidence and that is the date which it bears. The plaintiff left this note with the defendant's agent but it is not contended that it was so left under any arrangement that it was to be taken in payment of the first instalment of the purchase money or that any extended period of credit was thereby to be given to the plaintiff for the payment of it. The plaintiff himself says: "I wanted him to collect it and give me credit on my first instalment." Nothing was ever paid on this note to the defendant or his agent and it was sent to the plaintiff's solicitors at their request on the 7th of March, 1911. Early in November, 1910, an effort was made by the parties to have the agreement formally reduced to writing but it failed and they appear to have been at arms' length thereafter. Nothing further appears to have been done by the plaintiff until towards the end of January, 1911, when his solicitors commenced a correspondence with the solicitors for the defendant which ultimately resulted in the bringing of this action.

A discussion seems to have arisen at the trial after the close of the plaintiff's case and at the close of the examination of the defendant's first witness over this phase of the question. It will be found at pp. 114 and 115 of the case. The learned Chief Justice practically closed the discussion with these words addressed to the plaintiff's counsel:—

> But you have got to shew you have done your part of it and on your evidence you did not do your part of it.

This, I take, as being practically a finding that the plaintiff's own evidence established a failure to perform his part of the contract. In view of this the plaintiff with the leave of the Court at the close of the defence gave further evidence along this line. This evidence consisted in part of correspondence which commenced on the 26th of January, 1911, and ended on the 10th of March. In this the plaintiff took the stand that a contract had been made and the defendant denied that such was the case. It is true that the plaintiff was then asserting the right which he is now claiming, but the only evidence of his readiness and eagerness to perform his part of the contract is contained in his solicitor's letter of the 7th of February, in which the statement is made that "there has been a part payment of the purchase money by Mr. Andrews taking security for the first instalment," a statement which is quite at variance with the facts. The rest of this new evidence was of a statement of the plaintiff to the defendant's agent made on the 24th or 25th of April, more than two weeks after the commencement of this action, that if he would go to the office of the plaintiff's solicitors he would give him the whole of the purchase money and interest which was then available at that place for that purpose. The further fact was shewn that on the 11th of May the plaintiff paid into Court $495, being presumably the overdue instalment of $472 and interest.

I think that the plaintiff's readiness and eagerness must be judged of at the time that he brought his action. It surely is not competent for a purchaser who has been remiss in the performance of his own obligations and absolutely lacking in readiness and perhaps ability to perform them up to the time that he seeks, by the issue of his writ, the aid of the Court to enforce performance of the contract by the other party to it, to wipe out all of the results of his sloth by doing *pendente lite* what he should have done before he brought his action.

I would allow the appeal with costs and dismiss the action with costs and direct the removal of the plaintiff's caveat from the defendant's certificate of title. These costs should be paid out of the money in Court to the credit of this action.

The defendant counterclaims for $87.50, being the value of five tons of hay agreed to be delivered by the plaintiff to him in

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the year 1910, and for $250, "being the value of the land for the year 1911," he having been deprived of the use of it, as he alleges, under an injunction granted to the plaintiff in this action restraining the defendant from interfering with the plaintiff's occupation of it.

I do not think that he is entitled to his claim for the 1910 hay, for he was only to get that upon paying for it. His other claim is based upon the allegation that he was deprived of the use and occupation of the land under the injunction order to which I have referred, the obtaining of which is admitted by the defence to the counterclaim. I do not think that there is any evidence upon which the sum to be charged against the plaintiff upon this head could be assessed. It is quite possible that I have overlooked evidence of these facts, if it was given, in the bulky appeal case submitted to us, but neither in his factum nor, so far as my memory and my notes serve me, in his argument, did counsel for the defendant even refer to it.

I do not see, therefore, how we can deal with this now. I am inclined to think that the proper practice is to apply in Chambers for an order assessing the damages occasioned to the defendant by the injunction. I would dismiss the counterclaim with costs, reserving to the defendant the right to apply as he may see fit to have his damages assessed. The balance of the money in Court after payment of the defendant's costs should be retained there until the defendant has had an opportunity to have these damages assessed and then paid out according to the result, the plaintiff being at liberty to apply if the defendant's application is unreasonably delayed.

Appeal allowed, SIMMONS, J., *dissenting*.

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BANQUE NATIONALE (plaintiff) v. G. GODBOUT (defendant) and J. GODBOUT (tiers-saisi) and BANQUE NATIONALE (contestant).

Quebec Court of Review, Tellier, DeLorimier, Archibald, JJ. October 25, 1912.

1. DISMISSAL AND DISCONTINUANCE (§ I—2)—RIGHT OF COURT TO SUPPLY DEFENCE OF PRESCRIPTION—QUE. C.C. 1040.

The Court cannot of its own motion supply the defence resulting from prescription under C.C. 1040, and when such defence is not raised the Court cannot therefore base its reason for dismissal on such prescription.

2. EVIDENCE (§ II K—311)—BURDEN OF PROOF ON DEFENDANT TO ESTABLISH DEFENCE OF PRESCRIPTION.

In order to maintain a plea of prescription the defendant must prove affirmatively that the plaintiff did not attack the contract he seeks to have avoided, within the year following his knowledge of the existence of such contract.

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3. LIMITATION OF ACTIONS (§ II E—55)—WHEN STATUTE RUNS—DISCOVERY OF FRAUD.

Where the contesting party only becomes aware of the existence of a deed in fraud of his rights when it is produced in Court, he has one year from that moment, and not one year from the making of the deed, within which to contest under C.C. 1040.

Statement

APPEAL by the plaintiff contestant from the judgment of the Superior Court for the district of Sherbrooke, Hutchinson, J., rendered on April 11, 1911, dismissing the plaintiff's contestation of the declaration of the garnishee.

The appeal was allowed.

L. Gendron, for plaintiff, appellant.

M. O'Bready, for garnishee, respondent.

The opinion of the Court was delivered by

DeLorimier, J.

DELORIMIER, J.:—This case comes up in review of a judgment of April 11, 1911 (Hutchinson, J.), dismissing the contestation of the plaintiff to the declaration of the *tiers-saisi*.

The plaintiff obtained judgment against the defendant *et al.* and issued a *saisie-arrêt* after judgment in the hands of the *tiers-saisi*, who came up and declared that he did not owe the defendants anything, nor had he any money or other property in his hands belonging to them. On cross-examination, he admitted several transactions between him and them, by which property which had belonged to the defendants came to belong to the *tiers-saisi*.

The plaintiff contested the declaration of the *tiers-saisi*, and the *tiers-saisi* answered that, by certain documents and acts, the property mentioned in the plaintiff's contestation was his of right and for good and valid consideration.

The plaintiff contesting, considering the answer vague and insufficient, moved for particulars, which were ordered, and the *tiers-saisi* then furnished such particulars, shewing when the transfer of the properties in question had been made to him from the defendants. The plaintiff contesting, replied, declaring that these acts were illegal and fraudulent and simulated, and asked that they be set aside, and that the *tiers-saisi* should be declared to have had, at the time of the seizure, in his hands, money and property belonging to the defendants, and that he should be ordered to pay the plaintiff out of such moneys.

The answer of the *tiers-saisi* was made in the month of October, 1909. The plaintiff replied thereto, alleging fraud vitiating the transfers in question, on the 5th April, 1910, but the transfers were actually made in the month of February, 1909.

The plaintiff contesting, in its reply to the answer of the *tiers-saisi*, did not allege that it had only obtained knowledge of these deeds at a period within the year previous to filing its

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reply. But, on the other hand, the *tiers-saisi* did not raise the question that the plaintiff's attack upon the deed in question was prescribed by the year mentioned in art. 1040 of the Civil Code.

When the case came up for judgment, the Judge ruled that there being no allegation that the plaintiff contesting only obtained knowledge of the deeds in question after their date and within the year before its contesting their validity, plaintiff's right to question their validity was prescribed, and the plaintiff's contestation was dismissed.

Plaintiff inscribes in review and claims that the judgment was in error in deciding in that manner; that there was no presumption that the plaintiff was aware of the existence of these deeds of a private nature until they were pleaded in Court, and that date being fixed, and the date of the plaintiff availing itself of the right to attack these deeds being also fixed, and being less than a year, plaintiff had no necessity of alleging or proving when its knowledge of the acts in question did actually arise.

The Judge cites in support of his judgment three cases, two of which are certainly strongly in support of his judgment. In one of these cases, Mr. Justice Doherty decides precisely as the Court below decides in this case. Indeed, the very language used in the present judgment was used also in Judge Doherty's judgment. Judge Doherty, in support of his judgment, cites art. 1040, which is, I may say, marked as "new law" in the Code, as follows:—

> No contract or payment can be declared null in virtue of any one of the dispositions contained in this section, at the suit of an individual creditor, unless such suit be commenced before the expiration of the year, to be counted from the date when he obtained knowledge of it, that is, of such contract.

The Judge cites the imperative provisions of this article as rendering it necessary that, when any one undertakes to take an action to set aside a contract for fraud, more than a year after its date, he must allege and prove that he only became aware of the contract or of the fraud within the year from the date of his action, and in the absence of such allegation or proof, his action would be dismissed, whether he actually did know, or did not know, of the existence of the contract or of the fraud relating to it more than a year before the action was taken.

I doubt very much whether the extreme interpretation of art. 1040 can be upheld. Art. 1032 gives creditors the right, in their own name, to set aside the contract of their debtors made in fraud of their rights. This right would certainly not be prescribed in one year had it not been for art. 1040, so that art. 1040 is limitative of the right. It seems to me that, where a provision of law takes away a right, or limits it, it must be

interpreted rather in favour of the owner of the right than in favour of the person who is escaping from an obligation.

It is noticed that art. 1040 does not deny the action, but denies the right to obtain judgment. "No contract can be declared null." Now, if we look at a corresponding article in the title of "Prescription," viz., art. 2267, we find certain short prescriptions therein referred to, viz., prescriptions of five years, of two years and of one year, are dealt with, and this article is also referred to as "new law," and the language used is very different from that used in art. 1040. Art. 2267 says:—

> In all cases mentioned in articles . . . the right is absolutely extinguished and no action can be received after the time fixed for the prescription.

The language of this article would seem to be very energetic, and, as a matter of fact, the Courts have held that, in reference to all such actions referred to in art. 2267, whether prescription is pleaded or not, the Court is obliged to dismiss the action if it turn out, at any time, that the prescription in question applies.

Article 2188 provides that the Courts cannot of their own motion supply the defence resulting from prescription save in the case where the law denies the action, such as in the case of art. 2267. Art. 1040 does not deny the action, but only provides that a judgment cannot go annulling the deed on the ground of fraud unless action be taken for that purpose within the year from the time when the party claiming the nullity obtained knowledge of the deed.

I am of opinion, therefore, that, under art. 1040, the Court cannot, of its own motion, supply the defence resulting from prescription, and that defence not having been made in the present case, I think the Court was wrong in dismissing plaintiff's contestation, and certainly wrong in presuming that the plaintiff must have had knowledge of the deeds passed between other persons, of a private nature, at a time when they were passed for the express purpose of defrauding the plaintiff and would naturally be concealed as much as possible from the plaintiff. There is no suggestion that, before these documents were pleaded in the Court by *tiers-saisi*, that the plaintiff had any knowledge of their existence, and I am satisfied that the time from which the commencement of prescription would run was the time when these documents were brought up in Court and opposed to the plaintiff's right, and its action being taken within the year from that date, I hold that no prescription was acquired against plaintiff, and plaintiff had a right to a judgment upon the merits—as to whether these acts were or were not fraudulent.

Reading between the lines of the judgment, I should say had not the learned Judge considered himself bound to dismiss the

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plaintiff's contestation on the question of prescription, he would have maintained it on the question of fraud. It seems to me that the proof is sufficiently ample. The defendants in the case, since the time of the judgment against them as above mentioned, have fraudulently disposed of all their assets in favour of the garnishee, and the latter himself has also converted said assets to his own use and benefit.

Defendants were thus left without any means whatever to satisfy plaintiff's claim. The evidence shews that *tiers-saisi* was, and must necessarily have been, perfectly aware of that fact, and, under all the circumstances, the conclusions of plaintiff's contestation ought to have been maintained.

We are of opinion that the judgment must be reversed and the plaintiff's contestation maintained, the declaration of the garnishee set aside and the said garnishee ordered to pay the plaintiff the amount of its judgment against the defendants, with costs, and also to pay the costs as well of the contestation in the Superior Court as of this Review.

Appeal allowed.

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GRAND COUNCIL PROVINCIAL WORKMEN'S ASSOCIATION v. McPHERSON et al.

Nova Scotia Supreme Court, Meagher, Russell, Drysdale, and Ritchie, JJ. December 20, 1912.

1. BENEVOLENT SOCIETIES (§ II—6)—LOCAL LODGES—RIGHTS AND POWERS OF—SALE OF ASSETS TO RIVAL SOCIETY.

A labour organization which owes allegiance to a grand body of which it is a subordinate lodge, cannot, upon secession from the association, dispose of its assets to a rival organization to which no member of the lodge could belong without forfeiting his membership in the general association, where there is a provision of the grand body that upon the dissolution of any subordinate lodge its property not theretofore disposed of by the lodge in accordance with its by-laws is to be vested in the grand body to be applied first in payment of any debts of the subordinate lodge and the balance, if any, in such manner as the grand body may deem best for the general interests of the order in the Province; any such attempted sale is *ultra vires* and void and constitutes a breach of trust, and a receiver will be appointed over the real and personal property of the subordinate lodge on the application of the grand body.

2. RECEIVERS (§ I A—1)—JURISDICTION — GROUND FOR APPOINTMENT — BREACH OF TRUST.

A breach of trust is a sufficient ground for the interference of the court by the appointment of a receiver.

Statement

APPEAL by the defendants from the following judgment of Graham, E.J.

The appeal was dismissed.

Graham, E.J.

GRAHAM, E.J.:—The Provincial Workman's Association of Nova Scotia and New Brunswick has, according to its constitution, the following objects:—

1st. To advance materially its members by promoting such improvements in the mode of remuneration of labour as the state of trade shall warrant or allow, and generally to improve the condition of working men morally, mentally and socially and physically.

2nd. To shorten the hours of labour; to strive in obtaining better legislation, whereby the more efficient management of mines and other works may be effected thereby securing the health and safety of the workmen and in enforcing such legislation as already exists.

3rd. To secure the true weight of the miner's output at the pit head; to assist in abolishing all illegal stoppage at pay offices and recovering the prices and wages bargained for by its members as an equivalent for their labour.

4th. To foster habits of thrift, industry, economy and sobriety among its members.

5th. To secure compensation for injuries received while at work, where the employers may be liable.

6th. To extend support to lodges and their members who may be locked out by their employers or forced into discontinuing work on account of insufficiency of wages or from any unjust cause whatsoever.

Its affairs are managed by what is called the Grand Council of the Provincial Workman's Association, composed of certain officials, Grand Master, and so on, experienced members duly selected by each of the lodges composing the Association, the lodge being entitled to select a number of members (called delegates) in proportion to the number of its own members.

The Provincial Workman's Association is not incorporated, but its executive, the Grand Council, is incorporated and it is the plaintiff in this action. The Association at that time comprised some 35 lodges at various places in this Province. The objects of the lodge shall be "To use all legitimate means for the fulfilling of the objects which the Provincial Workman's Association has in view." Members in good standing in one lodge may work their way into any lodge in connection with the Association. A member of the lodge leaving the locality of that lodge may obtain a certificate entitling him to entrance into any other lodge and have his name enrolled there.

The rules for the governing of the local lodges are those prescribed by the Grand Council of the Workman's Association.

Generally speaking, initiation into a local lodge makes the man a member of the P. W. Association and entitles him to take part in the selection of delegates to the Council.

The funds of the Grand Council are raised from and through the lodge. When a lodge joins the Association there is a fee, then there is a percentage of the entrance fee of each member on joining and per capita tax periodically on the members of the lodge amounting to about 24 per cent. of its income. Then there are also special levies of not more than one dollar per member of the lodge, which apparently may be ordered as often as is necessary to aid any lodge that may have been compelled to

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strike, the strike having been first sanctioned by the Council. Then there is a defence fund for which about thirty per cent. of the income is contributed.

If any change takes place on the part of employers injuriously affecting the wages or the interests of the workmen being members of the lodge, the lodge reports and the Council considers the matter.

A lodge shall not go on strike unless sanctioned by a majority of legally appointed Grand Council delegates in session assembled.

The lodge or lodges shall not be allowed to enter into any contract concerning wages or hours of labour without submitting it to the members of every lodge and obtaining the sanction of a majority of the members of the lodges.

In case of accidents to members involving negligence, the Council may appoint a solicitor to watch the case, etc. A member dealt with by his lodge has an appeal to the Grand Council.

No person can become or remain a member of a P. W. A. lodge who is a member of any other trades union in the same locality.

Each lodge holds a charter or warrant from the Grand Council constituting the members a lodge. It proceeds in part as follows in this case: "Know also by this charter these and all who according to the constitution and rules established by the Grand Council, may be duly qualified to receive the same, are given right to administer to all the brethren all rights, privileges and protection guaranteed them by the constitution and rules of Council," etc.

Further the said pioneer lodge, No. 1, doth promise to act in strict conformity to the laws of the Association and in compliance with the behests of the Grand Council in default of which this charter may be suspended or revoked at the pleasure of this Council.

The property of the Association is kept by their trustees who are appointed by and report to the Grand Council. The property of the lodge, over and above what is necessary for current expenses, to be kept invested by trustees.

The secretary of the lodge shall make out as desired the returns required by the Grand Council, which shall embrace the number of members in good standing, the number admitted and the number withdrawn, also the amount of income and expenditures and the amount of funds held by the lodge, and also a return of work done by the lodge during the quarter. The Treasurer, Recording Secretary and Financial Secretary shall jointly make an annual report to the Trustees of the Council.

By the Acts of 1882, ch. 74, the plaintiffs were incorporated. By sec. 4 of that Act it is founded. Every subordinate lodge

which may desire to become incorporated may by a vote of two-thirds of the members present at any regular meeting decide to become so incorporated. And upon a copy of the vote of such lodge specifying also the name, number and place of location of such subordinate lodge, and the names of not less than ten of the members thereof under the seal of such subordinate lodge and the signature of its presiding officer and Secretary of the Grand Council, that such subordinate lodge is in full standing in the Order, being filed in the office of the Provincial Secretary, the members of such subordinate lodge whose names may be included in such vote and their associate members of the lodge, and such other persons as may become members thereof, shall be from the time of filing such certificate a body corporate for the purpose before mentioned by the style or name, number and place of location thereof.

Upon the incorporation of every subordinate lodge the real and personal property thereof and all debts due thereof shall vest in the corporation so established.

The powers of the subordinate lodges to adopt constitutions and by-laws whereby the object of its corporation and government are subject to the Grand Council.

Upon the dissolution of any subordinate lodge so incorporated, the property held by it at the time of the dissolution which shall not have been disposed of by the lodge in accordance with the by-laws, shall forthwith be vested in the Grand Council of the Provincial Workman's Association to be employed, first in the payment of any debts or liabilities of such subordinate lodge, and the balance, if any, in such manner as the Grand Council of the Provincial Workman's Association may deem best for the general interest of the Order in this Province.

In the year 1890 there was special legislation. By the Acts of that year, ch. 135, persons therein named and such other persons as are and shall become members of the lodge hereby incorporated according to the rule and by-laws thereof, created a body corporate under the name of pioneer lodge, No. 1, Provincial Workingman's Association, for the purpose of holding the property and managing the affairs of the lodge.

The property real and personal of the lodge, and all debts due thereto, are vested with corporation hereby created. (Power to hold real estate not exceeding $10,000.)

(Power to collect dues and to sue and be sued.)

Pioneer lodge, No. 1, shall have power to adopt such constitution and by-laws respecting the objects of its incorporation and government as the lodge shall deem necessary, provided the same is not inconsistent with this Act or the laws of the Province, but such power is subject to the approval of the Grand Council of the Provincial Workman's Association.

There was reference made at the hearing to the fact that

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"workingmen" is used because of the name of the society in this Act instead of "workman." I find that it is the same society and that the name is the same. That is a very small slip comparatively in this Legislature or in the printing of it.

It appears that in 1908 an amalgamation of the Provincial Workman's Association with a body known as the United Mine Workers of America was attempted. For this purpose Mr. John C. Douglas acted as returning officer to hold a poll on the 24th of June, 1908, of the various lodges, and he followed the procedure for municipal election, so he reports. The total vote stood 2,860 for and 2,448 against amalgamation. The members of pioneer lodge, No. 1, voted according to his report, 539 for and 39 against, but the Grand Council was to meet on September 15th, 1908, and apparently there was a majority of the Council against amalgamation. Of course all these proceedings to amalgamate without legislative sanction were quite irregular and absolutely void.

Then the trustees of the pioneer lodge, No. 1, Provincial Workman's Association, did a very improper thing, evidently in view of the members seceding going over to unite with body known as the United Mine Workers of America. By deed of the 14th of October, 1908, they proposed to convey to the defendant David Colwell, for the purpose of holding said lands and premises in trust for the trustees on the express condition that he should grant and convey them back on demand. The money, some $2,753.25, was also transferred to David Colwell in trust for these trustees. This was done in pursuance of a resolution of the lodge.

On the 17th of December, 1908, according to the unanimous resolution of the lodge, Mr. Walkins, the Secretary, returned the charter and warrant to Mr. Moffatt, the Secretary of the Association, and the lodge thenceforth ceased to perform its function. The members proceeded to form themselves into a union of the United Mine Workers to exercise its function at the same locality. Indeed this union since that time have occupied the lodge room of the pioneer lodge, No. 1, without paying rent to any one. Colwell and the other trustees became members of the union and the fund of $2,745.25 has been reduced to $2,604.09 for insurance, premiums, taxes and repairs on the lodge building. They claim the right to divide the property of the pioneer lodge now in Colwell's name, among the members of the lodge at the time of the surrender of the charter. The defendants are the three trustees, the treasurer and guardian of the lodge and the person to whom the property has been improperly made over.

From authority which I cited in the case of the *Equity Lodge, No. 11, Provincial Workman's Association* v. *McDonald*, 8 East. L.R. 421, I think it is clear that this property is impressed with a trust, and the very last thing that a trustee or a fiduciary is

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allowed to do is to transfer the trust property. It was a breach of trust. That was hardly disputed at the hearing. In the case I have just mentioned there was a majority vote only of the members to dissolve the lodge and there was a minority still holding on, and all that was necessary to do was to restore the property to the lodge; and if there was any lodge still in existence, in this case I think with the action framed as it is, the lodge being a defendant, the plaintiff could have asked to have the property restored to the lodge, when from its action it cannot or will not ask to have it restored to itself. But as I shall presently shew, I think the lodge is not now in a position to have the property restored to it.

This trust property cannot be withdrawn and divided up among the members. The other members of the Association have an interest other than those members in the ordinary course, contributing much of the money which was spent to acquire the lodge property.

I have already quoted from the constitution extracts which shew that such lodge is absolutely a subordinate lodge, as the name imparts. It has not independent existence. It is altogether subject to the Association acting through the Grand Council. It is an agency of the Association and cannot exist separate from it. The members of the lodges are members of the Association, and the members of one lodge participate in the benefits and share the burdens of other lodges through the action of the Grand Council acting for all. It is the executive.

While a certain percentage of the lodge collections goes periodically to the Grand Council because it has necessary expenses and immediate use for funds (it has no other source of revenue), all the money except what is necessary for current expenses of the lodges and invested by the lodge, are really funds stored for the emergency of a strike by any lodge or lodges concerned. They are held to be called up by special levies, and Mr. Moffatt said the funds are generally kept for strike purposes and work along that line; and no doubt a very large sum is required to maintain the workmen when they go on a strike.

Special levies must fall on their invested funds and they do not depend only on fresh collections from the members. Mr. Moffatt mentions a case where they used all their funds and mortgaged their halls. Take the $7,000 sent to the Springhill men—this very lodge when on strike. No one suggests that it was a fresh collection from the members. As the lodge dues consist of money deducted from the wage of the workmen, dependence could not be placed on fresh collections alone to support a large body of miners on strike.

The lodge is not allowed to go on strike without obtaining permission of the general body for this very reason that all will have to share the burden. And so the object of the lodges is

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stated to be to use all legitimate means for the furtherance of the objects which the P. W. A. has in view.

Then there is the further trust in which the property is held. That in case the lodge becomes permanently disorganized and ceases to exercise its function, their property becomes the property of the Grand Council upon the trust indicated.

How this agency can exist severed from the main body and perform its function to be performed as an agency and for the main body, is difficult to understand; and how it can expect to take this lodge property, and divide it up among the members, at the time of the surrender of its charter, is, I think, quite as difficult to understand.

In the *General Assembly of the Free Church of Scotland* v. *Overtoun*, [1904] A.C. 515 at 630, Lord Macnaghten says:—

> But after all the question at issue is one of a very ordinary description. It is alleged on the one hand and denied on the other that there has been a breach of trust in the disposition of the property. The complaint is that funds contributed and set apart for one purpose have been diverted for another and different purpose. Such questions are of everyday occurrence, and the problem in each case must be solved by the ordinary common-place inquiry: What was the purpose for which the funds in dispute were collected? What was the original trust?

Of course he reached a conclusion different from the majority, but now he enunciates the principles applying to such property. I refer to the following cases cited in the decision in *Grand Lodge, Knights of Pythias* v. *Germania Lodge*, 56 N.J. Equity 63; *Schubert Lodge* v. *Schubert*, 56 N.J. Equity 78; *Koerner Lodge, K. of P.* v. *Grand Lodge Knights of Pythias*, 146 Indiana 639, at page 655; *Ahlendorf* v. *Barkous*, 20 Ind. App. 691; *Duke* v. *Fuller*, 32 Am. Dec. 392; *American Primitive Society* v. *Pilling*, 24 N.J.L. 653.

I think the only objection that has to be considered is in connection with the plaintiff's right to maintain the action, and there were technical objections to the view that the property revested in the plaintiff under the provision of the statute 1882, ch. 74, sec. 7, which I have already quoted. But quite irrespective of the statute, it is clear, I think, that the Grand Council, the executive of the Provincial Workmen's Association, have a sufficient equitable interest to prevent the palpable breach of trust involved in a division of the property. Moreover, it is, in my opinion, also clear that as no trust fails for the want of a trustee, this Court would, on the instance of the Grand Council, it having the interest already indicated appoint a receiver.

Now coming to the statute.

In my opinion the lodge is covered by the description of sec. 7 as a subordinate lodge so incorporated. I think that this section was passed to make clear that although a lodge should

become incorporated and thus have a separate corporate existence, yet in the contingency mentioned its property should, notwithstanding incorporation, revert to the Grand Council. I expressly refrained from deciding this point in the case already mentioned because it was not necessary to do so.

First, I think that the lodge was properly incorporated under the Act of 1882.

There was filed with Provincial Secretary, December 2, 1882, which purported to be a copy of the vote of the lodge, and it was under the seal of the lodge and the signature of its presiding officer and its Secretary. The statute does not require a certified copy and gives no authority to a certificate to that effect. It was to be under the seal. After the presiding officer's signature are the letters M. W., which no doubt stand for Master Workman, which according to the by-laws referred to in the Legislature and in the legislation itself, is the title of the presiding officer. Then there is the certificate of the Grand Council under the signature of the Secretary and the seal of the Grand Lodge, that the lodge is in good standing in the Provincial Workmen's Association.

Going back to the vote itself, the fact that it was a unanimous vote at a regular meeting of the lodge would be a compliance with the statute requiring a vote of two-thirds of the members present at any regular meeting. The fact that the expression "unanimously agreed" is used instead of "decided" is, I think, immaterial that the lodge become incorporated as per statute of 1882.

The name, number and the place of location, namely, Springhill, are specified, and the names of not less than ten of the members are given and members of pioneer lodge written after these names.

Surely it was presumably at least a good *de facto* corporation not to be questioned except by a direct proceeding and sufficient to meet the description of sec. 7, "A subordinate lodge so incorporated." This special Act did not, in my opinion, create a new corporation. There was no new organization under it. There were not two corporations after that. It did not repeal or destroy the old charter. The English case cited in *Miller* v. *English*, 21 N.J.L. 317, is *Colchester's Corporation* v. *Seaber*, 1 Burr. 1866. The Court says whenever a corporation accepts a new charter, it remains to every intent and purpose as it did before, though the name be altered; referring to *Haddock's Case*, T. Raym. 439, where it is said that the new charter does not merge or extinguish any of the ancient privileges, but the corporation may use them as before. And to the same effect is *Rex* v. *Pasman*, 3 T.R. 199, and opinion of Lord Kengan 241. These are, it is true, cases of Royal charters of

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incorporation, but the same principles apply whether the removal is by a Legislature or by a general Act of incorporation: Angel and Ames on Corp. 513. The question of identity, that is, whether the new Act creates a new body politic or corporate, or merely reviews an old one, is one of the intentions. To ascertain whether a charter creates a new corporation or merely continues the existence of the old one, we must, says Story, J., look to the terms and give them a construction consistent with the Legislature's intent and the intent of the corporators. I am of the opinion, and I so find, that the special Act did not create a new body corporate, but if there were any defects in the old corporation, cured them and continued its existence, adding larger powers.

By the special Act 1890, ch. 135, sec. 4, it is clear that it remained a subordinate lodge subject to the Grand Council of the Provincial Workman's Association. Its constitutions and by-laws are those I have been citing from. It did not, by passing this Act, cut itself adrift from the provision providing for a revesting of the property to the Council.

There is no repeal of the legislation as it applies to this lodge creating that liability attached to the property to revert. In my opinion this lodge answers the description of a subordinate lodge so incorporated.

Then it is contended the contingency has not happened; that a dissolution has not taken place, and the common law is cited as to what constitutes the dissolution of a corporation. Certainly if a proceeding is necessary to have the dissolution determined in law, that has not taken place.

I notice that this statute has been copied from older statutes of the Province, to enable divisions of the Sons of Temperance, later lodges of the Order of Good Templars and Orange Lodges incorporations, and the same words "upon the dissolution" are used. I think it never could have been intended in the case of these bodies, some of them possessing no doubt very little property, that there must be such facts existing as would, at common law constitute a dissolution of a corporation at common law, and a proceeding on the part of the Crown to effect that dissolution. The word "dissolution" was rather, I think, used in a technical sense pertaining to lodges. It is always a dissolution of the lodge or of a division which is spoken of.

When the body surrenders its charter or warrant to the supreme body and is no longer tributary thereto, and the members permanently cease to perform the functions of the society and disorganize so that it cannot elect officers or restore itself, that would be regarded as a dissolution of a lodge. The surrender of its charter to the supreme society is like the surrender of a charter granted by the King to the King. That would be a

reasonable construction of the expression. Otherwise the provision would be practically useless in the case of these lodges. Apparently that is the view taken in one of the cases I have cited.

In *State Council, Order of United Mechanics* v. *Sharp*, 38 N.J.E. 24, a subordinate charitable association was incorporated, chartered and organized under the powers and regulation of the General Council of the Association. One of the provisions of the charter was that if it should dissolve, its charitable funds should be paid over to the General Council and be held or disbursed by the latter.

The Subordinate Council voluntarily disbanded, surrendered its charter to the General Council, and under a resolution divided all of its effects among its members then in good standing. It was held that the General Council could recover back the money so distributed. The Chancellor said that the Subordinate Council was incorporated. This does not affect the right of the complainant to recover the money received by the defendants. The complainant has the right to follow the trust funds into the hands of the defendants.

Delaware Council was in fact dissolved. It formally disbanded, divided up its fund among its members, and surrendered its charter. That was a dissolution. But if that is not the correct view and there must be a proceeding on the part of the King to dissolve the corporation, that view by no means requires the dismissal of this action. The defendant's counsel suggested that the company might be wound up under the Provincial Act. Whatever may be said about that proceeding, it was not open to the plaintiff. In my opinion it is not a contributory. But whether it is that, or a proceeding on the part of the King *quo warranto*, or something else (apparently there is *scire facias* in the Province for such a purpose) the right of the plaintiff is now fixed and to them the residue of the assets in the end must go.

The former members of the lodge cannot possibly under the constitution, rules and by-laws, restore it and its connection with the plaintiff. They can not get back into the shell which has been over three years empty. I am not going into details which constitutes the impossibility. In this view the plaintiffs having the reversionary interest are entitled to all the necessary relief to preserve that interest so that it may be realized. As I said, there has been a breach of trust. The property has been transferred and the defendants were parties to it, and that trust property must be followed.

The term of office of the trustees and of the officers defendants has now no doubt expired under the rules, and there have been no re-elections. I suppose declarations could be made, most of them in the terms asked for in the statement of claim excepting

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in so far as they imply that a dissolution of the corporation in law has already taken place. Necessary amendments are granted, but the effective remedy necessary now is a receiver and I direct that a receiver be appointed to get in the property funds in the hands of Colwell, and the further consideration will be adjourned.

The appeal was dismissed.

C. J. Burchell, K.C., and *J. L. Ralston*, in support of appeal:—There never was a dissolution in law or otherwise, nor did the trial Judge give a declaration of dissolution as plaintiffs asked in their statement of claim. Neither was there a breach of trust on the part of the trustees to warrant the appointment of a receiver. Any association incorporated by the Legislature can only be dissolved by the authority of the Legislature which incorporated it or has authority over it: Chitty's Blackstone 483, 484; Clarke and Marshall on Private Corporations, vol. 2, p. 831; Beach on Receivers, pars. 421, 426; Parker and Hamilton on Company Law, p. 413; R.S.N.S. 1900, ch. 129, secs. 3 and 65; *Re The Halifax Yacht Club*, Ritchie's Eq. Dec. 475; Acts of 1882, secs. 5 and 7. The new corporation has absorbed the old one. The new property was all acquired by the new corporation. So long as pioneer lodge was in full standing the money and property in dispute could not be called for by the Grand Council, and the breaking up of the lodge did not place them in such a relation to the Grand Council as to create a trust. On the subject of reincorporation: Thompson on Corporations, vol. 1, sec. 256. There may be a right to have the funds divided among all the late members of pioneer lodge: *Challinor* v. *Maskery*, [1899] 2 Ch. 184, 68 L.J. Ch. 537; *Re Lead Company Workmen's Fund Society*, 73 L.J. Ch. 629.

H. Mellish, K.C., contra:—The pioneer lodge was holding the property as trustees for the Grand Council. The lodge having been dissolved, the Council takes the property for the benefit of the whole Order. The word "dissolution" in the statute means simply the breaking up of a lodge, and does not involve the winding up of a corporation. There was no change in the organization of the lodge after the passage of the Act of 1890.

J. L. Ralston, replied.

The judgment of the Court was delivered by

Russell, J.

RUSSELL, J.:—The facts of this case are so fully set forth in the judgment appealed from that I shall only epitomise them briefly in this opinion.

The Provincial Workmen's Association consists of a number of lodges in various parts of the Province, or of the members of the various lodges; it makes no difference which for the purpose of this appeal. The scheme of incorporation is that a Grand

Council, which is the governing body of the Association, was incorporated by Act of the Legislature in 1882 "for the purpose of managing the pecuniary affairs of the Association" and for the promotion of the objects of the Association. Subordinate lodges might become incorporated upon the vote of two-thirds of the members present at a regular meeting, and amongst other conditions the filing in the office of the Provincial Secretary of a certificate of its good standing over the hand of the Secretary of the Grand Council. The Grand Council has power to adopt such constitution and by-laws for its government and subordinate lodges (sic) as the lodges shall deem necessary not being inconsistent with the Act or laws of the Province, and such subordinate lodges are to have the like powers subject to the approval of the Grand Council. There is a little confusion of idea manifest in this provision, but the general purpose of maintaining the subordinate position of the lodges is sufficiently indicated nevertheless. Upon the dissolution of any subordinate lodge its property not theretofore disposed of by the lodge in accordance with its by-laws is to be forthwith vested in the Grand Council to be applied, first, in payment of any debts of the subordinate lodge and the balance, if any, in such manner as the Grand Council of the Association may deem best for the general interests of the Order in the Province.

Pioneer lodge, No. 1, of the Association, was incorporated under the provisions of the above cited Act, and although the validity of the proceedings seems to have been attacked in the trial before Mr. Justice Graham, no point was made of that sort on the argument of the appeal. But in 1890 an Act of incorporation was passed by the Legislature which, it was contended, created a new juristic person with a new name. The only ground for this contention is what seems to have been a clerical mistake in the substitution of the term "workingmen" for "workmen" in the name of the corporation. The fourth section, conferring power to adopt a constitution and by-laws, expressly states that the exercise of this power is to be subject to the approval of the Grand Council of the Provincial Workingmen's Association, meaning obviously the body incorporated by the Act of 1882, and shewing clearly that the Act of 1890 did not create any new corporation, but merely continued the corporate existence of the subordinate body under the new provisions, in so far as they were new, contained in the Act of 1890.

There was no new organization of the lodge under the Act of 1896. The lodge continued its work with the old organization and treated the Act as a mere continuation of the existing incorporation.

Sec. 2 of the Act vests the real and personal property of the lodge in the corporation "created" by the Act, and provides

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that the corporation may *inter alia* "sell, mortgage, lease, convey or otherwise dispose of the same for the benefit of the lodge."

Sometime in or before the year 1908 a movement was started to amalgamate the Provincial Workmen's Association with another body, the United Mine Workers of America, and a poll was held which was without statutory authority and was, of course, a wholly unofficial and informal proceeding. The result was that a majority of the members who voted favoured the amalgamation, but eighteen of the lodges voted against amalgamation, while only seventeen voted for it, and the lodges all having, I suppose, the same representation on the Grand Council, the vote of the latter body was opposed to the amalgamation. Pioneer lodge voted by a large majority in favour of the amalgamation, 539 for and only 39 against, with 6 rejected votes. The poll was held on June 24th, 1908, and the result announced by the returning officer on July 6th.

The vote of the Grand Council I infer was taken at the meeting in September, 1908.

In pursuance of the policy adopted by the lodge, as I have no doubt, and for the purpose of carrying out a policy of secession, the trustees of the lodge in October, 1908, conveyed the real estate to one David Colwell in trust for the grantors and on the express condition that the grantee should grant and reconvey the said lands and premises to the said McPherson, Blue and Ross (the trustees who conveyed to Colwell), their successors and assigns on demand. The money of the lodge, amounting to upwards of twenty-seven hundred dollars, was also transferred to Colwell on the same trust. The lodge shortly after, in December, 1908, by unanimous resolution, returned its charter to the Secretary of the Association, and its members proceeded to form themselves into a union of the United Mine Workers.

For the reasons given in the judgment appealed from I have no doubt whatever that the proceedings taken were wholly *ultra vires* and void, that the property, both real and personal, was impressed with a trust for the benefit not only of the lodge in which it was vested, but for that of the members of the Association at large. The lodge was incorporated under the provisions of the Act of 1882 as a subordinate lodge of the Provincial Workmen's Association, of which the governing body was and is the Grand Council of the Association incorporated by that Act. The special Act of 1890, while changing the name, probably through a clerical accident, acknowledges the authority of the Grand Council. It is true, I assume, as Mr. Ralston argued for the appellants, that the contributions of the lodge to the Grand Council were fixed and have been duly paid, so that nothing is, or at least nothing was at the date of the resolution disposing of the property, due from the lodge to the governing body of the Association. And the 11th article directing that all moneys

over and above what is required for general purposes shall be placed on deposit in the name of such persons as the Council may direct, applies, I think, notwithstanding Mr. Mellish's contention to the contrary as I understood it, only to the moneys derived from the contributions from the lodges and in the hands of the Grand Council. But the following articles shew that one of the chief purposes of the organization is to accumulate funds for the purpose of maintaining members of lodges on strike, and they contemplate united action and a common interest throughout the Association in any strike entered upon under the sanction of the Grand Council, acting in this respect for the Association. For this purpose the Grand Council may enforce a levy of not more than a dollar per member to aid any lodge that may be forced to strike, and as there is no direct connection between the Grand Council and the individual members, sec. 2 of article 14 provides that the lodges are to pay the levies made on the membership. A lodge in arrears for any contribution forfeits its claim upon the Association for assistance. Among the rules established by the central authority for the government of the subordinate lodges is one which expressly says that the balance of the monthly dues paid in after deducting certain percentages shall go to the defence fund, which I understand to mean a fund for the purpose of enabling the Association to hold out at any point at which its members are involved in a labour struggle. I cannot find that the obligations of the subordinate lodges in this respect are anywhere very distinctly defined, but the common purpose is so clearly contemplated and the common obligation so fully although it may be indefinitely recognized, that I cannot imagine it would be other than a breach of trust for any lodge to hand over its funds or other property to a rival organization of which no member of the lodge could become a member without forfeiting his membership in the Association. The conveyances and transfers referred to would enable the nominees in the conveyances to carry out this design and there can be no reasonable doubt that they have been made for that purpose.

There seems to be no minority left to continue to constitute a lodge in accordance with the Act of incorporation. The lodge, as has already been stated, by unanimous resolution returned its charter to the Secretary of the Association, and I incline to think that under those circumstances, even if there were nothing in the Act of 1882 expressly providing for the case of a dissolution, the conditions would warrant the appointment of a receiver. In *Evans* v. *Coventry*, 5 DeG.M.&G. 911, Lord Justice Turner said:—

> I cannot accede to the argument that a breach of trust is not a sufficient ground for the interference of the Court by the appointal of a receiver . . . It is admitted that funds have been lost of which it was

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the duty of the defendants to take care. That loss is *primâ facie* evidence of a breach of the duty of the defendants, sufficient to authorize the interference of the Court by the appointal of a receiver.

There has been in this case not merely a loss of funds by a failure in the performance of a duty by the defendants, but a direct and intentional breach of trust in the deliberate transfer of the property of the subordinate corporation in which the Association at large, represented by the governing corporation, has an interest. Apart, therefore, from any question as to a dissolution of the subordinate corporation, I should consider the case a clear one for the appointment of a receiver.

But it is not necessary to so decide, and I do not pursue the inquiry. I agree entirely with the learned trial Judge that there was a dissolution of the lodge by the surrender of its charter in the sense in which the term is used in the Act of 1882, and that a receiver could properly be appointed to get in the property for the purposes to which it is to be devoted under the provisions of the Act.

I therefore think that the appeal should be dismissed with costs, subject to the question raised as to the costs of or against the parties joined as defendants, who were merely joined as officers of the lodge, and who, I suppose, it is contended have as such no interest in the proceedings. The plaintiffs are also entitled to the relief sought in the statement of claim.

Appeal dismissed.

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Nov. 22.

BEDARD v. PHOENIX LAND & IMPROVEMENT CO. and DROLET.

Quebec Court of Review, Tellier, Archibald, and Mercier, JJ.
Montreal, November 22, 1912.

1. CORPORATIONS AND COMPANIES (§ IV G 2—111)—POWERS OF PRESIDENT—RIGHT OF NOTARY PUBLIC TO PASS A DEED AS NOTARY IN WHICH COMPANY IS A PARTY—EFFECT OF ITS REGISTRATION.

A notary public holding the position of president of an incorporated company is not competent to pass a deed in his capacity of notary whereto such company is a party; and the registration of such deed is ineffective if registration is made of it as if it were an authentic deed.

2. CONTRACTS (§ III C—239c)—VALIDITY AND EFFECT—BOTH PARTIES ENTERING INTO CONTRACT FROM IMMORAL MOTIVES.

Where both parties enter into a contract from an improper and immoral motive, then that motive becomes the real cause of the contract and the contract is illegal.

3. LOTTERY (§ II—3)—WHAT CONSTITUTES—SALE OF LOTS—DEED TO COVER CONDUCT OF A LOTTERY.

A deed of sale intended as a blind for the purpose of running a lottery in subdivision lots, is illegal and null and cannot be opposed to a subsequent *bonâ fide* purchaser of these lots from the original owner, although it has been registered.

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APPEAL by the defendant company from the judgment of the Superior Court, St. Pierre, J., rendered at Montreal on March 14, 1911, maintaining with costs the plaintiff's petitory action to obtain possession of land sold to him by the *mis-en-cause* and occupied by the defendant.

The appeal was dismissed.

Paul St. Germain and *Aimé Geoffrion*, K.C., as counsel for the plaintiff, respondent.

J. Adam, K.C., for the defendant, appellant.

The opinion of the majority of the Court was delivered by

Archibald, J.

ARCHIBALD, J.:—The defendant company was incorporated in 1904, and its powers were expressed to be "to buy and sell, exchange and deal in and distribute immovable property." Until 1905, this company did nothing.

On the 28th June, 1905, by an authentic act passed before Dupuis, notary, the *mis-en-cause* Drolet sold to the defendant 140 lots of land for the price of $3,750, stated in the deed to have been paid cash, and this deed was enregistered on the 10th July, 1905. No cash was paid, but promissory notes were given for part and shares in the defendant company for the remainder, but no hypothec was taken.

This was the only property this company ever bought.

The plaintiff obtained a deed of the same property from the same *mis-en-cause* on the 18th November, 1907, which deed was also registered, and the plaintiff, purchaser under that deed, now takes a petitory action against the defendant to eject it from the occupation of the property.

The defendant pleads the earlier deed to it and the registration of that deed.

The plaintiff answers that the defendant's deed was altogether null because, in the first place, it was passed before notary Dupuis, who was, at the time, the president of the company defendant, and, being interested, could not pass an authentic deed; secondly, because the pretended deed of sale of the property by Drolet to the defendant was made for the purpose of enabling the defendant to engage in a lottery business, which is illegal, and was in fact so used, plaintiff alleging that the plan of the defendant was, that certain persons holding stock in the company defendant, should have the right to make certain drawings of the lots in question, and that the moment such drawings were made the lots were again redeemed by the payment of money, so that the lots always remained in the possession of the defendant, and plaintiff prays that, as far as is necessary, that deed should be set aside.

The parties disagree as to the effect of the proof. The defendant urged that the weight of the proof rebuts any pretence that, at the time of the sale, it was intended to use the property for lottery purposes. The *mis-en-cause* swears that, when the

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sale was made, it was intended to be used for the purpose of a lottery. One Thibeault, the secretary-treasurer of the defendant, swears that a lottery was never spoken of or thought of until about a month after the sale in question, and the president of the company, who is also the notary, swears that he never heard the matter spoken of. Negotiations were between the secretary-treasurer of the company and Drolet, the *mis-en-cause*, and Thibeault, at the time of the sale, gave to Drolet, the vendor, a *contre-lettre* by which he promised to retrocede the 140 lots bought "if the company was forced for one reason or another to discontinue business, and then payments made on account of the two promissory notes would be reimbursed."

Plaintiff claims that this *contre-lettre* comes very much in aid of the evidence of Drolet as to the intention of the parties at the time. If the property had been bought for the purpose of what was the ostensible business of the company, namely, trading in real estate, a clause such as that in the *contre-lettre* providing for the return of the lots to the vendor if the company should be forced to discontinue business, would be of little or no effect inasmuch as it would be likely that the lots would have been promptly disposed of in accordance with the defendant's idea of the scope of its business; but if, on the other hand, the lots were intended to be held by the defendant as a sort of blind for the operation of a lottery in which lots should be drawn and then redeemed in money according to a practice which has been very prevalent in other branches where lotteries have been conducted, then the agreement to retrocede would be more reasonable. Then again, the words "forced to discontinue business" would seem to indicate that the possibility of such an event happening was in the minds of the parties.

If we assume that that referred to the lottery in question, it would reasonably be in their minds, because naturally they might be forced to do so by criminal prosecution, which, as a matter of fact, happened shortly afterwards and defendant pleaded guilty. The defendant also says that Thibeault, the secretary-treasurer, gave the *contre-lettre* in question, but that he never submitted it to the board of directors of the defendant. It seems to me that this is really of little importance. It constituted part of the contract between the parties. The defendant never did any other business than this lottery business. It did transfer to the vendor Drolet its shares; it did admit Drolet to drawings in the lottery, and I think that it is an easy presumption and one which the Court ought to make, that, from the beginning, the defendant intended to do what it subsequently did, that is, conduct an illegal lottery.

Now, that being the case, and Drolet, the vendor, himself admitting that that was the cause of the contract in his mind, it would seem that the contract was absolutely null. I agree

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that there is quite a difference between the motive of a contract and the cause. But where the motive of a contract is a motive in the mind of one of the parties and not in the mind of the others, even if illegal, it does not render the contract void. But in this instance, where the motive is in the mind of both parties to the contract, is made for that purpose, then it becomes the cause of the contract and the contract becomes illegal.

I am of opinion that the judgment appealed from is well founded. Apart from that, it strikes me, though not pleaded in argument, that the notary, president of the company defendant, could not, under the law, act in his capacity as notary in such a way as to produce an authentic deed. But it is said that it would be a good deed as a private writing. Supposing that to be the case, its registration would not be a good registration if it was not authentic, so that the registration of the plaintiff's deed would be found to prime that of the defendant, and from that point of view also, plaintiff would have the right to judgment. I am of opinion that the judgment of the Superior Court should be confirmed.

Archibald, J.

MERCIER, J., dissented.

Mercier, J.

Appeal dismissed.

CARRUTHERS v. THE NOVA MOTOR CO.

(Decision No. 1.)

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Dec. 20.

Nova Scotia Supreme Court, Graham, E.J., and Meagher, Drysdale, and Ritchie, JJ. December 20, 1912.

1. JURY (§ I D—31)—RIGHT TO TRIAL BY—JURY NOTICE—PLEADINGS RAISING QUESTIONS OF FACT.

Where important questions of fact proper to be determined by a jury are raised upon the pleadings, a party who has given a jury notice has a *prima facie* right to have the case so determined, and an order made, notwithstanding such notice, setting the case down for trial without a jury, will be set aside.

[*Starratt* v. *Dominion Atlantic R. Co.*, 5 D.L.R. 641, 46 N.S.R. 272, followed.]

Statement

APPEAL by the plaintiff from the order of Russell, J., made at Chambers, setting the cause down for trial without a jury, notwithstanding the jury notice given by plaintiff.

The appeal was allowed.

Argument

W. F. O'Connor, K.C., in support of appeal:—The action was one in which plaintiff had the right to a jury: *Clairmonte* v. *Prince*, 30 N.S.R. 258; *Balcom* v. *Hiseler*, 44 N.S.R. 287; *Colonial Investment Co.* v. *Ledbetter*, 40 N.S.R. 504; *Starratt* v. *The Dominion Atlantic R.*, 5 D.L.R. 641, 46 N.S.R. 272. There were questions of fact to be determined in the cause as alleged in plaintiff's statement of claim: *Hunt* v. *Chambers*, 20 Ch.D. 365.

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Argument

E. P. Allison, contra:—The action is an equitable one and one that could not have been brought at common law: R.S.N.S. 1900, ch. 142, sec. 4. As to procedure at Chambers: *Balcom* v. *Hiseler*, 44 N.S.R. 287. There is a difference between the procedure in a common law and an equitable action: *Colonial Investment Co.* v. *Ledbetter*, 40 N.S.R. 504. An equitable action may be tried by a Judge without a jury: *Gray* v. *Hardman*, 28 N.S.R. 235; *Mangan* v. *Metropolitan Co.*, [1891] 2 Ch. 551; *Ruston* v. *Tobin*, 10 Ch.D. 558.

The judgment of the Court was delivered by

Ritchie, J.

RITCHIE, J.:—This is an appeal asserted by the plaintiff from an order setting the case down for trial at Chambers, notwithstanding a jury notice. This is in effect the same as setting aside the jury notice. The most important questions of fact raised by the pleadings are

(*a*) Was one Slipp on or about the 17th of October, 1910, a person in insolvent circumstances as defined by sec. 2, sub-sec. (*a*) of the Nova Scotia Assignments Act?

(*b*) Was he then known by the defendant company to be in such circumstances?

(*c*) Was a transfer made by Slipp to the defendant company made with the intent to give an unlawful preference?

There are other questions of fact raised, but I think those which I have stated are sufficient to shew that the plaintiff has a *primâ facie* right to have his case tried by a jury if he so desires. There is absolutely nothing in Mr. Allison's affidavit to meet the *primâ facie* case which I think the pleadings make for the plaintiff. The case recently decided of *Starratt* v. *Dominion Atlantic Railway Co.*, 5 D.L.R. 641, is an authority supporting the plaintiff's contention. I adhere to the view which I expressed in that case and it is not necessary for me to repeat it here.

The plaintiff's appeal in my opinion should be allowed with costs, and that the plaintiff have the costs at Chambers.

Appeal allowed.

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CARRUTHERS v. THE NOVA MOTOR CO.
(Decision No. 2.)

Nova Scotia Supreme Court, Graham, E.J., and Meagher, Russell, and Drysdale, JJ. December 20, 1912.

1. ELECTION OF REMEDIES (§ I—8)—ON TRIAL—MISTAKE—APPLICABILITY OF N. S. ORDER 34, R. 24.

A party cannot with full knowledge of all relevant facts and with a choice of two courses open to him, elect to adopt one of such courses and then invoke the aid of Nova Scotia Order 34, rule 24, to avoid the consequences of a mistake in his election, as that rule does not apply to a case where a party present at a trial elects for one reason or another not to take part in it, but is intended to cover cases of inadvertence, neglect or accident, etc.

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CARRUTHERS v. THE NOVA MOTOR CO. (No. 2.)

Ritchie, J

APPEAL from the following judgment of

RITCHIE, J.:—In this case I am asked to open up the judgment which has been regularly obtained by the defendant company, and am referred to O. 27, r. 14, and O. 34, r. 24.

The trial of this case was postponed from time to time in consequence of the absence from the city of Mr. O'Connor, he having the conduct of the action for the plaintiff and also being a witness on his behalf. The case was finally set down by Mr. Justice Drysdale for trial on the 4th of October. On that day Mr. O'Connor appeared, declined to take any part in the trial, and stated that he intended to rely upon an appeal which he had asserted from the order setting the case down for trial. It now appears that when Mr. O'Connor took this position he was under a misconception as to the effect of rule 23 of order 34. In other words, he made a mistake of law, and was under the impression that if Mr. Allison went on to judgment it would be irregular and the judgment would be set aside. He had a legal right to adopt this course. He was looking for strict law. But if in taking this course he is wrong in his law, I think he must take the consequences.

This, under all the circumstances, is a case in which I do not think I would be justified in granting relief on the ground of mistake of law.

The application is refused with costs.

Argument

W. F. O'Connor, K.C., in support of appeal:—O. 27, r. 14; O. 34, r. 24; An. Pr. 1913, p. 591, and cases referred to; *King* v. *Sandeman*, 26 W.R. 569; *Wright* v. *Mills*, 60 L.T.R. 887; *Burgoine* v. *Taylor*, 9 Ch.D. 1; *Ryan* v. *Fish*, 9 P.R. (Ont.) 458, 463.

E. P. Allison, contra:—The judgment was perfectly regular and there was no reason for opening it up. The Judge below had a discretion and no appeal should be allowed unless his discretion was exercised upon a wrong principle. Where there is a statutory limit within which a thing must be done, as where a writ is issued and is not intended to be served until a certain event happens, it is not considered as having been issued until it is served: *Hekla Fire Ins. Co.* v. *Schroeder*, 9 Ill. App. Rep. 473.

The judgment of the Court was delivered by

Russell, J.

RUSSELL, J.:—This cause was set down for trial before a Judge at Chambers at the instance of the defendant, who had succeeded in having the cause set down after a number of adjournments at the instance of the plaintiff. On the day appointed counsel for the plaintiff appeared and stated that he would take no part in the trial, but would rely on an appeal

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Russell, J.

outstanding from an order that the cause should be tried without a jury, notwithstanding plaintiff's notice that a jury would be required. It appears from the affidavit of plaintiff's counsel that when he so determined not to take part in the trial he was under the impression that the burden of proof was on the defendant, and that defendant would have to begin. It is agreed that he was mistaken on this point, that the burden was on the plaintiff, and that so far as this point is involved the judgment is perfectly regular.

The defendant nevertheless asks to have the judgment set aside under O. 34, r. 24. I do not think it can be possible that this rule applies to a case where a party being present at the trial deliberately elects for one reason or other not to take part in the trial. I should suppose the rule to be intended for cases of inadvertence or negligence or accident of some kind, or it might possibly be that if a plaintiff failed to appear owing to some misapprehension of fact relating even to the merits, or affecting the fortunes of the cause, the rule could be invoked. But it seems contrary to principle that a party can, with full knowledge of all relevant facts and with two courses open to him, elect to adopt one of those courses and afterwards invoke this rule to avert the consequences of his wrong choice of courses consequent upon his mistake of law. I must reluctantly agree with the decision of the learned Judge at Chambers. The appeal should be dismissed with costs, but the Court having decided on another appeal, that the defendant was entitled to a trial by jury the judgment obtained by the plaintiff will, of course, be set aside.

Appeal dismissed.

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McKENZIE v. TOWNSHIP OF CHILLIWACK.

Judicial Committee of the Privy Council. Present: Viscount Haldane, L.C., Lord Atkinson, Lord Shaw of Dunfermline, and the President of the Probate, Divorce and Admiralty Division (Sir S. T. Evans). October 30, 1912.

1. EVIDENCE (§ II H 1—265)—NEGLIGENCE—BURDEN OF PROOF—ESTABLISHMENT OF LIABILITY OF MUNICIPALITY FOR INJURIES TO INMATE OF JAIL.

In an action against a municipality for neglect to take precautions against fire whereby the death of a prisoner resulted while occupying a wooden cell after his arrest, it is incumbent on the plaintiff to establish, by the burden of proof, that the deceased's death was caused by the defendant's negligence, from a negligent act or omission, to which the death of the deceased can be attributed and traced; and if there is no direct proof of negligence, and the circumstances proven are equally consistent, the absence of negligence as with its existence, the burden has not been sustained by plaintiff, and a recovery cannot be had.

[*Wakelin* v. *South Western R. Co.*, 12 A.C. 41, applied.]

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2. Jails (§ I—1)—Injury to inmates—Liability of municipal corporations—Multifarious duties of peace officer.

Where a small rural community allowed its peace officer to combine also the duties of several other officers, and, as such peace officer, he placed a prisoner in the lock-up, which three hours afterwards burned up, and in which fire the prisoner lost his life, all during the absence of the peace officer, who was attending to other duties, it was not unreasonable on the part of the municipality to permit its peace officer to attend to the duties of other offices which he held, and it was not the duty of the municipality to keep said officer or any one else in constant attendance on the prisoner.

[*McKenzie* v. *Chilliwack*, 15 B.C.R. 256, affirmed on appeal.]

3. Municipal corporations (§ II G 4—255*a*)—Gaol supervision as to prisoners—Caretaker or watchman.

A small rural municipality whose only police officer arrests a person for drunkenness and disorderly conduct, and, after taking away from the prisoner the matches found upon him, imprisons him in a frame "lock-up" building to await his trial before a magistrate, is under no legal obligation to keep a caretaker or watchman in constant supervision over the prisoner; and the municipality is not liable to the prisoner's relatives for his death by a fire which burned up the lock-up in an interval between the police officer's hourly calls of inspection, where the cause of the fire is not shewn.

[*McKenzie* v. *Chilliwack*, 15 B.C.R. 256, affirmed on appeal.]

Statement

Appeal by special leave from a judgment of the Court of British Columbia, *McKenzie* v. *Chilliwack*, 15 B.C.R. 256, April 5, 1910, affirming a judgment of the Supreme Court, February 22, 1909, which dismissed the appellants' action.

The deceased was burned to death on October 27, 1906, while confined, under the circumstances stated in the judgment of their Lordships, as a prisoner in a lock-up within the respondents' township. It was alleged in the pleadings that this was due to the negligence of the defendant "in not causing some person to be constantly in and about the said building and to be constantly in charge thereof and in charge of the said Daniel McKenzie so that in case of fire or other danger the persons confined in said building might be rescued therefrom."

The respondents denied liability and pleaded that the lock-up was not the property of the municipality and that the police officer in charge thereof was not its servant or agent. They put in no evidence, but moved for judgment as of nonsuit. The jury found that they had been guilty of negligence and awarded damages to each of the appellants. Morrison, J., the trial Judge, dismissed the action on the respondents' motion for judgment. The Court of Appeal affirmed his decision. It considered that it would be unreasonable in a rural district to hold that it was the duty of the corporation to leave a constable or keeper constantly at the lock-up, and that there was no evidence of negligence on the part of the respondents or of the constable.

Argument

Joseph Martin, K.C., for the appellants, contended that the verdict of the jury should be upheld to the effect that the death in question was caused by the respondents' negligence. No

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provision had been made for the safe custody of the deceased. There was no one within call, although the burning of two men must have taken some time. Only one person was employed to take charge of them, and he had a variety of other duties to perform, imposed upon him by the respondents. The respondents detained the man in custody and they were bound to take all precautions to ensure safety to his life. They had cut off all means of escape and were legally responsible for what had happened.

Sir R. Finlay, K.C., *W. B. A. Ritchie*, K.C., and *Rowlatt*, for the respondents, contended that all reasonable precautions had been taken in view of what was likely to happen, and there was no evidence of negligence for which the respondents were responsible. The negligence charged was not against the constable, but against the respondents for not providing sufficient officers. The respondents were not bound to have a person constantly in charge of the lock-up. Reference was made to Bevan on Negligence in Law, 3rd ed., vol. 1, p. 326, where there are several American decisions collated, and *Stambury* v. *Exeter Corporation*, [1905] 2 K.B. 838, 842.

[They were stopped by their Lordships.]

J. Martin, K.C., replied.

The judgment of their Lordships was delivered by

Sir S. T. Evans.

THE PRESIDENT OF THE PROBATE DIVISION:—The appellants brought an action in the Supreme Court of British Columbia, under an Act resembling Lord Campbell's Act, claiming damages for the death of Daniel McKenzie. They were the widow, son and daughter of the deceased. His death was caused by a fire which burnt down a cell which was used as a "lock-up" for the rural municipality of Chilliwack. The deceased had been placed in this cell by a constable after arrest. The action was brought against the corporation of Chilliwack.

After much hesitation, the learned Judge at the trial left the case to the jury. The verdict of the jury was, "We find that Daniel McKenzie met his death through the negligence of the municipality of Chilliwack. We award the wife $3,000, and the children $2,000 each."

Subsequently, on motion made for the defendants for a nonsuit, the learned Judge dismissed the action without costs. The appeal of the plaintiffs from that decision of the Court of Appeal for British Columbia was dismissed with costs.

The question for decision is whether there was any evidence of negligence on the part of the defendants fit to be left to the jury.

There appears to have been some confusion in the Courts below between two matters, which should be kept quite distinct, namely, (1) acts of negligence on the part of the defendants'

servant in charge of the lock-up, which, if alleged and proved, would involve the question of the liability of the defendants therefor; and (2) alleged negligence on the part of the defendants themselves.

In their Lordships' opinion, no question of fact, or of law, of the former kind arises at all in this case.

The verdict of the jury affords no indication of what the negligence was which they found.

The statement of claim (par. 4) averred the duty of the defendants to have been "to cause some person to be constantly in and about the said building (i.e., the lock-up), and to be constantly in charge thereof, and of the persons confined therein." The negligence alleged in the statement of claim (pars. 5 and 6) was that of the defendants, in not having some person constantly in charge, so that in case of fire or other danger the persons confined in the lock-up might be rescued. It was also pleaded (par. 5) that by reason of such alleged negligence the lock-up took fire, and the deceased was burned to death.

Counsel for the plaintiffs who argued at the Bar before their Lordships, and who also conducted the case in the British Columbian Courts, did not contend that the defendants' servant had been guilty of any negligence. His case was that the defendants were directly guilty because they employed the person who arrested the deceased and who was in charge of the cell to perform other duties also which made it impossible for him to be in constant attendance at the lock-up.

Their Lordships are willing to assume for the purposes of this appeal (but without pronouncing any decision on the point) that the respondents are responsible for the appointment of the gaoler for the lock-up, and that if the appointment was not fitly or carefully made, they would be liable for any reasonably probable consequence.

The facts are few and simple.

Chilliwack is a small rural municipality. The "lock-up" which the respondents provided or used was a wooden cell, part of the Court House buildings which were situate about the centre of the little town.

In May, 1906, the respondents appointed one Calbeck to be "chief of police, sanitary inspector, pathmaster and poundkeeper." He was the only constable in the municipality. As constable he arrested the deceased man on October 27, 1906, for being drunk and disorderly, and placed him in the cell about six o'clock p.m. He searched him and took away the matches found upon him. About an hour later he arrested another man; he also searched him and deprived him of matches and placed him in the same cell.

Shortly after nine o'clock that evening a fire broke out in or about the cell. Calbeck was then in the town attending to

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some of his humble but useful duties; but he came on the scene of the fire before the fire company arrived.

Between the time of the arrest of the deceased, about six o'clock, and a quarter past nine o'clock, when he went to the fire, Calbeck appears to have been at the cell four times, and he was able to attend there and to look round within about half an hour of the occurrence of the fire.

The evidence went to shew that the fire originated in the cell in which the arrested men were. There was no stove, or fire, or furnace alight in or near the cell. The statement in the appellants' printed case upon the appeal to their Lordships as to the origin of the fire is as follows: "The fire, which occurred during Calbeck's absence, appears to have originated in the cell in which the prisoners were confined, but apart from the fact that matches could have been handed to one or other of the prisoners through a window by persons passing outside the cell, there is no evidence as to the actual cause of the fire."

If an inference is to be drawn it would not be unreasonable to infer that the place was set on fire by the deceased, or his fellow-prisoner, or both.

In any event the plaintiff failed to prove how the fire was caused, or to shew that any one could reasonably expect that a fire might take place.

The principle of law to be applied to these facts is that which was stated by Lord Halsbury, L.C., in the leading case of *Wakelin* v. *London and South Western R. Co.* (1886), 12 App. Cas. 41, as follows: "It is incumbent upon the plaintiff 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. That is the fact to be proved. If that fact is not proved the plaintiff fails, 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, for the very simple reason that the plaintiff is bound to establish the affirmative of the proposition, '*Ei qui affirmat non ei qui negat incumbit probatio.*'"

In their Lordships' opinion the appellants in this case entirely failed to establish, or adduce any proof, that the death of the deceased was in any way attributable to, or materially contributed to by, any negligent act or omission on the part of the respondents. Their Lordships concur in the way in which the case was dealt with in the judgment of Macdonald, C.J.A.

It was not unreasonable, in their Lordships' view, for the defendants in the small rural municipality of Chilliwack to allot to Calbeck the other duties to some of which he attended on the evening of the fire; nor was it the duty of the respond-

ents in the circumstances to keep Calbeck or any other person constantly at the lock-up. No breach of duty on their part caused or contributed to the death of deceased.

Upon the facts proved at the trial there was no evidence whatsoever of negligence on the respondents' part fit to be left to the jury.

Their Lordships will therefore humbly advise His Majesty that the judgment appealed from ought to be affirmed, and this appeal dismissed with costs to be paid by the appellants.

Appeal dismissed.

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ALLAN v. GRAND TRUNK R. CO.

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Nov. 19.

Ontario Court of Appeal, Garrow, Maclaren, Meredith, and Magee, JJ.A. November 19, 1912.

1. Master and servant (§ V—340)—Workmen's Compensation for Injuries Act, sec. 3, sub-sec. 5—Negligence of engineer—Injury to brakeman.

Where a brakeman engaged in coupling cars at night is injured by reason of the negligence of the engineer in charge of the locomotive in failing to wait for a new signal to start, it having been prearranged between the two that the brakeman was to give such signal by lantern, the master is liable under sub-sec. 5 of sec. 3 of the Workmen's Compensation for Injuries Act, making an employer responsible "by reason of the negligence of any person in the service of the employer who has the charge or control of any points, signal, locomotive, engine, machine, or train upon a railway, tramway or street railway."

[*Martin v. Grand Trunk R. Co.*, 4 O.W.N. 51, applied.]

Statement

Appeal by the defendants from the judgment at the trial before Boyd, C., and a jury, in favour of the plaintiff.

The plaintiff, a brakeman employed by the defendants upon a freight train, was while in the discharge of his duties injured at Berlin station upon the defendants' line on the night of the 18th of August, 1911, through the alleged negligence of the engineer in charge of the engine.

The appeal was dismissed.

D. L. McCarthy, K.C., for the defendants.

R. S. Robertson, for the plaintiff.

Garrow, J.A.

Garrow, J.A.:—The material facts were disputed at the trial. But it is now conceded by the learned counsel for the defendants that, for the purposes of the argument here, the facts must be accepted as given by the plaintiff, from which it follows, and is also conceded, that the only question really is as to the defendants' responsibility under the circumstances for the act of the engineer.

According to the plaintiff the circumstances were as follows: the train crew consisted of the conductor, the engineer and his fireman and two brakemen. On arriving at the station shortly

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after midnight the conductor directed a certain shunting operation to be made, and left the management of it to the plaintiff, the rear end brakeman, while he proceeded to the station-house in the discharge of his other duties. It being dark, the movements were necessarily directed by means of signals with lanterns. The plaintiff gave to the engineer the "back up" signal, in consequence of which the engine under the direction of the engineer backed up. When it had proceeded as far as the plaintiff considered necessary he gave the "stop" signal, and as he says (one of the much disputed points) the backing movement ceased. Then, while the engine was at rest the plaintiff proceeded between two cars to arrange a coupling, and while in that position, without any new signal having been given, the backing movement was resumed, with the result that the plaintiff was caught and injured as described.

By subsec. 5 of sec. 3 of The Workmen's Compensation for Injuries Act, an employer is made responsible "by reason of the negligence of any person in the service of the employer who has the charge or control of any points, signal, locomotive, engine, machine, or train upon a railway, tramway or street railway."

In *Martin* v. *Grand Trunk R. Co.*, 4 O.W.N. 51, this Court recently considered and applied to the facts in that case the sub-section which I have just quoted. That was the case of a negligent order given to an engineer by a yard helper by reason of which his foreman was run down and injured. The engineer in that case could not be said to have been negligent, for his duties required him to act upon the orders of the yard helper in the absence of the yard foreman. And we accordingly, Lennox, J., dissenting, held the defendants responsible for the consequences of the negligence of the yard helper in controlling the movements of the engine.

This seems a stronger case for the plaintiff, for here the result followed from the negligent act of the engineer himself in backing the engine after he had received and acted upon a "stop" signal, without receiving a new signal of any kind.

The appeal fails and should be dismissed with costs.

Maclaren, J.A.
Magee, J.A.
Meredith, J.A.

MACLAREN and MAGEE, JJ.A., concurred.

MEREDITH, J.A.:—The only question argued upon this appeal is whether the driver of the engine in question was a person in charge or control of it in doing that which, as the jury found, caused the plaintiff's injury.

It is contended that he was not, but that the plaintiff was, because, admittedly, the plaintiff was in charge of the shunting operations in which the accident happened, and in which the engineer was subject to the direction of the plaintiff.

But an engineer, in running his engine, is, necessarily, most

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of the time subject to similar direction by train-despatchers, conductors, yard-masters, yardmen, brakemen, switchmen and others; his engine could not be run safely or efficiently but for such direction; and he would seldom, if ever, be in charge or control of his own engine if such directions deprived him of it.

Physically he was in actual control of it; and so came quite within the literal meaning of the words "in charge or control"; and I can imagine no sort of substantial reason why it should not be considered he came, in the strictest legal sense, quite within the meaning of the words of the Act—a person in charge or control of an engine.

A railway locomotive engine is a very powerful, and, if not very carefully managed, a very dangerous, piece of locomotive machinery; which, doubtless, was the reason for creating liability among fellow-workmen in a common employment, for the negligence of any person in charge or control of it for the employer, rather than merely for want of care in the selection of those put in charge of such machinery.

Whatever may be said regarding the person who, as train-despatcher, conductor, yard-master, yardman, brakeman, switchman, or in any other capacity, may, in the performance of his duty as such, give directions to the engineer, or other person in actual control, of the engine, there cannot, I think, be any doubt that an engineer, when running his engine in the performance of his duty as such, or such other person so likewise engaged, as in this case, is, within the meaning of the enactment upon which the judgment in this case is based, a person in charge or control of an engine; see *Martin* v. *Grand Trunk R. Co.*, 4 O.W.N. 51, but it may be observed that there may have been liability any way in that case on the ground that the opening of the "point," which was held to be negligence causing the accident, was done by one in charge or control of that point and of the other point which it was held he ought to have opened instead, and so made this master liable whether, or not, he was in charge or control of the engine.

I would dismiss the appeal.

Appeal dismissed.

Re MONTGOMERY.
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Nov. 25.

Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue, Cameron and Haggart, JJ.A. November 25, 1912.

1. EXECUTORS AND ADMINISTRATORS (§ II A 2—40)—REAL ESTATE ASSETS—LIABILITY TO CREDITORS.

In Manitoba an administrator is liable to creditors for real estate assets in his hands. (*Per* Howell, C.J.M.)

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2. EXECUTORS AND ADMINISTRATORS (§ II B—45)—POSSESSION OR DISPOSAL OF ASSETS—LIABILITY AS TRUSTEE.

Under sub-sec. (b) of sec. 21 of the Devolution Act (Manitoba), declaring that the personal representative shall hold the land as trustee for the person beneficially entitled, the trust relationship of the administrator is the same in both real and personal property. (*Per* Howell, C.J.M.)

3. EXECUTORS AND ADMINISTRATORS (§ IV C 1—100)—DISTRIBUTION AND SETTLEMENT BY—BENEFICIARIES' RIGHT TO REAL ESTATE NON-PARTITIONED.

Where all the parties beneficially entitled to a decedent's real estate agree that they do not want the estate divided, the administrator should hand it over to them undistributed and undivided. (Dictum *per* Howell, C.J.M.)

[*Blake* v. *Bayne*, [1908] A.C. 371; *Cooper* v. *Cooper*, L.R. 7 H.L. 53, referred to.]

4. EXECUTORS AND ADMINISTRATORS (§ IV C 1—100)—DISTRIBUTION AND SETTLEMENT BY—ESTATE CAPABLE OF PARTITION—PARTITION IN PREFERENCE TO SALE.

Where a decedent's estate is of such a nature that the administrator can reasonably divide it and thus distribute it in specie amongst the parties beneficially entitled thereto, he may do so instead of converting it into money. (Dictum *per* Howell, C.J.M.)

5. EXECUTORS AND ADMINISTRATORS (§ IV C 1—100)—DISTRIBUTION AND SETTLEMENT BY—DISTRIBUTION OF REAL ESTATE UNDIVIDED—SALE OF PORTION OF REALTY TO CHARGE COSTS.

An administrator, though he has the right to sell real estate for the purpose of distributing the estate amongst the parties beneficially entitled thereto, cannot convey undivided fractions of it to some of the next of kin and retain a fraction in his hands so as to charge the expense of the administration after such distribution to the balance left in his hands. (*Per* Perdue, J.A.)

Statement

APPEAL from an order of Robson, J., discharging an order made to add parties in the Master's office.

The appeal was allowed and judgment below varied.

This suit was instituted for the administration of the estate of Margaret Jane Montgomery, by the plaintiff, one of her daughters, against Thomas Johnson Montgomery, the administrator.

After the decree was made, proceedings were taken in the Master's office during which Andrew Milton Thompson, Peter McDonald and Thomas Johnson Montgomery, the administrator, were made parties, the latter in his personal capacity.

Subsequently an order was made discharging the order adding McDonald and Thompson as parties.

An order was also made in the Master's office for sale of the intestate's lands.

Although the time for leave to appeal had expired, Thomas Johnson Montgomery, acting in his personal capacity, obtained leave to appeal against the order, adding him as a party in his personal capacity, and against the order for sale of the lands.

That application was heard before Robson, J., who discharged the order adding Thomas Johnson Montgomery as a

party in his personal capacity and set aside the order for the sale of the lands.

The plaintiff then appealed to the Court of Appeal against the order of Robson, J.

J. B. Coyne, and *J. Galloway*, for appellant.

E. K. Williams, for the respondent.

HOWELL, C.J.M.:—Practically the whole of the estate of the intestate consisted of wild prairie farms.

The administrator allowed the land to remain without sale, appropriation or distribution for about 17 years and then, apparently with the consent of three out of four of the next of kin, conveyed to each of the three an undivided one-sixth part of such of these farms, and then each at once re-conveyed this undivided share to him so that, with his undivided one-third, which he was entitled to as the husband of the deceased, he became the holder of an undivided five-sixths of the estate. He absolutely sold to other persons, not parties to this suit, two of the parcels of land. The administrator has, therefore, placed the estate in the position that as to two parcels of land there is left in him an undivided one-sixth, with the remainder in the hands of strangers, and as to four parcels, he has vested in himself, which he claims in his individual right, an undivided five-sixths thereof, and that as administrator, he holds only an undivided one-sixth share. He offers to convey to the plaintiff this undisposed of, undivided one-sixth share, upon her paying to him her share of certain moneys found to be due him from the estate.

Counsel for the administrator strongly argued that an administrator of an estate, at all events where the assets to be distributed are real estate, can so administer, and does divide the estate by such conveyances, and apparently, whether they consent or not.

After the enactment of our Devolution of Estates Act, whereby real estate passed to the administrator in the same manner and subject to the same distribution as personal estate, the Act of 5 & 6 Edw. VII. (Man.) ch. 21, was passed, and evidently the draftsman desired to copy into our statute portions of the English Land Transfer Act of 1897, and perhaps without fully considering that in Manitoba the same persons took alike without distinction the real and personal estate of an intestate, whereas, in England, the rights of heirs-at-law are not disturbed as to real estate further than is necessary to vest the same in the personal representative for administration.

I apprehend that an administrator would be liable to creditors for real estate assets in his hands in this country and that the remarks of Robbins & Maw, on Devolution of Estates, at page 148, would not apply to Manitoba.

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By placing in our Act, as sec. 21, sub-sec. (*d*), a practical copy of sec. 2, sub-sec. 3, of the Imperial Act, 60 & 61 Vict, ch. 65, confusion may arise as to what is intended. The original section 21 in the Devolution Act, ch. 48, is struck out and the English section 2 put in its place, but instead of section 3 of the English Act, the Legislature enacted a new section 25 of the Devolutions Act and repealed section 19 of the Trustees Act.

This new section gives power to the administrator to sell real estate for various purposes, and amongst others, for the purpose

> of distributing or dividing the estate among the parties beneficially entitled thereto, whether there are debts or not,

a power which the administrator has not got under the English Act. I can readily see the necessity for section 2 of the English Act, for Parliament desired to preserve to the heir-at-law his rights to the real estate or to the proceeds of the sale, if one was required to pay debts or charges, but as in the original Manitoba Act all estate both real and personal went to the same parties, I do not understand why the clause was copied into our Act, and I cannot see why it was necessary, therefore, to complicate matters by declaring in sub-sec. (*b*) that the personal representative shall hold the land as trustee for the persons beneficially entitled, if it was necessary here it was equally necessary as to personal estate.

After careful reflection I do not think that the Legislature intended by that sub-section to create a difference between real and personal estate in the title or holding of the administrator, and that his trust relationship is the same in both classes of the estate.

The late Mrs. Montgomery died in January, 1889, and a few months later administration was granted to the defendant, and it may be that the last mentioned statute does not apply to this case, but as the changes in the law therein made do not affect this case in the conclusions to which I have arrived it is not necessary to decide that difficult point.

Text-writers and Judges lay down the duties of administrators to be "to realize the assets," "to distribute the estate," "to get in the assets." "The executor has absolute dominion over the estate for distribution" . . . "and of course he can divide it, for that is the very reason why he was appointed." *Per* Kay, J., in *Barclay* v. *Owen*, 60 L.T.N.S. 220, 222.

> For the benefit of creditors and for the facility of division among the next of kin, the estate is to be turned into money.

Lord Cairns in *Cooper* v. *Cooper*, L.R. 7 H.L. 53.

In the case of *Re Fletcher*, 26 O.R. 499, 505, Osler, J., held under similar legislation that the administrator was not bound to sell where the parties entitled to the real estate consisted of

one person only, and a widow's right to dower. No doubt the reason being that one person only was entitled subject to a life estate in one-third of the land which could by law be assigned. If in such a case there was a sale it would be difficult to calculate the widow's right or share in the purchase money.

Where all the parties entitled agree that they do not want the estate divided, the administrator should hand it over to them undistributed and undivided. See the language of Lord Cairns in *Cooper* v. *Cooper*, L.R. 7 H.L. 53; *Blake* v. *Bayne*, [1908] A.C. 371.

Lord Cairns in that case set forth fully the nature of the estate or right of the next of kin in the estate of the intestate, and Lord Hatherly, at page 72, held that where all the parties entitled desired the property to be handed over to them undistributed the administrator must comply with this request.

This is not a case of handing over or conveying a particular parcel of the estate by way of appropriation as is often and properly done by administrators. If the estate is of such a nature that the administrator could reasonably divide, and thus distribute it amongst the parties entitled, this he might, and probably should, do instead of converting into money.

In my view of the law, I do not think the administrator, so far as the plaintiff is concerned, has distributed the estate as to the four parcels of land which are still in his name, and I do not think he acted properly in his disposition of the other two parcels. The parties who accepted the conveyances have taken that method of distribution, and cannot complain.

I think the order for sale of the four parcels should stand.

Owing to the tangle in which this suit now stands, it would be well to direct that the plaintiff take from the administrator the undivided one-sixth share in the two parcels sold to strangers as her share in the distribution of these two parcels.

The adminstrator has been made a party defendant personally, and while perhaps this was not necessary, I see no reason why he should not remain a party individually.

To the extent indicated above, the order of Mr. Justice Robson will be set aside, and the appeal allowed. The appellant is to have the costs of this appeal and of the application before Mr. Justice Robson.

Perdue, J.A.

PERDUE, J.A.:—The intestate in this case died on 1st January, 1889. In the month of April, 1889, letters of administration of her estate were issued to her husband the defendant T. J. Montgomery. At the time of the death of the deceased the enactment in force as to the descent of real estate, where the owner died intestate, was contained in 51 Vict. (1888) ch. 22, sec. 2, which is as follows:—

> Land in the Province shall go to the personal representative of deceased owners thereof in the same manner as personal estate goes.

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By 52 Vict. ch. 16, sec. 27, which came into force on 5th March, 1889, that provision was re-enacted and by section 33 of the same statute was declared to have extended from 1st July, 1885, and thenceforth to all land in the Province and every estate and interest therein.

The effect of the letters of administration issued to the defendant was to confer upon him as the personal representative of the deceased the right and duty of administering her estate both real and personal and in his administration he was to take and deal with the real estate in the same manner as if it were personal estate. This was the obvious meaning of the enactment in force when the defendant took upon himself the administration of the estate of the deceased.

By 54 Vict. (1891) ch. 6, sec. 3, the above section 27 was amended by adding at the end thereof the words:—

> and the personal representative shall have power to dispose of and otherwise deal with all land so vested in him, with all the like incidents but subject to all the like rights, equities and obligations as if the same were personal property vested in him.

I must confess that I am unable to see why this amendment was deemed necessary, or how it gave any extended meaning to the section. If land went to the personal representative of the deceased in the same manner as personal property, then he had power to sell or otherwise deal with it as if it were personal property. Therefore, it appears to me, the administrator in the present case had under the administration issued to him in 1889 full power to sell the land whether to pay debts or for the purpose of distribution, or otherwise, as he might lawfully deal with personal estate.

Section 3 of the Act of 1891 is, it seems to me, merely declaratory of the meaning of section 27 of 52 Vict. ch. 16, and 51 Vict. ch. 22, sec. 2, a meaning which these sections would carry without the addition made by section 3. The amendment was probably made to shew more clearly the true purpose of the legislation from the beginning and to ease the minds of lawyers who were obsessed with the sanctity of real estate and the old laws governing its descent.

The provisions of 52 Vict. ch. 16, secs. 27, 33 and 54 Vict. ch. 6, sec. 3, were consolidated in the Revised Statutes, 1892, as section 21 of the Devolution of Estates Act. In 1895 (58 & 59 Vict. ch. 10, sec. 1) this latter Act was further amended by adding a new section, sec. 25. This section empowered an administrator in whom the real estate of an intestate was vested to sell the real estate not only to pay debts but for the purpose of distributing the estate. Provisos were added to the section, one of which was that where infants or lunatics were interested and there were no debts, the approval of the district registrar

should be obtained in order to make a sale valid. But sub-section (2) declared that nothing in the section should derogate from any right or power heretofore possessed by an executor or administrator. The section was further amended in 1898 (ch. 15, sec. 2) and in 1900 (ch. 9); but these amendments do not affect the present case. The enactments relating to the power of an administrator to sell real estate and the qualification of such power, were consolidated in the Revised Statutes 1902, ch. 170, sec. 19, with the saving proviso:—

> nor shall anything in this section contained derogate from any right or power possessed by the administrator before the twenty-ninth day of March in the year one thousand eight hundred and ninety-five.

The enactment relating to the vesting of the real estate in the administrator was contained in the Devolution of Estates Act, R.S.M. 1902, ch. 48, sec. 21.

By 5 & 6 Edw. VII. ch. 21, sec. 1, both the above last-mentioned sections were repealed and new sections substituted in their place. These new sections were adopted from the Imperial Land Transfer Act, 1897. It is not necessary in this case to consider the effects of the changes made by 5 & 6 Edw. VII. ch. 21, in the powers of an administrator over the real estate of the intestate. By section 2 it is declared that the provisions of the Act, which are not merely declaratory, shall not be retroactive. The changes in the law introduced by the Act do not apply to the administration issued in the present case.

The result is that the administrator in this case had power to sell the lands of the deceased, without obtaining the approval of the district registrar or other authority, as he might sell personal property of the deceased for the purpose of distributing the proceeds and this power was not taken away by subsequent enactments. Instead of selling the land and distributing the proceeds, he obtained from the heirs of the deceased, except the plaintiff, conveyances of five-sixths interest in the lands, leaving, as he claims, one-sixth only in himself as administrator, out of which one-sixth the plaintiff's interest would, according to his contention, have to be paid. If this contention were sustained, the other heirs, including himself, would have received their full shares in the lands several years ago and any expense since incurred by him as administrator might have to come out of the plaintiff's share. Even if he were to convey to the plaintiff a clear undivided one-sixth in the land she could not realize from that fraction as much as if the land were sold out and out and one-sixth of the proceeds paid to her.

The administrator's dealing with the real estate of the deceased, by conveying undivided fractions of it to some of the next of kin, and retaining a fraction in his hands was not such a distribution as is contemplated by the law.

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I think that the appeal should be allowed and that an order should be made in the terms mentioned in the judgment of the Chief Justice.

RICHARDS, CAMERON, and HAGGART, JJ.A., concurred.

Appeal allowed and judgment below varied.

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SCHAEFER v. MILLAR et al. (The Battleford Realty Company).

Saskatchewan Supreme Court. Trial before Haultain, C.J. December 18, 1912.

1. BROKERS (§ II A—5)—OF REAL ESTATE LISTING BY MAIL—SALE BY BROKER BINDING OWNER.

Where the owner of land wrote a listing letter to a real estate broker saying, "I hereby give you the right to sell the above property" (having described it), and no other words or phrases in the letter modify or restrict the ordinary meaning of the word "sell," the agent would have authority to sell and enter into a contract binding upon the owner in the absence of any conduct by the parties or evidence shewing a modified meaning of the said word.

2. SPECIFIC PERFORMANCE (§ I A—12)—SALE BY BROKER—CONSTRUCTION OF WORD "SELL."

Where land is described in a letter from the owner to a real estate broker, which letter also contains the words, "I hereby give you the right to sell the above property," and the broker arranged for a sale thereof with the plaintiff, who executed a formal agreement of sale, and where the subsequent conduct of all the parties and the evidence in the case shews that the ordinary meaning of the word "sell" was considered as modified or restricted, the plaintiff is not entitled to specific performance of the said agreement of sale as against the owner.

3. BROKERS (§ II A—5)—OF REAL ESTATE—SALE BINDING OWNER—REFORMATION OF CONTRACT OF SALE.

Where a listing letter is sent to a real estate broker by the owner of land, describing it and containing the words, "I hereby give you the right to sell the above property," and the broker arranges for the sale of said land with the plaintiff, and the plaintiff acted thereupon in a *bona fide* manner, the owner is not entitled to reform the contract between the broker and plaintiff where, as a matter of law, the words quoted did give authority to the broker to sell.

Statement

ACTION for the specific performance of an agreement for the sale of lands, and for an injunction and damages, the defendant counterclaiming for the rectification of said agreement.

The action and counterclaim were both dismissed without costs.

R. R. Earle, for the plaintiff.

A. M. Panton, for defendant Good.

W. M. Martin, for defendant Millar.

Haultain, C.J.

HAULTAIN, C.J.:—Some time in December, 1911, the defendant Millar signed and delivered the following document to the

defendant Good, a real estate agent or broker in Battleford, carrying on business under the firm name of "The Battleford Realty Company."

To the Battleford Realty Company,
Battleford, Sask.

Dear Sir:—

Please place the following property for sale on your list:—

35, 36 N. 25th St. W.C.A.

Cash price $300. Time price $350.

Terms on the balance ¼ 6-12-18.

Incumbrances: Amount.....To Whom.....

Terms. Interest, etc., 7 per cent.

I hereby give you the right to sell the above property at the prices mentioned for four months from date and to pay you a commission of 5%, the same to be paid out of the first instalment as soon as the sale is completed. Should the property be sold by myself or any other person I agree to give you half the above mentioned commission on any such sale. This contract shall continue in force after the expiration of the listed period unless I give written notice to have the property withdrawn from sale.

(Sgd.) Stanley Millar,
Address, Battleford.

Witness.....

On the 20th January, 1912, the defendant Good arranged for the sale of the property in question to the plaintiff, and a formal agreement of sale was prepared and duly executed by the plaintiff. The price and terms of payment in the agreement are substantially the same as those set out in the document above mentioned. The parties named in the agreement are the defendant Millar and the plaintiff. On the execution of the agreement by the plaintiff, he paid to Good $180, the amount of the cash payment provided for in the agreement. The defendant Millar had left Battleford in December, 1911, and did not return until about the 6th May, 1912. On the 10th of May, Millar, having been informed by Good, after his return to Battleford, of the alleged sale to the plaintiff, repudiated the transaction and refused to ratify or carry it out. This repudiation and refusal and a notification to that effect by Millar to the plaintiff are stated by the plaintiff in his statement of claim. The statement of claim further alleges that Millar even since the 10th of May continued to repudiate and refuse to perform the agreement.

On the 10th June, 1912, the plaintiff executed and filed a caveat against the land. The circumstances under which this caveat became possible will be referred to later on.

On the 9th October, 1912, the plaintiff tendered Millar the sum of $201.60, and upon Millar's refusal to accept the amount tendered, the present action was begun the same day.

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The statement of claim asks for the following relief:—

(*a*) Under paragraphs 1 to 7 hereof inclusive, that this honourable Court declare that the agreement or contract for sale by defendant Millar to plaintiff and referred to in said paragraphs ought to be specifically performed and carried into execution, and ordering and adjudging the same accordingly, and further ordering that upon the plaintiff paying to the defendant Millar the principal and interest now overdue and paying to the defendant Millar the balance of the purchase money for the lots comprised in said agreement with interest on such balance at the rate of 8 per cent. per annum to the date of completion of said agreement as the same shall fall due and otherwise performing said agreement, that the defendant Millar execute a conveyance of the said lots to the plaintiff as covenanted for in said agreement, or in the alternative for damages for breach of contract.

(*b*) An injunction restraining the defendant Millar from transferring, mortgaging or otherwise encumbering the said lots or any of them, until the final disposition of this action.

(*c*) In the alternative, under paragraphs 8 and 10 hereof inclusive, damages against the defendant company in the sum of $2,300, being the difference between the price the plaintiff was so buying the said lots for and the present selling value thereof.

(*d*) Such further and other relief as the nature of the case may require and as to this honourable Court may seem just and necessary.

The plaintiff also alleges tender and brings $201.60 into Court and says that that amount "is at least equal to all sums payable on that date to the defendant Millar under the alleged agreement." Two more payments, with interest, are still due under the agreement, one of $180 on the 20th January, 1913, and another of $160 on the 20th July, 1913.

The defendant Millar, apart from formal denials, relies on two grounds of defence:—

(1) That the "listing contract or letter is not an authority to sell but only an authority to obtain a purchaser on the usual commission terms, and that consequently the defendant Good had no authority to sell or enter into any binding agreement on his behalf or to receive any part of the purchase money.

(2) That the amount of $201.60 which was tendered before action was not equal to the amount due to him under the alleged agreement at the date of tender.

In answer to the first point, it was very forcibly argued on behalf of the plaintiff that the words, "I hereby give you the right to sell the above property" have only one meaning, that they mean exactly what they say, and that they gave the defendant Good the power to sell and incidentally to sign all necessary documents and do all necessary things for the purpose. On this point a number of authorities were cited on both sides.

On behalf of the plaintiff reference was made to: *Harris* v.

Darroch, 1 S.L.R. 116; *Hamer* v. *Sharp*, L.R. 19 Eq. 108; *Saunders* v. *Dence*, 52 L.T. 644; *Chadburn* v. *Moore*, 61 L.J. Ch. 674; *Rosenbaum* v. *Belson*, [1900] 2 Ch. 267; *McIlvride* v. *Mills*, 16 Man. L.R. 276; *Conley* v. *Paterson*, 2 D.L.R. 94, 20 W.L.R. 722; *Rossiter* v. *Miller*, 2 A.C. 1124.

On behalf of the defendant Millar, several of the foregoing cases were referred to and distinguished and reference was also made to: *Gilmour* v. *Simon*, 15 Man. L.R. 205, 212; *Gilmour* v. *Simon*, 37 Can. S.C.R. 422, 425, 426; *Yates* v. *Reser*, 1 S.L.R. 247; *Boyle* v. *Grassick*, 2 W.L.R. 284, at 288.

On this point, I should not have much difficulty in deciding in the absence of any evidence or, indeed, in the absence of any evidence other than that of the defendant Millar. Some of the cases cited on behalf of the defendant seem to go pretty far in reducing "sell" to "obtain a purchaser," but in most of the "listing contracts" dealt with there were words or phrases which modified or restricted the ordinary meaning of the word "sell." In the document under consideration in this case there is no modification or restriction of the words, "I hereby give you authority to sell." If there had been no other evidence on this point except that of the defendant Millar, I should have found without any hesitation that the document did give Good authority to sell and enter into a binding contract on behalf of Millar. In the face of the unequivocal meaning of the words used, Millar could not be allowed to set up against a third party relying *bonâ fide* on the authority given to Good, that he intended anything other than what he said. But the evidence convinces me that not only Millar but Good and the plaintiff as well did not consider that Good had any authority to sign on behalf of Millar. Millar swears positively that he had no intention other than that Good was to obtain a purchaser and refer any proposed sale to him, or someone appointed by him for that purpose, for ratification. Good's evidence is that as Millar was going away for some months, he asked Millar at the time the "listing contract" was signed "who would sign for him," and that Millar told him that he would try to get one Harry Adams to act for him under power of attorney. This shews that Good at least expected that Millar would authorize some person other than himself to act for Millar in his absence in the event of a purchaser being found. Good also testified that when the agreement of sale was drawn up and signed by the plaintiff, he told the plaintiff that he would not sign on behalf of Millar because Harry Adams held a power of attorney for that purpose. The plaintiff himself says in his evidence that at the time the sale was being discussed, Good told him that he would have to wait until Millar came back. The agreement of sale was actually executed by Good on behalf of Millar later on, but

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nearly a month after Millar had returned and repudiated the transaction. Good's evidence on this point is to the effect that as Millar had repudiated and continued to repudiate the transaction the plaintiff requested him to sign the agreement of sale for the purpose of giving him some document upon which to found a caveat. Good thereupon signed the agreement, and a caveat was drawn up and filed on the 10th June, 1912. In the face of all this evidence, I should be unwilling to give effect to Good's signature even if it had been attached to the agreement before Millar's return and repudiation. But the agreement was not signed by Good until nearly a month after Millar had repudiated the transaction, and his authority to sign contracts, and the plaintiff has admitted that he was fully aware of this. Further, knowing that Millar had repudiated, the plaintiff secured Good's execution of the agreement for the purpose and under the circumstances already stated.

The plaintiff relies on the agreement of sale obtained in this manner, and his action must accordingly fail.

The plaintiff was allowed to sue the defendant Good in the alternative for breach of warranty of authority.

In addition to the facts already mentioned, there is the further evidence of the plaintiff on this point: "I was satisfied when I saw the listing agreement." So far as the evidence goes there was no other representation of authority made by Good to the plaintiff than shewing him the listing agreement. The claim against Good is founded on his execution of the agreement of sale on behalf of Millar. The time and circumstances of that execution have been mentioned above. Good's execution of the agreement was obtained by the plaintiff several weeks after he knew that Millar had repudiated Good's authority to act for him in the matter, and he cannot now come in and say that he was in any way relying upon any warranty of authority by Good.

The defendant Millar counterclaims in the following words:—

> This defendant, by way of counterclaim, says that at the time he signed the said listing it was distinctly understood and agreed between him and the Battleford Realty Company that he was simply listing the said lands in the ordinary way and that if the said company found a purchaser who would take the lands at the price and on the terms stated therein that he would pay the said company the commission therein specified and there was nothing said, suggested or thought of appointing the said company his agents to sell in the sense of making a contract between him and the intending purchaser and that if the words "I hereby give you the right to sell the above property" in law mean the giving by this defendant to the said company authority to make a binding contract of sale between the purchaser and this defendant, then such was not the intention of the

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parties to said listing agreement, and this defendant asks to have the said agreement rectified so as to express the true meaning and intent of the parties to the said listing.

Whatever claim to rectification Millar might have had under certain circumstances as against the defendant Good, he certainly would have had no right to rectification against the plaintiff if the words quoted did in law give authority to Good and had been *bonâ fide* acted upon.

I will, therefore, dismiss the action against both defendants, and the counterclaim, but without costs in each case.

The plaintiff will be entitled to payment out of the amount paid into Court by him and also to payment by the defendant Good of any amounts paid by him to Good on account of the alleged sale. These amounts are not clearly shewn by the evidence, and if they cannot be mutually agreed upon by the parties concerned within two weeks, the plaintiff may apply *ex parte* for a reference to the local registrar to ascertain the amounts. Upon filing a written acknowledgment by the defendant Good of the amounts still due by him to the plaintiff, or upon the finding of these amounts by the local registrar, the plaintiff will be entitled to judgment against the defendant Good for the sum so acknowledged or found to be due.

Action and counterclaim both dismissed.

RUTTER STATION PATRONS v. CANADIAN PACIFIC R. CO.

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(File No. 17241.)

Rutter Station Case.

Board of Railway Commissioners. January 16, 1912.

1. CARRIERS (§ III B—380)—FLAG STATION ON RAILWAY—COMPELLING APPOINTMENT OF CARETAKER.

The Railway Commission may, if it sees fit, order a railway company to maintain at a flag station a caretaker to receive, protect, and deliver freight, express goods and mail bags.

Commissioner Mills.

January 16, 1912. MR. COMMISSIONER MILLS:—Rutter is a station on the Canadian Pacific Railway (Sudbury Branch) about 37 miles south of Sudbury and 6 miles south of French, another station on the same line. Rutter and French have all the equipment of regular stations—waiting-rooms, rooms for telegraph operators, freight sheds, platforms, etc.

When the line was opened for traffic in 1908—an agent was placed in charge of Rutter station and the business thereat; and all seemed well, till an agent was installed at French to look after the shipping from a sawmill and attend to other business in that locality. Then some of the Rutter business was transferred to French; and on the 1st May, 1911, the Company removed its

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agent from Rutter, made Rutter a flag station, and arranged to keep a telegraph operator there at night to look after its night train-service.

In anticipation of the change at Rutter, 160 petitioners of Monetteville, Cosby, and Rutter,—professing to represent a population of about 2,500 people who are dependent on the station at Rutter, being cut off from French by the French river, which runs between the two stations,—appealed to the Board on the 22nd of April, 1911, against the removal of the agent from Rutter, alleging that a large (or at least a very considerable) amount of passenger, freight, and express business was done at Rutter; that the mail for five post offices in the district was regularly delivered at Rutter; and that the removal of the agent from that station would cause great inconvenience to a large number of people (over 250 families) and involve the business portion of the community in serious loss from the exposure of goods, night and day, in open sheds, to the depredations of thieves who would be at liberty to steal without the slightest risk of detection.

In response to the appeal of the petitioners, the Board sent one of its inspectors to make careful inquiry as to the facts, circumstances, and conditions at the station in question; and the following are extracts from his report, made on the 22nd December, 1911:—

"On my arrival at Rutter, on the 19th December, 1911, I found the freight shed nearly full of freight of various kinds; both the side and end doors were wide open to any person wishing to remove the freight; and no person was in charge. On the morning of December the 20th, I called at the station and found several teams being loaded, every person picking out his own material."

"I noticed an empty chocolate pail, addressed to T. N. Desmarais, the contents of which had all been removed by unknown persons. There was also a barrel of syrup from which the head and over half of the contents had been removed; and what was left was mixed with dust and dirt which had fallen into the barrel, making the remainder of the contents unfit for use. The following is a list of beer and liquor missing from a shipment addressed to N. Perron, a hotelkeeper at Cosby: 14 bottles of porter missing, November 7th; 20 bottles of beer missing, same date; 3 bottles of Scotch whiskey, 1 bottle of brandy, and 7 pint-flasks of whiskey missing, 24th November. And Mr. Desmarais informed me that last fall 2 pails of chocolates, 6 pounds of figs, and 3 barrels of apples shipped to him, were stolen before he was aware that the goods had arrived. Nearly every person that I called on had a similar complaint to make regarding the stealing of goods."

"I hired a team and drove to Noelville, which is 14 miles east; and while en route to this point I met 29 teams drawing hay to

be shipped from Rutter. I found that Noelville and the surroundings had about 250 families. Mr. Desmarais has quite a large general store and is doing a business of over $40,000 a year. There are a couple of other small stores and a custom sawmill. When returning to Rutter, I met 14 teams heavily loaded with merchandise on their way from Rutter station. There were also three teams at the freight shed loading freight for Noelville, and two other teams unloading freight from box cars."

"The night operator has nothing to do with the freight shed or receiving and delivering freight, selling tickets, or checking baggage."

"The night I was there 18 or 20 passengers boarded train No. 25 for Sudbury and points west of Sudbury, and also for North Bay and other points east, without tickets or having their baggage checked."

"The railway company has added over 20 feet to its freight shed, which would seem to shew that the business at Rutter is increasing."

"There should be a better roadway to the freight shed. It would require only two or three cars of ballast or cinders to fill a hole which is opposite the west door of the shed. The place in question is fairly good at the present time, on account of its being frozen; but I was informed by teamsters that in spring and fall it is almost impossible to get to the freight shed on account of the mud."

From a statement furnished, it appears that the revenue from freight and passenger traffic at Rutter station was $1,492.76 for the year ending the 31st of May, 1911. No doubt the earnings in June, July, August, and September are small, but they are very considerable in the winter and spring months; so, counting the freight and passenger traffic and the amounts paid by the Express Company and the Government for express and mail services during the year, we have a sum which, we are informed, is larger than the total revenue from each of several regular stations in the central and eastern provinces of the Dominion.

So much we may say regarding the matter of revenue—admittedly a very important matter, a matter which must always be carefully considered; but, whatever the revenue from any particular station may be, I think the time has come for putting an end to the practice of placing goods in open sheds, at flag stations or anywhere else, to be stolen as above, or throwing them on the ground and leaving them (as they are often left) exposed to rain, snow, and thieves. The practice is, to my mind, clearly indefensible, and should be stopped at the earliest practicable date.

There are remedies—reasonably cheap and effective remedies

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—for overcoming the difficulties which arise in the handling of traffic at flag stations. A remedy has been found by the great Pennsylvania Railroad Company in the United States. A remedy can be found in Canada; and my opinion, concurred in by the Chief Operating Officer of the Board, is that, in this case, upon the evidence, some given orally and some submitted in writing, an order should go directing the Canadian Pacific Railway Company to keep a caretaker attendant at Rutter station, on its line of railway to receive, protect, and deliver freight, express goods, and mail bags, between the hours of seven a.m. and six p.m., daily, except Sundays,—under such control and direction as the said Company may think proper; and to see that its conductors sell tickets to people who get upon trains at the said station (single and return tickets) and have their baggage checked, without any extra charge.

Further, I think the Company should be requested to improve the road to the freight shed, as suggested by the Inspector.

The Chief Commissioner and the Assistant Chief Commissioner concurred with Mr. Commissioner Mills.

Com. McLean.

January 18, 1912. MR. COMMISSIONER MCLEAN, dissenting in part:—I agree to the disposition recommended, understanding that, while the wording of the reasons for judgment would seem to import wider considerations, we are concerned simply with a particular case. The situation is that the railway established this station and provided an agent. It has not made an affirmative shewing that the removal of an agent, or of an official performing at least in part the duties of such an agent, is justifiable.

Reference is made in the reasons for judgment to the method of caring for freight at flag stations; and I infer that the reference is to flag stations where no order has been given by the Board as to the installation of an agent. But this, it seems to me, is concerned with a situation entirely distinct from that before us, where the Board is not concerned with the installation of an agent *ab initio*. So far as the caring for freight at flag stations is concerned, the Board has, after due consideration, set out a general policy, which, while it may be a matter for modification, has not yet been modified. The Board in its decision in the Flag Station case, 8 Can. Ry. Cas. 151, recognized that, subject to the limitations set out therein, as well as in the flag station order, the companies should not be called upon to appoint caretakers at flag stations. Further, the Board has also recognized, in its Order No. 6242, the justifiability of the railway releasing itself from liability for loss and damage occurring to property after it has been unloaded at a flag station at which there is no agent.

Order made.

FREWEN v. HAYS.

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Judicial Committee of the Privy Council. Present: The Right Hons. Lords Macnaghten, Atkinson, Shaw, and Robson. March 20, 1912.

1. SPECIFIC PERFORMANCE (§ I E 1—30)—LAND CONTRACT—INDEFINITENESS OF PURCHASE PRICE—RIGHT TO REMEDY.

The purchaser under a contract for the sale of land whereby it was stipulated that the price was to be fixed later by officials of a railway company acting in the same interests as the vendor, is not entitled to specific performance if he has rejected the prices fixed by those officials, and in consequence the parties came to no agreement as to the price.

[*Frewen v. Hays*, 16 B.C.R. 143, affirmed on appeal.]

Statement

APPEAL from a judgment of the Court of Appeal of British Columbia (Macdonald, C.J., Irving and Galliher, JJ.), affirming a judgment of Hunter, C.J., in favour of the respondents, defendants at the trial, refusing to award specific performance or damages in respect of a land contract (*Frewen v. Hays*, 16 B.C.R. 143, 16 W.L.R. 253, affirming *Frewen v. Hays*, 14 W. L.R. 632).

The appeal was dismissed.

Sir R. Finlay, K.C., *Buckmaster*, K.C., *C. H. Sargant*, and *Geoffrey Lawrence*, for the appellant.

Atkin, K.C., *Martelli*, K.C., and *E. F. Spence*, for the respondents.

Sir R. Finlay, K.C., in reply.

March 20, 1912. Their Lordships' judgment was delivered by

Lord Macnaghten.

LORD MACNAGHTEN:—In the action which has given rise to this appeal, the appellant, Moreton Frewen, as plaintiff, claimed specific performance of an agreement made between himself and the respondents the Grand Trunk Pacific Town and Development Company, Limited, called, for sake of brevity, the Town Site Company. In the alternative the plaintiff claimed damages for breach of the agreement. The agreement relates to the purchase of a number of lots in a town site or projected town named Prince Rupert, on the seaboard of the Pacific Ocean, which was intended to be the western terminus of the Grand Trunk Pacific Railway then in course of construction. The agreement is contained in a letter signed by Charles M. Hays, who was president both of the railway company and the Town Site Company. The Town Site Company was a company incorporated for the purpose of acquiring, holding, and managing certain lands along the line of the railway.

The case was argued at some length. Many points of interest were discussed. But the real question, and the only question with which their Lordships propose to deal, is a very short one.

The agreement at the time at which it was made was in-

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complete, both as to subject-matter and price. It was conceded that before action brought the agreement was completed as to subject-matter. The question is: Was it completed as to price, and, if not, are the respondents answerable in damages for breach of the agreement? The agreement came about in this way: Mr. Frewen was a gentleman apparently of some social position, connected with the press, and on terms of intimacy with capitalists or speculators on both sides of the Atlantic. Some ten years before the date of the agreement, in company with Sir Charles Rivers Wilson, the president of the Grand Trunk Railway Company, he had visited the country through which the Grand Trunk Pacific Railway was to pass, and on that occasion he stopped for a few days with Mr. Hays. Mr. Hays, according to his account, was anxious to interest him as a promoter in the development of Prince Rupert. Apparently he had impressed Mr. Hays with the notion that he would be useful in making known the capabilities of the projected town. Later on, in 1906, he was negotiating with Mr. Hays on the footing that he was to acquire a certain number of lots at 100 dollars apiece. Mr. Hays entertained the proposal, but in the result nothing came of it. After a time Mr. Frewen thought he was being trifled with, and, as he says, he got disgusted. Then on the 31st Aug. 1908 he had an interview with Mr. Hays, at which the matter was discussed. On the following day he submitted to Mr. Hays a proposal in the form of a letter to be addressed by Mr. Hays to himself. It was based on the discussion which had taken place on the previous day. Mr. Hays read the letter, introduced the words "with our concurrence" as qualifying the selection of lots by Mr. Frewen, and then without any further alteration he signed the document.

The letter, so far as material to the present question, is in the following terms:—

1st September, 1908.

Dear Mr. Frewen,—The agreement with the Government of British Columbia relative to water lots being now practically complete, I am able to supplement my letter to you of the 8th May. One important matter I must leave open; I cannot fix the price for the thousand lots you are to select, with our concurrence, in the two-thousand acre town site, but the prices will be decided by our officials as soon as the surveys are completed, and at the prices so fixed you are to have the lots and we are to return you as your commission 25 per cent. of the purchase money. You will have no fault to find with our prices; they will be at least no higher than the price which the public will be asked to pay. I may say for your protection that should you regard the price of any lot or lots as too high you are under no obligation to take that lot or those lots, provided you notify us to that effect within sixty days of their assignment to you. . . . The terms of payment are as follows: One-third of the cash to be paid within ninety days of

our throwing open the townsite to the public, the other two-thirds in one and two years at the same rate of interest annually as is charged the public on deferred payments. It remains to assure you that any advice and assistance you require in selecting your lands our officials will afford you.

Yours truly,

CHAS. M. HAYS,
President.

MORETON FREWEN, ESQ.,
Montreal, P.Q.

It was contemplated at the time of the agreement that the Town Site Company would dispose of their lands in the manner in which the Grand Trunk Railway Company had disposed of town sites on the line of their railway. The manner in which that company had dealt with their town sites was this: The site was surveyed and applotted; the prices for the several lots to be offered for sale were fixed before the town site was thrown open to the public. Then the applotted plan and the prices of the lots for sale were placed on view at the different offices or agencies of the company, and the lots were sold to the first applicants at the published prices. It is plain on the face of the agreement what steps were to be taken in order to carry the agreement into execution. In the first place the town site was to be surveyed and applotted. After that, with the concurrence of the company, Mr. Frewen was to select a thousand lots. Then the prices of those lots were to be fixed by the officials of the company, that is to say, by Mr. Hays and his co-directors; and at the prices so fixed the lots selected were to be offered to Mr. Frewen.

Mr. Frewen was protected against exorbitant demands by two provisions: (1) the prices were not to be higher than the prices asked from the public, that is, asked from the public for lots of the same class; and (2) Mr. Frewen was to be at liberty to reject any lots which he thought too highly priced. His advantage or profit lay in the commission or discount of 25 per cent. The intended survey was delayed by an event unforeseen or unexpected. The Government claimed part of the town site on the ground, it was said, that it had been Indian territory. Ultimately it was arranged after a protracted negotiation that the Government should have one-fourth and the company three-fourths of the town site, which as stated in the agreement of September, 1908, comprised 2,000 acres.

By an order-in-council confirmed by Act of Parliament it was provided that the time for making the survey of the town site should be extended to the 1st May, 1909. In the meantime it was arranged with the Government that a survey and valuation should be made by two surveyors, one acting on behalf of the Government and one on behalf of the company, and that

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out of the lots so surveyed and valued a sufficient number should be offered for sale by auction at the reserve prices put on them by the two surveyors. The proposed auction was commenced on the 25th May, 1909. It was held, as the appellant states, "with great success." "None," he says, "or hardly any of the lots offered by auction failed to reach the reserve prices." In the meantime Mr. Frewen's lots had been selected. On the 8th May, 1909, Mr. Frewen made a selection without the concurrence of the company. On the 17th he went to Montreal to get Mr. Hays to approve his list and to appraise the lots which he had chosen. Before meeting Mr. Hays he met Mr. Phillips, the secretary of the company. Mr. Phillips handed him a list which the company proposed for acceptance by him. Mr. Frewen objected to it in several particulars. Then he saw Mr. Hays and pointed out his objections. On the following day, the 18th May, a revised list was submitted to Mr. Frewen which Mr. Frewen reluctantly accepted as a compromise. This list is referred to as the "compromise list." Mr. Hays, however, refused point blank to put prices on the lots, saying that he could not do so "until after he knew the results of the auction sale." On the 9th June, 1909, the secretary sent Mr. Frewen a schedule of the lots in the "compromise list" with the company's prices thereon, noting that the lots had been assigned to him as of that date in accordance with the president's letter of the 1st Sept., 1908. On the 11th June, Mr. Hays wrote to Mr. Frewen confirming the assignment. On the 13th June, Mr. Frewen wrote to Mr. Hays from New York expressing his disappointment, and stating that one of his friends thought the prices "absurd," and that he meant to "stand on his legal rights."

On the 7th Aug., 1909, Mr. Frewen, who was then in London, sent to Mr. Hays the following telegram:—

> Charles Hays, Grand Trunk, Montreal.—7/8/09.—Neither selection nor price of town site lots offered accord with agreements. I decline accept same as such. I require lots in accordance with your engagements and in default hold you responsible for damages.—FREWEN.

On the refusal of Mr. Frewen to take the lots specified in the "compromise list" at the prices fixed by the company, and on the expiration of the period of sixty days from the date of the company's offer of those lots to Mr. Frewen, the lots in question were placed on the company's sale list and they were all sold to the public before the 1st Oct., 1909.

The writ of summons in this action was issued on the 30th Aug., 1909. The action came on to be heard before Hunter, C.J. On the 2nd July, 1910, it was dismissed with costs. On the 10th Jan., 1911, the judgment of the learned Chief Justice was affirmed by the Court of Appeal for British Columbia.

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Before this Board the plaintiff's contention was that the lots in question were duly ascertained by the "compromise list," but that the prices which the plaintiff was asked to pay were not duly determined by the officials of the company as alleged or suggested in the secretary's letter of the 9th June, 1909. It was contended that the prices payable by the plaintiff for the lots ascertained in and by the "compromise list" were the prices put on those lots by the two surveyors employed by the Government and the company, and that those surveyors were the "officials" of the company within the meaning of the agreement or that the directors were at any rate bound to adopt their prices. It was further contended that the reserve prices at the auction were the prices which the public were asked to pay for the lots offered for sale, and that whether that be so or not the company broke their agreement by demanding prices in excess of the reserve prices placed on lots of the same class as those in the "compromise list" or else by not fixing prices immediately the survey was completed without resorting to any other method.

In their Lordships' opinion there is no substance in any one of the plaintiff's contentions. The delay in completing the survey was not owing to any fault on the part of the company. It was due to the intervention of the Government, and the extension of time was sanctioned by an order-in-council confirmed by Act of Parliament. The surveyors were not the "officials" of the company within the meaning of the agreement, as indeed the plaintiff admitted in his cross-examination. I "assumed," he says, "Mr. Hays would be the official."

Although, no doubt, a sale by auction was not contemplated at the date of the agreement there is nothing in that document to prevent the company from resorting to an auction or to any other reasonable method of testing the value of their property. Some months before the date of the auction the plaintiff was informed that the Government had proposed that an auction should be held. He made no objection. Indeed he suggested that his lots should be included in the auction sale. The prices which the plaintiff was asked to pay were practically the same as those which were obtained at the auction, and it seems that when the lots assigned to the plaintiff in the "compromise list" were put on the company's sale list they were at once taken up by the public at those prices. At any rate the plaintiff has not proved, or attempted to prove, that the prices fixed on his lots were in excess of the prices which the public were asked to pay for them, or in excess of the prices which were paid at the auction for lots of the same class. It seems almost absurd to contend that in the case of an auction reserve prices are the prices which the public are asked to pay. As a rule reserve

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prices or upset prices are not published before an auction. The prices which the public are asked to pay are the highest prices which those who bid can be tempted to offer by the skill and tact of the auctioneer under the excitement of open competition.

As the plaintiff rejected the prices fixed by the company, and the parties are not agreed as to price, specific performance is impossible. As regards damages, the company seems to have followed duly the course prescribed by the agreement, and there has not been in their Lordships' opinion any breach of contract on their part.

It was stated without contradiction that if the plaintiff had accepted the prices fixed by the company he would have made a profit of something like 100,000 dollars. The loss of that profit appears to be due entirely to his own conduct.

Their Lordships will, therefore, humbly advise His Majesty that the appeal should be dismissed with costs.

Appeal dismissed.

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WELLAND COUNTY LIME WORKS CO. v. SHURR.

(Decision No. 2.)

Ontario Court of Appeal, Garrow, Maclaren, Meredith, and Magee, JJ.A., and Lennox, J. November 19, 1912.

1. MINES AND MINERALS (§ II B—52)—AGREEMENT "TO LEASE RESPECTIVE FARMS" BY SEPARATE OWNERS—GAS AND OIL LEASES.

An agreement by two separate landowners, neither of whom had any title or right to or interest in the farm of the other, that they are to give "the usual gas and oil leases of their respective farms," where the agreement throughout uses the word "leases" in the plural and never in the singular, is an agreement for separate leases of their respective farms and not for one joint lease of the two farms, notwithstanding a provision that the lessee was to supply gas free of charge to the landowners.

[*Welland County Lime Works* v. *Shurr*, 1 D.L.R. 913, 3 O.W.N. 775, reversed; *Welland County Lime Works* v. *Shurr*, 3 O.W.N. 398, restored.]

Statement

APPEAL by the plaintiffs from the judgment of a Divisional Court, *Welland County Lime Works* v. *Shurr* (No. 1), 1 D.L.R. 913, 3 O.W.N. 775, setting aside the judgment of Sutherland, J., at the trial, 3 O.W.N. 398, in which the facts of the case are stated.

The appeal was allowed.

W. M. German, K.C., for the plaintiffs.

S. H. Bradford, K.C., and *L. Kinnear*, for the defendant.

Meredith, J.A.

The judgment of the Court was delivered by MEREDITH, J.A.:—I agree entirely with the learned trial Judge in his disposition of this case; and can find no cause for the Divisional Court's reversal of it.

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The main question is whether the landowners were to give separate leases of their respective farms, or one joint lease of the two farms, though neither had any title or right to, or interest in, the farm of the other; and, under ordinary circumstances, and even in the case of an agreement quite silent on the subject, one might well ask, why not separate leases? Why should each demise a thing which was not his, and in which he had no legal or equitable estate or interest?

But by the plain, the unmistakable, words which the parties used in the formal writing evidencing the agreement between them, the matter seems to me to be put beyond any kind of doubt; the landowners are to give "the usual gas and oil leases of their respective farms," and the word "leases," nowhere "lease," is used in two other places in this short agreement.

The provision in the agreement for supplying gas to heat the homes of the landowners, free of charge, is not at all inconsistent with separate leases; nor is the provision for heating the house of a tenant of one of the landowners in a certain event. These things may be several and respective, and cannot override the unmistakable words, "leases of their respective farms"; as well as the very nature of the transaction.

Then the common form of lease, which each of the parties has put in, accentuates the absurdities to which a joint lease would lead; the landowner is to have a royalty upon all oil produced; and so much per annum for each well of gas in paying quantities; and so much per acre for damage to the land in working it for gas or oil; all things obviously for the benefit of the owner only, not for another whose land is in no way touched by these particular things.

No reasonable case for reforming the agreement was made at the trial. Indeed, it is the last thing the defendant wants—that is a reformation such as would support the joint lease holding of the Divisional Court. That which each of these landowners wants is really a separate lease, with a provision in it that the other of them, though not a party to it, shall have his home also heated with gas the same as the landowner's is to be under his lease; but there is nothing in the case to support an extraordinary claim of that character.

If there be a usual gas and oil lease, there is nothing in the defences of want of certainty, and the statute of frauds; whether there is, or is not, such a lease, is to be the subject of an enquiry under the judgment directed to be entered at the trial.

I would allow the appeal; and restore that judgment.

Appeal allowed.

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BANK OF OTTAWA v. BRADFIELD.

Ontario Court of Appeal, Garrow, Maclaren, Meredith, and Magee, JJ.A. November 19, 1912.

1. INCOMPETENT PERSONS (§ II—10)—BILLS AND NOTES BY INCOMPETENT PERSONS—RENEWAL PROMISSORY NOTE, EFFECT OF.

Where the endorser of a promissory note was at the time of the endorsement mentally incapable of making a contract, and where it appears that the note was merely a renewal of certain subsisting and enforceable notes, upon which the endorser was jointly and severally liable with others, such circumstances will govern, and the plaintiff holder may revert to the earlier notes and recover upon them, upon the ground that the renewal endorsement was made under a mistake of fact, especially where it does not appear that the plaintiff had knowledge of the mental incapacity of the endorser.

Statement

APPEAL by the plaintiffs from the judgment of Sutherland, J., in an action against the defendant as an endorser of promissory notes to recover $1,425.45 balance claimed to be due on the said notes. The defence was that the defendant was at the time of unsound mind and incapable of making any contract, and he counterclaimed for payments withdrawn by the bank from his bank account, and applied in payment of the two notes in question.

The appeal was allowed.

F. E. Hodgins, K.C., for the plaintiff.

R. A. Pringle, K.C., for the defendant.

Meredith, J.A.

The judgment of the Court was delivered by MEREDITH, J.A.:

After several attempts to find evidence enough to support the findings of the trial Judge upon all material questions of fact, I am obliged to say, in the fullest appreciation of the advantages of a trial Judge, that the finding upon the question of knowledge on the part of the plaintiffs, of mental incapacity of the defendant to transact business, when the notes were endorsed by him, cannot be sustained.

The case is not one of obvious, or commonly known, mental affliction; there is a sharp conflict of testimony as to whether there ever was any such incapacity, a conflict in which there is a good deal to be said on each side, so that if the finding upon that question had been the other way it might have been impossible to disturb it. The man was very old, but he was in no way confined, or restrained, as one of unsound mind; indeed he seems to have been frequently, if not constantly, in and about the place of business, and so concerned in the business in which the debt in question was contracted, which was always carried on in his name.

The trial Judge found that the indorsement by the defendant of the first of the notes in question was obtained by the plaintiff's manager Graham, in person, and that at the time he

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obtained it he knew of the defendant's mental incapacity, Graham having testified that the endorsement was obtained by the intestate's son, the witness Bradfield; and that he, Graham, had nothing personally to do with obtaining it, and that he never had any knowledge of any kind of incapacity of the defendant.

I cannot but say that the finding strikes me very forcibly as unreasonable. In the first place, it must be borne in mind, that the note was taken in renewal of a note of the firm of R. H. Bradfield & Co., and so a note upon which the defendant, R. H. Bradfield was liable; for there is no finding, nor any evidence upon which it could be well found, that the defendant was not a member of the firm thus prominently bearing his name: and it must also be borne in mind that this firm had for years before been indebted to the plaintiff, and that that note was but one of many renewals of notes given for that indebtedness; so that the proposition is that this astute business man, deliberately obtained from a man he knew to be of unsound mind, the note in question in place of the one upon which that man was already liable; so deliberately doing a most discreditable act in order not to better, but to make much worse, the legal position of the plaintiffs, one of the incorporated banks of Canada, in which he held the honourable position of one of its managers. If the finding of the trial Judge be true, one may, not unfairly, suggest that, perhaps, the mental capacity of this manager might reasonably have been inquired into. This point seems to have wholly escaped consideration by the trial Judge.

The case is, I think, plainly one in which, in order to defeat this action on the ground of mental incapacity of the defendant, he was bound to prove, not only such incapacity, but also that the plaintiffs had knowledge of it: and that the trial Judge's holding to the contrary is erroneous. There was no evidence of any such knowledge when the later note was endorsed; and it is not, I find, proved that there was when the earlier one was endorsed. And I incline to the view that if there were incapacity when the notes in question were endorsed, which incapacity vitiated the endorsements, the plaintiffs might revert to any of the earlier notes for the same indebtedness, and recover upon them, on the ground that the renewals were made under a mistake of fact.

The Act respecting the negotiation of co-partnership does not, in any way, relieve the defendant from liability. I would allow the appeal; and direct that judgment be entered, upon the two notes, in the plaintiffs' favour.

Appeal allowed.

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TAYLOR v. BRITISH COLUMBIA ELECTRIC R. CO.

(Decision No. 2.)

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., Idington, Duff, Anglin, and Brodeur, JJ. May 7, 1912.

1. APPEAL (§ VII L 5—515)—REVIEW OF QUANTUM OF DAMAGES—ON APPEAL FROM APPELLATE COURT.

The Supreme Court of Canada will not disturb a judgment of the Court of Appeal of British Columbia on a mere question of quantum of damages, where that court, by virtue of the power given to it by rule 869 (*a*) of the rules of the Supreme Court of British Columbia, has reduced a verdict of the trial court in an action for personal injuries arising out of an accident.

[*Taylor* v. *British Columbia Electric R. Co.*, 1 D.L.R. 384, 16 B.C.R. 420, affirmed.]

2. APPEAL (§ VII L 5—515)—REVIEW OF REDUCTION OF DAMAGES — ELEMENT OF DAMAGES NOT PRESCRIBED BY LAW.

The rule that the Supreme Court of Canada will not interfere with the judgment of a provincial Court of Appeal reducing the quantum of damages assessed by the trial court does not prevent interference in cases where some element of damages for which no compensation is allowed by law may have been given a place in the total of damages reached. (Dictum *per* Idington, J.)

[*Praed* v. *Graham*, 24 Q.B.D. 53, considered; see also *Johnston* v. *Great Western R. Co.*, [1904] 2 K.B. 250, and *Dunn* v. *Prescott Elevator Co.*, 26 A.R. (Ont.) 389, 30 Can. S.C.R. 620.]

Statement

APPEAL by the plaintiff from the judgment, *Taylor* v. *British Columbia Electric R. Co.*, 1 D.L.R. 384, 16 B.C.R. 420, 19 W.L.R. 851, allowing the defendants' appeal and reducing the damages awarded the plaintiff at the second trial from $17,500 to $12,000. A verdict for $15,000 at the first trial had been set aside as excessive, see *Taylor* v. *British Columbia Electric R. Co.*, 16 B.C.R. 109.

The present appeal was dismissed, ANGLIN, J., dissenting.

C. W. Craig, for the appellant.

Ewart, K.C., for the respondent.

Fitzpatrick, C.J.

FITZPATRICK, C.J., agreed that the appeal should be dismissed with costs.

Idington, J.

IDINGTON, J.:—This case in the first trial resulted in a verdict of $15,000 for the appellant which was set aside as excessive. On the second trial the verdict was $17,500 on substantially the same facts. The Court of Appeal reduced that sum to $12,000 by virtue of power given in the rule 869(*a*) which is as follows:—

> Where excessive damages have been awarded by a jury, if the full Court is of the opinion that the verdict is not otherwise unreasonable, it may reduce the damages without the consent of either party instead of ordering a new trial.

Hence this appeal and the questions raised relative to our right or duty to interfere.

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For many years past this Court has refused, and I think rightly, to interfere with any assessment of damages for personal injuries arising out of any accident.

What a Judge or jury passed and a local appellate Court (more likely conversant with local conditions of life than we) approved or did not disapprove of, it has been thought should remain unchanged.

Once this is clearly understood, as I think it now generally is, the local appellate Courts are more likely to feel that the entire responsibility rests with them and the natural results will follow. In this way the unjustifiable appeal will become rare and possibly cease.

This does not prevent our interference in the very rare case where some element of damages for which no compensation is allowed by law may have been improperly given a place in the total reached.

In British Columbia the rule I have quoted seems to fit the requirements that have arisen ever since the case of *Watt* v. *Watt*, [1905] A.C. 115, when it was declared the only course an appellate Court had, in finding excessive damages, was to grant a new trial. I fear it, in fact, was occasionally constrained thereby to let most undesirable verdicts stand.

It is urged that the Court had no right to interfere herein as there was nothing that would have justified a new trial. That seems to me to ignore mere excess as in any case justifying a new trial; certainly that is not law. Such cases arise from time to time. The Court or some Court of Appeal must draw the line to be followed as laid down in *Praed* v. *Graham*, 24 Q.B.D. 53. A new trial is a wretched expedient as a remedy for that sort of thing. This new power as alternative thereto is to be exercised by the local appellate Court as it has ever done only with a different result which it enables to be reached.

It seems to me we should adhere to the same line of conduct as we have for so many years past observed. The Court granting a new trial on the ground of excessive damages was not interfered with though occasionally we may have felt we should have let the verdict stand. The Court below should be given an opportunity to work out the experiment entrusted to them by this amendment to the law. It is called a rule of Court practice and when it is urged as being inconsistent with rule No. 430 governing trial by jury, is a taking away of the right of trial by jury. I see no sound argument in that contention.

The Lieutenant-Governor-in-council having had these rules drawn up, the Legislature adopted them and enacted they should become law and they are law just as any other statute. The later and earlier in number of sections can be made to harmonize.

True the right or duty of the jury to limit the damages is

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not henceforward to be so nearly a supreme thing as it was before. The mere consciousness on the part of jurors that this power exists, will no doubt result in a resort to its exercise being rarely necessary.

I have never joined in what seemed to me a senseless cry about jury assessments. I have seen verdicts just as I have seen judgments exceed what I could approve. But the first men to be changed are those justifying negligence. I think if all concerned recognize their respective duties, this new departure being upheld may lead to happy results. For these reasons I would not interfere, though if sitting below, I might not have felt inclined to go as far as the Court has.

The appeal should be dismissed with costs.

Duff, J.

DUFF, J., agreed in the result.

Anglin, J. (dissenting)

ANGLIN, J. (dissenting):—As I construe rule No. 869*a* of the rules of the Supreme Court of British Columbia, the jurisdiction which it confers exists only in cases in which the Court would be justified in ordering a new trial for excessive damages. That can properly be done only where the Court is satisfied that on the evidence in the record, twelve reasonable men could not have reached the impeached verdict unless they had given effect to considerations which should not have influenced them: *Praed* v. *Graham*, 24 Q.B.D. 53; *Johnston* v. *Great Western R. Co.*, [1904] 2 K.B. 250. In my opinion it is not possible in this case to reach such a conclusion. While I am very loath to interfere with the judgment of any provincial appellate Court upon mere quantum of damages, the present case, in my opinion, imperatively calls for such interference on our part. With great respect for the opinion of the Court of Appeal of British Columbia, I am unable to see how any appellate Court could, upon the evidence in the record now before us, satisfy itself that "the jury could (not) reasonably have awarded $17,500 damages."

Brodeur, J.

BRODEUR, J.:—I am of opinion that this appeal should be dismissed with costs.

Appeal dismissed, ANGLIN, J., *dissenting*.

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Oct. 7.

Re McLEOD v. AMIRO.

Ontario High Court, Riddell, J., in Chambers. October 7, 1912.

1. COURTS (§ V A—290)—RULES OF DECISION—CONSENT OF PARTIES, WHEN INSUFFICIENT BASIS FOR COURT ORDER.

Although all the parties interested consent to the making of an order or even ask for it, a court should not grant it unless it appears that the order is a proper one to make, since a court is not to be made a mere convenience for achieving some desired end.

2. COURTS (§ II A 2—155)—MANDAMUS TO INFERIOR COURT—JURISDICTION OF APPELLATE COURT.

The High Court of Justice, exercising the powers of the traditional Court of King's Bench, may by mandamus command an inferior court to hear a case within the jurisdiction of that court.

3. COURTS (§ II A 2—155)—MANDAMUS TO LOWER COURT—JURISDICTION OF APPELLATE COURT—BASIS—ERRONEOUS DECISION BELOW.

Mandamus does not lie to compel an inferior court to reconsider a decision where the matter decided was within the jurisdiction of the inferior court; notwithstanding that the decision of the lower court may have been erroneous.

[*In re Long Point Co.* v. *Anderson*, 18 A.R. 401, applied; see also *Township of Ameliasburg* v. *Pitcher*, 13 O.L.R. 417.]

4. MANDAMUS (§ II A—75)—PROCEDURE—PREREQUISITES.

Where an inferior court decides a matter within its jurisdiction on a preliminary point without going into the merits, there is no real decision on the case, and mandamus will lie to compel a reconsideration, but it must be clear that the point upon which the decision rested was in reality preliminary and not one upon the merits.

5. APPEAL (§ VIII E—686)—EFFECT OF DECISION—DECISION "ON THE MERITS" — SUMMARY CONVICTION — INSUFFICIENCY OF INFORMATION.

A judgment given by a Division Court in Ontario, upon an appeal taken from a summary conviction, whereby the conviction was quashed on the ground of the insufficiency of the information, is a decision "on the merits."

6. MANDAMUS (§ II A—75)—PROCEDURE — PREREQUISITES — ERRONEOUS DECISION OF LOWER COURT, EFFECT ON THE APPLICATION.

On an appeal to a Division Court under sec. 749 (*a*) of the Criminal Code (Ont.) from a conviction by a police magistrate, a decision by the appellate court allowing the appeal on the sole ground that the information on which the conviction was based was insufficient, though this point was not raised before the magistrate, while it may be erroneous under sec. 753 of the Criminal Code, is nevertheless a decision on the merits and not on a matter preliminary, and hence mandamus will not lie to compel the Division Court to reopen the appeal.

[*The Queen* v. *Justices of Middlesex*, 2 Q.B.D. 516, referred to.]

Statement

MOTION by Arthur McLeod, the informant, for a mandamus to the Judge of the County Court of the County of Frontenac, presiding in a Division Court, to compel him to reopen an appeal from a Police Magistrate's conviction, and hear and adjudicate upon the appeal.

The motion was made upon the consent of the Police Magistrate and the accused.

The motion was dismissed.

T. H. Peine, for the applicant.

Riddell, J.

October 7. RIDDELL, J.:—McLeod laid an information against Amiro for operating his automobile on the highway contrary to the statute; the accused was tried before the Police Magistrate at Napanee and convicted, being fined $10 and costs. No objection was taken before the Police Magistrate as to any defect in form or substance in the information.

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An appeal was taken to the Division Court of the division, under sec. 749 (*a*) of the Criminal Code. The Division Court Judge (the Judge of the County Court of the County of Frontenac) sat to hear the case. Counsel for the appellant took objection to the information as insufficient in form and in substance. No evidence was taken; although counsel for the informant requested that the merits on the facts should be gone into, the Judge refused; and the appeal was allowed on the sole ground that the information was insufficient. It was not shewn (as indeed it could not be) that the objection had been taken before the magistrate—nor was it shewn or contended that Amiro had been deceived or misled.

A motion is now made for an order setting aside the order of the Division Court and "for an order of mandamus requiring the Judge . . . to reopen the appeal from the conviction . . . and to hear the evidence of the . . . witnesses . . . and to adjudicate upon the same, or for such other order as . . . the justice of the case may require . . . ."

Amiro, through his counsel, consents: and a consent is also filed signed by the learned Judge.

Contrary to the opinion which some seem to entertain, an order is not made by His Majesty's Courts of Justice simply because all persons directly interested consent to such order or even ask for it. The Court must see whether the order is a proper one to make; and is not to be made a mere convenience for achieving some desired end.

Assuming all the facts to be as stated, I do not think mandamus can issue.

No doubt, the High Court of Justice, exercising the powers of the traditional Court of King's Bench, may by mandamus command an inferior Court to hear a case within the jurisdiction of that Court. But where such Court has decided a matter within its jurisdiction, however wrong that decision may be, mandamus does not lie to compel a reconsideration. "In a matter within his jurisdiction he may misconstrue a statute . . . or otherwise misdecide the law as freely and with as high an immunity from correction, except upon appeal, as any other Judge:" *per* Osler, J.A., in *In re Long Point Co.* v. *Anderson* (1891), 18 A.R. 401, at p. 408. See also what is said in *Township of Ameliasburg* v. *Pitcher* (1906), 13 O.L.R. 417.

It is, of course, contended in the present case that if the Court below decides on a preliminary point without going into the merits, there is no real decision on the case, and mandamus will lie.

No doubt—but we must be sure that the point upon which the decision rested was preliminary in reality and not on the merits.

It is in the view that what the learned Judge decided was preliminary, that both the applicant and his solicitor swear that "there was no argument before the said Judge of the legal merits

of the case—the only question being argued was the question of the insufficiency of the information and complaint." And it is pointed out that the Code (sec. 753) expressly provides that no judgment shall be given in favour of the appellant upon an objection to the information and complaint which objection was not taken before the magistrate. The learned Judge was, in my opinion, wrong in the view he took of the appeal (I am of course speaking only upon the material before me, and the facts may be quite different); but he has the same power to go wrong that any other Judge has.

That such a decision is not on a matter preliminary, but on the merits, is, to my mind, quite clear.

In *The Queen* v. *Justices of Middlesex* (1877), 2 Q.B.D. 516, the appellant had been convicted by a Police Magistrate in London for palmistry; he appealed to the sessions. Upon the appeal, the proceeding commenced with an objection by the appellant that the omission from the conviction of certain words made the conviction bad. The Justices, after hearing this point argued, decided in favour of the appellant, and they did not amend the conviction, as they should have done. They allowed the appeal. An application was made for a mandamus—and the motion came on before Mellor and Lush, JJ. Mellor, J., said (p. 519): "The principle has been very clearly stated . . . that a mandamus goes where persons having a jurisdiction to exercise decline to exercise it upon some matter preliminary to the hearing of the merits of the appeal, as regards fact or law . . . The question here is, did the sessions decline jurisdiction over this appeal? I am of opinion that they did not. . . . A conviction was brought before them, and objection was made that the conviction was bad because it omitted certain words. . . . That is really the substance of the objection. . . . They declined to amend, and they insisted upon deciding the appeal upon the conviction as it stood in point of form. . . . They have exercised their jurisdiction, and it is a cardinal rule when jurisdiction is vested in magistrates or any body of men, which they may exercise so long as they act within their authority, that however erroneously they decide, we cannot supervise their decision." Lush, J. (p. 520), came to the same conclusion with reluctance, "because I am not at all sure that the judicial mind of the learned Judge" (*i.e.*, the assistant Judge presiding at the sessions) "was applied to the construction of the statute. . . . But the question before us is whether the Court has decided the matter of the appeal. . . . They found the conviction bad on the face of it. That is a decision upon the legal merits of the case. If they decided upon the merits of the appeal, the legal merits, or the merits of the matters of fact, we cannot order them to rescind that decision. . . . Whether that decision is right or wrong, we have here no power to decide or inquire. It is nevertheless a decision. It is

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no more than saying, it is no use for us to hear the evidence. . . . Therefore this was not a preliminary objection. The sessions did not refuse to enter into the appeal on the ground of any preliminary matter. They did enter upon it and decide upon the legal merits of it."

In the present case the Court did enter into the appeal and "did decide upon the legal merits of it."

It makes no difference if the learned Judge misconstrued sec. 753 of the Code—he has the power, untrammelled by me, to make mistakes: and I can find no reason why a misconception of the meaning of a statute is any worse than a misconception of a common law principle or equitable rule.

If the statute was not present to the mind of the Judge—then his judicial mind was not "applied to the construction of the statute," just as in the case in 2 Q.B.D., already quoted from; and that can make no difference. It is no worse, as I have suggested, to fail to take into consideration a statutory provision than a well-established common law or equity principle. "In the hurry of business . . . the most able Judges are liable to err," says Lord Kenyon, C.J., in *Cotton* v. *Thurland* (1793), 5 T.R. 405, 409—and if Popham, C.J., could say of himself and his brethren as he did in *Sir Walter Raleigh's Case* (1603), 2 How. St. Tr. 18, "But we know the law," a greater than he has said, "God forbid that an attorney or even a Judge should be held to know all the law."

It would be going too far to assert a jurisdiction in this case to grant a mandamus—and considerations which should be elementary would have prevented the application being made.

"We are not to issue process here as instruments or conduit-pipes, but judicially as Judges:" *per* Holt, C.J., in *Lucy* v. *Bishop of St. David's* (1702), 7 Mod. 59. "A Court has no right to strain the law because it causes hardship:" *per* Lord Coleridge, C.J., in *Body* v. *Halse*, [1892] 1 Q.B. 203, 207. A Court "must look hardships in the face rather than break down the rules of law:" *per* Eldon, L.C., in the *Berkeley Peerage Case* (1811), 4 Camp. 401, 419. "We ought not to overstep our jurisdiction because we think . . . it might be advantageous so to do:" *per* Rigby, L.J., in *In re Watkins*, [1896] 2 Ch. 336, 339.

A total want of jurisdiction cannot be cured by the assent of the parties: *per* Patteson, J., in *Jones* v. *Owen* (1848), 5 D. & L. 669, 674; *The Golubchick* (1840), 1 Rob. Ad. Rep. 143, 147; *In re Thompson* (1861), 9 W.R. 203, 208, *per* Wilde, B.; and many other cases, especially *In re Aylmer* (1887), 57 L.J.Q.B. 168, *per* Lord Esher, M.R.

The motion must be dismissed. I have not considered whether, all parties consenting, the Court below cannot open up the matter *proprio motu*.

Motion dismissed.

Re GEORGE GEORGE, a supposed lunatic.

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Saskatchewan Supreme Court, Lamont, J., in Chambers. December 26, 1912.

1. INCOMPETENT PERSONS (§ VI—30)—GUARDIAN FOR INSANE PERSON—PREREQUISITES FOR APPOINTMENT.

Before a guardian of a lunatic's estate can be appointed, it must appear that the alleged lunatic is at the time of the application of unsound mind and that he has property and is incapable of managing such property.

2. INCOMPETENT PERSONS (§ I—3)—INQUISITION AND PROCEEDINGS—NATURE OF PROOF OF INSANITY.

On an application for the appointment of a guardian of the estate of an alleged lunatic, in order to determine whether or not he is of unsound mind, evidence of the facts and circumstances which go to shew insanity must be submitted.

3. INCOMPETENT PERSONS (§ I—3)—INQUISITION — INSANITY — FACTS, NOT OPINIONS, BASIS OF JUDICIAL DETERMINATION.

The affidavit of persons that, in their opinion, a supposed lunatic is of unsound mind is not sufficient upon which to base an application for the appointment of a guardian for his estate, since it is necessary to state such facts from which the court itself may judge whether the person is of unsound mind or not.

[*Re Bulger*, 21 Man. L.R. 702, referred to.]

4. INCOMPETET PERSONS (§ I—3)—INSANITY — PRIOR COMMITTAL AS INSANE, EFFECT AS EVIDENCE.

On an application for the appointment of a guardian of the estate of a supposed lunatic, the fact that he was committed to a hospital for the insane by a justice of the peace and that he is there at the time of making the application, is not evidence of insanity, for he may have been committed improperly.

5. EVIDENCE (§ VII E—615)—SANITY — OPINION EVIDENCE AS TO, SUFFICIENCY OF—NUMBER OF MEDICAL MEN REQUIRED.

The evidence of one medical man that a person is of unsound mind is not sufficient upon which to base an application for the appointment of a guardian of his estate on the ground that he is insane, at least two being required.

[*Re Bulger*, 21 Man. L.R. 702, referred to.]

6. INCOMPETENT PERSONS (§ I—3)—INSANITY — GUARDIAN OF ESTATE — PETITION FOR, TO WHOM.

A petition for the appointment of a guardian of the estate of a supposed lunatic must, under rule 753 (Saskatchewan rules, 1911) be addressed to a judge of the court.

7. INCOMPETENT PERSONS (§ VI—30)—GUARDIAN AND WARD—INSANE—APPOINTMENT OF GUARDIAN, FORM OF PETITION REQUIRED.

A petition for the appointment of a guardian of the estate of a supposed lunatic must pray specifically for a declaration of lunacy.

8. INCOMPETENT PERSONS (§ VI—31)—APPOINTMENT OF COMMITTEE — GUARDIAN OF ESTATE OF LUNATIC.

An application for the appointment of a guardian of the estate of a supposed lunatic will be refused where no facts are set out from which the court can determine whether or not the alleged lunatic is of unsound mind, or whether or not he is incapable of managing himself and affairs.

9. INCOMPETENT PERSONS (§ VI—31)—APPOINTMENT OF COMMITTEE FOR INSANE PERSON—REQUIREMENTS OF PETITION.

A petition for the appointment of a guardian of the estate of a supposed lunatic must be supported by the affidavits of at least two medical men, containing not only the conclusions at which they arrive, but also the facts upon which these conclusions are based.

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RE GEORGE GEORGE.

Lamont, J.

APPLICATION by the Western Trust Company to be appointed the guardian of the estate of one George George, a supposed lunatic.

The application was refused.

Mackenzie, Brown & Co., for the applicant.

LAMONT, J.:—This is an application by the Western Trust Company to be appointed the guardian of the estate of one George George, who is alleged to be insane. The only material read in support of the application consisted of

(1) The petition of the company, which sets out that the said George George was adjudged a lunatic by R. M. Crowe, a justice of the peace for Saskatchewan, and was committed to the asylum at Brandon, where he now is; that he was possessed of certain property, which is described in the petition; that the only next of kin to the said George George lives in Glamorganshire, South Wales; and that the said petitioner is informed that the said George is likely to recover his normal state within a reasonable time;

(2) An affidavit of the Regina manager of the company, that he believes the facts set out in the petition to be true in substance and in fact;

(3) An appointment for the hearing of this application;

(4) Affidavit of service of the petition and appointment upon the said George;

(5) The affidavit of Dr. McFadden, superintendent of Brandon hospital for the insane, who testified (*a*) that the abovementioned George George was committed to the hospital for the insane at Brandon on the 10th day of June, 1912, as a lunatic, and (*b*) that the said George is now insane and is likely to be so for at least one or more years in the future.

Before a guardian for his estate can be appointed it must appear that the said George George is, at the time the application is made for the appointment of such guardian, of unsound mind, and that he has property and is incapable of managing such property: Rule 753 *et seq.* In order to determine whether or not he is of unsound mind, evidence of the facts and circumstances which go to shew insanity must be submitted. In *McIntyre* v. *Kingsley*, 1 Ch. Ch. 281, Spragge, V.-C., laid down the law as follows:—

> The affidavits do not give any facts shewing the person to be of unsound mind; they only shew that the person swearing to them believed him to be so. The affidavits should state such facts, from which the Court may judge for itself whether the person is of unsound mind or not. For the purpose of declaring a person a lunatic and vesting the control of all his affairs in the hands of a committte, the affidavits must shew particularly all the facts evidencing the insanity.

And in *Re Bulger*, 21 Man. L.R. 702, Mathers, C.J., said:—

The affidavits of the medical men must not be confined to stating their opinion of the lunacy, but they must shew all the facts evidencing the lunacy, from which the Court may judge for itself whether the person is or is not of unsound mind.

In the present case no facts whatever evidencing the lunacy are set forth, and we have only the opinion of the medical superintendent that he is insane. The fact that he was committed to a hospital for the insane by a justice of the peace and that he is there now is not evidence, for he may have been committed improperly. Again, the evidence of one medical man is not sufficient. There must be at least two. Halsbury's Laws of England, vol. 9, at p. 417, and *Re Bulger*, 21 Man. L.R. 702. In these affidavits the facts upon which the medical witnesses base the conclusions at which they arrive must be set out so as to enable the Court to determine whether or not the opinions of the medical witnesses have been formed upon sufficient grounds. The material in this case is therefore defective in the following particulars:—

(1) The petition is not addressed to any one. It should be to a Judge: rule 753.

(2) The petition does not pray specifically for a declaration of lunacy.

(3) No facts are set out from which the Court can determine whether or not George is of unsound mind or whether or not he is incapable of managing himself and his affairs.

(4) The petition is not supported by the affidavits of at least two medical men, containing not only the conclusions at which they arrive but also the facts upon which these conclusions are based.

I therefore refuse the application.

Application refused.

TAYLOR v. YEANDLE.

Ontario Divisional Court, Mulock, C.J.Ex.D., Clute, and Sutherland, JJ. December 28, 1912.

1. DEEDS (§ I A—2)—WITNESS TO DEED—PROOF OF EXECUTION BY GRANTEE OF A DECEASED GRANTOR—RULE OF LAW.

The rule of law that in establishing a gift during a decedent's lifetime to the recipient, the gift must be established by separate and independent evidence without taking into account the evidence of the recipient himself, is satisfied, where in an action by an administrator to set aside a conveyance as invalid it appears that the deceased donor and recipient were mother and daughter, respectively, that the mother had lived with the daughter some years before the deed in question was made, that the mother had sent for a solicitor to draw up the conveyance which was done without the recipient being present and without the recipient taking part therein, that the instructions were given to the solicitor by the mother herself, and it is obvious from the evidence that the mother intended to compensate the daughter for her trouble and care and the amount which the daughter received was no more than a reasonable compensation.

[*Walker* v. *Smith*, 29 Beav. 396, distinguished.]

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APPEAL by plaintiff from the judgment of Boyd, C., of Oct. 15, 1912, in an action by an administratrix, to set aside a conveyance as invalid and as having been obtained by the fraud and undue influence of defendant, etc. At the trial the action was dismissed with costs.

The appeal was dismissed.

R. S. Robertson, for the plaintiff.

G. G. McPherson, K.C., for the defendant.

Clute, J.

CLUTE, J.:—The action was brought to set aside a deed dated 20th February, 1907, made by the late Eleanor Doherty, who died on the 7th March, 1911, to her daughter, the defendant. The deed was attacked chiefly upon the ground that it was a gift from the mother to the daughter, and that there was not sufficient evidence to support it without relying upon that of the daughter, which could not be looked at for that purpose.

In *Lavin* v. *Lavin*, 27 Gr. 567, which was strongly relied upon, reference is made to the judgment of Lord Romilly, in *Walker* v. *Smith*, 29 Beav. 396, where he is reported as saying: "I am of opinion that in all these cases you must not take into account the evidence of the recipient himself. The gift must be established by separate and independent evidence, and if there was separate and independent evidence here I could uphold the gift." Spragge, C., further says that he followed this decision in *Delong* v. *Mumford*, 25 Gr. at p. 90.

On referring to *Walker* v. *Smith*, 29 Beav. 396, it will be seen that this was a case between solicitor and client, where the testatrix had made a will, prepared by the solicitor, by which she gave legacies of $500 each to the solicitor, his wife and his son and daughter, and the residue to her sisters, and appointed the solicitor her sole executor. The will was attested by two clerks of the solicitor. Shortly afterwards the testatrix made a voluntary gift of £500 of East India stock, which was transferred into his name on the 18th September, and on the 28th of September she gave Mr. Smith a power of attorney to receive the dividends under the three per cents, which he received. She died on the 29th October, 1857. The transactions were kept secret, and no other independent solicitor was employed in them. The family asked a declaration that that the gifts and bequests had been improperly obtained and were void.

The Master of the Rolls in laying down the principle to be applied to cases of that kind, states that one of the questions to be considered is whether the influence of the donee or recipient of the bounty was improperly exercised on the donor, "the burden of proof of the first always lies upon the recipient of the bounty to shew that the gift was intended to be given, and

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I fully concur in the argument and observation that a solicitor does not stand in any different situation from any other person, and that there is nothing ipso facto in the relation of solicitor and client which makes it impossible for the solicitor to receive a gift from his client, but when the gift has been fully established the question then arises whether undue influence has been exercised, and then the question of the relation of solicitor and client is an ingredient in estimating the extent of the actual or probable influence exercised over the donor."

In that case he did not find any undue influence, and held that in all these cases you must not take into account the evidence of the recipient himself. The gift must be established by separate and independent evidence, and he observes that "if there were separate and independent evidence here I should uphold the gift." He found that as to the will, there was not in evidence any proof of undue influence and upheld the will. He set aside the gift, however, of the £500 East India stock, saying that that stood upon a totally different footing: "Undoubtedly if she had called in a third person who had no interest in the matter, and said, I have deliberately given this £500 to Mr. Smith for the benefit of himself or his children, or for his own benefit exclusively, then I should have upheld the gift, but I look in vain for such a thing in this case. I go through the whole of the evidence but, as I have stated, I am compelled to throw out of consideration the evidence of Mr. Smith himself. Unfortunately, the whole matter was kept secret and the evidence shews that she wished it to be concealed. Unfortunately, the effect of this is to destroy that which alone could support the gift, viz., evidence that the gift was really made." The result was that the bequest under the will was sustained, and the gift of East India stock was set aside.

This authority, having regard to the facts in the present case, supports, I think, the decision of the Chancellor. Here the mother had resided with the daughter for some years before the will was made and continued to reside with her for four years afterwards and until her death. The Chancellor finds that the mother in the first instance through her brother asked Mr. Davidson—the solicitor who drew the conveyance in question—to come and see her. The defendant was not present when the deed was made; she took no part in it. The solicitor came and states that the transaction was entered into by the mother herself who gave him the instructions, and this was some six or seven years after she had gone to live with the daughter. She was well-satisfied with the care which her daughter took of her, and during this earlier period she made a note of $500 payable to her daughter. Quite independently of the defendant's evidence, the execution of the deed seemed to be a free

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act and will of the mother, and, as the circumstances have proved, a reasonable and fair settlement. Whatever view might have been taken of the case, had the mother been dissatisfied with her treatment and sought in her lifetime to set aside the deed, it is, I think, under the circumstances of this case, too late after she had affirmed it by continuing to live with her daughter for over four years.

In this case, differing from *Walker* v. *Smith*, 29 Beav. 396, there was no secrecy. The deed was made on the 20th February, 1907, and registered on the 20th April, of the same year. There was no evidence whatever of undue influence on the part of the daughter, and there is the further fact that on the same day that the deed of the property in question was given, the mother made a will by which she gave to her daughter, the defendant, all her estate, real and personal, of which she might die possessed. This will was duly executed and never revoked.

It is true that it has not been probated and letters of administration have been granted to the plaintiff. This occurred for the reason that no proper inquiry or search for the will was made prior to the application for letters of administration. The mother died on the 7th March, 1911, and letters were granted on the 20th April, of the same year.

There was no evidence offered to impugn this will, and no reason presented to the Court why it should not be admitted to probate and the letters recalled. But this Court has no jurisdiction to revoke the grant. See *McPherson* v. *Irvine*, 26 O.R. 438. See *Empy* v. *Fick*, 13 O.L.R. 178, 15 O.L.R. 19, where the difference is pointed out in the position of a plaintiff who seeks to set aside an improvident deed made by herself, and where relief is sought after her death by her personal representatives.

From the evidence I think it cannot be doubted that the transaction as it actually took place and was worked out was for the benefit of the mother; she was satisfied with it during her life. It is obvious from the evidence, I think, that she intended from the first to compensate the daughter for her trouble and care, and the amount which the daughter received was no more than a reasonable compensation.

I think this appeal should be dismissed with costs.

Mulock, C.J. MULOCK, C.J.:—I agree.

Sutherland, J. SUTHERLAND, J.:—I agree.

Appeal dismissed.

READ & Co. v. FERGUSON et al.

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Saskatchewan Supreme Court. Trial before Haultain, C.J. December 19, 1912.

1. JUDGMENT (§ IV—220)—FOREIGN JUDGMENTS—LOCAL JUDGMENT THEREON—JURISDICTIONAL REQUIREMENTS.

A judgment *in personam* of a foreign court of competent jurisdiction may be sued upon in Saskatchewan where the evidence sufficiently establishes the identity of the defendant in the action on the judgment with the defendant in the judgment sued upon, and that the court which rendered the judgment had jurisdiction over the defendant in respect of the cause of action.

2. JUDGMENT (§ IV A—225)—FOREIGN JUDGMENT, JURISDICTIONAL REQUIREMENTS IN FOREIGN TERRITORY.

In an action in a provincial court on a judgment *in personam* obtained in one of the United States, evidence that the defendant against whom judgment was rendered was a resident of the state in question when the action was begun, was personally served with the summons which was the first step in the action, and submitted to the jurisdiction of the state court by entering an appearance in the action by his authorized attorney, is sufficient to establish the jurisdiction of the state court over the defendant at the time of the rendition of judgment.

3. JUDGMENT (§ IV A—225)—FOREIGN JUDGMENTS—JURISDICTIONAL REQUIREMENTS IN FOREIGN COURT.

In an action on a judgment *in personam* obtained in one of the United States, evidence that the defendant against whom the judgment was rendered was a resident of the state in question when the action was begun and was personally served therein with the summons commencing the action is sufficient to shew that he was subject to the jurisdiction of the court which rendered the judgment.

[*Carrick* v. *Hancock*, 12 Times L.R. 59, and *Rousillon* v. *Rousillon*, L.R. 14 Ch.D. 351, referred to.]

Statement

ACTION to recover the amount of a judgment obtained by the plaintiffs against the defendants in the Circuit Court of the county of Marquette, Michigan.

Judgment was given for the plaintiffs.

W. W. Livingston, for the plaintiffs.

G. O. McHugh, for the defendants.

Haultain, C.J.

HAULTAIN, C.J.:—The plaintiffs sue the defendants for the sum of $602.05, the amount of a judgment of the Circuit Court for the county of Marquette, in the State of Michigan, recovered by the plaintiffs against the defendants on the 25th May, 1910.

It will be unnecessary for me to deal at any length with the large mass of evidence which has been proffered. Much of it, and notably much of the evidence taken by commission on behalf of the plaintiffs, is altogether beside the question. That portion of the evidence which has had any weight or bearing on my findings will be quite apparent from what follows.

Subject to certain qualifications, a judgment *in personam* of a foreign Court of competent jurisdiction may be sued upon in Saskatchewan.

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In this case there has been proved:—

(*a*) A judgment of a foreign Court

(*b*) Of competent jurisdiction.

Jurisdiction is alleged in the statement of claim, and is not denied.

(*c*) A judgment against the defendants in this action.

The evidence satisfies me of the identity of the defendants in this action with the defendants in the judgment sued upon.

The defendants defend on the following grounds:—

(1) That the judgment was procured by fraud, in that they or either of them or any person or persons authorized to act for them or either of them were not served with any process or notice of any action or proceeding on which the judgment in question was obtained.

(2) That the defendants never submitted to the jurisdiction of the foreign Court.

The evidence establishes the fact that the defendant Anthony Ferguson was resident in the State of Michigan when the action was begun, was personally served with the summons which was the first step in the action, and submitted to the jurisdiction of the Michigan Court by entering an appearance in the action by his authorized attorney, M. J. Kennedy. The defendant Michael Ferguson states in his evidence that Anthony Ferguson did not leave Michigan until 1906, and F. H. Berg, one of the plaintiffs' witnesses, swears positively that both defendants were living at Ishpeming, in Michigan, at the time the Michigan action was begun.

So far, then, as the defendant Anthony Ferguson is concerned, the plaintiffs have established their case.

The facts concerning the defendant Michael Ferguson are not so clear and undisputed. Michael Ferguson swears that he was not served with process in the Michigan case, that he never instructed Mr. Kennedy to act for him, and that he was absent in Canada from the 18th July until some time before Christmas in 1905, while the action in Michigan was begun on the 5th September. The witness Prim swears that he served Michael Ferguson personally with the summons at Ishpeming on the 11th September, 1905. Mr. Berg, one of the plaintiffs' witnesses, gives very positive evidence concerning Michael Ferguson's personal presence at Ishpeming in September, when the Michigan action was begun. I was not very favourably impressed with the manner or the matter of the defendant's evidence. He was not at all candid with regard to his business connections with Anthony Ferguson, and their joint relations with the plaintiffs. He admitted under great pressure that he had been served with process on unnamed occasions, the nature of which he did not remember, and he further said that he did not remember being served with process in the case in

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question, but might have been, but later on was positive in his denial of service of process in this particular matter by Prim or at all. Looking at the evidence as a whole, and in view of the foregoing, I find that the summons in the Michigan action was served on Michael Ferguson by Prim on the 11th September at Ishpeming in Michigan.

There is no evidence to shew that the defendant Michael Ferguson submitted to the jurisdiction of the Michigan Court. Although he entered an appearance and acted throughout for both defendants, Mr. Kennedy's evidence shews that he was only instructed by Anthony Ferguson, and Michael Ferguson's statement that he never instructed Kennedy is uncontradicted. Mr. Livingston urges that as the defendants were sued as a partnership, Michael was bound by Mr. Kennedy's retainer by Anthony. There is no evidence as to the Michigan law on that subject. But it is not necessary, in my opinion, to shew submission to the jurisdiction by Michael Ferguson. He had been a resident of Michigan for a number of years prior to the time in question. Some time in 1905 he came to Canada for a short time, but returned to Michigan for at least five months before finally coming back to Canada. There is no evidence of an intention to remove his dwelling permanently in 1905, and in view of his long stay in Michigan on his return it is probable that the final decision to change his domicile was only arrived at in 1906. In any event, as I have already found that Michael Ferguson was actually resident or at least present in Michigan at the time of the commencement of the action, he was subject to the jurisdiction of the Michigan Court in an action *in personam* such as the action in question: *Carrick* v. *Hancock* (1895), 12 Times L.R. 59; *Rousillon* v. *Rousillon* (1880), 14 Ch.D. 351, 370, 371, *per* Fry, J.

The plaintiffs are therefore entitled to succeed against Michael Ferguson as well.

Judgment for plaintiffs for $602.05 and interest as claimed, with costs.

Judgment for plaintiffs.

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Judicial Committee of the Privy Council. Present: The Right Hons. Lords Macnaghten, Atkinson, and Shaw. June 18, 1912.

1. TIMBER (§ I—9)—MODE OF ESTIMATING—TIMBER "CRUISERS"—VERIFICATION OF QUANTITIES.

Where a sale of a block of shares in a lumber company is based upon the vendor's statement of the company's assets which included various timber licenses, some for twenty-one years and others perpetual, issued by the Government as concessions, and such statement also contains an estimate of the quantity of uncut timber under such licenses or concessions, and a valuation thereof, and it is stipulated

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between the parties that the buyer of the shares shall be entitled to a *pro rata* abatement in price for any deficiency in the quantity of timber, to ascertain which he is to "cruise and verify the figures" in a limited period, a deficiency is not shewn by the buyer on whom the onus is cast where his only evidence is that of his timber cruisers who made no estimate of growing timber which, at the time of the contract, was not merchantable in the sense that under the lumbering facilities then available it could not be profitably taken out at that time; the warranty being expressly limited to quantity and not applying to the estimated value, the contract should not be interpreted as leaving it to timber cruisers to exclude timber trees actually on the *locus in quo* upon any opinion they might have, that, by reason of cost of transportation or of manufacture, the excluded timber could not presently be taken out at a profit, although it would, in the natural course and with improved methods and conditions, be valuable during the company's operations on the limits.

[*Swift* v. *David*, 16 B.C.R. 275, affirmed.]

Statement

APPEAL from a judgment of the Court of Appeal of British Columbia, dated the 6th June, 1911, *Swift* v. *David*, 16 B.C.R. 275, 18 W.L.R. 360, reversing a judgment of Clement, J., dated the 29th Sept., 1910, in the appellants' favour for $171,500 and costs, and dismissing a cross-appeal by the appellants against so much of the judgment as permitted a deduction of $20,000 to be made from the appellants' claim.

The appeal was dismissed: *Swift* v. *David*, 107 L.T. 71.

By an agreement dated the 15th July, 1907, and made between the respondent and the appellants, the appellants agreed to purchase certain shares in a lumber company known as the Fraser River Saw Mills Limited upon certain terms therein mentioned. By clause 3 of the said agreement it was provided as follows:—

> First party (the respondent) is to give a satisfactory guarantee to second party (the appellants) that the quantity of timber on the different tracts of land as shewn by the statement of the Fraser River Saw Mills Limited under their statement of the 30th April, 1907, copy of which is attached hereto and made a part hereof, is true and accurate, it being the intention and made one of the conditions of this trade that the timber shall at least run equal in quantity to the number of feet shewn in the attached statement.

By clause 4 of the agreement the appellants were given a certain time within which to "cruise" and verify the figures in the statement, and it was further provided that "in the event of all the tracts from a cruising or other verification failing to reach the quantity represented in the attached statement" the respondent agreed to repay the appellants "in just proportion that the amount of shortage bears to the total number of feet of timber" appearing in the above-mentioned statement. The statement appended to the agreement was a statement from the commercial point of view of the whole assets of the Fraser River Saw Mills Limited with their values and of their liabilities. The assets included many things besides tim-

ber, such as land and buildings, live and dead stock, bills and accounts receivable, and so on. On the 23rd August, 1909, the appellants commenced an action against the respondents alleging that they had cruised the said tracts of land and that there was a shortage, and claiming the sum of $250,000 as representing the amount of that shortage. The case was tried before Clement, J., without a jury, and after a hearing lasting sixteen days the learned Judge gave judgment in the appellants' favour for $171,500 and costs.

At the trial a number of "cruisers" (or persons employed to estimate the quantity of timber on timber lands) were called on both sides. These cruisers had been over portions of the lands in dispute and gave their various estimates of the amount of timber upon such portions. After hearing all the evidence the learned Judge accepted in the main the evidence of the appellants' cruisers. The appellants also tendered expert evidence to shew that "timber" meant anything which could under present conditions be converted into merchantable lumber, but that it did not include anything smaller than 14 in. or at any rate 12 in. in diameter. That such smaller wood was known to the milling industry as "poles and piling," and was not timber any more than cordwood was timber. At the close of the appellants' case it did not appear that any exception was taken to the basis on which the appellants' cruisers had made their cruises. The position was thus stated by the respondent's leading counsel:—

> Our cruisers no more than the cruisers on the other side have attempted to put in timber which was entirely worthless or would not make lumber; it is a question as to whose judgment is the best as to the amount of timber found.

Evidence was given on behalf of the respondent by a number of cruisers who had cruised portions of the land in dispute on his behalf. The majority of the respondent's cruisers cruised upon the basis of a 16 ft. log instead of a 32 ft. log which was the size upon which the appellants had cruised. It was admitted that the result of so doing would considerably increase the amount of the cruises. The appellants contended that the 32 ft. basis was the proper one on which to work and the learned Judge so held. After hearing the evidence the learned Judge gave judgment for the appellants for $171,500. In effect he accepted the principle that in considering what was timber for the purpose of this agreement actual logging conditions as they existed at the time had to be borne in mind. He declined to accept the appellants' contention that "dead and down" timber should be excluded, but he rejected "piles and poles" from his consideration. He accepted the appellants' contention that the respondent's cruises were untrustworthy owing to the uncertainty as to the actual acreage cruised and by reason that the cruises were based on a wrong sized log.

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The respondent duly gave notice of appeal against the judgment, and by a notice of cross-appeal the appellants claimed that the judgment should be amended by disallowing a credit of $20,000. The appeal was heard before the Court of Appeal (Macdonald, C.J., Irving and Galliher, JJ.), and on the 6th July, 1911, they gave judgment reversing the judgment of Clement, J., and dismissing the action with costs, *Swift* v. *David*, 16 B.C.R. 275, 18 W.L.R. 360.

LONDON, May 21 and 22. Sir *R. Finlay*, K.C., *E. P. Davis*, K.C. (of the Canadian Bar), and *Rowlatt*, for the appellants.

Buckmaster, K.C., *E. V. Bodwell*, K.C. (of the Canadian Bar), and *Geoffrey Lawrence*, for the respondent.

Sir *R. Finlay*, K.C., in reply.

At the conclusion of the arguments their Lordships took time to consider their judgment.

June 18, 1912. The judgment of the Board was delivered by

Lord Atkinson.

LORD ATKINSON:—This is an appeal from a judgment of the Court of Appeal of British Columbia, dated the 6th June, 1911, reversing a judgment of Clement, J., dated the 29th Sept., 1910, awarding $171,500 damages and costs to the appellants, and dismissing their cross-appeal against so much of the said judgment as directed that a deduction of $20,000 should be made from the sum claimed by the appellants. The facts are plain. A certain limited liability company, named the Fraser River Saw Mills Company, incorporated in the 23rd December, 1904, under the laws of British Columbia, with a capital of half a million dollars in shares of $100 each, had acquired, and at the date of the contract hereafter referred to was entitled to, extensive rights of cutting timber over an area of over 50,000 acres in British Columbia. It was also possessed of mills capable of manufacturing into planks about 30,000,000 ft. of timber per annum, and its principal place of business was at Millside, near the city of New Westminster, in that province. This company had some time before the 15th July, 1907, increased its capital to $1,000,000 in shares of $100 each. The increased stock of half a million dollars had not at that date been issued, but was about to be issued prior to the 10th August, 1907. The respondent on the 20th July, 1907, owned, or controlled, 3,350 shares, stock of the company, and when the new issue took place would own or control shares amounting to 6,700 in number at least. On the aforesaid date, the 20th July, 1907, the respondent entered into an agreement with the appellants to sell to them 6,700 shares of this company at $75.00 per share. Attached to this agreement was a statement of the assets of the company, dated the 30th April, 1907, which contained the following items amongst others:—

Timber Lands:	
50 Provincial Licenses, 32,000 acres, containing 500,000,000 ft., at 50 cents per 1,000 ft.	$250,000.00
60,000,000 ft. of Crown Granted Timber carrying no royalty	58,763.23
141,925 ft. Timber Crown Granted Land, Comox District and Denman Island, at $1	141,925.00
170,000,000 ft. Timber, Government Leases, at 50 cents	85,000.00
E. and N. Ry. Co. Timber, 5,475 acres, 164,250,000 ft., $1	164,250.00
	$699,938.23

The clauses of the contract referring to this statement of assets, and containing the warranty for the breach of which the action out of which the appeal arises was instituted, are pars. 3 and 4.

The first of these, and the material part of the second, run as follows:—

> Third: First party is to give a satisfactory guarantee to second party that the quantity of timber on the different tracts of land as shewn by the statement of the Fraser River Saw Mills Limited Corporation under their statement of the 30th April, 1907, copy of which is attached hereto and made a part hereof, is true and accurate, it being the intention and made one of the conditions of this trade that the timber shall at least run equal in quantity to the number of feet shewn in the attached statement.
>
> Fourth: Second parties are to have until the 1st Sept., 1907, to cruise and verify the figures in the attached statement of the 30th April, 1907, regarding the quantity of timber on said various tracts, and in event of all of the tracts, from a cruising or other verification, failing to reach the quantity represented in the attached statement, first party is to repay second party in just proportion that the amount of shortage bears to the value of the total number of feet of timber estimated to be on said tracts as appears in said attached statement bearing date of the 30th April, 1907.

The "first party" in the above clauses means the respondent, the "second party" the appellants. The appellants alleged that the quantity of timber found by their cruisers on these timber lands was short of the amount guaranteed by about 300,000,000 ft., and they sued for breach of warranty in respect of this shortage. Their cruisers, however, acting presumably on instructions, only arrived at this figure as to the shortage by excluding from their computation and treating as non-existent all timber trees which if felled and brought to the mills of the company, and treated there according to the mode of manufacture now followed by the company, would not have produced manufactured timber which could, when manufactured, be sold at a profit. The appellants contend that this is the meaning of the

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contract. They insist that, having regard to the nature of the business of this company, the manufacture and sale of lumber, and to the fact that the document of the 30th April, was a statement of the assets of the company as a trading concern, made for the purposes of this agreement, the word "timber" used in these arts. 3 and 4 must mean timber merchantable in the trade or business of the company, that is timber which at the date or dates above-mentioned would be reasonably capable of being felled, treated, and sold in that trade at the then existing prices at a profit.

It is admitted by the respondent that timber trees growing in places so rocky that, if felled, their trunks would be split and injured in the fall should be excluded. He also admits that timber trees growing in places so inaccessible, owing to their physical features, that the trees could not under any circumstances be felled, or removed to the mill at any reasonable cost, should also be excluded, but he disputes altogether the test adopted by the appellants, and contends that at the very least all timber trees now growing on this large tract which, with the exceptions already mentioned, are by reason of their size and quality reasonably fit for use in a business such as that of this company come within the meaning of the word "timber" used in the above-mentioned list of assets and articles of the agreement, and ought not to be excluded from the estimate of the quantity of timber found on these lands; and he further insists that if the test he thus suggests be adopted, there is now, and was at the date of the agreement, more timber upon these lands than is mentioned in the statement of assets. Their Lordships have not to decide between these two contentions.

The sole question for their decision is whether the contention of the appellants as to the meaning of the contract is sound. Now, in the first place, it is not disputed that the terms for which some of the licenses mentioned in the statement of assets have been granted are twenty-one years, or that some are perpetual. It is proved by the former secretary of the company that the mill would, if reasonably worked, cut about 30 million feet of timber per annum. This statement was, apparently, not seriously disputed, so that if the quantity of timber suitable from its size and quality now on these lands be anything like that mentioned in the statement of assets, that is close upon 900 million feet, there would be enough raw material there to keep the mill working for the next twenty years, irrespective altogether of the timber now unripe, which would gradually mature in that period. Again, arts. 3 and 4 deal with quantity alone. Nothing is suggested in these as to value, cost of manufacture, price of profit. Moreover, the cruisers are in these clauses treated as persons capable of ascertaining the quantity and verifying the

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schedule of assets. If the appellants' contention be right these cruisers must necessarily be able to judge whether the timber is merchantable or not. This, however, admittedly involves an estimate of the present cost of felling the timber trees, and bringing them to the mill, the cost of manufacturing them in the mill, the expenses to be incurred in the conduct of the company's business, such as the cost of advertisement, wear and tear, etc., until the manufactured article is sold, or the portion of these expenses appropriate to this part of the company's business, and, lastly, to an estimate of the prices at which the finished product could be sold if now manufactured, before they could determine whether the raw material of this industry now existing on the land could be dealt with at a profit by this company.

It appears to their Lordships that several things of this nature must be taken into account before it can be determined whether the manufacture of the raw material of the industry obtained at any given cost will yield a profit. Men in the position and with the experience of cruisers may be well fitted to measure a tree, to determine whether or not it is sound, or to estimate the labour necessary to fell it, and to calculate the number of trees suitable to be treated as this company in its business treats them, but their Lordships think that it never could have been the intention of the parties to the contract to require these cruisers to solve the difficult and delicate problems above-mentioned before testing the accuracy of the statement of assets or determining what is the quantity of timber growing on these lands within the meaning of this contract. Yet this by the very terms of the agreement they should do before the 1st September, 1907, if they are to perform the task at all. A value is no doubt put upon the timber in the statement of assets, but it is admitted that there is no warranty as to value or the price at which it could be sold. Quantity is alone guaranteed. There is this difficulty, too, in adopting the test suggested by the appellants, prices may vary from time to time, and the cost of felling and bringing a log of timber to the mill may vary from month to month. The very operations of the company, the clearance which they must necessarily make wholly or partially in the forest on these lands in the conduct of their own business, may diminish so considerably the cost of procuring the raw material of their industry and bringing it to their mill, that the trees the treatment of which would yield no profit in 1907, would yield a profit in 1908. Again roads may be run through these woods opening new tracts and making them more easy of access. Machinery may be improved, and the whole condition of the industry may change long before the term of the shortest of the licenses shall have expired, or the supply of suitable timber been exhausted. Their Lordships cannot see on what principle, not only are all

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considerations of growth to be excluded, but the estimated cost of procuring, between the date of the contract and the 1st September, 1907, the raw material, of manufacturing it, as well as the estimated profit realizable by sale of the finished products within that period, none of which things can ever, in fact, take place, should be treated as determining factors in measuring or estimating the vast number of timber trees upon these lands, suitable in size and quality for the purposes of an industry which it was evidently contemplated should be carried on for years to come. Such a mode of verification bears no rational relation to the actual facts of the case, and in their Lordships' view never could have been contemplated by the parties to the contract as the mode to be adopted by the persons constituted judges of the matter, namely, the cruisers, who, in the words of the above-mentioned articles, were to "cruise and verify the figures" on the statement of assets "regarding the quantity of timber on the various tracts." It appears to their Lordships to be almost inconceivable that if it was intended that a method of verification so artificial in character as that contended for should be applied, no indication whatever, direct or indirect, express or implied, should be found in the contract to the effect that men should be selected so unfitted for their difficult task as these cruisers apparently are, and that no instruction should be given to them touching the special nature of the test which they were to apply. On the whole, therefore, their Lordships are of opinion that the construction of this contract contended for by the appellants is not its true construction, that the judgment appealed from was on this point right and should be upheld, and this appeal be dismissed, and they will humbly advise His Majesty accordingly. The appellants must pay the costs of the appeal.

Appeal dismissed.

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Ontario Divisional Court, Boyd, C., Latchford and Middleton, JJ.
December 23, 1912.

1. WILLS (§ III G 2—127)—LIFE ESTATE—IMPLIED POWER TO ENCROACH ON CORPUS.

Where, by the terms of a will, all of the testator's real and personal property went to his widow for life and after her death it was to go to one of the testator's daughters and legacies were then to be paid to various sons "if there is sufficient to pay the same, if not, then a corresponding deduction shall be made in every case," the residue to be divided among the daughters, and it appears in evidence that the widow is old, infirm and blind, and the life estate which consists of a house and personal property mostly in mortgages and notes yields a sum insufficient to properly support the widow, and these facts were known to the testator at the time of his death, the widow is entitled not only to a life estate and interest in all the property, but she has

an implied contingent power to encroach on the capital for the purpose of maintenance.

[*Re Johnson*, 7 D.L.R. 375, 4 O.W.N. 153, varied; *Re Dixon*, *Dixon* v. *Dixon* (1912), 56 Sol. J. 445, doubted; *Re Holden*, *Holden* v. *Smith*, 57 L.J. Ch. 648, doubted; *Re Willatts*, *Willatts* v. *Astley*, [1905] 1 Ch. 378, [1905] 2 Ch. 135, and *Re Thompson's Trusts* (1880), 14 Ch. D. 263, referred to; *Re McDonald* (1903), 35 N.S.R. 500, applied. Jarman on Wills, 6th ed., 464, referred to.]

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APPEAL by Agnes Johnson from the judgment of Mulock, C.J.Ex.D., *Re Johnson*, 7 D.L.R. 375, O.W.N. 153. Statement

The judgment below was varied

M. B. Tudhope, for the appellant.

D. Inglis Grant, for Janet Ratcliffe, a beneficiary, and an executor.

BOYD, C.:—The testator made his will in June, 1909, and died in August, 1911, his financial condition between these two years being much the same. Boyd, C.

He left a widow and grown up children—married and doing for themselves. His wife was at the date of the will weak and with failing eyesight—she is now old, infirm, and stone-blind. After paying debts his estate consists of land with house and its belongings, and personal property. The latter is chiefly made up of mortgages aggregating $4,400, notes amounting to $1,125, and money equal to $1,550, in all about $7,000 yielding (say) $350 a year.

The frame of his will is to give the whole of his property, real and personal, to his wife for life or widowhood (this last alternative may be dismissed). After her death the house and furniture or any live stock or chattels to one of the daughters, and after the wife's death legacies are to be paid to various sons, amounting in the whole to $3,200, and this clause contains the crucial words—at her death, then, "the legacies shall be paid forthwith if there is sufficient to pay the same; if not, then a corresponding deduction shall be made in every case."

All the residue of the estate is given among the daughters.

Upon the construction of the will the Chief Justice has held that the widow has a life estate only and not an out-and-out ownership. I agree that this is a right result, but would carry the benefit intended for the widow a little further, and say that she has a life estate and interest in all the property, with an implied contingent power to encroach on the capital for the purposes of maintenance. This aspect of the case was not presented to or considered by the Chief Justice, but it is a fair and reasonable conclusion to be drawn from the language of the will construed in the light of the surrounding facts known to the testator when he made his will, and at the time of his death.

He knew that his wife would need support and maintenance, and he left her all his property for her life for that pur-

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pose. He also knew that the income of the estate, while enough perhaps for a woman able to fend for herself, would be insufficient for one blind and infirm, and he knew that after paying debts he would leave plenty of easily available property, which he refers to as "funds," to pay the $3,200 legacies in full, if that available property were not diminished by being drawn upon. Under the terms of this will the widow is entitled to enjoy the whole property in specie and the money in her hands and coming into her hands from the notes and mortgages so much as she might need to apply for the satisfaction of her own proper wants. Such it appears to me is the only satisfactory explanation to be given of the language used by the testator. The income of $350 is not enough, rather would about $600 be required per year to have this blind woman properly looked after and supported. To this extent, a measurable extent, is the widow permitted to exercise power to encroach upon the moneys of the estate.

The case laid is in a somewhat confused condition upon this branch, yet many decisions support this conclusion.

The most recent case cited, *Re Dixon, Dixon* v. *Dixon* (1912), 56 Sol. J. 445, is not of authority because only found in the Solicitors' Journal (February, 1912), by Mr. Justice Neville. The will was of all the man's estate to his wife during widowhood, and at her death or remarriage the residue to be divided between children. The Judge held that "residue" had the same meaning as "remainder" used and construed in a will before Mr. Justice Kay, *Re Holden*, 57 L.J. Ch. 648, and followed him in declaring that the widow had a life estate only. This throws us back to consider *Re Holden, Holden* v. *Smith*, 57 L.J. Ch. 648, which cannot be regarded as a satisfactory decision. The will gave the personal estate to the widow for her own use as long as she might live, and on her death directed the remainder of the personal estate which might then exist should be made money, and given to brothers and sisters. It was argued that the words "remainder which might then exist" implied some power of disposition during her life. Kay, J., said:—Did the testator mean to give his wife more than a life estate? I confess that I strongly suspect that he did. The words (as to remainder) look as if he were contemplating a diminution of capital: but I cannot act upon mere suspicion. The words are intelligible if you refer them to the first direction in the will to pay debts. His wife was an executrix, and it might be that she would have to go on paying debts during her life, and I think the word "remainder" is sufficiently explained by that direction to pay debts.

There is no such outlet in the case in hand, for the wife was not appointed an executrix and the debts were too small to affect

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the sufficiency of the funds for paying legacies. And besides such a method of construction was not favoured in *Re Willatts, Willatts* v. *Astley*, [1905] 1 Ch. 378, [1905] 2 Ch. 135.

There the testator had appointed his wife executor with power to sell all his property and land, and at her death what is left to be divided between his daughters. Farwell, J., held that the words "what is left" meant the net residue of the estate after payment of debts and costs of realization, and did not give the wife a life or any other interest in the estate. This was reversed by the Court of Appeal, who held that the reference was not to what remained after payment of debts, but what should be left after the exercise by the plaintiff for her own benefit of her power of sale.

On the other hand there is a case decided in 1902, *Re Rowland, Jones* v. *Rowland*, 86 L.T. 78, by Eady, J., when the bequest or residue was for the sole use and benefit of the wife during widowhood. Should she marry, then the balance, if any, of the money and farm stock not to exceed £400 to be divided between others. She married, and it was held that she took absolutely all except as to £400 which went over in the event of there being a balance of any unexpended residue to that amount on the day of re-marriage. It was argued there that "balance" meant what was left after providing for debts, but it was held that "balance" meant the part unexpended by the widow.

This decision appears to go farther than is supportable, but it is upheld by the last editor of Jarman, as decided on the principle that property may be given for life with a power to expend capital, followed by a valid gift over of the unexpended part, p. 464 (note 3) 6th ed., 1910. At one time that was thought to be so indefinite and vague as to be nugatory and ineffective, and so was rejected by the Court.

I think the correct rule applicable to the case in hand is to be found in the words of James, L.J., in *Re Thompson's Trusts* (1880), 14 Ch.D. 263. He says "the widow took nothing but an estate for life with full power of enjoying the property in specie, so that if there was ready money it need not be invested, but she might spend it and she might use the furniture and enjoy the leaseholds in specie."

The same reason in this case extends to the use of the notes and mortgages—not absolute and unlimited, but having regard to the need of the widow. The testator does not contemplate the disposition of all the funds available for legacies, but some diminution of it, which is in reason and good sense to be measured and controlled by the executor. The testator speaks of "funds" in the popular sense of assets presently available for

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the payment of legacies and in this instance to be drawn first from the money in hand, then from the notes as they fall due; and then from the mortgages which run for some years. These funds may be drawn upon for the necessities of the widow as already indicated.

A Nova Scotia case deserves mention, *Re McDonald* (1903), 35 N.S.R. 500. Testator gave his wife all the estate for her own use during her lifetime. At the death of the wife he gave the house and contents to another for life, and to his nephews thereafter, as well as any money or securities which may remain "after the death of wife."

It was decided by Townsend, J., and affirmed by Justices Ritchie, Graham, and Meagher, that the wife was entitled to more than the income and had a right to use a part, if not the whole of the principal. And the question submitted was approved of, viz., that if the income was insufficient for the maintenance and support of the widow, the executors would be justified in allowing her as much out of the principal or the personal property as may be necessary therefor.

That case appears to be singularly like this, and though not an authority in this Province is a valuable exposition of the law: See also *Re Tuck*, 10 O.L.R. 309.

With this variation of the judgment the matter will be left in the hands of the executors to deal with as now indicated. Costs of appeal out of estate.

Latchford, J.
Middleton, J.

LATCHFORD and MIDDLETON, JJ., concurred.

Judgment varied.

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BRISTOL v. KENNEDY.

Ontario High Court, Middleton, J., in Chambers. December 28, 1912.

1. PLEADING (§ VII—360)—DEMURRER — DEMURRERS AS AFFECTED BY ONTARIO CON. RULE 259.

In Ontario, by rule 259, Consolidated Rules of Practice, 1897, demurrers are forbidden in civil actions, and there is substituted the procedure by which a point of law is raised in the pleadings which is to be disposed of at the trial, unless a special order is made that it be earlier dealt with.

2. PLEADING (§ VII D—380)—DEMURRER—WHAT QUESTIONS RAISED BY DEMURRER—MOTION AGAINST EMBARRASSING PLEADING DISTINGUISHED.

A motion to strike out a pleading on the ground that the same tends to prejudice, embarrass and delay the fair trial of an action is not equivalent to a demurrer, filed under the former Ontario practice, since prior to the passing of rule 259 (Consol. Rules, 1897) abolishing demurrers in Ontario there also existed a rule authorizing a motion against pleadings as embarrassing.

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3. PLEADING (§ VII D—380)—DEMURRER—EMBARRASSING PLEADING.

Embarrassment in a defendant's pleading is where the pleader brings forward, by way of defence, matters which he is not entitled to make use of, while a pleading, bad in law, is one which does not shew a defence at all.

[*Glass* v. *Grant*, 12 P.R. (Ont.) 480; *Stratford* v. *Gordon*, 14 P.R. (Ont.) 407, referred to.]

4. PLEADING (§ III C—320)—WHAT MAY BE PLEADED.

Where parts of defendant's pleading though couched in obscure terms nevertheless contains some facts which indicate a valid defence to some of plaintiff's allegations, a motion to strike out these parts as embarrassing will be denied.

5. PLEADING (§ IX—110)—AMENDMENTS—QUESTION ON MERITS OF ACTION FOR DETERMINATION AT TRIAL NOT IN CHAMBERS.

The determination of a question touching the merits of the action should not be made on a Chamber motion, since there is a very limited right of appeal from Chamber orders and the proper policy is to have all questions both of law and fact disposed of at the trial.

Statement

APPEAL by the defendant, Mary Kennedy, from an order of the local Judge at Hamilton striking out paragraphs 1 and 2 of the statement of defence and setting aside the jury notice.

The appeal was allowed.

J. Mitchell, for the defendant, Mary Kennedy.

H. A. Burbidge, for the plaintiff.

Middleton, J.

MIDDLETON, J.:—As the case is not one which, in my opinion, should be tried by a jury, I do not think I should interfere with what has been done by the learned local Judge in reference to the jury notice.

Under our present system of pleading it is difficult to maintain an order striking out a part of a pleading. As pointed out by Mr. Justice Bleckley, in *Ellison* v. *Georgia Railroad*, 87 Georgia 691, in every logical and well-constructed universe there must necessarily be much destructive work to be done. In the sphere of law this destructive work was assigned to the demurrer as a legal devil, always present and always ready, not having any particular claim upon modern emotion, but still entitled to some measure of co-operation and even of sympathy.

In Ontario we have advanced far beyond this stage: as by Rule 259 demurrers are forbidden, and there is substituted the procedure by which a point of law is raised in the pleadings which is to be disposed of at the trial unless a special order is made that it be earlier dealt with.

That destructive agent, thus forbidden access to the veritable paradise to be found in modern pleadings, is restless—like his prototype—and seeks to intrude himself, clothed in different garbs, yet intent on exercising his destructive energy. So we find him sometimes, as here, seeking to disguise himself in such wise that he shall not be recognized, in the garb of a motion to strike out a pleading on the ground "that the same tends to prejudice, embarrass, and delay the fair trial of this action."

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The learned counsel for the plaintiff argued that such a motion was equivalent to a demurrer. In this I think he is not correct, because, prior to the passing of the rule in question, and while demurrers were still in vogue, there also existed the rule authorizing a motion against pleadings as embarrassing.

The distinction between an embarrassing pleading and a pleading bad in law is not always easy to draw. This distinction is pointed out in *Glass* v. *Grant*, 12 P.R. 480, and in *Stratford* v. *Gordon*, 14 P.R. 407. Embarrassment is there defined as "bringing forward a defence which the defendant is not entitled to make use of."

Here, what is alleged is that the facts do not shew a defence at all; and although I am quite satisfied from what took place upon the argument that the defendant's counsel is not at all prepared to define what defence is intended to be pleaded, and would be most embarrassed if driven to clothe his thoughts in language of precision, yet I am not sure that there is not something, as said by Armour, C.J., "obscured as it no doubt is by the verbosity which now passes for pleading"—some attempt, feeble, and perhaps futile—to suggest such a case as was found adequate in *Adams* v. *Cox*, 10 O.L.R. 96, 2 O.W.R. 93, and *Stuart* v. *Bank of Montreal*, 14 O.L.R. 487; and I fear that the elimination of the paragraphs in question would prove to be a greater source of embarrassment at the trial than allowing them to remain; as they look like an attempt to set forth some facts which go to justify the allegation that the signature to the document in question was procured by fraud and misrepresentation. The importance of avoiding anything like a determination of any question touching the merits of the action on a Chamber motion is emphasized when it is borne in mind that there is a very limited right of appeal from Chamber orders. The policy is to have all questions, both of law and fact, disposed of at the trial.

I would, therefore, restore the paragraphs in question, and make the costs—both here and below—in the cause.

Appeal allowed.

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BORNSTEIN v. WEINBERG.

Ontario Divisional Court, Boyd, C., Latchford, and Middleton, JJ. December 28, 1912.

1. LANDLORD AND TENANT (§ II B 1—11)—"TO TURN OVER IN GOOD CONDITION"—EFFECT OF PROVISION.

Where a tenant in an informal lease was to receive the premises "in the best condition" and undertook "to give up the house in the same condition and repairs," the landlord is entitled to have included in his measure of damages upon the surrender of the premises all damages due to the loss attributed to ordinary wear and tear.

[*Lurcott* v. *Wakely*, [1911] 1 K.B. 905, referred to.]

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BORNSTEIN v. WEINBERG.

2. LANDLORD AND TENANT (§ II B 1—12)—LEASES — COVENANT TO TURN OVER "IN THE BEST REPAIR," EFFECT OF.

In considering whether a covenant by a lessee to surrender the premises at the end of his term "in the best repair" has been broken, that phrase must be taken in relation to the kind of house demised and the condition of repair in which it was at the time of the demise.

Statement

APPEAL by plaintiff from the judgment of the Junior Judge of the County of York, of Nov. 7, 1912, in an action by plaintiffs, owners of No. 82 Elizabeth street, Toronto, to recover $53.50 for double value of premises during defendant's retention of possession, $194.50 for repairs to No. 82, the sum of $50 for repairs to No. 78 and $80 damages for loss of enjoyment, being a total of $348. At the trial, judgment was awarded plaintiffs for $76.50 and costs.

The appeal was dismissed, but the judgment below was varied.

L. M. Singer, for the plaintiffs.

A. R. Hassard, for the defendant.

Middleton, J.

MIDDLETON, J.:—The plaintiffs appeal from a judgment of Denton, Co. J. The action was brought by the landlords against a tenant for breach of covenant contained in an informal lease in the Yiddish tongue, by which the tenant of No. 82 Elizabeth street—who was to receive the premises "in the best condition"—undertook "to give up the house in the same condition and repairs."

The learned Judge has allowed damages to the plaintiffs, excluding in his computation damages attributable to ordinary wear and tear.

I do not think that the learned Judge is warranted in reading this exception into the undertaking, which is in form absolute. The extent of the obligation of a tenant under a repairing lease is discussed in the recent case of *Lurcott* v. *Wakely*, [1911] 1 K.B. 905, where the Court of Appeal review most of the earlier authorities.

In *Gutteridge* v. *Munyard*, 1 M. & Rob. 334—a *nisi prius* decision—Tindal, C.J., said: "Where a very old building is demised, and the lessee enters into a covenant to repair, it is not meant that the old building is to be restored in a renewed form at the end of the term, or of a greater value than it was at the commencement of the term. What the natural operation of time flowing on effects, and all that the elements bring about, in diminishing the value, constitutes a loss which, so far as it results from time and nature, falls upon the landlord; but the tenant is to take care that the premises do not suffer more than the operation of time and nature would effect. He is bound, by seasonable applications of labour, to keep the house as nearly as possible in the same condition as when it was demised."

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This is not accepted by the Court of Appeal as being entirely accurate. Cozens-Hardy, M.R., says: "If he meant only to say that, given an old house which in the course of time, though still a habitable house, is rendered worse by mere lapse of time and the effects of wind and weather, the loss falls on the landlord, I should not object to the statement. But if it is made use of as meaning that the tenant is not liable for anything which can be said to be due to the lapse of time and the elements, I respectfully do not assent to it. . . . If a tenant under a repairing lease finds that a floor has become so rotten that it cannot be patched up, if it is in such a condition that it cannot bear the weight of human beings or furniture, can it be said that the tenant is exempt from the liability of repairing that floor?"

As put by Buckley, L.J., in the same case: "All the cases, to my mind, come only to this, that the question is one of degree." And the degree of repairs which is described in this lease as "the best repair" must be taken in relation to the kind of house that was demised and the condition of repair in which it was at the time of the demise, which is also described by the same phrase.

The plaintiff in this case put forward a grossly exaggerated claim; and the defendant, on his part, was equally blameworthy for his lack of any honest attempt to fulfil his obligation.

At the hearing we increased by six dollars the amount allowed, so as to correct what was apparently an error in computation in the amount allowed by the learned Judge for double value during the over-holding. We also increased it by ten dollars, to cover the time lost by the landlord during the making of repairs. Justice would, we think, now be done by allowing a further sum of twenty-five dollars to cover the loss attributable to wear and tear, and not included by the learned Judge in his assessment.

With this variation, the appeal will be dismissed; and, as success has been divided, without costs.

Boyd, C.

BOYD, C.:—I agree.

Latchford, J.

LATCHFORD, J.:—I also.

Judgment below varied and appeal dismissed.

McGREEVY v. HODDER.

ONT.

H. C. J.

1912

Dec. 28.

Ontario High Court. Trial before Falconbridge, C.J.K.B. December 28, 1912.

1. VENDOR AND PURCHASER (§ I E—25)—RESCISSION OF CONTRACT FOR THE SALE OF LAND—FAILURE TO PAY PURCHASE PRICE INSTALMENTS WITHIN TIME SPECIFIED.

Where time is expressly made of the essence of the contract in an agreement for the sale of land to be paid for in four instalments, and two of the instalments have been paid, and default is made in the payment of the other two, though one-half of the purchase price has been paid by the purchaser, the vendor is justified in rescinding the agreement where the default continues for about three years from the time the last instalment was due.

2. SPECIFIC PERFORMANCE (§ I E 1—30)—SALE OF LAND—VENDEE'S DELAY TO PAY PURCHASE PRICE—INSTALMENTS—LACHES.

Where, under a contract for the sale of land providing for payment in four instalments and making time of the essence of the contract, the vendee defaults in the payment of the last two instalments, though the first two instalments amounted to one-half of the entire purchase price, he is guilty of such laches, in waiting three years before bringing his action, as will defeat his right to specific performance.

3. VENDOR AND PURCHASER (§ I B—5)—RESCISSION OF CONTRACT FOR THE SALE OF LAND—RIGHT OF VENDOR TO RETAIN "DEPOSIT MONEY."

Where a vendor, under a contract for the sale of land in which time is of the essence, and in which the purchase price was to be paid for in four instalments, two of which amounted to one-half of the entire purchase price, rescinds the agreement on default of the vendee to pay the last two instalments, though the rescission is justifiable, the vendor will not be allowed to retain the money paid on account of the property; such money will be treated as payment on account and not as deposit money, though it is called "deposit money" in the agreement.

Statement

ACTION for specific performance of a contract for sale of land. Judgment was given for the plaintiff for $200.

W. F. Langworthy, K.C., for the plaintiffs.

M. J. Kenny, for the defendant.

Falconbridge, C.J.

FALCONBRIDGE, C.J.K.B.:—By four several agreements dated 16th January, 1907, made between the defendant (vendor) and the plaintiff (purchaser), the defendant agreed to sell four lots in the River Park addition, Port Arthur, for $100 each, payable $25 on the date of the agreement, (receipt of which was acknowledged) and the balance in four, eight and twelve months with interest at seven per cent. per annum. The last portion of each agreement is as follows:—

"The purchaser to be allowed five days to investigate the title at his own expense, and if within that time he shall furnish the vendor in writing with any valid objection to the title, which the vendor shall be unable or unwilling to remove, this agreement shall be null and void, and the deposit money returned to the purchaser without interest. Time to be the essence of this agreement. The vendor to pay the proportion of insurance premiums, taxes, local improvements, assessments,

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sewer rates, etc., of whatever kind, to this date, after which date the purchaser will assume them."

The plaintiff paid the second instalment of purchase money on the 18th of May, 1907, being in all another payment of $100.

This was a speculative property. There was what defendant calls a "little flurry" in 1907. It was supposed that a certain industry was about to be established in the neighbourhood, but that did not take place, so there were no sales for four years, but the property "came up" in 1911. The defendant paid taxes for the five years—about $2 a year on each lot. Defendant says he usually notifies purchasers that their payments are due, and he supposes that was done in this case, that is by simply mailing a "little bill" of the amount. About the autumn of 1911 defendant assumed to rescind the agreements, and sold the lots to the Alberta Land Company.

I am of the opinion that the laches of the plaintiff entitled the defendant to come to the conclusion that plaintiff had abandoned the agreement, and to re-sell, and I do not decree specific performance. I do not, however, think that the defendant is entitled to retain the money paid on account of the property. It is true that in the clause which deals only with investigation of the title, the expression used is "the deposit money"; but the sums paid constitute one-half of the whole purchase money, and I think both payments ought to be treated as payments on account, and not as mere deposits. Plaintiff will have judgment for $200 with costs. The law will take its course as to the scale of costs and right of set-off. I do not give any certificate one way or the other.

Judgment accordingly.

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Re RISPIN; CANADA TRUST CO. v. DAVIS.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Idington, Duff, Anglin and Brodeur, JJ. June 14, 1912.

1. WILLS (§ III G—145)—CONDITIONAL LIMITATION—DEVISE OF WITH ABSOLUTE DISCRETION—DEATH OF BENEFICIARY—DISPOSITION OF RESIDUE IN HANDS OF EXECUTOR.

Where, by will, securities were bequeathed to an executor with an absolute discretion to apply as he thought fit for the benefit of a named beneficiary, there is no power of disposition by will in such beneficiary of what remains in the hands of the executor on the death of the beneficiary; but it passes to the next of kin of the testator as at the time of his death.

[*Re Rispin*, 2 D.L.R. 644, 25 O.L.R. 633, affirmed on appeal.]

Statement

APPEAL from a decision of the Court of Appeal for Ontario, *Re Rispin*, 2 D.L.R. 644, 25 O.L.R. 633, affirming the judgment of the Chancellor on questions arising as to disposition of an estate under a will.

The appeal was dismissed.

T. G. Meredith, K.C., and *John Macpherson*, for the appellants.

Betts, K.C., for the respondent.

W. R. Meredith, for the official guardian.

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Statement

The will in question devised the testator's real estate and chattels to his son and the rest of his property to his executor in trust with directions as follows:—

> And I authorize and request him to pay the interest . . . and the principal in whole or in part to my son . . . as in the judgment of my executor as may be prudent with reference to the habits and conduct of my son, my will and intention being that it shall be wholly in the discretion of my said executor to pay the interest and principal in such amounts and at such times as he may think right or to withhold the payment altogether.

The son received various amounts from the executor while he lived and, after his death, a considerable sum remaining, the question arose as to its disposition, namely, whether it should go to the heirs of the son or to the next of kin of the testator.

The Courts below held that there was an intestacy as to this sum and that the next of kin of the testator, to be ascertained as at the date of his death, were entitled to it.

The executors of the son appealed to the Supreme Court of Canada.

Judgment

THE COURT after hearing counsel for the respective parties, reserved its judgment and, on a subsequent day, dismissed the appeal with costs, the testator's executor and official guardian to have out of the estate their solicitor and client costs incurred over and above the party and party costs to be paid by the appellant.

Appeal dismissed with costs.

DALLONTANIA v. McCORMICK AND THE CANADIAN PACIFIC R. CO.

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Ontario High Court. Trial before Falconbridge, C.J.K.B. December 30, 1912.

1. MASTER AND SERVANT (§ III B 2—300)—JOINT LIABILITY OF OWNER OF PREMISES AND INDEPENDENT CONTRACTOR—WORKMEN'S COMPENSATION ACT—R.S.O. CH. 160, SEC. 4.

Under the Workmen's Compensation for Injuries Act, R.S.O. 1897, ch. 160, sec. 4, both the immediate employer and owner of the premises on which one is working as an independent contractor are jointly responsible for injuries to a servant of the latter, where it appears that, although the work was being done originally by the independent contractor alone, it later developed that it was impossible to carry out the original agreement and an arrangement was entered into whereby the work was done under their joint supervision, and the accident occurred through the negligence of both the independent contractor and the owner.

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DALLONTANIA v. MCCORMICK AND THE CANADIAN PACIFIC R. CO.

Falconbridge, C.J.

ACTION for compensation for injuries suffered by the plaintiff in consequence of the alleged negligence of the defendants, or one of them.

Judgment was given for the plaintiff.

R. R. McKessock, K.C., for the plaintiff.

W. R. White, K.C., for the railway.

J. A. Mulligan, for McCormick.

FALCONBRIDGE, C.J.K.B.:—The plaintiff was working at the end of a tunnel beside the C.P.R. track, and a mass of rock and debris fell from the heights above where he was working, from which he received such injuries that his right leg had to be amputated.

I find that the plaintiff was not negligent or careless in any way, and that his injuries were caused by the negligence of both defendants. And I find, too, that the defendant McCormick personally, and the C.P.R., by its engineers and servants, had abundant notice of the danger that existed in carrying on the work in the manner in which it was being carried on, and that the cause of the accident was the negligence of the defendants, in either not guarding against the falling of the rocks which caused the accident, or first removing them before doing the work.

I find as a fact that McFadyen and Boughton are mistaken in thinking that "scaling" was done before the accident.

The work was being done originally under a contract dated 30th December, 1911, and made between the defendants for the driving of a tunnel by McCormick, and the excavation of approaches at a bridge on the Sudbury subdivision of the C.P.R.

On the 13th March, 1912, McCormick wrote to the resident engineer of the C.P.R. as follows: . . . "I find I am compelled to give this approach work up, as it has been misrepresented entirely to me from the beginning. The material is all quicksand and some loose rock."

To which the resident engineer replied on the 30th March, 1912 . . . "After discussing the matter with the division engineer, I am advised that the tunnel approaches will be completed by force account plus ten per cent. I am also instructed to place an inspector on the job. He will keep track of the time, and advise the division engineer's office weekly the progress being made."

McCormick contends that this new arrangement merely constituted him a hiring and purchasing agent with a profit of ten per cent. and is entirely a different proposition from the doing of extra work under section 17 of the contract.

On the other hand, the C.P.R. contends that at the time of the injuries to the plaintiff, plaintiff was in the employ of the

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defendant Michael McCormick as an individual contractor, and not in the employ of the C.P.R. And the C.P.R. further contends that it had no control or supervision over the work or methods used by Michael McCormick.

As I have indicated before, I think, in the peculiar circumstances of the case both defendants are liable to this plaintiff, regard especially being had to sec. 4 of "The Workmen's Compensation for Injuries Act," R.S.O. ch. 160.

I observe that neither of the defendants in their statement of defence claims any remedy over against the other; each one merely endeavours to avoid or evade responsibility to the plaintiff. While something was said on the subject in argument, I do not feel called on to apportion the damages or to give any remedy to one defendant over against the other.

The action is brought at common law and under the statute. Without deciding that the plaintiff's action does not lie at common law, I assess his damages at $1,750 as under the statute. Judgment accordingly against both defendants with costs.

Judgment for plaintiff.

Re CANADIAN OIL COMPANIES and McCONNELL.

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H. C. J. 1912

Dec. 30

Ontario High Court, Middleton, J., in Chambers. December 30, 1912.

1. PLEADING (§ II A—173)—COURTS—NECESSITY OF TIMELY PLEA TO JURISDICTION.

A prohibition to a Division Court (Ont.) upon the ground of absence of territorial jurisdiction in respect of a case alleged to have entered in the wrong district or division of the Province, will not be granted on motion of defendant where the question of jurisdiction is raised for the first time after a default judgment has been entered against defendant and where there is no excuse shewn for defendant's delay and it does not appear that any injustice will be done by allowing the judgment to stand.

[*London* v. *Cox*, L.R. 2 H.L. 238, specially referred to; *Broad* v. *Perkins*, 21 Q.B.D. 533, followed.]

Statement

MOTION by the defendant in the first Division Court of the County of York for a prohibition, upon the ground of the absence of territorial jurisdiction.

The motion was dismissed.

W. E. Raney, K.C., for McConnell.

D. Inglis Grant, for Canadian Oil Companies.

Middleton, J.

MIDDLETON, J.:—The action is for $44.30, price of goods sold and delivered. The defendant resides at Proton, in the county of Grey. The writ of summons was served on the 6th of August, 1912. A notice disputing the jurisdiction of the Court was immediately filed. On the 10th September, the day named in the summons, the action came on for trial in the Division Court.

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The defendant was not present nor was he represented in any way; and judgment was given for the plaintiff.

An application was made in the Division Court for a new trial, which application was dismissed, probably because it was out of time.

This motion is now made; and the defendant's affidavit stating that the contract for the purchase of the goods referred to was made in his store at Proton, and not elsewhere, is not contradicted: so that it may be assumed that the York Division Court had no territorial jurisdiction.

The plaintiff bases its opposition to the granting of the order upon the discretion of the Court to refuse to prohibit.

Willes, J., in *Mayor, etc., of London* v. *Cox*, L.R. 2 H.L. 238, at p. 283, says: "When the defect is not apparent, and depends upon some fact in the knowledge of the applicant which he had an opportunity of bringing forward in the Court below, and he has thought proper, without excuse, to allow that Court to proceed to judgment, without setting up that objection, and without moving for a prohibition in the first instance, although it should seem that the jurisdiction to grant a prohibition is not taken away—for mere acquiescence does not give jurisdiction—yet, considering the conduct of the applicant, the importance of making an end of litigation, and that the writ, though of right, is not of course, the Court would decline to interpose, except perhaps upon an irresistible case, and an excuse for the delay, as disability, mal-practice, or matter newly come to the knowledge of the applicant."

This statement of the law was adopted by the full Court of Appeal in *Broad* v. *Perkins*, 21 Q.B.D. 533.

The question therefore in this case is whether the defendant has shewn anything which amounts to an excuse for his delay. In the affidavit upon this motion no attempt is made to either explain or excuse the delay. In the affidavit made in the Division Court, all that is said is that the defendant did not attend the trial, "believing that the case would be transferred to the proper Division Court."

There is no satisfactory affidavit of merits. The defendant does not condescend to disclose his defence, if he has one. He contents himself by saying, "I have, as I am advised and verily believe, a good defence to this action upon the merits."

I think the cases warrant me in holding that where a defendant does not attend at the trial of an action for the purpose of upholding his contentions, and where it is not made clearly to appear that any injustice will be done by allowing the judgment to stand, the Court ought not to grant a prohibition; for the reason so well indicated in the extract quoted. Here, not only has there been a failure to attend, but the defendant has

applied in the Division Court to set aside the judgment. It is true that this application was abortive by reason of the delay in making it; but no case of hardship is shewn, as, for all that appears, the debt is justly owing.

I dismiss the motion without costs, as I do not think the practice of suing in a Division Court which is known to have no jurisdiction is one that ought to be encouraged.

Motion dismissed.

PEAT v. SEXTON.

Saskatchewan Supreme Court, Parker, M.C. December 3, 1912.

1. LIS PENDENS (§ II—10)—MOTION TO DISCHARGE—DEFENDANT'S FAILURE TO APPEAR "GRATIS"—EFFECT.

Where a writ of summons has been issued and a *lis pendens* filed, but no valid service of the writ is made on the defendant, the latter must enter an appearance gratis before launching a motion to dismiss the action and for the discharge of the *lis pendens*.

2. MOTIONS AND ORDERS (§ I—4)—AFFIDAVITS—FILING OF BEFORE USE ON MOTION—SASK. RULES 417.

It is essential that the respondent on a preliminary motion in Chambers shall file his affidavits in answer before using them on the motion, under rule 417 of the Sask. Judicature Rules, 1911.

Statement

APPLICATION by the defendant to dismiss action and for the discharge of a *lis pendens* on the ground that the writ of summons had not been served within a year from the date of its issue.

The application was dismissed.

F. B. Bagshaw, for the defendant.

W. H. McEwan, for the plaintiff.

Parker, M.C.

PARKER, M.C.:—The writ of summons in this action was issued October 4, 1910, and was served on A. L. Gordon, the registered attorney for the defendant company on October 8, 1910. The same day as the writ was issued the plaintiff caused a *lis pendens* to be filed against certain land belonging to the defendant, viz., S.E. 24-25-2-W 2nd. Since the service of the writ and filing the *lis pendens* the plaintiff has taken no further step in the action, and the defendant now moves to have the action dismissed and the *lis pendens* discharged. The ground upon which the application is made is that the defendant company has not been served with the writ within one year from the date of issue, from which it would appear that the registered attorney has never communicated to the defendant company the fact that he was served with the writ on its behalf. It was urged by counsel for the plaintiff that the motion must fail, because the defendant should have entered an appearance

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"gratis" before launching the motion, and I think the objection is well taken. See Annual Practice, 1912, p. 112:—

> Where a person has been informed that he has been made a defendant to an action, he may, before actual service, enter an appearance in all respects as if he had been served.

I think, therefore, that when the defendant discovered that a writ had been issued against him he should have entered an appearance "gratis" before launching the present motion. It was urged, however, on behalf of the defendant, that the plaintiff has not complied with the provisions of rule 417 in that he did not file his affidavits in answer to the motion before they were used. In view of this objection, which I think is a valid one, and in view of the further fact that there has been considerable delay on the part of the plaintiff in proceeding with the action, and that the defendant company launched the motion under a *bonâ fide* misapprehension as to the real state of the proceedings, I think the proper disposition of the matter is to dismiss the motion without costs.

Motion dismissed.

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Dec. 27.

MOYER v. JONES.

Manitoba King's Bench, Macdonald, J. December 27, 1912.

1. JURY (§ I B—6)—REFEREE'S JURISDICTION—INTERLOCUTORY ORDER FOR TRIAL BY JURY.

The referee in Chambers exercising certain judicial authority pursuant to the Manitoba King's Bench Act has the power to make an order granting a trial before a jury and setting aside the notice of trial served for a non-jury sittings.

2. JURY (§ I B—6)—REFEREE'S JURISDICTION—EFFECT OF NOTICE FOR NON-JURY TERM—INTERLOCUTORY ORDER.

The plaintiff is not precluded from applying for an interlocutory order for a trial by jury by reason of the service of a notice of trial on him by the defendant for a non-jury sittings of the court, and the setting down of the case accordingly; such setting down does not fix the forum so as to prevent a jury being had except upon the trial judge's order.

Statement

APPEAL from order of referee granting a jury and setting aside notice of trial served by the defendant.

The appeal was dismissed.

R. A. Bonnar, K.C., for plaintiff.

G. A. Elliott, for defendant.

Macdonald, J.

MACDONALD, J.:—Statement of claim was issued and served on the 31st October, 1912, and statement of defence filed and served on the 15th November, 1912.

On the 6th December, 1912, the defendant gave notice of trial and set the case down for hearing for the 17th December.

On the 11th December the plaintiff gave notice of motion

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requiring the issues to be tried by a jury returnable on the 16th December.

The referee made an order granting a jury and setting aside the notice of trial served, and from this order the defendant appeals.

It is urged on behalf of the defendant that the referee had no power to grant the order. That officer has the same power as a Judge of this Court, and if a Judge has the power there is no room to question the power of the referee.

The main contention is that the defendant, by serving notice of trial and setting the case down for trial, has fixed the forum and that this cannot be changed excepting under sec. 60 of the King's Bench Act, which enables a Judge presiding at a trial in his discretion to direct a trial by a jury.

If this contention were correct it would mean that the plaintiff would have to make his application for and succeed in obtaining an order for a jury within the ten days after the filing of the last pleading as, immediately after the expiration of the ten days, the cause being then at issue, the defendant might circumvent the plaintiff by serving him with notice of trial for a non-jury sitting.

The greatest possible expedition in the conduct of this case was shewn by the plaintiff, and the haste displayed by the defendant in serving notice of trial would plainly indicate his object being to thwart the plaintiff in obtaining a jury.

The conclusion I have arrived at is that the plaintiff is not precluded by reason of the service of the notice of trial, and upon reading the pleadings and hearing counsel, I think this is a case properly triable by a jury.

I dismiss the appeal with costs.

Appeal dismissed.

HERBERT et al. v. BELL.
("The Locators" v. Bell.)

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Dec. 23.

Saskatchewan Supreme Court. Trial before Newlands, J. December 23, 1912.

1. BROKERS (§ II B 1—12)—SUFFICIENCY OF BROKER'S SERVICES—COMMISSION—REAL ESTATE AGENCY TO SELL LANDS—CONSTRUCTION OF CONTRACT.

In an action by the plaintiffs as real estate agents for commission for alleged sale of lands setting up a written authority to them from the owner with a provision worded as follows: "In case you find such a purchaser, or in case you bring the property directly or indirectly to the attention of any one who becomes a purchaser upon any terms whatsoever, you are to be paid by me a commission of five per cent.'; such a provision means that the agents must bring the property, directly or indirectly, to the attention of some person who shall thereby become a purchaser; and where the plaintiffs actually brought the property to the attention of a third party who, however, did not thereupon agree to buy, but on the contrary gave up all idea of buying, yet

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subsequently took the matter up afresh with another agent and purchased, the plaintiffs, as a matter of law, had nothing to do with effecting such sale and are not entitled to any commission.

[See also Annotation, 4 D.L.R. 531.]

ACTION for commission on the sale of certain land.

The action was dismissed.

A. M. McIntyre, for the plaintiffs.

Donald Maclean, for the defendant.

Newlands, J.

NEWLANDS, J.:—This is an action for commission. The defendant placed his business in the hands of the plaintiffs for sale. The defendant signed a written authority to the plaintiffs to make the sale which contained the following provision:—

> In case you find such a purchaser, or in case you bring the property, directly or indirectly, to the attention of any one who becomes a purchaser upon any terms whatsoever, you are to be paid by me a commission of five per cent.

The plaintiffs brought the property to the attention of one Henry W. Dumouchel who looked the property over but decided not to purchase it. He was subsequently induced to purchase it by another agent named Clay. In his evidence he says: "I had given up the Bladworth business altogether when Mr. Clay induced me to buy." Under these circumstances are the plaintiffs entitled to a commission? I think not. The agreement, in my opinion, means that the defendant is to pay a commission if the plaintiffs bring the property, directly or indirectly, to the attention of any person who becomes a purchaser from the fact of their having so brought it to his attention. In this case the man to whose attention they brought the business gave up all idea of buying same and the matter was closed. He took it up again and bought through the efforts of another agent and the plaintiffs had nothing to do with his having become a purchaser.

There will, therefore, be judgment for the defendant with costs.

Action dismissed.

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Dec. 20.

FOREST v. HOME INSURANCE CO.

Alberta Supreme Court, Harvey, C.J., Scott, Stuart, and Walsh, JJ. December 20, 1912.

1. INSURANCE (§ VI A—247)—LOSS—COMPLETION OF PROOFS BEFORE ACTION—STATUTORY CONDITION.

Where one of the statutory conditions of a fire insurance policy requires the assured to supply, with his proofs of loss, a certificate of a justice or other officer resident in the vicinity of the fire, certifying, in effect, that the circumstances have been investigated by such official and do not indicate the perpetration of any fraud by the assured, the refusal of the assured to furnish such certificate within the statutory time, although demanded by the company, is a bar to the action.

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2. INSURANCE (§ VI A—247)—LOSS — PROOFS — EQUITABLE RELIEF AGAINST TRIFLING DEFECTS IN PROOFS, SCOPE OF.

Section 2 of the Fire Insurance Policy Ordinance, N.W.T. (Alta.), 1911, ch. 113, giving power to the court to hold the insurance company liable notwithstanding trifling defects in the proofs of loss occurring by necessity, accident, or mistake, or where it appears inequitable to hold the insurance void by reason of imperfect compliance with the conditions of the policy, should not be applied to dispense with reasonable formal proofs called for by the insurance company which the insured deliberately refused to furnish without assigning any reason for the refusal.

Statement

APPEAL by the plaintiff from the judgment of Simmons, J., dismissing action brought to recover the amount of loss under a fire insurance policy.

The appeal was dismissed.

C. C. McCaul, K.C., for appellant.

J. E. Wallbridge, for respondent.

Harvey, C.J.

HARVEY, C.J.:—The plaintiff's house which was covered by a policy issued by the defendant company was burned down on November 12th, 1909. Notice was given by one Canniff, plaintiff's solicitor to Mr. Mays, the company's agent at Edmonton, through whom the insurance was effected, who at once sent blank forms for proof of loss. About the end of March, 1910, apparently on the 26th, the proofs were sent to Mr. Mays by Messrs. Robertson, Dickson & McDonald, solicitors, of Edmonton. Mr. Mays acknowledged receipt on March 31st, stating that the matter was in the hands of Mr. Lilly for adjustment to whom he was forwarding the proofs. On 6th April, Mr. Lilly returned the papers to Messrs. Robertson, Dickson & McDonald under cover of a letter in the following terms:—

Dear Sirs,—Yours 26th addressed to Mr. R. Mays has been forwarded to me. I have herewith to return the papers submitted purporting to be proofs of loss from Clara Forest as they are unacceptable, especially in respect to the certificate signed by Geo. W. Flewell which is not at all as required by the policy condition in that respect.

Yours truly,

E. W. LILLY,
Adjuster.

On April 29th, a reply was sent to this as follows:—

Edmonton, Alberta,
April 29th, 1910.

E. A. Lilly, Esq.,
Adjuster of Fire Losses,
Calgary Alta.

Dear Sir,—We are in receipt of your communication of the 6th inst., with reference to Clara Forest's proof of loss in the Home Insurance Company.

If this policy is not paid within two days we will issue a writ, as our instructions are to stand no more fooling of this kind.

Yours truly,

ROBERTSON, DICKSON & MCDONALD,
Per R.

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The writ was not issued as threatened and nothing further appears to have been done for some time. At the trial there was produced a certificate presumably intended to meet the requirements of Mr. Lilly's letter made by Mr. Canniff. It is originally dated 22nd June, 1910, but that date is crossed out and the 26th of October written over it. A student in the office of plaintiff's solicitors states that he left this at the office of Mr. Mays on November 2nd, 1910, but it was subsequently returned to the solicitors. The statement of claim is dated 29th October, 1910, and that is the only evidence the appeal book contains of the date of the commencement of the action.

The action was tried before my brother Simmons, who dismissed it at the close of the plaintiff's case and the plaintiff now appeals.

Statutory condition No. 13 relating to proofs of loss is one of the conditions of the policy. Paragraph (*e*) of this condition is as follows:—

> (*e*) He (*i.e.*, the insured) is to produce, if required, a certificate under the hand of a justice of the peace, notary public, or commissioner for taking affidavits, 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.

The head office of the defendant company is in New York and the forms sent by Mr. Mays are forms prepared for use in the United States. There is a form of certificate, however, which though not in the terms of the condition is for the same purpose as that of the condition. In the proofs sent in some of the words of the printed portion of this form were struck out and others inserted and the certificate was given by Geo. A. Flewell, a liveryman, in the presence of J. F. Canniff, notary public.

It is apparent that this does not comply with the condition as Mr. Lilly pointed out.

It was argued before us that the certificate referred to in this condition is only necessary if required and that it was not required in this case. Even if the forms supplied did not amount to a request I find myself unable to consider Mr. Lilly's letter as anything other than an unequivocal request for a certificate that would comply with the condition.

The plaintiff at once refused to comply with this request and it was not complied with, if at all, until at or after the commencement of this action.

The 17th statutory condition provides that the loss shall

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not be payable until 60 days after completion of the proofs of loss and the 22nd condition provides that action must be brought within one year after the loss. The combined result of these two conditions is that an insured, to protect himself, must complete his proofs of loss within ten months after the loss occurs which, as a general condition appears not unreasonable, though in certain cases it might work a hardship. In such cases, however, there is ample protection in section 2 of the Act (ch. 16 of 1903, 1st session; N.W.T. Ord. Alta. 1911, ch. 113, sec. 2) which provides that:—

> When, by reason of necessity, accident or mistake, the conditions . . . .as to the proof . . . have not been strictly complied with, or where after a statement or proof of loss has been given in good faith . . . the company objects to the loss upon other grounds than for imperfect compliance . . . or does not within a reasonable time . . . . 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 . . . or when for any other reason the Court or Judge . . . 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 . . . shall . . . be allowed as a discharge of the liability of the company.

This section appears to give ample protection for all reasonable cases of defective proof but does not provide for cases in which the insured deliberately refuses to give the proof which it is his duty to furnish.

This certificate is for the purpose of enabling the company to form an opinion as to whether the fire was accidental or not. In the present case it appears that it would have been important inasmuch as the defence alleges incendiarism.

No reason why the certificate was not furnished is given other than the letter of the plaintiff's solicitors refusing to give it and threatening suit.

This does not, in my opinion, raise any equity in the plaintiff's favour for relief under section 2, and I think the action was properly dismissed and the appeal should be dismissed with costs.

SCOTT, STUART, and WALSH, JJ., concurred with the judgment of HARVEY, C.J.

Scott, J.
Stuart, J.
Walsh, J.

Appeal dismissed.

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Dec. 31.

BOX v. BIRD'S HILL SAND CO.

Manitoba King's Bench, Trial before Mathers, C.J.K.B. December 31, 1912.

1. ASSIGNMENTS FOR CREDITORS (§ VIII B—75)—UNSCHEDULED SECURITY—APPLICABILITY OF BANKRUPTCY RULE—PROOF OF CLAIMS.

The bankruptcy rule, that where a creditor holds security and does not value it he is deemed to have surrendered it, is not in force in Manitoba, and will not be applied to a proceeding to prove a claim against an estate assigned for the benefit of creditors.

2. ASSIGNMENTS FOR CREDITORS (§ VIII B—75)—RELEASE OF CLAIMS—LIABILITY OF ASSIGNOR—ENGLISH BANKRUPTCY RULES—MANITOBA ASSIGNMENT ACT.

The bankruptcy rules of England were never adopted as part of the law of the Province of Manitoba, except in so far as they have been introduced in part by the Assignments Act of Manitoba, but the Chancery rules were expressly incorporated into the Manitoba law and therefore apply where there is no statutory provision as to the valuation of securities by a creditor upon a deficiency of assets.

3. ESTOPPEL (§ III G 1—85)—EQUITABLE ESTOPPEL—SILENCE.

Where an insolvent debtor assigns his estate for the benefit of his creditors; and where the defendant company was one of his creditors to the extent of $900, for which it held a lien against 25 shares of its capital stock, with a par value of $2,500, owned by the insolvent debtor; and where the defendant company stood by, and permitted the plaintiffs to enter into a contract for the purchase of these shares at 60 cents on the dollar, without asserting its claim, and even voted for the sale of the shares to the plaintiffs; an estoppel is not thereby raised against the defendant company to prevent it from subsequently asserting its lien against the shares, if subsequently to the sale, but prior to the payment of the purchase price they gave notice of the lien in consequence of which the plaintiffs might have withheld sufficient funds out of the purchase money to be applied in payment of the lien in question.

Statement

SAMUEL C. DUNN, who was the holder of 25 fully paid up shares in the capital stock of the defendant company, on the 7th day of July, 1911, made a general assignment for the benefit of his creditors to Montague, Aldous & Laing. At the time of the assignment Dunn was indebted to the defendant company in the sum of $907.51. By the by-laws of the defendant company it was entitled to a charge on Dunn's shares as security for this indebtedness. On the 22nd July the defendants sent to the assignees a statutory declaration proving their claim against the estate at the full amount, but making no reference to their security.

The first meeting of creditors was held on the 24th July, and at that meeting an approximate statement of assets and liabilities was submitted, in which statement was included, under the heading of "Investments," this 25 shares at its face value of $2,500. At this meeting inspectors were appointed, Mr. F. J. Sharpe, one of the defendants' solicitors, being one. Using this approximate statement as a basis, Strevel and Box, on the 31st July, made an offer to the inspectors to purchase certain groups of assets, including those under the head of "Investments," at sixty cents

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on the dollar, payable one-quarter cash and the balance in three equal instalments in four, eight and twelve months, subject to verification as to quantities and a clear title to be given. The inspectors, on the same date, accepted the offer by resolution. Afterwards Strevel withdrew, and the assignees, Montague, Aldous & Laing, offered to take his place. This offer was accepted by the assignees on the 28th August. On the 18th September the assignees notified the defendants that they had obtained a transfer of the shares and on the 27th December following they executed a transfer of the certificate to G. S. Laing and H. J. Box, the plaintiffs, the former apparently representing Montague, Aldous & Laing. On the same day it was forwarded to the defendants for the purpose of being transferred on their books. The defendants refused to make the transfer on their books, except subject to a lien or charge for the amount of their claim against it. Subsequently the assignees paid a dividend of ten per cent. and the defendants were paid, and received this dividend upon the whole amount of their claim.

The plaintiffs bring this action for a mandamus to compel the defendants to transfer the shares in question to them on the company's books.

The plaintiff's action was dismissed.

H. J. Symington, for plaintiffs.

R. M. Dennistoun, K.C., for defendants.

Mathers, C.J.

MATHERS, C.J.K.B.:—At the trial the plaintiffs based their case on two grounds, neither of which is distinctly raised by the pleadings, but both of which are covered by the evidence, and, if necessary, an amendment ought to be allowed. They first say that by proving their claim for the full amount, without placing a value on their security; by voting at meetings in respect of the claim so proved, and by accepting a dividend in respect thereof, the defendants have irrevocably elected to rank on the estate and to give up their security. Secondly, they say that the defendants, by consenting to the sale of the shares in question to the plaintiffs, without making any claim in respect of their security, are now estopped from making such a claim as against them. The defendants answer by saying that the plaintiffs, at the time they purchased, had full notice of the defendants' lien.

If, as the plaintiffs contend, the defendants have, by proving their claim without valuing their security, elected to go against the general assets alone, the shares are of course freed from their lien, and the plaintiffs are now the absolute owners.

In support of this proposition the plaintiffs refer to *Ex parte Ashworth*, L.R. 18 Eq. 705; *Rainbow* v. *Juggins*, 5 Q.B.D. 138; *Re Rowe's Trustee*, [1905] 1 Ch. 597, which undoubtedly shew that such is the rule in bankruptcy. But the rule was for a long

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time peculiar to bankruptcy, and was only enforced in the bankruptcy Courts. It was not founded on any statute, but was established irrespective of express statutory enactment under the bankruptcy statute, 13 Eliz. ch. 7. It never was recognized by the Court of Chancery, which continued to administer estates without reference to it long after it had become a well-established rule in bankruptcy. In *Re Barned's Banking Corporation, Kellock's Case*, 3 Ch. App. 769, an attempt was made to have the bankruptcy rule applied to the winding up of a company, but the Court of Appeal refused to so apply it. The English Bankruptcy Acts of 1869 and 1883 recognized the doctrine and incorporated it in the rules applicable to these Acts, and similar rules were also made under the winding up statutes. So that now, if a creditor in either a bankruptcy or a winding-up proceeding hold security and does not value it as required, he, by the express language of the rules, is deemed to have surrendered it, unless his failure to value was due to inadvertence.

In the absence of this express penalty a secured creditor under the Winding-Up Act would not be held to have elected to abandon his security by proving his full debt without valuing it. The law was so laid down by North, J., in *Re Henry Lister & Co., Ltd.*, [1892] 2 Ch. 417, at 420.

At the time this Province was created the doctrine of the bankruptcy Courts and the doctrines of equity had not been harmonized. There were thus two rules in the administration of estates which ran concurrently in England; the rule in bankruptcy, and the rule in chancery. The bankruptcy rules were never adopted as part of the law of this Province, except in so far as they have been introduced by the Assignments Act; but the rules of chancery were incorporated in our law.

By sec. 29 of the Assignments Act part of the bankruptcy rule has been adopted, to the extent of requiring the holder of security to put a value upon it, and entitling him to vote only in respect of the excess. But nothing is said as to the consequence which will follow a failure to comply with this provision. The bankruptcy rules of 1883 provide that a secured creditor who votes in respect of his whole debt shall be deemed to have surrendered his security (schedule 1, r. 10). That part of the bankruptcy rule has been omitted from our Assignments Act; but in lieu thereof sec. 31 of the Act provides machinery for requiring the creditor to value his security, or, in default, barring him from ranking as a creditor of the estate.

The argument is that by failure to value his security the creditor *ipso facto* forfeits it. Such a conclusion is, however, entirely inconsistent with sec. 31. If a secured creditor had forfeited his security because of his failure to value it under sec. 29, sec. 31 would be an absurdity, as it enables the assignee to force a valuation of the security under penalty of not being

allowed to rank on the estate. By the combined effect of both sections, if the plaintiffs' contention were sound, the secured creditor who failed to value his security would not only forfeit it, but might also be barred from ranking for his debt.

In my opinion the bankruptcy rule is not in force in Manitoba, and that the defendants cannot be held to have elected to abandon their security by their failure to value it.

The other ground on which the plaintiffs rely is that defendants consented to the sale of the shares in question to them without saying anything about their security, and are now estopped from making any claim in respect of it. The defendants, on the other hand, assert that the plaintiffs bought with full knowledge of their security.

Now, there is no doubt that the defendants' representative not only stood by and permitted the plaintiffs to enter into a contract for the purchase of these shares without asserting, on the defendants' behalf, any claim thereon, but he went further, and actually voted for the sale of the shares to the plaintiffs. All this, however, does not deprive the defendants of the right to insist upon the lien which they undoubtedly possess, unless to do so as against the plaintiffs would be inequitable. If the plaintiffs knew of the defendants' lien when they bargained for the purchase of these shares, or if they acquired the knowledge at any time before they had paid over their purchase money, and while they were still in a position to protect themselves against the defendants' claim by applying, as they had the right to do, part of the purchase money in discharge of it, the defendants have not lost their right as against them.

I cannot find that the plaintiffs had notice of the defendants' lien prior to the acceptance of their offer to purchase on the 28th August. It appears that at the first meeting of creditors held on the 24th July some question arose as to these 25 shares. The certificate at that time was held by Duncan McDonald, who claimed to hold it as security, but his right was disputed. During this discussion Mr. Sharpe stated that the company had a lien on these shares for the amount of their claim. This statement does not appear to have been regarded as part of the proceedings of the meeting, because no reference is made to it in the minutes. Mr. Laing was present at the meeting as representing the assignees, but Mr. Sharpe's statement was not addressed to him, and was apparently not overheard by him. From what occurred at this meeting I cannot hold the plaintiffs affected with notice of the defendants' claim of lien. No further mention of the defendants' security took place at any of the subsequent meetings of either the inspectors or creditors until the 10th November.

The first reference in the minutes to the defendants' claim

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to hold security is contained in the minutes of the meeting of the inspectors held on that date. It appears that at that time Mr. Laing knew about the existence of this claim. When this knowledge came to him is not clear. He was cross-examined by the defendants upon the point, and he states that he acquired the knowledge some time between the meeting of the 10th of November and the meeting of the 28th of August, at which plaintiffs became purchasers; but he could not fix the time more definitely. He certainly had notice on the 10th November.

By a statement submitted at that meeting, bearing date the 31st October, it appears that the plaintiffs had paid $40,527.46, and the same statement shews an amount still to be paid by them amounting to $30,059.74. They had thus in their hands ample funds out of which to discharge the defendants' lien. The assignees had guaranteed them a clear title, so that they had a right to apply the unpaid purchase money in removing any incumbrance upon the property bought.

Under the circumstances the defendants are not estopped from asserting their lien as against the plaintiffs.

The plaintiffs' case will be dismissed, but, in view of the defendants' conduct, I will award them no costs.

Action dismissed.

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Dec. 14.

EDMUNDS v. MONTREAL STREET RAILWAY.

Quebec Court of Review, Davidson, C.J., Archibald, and Greenshields, JJ. December 14, 1912.

1. STREET RAILWAYS (§ III B—31)—EQUIPMENT OF CARS—BRAKE REQUIREMENTS—ELECTRIC AND RATCHET BRAKES.

A street railway company is obliged to use the best known appliances to conduct its business with safety to the public, and the use of the ratchet brake instead of the more modern electric air brake is of itself a fault.

Statement

THIS was an appeal by the plaintiff from the judgment of the Superior Court, Charbonneau, J., on December 24th, 1910, dismissing with costs his action in damages against the defendant for injuries received by his cows.

The appeal was allowed.

A. W. Atwater, K.C., and *W. L. Bond*, K.C., for plaintiff, appellant.

T. Rinfret, K.C., for defendant, respondent.

Davidson, C.J.

DAVIDSON, C.J.:—The judgment under review dismissed plaintiff's action to recover damages for the loss of three cows.

A herd of nine Ayrshire cows, the property of the plaintiff, and in charge of Godin and Beauchemin, left the East End Abattoir at about half-past four of the afternoon of April 27th, 1909. Their destination was plaintiff's farm at Verdun. Of necessity

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progress was slow. At about 8 o'clock the herd had reached a point, on Wellington street, Verdun, about midway between May and Mullarkey avenues, or, as Beauchemin puts it, "when we got about half way between the tail race and the Buffalo road." The two avenues are about 800 yards apart.

A rapidly approaching car, from the east, caused the men to attempt to drive the cattle from the tracks, which at this locality occupy the centre of the street. It became, almost at the same instant, obvious that the attempt could not be accomplished in time, whereupon Godin ran back and sought with signals and shouts to have the car stop. The motorman declares that he did not hear the one or see the other; that he was within 30 feet of the cattle before he observed them; and that in spite of turning off the power and applying the brakes he could not stop his car in time to avoid a collision.

Hence followed these results: One cow was found with its neck between the wheels of the after left hand truck, dead; another with its head between the wheels of the forward right hand truck, dead; a third thrown to one side with a broken hip, it had to be killed; the car pitched across the rails.

To have whirled the cattle about and to have ploughed over two of them in this fashion, makes belief of the evidence of the motorman that his speed did not exceed eight miles an hour quite impossible, *res ipsa loquitur*.

Believably may Mrs. Washer, a passenger within the car, assert, "I was so frightened I did not know where I was," and McKnight, a passenger standing on the rear platform: "I thought it was an earthquake." Dethier, chauffeur, a witness for the defendant, while hardly sensible of the shock, puts the speed at from 15 to 20 miles an hour. He further declares that he could, from the front platform on which he stood after the accident, see the reflection of the rails for a distance of 100 yards.

Some of the witnesses speak of the night as dark, but fine; others that it had been, or was, raining. Vallée, the motorman, claims that only thirty feet separated him from the cattle when he first saw them, "Je l'ai su lorsque j'étais, il faut dire, dessus." His window was clouded with drizzle or fog: "Ça brumassai la vitre."

The car was equipped with the ratchet brake. The street on which the cattle were is one of those designated for the purpose, and the night time, because of less inconvenience to traffic, is regarded as a favourable time for driving them.

All these circumstances called for a high degree of care as to the manner in which the car should have been run; of this prudence we find a radical absence.

The judgment found that the cattle men ought to have carried lanterns. Not a single exception to a contrary custom has been

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established. So far as the plea is concerned, omission of this kind is not charged.

We consider that the plaintiff is entitled to his damages. The cattle were worth $204.

Definite proof of the amount lost by way of profits on milk is not established. There was some loss of time in purchasing three other cows. We fix it at $6.

The Court reverses and condemns defendant in the sum of $210 with costs of the Superior and of this Court.

ARCHIBALD, J.:—This is a review of a judgment which has dismissed the plaintiff's action.

Edmunds was a farmer living in the parish of Lachine, who had bought nine cows at the East End Abattoir and was driving them by means of two drovers to his farm. He adopted the only road which could be adopted for the purpose of arriving at his farm, and when he arrived in the municipality of Verdun, going westward, it had come to be eight o'clock in the evening and was quite dark. A car belonging to the company defendant, following them to the westward, ran into the cows and killed three of them. Plaintiff sues for the sum of $250.

This occurred on the 27th April, 1909.

The fault charged against the defendant in reference to that matter is: that the car was being driven too fast, and that the motorman did not stop his car, notwithstanding the signals that were made to him by the drovers.

The defendant alleges, on the other hand, that the fault was on the part of the drovers; that it was very dark, and that the motorman could not see the animals in question until he was within a very short distance of them and too late to be able to stop his car. The fault alleged against the drovers is that they were not provided with lanterns.

The evidence as to the speed of the car is contradictory, as is usual in such cases. There was inside that car a person accustomed to driving automobiles, who estimated the rate of speed at 15 to 20 miles an hour. The motorman alleges that he was going only five or six miles an hour, but he says that it was so dark he could not see the cows until he approached them at a distance of about 30 feet. He says then that he made preparations to stop the car.

The car, by the impact upon the cows, was thrown off the track. It passed over the bodies of two of them and injured a third to the extent that it was necessary to destroy it. The motorman, being asked how long it would take him to stop his car, said that he thought it would take 150 yards.

There is some proof that there was an incandescent light in the street just about the place where the accident happened, and there is also proof, by another person, that, from the point where

the car was thrown off the track, it was possible to see a considerable distance, as much as 100 yards, in front of the car in a manner to distinguish a drove of animals.

As to the fault alleged against the drovers—that they had no lanterns—it does not appear to me that that is any fault. In the first place, it is not at all clear that the lanterns would have been of any service. In the next place, there is no by-law requiring persons driving cattle on a street to carry lanterns.

The obligation of the street railway company is to drive their cars with such precautions as that they shall not injure other persons using the streets, who are themselves not guilty of fault. The defendant pretends that the night was very dark. So much the more reason why the defendant's car should have been driven with great precautions. It is impossible to conceive that the defendant should have the right to drive at a high speed through the darkness without being able to distinguish whether anything was on the track or not. A child, a drunken man, a person who had fainted, or property of any description, which was lawfully upon the track, must be protected by the railway company. Their car was not furnished with electric brakes. This, in itself, constitutes a fault. A railway company is obliged to use the best appliances which are known for the purpose of enabling them to conduct their business with safety to the public. The electric brake is known and has been used by the company in connection with the greater number of its cars for years, and there is absolutely no reason why all other cars should not have been provided with this appliance. Everybody knows that this brake is much more effective than the hand brake—can be more quickly applied.

I think that it is impossible to characterize the action of the company in too strong language for bringing into the witness-box and examining a motorman evidently grossly ignorant of the matter, and attempting to lead the Court to suppose that it was necessary to take 150 yards to stop the car, when the company defendant is in possession of exhaustive tests to shew within what distance, in every atmospheric condition and at every speed, a car can be brought to a standstill. In my judgment, it is little short of contempt of Court for the company defendant to put before us such evidence on that point, when they were in possession of material which would have given us true evidence, and which evidence would have indicated that cars can be brought to a standstill, from a high rate of speed, in less than their own length.

I cannot agree with the judgment which has been rendered in this case. The car must have been proceeding at a very rapid rate of speed; otherwise the wheels would not have passed over two cows and the car itself would not have been thrown from the track and turned almost sideways.

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It appears to me that the company defendant, under these circumstances, was guilty of gross negligence. I am disposed to reverse the judgment and give judgment for the plaintiff in accordance with the demand.

Greenshields, J.

GREENSHIELDS, J.:—I concur entirely in the remarks of my brother Archibald.

Appeal allowed.

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THOMPSON v. YOCKNEY.

Manitoba King's Bench. Trial before Mathers, C.J.K.B. December 31, 1912.

1. LAND TITLES (§ IV—40)—TORRENS SYSTEM—MANITOBA REAL PROPERTY ACT—RIGHT OF CONTRACTEE FOR MORTGAGE TO FILE CAVEAT.

A person to whom the owner of land has agreed to give a mortgage has such "interest" in the land within the meaning of sec. 130 of the Real Property Act (Man.) as to give him the right to file a caveat against the land notwithstanding the provisions of sec. 100 of the Act to the effect that a mortgage shall have effect as a security, but shall not operate as a transfer of land thereby charged or of any estate or interest thereon.

2. LAND TITLES (§ IV—40)—TORRENS SYSTEM—RIGHT OF PARTY TO AGREEMENT FOR AN INTEREST IN LAND TO FILE CAVEAT.

Under the Torrens system of land titles any right conferred by contract relating to land against the registered proprietor is a sufficient "interest" to support a caveat.

3. PLEADING (§ VI—355)—SET-OFF AND COUNTERCLAIM—MANITOBA PROCEDURE AS TO FILING DEFENCE.

A person first made a party to an action by a counterclaim must file his defence thereto within the time limited by Rule 204 (Rule 298) or judgment may be recovered against him under Rule 298B; but, while the plaintiff, desiring to deliver a defence to a counterclaim, must deliver it within eight days (Rule 298), he is not obliged to deliver a formal defence to put such counterclaim in issue the matters in like manner as upon a general denial.

4. JUDGMENT (§ I A—2)—ON COUNTERCLAIM—PLAINTIFF'S FAILURE TO DEFEND.

Where a plaintiff has filed no defence to a counterclaim he should be held, under the Manitoba King's Bench Rules, 1911, to have denied all material allegations in it, and a default judgment signed upon the counterclaim will be set aside.

Statement

THE plaintiff sues for specific performance of an agreement made with the defendant Henry Yockney for the sale to him of part of lot 39, St. Clements, the deferred portion of the purchase money to be secured by a mortgage on the property sold and also on a portion of lot 38, St. Clements, owned by the purchaser. The plaintiff filed a caveat upon his agreement as against lot 38 on the 3rd of September, 1911. On the 9th of September the defendant Henry Yockney gave a mortgage upon lot 38 to his co-defendant Charles E. Yockney for the express consideration of $10,000.

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Judgment was given for specific performance.

C. P. Wilson, K.C., and *J. E. Adamson*, for plaintiffs.

J. B. Coyne, and *H. F. Tench*, for defendants.

MATHERS, C.J.K.B.:—Paragraph 6 of the statement of claim alleges that the defendant Henry Yockney,

> having made no move to carry out his part of the said agreement, the plaintiff, claiming an estate or interest in the said land described in paragraph 3 and to be entitled to a mortgage thereon as provided by the aforesaid agreement, duly filed with the proper district registrar in that behalf a caveat in the proper form under the Real Property Act, forbidding the registration of any instrument affecting the said land unless such instrument be subject to the said claim of the caveator, and the said caveat was filed on the 3rd of September, 1912.

Paragraph 8 says

> the defendant Henry Yockney executed a mortgage on the said lands described in paragraph 3 hereof to his co-defendant Charles E. Yockney, for the express consideration of $10,000, which mortgage was declared to be subject to the aforesaid caveat and was registered by the defendant Charles E. Yockney.

The defendant Charles E. Yockney, by his defence, admits paragraph 8, but he denies that the plaintiff had any interest in lot 38 entitling him to file a caveat, and he counterclaims to have the caveat removed.

The important question thus raised is whether or not a person to whom the owner of land under the Real Property Act has agreed to give a mortgage may protect his right by filing a caveat.

Sec. 100 of the Act provides that

> A mortgage or an encumbrance under the new system shall have effect as a security, but shall not operate as a transfer of land thereby charged or of any estate or interest thereon.

By sec. 130 "any person claiming an estate or interest in land" under the new system may file a caveat.

It may, I think, be taken as settled that a person who has neither an "estate" nor an "interest" in land has no right to lodge a caveat forbidding the registration of any instrument affecting it. The question is, Has a mortgagee, or what amounts to the same thing, a person holding an agreement for a mortgage, such an "estate" or "interest"?

A mortgagee upon default may enter into possession by receiving the rents and profits, and may distrain upon the occupier or tenant, or may bring an action to recover the land in the same manner as if the mortgage moneys had been secured to him by an assurance of the legal estate, and he may foreclose the right of the mortgagor to redeem the land (sec. 106). He may distrain on the goods of a tenant in the same way as a landlord might do (sec. 107). He may, upon default, enter into possession and lease the lands (sec. 109); or sell under power of sale

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(sec. 110); and execute a transfer thereof (sec. 111); which upon registration shall be effectual to vest the estate or interest of the mortgagor and owner in the purchaser (sec. 112); or he may foreclose, and in that way become absolute owner (secs. 113, 114). It seems a contradiction in terms to say that a person possessing a charge upon land accompanied by these large rights for enforcing it, and who may eventually either sell or become by foreclosure absolute owner of the land, has not an interest in it.

Under the Australian system a mortgagee is held to have an interest, but not an estate.

> A mortgage is a charge and nothing more . . . It confers an interest but no estate: *Per* Owen, J., in *Reid* v. *Minister of Public Works*, 2 S.R. (N.S.W.) 416.

Even a mortgage by deposit of the certificate of title gives the mortgagee an interest in the land: *Tolly* v. *Byrne*, 2 A.L.T. 194, 28 V.L.R. 95. In that case O'Beckett, J., said at p. 101:—

> I cannot conceive any sound ground for saying that it is not an interest in the land. It amounts to a contract between the parties that security shall be given over that land for the debt for which it is deposited.

According to the principles of the Torrens system, any right conferred by contract relating to land against the registered proprietor is a sufficient "interest" to support a caveat: Hogg 1037. The effect of a mortgage under the statute is to confer upon the mortgagee a very important interest in the land, and one which under other systems may be protected by a caveat: *Neal* v. *Adams*, 4 N.Z.R.S.C. 177.

But for sec. 100 it would not be arguable that a mortgagee has an "interest" sufficient to entitle him to lodge a caveat. Upon both principle and authority a mortgage under the Act does confer an interest in the land mortgaged to the mortgagee. If the word "interest" in sec. 100 is to be given the meaning which defendant's counsel contends for, then by that section a mortgage is deprived of the effect conferred upon it by the other parts of the Act. I can see no object that the Legislature could have in creating such an anomaly.

The expression "interest" as used in the Torrens Acts does not always mean the same thing: Hogg 785. It sometimes means the same thing as estate. In Wharton's Law Lexicon it is said that "estate" is used as meaning the quantity of interest in realty owned by a person; and in Murray's New English Dictionary "estate" is defined as "the interest which any one has in his lands and tenements." In my opinion it is used in sec. 100 as synonymous with "estate." I don't think it means the same thing as when used in sec. 130. In that section the term "interest" is used in a much wider sense: Hogg 1035.

The conclusion I have arrived at is that the plaintiff's caveat

was properly registered and that he is entitled to specific performance of the agreement set out in the statement of claim, a declaration that the agreement forms an equitable mortgage on said lot 38, and to an order for sale thereof in default of payment. There will be the usual reference to fix the amount due and to fix a time for payment of the instalments now overdue. The plaintiff is entitled to the costs of suit as against both defendants.

The defendant Charles E. Yockney's counterclaim will be dismissed with costs.

The plaintiff delivered no defence to the counterclaim and the solicitor for Charles E. Yockney signed interlocutory judgment, and thereafter moved for final judgment upon the counterclaim in Wednesday's Court. The motion was made before me, and I referred it to the trial Judge. At the trial the plaintiff moved to set aside the interlocutory judgment as not being authorized by the rules. At my suggestion the defendant's counsel consented that the interlocutory judgment be set aside. He, however, claimed that it had been properly signed, and asked for the costs of signing it, and of the motion for judgment, which, of course, he is not entitled to unless his proceedings were warranted by the practice.

Rule 291 provides that a defendant in any action may set up by way of counterclaim against the claim of the plaintiff any right or claim whether the same sound in damages or not. Sub-sec. (a) says a counterclaim shall have the same effect as a statement of claim in a cross-action, so as to enable the Court to pronounce a final judgment in the same action both on the original and on the cross-claim. Rule 292 provides for striking out a counterclaim, and 293 provides for giving judgment where the counterclaim is established. These rules refer to a counterclaim where the plaintiff alone is concerned. Rule 294 commences a new series dealing with the case of a counterclaim by the defendant against the plaintiff and some third person. In that case the counterclaiming defendant shall add to his defence a new style of cause similar to the title in a statement of claim setting forth the names of all the persons who, if such counterclaim were to be enforced by cross-action, would be defendants to such cross-action, and shall deliver his statement of defence to such of them as are parties to the action within the period within which he is required to deliver it to the plaintiff. Where any such person is not a party to the action he must be served with a copy of the defence, on which shall be endorsed a notice that his defence to the counterclaim must be filed within the time allowed, otherwise judgment will be entered against him (rule 295). The next two rules, 296 and 297, are difficult to understand. The former says:—

Any person not a defendant to the action who is served with a

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counterclaim as aforesaid must file his statement of defence as if he had been served with a statement of claim in an action. Such person shall be a party to the action from the time when the counterclaim is filed.

Then follows 297, which says:—

Any person, including the plaintiff, named as a party to a counterclaim, may deliver a defence thereto as if it were a statement of claim.

The first sentence of rule 296 is wide enough to include a plaintiff against whom a counterclaim is delivered, but the last sentence indicates that it refers to a person who was not prior to the filing of the counterclaim a party to the action. The fact appears to be that the words "any person not a defendant" in this rule are a mistake for "any person not originally a party." The first part of this rule was adopted from the old Ontario rule 378: Holmested & Langton, 1st ed., 416, which in turn had been adopted from English order 11, rule 13. In Annual Practice, 1913, p. 355, the mistake is pointed out. In its present form it is not intelligible and is moreover inconsistent with rule 297. The person referred to in 296, upon whom a counterclaim is "served," "must file his statement of defence as if he had been served with a statement of claim in an action," whereas the person referred to in rule 297 "may deliver a defence thereto as if it were a statement of claim." I think it reasonably clear that the words "any person" in rule 296 do not refer to the plaintiff in the original action, but it clearly does refer to a person who is made a party to the action by the counterclaim, and it goes on to provide that such a party must file a statement of defence. But rule 297 says that "any person, including the plaintiff," named as a party to a counterclaim may deliver a defence. The words "any person" in this rule includes every person named as a party to the counterclaim, except, of course, the counterclaiming defendant, and includes those persons referred to in rule 296. We have thus two rules, one of which provides that a person served with a counterclaim must file a defence, and the other that the same person may deliver a defence.

The confusion has been caused by the original draftsman adopting the Ontario rules without paying due regard to the fact that under the Ontario system an action was commenced by a writ of summons, to which an appearance was entered, whereas under our system the action is commenced by a statement of claim to which in lieu of an appearance a statement of defence is delivered. The Ontario rule 378, from which our rule 296 was taken, provides that a person served with a counterclaim must appear thereto as if he had been served with a writ of summons. Having thus only provided for an appearance being entered, it was necessary to provide for the delivery of a defence to a counterclaim. This was done by a rule 379, of which Man-

toba rule 297 is a verbatim copy. In Ontario this rule was the necessary complement of rule 378, and it included every person against whom a counterclaim was filed. Manitoba rule 296 having dealt with the question of a defence to a counterclaim by every person not theretofore a party to the action it was only necessary to provide for the case of the plaintiff against whom a counterclaim had been filed either alone or jointly with some other person. Rule 297 would have served this purpose had it omitted the words "any person including," which serve no purpose other than to create confusion.

The joint effect of these two rules appears to me to be that a person first made a party to the action by the counterclaim must file a defence within the time limited by rule 204 (rule 298) or judgment may be recovered against him under rule 298 B. A plaintiff, on the other hand, may deliver a defence (rule 297) and if he desires to do so, he must deliver it within eight days, rule 298. Rule 297 A gives a plaintiff the right to reply to a statement of defence. By rule 301 there shall be no pleadings in an action except those mentioned in rules 296, 297, 297 A and 297 B, and a statement of claim and a statement of defence. That is (1) a statement of claim; (2) a statement of defence; (3) a defence by a third party to a counterclaim (rule 296); (4) a defence by a plaintiff to a counterclaim (rule 297); (5) a reply by a plaintiff to a defence (rule 297 A); and (6) a pleading subsequent to a reply by leave of the Court or a Judge (rule 297 B). After ten days from the delivery of the last pleading the action is at issue. It is difficult to say what this sentence means. It does not mean that they have arrived at a point in their pleadings where there is assertion on the one side and denial on the other side, because the next sentence covers that by providing that

> after statement of defence is filed the plaintiff shall be held without further pleading to have denied all material allegations in the statement of defence, etc.

A plaintiff may deliver a reply to a statement of defence (rule 297 A), but he need not do so, and if he does not he is held to have denied all material allegations in the statement of defence. But what if he does not file a defence to a counterclaim? May interlocutory judgment be signed against him for default, or should he be held to have denied all material allegations in the counterclaim? In England, by reason of order 19, rule 17, and in Ontario, by old rules 728 and 729, and now expressly by rule 593, of which we have no equivalent, except rule 298 B, judgment may be recovered by default of defence by a plaintiff to a counterclaim.

In the case of a person other than an original party to the action against whom a counterclaim is filed, he must be served with a notice to defend or in default judgment will be signed against him. No such notice is required to be given to a plaintiff

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against whom a like claim is made. In the case of the former the language of the rule is imperative that he must file a defence; in the case of the latter it is permissive. Moreover, a counterclaim is not spoken of as a separate pleading, distinct from a defence; but is referred to as a defence (rules 294, 295). By rule 295 a person not previously a party to the action is to be "summoned to appear by being served with a copy of the defence." What is meant here is clearly defence and counterclaim. In rule 294 a defence which sets up a counterclaim is also referred to as a "statement of defence."

For these reasons I think it should be held that "statement of defence," where used in rule 301, is meant to also include counterclaim, and that when a plaintiff has filed no defence to a counterclaim he should be held to have denied all material allegations in it. I do not think the concluding sentence of that rule points to any other interpretation. That sentence appears to me to be entirely superfluous, the point having been fully covered by rule 297.

A consideration of rule 298 B confirms the conclusion I have arrived at. It deals with the case of default in filing a defence by a "defendant to a counterclaim." In all other rules where a plaintiff against whom a counterclaim is filed is referred to he is called the plaintiff. See rules 292, 297, 298, 301. If the expression "defendant" was meant to include a plaintiff when made a party to a counterclaim, one would expect to find that the expression "plaintiff" included a counterclaiming defendant. By sub-sec. (e) of sec. 2 of the King's Bench Act a defendant who counterclaims is not a "plaintiff."

In my opinion the interlocutory judgment signed by the defendant upon his counterclaim was not warranted by the rules, and should have been set aside with costs to the plaintiff.

Judgment accordingly.

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BOECKH v. GOWGANDA QUEEN MINES.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Idington, Duff, Anglin and Brodeur, JJ. June 4, 1912.

1. TRIAL (§ II A—40)—SUBMITTING QUESTIONS TO JURY—GENERAL QUESTION INCLUDED.

Where, at a trial of a civil action with a jury, the trial judge under sec. 112 of the Judicature Act, R.S.O. 1897, ch. 51, submits questions to the jury to be answered, he may, if he sees fit, also submit a question inviting a general verdict (*ex. gr.*, "do you find for the plaintiff or defendant") in addition to the answers to the questions submitted, and where the answers to the specific questions harmonize with the answer to the general question, a judgment entered in accordance with such findings is regular, provided the charge to the jury has been made sufficiently comprehensive to enable the jury to render a general verdict.

[*Gowganda Queen Mines* v. *Boeckh*, 24 O.L.R. 293, affirmed; *Furlong* v. *Carroll*, 7 A.R. (Ont.) 145, applied, and *Reid* v. *Barnes*, 25 O.R. 223, distinguished, by court below.]

2. APPEAL (§ V A 2—251)—OBJECTIONS—WHAT QUESTIONS RAISED BELOW—LACK OF PROOF ON TRIAL—SUPPLYING PROOF ON APPEAL.

Where, in an action on calls on shares of capital stock, there is no proof of a by-law that shares should be sold at a discount, and no objection was made below to such want of proof, the court hearing the case in appeal may permit proof of the by-law to be put in.

[*Gowganda Queen Mines* v. *Boeckh*, 24 O.L.R. 293, affirmed; *Cook* v. *McMullen*, 5 O.W.R. 507; *Hargreaves* v. *William* (1894), 58 J.P. 655, cited in court below.]

3. TRIAL (§ I C—10)—IRRELEVANT EVIDENCE—REJECTION—QUESTION NOT RAISED ON PLEADINGS—RECEPTION OF EVIDENCE.

Where, in an action for calls on company shares, the question is not raised by defendants' pleading that a statutory meeting was not held and that consequently the statutory limitation under the Ontario Companies Act for avoiding the allotment of shares had not begun, evidence upon such an issue, which would open up an entirely new case as to which no question had been raised previous to the trial, is properly rejected, particularly where no application was made to amend the pleadings.

[*Gowganda Queen Mines* v. *Boeckh*, 24 O.L.R. 293, affirmed.]

4. CORPORATIONS AND COMPANIES (§ V B 2—180)—SUBSCRIPTIONS — PAYMENT — ALLOTMENT OF SHARES — MINIMUM SUBSCRIPTIONS FOR ORGANIZATION.

An allotment of shares of capital stock offered for public subscription is not void but voidable only, for non-compliance with the Ontario Companies Act, 7 Edw. VII. ch. 34, sec. 106 (now 2 Geo. V. ch. 31, sec. 110), as regards payment to and receipt by the company of the deposits with applications for shares to the extent of the minimum subscriptions required for organization.

[*Gowganda Queen Mines* v. *Boeckh*, 24 O.L.R. 293, affirmed; *Finance and Issue, Ltd.* v. *Canadian Producer Corp.*, [1905] 1 Ch. 37, applied by court below.]

5. PLEADING (§ III D—326)—SUFFICIENCY AS TO CORPORATIONS—ALLOTTEE OF SHARES—IRREGULARITY OF ORGANIZATION OF COMPANY—ONTARIO COMPANIES ACT.

Where an allottee, upon a public subscription for shares of a company organized under the Ontario Companies Act desires to shew irregularities in the organization of the company in seeking to avoid the allotment in an action for calls made after the lapse of a long time during which notice of his refusal to accept had been given the company, but no legal proceedings had been taken by him to declare the allotment void, he must specifically set up in his pleadings the grounds on which he relies, so that the opposing party may have a reasonable opportunity of meeting the case he proposes to advance.

[*Gowganda Queen Mines* v. *Boeckh*, 24 O.L.R. 293, affirmed on appeal; *Re National Motor, etc., Co.*, [1908] 2 Ch. 228, cited in court below.]

Statement

APPEAL from a decision of the Court of Appeal for Ontario, *Gowganda Queen Mines Limited* v. *Boeckh*, 24 O.L.R. 293, affirming the judgment for the plaintiffs (respondents) at the trial.

The appeal was dismissed.

John W. McCullough, for the appellant.

W. R. Smyth, K.C., for the respondent.

The respondents brought action to recover calls upon shares of their capital stock claimed to have been subscribed for by

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appellant. The main defence was that the subscription for the shares was procured by fraudulent misrepresentations upon discovery of which appellant had repudiated it. The jury found that he was not misled by any statements made to him and that he had delayed his repudiation for an unreasonable time after becoming dissatisfied. Judgment was entered for the plaintiffs at the trial and defendant appealed directly to the Court of Appeal, where he complained of misdirection and non-direction to the jury. His objections on these grounds were overruled for the reason that they were not taken at the trial and the jury were properly instructed as to the subject-matter. Another objection was that a question, "Do you find in favour of the plaintiffs or the defendant?" should not have been submitted, as to which the Court of Appeal held that it was taken too late, and, even if it had been raised at the trial, it could not prevail, as the Judge had a right to put the general question if he thought fit, if his charge was such as to enable the jury to deal with the issues by a general verdict.

A third objection that there was no proof of a by-law authorizing the sale of shares at a discount was disposed of on the ground that, as such a by-law existed, proof could have been easily made and the plaintiffs would be allowed to put in a copy before the Court of Appeal.

The Court also held that an allotment made without compliance with the provisions of sec. 106 of the Ontario Companies Act was voidable only and could not be avoided except upon a record properly framed for the purpose.

On appeal by the defendant to the Supreme Court of Canada.

Judgment

THE COURT affirmed for the reasons given therein the judgment of the Court of Appeal.

Appeal dismissed with costs.

Leave to appeal to Privy Council was refused, 25 July, 1912.

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RILEY v. McGRORY.

Quebec Court of Review, Tellier, DeLorimier, and Greenshields, JJ. November 29, 1912.

1. WILLS (§ I C—32)—ERASURE — CERTIFICATION OF THE NUMBER AND NULLITY OF WORDS ERASED.

A will made under Quebec law in authentic form before two notaries must certify the number and nullity of words erased, otherwise the erasure will not be effective and the words through which a line had been drawn will be read in the will.

[Notarial Code, R.S.Q. 1909, sec. 4618, considered.]

2. WILLS (§ I B—20)—EXECUTION—NOTARIAL AUTHENTICATION — ERROR AS TO TIME OF EXECUTION.

A will in authentic form before two notaries under Quebec law is not invalid because, by inadvertence, it was certified on its face to have

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been executed in the afternoon of a certain day, while in fact it was executed in the forenoon of that day.

APPEAL by the plaintiff from the judgment of Monet, J., in the Superior Court for the district of Iberville, rendered March 9, 1911, dismissing the action with costs.

The appeal was dismissed.

A. D. Girard, K.C., and *F. J. Bisaillon*, K.C., for the plaintiff.

P. A. Chassé, K.C., and *T. E. Walsh*, K.C., for the defendant.

The opinion of the Court was delivered by

GREENSHIELDS, J.—The original plaintiff, Philip Riley, the husband of Betsy McGrory, instituted the present action, and by his prayer, asks that the will of his wife, made on the 8th day of July, 1901, received before Demers, notary public, and Deland, notary public, be set aside, annulled and declared of no effect. Greenshields, J.

During the pendency of the action, the original plaintiff died, and the present plaintiffs *par reprise d'instance* under a judgment of the Court, continued the action.

The plaintiff, in effect, alleges that on the 8th day of July, 1901, the testatrix, Betsy McGrory, had not the mental capacity to make a will; that, moreover, physically, she was unable to speak; that the said testatrix was subjected to undue influence by those in interest in having the will made, including among others the notary Demers; that the will is false, inasmuch as it declares that the testatrix was of sound and disposing mind; that it is false in that it declares that she gave her property in usufruct to her husband, and upon his death to her next of kin; that it is false in that it declares that the said will was dictated to the said notary Demers and his colleague notary Deland and that it was read over; that it is false in that it declares that she stated that she understood the said will or document and declared it to be her last will and testament; that it is false wherein it states that she revoked all former wills, and it is false in that it states that the testatrix declared she did not know how to sign. The plaintiff further alleges that these facts came to his knowledge only within a year before taking the action.

The defendants unite in their plea; admitting the contents of the will as set forth in paragraph one of plaintiff's declaration; admitting paragraphs 3, 4 and 5 of the declaration; denying paragraph 6 and all the sub-sections thereof; denying paragraphs 7 and 8 of the declaration; as to paragraph 9, they state that the document referred to therein speaks for itself; denying paragraphs 10 and 11; pleading ignorance of the document alleged in paragraph 12; denying paragraphs 13 and 14, and

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alleging that the plaintiff accepted without reserve the legacy and advantages conferred upon him by the will attacked, and such acceptance by the plaintiff operated as a renunciation and waiver of all rights to attack the will.

By an answer the plaintiff joins issue with the defendant, and expressly denies any special or express acceptance of the will, and alleges that the plaintiff accepted the revenues and interests in the said estate, believing that he was entitled to the same and that the principal sum belonged to him.

The learned trial Judge found in favour of the defendants on all questions, and dismissed the action with costs. There are two questions to be decided: first, as to the mental capacity of the testatrix on the 8th day of July, the date when the said will was received by the notary, Demers, and his colleague, notary Deland; and, second, whether the formalities prescribed by law for the execution of a will have been complied with.

Dealing with the first: By art. 835 of our Civil Code, the capacity of a testator is considered relatively to the time of the making of the will. In the present case, that capacity must be considered as it was, or existed, on the 8th day of July, 1901. The testatrix was an old lady of probably over seventy years of age, and up to the 26th of June, 1901, was, considering her age, in a good state of health. On that date she suffered a stroke of paralysis, more or less severe. Dr. Godin was called in to attend her, and did attend her up to the 4th of July following. He ordered her removal to the hospital, where she was taken the day after she suffered the stroke. She was placed in a room adjoining the hall on the first floor of the hospital. As above stated, the doctor attended her until the 4th of July, when, says he, her improvement was so marked that he considered further visits or attendance unnecessary. He testifies that up to that time she was perfectly able to talk and make herself understood, and daily improved. Between the 4th of July and the 12th of the same month he did not see her. On the latter date he was summoned and found that she had suffered another attack, and was much worse, and never improved after that, her death taking place in the following December. The doctor has no hesitation in stating that, on the 4th of July, at least, she was in possession of her mental faculties and was perfectly able to express her wishes.

Then follows the testimony of the notary Demers. He did not know the woman at all before he was summoned by an attendant of the hospital to go to her. He testifies that he did not even know her name, and it was she who gave him her name and the name of her husband, and he swears positively that the will was dictated by her on that occasion, and that she was fully possessed of her mental faculties. He testifies that

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she was in a room on the first floor of the hospital on the 8th of July. Against this proof is the evidence of Henderson Black and of his wife, and after a careful consideration of their testimony, I have no hesitation in saying that their visit to her was subsequent to the 12th of July, the date of the second attack. In any event, it was, without doubt, subsequent to the 8th of July. When these witnesses saw her, she was upstairs on the second floor, and she was certainly in a room on the first floor when she made her will.

The learned trial Judge found that the plaintiffs had failed to prove the mental incapacity of the testatrix to make her will on the day when the notaries received it. And the learned trial Judge went further, and found that the defendants, although not bound to do so, had established her capacity physically to dictate mentally, to understand her will and wishes on that day. With the finding of the learned trial Judge I fully agree.

As to the second point. It is urged by plaintiffs' counsel that by law, where a will is not signed by the testator, that fact must be stated and the reason given. That is true.

The original minute of the will contains the following statement:—

> Who (referring to the testatrix) hath declared not to know to sign.

It would appear that a line has been drawn through the two words—"know to"—and it is urged by the plaintiff's counsel that these two words must be read out of the document, leaving the statement, "declared not to sign," which, it is urged, does not fulfil the requirements of the law.

Here it should be stated that upon the application of the plaintiffs' attorney an order was given for the filing of this original minute. It was filed in compliance with the order on the 7th of January, 1908. At that time it may be presumed that the defendants' counsel had not seen and examined this original minute; but it must be with equal certainty presumed that upon the production and filing of this original minute it was examined by defendants' counsel and by his clients. Now, in the original statement of claim attacking the will, the plaintiff alleges that it was false in that it did state that the testatrix had declared that she did not know how to sign, as stated in the document. After having examined the original minute of the will on the 8th of January, 1908, the plaintiff, through his attorney, declared that he had no other reasons to add to those already stated in his declaration; therefore, the only charge made by the plaintiff is that it is false that the said testatrix declared that she could not sign, or did not know how to sign, as stated in the document impeached.

It is proved beyond all question that the testatrix did declare that she did not know how to sign, which was the fact. There is no certificate that two words were erased. There is not a

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word in the pleadings alleging the erasure of these two words; there is no proof that they were ever intentionally erased by any one, nor when, or under what circumstances, the line was drawn through the words. The plaintiff charges that the making of the will was brought about by the undue influence of (among others) the notary Demers. If this were true (and there is not a tittle of proof in support of the charge), it would be hard to believe that the notary, after securing the execution of the document, would proceed with a stroke of the pen to destroy his handiwork. We are asked to read out of the will words that appear clearly to be in the document, and thereby nullify what is manifestly the last wishes of a deceased person. As stated, the document nowhere contains a statement that any words have been erased. To render an erasure valid such would be done: sec. 4618, R.S.Q. 1909. In the present case the words "know to" must be read in and not out of the will.

There remains for me only the other question. The document impeached states that, "In the year 1901, on the 8th day of the month of July, in the afternoon," the will was received. The explanation is very simple. After the notary, Demers, had taken instructions from the testatrix to make her will, he saw his colleague, Deland, and asked him if he would attend at the hospital to receive her will. Deland told him that he would be busy during the forenoon and could only attend in the afternoon. Thereupon, notary Demers drafted the will, putting in the word "afternoon." Subsequently Deland saw him and told him that his engagements would permit him to attend in the forenoon, and in the forenoon they went, and, by an oversight, the word "afternoon" was not changed to "forenoon." This is the whole explanation, and inasmuch as whether a will was received in the afternoon or in the forenoon is of not the slightest importance, it cannot be set aside on that ground. I am to confirm the judgment.

Appeal dismissed.

DOUGLAS v. YOUNG.

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Saskatchewan Supreme Court, Parker, M.C. December 4, 1912.

1. PLEADING (§ I S—145)—STRIKING OUT—EMBARRASSING PLEADING, HOW DETERMINED.

Under practice rule 167 of the Saskatchewan Rules, 1911, a pleading will be struck out as embarrassing only in plain and obvious cases.

[*Hubback* v. *Wilkinson*, [1899] 1 Q.B. 86, referred to.]

2. PLEADING (§ III D—325)—WHAT MAY BE PLEADED—SUFFICIENCY ON MERITS—EMBARRASSING, WHEN.

Where parts of a defendant's pleading sufficiently disclose a reasonable ground of defence against the plaintiff or a reasonable cause

of counterclaim, it will not be struck out as embarrassing or as tending to prejudice the plaintiff under rule 167 of the Saskatchewan Rules of Practice, 1911.

3. PLEADING (§ III D—325)—STATEMENT OF DEFENCE—ACTION AGAINST SURETY—SUFFICIENCY.

Where, in an action to recover on a promissory note executed by the defendant and another, the defence is that the note in question was given as collateral to a mortgage made by the other person in favour of the plaintiff, which the defendant executed as co-covenantor and surety, that there was a prior mortgage on the same land, which mortgage was foreclosed, thus rendering the subsequent mortgage worthless as security, a further allegation that by reason of the plaintiff's neglect to give notice to the defendant of the foreclosure and to keep alive and preserve the security of the second mortgage for the benefit of the defendant as surety, the said mortgage became worthless as a security to the defendant as such surety and that, therefore, the defendant is relieved from further liability in respect to the said mortgage and of any promissory notes given as collateral thereto, should not be struck out as embarrassing since it sufficiently discloses a reasonable ground of defence.

Statement

APPLICATION by the plaintiff to strike out certain paragraphs of the statement of defence as tending to prejudice and embarrass him and to delay the fair trial of the action.

The application was refused.

P. H. Gordon, for the plaintiff.

C. E. D. Wood, for the defendant.

Parker, M.C.

PARKER, M.C.:—This is an action on a promissory note made by the defendant and one E. Marshall Young in favour of the plaintiff for the sum of $1,000. The defence alleges that the note in question was given by the defendant and the said E. Marshall Young as collateral to a certain mortgage made by the said E. Marshall Young in favour of the plaintiff, which the defendant executed as co-covenantor with and surety for the said E. Marshall Young; that the Empire Loan and Savings Co. held a prior mortgage on the same land, which they foreclosed under the Land Titles Act, thus rendering the subsequent mortgage worthless as a security; and that by reason of the failure of the plaintiff to give notice of the foreclosure proceedings to the defendant and keep alive and preserve the above mentioned mortgage for his benefit as surety, he is discharged from all liability in respect to the said mortgage and the promissory note collateral thereto. Paragraphs 4 and 5 of the defence are as follows:—

4. The plaintiff neglected to give notice to the defendant of the notice filed by the said Empire Loan Company and failed and neglected to keep alive and preserve the mortgage referred to in the second paragraph hereof for the benefit of the defendant as such surety, and by reason of the plaintiff's said failure and neglect to so notify the defendant of the said sale and to keep alive and preserve the said security for the benefit of the defendant as surety for the said E. Marshall Young, the said mortgage became worthless as a security to the defendant as such surety.

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5. The defendant repeats the next preceding paragraph hereof and says that by reason of the neglect and failure of the plaintiff to give notice of the said sale to the defendant, and of the failure of the plaintiff to keep alive and preserve the said mortgage for the benefit of the defendant as such surety, the defendant was relieved from all further liability in respect of the said mortgage and of any promissory notes given as collateral thereto, and the plaintiff has no right of action in respect of the promissory note sued on herein.

The plaintiff applies under rule 167 to strike out these paragraphs on the ground that they tend to prejudice and embarrass the plaintiff and to delay the fair trial of the action. Counsel for the plaintiff argued that the paragraphs in question were embarrassing in the following respects: (1) There was no allegation that the plaintiff himself knew of the foreclosure proceedings; (2) even though the plaintiff did know of the proceedings, it was not alleged that he was under a duty to notify the defendant; (3) there was no allegation that the defendant himself did not know of the proceedings, and that if he did, and there was a duty on the part of the plaintiff to give him notice, the fact that the defendant already had notice would discharge such a duty on the part of the plaintiff.

The legal duties of a principal creditor to a surety are set out in De Colyar on Guarantees at page 446 as follows:—

> A surety is entitled to the benefit of all the securities which the creditor has against the principal. It follows, therefore, that if the surety be deprived of this benefit by the act of the creditor, he will be discharged to the full extent of the security to which he was entitled; and consequently a creditor is bound to use diligence and care with regard to securities held by him. Thus, for instance, a creditor holding a mortgage for a guaranteed debt is bound to hold it for the benefit of the surety, so as to enable him, on paying the debt, to take the security in its original condition, unimpaired. The right of the surety is to have the same security in exactly the same plight and condition in which it stood in the creditors' hands.

In the first place I think it must be assumed that the plaintiff knew of the foreclosure proceedings. His mortgage was subsequent to that of the Empire Loan & Savings Co. and under the Land Titles Act he would have to be served with notice of the proceedings. The main question, therefore, is whether or not the duties above mentioned have been sufficiently alleged in the paragraphs in question, so as, if true, to disclose a reasonable ground of defence against the plaintiff or a reasonable cause of action if the defendant were suing instead of being sued. The paragraphs disclose that there was a mortgage held by the plaintiff which was executed by the defendant as a surety; that by reason of foreclosure proceedings taken by a prior mortgagee this security became lost to the surety; that the plaintiff failed and neglected to keep alive and preserve this security for the benefit of the defendant; that the plaintiff gave no notice of the

foreclosure proceedings to the defendant; and that by reason of such failure and neglect the defendant is discharged from all liability to the plaintiff. It seems to me that no further allegations are necessary; and that the paragraphs as they stand do, if true, disclose "an actionable breach of duty on the part of the plaintiff" (see *Gautret* v. *Egerton*, L.R. 2 C.P. 371), or in this case a reasonable ground of defence; and I cannot see where the plaintiff is seriously embarrassed by them. I use the word "seriously" because it is only in plain and obvious cases of embarrassment that a pleading will be struck out: *Hubback* v. *Wilkinson*, [1899] 1 Q.B. 86. In that case Lindley, M.R., says, referring to this procedure: "It is only appropriate to cases which are plain and obvious, so that any Master or Judge can say at once that the statement of claim as it stands is insufficient, even if proved, to entitle the plaintiff to what he asks." If the paragraphs in question were struck out the whole action would practically be disposed of, and if the plaintiff is embarrassed at all, it is not of such a nature as to justify such a drastic step. The motion will therefore be dismissed with costs in the cause to the defendant.

Motion dismissed.

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SIBBITT v. CARSON.

(Decision No. 2.)

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Oct. 10.

Ontario Divisional Court, Mulock, C.J.Ex.D., Clute, and Riddell, JJ. October 10, 1912.

1. BROKERS (§ II B 1—10)—OF REAL ESTATE—RIGHT TO COMPENSATION—COMMISSIONS—FAILURE TO PROCURE PURCHASER WITHIN TIME SPECIFIED.

An agent is not entitled to his commission where by the terms of the contract he was to procure a purchaser by a certain hour of the day, unless the purchaser is brought in within the time fixed; and this is true notwithstanding that the principal later negotiated with the person introduced by the agent after the expiration of the time limit.

[*Sibbitt* v. *Carson*, 5 D.L.R. 193, 26 O.L.R. 585, affirmed.]

2. BROKERS (§ II B 1—10)—OF REAL ESTATE—RIGHT TO COMPENSATION—COMMISSIONS—PROCURING FINAL PURCHASER—WHAT CONSTITUTES.

Where an agent was to procure a purchaser for his principal he cannot recover commission where he introduces a person who is not willing to buy on his own account but to take a share only upon a syndicate being formed to buy the property, although the person so introduced finally joins with another party, brought in by himself and not through the agent, in buying the property from the owner direct. (*Per* Clute, J.)

Statement

APPEAL by the plaintiff from the judgment of Middleton, J., *Sibbitt* v. *Carson*, 5 D.L.R. 193, 26 O.L.R. 585.

The appeal was dismissed.

Argument

R. G. Code, for the plaintiff:—The learned trial Judge erred in finding that, at the time of closing the agreement of agency on

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Argument

Saturday, the 24th February, 1912, the agency was limited in time and would expire on the following Monday at two o'clock p.m. No time-limit was agreed to when the contract of agency was completed on Saturday. The fixing of a time-limit expiring on Monday the 25th February at two o'clock p.m. occurred to the defendant Bingham some time during the forenoon of Monday, and was prompted only by certain telephone messages received by him indicating that the property in question was commencing to attract attention. I refer to *Singer* v. *Russell* (1912), 1 D.L.R. 646, 25 O.L.R. 444; *Wilkinson* v. *Alston* (1879), 48 L.J.Q.B. 733; *Stratton* v. *Vachon* (1911), 44 Can. S.C.R. 395; *Travis* v. *Coates* (1912), 5 D.L.R. 807, 27 O.L.R. 63.

George F. Henderson, K.C., for the defendants, was not called upon.

Mulock, C.J.

October 10. MULOCK, C.J.:—In the opinion of myself and my brother Riddell, the plaintiff was bound to have brought a purchaser on or before two o'clock. His agency ceased at that hour. He did not bring a purchaser within that time. Therefore, he did not earn his commission. The circumstance that a man who had been negotiating with him, subsequently introduced a third person to go in with him and become purchaser jointly with him, is not, in our opinion, obtaining a purchaser before two o'clock. There was a very distinct contract between the parties. They all knew of the significance of two o'clock; they knew that term to be material—that was the contract. And in that respect this case differs from the authorities cited, where there was no time-limit when an agency was created, and subsequently, as a result of the agency, the owner himself concluded negotiations begun by the agent. The majority of the Court rest their judgment upon the contract itself; and for that reason we think the plaintiff cannot succeed.

Clute, J.

CLUTE, J.:—I agree in the disposition of this case, but I should have required further time to consider if it were the fact that the final purchaser actually carried out the agreement, he having been introduced by the agent; but, as a matter of fact, Grant, who was first introduced and who became one of the purchasers, was not the final purchaser. He and his associate, according to the evidence, became the purchasers. If that is so, then the agent did not introduce a person or persons who became the purchaser; and there is no evidence at all that Grant would have become a purchaser if he himself had not found the person who was willing to join with him in an equal interest. The introduction of the third party broke the continuity of the previous negotiations; and, therefore, it could not be said that the agent brought a person who finally carried out the contract.

Riddell, J.

RIDDELL, J.:—I agree in the result; and, speaking for myself, I have no manner of doubt that the owner of property can simply

"sit tight," knowing that some purchaser is negotiating with his agent, and, seeing the two quarrel, say: "I have agreed with this agent that if he bring me a purchaser by a fixed time he is to have his commission, and I am not going to interfere; buy or not, just as you please"—and then, when the purchaser fails to complete his contract by the fixed time, deal with that purchaser. It would be preposterous if the liberty a man has to deal with his own property should be limited in the manner which has been suggested. Of course good faith must in all cases be preserved.

MULOCK, C.J.:—The appeal will be dismissed with costs. Mulock, C.J.

Appeal dismissed.

Re MACDONALD ELECTION.

MYLES (petitioner) v. MORRISON (respondent).

Manitoba Court of Appeal, Cameron, J.A. December 23, 1912.

1. ELECTIONS (§ IV—91*a*)—CONTESTS — STATUS OF PETITIONER — JURISDICTION.

In order to establish the status of the petitioner on a preliminary objection to set aside a petition against a person's election as a member of the House of Commons, it is not necessary to produce a certified copy of the voters' list actually used at the polls in the polling sub-division in which the petitioner was entitled to vote, as was the former practice, but all that is now required under the Dominion Elections Act, secs. 14 and 18 of ch. 6, R.S.C. 1906, is the production of a copy of the original list of voters with the imprint of the King's printer.

[*Re Richelieu*, 21 Can. S.C.R. 168; *Re Provencher*, 13 Man. L.R. 444; *Re Provencher* (No. 2), 1 D.L.R. 265, 22 Man. L.R. 16, referred to.]

2. ELECTIONS (§ IV—90)—IDENTITY OF PETITIONER—CHRISTIAN NAME TRANSPOSED IN VOTERS' LIST, EFFECT OF.

The fact that the given name of one of the petitioners was transposed in the printed voters' list, is not a valid objection, on an application to set aside on preliminary objections a petition against the applicant's election as a member of the House of Commons, where there appears to be no doubt as to the identity of the petitioner, who appeared and gave evidence, with the person intended to be named in the voters' list.

3. ELECTIONS (§ IV—93)—CONTESTS — PLEADINGS—STATEMENT.

The fact that the precise words of complaint specified in sec. 11 of ch. 7 of the Controverted Elections Act have not been used by the petitioners is not a valid objection on an application to set aside, on preliminary objections, the petition against the applicant's election as a member of the House of Commons.

4. ELECTIONS (§ IV—90)—CONTESTS — ELECTION PETITION — AFFIDAVIT VERIFYING SAME.

A petition to set aside an election of a member of the House of Commons is not invalidated by the fact that the affidavit verifying the petition and which is required to be filed therewith was sworn four days before the date of filing the petition.

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5. ELECTIONS (§ IV—90)—CONTESTS—PETITION, SERVICE OF.

Under the Controverted Elections Act, sec. 18, ch. 7, R.S.C. 1906, the service by the petitioner of a duplicate original of the petition against a person's election as a member of the House of Commons is not necessary, but the statute is sufficiently complied with by the service of a copy.

6. ELECTIONS (§ IV—90)—CONTESTS—AFFIDAVIT ON PETITION, SERVICE OF.

A copy of the affidavit prescribed by the Controverted Elections Act, sec. 6, ch. 7, R.S.C. 1906, need not be served by the petitioner on the respondent in order to maintain a petition against the respondent's election as a member of the House of Commons.

7. ELECTIONS (§ IV—90)—CONTESTS—PLEADING IN ELECTION CONTEST — DEMURRER TO PETITION.

On an application on behalf of the respondent to set aside a petition against his election as a member of the House of Commons, on preliminary objections, it is not improper to dispose of a demurrer to part of the petition.

[*Re Lisgar Election Petition*, 16 Man. L.R. 249, followed.]

8. ELECTIONS (§ IV—90)—CONTESTS—FREEDOM OF ELECTION, AS AFFECTING VALIDITY OF ELECTION.

Apart from statute, freedom of election is at common law essential to the validity of an election, irrespective of any question of the connection of the candidate whose election is sought to be set aside with the intimidation complained of.

[*The North Louth Case*, 6 O'M. & H. 137, 172, specially referred to.]

9. ELECTIONS (§ IV—91)—CONTESTS—ELECTION FRAUD AS GROUND — THREATS—UNDUE INFLUENCE.

An election, held under such circumstances that, owing to threats, undue influence and menaces, the canvassers and workers on one side are effectually excluded from taking part in the election, while, at the same time, the electoral district is over-run with workers, agents and orators of the other side, is not free and fair, and is void at common law if such threats and undue influence can be reasonably held to have affected the result. (Dictum *per* Cameron, J.A.)

Statement

AN application on behalf of the respondent to set aside the petition herein against his election as a member of the House of Commons for the electoral district of Macdonald.

The application was refused.

F. M. Burbidge, for the respondent.

A. B. Hudson, and *W. H. Trueman*, for the petitioner.

Cameron, J.A.

CAMERON, J.A.:—Some nineteen different preliminary objections and grounds of insufficiency against the petition herein and the petitioners and the notice of presentation and the security given were taken and filed, but comparatively few of them were pressed in argument after the evidence had been given.

The first objection taken is that the petitioners are not, nor is either of them, a person or persons who had a right to vote at the election to which the petition relates. Former decisions on this point (as on other matters raised by preliminary objections) tended to throw formidable technical obstacles in the way of petitioners, and if there could be deduced from the statutes an intention on the part of Parliament that, while peti-

tions against sitting members could be filed with the utmost freedom, they were not to be brought to trial except on compliance with the conditions of the most onerous and expensive kind. Rule 60 of the Parliamentary Election Petition rules of 1868 providing that no proceedings should be defeated by any formal objection certainly did not warrant such a deduction and later decisions have had a tendency to relax the severity of these conditions.

Formerly the status of the petitioner could only be established by the production of a certified copy of the voters' list actually used at the poll in the polling sub-division in which the petitioner was entitled to vote: *Re Richelieu*, 21 Can. S.C.R. 168. But, afterwards, in *Re Provencher*, 13 Man. L.R. 444, it was held by Mr. Justice Bain, in view of changes in the legislation, that, if the elector's name appears on the original list of voters, he has a right to vote and every copy of that original list with the imprint of the Queen's printer is an authentic copy of the original list for all purposes under the provisions of the Franchise Act then in force. That legislation is now to be found in sections 14 and 18 of ch. 6, R.S.C., the Dominion Elections Act. Here the names of the petitioners are to be found in the lists printed by the King's printer and authenticated by his imprint and also, as appears by reference thereto, in the original list. I refer to the judgment of Mr. Justice Perdue in *Re Provencher* (No. 2), 1 D.L.R. 265, 22 Man. L.R. 16, 22. If the imprint be an authentic copy of the original for all purposes, as the statute expressly says it is, it does seem to me that the production of it should be sufficient by itself. But much more than that was shewn here, and the right to vote of both the petitioners was fully made out.

Some objection was urged against the petitioner Woods, whose given name appears to be transposed in the printed voters' list. I can attach no importance to this, as there is no doubt whatever as to the identity of the petitioner who appeared and gave evidence with the person intended to be named in the voters' list.

I can see nothing in the objection that the precise words of complaint specified in sec. 11 of ch. 7, have not been used, where other words appear conveying the same meaning. And, in my judgment, the affidavits required by sec. 6 were duly sworn by both the petitioners as was amply shewn by the evidence. The objection that the affidavits were sworn on November 14, while the petition was not filed until November 18, must fail in view of the established practice and of the manifest impossibility of literally complying with the wording of section 6, if this objection be well founded. The object clearly aimed at by the statutory provision has been fully attained, and the provision duly complied with.

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It was argued that service of the petition upon the respondent was not sufficiently established. It is required that

> notice of the presentation of a petition under this Act, and of the security, accompanied with a copy of the petition, shall . . . be served on the respondent: sec. 18, ch. 7.

It is not a duplicate original of the petition, but a copy of it, that is to be served and, so far as I can see, there is no need to serve a duplicate original or a copy of the affidavit prescribed by section 6. But, if it is here really necessary for the petitioners affirmatively to establish that they have scrupulously complied in every imaginable particular with the requirements of the statute as to service, then it must be said that there is revealed a singular and anomalous provision of law. What have we here? We have here the respondent who had presented preliminary objections against the petition and petitioners, which he can only do, under section 19, within so many days "after the service of the petition and the accompanying notice" upon him. And more than that, we have here a cross-petition against the opposing candidate, filed by the respondent, which he can only do under the provisions of sub-section 2 of section 12, "not later than fifteen days after service of such petition against his election."

In these circumstances it seems incredible that the petitioners should be called upon positively to establish the service required by secs. 17 and 18. But, taking it that they are so called upon, I have no hesitation in holding that what was shewn in the evidence with respect to the service of the notice of presentation of the petition, of the security and of the petition, was amply sufficient to shew that the provisions of the Act were fully complied with.

I must hold against the respondent on the objection as to the security. That objection has already been taken and overruled in this province. I consider the notice of presentation which is in the usual form as sufficient.

Some other objections were urged, but these seem to me of an unimportant and formal character, to which it is impossible for me to attach any weight.

Paragraph 21 of the petition was objected to as being bad in law, and containing no allegations that furnish grounds for relief. Some doubt was expressed as to whether it were proper to dispose of a demurrer on this application. That, however, seems to have been the course adopted in *Re Lisgar Election Petition*, 16 Man. L.R. 249. The paragraph in question is lengthy and somewhat involved. The objection taken by respondent's counsel to it is that the allegations therein contained are in reality directed against the intimidation by certain persons mentioned of electors to prevent them from can-

vassing and soliciting voters (which is not expressly forbidden by sec. 269 of ch. 6), and not against intimidation preventing the voters themselves from voting. I extract the following from the paragraph as embodying its gist:—

> By reason of the arrest of the afore-mentioned persons and the communication of said threats and statements, electors entitled to vote at said election were intimidated and frightened and prevented from soliciting votes at said election for the election of or advocating the candidature of said Robert Lorne Richardson, and they refrained from soliciting votes at said election for the election of said Robert Lorne Richardson and they refrained from advocating the candidature of said Robert Lorne Richardson, and refrained from casting their votes at said election, whereby the said respondent was and is incapacitated from serving in Parliament for the said electoral district and the said election and return of the said respondent were and wholly null and void.

It is to be observed that the above quotation goes further than a mere allegation of intimidation preventing canvassing and states that electors, by reason of the facts stated, refrained from casting their votes.

Section 269 of ch. 6, R.S.C. deals with undue influence and intimidation and is very wide in its terms. Anyone who "impedes, prevents or otherwise interferes with the free exercise of the franchise of any voter" "shall be deemed to have committed the offence of undue influence." Apart from the statute altogether freedom of election is at common law essential to the validity of an election. If this freedom be by any means prevented generally, the election is void at common law. And there is no question of agency involved. Rogers, vol. 2, p. 864:—

> Intimidation operates on the mind of the intimidated, and when this influence pervades the electors to such an extent as to render the action of the constituency other than free, the election held under such circumstances is void and of no effect at common law, irrespective of any question of agency between the authors of the intimidation and the candidate in whose interest it has been exercised: *The North Louth Case* (decided in 1911), 6 O'M. & H. 172.
>
> It is a mistake to suppose that where general undue influence exists, it must be further shewn that the result of the election was, in fact, affected thereby. It is enough to shew such general undue influence as may be reasonably believed to have affected the result: *South Meath*, 4 O'M. & H. 142.

The question goes to the point whether it can or can not be said that the polling was a fair representation of the feeling of the constituency: *North Durham*, 2 O'M. & H. 156; Fraser on Parliamentary Elections, p. 126. Now, I have not observed a case in the reports where the charge was that there had been intimidation of electors who were workers, speakers and canvassers, to prevent them acting as such. But, if we suppose a

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case of a contested election where, by threats, undue influence and menaces, the canvassers and workers on one side were effectually excluded from taking part in the election, while at the same time the electoral district is overrun with the workers, agents and orators of the other side, then I think it might well be urged that, as free and full discussion is the basis of representative government any attempts to curtail or destroy it would be discountenanced by the Courts, and that an election held in those circumstances, was not free and fair, and was therefore void at common law, if such threats and undue influence could be reasonably held to have affected the result. It must be kept in mind that the

> common law is a living force, and can apply itself to new mischiefs as they spring up, as was said in *The North Louth Case*, 6 O'M. & H. 137, 172.

But in the questioned paragraph we find an express allegation that electors refrained from voting by reason of the facts and threats mentioned therein, so that, in dealing with this objection, I need go no further than that. I must refuse, therefore, to strike out the paragraph in question.

I must overrule the objections taken and order the costs of and incidental to the disposal of them to be costs to the petitioners, to be paid by the respondent in any event of the cause.

Application refused.

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HESS v. ROSS et al.

Saskatchewan Supreme Court, Trial before Haultain, C.J. December 19, 1912.

1. CANCELLATION OF INSTRUMENTS (§ I—1)—AGREEMENT OF SALE—FRAUD—RESCISSION—SALE OF LAND.

Where the evidence shews that the alleged vendor under a contract for the sale of land signed the agreement of sale on the representation of one of the alleged vendees, whom she hired as agent to sell the land, that it was an agreement in blank to be used by him in the event of obtaining a purchaser for the land, while as a matter of fact the agent wrote his own name and that of another in the agreement as vendees, the vendor is entitled on discovering the facts to have the agreement in question delivered up for cancellation and to an order for the removal from the register of the caveat and any *lis pendens* filed by the vendees.

Statement

AN action for the cancellation of an alleged agreement of sale and for the removal of a caveat filed against the land in question.

Judgment was given for the plaintiff.

G. O. McHugh, for plaintiff.

F. M. Brehaut, for defendants.

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Haultain, C.J.

HAULTAIN, C.J.:—I have had no difficulty in coming to the conclusion that the plaintiff is entitled to succeed in her action.

The evidence convinces me that the story told by the plaintiff is true and that when she signed the agreement of sale to the defendants, which is the subject of dispute, she did so on the representation of the defendant Sutherland that she was signing an agreement in blank to be used by the defendants in the event of their obtaining a purchaser for the land. Sutherland's statement that the plaintiff understood the real nature of the document, that is, that it was an agreement to sell to him and Ross, is absolutely contradicted by his own evidence. He swore that the only explanation of the document he gave to the plaintiff was given by reading the agreement over to her and that she must have known she was selling to the defendants, because their names were in the agreement as the purchasers. But later on, in explanation of certain things apparent on the face of the document, he admitted that the name of at least the defendant Ross was not written in the agreement until the day after the plaintiff had signed it and had had it "explained" to her. The statement of defence alleges that the plaintiff agreed to pay the defendants a commission of $400 upon the sale of the land in question by them, or that they should be allowed a discount of $400 in the event of their purchasing the land themselves. While it would not be desirable to tie parties down to statements of fact made in their pleadings, I think I am justified in coming to the conclusion that in this particular instance the defence in question was not merely dreamed by the draughtsman. The evidence of both defendants is to the effect that they had had no dealings with the plaintiff with regard to this land before the day the agreement was made, that the land was never put into their hands by the plaintiff for sale, and that before Sutherland went out to see her it was arranged between them that he was to go, not as a real estate agent looking for a listing, but as a purchaser. The plaintiff's evidence is quite positive on the point that the arrangement with Sutherland was that he and Ross were to procure a purchaser on a commission basis. She is corroborated in every particular by her daughter Katrine Hess, who was present all the time the negotiations were going on. Henry Hess, the husband of the plaintiff, also swears that Sutherland said he would get a buyer. The defendant Sutherland did not give satisfactory evidence. According to both his own and Ross's statements he went out to the Hess farm with the known purpose of buying the land from the plaintiff, Mrs. Hess. He testifies that while there he prepared the transfer of the land in question from Hess to his wife, while in an earlier part of his evidence he said that he did not know that Hess had transferred the land to his wife when he went out.

Without any further reference to the evidence, I find in favour of the plaintiff, and there will be

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(1) An order to the defendants to deliver up the agreement in question for cancellation.

(2) An order directing the removal from the register of the caveat filed by the defendants against the land in question, and of any *lis pendens* filed.

The plaintiff will have her costs of the action.

The defendants claim to have paid the plaintiff some amount on account of the alleged sale, and also to have paid off certain encumbrances against the land. Unless the parties can agree upon these several amounts within two weeks and file a joint certificate to that effect, there will be a reference to the local registrar to ascertain what amounts have been paid by the defendants to or for the plaintiff on account of or in connection with the alleged agreement. Upon the ascertainment of these amounts by agreement or reference, and the taxation of the plaintiff's costs of action, which will be set off *pro tanto* if necessary, either party may apply for further directions.

Judgment for plaintiff.

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MacLAREN et al. v. THE ATTORNEY-GENERAL OF QUEBEC and HANSON BROS.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Idington, Duff, Anglin, and Brodeur, JJ. March 21, 1912.

1. WATERS (§ I C 4—47)—UNDER GRANT FROM CROWN—EXTENT OF GRANTEE'S RIGHTS—LANDS BORDERING RIVER.

A grant by the Crown of land described as bounded by a river, which river is navigable and floatable, though it contains no special reservations in regard to the bed of the river, conveys no title to the bed of the river.

[*Attorney-General of Quebec* v. *MacLaren*, 21 Que. K.B. 42, affirmed by an equally divided court. Leave to appeal to Privy Council granted.]

Statement

APPEAL from the judgment of the Court of King's Bench, appeal side, *The Attorney-General of Quebec* v. *MacLaren*, 21 Que. K.B. 42, reversing the judgment of the Superior Court, district of Ottawa, which maintained the plaintiffs' (appellants') action with costs.

The appeal was dismissed, but without costs.

The plaintiffs alleged that they were proprietors of certain lots of land in the township of Low and Denholm, in the county of Wright, one lot being bounded on the west side and the other on the east side by the Gatineau River and lying directly opposite to each other. They contended that, as the river Gatineau was not navigable nor floatable, but merely *flotable à bûches perdues*, they were, as riparian proprietors, owners of the bed of the river between the lots in question, each title carry-

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ing with it ownership *ad medium filum aquæ*. The lots were granted in fee simple by the Crown in the years 1860 and 1891, respectively, and the grants contained no special reservations in regard to the bed of the river. At the locus in dispute the course of the river is interrupted by "Paugan Falls," a natural water-power capable of development for commercial purposes. The township of Low was erected, by proclamation, in 1859, out of the wild lands of the Crown, and its eastern limit was bounded by the waters of the river; in a similar manner the township of Denholm was erected, in 1860, with its western limit bounded by the waters of the river; the description of the lots stated they were, respectively, situated within Low and Denholm.

In 1899, the defendants, Hanson Brothers, purchased from the Government of Quebec that part of the bed of the river lying between the lots in question, and received a Crown grant therefor. Upon the institution of the action against them, the Attorney-General for Quebec intervened to protect the rights of the defendants in virtue of the grant to them, alleging that the river was navigable and floatable; that its bed was a portion of the Crown domain, and that it had never become the property of the plaintiffs. It was also contended by the defendants that, as the lots were described in the plaintiffs' title as bounded by the river and situate within the area of the respective townships, no property in the bed passed to them in any event.

The trial Judge, in maintaining the plaintiffs' action, held that the river was not a navigable river, and that, by the ruling of the Supreme Court of Canada in *Tanguay* v. *Canadian Electric Light Co.*, 40 Can. S.C.R. 1, it was also non-floatable. As to the other point he held that a grant giving a non-navigable and non-floatable river as the boundary of the land sold could not be read as implying a reservation of its bed or as excluding rights in it from the grant. The Court of King's Bench reversed this judgment on both grounds, holding the river to be floatable and that the plaintiffs' grant conveyed no title to the bed of the river.

The plaintiffs appealed to the Supreme Court of Canada.

Aylen, K.C., for the appellants.

R. C. Smith, K.C., and *Brooke*, K.C., for the respondents.

Judgment

The Court, after hearing counsel on behalf of both parties, reserved judgment, and, on a subsequent day, the Judges being equally divided in opinion, the appeal stood dismissed without costs.

Appeal dismissed without costs.

Leave to appeal to Privy Council was granted on 16th July, 1912.

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ANGLO-AMERICAN FIRE INS. CO. v. MORTON.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Idington, Duff, Anglin and Brodeur, JJ. June 14, 1912.

1. INSURANCE (§ VI E—400)—DEFENCES TO LIABILITY ON POLICY—RISK OF RESTAURANT AND OF BILLIARD ROOM—GASOLINE.

In the absence of evidence, it cannot be said that a change in the use of premises from a billiard and pool room to a restaurant is such a material change as will make the risk under a fire insurance policy more hazardous, even where gasoline is used on the premises.

[*Morton v. Anglo-American Fire Ins. Co.*, 2 O.W.N. 1470, affirmed.]

APPEAL from a decision of the Court of Appeal for Ontario, *Morton v. Anglo-American Fire Ins. Co.*, 2 O.W.N. 1470, 19 O. W.R. 870, reversing the judgment at the trial in favour of the defendants (appellants).

This was an action on a policy insuring premises used at the time as billiard and pool rooms and a bowling alley, and the main defence was that a portion of the premises having been leased for a restaurant without notice to the company this was a change material to the risk which avoided the policy. The trial Judge gave judgment for the company on this ground.

The Court of Appeal reversed this judgment on the ground that the defendants had not proved that the change in the use of the premises was material and that, in the absence of such evidence, it could not be said that a restaurant, even where gasoline is used, is more hazardous than a billiard room.

The defendants appealed to the Supreme Court of Canada.

D. W. Saunders, K.C., for the appellants.

Hamilton Cassels, K.C., for the respondents.

Judgment

THE COURT, after hearing counsel on behalf of both parties, reserved judgment and, on a subsequent day, there being an equal division of opinion among the Judges, the judgment appealed from stood affirmed.

Appeal dismissed without costs.

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GERVAIS v. BOUDREAU.

Quebec Court of Review, Tellier, DeLorimier, and Archibald, JJ. Montreal, June 21, 1912.

1. GUARDIAN AND WARD (§ II—11a) — INVESTMENTS — INFANT — DUTIES OF GUARDIAN (TUTOR)—SAVINGS BANK DEPOSIT.

It is the duty of a guardian (or tutor) of a minor, having charge of the latter's money awaiting investment, to deposit it in a chartered bank in an interest bearing account, instead of merely on safe deposit where it would earn no interest but would remain the property of the minor unaffected by the failure of the bank or other depository, and the tutor depositing in the savings department of a chartered bank is not liable for the loss occasioned by the failure of the bank.

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APPEAL by way of inscription in review from the judgment of the Superior Court, Monet, J., in favour of the plaintiff, delivered on June 23, 1911.

The appeal was allowed and the action dismissed by the Court of Review.

P. A. Chassé, K.C., for plaintiff.
S. Poulin, for defendant.

The opinion of the Court was delivered by

Archibald, J.

ARCHIBALD, J.:—This is a review of a judgment maintaining the plaintiff's action for $225. The defendant had been the tutor of one Laplante dit Courville and had received that sum for him, on the 18th December, 1907. All the parties lived in St. Johns. On the same day the defendant received the money he put it in the savings' bank department of la banque de Saint Jean. It remained there a little over four months, when, on the 27th of April, the bank closed its doors. It is not likely that much, if any, of the amount will be paid. Laplante dit Courville, who, subsequently to that, came of age, assigned his claim to the plaintiff, who now sues the defendant, the tutor, for the recovery of the amount.

The tutor pleads that the law gives him six months for making the investment of funds which he receives for his pupil, and that these six months had not expired; that, at the time when he received the $225, he received it unexpectedly, and he knew of no means of investing that small sum; that he was informed, at the time, that young Laplante, although not of age then, was about to get married, and that he thought, in any event, if he carried out that intention, he would need the money; and further, that, in the whole transaction, he acted in good faith and as a prudent administrator.

Articles 294 and 295 of the Civil Code (Que.) have reference to the matter. The former obliges a tutor, having to make investments of moneys belonging to his pupil, which may at any time be in his hands, to do so within a delay of six months, and, unless he does so, he is liable to pay the minor interest, whether the sums are invested or not. I do not think that that would authorize a tutor to refuse to invest his minor's money for a period of six months, in case good and legal investments offered, but the only way a tutor could escape from the obligation to pay interest after the expiration of the six months, would be by proving that it was impossible for him to find a proper investment for the money. The securities within which a tutor can invest his minor's money are pointed out in article 981 of the Civil Code, and they include bonds of the Dominion or of the province or securities of the United Kingdom or the United States, or any debentures of municipalities, or any real estate or hypothecary security in this province. As for bonds just men-

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tioned, there is no proof in the record which indicates the existence of any security of that kind for an amount so small as $225, and it is a sum which would scarcely be sufficient to invest in the purchase of real estate.

It is possible that a mortgage might be obtained upon real estate for such a sum, but there is no allegation that the defendant was in bad faith, in not having obtained an investment within the delay in question.

In the absence of all of these allegations, and the matter having been within six months, there is presumption that the defendant was not guilty of negligence in not having found an investment before the 28th of April, 1907, when the bank failed. The matter, then, comes down to this, which, I think, is the whole case: Was it an act of prudent administration, on the part of the defendant, to deposit the money in question, belonging to his pupil, in the bank of St. Johns in the savings' department, on the 18th December, when he received it, and to leave it there, as he did, for a space of four months, when the bank failed? One would have to consider the alternative. What should he do with it? Was he to keep it in his own house? Everybody knows that money would not be safe kept in a private house, especially in the country, where access is so easily obtained and where the house is often, perhaps, without any person in it.

I think that, undoubtedly, if the defendant had kept the money in his house and it had been stolen, there would be a very strong case against him of negligence in his administration; but the Judge in the Court below thought that he might have deposited it as a *dépôt nécessaire*, in which case the money would not have become the property of the bank, and would have been received afterwards, although the bank had failed. Doubtless, that is the case. Then, would come the other question. Supposing the bank not to have failed? The defendant would probably, in that case, be called upon to pay the interest which he should receive on that money from the savings' department of the bank, and the question would be asked: Was it prudent administration to put the money where it was earning nothing, when it could as well have been earning 4 per cent., while you were waiting to obtain a good investment? It would be, undoubtedly, proper for a tutor to be careful as to the bank in which he deposits his pupil's money; but it seems to me that a tutor is absolutely justified, when he has money in his hands waiting for investment, to deposit it in ordinary course in a bank, and it was a duty to deposit it so as that it should earn something, if that could be done. I am certainly not disposed to admit that it was negligence to trust the money in the hands of the bank upon ordinary deposit. I think the defendant had

in his mind the probability of his pupil having need of spending money, in consequence of his expected marriage. Admitting that it would not be a good reason to justify him in depositing the money in the bank, it certainly would have no injurious effect upon the good reason which he had to secure the safety of the money during the time necessary to find an investment.

I am of opinion that the judgment which has maintained the plaintiff's action and condemned the defendant to pay the plaintiff the sum of $225, is wrong, and it should be reversed and the action dismissed.

Action dismissed.

NORTHERN ASSURANCE COMPANY, Limited v. HART et al.

Quebec Court of Review, Tellier, DeLorimier, and Archibald, JJ. October 31, 1912.

1. ACCOUNTS (§ I—5)—INSURANCE COMPANY AND ITS AGENTS—CHARGES AND CREDITS—RUNNING ACCOUNTS.

An account between an insurance company and one of its agents, wherein the agent is charged with each premium due by him on policies he has obtained and where credits are given him for specific premiums paid, is not a running account within the meaning of the law, even though extensions of time may have been afforded the agent to make his remittances.

[See to same effect *London and Lancashire Fire Ins. Co. v. Hart*, 8 D.L.R. 332.]

2. PRINCIPAL AND SURETY (§ I A—8)—BOND—INSURANCE AGENT—APPLICATION OF PREMIUMS.

Where an agent has become bonded after he was in the company's debt and subsequent payments are applied in payment of specific premiums due prior to and not covered by the bond, and this to the knowledge of the debtor, the bondsmen or sureties cannot complain of such imputation of payment and be relieved from liability under the bond on the ground that if the imputation had been made against premiums covered by the bond they would be clear.

Statement

AN inscription in review from a judgment rendered by the Superior Court, at Montreal, on the 12th day of April, 1911, condemning defendants, Lewis A. Hart and B. Aronson, jointly and severally, to pay plaintiff the sum of $180.02 with interest and costs.

A. G. Brooke Claxton, K.C., for the plaintiff.

E. Lafleur, K.C., and *Peter Bercovitch*, K.C., for defendants.

The opinion of the Court was delivered by

DeLorimier, J.

DELORIMIER, J.:—By this action plaintiff alleges that defendant Claude B. Hart, being desirous of entering the employ of the company plaintiff was required to furnish a bond of indemnity, and that the other two defendants, L. A. Hart and B. Aronson, made a bond which has been filed as plaintiff's

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exhibit P-1, and which is dated 11th of March, 1909; that defendants thereby bound themselves, jointly and severally, to company plaintiff in the sum of $2,500 to make good to company plaintiff all sums of money for premiums, collections or otherwise received by defendant Claude B. Hart, for company plaintiff; that, on the 3rd of September, 1909, by virtue of the said bond, the defendants were jointly and severally indebted to plaintiff in the sum of $623.06, for premiums collected by said C. B. Hart, which he has failed to pay over to plaintiff, and therefore plaintiff prays that said defendant be jointly and severally condemned to pay said company said sum of $623.06, with interest and costs.

Defendant C. B. Hart appeared and confessed judgment for $442.28, but this confession was refused. By his plea defendant C. B. Hart pretended that he had written some insurance on the Baron de Hirsch Institute, and had given them as a subscription to their funds the amount of his commission on the insurance, to wit, $45.48. He claimed that plaintiff should be forced to return to him said subscription. Plaintiff had been no party to this pretended transaction and had nothing to do with C. B. Hart's rebates or subscriptions and by the judgment *a quo* said plea was dismissed with costs.

It appears that since the action the original claim of the company plaintiff for $623.06 was reduced, as appeared by statement submitted. According to said statement, defendant C. B. Hart was therefore condemned jointly and severally to pay plaintiff the said sum of $208.27, with interest thereon from 7th September, 1909, and the costs of action as instituted.

Defendant C. B. Hart has not appealed from said judgment. Defendants L. A. Hart and B. Aronson appeared separately and pleaded separately substantially the same defences. By their pleas said defendants deny all liability. They further allege that

> 5. By the terms of said bond defendant now pleading was only to become responsible towards the plaintiff for monies and property due from Claude B. Hart in respect of monies received or collected by him for the plaintiff herein on and after the 11th of March, 1909.
>
> 6. As a matter of fact the said Claude B. Hart has since the 11th day of March, 1909, up to the time of the institution of the present action, paid to the company plaintiff more monies than he collected or received on behalf of said company during said period, and plaintiff having received such monies from said Claude B. Hart, the defendant now pleading was discharged from all liability towards the company plaintiff in virtue of said bond.
>
> 7. Moreover, the said bond exhibit No. 1 became null, void and of no effect owing to the act of plaintiff and its duly authorized officers in allowing the said Claude B. Hart to collect the premiums of insurance, and to keep the same, the said company and its duly authorized agents having failed to insist upon the said Claude B. Hart imme-

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diately paying over to the company plaintiff all premiums that he, the said Claude B. Hart, had collected for policies of insurance issued by the company plaintiff, and this without notice to or knowledge of the defendant now pleading.

8. The company plaintiff were by law obliged to see that the said Claude B. Hart did not overdraw his account and did not unduly retain monies that he collected for premiums of insurance, and the company plaintiff carelessly and negligently allowed the said Claude B. Hart to retain said monies for an undue length of time, and in fact allowed him to run a regular debit and credit account to the prejudice of the defendant now pleading and contrary to the terms of the said bond exhibit No. 1 and contrary to law, and this without notice to or knowledge of the defendant now pleading.

9. By its said carelessness and negligence the company plaintiff violated the said bond exhibit No. 1 and defendant now pleading is therefore discharged from all liability thereon as towards the said company plaintiff.

10. In any case the said company has received from the said Claude B. Hart since the date of the signing of said bond monies exceeding the amount received or collected by him from the 11th day of March, 1909, to the date of institution of the present action, and the said company was not justified in applying said monies to an indebtedness of the said Claude B. Hart anterior to the 11th of March, 1909 (the date of signing said bond), but should have applied all said monies to the credit and discharge of the sureties on said bond exhibit No. 1.

11. Defendant in any case particularly denies the correctness of the account produced by plaintiff with its declaration.

12. In any case, as a matter of fact, the defendant Claude B. Hart did actually pay to the company plaintiff all sums of monies due by him in respect of monies received or collected by him for and on behalf of the said company from the 11th day of March, 1909, up to the date of the institution of the present action.

13. Defendant is not indebted to plaintiff in the sum claimed or in any sum whatever.

Plaintiff joined issue on defendants' pleadings, and by the judgment *a quo* plaintiff's action was maintained as above mentioned. The indemnity bond in question in this case reads as follows:—

Are jointly and severally held and firmly bound unto the Northern Assurance Company, Limited, each in the sum of twenty-five hundred dollars, lawful money of the Dominion of Canada, to be paid unto the said the Northern Assurance Company, Limited, or their attorney, agent or legal representative, to which payment well and truly to be made, we each jointly and severally bind ourselves, our heirs, executors and administrators, firmly by these presents.

Sealed with our seals and dated this eleventh day of March, one thousand nine hundred and nine.

The conditions of this obligation are such that whereas the above-named Claude B. Hart has been appointed agent of the Northern Assurance Company, Limited, at Montreal, district of Montreal, and Province of Quebec, and will receive as such agent sums of money for premiums, collected or otherwise; for the said the Northern Assur-

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ance Company, Limited, and is to keep a true and correct account of the same, pay over such money correctly, to the said the Northern Assurance Company, Limited, and in every way faithfully perform the duties as agent, in compliance with the instructions of the said company, through its proper officers, and at the end of the agency, from whatever cause, is to deliver up to the authorized agent of the said company, all its monies and property, due from him in respect of monies received or collected by him for the said company, or in his possession. Now, then, if the aforesaid agent shall faithfully perform all and singular the duties of the said agency of the Northern Assurance Company, Limited, then this obligation shall be null and void, otherwise to remain in full force and virtue.

And the said sureties, in consideration of the premises, hereby agree to waive any notice of any default the said Claude B. Hart may at any time make, and further renounce to all the benefits of division and discussion, and all other benefits in favour of sureties, and consent to be bound in all respects as the principal party.

Defendants' first contention, by their pleadings, is that plaintiff negligently allowed C. B. Hart delay to settle for his premiums, and by granting his extensions of payment, have avoided the contract. They also contended that plaintiff's business arrangements with C. B. Hart changed the nature of their dealings with him from a contract of agency to one of insurance brokerage, and that a debtor and creditor account was thus run by plaintiff with C. B. Hart. As to defendants' pretension that plaintiff acted negligently and allowed C. B. Hart delay to settle for premiums, the evidence clearly shews that C. B. Hart was always billed and written for such premiums, and no negligence or carelessness on the part of company plaintiff has been established.

As to defendants' contention that plaintiff's business arrangements changed the nature of their dealings, the evidence also clearly shews that company plaintiff's business was simply carried on in its usual and ordinary way, and that defendants' contention is absolutely unsupported by the very terms of the indemnity bond above recited, as well as by the evidence itself.

It is expressly stipulated in said indemnity bond that said defendants, as C. B. Hart's sureties, bound and obliged themselves jointly and severally with him to make good all monies and property due by said C. B. Hart in respect of monies received or collected by him for the said company and consent to be bound in all respects as the principal party. Under the terms of said bond it seems clear that defendants, being so bound as C. B. Hart himself, cannot now contend, any more than C. B. Hart could do it himself, that the accountings are between said company and said C. B. Hart, were not made in accordance with the usual and established order of things in Hart's dealings with company plaintiff.

The evidence, moreover, clearly shews that no change of contract between company plaintiff and C. B. Hart ever took place,

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either expressly or tacitly. On the contrary, it is clearly established that he was and always remained the company's agent, all his dealings as such being regularly recorded, as they always had been according to the ordinary established order of his dealings as agent with the company. The mode of recording C. B. Hart's dealings with the company plaintiff as its agent was simply a matter of bookkeeping, but no change of contract or responsibility ever took place either expressly or tacitly.

As mentioned in plaintiff's factum, each time the company received any amount from said C. B. Hart the company debited him with a specific premium for a specific amount, and that amount remained outstanding against Hart in the company's book until he, by a payment which he himself specially delegated and imputed as payment of that premium, settled it and received a receipt accordingly from the company, and that premium was thereupon marked off as paid in the company's book. For the definite premiums sued for in the present case, Hart has confessed judgment, that is to say, he confesses having collected them and confesses they are still owing to the company. By this confession, therefore, Hart himself, even if the company had not made the proof, has acknowledged that these specific premiums are due; has made no saving clauses or provisos in his confession of a nature to allow a proof on his part that the accounting rendered in the case was not in accordance with the established order of things in his business with the company.

The company's accountant, Mr. Belair, was examined, and he explains the company's dealings with C. B. Hart as its agent:—

Q. When the agent comes into the office, and pays you, does he tell you what premium has been paid? A. Every time.

Q. He specifies to you what premiums are being paid and you give him a receipt accordingly? A. I give him the details of the premium that he pays.

Q. Now, all these amounts which you have searched for this morning and entered as having been paid by Mr. Hart are credited specifically in that account? A. Yes, they are entered in our cash book just as in this account and a copy of it given to Mr. Hart to shew that he paid such and such premiums.

Q. And this exhibit No. 8 is a copy of your cash book shewing the respective amounts that Mr. Hart paid and the receipts he received for the same? A. Yes.

Q. Now, yesterday you said that you had a debit and credit account with Mr. Hart; what did you mean by that? A. After the interim receipt, or renewal receipt, is issued, we enter these receipts in order, in what we call a premium book, and on the 18th or 20th of each month there is an account sent to each agent, billing him for the premiums entered against him during that month, and Mr. Hart was furnished with these accounts like all the others. Then perhaps, in a week or two afterwards, the agent pays in the premiums collected and we mark them off in the premium book as paid, and those which

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are left we ask him to pay. We also enter the payments in the cash book.

Q. Now, when an agent pays a premium, does he state what premium he is paying? A. Every time.

Q. And this exhibit No. 8 states what premiums were paid by Mr. Hart, according to the declaration that he made when he made the premiums? A. Exactly.

Mr. Belair's cross-examination went over several days, as every item in the accounts had to be verified by him from the company's books. The detailed account attached to the summons gives the outstanding premiums sued on. Exhibit 8 gives in detail Claude B. Hart's agency transactions, premiums and credits, from the day he commenced business with the Northern in August, 1908. It will be noted that each cheque was given for certain definite premiums:—

No proof of any systematic payments on account generally was made and no failure to credit Hart with every payment was proved. Moreover, as exhibits there have been filed by plaintiff and defendants numerous receipts, cheques, and accounts. In each and every instance these shew that Hart paid cheques and received receipts wherein were detailed the particular premiums for which the cheques and receipts were given. Each payment was applied to particular premiums: C.C. 1158 and 1160.

Defendants' second last contention is that during the pendency of the bond C. B. Hart has paid over to company plaintiff more money than he had received and collected during that period, and that therefore the defendants as sureties were relieved. Defendants' pretension seems to be that, as sureties under said indemnity bond, they have a right to call in question the sources from which C. B. Hart obtained the moneys he paid to company plaintiff, during the pendency of said bond.

I cannot accept such a contention, the more so in the absence of any allegation of fraud or collusion between said company plaintiff and C. B. Hart, and defendants' contention simply stands as an admission of Hart's indebtedness, without proof of payment. It is in evidence that C. B. Hart had been an agent for some time before the signing of the bond, and that as such agent he had worked up quite a large business. It is in evidence that his customers did not always pay their premiums before the policies were delivered, and as the policies, according to the usual course of business of the company plaintiff, are only delivered some weeks after the premium receipt, it is in evidence that on the day of the signing of the bond, to wit, on the 11th of March, 1909, there was a considerable number of premiums outstanding and unpaid.

The evidence shews that after the bond C. B. Hart made three payments for premiums on insurance issued anterior to said bond:—

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March 19, 1909	$570.00
April 17, 1909	497.95
May 25, 1909	622.05

and defendants now pretend that these three payments should be credited against their indebtedness as Hart's sureties.

It appears by the above statement that the first amount—paid by said C. B. Hart—was so paid on the 19th of March, 1909, that is to say, only eight days after the signing of said indemnity bond, and the amount thus paid, to wit, $570.22, is such a large amount that it cannot be for one moment supposed to have been paid out of collections on policies of insurance issued within such a short space of time. In the absence of any allegation of fraud or collusion between said company and said C. B. Hart, and in the absence of any evidence on the part of defendants as to the sources from which C. B. Hart obtained such monies, it is impossible to presume that he had collected all these monies upon policies issued after the date of said indemnity bond. On the contrary, it is perfectly reasonable to presume that said C. B. Hart collected all such monies from customers on premiums of insurance issued previous to the execution of said indemnity bond.

As plaintiff correctly pretends, the whole question is one of imputation of payments:—

> As above stated, as an agent of the company previously to the bond, Hart had issued to his customers insurance and subsequently to the bond had collected monies for the premiums for such anterior insurance. Not only when making payments did he declare what debits he meant to discharge (C.C. 1158), but also he had accepted, with his full knowledge and consent, receipts by which the company had imputed what it had received in discharge specially of the special, particular and definite premiums; and if such be the case, can he and his sureties, who are bound with him as principals, afterwards require the imputations to be made upon a different debt, except upon the ground for which contracts could be avoided: C.C. 1160.

The first payment of $570.22 was made on the 19th of March, 1909, by Hart to the company for the definite and particular premiums set out in the bill attached to C. B. Hart's receipt fyled as exhibit P-12, at *enquête*. On that day Hart, according to the company's books, and this receipt, paid plaintiff $570.22 for the premiums set out in the bill.

The second payment of $497.95 was made by Hart on April 27th, 1909, for the definite and particular premiums set out in the bill attached to C. B. Hart's receipt fyled as exhibit P-13, at *enquête*. Therefore, on that date, according to Hart's receipt, and the company's books, Hart paid $497.95 for the definite premiums set out.

The third payment was made on May 25th, 1909, by Hart for the premiums set out in bill attached to Hart's own receipt

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fyled as exhibit P-14, at *enquête*. Therefore, on that date, according to Hart's own signature, according to the company's books, and to the evidence, Hart made a definite payment of a certain definite sum for definite premiums.

As to the validity and legality of the imputations of payments thus made as regards both said C. B. Hart and said defendants as his sureties under said indemnity bond, I simply refer to my notes in the case of the London & Lancashire Fire Insurance Company against said defendants, wherein judgment was also rendered this day by this Court: see *London & Lancashire Fire Insurance Co.* v. *Hart*, 8 D.L.R. 332.

On the whole I am of opinion that plaintiff has made proof that said C. B. Hart was at the time of the institution of the present action indebted to company plaintiff in the amount therein mentioned, and for which judgment has intervened against said C. B. Hart. That plaintiff has shewn that the three sums above mentioned paid by said C. B. Hart after the date of the bond were by him so paid for definite premiums for insurance issued before said bond, and that definite receipts imputing the amounts were given and accepted at the time such payments were accepted. I am also of opinion that as a matter of fact it seems sufficiently proved that these monies paid by C. B. Hart, after the bond for premiums of insurance issued before said bond could not have been obtained from insurance issued after said bond, because said C. B. Hart did not at the time of the payment write sufficient insurance wherefrom to collect premiums to make or effect the payments for the whole premiums on insurance issued before said bond.

For these reasons I am of opinion that the judgment *a quo* should be confirmed with costs.

Appeal dismissed.

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Nov. 19.

Re TOWNSHIP OF ANDERDON and TOWNSHIPS OF MALDEN AND COLCHESTER SOUTH.

Ontario Court of Appeal, Garrow, Maclaren, Meredith, and Magee, JJ.A., and Middleton, J. November 19, 1912.

1. MUNICIPAL CORPORATIONS (§ III G 3—235)—DRAINS—MUNICIPAL DRAINAGE ACT—DRAIN INVADING ANOTHER TOWNSHIP—QUESTION OF FACT.

Where under the Municipal Drainage Act, one township initiates proceedings for the building of a drain which would invade another township, whether what is proposed to be done is more than is required for the purpose is not a question of law but of fact, depending upon the evidence.

[Municipal Drainage Act, 10 Edw. VII. (Ont.) ch. 90, referred to.]

Statement

APPEAL by the township of Anderdon from the report of the Drainage Referee in a matter arising under the Municipal Drainage Act.

The appeal was dismissed.

M. Wilson, K.C., and *F. H. A. Davis*, for the township of Anderdon.

J. H. Rodd, for the township of Malden.

W. G. Bartlett, for the township of Colchester South.

GARROW, J.A.:—Agreeing as I do with the conclusion of the learned Referee it is not necessary to repeat here at any length the facts, which are very fully set forth and discussed in his judgment.

The proceedings were initiated by the township of Malden. The town of Colchester did not appeal either to the Referee or this Court.

The instructions to the engineer are contained in the following resolution passed by the council of the township of Malden:—"Moved by Mr. Campbell, seconded by Mr. Young, that, whereas 'in a certain drainage action brought by one Mary E. Bondy and Gordon Bondy against the townships of Colchester South and Malden, the Drainage Referee held that the Long Marsh drain had not been carried to a sufficient outlet, and the said townships were therefore held liable in damages for overflow. That therefore, Alexander Baird, C.E., be and he is hereby instructed to make an examination and report upon the said drain, providing for the putting of the said drain in a proper state of repair, and carrying it to a sufficient outlet, so as not to further damage the lower lands.' Carried."

Fault is found by counsel for the appellant with the inclusion in this resolution of the enquiry as to the state of repair of the old drain, a subject provided for in the former by-law which could only be changed as pointed out in the statute, see 10 Edw. VII. ch. 90, sec. 72. And the objection extends to what was subsequently done by the engineer under the resolution, which it is said has varied the provisions as to maintenance contained in the former by-law.

The mere reference in the resolution to the question of repair was at least harmless, and may even have been quite proper as being involved in the larger question of improved outlet. If, however, it had been followed by a variation of the former provisions as to maintenance a different and more serious question would have arisen. But, as is set out in the judgment of the learned Referee, whatever foundation the objection ever had was entirely removed before him by an amendment to the report, made with the consent of the engineer, so as to more clearly confine the provisions as to maintenance to the new work, which he said was what he had intended, but failed to clearly express.

The Bondy litigation had established that the Long Marsh drain had not been carried to a sufficient outlet, and it was conceded on all hands that something should be done to correct the then existing state of affairs.

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RE TOWNSHIP OF ANDERDON AND TOWNSHIPS OF MALDEN AND COLCHESTER SOUTH.

Garrow, J.A.

The engineer, Mr. Baird, C.E., a man of skill and experience in such matters, after it must be assumed a sufficient examination, was of the opinion that to properly and sufficiently improve the outlet it was necessary to do the work which by his report he recommended, and that, as so improved the drain could be used by and would be of benefit to lands in the appellant township, such lands should contribute in the proportion at which he assessed them.

It is not disputed, and it could not be, that for the purpose of obtaining the necessary outlet the Township of Malden might, under the statute, initiate proceedings under which the work might lawfully be extended into the adjoining township, and that lands in such township might be assessed if the circumstances otherwise justified an assessment. The wide propositions advanced by the learned counsel for the appellant, that one township cannot invade another township except by a strict compliance with the provisions of the Act, and, one township cannot impose a drainage system upon a neighbouring township, are not and need not be disputed, but seem upon the facts to be quite wide of the mark.

Whether what is proposed is more than is required for the purpose of obtaining the improved outlet, which after all must really be the main question, is not a question of law but of fact, depending upon the evidence, and practically upon that of the experts of whom there were five, three called by the appellant and two by the respondent. And a perusal of their testimony shews practical unanimity upon the main proposition, that Mr. Baird in what he proposed to do does not exceed his instructions to obtain a sufficient outlet. . . .

The criticism of the appellant's witnesses was directed not so much to the question whether what is proposed is excessive, as to the assessments in the appellant township which they all considered decidedly too large. On the other hand, Mr. McCubbin, C.E., called for the defendant, substantially agreed with the conclusions of Mr. Baird, both as to the necessity of the work and the justice of the assessment.

Into the details of the criticisms of the assessment by the appellants' experts I do not propose to enter. It has in such matters of "much or little" been the custom in this Court, wisely in my opinion, to rely very much upon the conclusions of the engineer in charge. He is a statutory officer, sworn to do his duty. He has necessarily to make a close and careful examination and study of the whole premises, and his deliberate conclusions ought not, in my opinion, to be disregarded, except under clear evidence of error, or unless a question of law is involved.

In my opinion the appeal fails and should be dismissed with costs.

MEREDITH, J.A.:—The appellants were literally, as well as figuratively drawn to the last ditch upon the argument of this appeal, and had indeed, as was there forcibly—perhaps too forcibly—pointed out, no solid foundation for the appeal, in any respect, there.

The new drainage works were not only reasonably, but were necessarily, undertaken. The old drainage works proved to be insufficient because not carried to a proper and sufficient outlet. All parties to this appeal had been sued for damages arising from that defect, and such damages had been awarded against all of them in a judgment against which none of them appealed.

One of them then undertook the new scheme for the one purpose of relieving all, and all persons concerned, from the evil effects of the earlier scheme; and the report and scheme of the drainage engineer, which is now appealed against, are entirely to remove that defect in giving a good and sufficient outlet; whether in the long run they do effectually or not.

Then in order to get such an outlet the drainage engineer deemed it necessary to do all the work, and to go to all the expense, that his report provided for; in the doing of which he found that lands in Anderdon would be benefited very largely; and he charged them accordingly with a share of the cost in proportion to the benefit to be had. In principle, I can see no reasonable objection to that course. What else could properly be done? And I have no doubt it is quite in accord with the purposes and the provisions of the drainage laws of this province.

Whether in fact the scheme is too large or too small or whether objectionable on any other question of fact, was threshed out very fully and carefully upon the appeal to the Drainage Referee, upon evidence which in its weight is quite favourable to the drainage engineer's views; views which have been sustained by the Drainage Referee; and, views which have not been shewn to be wrong here.

It is true that a very considerable sum of money is to be expended upon the intended work, and that a large proportion of it is to be taken from Anderdon and its ratepayers; and it is true too that great care should be taken by everyone concerned that the drainage laws are not made unnecessarily burdensome upon anyone, and especially anyone who is not bringing them into operation in the particular case.

Here, however, the work, bridges and all, seems to be necessary, indeed unavoidable, and it is obvious that Anderdon and its inhabitants must be greatly benefited by it.

Indeed, as I understood the appellants, they eventually took their main stand upon the contention that the new scheme involved works which was work of repair duly imposed under the

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Meredith, J.A.

earlier scheme, from which those upon whom it was so imposed would be relieved; and that in such a case there could be no new scheme adopted because it disturbed the old one in such a manner. But the obvious answer to that is, that in the new scheme all these things are taken into consideration, and new burdens are imposed which carry with them the old liability as nearly as can be.

I am but repeating that which was said during the argument more than once, and must refrain from again covering the old ground upon other and minor phases of the case; all of which expressions of opinion were heard and fully understood by the appellants upon the argument here; so that not too little, but very likely, too much has been said.

The appeal, on all grounds, has failed.

Maclaren, J.A.
Magee, J.A.
Middleton, J.

MACLAREN, and MAGEE, JJ.A., and MIDDLETON, J., concurred.

Appeal dismissed.

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Dec. 21.

ANDERSON v. SCOTT.

Saskatchewan Supreme Court, Newlands, J. December 21, 1912.

1. LANDLORD AND TENANT (§ III D 3—110)—AS TO RENT—DISTRESS — "TENANT OR PERSON WHO IS LIABLE FOR THE RENT," MEANING OF.

Under R.S.S. ch. 51, sec. 4, providing that a landlord shall not distrain for rent on the goods and chattels of any person, except the "tenant or person who is liable for the rent," the landlord cannot distrain upon the goods of a sub-tenant for rent due from the original lessee.

2. LANDLORD AND TENANT (§ III B—49)—RIGHTS OF PARTIES AS TO CROPS —SHARE OF CROPS AS RENT, TITLE VESTS WHEN.

Where a tenant is to pay as rent a one-third interest in the crops, the property in such one-third interest is in the tenant until the division of the crops is made.

Statement

STATED CASE to determine whether a landlord can distrain upon the goods of a sub-tenant for the rent due under a lease.

T. D. Brown, for the plaintiff.
Alex. Ross, for the defendant.

Newlands, J.

NEWLANDS, J.:—The defendant seized the crops grown by plaintiff on the south half of section 19, township 22, range 16, west of the second meridian, under a distress warrant against Frank E. Hibbert for rent of said premises due by Hibbert to defendant, the plaintiff being in occupation of the same under a lease from Hibbert.

The facts being agreed upon, in the case stated for the opinion of the Court, the only question to be decided is, whether the landlord can distrain upon the goods of a sub-tenant for

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the rent due by his lessee. Section 4 of ch. 51 of the R.S.S. provides that a landlord shall not distrain for rent on the goods and chattels the property of any person except the "tenant or person who is liable for the rent." The sub-lessee is not "a person liable for the rent" because the lessor cannot bring an action against him for the same, there being no privity between them. *Holford* v. *Hatch*, 1 Dougl. 183.

Nor do I think he is "the tenant" mentioned in this section. Littleton, J., in *The King* v. *The Inhabitants of Ditcheat*, 9 B. & C. 176, p. 183, defined a tenant to be "a tenant of a freehold is a person who holds of another; he does not necessarily occupy." The landlord can only distrain on the goods of the tenant, that must certainly mean the person who holds of him, in this case Hibbert, and not the person who holds of some one else. As between the landlord and Hibbert there is only one tenant and that is the lessee Hibbert, and the landlord can therefore only distrain on his goods and not on the goods of Hibbert's tenant.

As to the one-third interest in the crops to be paid to Hibbert as rent, the property in the same would remain in the plaintiff until the division. *Robertson* v. *Watt*, 2 S.L.R. 276. It could not therefore be seized under the distress warrant against Hibbert.

Judgment accordingly.

CITY OF MONTREAL v. MILOT.

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Quebec Court of Review, Tellier, DeLorimier, and Archibald, JJ.
Montreal, June 20, 1912.

1. POOR AND POOR LAWS (§ I—1)—PAUPER—SENDING HOMELESS CHILDREN TO INDUSTRIAL SCHOOL—REIMBURSEMENT OF CITY.

In an action by a municipality against the grandfather of three children to recover the sum paid by the plaintiff for their support and maintenance in an industrial school, where it is alleged they were sent there at the request of the mayor, and that defendant is well able to repay, and is the only person who can do so from among those who are liable, that the father is himself confined in an institution for the insane, and the mother is in extreme poverty, and it does not appear the sum charged is unreasonable, the defendant is liable under the laws of Quebec even where defendant received no notice of the proceedings to confine the children, he having been aware of their condition and not having taken any steps to provide for them, although able to do so.

[Arts. 4031, 4032, 4033, sub-sec. 4 of art. 4035, and art. 4037 R.S.Q. 1909, referred to.]

2. POOR AND POOR LAWS (§ I—2)—PAUPER — SETTLEMENT — INDUSTRIAL SCHOOL—CONFINEMENT OF CHILDREN—NOTICE OF PROCEEDING.

Proceedings on the part of a municipality to confine homeless children in an industrial school under art. 4037 R.S.Q. 1909, can be taken even where no notice has been given to those who may be liable to reimburse the city for the cost of maintenance.

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APPEAL by inscription in review, which is confirmed, was rendered by the Superior Court, Fortin, J., delivered on November 4, 1910.

Ethier, Archambault, Lavallée, Damphousse, Jarry & Butler, for the plaintiff.

C. A. Archambault, for the defendant.

The following opinion was handed down:—

Archibald, J.

ARCHIBALD, J.:—This is an appeal from a judgment maintaining the action of the plaintiff against the defendant for the sum of $180.

The action was brought under art. 4037 of the revised statutes of the province of Quebec, which reads as follows:—

> The mayor of a local municipality, or of a city or town, may cause to be brought before two justices of the peace or a magistrate, every child under twelve years of age, which child, owing to the continued illness or poverty of its parents or to their habitual drunkenness or vicious habits, or for any of the reasons mentioned in article 4031, is in need of protection and care, and may require that such child be sent to a certified industrial school.

It is provided, that, when such child is brought before a magistrate, he may be ordered to be sent to a certified industrial school, for any time, at the discretion of the magistrate, and then, it is further provided that any municipality, having paid the expenses of such child, at such school, may recover the amount, by action in the usual manner, on the property of such child, or of those who are obliged by law to provide and care therefor. In this article, it is seen that article 4031 was mentioned. That article provides that any ratepayer of a municipality may cause to be brought before a magistrate, any child, between the ages of six and fourteen years, who is an orphan or fatherless or motherless, if the surviving parent is badly behaved or is condemned to the penitentiary, as also every child who, owing to its being infirm or without a tutor, or any relative in the direct line, in a position to take care of him, or worthy of doing so, is liable to become a vagrant or to starve to death.

Then, the following article provides that the magistrate is required to take evidence upon all the points above referred to, and proceeds to say:—

> Relatives, either in the direct or collateral line, the tutor, or those who have charge of the child, shall be notified, and they have a right to be heard as witnesses, and may cause other witnesses to be heard, as in all other cases.

Then, further, it is provided that, if the magistrate is satisfied from the evidence, that the child is within the conditions set forth, he reports to the provincial secretary. The next

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article provides that the cost of the child and its transport to the industrial school is to be paid, half by the government, and half by the municipality, council or town in which the child was, at the time of its confinement. Then, sub-section 4 of art. 4035 provides that the amount which any city, or town, or municipality is bound to pay for such child, is recoverable by an action. There is no provision, under art. 4037 and following, that proceedings for the confinement of the child, under such circumstances, are to be accompanied by a notice to any person, who may be made responsible for the re-payment of the moneys paid by the city or town, in such cases.

The present action sets out that three grand-children of the defendant were so confined, at the request of the mayor, and remained ten months in an industrial school, and the charge made there, for their keep, was six dollars a month each, viz., $180, during ten months for the three; that that sum has been paid by the plaintiff, and that the defendant is in sufficiently good position to repay, and is the only one who can repay; that the father of the children is himself confined for insanity in the same institution; that the mother is in extreme poverty and cannot provide for the children.

The defendant pleads that he is not liable, because he was not notified of the proceedings for the confinement of the children; and further, that his means are not sufficient to enable him to pay the sums demanded of him. There are several grounds of illegality alleged by the defendant, in his factum. The defendant claims that, although, under the provisions which governed the children in this case, there is nothing said about notice being given to the persons who may subsequently be held liable to reimburse the city for the costs incurred, yet such a proceeding would be held essential under common law, as being reasonable. I think the statement of the law on that point amounts to this: That the action of the city might be held to amount to a *gestion d'affaires*, and that, if that had been undertaken without notice to the person whose affairs were being managed, it would not have the effect of depriving the city of its action to recover what it really expended by reason of such *gestion d'affaires*. In the present instance, the amount charged for each child per month was $6. It is not alleged, or proved or even pretended, that this was an exaggerated sum.

The defendant does say, it is true, that he could have taken these children into his own premises, but he does not say that it would have cost him less than six dollars a month to maintain them, nor is there any proof to that effect. I think the proof establishes that the defendant was, in law, liable for the cost of maintenance of these children, and that the city, in good faith, through its mayor, and following the provisions of law, caused

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these children to be maintained, when otherwise they were exposed to great hardships, which might have resulted in their starving to death. But the defendant was aware of the condition of these children, and, if he had thought proper to do so, might have provided for their support, which he did not do, or make any motion towards doing; and further, it is proved that the defendant had sufficient means to provide for these children, in the manner in which they were provided for.

The Court below finds all these facts and comes to the conclusion that the defendant must be condemned.

I am of opinion that that judgment is correct.

Appeal dismissed.

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Dec. 7.

MacINTOSH v. CITY OF WESTMOUNT.

Quebec Superior Court. Trial before Demers, J. December 7, 1912.

1. NUISANCES (§ I—13)—SMALL-POX HOSPITAL—INJUNCTION.

Where it appeared that the defendant municipality established and maintained within its limits, a hospital for the treatment of contagious diseases and especially small-pox patients; that the premises are unsuited for such a purpose and their establishment and maintenance are in contravention of law, and that it was in close proximity to dwelling-houses of plaintiff, access to which was interfered with, if not prevented, by barriers erected across the road and put up by the hospital, such hospital is a nuisance and its further use for the purposes indicated should be enjoined.

[*Crawford* v. *Protestant Hospital for the Insane*, M.L.R. 7 Q.B. 57, distinguished; sec. 43, by-laws of the Board of Health of the Province of Quebec, referred to.]

2. NUISANCES (§ I—13)—SMALL-POX HOSPITAL—EMERGENCY UNDER BY-LAWS OF BOARD OF HEALTH OF THE PROVINCE OF QUEBEC.

Where, in an action for an injunction against a municipality for the further use and maintenance of a building as a small-pox hospital or for contagious diseases, it is claimed by the city that the said building is an emergency hospital, but the weight of evidence is that it was intended for and was to be used as a permanent hospital for emergency cases, the said building must be established in conformity to sec. 43 of the rules of the Board of Health of the Province of Quebec, and the facts that the said Board of Health approved of the hospital has no bearing where the rule or provision of sec. 43 of the by-laws of said Board of Health as to a space of 40 feet between the pavilions of the patients and the fence or border of the ground has not been complied with, the Board of Health having no right to dispense with compliance with said sec. 43.

3. HEALTH (§ I—1)—PUBLIC HEALTH—POWERS OF BOARD—HOSPITAL FOR CONTAGIOUS DISEASES—ESTABLISHMENT OF.

Where a building is used or established as a hospital for all contagious diseases, its establishment and user as such must be in compliance with and governed by sec. 43 (*w*) of the by-laws of the Board of Health of the Province of Quebec.

Statement

THIS is an action instituted by three ratepayers of the city of Westmount, who are the owners of certain immoveable pro-

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perty situate on the Belvedere road in the city of Westmount, used and occupied by plaintiffs as dwelling-houses for themselves and their families. They complain that defendant has established and is presently maintaining within the limits of the city of Westmount in proximity to the said dwelling-houses and residences, in a certain house or cottage situate upon the public road leading to and from the said residences of the plaintiff and tributary to the said Belvedere road, a hospital for the care and treatment of patients suffering from contagious diseases, and more particularly small-pox; that these premises are wholly unsuited and inadequate for the purpose of a contagious hospital and are in direct contravention of the provisions of law governing the establishment and maintenance of contagious hospitals and constitute a nuisance and serious menace to the lives of the plaintiffs and the members of their families, amongst whom are small children. That, for purposes of maintaining the said hospital the defendant has caused guards and barricades to be placed in such a way as to completely block the said road leading to the residence of the said plaintiff.

Judgment was given for the plaintiffs.

Errol M. McDougall, and *G. S. Stairs*, for the plaintiffs.

F. S. MacLennan, K.C., and *W. A. Baker*, for defendants.

Demers, J.

Demers, J.:—That defendant was and is without right in establishing and maintaining the said premises as an emergency or permanent contagious hospital and any pretended proceedings by way of municipal resolution, by-law, or otherwise, adopted, for the constitution and maintenance thereof as such, are illegal, irregular, null and void.

The plaintiff prays that the constitution and maintenance of the said hospital be declared illegal and contrary to law; that all municipal resolutions or by-laws relating to the constitution and establishment of the said hospital be declared illegal, null and void, and as such quashed, and that an order in the nature of a perpetual injunction do issue enjoining upon the defendant to discontinue the use and maintenance of the said premises as either an emergency or a permanent contagious hospital.

Defendant pleads that the premises complained of by the plaintiffs were used during a portion of the month of May last as a temporary emergency small-pox isolation hospital with the consent and approval of the Board of Health of the province of Quebec, which had duly approved of the site, and the said emergency hospital was properly equipped and conducted, and its use as such was discontinued long before the service of the present action; the said premises are not near any private dwelling, or in a residential part of the city, are on land owned by defendant and are not now and never have been a source of danger to the plaintiffs or their families.

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By paragraph 5 the city of Westmount pleads that, owing to the destruction by fire of a building previously used as a small-pox hospital, the said building complained of has been at all the times mentioned in plaintiff's declaration and is the only building available in the city of Westmount for the isolation of small-pox patients, and the said defendant is entitled to use the said building for such purpose.

I think it would be useless to pronounce upon the scientific questions which had arisen from the evidence.

The judgment of the Court is based on three facts which are indisputable: First, there is no question that the establishment of a hospital specially for contagious diseases is injurious for the persons owning properties in the vicinity. This is admitted by both sides. In this particular case the danger is so evident that the authorities of the city of Westmount have caused guards to be placed, closing the road to the great inconvenience of plaintiffs. The city of Westmount has quoted the case of *Crawford* v. *Protestant Hospital for the Insane*, 7 M.L.R., Q.B. 57. It is admitted in that case that these establishments are also injurious to the neighbours, but that the neighbours are obliged to suffer them when they are authorized by law after the usual formalities. (See remarks of Chief Justice Dorion, pages 74 and 75.) Secondly, the Court is in the opinion that this hospital has been established in violation of the by-laws of the city of Westmount.

By section eleven of the by-law No. 30 of the municipality of Cote St. Antoine, now the city of Westmount, it is said that no small-pox hospital or other hospital of any description shall be allowed to be erected or established within the limits of the town unless specially allowed by resolution of the council. It appears that this hospital was started by the Board of Health of the city of Westmount without any special resolution.

Thirdly, the next point is that this hospital, though approved by the authorities of the Board of Health of the Province of Quebec, is violating the by-laws of the Board of Health of the Province of Quebec. Section 43 (*y*) of these by-laws says, that "there shall be a distance of at least 40 feet between the pavilions for the patients and the fence or border of the ground on which the hospital is built, but in this case of small-pox hospitals such distance shall be at least 300 feet, unless the Board of Health of the Province of Quebec otherwise permits.

It appears that in March, 1910, the Board of Health approved the report of the inspector, J. A. Beaudry. That report reads as follows:—

Site for a Civic Hospital.

February 27th, 1909. The President and Members of the Board of Health of the Province of Quebec:—

Accompanied by Dr. J. Hutchison, the medical health officer of the

town of Westmount, I visited the place where the municipal council of that town intend establishing a civic hospital for the isolation and treatment of persons suffering from contagious diseases, with a view to ascertain if the proposed site would have the approval of the Provincial Board of Health.

The proposed site is a lot of ground the property of the town of Westmount, situated on the slope of the mountain between Côté des Neiges and Belvedere roads, a few acres above the point where these two roads meet, or a few acres above where is the reservoir of the Montreal Water and Power Co.

This site is a very good one. It is well exposed, in an elevated place, where it commands the lands extending below. It is isolated from all dwellings and provided with a good supply of air and light. As far as air and light is concerned, no better spot can be found where to establish a civic hospital of moderate size.

For the time being the house actually existing on the above mentioned lot of land can be used without any objection as an hospital for contagious patients, but, when the road will become more frequented and the hospital more important, special care will have to be taken to prevent communication with outsiders. Consequently, the hospital will have to be built at a reasonable distance from the road and the ground fenced all around.

With this restriction, regarding the future building of the hospital, I have no hesitation in recommending that the above described lot of ground be approved of as a convenient site for the erection of a civic hospital.

The whole respectfully submitted.

(Signed) Jos. A. Beaudry.
Inspector to the Provincial Board of Health.

Against the application of this section, defendant makes two arguments: 1st. He alleges that this is an emergency hospital. The French version of by-law will help us in the interpretation. It says:—

> Les règlements, 43v, 43w, 43x, 43y et 43z, ne s'appliquent pas aux hospitaux d'isolement établis d'urgence à moins qu'ils ne deviennent permanents.

This shews clearly that one must not confuse an emergency hospital with a permanent hospital established for emergency cases. The reason is very simple in a case of emergency. You take what you can get because you have no time to do better but when an hospital is established permanently it should be established according to law. The better evidence that this hospital is established permanently is paragraph 5 of the plea where defendants say that they are entitled to use the said hospital in the future. The letter of Dr. Beaudry shews also that the establishment of the hospital was permanent. In the first paragraph of his letter he says:—

> I have visited the place where the municipal council of that town intend establishing a civic hospital for the isolation and treatment of persons suffering from contagious diseases with a view to ascer-

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tain if the proposed site would have the approval of the Provincial Board of Health.

At the end of his letter he says: "When the road will become more frequented and the hospital more important, special care will have to be taken to prevent communication with outsiders. Consequently, the hospital will have to be built at a reasonable distance from the road and the ground fenced all around. With this restriction, regarding the future building of the hospital and so on."

This shews conclusively that section 43 (*y*) does apply.

It is now argued that the Board of Health having approved the location of the building, people have no reason to complain.

I am obliged to say that the approval of this hospital by the Board of Health is not warranted by section 43 (*y*). The Board of Health by the terms of this section can dispense with the 300 feet, but they cannot dispense with the 40 feet required by the first part of that paragraph.

Moreover this hospital is not a smallpox hospital; but an hospital for all contagious diseases, and, therefore, it is govearned by first part of section 43 (*y*).

For these reasons I maintain: 1st. That plaintiffs are interested to have the building closed, and secondly, that this hospital has been established illegally in violation of the by-laws of the city of Westmount, and in violation of the by-laws of the Board of Health for the Province of Quebec.

The Court declares the continuance and maintenance of this hospital to be declared illegal and contrary to law and grants the demand for injunction. The whole with costs.

Judgment for plaintiffs.

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WOOD v. CITY OF HAMILTON.

Ontario High Court. Trial before Clute, J. December 3, 1912.

1. LICENSE (§ I A—1)—PERMISSION FOR THE USE OF PREMISES—OWNER'S DUTY TO REPAIR.

The owner of premises which another person is permitted to use under a license which is paid for, is under a duty to keep the premises fit for the purpose for which it was intended to be used.

[*Brown* v. *Trustees of Toronto General Hospital*, 23 O.R. 599, distinguished; *Marshall* v. *Industrial Exhibition*, 1 O.L.R. 319, 2 O.L.R. 62, referred to.]

2. MARKETS (§ I—4)—LICENSE FOR SPACE IN—LICENSEE NOT TENANT.

A huckster, who, for a limited time on certain days of the week, occupies a stall in a market-place conducted by a municipality and pays dues therefor, is not a tenant of the premises, but a licensee.

[*Flynn* v. *The Toronto Industrial Exhibition*, 9 O.L.R. 582, applied.]

3. MUNICIPAL CORPORATIONS (§ III S 4—255)—FAILURE TO KEEP MARKET-PLACE SANITARY—LIABILITY FOR RESULTING INJURIES.

Where, by reason of the failure of a municipality to keep its market-

place in a sanitary condition, one of the hucksters renting a stall therein became ill as a result of the unsanitary condition of the place, the huckster has a right of action against the municipality.

4. MUNICIPAL CORPORATIONS (§ III S 4—255)—FAILURE TO KEEP MARKET-PLACE SANITARY—LIABILITY FOR RESULTING INJURIES—RIGHTS OF LICENSEE TO RECOVER.

Where, by reason of the negligence of a municipality in failing to keep its market-place in a sanitary condition, a huckster renting a stall therein suffers damages by reason of illness due to such unsanitary conditions, the fact that the huckster knew the conditions were unsanitary and remains there, is not contributory negligence as a matter of law, where it appears that he gave notice of the condition to the proper officers of the municipality, who promised from time to time to repair the defects, and he, relying on these promises, remained on the premises, not fully realizing the danger.

5. LICENSE (§ I A—1)—REPAIRS ON LICENSED PREMISES BY LICENSEE—RIGHT TO CREDIT FOR.

A licensee has no right to make repairs on premises occupied by him and treat the costs of such repair as damages against the owner. (*Per* Clute, J.)

Statement

ACTION by plaintiff, a huckster, to recover damages for loss sustained from disease of her limbs and undermining of her health, alleged to have been caused by the negligence of the defendants.

Judgment was given for the plaintiff.

W. M. McClemont, for the plaintiff.

F. R. Waddell, K.C., for the defendants.

Clute, J.

CLUTE, J.:—The plaintiff for some 12 or 14 years carried on the business of a huckster in the market at Hamilton. During about half that period she occupied a covered place or stand outside the market buildings. About seven years ago a number of stalls were made for those carrying on the like business, but there was not a sufficient number of stalls to supply each huckster with one. However, at the request of the plaintiff she was allotted a stall next adjoining the one she now occupies and which she occupied at the time of the grievances complained of.

The first stall which she occupied was dry and as far as she knew sanitary. In 1910 she moved into the stall now occupied by her, and for about a year there was nothing noticeable in the way of wanted repair. In the fall of 1911 the stall became unsanitary, the roof leaked, the water ran in and upon the floor, and kept the place in such a condition that it was continually unhealthy and objectionable on account of its being wet and damp. I find that she gave notice verbally to the chairman of the market committee, and to Mr. Hill, who was overseer of the market under the chairman. Some repairs were made during the fall, but they did not remove the defects, as when it rained the water still continued to come in. She again notified the chairman of the market committee in the spring, and also

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Mr. Hill, but nothing was done for some time. The plaintiff says that finally about the end of March, and some time after she had notified the parties, she was taken ill, and she attributes her illness to the unsanitary condition of the stall.

At the close of the evidence I reserved my decision in order to consider the authorities. I found the facts as follows: That the premises in the fall of 1911 did become unfit and unsanitary for the use for which they were given to the plaintiff; I find that she notified the parties of the condition of the stall, and that the repairs were not effective in remedying the condition of the premises; I find that notice was given after that, and that the repairs were not immediately done, or until after the plaintiff became ill, and from her own evidence and that of the medical witnesses called, I think the strong probability is that her illness was caused by reason of the unsanitary condition of the stall which she occupied. I further find that, irrespective of the notice given by the plaintiff, the defendants reserved to themselves the duty of keeping the premises in repair, and that they appointed a person for that purpose (Mr. Hill), and that it was part of his duty to inspect and see that the premises were kept in repair, and that in this regard he neglected his duty, and that the premises were not kept in repair, from which neglect the plaintiff suffered the injuries complained of.

Under these facts and circumstances the defendants contend under the authority of *Brown* v. *Trustees of Toronto General Hospital*, 23 O.R. 599, that they are not liable. If the plaintiff was a lessee of the stall, and the liability, if any, arose from that contractual relationship, the authority relied upon seems to be conclusive against the plaintiff's right to recover. But it was strongly urged by plaintiff's counsel that the plaintiff was a mere licensee. She occupied the stall at certain hours of three days in the week under a by-law. The by-law in substance provides: that the market clerk shall, under the control and supervision of the property committee, have superintendence of the market grounds and market buildings and all other buildings, stands, etc. Section 24: hucksters, dealers, etc., and all persons frequenting the market, and not being lessees of the market's stalls or sheds, shall have places assigned to them by the market clerk, subject to the control and direction of the property committee, and to the general regulations contained in this by-law. Sub-section 2: the stands for hucksters shall be located and numbered by the market clerk and be under his control and supervision, and shall be assigned by him to the several applicants according to his discretion, but no such stand shall be assigned to any person for a longer period than one week. These are the provisions applicable to the plaintiff.

Flynn v. *The Toronto Industrial Exhibition*, 9 O.L.R. 582, is,

I think, applicable to the present case. Osler, J.A., in that case points out that except for the use permitted, the possession and control of the premises remained in the owner, and there was nothing to prevent the defendants, by their officers or servants, from entering or going over the ground so assigned, when not in actual use by the lessee, and his judgment proceeds on the ground that by the express terms of the agreement the owners retained the right of supervision. The judgment of Garrow, J.A., is to the same effect.

On each Saturday the market clerk collected the dues, $1.50 for the week, punching out the price on a ticket which he then handed to the plaintiff. It was not pretended that the plaintiff had other right than that indicated by this transaction.

Marshall v. *Industrial Exhibition*, 1 O.L.R. 319, affirmed, 2 O.L.R. 62. The plaintiffs purchased from the association the privilege of selling refreshments under a certain building during the holding of the exhibition. This right was held to be a license not a lease following *Rendell* v. *Roman*, 9 Times L.R. 192. In that case it was held that a stall let at an exhibition at a weekly rent, but which was not to be used before 10 a.m., or after 11 p.m., was a mere license. In that case *Selby* v. *Greaves*, I.R. 3 C.P. 594, was relied upon as shewing that the instrument in question was a lease, but Lord Coleridge pointed out that in that case the tenant was entitled to possession at all times.

In the *Marshall* case, it was held that the plaintiff not being a lessee, but a mere licensee, was there upon the invitation of the association, who owed a duty to the person whom they induced to go there to keep the place in proper repair, and that the association, who had by their negligence caused the accident, were liable. I am of opinion that the plaintiff was a licensee and not a lessee of the stall in question, but not a mere licensee.

The distinction is pointed out by Channell, B., in *Holmes* v. *North Eastern R. Co.*, L.R. 4 Ex. 258, and Beven on Negligence, Canadian ed., p. 452, N 6. Here the license was paid for with the intention that the plaintiff on certain days of the week should occupy the stall in question where persons coming to the market might buy produce from her. There was, therefore, in my opinion, a duty owing from the defendants to the plaintiff, that the stall should be fit for the purpose for which it was intended to be used.

In *Lax* v. *Darlington*, 5 Ex. D. 28, it was held that the defendants having received toll from the plaintiffs and invited them to come to the market with their cattle, a duty was imposed upon them to keep the market in a safe condition. Referring to

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the position of the defendants, Brett, L.J., is reported as saying: "I cannot doubt myself upon the most ordinary principles of law that inasmuch as they received payment for that standing (for cattle) they are *primâ facie* under the liability of affording a place which is not dangerous for the purpose for which the payment is made. Bramwell, L.J., agreeing in the judgment said: "I am not influenced by the consideration of this being a market; it might have been a cattle shed, or a place opened by the defendants as a speculation of their own. Market, or no market, the ground upon which I proceed is that the defendants received the plaintiffs' money; they took toll from the plaintiffs, and they make a profit; they invite the plaintiffs to come and make use of their market for profit to themselves. The defendants are, therefore, liable; as my brother Brett has said, they are bound to have the place in a non-dangerous condition for those who come there for any lawful purpose on certain occasions." It was argued that the plaintiffs incurred their loss by their own fault, and that the danger was obvious, or that they knew it. Bramwell, L.J., said: "If that question had been before us I should have had very great misgivings whether the plaintiffs were entitled to recover, because if they knew the danger and chose to risk it, it is their own fault; they are volunteers, and in my opinion the defendants ought not to have been made liable to them in that case."

Although this was obiter, yet it touches the point upon which I have the chief difficulty in the present case. The plaintiff had paid for the right of selling her produce in the market. She was entitled, I think, to have the stall in a reasonably fit and sanitary condition for that purpose. This I find it was not, and upon the evidence the strong probability is, and I find as a fact, that her sickness was caused by this unsanitary condition. The question then remains, ought the plaintiff to recover, inasmuch as she knew of this condition and remained there? Her answer to this question in her evidence was that she gave notice of the unsanitary conditions to the defendants, who promised from time to time to repair them, and this she fully expected they would do and so remained on, not realizing her danger.

In the present case the principal trouble arose from the fact that a gutter and down-pipe was clogged, causing an over-flow of the water, and also tending to destroy the roof. Under the facts in this case, it was, I think, clearly the duty of the defendants to make repairs, including this gutter. This, indeed, was admitted by the officer in charge of the market place. There was no inspection, and apparently no repairs made until they did receive notice.

Hargraves v. *Hartopp*, [1895] 1 K.B. 472, has a certain bear-

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ing upon this branch of the case, although that was a case between landlord and tenant. The plaintiffs were tenants of a floor in a building of which the defendants were the landlords. A rain-water gutter, in the roof, the possession and control of which was retained by the defendants, became stopped up. Notice of the stoppage was given by the plaintiffs to the defendants, but the defendants neglected to have the gutter cleared out until after the lapse of four or five days from the receipt of the notice, and in the meantime the plaintiffs had suffered damage by reason of rain-water having found its way into their premises in consequence of the stoppage. It was held that the fact of the gutter being under the control of the defendants imposed on them a duty to take care that it was not in such a condition as to cause damage to the plaintiffs, and that as they had notice of its being stopped up and neglected to clear it out within a reasonable time after the receipt of the notice they were guilty of a want of due care, and were, consequently, responsible for the damage done. It was held by the County Court Judge that the defendants had never inspected the gutters at any time, and under those circumstances he held that the defendants were liable for negligence in not periodically inspecting the gutters, and in not acting sufficiently quickly after the receipt of the plaintiffs' notice. Lord Alverstone, C.J., is reported as saying: "Here the gutter was not demised, and the question is whether under those circumstances the landlord is not under a duty to take reasonable care to prevent a gutter which is under his control from becoming stopped up, whereby damage may happen to the occupants of the floors below. I think there is, and that there being evidence of a failure to discharge that duty inasmuch as the defendants never inspected the gutters and delayed repairs even after receipt of the notice, they are liable for the damage which ensued."

In the present case whether the plaintiff was lessee or licensee it is quite clear from the evidence that the control of the gutter and down-pipe did not pass to the plaintiff and that the duty to see that it was kept in repair devolves exclusively upon the defendants. The defendants neglected to discharge this duty which they owed to the plaintiff, and the injuries complained of resulted from such neglect. The action does not arise out of the relation of landlord and tenant, or any covenant, express or implied, to repair, but it arises by reason of the duty raised from the defendants to the plaintiff by the license and payment for the right to occupy the stall. In this regard, I think, the case is distinguished from the *Brown* case (*Brown* v. *Trustees of Toronto General Hospital*, 23 O.R. 599), and I find that the plaintiff, under the circumstances, was not guilty of any contributory negligence in respect of the neglect which caused the

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injury. She had no right as licensee to make the repairs. Even in the case where it is the duty of a tenant to repair, it has been held that in case the repairing would be so large as to be out of proportion to the tenant's interest in the premises (as it would be in this case), he would not be justified in repairing and treating the costs of such repairs as damages: *Cole* v. *Buckle*, 18 U.C.C.P. 286. Nor is he, it would seem, in such case bound to make repairs under the penalty of a denial of a recovery for injuries which would have been obviated thereby: 18 Am. & Eng. Encyc., 2nd ed., 235.

The fact that the plaintiff continued to occupy the premises after she had given notice and while they were unsanitary, was not unreasonable under the circumstances, from the fact that she was in constant expectancy of the repairs being made, and repairs were in fact made some weeks prior to her illness, but so negligently done that the premises still continued in an unsanitary condition. I do not think such continuance, under the circumstances, constituted contributory negligence upon her part. She was seriously ill for some weeks, was put to a considerable expense and suffered great pain and was otherwise put to loss and damages in connection with her business. I assess the damages at $550 with full costs of the action.

Judgment for plaintiff.

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REX v. PILGAR.

Ontario Court of Appeal, Garrow, Maclaren, Meredith, and Magee, JJ.A., and Lennox, J. November 19, 1912.

1. JURY (§ II B—78) — BIAS — INTEREST — INTERROGATING JURY — PREMATURE APPLICATION.

A request by defendant's counsel, in a criminal trial for arson, made at the opening of the trial, that before the jury was called he would like to ask each of the men who are called whether he is interested in a certain insurance company, which interest on his part would have made him ineligible to serve, is prematurely made.

2. JURY (§ II B—55)—EMPANELLING — COMPETENCY OF JUROR — CHALLENGE—TIME FOR.

After a jury is empanelled and sworn it is too late to challenge for cause.

3. JURY (§ II A—50)—COMPETENCY OF JUROR—PREMATURE APPLICATION TO CHALLENGE JURY—STATEMENT BY JUDGE NOT AMOUNTING TO REFUSAL OF RIGHT TO CHALLENGE.

Where defendant's counsel, in a criminal action, makes a premature application that he be allowed to interrogate the jury on a question involving their eligibility to sit, a ruling by the judge in these words, "We will see when the question arises," while it might give rise to a wrong impression on the part of counsel that the court would later do the questioning, does not, however, amount to a refusal of the defendant's right to challenge for cause, where the defendant's counsel allowed the jury to be sworn before renewing his application.

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4. APPEAL (§ I C—25)—CRIMINAL CASES — APPEAL — OTHER REMEDY — STATED CASE.

The Ontario Court of Appeal, on a criminal appeal, has no jurisdiction to intervene in a case of error or misunderstanding, its jurisdiction being limited by section 1014 of the Criminal Code in a stated case to questions of law; the application for relief in a case of error or misunderstanding being to the Minister of Justice, under sec. 1022 of the Criminal Code (1906).

Statement

THE defendant was tried for arson at the Halton Sessions before the County Court Judge and a jury, and found guilty. The Judge reserved two questions for this Court, which, with the facts upon which they are based, are set forth by him in the stated case as follows:—

"At the opening of the trial and after the defendant had pleaded 'not guilty,' the following conversation took place between counsel for the defendant and myself:—

"MR. CAMERON: Before they call the jury I would like to ask each of the men who are called whether they are interested in the Halton Mutual Fire Insurance Company. If any of them are interested in that company I submit they would not be eligible to sit on this jury.

"HIS HONOR: We will see when the question arises.

"MR. CAMERON: Of course, I cannot tell without asking them.

"The clerk of the Court then proceeded with the calling of the jurors. At my request the clerk asked to stand aside several of the jurymen who had served on a jury the previous day and counsel for the defendant challenged some five jurors peremptorily. The jury was empanelled and sworn. The following conversation then took place between counsel for the defendant and myself.

"MR. CAMERON: Would your Honor see if any of the jury are interested in the Halton Mutual Fire Insurance Company.

"HIS HONOR: It is too late, Mr. Cameron; I was waiting for it; that would be a good challenge for cause.

"Exhibit 8 shews that the Halton Mutual Fire Insurance Company was actively engaged in prosecuting the Fire Inquest in connection with the burning of buildings for the burning of which the charge of arson was laid herein and the affidavit of John Wilson Elliott shews that some of the jurymen who tried the defendant were interested in the Halton Mutual Fire Insurance Company.

. . . . .

"I have reserved for the opinion of this Honourable Court the following questions:—

"1. Was the request of the defendant's counsel to examine the men called to serve on the jury which was to try the defendant made at the proper time, and at the time when the question of their interest in the Halton Mutual Fire Insurance Company arose?

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"2. Did what took place between counsel for the defendant and myself and prior to the empanelling of the jury which tried the defendant amount to a refusal of the defendant's right of challenge for cause?"

The questions reserved were answered in the negative, MEREDITH, J.A., dissenting.

D. O. Cameron, for the prisoner.

J. R. Cartwright, K.C., for the Crown.

Maclaren, J.A.

MACLAREN, J.A. (after setting out the facts as above):—There is no suggestion that the usual caution was not given to the accused by the clerk of the Court before the jurors were sworn in the prescribed formula: "Prisoner, these good men whose names you shall hear called are the jurors who are to pass between our sovereign lord the King and you upon your trial: if, therefore, you would challenge them or any of them, you must challenge them as they come to the book to be sworn, and before they are sworn and you shall be heard." See Archbold (24th ed.), p. 207; Taschereau, p. 779.

His counsel had no right to interrogate or ask any juror any question without challenging him for cause: Archbold, p. 213. The first application, if application it can be called, was premature, as it was made before the jury were called. The second was too late, as it was made only after the jury were sworn, when the Judge had no power to grant it.

The first question must, therefore, be answered in the negative.

As to the second question, I do not see how it can be said that what took place between the Judge and counsel before the empanelling of the jury can be said to amount to a refusal of the defendant's right to challenge for cause. It was a statement that the point would be dealt with when it arose, the Judge apparently being under the impression that counsel would challenge for cause any juror whom he suspected, but did not know, to be a member of the Mutual Insurance Company in question. It would appear that counsel misunderstood his Honor's expression, "We will see when the question arises," and interpreted the use of the "we" as an intimation that his Honour would do the questioning. As counsel did not challenge any juror at the proper time it may be that the Judge thought that he knew that none of the twelve who were sworn were members of the Mutual Insurance Company in question. As I have said, I do not think it can be construed into a refusal of the right to challenge for cause, and in my opinion the second question must also be answered in the negative.

By section 1014 of the Criminal Code it is provided that it is only questions of law that can be reserved for this Court in a stated case, and we must answer them strictly as we understand

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the law to be. We have no authority or jurisdiction to intervene in a case of error or misunderstanding. Section 1022 of the Code indicates where application for relief should be made in such cases, namely, to the Minister of Justice.

GARROW, and MAGEE, JJ.A., concurred.

MEREDITH, J.A. (dissenting):—The formal questions submitted for the opinion of this Court must be read in connection with the rest of the stated case, and must be given a reasonable interpretation with a view to meeting the real points of the case, and a strictly literal interpretation which would answer no useful purpose ought not to be applied to them, if they are fairly open to an interpretation which would meet the real needs of the case.

To interpret the questions in this case as meaning: is it regular to object to a juryman, for cause, before he is called; and did the Judge refuse to entertain an objection at the time, when the objection ought to have been made, would be to consider the reservation of this case a futile proceeding and a mere waste of time; which I am quite sure no one could have meant.

That which the Judge must have desired to know was whether he had, by his conduct, in any way deprived the prisoner of the opportunity to prevent persons disqualified by interest trying him upon the very grave charge made against him, and of which the jury found him guilty; if, therefore, the questions are capable of an interpretation which will enable this Court to consider such real point, and enable it to do justice in the case, they ought to be so understood and acted upon.

It is quite clear that counsel for the prisoner was not familiar with the practice in criminal cases; but he plainly intimated, at the outset, that he desired to guard against anyone disqualified by interest acting as a juryman; and in the acknowledgment of that desire, it ought to be needless to say, he ought to have had every reasonable assistance that the Court could give.

Then what happened? At the very outset the Judge was made aware of a possibility of some of the jurymen being disqualified by personal interest; and upon being made aware of that fact said: "We will see when the question arises." Not: "You are premature, you must raise the question at the proper time." If he had said that he would probably have been asked to say when the proper time would be; and counsel would have raised the question again at the proper time. It would not be unreasonable for the prisoner, or for his counsel to rest assured, after the Judge had said, "We will see when the question arises," that the Court would see at the proper time that opportunity for enquiry as to disqualification of jurors was afforded.

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Having regard to the duty of the Court to take great care that the prisoner got a fair trial, what else could the Judge's answer to counsel, obviously unfamiliar with the practice in this respect, mean? When the proper time came "we"—whether he meant the Court, or the Judge and counsel—did not "see" to it and consequently the man was deprived of his right of objection to any juror for cause, and so may have been tried by jurors disqualified by interest.

What took place obviously deprived the prisoner of the right of challenge for cause; and that which the Judge said was plainly the cause of that deprivation, and so I think it may be said, fairly, that which took place did amount to a substantial refusal of the right of challenge for cause. Counsel is not to be substituted for prisoner; neither the point, nor the question, is: was counsel refused? The point and the question is: Did all that took place amount to a refusal of the intended challenge? No one would call it incorrect to say that it amounted to a denial of the right; and surely that is equivalent to a refusal in the sense in what this case is stated for our opinion.

I cannot, but think and say, that it was plainly the duty of the Court under all the circumstances to have taken great care that a jury of disinterested jurors only was empanelled: to wait until it was too late to object, before saying anything, may very well have misled the prisoner out of his right, and was, in my opinion, an error on the part of the Court as well as of counsel.

I answer the first question, No: It is not a question which should have been reserved, for it is one about which there could be no reasonable doubt.

And my answer to the second question is: Yes, substantially.

And accordingly I would direct a new trial.

LENNOX, J.

LENNOX, J.:—The answers to both questions reserved should be "No." But at the same time I desire to add, with the greatest respect, that, in my opinion, it would have been much more satisfactory if the learned County Court Judge, knowing of the desire and intention of the prisoner's counsel, had, when the proper time for challenge was reached, then called counsel's attention to the matter, and afforded him an opportunity of exercising his undoubted right. I am sure the learned trial Judge will agree with me that whatever may be the presumption as to the prisoner's guilt or innocence, and whether he is defended with skill and judgment or the reverse, it is always the duty of the presiding Judge to see to it that nothing shall prevent the prisoner from having a fair trial and British justice.

Questions answered in the negative.
MEREDITH, J.A., *dissenting.*

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Ontario Court of Appeal, Garrow, Maclaren, R. M. Meredith, and Magee, JJ.A., and Kelly, J., ad hoc. November 19, 1912.

1. ASSAULT AND BATTERY (§ I—2)—COLLISION WITH BICYCLIST—JUSTIFICATION OR EXCUSE—CIVIL ACTION.

Where the defendant riding a bicycle on a city street violently collided with and seriously injured the plaintiff who was crossing the street; and where it appears (*a*) that there was nothing to prevent the defendant from seeing the plaintiff, (*b*) that he was in a better position to see the plaintiff than was the plaintiff to see him, (*c*) that the defendant did see the plaintiff long enough before the actual collision to warn him; such circumstances disclose a *primâ facie* case of trespass by the defendant and cast upon him the onus of proving justification or excuse in an action for damages.

[*Sadler* v. *South Staffordshire Co.*, 23 Q.B.D. 17, referred to.]

2. TRESPASS (§ I A—5)—TO THE PERSON—WHAT CONSTITUTES — RECKLESS BICYCLING ON STREET.

The reckless running of a bicycle on a street resulting in collision with and injury to a foot-passenger crossing the street, may constitute trespass to the person of the injured party.

3. EVIDENCE (§ II A—95)—RES IPSA LOQUITUR — NEGLIGENCE — PRESUMPTIONS IN GENERAL.

The maxim *res ipsa loquitur* applies to shew a *primâ facie* case of actionable negligence on the part of a defendant who while riding a bicycle on a city street violently collided with and seriously injured a foot-passenger who was crossing the street, where it appeared, (*a*) that there was nothing to prevent the defendant from seeing the plaintiff; (*b*) that he was in a better position to see the plaintiff than was the plaintiff to see him; (*c*) that the defendant did see the plaintiff long enough before the actual collision to warn him. (*Per* Garrow, J.A.)

Statement

APPEAL by the defendant against the judgment of a Divisional Court reversing a judgment of nonsuit at the trial before Riddell, J., and a jury, and directing a new trial.

The appeal was dismissed.

D. L. McCarthy, K.C., and *E. F. Appelbe*, for the defendant.

J. G. Farmer, K.C., for the plaintiff.

Garrow, J.A.

GARROW, J.A.:—On the 28th of September, 1911, the plaintiff, aged 55 years, was crossing a street in the city of Hamilton at about noon, when he was run into by a bicycle upon which the defendant was riding, and knocked down and very severely injured. At the time, the plaintiff was crossing the street diagonally, with his back somewhat turned towards the direction from which the defendant came. There was some evidence that the defendant saw the plaintiff immediately before the contact, and that he ordered him to get out of the way. There was no direct evidence by any eye-witness as to the speed at which the defendant was riding, but it was shewn by his examination for discovery put in by the plaintiff at the trial, at what time he left his place of business, the distance from there to the place of

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collision, and also the time at which the plaintiff left the place where he was employed, and the time which he probably consumed in arriving at the place of collision. In his examination for discovery, the defendant admitted striking the plaintiff and knocking him down.

Under these circumstances, Riddell, J., held that the plaintiff had not given any reasonable evidence of negligence, and upon this ground withdrew the case from the jury.

The Divisional Court was of a different opinion and directed a new trial, against which the defendant now appeals.

The judgments in the Divisional Court were, it is said, orally delivered, and all that appears in the appeal book is in the form of a note of what was said, from which it appears that the Court was of the opinion that enough had been shewn to place the onus upon the defendant, a conclusion with which I entirely agree.

The defendant was not approaching directly towards the plaintiff, but rather from the opposite direction. It was midday, and so far as appears, there was nothing to prevent the defendant from seeing the plaintiff. He was certainly in a better position to see the plaintiff than was the plaintiff to see him. The evidence indeed shews that the defendant did see the plaintiff before the actual collision, long enough at least to order him out of the way. These circumstances, even apart from the great violence of the collision, seem to me to call, and to call rather loudly I would have thought, for justification or excuse by the defendant rather than for more evidence from the plaintiff.

The facts, *primâ facie* at least, indicate a case of trespass, in which the element of negligence is not a necessary ingredient: see *Sadler* v. *South Staffordshire, etc., Co.*, 23 Q.B.D. 17. But even if it were otherwise, it is in my opinion a case clearly calling for the application of the maxim *res ipsa loquitur*.

I would dismiss the appeal with costs.

Maclaren, J.A.
Magee, J.A.
Kelly, J.

MACLAREN, and MAGEE, JJ.A., and KELLY, J., concurred.

Meredith, J.A.

MEREDITH, J.A. (dissenting in part):—This is another of those cases in which the plaintiff's advisers seem to have chosen to leave the facts very much in the dark, entrusting to the jury the task of "helping a lame dog over a stile." It is easy to say that further evidence was not procurable; it is much more difficult for anyone of ordinary intelligence to give credit to the assertion. It is very difficult to believe that of the good many persons who must have seen all that occurred, not one could be found to testify as to the facts; of course, it may be that none could be found whose testimony would help the plaintiff; and it is quite certain that one might have called the plaintiff and have

compelled him to testify and might have examined him thoroughly on all points as an adverse witness; and so have given the Court and jury the benefit of a connected story of the whole occurrence from one who must know the whole truth of the matter. Of course, that that course might have given the defendant the last word to the jury—if the case went to the jury—ought to be, obviously, no sort of reason for letting the case go to the jury without the plaintiff having given any evidence upon which reasonable men, acting conscientiously, could find in his favour. And, as the plaintiff's advisers chose to thus leave his case, I have no doubt that the learned trial Judge was right in "nonsuiting" him. The onus of proof that the defendant was guilty of a breach of some legal duty, which he owed to the plaintiff, and that such breach of that duty was the proximate cause of the plaintiff's injury, was upon the plaintiff; and that onus was not satisfied in the evidence adduced. It is idle to talk of assault or trespass or of *res ipsa loquitur;* because the plaintiff fared worse in the collision, is no evidence that the defendant was more, or at all, to blame for it; with quite as much reason, or want of reason, the defendant might declaim of assault and of trespass and of *res ipsa loquitur* if he had happened to fare the worse, as, of course, might have been the case; nor because the plaintiff was on foot and the defendant on a bicycle; the bicycle was not invading a footpath, the pedestrian was stepping, or had stepped, into the horse road where bicycles had a right to be, and which was stepped into with a knowledge that, at that hour of the day—the dinner hour—it was very likely that bicycles, automobiles, street cars, horses and waggons and other vehicular traffic would be rapidly passing in any one or more of the four directions the intersection of the streets provided for all such traffic.

Negligence must, therefore, be proved: and where was there any proof of it? Accidents may happen without actionable negligence on the part of anyone; this accident might have happened in that way; or it might have been caused by the negligence of the plaintiff or by the negligence of the defendant: but again in what is there any proof of it?

It was said, for the plaintiff, in the fact that the defendant was proceeding at an excessive rate of speed; but, as the trial Judge plainly pointed out, that argument assumes the fact of excessive speed, which has not been proved; evidence of excessive speed at or near the place of collision is entirely absent, and having regard to police supervision as well as of every reasonable man's care to avoid injury to himself as well as to others, ought to have been unlikely in this busy spot at that busy hour; but, in any case, if a fact, it has not been proved nor is there any such evidence in the fact that the defendant's bicycle ran on

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ten or twelve feet after the collision and before the defendant dismounted. The blow was merely a glancing one, the shoulders of the two men only coming in contact. Nor does the fact that the plaintiff was thrown down and sustained a severe injury to one of his eyes prove it; the fall on the hard pavement, however that fall may have been caused, might be enough to cause all the injury and more. Nor is there any evidence of negligence or wilful injury, in the words it is said the defendant some time after the accident admitted having made use of at the time of the accident; either they would indicate that the plaintiff was in the wrong. A rider about to negligently run down a pedestrian does not generally add insult to injury; such "expressions" as those said to have been used are more likely to come from one in danger by such invasion. Nor in the statement said to have been also made by the defendant, some time after the accident, that it was a case of either going into the man or going into a street car; there was no statement that the defendant had a deliberate choice of the one or other and chose the man; but if there had been it would all come back to the question: Whose fault was it that put the defendant in that predicament? For there is no law that requires a man to run into a street car, and possibly break his own neck, rather than run into the man who has negligently got in his way and forced the choice upon him.

It all comes back to the question of negligence on the part of the defendant, proximately causing the accident, of which there is really none. Looking at the plaintiff's story only it would appear as if the collision had happened just after he had stepped off the sidewalk to cross diagonally this much used intersection of two main horse roads, at the busiest hour of the day. If the accident so happened then the plaintiff would seem to be blamable for stepping off a place of safety into a place of danger without seeing, or if seeing, without heeding, the bicycle rider then almost upon him. And in any case the plaintiff—blind in one eye—was not adopting a very cautious method in crossing at such a place and time diagonally and so exposing himself to the traffic which might be going in four different directions, instead of crossing each of the streets separately at right angles and upon the crossings made for pedestrians in line with the sidewalks and so coming in contact with vehicular traffic in two ways only on each street, and each of such two ways separately so as to need to look out for danger in one direction at a time only. As I have said, the accident did not happen upon a footpath, but did happen upon a horse road which ought to have been approached and crossed by a pedestrian with great care. To step off the sidewalk into the horse road immediately in front of an on-coming bicycle, in the broad day-

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light does not seem to me to savour of great caution even if dinner-time hunger impel one to back and short-cuts. But it may be that the plaintiff was not so near the sidewalk as his evidence indicates when the collision took place. The scraps read from the testimony of the defendant, taken upon his examination for discovery, in the first place indicate that he was: "Just as I came about to the corner, the sidewalk on the north corner, I just saw a man come out from among the people there, his head was turned towards me, walking towards me, and I struck him on the right shoulder." Further on he says that the plaintiff was not more than a foot and a half from the west rail; but there is nothing to shew how far the west rail was from the sidewalk. And this is but an instance of the hopelessly uncertain state in which the plaintiff has chosen to brave his case, rather than give to the Court and jury all the light he could upon it.

It would be obviously absurd to treat the case—as it was contended for the plaintiff it might be treated—as if it were one of a person on a bicycle, or other vehicle, overtaking and passing a pedestrian, where he had a right to, or might reasonably be, going in the same direction, as for instance a footpath on which both had a right to travel, as the case, *Myers* v. *Hinds*, 69 N.W. Rep. 156, was; and to which the statute-law of this province is applicable.

But, though I think the nonsuit was quite right, I also think that the case is one in which a new trial may well be granted, as an indulgence. It is quite clear that the case has not been fully developed; that the plaintiff may possibly have a good cause of action; and he has unquestionably sustained a very serious injury; so that, though the mistrial is the fault of his advisers altogether, he may, I think, not unjustly, be given another chance; but it ought to be on the usual terms only.

Appeal dismissed.

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Ontario Divisional Court, Clute, Riddell, and Sutherland, JJ.
November 29, 1912.

1. BANKS (§ IV A 1—49)—DEPOSITS—CHANGING ACCOUNT TO JOINT ACCOUNT—SUFFICIENCY OF NOTICE TO MAKE CHANGE.

A written notice to a bank by a depositor to so "arrange" the latter's savings deposit account (then standing in her own name) in the name of the depositor's daughter that the latter can draw the money, is not sufficient authority to the bank to transfer the deposit to the joint account of the mother and daughter withdrawable by either with right of survivorship.

[*Everly* v. *Dunkley*, 5 D.L.R. 854, affirmed.]

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2. GIFT (§ I—7)—BANK DEPOSIT IN NAME OF MOTHER—NOTICE TO BANK —JOINT ACCOUNT—ABSENCE OF INTENTION TO MAKE GIFT.

Where one who has a sum of money on deposit in the savings department of a bank, being ill in the hospital, signs a written memorandum instructing the bank to arrange her money in her daughter's name so that she can draw it, which she hands to her daughter to take to the bank, saying, "If anything should happen to me in the hospital, take my money and my furniture and do the best you can with it," and requesting the daughter to pay her funeral expenses, and the bank thereupon changes the heading of the account so as to make it appear as a joint account in the name of the mother and daughter, and the deposit book remains in the mother's possession until her death, and there is no evidence of any intention of the mother to do more than make an arrangement by which, for convenience, the daughter could draw the money, the daughter has no right to the money at her mother's death, either by survivorship or otherwise.

[*Everly* v. *Dunkley*, 5 D.L.R. 854, affirmed; *Re Ryan*, 32 O.R. 224, and *Schwent* v. *Roetter*, 21 O.L.R. 112, distinguished; *Hill* v. *Hill*, 8 O.L.R. 710, specially referred to.]

Statement

APPEAL by the defendants from the judgment of Kelly, J., reported, *Everly* v. *Dunkley*, 5 D.L.R. 854, 3 O.W.N. 1607, where the facts are set out.

The appeal was dismissed.

O. L. Lewis, K.C., for the appellant.

M. Houston, for the respondent.

Clute, J.

CLUTE, J.:—The plaintiff, as the executor of Elizabeth Kenny, deceased, brings this action to recover $542.17 from the defendant Esther Dunkley, and the Canadian Bank of Commerce. This sum stood to the credit of the testatrix, Elizabeth Kenny, in the Canadian Bank of Commerce at the time of her death, which occurred on the 27th February, 1912.

On the 9th March, 1912, the defendant, Esther Dunkley, withdrew this sum from the bank and placed the same to her own credit in the same bank, and now claims it as her own.

The circumstances under which this claim is made, are as follows: The testatrix, Elizabeth Kenny, being ill, gave to her daughter, Esther Dunkley, a memorandum in writing in the following words: "Arrange my money in Esther Dunkley's name so she can draw it. Elizabeth Kenny. Chatham, August 18th, 1911." It is not disputed, as the evidence shews, that this was intended for the local agent of the Canadian Bank of Commerce, at Chatham. This instrument was taken to the bank, and on the 26th August, 1911, the defendant, Esther Dunkley, drew from the bank $5 and gave a receipt therefor in her own name, the money being in the Savings Bank Department. On September 2nd, 1911, Elizabeth Kenny drew $5 from the bank, signing her own name to the receipt, and on the 29th October a further sum of $35, signing her own name to the receipt.

On the 9th March, 1911, the defendant, Esther Dunkley, had the whole amount placed to her credit by signing a receipt therefor to the bank. The defendant claims this money upon two

grounds: First, that there was a verbal trust declared in her favour by her father, whereby she was to receive certain moneys, of which this formed a part, after her mother's death. The trial Judge has found against this claim, and I think justly so. The evidence falls far short, in my opinion, of creating a trust in her favour.

A further claim is made that the late Elizabeth Kenny authorised a joint account, and upon her death the right to the money in the bank survived to Esther Dunkley. The memorandum above referred to was signed by Elizabeth Kenny while in the hospital; that on the day it was signed she (Esther Dunkley) took it to the bank, and on its being presented to the accountant at the bank he changed the heading of the deposit account so as to read as follows: "Made joint account August 18th, 1911, Elizabeth Kenny and Esther Dunkley, or either," after which she says she returned to her mother and told her that either of them could draw it, and that the mother was satisfied. The deposit book remained in the possession of the deceased until the time of her death.

Esther Dunkley described the conversation which took place between her mother and herself in this way: "She," meaning the mother, "said: 'I want you to take my money and do the best you can with it.' I said, 'I could not cheque your money without you gave me some authority to do it.' She said, 'You get a pen and ink.' I got it, and she started to write, and then she said, 'No, you write it'; and I wrote it, and read it over and she signed it." This refers to the memorandum on which the agent of the bank acted in changing the account. She says that she read it aloud to her mother and her mother said it was all right, and signed it. She further says: "She told me to take it to the Bank of Commerce and have it arranged in the bank so that I could draw her money or she could, and I took it." She then took it to the bank. The manager not being in she told a Mr. Watson, accountant in the bank, that "my mother gave me this and wanted me to have her money arranged in the bank so I could draw it; and he took the paper and read it, and he said he made it a joint account so that I could draw it or my mother could." She then returned to the hospital and told her mother it was all right. The paper was all right and that it made a joint account; that she (the mother) could draw it or I could draw it, and that if anything happened to her I could draw it all, and the mother said it was all right.

The first question is whether the money became the joint property of the mother and daughter during the mother's life-time? What is the meaning of the words, "Arrange my money in Esther Dunkley's name so she can draw it?" Draw whose money? Plainly, I think the mother's money, the intention being that the mother desired her money in the bank to be so placed that the daughter could draw it instead of the mother drawing

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it. There is no indication or hint of intention to make a gift of the whole or any part to the daughter. The trial Judge says: "The present case is not one where the money became the property of the mother and daughter jointly. It was the mother's, and though the memorandum authorised it being placed in the daughter's name so that she could draw it, it remained the property of the mother, the daughter's power or rights being limited to the power to draw," and he finds that there was no intention on the part of the mother to make the daughter part owner of the money or to give it to her by survivorship.. The money continued to belong to the mother, and on her death it became a part of her estate.

In *Re Ryan*, 32 O.R. 224, the husband deposited money with a savings company and caused an account to be opened in the name of himself and his wife jointly "to be drawn by either or in the event of the death of either to be drawn by the survivor," and it appeared by the evidence uncontradicted that money of the wife went into the account and that both drew from it indiscriminately. It was there held that she was entitled as survivor to the whole fund.

The present case, I think, is distinguishable in this, that here no part of the daughter's money went into the account. The mother retained the deposit book. She did not authorize, as far as the evidence shews, a joint account; that the money should be so placed that her daughter might draw it, but it was the mother's money that she was to draw. It is true, that the daughter states that on her return to her mother she told her that it was placed to their joint account, and the mother said it was all right, but the trial Judge has not accepted the accuracy of her statement in this regard.

In *Hill* v. *Hill*, 8 O.L.R. 710, the plaintiff's father owned $400 on deposit in the bank to his credit. He procured a bank deposit receipt for this amount "payable to William Hill, senior, and John R. Hill, his son, or either, or the survivor." The understanding between father and son was that the money should remain subject to the father's control and disposition while living and that whatever should be left at his death should then belong to the son. The father's request to the bank manager was, to fix the money so that his son John would get it when he was done with it. The father told his son that he wanted him to get the money when he was gone. He, however, retained the deposit receipt in his own possession, and it was found among his papers at the time of his death. The trial Judge in giving judgment said that if the deposit receipt stood unexplained so that it might be treated as evidencing the substance of the transaction, the plaintiff's contention might be sustained upon the authority of such cases as *Payne* v. *Marshall* (1889), 18 O.R. 488, and *Re Ryan* (1900), 32 O.R. 224. But he found as a fact

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that the purpose of the father was by the means there employed to make a gift to his son in its nature testamentary, and as such it could only be made effectually by an instrument duly executed as a will.

It appears to me that that is the effect of what took place here, that there was no intention to make a present gift of any part of the property in the money so on deposit, to the defendant, the intention from the whole evidence being to authorise her, during her mother's lifetime, to draw from the bank such sums as might be required, and that probably it was her intention that after her death the daughter should have the balance. In *Schwent* v. *Roetter*, 21 O.L.R. 112, *Hill* v. *Hill* is distinguished, it being held that in the circumstances disclosed in the *Schwent* case, the money was during the joint lives joint property with right of survivorship. Of this the plaintiff was not able to satisfy the trial Judge, and upon the whole case I agree in the result at which he arrived.

The appeal should be dismissed with costs.

Riddell, J.

RIDDELL, J.:—It was argued, however, that as Mrs. Dunkley swore that being told at the bank that the money was to be put to the joint account of herself and her mother, that she reported this to her mother and her mother said that was all right, etc., the mother must be taken to have ratified the act of her daughter in having the amount put to a joint account; and consequently whatever the effect of the writing of August 18th there was a placing by the mother of the money to joint account.

If this did take place it would perhaps be hard to resist the conclusion desired; but the learned trial Judge does not find that what is alleged did take place in fact. He finds that the daughter "returned to her mother and told her that either of them could draw it and that the mother was satisfied." As my learned brother did not specifically find that what is alleged as taking place about a joint account, I have thought it well to see Mr. Justice Kelly in the matter, and he informs me that he did not believe the statement of Mrs. Dunkley first above referred to.

We are therefore to take the facts as found by the learned trial Judge (on this point) as the only facts in the case, and all question of ratification is consequently removed.

Much of the argument addressed to us on behalf of the appellant was based upon the proposition that the bank was a trustee. But since the case of *Foley* v. *Hill*, 2 H.L.C. 36, the relationship of banker and customer has uniformly been held to be not that of trustee and *cestui que trust* but that of debtor and creditor. There is nothing sacred in the position of banker, he sells the use of money—nor is there anything abstruse or recondite in his relation to his depositor—he is an ordinary debtor.

The bank in this case took Mrs. Kenny's money on the implied agreement to return that to her or her personal represen-

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tatives when called on so to do. They have paid it to another—they must justify their action.

I am of opinion that the document of August 18th, 1911, has a plain meaning—that it is a direction to the bank to place the customer's money in such a condition as that Esther Dunkley can draw it—and that only. There is no gift of the money to the daughter; if that had been the case there would have been no necessity of directing an arrangement that she might draw. There is no authority to place the money in a joint account in such a way that the survivor should have all. No objection could be taken to the opening of an account protected in such a way that while the daughter might draw during the lifetime of her mother, her authority would then cease—if this further consideration were borne in mind that the mother might at any time cancel the arrangement and revoke the authority of her daughter.

It seems to me that the last consideration is fatal to any claim by the bank to create a "joint account" with all legal consequences. Must it not be perfectly plain that this document does not prevent the customer at any time revoking the authority to her daughter—and resuming sole control? If so, how can such an account be properly opened? An account giving the daughter a vested interest in any part of the fund in existence at the time of her mother's death. In my opinion the document is nothing but an authorization to the bank to arrange matters in such a way as that the old woman would not herself be forced to sign cheques, etc., etc.

Had I been of a different opinion I should not have been satisfied to give the bank judgment without further evidence concerning the circumstances of Mrs. Everly's visit to the bank.

Mrs. Everly asked the manager in reference to Mrs. Kenny's account if anyone could draw it in case of her death. The manager told her: "Nobody can draw another person's money except her executor or whoever appoint." The manager says that he looked upon this as a hypothetical question—in a sense that is true, but the question was asked about a definite existing, and by no means hypothetical, fund in his bank, and it was as I think his duty to find out the exact situation of that fund and answer accurately any question put to him in reference thereto by any one who had the right to ask it.

But I do not think that there is any need to find out all the circumstances of this transaction.

There is nothing in any of the objections urged against the judgment appealed from, in my opinion, and the appeal should be dismissed with costs.

Sutherland, J.

SUTHERLAND, J., agreed with the judgment of RIDDELL, J.

Appeal dismissed.

NEWBERRY (defendant, appellant) v. LANGAN, et al. (plaintiffs, respondents).

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Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Idington, Duff, Anglin, and Brodeur, JJ. October 29, 1912.

1. SPECIFIC PERFORMANCE (§ I E—30)—SALE OF LAND—FAILURE TO PAY PURCHASE MONEY—REFUSAL TO ANSWER REQUISITION ON TITLE.

Specific performance may be granted of a contract for the sale of land at the suit of a purchaser who failed to pay the purchase price when due, though time was made of the essence of the contract in that regard, where it appeared that the vendor who, to the knowledge of the purchaser, was merely a holder of an agreement for the purchase of the land from the owner, refused a request for inspection of such agreement, and ignored a subsequent demand for a solicitor's abstract of title, both the request and demand being made by the purchaser before the first instalment of the purchase price was due.

[*Langan* v. *Newberry*, 2 D.L.R. 298, affirmed; *Cushing* v. *Knight*, 6 D.L.R. 820, 46 Can. S.C.R. 555, distinguished.]

2. CONTRACTS (§ II D 2—174)—VENDOR SELLING LAND—TITLE UNDER AN AGREEMENT—PURCHASER'S RIGHT TO INSPECT AGREEMENT.

A person contracting to buy land from one he knows to be merely a holder of an agreement for its purchase, is entitled to an inspection of such an agreement before he pays any part of the purchase price and the vendor has no power to cancel the agreement upon a failure of the purchaser to pay the first instalment of the purchase price when due where he has refused the other's request for such inspection and ignored the further demand, on the latter's part, for a solicitor's abstract of title both made before any part of the purchase price was due, even though time was made of the essence of the contract as far as the payment of the purchase price was concerned.

[*Langan* v. *Newberry*, 2 D.L.R. 298, affirmed; *Cushing* v. *Knight*, 6 D.L.R. 820, 46 Can. S.C.R. 555, distinguished.]

3. VENDOR AND PURCHASER (§ I C—18)—TORRENS TITLE WITHOUT ABSOLUTE CERTIFICATE—DEMAND FOR SOLICITOR'S ABSTRACT.

Where there is no stipulation, either express or implied, to the contrary, in an agreement for the sale of land held under Torrens title system of registration in British Columbia, upon a certificate of title which is for less than the absolute and indefeasible title, the English rule of law requiring the vendor to furnish a solicitor's abstract of title to the purchaser if demanded, will apply. (Dictum, *per* Duff, J.)

[*Brewer* v. *Broadword*, 22 Ch.D. 105, followed.]

Statement

APPEAL from the judgment of the Court of Appeal for British Columbia, *Langan* v. *Newberry*, 2 D.L.R. 298, 17 B.C.R. 88, reversing the judgment of Clement, J., at the trial, and maintaining the plaintiff's action for specific performance with costs.

The agreement in question was contained in two receipts, that respecting one of the parcels being as follows:—

Vancouver, B.C., Nov. 18th, 1910.

Received from W. B. Ryan the sum of $500 (five hundred dollars), being deposit on account of purchase of 13.79 acres, lot (15) fifteen, block 15, subdivision 463, Coquitlam, for the sum of $4,830, on the following terms: $500 cash, $2,330 on January 1st, 1911. Balance will assign my agreement Wakefield to myself. The deferred payments to bear interest at the rate of 7% per annum until paid. Net, no commission. Time is the essence of this agreement, and unless payments

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with interest are punctually made at the time or times appointed, this sale shall be (at the option of the vendor) absolutely cancelled or rescinded, and all money paid on account thereof forfeited to the vendor as and for liquidated and ascertained damages. Cost of conveyance, $5, to be paid by the purchaser. This receipt is given by the undersigned as agent, and subject to the owner's confirmation.

F. M. NEWBERRY,
Owner.

Statement

The receipt affecting the other parcel was framed in similar terms, with the exception that it was signed by F. M. Newberry as "agent for owner."

Argument

Wallace Nesbitt, K.C., and *J. Sutherland MacKay*, for the appellant, cited *Kintrea* v. *Preston*, 25 L.J. Ex. 287; *Phipps* v. *Child*, 106 R.R. 496; Dart, "Vendors and Purchasers." 7th ed., 315; *Brooke* v. *Garrod*, 2 DeG. & J. 62; *Lord Ranelagh* v. *Melton*, 2 Drew. & Sm. 278; 21 Am. & Eng. Ency. of Law, vo. "Option."

Bodwell, K.C., for the respondents, cited Armour on Titles, 3rd ed., 4; *Townend* v. *Graham*, 6 B.C.R. 539; *Cameron* v. *Carter*, 9 O.R. 427, *per* Boyd, C.J., at 431; *McDonald* v. *Murray*, 11 A.R. (Ont.) 101; *Ogilvie* v. *Foljambe*, 3 Mer. 53, *per* Grant, J., at 64; *Souter* v. *Drake*, 5 B. & Ad. 992; *Ellis* v. *Rogers*, 29 Ch.D. 661, *per* Cotton, L.J., at 670; *Doe d. Gray* v. *Stanion*, 1 M. & W. 695, *per* Parke, B., at 701; *Armstrong* v. *Nason*, 25 Can. S.C.R. 263, *per* Strong, C.J., at 268; *Brewer* v. *Broadword*, 22 Ch.D. 105, *per* Fry, J., at 107; *Boustead* v. *Warwick*, 12 O.R. 488; *Upperton* v. *Nickolson*, 6 Ch. App. 436, *per* James, L.J., at 443; *Foster* v. *Anderson*, 16 O.L.R. 565, *per* Moss, C.J., at 570, and in the Court below, 15 O.L.R. 362, *per* Boyd, C., at 370 and 372, *per* Anglin, J., at 574; *Cudney* v. *Gives*, 20 O.R. 500.

Fitzpatrick, C.J.

SIR CHARLES FITZPATRICK, C.J.:—I do not entertain any doubt; this appeal should be dismissed with costs.

There are two tracts of land in question, and the agreements are identical in terms, except as to the description of the property. There can be no doubt on the evidence that the appellant's offer to sell was accepted by Ryan, and that acceptance made the offer an agreement *inter partes* for the sale and purchase of the tracts of land described in it. The appellant from that moment had a right of action to recover the purchase price and his corresponding obligation to deliver the things sold arose then. It seems to me also clear, on the authorities to which we are referred, that it was incumbent on the vendor to disclose his title before demanding payment, and the purchaser, therefore, was justified in his request that this title should be produced before paying the purchase price or any portion of it. If there was any failure on the part of the purchaser to pay within the stipulated delay, it was caused by the wrongful refusal of the appellant to shew his title. I accept the reasons of the Judges in the Court of Appeal,

DAVIES, J.:—This was an action for specific performance of an agreement for the sale of land from appellant to respondents. The trial Judge dismissed the plaintiffs' action on the ground that they had failed to make payment of the instalment of the purchase money on the day provided by the contract; that there was no default on the defendant vendor's part excusing such failure, and that time was expressly made the essence of the contract.

The Court of Appeal for British Columbia reversed this judgment, holding, amongst other things, that there was default on the defendant's part in refusing to produce for inspection the agreements under which he held the land he agreed to sell, and that this default excused the plaintiffs from the payment of the instalment of the purchase money on the day named.

The question was raised as to the nature and character of the defendant's interest in the land which the agreement professed to sell. At any rate, one thing is sure, and that is that the plaintiffs bought and the defendant sold all the title and interest which the latter held in the land. I am of opinion that the plaintiffs were entitled to inspection of such agreements or evidence of title as the defendant had before they could be called upon to pay the instalment in question.

This inspection, although asked for by the plaintiffs a reasonable time before the instalment fell due, was refused by defendant. The defendant thus put himself in default, and his refusal to produce his agreements under which he claimed title excused the plaintiffs from tendering payment of the instalment on the day named.

The defendant, appellant, relied upon *Cushing* v. *Knight*, 6 D.L.R. 820, 46 Can. S.C.R. 555, lately decided in this Court. That case was a very different one from the present and turned entirely upon the terms of the agreement there in question, the construction of which we held demanded the payment of the instalment of the purchase money contemporaneously with, if not before, the execution of the written contract by the vendors, and that, there having been default in such payment, the obligation on the vendor's part to sell and convey the lands had not been created.

Assuming, therefore, that the contention of the appellant's counsel was correct, and that Newberry only agreed to sell whatever rights he had in the lands under his agreement with those from whom he bought, I think he was bound to grant inspection of these agreements to the plaintiffs before requiring payment by them of the substantial instalment of the purchase money, and, having refused to do so, put himself in default and was not in a position to take advantage of the non-payment by the purchasers of the instalment and to cancel the agreement for such default.

The appeal should be dismissed with costs.

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IDINGTON, J.:—The contention that the contracts here in question were mere options to purchase is hardly tenable in face of the express terms of the receipts evidencing same. The relation of vendor and purchaser was created between the parties thereto in each case by the payment of the deposit and the delivery of the receipt fully in accord with the conversation had between, and fully disclosing the purposes of the parties. The vendor became absolutely bound to sell. The vendee might, in law, have set up against him the Statute of Frauds. If the vendee had chosen to forfeit the money paid and so plead that statute, if sued on his contract, the vendor was helpless.

In a colloquial sense descriptive of that situation it may, therefore, be that the parties who referred to these contracts as options were not far astray. But, in the strict, technical sense, in law, of what an option means, as illustrated in the cases appellant's counsel referred to, such is not the nature of either of the transactions in question; but that of a selling and buying of an interest in real estate. The nature of the interest so sold is here quite immaterial, for the title asked to be shewn was that which the vendor had.

The appellant saw fit to maintain silence, when applied to by those entitled to claim, on behalf of the respondents, his attention to a request to shew title. He chose to ignore what common courtesy and a straightforward mode of dealing required at his hands.

I think he must take the consequence of failure in these regards and abide by the judgment of the Court of Appeal.

This appeal should be dismissed with costs.

Duff, J.

DUFF, J.:—The appeal is from the judgment of the Court of Appeal for British Columbia in an action for specific performance of two agreements entered into between the appellant, Newberry, and the respondent, Ryan, relating to two separate parcels of land, one parcel being part of district lot 382, group 1, New Westminster district, and the other part of lot 463 in the same group. The first of these parcels is referred to as the "Kendall" and the second as the "Wakefield" lot. The two agreements were entered into on the same day. The terms of the first (relating to the "Kendall" parcel) were set out in a receipt for the first instalment of the purchase money given by Ryan to Newberry, which reads as follows:—

> INTERIM RECEIPT. Vancouver, B.C., Nov. 18th, 1910.
>
> Received from W. B. Ryan the sum of $500 (five hundred dollars), being deposit on account of purchase of dist. lot 382, westerly 54 7/100 block, Coquitlam, subdivision . . . for the sum of $10,940, on the following terms: $500 cash, balance, $5,440 in January, 1911, balance will assign my agreement Kendall to myself. The deferred payments to bear interest at the rate of 7 per cent. per annum until paid. Net. No commission.

Time is the essence of this agreement, and unless payments with interest are punctually made at the times appointed, this sale shall be (at the option of the vendor) absolutely cancelled or rescinded, and all money paid on account hereof forfeited to the vendor as and for liquidated and ascertained damages. Cost of conveyance, $5, to be paid by the purchaser. This receipt is given by the undersigned as agent and subject to the owner's confirmation.

$500.00. F. M. NEWBERRY,
Agent for owner.

The same amount ($500) was also paid as a first instalment for the purchase of the "Wakefield" parcel, and a receipt given identical in terms with that set out, except as to the price and the description of the property.

The instalments of purchase money which became respectively payable under these agreements on the 1st of January, 1911, were not paid. The appellant, thereupon, notified the respondents that because of their failure to make these payments he would treat the agreements as having come to an end; and, on the 13th of January, the respondents commenced their action. The position taken by the respondents was this: They said that it was the duty of the appellant to disclose his title to the property he had undertaken to sell, that the provision requiring payment of an instalment of the purchase money on the 1st of January, though absolute in form, must be read as subject to the implied condition that the vendor must first perform his obligation to satisfy the reasonable demands of the purchaser with respect to disclosure of title, and this the vendor had refused to do.

The first question is: What was the vendor's duty in respect of the disclosure of title? The appellant contends that the agreements in question created options to purchase merely. The appellant, it is said, bound himself in each case, in consideration of the cash payment of $500, to an offer in terms of the receipt which was irrevocable up to the 1st of January, and which, in the meantime, could be accepted in one way only, namely, by the payment of the sum stipulated in their receipt to be paid on that date. If this were truly the nature of the contract between the parties—that the relation of vendor and purchaser was not to be constituted until the January payment should be made—then no obligation to disclose his title would, of course, rest upon the appellant until that payment had been made. But the language of the instrument manifestly cannot be reconciled with any such view of the character of the bargain; and the learned trial Judge has explicitly found that "the agreements were that the defendant sold and Ryan bought the properties for a certain sum."

Then it is said that the subject-matter of the purchases was not the fee simple in the parcels respectively described in the

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receipts, but certain agreements for the sale of these lands to the appellant. It was, in point of fact, understood by both parties at the time of the transactions in question that the appellant was not the holder of the fee in either parcel, but that, in respect of one of them, he had an agreement for the purchase of it with one Kendall, whose name appears in the receipt transcribed above, and, in respect of the other, with one Wakefield. In my view it is not necessary to decide, and I do not commit myself to any opinion upon the question whether or not the documents, read by the light of the facts in evidence, justify the conclusion that the subject-matter of the transactions was not the land, but these agreements for the sale of the land. There is, certainly, not a little to be said for the view that the parties were buying and selling the fee simple in the land; but I will assume that the other view, which is the view of the learned trial Judge, is the better one. What, then, in this view of these transactions, was the obligation of the vendor in respect of disclosing his title? If the law of British Columbia touching this matter is the law of England, then the rule to be applied seems to be stated by an eminent equity Judge (Fry, J., in *Brewer* v. *Broadwood*, 22 Ch. D. 105, at 107) in this passage:—

> The first inquiry is, what is the obligation of a person who agrees to sell an agreement to lease? It may be shewn either from the surrounding circumstances or by direct evidence that the intention of the agreement is to sell only such interest, if any, as the vendor may have; and, in such a case as that, the purchaser has no right to require a title to be shewn by the vendor; but, in the absence of such evidence, the view which I take of such an agreement is that it requires the vendor to shew that he has a title to a valid agreement. The law of England in the case of a sale of land in fee simple requires the vendor to shew that he has the fee simple of the land. In the case of a sale of a lease, it requires the vendor to shew that he has a valid title to the lease or to the term granted by the lease. Likewise, in the case of an agreement to lease, I hold that the vendor is bound to shew that there is a subsisting valid agreement to lease.

Assuming that these agreements were the subject-matter of the respondent's purchase, the respondents were then entitled to have valid and subsisting agreements for the sale of these parcels by the vendors vested in them, on the 1st of January, on payment of the stipulated sums. And they were entitled to something more; they were entitled, in each case, to have an agreement vested in them under which the sums remaining at that date to be paid to the original vendor should not exceed the residue of the purchase money stipulated for in the agreement between the appellant and Ryan after the payment to the appellant of the January instalment. It was, consequently, their right to have it shewn, within a reasonable time before the 1st of January, that the appellant was in a position to discharge his obligation in that respect. As I will presently explain more fully, I think the

evidence shews that the appellant refused to make any disclosure whatever; but another question of law must first be disposed of. The learned trial Judge took the view that the law of England (with regard to this matter of the obligation of the vendor of land under an open contract to disclose his title) is not, in its entirety, the law of British Columbia, and that there was, in this case, no duty on the part of the vendor to furnish the information demanded by the purchaser.

I quite agree with the learned trial Judge to this extent: that the establishment of a statutory system of title to land (such as prevails, for example, in the Province of Saskatchewan), by which the title is not completely constituted by documents and transactions *inter partes*, but rests upon registration by a public officer, may have the effect of rendering obsolete some of the specific rules governing the reciprocal rights of vendor and purchaser touching the matter in hand. Some of these rules have had their origin in the practice of conveyancers in England and others are based upon considerations of convenience or necessity which may cease to apply when the system of titles has been fundamentally changed. Moreover, the rule entitling the purchaser to demand a solicitor's abstract is a rule of comparatively modern origin (Sugden, on Vendors and Purchasers, 9th ed., 447), and I can conceive circumstances (having no special relation to the system of land titles) in which an over-punctilious deference to the letter of the rule as it would, perhaps, be applied in England would, in British Columbia, have consequences very widely at variance with the expectations of the parties. But, on the other hand, the rule that the vendor under a contract for the sale of an interest in land is under an obligation to give a title to that which he is selling, in the absence of express or implied stipulation (whether it be an obligation resting upon an implied term of the contract, as Baron Parke and Lord St. Leonards seem to think, or an obligation imposed *ab extra*, so to speak, by the law itself), is a rule which nobody has ever doubted was introduced into British Columbia with the general body of the law of England; and it has, without any specific enactment on the subject, always been regarded as having been introduced in the same connection into the other provinces in which the body of the law has been derived from the same source.

If it is the duty of the vendor to give a title, it would seem to follow, in the absence of special circumstances (since the vendor may be supposed to know his title), that the vendor ought to disclose the particulars of the title he proposes to transfer unless he stipulates to the contrary. If the circumstances of the contract are such as to exclude the possibility of the parties to such a contract having contemplated the delivery of a solicitor's abstract, then, in such a case, there could be no difficulty in implying a stipulation of that character. I can quite understand, for

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example, that a vendor holding land under a certificate of indefeasible title (and proffering his certificate) might properly regard a demand for a solicitor's abstract as a purely vexatious demand. But, in the ordinary case of the sale of land held under a registered title, there being nothing in the circumstances of a special character, I do not see why the rule should not take effect. A certificate of title under the British Columbia Land Registry Act, not being a certificate of indefeasible title, is only *primâ facie* evidence of the title of the holder and the documentary evidence upon which the certificate rests is not necessarily disclosed by the register.

The view expressed by the learned Judge has never, I think, been accepted in British Columbia. The difficulty of accepting that view is enhanced in the case where, as here, the vendor's interest is in whole or in part unregistered. This brings us to the question of fact. The Chief Justice of the Court of Appeal says:—

> The two agreements in question in this action, dated 18th November, 1910, are for the sale by the defendant to one Ryan, the plaintiff's assignor, of two parcels of land. They are practically identical in terms, the one with respect to one parcel and the other to the other. One parcel may be conveniently designated the "Wakefield" lot, and the other the "Kendall" lot. The defendant, prior to said 18th November, agreed with Kendall to purchase his lot on deferred payments. He had paid a deposit of $50 and received a receipt therefor. Defendant and one Clark had bought the Wakefield lot on similar terms, but had a formal agreement of purchase which was registered, at all events, before the commencement of this action. It also appears that the defendant had an assignment of Clark's interest, which was not registered. These agreements were not shewn to Ryan, with the exception of the receipt for $50. On the 19th of November defendant procured a formal agreement from Kendall, which was not shewn to Ryan. . . .
>
> Early in December plaintiffs requested defendant to shew them the agreements under which he held the property, and, I think, the inference from the evidence is irresistible that they were refused such inspection. Failing to get such inspection, the plaintiffs, on 27th December, formally notified the defendant that they intended to proceed with the purchase, and demanded a solicitor's abstract of title. This demand was ignored.

I think the evidence fully supports this; and I entirely agree with it. There was, therefore, not only a disregard of the request for a solicitor's abstract, but a refusal to permit inspection of the documents evidencing the agreements which the appellant was professing to sell. Such inspection was necessary to enable the respondents to ascertain whether those agreements were of such a character and so vested in the appellant that the appellant was entitled to assign them and whether the conditions on which the appellant's rights must rest had been observed; and it

would have been folly for them to proceed with the payment of the purchase money without first having obtained it.

I think the appeal should be dismissed.

ANGLIN, J.:—On the true construction of the receipts which evidence the transactions here under consideration, I have no doubt that the agreements between the appellant and the respondent Ryan were for the sale and purchase of the lands in question, or at least of the appellants' interest in them. Punctuality in payment was made of the essence of the bargains and provision was made, in the nature of a condition subsequent, for rescission by the vendor upon default of prompt payment. Payment on an instalment due on the first of January was not made on that day. The vendor relies upon this as a default which entitled him to exercise his option to cancel and rescind. The purchasers answer that the vendor had already refused a legitimate demand for production of his title, namely, in the case of one parcel, the agreement from the registered owner under which he held, and, in the case of the other, the transfer of the interest of his co-purchaser from the registered owner, and that the failure to make the January payment was, therefore, not a default entitling the vendor to rescind. The learned Chief Justice of the Court of Appeal finds that

> early in December plaintiffs requested defendant to shew them the agreements under which he held the property, and I think the inference from the evidence is irresistible that they were refused such inspection. Failing to get such inspection, the plaintiffs, on the 27th of December, formally notified the defendant that they intended to proceed with the purchase and demanded a solicitor's abstract of title. This demand was ignored and the plaintiffs did not make the January payments. When they took the matter up with the defendant, within two or three days afterwards, the defendant in effect declared the agreements cancelled for non-payment on the first of January.

The letter of the 27th of December has been criticized on the ground that it is open to the construction that it calls upon the vendor to furnish an abstract of the titles of the registered owners of the land, and not merely an abstract of his own title from such owners. The language is, "in the meantime you will please furnish Whiteside and Edmonds at once with an abstract of your title."

For the respondents it is contended that the purpose of this letter was merely to put in writing the demand already made verbally for the production of the agreements from the registered owners under which the vendor claimed and that an abstract of those agreements only was called for. Whatever may be the proper construction of the letter, and whether the respondents were or were not entitled to an abstract of the titles of the registered owners, they were, at all events, in my opinion, entitled to

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production and inspection of the documents under which their vendor claimed the interests in the lands of which he was disposing. The evidence abundantly justifies the holding of the learned Chief Justice, that production of these documents had been refused and has convinced me of the accuracy of the inference drawn by Mr. Justice Irving, that "the defendant was then (on the 3rd of January), and had been at the time when he was requested to shew title, endeavouring to bring about a deadlock with a view to preventing this contract being carried out."

This case is entirely distinguishable from the case of *Cushing* v. *Knight*, 6 D.L.R. 820, 46 Can. S.C.R. 555, much relied upon by the appellant. We have here a contract of sale with a provision in the nature of a condition subsequent for defeasance in the event of non-payment at the stipulated times, whereas in *Cushing* v. *Knight*, 6 D.L.R. 820, 46 Can. S.C.R. 555, it was held that, on the true construction of the contract there in question, the relationship of vendor and purchaser, with its incidental rights, would not come into existence until actual payment of the money in respect of which there had been default. The refusal of the appellant to produce the agreements evidencing the interests which he was selling I think put him in default and prevents him from claiming that, while such default continued, the respondents were under obligation to make further payments. There was, in my opinion, therefore, no default on their part which entitled the vendor to rescind, and the judgment for specific performance against him was right and should be maintained.

I would dismiss this appeal with costs.

Brodeur, J.

BRODEUR, J.:—This appeal should be dismissed, and I concur with the views expressed by Mr. Justice ANGLIN.

Appeal dismissed with costs.

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CAREY v. CAREY.

Quebec Court of Review, Malouin, Tourigny, and Dorion, JJ.
October 31, 1912.

1. DEEDS (§ II A—16)—DEED OF SALE—CONTRACT OF LEASE—CONSTRUCTION OF.

A so-called deed of lease made for a period of six years whereby the so-called lessee binds himself to pay to the so-called lessor $100 a year, with interest on a named capital sum, containing a stipulation that the lessee may at any time purchase the property for a fixed sum (e.g., $610) or the balance of such sum, credit being given for the instalments of $100 paid in, is a deed of sale and not a contract of lease, and failure to pay one or more of the annual instalments does not give the creditor the right to take an action in cancellation of contract before the expiry of the term (e.g., six years), and in no case may such action be accompanied by a *saisie-gagerie* to seize the furniture or the crops.

THIS was an appeal by the defendant from the judgment of the Superior Court, Pouliot, J., of March 18th, 1912, maintaining a *saisie-gagerie* and resiliating a deed of September 25th, 1906, between the parties.

The appeal was allowed.

J. E. Perrault, K.C., for the defendant, appellant.

A. D. Mailhiot, for the plaintiff, respondent.

The unanimous opinion of the Court was delivered by

MALOUIN, J.:—The present action was instituted by means of a writ of *saisie-gagerie* in expulsion. The plaintiff by her action prays for the cancellation of a lease, the radiation of the registration thereof, and the payment of $253 as lease and interest. The writ was issued on May 16th, 1910. On June 23rd, 1910, the plaintiff caused another writ to issue to seize the crops.

Malouin, J.

The plaintiff's action is based on the following writing:—

This lease made at Inverness, this 25th September, 1906, between Mrs. Ellen Carey . . . of the one part, and Denis Carey . . . of the other part, witnesseth:—

That the said party of the first part doth hereby lease and let unto the said party of the second part, for the space of six years, the lot No. 697 of the parish of St. Ferdinand d'Halifax, less twelve acres belonging to Patrick Carey personally, and including all buildings thereon. This lease is made on the following conditions:—

1. The lessee will pay annually the sum of $100, beginning in one year from this date, to the lessor, her heirs and assigns.

2. The lessee will pay all taxes, do all the road work, and perform every other duty to which the said land is or may be liable, care for, support and maintain in a comfortable manner and according to his rank and condition in life, and during his lifetime, John Carey, his father, care for him in health and sickness, and generally care for him and treat him as a dutiful son should treat his parent and give him Christian burial at his death.

3. He shall not sub-let the said premises without the consent in writing of the lessor.

4. The lessee will have the right to purchase the said property at any time, during the said lease, at the sum of $610, and all payments made as rent will be deducted from the said price of sale, and count as part thereto, and if, at the end of six years, the said rent has been faithfully paid, or if the said sum of $610 is sooner paid, the lessee will be entitled to a deed to said property, but subject to the living of his father, under special mortgage of said land to the extent of $1,500, which mortgage will be null at the death of the said John Carey.

5. The said sum of $610, purchase price of the said lot, payable as set forth in the lease, shall bear interest at the rate of five per cent. per annum, said interest payable annually with the said payments of $100 each year.

The defendant has pleaded, urging, among other grounds, that the foregoing writing is not a lease giving rise to the recourse of *saisie-gagerie*, but is a promise of sale or conditional sale.

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The Court below has held that this writing contains a lease subject to a resolutary condition and a promise of sale subject to a suspensive condition. In order to determine the nature of a contract, says Laurent (vo. Louage, No. 6), we must seek the common intention of the parties rather than stop at the literal meaning of the words, but account must be taken of the qualifications given to the contract.

After a careful examination of the evidence of record and of the writing, I have come to the conclusion that this writing does not contain a lease; it embodies either a sale under suspensive condition or a sale with a resolutory condition.

We find in the writing, it is true, the words lessee and rent, but there is no rent, no lessee. The lessee is the buyer, and the rent is in reality the purchase price.

The plaintiff sold the immoveable in question to the defendant for the sum of $610, payable in yearly instalments of $100, the purchase price to bear interest at 5 per cent. And if at the expiry of six years the purchaser has paid the stipulated instalments and the interest on the purchase price, or if he pay them before such delay has expired, he becomes the absolute owner and can exact a title deed.

This annual instalment of $100 is not a rent, but a payment on account of the purchase price.

The plaintiff never intended to have payment of a rent, and never stipulated to that effect; what she desired to stipulate and what she did stipulate was interest on the purchase price. And by spreading the instalments over a number of years she wished to give the defendant time for paying a capital he was unable to hand over all at once.

It would not be rational to stipulate rent and also demand interest on the purchase price. This stipulation of interest on the purchase price shews evidently that the plaintiff was selling, not leasing.

Clause 2 of the writing, obliging the defendant to maintain and support John Carey during his lifetime, is never found in leases; it is only found in donations and sales.

The deed contains no stipulation giving the plaintiff the right to demand the annulling of the sale in the event of the instalments not being paid regularly.

Consequently, if the instalments are not paid regularly, the plaintiff may either claim the instalments due or else claim only the interests on the purchase price and wait until the six years have expired to revendicate the immoveable if the instalments have not been paid before the expiry of the stipulated delay. The buyer cannot be deprived of his rights under the deed before the expiry of six years.

The six years are now up, and if we were to confirm the judgment of the Court below we should hold implicitly that the plaintiff is entitled to claim both the land and the purchase price.

I refer to Dalloz (Périodique, 1896, 1st part, p. 58, 2nd column, note), in which this class of contract is considered.

The interpretation which I put upon this writing of September 25th, 1906, finds support in the circumstances which preceded the making of this deed.

In 1894 the plaintiff bought this property from her brother John for the nominal price of $1. He further bound himself to pay hypothecary claims thereon to the amount of $618.

She bought this property to protect her brother John and to help him out of financial difficulties. John Carey and his family have nearly always lived on this property. Ellen Carey never exacted any rent and was ready to retrocede the property on being reimbursed of the amounts paid by her for her brother John with interest. On September 24th, 1901, the plaintiff transferred to Geo. and Denis Carey, two sons of John, this property for a price of $1,000. The buyers were to pay $200 a year for five years, with interest. This writing was about the same as the one in this case.

It was further stipulated that the buyers should keep with them and maintain their father and mother during their lifetime. George and Denis Carey only paid $420 (instead of $1,000) during the space of five years. Nevertheless, the plaintiff did not impute the instalments paid as being for rent, but imputed them on account of the capital due. George Carey died on February 3rd, 1905. On September 25th, 1906, the plaintiff entered into the agreement in question in favour of the defendant. The purchase price is $610, that is, the difference between the $1,000 and the amounts paid on the contract of September, 1901, plus a promissory note of $30 paid by the plaintiff. The plaintiff herself interpreted the writing of September, 1901, as a sale, and this same interpretation must be given to the writing of September 25th, 1906, which is drawn up in the same terms. In my opinion it is evident that the plaintiff simply wished to be reimbursed with interest of the sums paid for her brother John. And she admitted, in the box, that it was a sale that she made, and not a lease.

I therefore conclude that, as this writing is not a lease, the demand for cancellation is badly founded. The *saisie-gagerie* issued with the writ and the seizure of the crops, practised a month later, must be quashed. But, besides her demand in cancellation, the plaintiff claims $253 as rent and interest. This sum was due at the time of the institution of the action, not as rent, but on account of capital and interest. The writ of *saisie-gagerie* was not issued as summary procedure, but in virtue of the ordinary rules of procedure. The summons was not attacked by exception to the form, and I think it must be held regular.

The action was, as I said, instituted on May 16th, 1910. Now, a few days previously the defendant had called on the plaintiff

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to pay her an instalment. And when he saw she did not seem as well disposed as usual, he said to her: "Well, I shall raise a loan to pay you off and you will give me title." The appellant took steps to have a deed of sale prepared, but before he had time to present it to the plaintiff this action had been instituted. Thereupon the defendant had the plaintiff protested by his notary and a deed of sale presented for her signature, accompanied by a tender of $598, representing the balance due in capital and interest in the sum of $610. On April 11th, 1911, with his amended plea, the defendant deposited these $598 in Court and prayed that such tender and deposit be declared good and valid and the plaintiff ordered to sign him a deed of sale.

I am of opinion that the defendant had the right to obtain a title to the property by paying the capital and interest within the six years specified in the deed. . . . As this deed is not a lease, but a sale, and as it was not stipulated therein that the plaintiff, in default of any instalment being made, could ask for the cancellation thereof, she cannot ask for the resiliation of the sale before the six years have expired, and then, of course, it will result by the sole operation of law if all the instalments have not been paid.

The plaintiff insists on the word "faithfully," which occurs in this sentence: " . . . and if, at the end of six years, the said rent has been faithfully paid, or, if the said sum of $610 is sooner paid . . ." and contends that this word is of the utmost importance, and that the non-payment of the 1908 and 1909 instalments deprive the defendant of the right to pay the balance and to obtain his title. If the writing were a lease she might be right. But if, as I hold, it be a sale, then the word is of no value, because it is not accompanied by a resolutory clause. . . . In the event of unfaithful payment of these instalments the plaintiff may sue for them at law, but if all of them are paid before the six years are up the defendant is entitled to have a deed passed vesting him with full ownership of the property.

The tender was properly made and the plaintiff should have signed the deed. The judgment is reversed, the tender is declared valid and binding, and the plaintiff ordered to sign a deed of sale in favour of the defendant. The two seizures are quashed with costs against the plaintiff. The plaintiff to have costs as of an action of $253 up to the amended plea, but all subsequent costs to be against her, and she will pay the costs in review.

This is the unanimous decision of this Court.

Appeal allowed.

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British Columbia Court of Appeal, Macdonald, C.J.A., Irving, Martin and Gallihcr, JJ. November 5, 1912.

1. CORPORATIONS AND COMPANIES (§ VII C—376)—EXTRA-PROVINCIAL COMPANIES—TAKING OUT LICENSE TO DO BUSINESS.

Where an extra-provincial company carried on business in British Columbia in contravention of the Companies Act, R.S.B.C. 1897, ch. 44, sec. 123, then in force (see subsequent statute R.S.B.C. 1911, ch. 39), prohibiting the carrying on of business in British Columbia by an extra-provincial company until certain formalities were complied with and a license taken out, it has no right to maintain an action in the province of British Columbia as against the statutory defence of want of license which had become available to the company's debtor by reason of such contravention, although, prior to the action but subsequent to the carrying out of the contract upon which the cause of action is founded, it did comply with those provisions and took out a license to do business.

[*Northwestern Construction Co.* v. *Young*, 13 B.C.R. 297, applied.]

2. CORPORATIONS AND COMPANIES (§ VII C—376)—COMPANIES ACT, R.S. B.C. 1911, CH. 39—EXTRA-PROVINCIAL COMPANIES—SEC. 166 OF COMPANIES ACT, 1910 (B.C.)—WHETHER RETROACTIVE.

The amendment made, sec. 166 of the Companies Act, 1910 (B.C.) consolidated in R.S.B.C. 1911, ch. 39, as regards the penalty on extra-provincial companies carrying on business in British Columbia without being licensed or registered and precluding such companies from maintaining an action in any court of that province in respect of any contract made in whole or in part within the province in the course of or in connection with its business, which provides that upon the granting of the license the company may maintain an action as if such license had been granted before the institution of any such action, is not a statute relating to procedure merely and does not affect the rights of defence by reason of the company's contravention of the statute previously in force which at the time of the coming into force of such amending Act were in litigation in a pending action.

3. ACTION (§ I B 1—5)—CONDITIONS PRECEDENT—EXTRA-PROVINCIAL COMPANY'S LICENSE.

Where an extra-provincial corporation contracts outside of British Columbia for the sale of plant and machinery to be delivered in that province and there erected and installed by the vendor corporation, after which it is to test the plant and demonstrate its capacity to the purchaser, such extra-provincial corporation is thereby "carrying on business" in British Columbia so as to require an extra-provincial company's license under the Companies Act, R.S.B.C. 1911, ch. 39, in order to be entitled to bring action in the courts of that province.

Statement

APPEAL by the plaintiffs from the judgment of Clement, J., for the recovery of the balance due upon the sale to the defendants of a brick making plant.

The appeal was dismissed.

A. H. MacNeill, K.C., for appellants.

D. Armour, for respondents.

Macdonald, J.

MACDONALD, C.J.:—The plaintiffs (appellants) entered into contract with the defendants (respondents) for the sale by the plaintiffs (an Ontario corporation) to defendants of a brick making plant, to be erected and installed in British Columbia by the plaintiffs and to be there tested and demonstrated to be

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of a specified capacity. At the time the contracts were entered into, and until the 13th September, 1909, after the work of erection had been completed, as the plaintiffs claim, they were unlicensed to do business in this province. On that day they complied with the provisions of the Companies Act, R.S.B.C. 1897, ch. 44, sec. 123, and on the 24th of the same month commenced this action for the recovery of the unpaid balance of the purchase price.

I come without hesitation to the conclusion that the contract and business in question were made and carried out in contravention of the prohibition contained in said sec. 123, and in this respect this case cannot be distinguished from *N.W. Construction Co.* v. *Young* (1907), 13 B.C.R. 297, wherein it was decided by the full Court, that an action cannot be maintained by an unlicensed or unregistered extra provincial company in respect of business done by it in this province.

Since that decision, however, the law has been changed and the right of the plaintiffs to maintain this action will depend on the construction to be placed upon sec. 166 of the Companies Act, 1910, and the fact that the plaintiffs became licensed before they brought their action, though after the prohibited business had been done. I do not think the contracts in question were utterly void because of the plaintiff's non-compliance with the statute. The rights of the defendants were not affected by the plaintiffs' failure to comply with the law (see part 7 of the Companies Act.)

If the contracts were not void, but merely unenforceable at suit of the offending party, then, did the license subsequently obtained place the plaintiffs in good standing in respect of past transactions? If the Act of 1897 stood alone I should doubt this; but considered in the light of the Companies Act, 1910, and the same Act as revised in R.S.B.C. 1911, ch. 39, I think I ought to hold this action maintainable.

Said section 166 reads:—

> If any extra-provincial company shall, without being licensed or registered pursuant to this part, carry on in the province of British Columbia any part of its business, such extra-provincial company shall be liable to a penalty of fifty dollars for every day upon which it so carries on business, and so long as it remains unlicensed or unregistered under this Act, it shall not be capable of maintaining any action, suit or other proceeding in any Court in British Columbia in respect of any contract made in whole or in part within this province in the course of or in connection with its business, contrary to the requirements of this part:
>
> Provided, however, that upon the granting or restoration of the license or the issuance or restoration of the certificate of registration or the removal of any suspension of either the license or the certificate, any action, suit or other proceeding may be maintained as if such

license or certificate had been granted or restored or such suspension removed before the institution of any such action, suit or other proceeding.

In the revision of this section contained in R.S.B.C. 1911, there was inserted between the word "this" in the 6th line thereof, and "act" in the same line, the words "or some former" so that the section, after such revision, would, in effect, read in so far as it is applicable to this case:—

> So long as . . . a company remains unlicensed . . . under this or some former Act (Act of 1897), it shall not be capable of maintaining an action.

It appears to me that the necessary inference from this and the proviso above quoted is that having obtained a license under the Act of 1897, as this company did, they became, on the coming into force of the Act of 1910, entitled to maintain an action, and that too in respect of business transacted before the license was obtained, or in other words, that such a company was entitled to the same rights and remedies as a company licensed under the Act of 1910. But the revised Act of 1911 was not in force at the time of the trial of this action. The law then was as contained in said sec. 166. But sec. 166 must be read along with sec. 139 of the same Act, which required registration under this "or some former Act," and so read, I think the added words do not change the law, but appear to have been inserted to make plain what these sections read together meant on a proper interpretation thereof. The commissioners who inserted the words above referred to, had authority by 9 Edw. VII. ch. 41, sec. 5, to

> make such minor amendments as are necessary to bring out more clearly what they deem to have been the intention of the legislature, and by 2 Geo. V. ch. 41, sec. 3 (1): The said Revised Statutes shall not be held to operate as new laws, but . . . as a revision and consolidation and as declaratory of the law as contained in the said Acts or parts of Acts so repealed, and for which the said Revised Statutes are substituted.

This is to some extent qualified by sub-sec. (2), but in my opinion the sub-section ought not to be applied where it would be consonant with reason and justice to read the change as intended "to bring out more clearly" what the legislature meant.

I have referred to this difference in language because the revision of 1911 had not become law until after the trial of the action. Had it been in force before trial, the action could undoubtedly have been maintained. If the change is declaratory, as I think it is, the plaintiffs can even now invoke the later Act. But apart from this, I think that sec. 166 being plainly a remedial section having a well-defined object, the letter, if necessary, must give way to the reason where such a construe-

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tion is not repugnant to the clearly expressed meaning of the words themselves. To impose on companies in the situation of the plaintiffs a penalty out of all proportion to the offence might well have been regarded by the legislature as a scandal, and it was to correct this scandal that the law was amended. While the general rule is that statutes are to be construed as prospective unless a contrary intention is clearly made to appear, yet that rule must not be taken to mean that such contrary intention may not be inferred from the general scope and purview of the Act: see *Pardo* v. *Bingham*, 4 Ch. App. 735. Lord Eldon in *Johnes* v. *Johnes*, 3 Dow. 1, 15, observes:—

> It had properly been said that this was a remedial statute and that in advancement of the remedy all was to be done that could be done in a way consistent with any construction of it. This shewed how anxious the Courts were to extend a remedy to cases where it was wanted.

And in *Caledonia R. Co.* v. *North Brit. R. Co.*, 6 A.C. 114, 122, Lord Selborne said:—

> The more literal construction ought not to prevail if (as the Court below has thought) it is opposed to the intentions of the legislature as apparent by the statute, and if the words are sufficiently flexible to admit of some other construction by which that intention will be better effectuated.

Now, said sec. 139 places companies licensed under the Act of 1897 on the same plane as those licensed under the Act of 1910, that is to say, the license under the former Act is treated as equivalent to a license under the latter one. It retains its status on the repeal of the former Act in virtue of the latter one. The reason of sec. 166 is abundantly plain. It is to enable companies which offended to purge their offences by compliance with the law. In some respects it is clearly retrospective. For instance, if the plaintiffs had commenced this action without having obtained the license under the Act of 1897, and had waited until the Act of 1910 came into force, and had thereupon obtained it, the action would have been maintainable in respect of the very business in question in this action. To my mind, it is inconceivable, having regard to the reason for the remedial section, that a company complying earlier with the law should have been intended to be placed in a worse position than if it had continued longer to offend. Whether the recent amendments of the law be considered as restrospective, or as legislative interpretations of the consequences which were intended to follow contravention of the provisions of the earlier Act, the result is the same, the action is maintainable.

It has been suggested that section 166 has no application because the action is not brought in respect of a contract made in whole or in part in this province. The contract of the 5th Octo-

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ber was made in this province, and the one of the 10th of February, which incorporates it, and assigns it, was negotiated and drawn up in this province, though signed in Toronto. In my opinion the case does in this respect come within the section.

On the merits, I think the plaintiffs are entitled to succeed. The learned trial Judge made no specific finding of fact, but has simply declared, "I have not the slightest hesitation in saying that you (plaintiffs) have not demonstrated the contract; that means, of course, that the action is dismissed." What I conceive was meant by the learned Judge was that the plaintiffs had not, to use the words of the contracts, "demonstrated (the plant) to be of a capacity of 17,000 good merchantable bricks in 10 hours, or 34,000 good merchantable bricks in a day of 20 working hours for three consecutive days." Tests were made to demonstrate this capacity, and in respect of these the defendants have set up a curious objection. The presses have to be worked six or seven hours to produce the necessary quantity of unbaked bricks to fill the retort in which they are to be hardened by the use of steam. When, therefore, the plant is started in operation on the first day, the hardening section of it must remain idle for six or seven hours, but after the first day's operation both sections syncronize and work continuously because the presses will have then the required quantity of brick ahead to keep the retort supplied. The defendants, however, say that because the plant will not press and bake the specified number in ten consecutive hours, or in three consecutive days, making no allowance for the initial time required to meet the situation above outlined, it is not to be deemed of the specified capacity. I find myself unable to accede to that construction of the contract, capacity must mean normal working capacity.

As the only question argued before us were, the capacity and quality of the plant, and had it been sufficiently demonstrated, and the legal question of the plaintiffs' right to maintain the action, I need only add that I think, having regard to the plaintiffs' consent to make a further test in December, though the capacity had been demonstrated theretofor, the 20th of December, 1908, is to be taken as the date of completion and demonstration. The parties may speak to the question of how the amount for which judgment shall be directed to be entered shall be ascertained, whether by remitting the case back or by reference.

Irving, J.A.

IRVING, J.A.:—I think the plaintiffs cannot maintain this action: see *Northwestern Construction* v. *Young* (1907), 13 B.C.R. 297.

Mr. McNeill relies on the amendment of 1910, or I should say, the addition made to the statute in 1910, ch. 7, sec. 166. His argument requires us to consider whether that addition is a declaratory law, and therefore restrospective; or introductory of

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only a new state of law, and in the latter event whether it governs cases which were pending before and when it was passed, or whether they are to be decided by the law as it stood when they were brought.

This is not a statute relating to procedure merely. The general rule: see *Quilter* v. *Mapleson* (1862), 9 Q.B.D. 672, *per* Jessel, M.R., at 674, and Bowen, L.J., 677: is that a statute does not affect pending proceedings, but that rule is only a guide where the intention of the legislature is obscure. It does not modify the clear words of the statute. See too, *Reid* v. *Reid*, 31 Ch.D. 402; *per* Bowen, L.J., at 408-9; and *per* Lindley, L.J., in *Lauri* v. *Renad*, [1892] 3 Ch. 402, 420; *West* v. *Gwynne*, [1911] 2 Ch. 1, seems to be the latest case on the subject. In the argument of Hughes, K.C., in that case, a number of authorities bearing on the point are cited.

The statute is by no means clear that it was intended to apply to a case where the action had been commenced when there was a cause of action, and where the license was acquired before the Act of 1910 was passed.

The fact that the Act was not to come into force until the 1st July, 1910, sec. 308, in my opinion is against the plaintiffs. It is difficult to imagine that the legislature contemplated that the plaintiffs, who were on grounds of public policy without a cause of action, should remain so till the 1st July, 1910, and then that the license obtained by them in September, 1909, which, according to the law then in force, had no restorative powers, should on the 1st July, 1910, confer new rights by an Act passed in March, 1910.

Then again, section 166 speaks of the disability so long as the company remains unlicensed "under the Act." The plaintiffs seek to be relieved against the disability created under the old Act.

On the whole the legislation seems so obscure that I think the general rule should be held applicable and the appeal and action dismissed.

Martin, J.A.

MARTIN, J.A.:—We have first to decide the question of the contracts arising under secs. 123-4 and 143 of the Companies Act, ch. 44, R.S.B.C. 1897, and sec. 166 of ch. 7 of the Companies Act, 1910. Though the contracts were made in Ontario for the sale of certain machinery and plant, which were to be "shipped to Steveston, British Columbia," yet there was more than that; the plaintiff company undertook not only to "erect the plant and machinery" upon arrival at its agreed destination in this Province, but to "demonstrate" the capacity by a specified three days' test of the same. This, to my mind, is clearly "carrying on business" within this Province, and the case is brought within the decision of the late full Court in *North-*

western Construction Company v. *Young*, 13 B.C.R. 297. But the plaintiff seeks to escape from the consequences of that ruling by invoking sec. 166 of the Act of 1910, on the ground that though it did not take out a license till after the beginning of this action, yet the effect of that section is to cure all antecedent objections to the want of a license; and that after the company has paid the penalty its new status reverts back so as to give it a *nunc pro tunc* one.

Now while this sec. 166 is remedial and due effect should be given to it, yet on the other hand the interests of those who have acquired vested rights, such as a good defence to an action, before it was passed, must be considered, and as Baron Alderson said in *Moon* v. *Durden* (1848), 2 Ex. 22 at 40:—

> Unless the words imperatively require it, we ought not to make their prohibition retrospective, for it is contrary to the first principles of justice to punish those who have offended against no law, and surely to take away existing rights without compensation is in the nature of punishment.

And in *Knight* v. *Lee* (1893), 67 L.T. 688, Mr. Justice Bruce said, in the Queen's Bench Division, *coram* Matthew and Bruce, JJ., that "the Courts are always reluctant to construe statutes retrospectively" and that where a construction could be given to a statute "consistent with the words without their being held to be retrospective" it should be adopted. There is nothing to prevent this construction being applied to the section in question, and its being read prospectively. The words "shall not be capable of maintaining any action," etc., are beyond question used in the main and prohibitive part of the section in the sense of "bringing," and the remarks of Baron Alderson in *Moon* v. *Durden*, 2 Ex. 22, *supra*, taking a contrary view to that expressed in the dissenting judgment of Baron Platt, are singularly in point covering the very case he postulates, as follows:—

> If it had been stated "that no action shall be brought," or only, "that no action shall be maintained," it seems to me clear that we should have considered the words "brought" and "maintained" synonymous as prohibiting the success of future actions alone.

This view was also taken by Baron Parke (*Moon* v. *Durden*, 2 Ex. 22 at 42), who thus speaks of legislation affecting pending actions, the converse of which applies to the defendant at bar:—

> It is a still stronger thing to hold, that, if he has already commenced an action with an undoubted right to recover his debt and costs, he should not only forfeit both, but also be liable, as he would in the ordinary course of a suit, to pay the costs of his adversary, by being obliged to discontinue or be nol-prossed, or have his judgment arrested. These considerations afford a strong reason for limiting the operation of the words of this section and holding that they apply to future contracts, and actions on such future contracts only—at all events, to future actions only, if any distinction can be made in the degrees of apparent injustice.

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In view of this meaning which must be given to the word "maintain" in the principal part of the section, it would be impossible, legally, to give it a different one in the proviso thereto; both words must be held to mean "brought," which satisfies the remedial intention without encroaching upon the principle of retrospective construction.

GALLIHER, J.A.:—In this case the appellants have to meet two contentions, 1st, that upon the evidence the plaintiffs did not comply with the terms of their contract; and 2nd, that in any case they cannot succeed as they were carrying on business in British Columbia in contravention of the requirements of the Companies Act, R.S.B.C. 1897, ch. 14, sec. 123.

The learned trial Judge dismissed the action on the first ground.

After reading and weighing the evidence with great care, I cannot, I say it with respect, agree with his finding. A great deal of evidence was directed to the question as to whether the plaintiffs had demonstrated by test the capacity of the plant as guaranteed in their contract. Mr. Armour practically conceded that this had been done with this exception, that in a three day run the bricks were not cooked and completed within the specified time, and when the evidence on this point is examined closely it transpires that the cooking process takes some seven hours after the pressed brick is put in the retorts or kettles, so that in starting up for a run of three days (the time limit fixed in the contract for the test) the bricks would not be cooked until seven hours afterwards, but if that plant is run continuously for a month or a year, or longer, there would only be the one period of seven hours during all that time in which the plant would not be turning out the full complement of bricks fully completed.

Mr. Allen, in his evidence, states that in the trade when you speak of the capacity of a plant for turning out bricks the cooking is not included, but even if we disregard that in the light of what I have just stated, to hold that the contract had not been demonstrated in my opinion would be to depart from the true spirit and intent of the contract.

It was also objected that no formal notice was given as to when these tests were to be made, but the fact is that nearly all of the directors and shareholders of the company in British Columbia were present at these tests. Complaint was also made as to the inefficiency of the machinery by reason of breakages. The breakage to the valves was purely accidental, caused by the iron key of a bolt dropping out, and when new parts were obtained from the east the machinery ran satisfactorily. There were also some breakages in springs in the press, but when these were adjusted and fixed, no more difficulty was encountered. In a new plant starting up it not infrequently happens that

breakages take place, and to condemn a plant on that ground, which, after minor defects are remedied, works satisfactorily, would be unjust.

Mr. Armour further contended that while the plant might be capable of turning out the number of bricks specified it had to be speeded up to such a point as would in a very short time wreck the machinery. I have looked carefully for any evidence that might substantiate this, but fail to find it.

Holding this view of the evidence, it becomes necessary to consider the second ground.

The case of *Northwestern Construction Co.* v. *Young*, decided by the Full Court of British Columbia, 13 B.C.R. 297, is on all fours with the present case with these exceptions, that the plaintiffs in the case at bar had taken out a license (Sept. 13th, 1909) before bringing action, and that section 166 of the Companies Act, 1910, upon which the plaintiff relies, was not in existence. Unless the Act of 1910 assists the plaintiffs, and if *Northwestern Construction Co.* v. *Young*, 13 B.C.R. 297, was rightly decided, they must fail. I think the decision in that case is fully justified by the authorities there cited, and we have then only to deal with section 166 of 1910.

At the time the plaintiffs took out their license, and commenced their action, the statute law of 1897 was in force. The trial took place after the coming into force of the Act of 1910.

Section 123 of 1897 prohibits carrying on business in British Columbia by an extra provincial company until certain formalities are complied with, and imposes a penalty for infraction thereof, but is silent as to the rights of parties to maintain an action. This was the law as it stood when the plaintiffs brought their action.

Has the Act of 1910 made any difference as between the parties hereto? Unless it is retroactive, or is deemed to be an interpretation of the intention of the legislature as to what the rights as between parties to such a contract as the present then were, it is not applicable. I do not see how the canons of construction can be applied here to make it retroactive, and when we consider that the Act of 1897 is silent as to the rights as between parties, what is provided for by the Act of 1910 cannot, as I view it, be regarded as expressing any intention of the legislature in 1897, but is a dealing with the matter for the first time as a provision for the granting of a remedy as between parties on complying with certain conditions, and speaks only from the time of the coming into force of the Act.

I am, if I may say so with regret, forced to the conclusion that this appeal must be dismissed.

Appeal dismissed.

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JONES v. GORE.

Saskatchewan Supreme Court, Parker, M.C. December 5, 1912.

1. PLEADING (§ II L—257)—MALICIOUS PROSECUTION—EMBARRASSING DEFENCE—INCONSISTENCY.

Where the statement of claim in an action for damages for malicious prosecution and false imprisonment contains the usual allegations and the statement of defence denies all the material allegations, a further paragraph to the effect that "if the defendant laid or prosecuted said charge or procured the issue of said warrant, or caused the plaintiff to be arrested or imprisoned, the defendant did it on the advice of counsel," followed by a statement in detail of how the charge was laid before a magistrate who issued the warrant of his own accord and without defendant's request, will be stricken out on motion under rule 167 (Sask. Practice Rules, 1911), as tending to prejudice, embarrass and delay the fair trial of the action.

2. PLEADING (§ I S—149*a*)—STRIKING OUT—IRRELEVANT STATEMENTS — UNNECESSARY MATTER OF EVIDENCE.

On an application under rule 167 (Sask.) to strike out part of a statement of defence as unnecessary and as tending to prejudice, embarrass and delay the fair trial of the action, the fact that the objectionable plea contains considerable unnecessary matter of evidence is of itself not sufficient ground for granting the motion, the only question being whether the plaintiff has been embarrassed or prejudiced in any way by the evidence being pleaded.

3. PLEADING (§ I S—149*a*)—STRIKING OUT—IRRELEVANT STATEMENTS — ADVICE OF COUNSEL, HOW PLEADED—MALICIOUS PROSECUTION.

In a statement of defence of an action for malicious prosecution and false imprisonment, where one of the defences is that the defendant acted on the advice of counsel, it is sufficient merely to state that fact without pleading in detail what the defendant was advised by his counsel.

4. PLEADING (§ III A—303)—PLEAS AND ANSWERS—MALICIOUS PROSECUTION—PROPER FORM OF DEFENCE OF "REASONABLE AND PROBABLE CAUSE."

It is not necessary for the defendant, in an action for malicious prosecution and false imprisonment, to affirmatively plead reasonable and probable cause, the proper form of defence being merely to deny the plaintiff's allegations.

Statement

APPLICATION by the plaintiff to strike out paragraph five of the defendant's statement of defence as unnecessary and as tending to prejudice, embarrass and delay the fair trial of the action.

The application was granted.

G. H. Barr, for the plaintiff.

W. W. Guggisberg, for the defendant.

Parker, M.C.

PARKER, M.C.:—This is an action for damages for malicious prosecution and false imprisonment. The statement of claim sets out the circumstances and contains the usual allegations: (1) the criminal prosecution of the plaintiff by the defendant; (2) want of reasonable and probable cause for that prosecution; (3) malice; (4) the determination of the prosecution in favour of the plaintiff; and (5) the damage caused to the plaintiff by the prosecution. The defendant denies in paragraph one of

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the statement of defence that he laid the charge; in paragraph two he denies that if he did lay the charge that it was laid with malice or without reasonable and probable cause; and in paragraph four he denies that the prosecution was determined in favour of the plaintiff. The defendant therefore denies all the material allegations and joins issue with the statement of claim. Then follows paragraph five, which is as follows:—

> 5. If the defendant laid or prosecuted the said charge or procured the issue of the said warrant or caused the plaintiff to be arrested or imprisoned, the defendant did so on the advice of counsel and was merely following the advice and instructions of counsel in so doing, and said charge was laid and said warrant issued under the following circumstances and not otherwise; the defendant acting on the advice and instructions of counsel and accompanied by counsel, attended on or about the 30th day of August, 1912, before the said William Trant and fairly stated to the said William Trant the facts respecting the matters then in dispute between the plaintiff and the defendant, and the defendant did not make any specific charge whatever against the plaintiff, and the laying of the charge in question was not suggested by the defendant, but by the said William Trant, and the information was prepared by the said William Trant. The defendant never asked the said William Trant to issue any warrant of arrest, and any warrant of arrest that was issued against the plaintiff was issued by the said William Trant voluntarily and without any request from the defendant so to do.

The plaintiff makes this application under rule 167 to strike out paragraph five on the ground that it is unnecessary and tends to prejudice, embarrass and delay the fair trial of the action. The defendant apparently intended this paragraph as a plea in the alternative though it is not so stated in the pleading.

In the first place it appears to me that the paragraph in question contains considerable unnecessary matter, matters of evidence and not of pleading. I have some doubt as to whether or not any of paragraph five is necessary as a matter of pleading, but if the defendant wishes to plead that he acted on the advice of counsel, it would be, in my opinion, sufficient to merely state that fact. It appears to me unnecessary to plead in detail the instructions he received from his counsel or what took place between himself, his counsel and the magistrate who received the information and issued the warrant, in the absence of the plaintiff. I am well aware that it does not necessarily follow that a plea will be struck out because it contains evidence. The question is, has the plaintiff been embarrassed or prejudiced in any way by the evidence being pleaded. See *Sack* v. *Construction Co.*, 7 W.L.R. 653. I have already stated that paragraph five contains considerable unnecessary matter, matters of evidence and not of pleading and I am further of the opinion that this matter both prejudices and embarrasses

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the plaintiff, and that it would be difficult in fact almost impossible for him to plead in answer to it. The defendant first says that in laying the charge he followed the advice and instructions of his counsel. He then says that he "fairly stated to the magistrate the facts then in dispute" between the plaintiff and himself, that he "did not make any specific charge against the plaintiff and

> the laying of the charge in question was not suggested by the defendant, but by the said William Trant (the magistrate) and the information was prepared by the said William Trant.

He further says he

> never asked the said William Trant to issue any warrant of arrest, and any warrant of arrest that was issued against the plaintiff was issued by the said William Trant voluntarily and without any request from the defendant so to do.

In other words the defendant, after denying all the material allegations in the plaintiff's statement of claim and putting the facts in issue in effect says, in what I think he must intend for a plea in the alternative, that if he did what the plaintiff alleges his counsel is the responsible party, as he merely followed his counsel's instructions. And in the same breath he further says in effect that he did not lay any charge himself but that the magistrate was responsible for the whole proceeding. A somewhat analogous case is that of *Rassam* v. *Budge*, [1893] 1 Q.B. 571. This was an action for slander and the defendant denied that he spoke the words complained of; he then set out some other words not actionable *per se*, admitted that he spoke these, and pleaded that these other words were true in substance and in fact. The Court ordered all the paragraphs relating to these words to be struck out. A. L. Smith, L.J., says at p. 577:—

> It is like pleading to a statement of claim, alleging that the defendant had said the plaintiff stole a pair of boots and what the defendant said was that the plaintiffs' footman stole the boots, and that was true.

I might refer in conclusion to Bullen & Leakes' Precedents of Pleadings at p. 877, where the proper method of pleading in cases of this kind is well stated as follows:—

> As the onus of proving that the defendant acted without reasonable and probable cause and maliciously is on the plaintiff, the proper form of defence is to deny the plaintiff's allegations, and not to plead affirmatively that the defendant had reasonable and probable cause. If the defence is pleaded in the former way the defendant is not required to give particulars of reasonable and probable cause.

I think, therefore, that paragraph five of the statement of defence should be struck out, with costs in the cause to the plaintiff, but I think the defendant should have leave to amend his defence as he may be advised.

The application was granted.

SMART v. McINTOSH.

SASK.
S. C.
1912
Dec. 23.

Saskatchewan Supreme Court. Trial before Newlands, J. December 23, 1912.

1. DAMAGES (§ III A 3—62)—BREACH OF CONTRACT TO CONVEY—SALE OF LANDS—MEASURE OF COMPENSATION.

A vendor who after making a valid contract for the sale of land and receiving part payment, sells the land to a third person, is liable to the original vendee for the amount paid on account with interest, and in addition thereto damages for the breach of the contract.

Statement

ACTION to recover the amount paid by the plaintiff to the defendant under an agreement for the sale of certain lands, which the defendant subsequently sold to another person, and for damages.

Judgment was given for the plaintiff for the amount paid and $2,000 damages.

G. A. Cruise, for the plaintiff.

F. F. McDermid, for the defendant.

Newlands, J.

NEWLANDS, J.:—The defendant agreed to sell certain lands to the plaintiff and she subsequently sold same to another party and has now no title to the same. The plaintiff claims for a return of the money paid and damages. At the trial the defendant's examination for discovery was put in admitting these facts. The defendant put in no defence but claimed that the plaintiff in this action was not entitled to recover. I can see no reason why the plaintiff should not recover. It is admitted that the defendant executed the agreement of sale to the plaintiff and that she cannot now give him title. The plaintiff is therefore entitled to recover from her the amount he paid with interest and the damages claimed, $2,000, with costs.

Judgment for plaintiff.

ROGERS LUMBER CO. v. SMITH et al.

SASK.
S. C.
1912
Dec. 31.

Saskatchewan Supreme Court, Newlands, J. December 31, 1912.

1. LAND TITLES (TORRENS SYSTEM) (§ VII—70)—MORTGAGE CONTAINING MISDESCRIPTION—CAVEAT — NEW MORTGAGE — INTERVENING EXECUTIONS—PROCEDURE.

Where, by reason of a misdescription of the land, a mortgage given by a vendee under an executory contract could not be validly deposited in the land titles office for record on the completion of the mortgagor's title by the issue of a certificate of title, and the mortgagees consequently filed a caveat against the mortgagor's property as correctly described claiming to charge the same upon such defective mortgage, such mortgagees have lost priority over executions filed thereafter and before the issue of the certificate of title if they voluntarily discharged the caveat and accepted a new mortgage at the time when the transfer was made from the registered owner to their mortgagor; the mortgagees' proper recourse was to have taken action to have their original mortgage reformed and recorded in conformity with their caveat instead of discharging the same.

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1912

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2. LAND TITLES (TORRENS SYSTEM) (§ V—50)—MORTGAGE — CERTIFICATE OF TITLE—WHEN REGISTRATION EFFECTIVE.

Though a mortgage in proper form is handed in for registration at the same moment as the transfer of title to the mortgagor under the Land Titles Act (Sask.), it cannot be actually registered until after the title has been officially transferred of record under that Act (Torrens title system), and therefore it must be received subject to executions already on file in the land titles office.

Statement

A STATED case submitted by the plaintiffs and the defendants the Ideal Fence Company, Limited, as to whether the plaintiffs are entitled to rank upon the land described in the mortgages in priority to the defendants the Ideal Fence Company, Limited, execution creditors.

H. J. Schull, for plaintiffs.

P. H. Gordon, for defendants.

Newlands, J.

NEWLANDS, J.:—The plaintiffs and the defendants, the Ideal Fence Company, Limited, stated a case for the opinion of the Court, which may be briefly summarized as follows:—

Two of the defendants, Niklason and Cleugh, being indebted to the plaintiffs in the sum of $1,141.45 on the 27th September, 1910, mortgaged to the plaintiffs lot 80 in an addition to the townsite of Lang according to plan K 3720, which plan was incorrectly described in the mortgage as No. 3720. At the time of the giving of this mortgage Niklason and Cleugh were not the registered owners of this lot, but held an agreement of sale for the same. On the 4th October, 1910, the plaintiffs, learning that they could not register this mortgage, filed the same in the land titles office attached to a caveat properly describing said premises. On the 21st of February, 1911, having received a transfer for said lot, Niklason and Cleugh executed a new mortgage to the plaintiffs, who handed the same into the land titles office together with the transfer on the 27th day of February, 1911, for registration. In the meantime, between the filing of said caveat and the registration of said transfer and mortgage, certain executions against said Niklason and Cleugh, one of which was the execution of the defendants, the Ideal Fence Company, Limited, for $1,388.80, were filed in the land titles office, and I presume were registered against the above mentioned land. On the issue of the certificate of title to the defendants Niklason and Cleugh under the above mentioned transfer, the above mentioned caveat would also have been put upon said certificate of title as an encumbrance as of the day on which it was registered, viz., the 4th day of October, 1910, and would therefore be a prior encumbrance to the execution of the defendants, the Ideal Fence Company, Limited. On the 9th of March, 1911, the plaintiffs withdrew the above mentioned caveat and it then ceased to affect said land.

The question stated for the opinion of the Court is, are the

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Newlands, J.

plaintiffs entitled to rank upon the land described in the mortgages in priority to the defendants,' the Ideal Fence Company, Limited, execution?

From the facts as stated, the plaintiffs voluntarily discharged the caveat registered on the 4th October, 1910, which gave them priority over the defendants' execution and there being no fraud on the part of the defendants, the Ideal Fence Company, Limited, they are entitled to maintain the priority they have acquired by the plaintiffs' action. If the plaintiffs had wished to maintain their priority, they should have brought an action to reform their first mortgage, and should not have discharged it as they did.

The only point in favour of the plaintiffs that was suggested during the argument was that the transfer upon which the certificate of title to Niklason and Cleugh was issued was registered at the same time as the mortgage from them to the plaintiffs, and that therefore there was no time during which the defendants' execution could get in ahead of this mortgage. This argument will not, however, stand investigation, because under the Land Titles Act the mortgage could not be received in the land titles office until the issue of the certificate of title to the mortgagors. Therefore, although it was handed in for registration at the same moment as the transfer, it could not be received for registration until after the issue of the certificate of title, and the execution in question being on file in the land titles office before the mortgage could be received for registration would be entitled to be registered prior to it.

The question submitted will have to be answered in the negative, and judgment be entered for the defendants, the Ideal Fence Company, Limited, dismissing the plaintiffs' action with costs.

Action dismissed.

Re AMERICAN BRAKE SHOE AND FOUNDRY CO. and PERE MARQUETTE R. CO.

CAN.

Ex. C.
1912

Exchequer Court of Canada, Audette, J., in Chambers. August 1, 1912.

1. RECEIVERS (§ III—25)—CLAIMS AGAINST—SETTLEMENT — LIMITATIONS —RAILWAYS—WINDING-UP.

Claims for personal injuries and for damage to property against a railroad company prior to the appointment of a receiver by the Exchequer Court of Canada and claims for construction or repair work, court costs, counsel fees and advertising during the six months' period prior to the receivership must be submitted to the Exchequer Court upon their merits, so that creditors may be allowed to shew cause before any authorization is given the receiver to compromise such claims.

Statement

APPLICATION on behalf of one of the receivers appointed herein for authority to settle and pay the following claims:—

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RE AMERICAN BRAKE-SHOE AND FOUNDRY CO. AND PERE MARQUETTE R. CO.

Statement

1. Claims by injured employees, passengers, and other expenses incidental thereto, even though some parts thereof had been incurred more than six months before the appointment of the receivers herein.

2. Bills due prior to the appointment of the said receivers on contracts of the said railroad company for construction or repair work on bridges, buildings and other railroad property where the work is still in progress.

3. Bills for witness fees, Court fees, lawyers' fees, and other expenses in connection with the conduct of the legal department during said six months period.

4. Bills of newspapers for printing display advertisements of the railroad company's service during said six months period.

5. Claims for personal injuries, injuries to live stock killed along the line of the railroad company, and for damage to property caused prior to the appointment of the receivers, provided that in each such case the claim can be settled for an amount which in the judgment of the said receivers is no greater than would be the expense of preparing and conducting a defence.

Britton Osler, for the railroad company, supported the application.

Audette, J.

AUDETTE, J.:—No such sweeping application can indeed be granted under the circumstances upon such scanty material as that filed in support of the application. An order of this kind would indeed vest the receivers with such powers as would enable them to defeat the very spirit of the law where the property of a debtor is placed in sequestration in the hands of a receiver to look after the interest of the creditors of the defendant. By granting the prayer of the first clause, authority would be given to the receivers to pay even prescribed claims—claims extinguished by the Statute of Limitations. With respect to the second clause, no information is given to the Court whether the contracts in question involve large or small amounts. With respect to clauses 3, 4 and 5, suffice it to say that such claims cannot be paid and settled without giving the creditors an opportunity of shewing cause, and saying whether the judgment of the receivers is good or bad.

All such claims as are mentioned in this application can only be paid upon submitting them to the Court upon their merits, and allowing the creditors to shew cause. Following another course and giving the receivers *carte blanche*, would be defeating the principle of law obtaining in the present class of cases. A similar order consecrating the same principle was made on the 16th February, 1906, by Mr. Justice Burbidge, in *Horn* v. *Pere Marquette R. Co.*, Audette's Exchequer Court Prac., 2nd ed., 147. The application is refused.

Motion dismissed.

CITY OF SASKATOON (plaintiff) v. TEMPERANCE COLONIZATION SOCIETY, Ltd., James Pringle Steedman, Augustus Meredith Nanton, Edmund Boyd Osler, Charles Powell, William Waldie McKim, and Daniel Thomas Smith (defendants).

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Dec. 30.

Saskatchewan Supreme Court, Trial before Newlands, J. December 30, 1912.

1. EVIDENCE (§ VI L—580)—EXTRINSIC EVIDENCE AS TO STREET RECORD — ADMISSIBILITY.

In an action to determine the boundary of a street as appears by a regularly recorded sub-division plan or plat, evidence of instructions given to surveyors who laid out the street and made the plans at the instance of a private owner of the entire tract are not admissible to contradict what is shewn by the plan itself as to the intended width of the street.

Statement

TRIAL of an action to determine a street boundary.

J. A. Allan and *R. W. Shannon*, for plaintiffs.

H. E. Sampson, for Temperance Colonization Society and defendant Charles Powell.

D. H. Laird, for defendants Nanton & Osler.

J. F. Frame, and *J. Milden*, for defendant McKim.

J. D. Ferguson, and *F. F. McDermid*, for defendant Steedman (who withdrew).

Newlands, J.

NEWLANDS, J.:—The question at issue in this action is the width of Spadina crescent, as shewn on plans Q 2 and Q 3 of record in the land titles office for the registration district of Saskatoon. The city of Saskatoon claims that Spadina crescent is bounded on one side by the South Saskatchewan river, and the defendants claim that it is bounded on the river side by a line drawn parallel to and 132 feet distant from the blocks and lots which form the boundary on the other side of the street. The plaintiffs introduced the evidence of several provincial land surveyors as expert testimony to shew that there is no boundary to Spadina avenue on plan Q 2 on the river side excepting the river itself, and the defendants, the Temperance Colonization Society, Ltd., offered evidence, which I rejected, to shew the instructions given by that society to the surveyors who laid out the street in question and made the plans Q 2 and Q 3. In neither case is the evidence admissible, as I am of the opinion that the plans must speak for themselves, and it is not a case in which I need expert testimony to assist me in coming to a conclusion.

The interpretation I put on the plans is not that urged by either party. It seems clear to me that in laying out Spadina crescent the surveyor intended to lay out a street which would extend from the lots on one side to the top of the bank on the other side, and that the distance between the top of the bank and the lots at the corners of the blocks would be 132 feet. If it had been necessary to write a description of the street it would have read from any block corner "132 feet to the top of the

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river bank and thence following the several courses of said top of the bank, etc." On the one hand I do not think the land between the top of the river bank and the river was ever taken into consideration by the surveyor because there is no distance shewn from either the lots and blocks or the top of the bank to the river, and on the other hand, I do not think the surveyor ever intended to leave any land between the top of the bank and the street, as the plan shews clearly to my mind an intention to lay out Spadina crescent between the lots and the top of the bank, the figures 130 between two arrows being for the purpose of fixing the corners of the blocks. Plan Q 3 shews this much more distinctly than plan Q 2 because on plan Q 3 the surveyor drew an irregular line following the courses of the top of the bank which is omitted from plan Q 2, but the manner in which the arrows and figures are placed shews clearly that the top of the bank is to be taken as the boundary of Spadina avenue on plan Q 2 as well as on plan Q 3.

Neither party being successful, there will be no costs excepting as to defendant Steedman, who took no part in the defence, and the action will be dismissed as against him with costs.

Judgment accordingly.

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Nov. 5.

McGREGOR v. ST. CROIX LUMBER CO.

Nova Scotia Supreme Court. Trial before Graham, E.J. November 5, 1912.

1. CORPORATIONS AND COMPANIES (§ IV D 1—77)—POWER TO CONTRACT—TRANSFER OF ENTIRE PROPERTY—NOVA SCOTIA COMPANIES ACTS.

Under the provisions of the Nova Scotia Companies Act, R.S.N.S. ch. 128, as amended by N.S. Acts of 1912, ch. 47, a company, whether incorporated before or after the passage of the latter Act, may dispose of the whole of its undertaking; such sale is not limited to sales for shares, debentures or securities of other companies carrying on a business of a similar character, but covers sales for money as well.

2. CORPORATIONS AND COMPANIES (§ IV D 1—77)—POWER TO CONTRACT—TRANSFER OF ENTIRE PROPERTY—NOVA SCOTIA COMPANIES ACTS, REQUIREMENTS OF.

The procedure prescribed by the Nova Scotia Companies Act for the sale of its whole undertaking and assets must be strictly followed.

3. CORPORATIONS AND COMPANIES (§ IV D 1—77)—CONTRACTS ULTRA VIRES—TRANSFER OF ENTIRE PROPERTY—STATUTORY REQUIREMENTS N.S. COMPANIES ACTS.

An agreement entered into by the directors of a company for the sale of the entire undertaking to another company, although ratified by a resolution passed at a meeting of shareholders, is *ultra vires* and cannot be enforced in the absence of the special resolution called for by the amending Act, sec. 5, as defined by sec. 93 of the Companies Act.

4. CORPORATIONS AND COMPANIES (§ IV D—60)—CONTRACTS ULTRA VIRES—STATUTORY AUTHORITY—PROHIBITING IMPLICATION OUTSIDE OF THE AUTHORITY SPECIFIED.

Where the Legislature gives a company express power, within certain limits, to do a special thing, it is to be taken *primâ facie* to prohibit by implication any deviation from the power so given.

Action to enforce the specific performance of an agreement entered into by the directors of the defendant company to sell its property to the plaintiff company for the sum of $131,000.

H. Mellish, K.C., *C. J. Burchell*, K.C., and *J. L. Ralston*, for plaintiff.

T. S. Rogers, K.C., and *J. M. Davidson*, for defendant.

Graham, E.J.:—The power to make the sale is supposed to be contained in a clause in the memorandum of association of the defendant company, which is as follows:—

> The objects for which the company is established are:—
>
> (*j*) To sell, lease or otherwise dispose of the whole or any branch of the business, property or franchise of the company to any company carrying on or formed for the purpose of carrying out any object similar to any of those of the company hereby contracted.

The agreement purports to sell all the assets of the defendant company as a going concern, including all lands, buildings, hereditaments, goods, chattels, machinery, good will, contracts and agreements and all other property, etc., etc., excepting the manufactured lumber, laths, manufactured wood and wood pulp and excepting book debts.

As a fact the manufactured articles were already under contract for sale in the ordinary course of business.

Four or five horses were reserved by a verbal arrangement and the book debts were very inconsiderable.

I find that this proposed sale was to be a sale of the whole of the company's undertaking, leaving nothing for it to do but to wind up. It could do nothing beyond this.

It is quite evident that the Judges in England have conflicting views of the propriety of such a clause in the memorandum of association. Going back to *Doughty* v. *Lomagunda Reefs, Ltd.*, [1902] 2 Ch. 837, because I have to consider what was held by him in a later case, Buckley J. (as he then was) said:—

> Those sections of the Companies Act, 1862, which specify what the memorandum of association shall contain, provide amongst other things that the memorandum shall state "the objects for which the proposed company is proposed to be established." If the matters here were introduced by authority, I think there would be ample room for argument that these words mean the objects which the company is established to carry out as a going concern for the purpose of earning profit and the like, which I may call the living objects of the company, which it is established to carry out as a living corporation, and do not include provisions addressed to the disposal of the assets of the company at a time when it is not going to carry on any undertaking further.

He said this, but followed *Cotton* v. *Imperial and Foreign Agency Corpn.*, [1892] 3 Ch. 454, a decision of Chitty, J., and as he afterwards said in the later case, practically invited an appeal. An appeal was taken, but it went off without deciding this question.

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Afterwards *Bisgood* v. *Henderson's Transvaal Estates*, [1908] 1 Ch. 743, came on before the Court of Appeal, and Buckley, L.J., delivered the judgment of the Court. Now, that case was a sale for shares in the new company, and those shares were not fully paid up shares, so that the shareholders of the selling company who had fully paid up their shares might find themselves afterwards liable to calls in the purchasing company. And perhaps all that it was really necessary to decide was that these shareholders would, by reason of a sale under the memorandum in the articles of association, instead of the winding up provisions of the Act, be deprived of the benefit of those provisions which, among other things, entitle them to an arbitration and a sale of their shares for money. But the Court went further and gave expression to the view of Buckley, J., in the earlier case, which I have already quoted, and they overruled *Cotton* v. *Imperial and Foreign Corpn.*, [1892] 3 Ch. 454, and *Fuller* v. *White Feather Reward, Ltd.*, [1906] 1 Ch. 823, saying:—

> Under the Companies Act, 1862, the incorporation of a company is effected by the registration of a memorandum of association, which is to state the "objects for which the proposed company is to be established." To my mind that means the objects which the corporation during its corporate life is to pursue, the purposes by whose fulfilment it is to seek to earn profit. The definition of the objects is the definition of what is generally called the undertaking of the company. The modern practice is to add, I think erroneously, an enumeration of the powers for carrying those objects into effect. But, however that may be, the words "objects for which the proposed company is to be established" have, in my opinion, no relation to acts to be done after the corporate life has come to an end. So soon as the company passes into liquidation, the distribution of its assets is a matter which concerns the corporation not at all, but its creditors and contributories only. In my judgment, it is no part of the function of the memorandum of association to define under the corporate objects the distribution of the assets after the corporate life is over. . . . When liquidation ensues, the scheme of the Act shortly is that the assets are to be turned into money, the contributions of the contributories enforced as far as need be, the debts paid, and the balance divided amongst the contributories according to their rights. Sec. 161 introduces a modification. That is a section which speaks not only after liquidation, but when the company is proposed to be, as well as when it is in the course of being wound up: *Bisgood* v. *Henderson's Transvaal Estates*, [1908] 1 Ch. 743 at 757 and 759.

The Court said (p. 761), referring to the decision of Chitty, J.:—

> The decision affirmed that under clauses in the memorandum of association the company might sell its whole undertaking, meaning by that expression not merely all its assets at the moment, but all its present and future business, and might, under the authority of special resolutions, divide the proceeds of sale amongst the members without the safeguards provided by sec. 161. With the greatest respect to that

very learned Judge, I am unable to agree with this decision. Sale of even all the property at a particular moment may be, but sale of the whole undertaking and division of the proceeds cannot be, a corporate object. Under a clause in its memorandum of association a single steamship company may no doubt sell its only steamship with the whole of its equipment and with the proceeds buy another. But under a clause in its memorandum of association it cannot, in my opinion, sell its only steamship and all its undertaking and divide the proceeds. Distribution of capital (except in reduction of capital) can only be made in winding up. An agreement for sale may be a corporate Act of the going company and within its objects, but an agreement for sale and distribution can only be valid when the company "is proposed to be wound up" or is "in the course of being wound up" (p. 763). "But apart from that feature" (i.e., that the shares of the purchasing company were not paid up) and upon the general question I cannot agree with the decision.

Upon this condition of the law in England, which would be the law here, the Provincial Legislature in Nova Scotia intervened and passed, May 3, 1912, this provision in amendment of the Nova Scotia Companies Act, R.S.N.S. 1900, ch. 128, namely, Acts of 1912, ch. 47, sec. 5:—

> Any company now or hereafter incorporated under said ch. 128 may by special resolution sell or dispose of its whole undertaking for such consideration as the company thinks fit, and in particular for shares, debentures or securities of any other company having objects altogether or in part similar, provided such sale or disposition is one of the objects of the company contained in its memorandum of association.

It was under this provision that the defendants started to sell. The day previously to the date of the agreement for sale, namely, May 22, 1912, a meeting of the shareholders was held and a resolution was passed. It recited the clause from the memorandum of association already quoted. It recited sec. 5, ch. 47, Acts of 1912, the provision in the Act just quoted.

It also recited that the directors had agreed to sell all the assets of the company as a going concern, etc. This agreement of the directors only exists in the recital. At least it was not in writing. The resolution was to the effect that this agreement of the directors should be ratified and confirmed and that the company do sell to the plaintiff the said assets for the said consideration, that the directors are authorized to make such sale, and that the president and secretary should sign the necessary agreements. This resolution was carried by a three-fourths majority. But a minority was opposed to it, and one shareholder at least abstained from voting, relying upon the statutory provision just quoted as to a special resolution, which would require another meeting to pass upon the matter and confirm the resolution. The directors have *bonâ fide* failed to have another resolution passed by a further meeting for want of a majority.

The shareholders other than the directors, with the exception

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of one director, are opposed to the sale. I find that the shareholders are in good faith opposed to the sale because it would not be a good bargain for the company. The evidence of Mr. A. P. Shand satisfactorily proves that fact. The agreement entered into by the directors and executed, which, as I said, is dated the 23rd May, 1912, contains this proviso:—

> 8. This agreement is conditional upon such ratification, if any, as may be required in that behalf by the shareholders of the company.

By the Joint Stock Companies Act, R.S.N.S. ch. 128, sec. 93, a special resolution is defined. A resolution must not only be carried by a majority of not less than three-fourths and so on, but it must be confirmed by a majority at a subsequent general meeting, and held at an interval of not less than fourteen days nor more than one month from the date of the meeting at which such resolution was first passed.

I find as a fact that the plaintiff company was aware of and had knowledge of the proceeding of the defendant company and its shareholders and of the necessity of a special resolution and the absence of it. It took the risk of a second meeting confirming the resolution. Two payments received by the directors on account of the proposed sale were duly tendered back and, on refusal to accept them, they have been placed on deposit receipt for the plaintiffs. Nothing was said on the argument as to that feature and I have no doubt the payments do not affect the matter. In my opinion this case turns largely on the construction of sec. 5 of the Act passed in 1912. It applies to companies already incorporated as well as to companies to be thereafter incorporated.

This provision is in part taken from a usual clause in a memorandum of association in England, as follows:—

> To sell or dispose of the undertaking of the company or any part thereof for such consideration as the company may think fit, and in particular for shares, debentures or securities of any other company having objects altogether or in part similar to those of this company: 1 Palmer's Company Precedents 510.

In my opinion that provision is not limited to sales for shares, debentures or securities, but it covers sales for money as well. It emphasizes, no doubt in consequence of decisions of the Judges, sales for shares, debentures or securities, but it covers also all sales of the undertaking. There is nothing which cuts down the generality of the first part. Of course then there was the difficulty which Buckley, J. (as he then was), pointed out, that the legislation of the Companies Act contemplated as the "objects for which the proposed company is to be established" objects which it was to "carry out as a going concern for the purpose of earning profit and the like," "to carry out as a living corporation." And the provincial legislation comes to the aid of any such provision contained in the memorandum for a sale of

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the undertaking, and provides in effect that notwithstanding any other provision in the Companies Act a company may sell out its whole undertaking by a special resolution. The proviso of the section contemplates its application where there is contained in the memorandum of a company already incorporated a provision that the sale of the whole undertaking is one of the objects of the company, and by the hypothesis applies to this case. Effect must be given to this legislation in respect to companies already incorporated. It is not to be supposed that the legislature was passing an unnecessary provision.

I do not know that the proper view of the English law is material in determining what the Legislature meant. It may be that it means that if, by its memorandum, the company has the power to sell the whole undertaking, then it is (by way of restriction) only to sell after a special resolution. Or it may mean, as I have already indicated, that if the memorandum purports, although not validly or open to question, to contain, as one of the objects of the company, power to sell the whole undertaking, there it is enabled to effect a sale after a special resolution. Then it is well established that when the Legislature gives a company express power, within certain limits, to do a special thing, it is to be taken *primâ facie* to prohibit by implication any deviation from the power so given. The special resolution is essential.

For these reasons I am of opinion that the agreement of sale is *ultra vires* and invalid and cannot be enforced. The action should be dismissed, and with costs.

Action dismissed.

WILSON v. MUNICIPALITY OF DELTA.

IMP.
P. C.
1912
Dec. 13.

Judicial Committee of the Privy Council. Present: Lord Macnaghten, Lord Mersey, and Lord Moulton. December 13, 1912.

1. Waters (§ I C I—19)—Dyking by public authority—Variations in details.

Where a public body is intrusted with the construction of dyking works to prevent damage from the overflow of a river when in flood, it is its duty to avoid causing unnecessary inconvenience to individuals affected by the works; and where local adjustments and variations of the general plan can be made without affecting its suitability for its intended purpose or its compliance *de facto* with the description of works authorized, the public body is entitled to make such adjustments and variations if they diminish the interference with private rights or property and so lessen the amount of compensation to be paid in respect thereof.

[*Municipality of Delta* v. *Wilson*, 17 W.L.R. 680, affirmed on different grounds.]

2. Limitation of actions (§ I D—27)—Against municipality—Injury through public works.

A cause of action against a municipality in British Columbia for damages accruing in July, 1897, in respect of alleged deviations from certain dyking and drainage works constructed by it under the authority of municipal by-laws was subject to the provisions for limitation of actions contained in the B.C. Municipal Act, 1892, and of the Municipal Clauses Act, R.S.B.C. 1897 (see subsequent Revised Municipal Act, R.S.B.C. 1911).

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3. LIMITATION OF ACTIONS (§ I D—27)—AGAINST MUNICIPALITY—WORKS NOT WITHIN THE AUTHORIZING BY-LAW.

An action against a municipality in British Columbia claiming damages by reason of the construction of certain municipal dyking works would be barred in so far as the claim was based upon the contention that the works were not justified by the by-laws relied upon as authorizing the same, after the expiry of the periods of limitation specified in secs. 243 and 244 of the B.C. Municipal Clauses Act 1897 (see subsequent Revised Municipal Act, R.S.B.C. 1911, ch. 170, secs. 512 and 514).

Statement

APPEAL by the defendant in the original action, from the judgment of the Court of Appeal for British Columbia, in *Municipality of Delta* v. *Wilson*, 17 W.L.R. 680, which affirmed the judgment of Hunter, C.J., dismissing the appellant's counterclaim.

Sec. 146 of the Municipal Act 1892 of British Columbia provided that:—

> When debentures have been issued under a statute or under a by-law, and the interest on such debentures . . . has been paid for the period of one year or more by the municipality, the statute and the by-law and the debentures issued thereunder . . . shall be valid and binding on the corporation, and shall not be quashed or set aside on any ground whatever.

Sec. 243 of the B.C. Municipal Clauses Act 1897 provided that:—

> All actions against any municipality . . . for the unlawful doing of anything purporting to have been done . . . under powers conferred by any Act of the Legislature . . . shall be commenced within six months after the cause of such action shall have first arisen.

Sec. 244 of the same statute enacted as follows:—

> All actions against a municipality other than those mentioned in the last preceding section shall be commenced within one year after the cause of such action shall have arisen.

Argument

Martin, K.C., of the British Columbia Bar, for the appellant, contended that sec. 146 of the Municipal Act 1892 only affected the position of the holders of debentures under an invalid by-law, and did not refer to proceedings to question the validity of the by-law by a person injuriously affected. The appellant is not estopped by laches or acquiescence. See *Lindsay Petroleum Company* v. *Hurd*, L.R. 5 P.C. 221. As to the effect of the by-laws of a corporation, see *Corporation of Raleigh* v. *Williams*, [1893] App. Cas. 540, 69 L.T.R. 506.

Sir R. Finlay, K.C., *W. J. Taylor*, K.C., of the British Columbia Bar, and *H. S. Bompas*, for the respondents, argued that there was no evidence that the appellant had suffered any injury from the construction of the respondent's works. In any case his proper remedy was by arbitration under the Act. There was no illegality in the by-law, and it is too late to raise that question now. Apart from the Act the appellant was a mem-

ber of the corporation at the time, and acquiesced in what was done. His claim is barred by secs. 243 and 244 of the Municipal Clauses Act 1897, for these works were constructed in 1897, and the action was not commenced till 1902. The principle of the decision in *Darley Main Colliery Company* v. *Mitchell*, 54 L.T. R. 882, 11 App. Cas. 127, does not apply where the Act is alleged to have been wrongful from the beginning.

Martin, K.C., in reply.

The judgment of the Board was delivered by

Lord Moulton.

LORD MOULTON:—This is an appeal from a judgment of the Court of Appeal for British Columbia dismissing an appeal from the judgment of Hunter, C.J., upon a counterclaim by the appellant in an action brought against him by the respondents. The appellant is a landowner at Delta, New Westminster, in the Province of British Columbia, and the respondents are the municipal corporation of that place.

The counterclaim relates to certain dyking works executed by the respondents along the south bank of the Fraser river, which forms the northern boundary of certain lands of the appellant. These works run through the lands of the appellant, as well as through neighbouring lands lying upon the same bank, and were constructed for the purpose of keeping back the waters of the Fraser river at times when it is high, and thus preventing them from flowing over such lands, and it is admitted that they successfully accomplish this object. By his counterclaim the appellant claimed damages against the respondents on two grounds. In the first place, he alleged that the dyke and the works appertaining thereto (more especially a certain ditch running along by the side of the dyke) were constructed illegally and caused damage to his land by overflow.

In the second place, he alleges that the respondents, after constructing the dyking works under certain specific by-laws, neglected to maintain them and keep them in repair, and so caused damage to him. No evidence seems to have been given at the trial to support this latter claim, and no reference was made to it on the hearing of this appeal, so that it is unnecessary to make further reference to it. Shortly stated, the facts of the case are as follows. Prior to 1895, the Fraser river used to overflow its banks from time to time, and flood the neighbouring lands, thereby rendering portions of them, including those to which this case refers, incapable of cultivation and practically of no value. In January, 1895, a petition was presented to the respondents, by which they were asked to pass the necessary by-law to provide for the construction, protection, and maintenance of a dyke along the south bank of the Fraser river, from the high land to the Gulf of Georgia, in order to

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prevent these overflows. In consequence of this petition, the respondents passed a by-law to authorize the construction of the works in question and to provide the necessary moneys. Such by-law was provisionally adopted on the 10th June, 1895, and finally passed on the 5th October, 1895, and on the 13th January, 1896, the respondents entered into a contract for the construction of the works. In January, 1897, it was discovered that the sum of money so provided would be insufficient to complete the works; and accordingly, a further by-law was passed by the respondents authorizing the raising of the requisite further money. This by-law was provisionally adopted on the 10th April, 1897, and finally passed on the 22nd May, 1897. The money authorized by the said by-laws was raised by debentures of the respondent corporation, bearing interest at the rate of 5 per cent. per annum.

No application has been made at any time to quash either of the said by-laws or to set aside any of the debentures issued thereunder; and interest has been paid upon those debentures regularly to the present time. The works were completed in July, 1897. At the date of the petition for the original by-law above referred to, the appellant was the owner of lands in the area to be protected by the works, known as lots 83 and 84, and as such owner he signed the petition for the by-law. In November, 1897, after the works had been completed, he purchased certain other lands known as lots 128 and 129, which are the lands to which his counterclaim refers. During the years 1898 and 1899, he was a member of the council of the respondent corporation. Shortly after his ceasing so to be a member, the respondents passed a further by-law authorizing the borrowing of a further sum for the purpose of keeping the works in a proper state of repair. Such by-law was finally passed on the 18th September, 1900, and debentures were forthwith issued under it. As in the case of the other by-laws, no application has ever been made to quash this last by-law or set aside the debentures issued under it, and interest has been paid upon those debentures regularly to the present day. The appellant had from the first full knowledge of all things done by the respondents as above set forth, and no objection was at any time raised by him to anything that had so been done until the filing of the counterclaim to which this appeal relates. On the 13th July, 1902, an action was brought by the respondents against the appellant for arrears of taxes due from the appellant as owner of the said lands in respect of the assessment of those lands under the said by-laws. Besides putting in a defence, the appellant raised a counterclaim for damages and an injunction. The action was tried in the year 1902, before Mr. Justice Martin, who dismissed both the claims, but on appeal

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the case was sent back for a new trial. Thereupon the appellant amended his counterclaim, and in its present form it was delivered on the 31st July, 1905.

The second hearing of the action took place on the 30th October, 1905, before Hunter, C.J., who dismissed the claim of the respondents, on the ground that they had adopted the wrong remedy for the non-payment of the taxes. He held that such taxes could only be recovered by enforcing the statutable lien on the lands in respect of them. Against such judgment no appeal has been brought. He also dismissed the counterclaim. The present appellant appealed against this judgment so far as it related to the counterclaim, and the Court of Appeal, by a majority, supported the judgment of Hunter, C.J. From this judgment the present appeal is brought.

For the purposes of the present appeal it will suffice to say that the works in question consist mainly of a dyke reaching along the south bank of the Fraser river. This dyke has of necessity a ditch running along it on the side away from the river so as to conduct away the water which otherwise would have drained into the river from the protected lands at such times as the river might be at a sufficiently low level to receive such drainage. There are, however, two so-called sloughs in this portion of the Fraser river. The upper slough, known as "the Crescent Slough," is a kind of bye-pass, which leaves the river and returns to it, and thus encloses an island of considerable size known as "Crescent Island." The second slough, known as "the Chilukthan Slough," is in reality a small arm of the river flowing into the Gulf of Georgia by an independent opening. Both these waterways were admittedly of great utility to the lands through which they flowed, as well as to the lands lying adjoining thereto, for the purpose of watering cattle. In order to preserve these waterways without interfering with the protective action of the dyke, openings were made through the dyke at the junctions of the sloughs with the river, and these openings were protected by floodgates, which could be opened at times when the river was at such a level that this could be done without injury to the adjacent lands. To make the protection complete, it then became necessary to insert in the ditch, at its intersection with the sloughs, apparatus known as ditch-boxes, so that the ditch might be protected from the inflow of river water during such periods as the floodgates were opened. In addition to these special arrangements, at the points where the works crossed the sloughs certain dams and floodgates were constructed in the works at points where the dyke passed across the lands of two owners, who had themselves previously established protective works. Their Lordships are satisfied that all the variations in the gen-

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eral plan of the works were incidental to carrying out the authorized works and were fully within the powers of the respondent corporation in the performance of their duties under the by-laws. It is the duty of the public body intrusted with the construction of such works to avoid causing unnecessary inconvenience to members of the public affected by the works; and, where local adjustments and variations of the general plan can be made without affecting its suitability for its intended purpose or its *de facto* compliance with the description of the works authorized, it is right to make them, if they diminish the interference with the convenience of individuals, and so lessen the amount of compensation to which they would become entitled. In each particular case the propriety of such special variations will be a matter dependent on the facts of that case; but in the present case the evidence, both as to the works themselves and the conduct of the parties, satisfies their Lordships that there is no ground for doubting that whatever was done was fully justified by the surrounding circumstances.

The main argument for the appellant in the argument before their Lordships was directed to shew that the by-law was invalid because of certain irregularities in the procedure for obtaining it. Their Lordships have no doubt that the matters urged upon them in this behalf are immaterial. In view of the disastrous consequences which would ensue if the validity of a by-law of this type could be challenged long after action had been taken upon it, the legislature of British Columbia has, in the Municipal Act, 1892, enacted that all objections to such by-laws must be made promptly and within a very short period of their being passed. In this connection, secs. 146, 146*a*, 278, and 279, may be instanced, all of which apply to the present case and secure the by-laws in question from all attack. Section 146, which may be taken as an example, reads as follows:—

> When debentures have been issued under a statute or under a by-law, and the interest on such debentures and the principal of such thereof (if any) as shall have fallen due has been paid for the period of one year or more by the municipality, the statute and the by-law and the debentures issued thereunder, or such thereof as may yet be unpaid, shall be valid and binding on the corporation, and shall not be quashed or set aside on any ground whatever.

It was suggested on behalf of the appellant that the effect of this section was limited to the validation of the debentures issued. Their Lordships can see no ground for this contention. The section provides plainly that, under circumstances which are admittedly to be found in the present case, "the statute and the by-law . . . shall be valid . . . and shall not be quashed on any ground whatever."

For these reasons it is wholly unnecessary to inquire whether

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the contentions of the appellant as to the existence of irregularities in the procedure for obtaining the by-laws are well-founded or not.

The remainder of the argument on behalf of the appellant was based on the contention that the works were not justified by the by-laws. As has already been stated, their Lordships are of opinion that this contention is not justified in fact. But their Lordships are also of opinion that the claim, so far as it is based on this ground, is barred by the provisions as to limitations of action contained in the Municipal Clauses Act, 1897, secs. 243 and 244. It is not necessary to decide under which of these two sections the suggested right of action would come, because the acts complained of were all done before August, 1897, and the counterclaim was not put in until August, 1902. The longest period allowed by secs. 243 and 244 is one year after the cause of action has arisen; and this period had, therefore, elapsed long before the action was brought. As will be seen by the counterclaim, the appellant claimed an injunction to prevent the respondents from maintaining and working the apparatus complained of, and that cause of action, if it ever existed, must have first arisen in July, 1897. There is no suggestion here that the respondents have acted otherwise than *bonâ fide*, and with the greatest openness, and it is clear that everything relevant to such a ground of action was fully known to the appellant from the first.

Without in any way deciding whether or not the appellant might have any rights in this or any other form of action had such not been the case, their Lordships have no doubt that, under such circumstances, cases like the present are precisely the cases to which these provisions for limitation of actions in the case of municipal corporations are intended to refer, and that the appellant's cause of action, based on alleged deviations by the respondents from the works contemplated by the by-laws, is barred by these provisions. The above considerations suffice to decide this appeal. But, in addition thereto, there is in their Lordships' minds grave doubt whether the appellant has proved that he has suffered any damage in fact or in law. It is admitted that his land has been greatly benefited by the works; and, when analysed, his sole complaint is, that, if the respondents in working the ditch constantly kept the level of the water in it sufficiently low, he would have facilities of drainage of his lands which he does not now possess. Their Lordships see no obligation on the respondents so to work the ditch. Had they thought it proper, there was nothing to prevent their establishing weirs in the ditch, which would have maintained such level in each section of the ditch as they thought proper, and in fact the effect of the ditch-boxes and dams is of this nature. It

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would seem, therefore, that no legal right possessed by the appellant has been infringed by the actions of the respondents: and, although their Lordships do not feel called upon to decide the question, they think it proper to put on record that they are not satisfied that any damage has been proved.

Their Lordships will, therefore, humbly advise His Majesty that this appeal be dismissed, and that the appellant be ordered to pay the costs.

Appeal dismissed.

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Dec. 6.

PICKARD v. DEUTCHER-CANADIER CO.

Alberta Supreme Court, Harvey, C.J., Scott, and Stuart, JJ. December 6, 1912.

1. MASTER AND SERVANT (§ II A 3—54a)—LIABILITY OF EMPLOYER—TRANSFER OF INEXPERIENCED EMPLOYEE TO MACHINE OF DIFFERENT SPEED.

Where a child or young person of comparative inexperience has been employed in working a machine operating at a fixed speed and is transferred to a similar machine operating at a different speed, it is the duty of the employer to warn such employee of the difference in the machines, and in default he will be liable for personal injuries sustained by the employee who, in ignorance of the difference in speed, applied to the operation of the second machine, the movements applicable to the first and was injured in consequence.

Statement

APPEAL by defendants from the judgment in favour of plaintiff in a personal injury action brought by a child employed by defendants.

G. H. Ross, for defendant, appellant.

D. S. Moffatt, for plaintiff, respondent.

Harvey, C.J.

HARVEY, C.J.:—We are of opinion that the defendants did not discharge the duty they owed to the plaintiff. Being a child of comparative inexperience the danger should have been pointed out to her. The child's movement in the work she had been engaged in had become largely mechanical and fitted with the movement of the press. When put at a press that moved at a different rate of speed she was really running a greater risk than if she had had no experience whatever, for without experience or instruction she would not appreciate the need to alter the movement she had already acquired. That she did not appreciate this fact and the danger involved is shewn by the fact of the accident happening at the very commencement of the work. The appeal is dismissed with costs.

Appeal dismissed.

BROSSARD v. STERLING BANK and TURGEON es-qual. (intervenant).

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Nov. 22.

Quebec Court of Review, Tellier, DeLorimier and Saint-Pierre, JJ. November 22, 1912.

1. CHEQUES (§ III—16)—RIGHTS AND LIABILITIES OF DRAWEE—CHEQUE ACCEPTED BY BANK.

Where a cheque drawn to the order of another person is accepted by the bank on which it is drawn at the request of a third person, such acceptance renders the bank the sole debtor of the legal holder of the cheque; and if the drawer becomes insolvent after such acceptance and before payment of the cheque, his estate is not liable for the cheque either as regards the bank or as towards the legal holder of such cheque.

[*Brunelle* v. *Ostiguy*, 21 Que. K.B. 302, followed.]

2. CHEQUES (§ IV—21)—WHO ARE BONA FIDE HOLDERS—MODIFICATION OF CHEQUE.

Where a sum of money is given as a deposit of good faith to bind a transaction (*e.g.*, the transfer of a license) and a cheque is also given to evidence the transaction, but payable to the order of a third person (the collector of provincial revenue), and the transaction falls through and is not completed, the party to whom the cheque was given is the legal holder of the cheque within the meaning of the Bills of Exchange Act, and in order to obtain payment of this cheque the legal holder has the right to demand and the court has the power to grant an order authorizing the modification of the cheque so as to make him the payee thereof.

3. EVIDENCE (§ VI F—544)—ACTION AGAINST BANK ON ACCEPTED CHEQUE—PRIOR ACTION AND JUDGMENT FOR AMENDMENT OF CHEQUE BY SUBSTITUTING ANOTHER PAYEE—EXTRINSIC EVIDENCE AS TO CHEQUE.

The judgment in a prior action authorizing the amendment of a cheque by the curator in insolvency of the drawer's estate so as to make it payable to the person found to be the legal holder instead of to a government official who made no claim thereto and declined to endorse same because of his official position, may be regarded in an action against the bank to recover the amount of the cheque, as evidence that such new payee is the lawful holder, where no valid objection to payment by the bank is shewn nor had it taken any steps to annul such judgment.

Statement

THIS was an appeal by the plaintiff from the judgment of the Superior Court, Lafontaine, J., rendered at Montreal on June 7th, 1911, dismissing his action to recover the amount of a cheque for $200 drawn on the bank, respondent, by one Raymond, an absentee.

The appeal was allowed.

Edmond Brossard, for the appellant.

Walter S. Johnson (*H. N. Chauvin*, K.C., counsel), for the bank.

R. Taschereau, K.C., for the intervenant, respondent.

The judgment of the Court was delivered by

DeLorimier, J.

DELORIMIER, J. (translated):—Plaintiff prays for the revision of the judgment rendered by the Superior Court at Montreal, Lafontaine, J., on June 7th, 1911, maintaining the plea and the intervention herein and dismissing the plaintiff's action with costs.

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By his action the plaintiff claims from the defendant the amount of a cheque, dated Montreal, November 29, 1909, drawn by Hubert Raymond on the bank defendant, to the order of L. H. Boisseau, and subsequently, under the order of the Superior Court, modified so as to make the cheque payable to the plaintiff's order. The cheque had been accepted by the bank on November 30th, 1909.

The facts giving rise to the present action are substantially as follows: On November 25, 1909, Joseph Brousseau entered into negotiations with Hubert Raymond in view of obtaining the transfer of the license of No. 1437 Notre Dame st. West, Montreal. To bind the bargain Brousseau deposited in the hands of Raymond the sum of $200 and in acknowledgment thereof the latter handed him the following receipt: Received from Mr. Joseph Brousseau the sum of two hundred dollars ($200) deposited in my hands re payment of transfer of his license, Montreal, November 25, 1909, and this receipt bears Hubert Raymond's signature.

Following up this transaction Raymond on November 29, 1909, made out his cheque payable to the order of Mr. L. H. Boisseau, Collector of Provincial Revenue, and handed the cheque to Mr. Brousseau. This cheque evidently formed part of this transaction or proposed transfer of this license to Brousseau, as appears in so many words on the back of the cheque written by Raymond: Re-transfer Lajeunesse to Brousseau.

On November 30, 1909, the bank defendant accepted the cheque on presentation by Brousseau.

Raymond never completed the transaction in question and he absconded leaving the cheque in question in Mr. Brousseau's hands.

In order to recover the amount he had deposited and which was represented by this cheque, the latter only had this cheque payable to the order of L. H. Boisseau. Mr. Brousseau went to see Mr. Boisseau to get him to endorse the cheque and give it back to him, as the proposed transaction could no longer go through.

Mr. Boisseau, though admitting he had no right to the cheque, since it had been made for the purpose of transferring a license which could no longer be effected, declared to Brousseau that he could not endorse the cheque because by so doing in his quality of Collector of Provincial Revenue, the cheque would become the property of the Government, that is to say, he would have to account for it in his returns to the Government.

Whilst these pourparlers were going on, Raymond's creditors instituted proceedings against him, his estate was declared insolvent and the intervenant appointed curator thereto.

It was at this juncture that the plaintiff, to whom Brousseau had handed the cheque in payment of professional services, saw himself compelled to take legal proceedings to render this cheque payable to his order, as representing Brousseau, in the place and stead of Mr. Boisseau, who was unable to do so.

On February 25, 1909, the plaintiff presented to the Superior Court a petition, supported by affidavit, reciting the foregoing facts, praying the Court to authorize the curator to replace on the said cheque the name of L. H. Boisseau by that of Edmond Brossard so as to allow him to cash the cheque.

It is evident that the legitimacy of these allegations and conclusions was not then contested either by Boisseau, who always admitted he had no right to the cheque, nor by the curator who was not entitled to the amount represented by such cheque lying in the bank, since the acceptance of the bank had precluded it from falling into the insolvent estate.

For these reasons, no doubt, not only was there no objection raised to the granting of this petition but the curator himself appeared through his attorneys and produced a consent as follows: "Messrs. Perron & Co. appear for the curator and declare they have no objection if the Court has none."

Under these circumstances Mr. Justice Fortin granted the petition authorizing the curator to modify the cheque as prayed for. The curator complied with this judgment, modified the cheque, making it payable to the plaintiff and endorsing it in such a way as to disclose the authority under which he was acting.

The plaintiff thereupon presented the cheque anew to the bank defendant but payment was refused. The defendant had the cheque protested on March 4, 1910, for default of payment and instituted the present action wherein he recites the foregoing facts and claims from the bank the amount of the cheque accepted by it on November 30, 1909.

The bank appeared and asked an extension of delay within which to plead. This was granted, but instead of producing a plea it served a notice on the curator and inspectors to the Raymond estate, reciting the foregoing facts, averring that it was a creditor of this estate and calling on them to intervene in this suit.

On April 5, 1910, the curator, duly authorized, filed the intervention in this case wherein he denies the claims of the plaintiff and his right to obtain the amount demanded, and, without in any way attacking the judgment of March 1, 1910, concludes purely and simply to the dismissal of the plaintiff's action.

The bank, which had first of all produced a declaration of submission to justice, obtained permission to withdraw the same

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and file a plea. And in its plea it sets up that the plaintiff is not the legal holder of this cheque; that Boisseau never endorsed it; that, as the transaction between Brousseau and Raymond was never completed, the sum, represented by the accepted cheque, became the property of Raymond and his estate; that the plaintiff cannot be paid in preference to the other creditors; that the judgment of March 1, 1910, granting plaintiff's petition, is of no legal value. By its conclusions, however, the bank simply asks for the dismissal of the action; it does not take any conclusions against the judgment of March 1, 1910.

The trial Judge maintained the plea and the intervention and dismissed the plaintiff's action.

We cannot accept the conclusions of the first Court.

The question at issue is as to whether the plaintiff, who represents Mr. Boisseau, is entitled to this cheque, or whether, on the contrary, the Raymond estate is entitled to have the cheque returned to it, on the sole ground that the transaction between Boisseau and Raymond was never completed.

One thing is certain; this case rests on special facts, and this cheque is a special cheque given in part performance of a projected transaction which was never completed.

As appears from the plaintiff's petition and affidavit, the cheque was drawn on the bank defendant on account of the payment of a hotel license transfer from Mr. H. Lajeunesse to Mr. Joseph Brousseau. It is only as a result of complications that the transfer was not effected and that the right to do so became forfeited. From the cheque itself it appears that it was not an ordinary cheque since it was qualified by the words: "Re transfer Lajeunesse to Brousseau." This cheque was made payable to the order of Mr. Brousseau, solely because in his quality of collector of revenue, he was to receive the amount thereof, if the transfer in question was effected.

Brousseau was so interested in protecting himself that on November 30, 1909, he had the cheque accepted by the bank. Boisseau refused to endorse it because the transfer had not been effected, and it was on account of these facts that Brousseau remained the sole possessor and holder of the cheque which represented the deposit made by him in Raymond's hands.

It follows, therefore:—

1. That Brousseau can certainly not be considered as a mere messenger to whom Raymond would have handed the cheque. Brousseau had a special possession of this accepted cheque representing his deposit.

Why should he have gone to the trouble of having the cheque accepted by the bank if he had no interest in it, if he did not want to protect himself? This cheque stood in lieu of his deposit. He did not hold it as a messenger, but, on the contrary,

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for the purpose of effecting the transfer of the Lajeunesse license to his advantage; and if this transfer, for some reason or other, did not go through, then he had this cheque to secure himself. It is evident, therefore, that the cheque was an important part of the transaction and that Brousseau had a right of security and ownership in the cheque.

2. It is improperly concluded that, owing to the fact that the license was never transferred, the amount on deposit in the bank, representing this accepted cheque, thereupon became the property of Raymond and of his estate.

After this cheque had been accepted, the amount in the bank representing such cheque—which had been charged up to Raymond's account—no longer belonged to Raymond but to the legal holder of the cheque. Consequently only the legal holder of the cheque was entitled to claim the amount; neither Raymond nor his estate had any right therein. And the bank itself understood this when it first of all declared its readiness to pay to the legal holder thereof and submitted to justice: Maclaren, on Bills, p. 407.

Had Raymond merely deposited the amount received as a deposit by Brousseau with the bank defendant, without giving in return this special cheque, it is evident that Brousseau would have become a creditor of the estate. But such is not the case. Raymond made out a special cheque, Brousseau became the holder of this cheque which was his only security; and the cheque was accepted for the benefit of the legal holder thereof who might thereafter present it for payment at the counter of the defendant. We have, therefore, only to ascertain whether the plaintiff became the legal holder of this cheque.

Now, as to the merits of the case. The Superior Court, by its judgment of March 1, 1910, recognized that under the circumstances disclosed by the petition and affidavit, the plaintiff was to be considered as standing in the rights of Brousseau and regarded as the legal holder of the cheque; and that consequently this cheque, and the amount standing in the bank which it represented, did not belong to the Raymond estate, and therefore, that it was proper to order the curator to modify this cheque so as to make it payable to the plaintiff's order instead of Boisseau's.

It is well to note that the only person who might have complained of this judgment of March 1, 1910, is Mr. Boisseau, to whose order the cheque had been made payable. Far from so doing, however, Mr. Boisseau appears to have acquiesced throughout to this judgment. He certainly never contested it, and does not contest it to-day.

Taking all the circumstances into consideration we come to the same conclusions as did the Superior Court on March 1,

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1910. This judgment appears to be well founded in law; and, I may add, in equity, for any other judgment would evidently be absolutely unfair to the plaintiff who stands in the rights of Brousseau. The insolvent estate of Raymond is not and never was the owner of this cheque, nor of the sum on deposit in the bank defendant represented by this cheque, and this judgment is in accord with the provisions of articles 875 and 876 C.P. This judgment recognizing the plaintiff as the legal holder of this cheque has never been attacked on any ground and the bank defendant could have no serious ground to refuse payment of the cheque to the plaintiff in compliance with this judgment.

For these reasons we are of opinion to quash the judgment appealed from, to maintain the plaintiff's action and to dismiss the defendant's plea and the curator's intervention with costs.

I refer to the following authorities: C.P. 875, 876; Maclaren on Bills, p. 404 *et seq.* "The bank becomes the principal debtor and engages that it will pay the cheque to the holder on demand or at some later time."

Bills of Exchange Act, sec. 2 (*d*): "Bearer means the person in possession of a bill or note which is payable to bearer."

Ibid. sec. 2 (*g*): "Holder means the payee or endorsee of a bill or note who is in possession of it or the bearer."

Maclaren *ibid.* (ed. 1909), p. 407: "Among the effects of such certifying (acceptance) would appear to be . . . that the drawer has no longer the right to countermand payment of the cheque after its issue."

Canadian Breweries v. *Gariépy*, 16 Que. K.B. 44; *Banque Nationale* v. *City Bank*, 17 L.C.J. 197; *Exchange Bank* v. *Banque du Peuple*, M.L.R., 3 Q.B. 232; *Brunelle* v. *Ostiguy et al.*, 21 Que. K.B. 302; Randolph, on Commercial Paper, vol. 1, pars. 5 and 8, *ibid.*, vol. 2, pars. 588 *et seq.*

Appeal allowed.

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Quebec Court of King's Bench, Archambeault, C.J., Lavergne, Cross, Carroll, and Gervais, JJ. November 30, 1912.

1. DEEDS (§ II A—19)—CONSTRUCTION OF AMBIGUOUS PENAL CLAUSE IN A DEED.

Where a penal clause in a deed of sale is ambiguous, such clause will be interpreted restrictively and against the creditor of the obligation.

2. PENALTIES (§ I—5)—BREACH OF COVENANT IN DEED OF SALE—PARTNERSHIP ASSETS—NOT TO CARRY ON BUSINESS—SINGLE ACT.

Where a deed of sale of a partnership business contains a clause stipulating a penalty in the event of the vendor carrying on business within certain limits to the prejudice of the buyer, the proof of a single act of sale by the vendor for a very small price (*e.g.* $3.63) does not constitute such a carrying on of business by the vendor as would entitle him to the stipulated penalty.

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Statement

THIS was an action to recover a penalty of $1,000 stipulated in a deed of sale of a commercial partnership business. The Superior Court for the district of Sherbrooke, Lynch, J., on May 3rd, 1911, maintained the action. On January 27th, 1912, the Court of Review at Montreal, Guerin and Greenshields, JJ., Bruneau, J., dissenting, reversed this judgment and dismissed the plaintiff's action. The plaintiff thereupon inscribed in appeal.

The appeal was dismissed.

W. A. Handfield, and with him *G. Lamothe*, K.C., as counsel, for the appellant.

F. X. A. Giroux, and with him *E. Fabre Surveyer*, K.C., as counsel, for the respondent.

Archambeault, C.J.

The judgment of the Court was delivered by ARCHAMBEAULT, C.J. (translated):—The appellant herein claims from the respondent the amount of a penalty stipulated in a deed of sale to which I shall refer in a moment.

In 1910 the respondent and one Dépatie carried on business in partnership under the name of "Hill and Dépatie" in the village of St. Armand Station, parish of St. Armand West.

The respondent ran, besides, but alone, another trading establishment at another place of St. Armand West, known as Morse's Line.

On March 17th, 1910, Hill and Dépatie sold to the appellant their St. Armand Station establishment. And the deed of sale contained the following clause:—

> Les vendeurs (Hill & Dépatie) non plus qu'au nom de qui que ce soit, s'engagent à ne jamais tenir aucun commerce de nature à nuire à l'acquéreur, ni dans le village ni dans la paroisse de St. Armand Station, et ce, sous peine d'être obligés de payer à l'acquéreur une amende de $1,000.00. Il y a cependant l'exception pour Monsieur J. M. Hill que de dernier aura le plein droit de continuer le commerce qu'il fait actuellement à Morse's Line, et aussi de délivrer à la Station de St. Armand Ouest les chars de grain et de fleur qui arriveront pour ses clients de Morse's line, et sur ordres pris à sa demeure ou place de commerce.

The appellant contends that the respondent has violated the foregoing clause and incurred the penalty of $1,000 therein stipulated.

The declaration alleges that since the passing of the deed of sale and particularly in January and February, 1911, the respondent carried on business, which interfered with his, appellant's, interests, within the limits of the parish by selling to persons of St. Armand Station corn, flour, etc. The declaration mentions specially that in February, 1911, the respondent caused to be announced from the St. Armand church door that he had a carload of corn at St. Armand Station, and that there-

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after several of his, the appellant's, clients telephoned him to inform him that they were going to the station to buy their merchandise from the respondent at a lower price. The declaration finally alleges that as a result of the foregoing facts the appellant suffered damages in the sum of one thousand dollars, and concludes praying for the condemnation of the respondent in this amount.

The respondent's plea is a denial of the facts alleged in the declaration and asserts that the respondent never did anything to incur the penalty claimed by the appellant.

The trial Judge found in favour of the appellants. The respondent appealed from this judgment to the Court of Review, which, by a majority of two to one, reversed the judgment of the first Court on the ground that the action should have been brought against the firm of "Hill & Dépatie" and not against Hill alone.

One of the majority Judges, Mr. Justice Greenshields, adds that, in his opinion, the respondent had not violated his engagement not to carry on any business which might interfere with the interests of the appellant, and that the evidence does not establish that the respondent manifested any intention of carrying on business at St. Armand Station.

I shall not discuss the question as to whether the action could be brought against Hill alone, or whether it should have been directed against the firm of "Hill & Dépatie." In my opinion, it is unnecessary to decide this, as the appellant has not proven the allegations of his declaration.

The evidence discloses the following facts: On February 19, 1911, a Sunday morning, the respondent, who was at his home, called by 'phone one Georges Poirier, farmer, of the village of St. Armand Station, and asked him to announce at the church door that he had a car of Indian corn at the station which he would open the next day and that the price thereof was $1.10 per hundred pounds. It might be well to remark that St. Armand Station, the village of St. Armand Station, and Morse's Line, are all situate within the parish of St. Armand West. We have seen that the respondent had reserved the right to deliver at St. Armand Station the flour and grain cars which might arrive for his Morse's Line clients, on orders taken at his place of business. By causing to be announced from the St. Armand West church door that he had a car of corn at the station which he would deliver at $1.10 per 100 pounds, he certainly did not go beyond his rights.

I cannot find any evidence here that the respondent manifested the intention to carry on business at St. Armand station. As Morse's Line is situate in the parish of St. Armand West we cannot conclude from the fact of the announcement in ques-

tion that the respondent wished to offer his corn for sale to the whole public. He was entitled to let his Morse's Line clients know that he had a carload of corn at the station deliverable at a price of $1.10 per 100 pounds. This announcement alone is certainly not sufficient to place the respondent in default.

Very positive evidence of the respondent carrying on business of a nature to interfere with the appellant's interests would be required before we could condemn him to the onerous penalty stipulated in the contract. Now, what happened subsequently to the announcement of February 19th? One Joseph Leduc, of St. Armand West parish, states that, after this announcement, he went and brought 3 bags of corn, 330 pounds, at $1.10 per 100 pounds, for $3.63. One Chevalier also went to buy three or four hundred pounds, but there was no more left.

The respondent swears that he never delivered at the station anything but flour and corn. He adds that in January and February, 1911, he delivered at the station the flour and the corn for which he held orders and that the remainder of the carload was brought to his place at Morse's Line. He would give the orders received to his clerk and this clerk, who knew his clients, made delivery at the station of the grain or flour ordered.

No other sale than that to Leduc for $3.63 is proven in this case. It is established that the respondent has had his business place at Morse's Line for about thirty years, and that he has always been in the habit of delivering flour and corn in this way at St. Armand station after announcement at the church door.

Certain farmers preferred to go to the station for their grain, in order to save the carriage charge of ten cents per hundred pounds by carrying it themselves. The respondent's place of business at Morse's Line is about four miles from the station and the respondent preferred to deliver grain at the station for ten cents less per hundred pounds in order to save the cost of carriage to Morse's Line.

Can it be said under the circumstances that the respondent incurred the penalty of $1,000 stipulated in the deed of sale of March 17th, 1910? I do not think so. This penalty, be it noticed, is stipulated only in case the vendors should carry on business so as to prejudicially affect that of the respondent.

Now the respondent did not carry on business. The sale to Leduc cannot constitute a business. Nor did he prejudicially affect the business of the appellant. A sale of $3.63 cannot have affected the appellant.

Finally, it does not clearly appear from the clause in question that the respondent should not deliver flour and grain at the station to persons other than his Morse's Line clients.

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This clause begins by stipulating that the vendors undertake never to carry on any business which might prejudicially affect that of the appellant, neither in the village nor in the parish of St. Armand West; and then goes on to say that, nevertheless, the respondent may continue carrying on the business he is actually engaged in at Morse's Line, and that he may also deliver at the station cars of grain and flour which may arrive for his Morse's Line clients, and on orders by him taken at his home or place of business.

If the exception stipulated in favour of the respondent should only apply to his Morse's Line clients, why add that the orders of his clients should be taken at his home or place of business? Since he had the right to continue his Morse's Line business, he must have had the right to deliver where he pleased goods sold to his clients.

It seems to me that the respondent can reasonably interpret the exception in his favour as meaning that he could deliver grain and flour at the station both to his Morse's Line clients and also to other clients, provided, as to the latter, their orders had been taken at Morse's Line. Penal clauses must be strictly construed, and if they are ambiguous, if they are not clear, then the creditor has only himself to blame for such ambiguity.

For these reasons, I would confirm the judgment of the Court of Review.

Lavergne, J. (dissenting)

LAVERGNE, J. (dissenting) (translated), after reviewing the pleadings, said:—

The Court of Review reversed the judgment of the trial Judge on the ground that the action should have been brought against the firm of Hill & Dépatie, instead of against Hill personally. This ground was not pleaded, and in virtue of article 110 C.P. it should never have been taken into consideration. The Court was not called upon to decide any question other than that submitted, to wit: Did the appellant violate the clauses of his contract and thereby incur the stipulated penalty?

I do not think that the question as to whether the action should have been directed against Hill & Dépatie, instead of against Hill alone, is of any great importance, although very interesting from a legal point of view, and in the present case, I do not even think the question arises.

The penal clause in question is stipulated against Hill & Dépatie as partners, and also against each one of them personally. . . . It is evident that the firm of Hill & Dépatie was dissolved after their store was sold to the appellant. Hill, who carried on a separate business at Morse's Line continued this business at the same place; but the record does not disclose what became of Dépatie.

Hill alone violated the contract. He alone incurred the penalty. It is evident that had Dépatie been sued at the same

time as Hill, as being one of the firm of Hill & Dépatie, he would have called in his ex-partner to defend him against this action.

I am of opinion that the action could not have been so instituted; at any rate, if it had been, the result would have been an unnecessary circuit of actions; the violation charged against Hill was committed by Hill alone, and Dépatie could not be held therefor.

This new ground raised in Review is the result of an afterthought and of an attempt to try and get rid of the action against Hill who had been unable to answer it successfully.

It is easily understood why this penalty should be imposed not only on the partnership, but also on the partners personally, for otherwise this penal clause would be useless and even ridiculous inasmuch as there would have been nothing to prevent the partners from dissolving their partnership and opening up, each one of them, a store at St. Armand Station and compete unfairly against the appellant. The penal clause would be absolutely ineffective.

Mr. Justice Bruneau was of the opinion that the action could be taken against one of the partners, the guilty partner, and that in all such cases, the plaintiff had the right to sue one or the other partner and was not obliged to sue the firm.

I should probably concur but do not think it necessary to decide on this point. I consider that the penal clause in the present case applies separately to the one and the other of the partners where the offence has been committed by one of them. If fault there is, the respondent Hill is certainly liable. In my opinion only the question of fact need be examined.

As to the facts, I agree entirely with the learned trial Judge. The defendant Hill incurred the penalty stipulated, he carried on a business prejudicial to that of the appellant. He was not content to deliver at St. Armand Station carloads of merchandise sold in advance, but actually sold two or three carloads in the winter and spring of 1910.

This was certainly carrying on a business prejudicially to that of the appellant, within the terms of the penal clause in question. We are not called upon to fix the amount of the damages. The penal clause was stipulated precisely to do away with any discussion on the subject. The plaintiff has established his demand to the satisfaction of the trial Judge and of one of the Judges in Review, and I agree entirely with these two Judges.

I would allow the appeal and restore the judgment of the trial Judge.

Appeal dismissed.

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THE KING v. KENDALL.

Exchequer Court of Canada, Audette, J. June 28, 1912.

1. DAMAGES (§ III L 12—247)—EMINENT DOMAIN—MARKET VALUE.

Compensation for the expropriation of lands for the purposes of a public work is to be measured by the market value of the lands as a whole at the time of expropriation, in respect of the best uses to which it can be put, taking into consideration any prospective capabilities and any inherent value it may have, and the damage to the remainder of the property held in unity therewith.

2. DAMAGES (§ III L 1—235)—EMINENT DOMAIN—PERCENTAGE FOR COMPULSORY TAKING.

In addition to the damage for expropriation of lands by the Crown for harbour improvements, ten per cent. may be added by the Exchequer Court (Can.) for the compulsory taking.

Statement

THIS was an information filed by the Attorney-General of Canada for the expropriation of certain lands required for harbour improvements at Sydney, N.S., and was heard at Sydney.

Argument

J. W. Maddin, for the plaintiff, contended that the defendant was seeking compensation for the sand and gravel on a purely speculative basis, and one not supported by the facts. Not a pound of material had been taken out below the level of the water up to the present time; and the demand for it in the future is problematical in view of the difficulty of working the bar as compared with other pits in the neighbourhood more easily got at. The case of *Burton* v. *The Queen*, 1 Can. Ex. R. 87, is distinguishable from this case, because there the gravel-pit was the only one in the vicinity of Winnipeg, and that fact gave it a distinctive value.

G. A. R. Rowlings, for the defendant, submitted that under *Burton* v. *The Queen*, 1 Can. Ex. R. 87, and *Vezina* v. *The Queen*, 2 Can. Ex. R. 11, the defendant was entitled to full compensation for the property taken on the basis of a prospective use which would give the lands their highest value. The evidence shews that the whole of the sand and gravel can be taken out of the bar, and this prospective element of value is an extremely large one. The authorities shew that the prospective capabilities of property taken in expropriation proceedings are part of its market value. He cited *Macarthur* v. *The King*, 8 Can. Ex. R. 245; *Buccleuch* v. *Metropolitan Board of Works*, L.R. 5 H.L. 418; *Re Wadham and the North Eastern Railway Co.*, 14 Q.B.D. 747.

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AUDETTE, J.:—This is an information exhibited by the Attorney-General of Canada, whereby it appears, *inter alia*, that the Government of Canada has expropriated, under the provisions of the Expropriation Act, R.S. 1906, ch. 143, a certain lot or strip of land, situate, lying and being on the northern side of

the South Bar, Sydney Harbour, in the county of Cape Breton, N.S., for the purposes of a public work of Canada, to wit: the harbour protection works at South Bar, Sydney Harbour, N.S. The area expropriated is (22½) twenty-two and one-half acres, for which a plan and description have been deposited in the office of the registrar of deeds for the county of Cape Breton, on the 5th day of September, A.D. 1911. The Crown by its information tenders the sum of $4,000. The defendant, by his plea, avers that the amount tendered is grossly insufficient and inadequate, and claims the sum of $300,000 for the lands taken and for all damages resulting from the said expropriation. It is now well established and settled that the Crown, by its prerogative and by law, is entitled to the foreshore on all of our Canadian coasts, unless and except so far as any subject can establish title to it by Crown grant before Confederation. The claim of the defendant's title to the sand and gravel bar in question in this case runs as far back as the 14th June, 1788, under a Crown lease or grant of George III. This grant is confirmed by an Act of the Legislature of Nova Scotia, passed in the year 1850, ch. 41, whereby lands held under Crown leases are declared to be held in fee simple. As will, therefore, be seen, the Crown grant dates before Confederation, and the defendant's *auteurs* were in possession for over a century. The defendant's title was admitted by the Crown's counsel at the opening of the trial. The defendant purchased, on the 2nd July, 1888, one hundred and twenty-five acres for the sum of $240. The twenty-two and one-half acres expropriated herein are part and parcel of these one hundred and twenty-five acres which he then acquired for the sum of $240.

On behalf of the defendant were examined the following witnesses, viz.: George J. Ross, Arthur S. Kendall, Duncan M. Campbell, Harry J. McCann, Clarence A. Lowe, Alfred Bouthillier, George E. Bool, William Rutledge, Hector F. McDougall, Thomas J. Brown and Thomas Cozzolino.

The first witness, G. J. Ross, of Sydney, a contractor in the cement business for one year, says he knows the property in question for 30 years, and that the bar contains at least 12 to 14 feet of sand and gravel through the 22½ acres taken, and values the material *in situ* at forty cents a yard. There are other places in Cape Breton where such material can be had at some distance from Sydney; the bar is only four miles from Sydney, and the material is getting scarce while the demand is increasing. He contends that with modern appliances the material could be procured at the bar for ten cents a yard. Gravel costs in Sydney as much as $1.05 to $1.10 a ton, including freight. The witness prepared the plan filed as exhibit "G," and he saw the boring of the holes indicated on the plan. He purchased some of that

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gravel at five cents a barrel from the owners, costing him twenty-five cents to transport it to Sydney. At twelve feet deep he estimates the total quantity at 530,000 cubic yards, with 25,000 to 30,000 tons of large stones on some part which would have to be crushed. He used the material for plastering and concrete and says it is the best they can get; contends that every storm brings in sand and gravel, and looks upon it as practically inexhaustible. He values at from $400 to $500 the yearly revenue which could be derived from the kelp and seaweed. His company was organized in July last and they procured gravel from the Grand Narrows, where the gravel is loaded on the cars from the beach. He says he knows that last year, when things were not as prosperous as this year, the defendant's property could not be bought for $25,000 to $30,000, and adds he would quickly give $25,000 for the property—it is worth a good deal more. He admits the bar is subject to attacks by gales from the ocean, and that it has been broken through at times; but that would not alter his figures. He admits that there are a number of places where sand and gravel can be had in Cape Breton, but not so near Sydney as the South Bar.

Arthur S. Kendall, the defendant, testifies that in 1901-02 he took from 2,000 to 3,000 tons of gravel from the bar, for which he received five cents a barrel, which represents a little less than thirty-three cents a ton. In 1900 there was as much taken away that was not paid for. He says he had an idea to equip for working and using this sand and gravel, and that it would be a source of very good returns to him. Sand and gravel are worth about ninety-five cents a ton in Sydney. He says that the first two borings went down to 17 feet, but if measurement had been taken from the crest, it would have shewn 22 feet. He contends he shipped in fifty-ton scows and made a profit of 40 cents a ton, the cost being about 15 to 17 cents a ton to place it on the scow, and as much more for the tug, with 10 to 15 cents to put it ashore, together with 25 to 30 cents to distribute it in the city. He says that kelp is not much of a manure, and that used alone, without phosphate, it would hurt the land. There was not much last year, but some years he had seen as much as 20,000 tons. If he were in a position to use it, it would be worth from $400 to $500 a year. He says that his property was of very little use before the steel works came here, and that it is becoming more and more valuable. He acknowledges having received the $4,000 tendered by the information, which is to be applied *pro tanto*, he says, on the amount he would recover. There are other places where sand and gravel can be had, but it is far away and not always of easy access.

Duncan M. Campbell, the city engineer at Sydney, under whom concrete works have been carried on, has seen the property

in question during May last, when test pits or holes were bored in his presence, and contends that there is sand and gravel there not less than 12 to 14 feet deep, but the largest proportion is sand—there is sand, gravel and stones. He values the material at fifty cents a ton, and says that is what they pay. Estimates the quantity for every foot in depth at 35,350 cubic yards, and the total quantity, at 15 feet deep, at 544,500 cubic yards. The contractors working for the city have used material coming from South Bar in concrete and sewer work, and it was found good and satisfactory. From the witness' printed annual report of the city of Sydney, for the year 1911, exhibited in Court and noted in the evidence, it appears at page 97, that gravel was paid for by the city at the rate of 50 cents per ton, freight 38 cents per ton, and truckage at 36 cents per ton. The witness said he would not care to put a price upon the bar, and gave as his opinion that if the bar were wiped out, carried away, by a storm, it would be put back by nature.

Harry J. McCann, the purchasing agent of the Dominion Iron & Steel Company, says his company uses a deal of sand and gravel. In 1911 they used 35,000 tons at a cost of $29,770.15; of this, 20,000 tons were procured from the Grand Narrows and 15,000 tons from Mira. He says the bar is four to five miles from Sydney, and that he would work it by suction in the good months. Lingan bar was partly washed out two years ago; a hole was washed through thirty feet wide, but now it does not shew, it has all been filled up and is quite as good as before. There is in Sydney a good opening for one man dealing in gravel and sand, as there would be about 100,000 tons used per year.

Clarence A. Lowe, the Intercolonial Railway agent at Sydney, under whose supervision come all the shipments to Sydney, produced as exhibits "H" and "I" two statements shewing the shipments for 1910 and 1911. From Iona the charge is 45 cents a net ton, or 2½ cents per 100 lbs.

Alfred Bouthillier, of Sydney, who has an experience of 15 years in boring, was, last week, in charge with his partner Boyd, of the borings made at South Bar. He heard the statements as to depth made by the previous witnesses and says they are correct. He is satisfied there was sand and gravel as far down as they went.

George E. Bool, manager for building-contractor, says they used sand and gravel in their works last year to the extent of 600 cars, at 20 tons to the car. He has seen South Bar—he went over it once the day before his examination and all he saw on that beach is good. He says he has used very little of the sand and gravel coming from the bar; but has used some for plaster and found it very good. He values the bar at thirty cents a ton, as a commercial commodity. The material is getting scarcer,

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the beaches are getting exhausted. He has, however, no idea what it would cost at Sydney; he would have to look into the matter before expressing an opinion.

William Rutledge, in the course of an experience of ten years, has handled a large quantity of sand and gravel and knows the property at South Bar. Some years ago had some holes bored there about seven feet deep, and found all sand. He did not notice any gravel in the particular locality where the test pits were made, but knows no better sand in around Sydney. The sand and gravel on the bar is good for masonry and cement purposes. He contracts for the Steel and Coal Companies and shipped sand and gravel from Mira and Lingan. He reckons the requirements of the Coal Company is in the vicinity of 5,000 tons a year, and has no idea whether their requirements will increase or not. There is loose stone on the bar which could be used for cement, and the sand and gravel represents a value of 30 to 35 cents a ton on the ground to the owner. The cost of transportation by water from the bar would be between 28 to 30 cents. With respect to the future market, he contends the banks are getting exhausted, and that would have the effect of increasing the cost of the sand. He says further that continuous dredging would affect the bar; but that, however, it fills as fast as any material is taken away. The bar was broken a couple of years ago and it has all made up.

Hector F. McDougall, contractor, chiefly engaged in shipping building material, sand and gravel, to Sydney, knows South Bar, has gone over it, and says there would be no difficulty in handling two or three feet of the sand and gravel there. Taking an average of three feet deep—a quantity he thinks could be easily worked—he values it at 25 to 30 cents a ton *in situ*, or in other words, 4,840 cubic yards in an acre, at a depth of three feet. He estimates there would be 7,260 tons in an acre, which at 25 cents, he values at $39,930; and at 30 cents, at $47,916. The market price of sand now is 65 cents, and gravel 50 to 55 cents, both delivered on the cars. To work the bar below three feet, mechanical appliances would have to be resorted to, and he believes the nature of the bar would justify the expenditure, as the gravel goes down deeper than it does on the Bras d'or lakes, where clay is struck after taking the surface gravel washed upon it by the waves. He thinks by building small piers in batches, he could protect the bar against being washed away. There is sand and gravel at North Sydney, but there is no market there. There would be the transportation that would make it expensive, and the distributing point is Sydney.

Thomas Brown, the general superintendent of the Nova Scotia Steel Company, says his company use from 3,000 to 5,000 tons of sand and gravel a year. The quantity of sand and gravel has been more or less depleted on the beaches; but he entertains no

fear of disappearance for a number of years, and is under the impression the demand will increase. He offered $10,000 to the defendant for the whole of his property, the 125 acres, and the defendant refused it. He thought the site would appeal to the company as a good site for a pier.

Thomas Cozzolino says he was on the South Bar recently and that the breaches indicated on the plan are filled, but there is water in the centre; he could walk around. He is a contractor and says he could make between $10,000 to $12,000 a year with the bar.

On behalf of the plaintiff, the following witnesses were examiner, viz., Donald M. Curry, John Burke, Thomas C. Harold, Charles M. O'Dell, and Ronald Gillis.

Donald M. Curry, the municipal clerk, says the defendant's property has been assessed during the last six or seven years at $650.

John Burke, the county assessor for 1905 to 1912, says that the assessment on the defendant's property was made when he came in office, and he did not disturb it. It was assessed at the same value as the other farms in the neighbourhood. It was not assessed as sand and gravel property.

Thomas C. Harold speaks of the manner in which lands taken for the Steel Works were assessed, and is not cross-examined.

Charles M. O'Dell is a civil engineer who has been with the Dominion Coal Company, in the capacity of resident engineer, since 1893, with an interruption of three years, and has been engaged in the purchase of land for the company during the last ten years. He has made, at the request of the company, a plan of the property in question (which is filed as exhibit No. 6). The survey for the plan was made in 1910. He has examined the bar for the Steel Company and he did not consider it worth exploiting on account of the difficulty of loading by lighters and reloading at the wharf and then on the cars. He thought this difficulty overcame any advantage it had, and found that they could get sand and gravel elsewhere in by cars much more conveniently. He valued the lands in question as a sand and gravel proposition at $3,000 to $4,000. He has experience in the purchase of land, and bought within the last four years about 2,000 acres of land for the company. He bought a sand proposition—the McDonald property, within four miles of Louisburg, 36 miles from Sydney—at $100 an acre; however, it was not bought as such, but purely as part of the right-of-way for the railway. He made a contract to load on the cars at thirty cents, and then raised that to thirty-five cents. Did not make any estimate of the quantity of sand and gravel at South Bar. Two breaches are indicated on the plan, shewing where the bar was broken by a storm; he does not know whether it has since filled in—would be surprised if it did. He is president of the Silicate Brick Co. at

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North Sydney, also referred to by witness McDougall. They have there seven acres of sand above high water and 10 below. This is nearly directly across the harbour from the property under discussion.

Ronald Gillis, a contractor for over forty years, has used a quantity of sand from the South Bar for plastering. It is very fine, but very good. He has not used it for concrete to any extent, and everything he saw of it was too fine for concrete; but it would do well for brickwork.

This concluded the evidence.

The Court is of opinion that the property in question must be assessed at its market value in respect of the best uses to which it can be put by the owner, taking into consideration any prospective capabilities and any inherent value it may have. One must discard the idea of arriving at its value by measuring every yard of sand and gravel on the bar. What we are seeking in this case is the value in the market of the 22½ acres expropriated from the defendant, taking in consideration all that has just been mentioned. This property, comprising 125 acres belonging to the defendant, changed hands in 1878 and was bought for $200. Ten years after, on the 2nd July, 1888, the present defendant bought it for $240. Now, inasmuch as it had a price as a whole in 1878 and again in 1888, taking into consideration its prospective capabilities, it should also have a market value as a whole at the date of the expropriation, without one being obliged, in arriving at such value, to go into abstract calculations with respect to the quantity of material *in situ*. To pursue such a course would lead one to a fanciful valuation, if, indeed, it would not appear on its face as preposterous and absurd. In endeavouring to estimate the market value of this property on such a basis, one would be confronted with many contingencies. For instance, there is always that *alea*, more or less uncertain under the evidence, but it exists, of having the whole bar either wiped out or partly washed away by a gale or storm from the ocean. Then the material taken from the bar is sold like all other public commodities, under a keen competition, and much more so in the present instance, as there are quantities of sand and gravel on the Bras d'Or lakes, which, perhaps, do not lie so close to Sydney, but which can be exploited much easier. Mr. O'Dell, a witness of great experience, who examined the property for his company, did not, without taking any price into consideration, recommend the purchase of it, because of the difficulties of working it. The only way to work it is by water. Horses could hardly draw a reasonable load on the beach itself. Then why should an amount, arrived at by measuring every yard in the bar, be paid at one time? Admitting it could be sold, it would take a number of years to sell it, with heavy expenditure for getting it out and

with profits coming in gradually and be very small amounts at a time. Then if it is to be worked by water with perfected appliances, if the undertaking is not properly managed—and that depends on the industry and capacity of a manager most of the time—the undertaking might go into insolvency instead of appearing so profitable, and would have to be abandoned. Furthermore, if it is to be worked by water, there is also the contingency of the elements to be reckoned with. Indeed, while the dredge, scows and tugs would be lying at the bar, a storm or gale from the ocean might wreck them all. Then there is the outlay of a capital which has to be taken into consideration in promoting such an undertaking. The continuous working of the bar or excavating from it would also affect it, and made it more liable to be wiped out and washed away by the storm. It is said it can be worked down from 12 to 14 feet—some even mentioned 30 feet—but there is no evidence that sand and gravel banks were ever worked in that manner. It may also happen that the owner would never care, in view of the difficulties in working it, to engage capital in such a venturous undertaking as buying an expensive plant. The present owner worked it during 1901 and 1902 with scows and tug. If it were so profitable, why did he not do so for any length of time; and why did he abandon it? It appears from the evidence there are sand and gravel banks on the Bras d'Or lakes, and possibly new ones may be discovered and exploited in competition with the South Bar.

This Court is of opinion that this theory of measurement, while it must be taken into consideration to some extent in arriving at its valuation, is not to be accepted blindly, and as the controlling element to be considered in arriving at a fair compensation. What we are seeking here is the market value of the 22½ acres as a whole.

The Supreme Court of Massachusetts, in the case of *Manning* v. *Lowell*, 173 Mass. 103, puts the case very clearly, viz.:—

> All of the evidence relating to the value of the sand as merchandise might have been excluded in the discretion of the presiding justice, as the question in the case was the market value of the land, and not the value of sand: *Providence & Worcester Railroad* v. *Worcester*, 155 Mass. 35. As was said in *Moulton* v. *Newburyport Water Co.*, 137 Mass. 163, 167, the value for special and possible purposes is not the test, "but the fair market value of the land in view of all the purposes to which it was naturally adapted."

In *Moulton* v. *Newburyport Water Co.*, 137 Mass. 163, also decided by the Supreme Court of Massachusetts, will be found the following:—

> The damages must be measured by the market value of the land at the time it was taken. . . . The petitioners were not entitled to swell the damages beyond the actual fair market value of the land at the time, by any consideration of the chance or possibility that, in the

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future, authority might be acquired, by legislation or purchase, to carry the water in pipes to neighbouring towns. Such chance or probability must needs enter to some extent into the market value itself; and, so far as the market value might be enhanced thereby, the petitioners were entitled to the full benefit of it. If there were different customers who were ready to give more for the land on account of this chance, or if there were any other circumstances affecting the price which it would bring upon a fair sale in the market, these elements would necessarily be considered by the jury, or by a witness, in forming an opinion of the market value. Nevertheless, the value for these special and possible purposes is not the test, but the fair market value of the land in view of all the purposes to which it was naturally adapted: *Cobb* v. *Boston*, 112 Mass. 181; *Lawrence* v. *Boston*, 119 Mass. 126; *Drury* v. *Midland Railroad*, 127 Mass. 571, 581.

Defendant's counsel cites the case of *Burton* v. *The Queen*, 1 Can. Ex. R. 87, lays great stress upon it, and says that under that case he is entitled to recover all he is asking. But this case must be distinguished from the present one on two grounds: first, the Bird's Hill ballast pit there dealt with was situated but a few miles from Winnipeg, a very large and populous centre. It contained only a limited quantity of gravel, and with the exception of the pit at Little Stoney Mountain, was the only gravel pit known and available in the neighbourhood; secondly, and principally, because in the *Burton* case, the owner's land was not expropriated; but the Government took a certain quantity of gravel, which had to be paid for on the basis of its market value. These facts sufficiently distinguish the *Burton* case from the present one to make it inapplicable.

The principle of valuation being now clearly established, there remains the question, what is the market value of the 22½ acres expropriated herein, taking into consideration the elements above mentioned with all of its prospective capabilities—the value of the seaweed, kelp, and the damage to the balance of the 100 acres held in unity therewith by the defendant, as indeed the balance of the property is materially affected by the taking away of the water front? Witness Brown said he offered $10,000 to the defendant for the 125 acres, which price was refused by him. It appeared to him (Brown) to be a good site for any pier the company might desire to build. Under all the circumstances of the case, the Court is of the opinion that the sum of ten thousand dollars is a fair and liberal compensation to the defendant for the 22½ acres taken, and all damages whatsoever resulting from the said expropriation, including the kelp and the damage to the balance of the property held in unity therewith; to which should be added ten per cent. for compulsory taking, making in all the sum of eleven thousand dollars as full compensation to the defendant.

The Court has some hesitation on the question of costs. In the case of *McLeod* v. *The Queen*, 2 Ex. C.R. 106, it was held

that where the tender was not unreasonable and the claim very extravagant, the claimant was not entitled to costs, although the amount awarded exceeded somewhat the tender. The amount tendered by the Crown in the present case is not unreasonable—it is only found by the Court to be inadequate. The defendant by his plea first claimed the sum of $60,000 and then at the trial, on leave, amended and claimed the extravagant sum of $300,000 for a piece of land lying almost idle for a number of years, for which he paid $240 in 1888, covering an additional area of a little over 100 acres. The theory of valuation pursued at the trial and the finding in the *Burton* case [*Burton* v. *The Queen*, 1 Can. Ex. R. 87] must have upset the defendant's base of vision to lead him to ask for such an extravagant amount as $300,000. Should the reckless suitor be punished? Taking in consideration that this is an unusual case, and while the onus was on the defendant to prove the real market value of the land as a whole, that he failed to do so, but adduced evidence which had to be considered in arriving at a conclusion, and further that the property was taken against his will—by compulsory taking—this Court is of opinion to allow costs.

Therefore, there will be judgment as follows, viz.:—

1st. The lands taken herein are declared vested in the Crown from the date of the expropriation.

2nd. The full compensation herein is fixed at the total sum of eleven thousand dollars, with interest. It appears from the evidence the defendant has already received the sum of four thousand dollars in satisfaction *pro tanto* of the compensation; he is now entitled to recover from the plaintiff the sum of seven thousand dollars with interest thereon from the 5th day of September, A.D. 1911, to the date hereof, and on $4,000 from the said 5th day of September, A.D. 1911, to the date of the payment of the said sum (which date may be established by affidavit hereafter), the whole in full satisfaction for the lands taken and the damages resulting from the expropriation, upon giving a good and sufficient title to the Crown, including a release of dower rights in the property, if any, and a release of the mortgage of $5,000 mentioned in the information herein. On the defendant failing to give the release of the said mortgage, the moneys will be paid to the mortgagee in satisfaction of the said mortgage and interest, and the defendant will then be entitled to be paid the balance, if any, after satisfying the said mortgage and interest.

3rd. There will be costs to the defendant, which are hereby fixed at the sum of two hundred dollars in all, including disbursements.

Judgment for plaintiff.

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SAVAGE v. SHAW.

British Columbia Supreme Court. Trial before Gregory, J. September 30, 1912.

1. ASSIGNMENTS FOR CREDITORS (§ VIII A—74)—PRIORITIES — CREDIT OF DIVIDEND PRIOR TO COMPANY'S INSOLVENCY.

A shareholder in a company incorporated under the B.C. Companies Act, R.S.B.C. 1911, ch. 39, who leaves a portion of his dividend at his credit in the company's books is not debarred from proving his claim thereto in competition with other creditors upon the company long afterwards making an assignment for the benefit of creditors under the Creditors' Trust Deeds Act, R.S.B.C. 1911, ch. 13, where no winding-up proceedings have been taken.

Statement

TRIAL of an action by a shareholder in a company to establish his claim as a creditor of the company upon its assignment to a trustee for the benefit of creditors, in respect of part of a dividend declared many years before which, with his consent, had been placed at his credit instead of being paid out in cash to him.

Plaintiff was a shareholder in the Red Fir Lumber Company, Limited, which some years before action brought declared a dividend of some $5,000 in respect of his shares. All the shareholders, except five, took their dividends in cash. Savage took $1,250 on account of his dividend, and allowed the balance to remain to his credit with the company. Subsequently he purchased some lumber from the company, and this was allowed to go against his credit as part payment. In 1910 he ceased to be a shareholder, and the balance owing to him at that time was something over $2,000. In 1911 he pressed the company for payment, and was given a promissory note. The company later assigned for the benefit of their creditors, under the Creditors' Trust Deeds Act. The assignee admitted the facts above set out, but submitted that section 182 (*g*) of the Companies Act applied, which provides that no member of a company being wound up shall be entitled to payment of a dividend in competition with the claim of an ordinary creditor.

Harold B. Robertson, for plaintiff.

J. H. Lawson, for defendant.

Gregory, J.

GREGORY, J.:—This case rests entirely on section 182 of the Companies Act. Without this Act, creditors are entitled to the benefit of their diligence. The section does not seem to me to apply to the present case, as the company is not being wound up, and the section in terms applies only to a company in such position. It begins: "In the event of the company being wound up," etc. In the circumstances of this case, until the Red Fir Company is brought under the provisions governing companies being wound up, the provisions of the Assignment for the Benefit of Creditors Act must govern. On the question submitted, the plaintiff is entitled to judgment, with costs, which are to be paid out of the estate, as the assignee was quite justified in obtaining the opinion of the Court before recognizing the claim.

Judgment for plaintiff.

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Exchequer Court of Canada, Audette, J. June 10, 1912.

1. CROWN (§ II—25)—LIABILITY—NEGLIGENCE ON GOVERNMENT RAILWAY.

To render the Crown liable upon a petition of right for acts of negligence of servants of the Crown in the operation of a Government railway within the provisions of the Exchequer Court Act, R.S.C. 1906, ch. 140, sec. 20 (*f*) (amendment of 1910), such negligent acts must be the proximate, determining and decisive cause of the injury.

2. WITNESSES (§ IV—62)—CREDIBILITY—AFFIRMATIVE AND NEGATIVE TESTIMONY.

A witness who testifies to an affirmative is ordinarily to be credited in preference to one who testifies to a negative.

[*Lefeunteum* v. *Beaudoin*, 28 Can. S.C.R. 89, applied.]

Statement

PETITION of right for damages alleged to have arisen out of the negligence of the Crown servants on the Intercolonial Railway of Canada, heard at St. John, N.B.

Argument

L. A. Currey, K.C., and *E. T. C. Knowles*, for the suppliant, referred to *Ryan* v. *The King*, 11 Can. Ex. R. 267; *Robson* v. *Northeastern Ry. Co.*, L.R. 2 Q.B.D. 5; *Keith* v. *Ottawa & New York Ry. Co.*, 2 Can. Ry. Cas. 26.

E. H. McAlpine, K.C., for the Crown, contended that the proximate cause of the accident was the negligent act of the suppliant in placing herself on the step of the car from which she was thrown by the motion of the train. Had she not been there she would not have been injured.

Audette, J.

AUDETTE, J.:—This is a petition of right brought by the suppliant to recover the sum of $10,000 for bodily injury, alleged to have been sustained by her through the negligence of the officers and servants of the Crown, by being violently thrown from the steps of the platform of a car, while travelling on a train of the Intercolonial Railway, a public work of Canada. The Crown, by its pleas, denies the facts as alleged in the said petition of right and says, *inter alia*, that if the suppliant suffered any bodily injuries, they were caused by her negligent and improper conduct.

The suppliant, who is at present a widow of 61 years of age, acting on a "reading" notice (as distinguished from a "displaying" notice as mentioned by witness Jordan) which appeared in the local papers, to the effect that on Saturdays, suburban trains leaving St. John at 1.15 would stop at Fernhill Cemetery, and that returning trains would also stop at the crossing, proposed to a Miss Mabel Babington, then 15 years of age, to take her to Fernhill Cemetery. Her invitation being accepted, they both started, on the 13th August, 1910, and went to the union station, where Miss Babington, applying to the ticket office, asked the agent for two tickets to Fernhill Cemetery, and having paid for the same, was given two tickets which, some time after the

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accident, were discovered by them to read from St. John to Coldbrook. Fernhill Cemetery is a mile and a half, and Coldbrook three miles, from St. John. The Intercolonial Railway has not and does not issue tickets to Fernhill Cemetery. The ticket agent, F. E. Hannington, says there is no station at Fernhill Cemetery, it is only a crossing and the suburban trains stop there only on Saturdays for the convenience of and to oblige passengers. He further contends that when a purchaser asks for a ticket to Fernhill Cemetery, he gives him a ticket to Coldbrook, telling him to ask the conductor to stop at Cemetery Crossing. On that point the suppliant says that the person selling the tickets at the station made no remarks, while Miss Babington says she asked him if the train stopped at Fernhill Cemetery, and the agent said yes, but did not say anything about asking or letting the conductor know. After purchasing their tickets they both boarded the train leaving at 13.15 o'clock. Miss Babington says they did not get on the rear car, there were three or four cars behind them. It was an excursion, the train was crowded, and two young men gave them their seat, while they (the young men) sat on the arm of the seat. They did not see the conductor on the train. No one came to take up their tickets, and they did not hear the conductor or brakeman announcing Fernhill Cemetery, their destination. On this question of announcing Cemetery Crossing on the train, the evidence is somewhat conflicting. Mrs. Worden says she did not notice any official announcing it. Mrs. Kelley says she does not remember if the officials did announce; and Mrs. Corbet says none of the officials announced. Brakeman Berryman says that when they left St. John, at the request of the conductor, he started collecting tickets at the rear of the train, and when they arrived at Cemetery Crossing he had got as far as half the second car from the rear, and that he had announced Cemetery Crossing in these two cars. Brakeman Cobham on leaving St. John stayed in the head car, near the engine, until they reached the switch, 1¼ miles from St. John. On arriving there he opened the switch, let the train pass, closed the switch and boarded the train at the far end of the last car and walked back to the front announcing Cemetery Crossing in all the cars.

Taking the rule of evidence to be that affirmative evidence must prevail over negative evidence, it should be found that Cemetery Crossing was announced, although, in the view this Court takes of the case, it does not matter here—the accident did not occur because Cemetery Crossing had not been announced—but indeed, because of the last act before the accident, the reckless position assumed by the suppliant on a moving train. Under the evidence of the crew, it must be found the station had been announced. Without casting upon them any discredit, one must realize it is the evidence of interested witnesses, whose interest

is closely identified with that of the Crown, in fact, in a larger degree because they may think their employment at stake. However, in estimating the value of evidence one must not lose sight of the rule of presumption that ordinarily a witness who testifies to an affirmative is to be credited in preference to one who testifies to a negative, *magis creditur duobus testibus affirmantibus quam mille negantibus*, because he who testifies to a negative may have forgotten a thing that did happen, but it is not possible to remember a thing that never existed: *Lefeuntcum* v. *Beaudoin*, 28 Can. S.C.R. 89.

However, while the suppliant and Miss Babington were sitting quietly in their seat, one of the young men said it was Fernhill Cemetery. The train had then come to a stop, says the suppliant, and they both (herself and Miss Babington) walked from about the centre of the car toward the rear to get off. Before they reached the rear of the car, the train was moving—it had started. Miss Babington jumped off and the suppliant sat on the last step, and said to Miss Babington, who was opposite her, she would not jump. Then Miss Babington jumped back on the train, on the step of the adjoining car. The suppliant was asked by the Court if she were then holding the railings, and she said she did not remember whether she did or not, but she said she was sitting on the last step. She contends the train then gave a jerk and she was thrown off. Miss Babington says the train stopped before the suppliant fell, but she must be in error. After her fall the train was stopped. Some of the officials came to her, and she was cared for and left in charge of Miss Babington. She says she fell at the place where she would have alighted, and at that time the train was moving a little, just as fast as she would walk. She says she fell when Miss Babington was back on the train, on the step of the adjoining car.

There is no platform, no contrivance for alighting at Cemetery Crossing; and L. R. Ross, the terminal agent of the Intercolonial Railway at St. John, says that the space between the last step of the cars and the ground at that place is 18 inches—varying between 18 and 22 inches. On this question of convenience for alighting, we have the evidence of three lady passengers—one of them a pretty old person and another a mature and rather heavy person. Mrs. Worden says she had no trouble or bother getting out. Mrs. Corbet says she had no difficulty in alighting or getting back on the train—they stepped on the ground. Mrs. Kelly says she got off the train without trouble—it was as flat as the floor and it was not a long step getting off. With respect to the time the train stopped at Cemetery Crossing, we have profuse evidence. A. C. L. Tapley, a newspaper reporter, who was on board, says the train made an ordinary stop the first time, when he saw some ladies getting off. Mrs. Worden

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says the train stopped long enough to get off; she had ample time to get off. "Five of us got off—five ladies." She had not risen from her seat before the train stopped and had ample time to get off. Mrs. Corbet says she had ample time to get off. Mrs. Kelly says the train stopped long enough for any person who had her mind made up to get off. There was lots of time, ample time to get off; time enough to get off for any person who had her mind made up to get off. She had no trouble either going or coming, although she had never been there by train before.

Brakeman Berryman says the train stopped a reasonable time, long enough at that place. Everything was done in the usual way. George W. Speer, the engine driver, says the train stopped at Cemetery Crossing the usual time—possibly a minute—suppose the train stopped one minute the first time, ample time for passengers to get off. Brakeman Cobham says the train stopped long enough to allow passengers to get off, two or three minutes (he does not seem to have a good idea of time). He helped three passengers off the train. After all the passengers were off he asked Brakeman Berryman if all was well behind, and on the latter announcing all right, he—the conductor being inside collecting tickets—gave the order to go ahead. Berryman corroborates him on that point, and adds that he did not see anyone appearing on the platform or any one coming off. The conductor says before leaving he had been asked to stop at Cemetery Crossing and had given the order to stop. Now, how and when did the suppliant fall? The suppliant herself says she fell only after Miss Babington had jumped back on to the train—when she was still sitting on the last step. Witness Tapley, the reporter, already referred to, says that while he was standing with another reporter on the front platform of his car, he looked over the side and saw the suppliant falling off. At that time the train was practically in motion—it had stopped and started again, and the train was in motion before she fell. Asked if the suppliant had jumped, he says he thinks, he imagines, she had fallen, he saw her come head foremost.

The engine-driver, a man of 21 years' experience, who gave his evidence in a most quiet and creditable manner, says he had no sooner started after receiving the signal to do so, when he looked back and saw a young girl on the bank—she jumped on the train, and right off after the suppliant fell, when he immediately applied the emergency brakes on account of what he had seen. When he applied the emergency brakes the train had gone on about half the length of a car, and one could walk as fast as the train was then going. The suppliant fell and came off all in a heap. Brakeman Berryman says the train was barely moving when the emergency brakes were applied.

The last and only question to be now answered is, what was

the proximate, the determining, the decisive cause of the accident? It is now beyond doubt and established by the evidence that the suppliant got on the platform of the car and took her seat on the last step thereof while the train was in motion, and that she fell when it was in motion, almost immediately as young Miss Babington jumped back on to the steps of the adjoining car, as above stated. Miss Babington must be mistaken and in error when she says the train gave a jerk and the suppliant fell, as the overwhelming weight of the evidence is the other way. If there was a jerk when the train left, that must have happened much before Miss Babington jumped back and therefore before the suppliant fell. The emergency brakes were only applied after the accident, when the engine-driver saw the suppliant fall. There must have been a jerk when the emergency brakes were applied, but that was after the accident. How then did the accident happen, how can it be explained?

The suppliant had certainly taken a most dangerous position when she went down and sat on the very last step with her feet hanging over and not far from the ground—a most dangerous and reckless position; indeed, at the sight of which, a witness in the case, Mrs. Kelly, was perfectly horrified, and she told her companions, "Look at that woman, she might be killed"; she turned her head away and said she did not want to see her fall off. There was no justification, under the circumstances, to take the position the suppliant took. If by inadvertence she let her destination go by, she could either get off at the next station, or call the attention of the conductor and ask him to stop the train and take her back, if possible, to Cemetery Crossing—but not do what she did.

The ordinary cautious and prudent persons had no difficulty in getting off, and contend they were given ample time to do so. Should the railway authorities provide for extremely incautious, reckless and imprudent people? Here is a passenger, the suppliant in this case, going through the feat of sitting down on the last step of a car with her feet hanging almost to the ground while the train is moving—a feat an ordinary train man with experience would hesitate to attempt, and one no passenger with any common sense would dare try. Under all the circumstances, as brought out from the evidence, it would appear to the Court that when young Miss Babington jumped back on the train the suppliant must have endeavoured to right herself, to get on her feet, and in doing so necessarily and obviously did place a foot on her skirts on the step, and in making the effort to get up, lost her balance and fell, as described, all in a heap, head foremost.

The Court must therefore find that the proximate, decisive and preponderant cause of the accident was the fact of the suppliant, on a moving train, assuming the reckless position she did. Much stress has been laid by suppliant's counsel on the case of

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Ryan v. *The King*, 11 Can. Ex. R. 267, but on perusal of the case the Court arrives at the conclusion that it does not apply to the present case. The suppliant here did not alight from a moving train. She fell off. She so fell, not in the act of endeavouring to alight, because she absolutely refused to attempt to alight under the circumstances. Ample time was given to the suppliant to alight as established by the evidence. The Cemetery Crossing through inadvertence was let go by, and an endeavour or rush to alight was made too late and abandoned.

Instructive comments on the question of proximate cause of the accident will be found at page 154 in Schuster's German Civil Law, 1907, reading as follows:—

> 149. Under English law the plaintiff's contributory default affects the defendant's liability in the case of claims for damage done by unlawful acts; under the rules of the present German law the liability created by a contract or other act-in-the-law is affected in the same way by the contributory default of the other party as the liability for an unlawful act. Under German as well as under English law, the proof of the plaintiff's own default is relevant only for the purpose of shewing that the defendant's default was not the "decisive" or "preponderant" (vorwiegend) cause of the damaging event, but while under English law the fact that the defendant's default was not the decisive cause, deprives the plaintiff of his entire claim to compensation (except in cases coming under Admiralty law), German law leaves it to judicial discretion to determine whether the defendant's liability to make compensation is entirely destroyed or merely reduced by contributory default on the part of the plaintiff: B.G.B. 254. (The expression "decisive," which is used by Sir F. Pollock (see Law of Torts, 7th ed., p. 455) is clearer than the expression "proximate" generally used in the English authorities.)

The suppliant, under the circumstances of this case, is barred from recovering under the Roman rule of law respecting contributory negligence, which says that *Quod quis ex culpa sua damnum sentit, non intelligitur damnum sentire.* The suppliant's counsel contended there was negligence on behalf of the Crown because of the following reasons:—

> 1. Because after advertising excursion to Cemetery Crossing, the Intercolonial Railway authorities did not issue tickets reading for that place.
>
> 2. Because the conductor did not take up all the tickets before making his stop at Cemetery Crossing, after it had been advertised and the ticket agent stating they would stop.
>
> 3. Failing to announce the stop to the passengers.
>
> 4. For not stopping the train long enough to allow the passengers to alight.
>
> 5. For not having any platform, step or other contrivance at the Crossing, after advertising the train would stop there.

With respect to the three first counts, the Court must find they had nothing to do with the proximate cause of the acci-

dent. With respect to the second count, under the evidence, it must be obviously found the train was announced, although again it had nothing to do with the determining cause of the accident. With respect to the fourth count, the Court must find under the evidence there was ample time to get off. And with respect to the fifth count, again it had nothing to do with the determining cause of the accident.

The acts of negligence contemplated by sec. 20 of the Exchequer Court Act, R.S.C. 1906, ch. 140, as amended by 9-10 Edw. VII. ch. 19, are only such as would be the proximate, determining and decisive cause of the accident.

There will be judgment that the suppliant is not entitled to any portion of the relief sought by the petition of right.

Petition dismissed.

FRUITATIVES, Limited, v. LA COMPAGNIE PHARMACEUTIQUE DE LA CROIX ROUGE.

Exchequer Court of Canada, Cassels, J. May 28, 1912.

1. TRADE-MARK (§ II—9a)—DESCRIPTIVE WORD ON REGISTERED LABEL.

The word "Fruitatives," considered as the essential feature of a specific trade-mark applied to the sale of a laxative medicine and used on two sides of a four part label with the words "or Fruit Liver Tablets" printed thereunder, is not a mere descriptive word, and a carton four part label is not invalid as a trade-mark under the Trade Marks Act, R.S.C. 1906, because of the combination of that word with other features of color and design in the registered trade-mark.

[*The Bovril Trade-Mark*, [1896] 2 Ch.D. 600; *Re Hudson's Trade-Marks*, L.R. 32 Ch. D. 311; *Smith* v. *Fair*, 14 O.R. 729, and *Provident Chemical Works* v. *Canadian Chemical Co.*, 4 O.L.R. 549, referred to.]

Statement

THIS was an action for the infringement of a trade-mark. The material facts of the case were as follows:—

1. The plaintiff is an incorporated company with its head office in Ottawa, Ontario, and manufactures a proprietary medicine known as "Fruitatives."

2. In the 8th day of October, 1903, Amos Rogers, of Ottawa, applied to the Minister of Agriculture for the Dominion of Canada under the provisions of the Trade-Mark and Design Act for the registration of a new and original specific trade-mark to be applied to the sale of a medicine for human use, which had been designed by him and his application being granted, said specific trade-mark was duly registered in the trade-mark register on the 8th day of October, A.D. 1903, and a certificate under the statute that the same had been so registered, issued to the said Rogers. The said specific trade-mark consists of a four part label with the use of the word "Fruitatives" as a title, with a sub-title "Fruit Liver Tablets" and the colours and arrangement of certain designs of fruit. After the incorporation of the

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FRUITATIVES, LTD. v. LA COMPAGNIE PHARMACEUTIQUE

Statement

plaintiff company, the said specific trade-mark was assigned to it by the said Amos Rogers. The plaintiff manufactures and sells its said medicine for human use, known as "Fruitatives," prepared in the form of tablets enclosed in a round wooden box covered with a paper label, which box is itself enclosed in a rectangular paper carton covered by the four part label constituting the specific trade-mark hereinbefore referred to.

The said preparation of the plaintiff is well known and the plaintiff has spent large sums of money in advertising it throughout Canada, and in acquiring a good-will for the business. It has been the practice of the plaintiff to reproduce the carton covered with the said trade-mark in very many of its advertisements, and retail dealers throughout Canada have been in the habit of making window displays of the said cartons, so that the appearance of the said cartons had become familiar to the people of Canada.

Defendant company placed upon the market a medicine in tablet form similar to the tablets of the plaintiff in appearance, and also enclosed in a round wooden box with paper label similar to that of the plaintiff, it again being also enclosed in a rectangular carton covered with a four part lithographed label of which the chief word is "Fruit-i-nol' with the word "Tablets" underneath and a sub-title "Fruit Liver Regulator," the said label being colored like the plaintiff's label and having fruit designs upon it similar to those upon the plaintiff's label.

G. F. Henderson, K.C., for plaintiff.
A. Lemieux, K.C., for defendant.

Cassels, J.

CASSELS, J.:—This was an action tried before me in which the plaintiff claims an injunction to restrain the defendants from infringing its trade-mark. It has to be borne in mind that the case of the plaintiff is confined to an action based upon its trade-mark which it claims is infringed. There is no case set up of "passing off." The distinction between the two classes of cases is set out in *Standard Ideal Co.* v. *Standard Sanitary Mfg. Co.*, [1911] A.C. 78. This case also deals with the construction of the Canadian Trade Marks Act, R.S.C. 1906, ch. 71. If the trade-mark of the plaintiff is a valid trade-mark, I have no doubt whatever that the defendants have infringed. The registration by the plaintiff of his trade-mark bears date the 8th October, 1903. Over $300,000 has been spent in advertising, with the result that the plaintiff's sales have been very large.

It is very evident from the testimony of Joseph Edmund Dubé, the president of the defendant company, coupled with a view of the defendant's boxes, that he deliberately set to work to try and obtain the benefit of the plaintiff's advertising and business. The remarks of Bowen, L.J., which are quoted by Burbidge, J. in *Melchers* v. *DeKuyper*, 6 Ex. C.R., at p. 101,

are pertinent. I have considered the authorities cited by counsel and numerous others, and am pleased to have come to the conclusion that the plaintiff is not without remedy. I think the plaintiff's trade-mark is a valid one. It has to be taken in its entirety. In considering the later English authorities, care has to be exercised, as the Canadian statute and the English statutes are not the same. The distinction is pointed out in *Smith* v. *Fair*, 14 Ont. R. 729; also by Sir Charles Moss, C.J., in *Provident Chemical Works* v. *Canadian Chemical Co.*, 4 O.L.R., at p. 549. An interesting case in England is *Re Hudson's Trade-Marks*, L.R. 32 Ch.D. 311, where it was sought to register "Carbolic Acid Soap Powder." The application was a few days prior to the enactment of the Imperial Act of 1883 and was governed by the statute of 1875 (see Cotton, L.J., p. 320). It was held that the label was a good trade-mark under the statute of 1875, although it might not be so under the statute of 1883.

It is argued that the word "Fruitatives" is a mere descriptive word. I do not think so. In the *"Bovril" Trade-Mark*, [1896] 2 Ch.D. 600, the Court of Appeal upheld the trade-mark. The language of Lopes, L.J., in commenting on the effort of counsel to cut the word "Bovril" in two is pertinent to the present case. He observes (p. 608):—

> It is said that the word "Bovril" indicates that the substance in question was made from beef, for that the first syllable 'bov' relates to the animal from which beef comes—'Bos,' 'bovis' and 'ox.' In my judgment you must look at the whole word, and not at part of it. The combination of that part of the word with the rest of it may be such as to make the word in its totality meaningless and non-descriptive. That is the view I take of the word "Bovril" and I cannot think that, in 1886, when that was placed upon the register, it would have conveyed to the mind of an ordinary Englishman any idea involving any connection with 'bos' or 'bovis' or with 'beef.'

I would also refer to *Re Densham's Trade-Mark*, [1895] 2 Ch. D. 176.

Counsel for the plaintiff asked to amend by praying that the defendants' trade-mark "Fruit-i-nol" be expunged from the register. This request I will not grant, but such refusal will be without prejudice to any further proceeding for that purpose if deemed necessary. See the judgment of Swinfen-Eady in *Coleman & Co. Ltd.* v. *Stephen Smith & Co. Ltd.*, 27 Times L.R. 533, which case, it might be noted, is also instructive upon the point as to the "get up" used with a trade-mark. The plaintiff is entitled to an injunction in the usual form, and an order that the defendant's cartons be destroyed. Counsel for plaintiffs abandoned at trial any claim for damages. The defendants must pay the plaintiff's cost of action, including the costs of the examination for discovery.

Judgment accordingly.

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BUCYRUS CO. v. CANADA FOUNDRY CO.

Exchequer Court of Canada, Cassels, J. June 6 and 19, 1912.

1. TRADEMARK (§ II—9a)—DESCRIPTIVE WORD—VARIATION.

Where a particular name (*ex. gr.* Bucyrus) has been applied to a specific line of goods manufactured by a company for so long a time that the designation so given by the company, although originally a mere geographical name, had acquired a secondary meaning as identifying such goods although not registered as a trademark, a registration in opposition thereto of such name with the prefix of the word "Canadian" (*ex. gr.* Canadian Bucyrus) is not permissible under the Trade Marks Act, R.S.C. 1906, ch. 71, and will be cancelled upon petition.

2. TRADEMARK (§ II—8)—GEOGRAPHICAL NAME—SECONDARY MEANING.

Where a geographical name has become identified with manufactured goods of a certain class manufactured by a particular manufacturer and has in that respect acquired a secondary meaning, it may be registered as a specific trademark to such goods under the Trade Marks Act, R.S.C. 1906, ch. 71.

[*Grand Hotel Co.* v. *Wilson*, [1904] A.C. 103, and *Montgomery* v. *Thompson*, [1891] A.C. 217, considered.]

Statement

PETITION praying that the entry of a certain specific trademark be expunged from the register of trade-marks, and that the petitioners be allowed to register a certain specific trademark.

The facts of the case are sufficiently stated in the head-note.

D. L. McCarthy, K.C., and *Britton Osler*, for the petitioners.

J. K. Kerr, K.C., and *J. A. Paterson*, K.C., for the respondents.

Cassels, J.

June 6, 1912. CASSELS, J.:—I have not the slightest doubt that the respondent's trade-mark has not been properly registered. The evidence before me is that the petitioners have been manufacturing these articles for years, and their product has become known in the trade as that of the Bucyrus Company. The respondents were under an agreement with the Bucyrus Company, had entered into covenants with them, by which they were to have the sole right to manufacture and sell these articles in Canada. The word "Bucyrus" was put on each article, and that went on for years. It became known to the trade, and their product became known as the product of the Bucyrus Company in the States. That being so, how can the respondents come in, and, by prefixing a word, get a valid trade-mark? The result would mean this, that if the petitioners sent their articles into Canada, and called them "Bucyrus," a Judge could restrain them from selling under the name under which they had been sold for years. It is not a passing-off case. The defendants are not guilty of any attempt to defraud. Circulars are issued marked "manufactured in Canada," and they are shewn to be manufactured by the Canada Foundry Company, and most

people would understand that they were manufactured by the Canada Foundry Company. Supposing that they advertised "Canadian Bucyrus," and did not use these particular words, they would simply run the risk of having a suit for passing-off; but they are not bound to use those words. The sole question is whether "Canadian Bucyrus" is capable of being a trade-mark after the word "Bucyrus" has been on the market for years.

I direct that the registration is to be expunged, and the trade-mark cancelled.

The question of the petitioners' right to register the word "Bucyrus" was reserved.

Judgment was delivered on the question reserved.

June 19, 1912. CASSELS, J.:—This was a petition filed by the Bucyrus Company of South Milwaukee, asking to have a certain trade-mark consisting of the word "Canadian Bucyrus" registered by the Canada Foundry Company, Limited, expunged from the register of trade-marks. The Bucyrus Company also asked for an order that their trade-mark "Bucryus," as applied to wrecking crane, steam-shovels, and railway pile-drivers, together with appliances and devices for use therewith, should be registered.

The case came on for trial before me in Toronto on the 6th June, 1912. At the close of the hearing in Toronto, I gave judgment ordering the trade-mark "Canadian Bucyrus" to be expunged. I gave my reasons for judgment orally at the trial. I reserved for further consideration the question of the right of the "Bucyrus Co." to register the word "Bucyrus" as a trade-mark. Since the trial I have considered the evidence and the various authorities, and I am of the opinion that the Bucyrus Company are entitled to register a specific trade-mark "Bucyrus" as applied to the articles mentioned. I think the word has become identified with the goods of their manufacture and has acquired a secondary meaning.

In a case lately decided by me, of the *Fruitatives, Limited* v. *La Compagnie Pharmaceutique de la Croix Rouge*, 8 D.L.R. 917, 14 Can. Exch. R. 30, I had occasion to point out the care that had to be exercised in considering the English authorities. I do not wish to repeat what I there stated. It appears that "Bucyrus" is a small town in the State of Ohio, where the petitioners' predecessors in title originally started their business. Some years ago they moved to Milwaukee. The Canada Foundry Company rely upon the decision of the Privy Council, in the case of the *Grand Hotel Company* v. *Wilson*, [1904] A.C. 103, and contend that "Bucyrus," being a geographical name, is not capable of registration as a valid trade-mark. This case, however, was not finally disposed of on the ground that the name was a geograph-

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Cassels, J.

ical name. It was a case tried before the learned Chancellor of Ontario, who gave judgment for the plaintiffs, 2 O.L.R. 322. This judgment was reversed by the Court of Appeal, Moss, C.J., dissenting and agreeing with the judgment of the Chancellor, 5 O.L.R. 141. An appeal was taken to the Privy Council, and judgment was delivered affirming the Court of Appeal. It is necessary to consider the judgment. The judgment of their Lordships was delivered by Lord Davey. He points out that the first fact to be noted is that the goods in question are not a manufactured article, or, in other words, the name which it is sought to protect is not the name for the appellants' make of goods, but, to put it most favourably for the appellants, designates water from particular springs belonging to them. The waters derive their virtues from the strata from which they spring, or through which they pass, before they reach the surface—that is to say, from the inherent properties of the soil itself in that particular locality. Further on he states:—

> It is quite true that the same trade-name may designate the goods of more than one person, but it is less easy to infer that a geographical description has acquired a secondary meaning when you find that it is used to designate the goods of two or more persons connected only by identify of geographical origin: *Grand Hotel Company* v. *Wilson*, [1904] A.C. 110, 111.

In commenting upon the Stone Ale case, *Montgomery* v. *Thompson*, [1891] A.C. 217, His Lordship uses the following language:—

> Their Lordships are therefore of opinion that the appellants have not a right to the exclusive use which they claim of the word "Caledonia" in connection with their waters. The Stone Ale case does not appear to them to have any bearing on the present case. That was a case of a manufactured article, etc.

I order that the petitioners be at liberty to register the word "Bucyrus" as a specific trade-mark to be applied to the articles mentioned. I direct that the Canada Foundry Company, Limited, pay the costs of the petition and of these proceedings.

Judgment for petitioners.

B.C.
S. C.
1912
Sept. 12.

Re FALSE CREEK FLATS Arbitration.

(Decision No. 3.)

British Columbia Supreme Court, Murphy, J., in Chambers. September 12, 1912.

1. COSTS (§ II—28)—SCALE—ARBITRATION UNDER RAILWAY ACT (CAN.).

Upon an arbitration in eminent domain proceedings in reference to damage occasioned to land by railway construction, the "costs of the arbitration" under the Railway Act, R.S.C. 1906, ch. 37, to be allowed to the owner who succeeds in the arbitration are not to be restricted to costs upon the scale or tariff applicable to ordinary litigation in the province, although the latter may be accepted as a general guide.

[*Canadian Northern R. Co.* v. *Robinson*, 17 Man. L.R. 579, 8 Can. Ry. Cas. 244, applied.]

2. COSTS (§ II—40)—EMINENT DOMAIN PROCEEDINGS—RAILWAY ACT (CAN.).

The successful owner entitled to tax costs in eminent domain proceedings under section 199 of the Railway Act, R.S.C. 1906, ch. 37, against the railway company in respect of the costs, fees, counsel fees and expenses of an arbitration to settle the compensation for the compulsory taking, should be allowed for everything necessarily or reasonably done, and for every disbursement necessarily or reasonably made in order to properly present his case to the arbitrators, and the taxation should be on a solicitor and client basis rather than under the practice prevailing in party and party taxations.

[*Canadian Northern R. Co.* v. *Robinson*, 17 Man. L.R. 579, 8 Can. Ry. Cas. 244, followed; and see *Hyde* v. *Mayor of Manchester*, 12 C.B. 474; *Malvern* v. *Malvern*, 83 L.T. 326.]

3. COSTS (§ II—45)—DISBURSEMENTS AND EXPENSES—AFFIDAVIT OF INCREASE.

The successful owner taxing costs against a railway company in eminent domain proceedings under sec. 199 of the Railway Act, R.S.C. 1906, ch. 37, must file an affidavit of increase as regards items of disbursement which he seeks to charge as reasonable expenses actually incurred, and it is not a valid objection to their allowance that the items do not correspond to any particular items of the tariff of costs promulgated by the court of superior jurisdiction in the province.

4. COSTS (§ II—50)—OF UNNECESSARY PROCEEDINGS.

Money disbursed as expenses in the preparation of the owner's case to the arbitrators upon an arbitration under the Railway Act, R.S.C. 1906, ch. 37, may be disallowed if they appear to have been incurred through over-caution or unnecessarily.

Statement

APPEAL from the taxation of costs of an arbitration under the Railway Act, R.S.C. 1906, ch. 37, sec. 199.

R. L. Reid, K.C., for appellant.

A. H. MacNeill, K.C., for respondent.

Murphy, J.

MURPHY, J.:—The principles under which taxation of costs should be carried out are laid down by Mathers, J., in *Re Canadian Northern Railway and Robinson* (1908), 17 Man. L.R. 579, 8 Can. Ry. Cas. 244, and are:—

First, that the taxation should be on a solicitor and client basis;

Second, that where land is taken compulsorily, the costs should be taxed on a larger scale than in ordinary litigation. Everything that was necessarily or reasonably done and every expense that was necessarily or reasonably incurred in order to properly present a party's case to the arbitrators should be allowed to him on taxation;

Third, the tariff of costs prescribed for in ordinary litigation may be accepted as a general guide, but the taxing officer is not bound by it and should not follow it in all circumstances.

Applying these principles to the disputed items, I hold that the cost of obtaining transcripts of evidence, as was done here, is a reasonable expense which a prudent man would incur, and I direct that the registrar proceed to tax such disputed costs, but in so doing, I in no way hamper his discretion in deciding whether any particular item is chargeable as one which was necessary. I allow the $6 paid for the motor car, as I hold that it is an expense reasonably incurred.

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As to the third set of disputed items, I hold that the registrar is not bound to refuse to tax them merely because they do not fall within the words of any particular item of the Supreme Court tariff. I hold, also, that he is not precluded from taxing them by reason of sub-section (3) of section 201 of the Railway Act. I further hold that they are only recoverable as reasonable expenses actually incurred and that, therefore, before they can be taxed, an affidavit of increase must be filed. If such affidavit is filed, the registrar is to proceed to tax them, but in so doing he is not bound to allow the amounts actually paid, but only such amounts, if any, as he in his discretion deems fair in view of all the circumstances, and then only if he, in his discretion, deems that such amounts were reasonable and necessary expenses demanded by a proper presentation of the appellant's case. He is not to allow any amounts under this head which he deems to result from unnecessary work or from over-caution. With these directions, the matter is referred back to the registrar.

Order accordingly.

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Nov. 1.

PICKFORD & BLACK v. STEAMSHIP "LUX."

Exchequer Court of Canada, Nova Scotia Admiralty District, the Hon. A. Drysdale, Local Judge. November 1, 1912.

1. ADMIRALTY (§ II—6)—PARTIES—ADDING MASTER AND CREW IN SALVAGE ACTION TO PARTICIPATE.

In an action in Admiralty by ship owners to recover salvage remuneration for rescuing a disabled ship in response to her call for aid, the court may, upon consent of the master and crew of the salving vessel entitled to participate with the owners in the distribution of the salvage remuneration, join them as parties at the hearing, and determine the amount of salvage remuneration and its apportionment.

Statement

THIS was an action by the plaintiffs as owners of the steamship "Boston" for $12,000 for salvage services rendered by them to the steamship "Lux" from the 4th day of October to the 6th day of October, A.D. 1912.

The following statement of facts was agreed upon by counsel for the plaintiffs and defendant, respectively, and submitted to the Court:—

The steamship "Boston" left Turk's Island, West Indies, on the 28th day of September, 1912, loaded with a cargo of sugar and fruits, a part of the latter being perishable goods, bound for Halifax. The "Boston" had 10 passengers. On Friday, the 4th of October, 1912, at 10.15 a.m., lat. 41.30 N., long. 64.12 W., the "Boston" sighted a steamer which was found to be the English tank steamer "Lux," apparently disabled, being by the head, and a stage out over the stern. The "Boston" proceeded close to her and asked what was the matter. They replied, "Rudder damaged." The "Boston" asked if they could

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be of assistance, and the "Lux" replied that they were repairing the damage. Three other steamers were in sight when the "Boston" came alongside, one of which was the "Idaho," a Wilson liner, and the other two were New York passenger liners. The "Lux" was in the line of steamers. The "Boston" then proceeded. Shortly afterwards the "Boston" noticed that the "Lux" had hoisted a signal asking if the "Boston" could tow them, to which the "Boston" agreed. The "Boston" steamed as close alongside as possible and two hawsers belonging to the "Lux" were run from her stern to the bow of the "Boston." The boats of the "Lux" carried the hawsers to the "Boston." The hawsers were made fast to the bitts of the "Boston." These bitts were not constructed for the purpose of towing, but were primarily intended for mooring the ship. One of the hawsers of the "Boston" was used the first day as a bridle and was afterwards carried away. As soon as they were fast, 1.30 p.m., the "Lux" started for Halifax, the "Boston" steering. Strong breeze and choppy sea. At 2.15 p.m. the hawser on the port side carried away, but they proceeded with only one hawser until 7.30 p.m., when, owing to increasing wind and sea, accompanied by rain, the remaining hawser carried away. Owing to the darkness, rain and heavy sea, it was impossible to establish connection that night. The "Boston" laid by all night, and on the 5th of October, daylight, the sea having moderated, the "Boston's" boat was launched to run another hawser, which was finally accomplished and the towing resumed at 8 a.m.

October 6th, 3.30 a.m., sighted Sambro and slowed down. 9.15 a.m. took a pilot and proceeded up the harbour to Quarantine Ground, where the "Lux" was safely anchored at 10.45 a.m. The "Boston" arrived at Pickford & Black's wharf at 11.15 a.m. On examination found one wire hawser broken and a piece lost, also a quantity of manilla rope and heaving lines used for lashings cut and destroyed. A piece of the main rail on the starboard side forward carried away and a hatch strong-back, which was used for a fender on the bow, damaged. The bulwark forward on the starboard side was somewhat strained. To repair all the damage suffered by the "Boston" and to substitute new rope would cost about $250. The tonnage of the "Boston" is 738 registered, gross 1,168. That of the "Lux" is 2,621 gross and 1,634 net. The valuation of the "Lux" in her damaged condition is £18,468. The valuation of the "Boston" is £15,000. Her cargo was valued at $20,030, freight at $2,192.47. The distance towed is 200 miles, and the "Boston" was engaged in the service forty-eight hours, of which thirty-four hours was actual towing.

Argument

H. McInnes, K.C., for the plaintiffs:—The sole question is the amount to which the plaintiffs are entitled. The "Boston" was on her way from Turk's Island, West Indies, to Halifax. Her value was about £15,000, or $75,000. She had a cargo of sugar and fruits and 10 passengers.

The "Lux" was an English tank steamship and was then empty. Her value was about $90,000. The "Lux" rudded was out of order and the "Boston" acted as a rudder in steering her. She was in the track of steamer. The services rendered were more meritorious than towing. The control was in the "Lux," as

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Argument

she was ahead and proceeded under her own steam. Had the hawsers parted, it is uncertain which might have been sunk. The weather was bad and stormy and we were subject to heavy risk. The "Boston" being smaller than the "Lux," greatly helped and minimized the risk, lessening the jerking and straining in the heavy sea. Had the "Boston" been greatly injured heavy damage could have been awarded. The size of our ship was very important. A rudderless ship is always in danger, and more so when in the track of other ships. The work was efficiently done. We had to pay out $250 for actual repairs. The amount awarded should be reasonable. He relied upon the following cases: *The "Glenfruin,"* Pritch. Adm. D. 2032; *The "Sappho,"* Pritch. Adm. D. 2031; *The "Middleton,"* Pritch. Adm. D. 2026; *The "Grantully,"* Pritch. Adm. D. 2025; *The "Miranda,"* Pritch. Adm. D. 2012; *The "City of Brussels,"* Pritch. Adm. D. 1998; *The "Gorji,"* Pritch. Adm. D. 1984; *The "Isis,"* Pritch. Adm. D. 1967; *The "Ayrshire,"* Pritch. Adm. D. 1965; *The "Inchrhona,"* Pritch. Adm. D. 1959; *The "Lord O'Neil,"* Pritch. Adm. D. 1953; *The "Osiris,"* Pritch. Adm. D. 1950; *The "Memphis,"* Pritch. Adm. D. 1949; *The "Glamis Castle,"* Pritch. Adm. D. 1947; *The "Sussex,"* Pritch. Adm. D. 1942; *The "Verona,"* Pritch. Adm. D. 1941; *The "Rhynland,"* Pritch. Adm. D. 1935; *The "City of Berlin,"* Pritch. Adm. D. 1934; *The "Republic,"* Pritch. Adm. D. 1932; *The "France,"* Pritch. Adm. D. 1931; *The "City of Richmond,"* Pritch. Adm. D. 1925.

In estimating the value of salvage services, circumstances, among others, to be considered by the Court are, the degree of danger to which the vessel was exposed, and from which she was rescued by the salvors, the mode in which the services of the salvors were applied, and the risk incurred by the salvors in rendering the services: *The "Chetah,"* 38 L.J. Ad. 1, L.R. 2 P.C. 205. Where no special risk has been incurred by the salvors, salvage reward is allotted upon a calculation of a fair remuneration for time and trouble to the owners of the salving vessel and to each hand engaged: *The "Otto Hermann,"* 33 L.J. Ad. 189. In estimating the amount of a salvage remuneration, the Court takes into consideration, first, the value of the property saved, and next the actual perils from which it has been saved. In considering the perils, the possibility of assistance being rendered to the vessel in peril must be taken to lessen the amount to be awarded: *The "Werra,"* 56 L.J. Ad. 53, 12 P.D. 52; *The "Edenmore,"* [1893] P. 79. Reference is also directed to the case of the SS. "Lydia" against the SS. "Millwall," decided by Sir Samuel Evans in the Admiralty Division on October 18th, 1912, not yet reported, but published in an English newspaper called *Fairplay*, Oct. 24th, 1902.

W. A. Henry, K.C., for defendant:—It is less meritorious where the relieving steamer is a tow, as in this case. Where the relieving steamer uses her own motive power it is more meritorious. The danger was nothing. The "Boston" could easily get out of the way in case of a breakdown. The danger of running into the towed vessel is too remote. Nothing indicates that the size of the "Boston" was the proper size for acting as a rudder for the "Lux." If there was no great strain on the "Lux" there was likewise none on the "Boston," and *vice versa*. There was no deviation nor delay to the salving steamer. She was bound to Halifax and arrived with very little, if any, delay. We did the towing and thus saved the "Boston" her coal. A vessel which has steam is in less danger than without it. The "Lux" was in no danger, as she was not drifting around. She only required to be steered and her rudder was being repaired. She was in the line of steamers and could be reported by wireless. She was not in a stormy sea, as in the case of the "Millwall." The "Boston" in consequence lost no time from Turk's Island to Halifax. The time occupied was forty-eight hours from the time she connected until arrival in Halifax. The distance was less than 200 miles. The amount allowed should be very little more than for tonnage. In *The "Gorji,"* 2 Pritch. Adm. D. 1984, the amount allowed is less than asked here.

McInnes, K.C., replied.

Drysdale, J.

DRYSDALE, L.J.:—The services here are Admiralty salvage services, the only question in controversy being the amount the salvors should be awarded. The value of the ship salved is about $90,000. The "Lux" was in latitude 41.30 North, longitude 64.12 West, on October 4th last, in distress with a damaged rudder. She was in the track of ships, but in such a condition that she sent up distress signals and called for aid. The plaintiffs' ship, the "Boston," went to her assistance and either steered or stayed by her for forty-eight hours until she was safely landed in Halifax. The services, I think, were somewhat difficult, as the weather was such as to part the hawsers, and laying by all one night was necessary in the effort to bring the "Lux" in. The value of the salving ship, her cargo and freight, was about $96,000 and I must be guided as near as I can by the authorities in salvage awards.

Taking all the circumstances into consideration, and guided by the modern precedents, I am of opinion that fair and just salvage remuneration ought to be fixed at the sum of $4,500, to be apportioned as follows: $3,750 to the owners of the "Boston" and $750 to the master and crew; of this $750, the sum of $250 is awarded the master and the other $500 to be divided between the other officers and crew according to their rating. The master

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and crew are directed to be joined in the action in order that they may get the benefit of this award and to make the question as regards their award *res adjudicata;* I understood the parties in the hearing to consent to this joinder and to have the whole matter disposed of in this award.

Judgment accordingly.

ONT.
D. C.
1912
Oct. 10.

Re DICKSON & CO. and GRAHAM.

Ontario Divisional Court, Riddell, Kelly, and Lennox, JJ. October 10, 1912.

1. LANDLORD AND TENANT (§ III E—115)—RECOVERY OF POSSESSION—OVERHOLDING TENANT—LANDLORD AND TENANT ACT (ONT.).

It is the statutory duty of a County Court judge to determine whether or not a tenant is wrongfully holding against the landlord upon an application under Part III. of the Landlord and Tenant Act, 1 Geo. V. ch. 37 (overholding tenants) and such duty is not fulfilled by dismissing the application without any specific finding of fact.

[*Re St. David's Co. and Lahey*, 7 D.L.R. 84, 4 O.W.N. 32, approved.]

2. APPEAL (§ VII M 8—658)—FAILURE TO FIND ON MERITS—DISMISSAL OF APPLICATION FOR WRIT OF POSSESSION—RE-ENTRY—LANDLORD AND TENANT ACT (ONT.).

Where an application is made by a landlord to a county judge against an overholding tenant under the Landlord and Tenant Act (Ont.), and where the judge makes no findings of fact, but simply dismisses the application, it is in substance an application for a writ of possession, and the judge's refusal to make any finding as to whether the tenant "wrongfully holds against the right of the landlord," although dismissing the application, is, in effect, a refusal of a writ of possession from which there is a right of appeal to the Divisional Court under sec. 78 of the Act.

[Landlord and Tenant Act, 1 Geo. V. (Ont.) ch. 37, secs. 75 and 78, referred to.]

3. LANDLORD AND TENANT (§ III—115)—RECOVERY OF POSSESSION—SUMMARY PROCEEDINGS.

If upon an appeal by the landlord from the dismissal of his summary application for an order of possession against an alleged overholding tenant under the Landlord and Tenant Act (Ont.), the appellate court is of opinion that the matters in question should be disposed of in an action and not summarily, it may vacate the order of dismissal and leave the plaintiff to his remedy by action and direct that the costs of the summary proceedings and appeal be costs in the action if brought within a time limited by the order.

Statement

APPEAL by the company from an order of the Judge of the County Court of the County of Peterborough, made in a proceeding under Part III. of the Landlord and Tenant Act, 1 Geo. V. ch. 37, relating to overholding tenants.

Graham had been a tenant of hotel premises in Peterborough, the company being his landlords. After the termination of the tenancy, the company applied to the County Court Judge to make the inquiry provided for in sec. 75 of the Act. The Judge gave an appointment, and all parties appeared. The parties and their witnesses were heard, and counsel were heard in argument.

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The facts were in dispute, and the Judge made no specific finding; but, instead of issuing a writ of possession, or specifically refusing to do so, he ordered "that the application of the landlords be and the same is hereby dismissed with costs."

The order was set aside.

G. H. Watson, K.C., and *E. L. Goodwill*, for the appellants, relied upon their rights under the lease between the parties which had terminated, and the Landlord and Tenant Act, 1 Geo. V. ch. 37. The alleged agreement for a new lease was conditional only, and not binding on the appellants. They referred to the following authorities: *Re St. David's Mountain Spring Water Co. and Lahey* (1912), 7 D.L.R. 84, 4 O.W.N. 32; *In re Lumbers and Howard* (1905), 9 O.L.R. 680; *Moore* v. *Gillies* (1897), 28 O.R. 358; *Ryan* v. *Turner* (1904), 14 Man. L.R. 624; *Re Grant and Robertson* (1904), 8 O.L.R. 297; *Re Graham and Yardley* (1909), 14 O.W.R. 30; *Re Fee and Adams* (1910), 1 O.W.N. 812; *Re Broom and Godwin* (1910), 2 O.W.N. 125. The right of appeal under sec. 78 is not limited as contended by the respondent.

Argument

I. F. Hellmuth, K.C., and *F. D. Kerr*, for the respondent, objected that no appeal under sec. 78 lay from the decision of the County Court Judge; but, owing to the view of the case taken by the Court, they were not called upon to argue.

RIDDELL, J.:—Graham had been a tenant of certain premises in Peterborough, his landlords being the company. After the termination of that tenancy, the landlords applied to the County Court Judge to make the inquiry provided for in sec. 75 of the Act 1 Geo. V. ch. 37. The learned Judge gave an appointment under sec. 75 (2), and all parties appeared (sec. 77 (2)). The parties and their witnesses were heard and argument had—and the learned Judge, instead of issuing a writ of possession or specifically refusing to do so, made an order in the following terms: "It is ordered that the application of the landlords be and the same is hereby dismissed with costs to be paid forthwith after taxation thereof by the landlords to the tenant."

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His reasons for doing so are as follows:—

"The tenant has been for nineteen years and still is in possession of the Oriental Hotel, Peterborough, as tenant of the landlords or their predecessors in title. His lease expired on the 1st May, 1912, and he now holds possession—the landlords say wrongfully, he says rightly and pursuant to a new agreement for further tenancy. Negotiations were undoubtedly entered into and their effect reduced to writing—a small memorandum only—by Mr. Gordon, at that time acting as solicitor for the tenant. This writing has been lost or mislaid by the landlords or their manager. This is not very important, however; there being little, if any, dispute as to the nature and contents. The tenant says it was an absolute and binding bargain, to be reduced into a formal lease; the landlords contend that it was tentative only, and conditional

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on the assent of other parties not then present. A lease was subsequently tendered by the landlords for signature by the tenant, which differs materially from the terms contended for by either party as the result of the meeting and negotiation mentioned.

"The evidence is very contradictory, and not, in my mind, wholly reconcilable.

"In summary proceedings such as this, the case must certainly be 'clearly' made out before an order is made. The word in the former statute seems superfluous—an ample reason for its omission in the late revision. This is a summary proceeding, conferring unusual and extraordinary powers, which is another cogent reason for the strict construction of the statute, and for requiring the landlords to shew clearly and undoubtedly that the order for possession should be granted.

"The word 'wrongfully' is still an essential part of the statute. This adverb seems, as said by Boyd, C., in *Re Snure and Davis* (1902), 4 O.L.R. 82, 87, to be used emphatically, and must be satisfactorily and adequately met by the applicants, the landlords.

"I am not referred to, neither can I find, any case under the new Act as to the method of its construction or application.

"In view of the fact that there may—probably will—be further litigation in another Court (but with proper pleadings and discovery) between these same parties, on the same facts and the same evidence, I do not think it fair that I should either assist or prejudice any party or witness by a specific finding on the facts in controversy or any of them."

The landlords appeal.

It was objected that no appeal lies under these circumstances, as sec. 78 (1) gives an appeal only "from the order of the Judge granting or refusing a writ of possession;" and it was contended that here the Judge had done neither.

We think that the application to the County Court Judge, whatever its form, was in substance an application for a writ of possession; and that his refusal to decide was in effect a refusal of a writ of possession. Consequently, we consider that an appeal lies.

I agree with what is said by my brother Britton in *Re St. David's Mountain Spring Water Co. and Lahey*, 7 D.L.R. 84, 4 O.W.N. 32, at p. 35: "It is competent for and the duty of the County Court Judge to determine the question of tenancy, and the termination of it, and . . . the Judge may do this on conflicting evidence." The judgment of the other members of the Court in that case implied an agreement by them in that statement of the law.

It is now the duty of the County Court Judge to determine whether the tenant "wrongfully holds against the right of the landlord:" sec. 77 (2); and no colour of right set up by the tenant justifies him in declining to exercise his statutory duty. He need

not fear that in a proper case his decision will be final, even if that were a sufficient reason for failing to decide—which, of course, it is not.

And it is not for the County Court Judge to decide whether the right of the tenant should be determined under the Act in question—that function is vested in the Divisional Court (sec. 78 (2)), and not in the County Court Judge.

Nor can it be said that the proceeding before the County Court Judge is summary—if at all events by "summary" is meant the depriving of tenant or landlord of the opportunity of full disclosure, full evidence, exhaustive argument, or of the benefit of all the law applicable to the case. A County Court Judge, in my opinion, has much more important duties to perform than those under this Act: for example, he may in a "summary" way determine facts which may land a man in a penitentiary for a long term of years.

There is no anomaly in a trial Judge not having the power of a Divisional Court in appeal: every day at *nisi prius* we are compelled to accept verdicts with which we are dissatisfied, but with which we cannot interfere—these are often set aside by the Divisional Court.

Were the law the same as formerly, there are many decisions shewing that the course pursued was right, but the decisions on a different state of the law are not of authority.

If then there were no more in the case than the refusal of the learned Judge to determine the rights of the parties, we should allow the appeal, and send the case back to be disposed of on the merits.

But we are of opinion that the right to possession in this particular case should not be determined in such a proceeding. We need not set out the reasons more fully than they are given as reasons for his own decision—or want of it—by the County Court Judge.

The Act, sec. 78 (2), gives us the power "to discharge the order of the Judge, and the landlord may in that case proceed by action for the recovery of possession." It is argued that there is no necessity for setting aside the order. Perhaps so; but, on the other hand, if we omitted to do so, it would probably be argued by the tenant that no action lay—"*expressio unius est exclusio alterius*," etc., etc., etc. To avoid any possible difficulty and doubt, the order will be set aside—costs here and below to be costs in any action to be brought by the landlords for possession. If no such action is brought within thirty days, the costs aforesaid to be paid by the landlords. The County Court Judge will not take any further steps in the matter without the consent of both parties.

KELLY, J.:—I agree.

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LENNOX, J.:—I agree in the result arrived at by my brother Riddell. But, while it is quite clear that, as the law is, it was contrary to the statutory duty of the learned County Court Judge to stay his hand, even for the cogent reasons set forth in his judgment, and in order that the questions in issue between the parties might be determined in exactly the way in which, in the unanimous opinion of this Court, these issues ought to be determined, yet it might be worth while for the Legislature to consider whether, where the Judge is of opinion that the issues cannot be safely or properly tried before him—as was the case in this instance—the right of refusal to proceed ought not to be conferred upon a County Court Judge called upon to act under the overholding provisions of the Landlord and Tenant Act. The proper mode of trial is being reached in this case by an unintentional infraction of the provisions of the Act. It will be more satisfactory if in the future the proper method of trial is secured, in each case, under the provisions of the Act.

Order accordingly.

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STODDART v. TOWN OF OWEN SOUND.

Ontario High Court. Trial before Lennox, J. October 3, 1912.

1. JUDGMENT (§ I E—25)—DECLARATORY — FORM AND SUBSTANCE—RESULTING RELIEF.

A declaratory judgment may be had, declaring that a by-law was not submitted or voted upon according to law, in order to remove the uncertainty as to the actual effect of the submission and voting; whether any consequential relief is or could be claimed or not.

[Jud. Act (Ont.) R.S.O. 1897, ch. 51, sec. 57, sub-sec. 5; *Bunnell* v. *Gordon* (1890), 20 O.R. 281; *Barraclough* v. *Brown*, [1897] A.C. 615; *London Association of Shipowners and Brokers* v. *London and India Docks Joint Committee* [1892] 3 Ch. 242; *Re Van Dyke and Village of Grimsby* (1909), 19 O.L.R. 402, referred to.]

2. ELECTIONS (§ II B 2—47)—SECRECY OF BALLOT—LOCAL OPTION BY-LAW.

A ballot *per se* imports secrecy, and, when voting by ballot was adopted, the Legislature thereby wholly abandoned and repudiated open voting, and statutory infractions of the statute whereby secrecy is impaired are fatal to a local option by-law.

3. MUNICIPAL CORPORATIONS (§ II C—50)—BY-LAWS—DISCRETION AS TO SUBMITTING TO ELECTORS.

There is no provision of law compelling a municipal council to submit a by-law to the electors for the repeal of a local option by-law in respect of the sale of intoxicating liquors.

4. COSTS (§ I—1)—RIGHT TO RECOVER—IRREGULAR LOCAL OPTION ELECTION —STATUS OF PROMOTERS AND MUNICIPALITY.

Where both the promoters of a by-law to repeal a local option by-law and the municipality were cognizant of gross irregularities in the submission and voting and did not protest, neither party is entitled to costs in an action for a declaration that the by-law was irregular.

Statement

ACTION for a declaration that a by-law for the repeal of a local option by-law of the corporation of the town of Owen

Sound was not submitted to the vote of the electors in the manner provided by law; that what was done should not stand in the way of submitting a repealing by-law in January, 1913; and for a mandamus or direction to the defendants or their council to submit a repealing by-law.

Judgment was given for the plaintiff.

W. H. Wright, for the plaintiff.

R. W. Evans, for the defendants.

LENNOX, J.:—In January, 1906, the Town of Owen Sound adopted local option by a by-law numbered 1172. This was before the enactment of 6 Edw. VII. ch. 47, sec. 24; and this by-law could, therefore, be repealed, by another by-law, on a bare majority vote.

On the 1st January, 1912, being the polling-day for the election of councillors, the Municipal Council of Owen Sound submitted, or purported to submit, a by-law, number 1494, for the repeal of their local option by-law.

There are fourteen polling subdivisions in Owen Sound; and in seven of these, contrary to the policy and direction of sec. 536 of the Municipal Act, 1903, there are more than 300 qualified electors: the lowest number being 316, and the highest 393.

In addition to the repeal by-law, there were several money by-laws to be voted upon, and there was a contest for election between about eighteen councillors and four or five school trustees. There was, therefore, likely to be, and there was in fact, a very heavy vote cast, in all some 3,400 votes. For the repeal by-law there were 1,268 counted ballots cast and 1393 against it. The repeal movement, therefore, failed.

Section 141 of the Liquor License Act, R.S.O. 1897, ch. 245, provides that a local option by-law shall not be finally passed until it has "been duly approved of by the electors of the municipality in the manner provided by the sections in that behalf of the Municipal Act;" and sub-sec. 6 of sec. 141, as enacted by 6 Edw. VII. ch. 47, sec. 24, provides that no such by-law shall be repealed "until after a by-law for that purpose has been submitted to the electors and approved by three-fifths of the electors voting thereon, *in the same manner* as the original by-law," etc.; "and in case *such repealing by-law* is not so approved, no other repealing by-law shall be submitted to the electors until the polling at the third municipal election thereafter. Provided that any by-law heretofore passed under sub-sec. 1 of this section may be repealed with the approval of a majority of the electors voting upon such repeal."

Disregarding to some extent the exact language of the statement of claim, the plaintiff comes into Court to have it declared that the repeal by-law in question was not submitted to the vote of the electors in the manner provided for by the Municipal Act;

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that what was done does not, or at all events shall not, stand in the way of submitting a repealing by-law in January next; and for a mandamus or direction to the Municipal Council of Owen Sound to submit a repealing by-law.

Dealing first with the question of a mandamus, I am of opinion that, whether the plaintiff requires or is entitled to a declaratory judgment or not, he clearly is not entitled to this relief; and that, even if it is declared that a repealing by-law has not been submitted, within the meaning of the Act, it is still a matter entirely in the discretion of the council whether they will or will not submit a repealing by-law later on.

In 1906, the Legislature made it compulsory upon municipal councils to submit a local option by-law if petitioned for by twenty-five per cent. of the qualified voters of the municipality; but there is no corresponding provision, nor any provision of law, so far as I am aware, compelling a council to submit a by-law for the repeal of a local option by-law. As to "a direction," whatever that may mean, it is not the practice of the Court, I think, to give a direction which it cannot make effective. This branch of the relief asked for is refused.

Before dealing with the other branch of the plaintiff's case, upon the merits, I will dispose of the preliminary objection urged upon me, viz., that I have no jurisdiction to pronounce the declaratory judgment asked for. The Ontario Judicature Act, R.S.O. 1897, ch. 51, sec. 57, sub-sec. 5, provides that "no action or proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make binding declarations of right, whether any consequential relief is or could be claimed or not." This is the same as the English Order xxv., Rule 5.

I am referred to: *Stewart* v. *Guibord* (1903), 6 O.L.R. 262; *Honour* v. *Equitable Life Assurance Society of the United States* [1900] 1 Ch. 852; *Thomson* v. *Cushing* (1899), 30 O.R. 123; *Bunnell* v. *Gordon* (1890), 20 O.R. 281; and *Barraclough* v. *Brown*, [1897] A.C. 615.

These cases do not sustain the objection taken. In *Bunnell* v. *Gordon*, it is true, the Court refused to declare that a woman whose husband was still alive was entitled to an inchoate right of dower; as the woman might die before her husband, her contingent estate could not be prejudiced in any way, and there could be no good purpose served by the declaration; but the case is important as shewing the opinion of Mr. Justice Ferguson as to the scope and meaning of the provision of the Judicature Act above quoted. Referring to the new provision, his Lordship says (p. 285): "The difference between the law as it was formerly and the present law on this immediate subject seems to be that the latter *enables* the Court to make a binding declaration of right whether any consequential relief is or could be claimed or not,

whereas the former only *enabled* the Court to make a declaration when consequential relief was claimed or might have been claimed."

The only other of these cases that should be noticed is the *Barraclough* case. There, however, the defendants were not liable at all but for the express provision of a special Act, and this Act provided that the money payable should be recovered by summar proceedings in an inferior Court. The plaintiff, notwithstanding, sued in the High Court, and, failing because of want of jurisdiction, he then asked to have it declared that he was *entitled* to this money. This was the very point the inferior Court would have to determine, and a declaration of right was refused upon this ground.

On similar grounds, the Court refused to act in *Grand Junction Waterworks Co.* v. *Hampton Urban District Council*, [1898] 2 Ch. 331, where the Legislature directed the proceedings to be before a magistrate. And the same principle is recognised in our own Courts in *Attorney-General* v. *Cameron* (1899), 26 A.R. 103.

On the other hand, however, in *London Association of Shipowners and Brokers* v. *London and India Docks Joint Committee*, [1892] 3 Ch. 242, although the principal claim advanced, an injunction, was refused, a declaratory judgment was pronounced. See, too, *Re Van Dyke and Village of Grimsby* (1909), 19 O.L.R. 402.

Upon the whole, with some reluctance, I have come to the conclusion that I have jurisdiction to pronounce a declaratory judgment of the character the plaintiff asks, if the facts justify it.

What are the facts? Summarised, they present a singular disregard of many of the most important provisions of the Municipal Act relating to voting at elections and on by-laws, and particularly of those affecting the secrecy of the ballot.

By sec. 145: "Every polling place shall be furnished with a compartment in which the voters can mark their votes screened from observation . . ."

By sec. 168: On receipt of a ballot, the voter is immediately to retire to the screened compartment and there vote, and before leaving the compartment fold the ballot so as to conceal his vote; and he shall then so handle his ballot paper as to preserve secrecy and give it to the Deputy Returning Officer; the officer shall see that it is the ballot he gave out, put it in the box, and the voter shall *at once* leave the room.

By sec. 169: "While the voter is in a balloting compartment for the purpose of marking his ballot paper, no other person *shall be allowed* to enter the compartment, *or to be in any position from which he can observe the mode in which the voter marks his ballot paper.*"

Section 170: No person shall take a ballot out of the polling-place.

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Section 173: "During the time appointed for polling, no person shall be *entitled or permitted* to be present in the polling-place other than the officers, candidates, clerks or agents authorised to attend at the polling-place and the voter who is for the time being *actually engaged in voting*"—adding that there may be constables or peace officers in addition, if required.

Again, under the heading "Secrecy of Proceedings," we have secs. 198, 199, and 200.

Section 198 enacts that every officer, clerk and agent shall *maintain and aid in maintaining secrecy*—that no one shall interfere with a voter when marking his ballot or try to find out how he has voted or intends to vote—that no officer shall divulge any knowledge acquired at the poll. And for violation of any of the provisions of this section there is a penalty of as much as six months' imprisonment, with or without hard labour.

By sec. 199, every officer, clerk and agent is to be *sworn to secrecy*.

And by sec. 200, no voter shall, in any proceeding to question the election, be required to state how he voted.

These are some of the provisions aiming at secrecy and an independent vote. These provisions, and others in words referring to an election, are, by sec. 351, made applicable to voting upon a by-law.

The evidence shews:—

Polling subdivision No. 1: A busy poll. A room for the returning officer. An average of fifteen to twenty persons there at a time. Two other rooms used as voting compartments. A table in one of these where the voter marked his ballot. The other supplied with three desks for the same purpose. As to this the witness said on cross-examination that the desks were about seven feet apart, and if a man wanted to mark his ballot secretly he could do it. There was no division between the desks.

Subdivision No. 2: A school-house. A class-room served for all purposes. Not more than eight or nine people in the room at one time. Two compartments were formed by a blackboard placed six feet from the wall, forming a lane, and this lane walled across in the centre by a map. This formed compartments of a sort, each open at the end. This opening was six feet wide, and without screen. This was in the morning. Later, as the witness puts it, they "made" three more compartments; but the making consisted in allowing the voters to mark their ballots on window-sills. These windows were three or four feet wide.

Subdivision No. 3: The officer was in a room behind a shop. Behind this was a kitchen, in size about nine by twelve feet. One witness said it was a little larger. There were three places provided in this kitchen for voting. One was in a corner, screened. It is said that the voter in this could be seen, but could avoid being seen. The other two voting places were a table and a stove.

These points open from all sides. Usually—or often at all events—three voters voted in this kitchen at the same time.

Subdivision No. 4: This was in a dwelling-house. The Deputy Returning Officer occupied the kitchen. There were 212 votes cast. Said to have been "a rush of votes." There was no attempt at providing screened compartments. A small room was behind the Deputy's room. Two tables there. Voters marked their ballots at these. Usually two in this room at a time. There were doors leading from this room outside, which the voters could open. In addition, in the Deputy's room there were many places for marking ballots: on the sink, on the sideboard, and the walls. There was an average of from eight to fourteen persons in this room during polling. It is sworn that at times there would be in all as many as five voting at once; that the way persons were voting could be seen by people in the polling-place standing about.

Subdivision No. 5: One room used. Including officers and agents, about twenty persons in the room during voting. Great numbers voting at once, at one time, about noon, running up to eight or nine. At busy times marked their ballots anywhere—on window sills, desks, and the like. There were several witnesses as to this polling place. The Deputy Returning Officer swore. There were three illiterate voters. It was a busy time. Difficult to keep up. Began with four voting-places. Three other places adopted—"anywhere the voter could find a place." "Eight or ten at my desk at a time, and six or eight voting about the room. Nothing to prevent seeing a voter voting, but might not see how he voted."

Subdivision No. 6: No screens or compartments. Five or six voting, and as many waiting, at a time. Marked their ballots anywhere. Three illiterate voters. Deputy Returning Officer marked for one; and Alexander Wright, a scrutineer, and the other scrutineer, marked for the other two. About twelve or fourteen voting and waiting at times. Wright swears that some parties sat down at his desk to mark their ballot. When rush on, not told where to go.

Subdivision No. 7: The Deputy Returning Officer swears that until the middle of the day from five to thirty present. As many as eight or nine voting at once. A great many people, perhaps as many as twenty or thirty, present when these voted. There were two tables where ballots were marked, and other voters had to pass these, and could see, if they looked down. A scrutineer swore four tables provided for voting. School desks also used. Voters told to go anywhere. Possibly as many as ten voting at once. There were 302 votes polled. Nothing to prevent seeing how ballots were marked. Three or four illiterate voters' ballots marked right at the desk. Crowds standing around could see how these ballots were marked and hear what was said.

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Subdivision No. 7a: Two compartments, but more than one voter allowed into them at the same time, and the vote there was sworn not to have been secret (see Karn's evidence). They voted also on desks, four or five at a time, and as many waiting to vote. Three illiterate voters. These ballots were marked at Deputy's table. There were men standing near who could see how these ballots were marked. It is sworn, too, that persons passing the compartments could see in. They selected any desks they liked.

Subdivision No. 9: Irregular. Want of secrecy, but an average of only eight or nine present.

Subdivision No. 10: Margaret Wright was in and out a good deal. Her mother, Mrs. Wright, came to vote, but left without voting. This lady came again, and her daughter Margaret says she stood by and saw the officer mark her mother's ballot, and that she could have seen how it was marked. Mr. Pearce swears he voted at No. 10. Others voting at the same time. Voted at table, and another voter at this table, too. They compared ballots. Four more waiting.

Subdivision No. 11: As usual, people were allowed to loiter. There is evidence of irregularities, but nothing serious, and I attach no great importance to them.

Subdivision No. 13: No adequate provision for secrecy. One of the voting compartments composed of chairs piled up, I do not know how.

Some evidence was called for the defence.

Johnston Little, a Deputy Returning Officer, said as to No. 6: There were no screens. The voters voted at tables, in corners of the room, and at desks. Going to some of these places, the voters passed others. Those passing could not see how ballots were marked, unless they looked over the other voter's shoulder. One ballot was marked for an illiterate by a scrutineer. It was impossible to give the time to carry out the Act. Half a dozen voting and half a dozen waiting at the same time. Used desks too. No attempt was made to keep voters away while others voted. Nothing to prevent the others from hearing how illiterates voted.

Alfred Atkins, Deputy in subdivision 7a, says two cloak-rooms, and voters also allowed to vote on desks. Quite possible for one voter to see how another voted. Poll twice too heavy.

Robert Morrow, Deputy at No. 4, swore that he sent the voters to the back room. Two places to vote there, but not divided off. When this was full (meaning, I suppose, when there were two voters in it), he told the other voters to go where they liked.

Mr. W. E. Raney, K.C., watched the proceedings during the taking of evidence, but did not ask to intervene. He desired, however, to be heard on the argument. I felt disposed to hear him, not with the idea that he had any *locus standi*—for there was no in-

dication of bad faith on the part of the municipal council—but on account of the somewhat one-sided character of the proceedings; the plaintiff, backed no doubt by practically the entire anti-option vote, fighting with the utmost vigour, opposed by a municipal council representing, it is true, the local optionists, but, of necessity, representing the anti-optionists, as well.

I bear cheerful testimony to the absolute fairness, earnestness, and ability of the counsel for the defence; but it would not perhaps have been going too far if the municipal council had obviated the technical objection as to *locus standi* by associating with their counsel a counsel nominated by the local option vote; but I know a good deal could be said against this suggestion, too. Counsel for the plaintiff objected to Mr. Raney's being heard; counsel for the defence desired it; and it was arranged that, if I decided to allow him to take part in the discussion of the law—as it was all a question of law—he would file a written memorandum and furnish a copy to each of the counsel. This was done, because I concluded that he might very well be heard as an additional counsel for the defence—the defendants' counsel having, as I noticed, availed himself of Mr. Raney's friendly assistance at times during the trial and argument—and at all events as *amicus curiæ*. The plaintiff's counsel replied.

It is frequently said that in municipal contests and voting upon by-laws we must not look for literal compliance with every provision of the statute. I quite agree. There will always be cases arising in which, the provisions of the Act being, in the main, substantially complied with, the Courts will, even without reference to sec. 204, overlook isolated and trifling irregularities.

Section 204, which is, by sec. 351, made applicable to voting on by-laws as well, enacts that "no election shall be declared invalid . . . by reason of any irregularity, if it appears to the tribunal having cognizance of the question that the election was conducted in accordance with the principles laid down in this Act, and that such non-compliance, mistake or irregularity did not affect the result of the election."

This section clearly indicates the bounds beyond which I ought not to go. The onus of shewing that the omission, mistake, or irregularity did not affect the result is upon those who assert that it did not: *Re Hickey and Town of Orillia* (1908), 17 O.L.R. 317. There was no attempt made to prove that the result was not affected by the conditions which generally characterised this election; and, although there is a considerable difference in the votes pro and con, I am very far from being able to say that, with these conditions eliminated, and the statute complied with, the majority might not have been the other way.

But, at most, this is only a secondary consideration. The initial condition is, that the by-law is submitted, and the vote taken, in accordance with the principles of the Act. Without

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specific provisions at all, a ballot *per se* imports secrecy; and, when voting by ballot was adopted, the Legislature thereby wholly abandoned and repudiated open voting. With this, and the specific sections referred to, secrecy is now a basic principle of our municipal voting; and, if it is important in a municipal contest, it is vital in a vote upon a tense social question such as this.

It is not enough to say that the method pursued was just as good as, or even better than, the statutory method. It is the statutory method that gives meaning and validity to the vote. The vote without the statute is of no effect, is meaningless, binds nobody.

Almost every witness was asked, "Could the voters not conceal their votes if they wanted to?" That is not enough. The dangerous voter, the bribed voter, is the one who does not want to conceal his vote. The aim of the statute is not alone that the voter *can conceal*, but that while voting he shall not disclose—shall not be in a position to disclose—how he votes. To ignore the observance of the latter requirement would be to enable the bribed voter to prove himself entitled to the bribe, and thus remove one of the greatest obstacles from the briber's path.

There was no evidence as to polling subdivision number 12. In all the others there were grave, if not gross, irregularities; and in eleven out of a total of fourteen subdivisions the voting, speaking of it generally, was characterised throughout by a flagrant, callous, and wholly inexcusable disregard of the plain provisions of the statute.

The irregularities are somewhat of the same class, but disregard of the law was far more general in this case than in *Re Hickey and Town of Orillia*, 17 O.L.R. 317; *Re Quigley and Township of Bastard* (1911), 24 O.L.R. 622; or *Re Service and Township of Front of Escot* (1909), 13 O.W.R. 1215.

It cannot be argued for a moment that the vote in this case was taken in accordance with the principles of the statute, or that there was an opportunity afforded for "a full, fair, and untrammelled vote of the electorate;" and I find that this vote was not so taken.

Nor can it be contended that what took place on the 1st January last was a *bonâ fide* submission of a repealing by-law, within the meaning of 6 Edw. VII. ch. 47, sec. 24, or—subject of course to the discretionary will of the council—that this so-called submission and vote stand in the way, or should be allowed to stand in the way, of the exercise of the people's franchise upon this question until January, 1915; and I find that it was not a *bonâ fide* submission or vote, within the meaning or intent of sec. 24.

I have not overlooked that, even with jurisdiction and sufficient evidence, as stated in *Austen* v. *Collins* (1886), 54 L.T.R. 903, and in other English as well as Canadian cases, it is not always advis-

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able for the Court to pronounce a declaratory judgment where there can be no immediate result, or relief; but I am of opinion that this is a case in which the uncertainty incident to what has happened should not be allowed to continue.

There will be judgment for the plaintiff declaring that the repealing by-law in question was not submitted or voted upon in the manner provided for by the Liquor License Act and the Municipal Act, or according to law, and that the alleged vote upon the said by-law does not—or at all events shall not hereafter—prevent the Municipal Council of Owen Sound from submitting a by-law of this kind, in January next or thereafter, if they desire to do so.

There will be no costs to either party. The persons promoting the by-law, and with whom the plaintiff is, no doubt, identified, stood by and watched the irregularities without protest. The matter did not come upon them suddenly. It is said that the voting was very much as it had been. They, perhaps, were taking a double chance. The same thing may possibly be surmised as to the other side: at all events, if the voting was of the same character six years ago, when local option carried, then they too are without any very substantial ground for complaint, if the council decide that all must vote again.

If difficulty arises as to the wording of the judgment, I may be spoken to.

Judgment for plaintiff.

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Dec. 13.

Ontario Divisional Court, Falconbridge, C.J.K.B., Riddell, and Lennox, JJ. December 13, 1912.

1. COSTS (§ II—38)—ON ACCEPTING PAYMENT INTO COURT.

Where the plaintiff sets up two alternative claims, and the defendant pays money into court in satisfaction of one of them, the plaintiff on taking money out of court in satisfaction of that claim must abandon the other claim if he wishes to tax his costs of the action and sign judgment for such costs under rule 425 (Ont. C.R. 1897).

Statement

APPEAL by the defendant from the order of the Judge of the County Court of the County of Bruce, dismissing the defendant's appeal on the taxation of the plaintiffs' costs.

T. H. Peine, for the defendant.
G. H. Kilmer, K.C., for the plaintiffs.

Riddell, J.

RIDDELL, J.:—This action was brought in the County Court of the County of Bruce. The statement of claim sets out that the defendant was the agent of the plaintiffs at Hanover on commission, but he was to obtain such security for the payment of

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any implements sold by him as such agent as would be satisfactory to the plaintiffs, etc.—that the plaintiffs shipped him a large quantity of implements accordingly—that a statement was made of accounts on November 9th, 1911, shewing the defendant owed the plaintiffs $504.29—that at the defendant's instance, as he could not pay at once, the plaintiffs' traveller took promissory notes for $480.29 as follows:—

Due January 1st, 1912	$ 80.29
Due June 1st, 1912	100.00
Due October 1st, 1912.....	300.00
	$480.29

to submit to the plaintiffs—that the plaintiffs refused to accept them and returned them to the defendant forthwith—that nothing has been paid—that the defendant sometimes asserts that the plaintiffs took the notes in settlement, but this the plaintiffs deny—a statement of the items amounting to the $504.29 is annexed to the statement of claim and the plaintiffs claim "to recover from the defendant the said sum of $504.29 and interest from the 9th November, 1911, or in the alternative to recover from the defendant the sum of $180.29, the amount of two of the three promissory notes and interest thereon." It does not exactly appear whether the plaintiffs are claiming as on account stated or on the open account—from the items being attached to the record, I presume the latter.

The statement of defence sets up that it was the recognized custom to accept the personal notes of the defendant for any balance due: that the plaintiffs' agent Appleby "settled the balance at $480.24 and insisted and demanded that the defendant should furnish his promissory notes . . ." as mentioned, which he did: that he on June 13th, 1912, paid the plaintiffs the sum of $184.39, being the amount of the first two promissory notes with interest, but the plaintiffs refused to accept it and repudiated the settlement and he brought into Court that sum and said it was sufficient to satisfy the plaintiffs' claim.

The plaintiffs thereupon served a notice in the following terms. "Take notice that the plaintiffs accept the sum of $184.39 paid by you into Court in satisfaction of its alternative claim herein"—and taking the money out of Court proceeded to tax costs. These were allowed by the clerk on the County Court scale, and on appeal to the County Judge the clerk's ruling was upheld.

The defendant now appeals.

Since the judgment already spoken of, the plaintiffs have issued another writ for the note for $300 or in the alternative for damages for conversion thereof.

The state of affairs, then, is that the plaintiffs contended that, while there may have been a settlement of the amount due them

from the defendant, there was no settlement of the account by notes, but that he owed them $504.29, i.e., $24 more than the amount of the notes: but if it turned out that the notes were accepted in settlement, then they wanted the amount of the notes. The defendant said that the notes were given in settlement: he did not deny that the notes should be paid, but he said that within a week of the writ he "paid" the amount of the notes which were due, but the plaintiffs refused to accept the payment and repudiated the settlement. It is perfectly manifest that had the case gone on, the only issue to be tried would be whether the notes were accepted as the defendant says they were —with what we know now, that would have been determined in favour of the defendant—and the defendant would have been entitled to all the costs subsequent to payment in, and to so much as his County Court costs before that time would exceed his Division Court costs. As it is, by paying money into Court, the plaintiffs contend that he has enabled them to compel him to pay more costs than he would have paid had the action gone to trial. In other words, the plaintiffs by suing for a claim they cannot support, and adding their real and supportable claim as an alternative, contend that they may tax costs payable attributable only to the unsupportable claim. This would be a monstrous result, and we must examine the rules with care to see if they make such a result necessary.

The rule is Con. Rule 425: "When the plaintiff takes out money in satisfaction of all the causes of action he may tax his costs of the action and sign judgment therefor, unless the defendant pays them within 48 hours after taxation."

The former rule read, "the entire cause of action": Con. Rule 637—the change being made in order that there could be no doubt that the action was at an end: *Moon* v. *Dickinson*, 63 L.T. 371. Here there are two causes of action, alternate, indeed, but still two. How can it be said that satisfaction of one cause of action, and that the minor one, is a satisfaction of all the causes of action?

It is argued that the plaintiffs would be estopped as by matter of record if they were to set up again the original cause of action, and consequently that cause of action is at an end (I do not discuss the effect of the new action with which, as I think, we have nothing to do).

Stirling, J., in *Coote* v. *Ford*, [1899] 2 Ch. 93, at p. 99, says: "I do not see how any such proceedings could ever be available as a ground for a plea of res adjudicata. If either party were to attempt to open the matter, the appropriate defence of the other would seem to be, not a plea of res judicata, but an application to the Court, to stay proceedings"—and the learned Judge was there speaking of the cause of action on which specifically

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money had been paid in. It is a fortiori in the case of a cause of action upon which money has not been paid in.

The plaintiffs must, in my opinion, elect either to take the money paid in, in full satisfaction of their claims against the defendant, in which case they may retain their taxation of costs in the County Court: *Babcock* v. *Standish*, 19 P.R. 195; *McKelvey* v. *Chilman*, 5 O.L.R. 263; *Stephens* v. *Toronto R. Co.*, 13 O.L.R. 363; but must dismiss their other action with costs—or they must be held not to have brought themselves within Con. Rule 425. In this case they must repay the money into Court with interest and pay the defendant his costs of taxation, of the appeal to the County Court Judge and of this appeal.

If they elect the former alternative they will hold their judgment with County Court costs up to the judgment: but pay to the defendant his costs of the appeal from the taxing officer and of this appeal.

Falconbridge, C.J. Lennox, J.

FALCONBRIDGE, C.J.K.B., and LENNOX, J., agreed in the result.

Judgment accordingly.

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POWELL-REES, Limited v. **ANGLO-CANADIAN MORTGAGE CORPORATION.**

Ontario Divisional Court, Boyd, C., Latchford and Middleton, JJ. December 16, 1912.

[*Powell-Rees* v. *Anglo-Canadian Corporation*, 8 D.L.R. 995, varied.]

CONTEMPT (§ I C—1)—*Motion to Commit—Refusal to Answer Questions on Examination—Company—Director.*

Appeal by E. R. Reynolds from order of Sutherland, J., 8 D.L.R. 995, 4 O.W.N. 352. The judgment of the Court was delivered by BOYD, C., at the close of the argument, as follows: We think a declaration should be made that the order of the Divisional Court of September 23rd, 1912, should have been framed to provide that E. R. Reynolds was an officer of the defendant company and as such can be examined, and that on such examination he make full discovery and production of documents, said order to be amended nunc pro tunc. There shall be no costs of the motion before SUTHERLAND, J., or of this appeal. E. R. Reynolds, in person. M. C. Cameron, for the plaintiffs.

FOX v. SELKIRK LAND & INVESTMENT CO. LTD.

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Dec. 10.

Manitoba King's Bench. Trial before Metcalfe, J. December 10, 1912.

1. CORPORATIONS AND COMPANIES (§ V E 1—214)—SHAREHOLDERS — STOCK SOLD FOR ASSESSMENTS—CALLS—NOTICE.

A by-law of a company, giving the board of directors the power to summarily forfeit shares and the money paid thereon upon which any call shall have remained unpaid for six months after it shall be due and payable, is not sufficient to forfeit shares upon which part payment had been made, unless notice of the intended forfeiture has been given to the shareholder.

2. CORPORATION AND COMPANIES (§ V E 1—214)—STOCK SOLD FOR ASSESSMENTS—IRREGULAR FORFEITURE—SHAREHOLDER'S CAUSES OF ACTION.

Where stock of a shareholder partly paid for has been improperly declared forfeited for non-payment of calls, the shareholder is not restricted to an action for damages, but is entitled to sue for his stock and for a judgment giving him the benefits of a shareholder subject to all obligations legally imposed upon him as such.

Statement

THE plaintiff sues the defendant corporation alleging that he became on the 31st December, 1906, a shareholder for 4 shares, and on the 11th February, 1907, a shareholder for 2 shares of the capital stock of the company; that he paid thereon the sum of $60; that he recently applied for a statement of the balance owing on his stock, with the expressed intention of paying such balance; that the defendants refused to give any such statement, contending that the said 6 shares were cancelled and that in consequence thereof the plaintiff was not any longer the owner of the said shares. The plaintiff says that he is ready and willing to pay whatever moneys might be found to be due. He claims a declaration that he is still the owner of the said 6 shares of the said stock and an order that the defendant company treat the plaintiff as a shareholder.

Judgment was given for the plaintiff.

F. Heap and *R. D. Stratton*, for plaintiff.

R. M. Dennistoun, K.C., and *H. M. Hannesson*, for defendants.

Metcalfe, J.

METCALFE, J.:—The defendants, by their pleading, deny that the plaintiff ever was a shareholder or that any stock was ever allotted or issued to him. As an alternative they say that if the defendant ever applied for stock, and if the application was accepted, such acceptance was conditional upon the terms set forth in the said application; that such conditions were not complied with by the plaintiff; that the acceptance never became absolute; that the plaintiff abandoned his said application and his right thereby became at an end.

As a further alternative the defendants set up default of the plaintiff in respect of payment of calls, and say that the

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same were summarily forfeited together with the moneys paid thereon to the company and that the plaintiff's right has lapsed and determined.

The defendants further say that all the stock of the company has been issued and there is now no further stock which the company may lawfully allot to the plaintiff.

In reply the plaintiff, amongst other things, says that the company accepted his applications and allotted the stock; that if they made any call it was invalid, and that any forfeiture was invalid. He further says that if it should appear that these 6 shares have been sold to innocent purchasers subsequent to the forfeiture, and that there are not any longer any shares, then in the alternative, but not otherwise, he claims:—

(*a*) the return with interest of the moneys paid;

(*b*) damages to be assessed upon a reference to the Master.

It appears that the plaintiff on the 31st December, 1906, made his application in writing as follows:—

Jan. 10/07.

Application for shares.

I, George Herbert Fox, hereby request the directors of the Selkirk Land and Investment Company, Limited, to allot to me four shares of the capital stock of the company, and I agree to accept the same or any less number that may be allotted to me.

I have paid with this application the sum of forty dollars ($40), being 10 per cent. of the shares subscribed for, and premium at the rate of $5 per share and agree to pay further payments of 15 per cent. in 30 days and 25 per cent. in 60 days, and the balance as may be called by the directors.

I hereby appoint the president and secretary, or either of them in the absence of the other, to act and vote for me at any meeting or meetings of the company at which I may not be personally present.

Dated this 31st day of Dec., 1906.

Witness: F. A. GEMMELL. (Signed) GEO. H. FOX.

He paid the $40.00 and received a receipt therefor as follows:—

Selkirk, December 31, 1906.

Received from G. H. Fox, of Selkirk, the sum of forty dollars, being 10 per cent. payment on four shares of the above company.

Premium	$20.00
10 per cent. on shares.	$20.00
	$40.00

F. A. GEMMELL, *Agent.*

On January 15th, he received a letter from the secretary of the company as follows:—

At a meeting of the directors held Jan. 10th, 1907, you were allotted four shares of the capital stock of the Selkirk Land & Investment Co. Ltd. You have paid on subscription the sum of $20 and premium, and in accordance with your application, further payments will be payable as follows: $30 in thirty days and $50 in sixty days.

The minutes of a meeting of the directors of the company on January 10, 1907, are found at page 77 of the minute book, the material part being as follows:—

> An application from G. H. Fox for 4 shares was presented. Moved by R. Bullock, seconded by Dr. Ross, that 4 shares be allotted to G. H. Fox as applied for. Carried.

Thereupon in the stock ledger of the company there was entered, in the ordinary way, the name of Geo. H. Fox, as a shareholder for 4 shares, for which he was credited with the sum of $20 paid and debited with $200.

Afterwards, on the 11th day of February, 1907, he made a similar application in writing for 2 shares. It is not shewn that he received a receipt therefor, but it is shewn that he paid the money.

Mr. Fox did not receive any written notice of allotment of these subsequent shares, but he received a verbal notice that such had been allotted, and in any event, there appears an entry of February 12, 1907, in the stock ledger of the company, shewing George H. Fox, as a shareholder for a further 2 shares, shewing a debit of $100 and a credit of $10, and the further entries shewing that he is a shareholder in the amount of $300.

The company appears to have held its first shareholders' meeting on July 2, 1903. At that meeting there were the following resolutions:—

> It was moved by R. Bullock, seconded by Dr. Ross, that the draft of the by-laws be read over and discussed. Carried.
>
> Moved by D. Morrison, seconded by Dr. Ross, that the by-laws as read with amendments be adopted. Carried.

A document is filed, purporting to be the by-laws mentioned. There is no seal nor signature attached to the exhibit; but to it is a certificate as follows:—

> We certify this to be a correct copy of the by-laws of the Selkirk Land & Investment Co., Ltd., as passed at a general meeting of the shareholders of the company held July 2nd, 1903.

And to that certificate is attached a seal. These by-laws appear never to have been dealt with by the directors.

Clause 19 of the general by-laws is as follows:—

> 19. That the Board shall have power to summarily forfeit shares and the money paid thereon, upon which any call shall have remained unpaid for six months after it shall be due and payable, and such forfeit stock shall thereupon become the property of the company; interest at the rate of ten per cent. per annum to be paid on arrears.

The plaintiff paid no further sums than the moneys accompanying the applications. He received notice of the meeting of the shareholders down to and including February, 1908, and attended some of the meetings and voted.

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At a meeting of the directors held on the 24th July, 1911, the following resolutions were passed:—

Moved by J. E. Mailhot, seconded by Dr. Ross, that whereas G. H. Fox has defaulted in the payment of the calls on his stock subscription the stock allotted to him be and is herewith cancelled, in accordance with the provision of the by-laws governing such cases. Carried.

Moved by J. E. Mailhot, seconded by E. F. Comber, that the applications of F. A. Gemmel, J. E. Mailhot, E. F. Comber and D. Morrison to exchange certificates covering 23, 11, 15 and 11 fully paid shares respectively for certificates representing double those numbers of shares of half paid stock, be accepted and that the old fully paid shares be cancelled and new shares issued with 50 per cent. paid thereon. Carried.

Thereupon the company caused the stock to be cancelled and entries made in the stock ledger to that effect, after which the company claims they disposed of such stock amongst other shareholders and that thereafter there was no unissued stock.

The whole question to be decided, therefore, is the matter of cancellation, and if the stock has not been forfeited, can the plaintiff get an order for his stock, or must he rely upon his right to damages?

The purchasing shareholders were aware of the fact that they were purchasing stock which the company claimed was forfeited. I think they must be held to have had knowledge of all the circumstances. No certificates have as yet been issued to them.

On the argument counsel for the defence very properly admitted that, in view of the evidence, he could no longer contend that the plaintiff had not at one time been a shareholder.

I do not think the forfeiture valid. No notice was given the plaintiff of intended forfeiture. Even had the by-laws been regular, I would hesitate to give effect to a forfeiture of which no notice of intention had been previously given.

In the words of Macdonald, J., in *Boyce* v. *Kootenay Valley etc., Co.*, 5 W.L.R. 140:—

> The company refused to acknowledge him as a shareholder and made efforts to deprive him of his rights and interest in the company.

The defendants acted arbitrarily towards the plaintiff, and still continue to refuse to recognize him as a shareholder, contending that they have cancelled his stock.

I find that the plaintiff became a shareholder of six shares of the capital stock of the defendant company, with ten per cent. paid up. He is now entitled to all the benefits of a shareholder to such an extent, subject to all obligations legally imposed upon him as such shareholder.

There will be judgment for the plaintiff accordingly, together with costs.

Judgment for plaintiff.

WYLIE MILLING CO. v. CANADIAN PACIFIC AND KINGSTON AND PEMBROKE R. COS.

CAN.

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(File No. 1179.7.)

Board of Railway Commissioners. February 15, 1912.

1. CARRIERS (§ IV B—520)—COMPULSORY CONNECTION—COMPANY, MAJORITY OF STOCK IN ANOTHER COMPANY—SEPARATE CORPORATIONS AND OFFICERS—UNIT IN CONTROL—FIXING RATES.

Where one railway company by owning 51 per cent. of the stock has *de facto* control of another railway company, although they are separate corporations with separate sets of officers, the two companies, for the purpose of fixing rates, should be treated as one company.

Statement

THE application was heard at Ottawa, October 17, 1911.

W. H. Stafford, for the applicant.

E. W. Beatty, for the respondents.

The facts are fully set out in the judgment of the Assistant Chief Commissioner.

Asst. Chief Commissioner.

February 15, 1912. ASSISTANT CHIEF COMMISSIONER:—The Wylie Milling Company has a flour mill at Almonte, Ontario. It gets grain in ex-lakes from Kingston over the Kingston and Pembroke Railway at Sharbot Lake, and thence on the Canadian Pacific Railway, via Smith's Falls and Carleton, to Almonte, where it is milled and then forwarded to Montreal.

The rate from Kingston to Montreal, with stop-over for milling at Almonte, at one time was 15½ cents per 100 lbs. It was then reduced to 13¼ cents per 100 lbs. by the Company, and at the hearing Mr. Beatty, counsel for the Company, suggested it should be made 12¾ cents. That rate he made up as follows:

Kingston and Pembroke	3 cts.	47 miles	
Canadian Pacific	6½ cts.	171 "	Sharbot Lake to Montreal.
Stop-over for milling	2 cts.		
Side haul to Almonte	1¼ cts.		
	12¾ cts.		

It will be observed that in computing this rate counsel for the railway companies treats the Kingston and Pembroke Railway Company and the Canadian Pacific Railway Company as two separate roads. It was admitted by counsel for the Companies that the Canadian Pacific Railway Company owned 51 per cent. of the stock of the Kingston and Pembroke Railway Company. Counsel for the Companies submitted that as the two Companies were separate corporations, with a separate set of officers, that they should be treated separately, and that each one was entitled to its rate.

In a memorandum prepared by Mr. Commissioner Mills, dated October 19th, 1911, he deals with the question of the Canadian

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Pacific Railway Company's control of the Kingston and Pembroke Railway Company as follows:—

"On the facts stated in this complaint, the written answer submitted by the Canadian Pacific Railway Company, and the evidence given at the hearing of the case, it is clear to me that the Canadian Pacific, as the owner of 51 per cent. of the stock of the Kingston and Pembroke Railway has *de facto* control of the latter railway. It has the essence and all the advantages of formally complete control; and the fact that the consequences of the said control, are not specifically set forth in a lease or other document, is a mere incident, and does not nullify the control or exclude the benefits and obligations which result therefrom.

"Judging from the character and traffic of the Kingston and Pembroke Railway, I think we are safe in assuming that the purchase by the Canadian Pacific Railway Company of a majority interest in the stock of the said Kingston and Pembroke road, was made, not with a view to a directly remunerative investment, but to secure certain advantages which it was thought would accrue from control of the rates and operation of the said Kingston and Pembroke Railway; and the company which secured and enjoys the advantages, great or small, resulting from control, should, according to the usual practice, discharge the obligations growing out of such control.

"Therefore, we are, in my opinion, logically forced to the conclusion that the Kingston and Pembroke Railway should be considered a part, and treated as a part, of the Canadian Pacific Railway System; and that the complaint in this case should be disposed of in accordance with this conclusion."

I agree with the conclusion arrived at by Mr. Commissioner Mills in his memorandum of October 19th last, that for the purpose of freight rates the Kingston and Pembroke Railway Company should be considered as part of the Canadian Pacific Railway System.

This conclusion is strengthened by a decision of the Interstate Commerce Commission in *Carl Eichenberg* v. *Southern Pacific Company et al.*, 14 I.C.C.R. 250. The material points in this decision as summarized in the head-notes are:—

"1. The railroad and steamship lines forming the so-called Southern Pacific System are one in control and operation, are owned by the Southern Pacific Company, and are identical in officers and interests; and that as the Terminal Company was organized to furnish terminal facilities for the Southern Pacific System at Galveston, and through shipments on the system lines pass and repass over the docks of the Terminal Company, the latter forms a necessary link in the chain of interstate commerce and is subject to the Act.

"2. It makes no difference whether or not a connecting railroad company owns the Terminal Company, if the ownership of both is invested in the same corporation.

"3. In finding that the Terminal Company was part and parcel of the system engaged as a whole in the transportation of commerce, the Commission stated that to hold otherwise would in effect permit carriers generally through the organization of separate corporations to exempt all their terminals and terminal facilities from the regulating authority of the Commission.

"4. The Commission stated that it was not concluded by the form, but looks to the substance of the relations between corporations engaged in interstate commerce, and it therefore found that the Terminal Company, which was doing a wharfage business was a necessary element in and facility of interstate transportation in which the Southern Pacific System was engaged."

Having come to the conclusion that for the purpose of this case the two roads should be treated as one, the fixing of the rate presents no difficulty.

In the Richardson complaint, the Board decided that 7 cents was a fair rate on ex-lake grain, Kingston to Montreal. That was on the Grand Trunk Railway Company's mileage of 176. The distance to Montreal from Kingston, via Sharbot Lake, over the Kingston and Pembroke Railway and the Canadian Pacific Railway is 218. Giving the Railway Companies the benefit of the longer mileage it would make the rate to Montreal approximately 7½ cents. Adding to this 1¼ cents for the side haul, Smith's Falls to Almonte and return at the usual side haul rate of ½ a cent per ton per mile, and 2 cents the usual milling stopover, makes a total rate for the service rendered of 10¾ cents per 100 pounds.

I suggest, therefore, that an order go directing the Canadian Pacific Railway Company and the Kingston and Pembroke Railway Company to file tariffs within thirty (30) days establishing the 10¾ cent rate above mentioned.

MR. COMMISSIONER MCLEAN concurred.

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WYLIE MILLING CO. v. CANADIAN PACIFIC AND KINGSTON AND PEMBROKE R. COS.

Asst. Chief Commissioner.

Com. McLean.

THE VILLAGE OF BRIDGEBURG v. GRAND TRUNK AND MICHIGAN CENTRAL R. COS.

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(File No. 18046.)

Board of Railway Commissioners. February 29, 1912.

1. RAILWAYS (§ II B—181)—HIGHWAY CROSSING—COST OF OVERHEAD BRIDGE —MUNICIPALITY—NO COMPENSATION FOR EASEMENT.

Leave was granted by the Board to a municipality to carry a highway over the right of way and tracks of two railways by means of a bridge where no highway existed and the development of a village had been retarded for want of a crossing upon condition that the municipality bear the whole cost of construction. An easement was granted over the right of way, with right of support by piers without payment of compensation to the railway companies.

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VILLAGE OF BRIDGEBURG v. GRAND TRUNK AND MICHIGAN CENTRAL R. COS.

The Chief Commissioner.

THE application was heard at Hamilton, January 27, 1912.

G. H. Pettit, for the applicant.

W. E. Foster, for the Grand Trunk Ry. Co.

W. P. Torrance, for the Michigan Central Ry. Co.

The facts are fully set out in the judgment of the Chief Commissioner.

February 29, 1912. THE CHIEF COMMISSIONER (Hon. Mr. Mabee) :—The corporation of the village of Bridgeburg asks for authority to carry a street over the right-of-way and tracks of the Grand Trunk and Michigan Central Railways, by means of an overhead bridge. The work is one of necessity, as the public are put to great inconvenience under present conditions; and the development of the place is being retarded.

The Board visited the locality, and carefully examined the local conditions.

The Village should be granted permission to do the work, and detail plans must be filed for the approval of the Chief Engineer.

It is impossible to direct either railway company to contribute towards the expense of the work. It is entirely for the convenience of the people there. No highway at present exists at or near the point in question, and all the Board can do is to give the village an easement over the right-of-way of both companies, with the right to locate piers at proper places, without payment of compensation.

It was said that this work would be of advantage to the companies, in that, for years, large numbers of persons have crossed and recrossed the companies' lands on foot, in the vicinity of where the bridge would be located, and the latter would relieve the companies from these trespassers. I am afraid it would be rather hard doctrine to invoke, that, because the companies have not in the past prosecuted trespassers, they should now be called upon to pay for works to keep these trespassers off their property.

The Board's Engineer will see that the piers are so located that the least inconvenience will be done to the companies, having regard, as well, to future development.

Com. Mills.

MR. COMMISSIONER MILLS concurred.

WYLIE MILLING CO. v. CANADIAN PACIFIC R. CO.

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(File No. 1179.7.)

Board of Railway Commissioners. February 27, 1912.

1. CARRIERS (§ IV C 4—547)—REBATES—UNJUST DISCRIMINATION—SIDE-HAUL TOLL.

It is not unjust discrimination for a railway company to charge a side-haul toll to points where there is no competition, although no such toll is charged to points where competition exists.

THE application was heard at Ottawa, October 17, 1911. Statement

W. H. Stafford, for the applicants.

E. W. Beatty, for the respondent.

The facts are fully set out in the judgment of the Assistant Chief Commissioner.

February 27, 1912. ASSISTANT CHIEF COMMISSIONER:—The complaint of the Wylie Milling Company with reference to the rate on ex-lake grain, Kingston to Montreal, with stop-over at Almonte, was disposed of in my memorandum of 15th instant. Asst. Chief Commissioner.

There still remains another matter raised by the Milling Company, *i.e.*, that the rate from Georgian Bay ports to Montreal with milling stop-over at Almonte is 1½ cents higher when milling is done at Almonte than the rate via Arnprior, Renfrew, Douglas, and Eganville. The ex-lake rate from all Georgian Bay ports, both Canadian Pacific and Grand Trunk, to Montreal, is 10 cents per 100 lbs., with a milling-in-transit stop-over of 2 cents additional on the direct run. The tariffs provide that, where a side-haul to reach a milling point is necessary an additional charge of ½ cent per ton per mile is made. This side-haul charge from Smith's Falls to Almonte constitutes the extra cent and one-quarter which the Milling Company complain of. The Canadian Pacific Railway have a side-haul to Arnprior, Renfrew, Douglas, and Eganville, but they do not make any extra side-haul charge to those points. The reason is that those four points being on the Grand Trunk line from Depot Harbour to Montreal the Canadian Pacific must meet the Grand Trunk rate of ten and two in order to get any business. This, of course, is quite justifiable.

The side-haul charge made in the case of Almonte is the usual charge for such service, and the Railway Company is justified in making it in the case of Almonte.

If the Canadian Pacific Railway withdrew from competing with the Grand Trunk at Arnprior, Renfrew, Douglas, and Eganville, the Wylie Milling Company would be no better off because the rate through Almonte would not be changed and the millers at Arnprior, Renfrew, Douglas, and Eganville would doubtless ship their grain and grain products solely via the Grand Trunk at the rates they are now paying.

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The reasonableness of the 10-cent rate from the Bay to Montreal or the extra side-haul charge of a half-a-cent per ton per mile has not been questioned in this matter, but merely the application of these rates as set out above.

I, therefore, think that this feature of the Wylie Milling Company's application should be dismissed.

COMMISSIONERS MILLS and MCLEAN concurred.

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BENNETT v. HAVELOCK ELECTRIC LIGHT CO.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Idington, Duff, Anglin, and Brodeur, JJ. February 22, 1912.

[*Bennett v. Havelock Electric Light Co.*, 25 O.L.R. 200, affirmed.]

Statement

CORPORATIONS AND COMPANIES (§ V E 2—220)—*Shareholders—Action by stockholders against corporation.*]—Appeal from a decision of the Court of Appeal for Ontario, *Bennett* v. *Havelock Electric Light Co.*, 25 O.L.R. 200, reversing the judgment of a Divisional Court, *Bennett* v. *Havelock Electric Light Co.*, 21 O.L.R. 120, by which the judgment at the trial, dismissing the action, was reserved.

Mathieson, a resident of the village of Havelock, purchased the only water-power in the village, capable of producing electric power, for $300. He offered it to the municipal council, or any company, at the same price if either would undertake to establish a system of electric lighting and electric power, but could not induce any one to do so. He then associated himself with four other persons and a company was formed, the five pledging their own credit for the necessary funds. Mathieson sold the water-power to the company for $5,000, which he divided with his four associates.

Bennett and another shareholder in the company brought action to have the sale set aside and an account taken of the secret profit made by the five. His action was dismissed by the trial Judge, but maintained by the Divisional Court, where judgment was entered against the four defendants, Mathieson being discharged from liability, for $1,000 each. The Court of Appeal reversed the latter judgment and the action stood dismissed. The plaintiffs appealed.

S. T. Medd, for defendant moved to quash the appeal.

D. O'Connell, for plaintiff, contra.

Judgment

THE COURT quashed the appeal on the ground that there was no joint liability of the defendants and none of them was liable for a sum exceeding $1,000.

Appeal quashed with costs.

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Re FRASER.
FRASER v. ROBERTSON.
McCORMICK v. FRASER.

Ontario Court of Appeal, Moss, C.J.O., Garrow, Maclaren, Meredith, and Magee, JJ.A. June 18, 1912.

1. APPEAL (§ VII C—301)—EVIDENCE ON APPEAL—EXPRESS OR IMPLIED AUTHORITY FROM STATUTE CONFERRING POWER.

The power of appellate Courts to direct the reception of further evidence is purely statutory, and exercisable only to the extent conferred either expressly or by fair implication.

2. APPEAL (§ VII C—301)—EVIDENCE ON APPEAL—ADMISSION OF FURTHER EVIDENCE OF MATTERS ARISING BEFORE TRIAL JUDGMENT.

In dealing with the reception of further evidence bearing upon matters which have occurred before the decision upon the merits at the trial, an appellate Court should exercise great caution, owing to the danger of throwing open the whole matter after it has been investigated at a trial, and the opinion of the trial Judge and his reasons for it have become known.

[*Trumble* v. *Hortin*, 22 A.R. 51, referred to.]

3. APPEAL (§ II C 1—50)—JURISDICTION OF ONTARIO COURTS AS TO ADMISSION OF FURTHER EVIDENCE ON APPEAL—ONTARIO CON. RULE, 1897, 498.

Ontario Rule 498 (C.R. 1897) does not throw the case in appeal open for the reception of further evidence unless grounds are shewn for obtaining the special leave of the Court; and such leave will, in general, be confined to the production of such evidence as, upon an application of which the opposite party in the appeal would be notified and would have an opportunity of meeting, a proper case is made for adducing at that stage; though, where it appears to the appellate Court that, by reason of some slip or oversight, evidence necessary for the full elucidation of a point, or which would complete more or less formally the proof of some instrument or fact bearing upon the issues, has been omitted, it may, in its discretion, of its own motion direct the production of the necessary evidence.

[*Re Fraser*, 24 O.L.R. 222, reversed on appeal.]

4. INCOMPETENT PERSONS (§ I—3)—PROCEEDINGS ON A LUNACY ISSUE—THE LUNACY ACT, 9 EDW. VII. (ONT.) CH. 37, SEC. 77.

An issue as to lunacy under sec. 77 of the Lunacy Act, 9 Edw. VII. (Ont.) ch. 37, is to be conducted in the same manner and according to the same rules of law and procedure as any other trial.

5. INCOMPETENT PERSONS (§ I—3)—POWER TO EXAMINE AN ALLEGED LUNATIC—JURISDICTION OF TRIAL JUDGE—ABSENCE OF RIGHT IN APPELLATE COURT—THE LUNACY ACT, 9 EDW. VII. (ONT.) CH. 37, SEC. 7, SUB-SEC. 4.

Power to examine an alleged lunatic is conferred by sub-sec. (4), of sec. 7 of the Lunacy Act, 9 Edw. VII (Ont.) ch. 37, only upon the Judge presiding at the trial of the issue as to his soundness of mind, and cannot be exercised by an appellate Court.

[*Re Fraser*, 24 O.L.R. 222, reversed on appeal.]

6. COURTS (§ I A—2)—JURISDICTION AND POWERS OVER INCOMPETENT PERSONS—INHERENT POWERS—THE LUNACY ACT, 9 EDW. VII. (ONT.) CH. 37, SEC. 3.

The powers, jurisdiction and authority conferred upon the Court by section 3 of the Lunacy Act, 9 Edw. VII. (Ont.) ch. 37, or its inherent jurisdiction, as representing the King, over the persons and estates of lunatics or persons of unsound mind, can be exercised only after a declaration, upon due inquiry, that the person in question is of unsound mind.

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7. APPEAL (§ II C 1—50)—JURISDICTION OF ONTARIO DIVISIONAL COURT—RE-OPENING OF CASE—TAKING OF FRESH EVIDENCE—TRIAL DE NOVO.

In an issue as to lunacy a Divisional Court has no power, either under the Lunacy Act, 9 Edw. VII. (Ont.) ch. 37, or under the Ontario Con. Rules, or otherwise, of its own motion and against the protest of one of the parties to the issue, to re-open the case and to call for and hear a large amount of fresh evidence, and to determine the issue upon the original evidence and the fresh evidence thus obtained, not as upon an appeal but as in the first instance.

[*In re Enoch and Zaretsky Bock and Co.'s Arbitration*, [1910] 1 K.B. 327, and *Kessowji Issur* v. *Great Indian Peninsula R. Co.*, 96 L.T.N.S. 859, specially referred to; *Re Fraser*, 24 O.L.R. 222, reversed on appeal.]

8. APPEAL (§ VIII C—675)—WHERE PROPER DECISION CAN NOT BE GIVEN—DUTY OF APPELLATE COURT—NEW TRIAL.

Where an appellate Court is not satisfied upon the argument of the appeal that the case has been so fully developed as to enable a proper decision to be given, it should direct a new trial.

9. NEW TRIAL (§ II—7)—ON APPEAL FROM APPELLATE COURT—ADMISSION OF EVIDENCE—EXAMINATION OF ALLEGED LUNATIC BY APPELLATE COURT.

Where, in an issue as to lunacy under sec. 7 of the Lunacy Act, 9 Edw. VII. (Ont.) ch. 37, a Divisional Court has, of its own motion and against the protest of one of the parties to the issue, improperly called for and heard fresh evidence, and itself examined the alleged lunatic, and, upon the original evidence and the further facts thus ascertained, has determined the issue and reversed the decision of the trial Judge, and it appears that much of the fresh evidence so obtained may be material and important, the proper course is, not to determine the issue upon the record as it stood when the appeal came before the Divisional Court, but to direct a new trial.

[*Re Fraser*, 24 O.L.R. 222, considered.]

Statement

APPEAL by Michael Fraser from the order of a Divisional Court, *Re Fraser*, 24 O.L.R. 222, 19 O.W.R. 545, declaring him of unsound mind.

The appeal was allowed and a new trial ordered.

Previous decisions in the same litigation are reported, *Fraser* v. *Robertson*, 1 O.W.N. 800, 843, 894, and *Re Fraser*, 1 O.W.N. 1105, affirmed, *Re Fraser*, 2 O.W.N. 26.

Argument

G. H. Watson, K.C., *John King*, K.C., and *F. W. Grant*, for the appellant. The Divisional Court acted in excess of its proper discretion and jurisdiction in opening up and practically retrying the case, as it did. The judgment of the trial Judge was based upon a full and accurate view of the law and a careful analysis of the evidence; and it was not shewn that anything was omitted at the trial that should have been taken into consideration. The Court below erred in going outside of the question properly before it as to whether the appellant was of unsound mind or not, and in going far beyond that issue into a general and widely extended investigation of the manner in which his business affairs had been managed. Con. Rule 498, on which the respondent relies, does not authorise the admission of such further evidence as was taken in this case, except upon special grounds,

and with the special leave of the Court; and there is no precedent to be found for the extraordinary action which has been taken by the Divisional Court. *Dodge* v. *Smith* (1902-3), 1 O.W.R. 803, 2 O.W.R. 561, in this Court, went rather far, but has no resemblance to the present case, as it dealt with letters that were discovered after judgment. Counsel referred to a number of the cases cited on this point in the argument before the Divisional Court, 24 O.L.R. at pp. 240, 241, and also to *Burfoot* v. *DuMoulin* (1891), 21 O.R. 583; *Murray* v. *Canada Central R. Co.* (1882), 7 A.R. 646, 655; *Dinsmore* v. *Shackleton* (1876), 26 C.P. 604. In any event, the Court below should have been guided by the report of Dr. Caven, the professional expert appointed by itself during the course of the appeal, which was clearly in favour of the appellant. The Divisional Court also erred in directing a personal examination of the appellant by itself, as that is something which, under the statute, is permitted only to the trial Judge. If a different rule were to prevail, it would be open to the Judge of the higher appellate Courts to make similar examinations, and the result is in effect a conflict of judicial testimony. On the question of jurisdiction, they referred to *In re Enoch and Zaretzky Bock & Co.'s Arbitration*, [1910] 1 K.B. 327 (in which *Coulson* v. *Disborough*, [1894] 2 Q.B. 316, is commented on), especially to the judgment of Fletcher Moulton, L.J., and to that of Farwell, L.J., at pp. 335-337. This is not a mere matter of discretion, but one of excess of jurisdiction; and, in any event, there has been an excess of judicial discretion. It is evident that the Court below was largely influenced in coming to its decision by collateral circumstances relating to the marriage of the appellant and other matters of that kind, which had no relevance to the real issue. As to the weight to be attached to such circumstances, see *Cornwall* v. *Cornwall* (1908), 12 O.W.R. 552. There was no authority for the action of the Divisional Court either under the Judicature Act or the Lunacy Act, under the latter of which the judgment of the trial Judge can be set aside only by the judgment of a Court of appeal sitting as such. The irregularity of the course followed by the Court below is clearly shewn by the case of *Kessowji Issur* v. *Great Indian Peninsula R. Co.* (1907), 96 L.T.N.S. 859, before the Privy Council. The temporary lapses of memory on the part of the appellant are consistent with normal senility, and any confusion of mind shewn by him would be the natural result of his feeling of depression and resentment. He had peculiarities and eccentricities, but not such as amounted to mental unsoundness.

A. E. H. Creswicke, K.C., and *A. McLean Macdonell*, K.C., for the respondent. The Judges in the Court below were amply justified in their action under Con. Rule 498, which is practically the same as the English Rule: *In re Neath Harbour Smelting and Rolling Works* (1885), 2 Times L.R. 94; *In re National Debenture*

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and Assets Corporation, [1891] 2 Ch. 505, 516; *Shoe Machinery Co.* v. *Cutlan*, [1896] 1 Ch. 108, 114, *per* Rigby, L.J. The *Kessowji* case, on which great stress is laid by the appellant, is distinguishable from the case at bar because the Rules there applicable shew that the decision of the trial Judge as to the admission of new evidence was final, and the appellate Court had no power to reverse it. It was a mere matter of accommodating themselves to the convenience of the appellant for the members of the Divisional Court to go to Midland, as they had a right to require him to appear personally before them: Pope on Lunacy, ed. of 1877, p. 65; *In re Roberts* (1746), 3 Atk. 308, 312. It cannot be doubted that, if the learned trial Judge had had all the facts put before him which were elicited by the examination of witnesses and of the appellant himself, shewing the utterly reckless and improvident disposition made by him of his property, and his general weakness and unsoundness of mind, the same conclusion would have been arrived at by him as by the Judges of the Divisional Court. The facts so elicited shewed that the appellant was either a senile dement with a diseased mind, or that he was at all events so unsound in mind as to be utterly incapable of looking after his own affairs. In either case the Court below was justified in the conclusion to which it came: *Ridgeway* v. *Darwin* (1802), 8 Ves. 65. "Opinion evidence" as to the sanity of the appellant can be given only by the qualified experts called on each side, and no weight is to be attached to the opinion of other witnesses, even though some of them may be medical men: *Regina* v. *Neville* (1837), Crawford & Dix's Notes of Cases 96, 97; *Carter* v. *Boehm* (1766), 3 Burr. 1905. The expert medical evidence is fully discussed in the judgment of Middleton, J., 24 O.L.R. at p. 273 *et seq.*, on whose conclusions the respondent relies. The course taken by the Court below is justified by the wide language of Con. Rule 498, which gives the appellate Court "all the powers and duties as to amendment *and otherwise*" of the Court appealed from, where the word "and" is disjunctive, and not merely "powers" but "duties" are included within the scope of the Rule. The following authorities were also referred to: *Quilter* v. *Mapleson* (1882), 9 Q.B.D. 672; *Skinner & Co.* v. *Shew & Co.*, [1893] 1 Ch. 413; *Shelford* v. *Louth and East Coast R.W. Co.* (1879), 4 Ex.D. 317. They also relied upon the cases and reasons set forth in the argument before the Divisional Court, 24 O.L.R. at pp. 238, 239.

Watson, in reply, referred to the type-written appeal case in *Cornwall* v. *Cornwall*, 12 O.W.R. 552, at pp. 589, 628, 630, which was a stronger case against the appellant than this, as to alleged delusions and the transfer of property. No opportunity has been given to the appellant to rebut the inferences that might be drawn from some of his statements, made as they were under the forced and unnatural conditions that obtained at the time of the visit of the Divisional Court. As to jurisdiction, we do not say

that the Court below had no power to receive new evidence, but that in its acting as it had done in this case, there was an absence or an excess of judicial discretion. The action so taken was the beginning, and, it was to be hoped, would be the end, of an unprecedented chapter in judicial procedure.

June 18, 1912. MOSS, C.J.O.:—This is an appeal by Michael Fraser from an order of a Divisional Court, reversing an order pronounced by Britton, J., after the trial by him of an issue, the question to be determined being whether or not Michael Fraser was, at the time of the inquiry, of unsound mind and incapable of managing himself or his affairs.

After a trial extending over four days, during which eleven witnesses in support of the affirmative and ten in support of the negative of the issue were called and examined, and after a personal interview with and examination of Michael Fraser at his home in Midland, the learned trial Judge determined and adjudged that Michael Fraser was not, at the time of the said inquiry, of unsound mind and incapable of managing himself or his affairs.

From this finding and adjudication an appeal was taken by Catherine McCormick, the promoter of the proceeding, with the result already stated.

Upon the appeal from the order of the Divisional Court, there arose some important and to some extent novel questions, owing to the course into which the case was turned, the shape it was caused to assume, and the manner in which it was finally dealt with by the Divisional Court upon the appeal to it. The Divisional Court did not dispose of the appeal upon the record as it came before it from the trial Court. While the argument was in progress, it, apparently on its own motion, without any application on the part of the then appellant or any notice of intention on her behalf to make an application, and against objection on behalf of Fraser, directed that the evidence of further witnesses be taken before it. Under this direction, eleven witnesses testified before the Court, all but one of whom had not testified before the trial Judge. The Court also appointed one of these witnesses, a medical practitioner, to make a special personal examination and inquiry into the mental condition and capacity of Michael Fraser and report his conclusions. In addition, the Judges constituting the Court made a special visit to Fraser's home, and themselves questioned him, the interview lasting, it is said, about two hours.

Upon the record thus procured, more than upon the original record, the argument was resumed and concluded. So that, as stated by Middleton, J. (24 O.L.R. at p. 266): "Originally an appeal, the hearing was reopened, and the matter fell to be dealt with by us upon the original evidence and the new evidence, and upon this we are called upon to pronounce, not as upon an appeal,

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but as in the first instance—and if, in the result, we differ from the learned trial Judge, we are not reviewing him but are arriving at a different conclusion upon widely different evidence."

It is quite apparent from the opinions of the learned Judges that, on finally disposing of the case, the Court proceeded almost entirely upon the material which was not part of the record when the appeal was taken from the decision of the learned trial Judge.

The first, and indeed the main and most important question, is, whether it was competent for the Divisional Court as an appellate tribunal to deal with the case as it has been dealt with, and whether the now appellant, Michael Fraser, is bound by its action in this regard.

The serious consequences to him of what has been done are very apparent; for, whereas upon the case as appearing on the record when the appeal was taken he had been found and adjudged not to be of unsound mind and incapable of managing himself or his affairs, he has now a decision to the contrary against him, based not upon appeal from that finding and adjudication, but upon a trial and inquiry conducted by a new and different tribunal.

The action of the Divisional Court is sought to be upheld, first, upon the ground that, under the Lunacy Act, 9 Edw. VII. ch. 37, and the Con. Rules with respect to appeals, there was jurisdiction; and, secondly, that, having regard to the nature of the inquiry and to the inherent as well as statutory jurisdiction of the Court over the persons and estates of lunatics or persons of unsound mind and incapable of managing themselves or their affairs, it is not only within the powers of the Court, but it is its imperative duty, to adopt methods of investigation and prescribe rules of procedure which in a case of ordinary litigation between subjects could not and would not be permitted. With great deference, I am unable to subscribe to either of these propositions.

It is, of course, beyond dispute that the Court, either as the inheritor or statutory delegate of the powers, jurisdiction, and duty of the King as *parens patriæ*, or as the instrument of the Legislature for the care and protection of the persons and estates of lunatics or persons of unsound mind as defined by the Lunacy Act, possesses most extensive powers, jurisdiction, and authority in regard to such matters.

But the exercise of these powers or the right to exercise them is based, not upon the allegation of any one, not even of the Crown or of the Attorney-General as representing the Crown, that a person is a lunatic or of unsound mind and incapable of managing himself or his affairs, but upon a finding and adjudication after due inquiry that such is the case. The inquiry into that question is to be conducted in the same manner and according to the same rules of law and procedure as any other trial where a trial is to take place.

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So far as the matter is governed by statute, it is quite clear that the first preliminary to the assumption by the Court of the powers, jurisdiction, and authority specified in sec. 3 of the Lunacy Act, is a finding and adjudication in some form and a declaration by the Court that the person in regard to whom application is made is a lunatic. Under sec. 6, that declaration may in some cases be made without the trial of an issue. But when, under sec. 7, the Court directs an issue to try the alleged lunacy, the directions as to the mode of trial and the practice and procedure to be observed are specific. It is expressly declared that the practice and procedure as to the preparation, entry for trial and trial of the issue and all the proceedings incidental thereto shall be the same as in the case of any other issue directed by the Court or Judge (sub-sec. 6). By sub-sec. 7, the same (no higher or different) right of appeal may be exercised by any party to the issue as may be exercised by a party to an action in the High Court, and the Court hearing the appeal has the same (and no higher or different) powers as upon an appeal from a judgment entered at or after the trial.

It is plain that the statute confers upon the Court no power of dealing with an issue, either at the trial or upon an appeal, beyond that which it possesses in the case of an ordinary action.

Nor is there any ground for the contention that special power or authority outside the statute is vested in the Court so as to enable it to conduct the trial of an issue, or an appeal from the order made, otherwise than according to the rules of law, procedure, and practice governing trials of ordinary actions. As has been pointed out, the benevolent and paternal jurisdiction and authority over the persons and estates of lunatics or persons of unsound mind only arises or attaches after a finding and adjudication resulting in a declaration of lunacy or unsoundness of mind. Until that result has been reached, the alleged lunatic is entitled to all the rights and privileges to which any litigant may lay claim. There is no presumption to be made against him, and the proof upon which the trial is to proceed is to be governed by exactly the same rules as in other cases. And he has the right to require and insist that the inquiry and the subsequent proceedings be conducted against him on no different principles. The contention that, because, if the finding be adverse to him, the Court will be concerned in seeing to the care and protection of his person and estate, it is, therefore, to be deemed as in some sense a party to the litigation, and may step outside of the powers to which it is restricted in ordinary cases, appears to me to be contrary to those principles of justice upon which all alike are entitled to rely.

In this case the test must be whether what has been done is justified by the law and rules of practice and procedure applicable to appeals from a judgment entered at or after the trial of an action. If so, then the question would be whether, upon the record as now

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before this Court, the finding and adjudication and the declaration of unsoundness of mind is sustainable upon the whole case. If, on the other hand, what has been done, or any substantial part of it, was contrary to the law and rules of practice and procedure applicable to such appeals, and, therefore, beyond the powers and jurisdiction of the Court, all such proceedings are *coram non judice* and not binding upon Fraser.

The power of appellate tribunals to direct the reception of further evidence is, it is scarcely necessary to say, purely statutory, and only exercisable to the extent conferred either expressly or by fair implication.

Here the authority of the Divisional Court is derived from Con. Rule 498, which has the force of a statute. By it the appellate tribunal is given "full discretionary power to receive further evidence upon questions of fact," subject, however, to the further provisions of the Rule. By sub-sec. (3), upon appeals from a judgment, order, or decision given upon the merits at the trial or hearing of any cause or matter, such further evidence (save as provided by sub-sec. (2) in case of evidence as to matters which have occurred after the date of the judgment, &c.), shall be admitted on special grounds only, and not without the special leave of the Court.

Obviously it was not the intention to throw the case in appeal open to the reception of further evidence unless upon special grounds shewn for obtaining the special leave of the Court. In general, the order, if made, would be for production of such evidence as, upon such an application, of which the opposite party in the appeal would be notified and have an opportunity of meeting if so advised, a proper case was made for adducing at that stage. It is not, however, to be thought that in a case where it appeared to the tribunal that, by reason of some slip or oversight, a piece of evidence necessary to fully elucidate a point or to complete more or less formally the proof of some instrument or fact bearing on the issues had been omitted, it might not, in its discretion, of its own motion, direct the production of evidence necessary for such purpose.

It would not be proper nor is it advisable to attempt to formulate rules or classify instances, for any such attempt could only tend to hamper or embarrass appellate tribunals in the exercise of their powers under the Rule.

It must be conceded, however, that in doing what was done in this case the Divisional Court has gone much beyond anything that has ever been done by any appellate tribunal in this Province. This fact is not necessarily conclusive against what was done, but it is sufficiently significant to call for careful consideration.

In dealing with the reception of further evidence bearing on matters which had occurred before the judgment, order, or decision upon the merits at the trial, and which might have been

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produced at the trial, the appellate tribunals have always exercised great caution, for reasons which are explained in some of the cases and are sufficiently apparent. The manifest danger in most cases of throwing open the whole matter after it has been investigated at a trial, and the opinion of the trial Judge and his reasons for it have become known, has been very generally recognised.

In no case has the direction for reception of further evidence been made to extend to what is in substance a retrial of the whole case, where, as appears from the opinions of the Judges, the evidence adduced at the trial formed the least important factor, the appellate tribunal taking the place of the trial Judge, and, as Middleton, J., says, pronouncing not as upon an appeal but as in the first instance.

For this course I am unable to find any warrant in the law, statutory or otherwise. In my opinion, the course the Divisional Court, if not satisfied upon the argument of the appeal that the case had been so fully developed as to enable a proper decision to be given, should have adopted, was to direct a new trial. That would have sent the case to the proper tribunal designated alike by the Judicature Act and the Lunacy Act for the trial of the issue directed. And it does not appear to me that there exists any power or authority in an appellate tribunal to virtually assume the functions of a trial Judge and enter upon a trial, at which, as Middleton, J., says, the evidence adduced was widely different from that heard by the trial Judge.

Nor do I think there is any warrant for the examination of Fraser by an appellate tribunal. That appears to be something that is to be done by the trial Judge at or before the conclusion of the trial before him. Section 7 (4) is explicit upon the subject, and there is nowhere any expansion of the right or duty enabling the appellate tribunal to substitute itself for the trial Judge in the conduct of such an examination. The judgment of the Judicial Committee in the case of *Kessowji Issur* v. *Great Indian Peninsula R. Co.*, 96 L.T.N.S. 859, though dealing with a differently expressed statute, bears upon both these questions, and supports, I think, the views here expressed.

If these conclusions be correct, it follows that much of the record now before this Court is not properly before it. The question then is, whether this Court should deal with the case upon the record as it was when the appeal came before the Divisional Court.

After giving the case the best consideration in my power, I think we should not do so, but that we should do what the Divisional Court might have done under the circumstances, and direct a new trial.

I greatly regret that this result has the effect of putting aside that which was done by the Divisional Court with an evident desire to fully elicit facts and circumstances that may prove very

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material and important in arriving at a just conclusion upon the issue directed.

But, in the view I hold with regard to the powers and authority of the Court, I am unable to perceive any alternative.

I would set aside the order of the Divisional Court and direct a new trial, the costs of the former trial and of the proceedings before the Divisional Court and of this appeal to be disposed of by the Judge presiding at the new trial.

GARROW, J.A.

GARROW, J.A.:—Appeal by Michael Fraser from an order of a Divisional Court declaring him to be a lunatic and appointing committees of his person and of his estate.

The application was heard before Sutherland, J., in Chambers, who, by an order dated the 23rd day of July, 1910, directed an issue to be tried before Britton, J., or the Judge assigned to preside at the Barrie Assizes.

The issue was accordingly prepared and settled, and was set down for trial at the Barrie Assizes, Britton, J., presiding, who, after hearing evidence, and an examination at his home of the alleged lunatic, dismissed the application. The applicant appealed to a Divisional Court; and, upon the hearing of the appeal, the Court directed further evidence to be adduced, which was done. And the members of the Court also personally examined the alleged lunatic at his home; and, upon the whole material thus obtained, allowed the appeal, and made the order now complained of.

The direction that further evidence should be given came apparently from the Court, and, while acquiesced in by counsel for the applicant, was opposed by counsel for Michael Fraser, who also opposed the further examination of the alleged lunatic by the Court.

Middleton, J., a member of the Divisional Court, in his judgment, said (24 O.L.R.) 222, at pp. 262, 264, 265): "Upon the appeal coming before us, we thought that at the hearing the real issue before the Court had not been sufficiently kept in mind, and that evidence essential to the determination of the sole question before the Court, 'Is Michael Fraser of unsound mind and incapable of managing himself or his affairs?' had not been given.

. . . .

"The evidence which we thought should have been given was:—

"1. That of Dr. McGill, the medical man who had attended Fraser for a long time prior to his marriage, and who had also attended the deceased brother John.

"2. That of Mr. Finlayson, who for many years had been Mr. Fraser's solicitor, and who had seen him almost daily from the time of his brother's death till the marriage.

"3. That of Robert Irwin, who was an intimate friend of many years and had been a business confidant of both brothers, and was, along with Michael, executor of John's estate. Against these three men, charges were freely made by counsel representing Mr. Fraser and his wife, with, so far as we could see, no foundation in the evidence.

"4. That of Mrs. Fraser. She would, we thought, be able to explain how Mr. Fraser's affairs had actually been managed after the marriage, and also be able to explain the circumstances surrounding the marriage itself.

"5. The bankers having custody of Fraser's funds, so that we might see how they had been dealt with.

"6. Some of those who were responsible for the marriage, so as to ascertain if Fraser entered into the married state with any apparent appreciation of what he was doing.

"Had the litigation been between the McCormicks and Mr. Fraser, they would have had the right to present the case as they chose, and the Court would have been bound to deal with the matter as best it could upon the evidence adduced. But the inquiry before the Court was not a piece of litigation between adverse parties, but a solemn inquiry by the Court for the purpose of ascertaining if the old man is, at the time of the inquiry, capable of managing his affairs, or is, as suggested, in the feebleness of his old age, the victim of a designing woman and her family, who are attempting to deprive him of his property —her marriage being a mere incident to the larger scheme.

"Upon such an inquiry the Court is not shut up to the evidence which the parties choose to tender, but has the right to demand the fullest information. The suggestion that it is the duty of the Court, in a case of this kind, to grope blindly in the dark, when light may be had for the asking, belongs to the days of long ago and meets no response in my mind.

"We felt that any inquiry could be better conducted before us than upon a new trial, because much evidence had been taken and much argument had been heard, and this would be thrown away by directing a new trial; but far more important than this was the question of delay."

Upon the argument in this Court, counsel for Michael Fraser renewed the objections which had been taken to the course adopted in the Divisional Court in directing further evidence to be given, and in examining the alleged lunatic, and contended that the order of Britton, J., dismissing the application, should be restored. The first question, therefore, to be determined on this appeal, is as to the procedure in the Divisional Court in respect of the further evidence, and the further examination, under the circumstances which I have stated.

It is practically conceded that what was done was a departure from the ordinary procedure; but it is justified, or attempted

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to be, upon the ground that, the issue in question arising in a lunacy matter, the Court had some special duty or special power by virtue of which it might ignore the trial which had been had before Britton, J., and try the matter *de novo*.

I have not been able to find any justification for such a contention. On the contrary, it appears to me that the procedure in lunacy matters, however it may have been originally, is now definitely settled by statute; and that, in a word, an issue in lunacy must be tried and afterwards dealt with exactly as if it was the more familiar interpleader issue.

What the Divisional Court has power to do in the one case it may do in the other, neither more nor less.

This seems to be quite clear from a perusal of the statute 9 Edw. VII. ch. 37, which was the statute in force when the application was made.

By sec. 6, the Court—which, by the interpretation clause (c), means the High Court—may, if satisfied that the evidence establishes the lunacy beyond reasonable doubt, make the necessary order; or, if not so satisfied, may, under sec. 7, direct an issue to be tried, with or without a jury, as the Court or the Judge presiding at the trial directs. Sub-section 4 directs that upon the trial of the issue the alleged lunatic, if within the jurisdiction of the Court, shall be produced, and shall be examined at such time and in such manner, either in open Court or privately . . . as the presiding Judge may direct. . . . By sub-sec. 6 it is declared that the practice and procedure as to preparation, entry for trial and trial of the issue and all the proceedings incidental thereto shall be the same as in the case of any other issue directed by a Court or a Judge. By sub-sec. 7 a right of appeal is given such as may be exercised by a party to an action in the High Court from a judgment rendered at or after a trial, including the right of appeal, without leave, from the Divisional Court to this Court; and the Court hearing any such motion or appeal shall have the same powers as upon a motion against a verdict or an appeal from a judgment entered at or after the trial of an action.

From these very definite provisions it is, I think, abundantly clear that the jurisdiction conferred upon the Divisional Court is appellate only, and in no way includes the powers which the statute expressly confers upon the trial Judge. It does not, and cannot, sit in such a matter merely as a Court of first instance. As an appellate Court it has, by virtue of Con. Rule 498, upon the application of either party, upon a proper case being made for the indulgence, power to receive further evidence, a power very jealously guarded, as the numerous cases on the subject shew, and, if improperly exercised, a proper subject of review on appeal to this Court. See *Trumble* v. *Hortin* (1895), 22 A.R. 51, where an order to admit further evidence was set aside.

The Court has, apparently, no power, of its own motion and without the consent of both parties, to direct further evidence to be given: see *In re Enoch and Zaretzky Bock & Co.'s Arbitration*, [1910] 1 K.B. 327; and see also *Kessowji Issur* v. *Great Indian Peninsula R. Co.*, 96 L.T.N.S. 859. The parties, and not the Court, are *domini litis* in all civil proceedings. If a party comes into Court with an imperfect case, the proper penalty is dismissal. If he desires to give further evidence, he can only be allowed that privilege under the Rule to which I have before referred, which, in my opinion, is as applicable in a lunacy matter as in any other.

It was scarcely attempted upon the argument to uphold what was done as falling within the provisions of what may be called ordinary procedure. The respondent's contention, while scarcely so definitely stated perhaps, amounted to this, that the Court, as representing the King, has in lunacy matters some official power by virtue of which the ordinary procedure may, under certain circumstances, be ignored. For such an idea I can find no warrant.

In Chitty's Prerogatives of the Crown, p. 155, it is said: "The King as *parens patriæ* is in legal contemplation the guardian of his people; and in that amiable capacity is entitled (or rather it is His Majesty's duty in return for the allegiance paid him), to take care of such of his subjects as are legally unable, on account of mental incapacity, whether it proceed from, 1st, nonage; 2, idiocy; or, 3, lunacy; to take proper care of themselves and their property."

Another and equally important branch of the King's prerogative is the creation of Courts. At pp. 75, 76, Chitty further says: "It seems that in very early times our Kings, in person, often heard and determined causes between party and party. But, by the long and uniform usage of many ages, they have delegated their whole judicial powers to the Judges of their several Courts; so that, at present, the King cannot determine any cause or judicial proceeding, but by the mouth of his Judges, whose power is, however, only an emanation of the royal prerogative. The Courts of justice, therefore, though they were originally instituted by royal power, and can only derive their foundation from the Crown, have, respectively, gained a *known and stated jurisdiction, and their decisions must be regulated by the certain and established rules of law.*"

The "known and stated jurisdiction" of the Courts in lunacy matters is, in this Province, expressly conferred and defined by statute. And the statutory provisions to which I have before referred in detail, must govern, else great confusion would arise.

I am, for these reasons, with deference, of the opinion that the Divisional Court, in calling further evidence and in personally examining the alleged lunatic, acted in excess of its juris-

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diction, and that the appellant's objections to the course pursued are well founded.

Upon the merits not much need be said, as, in my opinion, the proper remedy, under all the circumstances, is to direct a new trial of the issue. This may be had if the parties, or either of them, desire, before a jury.

If the matter stood as it did when it left the hands of Britton, J., I would not have been inclined to disturb his conclusion.

But I cannot shut my eyes to the fact that further evidence, of more or less importance, was, although irregularly, produced before the Divisional Court, which it is desirable, in the best interests of the alleged lunatic himself, should be submitted to the proper tribunal.

Nor do I feel as much impressed by a consideration of the necessary delay involved in such a course, as was Middleton, J. Delay is, of course, undesirable when it can be properly avoided; but it is also highly desirable, even at the expense of some delay, that an order practically depriving an old man, whom several respectable witness, and at least one learned Judge, consider sane, of his liberty and the control of his property, and inflicting upon him the stigma of being a lunatic, should only be made after due and even strict compliance with the established course of legal procedure applicable in such cases.

The costs, including those of this appeal, should, I think, be reserved to be disposed of by the Judge upon the new trial.

In any event of this appeal, paragraph 6 of the formal judgment should be so amended as to omit all reflections upon the conduct of Mrs. Fraser, who is in no way a party to this record, although doubtless the real cause of this application: for one may, I think, safely say that, if there had been no marriage, there would have been no application.

Maclaren, J.A.
Magee, J.A.

MACLAREN and MAGEE, JJ.A., concurred.

Meredith, J.A. (dissenting)

MEREDITH, J.A. (dissenting):—This case has been presented, throughout, by the persons whose interests really are being advocated in it, from an entirely wrong standpoint; a thing which, no doubt, is natural enough, but none the less entirely wrong; these proceedings, rightly, cannot be seized upon to bolster up the rights, or claims, present or future, of such persons, to the property of the "supposed lunatic;" and must not be permitted to be made use of for any such ulterior purpose, much less to influence the conscience of the Court in dealing with the real question involved.

The real question involved is, whether the supposed lunatic is a person of unsound mind and incapable of managing himself or his affairs; and that question is not to be solved in the interest, or for the benefit, of his wife or of his heirs at law, but solely in his own, and in the public, interests; and the firmer

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we close our eyes against the purposes and interests of those who are taking advantage of these proceedings to advance their own selfish ends, in the possession or distribution of the supposed lunatic's property, now or after his death, the more likely is right to be done.

The case is not one, or at all like one, nor is it to be treated as one, of ordinary litigation between adverse litigants, able to assert, and to take care of, their own interests. The jurisdiction involved in such a case is entirely different from that which is involved in this case. Under the statute-law of this Province, "all the powers, jurisdiction, and authority of His Majesty over and in relation to the persons and estate of lunatics," is conferred upon the High Court of Justice for Ontario; and the word "lunatic" includes persons "of unsound mind:" 9 Edw. VII. ch. 37, sec. 3, and sec. 2 (*e*); and the power of His Majesty was based upon his position as *parens patriæ;* so that that jurisdiction which alone should be exercised in this case is of an essentially paternal character. To use the words of Cotton, L. J., as to lunacy inquiries, reported in one of the cases: "They are not taken adversely between litigants, but under special authority from the Crown given to the Lord Chancellor, and other persons designated, under the sign manual, to act for the care and custody of lunatics. It is not intended that these powers, which are only given to enable the Crown to ascertain whether the alleged lunatic is insane, should be exercised by the Lord Chancellor, or Lords Justices, as Judges of a court of appeal deciding between adverse litigants."

Under the statute to which I have referred, the High Court might exercise its jurisdiction without any trial in the ordinary sense; but it has power also, in case of reasonable doubt, to direct an issue to try the question, whether the alleged lunatic is a person of unsound mind and unable to manage his person or affairs, with or without a jury; the difference between the methods of determining the question being—apart from jury or no jury—a trial upon affidavits and a trial upon *vivâ voce* testimony; the jurisdiction being in each case, and under all circumstances, that of the High Court standing in the place of His Majesty, as the Act expressly provides.

In this case an issue was directed to be tried, not because of the right of any one to such a trial, but solely for the better satisfaction of the conscience of the Court upon the question of the alleged lunatic's soundness of mind and capacity for managing himself or his affairs; every act and every proceeding being taken, as I have said, solely in his, and the public, interests: considerations which alone should guide this Court, which, though not the High Court, has, under the enactment, appellate powers conferred upon it: sec. 7 (7).

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The issue was, as the Act requires, whether, at the time of the inquiry, the supposed lunatic was of unsound mind and incapable of managing himself or his affairs; and it was tried without a jury, and found in the negative by the trial Judge. Upon an appeal to a Divisional Court of the High Court, much additional, very material, evidence was taken, *viva voce*, before that Court, and the finding of the trial Judge was, thereupon, reversed; and an order was thereupon made declaring that the supposed lunatic was, at the time of the trial of the issue, and of the hearing of the appeal, of unsound mind and incapable of managing himself or his affairs; and consequent directions, not appealed against, were given; and the question now is, whether that judgment is wrong; the onus of establishing which is, of course, upon the appellant, who is nominally the alleged lunatic, but really his wife.

The inquiry, in both instances, involved the finding of two facts to support an order such as that now appealed against: (1) that the alleged lunatic was incapable of managing himself or his affairs; and (2) that such incapacity was caused by unsoundness of mind.

Upon the first question I am unable to understand how the Divisional Court could have come to any other conclusion than that which they, unanimously, and without any sort of doubt, reached; indeed, I would be inclined to doubt my own, or any one else's, soundness of mind, if capable, upon the main indisputable facts of the case, of conscientiously saying that this poor old man, fast sinking into his dotage, is capable of managing his affairs—which are in no sense trifling affairs—or himself, either of which would be enough to support the order in question, if, as I have said, his incapacity be caused by unsoundness of mind.

To say that a man who to-day, without any known consideration for it, gives to a woman an order in writing for a discharge of a $2,500 mortgage, and to-morrow repudiates it; and who to-day gives away the whole of his property, upon which he can lay his hands, amounting to about $40,000, and to-morrow has forgotten all about it, denying it in vehement language; and who would, undoubtedly, have given away, in like manner, the rest of the property—amounting to another $40,000 or so—which is coming to him from his brother's estate, if it had come to his hand; and who could be treated as if a mere child, as this man was for some time before and at the marriage, first on one side giving written orders to turn the woman who was seeking to marry him—for his money—and her father off his property; and then, when they, with assistance, had found their way into his house and made prisoners of the persons he had commissioned to keep them off the property, being married to the woman, by her father, before he, the bridegroom, was fully dressed, after

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being roused from his bed by the conflict; married in such a manner altogether as shocks one's sense of decency, in a supposedly solemn ceremony, performed by a Minister of the Gospel, with the rites of a religious body; and then going over to the other side apparently as contented as a child with a new toy: to say that such a man is of sound mind and capable of managing his affairs, is to say something which seems to me to be wholly incredible. One has but to imagine what would have happened if any attempt had been made to treat this, when in possession of all his faculties, stalwart Irish-Canadian, as he was treated at this marriage and for some time before—to treat him as if he were almost an imbecile, and so to treat him in his own house, his own castle—one has but to imagine that to see and know what a mental falling off was there, to what a helpless condition he has degenerated. It is not necessary to refer to the many other evidences of his mental deterioration appearing throughout the testimony. In regard to his inability to take proper care of himself, his condition up to the time of the marriage, and the manner in which he had to be cared for, shews that; and the greatest excuse for his wife's conduct, if there can be any, in getting possession of him, was his need of some one to take care of him; I can have no doubt of his need for a nurse, but not at the cost of his fortune, when better qualified medical persons are available at reasonable wages: his need was of one who would take care of him, and of his property for him, not take care of him in order to wheedle him out of it.

Then is his present condition, as to inability to manage himself or his affairs, the result of unsoundness of mind? What else can it be? Nothing else has been suggested, nor could anything else reasonably be suggested. The man is upwards of eighty years of age; and, if the saying that "a man is as old as his arteries" be true, his age is considerably greater; his arteries are so degenerated that his own physician—at the present time—declared upon oath that it would be very dangerous to his life for him to give evidence at the trial of the issue; and, consequently, he was relieved from his duty to attend and be examined there: the same physician also testified to his having had a slight hæmorrhage of the brain—stroke of paralysis—in June, 1910, when he was attending him as the "family physician:" the family history, regarding mental disease, even when read in the most favourable light, is very bad; and his conduct towards one of the witnesses, as well as his conversation with another of the witnesses in regard to marrying a daughter of that witness, and the other things of the same character detailed in the evidence, as well as his marriage, to which I have referred, all seem to be in accord with mental derangement and of degeneration of a character not uncommon in old age. Among the typical symptoms of senile dementia Dr. Berkeley mentions that "plans of marriage are formulated and declaimed upon;" quite in accord with this case.

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In these, and in the other circumstances of the case, what could be looked for but mental derangement as the cause of the man's mental condition? But mental disease is not necessary to support the order appealed against; the supposition that it is, seems to me to account for some of the medical testimony which otherwise it might be difficult to account for: the mind ought not to work after this fashion:—If I cannot clearly find some lesion of the brain or some known mental disease or abnormal condition, I am justified in testifying against unsoundness of mind; but rather after this fashion:—finding undoubted incapacity, how can it be accounted for except by unsoundness of mind? For I cannot doubt that there may be that which is in law unsoundness of mind arising from mere natural decay. The use of the word "lunatic" is, by reason of its more generally accepted meaning, apt to be misleading: see *In re Lord Townshend's Settlement*, [1908] 1 Ch. 201. This ought to be known to the medical profession, for I find it very plainly expressed in such standard works as Dr. Maudsley's: one may be capable of making a will, and yet, by reason of loss of memory through old age, quite incapable of managing his own affairs or person.

So that I cannot think that any one, having in mind the evidence adduced before the Divisional Court, can conscientiously and reasonably assert that the supposed lunatic is capable of managing himself or his affairs. No one has yet, as witness or Judge, said so; and, if any one had, the facts would shew the inaccuracy of it. It was argued that it was not necessary that the man should be physically capable of managing his affairs or even himself, that it was enough if he could employ others to do that for him; a contention that no one will dispute, if it means that it is enough if he can manage his servants and agents, those who manage for him; but the contrary of that ability is proved in the way he has permitted his wife to despoil him of his whole available property, and in his belief that it is all yet his own, in his own name and under his sole control, and that, if not, he has been robbed of it; and in his want of understanding as to his means and where deposited or by whom held. In order that there may be no misunderstanding as to his pitiable state of mind in regard to these things, I take up the time necessary to read some extracts from his statement to the Judges:—

"Q. Who owns the farm now? A. I own it.

"Q. In your own right? A. In my own right.

"Q. You have not parted with it to anybody? A. No, I never would part with it.

"Q. You have not given it away to anybody? A. No.

"Q. I was told you had given that property away? A. Well, whoever told you, told you an untruth.

"Q. I was told you made a deed of it to your wife? A. Well, I may have given it to the wife for all I know, but I have no recollection of it.

"Q. Somebody said you gave her this house. Is that true? Have you any recollection of that? A. I might just have hinted it to her, but she hasn't got it yet, I don't think. I don't think she would have it that way, anyway.

"Q. You have no recollection of having deeded to your wife the house we are now speaking in? A. No, I may have hinted to her, you know, that when I drop out of the world that all that I own would be hers. There is the only way. Whoever has told you that has exaggerated.

"Q. But you have never actually signed any deed? A. No.

"Q. To her? A. No, not yet. I have signed nothing to her yet.

"Q. Nor any deed of the farm? A. But I gave her an understanding to this effect, that I would leave all I have, or the greater part of it, to her anyway after I drop off.

"Q. But, as far as actually deeding it is concerned, you have not yet done so? A. Not done it to anybody at all.

"Q. Neither the house nor the farm? A. Nothing whatever.

. . .

"Q. Indeed! Coming back to your own money that was in the bank at the time you got married, whether it was your own or money belonging to John, where is the money now? A. I never would mention another party's money, for fear they would think that I would lay claim to it. John's and mine were separate while he was living, and I believe I had ten or twelve thousand dollars of my own in the bank.

"Q. In different banks? A. Yes.

"Q. In Midland? A. Yes, some in each of the three banks.

"Q. And is that still there? A. I think so. Why shouldn't it be?

"Q. You have not parted with it? A. No.

"Q. Who owns it now? A. Of course, it is mine now.

"Q. You have not given that away to anybody? A. No, not at all.

"Q. It was said that you had given it to your wife, is that true? A. No (laughs). Who could say that at all? She hasn't got a dollar from me yet, the poor creature, but I told her, I had made hints to her you know, that in case I drop off it would be all hers. That is all. Probably that is how that has come out.

"Middleton, J.: It is curious how these stories get around, is it not? A. Yes. I never have given the poor little woman—I offered her twenty dollars on a couple of occasions, and she declined taking it.

"Mulock, C.J.: Was it you sold the property to Midland and got debentures for it? A. I think it must have been my brother Samuel.

"Q. Well, you did have some debentures of the Town of Midland, did you not? A. I have no knowledge of it.

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"Q. The Town of Midland bought some property, and we are told that the Town of Midland, or is it a city, issued debentures, or bonds; do you know what bonds are? A. I never signed a paper for any municipality in the world or party either.

"Q. Do you remember owning at any time, either in your own right or through any of your brothers, any bonds or debentures of the Town of Midland that you are living in? A. I believe my brother Samuel did.

"Q. But you did not? A. No, never. I never dealt with the corporation in my life, never.

"Q. We have been told that when you got married, Mr. Finlayson, a lawyer here, was acting for you as your lawyer, was that right? A. I don't know; I heard them saying he has some claim on me.

"Q. No, it is not any claim, but that there was a debenture falling due at that time, a debenture issued by the Town of Midland; it was one of a number, and that you at one time had owned a considerable number of those debentures going up in value to about $13,500?

"Teetzel, J.: Ten debentures at $1,300 each? A. It is likely it was my brother John, but I never had any dealings with a corporation in my life, only to pay my taxes. Likely it was my brother John.

"Mulock, C.J.: Is it your recollection then that you never had any debentures of the Town of Midland? A. It is. I never had any claim against the corporation.

"Q. A claim either of your own or debentures that might have come to you through any of your brothers? A. They might have come to me through my brother John.

"Q. Did you ever hear of any coming to you through your brother John? A. No.

"Q. Do you remember ever giving any order to have these given to your wife? A. Eh?

"Q. Did you ever authorise any one to give these debentures over to your wife? A. No, never.

"Q. Or to Mr. Grant? A. No.

"Q. Do you know Mr. Grant, a lawyer here? A. I have seen him, that's all I know about him.

"Q. Is he acting for you? A. I really cannot say.

"Q. Who is your lawyer? A. I have none whatever.

"Q. You have heard of this trouble that is on in the Courts, have you not? A. There is a—I have heard something of it

"Q. What do you understand is going on just now? A. What is going on? If there is anything going on, they are doing their endeavour to pluck me. That is the whole short and long of it. I don't know a pin's worth about them, or care a damn about them. I paid my way and always did from childhood up.

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"Q. Have you any lawyers acting for you now in any cases? A. I believe that firm named Grant & King are acting for us.

"Q. For us? A. For myself and my wife.

"Q. In what matters? A. Oh, for some—lest some party should try to pluck us, I suppose, to prevent that. My gracious, I never knew the like, a fellow that never meddled with a soul in the whole world.

"Q. That is the way of the world? A. Well, it is, sir, yes.

"Q. When a man gets as much experience as you have got, you don't expect much from the world? A. No, I don't.

. . .

"Q. Do you recollect once, when the Rev. Mr. Robertson came here with your present wife, and you wanted them to leave the premises and keep away from the premises? A. No, never. I never gave orders to anybody to leave the place or keep away from it. My brother John might for all I know, but he, poor fellow, I believe, has gone over the mountain.

. . .

"Mulock, C.J.: Here is a signature of yours to a piece of paper, and I want to see if this is your signature. I will read it to you, shall I? A. Do, please.

"Q. It is dated, 'Midland, September 28th, 1909.' That will be two years from next September? A. Two years, yes.

"Q. A year ago last September. This is directed to Mr. Robert Irwin. That is the co-executor, is it? A. Yes.

"Q. It is worded as follows: 'You will please take such steps by the employment of constables, or otherwise, as may be necessary to protect my house and grounds from trespass by one Robertson, or others.' Whose signature is that to that? A. It isn't mine, anyway.

"Q. It is not yours? A. No. I never signed my name if I can't do it better than that.

"Q. That is not your signature? A. No.

"Q. Did you ever give orders to Mr. Irwin to employ constables or other people to protect your house and property against trespass by Robertson? A. Who is Robertson?

"Q. What was your wife's name? A. Robertson. No, never in my life. I never gave an order to any person in all my life. My brother John may have done it for all I know, and he is out of the world now, but I never did.

"Q. But this paper is signed 'Michael Fraser'? A. Is it? Well, it isn't mine.

"Q. You never gave an order to anybody to keep them off the premises? A. No, never in the wide world. Because if they were trespassing or intruding on me I would keep them off myself pretty damn quick.

"Q. A little of the old Irish would come up in you. Do you know Mrs. Weston? A. Mrs. Weston? Yes, I do pretty well. My little wife knows her far better.

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"Q. Where does she live? A. Right across there, that brick house across there.

"Q. Did your brother have any mortgage against her, John? A. I believe he had. Really, I am not certain. You see, gentlemen, you know, we have been seven brothers of us and we never tried to inquire into each other's affairs whatever, lest the idea should get out that we were trying to pilfer or——

"Q. After John died did you ever have any business talk with Mrs. Weston about the mortgage that was held against the Weston property? A. My gracious, I never opened my lips to the woman in my life. She visits once in a while up here, my wife you know, and they have a little chat, but I don't interfere in their conversations.

"Q. Do you know what the amount of the mortgage was? A. I do not. I never inquired of poor John, never inquired into his affairs whatever.

"Q. You never knew what it was? A. No. I don't know the amount anyway.

"Q. Were you not one of his executors? A. I believe I am But it is lately, isn't it? That Irwin up there is one, I believe, and I another.

"Q. Did you never make inquiry after John's death how much was owing on that Weston mortgage? A. No, I did not. I never inquired a whimper about anything belonging to him, about any of his affairs.

"Q. Some witnesses in the Court told us that there was about $2,500 owing on that Weston mortgage? A. That they owed that to John Fraser, is it?

"Q. Yes? A. I know nothing about that, gentlemen.

"Q. Do you know that you are entitled to your brother John's property? A. Of course, I am what is called the heir at law, I know.

"Q. Under your brother's will? A. And my brother who lived over there, Samuel.

"Q. Is Samuel living yet? A. I really cannot tell you.

"Q. Where was Samuel living when you last saw him? A. Oh, living on that lot over there.

"Q. Near your homestead lot? A. No, more up that way.

"Q. How far from here? A. It would be about a mile from here.

"Q. In the township of Tay? A. Yes. It would not be a mile. A little better than half a mile.

"Q. You are not sure about his living there yet? A. I am not certain whether he is living or dead now.

"Q. When did you last see Samuel? A. The last time I saw him I guess would be six or eight months.

"Middleton, J.: Samuel was the one that was the Reeve? A. Yes, that is the one that used to be Reeve of the Township, and he was a J.P. too.

"Mulock, C.J.: They are all dead but you now? A. I believe so. That is what I have been told, you know. You know, gentlemen, I have been sick myself, and I am not able to move around, and the most of my intelligence has come through acquaintance with other parties, inquiring of them.

"Q. Coming back then to Mrs. Weston's mortgage, do you remember telling Mrs. Weston that you were going to forgive her that mortgage? A. No. Forgive? No.

"Q. You never did? A. Never in the wide world. Never in the wide world. I never darkened the woman's door, never darkened her door, and how could she expect favours of me that never received the toss of a straw from one of them?

"Q. It is said she came here to your house one day just after John's death? A. She is here a couple of times a week.

"Q. And that she got from you a paper to Mr. Finlayson to make out a release of her mortgage and that you gave it to her? A. I heard something of it. I heard it whispered, but I never did.

"Q. You never did? A. Never.

"Q. Is it your intention to collect what is owing on that mortgage? A. I don't know yet.

"Q. You don't know what you will do? A. No, I hardly know.

"Q. Let me tell you what this piece of paper says. Can you read that signature there? A. I see Mrs. Weston's name in it and Michael Fraser's name in it. That is all I can read of it.

"Q. Who wrote 'Michael Fraser' there? Can you read it at all? A. I could not without my glasses.

"Q. Well, I will read it to you. 'William Finlayson, Esq.' Who is he? A. A lawyer. I have heard of him, but I have no acquaintance with him. I never saw him to my knowledge.

"Q. You never saw him? A. I think not.

"Q. I mean Mr. Finlayson, a lawyer in Midland? A. Yes, Finlayson, I have heard of the name, that there is such a person, a lawyer, but I never had the pleasure of his acquaintance or seeing him.

"Q. You never saw him at the house here? A. No, never.

"Q. He told us in Toronto that he was in the habit of coming to your house. A. (Laughs) I never saw the gentleman at all. I know his name well enough. I have heard the name mentioned often enough.

"Middleton, J.: Did you give him any cheques? A. Sir?

"Q. Did you give him any money? A. Not to my knowledge, I never gave him a dollar.

"Mulock, C.J.: I want to read this paper to you and see what you say about it? A. If you please.

"Q. 'William Finlayson, Esq. September 8th, 1909. I wish you to make out a release of the Weston mortgage.' Signed, 'Michael Fraser.' A. I never signed a paper for her. A damn old —— old stink.

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"Q. You never signed that? A. No.

"Q. We were told that that was in your handwriting? A. It is not my writing.

"Q. That the body of that is in your writing? A. No, no, it is not my writing.

"Q. None of it is your writing? A. No.

(The document referred to is exhibit 12.)

"Q. At all events did you ever intend to give up your mortgage against Mrs. Weston? A. No, never. I had nothing to do with it. The mortgage belonged to my brother John. It was he that took the mortgage. The woman comes to our place once or twice a week.

"Q. See if you cannot remember having met Mr. Finlayson some time. I want to try and refresh your memory, if I can. I have now in my hand a cheque on the Bank of British North America, and there is a signature at the bottom of it, 'Michael Fraser.' Tell me, is that your signature? A. Ah, it is not. I never signed anything for anybody. Damn impostors, they ought to be sent to hell, the buggers, for all I know about the damn crew.

"Q. Let me tell you what this cheque says. You had better know what they have got your signature to? A. I suppose it is trying to cheat me out of some money.

"Q. I don't know what it is for, you can explain it perhaps. A. I cannot. I know nothing about it. I have no dealings with any of the people around here at all. Didn't want to know them.

"Q. This cheque is dated September 28th, 1909. A. I have no knowledge of it.

"Q. That is a short time after your brother John died. He died in August, 1909, didn't he? This is the way it reads: 'Pay to W. Finlayson, or order, $1,000, a gift to Miss Catherine McCormick.' From Michael Fraser? A. He is an impostor. God damn the damn son of a bitch—that there should be such damn scoundrels in the world.

"Middleton, J.: What we are here for is to see whether any of these people are putting up any frauds upon you? A. I hardly know that mother McCormick at all.

"Mulock, C.J.: Miss McCormick? A. Miss, I know, but I call her mother. She is old enough to be a mother.

"Q. At all events here is a cheque which is a gift from you to her of $1,000. Did you ever give her $1,000? A. No, not a red cent did I give her.

"Q. Well, there is a cheque for $1,000 of your money gone to her. A. Well, who will give it to her? Will the bank give it to her? The bank will have to be at the loss of it. For I won't.

"Middleton, J.: The bank gave it to her. A. Did they?

"Mulock, C.J.: Yes, the cheque was cashed and the money

drawn. A. Well, my gracious, did any one ever see such a damn infernal country as this?

"Q. Then here is another cheque of the same date and signed, 'Michael Fraser'? A. Michael Fraser never signed anything for anybody.

"Q. Wait until you hear this one. A. He signed a cheque for himself, his own cheques; that is all the cheques he ever signed.

"Q. This is another cheque on the Bank of British North America, and it is, 'Pay to W. Finlayson $3,000, a gift to R. McCormick.' Did you ever give R. McCormick $3,000? A. That is a fellow named Richard? No, never, I would kick the fellow's backside first; damn it, I am sorry I didn't do it when I had him here. Since I came up into this house, I was out in the field there, and he was tossing things around like the mischief and swearing like a trooper. I came up and I laid hold of him, and, 'Come sir,' says I, 'Out of this!' I am sorry I didn't kick the guts out of the bugger.

"Q. Sit down. Do you know that this $3,000 is gone? A. It is gone? And who has paid it? I didn't pay it. I gave no order to pay it.

"Q. The bank has paid it. A. Well, let the bank lose it. I am not going to lose it.

"Middleton, J.: It is about time some one should get after the bank, is it not, to make them put the money back?

"Mulock, C.J.: The money must be put back? A. That is so. I never gave an order to anybody for money in all my days.

"Q. Do you know Dr. McGill? A. No, I don't know him. No, I believe my brother had him a couple of times, attending him. I don't know him.

"Q. Did he ever attend you as a doctor? A. Not to my knowledge. Once I believe I went to his office. That is all I know about him.

"Q. He says you signed a cheque to him for $1,000? A. He is an infernal liar, and I will tell him to his teeth, the bugger; an infernal god damn liar. Damn it, is this Canada getting——

"Q. Well, he has not got his money? A. Is this Canada getting to be such a devil of a country as this?

"Q. He has not got the money yet? A. Well, I never signed anything for him. I am sorry, gentlemen, to create such a disturbance in your ears.

"Middleton, J.: If they are robbing you, you ought to create some disturbance.

"Mulock, C.J.: If people are plundering you, you have a right to be indignant. A. Of course I have, sir, that is so. I never signed anything for anybody. I pay my lawful debts as soon as they are asked of me.

"Q. Here is another cheque to H. R. McGill for $125 on the

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Bank of Hamilton. Did you ever give him that cheque? A. No, never. No, never.

"Q. Here is a cheque to Margaret Fraser for $2,998.41? A. Margaret Fraser? Who is she?

"Q. That is for you to say? A. Margaret Fraser? I believe I am married—but I don't know whether that is her name or not.

"Q. Supposing you are married, and supposing that is the name of your wife, do you remember ever giving her a cheque for $2,998.41, or thereabouts? A. No, never gave a cheque to a female, whether the wife's sister or mother, in all my days. No, never.

"Q. Look at that cheque and tell me if you know whose signature that is? A. I want my glasses, please. I nearly drew the last amount in the Bank of Hamilton when I lived outside, before I came in here.

"Q. What do you mean by before you came in here? A. To live in this place. Of course, we lived outside. (His spectacles having been handed to Mr. Fraser.) You want to know whether that is my signature or not?

"Q. Yes? A. No, that is not mine. That is a fraud.

"Q. You say before you came from the country to live in Midland you drew out all your money, out of the Bank of Hamilton, did you? A. The greater part of it. I believe I only left about $800 in it.

"Q. And what became of that? A. I suppose it is remaining in it yet, if the bank is anyways solvent.

"Q. Oh, the bank is all right, it is a good bank? A. I believe so, yes, and I left it there.

"Q. This cheque for $2,998.41 that the banks say you signed, you say you did not sign? A. No, I never signed it, no, never.

"Q. Do you remember ever agreeing to give Margaret Fraser that amount? A. Eh?

"Q. Do you remember telling Margaret Fraser that she could have that money? A. No.

"Q. Or that she could draw it out? A. Who is that, Margaret Fraser?

"Q. You say you have married a woman named Margaret? A. I am married to—I really believe that is her name, Margaret; but I never made a promise for anybody.

"Q. Then you did not give her that? A. No, I told my wife that if I dropped out of the world that she would be the principal possessor of all I owned, yes.

"Q. Well, do you know whose signature that is? There is another cheque on another bank, the Bank of British North America. I will read it to you if you like? A. This is more like my writing than any other part of it, but it is not mine.

"Q. It is not yours? A. No.

"Q. What I am shewing to you now, Mr. Fraser, is another

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cheque dated the 14th February, 1910, for another sum of money, namely, $2,536.45? A. Who is that to?

"Q. Well, that cheque purports to be signed by you and payable to yourself, and your name is on the back of it, and it is said that you signed that cheque and put your name on the back of it, and gave it to your wife to draw the money for herself. Is that true? A. I don't think it. I have no knowledge of it.

"Q. No knowledge of it? A. No. No knowledge of it whatever.

"Q. Where ought your money to be that was in the Bank of British North America when you got married, where ought it to be now? A. I suppose they have some of it in each of the banks.

"Q. In whose name? A. In my own name.

"Q. You have not given away that money? A. No.

"Q. Any of this money? A. No, none whatever.

"Q. I have some other little things I want to ask you about? A. I never thought there was such damn cheats in this Ontario.

. . .

"Q. Do you know what property you own behind John's property, these two lots in Midland? A. Yes, I think I do. I can't give it just on the moment.

"Q. Have you ever sold any of the land that you owned in Midland since John died? A. No, not a perch since John died. I have not sold a perch of land since John Fraser died.

"Q. Did you sell Dr. McGill any land before John died? A. No, I don't know anything about McGill at all. Never saw him that I know of.

"Q. Dr. McGill says he got a deed from you of a piece of land at a price of $500, and that he did not pay the money, but the $500 went on account of moneys owing to him by John and by you? A. Oh, gracious, he is a damned impostor, and I will tell him to his teeth and probably kick him, too, or he kick me, one or the other. By heavens, I won't be bullied in this style.

"Q. Supposing he produces a deed signed by you for that piece of land for $500 consideration, what do you say to that deed? A. I say it is a cheat, it is a forgery.

"Q. Supposing Finlayson says he came here to your house and drew that deed by your instructions, what do you say to that? A. I will tell him he is lying. I will tell him he is a liar, damn him, to his teeth, and he may knock me down if he is able, the bugger. Do the damn whelps think men are mice that they can impose on them this way?

"Q. Did you ever have any business dealings with Dr. McGill? A. I don't know the gentleman. I believe my brother John went to him to consult him a couple of times.

"Q. Who is your doctor now? A. Raikes is our principal doctor; I wouldn't give him for all the doctors and lawyers in Midland.

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"Q. There were some papers of yours in Mr. Finlayson's office once, were there not? A. I don't know that I ever placed any papers there. I never had anything to do with Finlayson. My brother Samuel might and John might for all I know. And the name Fraser might be to them.

"Q. Here is a paper signed Michael Fraser. I will read it to you, shall I? A. Do, please. Let me look at it first.

"Q. Do you think that is your signature? A. No, the writing is not mine. It does not belong to me at all. I have a horror of scribbling on paper or sending documents to anybody.

"Q. Shall I read it to you? A. Do, please.

"Q. 'Midland, April 21st, 1910. Mr. Finlayson. Dear Sir: Kindly give my wife any of my papers that she may ask you for, and oblige, yours very truly, Michael Fraser." What do you say to that? A. What is it dated?

"Q. It is dated a year ago last April. This is May. A. Well, I had no wife a year ago last April.

"Q. When did you get married, how long are you married? A. It is now, I am married on the 13th January, 1910.

"Q. Well, this is dated April, 1910. A. Well, it is a forgery.

"Q. That is three months after you were married. If you were married in January, you were married in April, that is, you had a wife in April. Well, no matter. Did you ever give your wife instructions to go to Mr. Finlayson to get any of your papers? A. Never.

"Q. Very well, that will do. A. Never in the world. The woman is truthful. She will deny it. She will acknowledge everything that I did for her. I never gave her an order for anything. And if she is acting that way—treacherously that way—she is a damn scoundrel. Damn it, did you ever know such a thing, the spawn of a damn Irish navvy? I could kick the guts into them or out of them, when I have them in my power.

"Q. Did you have a mortgage against a man named Smith? A. What is his Christian name?

"Q. It is that Smith that used to be around your house here? A. No, I have no mortgage. My brother John might, for all I know.

"Q. Did you have a mortgage against a man named Johnston? A. No.

"Teetzel, J.: Smith's name is William Smith. A. What countryman is he?

"Q. The man who was about your place here a year or so ago? A. My brother John might, but I never had a mortgage against a soul in my life.

. . .

"Mulock, C.J.: I want to find out what become of the inventory to John's estate. Mr. Finlayson made out a list of the things belonging to the estate of John, and he says he gave it to

your wife. If he did, do you know what became of it? A. Probably he did. I don't know a pin's worth about it. That is the first I heard of it. I will inquire of the little wifie and know whether she did or not. Know whether she is truthful or not, and if she is not truthful I will think the less of her. I never heard that he gave it to any person in the world.

"Q. Are you aware that she got a good deal of money out of your bank accounts? A. No, I am not.

"Q. And got it into her own name? A. I don't know a pin's worth about it. I fancy I gave her an order for some money one time.

"Q. You did? A. Yes.

"Q. What was that order? A. I really don't know. My memory latterly—I am badly getting indifferent about things. I hardly care how they go.

"Q. What was she to do with any money she got from you, was it for the house, the expenses? A. Partly for the house, and partly to give herself an odd new dress. Because I know the sex is fond of dress.

"Q. About how much was that order for? A. I really don't know.

"Q. About how much money? A. I don't know. I cannot tell you, sir.

"Q. Was it for as much as $100? A. I don't think it.

"Q. Was it for thousands? A. Oh, no. I would look a good while before I would give her thousands. I might give her a hundred and would not grudge it to her.

"Q. Do you say you never gave her an order for as much as a thousand? A. No, not for a hundred either.

"Q. At no time? A. No, I asked the little wifie here a few days ago if she would accept a little money, and she would not. Declined it. Said she had enough in her pockets.

"Q. Do you know whether or not you have made a deed of this house to your wife? Who owns this house? A. It belongs to me.

"Q. Not to your wife? A. No.

"Q. You have never made a deed of it to her? A. I have not, but I told her I would give it to her and all the land around it, too.

"Q. When were you to give it to her? A. As soon as I kicked the bucket.

"Q. You mean you would give it to her by will? A. Yes, by will.

"Q. But do you say you have never given it to her by a deed? A. No, never.

"Q. It is your property yet? A. Yes, I never gave it to anybody yet. It is my own. I have my clutches on it yet.

"Q. Did you ever make any will? A. Never.

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"Q. You have never made a will yet? A. Never, I have a horror of them things. It is next to going to die, to kick the bucket.

"Q. We have been told that when John was alive you made two wills, before John died. Did you? A. No, never.

"Q. And that after John died and before you got married you made another will? A. No, never. Never made a will in my life. They are fabricators and mischief-makers that say so.

"Q. We are told that since you are married you have made still another will? A. I have not made a will in all my life yet.

"Q. You have not made a will at any time? A. No, never intend to. My gracious, what trouble they are taking about people.

"Teetzel, J.: Which church do you belong to, Mr. Fraser? A. The Church of England.

"Q. Who is your minister? A. Up here?

"Q. Yes? A. Mr. Hanna.

"Q. He visits you, I suppose, does he? A. Once in a while.

"Q. A pretty fine man, is he not? A. I believe he is, yes.

"Q. A splendid man? A. Yes. Our minister in the old country was the Rev. Henry Stewart. He was over six feet high, and he had three children, three little girls.

"Q. What minister married you? A. It was the Rev. Mr. Robertson.

"Q. Any other minister with him? A. No, he did it himself.

"Middleton, J.: Who were in the house when you were married? A. I really forget who they were now. Some friends of ours—some of my brother's.

"Teetzel, J.: Which one of your brothers was present at your marriage? A. John was there.

"Q. Who was your best man? A. I really don't know.

"Q. Was Samuel there? A. No, I believe Samuel was not living at this time. I am not positive, you know.

"Q. Any of your sisters at the wedding? A. Sisters? Never had a sister in my life. Her brains were knocked out in her eighth year on the door-step.

. . .

"Q. You said you were engaged only a short time before you were married—how long were you engaged before you were married? A. Probably ten or twelve days.

"Q. You have no family, I suppose? A. No. We are only about 12 or 14 months married.

"Q. You have hopes, then, yet? A. That is so, yes. My hopes are bright. Would you take a taste of whisky, gentlemen?

"Mulock, C.J.: Thank you, no, I won't. I don't know about these other gentlemen. A. We have some in the house, I believe, if I could only find it.

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Mulock, C.J.: I spoke to you a little while ago, Mr. Fraser, about a cheque on the Bank of Hamilton for $2,998.41? A. Yes.

"Q. This is a cheque I am now shewing you. A. And who is the author of that?

"Q. Well, it pretends to be signed by you? A. I haven't had that amount in the Bank of Hamilton.

"Q. Then, later on, the Bank of Hamilton statement shews another cheque drawn against your account for $3,013.70? A. And who is the author of that?

"Q. The cheque is not here, but the bank claims that you drew a cheque for that amount and gave it to somebody—is that true? A. No, it is a lie. It is hell's own lie, concocted by Beelzebub.

"Q. It is contended that that cheque was given to Margaret Fraser? A. Margaret Fraser, and who is she?

"Q. Your wife, I expect? A. Well, what is the date of it?

"Q. February 14th, 1910. A year ago last February. Did you ever give to your wife that cheque? A. No, never. I never gave her a cheque in my life. Never. 1900 and how much?

"Q. 1910."

All of which is a hopeless muddle of inaccuracies upon vital questions affecting the man's capability in the management of his own affairs, shewing without any room for doubt, I would have thought, his utter incapability.

So, also, I cannot but find that such incapability was caused by unsoundness of mind.

But it is said, in effect, that, if that be so, the Divisional Court had no right to find it out; a contention which, in my opinion, has nothing in law, or in reason, to support it.

If the case were one of ordinary litigation, between adverse litigants, confined to their strictest rights, I would have no doubt that the Divisional Court acted well within its power, and indeed was in duty bound to obtain the additional light thrown upon the case by the additional evidence, adduced before it, when the case appeared to be so incomplete as it was, without it. The taking of additional evidence, even in such cases, is expressly authorised by legislation, and is not even an uncommon practice in this Court. It is the duty of the Judges to find the real truth of the matters in controversy. The power expressly conferred upon appellate Courts is "full discretionary power to receive further evidence on questions of fact;" a power which, of course, must be exercised so as not to be made the means of doing an injustice to any party to the litigation, but only a means of elucidating the truth; but also a discretionary power which ought not to be interfered with by an appellate Court. But this case is one of an entirely different character—under the Lunacy Act—in which it is the duty of the Court, acting in the place of His Majesty, to find out the state of the supposed lunatic's mind; and I can have no manner of

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doubt that the Divisional Court rightly exercised a power which it had, and wisely performed a duty, in receiving the additional evidence: and I can find no excuse for any other court deliberately closing its eyes to the truth revealed in the Divisional Court: nor any excuse for treating this as ordinary litigation between adverse parties, which it obviously is not; nor for failing to appreciate the fact that the additional conclusive evidence comes from the man's own mouth, and must be admitted as evidence whenever and wherever the question of his mental capabilities has to be determined.

Then it is said that, if that be so as to the evidence, the Divisional Court had no power to hold the examination of the supposed lunatic. But, again, why not? The High Court of Justice acts, as I have said, in the place of the King as *parens patriæ;* legislation requires that the supposed lunatic shall be produced and examined at the trial of the issue unless the Court otherwise directs; the supposed lunatic was seen and examined by the trial Judge; seeing and hearing him has always, in legislation as well as in practice, been deemed a thing of great importance; in some cases an appeal might be a useless proceeding unless the appellate Court could have also the advantage of seeing and hearing the supposed lunatic; if it had not exercised that power, in this case, the most weighty of the whole evidence would be wanting, the truth would not have been elucidated as it has been; it cannot be doubted, I think, that, even if the case were one between adverse litigants, standing upon their strictest rights, the Divisional Court would have had power to have compelled him to attend, and to have examined him upon oath, before it; but they chose, in his ease and for his benefit, just as the trial Judge did, to see and to converse with him in his own house; and, above all, there was the power of His Majesty over the persons and estates of persons of unsound mind, now existing in the High Court, under which that Court might, even if the finding upon the issue stood, exercise its jurisdiction, at a later date, upon further evidence, without requiring that the proceedings be taken anew. The fact that the power of the Court may be exercised by a Judge in Chambers does not derogate from the power of the Court; nor can I think that the "revised" Lunacy Act was intended to, or does, substantially change the power or duty of the Court under the earlier enactments intended to be embodied in it, but rather to simplify the procedure in exercising such power and duty. Interesting instances of examinations of a like character will be found in such cases as *In re Cumming* (1852), 1 DeG. M. & G. 537; *In re Bridge* (1841), 1 Cr. & Ph. 338, 347; and *In re Gilchrist*, [1907] 1 Ch. 1. The Indian case so much relied upon by Mr. Watson is not at all applicable; it was a case between adverse litigants, in which the Court undertook to determine the question of fact really upon their own evidence, instead of upon that adduced at the trial.

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Many cases have been referred to; but, as the question is one of fact only, and no two cases can be quite alike, in their facts, they cannot have authoritative effect; and indeed some of them may be misleading if applied to this case, such, for instance, as those between adverse litigants determining questions as to the validity of wills and of contracts; for no such question arises in this matter, nor will anything done in it conclude any such question; that which is in question is, whether the supposed lunatic is, by reason of unsoundness of mind, so incapable of managing himself or his affairs that they or he ought to be managed by a committee appointed by the High Court, under the power conferred upon it by the statute; and, as I have already intimated, I cannot understand how any reasonable and conscientious person could now say, in view of the revelations made in the proceedings in the Divisional Court, that he is not so incapable.

It may be said, and truly said, that many a person more unsound in mind, and less able to manage his or her affairs than the supposed lunatic, is permitted to depart this life without having been declared of unsound mind; and rightly so, because there was no need of any such precaution, because such lunatics were surrounded by those who were willing and able to protect them and their property, not left alone in the world subject to the wiles of those who were willing to stoop very low to conquer the man's money, and so eager for it that all that could be made available was speedily extracted from him and in such a manner that he is now unaware of having parted with any of it, and is incensed at the thought of it.

Another question of some importance also arises in this case, and one upon which it is proper to express my opinion, though, as I have already intimated, the order in question should be sustained without any aid from it. That question is as to the effect upon this case of the recent enactment (1 Geo. V. ch. 20) which more broadly defines the meaning of unsoundness of mind under the Lunacy Act; it was passed on the 24th March, 1911, and provides, among other things (sec. 1), that "the powers and provisions of the Lunacy Act, relating to management and administration shall apply to every person not declared to be a lunatic with regard to whom it is proved, to the satisfaction of the Court, that he is, through mental infirmity, arising from disease, age, or other cause, or by reason of habitual drunkenness or the use of drugs, incapable of managing his affairs." The additional evidence was taken, the supposed lunatic examined, and the order in appeal made, by the Divisional Court, after the passing of this enactment. The appellant's contention is, that the provisions should not be applied to the case. If the strict rights of adverse litigants were in question, it might be that that contention would raise an arguable point, but in which there would be at least a good deal to be said against it, as the case of *Quilter* v. *Mapleson*, 9

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Q.B.D. 672, shews; in that case, the enactment there in question was passed after the judgment at the trial and before the hearing of the appeal, just as in this case, and that case was one between adverse litigants relying upon their strict legal rights; yet it was held that the enactment was retrospective, and, though passed after the judgment appealed against was made, the Court of Appeal had power, and ought, to give effect to it. How very much more so should that be in this case, in which the inquiry is made in the interests of the supposed lunatic and of the public only; if, for any of the reasons set out in the enactment, he is incapable of managing himself or his person, what excuse could be given for declining to give effect to the enactment; what excuse for introducing almost barbarous technicality; for compelling the parties to march down the hill merely to march up again at such a great loss in law costs? Having regard to the character and purpose of these proceedings, and having regard to the nature and extent of the jurisdiction of the High Court, it would, in my opinion, be quite an inexcusable practice for that Court to refuse to give effect to the later enactment merely because these proceedings were begun before it was passed. If the man need protection of his property, as he unquestionably does, it assuredly ought to be given if either enactment authorises it.

These observations apply equally to a new trial. What object can there be in that, with the man's own evidence of his incapability, in his conversation with the Judges, ever ready to conclusively prove his incapacity?

An application was made for leave to file affidavits, of some of the medical gentlemen who have given their evidence at the trial in favour of the man's soundness of mind, and of others, to the effect that the examination made by the Judges did not afford a fair test; that, as I understand it, the answers given were given when the man was tired, the examination was had under not sufficiently favourable circumstance, etc.; but do these gentlemen think a man's capacity is to be judged only by his words and acts when at his best; that in business matters he cannot be dealt with and advantage taken of him when not at his best? His best, and his worst, must be taken into consideration; and, as to the fairness of the examinations, I can have no manner of doubt that the learned Judges who were present at it are very much better judges of that than party witnesses who were not present: and it may be pointed out that the man's incapacity was shewn at the very outset of the examination, in his evidence as to the deed of the farm to his wife. Gentlemen of the medical profession are not, generally speaking, considered the most competent in business matters; nor can I think that, without the least experience with a man in business matters, they are anything like as competent, as a rule, to speak as to the man's business capacity, as the every day business man, learned or unlearned, who has

had such advantages, in such a case as this; and, I cannot but think, the affidavits intrinsically prove this. Let me give an instance; taking the affidavit which comes first to my hand, in which it is said, "I verily believe, from what I know of him, that he would regard further examinations by the Judges, on the occasion referred to, as a meddlesome interference with his business affairs and private rights, and this, I believe, would account largely for his not answering according to the fact:" that is to say, this learned gentleman believes that a man of sound mind and capable of managing his business affairs, knowing that the question of his capabilities in that respect was the subject of litigation, and that the Judges who were to determine the question, and to declare, in the most binding manner, whether he was or was not capable of managing his affairs, and if not to take the management of them out of his hands and commit it to others, and had come from Toronto to his house for the purpose of judging for themselves of his capability, would consider their action meddlesome interference and give untrue answers to them, as if desirous of being declared incapable; the logic, the plainest common sense of the thing, is surely against such an extraordinary belief; if that is the way the man would take to advance his interests in his other business affairs, to say the least of it, they could hardly be successful: indeed can any one but say that, if this medical gentleman's belief is true, it is pretty strong evidence of the man's incapacity? In view of such things as this, things which are not confined to this affidavit, there is at least some excuse for repeating the observations of Lord Shaftesbury upon his examination before a Royal Commission in the year 1859: "For my own part I do not hesitate to say, from a long experience, that, putting aside all its complications with bodily disorder, the mere judgment of the fact whether a man is in a state of unsound mind and incapable of managing his own affairs and going about the world, requires no medical knowledge. My firm belief is that a layman, acquainted with the world and mankind, can give not only as good an opinion but a better opinion than all the medical men put together." In this case, as is usual, the medical men are not all together, but are pretty equally divided in opinion, against one another.

I well remember a case in which the question was whether the father of a child had sufficient mental power to be intrusted with her care. A member of the medical profession, whose probity, ability, and sportmanship were known and admired throughout Western Ontario, had made an affidavit of the man's fitness; the man also had made an affidavit, and he was subpœnaed for cross-examination, and the medical gentleman was also subpœnaed, and attended. The examination went on smoothly for some time, but after that signs of weakness began to creep in, and soon it became apparent that the man's mental control was greatly impaired; without waiting to be asked a question, without any

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sort of attempt to bolster up his former opinion, the gentleman rose and asked leave to withdraw his affidavit, saying he was convinced that he had made a mistake, and desired to say, if it would be of any use to the Court, that he now thought the man incapable; though there was no more to shew it in that case than there is in the examination of the supposed lunatic in this case. All professional men are not partisans in giving evidence.

I would allow the affidavits to be filed for what they are worth. And would dismiss the appeal.

New trial ordered; MEREDITH, J.A., *dissenting.*

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Dec. 14.

ZIMMERMAN v. CANADIAN PACIFIC R. CO.

Quebec Court of Review, Davidson, C.J., Archibald, and Greenshields, JJ. December 14, 1912.

1. CARRIERS (§ III D 3—410)—WRONGFUL DELIVERY — LIABILITY TO CONSIGNOR AFTER INSTRUCTIONS TO RETURN GOODS.

Where a shipper entrusts goods to a carrier for delivery to a consignee and the consignee refuses to accept the goods and on being informed thereof by the carrier, the shipper acquiesces in such refusal and instructs the carrier to return the goods immediately, the carrier is responsible for the value of such goods if he deliver them to another party, even if he does so on the consignee's order presented by a third party who holds himself out as the shipper's agent.

Statement

THIS was an action to recover the value of goods entrusted to the defendant for delivery at Winnipeg. The action was dismissed by the Superior Court, Laurendeau, J., on December 14th, 1910. The plaintiff inscribed in Review.

The appeal was allowed.

H. Weinfield, for plaintiff, appellant.

A. R. Holden, K.C., for defendant, respondent.

The judgment of the Court was delivered by

Archibald, J.

ARCHIBALD, J.:—This is an appeal from a judgment dismissing plaintiff's action. The circumstances of the case were that Zimmerman, a merchant in Montreal, sold to a man named Handel, in Winnipeg, Manitoba, a bill of goods and shipped them over the defendant's railway to Winnipeg. Upon arrival at Winnipeg, the defendant sent the goods by its carrier to said Handel, but Handel refused acceptance. The defendant's office in Winnipeg evidently communicated to its office in Montreal the fact of the refusal of Handel to accept. About a week or ten days after Handel refused to accept, the defendant's office at Montreal notified the plaintiff of such refusal and asked for instructions as to what was to be done with the goods. Plaintiff claims that, within two days after that letter, he communicated to defendant's office in Montreal instructions to ship the

goods back to Montreal. Defendant, however, does not admit that these instructions were given so early as the plaintiff claims. Just two weeks after the date of the defendant's letter to plaintiff informing plaintiff of the refusal of the goods by Handel, one Aronson, of Winnipeg, came to the defendant's office in Winnipeg, where the goods still were, and told them that he was the plaintiff's agent and wished to receive delivery of those goods for the plaintiff. He produced at the same time a card signed by Handel, the consignee of the goods, in which Handel instructed the defendant to deliver the goods to Aronson.

Aronson was not the plaintiff's agent, and Aronson converted the goods to his own use. Plaintiff, thereupon, sued the defendant for the value of the goods, alleging that they had delivered them, not to the consignee, but to another person.

The defendant originally pleaded that it had delivered the goods to the consignee or his agent, treating Aronson, to whom the goods actually were delivered, as the agent of the consignee Handel. Subsequently, after the proof was made, defendant moved to amend its plea by claiming that the defendant had delivered the goods to the plaintiff's agent or to a person, who, they had reason to believe, was the plaintiff's agent.

The questions of law which arise in the case appear to me to be without difficulty. One question was asked and some importance was laid upon it at the argument. Counsel contended that, when the consignee had once refused to take delivery of the goods in completion of his contract of purchase from the plaintiff, that bare refusal resiliated the sale, and that he could not, subsequently, withdraw his refusal and consent to accept the goods. It was said that authority could be adduced to support an affirmative answer to that question. No such authority was produced. The point appears to me to be one which arises out of elementary notions of contract. Every contract presumes an agreement upon every essential element of the contract between the parties to it, and when a contract is once completed, one party to it cannot resiliate it without the consent of the other party, so that a mere refusal of a purchaser to take the goods which he has bought, does not set aside the contract of sale. The vendor might compel the purchaser to pay for the goods, notwithstanding such refusal, provided he could make the necessary proof. On the other hand, it is just as clear that, if both parties consent to the resiliation of the contract, the contract is set aside, and it would not be open after that for one of them to change his mind and to contend that the other was still obliged to conform to the contract.

If a merchant, for example, sells goods to an individual and delivers them, say, in the same city, and the purchaser refuses

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acceptance and the goods are brought back into the merchant's possession, the merchant accepts them as his property, the sale is at an end, and neither party can subsequently force its execution.

In the present case, there is no doubt upon the evidence of either party, that, at least one day before the actual delivery of the goods in Winnipeg to Aronson, the plaintiff, vendor of the goods, had acquiesced in the refusal of the goods by Handel and had instructed the defendant to return the goods to him at Montreal. But, perhaps, that fact was unknown to the office of the defendant in Winnipeg when the goods were actually delivered. It seems to me clear that, if it is proved that, after the notification by the defendant to the plaintiff that the goods had been refused by the consignee in Winnipeg, the plaintiff had acquiesced in that refusal and had instructed the defendant to return the goods to him at a time when the office of the defendant at Montreal could have notified its office in Winnipeg of the plaintiff's action—that no subsequent delivery of the goods to the consignee could avail as a good delivery under the bill of lading.

I think that defendant's office at Montreal would be obliged to write promptly to its office in Winnipeg conveying the instructions of the plaintiff for the disposal of the goods.

But it is argued that these goods were delivered on a written order of the consignee. As I have just stated, that written order could not avail if the contract of purchase and sale had been put an end to. The consignee had no longer anything to do with it.

But take the case where the office at Winnipeg did not know of the acceptance by the plaintiff of Handel's refusal, and supposing that defendant had the right still to deliver to Handel, was the delivery upon an order given by Handel a good delivery such as to comply with the obligations assumed by the defendant when it issued its bill of lading?

Handel was the purchaser of these goods. The defendant knew that fact, and that the goods were transported upon an invoice and bill of lading in the ordinary way between vendor and purchaser. Handel says: "I am not purchaser and I will not accept the goods as purchased. But Mr. Aronson is the agent of the plaintiff, agent of the seller; go and give them to him," and the defendant did as directed. Supposing it to turn out, as it did turn out in this case, that Aronson was not the agent of the plaintiff, but was a dishonest man, who subsequently converted the goods to his own use, all of which happened in this case, is it possible to contend that the defendant would have made a good delivery under the bill of lading? But defendants say: "We had the written order of the consignee to de-

liver to Aronson; we were justified in supposing that Handel had withdrawn his refusal to accept the goods, and had himself disposed of the goods to Aronson, and that his written instructions were simply a mode of avoiding two deliveries."

If, as I said before, the defendant had good reason to believe that, and if they had not already been properly notified of the cessation of the contract as above referred to, very likely they would be entitled to succeed. But is that the case? Did the defendant, in making delivery, intend to deliver those goods to the consignee in accordance with the intention of the bill of lading—that is to say, deliver them to Handel as the purchaser of the goods. It appears to me that they did not, for one minute, treat the written order of Handel for the delivery in that way. That order was brought to them by Aronson, who was far from pretending that he was in the rights of Handel as purchaser of these goods, claiming, on the other hand, that he was the agent of the plaintiff and was receiving the goods as such; and the evidence of defendant's servants, who were connected with the delivery of the goods, makes it plainly evident that they supposed that, in the delivery of the goods, there was no question of the withdrawal of the refusal of Handel to accept, but they thought they would deliver the goods to the plaintiff's agent for such future disposal of them as plaintiff might direct.

That is in accordance with the evidence of Handel, who declares that he had no intention whatever of withdrawing his refusal to accept; that he gave that order for the delivery of the goods because he supposed that Aronson was the plaintiff's agent, not because he had any intention of accepting the goods himself after having refused them.

It is said—if Handel gives instructions to the company for the delivery of the goods to Aronson, which instructions were contrary to the rights of the parties, the plaintiff would have his recourse against Handel. Very likely he would, but not as purchaser of the goods, but for damages which had been caused to plaintiff by Handel's unauthorized act. That would not, in any way, relieve the defendant from its responsibility for having delivered the goods not in accordance with its contract with the plaintiff, or with the plaintiff's subsequent instructions, and it strikes me that the judgment which has relieved the defendant from liability is clearly wrong, and should be reversed and the defendant condemned to pay plaintiff the value of the goods, with costs of both Courts.

Appeal allowed.

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Sept. 23.

POWELL-REES, Limited v. ANGLO-CANADIAN MORTGAGE CORPORATION.

Ontario Divisional Court, Boyd, C., Latchford, and Middleton, JJ. September 23, 1912.

1. EXECUTION (§ II—20)—SUPPLEMENTARY PROCEEDINGS—"OFFICERS" OF A CORPORATION—DIRECTORS.

The word "officers" in Rule 902 (Ont. C.R. 1897), providing that the officers of a corporation may be examined under a judgment against the corporation, includes a director.

[*Société Générale de Commerce et de l'Industrie en France* v. *Johann Maria Farina & Co.*, [1904] 1 K.B. 794, referred to; *Powell-Rees* v. *Anglo-Canadian*, 5 D.L.R. 818, 26 O.L.R. 490, affirmed.]

Statement

AN appeal by E. R. Reynolds from the order and decision of Riddell, J., *Powell-Rees* v. *Anglo-Canadian*, 5 D.L.R. 818, 26 O.L.R. 490.

Argument

E. R. Reynolds, the appellant in person. The defendant corporation never received an initial certificate of registry, as required by the corporation by-laws and required by R.S.O. 1897, ch. 205, the statute under which the defendant corporation was incorporated, and never held a first statutory meeting, and has not now and never had any officers, and never commenced business; and it has not now, and I am not now and never was, an officer or servant of the corporation, within the meaning of Con. Rule 902: *Ahrens* v. *Tanners' Association* (1903), 6 O.L.R. 63. The defendant corporation has no power to appoint any officers until it is properly registered, and it has no right or authority to hold a statutory meeting for that or any other purpose until it is properly registered.

M. C. Cameron, for the plaintiffs. The order appealed from is right, for the reasons given by the learned Judge. Reynolds is estopped from denying that he is president of the company, as he is stated to be so in the prospectus. A provisional director is an officer who may be examined under the provisions of Con. Rule 902. I can find no direct authority on this point, but see *Société Générale du Commerce et de l'Industrie en France* v. *Johann Maria Farina Co.*, [1904] 1 K.B. 794. At any rate, an order for examination may be made under Con. Rule 910.

Reynolds, in reply. If I should hold myself out as president, I should be liable to a fine, yet I may properly set myself out as such in the prospectus.

Middleton, J.

November 2. The judgment of the Court was delivered by MIDDLETON, J.:—An appeal by E. R. Reynolds from the order of Riddell, J., allowing the examination of the appellant for discovery, as an officer of the defendant company, after judgment.

The appeal is irregularly brought, as leave to appeal had not been obtained, and the order is not in its nature final, but is merely interlocutory.

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Counsel agreed to waive this objection if the argument before us was confined to the question of the right of the judgment creditors to examine the appellant.

We agree with the judgment in review that a director is an officer who may be examined under the provisions of Con. Rule 902. If there could be any possible doubt as to the correctness of this, the case is one in which an order might well be made for examination under Con. Rule 910. The practice in this case seems to have been lax, as an examination under Con. Rule 902 can be had without an order.

Appeal dismissed.

POWELL-REES, Limited v. ANGLO-CANADIAN MORTGAGE CORPORATION.

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NOV. 19.

Ontario High Court, Sutherland, J. November 19, 1912.

1. EXECUTION (§ II—20)—EXAMINATION OF DIRECTOR OF A CORPORATION.

Where an order for the examination of a director of a corporate judgment debtor purports to be made under the provisions of Rule 910 (Ont. C.R. 1897), but contains words indicating that it was intended to make rule 902 applicable also, and the court making the order has said that in its opinion the case fell within rule 902, the examination may be as full and wide as though the director were being examined as an officer of the company under rule 902.

Statement

APPLICATION for an order to commit Edwin R. Reynolds, for contempt in failing to comply with the directions and terms of an order of the Divisional Court, dated 23rd September, 1912, and in refusing to answer satisfactorily certain questions alleged to have been properly put to him on his examination, and to produce certain documents as therein required, or in the alternative for an order that he do attend at his own expense and submit to be further examined pursuant to the provisions of the said order.

Paragraph 2 of the order referred to is as follows: "2. And this Court doth under the provisions of Rule 910 in that behalf order that the said E. R. Reynolds, upon being served with an appointment issued by one of the special examiners of the Court, do attend before such examiner and do submit to be examined upon oath by or on behalf of the plaintiff as to the names and residences of the shareholders in the defendant corporation, the amount and particulars of stock held or owned by each shareholder, and the amount paid thereon and as to what debts are owing to the defendant corporation, and as to the estate and effects of the defendant corporation, and as to the disposal made by it of any property since contracting the debt or liability in respect of which judgment has been obtained by the plaintiff in this action."

C. A. Masten, K.C., for the plaintiff.

E. R. Reynolds, in person.

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Sutherland, J.

SUTHERLAND, J. (after setting out the order as above):—On the motion it was contended on behalf of the plaintiffs in the action that the examination of Reynolds was intended, under the said order, to be as wide as in the case of an officer of the defendant corporation.

Mr. Reynolds, who appeared in person, contended for a very strict construction of the terms of the order, which he said was made under Rule 910. He seemed to rather contend that the order as drafted had gone farther than it should have gone or was intended. By a reference to paragraph 2 already quoted, it would seem to have been made under the provisions of Rule 910, but when Rule 902 is referred to, the remaining part of said paragraph 2 seems to have been drawn so as to make the order applicable under that section also.

I was not referred by either counsel to any written judgment of the Divisional Court. It appears that the reasons for the judgment were delivered orally at the time. A written judgment was, however, handed down later, which contains the following statement: "We agree with the judgment in review that a director is an officer who may be examined under the provisions of Con. Rule 902. If there could be any possible doubt as to the correctness of this, the case is one in which an order might well be made for examination under Con. Rule 910."

It seems to me that the plain intention of the order of the Divisional Court was that Reynolds should be examined in as wide and full a manner as though he were an officer of the company. It appears that he was one of its provisional directors, and there has been no meeting held for the regular organisation of the company. Under these circumstances, I think the motion must succeed. Reynolds is ordered to attend and be further examined at his own expense, and to pay the costs of this motion.

Application granted.

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Nov. 6.

SMITH v. BARFF.

Ontario Divisional Court, Falconbridge, C.J.K.B., and Britton, and Riddell, JJ. November 6, 1912.

1. BROKERS (§ II B 2—17)—REAL ESTATE AGENTS—COMPENSATION—FAILURE OF PURCHASER TO COMPLETE.

Where a real estate agent was employed to "sell" certain property and he found a purchaser and obtained an agreement of sale to be entered into between such purchaser and his principal, a subsequent written agreement between the agent and his principal whereby it was stipulated that the latter should pay the agent a stated percentage as commission "for selling my property" is to be construed as contemplating merely an agreement of sale with a person of substance against whom it might be enforced; and the commission will be payable although the sale was not completed by reason of the purchaser's default in carrying it out and the dishonour of his cheque given for the deposit.

[*Robinson* v. *Reynolds*, 4 D.L.R. 63, 3 O.W.N. 1262, distinguished; *Mackenzie* v. *Champion*, 12 Can. S.C.R. 649, referred to; see also Annotation on commission agreements generally, 4 D.L.R. 531.]

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SMITH v. BARFF.

Statement

AN appeal by the plaintiff from the judgment of Denton, Junior Judge of the County Court of the County of York, dismissing an action in that Court, brought to recover a commission for the plaintiff's services as agent in procuring a purchaser for the defendant's land. The dismissal of the action was upon the ground that the defendant agreed to pay a commission to the plaintiff only for *selling the property*, and, as the property was not sold, the defendant was not liable to pay the commission.

L. C. Smith, for the plaintiff, argued that, as the agreement to pay commission was reduced to writing after the written offer to purchase the property had been accepted in writing by the vendor, it was evident that the intention of the parties was that the defendant should pay the commission in consideration of what the plaintiff had already done. In *Peacock* v. *Freeman* (1888), 4 Times L.R. 541, cited by the learned trial Judge, the circumstances were different, and the case does not apply here. In *Robinson* v. *Reynolds*, 4 D.L.R. 63, 3 O.W.N. 1262, also cited by the trial Judge, the agreement to purchase was defective, and the other circumstances of the case distinguish it from the case at bar. He also referred to *Hunt* v. *Moore* (1911), 2 O.W.N. 1017; *Prickett* v. *Badger* (1856), 1 C.B.N.S. 296; *Fisher* v. *Drewett* (1878), 48 L.J.Q.B. 32; *Platt* v. *Depree* (1893), 9 Times L.R. 194.

D. Inglis Grant, for the defendant, argued that, under the terms of the agreement, the commission was not payable unless the property was actually sold, and relied on the cases first cited above and other cases referred to in the judgment of RIDDELL, J.

Riddell, J.

November 6. RIDDELL, J.:—The plaintiff is a foreigner, who seems to act as a real estate agent; the defendant was the owner of certain lots, three in number, in Toronto; at least they are in his name. He seems to have been desirous of selling the lots; and, about the middle of March, 1911, the plaintiff and one Herman came to his house and asked Mrs. Barff if she wanted to sell. Barff seems to have been away from home during the day-time, and Mrs. Barff to have transacted business in connection with the lots. She said: "We wanted to sell: of course, if we got our price we would sell." It is apparently clear that at that time she said, "If you bring me a purchaser, I will sell it." So Smith swears, and she does not contradict him—and she mentioned the price she wanted.

About two months thereafter, the two men came to her house with one Heller, and he made an offer of $2,500 for each of the lots; she wanted $2,800. "I said I would not accept it; that I knew Mr. Barff would not accept; we wanted $2,800 or none at

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all." Then Heller offered $2,600 for each lot, and she said, "I know Mr. Barff will not accept that;" and then Heller asked for pen and paper, and, getting them, wrote out an agreement of purchase and also a cheque for $200 as a deposit. Leaving the cheque according to one story, taking it with them according to another, the three went away: in the evening the two agents returned and saw Mr. Barff; and, "after a lot of talk" (to use his own words), "we decided that I would accept the agreement as made out and the $200 cheque as a deposit. . . . Then I signed the agreement." Then the plaintiff produced an agreement which had been written or perhaps was then written out by Herman, and Barff signed that. It reads: "I, Mr. Thomas Barff, agree with L. Smith to pay The yussel comition 2½% for seling my property 6-8-10 Stanley Ave. in the City of Toronto. April 3rd, 1911. Thomas Barff."

The cheque was either handed over to or simply left with the defendant as the deposit. As I have said, there is a conflict as to whether it had been taken away after the day interview.

There is a difference of recollection as to what was said about the cheque; but, like the other conflict, it is, in my view, quite immaterial.

The plaintiff's story is: "I said, 'Mr. Barff, would you like to pay me my commission right away?' I said, 'My commission is $195, and you sign that cheque, and I will give you cheque for $5;' and I went down to the bank, and bank refused to pay."

The defendant's account is: "I had the cheque in my hand, and Mr. Smith said, 'You can give me that and I will get it cashed for you.' He said, 'You can give me that and I will get it cashed for you.' Q. Is 'cashed' the last word he said? A. Yes, and with that they took it away."

The defendant's counsel before us contended that this was an agreement on the plaintiff's part to accept the cheque endorsed by the defendant as payment of his commission. If the plaintiff agrees, we should let him accept the cheque as in payment of commission, amend his pleadings now, claiming upon the cheque, and be awarded the amount, with County Court costs of action and appeal—that is, if the defendant does not object.

Notwithstanding the argument of the defendant's counsel, I do not see that there was such an accord and satisfaction as is contended for. The whole transaction is, I think, clearly nothing more than the plaintiff, being anxious to get his commission, saying to the defendant: "Give me the cheque; I shall get it cashed, pay myself out of the proceeds, and pay you the balance." It is at least clear that any offer on his part to accept the cheque as payment of his commission and to give his cheque for $5 was not accepted.

Heller seems to have changed his mind almost at once, thought he had paid too much for the property. The day after

the cheque was handed to Smith, he (S.) went to the bank—the bank said, "Call around later on, and the cheque will be all right;" but, later on, payment was refused, as they had been instructed not to pay it.

Smith brought back the cheque, and appears to have given it to Mrs. Barff.

At the time of the contract for sale, the defendant had given the purchaser the name of his solicitor, but Mrs. Barff wanted to make a change, and went down town early to prevent the purchaser from going to the solicitor named. She saw Herman and then Smith, had the board taken off the houses, as "they were sold," and was introduced by these two to Mr. H. as a solicitor whom they had found very good. She delivered the deed to Mr. H. to have the sale carried out—Mr. H. to act for the vendor. She was then (apparently) told that the cheque was stopped. Mr. H.'s advice was asked, and he advised suit in the name of the defendant. An action was brought and judgment obtained, which was set aside on some ground not disclosed. She told her husband that the suit was to be brought in his name, and no objection was made, so far as appears—none is suggested.

A respectable firm of solicitors acted for the purchaser, requisitions of title passed between the solicitors; the trial on the cheque was adjourned from time to time, and the Judge at length said that he would not try the question pending the disposition of the requisitions of title; and Mrs. Barff then "refused to go any further, there being so much trouble and annoyance about it that they would not be bothered any more with it;" "it reached a stage that an action had to be brought in some form or another to compel Heller to carry it out—and the conclusion was . . . that they made up their minds not to have anything more to do with it."

It seems quite clear that Heller is a man of substance, and that there was no ground for failing to carry out his purchase, but that he thought he was paying too much.

This action was brought in the County Court of the County of York. His Honour Judge Denton dismissed the action, on the ground that, "as the defendant only agreed to pay a commission to the plaintiff for *selling the property*, and as the property was not sold, he is not liable to pay the commission."

The plaintiff now appeals.

In this case we must determine what the parties meant by "selling the property;" and that, under the facts, I cannot think at all doubtful. Mrs. Barff had told the plaintiff, "If you bring me a purchaser, I will sell it." The purchaser was brought, and Barff (if not Mrs. Barff) did sell the property in the usual sense of the word—so much so that the boards were taken off the houses because they were "sold." There was nothing more for the

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agent to do; and I am of opinion that what both parties meant by "selling the property" was the successful effort of Smith to procure a purchaser acceptable to the vendor, this purchaser signing a contract acceptable to the vendor.

There is no case forbidding us to place this interpretation upon these words.

In *Peacock* v. *Freeman*, 4 Times L.R. 541, both Mr. Justice Mathew and the Court of Appeal interpreted "sale" as meaning "sale and conveyance complete" (p. 542). But that was under a special form of contract. The Master of the Rolls pointed out that the correspondence shewed that the "sale" in this instance "could only refer to a completed sale, as they (the letters) referred to the accounts of the mortgagees being taken upon the completion of the sale and the payment of the purchase-money."

So the dictum of Bramwell, B., in *Attorney-General* v. *Wyndham* (1862), 1 H. & C. 563, at p. 574, "A sale supposes a seller, and also, I think, a conveyance," is upon a particular form of words—the learned Baron goes on to say, "Here there is neither."

Robinson v. *Reynolds*, 4 D.L.R. 63, 3 O.W.N. 1262, before Mr. Justice Britton, as my learned brother pointed out on the argument, is a wholly different case. There "the agent's commission" was "to be paid out of and form part of the purchase-money." The like form of words is to be found in other cases.

So, too, in a statute, "sale" has been interpreted as meaning "conveyance:" *Donovan* v. *Hogan* (1888), 15 A.R. 432; *Sutherland* v. *Sutherland* (1912), 3 O.W.N. 1368.

But "sale" and cognate words are used by the most accurate speakers and writers, both in judgments and otherwise, as meaning an agreement for sale, etc., even if it be not implemented by conveyance. For example, in the case in 4 Times L.R. already cited, "sale" is used of the agreement more than once. In *Mackenzie* v. *Champion*, 12 Can. S.C.R. 649, "McK. *et al.* sold the land . . . receiving from the purchasers . . . $5,000 as a deposit. . . The purchasers refused to complete their purchase . . . " (head-note). Strong, J. (p. 656), says that the plaintiffs being instructed by the defendants to sell certain lands at a certain price and upon certain terms of payment, "the only duty undertaken . . . was to find a purchaser for the price and on the terms to which they were limited by their instructions, and that it was not incumbent on them to do more than to bring the parties together, which they did and thereby earned their commission." Henry, J., dissents, but on the ground that the plaintiffs "took no accountable document to complete the sale" (p. 659). The learned Judge adds (p. 661): "If he had taken a written agreement from the purchaser the sale would be completed." This, of course, was done in the case at bar.

It is wholly unnecessary, in my view, to cite cases to shew that the meaning I have set out can be given to the language of the contract—and, under all the circumstances of the case, I think it should be.

The appeal should be allowed with costs, and judgment entered for the plaintiff for $195, interest, and costs, all on the County Court scale.

Falconbridge, C.J.

FALCONBRIDGE, C.J.:—I agree in the result.

Britton, J. (dissenting).

BRITTON, J. (dissenting):—It seems to me perfectly clear that what the plaintiff and defendant both understood by the document signed by the defendant, at the instance of the plaintiff, was, that the defendant should pay the commission to the plaintiff for selling the defendant's property, 6, 8, and 10 Stanley street.

The plaintiff did not sell the property—the property was not sold.

An offer was put in, signed by a person named Heller. There is no formal acceptance of that offer. I will assume that the defendant was willing to accept it. Heller gave a cheque, nominally for $200—but, for all that appears, a cheque that the defendant could not use— as, if there were funds at the bank upon which the cheque was drawn, available for payment of the cheque, payment was stopped.

The plaintiff got the defendant to endorse the cheque, and apparently got it from the defendant in payment for any commission, if any, which the plaintiff could claim; but, upon payment being refused, he took the cheque and handed it to the wife of the defendant.

The defendant apparently thought, under advice from the plaintiff—and from persons in the interest of the plaintiff—of endeavouring to compel performance by Heller of the so-called agreement. Upon reading the offer on which the plaintiff relies, I am of opinion that the defendant adopted the wiser course in not pursuing Heller under the circumstances. Considering how the plaintiff came into this transaction—how he happened to find Heller—considering how, when, and where the offer of Heller, the so-called acceptance of the defendant, and the agreement to pay the usual commission, were drawn up and signed, the true construction of the offer is, that, if a sale was actually effected—not an agreement for sale signed—the commission was to be paid.

I agree with the decision of the County Court Judge, and I would dismiss the appeal with costs.

Appeal allowed; BRITTON, J., *dissenting.*

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ROBINSON v. GRAND TRUNK R. CO.

(Decision No. 2.)

Ontario Court of Appeal, Garrow, Maclaren, Meredith, and Magee, JJ.A., and Lennox, J. November 19, 1912.

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

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

[Dicta in *Goldstein* v. *C.P.R.*, 23 O.L.R. 536, followed; *Robinson* v. *Grand Trunk R. Co.*, 5 D.L.R. 513, reversed.]

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

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

Statement

APPEAL by the defendants from the judgment of Latchford, J., *Robinson* v. *Grand Trunk R. Co.*, 5 D.L.R. 513, 26 O.L.R. 437, in favour of the plaintiff, holding the defendants liable for damages for injuries sustained by the plaintiff, while travelling at a reduced fare upon a train of the defendants, owing to negligence of the defendants, notwithstanding the terms of a contract purporting to exempt the defendants from liability.

The appeal was allowed, MAGEE, J.A., and LENNOX, J., dissenting.

Argument

D. L. McCarthy, K.C., for the defendants, argued that the plaintiff was either travelling under the contract, in which case he was bound by its terms; or he was a trespasser, in which case the defendants owed him no duty, except not to injure him wilfully, of which there was no suggestion. He referred to *Goldstein* v. *Canadian Pacific R.W. Co.* and *Robinson* v. *Canadian Pacific R.W. Co.* (1911), 23 O.L.R. 536; *Heller* v. *Grand Trunk R.W. Co.*, 5 D.L.R. 114, 25 O.L.R. 488; the Railway Act, R.S.C. 1906, ch. 37, sec. 284, sub-sec. 7; Elliott on Railroads, 2nd ed., vol. 3, p. 905, citing *Boering* v. *Chesapeake Beach R.W. Co.* (1904), 193 U.S. 442, a case almost identical with the case at bar.

R. McKay, K.C., for the plaintiff, argued that the contract was not binding on the plaintiff, not having been signed or assented to by him, or brought to his notice. The action is founded on tort, not on contract, and on the authorities the plaintiff is entitled

to recover. The cases are collected in *Jennings* v. *Grand Trunk R.W. Co.* (1887), 15 A.R. 477, at p. 484. Reference was made to *Marshall* v. *York, &c., R.W. Co.* (1851), 11 C.B. 655, 662, 663; *Richardson Spence & Co.* v. *Rowntree*, [1894] A.C. 217; *Henderson* v. *Stevenson* (1875), L.R. 2 Sc. App. 470; *Bate* v. *Canadian Pacific R.W. Co.* (1889), 18 Can. S.C.R. 697; *Parker* v. *South Eastern R.W. Co.* (1877), 2 C.P.D. 416. The obtaining of the plaintiff's signature to the contract was a material step, and the failure to do so made it of no effect, as far as he was concerned. The provision of the Railway Act, sec. 340, under which the Board may determine the extent to which the liability of the company may be "impaired", does not extend to relieving the company from liability altogether (*Heller* v. *G.T.R.*, 5 D.L.R. 114), and sec. 284 remains good. *Sutherland* v. *Grand Trunk R.W. Co.* (1909), 18 O.L.R. 139, was also referred to.

McCarthy, in reply, referred to *Bicknell* v. *Grand Trunk R.W. Co.* (1899), 26 A.R. 431, and to *Taylor v. Grand Trunk R.W. Co.* (1902), 4 O.L.R. 357.

GARROW, J.A.

November 19. GARROW, J.A.:—The action was brought by the plaintiff to recover from the defendants damages caused to the plaintiff while upon a railway train on the defendants' line of railway. The injury was caused by a collision with another train; and negligence in operating the train is admitted. The jury assessed the damages at $3,000.

The only question upon this appeal arises out of the circumstances under which the plaintiff was upon the train at the time of the injury complained of, which are very similar to those recently before this Court in *Goldstein* v. *Canadian Pacific R.W. Co.*, 23 O.L.R. 536, even to the circumstance that the blank for the signature of the person travelling with the animal had here, as there, been left unsigned. There is, however, this circumstance which should be mentioned; in the *Goldstein* case it did not appear that any fare was paid or intended to be paid by the shipper for the carriage of the attendant; while in this case a reduced fare was charged and paid by the consignee.

The view of Latchford, J., is thus expressed: "I am firmly of the opinion that Robinson's common law rights against the defendants were not taken away by the contract made between the defendants and Dr. Parker. Any other view appears to me necessarily to imply that, by a contract to which he was not a party, under which he derived no benefit—the reduction in fare benefiting only the consignee—and of whose terms he had neither notice nor knowledge, his right to be carried without negligence on the part of the defendants was extinguished, and they were empowered, without incurring civil liability, to maim and almost kill him while he was lawfully upon their train. If such can possibly be the effect of the special contract, a higher Court must so decide."

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In the *Goldstein* case, the main question was as to the right of indemnity which the defendants claimed against the third parties. And in considering that question I incidentally referred to the nature of the contract under which the plaintiff was travelling at the time of his injury, and indicated my opinion of its proper construction as far as the then plaintiff was concerned: see 23 O.L.R. at p. 539.

Further consideration in this case, in which the question is, of course, more directly involved, has only served to confirm what I there expressed, that a person in the position of the plaintiff, travelling under such special circumstances, paying no fare himself, and having no other ticket or other authorisation entitling him to be upon the train at all, cannot be heard to deny that he was travelling under the provisions of the contract in his possession, whether he had taken the trouble to read it or not. And the result would, in my opinion, be the same whether or not the signature of such person upon the back of the contract, in the blank for that purpose, had been obtained. Such signature is clearly not essential to the creation of the contract, its only use being obviously for the purpose of identification and to prevent any one else from travelling upon it.

I am not quite certain what is meant in the judgment by the "common law rights" of the plaintiff, to which the learned Judge thought he might be remitted. He cannot, of course, have meant a common law right to travel free, or at a reduced fare, upon the defendants' railway; for, of course, no such right exists or ever existed. The only other common law right which occurs to me is the ordinary right of every one to be protected against negligence. But negligence in such connection does not mean abstract negligence, but negligence under circumstances which imposed upon the negligent one a duty not to be negligent. And the nature and extent of this duty is not a fixed and definite quantity applicable to all alike, but varies according to the circumstances. For instance, a passenger who has paid his fare and has a ticket is legally entitled to assert a higher and more extensive duty in his case than has a mere trespasser, who has paid no fare and has no contract. So that the fundamental inquiry into the nature and extent of the duty does not stop short at the point where the plaintiff is merely found to have been upon the defendants' train, but must involve and include the further question of how and by what authority he came to be there, with the inevitable result, as it seems to me, that the contract is thus reached, and must be received and acknowledged as the foundation and the measure of the rights, duties, and liabilities of all parties, the plaintiff included. The shipper, under such a contract as the one in question, may himself accompany the animals, or he may name a person to do so, who becomes, in the language of the contract, his "nominee." No one accompanying the animals is apparently compelled to accept

the privilege of travelling under such a special contract at reduced fare, or no fare at all. Instead it is quite open to the person to purchase in the ordinary way the regular ticket, paying the regular fare, in which case he would be entitled to the rights of an ordinary passenger.

But, if the travelling is done under special contract, and at the reduced fare, or no fare, as the case may be, its terms must, I think, be equally binding upon the shipper, if he alone accompanies the animals, or upon his nominee, if he does not.

And, as the contract in question clearly excludes liability on the part of the defendants for the death, injury or damage, whether "caused by the negligence of the company or its servants or employees, or otherwise howsoever", and has been duly authorised by the Railway Board, under sec. 340 of the Railway Act, R.S.C. 1906, ch. 37, the only remaining question must be the important one whether the Board has authority in the premises.

And that question I would answer in the affirmative.

The language of the section is:—

"No contract, condition, by-law, regulation, declaration or notice made or given by the company, impairing, restricting or limiting its liability in respect of the carriage of any traffic, shall, except as hereinafter provided, relieve the company from such liability, unless such class of contract, condition, by-law, regulation, declaration or notice shall have first been authorised or approved by order or regulation of the Board.

"(2) The Board may, in any case, or by regulation, determine the extent to which the liability of the company may be so impaired, restricted or limited.

"(3) The Board may by regulation prescribe the terms and conditions under which any traffic may be carried by the company."

"Traffic" is interpreted to mean "the traffic of passengers, goods and rolling stock:" sec. 2 (3). And "goods," by clause (10) of the same section, as "personal property of every description that may be conveyed upon the railway, or upon steam vessels, or other vessels connected with the railway."

Section 284, which I need not quote at length, should also be looked at. It prescribes for "accommodation for traffic," and, among other things, for "with due care and diligence" receiving, carrying and delivering traffic. And sub-sec. 7 gives to "every person aggrieved by any neglect or refusal of the company to comply with the requirements of this section," *but "subject to this Act,"* "an action therefor against the company, from which action the company shall not be relieved by any notice, condition or declaration, if the damage arises from any negligence or omission of the company or of its servant." The omission from this sub-section of the word "contract" should also be noted, a word found in sec. 340 in connection with the other words here used—with the additional words, "by-law, regulation."

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In the well-known *Vogel* case, *Grand Trunk R.W. Co.* v. *Vogel* (1886), 11 Can. S.C.R. 612, two of the learned Judges, Strong, J., and Taschereau, J., were of the opinion that a similar provision, without the words "subject to this Act," and without any provision, in the legislation as it then stood, equivalent to the present sec. 340, did not prohibit a railway company from entering into a special contract limiting its liability even for the consequences of its own negligence. And a similar opinion was expressed in this Court by Burton, J.A.: see *Vogel* v. *Grand Trunk R.W. Co.* (1884), 10 A.R. 162, 171, 172; and in effect by Patterson, J.A., at p. 183. That was before the days of the Railway Board, when efforts unduly to limit their responsibilities as common carriers were not infrequent on the part of railway companies, by means of "notices, conditions, and declarations," to which it could not be said that the consignees were parties otherwise than through an often doubtful notice of some kind. See the history of such efforts in the judgment of Strong, J., in the *Vogel* case, at p. 629 *et seq.*

Now, after the matter had repeatedly arisen in the Courts and formed the subject of much expensive litigation—see, among other cases, *Grand Trunk R.W. Co.* v. *McMillan* (1889), 16 Can. S.C.R. 543, 559; *Robertson* v. *Grand Trunk R.W. Co.* (1895), 24 Can. S.C.R. 611; *St. Mary's Creamery Co.* v. *Grand Trunk R.W. Co.* (1904), 8 O.L.R. 1—the policy of the legislation, which received its present form in the year 1903 (see 3 Edw. VII. ch. 58, sec. 275 (D.), apparently is, to remit the question of what is a fair and reasonable contract between the carrier and the shipper to the Railway Board.

Such a policy, tending to secure reasonableness and justice between the parties, as well as definiteness and certainty in contracts which from their former obscurity were so often the subject of litigation, is, I think, wise and useful, and entitled to receive a liberal interpretation for the purpose of enabling it to accomplish its obvious purpose. And, so regarding it, I have no hesitation in holding that the contract in question was one the approval of which was well within the powers of the Board.

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

Maclaren, J.A.

MACLAREN, J.A.:—I agree.

Meredith, J.A.

MEREDITH, J.A.:—The learned trial Judge thought that the plaintiff might recover upon his common law rights; but has not made it very clear just which common law right he had in mind. Of course, if the plaintiff were within his legal rights in being upon the defendants' property, as he was, at the time of his injury, and if the defendants' "common law" liability were not in any way limited, he would have a right of action. But his rights, however they are put, must be measured by the duty the defendants owed to him; and that duty must depend upon his right to be where he

was when injured. If he were a trespasser, he would have no right of action; because the defendants would not owe any duty to him in regard to the running of their train; and in the facts of this case, unless he was a passenger under the contract made by his master for his carriage, which contract he carried with him as evidence, and the only evidence, of his right of transportation, he was a trespasser, and cannot recover: and by the explicit terms of that contract the defendants are relieved from liability for the injury sustained, unless the law renders a contract for such relief ineffectual.

So it really all comes back to a question of the contract under which the plaintiff was rightly upon the defendants' property when he was injured.

The contract relieving the defendants from such liability was made in the plaintiff's presence, by his master, and the evidence, in writing, of such contract was then given to the plaintiff and always afterwards retained by him as his authority for being upon the defendants' property and as evidence of his right of transportation. Upon the face of the contract were printed in red ink and in large letters the words "Read this Special Contract;" and in the body of the "contract" the limitations of liability were headed by the words "Restrictions of Company's Liability;" under which the defendants were relieved from liability for the injury the plaintiff has sustained, in these plain words: "In case of the company granting to the shipper or any nominee or nominees of the shipper a pass or a privilege at less than full fare to ride on the train in which the property is being carried, for the purpose of taking care of the same while in transit and at the owner's risk as aforesaid, then as to every person so travelling on such a pass or reduced fare the company is to be entirely free from liability in respect of his death, injury, or damage, and whether it be caused by the negligence of the company, or its servants or employees or otherwise howsoever."

It therefore appears to me to be quite plain that the plaintiff has no legal cause of action against the defendants in this case, unless by law they are prohibited from so limiting their liability; and I am unable to say that they are now so prohibited.

By section 284 of the Railway Act, railway companies are required to, among other things, "with due care and diligence, receive, carry and deliver" all traffic offered for carriage on the railway; and, under sub-sec. 7 of that section: "Every person aggrieved by any neglect or refusal of the company to comply with the requirements of this section shall, subject to this Act, have an action therefor against the company, from which action the company shall not be relieved by any notice, condition or declaration, if the damage arises from any negligence or omission of the company or of its servant."

Then section 340 of the same Act proceeds to deal with the

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same subject, in these words (as set out in the judgment of Garrow, J.A., *supra*.)

When the present Railway Act was passed, the law in this respect was not in a very logical or satisfactory state. The holding of the Courts then was, that, though a railway company might not relieve itself from liability for negligence altogether, it might limit the amount of such liability. I speak, of course, in very general terms.

Then, when Parliament dealt with the question in passing the present Act, they seem to me, in the two sections from which I have quoted, to have solved the difficulty by leaving it to the Board of Railway Commissioners to determine under sec. 340, and, until that was done, to keep the old law in force under sec. 284. Thus reading these enactments gives effect to each, without any clashing in any respect, is in accord with the literal interpretation, and is just what one might have expected would have been done in the circumstances I have mentioned.

Sub-section 7 of sec. 284 is expressly made "subject to this Act," and so subject to sec. 340: and was necessary in order to maintain the law as it was, unless or until the Board should act under the latter section: and, generally speaking, putting the duty upon the Board was quite in accord with the purpose of Parliament in creating that Board, and in line with the other duties and powers given to it: see *Hayward* v. *Canadian Northern R.W. Co.* (1906), 4 W.L.R. 299; *Sheppard* v. *Canadian Pacific R.W. Co.* (1908), 16 O.L.R. 259; and *Sutherland* v. *Grand Trunk R.W. Co.*, 18 O.L.R. 139.

And, it being admitted that the Board had, long before the occurrence in question, acting under sec. 340, authorised the condition which I have quoted, the respondent's case fails in this respect also.

I would allow the appeal and dismiss the action.

Lennox, J. (dissenting)

LENNOX, J. (dissenting):—I think the appeal should be dismissed with costs.

I cannot agree with the argument so strenuously urged that the plaintiff must have occupied one or other of these alternative positions, namely: he was travelling as a trespasser; or, still worse, he was travelling upon and bound by the terms of what is called the "special contract."

This is not necessarily true. There is possible intermediate ground between these extremes; and, in my judgment, the undisputed facts clearly shew that the plaintiff occupied this intermediate position, that is, he was "lawfully upon the train," but he had neither notice nor knowledge of nor was he bound by the alleged special contract.

Parker, the shipper, swore:—

"I went down to the agent at Milverton to find out when I

could get a car, and he asked me who was going with the horse. I says, 'I am not going to send anybody.' He says: 'We won't accept it unless you do; the rules of the company demand that a horse going over 100 miles, a person will have to accompany it.' I said, 'That is a horse of a different colour;' and a day or two afterwards I urged him to bring things to a head, because I wanted to get away on some business, and he wired me that he was going to send a man down. It was loaded up, and you know the rest.

"Q. You had no previous experience in shipping horses? A. No.

"Q. What did you do? A. I took the advice of this fellow who had experience.

"Q. But what did you do? A. I got a man to board off the end of the car for hay and that sort of thing. I was very well acquainted with Mr. Burgman, a reputable citizen, and I took his advice and did everything he advised me to do. In regard to the bill in question, there is a statement here that my name is signed to it. I remember signing some document; and, as the plaintiff has said, Mr. Burgman folded it up and shoved it across on the counter, and says 'That is yours.' I folded it up and said, 'I had better mail this to Dr. McCombe;' and he says 'No; better give it to this gentleman, for he will need it to indicate that he is accompanying the horse;' and I gave it to him, and that is the last I saw of it until to-day."

The defendants, as they had a right to do, insisted upon having a man accompany the shipment; and, in consequence, McCombe sent the plaintiff to Milverton to bring back the horse.

The plaintiff's evidence is:—

"Q. Coming down to the time you went down to Milverton, tell us the circumstances preceding your trip there? A. I left South River to go to Milverton to bring up a horse which Dr. Parker was purchasing there for Dr. McCombe, and I went there and saw Dr. Parker, and we drove out and saw several horses. Dr. Parker purchased a horse, and we loaded it on the car, and I left Milverton with the horse in the car, for home.

"Q. For your home? A. For my home.

"Q. Did you have anything handed to you? A. I had nothing. Well, I had a shipping bill handed to me.

"Q. And that is what has been referred to, and will be referred to, as this contract, this special contract? A. I believe so.

"Q. What did you do with it? A. I did not know it by that name. I put it in my pocket.

"Q. Did you do anything with it before putting it in your pocket? A. I did not.

"Q. How was it handed to you? A. It was handed to me by Dr. Parker; I would not swear just to be sure that it was Dr. Parker, or the agent, but I think it was Dr. Parker.

"Q. In what shape? A. Folded up.

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"Q. You did what when it was handed to you? A. Put it in my pocket.

"Q. When did you first see that contract after that time? A. It was about a week after I was home, and I was running through my pockets one day, and thought Dr. McCombe should have had that, as he was shipping the horse, and I sent it down to Dr. McCombe."

On cross-examination the plaintiff said:—

"Q. Did Dr. Parker sign this in your presence? A. I was standing right there, alongside Dr. Parker.

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

"Q. And you never discovered it until after the accident? A. No.

"Q. You did not read it? A. No, sir, not until after the accident.

"Q. You paid no fare on the train going with the horse? A. No.

"Q. That is all you know of the transaction; you stayed with the horse all the way? A. I travelled with the horse all the way.

"Q. And the horse was on the same train as you were at the time of the accident? A. Yes, sir.

"Q. You were not asked for any fare by the trainmen? A. No.

"Q. And you were recognised as travelling with the horse? A. Certainly.

"Q. You were in charge of the horse, looking after it from time to time? A. Yes, at times.

"Q. The way-bill shewed you were in charge of the horse? A. I don't know anything about that.

"Q. You did not see the way-bill? A. I would not say that I did not see it. I saw the conductor in the caboose, with several bills.

"Q. Did he ask you were you the man in charge of the horse? A. No.

"Q. You were the only man there? A. I was the only man there?

"Q. And the only horse? A. Yes.

"Q. I presume he looked upon you as in charge of the horse? A. I presume so."

Clearly then, whatever may be argued as to his being barred from recovery by the contract signed by Parker, and I will deal with that later, the plaintiff was not a trespasser. On the contrary, the plaintiff accompanied the shipment, not only with the knowledge and approval, but at the instance, of the company's

agent at Milverton—the agent acting in pursuance of the specific rules of the company—and this agent of the company, well knowing the provisions of the agreement, sent him out upon his journey without a suggestion of any kind that the company's liability for negligence was limited or restricted in any way whatever. It is enough in this case that the plaintiff was "rightfully" upon the train—that he was there with the consent of the company. The plaintiff was injured by a collision. It is admitted that this was caused by the negligence of the company's servants. A bare licensee may not recover for negligent omission, or nonfeasance, whereas a bailee for hire or passenger can recover in such a case. The distinction is thoroughly discussed in *Blackmore* v. *Toronto Street R.W. Co.* (1876), 38 U.C.R. 172, and the plaintiff, claiming damages for the death of a newsboy, a mere volunteer upon the train, failed because there was an absence of what is frequently called "active" negligence; but even in that case it was conceded on all hands that it would have been otherwise had there been any misfeasance causing the accident. At p. 210, Hagarty, C.J., said: "It seems to me, with great deference, that in the Court below the distinction has not been sufficiently pressed between an injury arising from such a defect as the want of a step, and an injury from careless driving, or collision, or any other negligence in the act of carrying." That the plaintiff here was accepted as a passenger, I consider, is beyond question; but there is no object in elaborating this point, as there is no distinction in the liability of the company when the negligence is of the active kind.

For a direct authority shewing that negligence causing a collision is misfeasance and "active" negligence, see *Allen* v. *Canadian Pacific R.W. Co.* (1909), 19 O.L.R. 510, where the English cases are collected, and the same case in appeal (1910), 21 O.L.R. 416.

In *Meux* v. *Great Eastern R.W. Co.*, [1895] 2 Q.B. 387, the contract was with the servant, the plaintiff was his employer, and the livery destroyed was hers—and it was held that, the cause of action, as in nearly all these cases, arising *ex delicto*, and the carelessness of the defendants' servant being shewn, it was enough that the plaintiff's goods were lawfully on the defendants' premises.

In *Marshall* v. *York, etc., R.W. Co.*, 11 C.B. 655, the position was reversed. Here the contract was made with the master, and the servant was injured, brought action, and recovered.

Once it is shewn that the persons injured or their goods were permitted by the company to be in the place where the injury is sustained, and the negligence is of the class here complained of, the company is liable. The most direct case I have come upon in our own Courts is *Jennings* v. *Grand Trunk R.W. Co.*, 15 A.R. 477. This case is important, too, as to the effect of an attempt of the employer to bind the employee. At p. 483, Osler, J.A., said: "We need not, therefore, decide whether notice to the deceased

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of the terms of the agreement with his employers, was essential to be proved in such an action as this, as the learned Chief Justice at the trial held that it was. My present impression is, that if the case turned upon the effect of the agreement of the 1st January, 1874, this ruling was correct. . . . There being then, as I hold, no agreement that the deceased should travel at his own risk, it is not material in an action like this, that there was no contract of carriage between him and the railway company. He was lawfully on their train as a passenger with their assent, or under some agreement, express or implied, between them and the express company, and a duty was thereby cast upon the railway company to carry him safely." The learned Judge then points out that, there being no contract between the deceased and the defendants, the defendants owed no duty *ex contractu;* and, consequently, there could be no cause of action for nonfeasance. "But," he adds, "there would be that duty which the law imposes on all, namely, to do no act to injure another."

To the same effect are the judgments of Bramwell, L.J., and Baggallay, J., in *Foulkes* v. *Metropolitan District R.W. Co.* (1880), 5 C.P.D. 157; and the decision in *Austin* v. *Great Western R.W. Co.* (1867), L.R. 2 Q.B. 442.

In *Martin* v. *Great Indian Peninsular R.W. Co.* (1867), L.R. 3 Ex. 9, Baron Channell held that, so long as the injury complained of was "in the nature of an affirmative act," the plaintiff was entitled to recover. The contract was with the Government, and there was a special provision exempting the company from liability for negligence.

In *Collett* v. *London and North Western R.W. Co.* (1851), 16 Q.B. 984, the plaintiff was an officer, and the contract was with the Postmaster-General.

In *Sheerman* v. *Toronto Grey and Bruce R.W. Co.* (1874), 34 U.C.R. 451, Mr. Justice Wilson put his judgment upon the ground that "the deceased . . . was not there by fraud, nor as a trespasser . . . knowingly violating in the use of the car the purposes for which the defendants say it was only to be used; and he was, therefore, entitled as a matter of duty to be carried safely and securely by the defendants."

And, in delivering the judgment of the Supreme Court of the United States in *Philadelphia and Reading R.R. Co.* v. *Derby* (1852), 14 How. 468, Mr. Justice Grier, at p. 485, said: "If the plaintiff was lawfully on the road at the time of the collision, the Court were right in instructing the jury that none of the antecedent circumstances, or accidents of his situation, could affect his right to recover." In that case the plaintiff was paying no fare and was riding on the invitation of the president of the company.

Clearly then, I think, the first alternative is disposed of; the plaintiff was not a trespasser—he was rightfully upon the railway—and he is entitled to recover for the class of negligence here com-

plained of, unless the defendants have effectively contracted themselves out of liability.

Then taking up the contract. Throughout the argument there seemed to be an undercurrent of suggestion that the plaintiff might in some mysterious way be bound by estoppel. What foundation is there for this? Brought out into the open, it means that he was bound by contract—bound by the special contract—or he is not bound at all. Here the plaintiff was never asked to make a contract, never authorised the making of one on his behalf, and never knew that there was a contract on his behalf. Did he not know or understand that his passage would be arranged for? Yes, but that would be a contract on behalf of McCombe; and, until he was told otherwise, he had no reason to anticipate special conditions or that he was being contracted out of his rights And a great deal of stress was laid on the fact that this form of contract was approved by the Board. There is no magic in this. The question is not whether such a contract, *if made*, is binding, but whether such a contract, so far as the plaintiff is concerned, was made at all. The Board sanctions certain contracts, if made. It does not bring contracts into being, or dispense with the common law essentials—communication, knowledge, consent, and the like. Are these conditions in evidence in this case? Neither McCombe, who employed the plaintiff, nor his agent Parker, could, without express authority from the plaintiff, trade away his right to be carried safely, or indemnified in case of default; and Parker never bargained, or intended, and the company never asked Parker to bargain, to do so. Parker never read the agreement, and no word about reduced rates, option, special terms, or exoneration, was ever uttered to anybody. Indeed, if it were necessary to decide as to the effect of this document, even as against McCombe—for Parker has no interest in it—it might be difficult to determine in favour of its validity, seeing that the initial condition exacted by the Board, namely, an option afforded to the shipper to retain his ordinary remedy against the company if he desired, was entirely ignored—a condition, as I understand it, which must exist as a matter of fact, as a foundation, before such a contract as this can be entered into at all. If McCombe was not bound, it could hardly be binding upon the plaintiff. Be this as it may, at all events, to the plaintiff, so vitally interested in the company's proposal, it was never hinted that his rights as a passenger were being affected in any way, although he was within easy reach of the agent, and although the drastic provisions of this contract, and the exceptional risk of travel upon a freight train, must have been present to the agent's mind. Instead, he prevented the possibility of the plaintiff making the discovery, by neglecting the statutory condition of requiring signature. To the man who already knew of the contents of the contract, the signing might be immaterial, but it is a part of the sanctioned

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contract; it is to be strictly observed; and, when it comes to the case of a man who does not know the facts at all, it cannot be said to be unimportant. It was folded up—the conductor never asked for it—the plaintiff never read it. The agent should have informed him of its contents if he intended him to be bound. There is no special rate filled in, although there is a blank space left for it—the marginal reference to half fare is of the vaguest kind; and on this condition, and finding that there is no entry on the back where the name of the reduced fare passenger, if any, is to appear, if the plaintiff had read this agreement he would be quite likely to conclude, and I think not unreasonably, that no arrangement for reduced fare had been made. He could pay a full fare without the personal loss of a farthing. If either the agent or conductor had done his duty, this plaintiff might have been put upon his guard, and if the real situation, proposed, had ever become known to him, is it conceivable that he would have bartered away his protection for less than a mess of pottage—in fact have surrendered his rights against the company without advantage of any kind?

I am of opinion that the judgment of the learned trial Judge should be affirmed.

Magee, J.A.

MAGEE, J.A., also dissented, agreeing with the opinion of LENNOX, J.

Appeal allowed; MAGEE, J.A., and LENNOX, J., *dissenting.*

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ROBINSON v. OSBORNE.

Ontario Divisional Court, Riddell, Kelly, and Lennox, JJ. October 15, 1912.

1. ADVERSE POSSESSION (§ II—61)—ENTRY WITHOUT TITLE—OCCUPATION BY TRESPASSERS—CONTINUITY AND INTERRUPTIONS—EFFECT AS TO RIGHTFUL OWNER.

If a person enters upon the land of another and holds possession for a time, and then, without having acquired title under the statute, abandons possession, the rightful owner, on the abandonment, is in the same position in all respects as he was before the intrusion took place.

[*Trustees Executors and Agency Co.* v. *Short*, 13 App. Cas. 793, followed.]

2. ADVERSE POSSESSION (§ II—62)—CONTINUITY AND INTERRUPTIONS—SUCCESSIVE TRESPASSERS.

Semble, the occupation of successive trespassers following each other without interruption is sufficient to bar the owner, though they are not in privity with each other. (*Per* Riddell, J.)

AN action in the County Court of the County of Halton, to recover possession of the east half of lot 10, north of Ontario

street, east of the river, in the village of Bronté, in the possession of the defendant. The defence was the Statute of Limitations.

The action was tried before the Judge of the County Court, without a jury; and the following reasons for judgment were given in writing:—

Statement

I find that the plaintiff proved sufficient paper title in himself to entitle him to have the actual and visible occupation of the land described in the plaintiff's statement of claim, if such title and right have not been extinguished under the statute.

That the defendant has failed to prove actual, continuous, open, visible, and exclusive occupation of the said land, either by himself or those under whom he claims, in succession, for a period of ten consecutive years.

That, if there were ten consecutive years of such occupation adverse to the possession of the plaintiff, such occupation could only be made out by uniting the occupation of some two or more of the plaintiff's predecessors, or by uniting Dobson's occupation with the defendant's; and the defendant failed to prove a conveyance or transfer of any kind of such occupation or possession from Pollock to Thomas, Thomas to Triller, Triller to Dobson, and Dobson to himself.

On these findings judgment will be entered for the plaintiff, that he, the plaintiff, is entitled to possession of the said land as against the defendant, and that the defendant give up such possession to the plaintiff, and pay the plaintiff's costs of action.

The defendant appealed.

The appeal was dismissed with costs.

Argument

W. Laidlaw, K.C., for the defendant, argued that the plaintiff had failed to prove a paper title; for, though he had put in a deed to his predecessor dated in 1871, he had failed to prove that the vendor was in possession at that date. Even if the plaintiff's paper title should be admitted, there is evidence that there has been such a discontinuance of possession on his part as entitles the defendant to succeed. He referred to *McConaghy* v. *Denmark* (1880), 4 Can. S.C.R. 609, *per* Gwynne, J., at pp. 632, 633, where the decisions are summarised; *Simmons* v. *Shipman* (1887), 15 O.R. 301; *Trustees Executors and Agency Co.* v. *Short* (1888), 13 App. Cas. 793; *Willis* v. *Earl Howe*, [1893] 2 Ch. 545; [RIDDELL, J., referred to Armour on Titles, 3rd ed., p. 307]; *Samuel Johnson & Sons Limited* v. *Brock*, [1907] 2 Ch. 533, *per* Parker, J., at p. 537; *Perry* v. *Clissold*, [1907] A.C. 73, *per* Lord Macnaghten, at p. 79.

J. P. MacGregor, for the plaintiff, argued that the trial Judge had properly found the plaintiff's paper title made out.

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Argument

The Statute of Limitations is extinctive, not acquisitive, in its general scope, and the defendant cannot rely upon the possession of a succession of trespassers between whom no connection is shewn, to establish his title. The *Short* case is a binding authority in the plaintiff's favour. He referred to *Doe Baldwin* v. *Stone* (1849), 5 U.C.R. 388; *Allison* v. *Rednor* (1857), 14 U.C.R. 459; *Young* v. *Elliott* (1864), 23 U.C.R. 420; *Kipp* v. *Synod of Toronto* (1873), 33 U.C.R. 220; *Handley* v. *Archibald* (1899), 30 Can. S.C.R. 130. The evidence shews that the possession relied on by the defendant was interrupted within the statutory period. The defendant fails to shew any possession in Dobson, and there is a gap in the chain of possessory owners which is fatal to his claim.

Riddell, J.

October 15. RIDDELL, J. (after setting out the facts as above):—The lot in question lies to the west of lot No. 9, which is frequently mentioned in the evidence.

The plaintiff's mother, in 1871, received a deed of the east half of lot 10 from one Croker, paying $40 as consideration, and he had received a quit-claim deed in 1868 from Celista M. McNeil. These grantors had been in possession, and she went into possession and lived on the lot till about 1875. She then moved to Dundas, then to Oakville, then to Toronto, where she died in 1889, never having been upon the lot in the meantime. The plaintiff is her administrator, as well as grantee of her heirs-at-law.

When she left the lot with her family, she placed it in the care of her brother, John Riggs, who himself died in 1901. There was a house at that time on the lot, and this was rented by Riggs to tenants. It did not seem to pay—the tenants did not pay—and Riggs had the house removed about twenty-five years ago; this was after the last tenant, one Cullen, had partly burned it down, and it had become uninhabitable. No one on behalf of Mrs. Robinson went on the property after that time.

The learned County Court Judge has not favoured us with his view of the credibility of the witnesses; counsel for the plaintiff (p. 39) says expressly that he is not disputing the honesty of Pollock, Sargeant, Speers, or Dobson. The evidence is very contradictory as to the fencing in of this lot with the adjoining lot 9. Applying the best judgment I have, and remembering the onus of proof, the following are my conclusions as to the facts succeeding the occupancy of Mrs. Robinson:—

William Pollock bought lot 9 in 1892, and got his deed in 1896. He went into possession of lot 9, and tore up an old picket fence between 9 and 10, replacing it by a wire fence. This fence I think it is that the plaintiff's witnesses speak of. Pollock made no use of lot 10, but he had a tenant, Thomas, to whom he

sold lot 9 in 1896, and Thomas took down the fence and put it at another place, at least much of it. Thomas used lot 10, ploughed it in 1897, planting potatoes that year and potatoes and corn the following year, with one Sargeant. In 1899, Thomas sold to Triller, who pastured his horses in this lot, which was not at least wholly separated from No. 9, and in 1910 he sold to Dobson; Dobson himself never went on the lot or exercised any acts of ownership thereon, but rented lot 9 to one Hart. Hart never went on lot 10 to use it—never attempted to use it—and he left 9 after having been in possession for a year or a little more. Then the defendant came in possession of 9, and took possession of the east half of lot 10, tearing down the remains of the old wire fence between the two lots, and cultivating them together. It would seem that Pollock made some kind of an indefinite claim to this lot, as Camp, Triller's tenant, thought his tenancy covered it, as well as "the old Pollock property." And, though all the conveyances speak of lot 9 only, Dobson, when he bought lot 9, thought he was also getting a claim to lot 10; and, beyond question in my mind, he intended to sell and the defendant to buy not only lot 9, but also a claim to the east half of lot 10.

If Dobson's possession had been such as to answer the statute, I think the defendant could take advantage of it, even though his deed covered lot 9 only.

In *Simmons* v. *Shipman*, 15 O.R. 301, H. had lived on the land and worked it for thirteen or fourteen years; he then sold to D., and went off the land; possession was forthwith taken by D. Mr. Justice O'Connor, at the trial, ruled that there was a break in the continuity of possession, because no writing passed between H. and D. with reference to this land. But the Divisional Court held that this was error, and that an actual transmutation of possession for value was enough—that there was no need of deed or writing. To the same effect is *Burroughs* v. *McCreight* (1844), 1 Jo. & Lat. 290, at p. 303: "It is not necessary that this possession should be strengthened or corroborated by intermediate conveyances. The Act speaks of possession without reference to conveyances."

Dixon v. *Gayfere* (1853), 17 Beav. 421, and *McConaghy* v. *Denmark*, 4 S.C.R. 609, may also be looked at.

The attention of the learned County Court Judge does not seem to have been directed to this feature of the evidence.

The learned Judge, in my opinion, misconceives the law.

In *Trustees Executors and Agency Co* v. *Short*, 13 App. Cas. 793, it was held that the Act does not continue to run against the rightful owner after an intruder has relinquished possession without acquiring title under the Act; and thereafter it was by many considered that "the doctrine has now been

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exploded that the paper title may be extinguished by a succession of independent trespasses, without any one of the intruders having been in possession for the statutory period:" Armour on Titles, 3rd ed., p. 306. But the doctrine and the case in 13 App. Cas. came under consideration in *Willis* v. *Earl Howe*, [1893] 2 Ch. 545, and *Samuel Johnson & Sons Limited* v. *Brock*, [1907] 2 Ch. 533, and the decision was shewn to be based upon the ground "that the old right of action was gone when the first intruder went out, and that a new right of action arose when the fresh intrusion ocurred:" *per* Parker, J., in [1907] 2 Ch. at p. 538. If, however, the new intruder came in immediately, there was no advantage under the statute or otherwise to the real owner from the old intruder going out. The law is as laid down by Sir Henry Strong, C.J., in *Handley* v. *Archibald*, 30 S.C.R. 130, at p. 137: "The statute does not run against a party out of possession unless there is a person in possession: *Smith* v. *Lloyd* (1854), 9 Ex. 562; *McDonnell* v. *McKinty* (1847), 10 Ir. L.R. 514; and further, if there has been a series of persons in possession for the statutory term between some of whom and their predecessors there has been no privity, in such case the bar of the statute is complete, but if there has been any interval between the possession of such persons then inasmuch as during that interval the law refers the possession to the real owner having title, the benefit of the former possession of a precedent wrong-doer is lost to a trespasser who subsequently enters, in whose favour the statute consequently runs only from the date of his own entry: *Trustees Executors and Agency Co.* v. *Short*, 13 App. Cas. 793. And this rule is not affected by the old common law principle that in case of disseisin there could be no remitter without actual entry, inasmuch as the statute does not deal with feudal possession or seisin but with actual or constructive statutory possession as distinguished from seisin."

If then the defendant could prove a continuous occupation adverse to the owner, his case would be made out. But there is a fatal gap of a whole year during Dobson's time. Neither he nor his tenant, Hart, exercised any acts of ownership on the land. The very stringent rule in *Trustees Executors and Agency Co.* v. *Short*, 13 App. Cas. 793, must, therefore, be applied—and it must be held that the defence of the statute has not been made out.

Some argument was addressed to us that the plaintiff had not made out his case. But he proved possession by his predecessor in title: that was *primâ facie* evidence of a fee simple: *Allen* v. *Rivington* (1671), 2 Saund. 111; *Doe dem. Smith and Payne* v. *Webber* (1834), 1 A. & E. 119; *Doe dem. Carr* v. *Billyard* (1828), 3 M. & Ry. 111; *Doe dem. Carter* v. *Barnard*

(1849), 13 Q.B. 945; *Wallbridge* v. *Gilmour* (1871), 22 C.P. 135, at p. 137; Williams and Yates on Ejectment, 2nd ed., p. 250.

The appeal must be dismissed, and with costs.

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KELLY, J.:—This is an action for possession, in which the defendant (the appellant) claims, as against the plaintiff, to be entitled to possession of the property in question, basing this claim upon possession by several successive trespassers or intruders. The evidence shews that the possession of these persons was not continuous—that there was a considerable interval between the time when possession was given up by one of them and the time when the next in succession took possession. During such an interval the law refers the possession to the real owner having title, and the person going into possession at the termination of such interval cannot claim the benefit of the possession of a trespasser prior to him, the statute beginning to run in his favour only on his entry: *Trustees Executors and Agency Co.* v. *Short*, 13 App. Cas. 793.

That being the state of the law, as I understand it, the appellant has not shewn possession for such a time as would entitle him to hold as against the respondent.

The appeal should be dismissed with costs.

Lennox, J.

LENNOX, J.:—The plaintiff has judgment for recovery of possession of the east half of lot 10, north of Ontario street, in the village of Bronté, from the defendant, with costs of action. In my opinion, the judgment of the learned Judge of the County Court, who tried the action, is correct, but for reasons other than those given by the learned Judge.

The plaintiff claims title as the administrator of the estate of his mother, Isabella Robinson, and also as one of the heirs-at-law, and assignee of all the other heirs-at-law, of his mother.

It is shewn by the evidence that Isabella Robinson purchased the property and obtained a conveyance from a person in possession, I. K. Croker, in 1871, and that she lived upon the property until 1875. The title of the plaintiff was questioned upon the argument, but I thought the argument was not seriously pressed. However this may be, possession in the registered owner is sufficient *primâ facie* evidence of title; and the learned Judge's finding upon this point cannot be disturbed.

The defendant claims title by length of possession under the statute. This he rests upon the occupation of successive trespassers, including himself, and upon having had transmitted to him for valuable consideration—although not by deed or writing—the title of his predecessors in trespass, for a period which, added to his own occupation, covers the whole statutory period of ten years.

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The crux of the whole inquiry is, was the occupation continuous for ten years, and for at least ten years did each succeeding trespasser immediately follow the other without a break? If they did, the defendant's title is made out. If they did not, he fails.

The learned Judge apparently did not understand it in this way; he says: "If there were ten consecutive years of such occupation adverse to the possession of the plaintiff, such occupation could only be made out by uniting the occupation of some two or more of the plaintiff's predecessors, or by (as by?) uniting Dobson's occupation with the defendant's; and the defendant failed to prove a conveyance or transfer of any kind of such occupation or possession from Pollock to Thomas, Thomas to Triller, Triller to Dobson, and Dobson to himself."

I am unable to agree with this conclusion of the learned Judge, that for the defendant to avail himself of the possession of his predecessor Dobson he must shew an actual conveyance of Dobson's claim, or a writing of any kind. See *Asher* v. *Whitlock* (1865), L.R. 1 Q.B. 1; *Simmons* v *Shipman*, 15 O.R. 101; *McConaghy* v. *Denmark*, 4 Can. S.C.R. 609, at pp. 632-3; *Kipp* v. *Synod of Toronto*, 33 U.C.R. 220.

But this does not, by any means, dispose of the action. The presumptions are all in favour of the rightful owner, that is, of the person who claims regularly by, or under, a paper title, with possession under it. The onus is upon the defendant. He must clearly establish, not only that the true owner has been "out" for ten years, but that during that period of time some one else has been "in," and that this person has had possession by an actual, constant, and visible occupation. See the *McConaghy* case and cases noted at p. 633 of 4 S.C.R. And, furthermore, when, as in this case, he depends in part upon the occupation of predecessors in trespass, he must also clearly establish that these trespass occupants have followed each other in close succession—in an unbroken chain—the one coming in as soon as the other went out—during the time the statute was running. The moment the property becomes vacant the law attributes possession to the true owner.

Upon this question, Lord Macnaghten, delivering the judgment of the Privy Council in *Trustees Executors and Agency Co.* v. *Short*, 13 App. Cas. 793, at p. 798, says: "Their Lordships . . . are of opinion that if a person enters upon the land of another and holds possession for a time, and then, without having acquired title under the statute, abandons possession, the rightful owner, on the abandonment, is in the same position in all respects as he was before the intrusion took place. There is no one against whom he can bring an action. He cannot make an entry upon himself. There is no positive enact-

ment, nor is there any principle of law, which requires him to do any act, to issue any notice, or to perform any ceremony in order to rehabilitate himself. No new departure is necessary. The possession of the intruder, ineffectual for the purpose of transferring title, ceases upon its abandonment to be effectual for any purpose. It does not leave behind it any cloud upon the title of the rightful owner, or any secret process at work for the possible benefit in time to come of some casual interloper or lucky vagrant."

In the same line are *McDonnell* v. *McKinty*, 10 Ir. L.R. 514, and *Smith* v. *Lloyd*, 9 EX. 562.

Now as to the facts. The learned trial Judge specifically finds "that the defendant has failed to prove actual, continuous, open, visible, and exclusive occupation of the said land, either by himself or those under whom he claims, in succession, for a period of ten consecutive years."

This is sufficient to dispose of the appeal: but I may add that a perusal of the evidence satisfies me that this finding is clearly supported by the evidence. There is some contradiction as to the boundary fence between this lot and number 9; and upon this point— not very material, perhaps—I think the probabilities and the preponderance of evidence are very much against the defendant's contention. But, at all events, it is beyond question that from the time that Hart became the tenant of Dobson of the adjoining lot 9 until the defendant took possession of it, as he says in 1903—a period of more than a year—the property in question was not occupied by any one. It was not in Hart's lease; Hart had nothing to do with it. Nor did Dobson work it or go upon it or do anything about it. They both swear to this.

Appeal dismissed with costs.

Annotation — Adverse possession (§ II—61) — Tacking — Successive trespassers.

Annotation.

Adverse possession— Successive trespassers

By E. DOUGLAS ARMOUR, K.C.

The decision on the only point directly calling for it, viz., the effect of a vacancy of the land between the occupation of two independent trespassers, is merely a following of the Privy Council decision on that point in *Trustees and Agency Co.* v. *Short*, 13 A.C. 793.

The opinion expressed on the other point, which was the only one decided by the County Court Judge, but which became unnecessary to pass upon in the Divisional Court, viz., that where there is a succession of trespasses amounting in all to the statutory period, without any intermediate vacancies, the owner is barred, although there is no privity between the trespassers, is of course *obiter*, but revives the theory which it was thought had been exploded by the judgment in *Trustees and Agency Co.* v. *Short*.

In *Doe dem. Goody* v. *Carter*, 9 Q.B. 863, a trespasser died in possession within the statutory period, and was succeeded in the possession by

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Annotation

Adverse possession—Successive trespassers

Annotation (*continued*)—Adverse possession (§ II—61) — Tacking — Successive trespassers.

his widow, the defendant; she remained in possession for less than the statutory period, but both occupations exceeded in time the twenty years then prescribed. The lessor of the plaintiff was mortgagee for a term of years, of the owner. The whole argument and the greater part of the judgment were devoted to the point as to whether the tenancy at will of the defendant's husband had been determined. It seemed to have been assumed by both counsel and Court, without argument, that if the lessor of the plaintiff had not been in possession for the statutory period, it mattered not how long each of the trespassers occupied.

Three years later, one Barnard, claiming under Goody, got into possession, and Mrs. Carter brought the action of *Doe dem. Carter* v. *Barnard*, 13 Q.B. 945, to eject him. In that case it was said that, in order to acquire a title, the lessor of the plaintiff should herself have been in possession for the statutory period. But the case turned upon the point, that the wrongful seisin of her husband descended to his son, and therefore the lessor of the plaintiff had proved title in another and could not succeed.

In *Burroughs* v. *McCreight*, 1 Jo. & Lat. 290, one tenant in common of an equitable estate filed a bill against the trustee holding the legal estate and four other tenants in common, claiming one-fifth of the rents. The four tenants in common who were defendants, had been in receipt of the rents to the exclusion of the plaintiff for the statutory period. Sugden, L.C., pointed out that, under the modern statute, the possession of one tenant in common was not the possession of the others, saying "the rule being altered by the statute . . . the possession of one of them here would not in point of fact be such a possession or would enure for the benefit of his co-tenant," and he immediately adds:—

"Now it must be borne in mind, that *it is not necessary that this possession should be strengthened or corroborated by intermediate conveyances.* The Act speaks of possession without reference to conveyances; and therefore conveyances can only be brought in aid to shew that there were such dealings with the legal estate as continued the trust."

The sentence in italics, if detached from the context, would indicate that persons wrongfully in possession need not be in privity with each other; but read with the context, it seems obvious that it could not be understood to refer to such a case.

In *Dixon* v. *Gayfere*, 17 Beav. 421, the land being in a trustee, a trespasser who died in possession was followed in the possession by his widow. The facts as to possession were the same as in *Goody* and *Carter's* case. The Court held that the statute did not apply, as a receiver was put in possession to enforce the trust, but the learned Judge, putting the case of successive independent trespassers, said that there were insuperable objections in his opinion to declaring in favour of any one of the trespassers. This, it will be observed, was as against the last trespasser in possession.

In Upper Canada, it was held, in *Kipp* v. *Synod of Toronto*, 33 U.C.R. 220, citing *Doe dem. Carter* v. *Barnard*, 13 Q.B. 945, that the owner could not eject the last trespasser in possession after being out of possession for more than the statutory period.

ONT.

Annotation

Adverse possession—Successive trespassers

Annotation (*continued*)—**Adverse possession (§ II—61) — Tacking — Successive trespassers.**

In *McConaghy* v. *Denmark*, 4 Can. S.C.R. 609, it was stated by Gwynne, J., to have been the law as settled by an unbroken line of decisions for over forty years (although as far as the writer knows, *Kipp* v. *Synod of Toronto*, 33 U.C.R. 220, is the only reported case on the point in Ontario), that the owner could not eject the last trespasser, nor, if the tables were turned, could the last trespasser eject the owner if the latter got into possession.

At this stage, *Trustees and Agency Co.* v. *Short*, 13 A.C. 793, came to be decided. The facts were that a trespasser had come and gone, leaving the land vacant. Subsequently, another trespasser entered, and, in an action by the true owner, set up the defence that time, having commenced to run when the first trespasser entered never stopped, and that the plaintiff was therefore barred of its right to recover. Lord Macnaghten in delivering the judgment, said:—

"The possession of the intruder, ineffectual for the purpose of transferring title, ceases, upon its abandonment, *to be effectual for any purpose*. It does not leave behind it any cloud on the title of the rightful owner, or *any secret process at work for the possible benefit in time to come* of some casual interloper or lucky vagrant."

This reads like a final pronouncement upon the subject. The second "lucky vagrant" gets no benefit from the possession of the prior trespasser, whose possession, when abandoned, ceases "to be effectual for any purpose." And yet in *Willis* v. *Earl Howe*, [1893] 2 Ch. 545, at 554, Kay, L.J., said:—

"But it was not meant that if the possession had not been vacant, but some one or other had been in adverse possession during the twelve years, such possession would not bar the true owner, unless all such occupants could shew a title derived from one another."

In other words, his Lordship was of opinion that, if the second trespasser only followed close enough upon the heels of the first, he would get the benefit of some "secret process" arising from the first trespass, which would be effectual for the purpose of being added to the occupation of the second trespasser. The Privy Council's judgment is not open to such construction. *Willis* v. *Earl Howe*, [1893] 2 Ch. 545, was a case of alleged concealed fraud, and was decided upon an application to strike out the statement of claim and dismiss the action as frivolous and vexatious.

If the generality of the expressions in *Trustees and Agency Co.* v. *Short*, 13 A.C. 793, are to be restricted and applied only to the actual state of facts in that case, then of course, the decision does not affect the point now under consideration. But they seem to have been framed with carefully selected language to get rid of the idea that a second trespasser should get any benefit from the occupation of a prior trespasser, where the latter abandons possession and does not convey it to his successor: *Doe dem. Goody* v. *Carter*, 9 Q.B. 863, and *Doe dem. Carter* v. *Barnard*, 13 Q.B. 945, were both cited upon the argument, and no doubt received the full consideration of their Lordships. It is submitted that the decision both by the generality of its language, and its specific reference to the supposed relationship between intruders, covers the point now

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Adverse possession—Successive trespassers

Annotation (*continued*)—Adverse possession (§ II—61) — Tacking — Successive trespassers.

under discussion and that that is the proper wording of the statute. The cases before that decision proceeded upon the supposed principle that it was the absence from the land of the owner that disabled him from bringing a successful action against any person whom he found in possession. The decision in *Trustees and Agency Co.* v. *Short*, 13 A.C. 793, shews that the real point is, whether the trespasser can successfully defend himself against the paper title by shewing that a cause of action which he occasioned by his intrusion has been extinguished. The cases before *Trustees and Agency Co.* v. *Short* assume that one cause of action arose on the entry of the first intruder, and continued, notwithstanding the latter's vacating of the land, through the wrongful possession of succeeding intruders. The true view is that as each trespasser leaves the land, the right of entry and action against him is gone; and when a second intruder enters, a new and entirely different right of action arises which the owner has a right to maintain at any time within the statutory limit. Parker, J., points this out in *Samuel Johnson & Sons* v. *Brock*, [1907] 2 Ch. 535, at p. 538, where he says, "that the old right of action was gone when the first intruder went out, and that a new right of action arose when the fresh intrusion occurred."

It must always be borne in mind that the Statute of Limitations is an Act limiting the time to bring an action, and if the cause of action ceases of itself, by the potential defendant's abandoning the lands, the right of action becomes extinct. Why should any evil consequences be visited on the owner, who was absolved from the necessity of bringing the action by the cause being removed? The new cause of action against a second intruder is as different from that against the first, whether it arises a year afterwards, or whether it arises a day afterwards or half a day afterwards.

When the intruders are in privity with each other, however, different considerations arise. When a trespasser is in occupation he is seised of the land—wrongfully, it is true, but still seised. And he may deliver the seisin to another. At common law, this seisin was transmissible by descent; Watkins on Descent, 4, 5. It passed by descent under the statute of William IV., R.S.O. ch. 127, sec. 22; and it is devisable: R.S.O. ch. 128, sec. 2.

To transmit *inter vivos* under feudal rules, livery of seisin might have been made, accompanied by a feoffment. Since the enactment, R.S.O. ch. 119, sec. 3, the feoffment must have been by deed. Since sec. 2 of the latter Act was passed, the immediate freehold can be conveyed by grant. If a bargain and sale had been resorted to, it must have been by deed. In the absence of a deed, the case of *Simmons* v. *Shipman*, 15 O.R. 301, would seem to be of doubtful authority. A mere contract, a promise to convey, cannot take the place of an actual conveyance; and, as all that an intruder has is seisin of the land, and that wrongful, it should be seen to, that he effectually transfers that seisin to a subsequent intruder before the true owner is affected. It might be otherwise if the Statute of Limitations were an enabling Act, and one to be benevolently interpreted in favour of wrongdoers.

MEMORANDUM DECISIONS.

Memoranda of less important Cases disposed of in superior and appellate Courts without written opinions or upon short memorandum decisions and of selected Cases decided by local or district Judges, Masters and Referees.

REX v. HOWLEY.

Quebec Court of King's Bench (Appeal Side), Archambeault, C.J., Trenholme, Lavergne, Carroll, and Gervais, JJ. November 30, 1912.

APPEAL (§ I C—25)—*Reserved Case—Perjury — Examination for Discovery.*]—This was a reserved case submitted to the Court of Appeal by the trial Judge of the Court of Sessions, who had found the accused guilty of perjury committed in a civil case. The question was as to whether a false statement made under oath at an examination on discovery constituted perjury.

TRENHOLME, J., in rendering judgment for the Court, stated that as proceedings in an examination on discovery now formed part of the proceedings in a case and of the evidence of record, such false statement constituted perjury within the meaning of the Criminal Code. The conviction was, therefore, affirmed and order was given that the record be sent back to the Court of Sessions. G. A. Campbell, K.C., with N. K. Laflamme, K.C., for the Crown. R. G. DeLorimier, K.C., and Alban Germain, K.C., for the accused.

REX v. LEMELIN.

Quebec Court of King's Bench (Appeal Side), Archambeault, C.J., Trenholme, Lavergne, Carroll, and Gervais, JJ. November 30, 1912.

APPEAL (§ IX—720)—*Leave to Appeal—Conviction—Sufficiency of Particulars.*]—Demand for leave to appeal from a conviction for theft on the ground that the indictment was too vague, and insufficiently particularized.

LAVERGNE, J., said that the indictment disclosed the date of the offence, the name of the person from whom the money was stolen, and the amount stolen. Such indictment disclosed the offence charged quite sufficiently to enable the accused to defend himself properly. Leave to appeal would be refused. Nicol, for the Crown. C. C. Cabana, for the accused.

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REX v. EAVES.

Quebec Court of King's Bench (Appeal Side), Archambeault, C.J., Trenholme, Lavergne, Carroll, and Gervais, JJ. November 30, 1912.

APPEAL (§ IX—720)—*Leave to Appeal — Conviction for Usury—Importance of Question.*]—This was an application by the private prosecutor for leave to appeal to the Court of King's Bench from the decision of the trial Judge of the Court of Sessions, who had dismissed a prosecution against the accused, charged with money-lending at a usurious rate without calling on the accused to make any defence.

LAVERGNE, J., for the Court, stated that, owing to the importance of the question raised it was desirable to hear the case on the merits, so that the entire record might be before the Court. Leave to appeal was therefore granted. N. K. Laflamme, K.C., for the Crown. E. Pelissier, K.C., and J. P. Whelan, for the accused.

MAN.

C. A. 1912

BROWN v. TELEGRAM PRINTING COMPANY.

Manitoba Court of Appeal, Richards, Perdue, and Cameron, JJ. February 20, 1912.

PLEADING (§ I N—113)—*When Action at Issue — Amendment of Pleadings—Application for Special Jury.*]—When the statement of defence has been amended, the action is not at issue, under Rule 301 of the King's Bench Act, until the expiration of ten days from the delivery of the amended statement of defence and an application for a special jury may, under section 60 of the Jury Act, be made within six days after the expiration of such ten days. A. B. Hudson, for plaintiff. F. M. Burbidge, for defendants.

B.C.

S. C. 1912

TRAWFORD v. BRITISH COLUMBIA ELECTRIC R. CO.

British Columbia Supreme Court. Trial before Murphy, J.

ACTION (§ I B 2—10)—*Nature and Right—Restoration of Benefits Received—Condition Precedent, as to Prior Release—Families Compensation Act (B.C.).*]

MURPHY, J., held that where an action for damages under sec. 3 of the Families Compensation Act, R.S.B.C. 1911, ch. 82, is brought by and in the name of the persons entitled as beneficiaries under sec. 4 of the Act more than six months after the death of a person alleged to have been caused by the wrongful act, neglect, or default, of the defendant, and where it appears that after the accident complained of and before the death of the person injured a release (in consideration of a sum certain

duly paid) was by him executed and delivered to the defendant, the action for the death cannot lie unless and until (*a*) the release shall have been set aside in an action brought by the personal representative (the beneficiaries having no status in that respect), and (*b*) the amount of its consideration in cash shall have been brought into Court.

Action dismissed.

[Appeal taken to the B.C. Court of Appeal.]

O'ROURKE v. BELL.

Alberta Supreme Court. Trial before Stuart, J.

CONTRACTS (§ II D 4—186)—*Construction of buildings or works—Plumbing and heating—Sub-contract.*]—Trial of action for the price of work and labour and for material supplied.

STUART, J.:—The defendant, Bell, was having a hotel built for him to be known as the King George Hotel. One Gilmour had the contract for the plumbing and heating. In connection with this work, it became necessary to have some work done in the way of insulating the piping from the heating boilers so as to prevent radiation. By Bell's expressed or implied authority, Gilmour employed the plaintiff to do this work. No price was fixed, unfortunately, for the work. The plaintiff was paid by Bell $150 on account and now sues for $1,038.70 less the said sum of $150, that is for $880.70 as the balance of the price of the work done. The sum of $1,038.70 is made up of $540 for labour and $498.70 for materials supplied. He also sues for an additional sum of $20 as the price of removing a boiler in the building. As there was no agreed price, the onus lay upon the plaintiff to shew that he was charging a reasonable price. He swore that he, his foreman and another man, put in a total of 720 hours of labour and he charges 75 cents an hour for this.

He swore that he considered his own work worth 75 cents an hour, that he paid his foreman 75 cents an hour and that he paid the other workman 50 cents an hour. Part of his profit, he said, consisted in the extra 25 cents an hour which he charged for the workman. The plaintiff also stated that his account for materials, namely the sum of $498.70 was made up by him by adding 50 per cent. to what the materials actually cost him. He said that 30 per cent. was a fair profit and that he had added 20 per cent. in addition "because he had guaranteed a good job which would last for three years." The inference from this would be that a workman is entitled to get his 30 per cent. profit even without any assurance of the perfect character of the work.

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I have seldom met with so bold and unblushing an attempt to "hold up" the person who must pay the price, as the present case presents. The plaintiff boasted of his peculiar and exceptional skill at the kind of work involved, yet his evidence and that of his witness shews that he himself worked only nine complete days in all, and that the rest of the work was done by two so-called skilled artisans, one of whom worked a little while at the trade when he was seventeen years old and then after spending ten or twelve years in the army, returned to the kind of work involved here only shortly before he did the work in question; and the other of whom did a little when he was 14 years or so old and after spending over ten years at insurance and office work returned to this work only about the time he worked for the plaintiff. One of these men gets $7.50 a day, and the other $5 a day from the plaintiff. It is true the plaintiff says he was there every day but did not charge except for the whole days he worked. I am convinced he could have spent very little time there, for otherwise he would have made a charge. Mr. MacDonald said the work was well done.

If men with so little experience as the foreman could do the work well, I hesitate to believe that it was worth $7.50 a day to work at it. The evidence is, if I believe it, that the workmen worked 34 days of ten hours each. For the one workman, this would amount at $5 a day to $170. To this the plaintiff adds $85 or 50 per cent. as profit. The evidence for the defence shews that plaintiff was charging exorbitant prices for parts of the materials. MacDonald and Dowler say that $165 is a very liberal allowance for the labour involved. The plaintiff claims $540. Taking the whole evidence together I am forced to conclude that these workmen lingered and loafed at their work. I simply do not believe that it would take or ought to take 720 hours of the work of one man, or a period of two months about at ten hours a day, to do the work involved. At $5 a day, $165 would give 33 days' work which looks every way more reasonable. Making some allowance for a possible strictness in the architects I have decided to allow $200 for labour and with a 15 per cent. profit, this will give the plaintiff $230.

For the materials I take the evidence of Berryman, Bell and Clancy and have to make deductions. In making the reductions I take the prices given by the materialmen, and allowing from 25 to 30 per cent. for profit, the total reductions will amount to $129.60. I cannot find any basis in the evidence for making any reduction on the other materials except that the plaintiff says he made a profit of 50 per cent. on them. I consider this unreasonable and will allow only 30 per cent. The articles on which I have made a specific reduction are charged by the plaintiff at $409.25 which leaves $89.45 charged on the

articles on which I make no specific reduction. Taking this as 130 per cent. of cost I will allow him 13⅓ per cent., *i.e.*, a profit of thirty per cent. which will reduce this sum by $12.95. Adding this to $129.60 gives a total reduction in materials of $142.55. Deducting this from $498.70 leaves $356.15, which is the amount I finally allow for materials. Adding the labour allowance we have $586.15. I think the $20 asked for the removal of the boiler should be allowed, which brings the plaintiff's claim up to $606.15, a little over half of what he claimed. This I feel satisfied is a result not unfair to the plaintiff in view of his general attitude, which I can only describe as that of a man who wanted to "get rich quick."

The plea of the defendant that the plaintiff had agreed to leave the dispute to arbitration, while proved in fact to my satisfaction, is clearly not sufficient in law to bar the plaintiff's action. There was no agreement to arbitrate contained in the original contract itself and no stipulation that the result of action should be suspended. Besides, it does not appear that the arbitrators heard the plaintiff's side of the case at all. There might have been some ground for arguing that he should be bound by their decision if they had given the plaintiff a fair chance to lay the whole plea before them as they did before me. I do not mean to say that they acted unfairly but merely that the method they adopted was not such as should preclude an enquiry by the Court. It is true that I am allowing a good deal more than the arbitrators allowed and that the result may be said to be unfair to the defendant for that reason, but I think the defendant, or at least his agent, Gilmour, should share some of the responsibility for Payne and Turner having been paid, as they say they were, for so many days at such a high rate, Either Gilmour, who employed the plaintiff, the defendant himself, or both of them, were apparently very careless in not attempting some checking of the payments made by the plaintiff for labour, or in not keeping a better watch on what was going on. MacDonald and Dowler did not give any specific details as to how they arrived at the amount and value of the materials used; and while, from what I have said and from the fact that the plaintiff has claimed practically three times as much for the work as two competent architects, one of his own selection, have after examination allowed, I make the inference that he must certainly have been attempting to exact an exorbitant price for his work, yet I am not absolutely satisfied that the architects may not have overlooked some circumstances which if fairly considered might have led them to increase the allowance made. The sum of $150 was paid on account and the plaintiff will therefore have personal judgment against defendants Bell and Schiesel for $455.15 and also

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a judgment declaring that he has a lien on the land in question for that amount and giving him liberty to apply for a sale of the amounts if not paid within one month. There will be no costs to either party.

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TEMISKAMING MINING CO. v. SIVEN.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Idington, Duff, Anglin and Brodeur, JJ. May 22, 1912.

[*Siven* v. *Temiskaming Mining Co.*, 2 D.L.R. 164, 25 O.L.R. 524, affirmed on appeal.]

MASTER AND SERVANT (§ II A 4—75)—*Mines—What places must be made safe in.*]—Appeal from a decision of the Court of Appeal for Ontario, *Siven* v. *Temiskaming Mining Co.*, 2 D.L.R. 164, 25 O.L.R. 524, maintaining the verdict for the plaintiff at the trial.

The appeal was dismissed.

H. E. Rose, K.C., for the appellants.

A. G. Slaght, for the respondent.

The plaintiff, Siven, was working in the defendants' mine when he was injured by a rock falling down the shaft and striking him. The rock came through a man-hole above the shaft where men were engaged in stoking and there was a trap-door over the mouth of the shaft which was open at the time. Before proceeding with the stoking the workman in charge sent a helper to see if the trap-door was shut and when the latter called out "everything is all right" went on with the work. If the trap-door had not been open the plaintiff could not have been injured.

The plaintiff brought an action at common law and under the Mining Act for damages in which the jury found that the defendants were guilty of negligence for not providing a suitable pentice for the protection of workmen in the shaft (as required by sub-sec. 17 of sec. 164 of the Mining Act of Ontario); they negatived contributory negligence by the plaintiff and assessed the damages at $2,500, for which judgment was entered for the plaintiff.

The Court of Appeal maintained this verdict and held that the defendants could not rely on the doctrine of common employment as the accident was caused by breach of a statutory duty to which that doctrine does not apply.

The defendants appealed to the Supreme Court of Canada.

THE COURT, without reserving judgment, dismissed the appeal with costs.

Appeal dismissed with costs.

FAVREAU et al. v. ROCHON et al.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Idington, Duff, Anglin and Brodeur, JJ. June 14, 1912.

[*Rochon* v. *Favreau*, 21 Que. K.B. 61, reversed; *Favreau* v. *Rochon*, 38 Que. S.C. 421, restored.]

CONTRACTS (§ II D 4—188)—*Building contracts—Construction of.*]—Appeal from the judgment of the Court of King's Bench, appeal side, *Rochon et al.* v. *Favreau*, 21 Que. K.B. 61, by which the judgment of the Superior Court, sitting in review at Montreal, *Favreau et al.* v. *Rochon et al.*, 38 Que. S.C. 421, was set in part aside, and the judgment of Lafontaine, J., at the trial, was in part restored.

The appeal was dismissed, but without costs.

R. C. Smith, K.C., and *Paul Lacoste*, for the appellants.

Bisaillon, K.C., for the respondents.

The appellants entered into a contract for the construction of a row of houses for $13,940, and the time for their completion was agreed upon. There was some delay in the completion of the buildings and the respondents, after taking possession of the buildings, refused to make the final payment provided under the contract on the ground of faulty execution of the works, deviation from specifications and negligence. In an action to recover the balance of $8,800 remaining unpaid the respondents filed a defence and instituted a cross-action against the appellants for rescission of the contract, reimbursement of $5,200 paid on account, and for $9,300 damages for breach of contract, asking also for the demolition of the buildings on account of defective construction. The cases were tried together in the Superior Court and the judgment by Lafontaine, J., dismissed the appellants' action, awarded the respondents $513 for damages, and ordered the return of the money paid on account. By the judgment of the Court of Review this judgment was varied by increasing the damages to $5,800 and allowing the appellants $2,930 for balance due them on the contract price. By the judgment appealed from the Court of King's Bench restored the judgment at the trial in so far as it dismissed the action of the appellants and awarded $513 to the present respondents.

On the appeal, by the contractors, to the Supreme Court of Canada, after hearing counsel for both parties.

THE COURT reserved judgment and, on a subsequent day, the Judges being equally divided in opinion (the Chief Justice and Duff and Anglin, JJ., considering that the appeal should be dismissed; Davies, Idington and Brodeur, JJ., considering that the appeal should be allowed and the judgment of the Court of Review restored), the judgment of the Court of King's Bench stood affirmed, no costs being allowed.

Appeal dismissed without costs.

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REX v. BEGEOTAS.

British Columbia, County Court of Westminster, Judge Howay. June, 1912.

INTOXICATING LIQUORS (§III A—59)—*Unlawful sales—Liability of restaurant waiter—Purchase from licensed premises—Agent of customer—B.C. Municipal Act, R.S.B.C.* 1911, *ch.* 170, *sec.* 318, *sub-sec.* 5.]—This is an appeal from the decision of the police magistrate dismissing a complaint against the respondent for unlawfully keeping liquor in the premises known as the Bismarck Cafe.

JUDGE HOWAY:—The facts are not in dispute. One Young, accompanied by a friend, entered the Bismarck Cafe about 10 o'clock on the night of March 8. Meals costing $1.45 were ordered and consumed. Just after ordering the meals, Young said to the defendant, who is a waiter at that cafe, "Just go and get three bottles of beer." The defendant went to the Liverpool Arms which is a saloon situate next door and obtained the required liquor, paying the 50 cents therefor. On returning with the beer Young and his friend drank a part and the remainder was given to the defendant. The Bismarck Cafe has no license authorizing the sale or other disposal of liquor under sec. 318, sub-sec. 5 of the Municipal Act, ch. 170, R.S.B.C. 1911. On these facts the learned magistrate dismissed the complainant, holding that they disclosed no offence.

It was argued for the appellant that these circumstances constitute an offence because the Bismarck Cafe having no license can by a system such as this circumvent the statute and supply liquor with meals. This would be a weighty argument if the question before me were what should the law be. The question, however, is, "Do these facts disclose an offence against the law as it is?"

Section 322 of the Municipal Act forbids the sale or barter of liquor without a license. It is clear to me that neither a sale nor a barter of liquor occurred at the Bismarck Cafe on the evening in question. Counsel for the appellant was undoubtedly oppressed with this view for he invokes sec. 325 of the same Act in aid. That section which deals with the proof of sale of liquor says that it shall be sufficient if the Court is satisfied that a transaction in the nature of a sale or other disposal actually took place. Now this brings the matter to this point: "Was there a disposal by the defendant to Young of liquor at the time and place in question?" Now it is manifest that a person cannot sell what does not belong to him. It is equally clear that he cannot dispose of it. Thus in the final analysis it is reduced to this: "Whose liquor was it when it was handed over to Young in the cafe?" Can there be any doubt on this question? *Qui facit per alium facit per se.* The defen-

dant was, on the undisputed facts, the agents of Young to purchase the liquor. The liquor was Young's when handed over by the bar-keeper at the Liverpool Arms. This disposes of the matter. I may add that I am not here dealing with a question of *mala fides* as for instance where a restaurant keeper uses a waiter as his agent for the sale of liquor. Such was the case of *Rex* v. *Gunn*, 10 Can. Crim. Cases 148. Totally different conditions may in such case arise for consideration.

I have dealt with this matter without reference to authorities but not without consulting them. See *Rex* v. *Mat Hing*, 10 O.L.R. 262, and *Pasquier* v. *Neals*, [1902] 2 K.B. 287, 71 L.J.K.B. 835, 87 L.T. 230. The appeal is therefore dismissed with costs which I fix at $35.

Appeal dismissed.

GREAT WEST LIFE ASSURANCE CO. v. WHITCHELOW.

Saskatchewan, District Court, Judge Farrell. January 8, 1912.

GARNISHMENT (§ III—60)—*Procedure—Step in the Action—Small Debt Procedure—Jurisdiction as to Costs or Counsel Fees.*]

JUDGE FARRELL:—In my opinion the issue of a garnishee summons is merely a step in the action. It is an additional remedy, providing the plaintiff, under certain conditions, with the means of securing the debt which has been sworn positively to be owing by the defendant to the plaintiff. All the proceedings in connection with the garnishee summons are kept along with the suit papers of the plaintiff's action against the defendant, on which the garnishee proceedings are founded, in the same file in the clerk's office and under the same number. Unless it is a garnishee summons issued after judgment the plaintiff can do nothing under it until he has first obtained judgment against the defendant in his original action. I have no doubt at all that a garnishee summons is a step in the action and that the garnishee summons here is a step in admittedly a small debt action and governed by all the rules of the small debt procedure. It is true that the small debt procedure has no rules of its own regarding attachments and garnishee and in consequence as provided by the new District Court rule 22 in such matters the general rules of practice govern, but these rules only govern as far as it is necessary to carry out the particular step when not inconsistent with the rules of the small debt procedure. Rule 517 makes the costs in these garnishee matters in the discretion of the Judge, but that can only mean costs in the scale applicable to the Court in which the action is brought. In this case

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the action is brought under the small debt procedure and rules as to costs under that procedure must apply. Rule 19 of the new District Court Rules enacts that "no other counsel or solicitors' fee shall be taxable or payable as between party and party," except as provided in that rule. It was not argued or contended that the solicitor's fee of 5 per cent. or counsel fee of 10 per cent. therein provided was applicable to this case, and I do not see how it can be applicable. This being so and in view of the very explicit terms of Rule 19 I do not see that I have any jurisdiction to grant or order any solicitor's fee or counsel fee in this case. All I can do is to deal with the costs which are in my discretion, namely, the disbursements provided for in the small debt tariff by section 20. A reference to this tariff shews that the costs in garnishee matters were not overlooked by the compiler of the tariff, as three of the items there are for such matters, and the inference is that if any other fees were intended to be allowed they would have been provided for. I was referred by counsel for the defendant to a judgment of the Chief Justice in *Union Bank* v. *Stewart*, 3 Terr. L.R. 342, but I think this judgment rather confirms the view I have taken. In that case the Chief Justice held, as the Small Debt Ordinance did not expressly prohibit it, an advocate retained to prosecute an action, and who does so, may recover, as between solicitor and client the fee he would be entitled to under the general tariff, instead of being confined to the 10 per cent. counsel fee of the small debt tariff. That is as regards costs between the solicitor and client and not costs between party and party as in this case. In setting aside the garnishee summons herein, I inadvertently allowed the defendant along with his costs a counsel fee of $5. Counsel for defendant informs me that he drew my attention at the time to the fact that it was a "small debt" case. I have no doubt that he did, although that fact did not come home to me at the time. I was thinking solely as to whether the $5 fee asked for was reasonable or not. I regret this, as my action in so doing has, no doubt, misled the defendant.

For the reason I have already expressed, in my opinion I had no jurisdiction to allow this fee, and I therefore rescind my fiat granting that fee, as I think I have the authority to do. It was contended that in any event the proper procedure for the taxing officer was to allow this $5 on the taxation, as the defendant had a fiat for it, and for the plaintiff then to have asked for a review of the item. I agree that such is the proper procedure, and that the taxing officer erred in disallowing the item under the circumstances. There is one item of costs which has not been touched on, and that is the costs of the garnishee, which, under rule 509, he is allowed to deduct up to the sum of $5 from the moneys in his hands before he pays the balance into

Court. These costs fall upon the defendant, as all I can order to be paid back to him is the money in Court, which is short the amount of the garnishee costs, which he has already paid himself under the rule out of the defendant's money.

In this case I have ascertained that the garnishees (being the Provincial Government) made no deductions for costs. If they had, I think I have authority to charge them up to the plaintiff by adding them to the defendant's costs and would have done so. I therefore find that the only costs the defendant is entitled to herein are the disbursements provided for in the small debt tariff. Proctor, for defendant. Truscott, for plaintiffs.

HART, PARR CO. v. WORTH.

Saskatchewan Supreme Court, Judge Maclean, Local Master. January 9, 1912.

JUDGMENT (§ VII C—282)—*Default Judgment Entered Prematurely—Grounds for Relieving Against—Laches of Solicitor—Delay in Moving to Set Aside—Consideration of the Merits.*]

JUDGE MACLEAN:—The defendant by Chambers summons dated Dec. 13th, 1911, applied to me to set aside the judgment and execution herein on the ground of irregularity and on the ground that the defendant has a good defence on the merits. The ground of irregularity was that judgment was prematurely entered. The plaintiff's solicitors, on September 30th, 1911, notified the defendant's solicitors that:—

> We are instructing our agent at Battleford to do nothing further until the 9th October, but if, on that date, he has not received statement of defence he is to sign judgment.

I find that the judgment was entered on the 9th October, and, according to Rules 705 and 706, the defendant would have all of the 9th up to six o'clock in the evening to file and serve statement of defence herein, and that the judgment should not have been entered until the morning of the 10th. It appears that the defendant's solicitor was sick for some time and unable to attend to his professional duties, and this was put forward as the reason for the delay in making this application, but according to his physician's letter he was taken ill with fever on the 16th October. As this judgment was entered on the 9th October, and the said solicitor had full knowledge of the said judgment and made an effort to have it re-opened by consent he should have, before the 16th October, taken out a Chambers summons to have the judgment opened up on this ground of irregularity. The said solicitor, if he was unable to

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do his work, should have left the matter in the hands of one of his partners to attend to; it was not a matter requiring his personal attention and I do not consider that his excuse of sickness from October 16th until December 7th, a satisfactory reason why there should have been such delay in the application.

Following *Scott* v. *Hoffner*, 3 W.L.R. 247, I find that the defendant has been guilty of laches and under Rule 748 he is not at this date entitled to have the judgment opened up on the ground of irregularity alleged. The defendant submits an affidavit of merits. I consider that the said affidavit discloses a sufficient defence to justify me in opening up said judgment on terms. The affidavit discloses the character of the defence, and while there may be objections that the written agreement of sale in question does not admit of such a defence being raised, yet this is a question partly of law and partly of fact and as I am not trying the action it is not one I feel that I should consider on this application.

I follow the finding of the learned Chief Justice of this Court in the case of *Miller and Smith* v. *Ross*, 2 S.L.R. 449, 451, where he lays down the law that there must be something to shew that the defence is real, and that it is a defence worthy to be entertained, and also that in order to open up a regular judgment the acknowledged practice is that an affidavit should be produced setting forth what the character of the defence is and by that it is understood that this must be established in a general way at least. I feel it my duty in view of the material presented on the application to allow the judgment to be opened up and I accordingly do so. The judgment and execution will be set aside; the plaintiff will have the costs of entering judgment and issuing execution and also the costs of this application. Earle for plaintiff. Livingston, for defendant.

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Re SOUTH HAZELTON Station.

Board of Railway Commissioners. October 2, 1912.

CARRIERS (§ IV D—550)—*Governmental Regulation—Location of Station — Engineering Difficulties — Public Convenience.*]—Application of the Grand Trunk Pacific Railway Company under section 258, for an order approving of a station location on its line at South Hazelton, on lot 9, Cassiar District, B.C. (File 18849.)

COMMISSIONER MCLEAN:—The judgment rendered June 10th, 1912, *sub nom. Kelly* v. *Grand Trunk Pacific R. Co.*, 5 D.L.R. 303, specifically re-affirmed the provision of the original order directing that a station should be constructed on lot 882. It was

also stated that the representatives of the present town of Hazelton had made out a case for a station location nearer to them than would be afforded by the location on lot 882.

The plans of the proposed station at South Hazelton have been received, and the Board is in receipt of applications of parties who desire to be heard in opposition. Mr. Smellie desires to be heard on behalf of the owners of land at New Hazelton. Messrs. Pringle and Guthrie state that the clients whom they represent are principally at New Hazelton.

So far as New Hazelton is concerned, a station has been ordered there. The Board has found that a station at some point closer to Old Hazelton is necessary. To now hear the application of the representatives of New Hazelton would be to grant a re-hearing. There has to be some finality. Every party concerned has been given ample opportunity to be heard and at full length. There is no necessity of hearing anything more so far as New Hazelton's objection is concerned.

There remains the consideration of the engineering and operating features pertaining to the proposed station at South Hazelton. In the judgment of June 10th, 1912, it was said:—

> The original plan for the location of the station at South Hazelton, which is before us, shews that the railway, in the layout of the station grounds and sidings, departed from practically everything which it has considered as a standard from the standpoint of engineering and operating practice. Had the Board required the railway to locate a station under the engineering and operating conditions, which it itself chose in this case, there undoubtedly would have been the most strenuous objection upon the part of the railway. When called upon by the railway to approve of such station site as it may deem convenient for the people of Hazelton, the Board cannot, and will not be oblivious of the standard which the railway has chosen for itself.

The Board's chief engineer and chief operating officer, in reporting on the plans now submitted by the Grand Trunk Pacific, say:—

> The plans attached to application would indicate that the Grand Trunk Pacific Railway now propose to locate passenger and freight station at South Hazelton, with short siding for the handling of carload freight, while previous plans submitted shewed passenger and freight station with passing track for the meeting of and passing of trains.

This siding is about eight hundred feet in length. There is an improvement over the situation disclosed in the plan formerly filed to this extent, viz., within the headblocks of the siding as proposed by the railway, the line is changed from a two degree curve to a tangent with a length of one thousand feet. Aside from this improvement there still exists at the proposed location the maximum grade and curves which have previously been very

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strongly objected to by the Grand Trunk Pacific, when it has been claimed that public convenience demanded the location of a station on maximum grade and curvature.

I entirely agree with the considered opinion expressed by the Board's chief operating officer and chief engineer that "the proposed location is not a desirable one either from a railway engineering or operating standpoint." It is highly probable that the gradients and curvature will lead to controversy in the future in respect to the handling of the traffic. With the increase in population and traffic either of Hazelton or of South Hazelton, or of both of these places, there may be a desire to have the through passenger trains stop at South Hazelton. It is highly probable that the railway would object to this on account of the grades and curves. The same condition would arise as regards handling freight. The railway would probably not want to stop its through freight trains to set out or pick up important cars, on account of the grade and curvature. Under such conditions the freight to or from this point would have to be handled exclusively on local way-freight trains. It can readily be understood that this will be objected to. The passing track on the plans before the Board is at New Hazelton.

In regard to the engineering and operating features, the Board has in more than one instance, recognized the justice of the plea of the Grand Trunk Pacific that it should not be compelled to construct its stations, or even give siding facilities on anything approximating its maximum grade. It has recognized also the plea that the railway should not be required to build a station on a three degree curve. Here the Board is asked to approve a layout which involves running off a six degree curve on to a five degree one.

Were the only considerations involved these of engineering and operating, I would have no hesitation in saying that in my opinion the plans should not be sanctioned. But the Board is faced by the question that facilities are required by the public. Limited and inadequate as the facilities at South Hazelton must inevitably be, as the traffic tributary to this station expands, the people of Old Hazelton appear to be willing to accept them. If they are willing to accept them with their eyes open it does not seem to me that the Board should withhold its sanction.

The plan as submitted may be sanctioned.

It is obvious that the question of station location and the determination of where, in response to a proved public need, a station should be located is a question of particular facts. So far as the Grand Trunk Pacific Railway is concerned, the present application frees the hands of the Board in dealing in future with pleas of maximum grades and curves where these are the only arguments advanced against public needs.

COMMISSIONER GOODEVE concurred.

KELLY v. LOCKLIN.

British Columbia Supreme Court. Trial before Murphy, J. October 20, 1912.

CONTRACTS (§ II A—127)—*Printed Form—Partial Filling in of Blanks.*]

MURPHY, J.:—As to the defence of the Statute of Frauds, I think that a person of ordinary capacity must infer from exhibit 1 that it is a guarantee by defendant to plaintiffs of Locklin & McNair's account for goods or for any other indebtedness accruing after its date. It is only necessary for plaintiff's purposes to make out the first clause of exhibit 1 as it alone is relied on and in that clause but one blank occurs. As stated, I think the document itself necessarily supplies the missing pronoun "they." It is to be noted that this is a printed form obviously intended for use in obtaining guarantees primarily in the case of contemplated sales of goods on credit. The persons to be supplied appear herein "Locklin & McNair." They are to get goods "on credit." The guarantee is primarily for goods "as supplied" but is confined to a liability of $2,000 in respect of "their" dealings with plaintiffs.

Whilst the balance of the document is not necessary for plaintiff's case it can of course be looked at in dealing with the question before the Court. The signatory gives liberty to extend the period of credit to the "said Locklin & McNair" and waives notice of "sales of any goods under this guarantee." All these terms taken as they stand in exhibit 1, when its character is apparent from its form, in my opinion fulfil the requirement of the Statute of Frauds.

As to the defence of undue influence that is answered by the principles laid down in *Bank of Montreal* v. *Stuart*, [1911] A.C. 120, when applied to the evidence of the defendant herself. Plaintiffs exercised no influence, undue or otherwise, on defendant. In the argument some suggestion that defendant did not understand what she was doing was advanced. No such plea is raised on the record and therefore it is doubtful if it is open to defendant to rely upon it. If it is, I hold that the evidence fails to substantiate such contention.

There will be judgment for the plaintiffs for the amount claimed and costs.

M. A. Macdonald, for plaintiff. *R. M. Macdonald*, for defendant.

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ANONYMOUS CASE.

M—— v. M——.

British Columbia Supreme Court. Trial before Murphy, J. October 21, 1912.

DISCOVERY AND INSPECTION (§ IV—35)—*Divorce action—Harsh and oppressive interrogatories.*]

Motion on behalf of the petitioner for the examination of the respondent on the following interrogatories:—

1. Did you and the petitioner at Three Rivers, Quebec, go through the ceremony of marriage in solemn form together?

2. Did you return with the petitioner as his wife and reside with him in Vancouver after the performance of the said marriage?

3. Has there been any consummation of the said marriage? If so, when? If not, why not?

4. Has there been any physical incompatibility preventing the consummation of the said marriage or of sexual intercourse between you and the petitioner?

5. Has the want of consummation resulted in estrangement or unhappiness between you?

6. Is there any practical impossibility preventing the consummation of the said marriage?

R. Macdonald, for petitioner.

C. L. Fillmore, for respondent.

MURPHY, J.:—I have been referred to no case where such interrogatories as Nos. 3, 4, 5 and 6 here proposed have been allowed. The divorce practice in British Columbia is in an anomalous condition, but, presumably, it is the practice of the English Divorce Courts as that existed when English law was introduced here in so far as same was adaptable to local conditions. Now, whilst it is clear that the old Ecclesiastical Courts had discovery powers their extent seems difficult to ascertain and their utilization seems to have been by interrogating the parties as witnesses.

It is true that in that case, which was a nullity case as is this, interrogatories were allowed, but it is to be noted that the Judicature Act is relied on in part at any rate in the reasons for judgment. The interrogatories allowed were moreover of a very different character from those here proposed. I think then it may fairly be assumed that whatever were the old discovery powers no Court exercising jurisdiction in divorce under the peculiar conditions of law existing in British Columbia with regard to that question would, in the absence of decisions, hold that such powers were to be exercised on other principles than those in force with regard to the modern practice governing interrogatories in the civil Courts. Those principles are laid down in *Maass* v. *Gas, Light & Coke Co.*, [1911] 2 K.B. 543. In that case Vaughan-Williams, L.J., arguendo states:—

It is a general principle that interrogatories must not be harsh and oppressive. Each case must depend on its own circumstances.

The rule laid down in the judgment is:—

It is plain that the Court has in all actions a discretion to allow or not to allow an interrogatory. This discretion is in the first instance vested in the Master subject to appeal to the Judge whose exercise of this discretion ought not to be lightly interfered with. In exercising this discretion it is legitimate to have regard amongst other things to the nature of the action and the probable consequences which will result from allowing the interrogatory.

Now, having regard to the nature of this action, I can conceive of no questions more harsh and oppressive than the proposed interrogatories Nos. 3, 4, 5 and 6, and having regard to the possible consequences of allowing them under the peculiar conditions surrounding divorce jurisdiction in British Columbia they are equally objectionable. We have no King's Proctor in British Columbia and to allow these questions would open the door yet wider than it now is to collusion. On the other hand supposing the respondent refuses to obey the order what is to be done? To strike out her answer would be against the whole policy of the divorce law which must have the interest of society in view fully as much as the rights of the parties. Moreover to do so would almost amount to a premium on collusion. To commit her for contempt, assuming such process could be invoked, would be to outrage the sentiments of any civilized community. On the other hand a refusal prejudices the petitioner little if at all. Our Courts have always exercised the power of directing a physical examination and if submission is refused such conduct is given its due weight by the trial Judge. Interrogatories 3, 4, 5 and 6 are therefore, to be struck out, but, as the former Ecclesiastical Courts have discovery jurisdiction, I see no reason why 1 and 2 should not be answered though I express no opinion either of their admissibility at the trial as evidence or of their evidentiary weight if admitted. It may well be that, owing to the condition of the law relative to the compelling a spouse at the time we acquired the English divorce law (subject to any change made by the British Columbia legislature prior to confederation and to any Dominion legislation subsequent thereto, applicable to the matter) such answers given under compulsion may not be admissible in evidence at all. The question of costs is referred to the trial Judge.

SMITH v. MILLS.

Saskatchewan, District Court of Moosomin, Judge Farrell. November 12, 1912.

MASTER AND SERVANT (§ I E—23)—*Liability for wrongful dismissal—Amendment of pleading—Disobedience of lawful*

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commands—Statute of Frauds—Part performance.]—JUDGE FARRELL:—This is an action as originally commenced for wrongful dismissal by the defendant of the plaintiff. The plaintiff was the farm servant of the defendant, the contract being according to the original pleadings of the plaintiff, for one year from the 6th day of November, 1911, at $20 per month for the winter months, and $35 a month for the summer months, and in consequence of said dismissal, the plaintiff claimed for five months' wages from 6th November, 1911, at $20 per month and the balance of the time up to the 14th May, 1912, being the date of the alleged dismissal at $35 per month, $144 in all, less $25 paid on account thereof. The plaintiff further claimed $5.75 for damages sustained by him because of said wrongful dismissal. The defendant in his original statement of defence, pleaded a general denial of all the allegations set up by the plaintiff in the statement of claim; that the true contract between the parties was from 6th November, 1911, to 1st December, 1912, at a total wage therefor of $365 payable at the expiration of the contract; he also pleaded the Statute of Frauds and that the plaintiff left the defendant's employ on the 14th of May, 1912, voluntarily, without cause, excuse or justification and that the defendant was ready and willing at all times to carry out his part of the contract. The defendant further counterclaimed for damages.

At the trial the defendant asked leave to amend his statement of defence by pleading in the alternative that the defendant dismissed the plaintiff from his employ on the said 14th May, 1912, for good cause, giving the following reasons as being sufficient justification in each case for such dismissal:—

(1) On May 14, 1912, the plaintiff disobeyed a lawful order of the defendant, namely, to assist in loading a pig upon a waggon.

(2) On May 14, 1912, the plaintiff did not go to work at one o'clock as ordered by the defendant.

(3) On May 14th, 1912, the plaintiff encouraged one Walter Smith, a servant of the defendant, to leave the defendant, and on the said day the said Walter Smith left the employment of the defendant at the same time as the plaintiff did so.

(4) The plaintiff did from May 6th to May 14th, 1912, perform his work in an unsatisfactory manner.

This amendment was allowed and at the same time the application of the plaintiff to amend his statement of claim by adding a paragraph claiming for the time he worked for the defendant, the wages already claimed, as a *quantum meruit*.

I found as a fact at the trial that the contract between these two parties was as alleged by the plaintiff. The plaintiff put in a memorandum book containing a memo. of this contract as follows: "1911, Nov. 6. W. J. Smith started to work Nov. 6,

1911, and to work until Dec. 1, 1912, for the sum of $365." This memo. is in the defendant's handwriting, and was admitted by the plaintiff to have been so written in his presence in that book by the defendant the day and time of his said hiring and to correctly set out his agreement with the defendant.

I also found at the trial, that the plaintiff had not left the defendant's employ voluntarily, but that he had been dismissed by the defendant.

I therefore find that the plaintiff was discharged by the defendant from his employ, contrary to his contract with the plaintiff and without justifiable reason or cause.

Having so found, can the plaintiff succeed in the action as set up by him? Defendant's counsel argued that he could not as to the claim for wrongful dismissal, because it did not comply with the Statute of Frauds, which had been pleaded by the defendant, citing *Harper* v. *Davies*, 45 U.C.Q.B. 442; *Britain* v. *Rossiter*, 11 Q.B.D. 123, that it could not be rectified by part performance: *Snelling* v. *Lord Huntingfield*, 1 C.M. & R. 20, and that this doctrine is not applicable to personal action. That if it were sought to set up an implied contract it must be one for a general hiring of a servant in husbandry, and the law is settled that such a hiring is for a year: *Lilley* v. *Elwin*, 11 Q.B. 742; Smith on Master and Servant, 15th ed.; *Turner* v. *Robinson*, 5 B. & Ad. 789, 110 Eng. Rep. 982, and the terms of the original agreement must be looked to as far as they are applicable, that these shew that the hiring was not a monthly hiring and that the wages were not due until the end of the term. That where the Statute of Frauds is pleaded, although the plaintiff cannot sue on such a contract, the defendant can rely on it in his defence; *Frith* v. *Alliance Investment Co.*, 5 D.L.R. 491. The defendant's counsel therefore contended that the plaintiff could not recover in his action of wrongful dismissal because of the Statute of Frauds, nor on an implied contract, because it must in that case be a general hiring for a year with the wages not payable until the end of the year, and as the plaintiff had not completed the term no wages were due. This I understood to be the gist of the argument of the defendant's counsel. In support of the reasons given for the dismissal of the plaintiff, besides the two cases I have before referred to, he cited Halsbury's Laws of England, vol. XX., p. 85, and at pp. 101 and 102, Smith on Master and Servant, 6th ed., pp. 57 and 58, 102-103, 107, 112; *McGeorge* v. *Ross*, 5 Terr. L.R. 116. In reply, Mr. Cole contented himself with citing *Rose* v. *Winters*, 4 Terr. L.R. 353. I have already found that the contract of hiring between these two persons was from the 6th of November, 1911, to the 1st December, 1912, and therefore, for more than a year.

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The defendant has pleaded the unmeritorious defence of the Statute of Frauds. Whether the memorandum of the agreement between the parties which has been put in by the defendant, which is in the defendant's handwriting, in a book of his containing like contracts and having his name in the book, the memo. containing the name of the plaintiff and both parties agreeing that said memo. is the contract between them is sufficient to comply with the requirement of the statute, or whether the part performance of the contract by the work of the plaintiff and the payment of $25 to the plaintiff by the defendant would take it out of the statute, plaintiff's counsel did not attempt to argue, and I do not express any opinion on this point, except to say that on the presumption that the statute does apply, in that case the plaintiff cannot recover on the contract for wrongful dismissal: *Britain* v. *Rossiter*, 11 Q.B.D. 123. The plaintiff, however, by his amended pleadings, claims to be entitled on a *quantum meruit*. This on the authority of *Giles* v. *McEwan*, 11 Man. L.R. 150, and *Rose* v. *Winters*, 4 Terr. L.R. 353, I think he is entitled to do. The cases on the subject are collected and very fully discussed in *Giles* v. *McEwan*, 11 Man. L.R. 150, which was a unanimous decision of the full Court of Manitoba, and is quoted with approval by Chief Justice Wetmore of our own Court in *Rose* v. *Winters*. As Killam, J., says in his judgment in *Giles* v. *McEwan*, 11 Man. L.R. 150, at p. 166, quoting from Alderson, B., in *De Bernardy* v. *Harding*, 8 Ex. 822:—

> Where one party has absolutely refused to perform or has rendered himself incapable of performing his part of the contract he puts it in the power of the other party either to sue for a breach of it, or to rescind the contract and sue on a *quantum meruit* for the work actually done.

And again at the same page:—

> In the notes to *Cutter* v. *Powell*, 2 Sm. L.C., 10th ed., p. 1, it is laid down that in recovering upon a *quantum meruit*, he does not recover upon the special contract, but upon a promise implied by law to remunerate him for what he has done at the defendant's request. These remarks were approved and adopted by Crompton, J., in *Emmens* v. *Elderton*, 13 C.B. 495, and by Crowder, J., in *Prickett* v. *Badger*, 1 C.B.N.S. 296, and indeed, expresses an elementary principle of the law of contracts. In the latter of these two cases, it was distinctly held that this obligation is one absolutely implied by law, and not one which a jury may reject as not intended by the parties. This is perfectly consistent with the doctrine of *Britain* v. *Rossiter*, 11 Q.B.D. 123, which applies only while the contract is open and unrescinded.

To quote also from Bain, J., in the same case of *Giles* v. *McEwan*, 11 Man. L.R. 150, at p. 173:—

> The defendant, in the view I take of the evidence, by dismissing the plaintiffs without justification, before their year of service had been

completed repudiated the agreement that had been made, and the plaintiffs thereupon had the right to elect to treat the agreement as rescinded and put an end to, and to bring an action as on the *indebitatus* counts, for the work which they had done for the defendant. Their work was indeed done in pursuance of the special agreement, but their right to recover depends not on the special agreement, but on the promise of the defendant that the law implies that he will pay for the work he has had the benefit of without consideration.

The plaintiff in the case at bar is prevented by the Statute of Frauds from suing on the contract for wrongful dismissal, because he can only succeed in such an action by setting up the contract. The defendant, however, having as I have found, dismissed the plaintiff without justification before the period of his service was completed, has repudiated the contract and the plaintiff is entitled on the authority of the cases I have quoted and others, to treat the agreement as rescinded and sue on a *quantum meruit* for the work actually done by him for the defendant. As has been pointed out by Killam, J., in *Giles* v. *McEwan*, 11 Man. L.R. 150, this doctrine is not inconsistent with *Britain* v. *Rossiter*, 11 Q.B.D. 123, and such like cases. There the plaintiff was suing solely for damages for a breach of a contract, on which he must rely to succeed but was prevented from doing so because of the Statute of Frauds, but it will be noticed that Thesiger, L.J., in his judgment in that case, p. 133, points out that although the plaintiff could not recover on an action for dismissal he could sue for services rendered, which is exactly the case here. This, as Thesiger, L.J., points out, was the decision of the Court of Exchequer in *Snelling* v. *Huntingfield*, 1 C.M. & R. 20, 3 L.J. Ex. 232. Lord Lyndhurst, C.B., in his judgment in that case at p. 234, says:—

> The question is not whether the plaintiff shall have compensation for services rendered, but damages for not employing him during the whole year,

which, as the contract was for more than a year and not in writing, the Court refused.

Then as to the services performed by the plaintiff for the defendant. He claims the sum of $144, less $25 paid on account. No objection was taken to the scale of wages on which this sum is computed. I think the plaintiff might easily have claimed he was entitled to wages for the time he worked, based on the agreement of $365 for the period stipulated for, which would have come to the sum of $205 instead of the $144 asked for; however, he did not so frame his claim. There will be judgment, therefore, for the plaintiff for $119 and the costs of the action.

The defendant's counterclaim is dismissed without costs. At the defendant's request, there will be a stay of ten days to allow him to appeal if he is so advised, and that said stay be continued if judgment so appealed.

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REX v. DAVIS.

Ontario High Court, Kelly, J., in Chambers. November 19, 1912.

INTOXICATING LIQUORS (§ III A—55)—*Conviction—Evidence—Acting as Messenger.*]—Motion to quash a conviction. The defendant was convicted by the Police Magistrate for the city of Toronto, for having on August 5th, 1912, sold liquor without a license. On that day the defendant was a waiter in the National Cafe, in Toronto, and one of two persons who were together in the cafe gave him a dollar and asked him to go out and get them some beer. Acting on this, the defendant brought back four bottles of beer and returned to the person who gave him the dollar, forty cents in change, placed two of the bottles on the table for those for whom they had been procured and put the others in the ice-box. KELLY, J., said that there was no evidence that these persons offered to buy liquor from the accused, or that he offered to sell them, or that the accused did anything more than act as messenger in the purchase of the beer for the persons who desired it, and unless he were to make assumptions not warranted by the evidence, he was unable to find that the accused was guilty of the charge on which he was found convicted. Conviction quashed with costs, and order for protection to the Magistrate. W. A. Henderson, for the defendant. E. Bayly, K.C., for the Crown.

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WELLAND COUNTY LIME WORKS CO. v. AUGUSTINE.

(Decision No. 2.)

Ontario Court of Appeal, Garrow, Maclaren, Meredith, and Magee, JJ.A., and Lennox, J. November 19, 1912.

[*Welland County Lime Works* v. *Augustine*, 4 D.L.R. 315, reversed on other grounds.]

JUDGMENT (§ II D 6—136)—*Res judicata—Joint agreement.*]—Appeal by the plaintiffs from the judgment of Boyd, C., at the trial in an action for an injunction and damages in respect of an alleged breach of an agreement. The judgment is reported in 4 D.L.R. 315, 3 O.W.N. 1329, where the facts are set out.

W. M. German, K.C., for the plaintiffs.

S. H. Bradford, K.C., and *L. Kinnear*, for the defendant.

The judgment of the Court was delivered by MEREDITH, J.A.:—It follows from the decision, in this Court, of the case of *The Welland County Lime Works Co.* v. *Shurr*, 8 D.L.R. 720, 4 O.W.N. 336, reversing 1 D.L.R. 913, 3 O.W.N. 915, that the plaintiffs in this action are entitled to the relief sought by them

in it; but I do not think they should have their costs of it, as a separate action might easily have been avoided: the defendant Augustine might very well have been made a party defendant, in the other action, at some time; and all the necessary relief against him might have been had in it.

I would allow the appeal: and grant the injunction sought, which I suppose is all the plaintiffs now really seek, in this action.

REINHORN v. THE KNETCHEL FURNITURE CO.

Saskatchewan Supreme Court, Parker, M.C. November 20, 1912.

WRIT AND PROCESS (§ II B—28)—*Service on foreign corporation—Registered attorney.*]

Application by defendant to set aside service of the writ.

PARKER, M.C.:—The plaintiff is a merchant, residing at Saskatoon in the Province of Saskatchewan, and the defendant is an incorporated company having its head office at the town of Hanover, in the Province of Ontario. In the month of September, 1911, the plaintiff purchased from the defendant a carload of furniture, which the defendant shipped to the plaintiff on or about October 7th, 1911. The goods arrived in Saskatoon on or about October 23rd, 1911, but the railway company, on instructions from the defendant, refused to deliver the goods and the defendant otherwise disposed of same. On Aug. 20th, 1912, the plaintiff issued a writ against the defendant claiming $2,000.00 damages for non-delivery of the furniture. The writ was served on September 21st, 1912, on one A. N. Kennedy, who at the time of the service of the writ was the registered attorney of the defendant company under the Foreign Companies Act, R.S.S. ch. 73, sec. 5, sub-sec. (*d*).

The defendant now makes an application to set aside the service of the writ on the following grounds:—

1. That the cause of action, if any, is based on an alleged breach, in the Province of Ontario, of a contract made and entered into in that Province, and that this Court has therefore no jurisdiction to entertain the action.

2. That the defendant company has no resident agent or representative, and no warehouse, office, or place of business in Saskatchewan, and does not carry on business in Saskatchewan within the meaning of the Foreign Companies Act, and that therefore, even though the cause of action did arise in Saskatchewan, an order for service *ex juris* was necessary before the writ was issued.

3. That the writ is irregular in the following respects:—(*a*) The word "notified" is used in the second paragraph instead of

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the word "command," as prescribed by the rules at the time the writ was issued. (*b*) The copy of the writ served on the defendant is not a true copy of the original, in that it is not dated and does not purport to be signed and sealed by the local registrar who issued it.

By the Judicature Act, R.S.S. ch. 52, sec. 41, it is provided that "Actions shall be entered in the judicial district where the cause of action arose or in which the defendant resides or carries on business at the time the action is brought." In this case I am of the opinion that the defendant does not reside or carry on business in this Province within the meaning of the above section. In *Ontario Wind Engine and Pump Co.* v. *Eldred*, 2 D.L.R. 270, 20 W.L.R. 697, it was held that where a person in Saskatchewan forwards an order to a Manitoba company at Winnipeg to send an article to him, and that order is accepted and the article shipped, that is not carrying on business for gain in Saskatchewan. In the case of *Pearlman* v. *Great West Life Assurance Co.*, 4 D.L.R. 154, 21 W.L.R. 557, it was held by the Court of Appeal in British Columbia that where the cause of action did not arise within the jurisdiction, the fact that the defendants had a local office in the jurisdiction and were also registered under the Companies Act of the Province did not confer jurisdiction on the British Columbia Courts, and that the defendants did not "reside or carry on business" within the meaning of sec. 67 of the County Courts Act, which is similar to section 41 of the Judicature Act. This case is supported by numerous English authorities quoted in the judgment of Macdonald, C.J.A. I have therefore no hesitation in finding that in this case there is no such residence or carrying on business as to confer jurisdiction on this Court. The main question, therefore, to be decided is, where did the cause of action arise? I am of the opinion that the cause of action arose in Saskatchewan. It is true that the contract was made in Ontario, but it had to be performed in Saskatchewan. If, as the defendant alleges, the contract was performed by delivery of the goods f.o.b. Hanover, Ontario, it had, in my opinion, no right to refuse delivery in Saskatoon. Having done this, it cannot now take advantage of its own wrong, and allege that the contract was to be performed in Ontario. This case, it seems to me, comes within the provisions of Rule 23, sub-sec. (5) and a writ could have been issued and served *ex juris*. The question now is, therefore, does registration of an attorney under the Foreign Companies Act dispense with the necessity of obtaining an order for service *ex juris?* I am of opinion in this particular case that it does. Section 5, sub-sec. (*d*) reads as follows:—

> A duly executed power of attorney under its common seal approved by the registrar empowering some person therein named and residing

in Saskatchewan to act as its attorney for the purpose of accepting service of process in all suits and proceedings against the company within Saskatchewan and of receiving all lawful notices and declaring that service of process in respect of such suits and proceedings and of such notices on the said attorney shall be legal and binding to all intents and purposes whatever and waiving all claims of error by reason of such service; and such company may from time to time by a new or other power of attorney executed and deposited as aforesaid appoint another attorney within Saskatchewan for the purposes aforesaid to replace the attorney formerly appointed.

Section 4 of the Foreign Companies Act reads as follows:—

Any foreign company may become registered on compliance with the provisions of this Act and on payment to the registrar of such fees as would be payable for registration of such company under the provisions of the Companies Act; and thereupon shall, subject to the provisions of its charter and regulations and to the terms of the registration, have the same powers and privileges in Saskatchewan as if incorporated under the provisions of the Companies Act.

From these two sections it appears to me that in a case where the cause of action arises in this Province, a foreign company having complied with the requirements of the Foreign Companies Act is in the same position with respect to the service of process as if it had been incorporated and was carrying on business in this Province. The cause of action having arisen in this Province, the defendant, by registration under the Foreign Companies Act, has practically waived the provisions of Rule 23 and agreed to be served with process in this Province. See the *Tharsis Sulphur and Copper Company* v. *The Societe Industrielle et Commerciale des Metaux*, 60 L.T. 924, and *Montgomery, Jones & Co.* v. *Liebenthal Co.* (1898), 1 Q.B. 487.

I find, therefore, in this action that the writ of summons was properly issued and served in this Province. The only question remaining to consider is whether any of the irregularities mentioned above are such as to render the writ of summons a nullity, or whether they are merely irregularities which may be cured by amendment. I am of opinion that the latter is the case, and will allow the writ to be amended so as to overcome the irregularities mentioned. The motion to set aside the service of the writ will be dismissed, and the plaintiff will be allowed to amend the writ of summons on payment of the costs of the motion to the defendant forthwith after taxation thereof. H. F. Thomson, for applicant (defendant). H. E. Sampson, for plaintiff.

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