Dominion Law Reports

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

ANNOTATED

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J. I. CASE THRESHING Co. v. WHITNEY.

Saskatchewan Court of Appeal, Haultain, C.J.S., and McKay and Martin, JJ.A. October 23, 1922.

STATUTES (§IID—125)—FARM IMPLEMENT ACT, R.S.S. 1920, CH. 128—PROSPECTIVE OR RETROSPECTIVE OPERATION.

The provisions of the Farm Implement Act, 1915 (Sask.) ch. 28, sec. 17, and 1916 (Sask.), ch. 26, sec. 7, being amendments of 1915, ch. 28, respecting appraisement by arbitration after repossession by the vendor are not retrospective, and do not apply to contracts for the sale of farm implements in existence at the time the Act was passed.

[*West* v. *Gwynne*, [1911] 2 Ch. 1, distinguished; *Re Joseph Suche & Co.* (1875), 1 Ch.D. 48; *Re Athlumney; Ex parte Wilson*, [1898] 2 Q.B. 547, applied.]

APPEAL by the defendant from the trial judgment on a case stated as to the meaning and application of certain provisions of the Farm Implement Act. Affirmed.

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

G. N. Broatch, for appellant.

F. L. Bastedo and *Henry Ward*, for respondent.

The judgment of the Court was delivered by

MARTIN, J.A.:—By an agreement in writing bearing date October 20, 1914, the plaintiff sold to the defendant and to A. A. Whitney and R. G. Whitney, jointly and severally, and the said parties agreed to purchase from the plaintiff, jointly and severally, certain second-hand machinery, including one 40 x 60 separator and one 75 h.p. simple traction engine, for the price of $3,280.95. In accordance with the terms of the written agreement, the purchasers gave to the plaintiff joint and several lien notes for the amount of $3,280.95, dated October 20, 1914. The machinery was duly delivered in accordance with the agreement, which contained the following provision:—

"The property in and the title to the said goods shall remain in the vendor and shall not pass to the purchaser until the vendor has received in cash the purchase price and interest. If the vendor should, at any time, consider that any part of the purchase money is insecure, it may take possession of the said goods, and if necessary repair the same and sell the same or any part thereof either by public or private sale without any notice at such time or times and upon such terms and for such price as the vendor may deem best and the net proceeds of such resale when actually

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received in cash (all costs, charges and expenses, including transportation, being charged against and deducted from the purchase money) shall be credited upon the purchase price and the purchaser shall remain liable for the balance. Upon the vendor taking possession as hereinbefore provided for, or upon default being made in the payment of any instalment of the purchase price, the whole purchase price and all securities given therefor shall (notwithstanding deferred times of payment) become due and payable."

The defendant made default in payment of the lien notes, and the plaintiff, considering the purchase price insecure, on August 1, 1917, repossessed the said machinery under the powers contained in the said agreement. On August 24, 1917, the machinery was offered for sale by public auction after proper advertising, but no bid was made. Subsequently, the plaintiff sold the machinery by private sale and realised the gross sum of $3,650.50. The plaintiff's costs and charges in connection with the repossession sale and repairing of the said machinery, as set out in the plaintiff's reply to the statement of defence, amounted to $1,995.15, and the net proceeds of sale, namely $1,655.35, was credited to the defendant, leaving a balance due the plaintiff of $1,372.60, together with interest at 10% on $1,259.66 from October 17, 1921.

The plaintiff sold the said machinery after repossession without the same having been appraised by arbitrators, pursuant to the provisions of the Farm Implement Act, 1915 (Sask.), ch. 28, sec. 17, and 1916 (Sask.), ch. 26, sec. 7 (amendment), now R.S.S. 1920, ch. 128. A case was stated, and the Court was asked to decide the following questions:—

"1. The amount of the costs, charges and expenses paid or incurred by the plaintiff in repossessing, repairing and reselling the said machinery. 2. Do the provisions of the Farm Implement Act requiring appraisement by arbitration after repossession of farm implements by the vendor apply to the repossession of the machinery in question herein. 3. If the answer to question 2 is in the affirmative, does the failure to have the said machinery appraised and the resale by the plaintiff operate as a rescission of the said agreement?"

According to the terms of the reference, if question 2 is answered in the negative, there was to be judgment for the plaintiff for the amount of its claim, interest and costs, less any reduction made by the trial Judge in the amounts

charged on repossession, repair and resale of the said machinery.

The trial Judge answered question No. 2 in the negative, and it appears that an order has been made for a reference to ascertain the costs, charges and expenses paid or incurred by the plaintiff in repossessing, repairing and reselling the said machinery. From the judgment of the trial Judge the defendant has appealed.

The main question to be determined is, whether the provisions of the Farm Implement Act respecting appraisement by arbitration after repossession by the vendor apply to repossession of the machinery in question in this action. In other words, are the provisions of the Farm Implement Act with respect to arbitration retrospective.

The right to repossess in this case was exercised under powers contained in the agreement in writing, and not under the lien notes. The right was exercised on grounds which do not exist under sec. 17 of the Farm Implement Act. The right to repossess, under sec. 17, is limited to cases where the vendor has taken lien notes, and the vendor may only repossess where there has been default in payment of any instalment of the purchase price, or in the event of the purchaser absconding. When the agreement in writing in question was entered into on October 20, 1914, certain contractual rights were created between the parties with respect to the right to repossess, which rights, if sec. 17 is retrospective in effect, would be very seriously curtailed.

Counsel for the defendant relied on the case of *West* v. *Gwynne*, [1911] 2 Ch. 1, 80 L.J. (Ch.) 578, 27 Times L.R. 444. In this case the effect of the provisions of sec. 3 of the Conveyancing and Law of Property Act, 1892 (Imp.), ch. 13, came under review. The section in question was as follows:—

"In all leases containing a covenant, condition, or agreement against assigning, underletting, or parting with the possession, or disposing of the land or property leased without license or consent, such covenant, condition, or agreement shall, unless the lease contains an expressed provision to the contrary, be deemed to be subject to a proviso to the effect that no fine or sum of money in the nature of a fine shall be payable for or in respect of such license or consent; but this proviso shall not preclude the right to require the payment of a reasonable sum in respect of any legal or other expense incurred in relation to such license or consent."

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Cozens-Hardy, M.R., in delivering judgment, [1911] 2 Ch., at p. 10, stated:—

"This appeal raises an important question whether sec. 3 of the Conveyancing Act, 1892, is of general application, or whether its operation is confined to leases made after the commencement of the Act. . . . Mr. Justice Joyce has held that the section is of general application, and I agree with his view. I arrive at this conclusion for several reasons. In the first place, the language of the section is perfectly general, 'in all leases,' and there is nothing in the section itself to confine it to leases subsequent to the Act. In the second place, secs. 2, 4 and 5 of the Act are plainly general, for they are amendments of sec. 14 of the Conveyancing Act, 1881, which by sub-sec. 9 is expressly declared to be general; and it would be strange that the interposed sec. 3 should not also be general . . . In the third place, the Legislature appears to have regarded the exaction of a fine as the price of consent to an assignment as so unreasonable that it ought not to be deemed to have been part of the bargain unless expressly mentioned in the lease itself."

Buckley, L.J., at pp. 12-13, said:—

"As a matter of principle an Act of Parliament is not without sufficient reason taken to be retrospective. There is, so to speak, a presumption that it speaks only as to the future. . . . To construe this section I have simply to read it, and, looking at the Act in which it is contained, to say what is its fair meaning. I will first take the section without assistance from the surrounding sections amongst which it is found. It provides that in all leases containing a certain covenant the covenant shall, unless the lease expressly provides to the contrary, be deemed to be subject to a certain proviso. I am asked to read this as if it were not 'in all leases,' but 'in such leases as shall be executed after the commencement of this Act.' I see no reason for so doing."

Kennedy, L.J., at p. 15, said:—

"I recognise the existence and the justice of the general rule of English law which is summarised by Sir Peter Maxwell in his work on the Interpretation of Statutes. . . . 'that no statute shall be construed so as to have a retrospective operation, unless such a construction appears very clearly in the terms of the Act, or arises by necessary and distinct implication.' I do not think this is a very clear case; but, after giving, as I hope, due weight to all the foregoing considerations, I have come to the conclusion that the

decision in the Court below ought to be upheld.

In the first place, it appears to me that the language of the section, although it does not exclude the contention of the appellant, favours the wider interpretation. The opening words, 'In all leases,' *prima facie* negative a distinction between leases made before and leases made after the passing of the Act. Nor is there anything in the context to prevent or modify this inference."

In the section of the Conveyancing Act under consideration in the above case, the words "In all leases" *prima facie* appear to refer to every lease, both those in existence at the time the Act was passed and those that were executed subsequently. It must also be observed that other sections of the said Act, as set out in the judgment of Cozens-Hardy, M.R. *supra*, namely, secs. 2, 4, and 5, were general in application, and, as he pointed out, it would be strange if sec. 3 were not also general in application.

There are no words used in the Farm Implement Act 1915 (Sask.), ch. 28, which would justify its being construed as of general application, or as having a retrospective operation. The whole application of the Act is to the future. Its main object is to provide a form of contract for the sale of farm implements. It declares that the sale of large implements shall be invalid unless in the form prescribed by the Act. In its general provisions, therefore, it, obviously, cannot apply to past transactions. All its provisions seem to me to centralise around this main purpose, and are directed to a definition of the rights and obligations which shall attach to parties who have entered into some form of contract provided for by the Act. The words "vendor" and "implement," where they occur in secs. 16 and 17, must refer to vendors and implements in contracts made under the Act.

Counsel for the defendant contended that sec. 17 (2) is so worded that it must be construed as retrospective, and he made special reference to the use of the words "in every case" in the second line of sub-sec. (2). It appears to me, however, that these words are used in connection with the words "where the implement is a large implement" only for the purpose of pointing out that arbitration must take place "in every case" of the sale of a large implement, whereas in the case of small implements it is only compulsory where the vendor and purchaser are unable to agree as to the value of the same.

If it was the intention of the Legislature in enacting sec.

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17 of the Farm Implement Act to make it apply to all contracts for the sale of farm implements then in existence and thus interfere with and prejudice contractual rights, this intention should be set forth in express words, or, at least, in words that would leave no reasonable doubt as to what was meant. I can find no such intention, either by express words or by implication.

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Maxwell on Interpretation of Statutes, 6th ed., p. 501, says:—

"Statutes which encroach on the rights of the subject, whether as regards person or property, are similarly subject to a strict construction in the sense before explained. It is a recognised rule that they should be interpreted, if possible, so as to respect such rights. It is presumed, where the objects of the Act do not obviously imply such an intention, that the Legislature does not desire to confiscate the property, or to encroach upon the right of persons; and it is therefore expected that if such be its intention, it will manifest it plainly, if not in express words, at least by clear implication, and beyond reasonable doubt. It is a proper rule of construction not to construe an Act of Parliament as interfering with or injuring persons' rights, without compensation, unless one is obliged so to construe it."

It was also contended on behalf of the defendant that sec. 17 of the Act relates to procedure only, and that the law and leading cases support the view that where a statute merely alters the procedure whereby a certain remedy is to be exercised by a party to a contract, that statute may, with perfect propriety, be made applicable to past as well as future transactions. In support of this contention reference was made to the cases of *Gardner* v. *Lucas* (1878), 3 App. Cas. 582, and to *In re Joseph Suche & Co.* (1875), 1 Ch.D. 48, 45 L.J. (Ch.) 12, 24 W.R. 184.

In the first of these cases Lord Blackburn, 3 App. Cas., at p. 603, stated:—

"I think it is perfectly settled that if the Legislature intended to frame a new procedure, that instead of proceeding in this form or that, you should proceed in another and different way; clearly there bygone transactions are to be sued for and enforced according to the new form of procedure. Alterations in the form of procedure are always retrospective unless there is some good reason or other why they should not be."

In the second case referred to, Jessel, M.R., 1 Ch.D. at p. 50, says:—

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It is a general rule that when the Legislature alters the rights of parties by taking away or conferring any right of action, its enactments, unless in express terms they apply to pending actions, do not affect them. It is said that there is one exception to that rule, namely, that where enactments merely affect procedure and do not extend to rights of action they have been held to apply to existing rights."

I am of the opinion, however, that sec. 17 of the Farm Implement Act does not deal with matters of procedure; it deals with the rights of parties who enter into certain forms of contract as provided for in the Act, and if the section were held to apply to transactions that took place before the Act came into force contractual obligations would be prejudiced, and, unless the language is of such a character as to make it necessary to so construe the section, it should not be given a retrospective construction.

In Re Athlumney; Ex parte Wilson, [1898] 2 Q.B. 547, at pp. 551-552, 67 L.J. (Q.B.) 935, 47 W.R. 144, Wright, J., said:—

"Perhaps no rule of construction is more firmly established than this—that a retrospective operation is not to be given to a statute so as to impair an existing right or obligation, otherwise than as regards matter of procedure, unless that effect cannot be avoided without doing violence to the language of the enactment. If the enactment is expressed in language which is fairly capable of either interpretation it ought to be construed as prospective only."

I would answer question two (2) of the stated case in the negative, and dismiss the defendant's appeal with costs.

Appeal dismissed.

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Alberta Supreme Court, Appellate Division, Stuart, Beck and Hyndman, JJ.A. October 28, 1922.

BROKERS (§IIB—10)—REAL ESTATE BROKER—RIGHT TO RETAIN DEPOSIT AS COMMISSION ON SALE.

Where a real estate agent procures a purchaser who, after agreeing to purchase certain property and paying a deposit thereon, subsequently refuses to complete his contract, so that, in fact, no real sale is brought about, the agent cannot be said to have obtained a purchaser ready and willing to complete the purchase, so as to entitle the agent to retain the money paid as a commission on the sale. While the deposit paid might, in the absence of agreement, belong to the vendor subject to any claim which the purchaser might have, where the agent has agreed to refund the money if the vendor fails to deliver, the agent is a trustee for the purchaser until an issue is tried between the vendor and purchaser as to who is entitled to such deposit.

[See Annotation, 4 D.L.R. 531.]

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APPEAL by defendants from the trial judgment in an action to recover the amount of a deposit paid on a land purchase, which the purchaser subsequently refused to complete. Reversed.

J. S. Mavor, K.C., for appellants.

C. A. Wright, for respondents.

The judgment of the Court was delivered by

STUART, J.A.:—The plaintiff resides in the State of Maine but is the administratrix here of the estate of George C. Gray deceased. The various defendants are all partners in a firm of real estate agents which was afterwards changed into a limited company, and this company as well as the firm are also defendants.

One Ralph O. Brewster, an attorney of the State of Maine, was looking after the affairs of the plaintiff. On August 20, 1919, Brewster, under authority from the plaintiff, listed certain property with the defendants for sale. The listing agreement is as follows:—

"Authority to sell.

Murchison Bros., Gaddes & Braden, Calgary, Alberta.

In consideration of your endeavoring to find a purchaser for the following lands situated in the Province of Alberta, and being: (here follows the description) . . . I hereby list the said lands for sale with you and authorize you to sell the same for me at the price of fifty no/100 dollars ($50) per acre, payable as follows:—Ten no/100 dollars per acre cash, balance C.P.R. terms.

In consideration of the above, I agree to pay a commission of 5%, with a minimum commission of $1 per acre, and in case I sell or otherwise dispose of the aforementioned lands, or any portion thereof, to any purchaser whom you have interested regarding the purchase of same or in case the terms of sale vary in any way whatsoever, I still agree to pay you the commission as aforesaid.

I further agree that this is not an exclusive listing to you covering the aforesaid lands, but in case that I desire to withdraw I will give 10 days' notice in writing by registered mail, otherwise, this listing shall remain in full force and effect.

Dated this 20th day of August, 1919, Ralph O. Brewster."

On September 14, 1920, the defendants had secured a prospective purchaser in the person of one Fred Leiser, and on that date received from him the sum of $1,000 and gave him the following receipt.

"Calgary, Alta., Sept. 14th, 1920.

Received of Fred Leiser, of Grafton, California, one thousand dollars, ($1,000) as part payment on section (28) township (25) twenty-five range (27) twenty-seven west of the (4th) fourth Meridian Alberta, Canada, agreement of Canadian Pacific Railway to be made direct to the said Fred Leiser, purchase price to be $50 per acre balance of first payment being equity due Gray estate, approximately $6,000 to be paid on or before December 1, 1920, providing said estate is ready to deliver contract, subject to clear abstract of title and subject to approval of administrator. Money to be refunded if Gray estate fail to deliver, as per agreement.

Murchison Bros. Ltd., by T. F. Hook."

On September 16, the defendants sent a telegram to Brewster, which so far as it related to this matter, said:—

"Have sold and accepted deposit on all of section at fifty dollars per acre."

On September 28, defendants sent a telegram to Brewster which, so far as material, reads as follows:—

"Kindly confirm sale section twenty-eight ten dollars per acre cash within sixty days balance C.P.R. terms one thousand dollars deposit. . . . . must have confirmation at once to hold deposits."

To this Brewster replied:—

"Confirm sale on section twenty-eight. . . . . subject to approval of Court and terms as stated in your receipt."

The portions of these telegrams omitted above referred to a separate sale to other parties of one of the other parcels mentioned in the listing agreement.

On October 29, and afterwards, correspondence ensued between the defendants and Brewster about the method of completing the sale. It seems that Leiser had requested the documents to be sent to a bank in California. Owing to some delay, the responsibility for which became a matter of dispute between Leiser and Brewster, the matter was not completed by December 1, as specified in the receipt of September 14, and ultimately Leiser refused to complete the sale.

The plaintiff brought this action on April 15, 1921, to recover from the defendants the sum of $1,000 deposited with them by Leiser.

The trial Judge gave judgment for the plaintiff for $1,100 and costs. The additional $100 arose from the premium or

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American currency in which Leiser had paid.

There was no oral testimony given at the trial. The parties agreed upon certain admissions of fact and all the correspondence considered relevant was put in evidence by consent.

In giving his reasons for judgment, the trial Judge said:

"Negotiations then proceeded for the completion of the transaction by way of having assignments made of certain Canadian Pacific Railway contracts covering the lands in question and after this had proceeded for some time, the purchaser decided to abandon the contract and forfeit the deposit made. In other words, while he did not specifically make a declaration of abandonment, he refused to complete and has not up to the present time made any claim for the return of the deposit. The vendor was reasonably diligent in completing the documents necessary to close up the transaction and I find on the facts that the purchaser could advance no claim that the vendor was in default in any manner whatsoever.

The anomalous situation, however, arises that it is still open to the purchaser to make a claim for a return of the deposit money so that the real determination as to whether this deposit money belongs to the vendor or to the purchaser has not been arrived at. However, the vendor claims it in the meantime, and, while I am not able to make any adjudication which would bind the purchaser, the facts are such that, in my opinion, the vendor would be successful in claiming this deposit since the purchaser has refused to complete and has no valid reason for such refusal.

The agents who procured the purchaser now claim this sum of money as their commission on the basis that a sale was brought about by them. I am not able to give effect to this contention. In the first place the money was received by the agent, for, and on behalf of the vendor, and it was the vendor's money which he was bound to pay over and which the vendor would be entitled to retain, subject to any claim which the purchaser might make for its return.

It is alleged on behalf of the defendant that the plaintiff is estopped from denying that a sale was brought about, since the plaintiff is claiming this sum of money as a deposit made upon such sale. I do not think the plaintiff can be forced to say at this present time that he is claiming this money as a deposit which has been forfeited. The determination of that question is entirely between the plaintiff and the purchaser. The purchaser is not a party to the action and his

claim, whatever it may be upon this money, has not been adjudicated upon, but it is quite within his, the purchaser's right to, at least, assert a claim to this money. The agent is not able to say at this present time that he obtained a purchaser who was ready and willing to purchase the property. While he did obtain a purchaser who was at one time, apparently ready and willing, this so-called purchaser has elected to abandon his contract and refuses to complete it, so that, in fact no real sale of the land has been brought about. I think the essence of the contract was that the agent should obtain a purchaser ready and willing to complete the purchase. He has not succeeded in doing so and, therefore, has not earned a commission."

It will be observed from these passages that the trial Judge did not deal with one defence clearly raised in the statement of defence. The substance of this defence was that the defendants did not receive the money merely as agents of the plaintiff, but that they also held it subject to a certain trust in favor of Leiser, namely, that it was to be returned to him "if the plaintiff failed to deliver title to the land in question in this action on the terms set forth in the said agreement in writing," i.e., the receipt of September 14, and that "they have never, at any time, been released by the said Fred Leiser from their said undertaking and agreement to refund to him the said money." This is set out in para. 7 of the statement of defence.

The reasons for judgment, as above quoted, do indeed assume, if not directly assert, that the defendants were under no obligation to Leiser with respect to the disposition of the money. There can, I think, be little doubt that the trial Judge was led to take this view by the rather unfortunate wording of the second clause of the admissions of fact, which read as follows:—

"That Murchison Brothers Ltd., as agents for the plaintiff, received from Fred Leiser, the sum of $1,100 on the terms set forth in a certain document signed by it (the said Murchison Bros. Ltd.), on September 14, 1920, and delivered on that date to Fred Leiser."

But, in my opinion, this cannot be taken as an admission that the money was received *solely* as agents for the plaintiff. The admission is obviously true in the sense that the defendants were, at the time, acting as agents for the plaintiff. But the admission does not, by any means, negative the fact, if it was the fact, that the defendants were at the same time and also agents for Leiser. And I think we need only

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look at the words on the receipt to discover that, by its terms, the defendants did undertake a duty or obligation to Leiser. The document nowhere described the defendants as agent for the plaintiff and there is no such description under their signature. I think the obligation to "refund" expressed by the words "money to be refunded if Gray estate fail to deliver as per agreement" was clearly intended as an obligation directly resting upon the person signing the receipt, that is, the defendant. The plaintiff is mentioned in the third person and as in some sense another party. The document was more than a receipt by the Gray estate signed on its behalf by its agent. There would appear, indeed, to have been no authority given by the Gray estate to the defendants to bind that estate to refund any money.

The words of para. 2 of the admissions clearly show that it was intended to leave the interpretation of the receipt and the question of the defendant's objections under it to the decision of the Court. And my firm opinion is that, by the terms of the receipt, the defendants did undertake to hold the money on Leiser's behalf although they may have been also at the time acting as agents for the plaintiff. This being so, I think it becomes clear at once that the plaintiff cannot recover the money from the defendants as if it had been received by the defendants simply and solely on her behalf.

Of course it may be suggested that the telegrams from the defendant to Brewster, which are quoted above, are an admission that the defendants held the money for the plaintiff and for her alone. But, in the absence of anything creating an estoppel, I think it was still open to them to show the real capacity in which they held the money. It will be observed that, by the terms of the listing, there was no stipulation for a mere deposit at all. The vendor was to get paid in full for her equity upon completion of the documents so that the defendants went further than they were required to do in taking the deposit. And the last telegram of Brewster shows that he was acquainted with the terms of the receipt.

The case has been argued twice on appeal. After the first argument we were in some doubt whether Leiser was really claiming the money. The trial Judge had said in his judgment that Leiser had practically decided to forfeit this deposit. But, with much respect, I am unable to discover evidence of that decision and the Court was on the first argument also unable. We, therefore, directed Leiser to be added as a party and he was given a certain time to come

forward and say whether he had or had not really given up all claims to the money. In response he did, or his representative, one Ide, who advanced the money for him did, come forward with an affidavit stating that he still claimed the money. And there was further argument, though none directly on Leiser's behalf, for the affidavit was presented through the counsel for the defendants. Of course, I place no reliance on this affidavit in deciding upon the capacity in which the defendants hold the money. That would be improper.

My opinion, therefore, is that the defendant's defence in para. 7 is well founded and that the appeal should be allowed with costs and the judgment below set aside and the action so far as it is now an action, solely by the plaintiff against the original defendants, should be dismissed with costs.

The defendants did not counterclaim for their commission. They merely set up by way of set-off a right to retain the money on account of their commission. As the defendants succeed on another defence, it is unnecessary to discuss the question whether they could have succeeded in a direct action or counterclaim for their commission. In such an action, the extent of a real estate agent's obligation with respect to getting the purchaser legally bound, which apparently was not done here, would doubtless come up; but we need not deal with it here. The defendant's right to sue for the commission in a direct action should not be prejudiced by the reasons for judgment below and there should be an express declaration to that effect.

Inasmuch, also, as Leiser is now a party to the action, it should be left still open to the plaintiff in this same action to proceed in some appropriate way to have an issue tried with respect to the ultimate disposition of the $1,100 still in the defendant's hands. While the absence, or the supposed absence, of a memorandum in writing may stand in the way of a claim for specific performance against Leiser, it does not follow that the plaintiff may not claim the $1,100 as against Leiser in the defendant's hands, although it can easily be seen that there may be difficulties in the way. As for Leiser, he ought also to have the right to come forward in this action and claim the sum. Whether he could do so without admitting the agreement and so relieving the plaintiff from her embarrassment is perhaps the point that has led him to remain very quiescent.

But if either the plaintiff or Leiser desire to secure the money, she or he must move in Chambers within three

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months from entry of judgment for some form of issue to have the question decided, and in any such issue the present judgment, and not that of Simmons, J, should alone be considered *res judicata*. But this direction is not to be treated as preventing Leiser bringing a new action against the defendants alone if he is so advised.

Appeal allowed.

METX v. MARSHALL.

Saskatchewan Court of Appeal, Houltain, C.J.S., Turgeon, McKay and Martin, JJ.A. October 23, 1922.

AGISTERS (§I—1)—FAILURE TO SUPPLY WATER—NEGLIGENCE—LIABILITY.

An agister must take reasonable and proper care of the animals taken in by him, and is liable for injury caused to them by negligence and neglect in not supplying them with water which it was his duty to supply.

APPEAL by defendant from the judgment of the Judge of the Judicial District of Regina in an action for damages on a contract of agistment. Varied.

L. McK. Robinson, for appellant.

J. S. Rankin, for respondent.

The judgment of the Court was delivered by

MARTIN, J.A.:—This is an appeal from the judgment of the Judge of the Judicial District of Regina.

The facts are that on or about May 17, 1921, the defendant, being the owner of certain pasture lands in the vicinity of Foxleigh, verbally agreed, in consideration of the payment to him of $2 per month per horse, to keep and pasture 7 head of horses for the plaintiff. Pursuant to such agreement, the plaintiff on or about May 23, 1921, delivered the 7 head of horses to the custody of the defendant on the pasture land, and paid the defendant at that time the sum of $28, being the remuneration agreed upon for a period of 2 months. The plaintiff alleges that the defendant failed to exercise reasonable and proper care in the keeping of the said horses whilst in his custody, in that he failed to provide the said animals with sufficient food and water, particularly water, and that, as a consequence of such neglect, one of the horses died and the remainder were in a weakened, exhausted and emaciated physical condition and permanently injured in health.

The agreement made in this case was a contract of agistment. 1 Hals. pp. 386-387, sec. 841, says:—

"Agistment is in the nature of a contract of bailment, conferring no interest in the land and, therefore, not requir-

ing to be in writing, and arising where one man (the agister), takes another man's cattle, horses, or other animals, to graze on his land for reward (usually at a certain rate per week) on the implied term that he will redeliver them to the owner on demand."

An agister must take reasonable and proper care of the animals entrusted to him. 1 Hals. p. 387, sec. 842, says:—

"The agister is not an insurer of the beasts taken in by him, but he must take reasonable and proper care of them, and is liable for injury caused to them by negligence or neglect or such reasonable and proper care."

The trial Judge found as a fact that the animal which died, died from lack of water, and that water was not furnished to it in the pasture by the defendant, whose duty it was to see that the animals were supplied with water. He also found that the emaciated condition of the other animals, and the serious loss in their value, was due to the same cause, namely, lack of water, which it was the defendant's duty to furnish, and which he did not furnish.

With the findings of the trial Judge, I entirely agree; in fact, I do not see how, on the evidence, he could have found otherwise than he did.

It remains only to consider the amount of damages. The trial Judge awarded as damages the amount set out in the statement of claim, namely, $475, and allowed as a credit the sum of $42, being the amount due for 3 months for the use of the pasture. It appeared by the evidence, however, that this sum had been paid and should not be credited on the statement of claim or on the judgment. This fact was admitted by counsel for the plaintiff on the hearing of the appeal.

I am of the opinion that the amount of the judgment should be reduced from the sum of $50, which is the amount claimed by way of damages for "one yearling," because there is no evidence as to the value of this horse, and no evidence as to any damage suffered by it. I also think that the judgment should be reduced by a further sum of $50, which is the amount claimed as damage to a "black gelding rising 3 years old." The evidence is that this animal was suffering from spinal meningitis when put in the pasture, and there is no evidence that it suffered any damage while in the pasture, nor is there any evidence as to its value when placed therein.

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The judgment of the trial Judge will, therefore, be varied, by reducing the amount of the same to $375. The defendant will have his costs of appeal and the same when taxed to be set against the amount of the judgment.

Judgment varied.

McCULLOUGH v. S. S. "SAMUEL MARSHAL" and Owners and ELIASOPH, Claimant-Appellant.

Exchequer Court of Canada, Audette J. October 14, 1922.

APPEAL (§VIA—280)—MOTION TO DISMISS FOR WANT OF PROSECUTION —JURISDICTION OF COURT IN ABSENCE OF SPECIFIC RULE— COMMON LAW.

There is no distinction in principle to be drawn between the inherent authority of the Court to order the dismissal of a case on appeal for want of prosecution and the dismissal of one at first instance, and in the administration of justice right and justice ought not to be deferred at the will of any litigant in Court.

[See also 68 D.L.R. 729.]

MOTION to dismiss for want of prosecution.

H. E. Walker, for respondents; *T. M. Tansey*, for appellant.

Shanks, for the purchaser.

AUDETTE, J.:—This is an appeal, lodged by the claimant Hyman I. Eliasoph, from the judgment of the Local Judge of the Quebec Admiralty District, pronounced on July 8, 1921, in respect of, and in so far only as that judgment deals with the fees and costs taxed in favour of: 1. The plaintiffs' solicitors; 2. The Local Judge; 3. The District Registrar, and 4. The priority denied Hyman I. Eliasoph's claim.

The three first subjects of this appeal are, exclusively, questions of costs upon which the District Taxing Master has passed and whose finding has been confirmed on appeal to the local Judge. The judgment in that respect would appear to deal exclusively with the quantum of the costs and not with their rank in the distribution of the proceeds of the sale of the vessels nor as to whether or not costs were rightly or wrongly allowed and, therefore, such judgment becomes an interlocutory judgment or order, and leave was accordingly asked for and obtained to prosecute such appeal, and security to the amount of $100 was duly made, as provided by the rules, in such interlocutory matters.

The fourth subject would appear to deal with the merit of the claim, since Eliasoph claims a priority which is denied him by the judgment appealed from. As suggested by counsel for the respondent, in such a case the Rules of Court provide for security to the amount of $200,—instead of the $100 given herein.

The matter now comes before this Court, on appeal, on three motions: one, on behalf of the plaintiffs-respondents to dismiss the appeal for want of prosecution; the second, on behalf of the appellant, made subsequently to the first motion and as a sequence thereto, for an order fixing a date for the hearing of the appeal; and a third one also (made during the hearing of the two first motions) by the appellant for leave "to amend the notice of appeal, in order to include therein notice of said appeal to the local Judge in Admiralty and to the Registrar . . . and that he be now permitted to serve such notice or amended notice thereof on the Solicitors for the said local Judge and Registrar, or on themselves and the other parties herein, etc."

The questions raised respecting the three first subjects deal exclusively with a question of costs and as such involve a question of discretion since under Rule 132 "the Judge may, in any case, make such order as to costs as to him shall seem fit."

23 Hals. p. 132, sec. 233, says: "No appeal lies from an order . . . as to costs only, when such costs are in the discretion of the Judge, except with the leave of the Judge making the order," which was given herein. But, 23 Hals. p. 133, sec. 234, "in all matters coming within the discretion of the Judge in Chambers, the Court of Appeal does not interfere unless the discretion has been exercised on a wrong principle or there has been some miscarriage."

A matter involving merely a question of costs should not be entertained. *Chicoutimi Pulp Co.* v. *Price* (1907), 39 Can. S.C.R. 81.

In *Smith* v. *Saint John City Railway Co.* (1898), 28 Can. S.C.R. 603; it was further held that it is only when some fundamental principle of justice has been ignored or some other gross error appears that the Appellate Court will interfere with appeals upon questions of costs only. The latter case is made very much more apposite from the fact that the question of costs therein mentioned was one resulting from the consolidation of cases. The judgment appealed from seems to cast the blame for this alleged welter of costs to the number of motions lodged by the present appellant himself and it would follow that if he had asked for consolidation, at the proper stage, much of what he now finds fault with would have been avoided.

In *Beaudette* v. *S.S. "Ethel Q."* (1916), 16 Can. Ex. 280. Affirmed on appeal to the Supreme Court of Canada, June 2, 1917 (unreported), Anglin, J., said: "It is the invariable

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practice of this Court to refuse to entertain appeals of which the sole object is a reversal or modification of a disposition made of costs, however manifest it may be that such disposition was based upon an erroneous conception of the merits of the proceeding before the Court."

The fourth question involved is one with respect to the priority claimed by the said Eliasoph and which is clearly dealt with by the local Judge.

Then there is the application to allow to give notice of appeal to the local Judge and the Registrar; a motion originating during the argument of the other application above mentioned.

Having for the purpose of clear understanding set forth the matters involved upon the merits of this appeal from a perusal of the record and from what was said on the argument of those three motions, I now come to the determination of these applications.

The judgment appealed from bears date July 8, 1921. The first document or notice of motion by way of appeal served upon the plaintiffs alone (see Rule 159), was filed on appeal to the Exchequer Court, in this registry, on September 10, 1921, and thereunder attached was a copy of the motion paper of an application to the local Judge for leave to appeal and extension of time if necessary.

On September 2, 1921, an order was made by the local Judge, granting leave to appeal and extending the delay insofar as the same may be necessary, to September 10, 1921.

The notice of motion by way of appeal, filed on September 10, 1921, and served exclusively upon the plaintiffs, gave notice for the hearing of the appeal on September 19, 1921. (See R. 166.)

No one appeared before this Court, on appeal, on September 19, 1921, either on behalf of the appellant or the respondent. See Annual Practice, 1922, at pp. 1109-1110. Would it not seem that the appeal should have been then either enlarged or set down for another day instead of leaving it lapse?

Therefore, from September 10, 1921, no proceedings of any kind were had or taken until June 8, 1922 (save and except the filing of the record on January 18, 1922), when a notice of motion was filed by the plaintiffs-respondents, of which service had been made on the appellant on the sixth,—stating that the motion would be presented before this Court on June 27, 1922.

Then on June 15, 1922, the claimant-appellant issued a summons returnable on June 27, 1922, asking for an order

fixing the date for the hearing of this appeal.

These matters stood adjourned from June 27 to July 4, 1922 (through no fault of any of the parties herein), when the two first mentioned motions were made before me. Realizing then that the appeal involved both the Judge's as well as the Registrar's fees and that no notice of any kind of this appeal from the taxation of these bills had been given them, I, therefore, refused to proceed with the hearing without enquiring whether or not these two parties intended to be represented on the appeal, feeling in duty bound to do so, not only as a matter of courtesy, but of justice to these two interested parties, who had had no notice of such appeal, —notwithstanding that R. 160 provides that "the notice of appeal shall be served upon all parties directly affected by the appeal."

These two parties had a right to expect their fees would not be dealt with in their absence and without giving them an opportunity to show cause, if they saw fit. Would not the want of service of the notice of appeal upon these two parties render thereby the appeal null and void in respect at least of these two parties?

The appellant's counsel denied, at Bar, the jurisdiction of the Court to hear a motion for dismissal of the appeal for want of prosecution; because there was no specific Rule of Court to that effect. However, R. 228 enacts that in all cases not provided for by the rules the practice for the time being in force in respect to admiralty proceedings in the High Court of Justice in England shall be followed. See now Roscoe's Admiralty Practice, 4th ed., p. 508; Coote Admiralty Practice, 2nd ed., 151-155.

At common law, Courts of first instance have undoubted authority and jurisdiction to dismiss for want of prosecution actions instituted therein; and there is no distinction in principle to be drawn between the dismissal of a case on appeal for want of prosecution and the dismissal of one at first instance. Right and justice ought not to be deferred at the will of any litigant in any Court. That is a fundamental principle in the administration of justice. See C.P.C.P.Q. art. 1239.

All rules in all our Courts which deal specifically with the question of dismissal would seem to so deal with the matter with the specific object of fixing a delay within which peremption is acquired. And in the absence of the fixing of such delay, the Court is nevertheless seized with the jurisdiction to deal with the subject-matter and its judicial discretion is limited to the question of diligence or want of

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diligence in prosecuting an appeal within reasonable time.

A party unsuccessful in an action cannot unreasonably interfere with the judgment the adverse party has obtained against him and unduly deprive him of the benefit of such judgment in his favour by the mere lodging an appeal which he does not prosecute, and in the present case this want of diligence of prosecuting the appeal affects not only the parties to the appeal, but also all parties entitled to receive monies and be collocated from the proceeds of the sale of the vessel.

Had the appellant been in earnest in his appeal, he had the opportunity to manifest it within almost a year from the date of judgment. The record from the Court below was only transmitted to this Court in January, 1922, which again would go to show intentional and unreasonable delay.

I have, therefore, come to the conclusion that the present appeal does not appear to me, from all was said on the argument of these applications and the perusal of the record, to be meritorious. The appellant has failed in many material instances, namely, *inter alia*: 1. The want of giving notice of appeal to all interested parties; 2. The want of attending on the day fixed by his notice of appeal; and 3. The want of diligence in prosecuting the appeal which, coupled with all the other reasons, compel me to arrive at the conclusion to grant with costs the motion to dismiss the appeal for want of prosecution in respect of the issues between the appellant and the plaintiffs-respondents, the Judge and the Registrar,—the three first issues above mentioned. The appellant has shown unreasonable delay in prosecuting his appeal and has been derelict in respect of the matters above mentioned. He has already delayed for over one year the distribution of the proceeds of the sale of the vessels; he cannot, with impunity, thus impede the expeditious administration of justice.

The application, made at the end of the argument of these matters, for leave to amend the notice of appeal in order to include therein notice of appeal to the local Judge and the Registrar is, therefore, dismissed with costs.

The application, on behalf of the claimant-appellant to fix a date for the hearing of those appeals is also dismissed with costs, but insofar only as in respect of the three above mentioned issues, with leave to the claimant-appellant to apply with due speed, upon notice to all interested parties, to fix a date for the hearing of the appeal upon his claim.

Judgment accordingly.

STUART v. HENRY FULLER (administrator of the estate of Fred Fuller).

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Saskatchewan Court of Appeal, Haultain, C.J.S., Turgeon, McKay and Martin, JJ.A. October 23, 1922.

EVIDENCE (§ IIB—105)—PROOF OF CLAIM AGAINST ESTATE OF DECEASED PERSON—CORROBORATION.

There is no rule of law that the evidence of a person having a claim against the estate of a deceased person cannot be received unless corroborated, but such evidence will be regarded with jealous suspicion.

[*Re Griffin*, [1899] 1 Ch. 408; *Re Hodgson* (1885), 31 Ch.D. 177, followed.]

CONTRACTS (§IID—145)—AGREEMENT TO SELL CERTAIN MATERIALS—REMUNERATION—LIABILITY.

A person who agrees to sell certain materials at a fixed price to persons who desire them, and to supply the necessary labour to instal them, and, in return for his services, is entitled to a percentage of the proceeds, does not put himself in the position of a guarantor, and is not liable for the price of the materials until he has received payment from the purchasers.

TROVER (§IB—10)—CONVERSION—WHAT CONSTITUTES.

In order to constitute conversion there must be a positive and wrongful act, and when a person is lawfully in possession of goods under an agreement to dispose of them, there can be no conversion, although only part of the goods have been disposed of and none of them have been paid for.

APPEAL by defendant from the trial judgment in an action on an agreement as to the sale of certain lightning rods. Reversed, action dismissed.

D. Buckles, K.C., for appellant.

J. O. Begg, for respondent.

HAULTAIN, C.J.S. and TURGEON, J.A., concurred with MARTIN, J.A.

MCKAY, J.A.:—I concur in the result.

MARTIN, J.A.:—This is an appeal by the defendant from the judgment of the Judge of the District Court of Swift Current. The claim is against the administrator of the estate of the late Fred Fuller and is based upon a verbal agreement alleged to have been made between the plaintiff and the late Fred Fuller, under the terms of which the plaintiff was to supply certain goods to be used in the putting up of lightning rods, the deceased was to supply the labour necessary in putting up the material, and the proceeds were to be shared equally. The trial Judge found as a fact that the goods claimed were received by the deceased, and he gave judgment for the amount claimed less the amount of $40, which was charged for an electric machine.

It was argued by counsel for the administrator that, inasmuch as the claim is against the estate of a deceased person, there should be corroboration. As to this, it is only

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necessary to say that while a claim against an estate of a deceased person should be supported by clear and unequivocal evidence, there is no need for corroboration.

Taylor on Evidence, vol. 1, 11th ed., p. 660, says: "It has sometimes been supposed that it is an absolute rule of law that a court cannot act on the unsupported testimony of any person in his own favour. But there is no actual rule of law to the effect suggested; though a court ought to regard a claim against a dead man's estate which is only supported by the evidence of the claimant with suspicion; but if in the result it convinces the court that the claim should be allowed, the court should allow the claim."

See also in this connection *Re Griffin*, [1899] 1 Ch. 408, 68 L.J. (Ch.) p. 220; *Re Hodgson; Beckett* v. *Ramsdale* (1885) 31 Ch. D. 177, 55 L.J. (Ch.) 241; *Adamson* v. *Vachon* (1912), 8 D.L.R. 240, 5 S.L.R. 400; (1914), 6 W.W.R. 114.

These cases are all authority for the proposition that there is no rule of law that the evidence of the claimant himself against the estate of a deceased person cannot be received unless corroborated. Such evidence will, however, be regarded with jealous suspicion.

In this case, there is the evidence of the plaintiff as to the agreement with the deceased, and evidence (given by the plaintiff, it is true), that the deceased admitted to the plaintiff afterwards the receipt of the goods and also stated that he had used some of the goods on one job. There is evidence given by the defendant administrator that he saw at least some of the goods at his (the administrator's) house, and after this action was brought the administrator returned a small quantity of the goods. There is also some evidence that the deceased used some of the goods on the farm of one Payne. The trial Judge has found that the deceased did receive the goods referred to in the statement of claim. There is evidence upon which he could well make this finding, and this Court, in my opinion, should not disturb the fact so found.

Admitting then that the deceased did receive the goods as set out in the statement of claim, what is the liability of his estate in connection therewith? The plaintiff's claim, as set out in para. 2 of the statement of claim, is as follows:—

"2. On or about the 1st day of March, A.D. 1915, the plaintiff, J. Y. Stuart, left with Fred Fuller, deceased, the following goods:—one electric machine, 1200 feet of cable, 60 points, it being agreed between the plaintiff and the said Fred Fuller that the said Fred Fuller should bargain and

sell the goods hereinbefore mentioned for the sum of $820, the same to be sold for the following amount of the following prices:—one electric machine, $40; 1200 feet of cable,@ 40c a foot, $480; 60 points, @ $5, $300. Total, $820; and that the said Fred Fuller should have 50% of the selling price, being the sum of $820, for his time and work in disposing, bargaining and selling of the said goods and that he would be accountable to the plaintiff for the remaining 50% of the selling price, being the sum of $410."

In the alternative, a claim is set up that the deceased wrongfully converted the said goods unto his own use and refused to deliver the said goods to the plaintiff on demand, and has not accounted for and refused to account for the said goods, and a statement is also made that the administrator has refused to account for the said goods although demands had been made upon him.

The claim as set out in para. 2 is that the plaintiff left with the deceased certain goods and it was agreed that the deceased should sell the goods for the sum of $820 in all; that the various articles should be sold at certain fixed prices to make up the sum of $820, and that the deceased was to have 50% of the amount for his work in disposing of the said goods, and that the deceased was accountable to the plaintiff for the remaining 50%.

The evidence given by the plaintiff setting out what the agreement really was is as follows:—

"Q. You had some dealings with the late Fred Fuller in connection with certain lightning rods? Just tell me about the deal. A. The deal was, that as I was leaving this part of the country in 1914—I went down to Manitoba—there was no school here—I went down to be near a school—I saw Fred in connection with putting up some lightning cable which I had left. He said he would put it up for fifty-fifty. Q. That is, you supplied the materials and he supplied the labour? A. That is the idea. I gave him an order to get this stuff at my farm. . . Q. What was the agreement between you and Fred as to its value? A. Well, the cable was to be sold at 40 cents. Q. And the 60 points, how much were they worth each? A. They were supposed to be $5.00 apiece."

This is the evidence as to the agreement, and it establishes simply that the deceased agreed to undertake to sell certain lightning rod materials to persons who desired lightning rods placed on their buildings and at certain fixed prices; he was to supply the labour necessary to sell and put

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up the rods, and in return for his services he was entitled to one-half of the proceeds, the plaintiff to have the other half. Under such an agreement there could be no liability on the deceased to pay money to the plaintiff until he sold and put up the material, or some of it, and realised monies for so doing. The agreement established did not place the deceased in the position of a guarantor. Suppose the deceased had sold all the materials and put them up and accepted notes from the purchasers, would he be liable to the plaintiff until he collected the moneys? In my opinion, he would not be liable. There is evidence to the effect that the deceased did dispose of some of the cable and put it up in accordance with the agreement and accepted a note for payment, and when the fact was brought to the attention of the plaintiff he did not object, thereby showing that it was never intended that there should be any liability on the part of the deceased until the money was actually collected. There is no evidence that the deceased ever succeeded in selling and putting up the materials except the one job for one Payne, and there is no evidence that he ever received a dollar from Payne or from anyone else. This being the case, the plaintiff cannot recover under the agreement alleged.

The plaintiff's alternative claim is that the deceased wrongfully converted the goods in question for his own use and had refused to deliver the goods to the plaintiff on demand.

27 Hals., p. 889, sec. 1569, says that to constitute conversion there must be a "positive and wrongful act." There is no wrongful act established by the evidence on the part of the deceased; in fact, no effort was made by the plaintiff at the trial to establish the fact that the deceased had wrongfully dealt with the goods in question; the deceased was lawfully in possession of the goods; he was put in possession of them by the plaintiff, and the plaintiff during the lifetime of the deceased was, apparently, satisfied with the efforts made by the deceased to dispose of the goods, although only a part of them had been disposed of and none of them had been paid for, as far as the evidence shows. The goods were delivered in March, 1915, and the deceased died on August 20, 1917, so that for a period of 2 years and 5 months no objection was taken by the plaintiff to the manner in which the deceased was disposing of the goods. To establish the fact that the deceased wrongfully converted the goods to his own use, some wrongful act on his part must be established. The onus is on the plaintiff to establish the wrong-

ful act, and he has failed to do so.

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

The judgment below will be set aside, and judgment entered for defendant, dismissing the action with costs.

Appeal allowed.

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Alberta Supreme Court, Appellate Division, Stuart, Beck and Hyndman, JJ.A., October 20, 1922.

CHATTEL MORTGAGE (§IVB—45)—RENEWAL—PRIORITY OVER CLAIMS OF SIMPLE CREDITORS—CREDITORS SUBSEQUENTLY OBTAINING JUDGMENT, AND SEIZING UNDER EXECUTION—BILLS OF SALE ORDINANCE (O.C. 1915 (ALTA.), CH. 43)—CONSTRUCTION.

Simple creditors at the time of the renewal of a chattel mortgage pursuant to a Judge's order made under sec. 23 of the Bills of Sale Ordinance O.C., 1915 (Alta.) ch. 43, have no proprietary interest in the specific goods at the time of the renewal, and a seizure under executions on judgments subsequently obtained are not effective as against the mortgagee.

CHATTEL MORTGAGE (§III—38)—VALIDITY AS AGAINST CREDITORS—POSSESSION TAKEN OF CHATTELS BY MORTGAGEE DURING CURRENCY—MORTGAGE NOT RENEWED.

Where a mortgage is, unquestionably, valid as against creditors, if the mortgagee during the currency of the mortgage and before renewal becomes necessary, takes what is an unquestionable possession of the goods, and yet makes no sale or change of title in the goods, the mortgage remains valid and effective as against the creditors without renewal.

[*G.T.P.R. Co.* v. *Dearborn* (1919), 47 D.L.R. 27, 58 Can. S.C.R. 315, distinguished; *Halbert* v. *Peterson* (1905), 36 Can. S.C.R. 324, referred to.]

APPEAL from the judgment of Ives, J., in favour of the plaintiffs upon an interpleader issue between the execution creditors of Walter R. Martin and A. R. Phillips and of the firm of Martin & Phillips, as plaintiffs and Coste, a chattel mortgagee of Martin as defendant. Reversed.

The facts of the case are fully set out in the judgments following.

H. P. O. Savary, K.C., for appellant.

C. S. Blanchard, for respondent.

STUART, J.A.:—I have had the opportunity of reading the judgment of my brother Beck in this case and I am bound to say that, although I have hesitated, considerably, before concurring in it, I have also found it very difficult to find any serious flaw in the reasoning contained therein. It seems to me almost, if not quite, impossible to refute it.

But, perhaps, it is worth while to draw attention to the one matter which has been the cause of my hesitation. It is suggested by my brothers Beck and Hyndman that the concluding words of sec. 23, O.C. 1915 (Alta.) ch. 43, point

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to some discretionary power in the Judge to whom an application is made for an order extending the time for filing a renewal statement. The section itself suggests that the Judge may, in his discretion, require notice to be given, "by advertisement or otherwise," of the intended application. The order made in this case by His Honour Judge Greene shows that no notice of any kind was exacted, that the order was made entirely *ex parte* and solely upon an affidavit of the mortgagee explaining the cause of the omission to file the renewal statement.

Now this very action shows that there were creditors who would probably have desired to be heard. The plaintiff McCabe had become a creditor while the mortgage was in good standing and on file. His note was taken on March 29, 1919. The omission did not occur until January 14, 1920. The plaintiffs, the Calgary Brewing and Malting Co., got their judgment upon a note dated May 10, 1920, that is, during the interval between the omission and the making of Judge Greene's order extending the time. This may have been (for the facts are not stated), either a present granting of credit or a taking of security for a previous advance or debt made or incurred before the omission. The facts as to the claim of the Canada Wire and Cable Co. are not stated, except that the date of the judgment is given.

Now, inasmuch as the facts as to the existence of these claims against the mortgagor were not presented to Judge Greene, I doubt very much whether it can be said that he ever really exercised any discretion to disregard them. And the question has arisen in my mind, whether they ought not, in such circumstances, to be allowed even now, to question the propriety of the order of extension itself. They were not parties to it and if it affected their interests in any way prejudicially, it seems to me to be possible that they might have a right to ask to have it disregarded.

If the Judge had made an enquiry into the state of the mortgagor's affairs, as we always do in the case of an extension of time for filing an agreement to pay for shares otherwise than in cash under the Companies' Ordinance, O.C. 1915 (Alta.) ch. 61, in regard to a joint stock company, it may be that where he found credit had been given while the mortgage was in good standing, he would have disregarded such a creditor, but that, where credit had been given when there appeared to be no valid encumbrance filed he would have protected the creditor in some way. Is it too late to insist on some such protection in an interpleader suit of

this kind? Of course such a point as this, viz., the validity of the order itself for want of notice was not suggested on the argument and, as it is an interpleader suit, I suppose it was really too late even at the trial to raise any such question, and, *a fortiori*, too late now.

But, if any of the present plaintiffs had at the trial adduced evidence showing that it had, after the omission to renew, searched the records, found that there had been a $35,000 mortgage filed but not renewed, and that, on the assumption that it had been paid, a credit had been given to the debtors who apparently owned a large amount of chattel property, then, I am not sure but that such a creditor would have been entitled to say "We had a right to be heard before Judge Greene before the mortgage was reinstated. He disregarded us entirely and we now say that there was no right to make such an order without hearing us and this was a 'right' within the meaning of sec. 23, to which the order is still subject." But there was no evidence of this kind presented. I would like to reserve this point for the future, if it ever comes up.

I have myself made quite a few such orders as His Honour Judge Greene made and without any more enquiry or material. I always assumed that by the insertion of the proviso protecting third parties in the words of the statute, I could not possibly be prejudicing the interests of any one in his absence.

While, therefore, I concur in the judgment of my brother Beck, it seems to me that the judgment, if it finally stands, must lead to greater precaution in making orders under sec. 23.

With respect to the other point, I was of opinion at the close of the argument that, when an order for sale had actually been made by the Master under the Extra-Judicial Seizure Act, 1914 (Alta.) ch. 4, it was impossible to suggest that there was any necessity for the filing of a second renewal statement thereafter.

BECK, J.A.:—The chattel mortgage, Martin to Coste, was executed on December 29, 1917, and duly filed on January 14, 1918. Under the provisions of the Bills of Sale Ordinance O.C. 1915 (Alta.) ch. 43, sec. 17, renewal was required to be made within 2 years from the filing; that is, by January 14, 1920. It was, in fact, renewed only on October 13, 1920, but this renewal was made pursuant to a Judge's order made under sec. 23, which reads as follows:—

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"Subject to the rights of third persons accrued by reason of such omissions as are hereinafter defined [a Judge] .....on being satisfied that the omission to register a mortgage.....or any statement and affidavit of renewal thereof within the time prescribed by this ordinance or the omission or misstatement of the name, residence or occupation of any person, was accidental or due to inadventure or impossibility in fact, may, in his discretion order such omission or misstatement to be *rectified* by the insertion in the register of the true name, residence or occupation or by extending the time for such registration, on such terms and conditions, if any, as to security, notice by advertisement or otherwise or as to any other matter, as he thinks fit to direct."

The only restriction contained in the order was:—"Subject to the rights of third persons by reason of the omission to renew within the time limited by the Bills of Sale Ordinance."

The plaintiffs at the date of the renewal were simple creditors. Subsequently, they obtained judgments and issued execution under which the goods in question were seized. And the question raised was whether the seizure under the executions was effective as against the mortgagee or, in other words and more explicitly, was the order extending the time for renewal together with the renewal made in pursuance of it, effective to keep the mortgage alive as against the general body of simple creditors or, still more explicitly, were the simple creditors existing during the interval while the mortgage remained unrenewed "*third persons*" and, if so, were they third persons who had "*rights*" which were or could be made effective against the goods, and, if so, were those rights such as "*accrued by reason of the omission to renew*"?

For a solution of this question it is necessary to consider the effect of the decision of the Supreme Court of Canada in the case of *G.T.P.R. Co.* v. *Dearborn* (1919), 47 D.L.R. 27, 58 Can. S.C.R. 315. That case, settling a divergence of judicial opinion, held that in sec. 17 of the Bills of Sale Ordinance, O.C. 1915 (Alta.) ch. 43, enacting that a mortgage filed should cease to be valid, unless renewed within two years, against "the creditors" of the mortgagor and against subsequent purchasers and mortgagees in good faith for valuable consideration, the word "creditors" means all creditors of the mortgagor and not merely execution creditors.

To this extent, the decision of this Court in *Security Trust Co.* v. *Stewart* (1918), 39 D.L.R. 518, 12 Alta. L.R. 420 at p. 423, is overruled in 47 D.L.R. 27.

Reverting then to sec. 23, O.C. 1915 (Alta.) ch. 43, how are the words "subject to the *rights* of *third persons, accrued by reason* of such omissions as are hereinafter defined" to be construed?

The "omissions" defined in the section are:—(1) Omission to register a mortgage or bill of sale. (2) Omission to register an authority to take or renew a mortgage. (3) Omission to register a statement and affidavit of renewal within the prescribed time. (4) Omission (or misstatement of) the true name, residence, or occupation of any person (in the mortgage, bill of sale, authority, renewal statement or affidavits).

"Omissions" does not include such things as an insufficient description of the goods or the untrue expression of the consideration (sec. 11), which, consequently, are incurable under sec. 23.

Any omission to conform with the requirements of the Ordinance (where the Ordinance applies) with reference to a purchase or mortgage causes the purchase or mortgage to be "absolutely null and void" (secs. 9 and 11) or to "cease to be valid" (sec. 17), as the case may be, as against creditors of the mortgagor and as against subsequent purchasers or mortgagees in good faith for valuable consideration. It seems impossible to contend that "third parties" does not include, and probably there is no other class of persons that it can include than, creditors and subsequent purchasers and mortgagees. Then what are the "rights"—what is the extent of the rights—which, by reason of such omissions accrue to these third parties—the creditors and subsequent purchasers and mortgagees? "Subsequent," of course, means subsequent in date to the purchase or mortgage attacked. Now, clearly, it is not every subsequent mortgage in good faith for valuable consideration whose rights are preserved, but only such subsequent mortgagees as have themselves got, concurrently with the mortgage, immediate delivery accompanied by an actual and continuous change of possession or got an instrument of mortgage made and filed in accordance with the requirements of the Ordinance and, in the latter case, have, if two years have elapsed, maintained it on foot by renewal; and in the case of a subsequent purchaser the same restriction of definition is applicable, except, of course, that of renewal. Similarly, creditors must,

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at least, be restricted to such creditors as were creditors before the rectification of omissions—though this conclusion may result rather from a consideration of the word "rights."

What then are the rights of these classes of persons respectively? In the case of subsequent purchasers and mortgagees, the rights are the vested rights of the purchaser or mortgagee, as the case may be, to the specific goods. Non-execution creditors had no such rights. I think it clear that it cannot be properly said that they had any vested right to or in the specific goods. They occupied such a position towards—not the goods, but—the mortgagor that, by suing the mortgagor and proceeding to judgment and execution, they would then have the right to seize the goods comprised in the mortgage originally being, or subsequently becoming, invalid for non-conformity with the ordinance—that right of seizure coming into existence only upon the specific goods becoming bound by the lodging of the execution in the sheriff's hands, and the creditor thereby, and then, acquiring a vested interest in the specific goods. The creditors also occupied such a position that, by appropriate proceedings, they could have acquired a right in or to the specific goods by liquidation, bankruptcy, or other similar proceedings. And because of occupying that position during the time the defect in the mortgage was in existence, that is, being then simple creditors of the mortgagor without, however, having any proprietary interest in the specific goods they could acquire, in one of the ways indicated, a specific right in or to the goods.

The simple creditors not having in the interval of default any vested interest in the specific goods mortgaged, can it be said that they had a contingent or inchoate interest? These expressions seem to be the only alternatives to a vested interest and seem to imply some kind of present right in or to the specific property, which is capable at the moment of being made the subject of a contract *inter vivos* or of an action, for example, one for an injunction. It is said that there existed a right in the simple creditor, to bring an action to declare the mortgage to have ceased to be valid against their claims. It seems to me that this is not so; that the Court would not entertain such an action, inasmuch as, if it did, the action could result only in the Court repeating the words of the ordinance; and that the only remedy of the simple creditors was by proceeding to judgment and execution or by other appropriate proceedings to obtain, for the first time, an interest in the specific goods.

In the *Dearborn* case, 47 D.L.R. 27, the simple creditors did this, it there being found that nothing had occurred intervening between the accruing of the personal right of the simple creditors and the acquiring of a proprietary interest in the specific goods, by means of execution based upon the previously existing personal right; that, in other words, nothing had intervened to prevent the consummation of a unity between the two.

In the *Dearborn* case *supra* the chattel mortgage was never renewed and, consequently, in that case, the effect of an order under sec. 23 and of a renewal in pursuance of such an order was not considered.

Now, reverting to the words in the opening clause of sec. 23—"rights accrued by reason of such omissions." It seems improper to attempt to define the word "rights" independently of the words "accrued by reason of such omissions." We must take the whole context. If the simple creditors have any greater rights than those I have said, the words "accrued by reason of such omissions" are entirely superfluous, and it cannot be supposed that words are used uselessly. It seems clear, therefore, that what is protected when a renewal is made under sec. 23 are rights which have, before the renewal, become attached to the goods. Judicial opinion in the only provinces in which this provision is in force accords with the opinion I have expressed.

It was so held by the Court *en banc* of Saskatchewan, eight years ago, in *Rogers Lumber Co.* v. *Dunlop* (1914), 20 D.L.R. 154, 7 S.L.R. 421. The same opinion was expressed by Hyndman, J. in *Royal Trust Co.* v. *Town of Caston* (1917), 37 D.L.R. 277, 13 Alta. L.R. 535, and by myself in *Security Trust Co.* v. *Stewart*, 39 D.L.R. 518. In British Columbia, Clement, J.'s, decision in *Re W. P. Ellis & Co.* (1907), 13 B.C.R. 271, by reason of his reference to the English case of *Re Ehrmann Bros. Ltd.*, [1906] 2 Ch. 697, 75 L.J. (Ch.) 817—a case under the Companies Act 1900 (Imp.) ch. 48, to which I shall refer presently—seems to imply the same opinion. The latter case was followed in *Morrison Thompson Hardware Co.* v. *Westbank Trading Co.* (1911), 16 B.C.R. 314.

There is a provision in the English Bills of Sale Act, 1878 (Imp.), ch. 31, sec. 14, which is substantially in the same words as sec. 23 of our ordinance. No doubt, the latter was copied from the former. The opening protective words do not appear in the English Act; but it had already been held, in England, before the introduction of the clause into our

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ordinance that "it could not have been intended to give a discretion to extend the time for registration so as to defeat a title actually vested in a person who had acted with perfect good faith"—that is, "after the title to the goods had actually vested in the execution creditor by reason of the failure of the holder of the bill of sale to comply with the provisions of the act."

It would seem to have been the intention to express in the ordinance what had been expressed in the English decisions.

In the English Companies (Consolidation) Act, 1908 (Imp.), ch. 69, there is a somewhat similar provision, sec. 96, for the extension of time for registration of mortgages or charges and for the rectification of mistakes. The power is not to be exercised unless the thing to be rectified "is not of a nature to prejudice the position of creditors or shareholders of the company," and the practice is to insert in the order, words to the effect that the order is to be without prejudice to the rights of parties previously acquired. The result of the decisions seems to be that the Court is restricted from making an order prejudicing acquired vested rights in the goods, e.g., the rights of execution creditors—that it has no discretion in this respect—but has a discretion to impose terms protecting others. See *Re Ehrmann Bros. Ltd.*, [1906] 2 Ch. 697 and *Re Cardiff Workmen's Cottage Co.*, [1906] 2 Ch. 627. See Reed's Bills of Sale Acts, 9th ed. p. 203.

On a first reading of sec. 23 O.C. 1915 (Alta.), ch. 43, it seemed to me that the closing words "On such terms and conditions, if any, as to security, notice by advertisement or otherwise or as to any other matter as he thinks fit to direct," indicated that the opening words of the section were not intended to be confined to the rights of third persons whose claims could be ascertained by a search in the proper offices, e.g., the office for the registration of bills of sales and chattel mortgages, and lien notes, and the sheriff's office; but observing the result of the English cases just cited and especially the argumentation of Buckley, J. in the latter case, it seems to me that the opening words are intended to be an absolute nullification of the effect of the order with respect to vested rights in the specific goods and that the closing words of the section are intended to give the Judge a discretionary power, in special cases, of directing that the rectification shall be without effect as against the claims of certain specific persons or classes of persons.

For the reasons which I have endeavoured to make clear it seems to me that although from the moment of the omission to renew the simple creditors had some kind of rights, which, by appropriate proceedings, could be made the starting point and basis for the acquiring in the future of rights in the specific goods, yet the defect of omission having, in pursuance of the ordinance, been rectified, the intervention of the rectification prevented the development and consummation of that personal right into a right against the specific goods which is alone the right which it is contemplated by sec. 23 should be preserved.

I would, therefore, hold that the defendant's mortgage was validated as against the plaintiff's claim, in respect of the omission to renew, which was rectified pursuant to the Judge's order.

Then it is urged on behalf of the execution creditors that even if the renewal pursuant to the judge's order was effective to keep the mortgage in good standing, yet, upon the lapse of a year from the date of renewal, the mortgage then ceased to be valid for want of a renewal, (sec. 19), because, as is claimed on their behalf, there was, before the time for this second renewal had expired, no delivery to the mortgagee of the mortgaged goods, accompanied by an actual and continued change of possession, nor did the mortgagee take actual physical possession of the mortgaged goods. Admittedly, there was no second renewal or delivery by the mortgagor to the mortgagee of the mortgaged goods. It is of importance to fix the date when it became necessary to renew the mortgage the second time, unless excused. I think that in view of the terms of sec. 19, that date would be October 13, 1921. The words of sec. 19 are that a second renewal is required before "the expiration of the term of one year from the day of the *filing of the statement required by the said sec.* 17."

Then comes the question whether renewal on or before October 13, 1921 was excused. If it was excused, it was so by reason of a seizure by the mortgagee, while the mortgage was in good standing, namely on November 1, 1920, and (what it is important not to overlook) of acts and conduct following upon and in furtherance of such seizure.

Before considering this question, I think it well to call the different Provinces. Turning over the pages of Barron & attention to the difference between the Bills of Sale Acts of O'Brien on Chattel Mortgages & Bills of Sale, 2nd revised, I find as follows: In the Acts of Alberta, New Brunswick,

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and Saskatchewan, the words are: (See pp. 198, 318, 564.) "accompanied by an immediate delivery and an actual and continued change of possession"; in the Act of British Columbia (p. 245); "possession or apparent possession," (defined at p. 234); in the Acts of Manitoba and Ontario:— "actual and continued change of possession" *defined to be* (at pp. 269, 385) "such change of possession as is open and reasonably sufficient to afford public notice thereof."

Under the Acts of Nova Scotia and Prince Edward Island the question does not arise, inasmuch as under these Acts, every bill of sale authorizing the taking of possession at or after its execution requires to be registered.

The English Bills of Sale Acts are those of 1854, ch. 36; 1866, ch. 96, 1878, ch. 31; and 1882, ch. 43. Section 8 of the Act of 1878 (Imp.) ch. 31, enacts that every bill of sale etc. shall be registered etc., otherwise it shall as against certain classes of persons be deemed fraudulent and void "so far as regards the property in or right to the possession of any chattels comprised in such bill of sale which" etc., are "in the *possession or apparent possession* of the person making such bill of sale etc.

Sec. 4 of the 1878 Act defines "apparent possession" as follows:—

"Personal chattels shall be deemed to be in the 'apparent possession' of the person making or giving a bill of sale, so long as they remain or are in or upon any house, mill, warehouse, building, works, yard, land or other premises occupied by him or are used and enjoyed by him in any place whatsoever, notwithstanding the formal possession thereof, may have been taken by or given to any other person."

This provision was repealed as to future transactions by sec. 8 of the Act of 1882 which requires registration in all cases. According to Mellish L. J. in *Ex. parte Jay, Re Blenkhorn* (1874), L.R. 9 Ch. 697, 43 L.J. (Bcy.) 122, 22 W.R. 907, to prevent a possession being merely "formal" under the words of the above-quoted provision, (43 L.J. (Bcy.) of p. 126).

"There must be something done, which, in the eyes of everybody who sees the goods, *or who is concerned in the matter*, plainly takes the goods out of the apparent possession of the debtor."

Again, the decisions have restricted the meaning of apparent possession, notwithstanding its definition, by holding, for instance, that where there was really no change in the actual possession, the actual and apparent possession

would be attributed by law to the person holding the legal title. *Ramsay* v. *Margrett*, [1894] 2 Q.B. 18, followed and applied in a number of cases and lastly in *French* v. *Gething*, [1922] 1 K.B. 236.

In my opinion, we have nothing to do with statutory requirements of the conditions as to delivery or possession, obviating the necessity for a bill of sale or chattel mortgage in the first instance but, at all events in the case of a mortgage in good standing, have merely to enquire what, apart altogether from such statutes, would be an actual *bona fide* taking of possession in the eye of the law.

But, if this view generally is incorrect, then certainly no greater or different change of possession is necessary to dispense with a properly registered instrument.

Under our ordinance, this is merely an "actual" possession, and it is not actual as interpreted in the present Ontario Act, for that interpretation was introduced only in 1892 (Ont.) ch. 26, sec. 3. No such interpretation clause has been added to our ordinance which was introduced long prior to that Act.

The cases decided under the Ontario Act, prior to 1892, are much less exacting upon the question of possession than those subsequently decided. See for instance *Kinloch* v. *Scribner* (1886), 14 Can. S.C.R. 77.

It is clear then that great discrimination must be used in attempting to apply the judicial decisions of other Provinces and of England to the statutory provisions of this Province. I desire to emphasize the point that all these expressions refer to the condition imposed by statute making necessary the taking and filing of an instrument of mortgage in the first instance and do not purport to deal with the distinct question of the rights and duties of a mortgagee once he has a valid mortgage.

In the *Dearborn* case, 47 D.L.R. 27, the question, whether the taking of possession by a mortgagee without the intervention of the mortgagor would keep the mortgage in good standing, and if so, what is a sufficient taking of possession for that purpose, were not settled.

As already stated, there was no renewal in that case and the seizure by the mortgagee, in that case, was made after the time for renewal had expired. Here, the mortgage was in good standing, and, consequently, the question for our consideration now is whether, while a mortgage is in good standing, taking of possession by the mortgagee obviates

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the necessity for renewal, and if it does, was there a sufficient taking of possession.

In the *Dearborn* case it was held that the possession taken was not sufficient for the purpose—namely, of validating a mortgage which already had ceased to be in good standing.

Anglin J., says 47 D.L.R. at p. 35 that the evidence did not:—"establish any change of possession or anything more than a mere formal delivery to the sheriff's officer, as the mortgagee's bailiff, without any real change of the possession being intended or effected. The apparent possession continued as before. The goods covered by the chattel mortgage were found by the sheriff's officer lying in or about a barn on a tenanted farm. After taking an inventory, the officer left them on the place just as he found them in charge of the tenant, without pay, merely with instructions to 'see that nobody took the stuff.' In my opinion, even in the absence of a statutory provision expressly prescribing that the change of possession be open and reasonably sufficient to afford public notice thereof (*Hogaboom* v. *Grayden*, (1894), 26 O. R. 298, at p. 302), what took place did not constitute the 'actual and continued change of possession' requisite to dispense with a mortgage duly registered in conformity with the Bills of Sale Ordinance, and only such possession would enable the mortgagee to hold as against execution creditors of the mortgagor."

Mignault, J., expressly agreed with Anglin, J., (47 D.L.R. at p. 43) that "there was not, by means of the proceedings under the seizure [under the mortgage] such a taking of possession of the mortgaged goods as would dispense with compliance with the requirements of the statute as to registration or renewal thereof."

Davies, C.J., held that, inasmuch as the goods had not been actually sold at the instance of the mortgagee, they were still held under the mortgage which had become invalid against the execution creditors, apparently holding that even a seizure resulting in an entire change of possession would be insufficient. Anglin and Mignault, JJ., expressly leave open this question contenting themselves with finding an insufficient change of possession. Idington and Brodeur, JJ., express no opinion upon this point, which is, therefore, left entirely open.

There are in the present case three execution creditors who are plaintiffs. Their executions were respectively placed in the sheriff's hands on June 21, August 19 and June 14, 1921. The debts founding their judgments were, appar-

ently, all in existence before the date of the renewal of the mortgage.

On November 1, 1920, the sheriff seized the mortgaged goods under a warrant issued to him by Coste, the mortgagee; and the sheriff took some kind of possession of the goods and was continuing to hold the goods when the plaintiff's executions came into his hands.

To understand the kind of possession the sheriff took as mortgagee's bailiff it is necessary to call attention first to some other facts.

The chattel mortgage, as already stated, was made by Martin alone. Concurrently, he, alone, executed a land mortgage upon the land upon which all the goods in question were situated; and each is expressly stated to be collateral the one to the other. The land and the goods together were the business premises and plant of a foundry and machine shop. This business was carried on by the firm of Martin & Phillips, apparently, from a time soon following the execution of the mortgages—for the debts to the execution creditors were partnership debts—and the proper inference to be drawn is, it seems to me, that, subsequently to the mortgages, Phillips acquired as purchaser some proprietary interest in the goods and perhaps in the land and that at a date long prior to the date at which, if nothing obviating the necessity for it intervened, it became necessary to renew the chattel mortgage.

An agreement between Martin and Phillips made *bona fide* whereby Phillips was given a partnership interest in Martin's property would not, I think, in view of a considerable body of judicial authority in Ontario, followed in the Western Provinces, come within the provisions of the Bills of Sale Ordinance so as to require the registration of a bill of sale, in default of change of possession.

If this is so, then, in consequence of the provisions of the Partnership Ordinance, N.W.T. Ord. 1899, ch. 7, sec. 25, the goods being partnership property were seizable only under the executions against the firm, as such, of Martin & Phillips, not under those against the individual partners, Martin & Phillips.

When the sheriff went to execute the mortgagee's distress warrant he found one White in charge of the business as manager, i.e., of the partnership business of Martin & Phillips. He had acted in that capacity from about November, 1918. Martin had since about November, 1919, been engaged in developing some exploration work in the north

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country and, consequently, was seldom, if ever, about the premises of the partnership. Phillips' work was "field work" and he consequently was never actively concerned with the shop. There was a painted sign on the building "Martin & Phillips." When the sheriff made the seizure under the mortgagee's distress warrant, he took an undertaking from White to keep the goods as his bailiff. The question of White's remuneration was not talked of until some 6 or 7 weeks afterwards, when it was agreed between him and the sheriff that he should get his compensation by continuing to run the business and make what he could out of it—the idea, apparently, being that it would be disastrous not to keep the business on as a going concern, and that, in the course of time, it might be sold as an entirety for a sufficient sum to satisfy or nearly satisfy all creditors. White took charge and managed the business, independently of both Martin and Phillips. He cut down the staff somewhat.

It is, I think, the proper inference, that all the employees of the business knew that Martin and Phillips had lost control of the business and probably that any of the public doing business with White as manager knew that some change of that nature had taken place.

On October 27, 1920, Coste commenced an action on his land mortgage and in that action an order *nisi* (that is, judgment), was issued on March 8, 1921.

In that action, on June 29, 1921, the plaintiff obtained an order for sale of the land, and, concurrently, obtained under the Act respecting Extra Judicial and other seizures an order for the sale of the goods comprised in the chattel mortgage. The two orders were, substantially, in the same terms, and resulted in an advertisement being settled by the Master for the sale by tender both of the land and goods. The advertisement purported to be given "pursuant to judgment and order for sale in a certain action No. 16705" (*Coste* v. *Martin*) "in the Supreme Court, Judicial District of Calgary and under and by virtue of a chattel mortgage from Walter R. Martin to Eugene Coste, and a distress warrant directed to the sheriff of the Judicial District of Medicine Hat against the goods and chattels therein contained, and under and by virtue of an order for sale of the said goods and chattels."

No sale was effected. Nothing that occurred afterwards seems material.

It is to be remembered that in this Province—differing in this respect from all the other Provinces—a mortgagee cannot himself make a seizure for the purpose of realising

upon his mortgage but is compelled to do so through the sheriff (1914 (Alta.), ch. 4, sec. 1) with the two consequences, first that he is to a large extent, compulsorily, in the hands of the sheriff, and secondly, that his bailiff is a public official, whose acts, it would seem, ought to be given a more public effect than those of a private individual.

If we take the case of a mortgage, unquestionably valid as against creditors, it seems to be undoubted that if the mortgagee, during the currency of the mortgage and before renewal, becomes necessary, takes what is an unquestionable actual possession of the goods, and yet makes no sale or change of title in the goods, the mortgage remains valid and effective as against the creditors of the mortgagor without renewal. *Wood* v. *Weimar* (1881), 104 U.S. 786. This proposition depends not upon the Bills of Sale Ordinance, which have no application to such a case, but upon the general law, composed of what was formerly common law and equity (See *Hulbert* v. *Peterson* (1905), 36 Can. S.C.R. 324).

The possession taken in this case by the sheriff as bailiff for the mortgagee, unlike that in the *Dearborn* case, 47 D.L.R. 27, was clearly actual, which, as I have said, is, I think, sufficient, but it was also, in my opinion, also visible, if that is essential.

Had I come to the conclusion that the defendant could not maintain his claim under the chattel mortgage, I should have been disposed to direct a reference to a Judge to ascertain what, if any, of the goods in question, could be held by the mortgagee under his land mortgage, for it appears altogether likely that a large proportion of the goods are fixtures which the land mortgage would carry and that there was no final and irrevocable election by the mortgagee to treat them as chattels.

For the reasons indicated, I would hold in favour of the defendant's chattel mortgage, with the result that I would allow the appeal with costs, and direct judgment to be entered for the defendant with costs, including the defendant's costs of the interpleader proceedings.

HYNDMAN, J.A.:—I agree generally with the remarks of Beck, J.A., in allowing the appeal.

I am greatly impressed with the peculiar terms of sec. 23 of the Bills of Sale Ordinance, O.C. 1915, ch. 43, empowering a Judge to extend the time for registration. It enacts substantially:—

"Subject to the rights of third persons accrued by reason of such omissions as are herinafter defined [a Judge of the

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D.C.....] on being satisfied that the omission to register a mortgage.....or any.....renewal thereof within the time prescribed by this Ordinance.....may in his discretion order such omission.....to be rectified by .....extending the time for such registration *on such terms and conditions, if any, as to security, notice by advertisement or otherwise or as to any other matter as he thinks fit to direct.*"

Now if the expression "third persons" is to be taken as the equivalent of "creditors" and "creditors" mean the whole body of creditors then in existence, as decided in the *Dearborn* case, 47 D.L.R. 27, then, it seems impossible to conceive what object the legislation could have had in view, in providing that the Judge should have the right to require security, give notice by advertisement, &c., &c. It surely must have been intended that a certain fraction only of the body of creditors would still remain unprejudiced by reason of the order and that, once the order is granted, the chattel mortgage should stand valid and effectual against all, except those who already have rights directly against the goods, and those who are protected specifically in the Judge's order, which protection he, doubtless, would have the power to give.

To illustrate what I have in mind, take the case of a mortgagor (the mortgage not having been renewed in time) having a number of creditors, some execution creditors and others whose debts are not yet, but are almost, due; and still others whose claims do not mature for a lengthy period.

In such circumstances, the Judge would, of course, have no authority to make any order affecting execution creditors whose rights had already, in fact, accrued directly against the goods; but, he would have power to make his order, subject to the rights of the ordinary creditor, whose debt is on the eve of maturity, and cut out any claims of the creditor whose debt does not mature for a lengthy period.

Unless this was what was in the contemplation of the framers of the Act, the provisions I have referred to, must, I think, be regarded as a mere waste of words, for they can have no practical or useful effect if the order is, in any event, subject to the rights of "third persons" interpreted as meaning "creditors generally" as decided in the *Dearborn* case.

It must not be overlooked that the granting of the order is in the discretion of the Judge and that he is empowered to make all necessary inquiries as to the true state of the mortgagor's affairs, and that he may grant the order on such terms and conditions as he may think fit to direct.

This, I think, is the protection which the public was intended to have by the legislation; but once the order is made, then the omission is rectified, or wiped out, subject only to such rights of third persons against the specific goods as they acquired owing to the omission, and possibly, subject further to such terms and conditions as the Judge may impose with regard to the unsecured or ordinary creditors.

Appeal allowed.

THOMPSON v. NORTHERN TRUST Co.

Saskatchewan Court of King's Bench, Brown, C.J.K.B. October 4, 1922.

DISCOVERY AND INSPECTION (§IV—30)—AMENDMENT OF CLAIM AFTER TRIAL HAS PARTLY TAKEN PLACE—EXAMINATION FOR DISCOVERY —WHEN GRANTED—SASK. RULES.

Where the plaintiff's claim has been amended after the trial of an action has partly taken place, and where such amendment is of such a character as to make it unsafe for the parties to go to trial without an examination for discovery, leave to examine will be granted, but it will not be granted when it can be of no assistance to the parties.

APPEAL from the order of a local Master refusing an order for examination for discovery. Affirmed.

W. H. McEwen, for plaintiffs.

T. D. Brown, K.C., for defendant.

BROWN, C.J. K.B.:—The material on which this application is based is so incomplete and unsatisfactory that one is tempted to dismiss the appeal on that basis alone. There is no material to indicate the state of the case at all, and even the pleadings are not complete, although a perusal of them is essential for a proper disposition of the application. There is what purports to be an amended statement of claim on file, but no original, and it is impossible to decide from a perusal of the amended claim to what extent the original claim has been affected by the amendments. Counsel, however, made certain statements during the argument, and I assume that somewhat similar statements were made during the argument before the local Master. I will endeavour to deal with the appeal in the light of such statements.

It appears that the action as originally framed was for an accounting. In this state of the pleadings, the case was set down for trial and came on for trial. The trial Judge ordered a reference and accounting, and in connection with the accounting, a special audit of the defendant's books was made. After the audit, and because of certain facts which came to light as a result of the audit, the plaintiffs applied to amend their claim so as to cover the matters thus revealed.

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The amendment was allowed and st[illegible]ment of defence filed to the amended claim. The defendants now want to examine certain of the plaintiffs for discovery. Ordinarily under our rules, either party is entitled, as a matter of course, to examine the other for discovery before trial, and ordinarily, unless the examination is held before trial it cannot be held at all *Stevens* v. *Olson* (1904), 6 Terr. L.R. 106. The above case, however, does not apply to the situation here, where the plaintiffs' claim has been amended after the trial has partly taken place. I can readily understand an amendment being of such a character as to justify an examination for discovery and as to make it unsafe for parties to continue the trial without such examination. I am not satisfied that an examination is at all necessary in this case. The defendants do not suggest in what respect they hope to get any assistance from such examination, and, moreover, I gather from the statements of counsel that the plaintiffs' amended claim largely arises out of disclosures made from an examination of the defendant's books and accounts, and it would appear to me that an examination of the plaintiffs would not be of any assistance. It may be that the defendants should have further and better particulars. If they want such particulars, they can demand same, and in the event of a refusal, and in the further event of them being entitled to such particulars, the same would be ordered on an application made for that purpose. Under all the circumstances, I see no reason for disturbing the order made by the local Master, and the appeal is, therefore, dismissed with costs.

Appeal dismissed.

THE KING v. NASHWAAK PULP & PAPER Co.

Exchequer Court of Canada, Audette, J. September 28, 1922.

EVIDENCE (§IIB—108)—DAMAGES—CIRCUMSTANTIAL EVIDENCE—BURDEN OF PROOF—APPRECIATION OF EVIDENCE.

Where plaintiff is forced to prove his case from presumptive or circumstantial evidence, such evidence, in order to prevail, should not only give rise to a presumption in favour of plaintiff's contention, but should also exclude the possibility of the accident having been occasioned by any other causes than those relied upon by the plaintiff.

INFORMATION filed by the Attorney General of Canada on behalf of His Majesty The King to recover damages sustained by reason of the caving in of certain portion of the right of way of the C.N.R. by a wash-out in the Province of New Brunswick. Dismissed.

The facts of the case are as follows:—

Plaintiff had built the embankment hereinafter mentioned leading to a railway bridge over the Nashwaak River as

part of its railway system. This embankment was built 18 feet in height and solely of loose sand and gravel, and was not rip-rapped. It extended into the water and being on a bend in the river was exposed to the full strength of the current. A wing-wall of the bridge was also erected, at right angles to the bank of the river, causing an eddy or whirlpool against this said embankment.

Defendant who for years had been using the river for the driving of its logs, etc., had erected a dam about three-quarters of a mile below the bridge and had also a number of piers connected by floating booms, used for the collecting and sorting of logs. This installation had been duly approved of by the Provincial Government. Part of the piers were carried away during the night previous to the accident. The river itself is a fast flowing river about 200 feet wide and the flow thereof had been greatly increased, at the time in question, by heavy rains and by melting snow, and freshets had occurred at different places along the river, and the frost was coming out of the ground. A number of logs had accumulated on the piers of the bridge extending a distance of 50 yards up stream, which did not raise the water and did not, appreciably, interfere with the flow thereof. For between 50 to 150 ft. below the bridge, there was clear water without logs.

On Monday, May 10, 1920, whilst a train of the plaintiff was travelling over the said embankment, it caved in, causing the train to topple over, resulting in the death of some of the crew and damage to cars, etc., for which compensation is now claimed from the defendant. Plaintiff claims that the cave in was caused by the works and jams of logs of the defendant, backing the water to an unusual height, to wit, 2 or 3 ft. above customary level, and when the piers broke, the water, suddenly receding, caused a suction under the embankment, undermining it, which was the cause of the accident. No one saw this exceptionally high water, or the waters receding. Defendant's contention is that the cave in was due to the improper construction of the embankment, amounting to negligence.

P. J. Hughes and *Raleigh Trites*, for plaintiff.
W. Henry Harrison and *J. J. F. Winslow*, for defendant.

AUDETTE, J.:—This is an information exhibited by the Attorney General of Canada, whereby the Crown claims the sum of $24,319.22 as damages resulting from an accident on the Canadian National Railway. It is alleged that the right

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of way caved in as a result of the use, in the manner hereinafter mentioned, by the defendants, of their piers and dams in driving logs on the Nashwaak River, near Marysville, in the County of York, in the Province of New Brunswick.

The defendants, who as well as their predecessors in title have been driving logs on the river in question for a number of years, deny having, in any manner whatsoever, done anything on the river which caused the accident in question; and aver by their pleadings that the accident resulted from the improper and negligent construction of the embankment which caved in and slid down the river on May 10, 1920.

The parties herein have filed for the purposes of this action, as ex. 11, the following admission, viz.:—

"1. That the defendant is riparian owner on both sides of the river from the highway bridge at Marysville to a point above the abutments and the piers holding the booms of the defendant company, which were carried out at the time of the accident. 2. That a dam above the highway bridge at Marysville was in existence for over 65 years prior to the time it was carried out. 3. That the C.N.R. authorities knew of the building of the dam and had the plan thereof."

And by ex. 10, it is further, *inter alia*, admitted:—

"(7) That the right of way upon which the Nashwaak bridge and its approaches are situate, to a width of 200 ft. on the west bank and 425 ft. on the east bank, is vested in His Majesty the King in fee simple."

The accident took place on the early morning of Monday, May 10, 1920.

On that morning of May 10, 1920, Moore, a locomotive engineer on the C.N.R. left South Devon at 4.40 a.m. and passed over the fill adjoining the railway bridge, where the accident occurred later—at between 4.50 and 4.55 a.m., with engine and tender running backwards and saw nothing, felt nothing unusual. He got over the place in question without accident and without noticing anything wrong.

On the same morning of May 10, 1920, conductor Long testified that he left South Devon, at 4.50 a.m. with the local freight train, loaded with pulpwood, composed of engine and about 15 cars and van, and proceeded to Marysville which he left at 5.30 a.m. and at about 1¼ miles therefrom, when he came to the west embankment of the railway bridge built across the Nashwaak river, the engine, tender and two cars went over the embankment,—as more particularly shown by the two photographs exs. 1 and 2.

Two of the crew lost their lives, one was injured, the track

and rolling stock were damaged; and for the recovery of all such elements of damage, the Crown is now suing the defendants.

Long says he came over from his van to the place of the accident and found half of the filling gone,—from the centre of the road it had slid out. The rails and sleepers had toppled over, leaning towards the river. He judged about 65 ft. in length had so slid. The centre of the track between those 65 ft. was worn out more than the ends. The embankment at that place is 18 ft. high. The engine and two cars took also a deal of material with them when falling down the embankment.

There had been a steady and heavy rain all of Saturday and Sunday (8th and 9th May), preceding the Monday (10th) upon which the accident happened. One witness said he thought the rain had started during the night of Friday.

The river was running high and rising on Saturday and Sunday, the volume of water being increased by the melting of snow in the forests, and the heavy rain during several days. Freshets were manifested at different places on the river, around the date in question. And witness Underhill said that he noticed quite a freshet, but that it was nothing unusual for that time on the river.

The Nashwaak river, as put by one witness, is a "savage river" liable to rises and falls.

About three quarters of a mile or so below the railway bridge, adjoining which the western embankment is built on the edge of the shore and which slid out, the defendant company had erected a concrete dam, and in 1919-1920, at 1000 ft. above the dam, they had five piers diagonally set across the river, and at the same height as the dam, being composed of two shore abutments and three piers, in front of which was a floating boom tied to the piers, for the purposes of gathering their logs. In the result, two new piers had been added at that date. The whole installation was approved by the Provincial Government.1865 (N.B.), ch. 53; 1919 (N.B.), ch. 109; *C.P.R. Co.* v. *Parke*, [1899] A.C. 535, 15 Times L.R. 427.

The theory of the Crown is that during the night between Sunday and Monday the top of these piers gave out under the pressure of the logs which had formed a floating jam; but there was no eye witness of the actual occurrence heard before me. Yet, it would appear from the evidence that the piers had given away and the water receded before the first

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train passed over the embankment in question on the morning of the accident.

The river is about 200 ft. wide and 14 ft. deep, which would give quite a large cross-section.

Now, it is contended by the plaintiff that the gathering of a large quantity of logs at the piers had the effect of raising the water about 3 ft. higher than the highest level of the past, and that, assuming the logs went over suddenly during the night of Sunday to Monday, the flow of the water being impeded and retarded by the logs, in suddenly receding, created a suction under the embankment at the railway bridge about three quarters of a mile up the river.

While this theory is supported by some evidence and contradicted by other, it may be stated, that, under conflicting evidence, it is so asserted. And as admitted at trial, the evidence does not disclose the cause of the accident. Even if, as surmised, the jam at the piers might have occasioned the damage to the bank, there is no evidence that it did and there is no reason to take that inference as a fact and be on the alert to accept it.

Was this alleged flood on the river the result of the piers or of the heavy rain? No one saw the waters receding suddenly, as alleged. Washouts on railways continually occur in the course of the year, and more especially in the spring, as a result of heavy rain and freshets, as well near and away from rivers.

The accident itself affords no just inference against the defendants,—it is a matter of proof. One must look around and see if the accident might just as well be the result of other causes. It is contended by witnesses heard on behalf of plaintiff that a floating jam would not affect the height of water to the extent mentioned by some other witnesses.

Now confronting this wide field of conjecture, there is sufficient evidence of a positive character to justify the inference of that it was not good and prudent workmanship to construct of sand and gravel an embankment 18 ft. high on this edge of a shore without the protection of rip-rap. How indifferent the railway people were to the possibilities of trouble here is further manifested by the fact that the workmen engaged in constructing the embankment were taken away before the same was completed to the satisfaction of the person in charge of such construction. Moreover, if the waters had only reached a level of 3 ft. less, the slide and the accident might just as well have happened from the same cause on account of defective construction.

There is no evidence establishing that the scouring or caving in started high or low on the bank.

There is ample evidence on the record to find that the building of such a railway embankment with a bank of light gravel and sand exposed to the action of the water in the river would not be proper workmanship and would amount to negligence. All reasonable care in the construction and maintenance of the bank does not seem to have been established.

It is important, however, to note and consider that while it is contended that the water went to this height of 2 to 3 ft. above the normal height,—that no one ever saw it. The contention is exclusively based upon the evidence of witnesses who gather and reason it from *indicia* upon the ground—upon the soil. And more especially, upon the evidence of witness Wade, a section man upon this very section which was under his care, who, after the accident,—at about 9 o'clock on Monday morning, May 10, 1920, crossed over the east side,—the side opposite where the accident happened, and made a mark on a telegraph post at the height he thought the water had gone up to. Again it will be noted this witness speaks not from having seen the water at that height but at the height he theorized and surmised it went from *indicia* on the post. In appreciating this testimony one must not forget that it had been raining heavily for several days and that this telegraph post must have been wet and soaked with rain from top to bottom. How could Wade with certainty distinguish the wet from the rain and the wet from the water from the river?

It is in evidence that by Sunday and even Monday morning there was a serious and large accumulation of logs occasioned by the piers of the railway bridge for 50 yards back, as testified to by witness Easterbrook—above the place where the accident happened—and yet this large accumulation of logs,—as shown on several photographs filed as exhibits,—did not seem to have interfered with the flow of the water in the river below. There is no evidence as to that effect and it is with this jam above the Railway Bridge that this high water and the floating jam below would have manifested itself at the piers near the dam, ¾ of a mile below, according to the theoretical and surmising evidence, placing the cause of the accident to such jam.

There was a strong current in the river during the days in question,—but it is well in this respect to consider that the embankment that gave way and where the accident hap-

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pened, is at almost right angle at the bend of the river where the full strength of the current strikes the very opposite side of the river where the accident happened. Moreover, one must not overlook that the lower end of the western wing wall of the railway bridge, adjoining the place of the accident, extends about 15 ft. from the shore, as testified by witness Maxwell, a civil engineer, who recently made a survey of the locality and the main abutment, is almost at right angle with the river.

From the evidence adduced by witness Price it appears that the bank would have,—either partly or entirely—gone only between the passage of the first train and that of the freight train that morning. He saw the accident from the opposite side of the river, at a distance of about 200 yards. He says that at about 5 o'clock, or before, that morning, when there was a dense fog he "thought he noticed something like fresh dirt on the south side of the embankment."

And at about 6 o'clock, when "the fog had lifted some," he heard the train coming and then could see that the bank had gone and the sleepers curved in.

At that time, according to the plaintiff's contention, the waters had subsided. At no time did the logs gather within between 50 and 150 ft. below the railway bridge, where it remained clear water. The logs would have gathered between the piers,—1,000 feet about the dam,—and this distance of 50 to 150 ft. from the railway bridge.

The question left to the Court is to determine whether this theory or surmise is a sufficient discharge of the burden of proof cast upon the plaintiff in proving his case—when it is obvious the accident might, under the circumstances, have happened through and resulted from several other causes which will have to be examined and analysed.

(a) The defendants contend the embankment in question "was improperly and negligently constructed." Upon this point, there is clear and distinct evidence, by competent witness, that had the embankment been properly rip-rapped there would have been no caving in, no slide and, therefore, no accident.

From the examination of all the photographs taken on May 10, the date of the accident, there is nothing showing any stone or any rip-rap, but quite the contrary.

There does not seem to have been any slide between the dam and the bridge, except at this embankment made of the material mentioned at trial. Would not that go to show that if there has been any slide there, that it is due to the

material used, which was left unprotected?

There is conflict in the evidence of the engineer who was supposed to have the charge of filling behind the western wing wall at the time of the construction of the railway bridge—and Astle the section foreman who was in charge of the men making the fill of this western approach—with respect to the nature of the material used. However, witness Howie, a civil engineer, and one of the contracting firm for that bridge, testified that he saw the material used in the embankment and that while he qualified it as good material, he says that it was not material that would protect itself against water—it would be all right if protected. But would not such a construction become a dangerous menace under flood conditions? Even witness Condon, District Engineer, C.N.Ry., says he would not leave a bank of light material exposed to water. Coming back to what has already been said which is that if properly rip-rapped, no accident would have happened, and as testified to by several witnesses, the embankment should have been properly rip-rapped above extreme high water and that it would be negligence not to so protect it.

In *Great Western R. Co.* v. *Braid* (1863), 1 Moo. P.C. (N.S.) 101, at 116, 15 E.R. 640, Lord Chelmsford said: "There can be no doubt that where an injury is alleged to have arisen from the improper construction of a railway, the fact of its having given way will amount to *prima facie* evidence of its insufficiency and this evidence may become conclusive from the absence of any proof on the part of the company to rebut it." See also *Wing* v. *London General Omnibus Co.*, [1909] 2 K.B. 652, at p. 663, 78 L.J. (K.B.) 1063, 25 Times L.R. 729.

(b) The accident happened on May 10, when the frost was coming out of the ground and when the railway authorities knew so well that their road bed was not in good and proper order, that witness Long,—the engineer in charge of the wrecked freight train,—testified that it was an ordinary freshet and that at the time of the accident he was going at a speed of 5 to 6 miles,—because they had had "orders limiting their speed to 10 miles an hour, due to the softness of the track,—that frost was then coming out of the ground, that pulp wood was heavy—." Would not the limiting of speed to such a low rate as 10 miles an hour for these reasons amount to the knowledge that their tracks or right of way was in precarious condition and that it would be as plausible to surmise or accept the theory that the accident

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might have been the result of this bad state of the right of way rather than that assumed—sudden receding of water in the river,—which no one ever saw?

(c) Witness Campbell said that "the jar of a train would start a slide." Would not this be also more likely when the roadbed of the railway was in such bad condition that freight trains were not allowed to travel at a greater speed than 10 miles an hour?

(d) A train—or rather an engine and tender—had passed over the place of the accident shortly before the mishap without its crew noticing anything out of the ordinary. Before approaching the railway bridge and the place of the accident there is in the track a curve running into a tangent. Is it not also reasonable to surmise or suggest that a rail might very well have spread after the passage of the first train that morning, and started the slide described by witness Price? Is not that theory as reasonable as the sudden receding of the water on the river having the effect claimed as above mentioned? Witness Condon says the spread of a rail would have the same effect on the embankment as that claimed by the sudden receding of the waters on the river.

(e) Respecting the filling of the approach or embankment at the back of this wing wall, extending 15 ft. from the shore, the evidence discloses that it was entrusted to section-foreman Astle who declared there was no engineer in charge while he did the work,—notwithstanding the statement of the railway engineer who stated he occasionally went over to inspect. The same engineer was also contradicted respecting his statement as to the nature of the material used or rather where the material was also taken from. Witness Astle, the person in charge, stated rock had been thrown at the foot of the fill, but he adds that "we had not time to put rock as we wanted, we were called away." *Withers* v. *North Kent R. Co.* (1858), 27 L.J. (Ex.) 417.

Be that as it may, there is no satisfactory evidence to establish that the embankment was properly rip-rapped and that the necessary stone was put into the embankment.

I must also find, under the evidence, that the rip-rap mentioned in ex. 9 was not placed on that embankment. The context of the evidence establishes that clearly as the construction contract had nothing to do with the filling at the back of the embankment.

(f) It is further established by the evidence and ex. 1 that the building of the wing-wall at almost right angle with the river,—at that bend—and extending 15 ft. from the

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shore has had the effect of deflecting the course of the water or current onto the opposite shore and of creating an eddy (or a whirlpool as put by one of the witnesses), at the very foot or toe of this embankment which so caved in. The eddy was observed and noticed by some of the witnesses. Could not that eddy work into a sandy bank,—if it was not rip-rapped—and undermine and scour at the toe, thus provoking the slide in question? Witness Bishop contends that the embankment should not only have been rip-rapped on the surface, but that the bottom of the fill should have been made entirely of stone. The plaintiff rests his case upon the theory and surmise of one single manner in which the accident might have happened and I find that out of the many other causes above mentioned the one suggested by the plaintiff is the most unlikely of all.

However, the onus was upon the plaintiff to prove his case, and this onus was not discharged by the evidence adduced from which inferences merely could be drawn and which failed to negative the possibility of the accident having been occasioned by other causes which are just as plausible, if not more, than that surmised and relied upon by the plaintiff. The plaintiff failed to show with any reasonable degree of certainty—there is no direct evidence, flowing from weighty, precise and consistent presumptions or conjecture arising from the facts proved—that the accident was actually caused by the positive fault, imprudence or neglect of the defendant. In the result, I must find that the plaintiff has failed to prove his case. *Quebec and Lake St. John R. Co.* v. *Julien* (1906), 37 Can. S.C.R. 632; *Montreal Rolling Mills Co.* v. *Corcoran* (1896), 26 Can. S.C.R. 595; *Beck* v. *C.N.R. Co.* (1910), 2 Alta. L.R. 549. (See 47 Can. S.C.R. 397, ordering a new trial.)

Therefore, there will be judgment, declaring and adjudging that the plaintiff has failed to prove his case and dismissing the action with costs.

Appeal dismissed.

REX v. LIMERICK; EX PARTE BURDEN.

New Brunswick Supreme Court, Appellate Division, Hazen, C.J., White and Grimmer, JJ. June 8, 1922.

SUMMARY CONVICTIONS (§III—33)—POSTPONEMENT OF DECISION PENDING HEARING OF ANOTHER CHARGE.

While Justices of the Peace in summary conviction cases are not to mix up two or more criminal charges and convict or acquit in one of them with reference to the facts or in respect to the facts appearing in the others, the Justices may, in any circumstance arising out of the case itself and for its better

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determination, adjourn or postpone their decision, and, before deciding it, proceed with the trial of similar charges against the same accused so long as their discretion in so postponing is honestly exercised, and not used with a view of bringing in facts or evidence not having any legitimate bearing upon their decision.

[*Rex* v. *Steeves* (1914), 24 Can Cr. Cas. 183, followed; *Hamilton* v. *Walker*, [1892] 2 Q.B. 25; *Reg.* v. *Fry* (1898), 19 Cox. C.C. 135; *The Queen* v. *McBerney* (1897), 3 Can. Cr. Cas. 339, distinguished.]

APPLICATION by way of *certiorari* to quash a conviction under the Intoxicating Liquor Act 1916 (N.B.), ch. 20. Rule *nisi* discharged.

P. J. Hughes, shews cause against a rule *nisi*.

J. J. F. Winslow, in support of rule.

The judgment of the Court was delivered by

GRIMMER, J.:—In April last a writ of *certiorari* was granted by this Court to cause to be brought before it two convictions made by the Police Magistrate of Fredericton against one Weldon Burden for violation of the Intoxicating Liquor Act 1916 (N.B.), ch. 20, the charges or complaint against him being respectively for selling and keeping liquor for sale. One conviction was made on January 3 last, and the other upon January 9. The writ of *certiorari* was granted upon the sole ground that the Police Magistrate acted without jurisdiction in intermixing the trial of the two charges against the defendant Burden, and not disposing of one charge before proceeding with the other.

The facts as I am able to gather them are that on December 30 last one Fraser Saunders, a sub-inspector under the Intoxicating Liquor Act, caused two informations to be laid against the defendant Burden, charging him in the one case that between September 30, 1921, and December 18, 1921, he did sell intoxicating liquor contrary to the provisions of the Intoxicating Liquor Act, and in the other case that on December 23, 1921, the said defendant did keep intoxicating liquor for sale in the City of Fredericton without having first obtained a wholesale or retail license under the Intoxicating Liquor Act of 1916. Summonses were duly issued to the defendant Burden requiring him to appear before the said Police Magistrate on January 3 last at 10 o'clock in the forenoon, to answer the said information. The summonses were served upon the defendant, who appeared as required and was represented by counsel, and the charge for selling liquor between the dates named, that is September 30 and December 18, 1921, was first proceeded with, and the evidence of witnesses was taken until the testimony of all the witnesses present in Court was exhausted,

and the case was adjourned until 2.30 o'clock in the afternoon.

The second case was then taken up by the Police Magistrate, and witnesses were called and examined. While this was being done, a witness in the first case who had not been present and on whose account the adjournment was made, came into the Court and the proceedings in the second case were stopped, those in the first case opened against the protest of the counsel for the defence, and the witness who had come into the Court was examined and gave his evidence. The Court having decided against the protest of the counsel for the defendant to proceed, the counsel, thereupon, withdrew from the case at that stage and left the courtroom. The witness having been examined, whose testimony was very short, the Court thereupon adjourned again until 2.30 o'clock in the afternoon of the same day, when it was again proceeded with, and at which time the counsel for the defendant who had the Court in the forenoon returned and again appeared for the defendant, conducting the defence until the conclusion of the case, whereupon judgment was given by the Court and the defendant was found guilty of the offence charged against him and adjudged to pay a penalty of $200 and costs or be imprisoned in the York County jail for a period of 6 months. After a certain amount of evidence had been taken in the second case an adjournment was also made in that until January 6 at 2.30 p.m. upon which day the parties being present the case was proceeded with and evidence taken, whereupon the case was further adjourned until January 9 at 12 o'clock, when judgment was given, the defendant being found guilty of the offence charged, and adjudged to pay a penalty of $200 and costs or be imprisoned in the York County jail for the period of six months.

From the method pursued by the Magistrate on the trial of these causes, it was contended by counsel for the defendant that he had so intermixed the trials on the charges that it was impossible for him not to have been influenced in the second case by the evidence given in the first, and that, therefore, the convictions were both bad and should be quashed. The case of *Hamilton* v. *Walker*, [1892] 2 Q.B. 25, was strongly relied upon as an authority for the quashing of the indictment. In that case, a charge was made against the same person upon two informations before Justices of the Peace under different sections of the statute. The Justices having heard the case on the first information

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were asked by the defendant's solicitor to dismiss it, but they reserved judgment until they heard the other. The evidence being substantially the same in both cases, the Court quashed the conviction. In my opinion, this case is clearly distinguishable from that now under consideration. It is true that evidence was given by one witness in both of these cases, but the conviction in the first case contains evidence substantially different from that which was given in the second case, and it cannot, in my opinion, be successfully contended that the conviction in the second case was based upon the evidence which was taken in the first case, or that the magistrate was necessarily so influenced by the evidence given in the first case that he felt constrained to make the conviction in the second case. This, I think, is clearly the distinction between the case cited, and also the other cases which were relied upon, viz., *Reg.* v. *Fry* (1898), 19 Cox. C.C. 135, 62 J.P. 457; *The Queen* v. *McBerney* (1897), 3 Can. Cr. Cas. 339, 29 N.S.R. 327; *The King* v. *Burke* (1904), 8 Can. Cr. Cas. 14; and others.

It is quite true that our Courts do not countenance Justices mixing up two or more criminal charges and convicting or acquitting in one of them with reference to the facts or in respect to the fact appearing in the others, but it is also recognized as a prudent and right thing for Justices to avoid taking any such course which might have the appearance of such a mistake. Equally, our Courts would hesitate to throw doubt upon the authority of Justices in any case arising out of the circumstances of the case itself, and for its better determination to adjourn or postpone their decision, because, if their discretion in this respect be properly exercised, and not with a view of including facts or evidence which have no legitimate bearing upon their decision, it must not be interfered with. The point which is raised in this case was disposed of in our own Court in the case of *Rex* v. *Steeves; Ex parte Richard* (1914), 24 Can. Cr. Cas. 183, 42 N.B.R. 596, and I am of the opinion that the circumstances which led to the decision of the Court in that case existed in this, and that there was no such intermixing of these two cases as to render the action of the Police Magistrate improper or illegal. In the first case it was highly improper for the Police Magistrate, having adjourned the hearing until 2.30 o'clock in the afternoon to reopen it against the protests of counsel for the defendant, and take evidence. Upon this ground, if it had been urged before us, I am disposed to think the defendant could have suc-

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ceeded in voiding the conviction, but that was not taken and is not now open to the defendant. It does seem that a very severe penalty has been imposed upon the defendant, for the violations of the Act complained of, but this is purely a matter for the Police Court, with which, in my opinion, this Court has no right to interfere.

For the reasons stated the rule will be discharged.

Rule discharged.

LANGSTAFF v. LANGSTAFF.

Saskatchewan Court of Appeal, Haultain C.J.S., and Turgeon, McKay and Martin, JJ.A., October 23, 1922.

JUDGMENT (§IG—55)—AGAINST GOODS AND CHATTELS OF DECEASED—EXECUTION ISSUED AGAINT LANDS—EXECUTION SET ASIDE AS NOT BEING WITHIN THE JUDGMENT—APPLICATION TO AMEND JUDGMENT—GREAT DELAY IN MAKING—DEVOLUTION OF ESTATES ACT R.S.S. 1920, CH. 73 SEC. 5—CONSTRUCTION.

Where by the terms of a judgment a creditor is given the right to levy of the goods and chattels of the deceased in the hands of the representative, and an execution against lands has been held to have been improperly issued as not being within the terms of the judgment, the Court will not, after great delay on the part of the applicant, amend the judgment so as to enable such applicant to realize the amount of the judgment out of the lands of the estate, although if the attention of the Court, giving the judgment, had been drawn at the time to the Devolution of Estates Act R.S.S. 1920, ch. 73 sec. 5, such right would probably have been included in the judgment.

MOTION for an order giving leave to realise the amount of a judgment (1920), 55 D.L.R. 429, out of the goods and lands of an estate in the hands of an administrator, and for that purpose to amend the judgment previously given. Motion refused.

Russell Hartney, for the administrator.

C. M. Johnston, for respondent.

The judgment of the Court was delivered by

HAULTAIN, C.J.S.:—On the trial of this action, the trial Judge gave judgment against the administrators, and directed that the judgment should be for the payment of the amount due and costs in due course of administration, according to the form suggested in *J. I. Case Threshing Machine Co.* v. *Bolton* (1908), 2 Alta. L.R. 174. On appeal (1920), 55 D.L.R. 429, 13 S.L.R. 265, the judgment was varied, this Court holding that, as the administrator did not plead *plene administravit* in his defence, he must be taken to have admitted assets to satisfy the judgment. It was, therefore, held that the judgment against the administrator should follow the form referred to in *Ruttle* v. *Rowe* (1919), 50 D.L.R. 346, 13 S.L.R. 79.

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Judgment was accordingly entered according to the form referred to, as follows:—

"that the respondent have judgment for the amount of the claim with costs against the appellant F. G. Squirrell, such sum of money and costs to be levied of the goods and chattels which were of the deceased at the time of his death come to the hands of the appellant F. G. Squirrell as administrator to be administered if he hath or shall, hereafter have so much thereof in his hands to be administered; and if he hath not so much thereof in his hands to be administered then, as to the costs aforesaid, to be levied out of the proper goods and chattels of the said F. G. Squirrell."

14 Hals. p. 332, note (k), says that in England:—

"this form is still in ordinary practice confined to the goods and chattels of the deceased notwithstanding that the real estate is now by the Land Transfer Act. 1897 (Imp.) ch. 65, sec. 1, vested in the representative. The form ought, it is submitted, to be extended, so as to include all the estate, both real and personal, vested in the representative."

The provisions of the Devolution of Estates Act, R.S.S. 1920, ch. 73, in this regard are similar to those of the Land Transfer Act, 1897 (Imp.), ch. 65, and in this Province, as in England, real estate devolves to and becomes vested in the personal representative and his legal assets, and in the administration of the assets of a deceased person, his real property is administered in the same manner, subject to the same liability for debts, costs and expenses, and with the same incidents as if it were personal property. R.S.S. 1920, ch. 73, sec. 5.

In pursuance of the above judgment, execution was issued by the respondent. The execution directed the sheriff to levy on the goods and lands of the deceased in the hands of the administrator. On an application by the administrator for advice and directions, it was held by Maclean, J., that execution against lands was not properly issued as the execution did not conform with the judgment upon which it purported to be based. From this decision no appeal has been taken, but the respondent now comes and moves for an order giving the respondent leave to realise the amount of her judgment herein out of the goods and lands of the estate in the hands of the administrator, and that, for that purpose, the judgment be amended accordingly, on the ground that this Court intended that the respondent should proceed against the goods and lands and not against the goods and chattels only. It is most probable that the judg-

ment would have been given in the more comprehensive form suggested by the above cited note in Halsbury if the matter had been brought to the attention of the Court because of the change in the law effected by the Devolution of Estates Act. The question now arises whether, under the circumstances, we have jurisdiction to vary this order which has been drawn up and entered in the exact terms ordered by the Court.

In view of the decisions in *Preston Banking* v. *Allsup*, [1895] 1 Ch. 141, 64 L.J. (Ch.) 196, 43 W.R. 231, and *Barnett* v. *Port of London Authority* (No. 2), [1913] 2 K.B. 115, 82 L.J. (K.B.) 918, 29 Times L.R. 252. I am doubtful as to our power to grant this application, although, if this application had been made within a reasonable time, a very strong argument for the proposed amendment might have been made on the grounds that, as the respondent was entitled to judgment, she was entitled to realise that judgment out of all the assets of the estate in the hands of the administrator, and that the form prescribed in the judgment should be varied to meet the changes in the law of devolution. But this application is made nearly two years and a half after the judgment was delivered and the order was drawn up and perfected, and there does not appear to me to be any excuse for such a long delay.

In any event, if the respondent could not, by reason of the terms of the order, proceed directly against the lands belonging to the estate, she could have come against them indirectly by applying to force the administrator to sell the lands and proceed with the administration of the estate.

I would, therefore, refuse the application, but without costs, as I think that a more prompt administration of the estate would have made this application unnecessary.

The administrator should have his costs out of the estate.

Application refused.

GARDNER v. GUY STREET GARAGE Ltd.

Quebec Superior Court in Bankruptcy, Panneton, J., October 5, 1922.

BANKRUPTCY (§I—6)—SEIZURE OF GOODS OF INSOLVENT FOR NON-PAYMENT OF RENT—RIGHT OF AUTHORISED TRUSTEE TO POSSESSION—PAYMENT OF COSTS.

The authorized trustee is under sec. 52 of the Bankruptcy Act entitled to the possession of goods of an insolvent under seizure by a landlord for rent, without first paying the costs of the seizure.

[*Re Auto Experts Ltd.; Ex parte Tanner* (1921), 59 D.L.R. 294, 49 O.L.R. 256; *Re Work and Day Estate* (1921), 58 D.L.R. 377, followed. See Annotations 53 D.L.R. 135, 56 D.L.R. 104, 59 D.L.R. 1.]

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PETITION by the trustee in bankruptcy for the possession of goods of the insolvent under seizure by a landlord for rent.

Monty & Duranleau, for petitioner.

Pierre Ledieu, for respondent.

PANNETON, J.:—Petition is opposed by the seizing creditor unless the costs are paid, sec. 11 (3) of the Bankruptcy Act, 1920 (Can.), ch. 36.

Petitioner answers that the provisions of sec. 11 (3) are superseded by the special provision of sec. 52 (1) respecting the case of a seizure for rent.

Under this last mentioned section the jurisprudence is that the trustee is entitled to obtain possession without first paying the costs: *Re Auto Experts Ltd.*; *Ex parte Tanner* (1921), 59 D.L.R. 294, 49 O.L.R. 256; *Re Work and Day Estate* (1921), 58 D.L.R. 377. The Judges in these two cases differed as to the rank of these costs, whether they should be collocated before the trustee fees and expenses or after—Orde, J., holding that they should be collocated before, and Hyndman, J., after the trustees' costs. But they both agree that the property seized must be given to the trustee without previous payment of costs.

This jurisprudence is in conformity with the text of that sec. 52 (1)—The right of the trustee to the possession of the goods is the only question submitted in the case.

Petition granted with costs limited to $20 for the attorney and disbursements.

Petition granted.

NATIONAL MANUFACTURING Co. v. HOUNGET.

Saskatchewan Court of King's Bench, Brown, C.J.K.B., October 7, 1922.

PLEADING (§IS—145)—STRIKING OUT—

A pleading will not be struck out as disclosing no reasonable cause of action or defence except in obvious cases and where the matter is beyond doubt, the object of the rule being to prevent the delay and expense of an unreal defence, and although in some circumstances a portion of a defence may be struck out, it will not generally be done when the plaintiff will in any case have to go to Court to prove his case.

[*Moore* v. *Lawson* (1915), 31 Times L.R. 418; *Murdoch* v. *Minneapolis Threshing Co.* (1921), 60 D.L.R. 284; *Schofield* v. *Emerson* (1918), 43 D.L.R. 509, 57 Can S.C.R. 203, affirmed 51 D.L.R. 87, [1920] A.C. 415; *Ontario Wind Engine Co.* v. *Bunn* (1915), 21 D.L.R. 420, referred to.]

APPEAL by plaintiff from an order of the local Master dismissing an application to strike out certain portions of the defence. Affirmed.

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NATIONAL MFG. CO. v. HOUNGET.

Brown, C. J. K. B.

P. H. Gordon, for appellants.

T. D. Brown, K.C., for respondent.

BROWN, C.J., K.B.:—This is an appeal by the plaintiffs from an order made by the local Master on an application made to him to strike out the whole of the defendant's defence and counterclaim, paras. 1-4 inclusive, of defence on the ground that the same are false, frivolous and vexations; paras. 5 and 6 of the defence, on the ground that the same disclose no reasonable ground of defence to the action; the counterclaim, on the ground that the same discloses no cause of action. The local Master dismissed the application with costs.

The action is brought to recover the purchase price of a Maccertney Milking Machine which it is alleged the defendant purchased from the plaintiffs under a contract in Form B of the Farm Implement Act, R.S.S. 1920, ch. 128. It is further alleged that the machine was duly delivered and installed by the plaintiffs. The defendant in paras. 1-4 inclusive of his defence denies the making of the contract and denies the delivery and installation thereof. In paras. 5 and 6 of the defence the defendant says that if he did agree to purchase a milking machine the same was to have a brass-lined pump and was capable of being operated by a two horse-power gasoline engine; that it was so represented to him by the selling agent of the plaintiffs, and that the defendant was induced to buy the machine because of such representations, and that the representations were false, and, in consequence, the machine was of no use to the defendant and was returned by him to the plaintiffs. In his counterclaim, the defendant repeats paras. 5 and 6 of his defence, and alleges that, in consequence of the false representations, he suffered damages, and seeks to recover same.

It seems desirable to deal first with paras. 5 and 6 of the defence and the counterclaim. They can be dealt with together, and, upon the disposition which I make of them will largely depend what should be done with paras. 1 to 4 of the defence.

A pleading should not be struck out as disclosing no reasonable cause of action or defence except in plain and obvious cases and where the matter is beyond doubt. Annual Practice, 1922, p. 410; *Moore* v. *Lawson* (1915), 31 Times L.R. 418.

If, what the defendant alleges in his defence and in his affidavit material used in opposing this application is true,

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and for the purpose of this application I must assume the same to be true, then I would be very sorry indeed to have to reach the conclusion that the defendant was without defence or remedy. The defence and affidavit in support show that the defendant had a two-horse power gasoline engine of his own at the time he was approached by the plaintiffs' agent; that he did not want to buy the milking machine unless it could be operated successfully with this engine; that the selling agent was made aware of this; that the agent assured him that it could be so operated, and that the pump of the milking machine was brass-lined; that he was thus induced to buy the machine and would not have bought same had not such representations been made; that such representations were false; that the machine could not be operated with the two horse-power engine, and that the pump to the machine was not brass-lined. It may be, in view of the provisions of the Farm Implement Act, R.S.S. 1920, ch. 128, and the decision of the Court of Appeal in *Murdoch* v. *Minneapolis Threshing Machine Co.* (1921), 60 D.L.R. 284, 14 S.L.R. 296, that the defendant is, under the circumstances, without remedy. On the other hand, in the light of what has been decided in *Schofield* v. *Emerson Brantingham Implement Co.* (1918), 43 D.L.R. 509, 57 Can. S.C.R. 203, affirmed 51 D.L.R. 87, [1920] A.C. 415, and *Ontario Wind Engine Co.* v. *Bunn* (1915), 21 D.L.R. 420, 8 S.L.R. 58, it may be possible for the defendant to get full relief. I don't wish to make any statement or any suggestion that would embarrass either party at the trial of the action. The matter is certainly not clear and obvious and can only properly be decided after a fair trial.

Having reached this conclusion with reference to paras. 5 and 6 of the defence and the counterclaim, I am of opinion that paras. 1-4 inclusive of the defence must also be allowed to stand. Under the circumstances of this case, it is not easy for the defendant to admit any of the allegations made in the claim, and he was, I think, well advised to put the plaintiffs to the proof. In this connection, and, especially as it applies to this case, I approve of what Lamont, J., stated in *Canadian Grain Co.* v. *Lepp* (1916), 33 D.L.R. 185, at p. 190, 9 S.L.R. 447, where he says:—

"This rule was never intended to afford the plaintiff the opportunity of trying the case piecemeal. The object of the rule was to prevent the delay and expense of an unreal defence. I do not wish to be understood as holding that under no circumstances should a portion of a defence be struck

out, but, generally speaking, but little will be gained by striking out an individual paragraph where the plaintiff has to go to Court to prove his case. If he has material sufficient to justify a Court in striking out the paragraph it will usually be found sufficient to establish his allegation at the trial. At any rate, the rules relating to admissions of facts for use at the trial afford the plaintiff ample protection."

In the result the appeal will be dismissed with costs.

Appeal dismissed.

DETRO v. DETRO.

Alberta Supreme Court, Simmons, J. September 26, 1922.

DIVORCE AND SEPARATION (§II—5)—JUDGMENT FOR ALIMONY IN CALIFORNIA—HUSBAND DEFENDANT DOMICILED IN CANADA—ACTION IN CANADA BY WIFE FOR ALIMONY—JURISDICTION OF COURT.

The fact that a wife whose husband has deserted her in California, obtains judgment against him for her maintenance and support, after he has removed to Canada, and under which no payments have been made, does not prevent her from bringing an action for alimony in the Canadian Courts where the husband is domiciled, although she may be banned from recovering on the foreign judgment obtained.

[*Swaizie* v. *Swaizie* (1899), 31 O.R. 324; *Re Williams and the Ancient Order of United Workmen* (1907), 14 O.L.R. 482, distinguished; *Armytage* v. *Armytage*, [1898] P. 178, referred to. See Annotation on Divorce 62 D.L.R. 1.]

ACTION to recover alimony. Judgment for plaintiff.

S. S. Cormack and Alex. Morris, for plaintiff.

H. H. Parlee, K.C., for defendant.

SIMMONS, J.:—The plaintiff now 56 years of age, and the defendant now 66 years of age, were married in the State of California in February, 1918. Immediately prior to their marriage, the plaintiff was a widow and the defendant was a widower. Immediately after their marriage, they removed to Phoenix in the State of Arizona, where they resided for a month and then took up their residence at Colorado Springs in the State of Colorado. Shortly afterwards, domestic differences arose, although these do not seem to have been of a serious character, and the defendant left their residence and took up his residence with a relation in Colorado Springs. Immediately prior to their marriage, a matrimonial agreement was drawn up in which the defendant agreed with the plaintiff that as soon as convenient after their marriage had been consummated, he would purchase a piece of real property, either in the city or country and pay therefor not less than $2,000 and not to exceed

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$2,500, and cause the title to the same to be vested in the plaintiff with a life interest therein to himself, and in the alternative, that if he should die before the said property was purchased, that the plaintiff should have $2,500 in money out of his estate. After the defendant ceased to live with the plaintiff, he contributed to her support by making payments to her from time to time of $30 per month until December, 1918, when he increased this amount to $40 per month and apparently continued these payments until January, 1920. In the spring of 1918, the defendant removed to Hardisty in the Province of Alberta, and has, since that date, resided in this Province. Some time in the year 1919, the plaintiff began action in the County of El Paso in the State of Colorado claiming moneys for her support and maintenance and on March 29, 1920, according to the allegation in her statement of claim, a judgment was rendered in her favor ordering the defendant to pay her the sum of $100 per month and costs of the proceedings. The plaintiff alleges that no payments have been made under said judgment, and sues upon the same, and in the alternative, the plaintiff claims alimony from the defendant. At the trial, the plaintiff abandoned her claim to recover upon the judgment given in the State of Colorado and rests her claim upon her right to alimony in the present action. Counsel for the defendant relies upon the defence that the judgment rendered in the State of Colorado was a judgment *in rem*, and is, therefore, conclusive upon all parties concerned and in the alternative that if the judgment were one *in personam* that the plaintiff in either case is estopped from pursuing her remedy within this jurisdiction; but no evidence has been submitted and no information has been given to the Court as to the law governing matrimonial relations in the State of Colorado. I am of the opinion, however, that it is quite unnecessary to deal with the question of whether the Colorado judgment was a judgment *in rem* or a judgment *in personam* because the first and necessary element concerning the validity of a so-called judgment *in rem* is that the Court delivering the same has jurisdiction over the matter or property in question. 2 Smith, L.C. 11th ed., p. 786.

Le Mesurier v. *Le Mesurier*, [1895] A.C. 517, 64 L.J. (P.C.) 97, decides conclusively that, according to the rules of international law, domicile is the first and necessary condition to the jurisdiction of the Court. Lord Penzance says in *Wilson* v. *Wilson* (1872), L.R. 2 P. & D. 435, at p. 442:—

"It is the strong inclination of my own opinion that the

only fair and satisfactory rule to adopt on this matter of jurisdiction is to insist upon the parties in all cases referring their matrimonial differences to the Courts of the county in which they are domiciled." Lord Watson cites this with approval in *Le Mesurier* v. *Le Mesurier*, [1895] A.C., at p. 540.

The question of jurisdiction in the matter of a divorce *a vinculo* was under consideration but the above citation would imply that the same rule is applicable where a decree of judicial separation is in issue.

The judgment of the Colorado Court was not put in evidence nor was any exemplification of the same made a part of the record in this trial. On cross examination, the plaintiff admits that she took proceedings for separation and that she also took proceedings to set aside his life interest in the property which he had given to her and that there was a trial and that she got an order from the Court cancelling her husband's life interest in the property and an order entitling her to live separate from her husband. She alleges however that she claimed at the said trial that she did not know that her husband was retaining a life interest in the property which he gave her and that she did not know that the same was to be put in the marriage agreement until they went to the notary public to have the same executed. The evidence does not disclose, then, whether the property was given to her to apply in the nature of alimony or whether it was given on plea of rectification of the original marriage contract. The plaintiff does not contest the defendant's claim that he is domiciled in the Province of Alberta. The exact nature and the extent of the judgment given in the Colorado Court is uncertain, but the plaintiff's admissions justify the conclusion that something in the nature of a judicial separation and an allowance in the nature of alimony was decreed to her. It is not suggested by either party that a divorce *a vinculo* was granted. It, therefore, becomes necessary to consider the second defence, namely, that the plaintiff is estopped by virtue of the decree in the Colorado Court from pursuing her remedy for alimony in this Court; and the defendant relies upon *Swaizie* v. *Swaizie* (1899), 31 O.R. 324, and *In Re Williams and Ancient Order of United Workmen* (1907), 14 O.L.R. 482. In both these cases a decree of divorce was granted, and it is obvious that the effect of such a decree may be that the rule of estoppel applied by the Ontario Courts to a decree absolute of divorce does not necessarily apply to a decree for

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judicial separation. The Ontario Courts held that a party who had invoked and submitted to the jurisdiction of a foreign Court was precluded from setting up want of jurisdiction even by way of defence though the decree was one which the Ontario Court might not recognise. A decree of divorce terminates the contract of marriage relationship, and changes, entirely, the status of the parties. A decree awarding judicial separation does not carry such far-reaching results. There are still rights and obligations accruing to the parties to the contract and it is quite obvious that it would be a scandalous proceeding for a party to obtain a decree of divorce in one jurisdiction and attempt to renounce or escape from the effects of the same in a proceeding in another jurisdiction; but I am not able to apply the same reasoning to a decree which goes no further than judicial separation and an allowance for support. As Gorell Barnes, J., pointed out in *Armytage* v. *Armytage*, [1898] P. 178, 67 L.J. (P) 90, 14 Times L.R. 480, marriage is not dissolved but some of the obligations of the parties is "merely suspended either for a time or without limitation. . . . The sentence commonly separates the parties until they should be reconciled to each other. The relation of marriage still subsists, ... leaves the legal status of the parties unchanged." (See [1898] P. at pp. 195-196).

I fail to appreciate the effect of the defendant's argument as to estoppel. The plaintiff and defendant were residing in the State of Colorado, there is no doubt but that there was a desertion by the defendant, as he refused to live or cohabit with the plaintiff, although he contributed in a partial degree to her maintenance, and he removed to this Province without giving the plaintiff any information as to the same.

She brought an action in the Colorado Courts, and the defendant did not appear or submit to the jurisdiction of that Court. She brought an action on that judgment and is met by a plea of absence of jurisdiction. She admits the sufficiency of this as an answer to her claim upon the foreign judgment. She now asks for relief under the alternate claim. She admits, as a fact, the defendant's claim that he is domiciled in the Province of Alberta, and she came to this Court for relief. This is not in any sense an attempt by her to repudiate the decree of the foreign jurisdiction which she invoked.

Under the Judicature Act, 1919 (Alta.), ch. 3, sec. 21,

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"The Court shall have jurisdiction to grant alimony to any wife who would be entitled to alimony by the law of England, or to any wife who would be entitled by the law of England to a divorce and to alimony as incident thereto, or to any wife whose husband lives separate and apart from her without any sufficient cause and under circumstances which would entitle her, by the law of England to a decree for restitution of conjugal rights."

In our Court in *Lee* v. *Lee* (1920), 54 D.L.R. 608, 16 Alta. L.R. 83, it was held that an action for alimony was not necessarily incident to an action for divorce or judicial separation or to a decree for restitution of conjugal rights. The inference is clear that an action for alimony can be brought alone, although in England it would be necessarily an incident for a claim for divorce, judicial separation or restitution of conjugal rights. I am, therefore, of the opinion that the plaintiff is entitled to pursue her action for alimony in this jurisdiction. The defendant admits that he is domiciled here. He admits that he is the owner of $18,000 in Victory Bonds and Liberty Bonds. He deserted his wife without cause and said desertion has covered a period of more than 2 years. She has no other means of support, and I conclude that she is entitled to judgment for alimony from the date of commencement of this action, namely, from June 14, 1922, computed at $40 per month, and costs of the action.

Judgment accordingly.

JACKSON MACHINES Ltd. v. MICHALUK.

Saskatchewan Court of Appeal, Haultain, C.J.S., and Turgeon and McKay, JJ. A. October 23, 1922.

APPEAL (§XI—720)—SPECIAL LEAVE—NO QUESTION OF PUBLIC INTEREST OR OF IMPORTANT LAW.

Special leave to appeal to the Supreme Court of Canada, will not be granted where the case does not involve any question of public interest, nor any important question of law.

[*Lake Erie & Detroit River R. Co.* v. *Marsh* (1904), 35 Can. S.C.R. 197; *Whyte Packing Co.* v. *Pringle* (1910), 42 Can. S.C.R. 691; *Re Henderson & Tp. of West Nissouri* (1911), 46 Can. S.C.R. 627; *Riley* v. *Curtis' and Harvey* (1919), 50 D.L.R. 281, 59 Can. S.C.R. 206, followed.]

APPLICATION by defendant for special leave to appeal to the Supreme Court of Canada from the judgment of the Court of Appeal for Saskatchewan, (1922), 67 D.L.R. 182, dismissing the appellant's appeal. Application dismissed.

J. N. Fish, K.C., for appellant.

F. F. Macdermid, for respondent.

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The judgment of the Court was delivered by

HAULTAIN, C.J.S.:—This is an application on the part of the appellant for special leave to appeal to the Supreme Court of Canada from the judgment of this Court of May 29, 1922, dismissing the appellant's appeal herein, 67 D.L.R. 182.

As the amount in controversy in the appeal is about $1,250, special leave to appeal is required by sec. 41 (*f*) of the Supreme Court Act, R.S.C. 1906, ch. 139, as amended by 1920 (Can.), ch. 32, sec. 2.

The case does not involve any question of public interest, or, so far as I can see, any important question of law. The question of breach of warranty has been dealt with by the jury, whose verdict has been unanimously sustained by this Court. The other question raised on the appeal was with regard to the amendment allowed at the trial. This question is technical and deals to a large extent with procedure. On the principle stated in *Lake Erie & Detroit River R. Co.* v. *Marsh* (1904), 35 Can. S.C.R. 197, approved and followed in *Whyte Packing Co.* v. *Pringle* (1910), 42 Can. S.C.R. 691, *Re Henderson and Tp. of West Nissouri* (1911), 46 Can. S.C.R. 627, and *Riley* v. *Curtis's and Harvey and Apedaile* (1919), 50 D.L.R. 281, 59 Can. S.C.R. 206, I would dismiss this application with costs.

Application dismissed.

FINLAYSON v. BALFOUR, WHITE & Co.; Re THORNTON DAVIDSON & Co.

Quebec Superior Court in Bankruptcy, Panneton, J. October 14, 1922.

BANKRUPTCY (§II—18)—SALE OF ASSETS OF BANKRUPT THROUGH BROKER—INSOLVENCY OF BROKER WHO ACTED AS AGENT——RIGHT OF TRUSTEE TO SUE PURCHASER IN OWN NAME.

A trustee who sells the assets of a bankrupt through a broker may sue the purchaser directly in his own name for the price of the assets sold when the broker who acted as his agent has become insolvent.

[See Annotations 53 D.L.R. 135, 56 D.L.R. 104, 59 D.L.R. 1.]

PETITION by an authorised trustee that the purchaser of certain shares be ordered to pay the purchase price to the said petitioner.

G. L. Alexander, for trustee.

Trihey & Burke, for respondent.

PANNETON, J.:—Petitioner alleges that on December 20, 1921, through the firm of Fairbanks, Gosselin Co., he sold to respondent 5 shares of the Sterling Bank for $527.50 which they refuse to pay and demands that respondent be ordered to pay him said sum of money.

Respondent answers this petition by stating that when it bought the said shares from Fairbanks, Gosselin Co. on December 21, 1921, they were bought as being the property of said Fairbanks, Gosselin Co., that it did not know- and was not advised that they belonged to Thornton Davidson Co. and that possession of said shares had been given to them by Fairbanks, Gosselin Co. that it was advised only on January 31, 1922, that said shares had belonged to Thornton Davidson & Co.

Respondent further alleges that when it was so advised Fairbanks, Gosselin & Co. were owing it $200 leaving a balance of $327.50 in favor of the said firm which firm also went into insolvency, that it has tendered the trustee of said firm the said balance of $327.50, that it does not recognize petitioner as its creditor and pray for the dismissal of the petition. Petitioner replied to said answer in a manner to join issue, and added that the trustee of Fairbanks, Gosselin & Co. had given petitioner an order on respondent to pay petitioner the $527.50, demanded by the petitioner which order was not complied with by respondent.

The claim of respondent for $200 arose a few days after it had purchased said shares from Fairbanks, Gosselin & Co. it had no claim against them on December 21, the whole amount was then due without any dispute. Respondent does not acknowledge any liability whatever towards petitioner, as a consequence it does not offer to pay petitioner any money whatever.

As between Thornton Davidson & Co. and Fairbanks, Gosselin & Co., it is a case of mandate, of principal and agent. In ordinary cases, the principal can always sue upon a contract made by an agent in his own name. The jurisprudence is well settled in that sense. Beauchamp, Répertoire v. co. Mandat, No. 158; Mignault, vol. 8, p. 36., In this case, the agent, by its trustee, has given an order on respondent to pay the principal, now petitioner. As stated, respondent refuses to pay petitioner even the $327.50 due to him. It does not recognise any *lien de droit* between them. It is claimed that the general rule created by the jurisprudence does not apply to brokers. The situation created by the issue joined is not whether respondent can set up its claim of $200 which it alleges it has against Fairbanks, Gosselin & Co., against petitioner's demand, but merely whether petitioner has any action at all against it. If he has, there being no plea of partial compensation to the extent of $200, the demand must be granted *in toto*. The

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value of respondent's claim for $200 was not and is not to be inquired into in this case.

To support their contention that the relations of brokers are not governed by the general laws concerning mandate, that the principal have no action against anyone else than against the brokers, respondent quotes two decisions from the Courts of France rendered under the French Code de Commerce, one rendered by the Court of Appeal reported in Sirey, Recueil Général, 1849, p. 267, and the other in the same work, 1890, p. 302, rendered by the Cour de Cassation. In this last case, a list is given of French authors whose opinions are in the sense of these decisions. However, a note at the bottom of the second decision at p. 303 states that the Cour de Cassation did not express any opinion on the question whether the seller could sue directly the purchaser under art. 575 of the Code de Commerce when the broken who acted as his agent has become insolvent. This is the present case. The brokers, Fairbanks, Gosselin & Co. have become insolvent. The provisions of the French Code de Commerce differ from those of our Code more specially in this, our art. 1737 C.C. (Que.), states that "brokers and factors are subject to the general rules declared in this title [mandate] when these are not inconsistent with the articles of this chapter." Then the general laws apply to brokers, provided no special dispositions of the chapter treating of brokers come in conflict with it. Our article 1716, C.C. (Que.), gives us the general law as follows:— "A mandatary who acts in his own name is liable to the third party with whom he contracts, without prejudice to the rights of the latter against the mandator also." This article protects the right of the principal to avail himself of the contract made by the agent in the agent's name. The Canadian jurisprudence, as stated before, is in accordance with this text of the law. There is no disposition in our law conflicting with this.

Considering that petitioner has proved the allegations of his petition.

Considering that respondents have not pleaded against petitioner, the compensation of the amount which it claims is due to it by the insolvents Fairbanks, Gosselin & Co.

The petition is granted and respondents are condemned and ordered to pay to petitioner the said sum of $527.50 with interest from May 5, 1922, and costs.

Petition granted.

SECURITY LUMBER Co. v. THIELENS.

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Saskatchewan Court of King's Bench, Brown, C.J.K.B., October 5, 1922.

MECHANICS' LIENS (§VIII—60)—ENFORCEMENT—POWERS OF DISTRICT COURT JUDGE—REFERENCE TO FIND AMOUNT—INTEREST ALLOWED ON CLAIM.

On an application under Rule of Court 124, in a mechanic's lien action the District Court Judge having jurisdiction for judgment, where there are no mechanics' liens registered against the property and where the defendants have not appeared, may make a fiat directing a reference to ascertain the amount due under the lien, and declaring that the plaintiff has a valid lien for the amount found due by such reference, the proof of the truth of the allegations being in his discretion, and standing instructions given by such District Court Judge to the clerk of the Court in mechanics' lien actions may be incorporated in such order. The clerk acts in such a case as ministerial agent of the Judge and no appointment or notice to the defendant is necessary on the reference.

Where an agreement has been made at the time the material was purchased to pay interest at a greater rate than the legal rate, the lienholder is entitled to include such interest in his claim, and the clerk should allow for this in calculating the amount due.

[*Canadian Lumber Yards Ltd.* v. *Paulson* (1922), 66 D.L.R. 80, 15 S.L.R. 400, referred to.]

APPLICATION by way of appeal from an order of a District Court Judge on an application under R. 124 in an action to realise on a mechanic's lien. Varied.

H. J. Schull, for appellants.

No one for respondents.

BROWN, C.J.:—This is a mechanic lien action. The defendants did not appear and application was made under Rule of Court 124 to the District Court Judge having jurisdiction for judgment. The abstract of title shows that there are no mechanics' liens registered against the property. If there had been, then, under secs. 30 to 34 of the Mechanics' Lien Act, R.S.S. 1920, ch. 206, it would, apparently, have been necessary to set the action down for trial and such lien holders would have been brought into the case for the first time by serving them with notice of trial. This would seem to be necessary, even when no appearance was entered by any of the parties who may have been made defendants to the action. The District Court Judge made his fiat as follows:—

"Order declaring that the plaintiff has a valid lien against the property herein described for such amount as may, upon the reference, be found owing by the defendant owner to the plaintiff company. Reference to the clerk of the Court to ascertain the amount due under the mechanic's lien herein. Payment into Court of the amount so found due within five

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months after the date of the clerk's certificate. Otherwise sale upon one month's notice by advertisement once a week for four consecutive weeks in a newspaper published at Assiniboia, and by notice posted in six conspicuous places at St. Victor, Willow Bunch, Verwood and Assiniboia. I, hereby, further adjudge that the defendant Thielens shall pay to the plaintiff company any deficiency which may remain after the sale of the land hereby adjudged to be sold. Service of this order, with date of the reference at foot of same, to be made by registered mail on the defendant Thielens, and on any other parties appearing to be interested in the said land."

This application is by way of an appeal from the above order and the appeal has been taken on several grounds; (1) that no reference should have been ordered at all; (2) that the Judge should have found a valid lien for the amount claimed in the pleadings; (3) that the time allowed for redemption is unreasonably extended and (4) that the Judge should have finally decided all questions and completely disposed of all matters as provided for in sec. 34 of the Mechanics' Lien Act, R.S.S. 1920, ch. 206.

Counsel on appeal stated that the Judge whose order is appealed from had given standing instructions to the clerk of the Court in mechanics' lien actions which, in reality, formed part of the order. I requested a certificate from the clerk of the Court to that effect and this certificate has been furnished and filed as well as a statement by the Judge himself setting forth what his practice is in that respect. I, therefore, deal with the matter in the light of all the material on file including such certificate and statement.

Dealing with the first point that has been raised, I agree with the statement made by Taylor, J., in *Canadian Lumber Yards* v. *Paulson* (1922), 66 D.L.R. 80, 15 S.L.R. 400, where he says, at pp. 82-83:—

"Whether any further proof of the truth of the allegations in the statement of claim should be given is under the Rule in the discretion of the Court or Judge. In the exercise of that discretion, the Judge should in my opinion bear prominently in mind that if a defendant desires to contest a plaintiff's claim or defend an action he must enter an appearance. Rule 98. Where a defendant does not appear, or, having appeared, omits to file a defence, he is deemed to have admitted all the allegations in the statement of claim. In England, under analogous practice, as it is stated in the Annual Practice, 1921, p. 441: 'At a meeting of the Judges a majority

decided that the Court cannot receive any evidence in cases hereunder, but must give judgment according to the pleadings alone. (*Smith* v. *Buchan* (1888), 36 W.R. 631, 58 L.T. 710; *Young* v. *Thomas*, [1892] 2 Ch. 134, 61 L.J. (Ch.) 496). The costs of any affidavits in support of the claim will be disallowed (*Jones* v. *Harris* (1887), 55 L.T. 884). This however does not apply where the defendant is an infant or person of unsound mind.'

And the cost of an affidavit verifying the allegations in the statement of claim where no defence was filed in an action by a mortgagee for accounts, foreclosure and sale was refused by the Vice Chancellor in *Perpetual Inv't Bdg. Society* v. *Gillespie* (1882), 17 W.N. 4.

The admission by failure to appear and defend is no less cogent under our practice than in England. The Rule 124 confers on the Judge a discretion to refuse to accept the admission by default as sufficient. There may be something in the nature of the action or proceedings or relating to the pleadings itself which would justify the Court in requiring proof of the allegations in the statement of claim to the satisfaction of the Judge, notwithstanding the failure of the defendant to appear and defend himself."

In the case at Bar, the plaintiffs specially allege in their claim an agreement on the part of the defendant to pay for the material furnished at the price claimed and with interest at 10% from the date of the last delivery. A number of credits are admitted and the balance is calculated and claimed. The defendants not having appeared, must be taken to have admitted all material being filed in support of the claim, and it simply remains to accurately calculate the amount due on the facts as alleged. This can be done more conveniently by the clerk of the Court than by the Judge and I infer from the Judge's statement filed that this was all he intended by the reference. It is true that the fiat calls for the taking out of an appointment, and the defendant, Thielens, being given notice thereof, and this provision seems to me to be wholly unnecessary. There is, under the circumstances, no necessity for any appointment being taken out at all, and there, therefore, should not be any provision for notifying the defendant of same. The clerk in ascertaining the amount due is simply acting as ministerial agent of the Judge and the defendant is no more entitled to have notice than if the Judge himself proceeded to make the calculation.

With reference to the second ground of appeal, according

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to the statement filed by the Judge, he allows interest at legal rate only, and that but from the date of the commencement of the action. The claim alleges, as has already been pointed out, an agreement to pay interest at 10%. Where such an agreement has been made at the time of the purchase of the material, the lienholder, in my opinion, can include such interest in his claim and recover it as part of same. In this case, they claim for interest at the agreed rate as set out in the lien that has been registered. I am of opinion, therefore, that the clerk in calculating the amount due should allow for interest as claimed.

With reference to the third point, I am of opinion that the time fixed for redemption is not so unreasonable as to call for any interference on my part.

As to the fourth point, under the Judge's practice the proceeds of the sale are paid into Court to be paid out later when application is made to confirm the sale. This strikes me as a sound practice and one that I should not interfere with.

Generally speaking I wish to say that the practice followed by the Judge seems to be well founded and in harmony with the Act.

The order appealed from will be varied, but only in the two particulars above referred to, namely, no appointment is necessary on the reference, and interest should be allowed as claimed. I will fix the plaintiffs' costs of appeal at $25.

Order varied.

NORTHERN TRUSTS Co. v. JONES.

Alberta Supreme Court, Harvey, C. J. October 24, 1922.

MORTGAGE (§ VID—85)—ORDER NISI FOR FORECLOSURE—DROUGHT AREA RELIEF ACT, 1922 (ALTA.), CH. 43—LAND SITUATED WITHIN PROHIBITED DISTRICT—DEFENDANT FILING NO DEFENCE NOR DEMAND FOR NOTICE—RIGHTS OF PLAINTIFF UNDER ACT.

The Drought Area Relief Act, 1922 (Alta.), ch. 43, does not prohibit a plaintiff from obtaining the usual judgment and order *nisi* for foreclosure against land situated in the prohibited district, if the defendant does not file a defence and plead the Act in the regular authorised way.

APPLICATION for judgment and order *nisi* for foreclosure in a mortgage action, referred by the Master in Chambers to a judge of the Supreme Court. The defendant filed neither defence nor demand for notice and the application was opposed by the Attorney-General.

Porter, for plaintiff; *Sellar*, for Attorney-General.

HARVEY, C.J.:—On March 28, the Drought Area Relief Act was passed. By sec. 8 of that Act, 1922 (Alta.), ch. 43, legal proceedings against residents of the drought area

were prohibited from being begun, or continued, for a certain limited time. It is admitted that the land in question in the action is within the area proclaimed as the drought area under the authority of the Act, and the defendant is stated in the statement of claim to be residing in that area. That fact alone, however, does not constitute him a resident within the meaning of the Act, and it is not admitted that he is such resident. A resident within the Act is one who has been and has continued to be a resident, and actively engaged in farming operations within the drought area since January 1, 1921. (Sec. 2 (d). Mr. Sellar's contention is that the plaintiff is not entitled to the order applied for without either satisfying the Master or Judge that the defendant is not a resident within the meaning of the Act, or obtaining leave from a Judge to take the proceedings. Mr. Porter for the plaintiff, however, contends that it is for the defendant to take the objection and order and until that is done he may rightfully proceed and in the absence of the defendant taking the objection he waives his right to the protection of the Act.

It would be difficult to find a prohibition in more absolute terms than that of the Statute of Frauds which says that "no action shall be brought," and yet it has been held for centuries that it is for the defendant, and for the defendant alone, to take the objection to an action being brought, and that unless he does so, and does it in the regular authorised way he waives his right, and the plaintiff may prosecute his action, in other words that the defendant not merely has the right to be protected from the action but he also has the right to have the action proceed regardless of the protection, and as regards the Statute of Frauds, there are many men who would scorn to shield themselves under its provisions. It may also be that there are many residents of the drought area who would prefer not to rest under the protection of the Drought Area Relief Act, and if it were clear that its purpose was merely to protect the defendant or proposed defendant, it appears to me that on principle and precedent it would be necessary to hold that the debtor would be entitled to waive the benefit of the Act, and would be bound to claim its protection if he desired to avail himself of it.

A consideration of the provisions of the Act, however, suggests that its purpose is wider than the protection of the debtor alone. The first preamble refers to the interests of the residents *and their creditors*. Then provision is made for the appointment of a commissioner "who shall endeavor

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to adjust matters between residents in the said area and their creditors so as to provide for the satisfaction of the just claims of the latter without recourse to legal proceedings." Then sec. 10 provides that the leave to commence or continue proceedings can be obtained only after notice, not merely to the debtor but also to the commissioner or his deputy. Though it is not necessary for this application to decide the question definitely, there is much in the above provisions to lead to the conclusion that there is a question of public policy involved in the prohibiton, and that it is not one for the benefit of the debtor alone so as to permit him to waive it.

I say it is not necessary to decide that question, because, in my opinion, whichever view is the correct one, it is not part of the Master's or Judge's duty, at his own instance, to interfere with a plaintiff's regular procedure. Whether a defendant or proposed defendant comes within the provision of the Act is a question of fact, which, like all other questions of fact can only be determined decisively as against the defendant when he has an opportunity to meet it. The situation of the land is not important, but merely the qualification of the defendant, and any action in any part of the Province might be open to the same objection, and if carried to its logical conclusion it would mean that all litigation would be at a standstill, since no one could be deemed to have a *prima facie* right to prosecute proceedings. Even if I required the plaintiff to furnish me with *ex parte* evidence which satisfied me of his right to proceed, hearing only one side, and granted the order, the defendant would be in no way bound, and if he were, in fact, entitled to the protection of the Act, he or perhaps the commissioner or possibly a creditor, would surely later have the right to show that the proceedings were unauthorized.

It was suggested on the argument that the clerks and sheriffs had been instructed to refuse to permit persons to proceed until they satisfied them that they had the right to do so. If such instructions have been given I have no doubt it has been for the purpose of forcing some one to bring the matter up so that it might be formally determined as is now being done, because, it is clear that as far as such duties of clerks and sheriffs are concerned, they as officers of the Court are bound by the legal practice and procedure from which they have no more right to depart on instructions than I would have. I think, therefore, that there is no ground for refusing the plaintiff the order asked for, if

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he makes the usual proof according to the regular practice.

It is to be observed, however, that if the view I have suggested is the correct one, the plaintiff takes the proceedings at its peril, and at the risk of having them all set aside at the instance of anyone who is entitled to take objection under the Act. With such a consequence staring him in the face, a plaintiff or proposing plaintiff, will be likely to take such steps to establish the rightfulness of his action as will furnish a greater protection against unauthorized proceedings than could be furnished by any obstruction by Judges or officials. The application will be referred back to the Master for action in accordance with the foregoing reasons.

There will be no costs of the application thus far.

Judgment accordingly.

REGINA BROKERAGE & INVESTMENT Co. v. KISTNER.

Saskatchewan Court of Appeal, Haultain, C.J.S., McKay and Martin, JJ.A. October 23, 1922.

BROKERS (§ IIB—10)—SALE OF REAL ESTATE—CONTRACT—ACCEPTANCE OF OFFER—REFUSAL OF PURCHASER TO COMPLETE—COMPENSATION OF AGENT.

In order to succeed in a claim for work performed and services rendered in connection with the sale of land, a real estate agent must show that he procured a purchaser ready, able and willing to take over the land on the terms agreed upon and where the purchaser, after receiving the alleged owner's acceptance to his offer, refuses to complete the transaction the agent is prevented from earning his commission under the contract, there being no evidence to show that the alleged owner was able to comply with the terms of the contract.

[See Annotation, 4 D.L.R. 531.]

APPEAL by defendant from the trial judgment is an action to recover commission claimed to be due under a written agreement as to the sale of land. Reversed.

F. D. Noonan, for appellant,

C. M. Johnston, for respondent.

The judgment of the Court was delivered by

HAULTAIN, C.J.S.:—This action was brought for commission claimed to be due to the plaintiff by the defendant under a written agreement under seal. The agreement is as follows:—

"The Regina Brokerage Company, Ltd., Regina, Canada. August 2nd, 1921.

I hereby offer to purchase from or through you the west half of 27, the east half of 28, the south half of 33-8-5-W-2nd, at and for the price or sum of $65 per acre including all the crop and equipment or $55 per acre with the equipment but without the crop, on the following terms:—

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I agree to assume the mortgage of $15,000 against the above land, bearing interest at 8% per annum, and agree to sell to you the s. ½ 6-20-22-w. 2nd at and for the price or sum of $17,950 including all the horses and machinery now on the place or what was on the place when you inspected it including the threshing outfit. There is against the farm $4,500 and you are to accept my equity as cash payment on the above mentioned land which I have offered to purchase. The balance of the purchase price of the land I am offering to purchase from you to be payable $1,400 per year and interest payable on December 1, each year for 9 years and the balance on December 1 the 10th year. Your equity in the above land to bear interest at 7% per annum. Should you be successful in putting through this deal for me I agree to pay you a commission of 5% on the 1st $10,000 and 3% on the balance of the purchase price of the land I am turning in on this deal. This commission is not to be paid by me in cash but is to be charged to me on the land which I am purchasing. In consideration of the sum $1 (receipt of which is hereby acknowledged) I hereby make this offer irrevocable until August 31, 1921.

In case the offer including crop is accepted you are to give me credit for the whole of the proceeds of the crop.

Signed, sealed and delivered, in the presence of Murdock, S. McLeod.

John Kistner (Seal)"

The statement of claim sets up the written agreement, and alleges that "the plaintiff found a purchaser ready, willing and able to take over the defendant's land on the terms and conditions upon which the defendant agreed to sell the same and thereupon became entitled to payment of the commission." There is also an alternative claim for work performed and services rendered to the defendant "in the procuring of the purchaser for the defendant's land on terms which the defendant in writing agreed to accept."

Among other defences, the defendant in his statement of defence, pleads that "the plaintiff never found a purchaser ready, willing or able to take over the defendant's land on the terms or conditions upon which the defendant agreed to sell the same or at all."

It is quite clear that the plaintiff is confined by the facts of this case to its alternative claim, as, to use the language of the agreement, the "deal" was never "put through."

The evidence shows, however, that, through the agency of the plaintiff, the offer of the defendant was accepted by

one Creswell in writing and that the written acceptance was duly delivered to the defendant within the time mentioned in the offer. The acceptance was as follows:—

"John Kistner, Esq., Disley, Sask.

Re w. ½-27, e. ½-28 and s. ½-33-8-5-w. 2nd.

As owner of the above mentioned property I hereby accept your offer of August 2, 1921, on the above mentioned land addressed to The Regina Brokerage & Investment Co., through which company you have offered to purchase this land including crop and equipment at $65 per acre.

Witness

(Sgd.) H. C. Creswell"

(Sgd.) Murdock S. McLeod.

The defendant, after receiving Creswell's acceptance, refused to complete the transaction.

In order to succeed on its alternative claim the plaintiff must prove, substantively, that it procured a purchaser ready, able and willing to take over the defendant's land on the terms proposed and that by the plaintiff's wrongful refusal to complete the transaction it was prevented from earning the commission under the contract.

In my opinion, the plaintiff's action fails at the very outset. There is no evidence to support the allegation that Creswell was able to comply with the terms of the agreement. This was made a distinct issue by the pleadings. The only evidence relating to any possible title or interest of Creswell in the land proposed to be bought and sold was given by Smith, the real estate manager of the plaintiff company, who conducted the whole of the negotiations connected with the transaction in question with the defendant. This evidence was given on Smith's cross-examination by counsel for the defendant at the trial, and is as follows:—

"Q. You say that Mr. Creswell was the owner of the Kisbey farm? A. Well, he was not absolute owner of it. The biggest interest in it though. Q. That is what he told you? A. Mr. Creswell, yes. Q. You do not know of your own knowledge what interest he had? A. Oh yes, I do. Q. How? A. Well, because the company that I am with hold the agreement on it. I do not know—I could not give you the exact figures to-day. No."

This point was raised by counsel for the defendant at the trial, as will appear from the following passage from the judgment of the trial Judge:—

"On the argument counsel for the defendant contended that the plaintiff has not shown that Creswell could carry

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out the deal. The defendant, however, appears not to have questioned this when put to him on his examination for discovery, and further made no effort to negative it at the trial."

The Judge must have been mistaken in his reference to the defendant's examination for discovery. The only reference to Creswell by the defendant in those portions of his examination for discovery put in at the trial are contained in the following questions and answers.

"Q: Now Mr. Creswell has always been willing to go through with this deal, as far as you know? A. Yes, as far as I know. Q.: He signed the acceptance of your offer? A.: Yes."

As has already been pointed out, a distinct issue on this point was raised by the pleadings and the onus of proof was on the plaintiff and not on the defendant. As an essential part of its case the plaintiff must show that Creswell was able to take over the defendant's land on the terms and conditions set out. This it has absolutely failed to do, and, for that reason, I would allow this appeal. The judgment below should, therefore, be set aside and judgment entered for the defendant, dismissing the plaintiff's action with costs. The defendant should also have his costs of appeal.

Appeal allowed.

REX v. RITCHIE; Ex parte HAND.

New Brunswick Supreme Court, Appeal Division, Hazen, C.J., and White and Grimmer, JJ. June 8, 1922.

CERTIORARI (§I—9)—INTOXICATING LIQUOR ACT, 1916 (N.B.), CH. 20—BREACH—CONVICTION BY MAGISTRATE—CERTIORARI TO QUASH.

Under the New Brunswick Intoxicating Liquor Act, 1916, ch. 20, it is fully within the competence of the Police Magistrate to determine whether a sale of liquor is *bona fide* for the purpose of export without the Province or not, and where he has before him facts which justify him in coming to the conclusion that the sale is not a *bona fide* one for the purpose alleged, a rule *nisi* in *certiorari* to quash the conviction on the ground of want of jurisdiction, because there is no evidence to support the charge, will be discharged.

]*Bronfman* v. *Hawthorn* (1921), 69 D.L.R. 277, 37 Can. Cr. Cas. 303, distinguished.]

APPEAL by way of *certiorari* from the conviction by a Police Magistrate for a breach of the New Brunswick Intoxicating Liquor Act, 1916, ch. 20. Affirmed.

W. B. Wallace, K.C., and *W. M. Ryan*, shew cause against a rule *nisi*. *F. R. Taylor, K.C.*, in support of rule.

The judgment of the Court was delivered by

HAZEN, C. J.:—Hand was convicted before the Police Magistrate of the City of Saint John for having on October

27, 1921, unlawfully sold liquor contrary to the provisions of the Intoxicating Liquor Act, 1916 (N.B.), ch. 20. It is claimed in defence that the liquor was sold to one Pope D. MacKinnon for export to persons or corporations outside the Province of New Brunswick, and was in transit or in process of shipment *bona fide* to such persons or corporations. Application for a rule *nisi* was in the first place made to Barry, J., who declined to grant it but stated that while he felt himself bound by authority to refuse the application, he was sensible of the possibility of other Judges refusing to accept his view of the case. For that reason, and because the value of the property which had been seized by the chief inspector was considerable, and was liable to be confiscated if conviction stood, and because the question raised by the Police Magistrate involved the construction of an important section of the Intoxicating Liquor Act, he left it open to the accused and granted him leave, if any such leave was needed, to renew his application before the Appeal Division of the Court on the second Tuesday in February next, in the meantime staying proceedings. The accused, accordingly, applied for a rule *nisi* to the Appellate Division of the Supreme Court, on the date mentioned, and one was granted returnable last term when the case was argued.

There is no denial of the fact that the sale was made, and the only ground upon which the application can be urged is that there was a manifest defect of jurisdiction in the tribunal that made it.

Having carefully read the evidence given before the Police Magistrate, I cannot conclude that there was any such defect of jurisdiction, and it was fully within the competence of the Police Magistrate to determine whether the sale of the Liquor in question was *bona fide* for the purpose of export without the Province or not. The magistrate has evidently decided that it was not, and it seems to me the question was one entirely for his consideration. After carefully reading the evidence I would decide if it was necessary to do so that the magistrate had before him facts that would justify him in coming to the conclusion that the sale was not a *bona fide* one for the purpose alleged by the defendant. Hand himself did not go on the stand, and it was shown in evidence that MacKinnon, in addition to having places of residence in the State of Maine also had one in Richmond in the Province of New Brunswick near the International border. The attention of the Police Magistrate was also called to the provisions of sec. 129, of the Intoxicating Liquor

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Act, 1916 (N.B.), ch. 20, which provides that:—

"For the purpose of evidence, every brewer, distiller or other person licensed by the Government of Canada. . . . . and every liquor exporter mentioned in sec. 45 hereof, who makes a sale of liquor in the Province, shall immediately enter in a book to be kept for that purpose the date of such sale, the person to whom such sale was made and the person or carrier to whom the same was delivered for carriage; and the failure of such person to make, keep and produce as evidence the said entry and record of such sale shall, in any prosecution under this Act of such person for illegally making such sale of liquor be *prima facie* evidence against such person of having illegally sold such liquor."

Section 45 referred to provides that nothing shall prevent any person from having liquor for export sale in his bonded warehouse, provided such liquor warehouse and the business carried on therein complies with requirements that are specified, or from selling from such liquor warehouse to persons in other Provinces where such sales may be lawfully made, or in foreign countries. Although it was contended before the magistrate that Hand had the liquor for sale in his bonded liquor warehouse, and sold from such liquor warehouse to MacKinnon, who was a person from a foreign country, no record appears to have been kept of the transaction, and the book referred to in sec. 129 was not produced in evidence, and the magistrate was authorised, as appears by the section which I have quoted, to regard the failure of Hand to produce as his evidence the entry of sale as *prima facie* evidence against him of having illegally sold.

I do not wish, in any way, to review the evidence before the Police Magistrate, and I am making these remarks simply for the purpose of showing that, in my opinion, under the evidence, there was evidence to justify him in coming to the conclusion which he did, and that, therefore, the contention, even if legally correct, that there was no jurisdiction because there was no evidence to support the charge, cannot possibly be sustained.

The right of *certiorari* having been taken away, for these reasons and also for the reasons stated in his judgment by Barry, J., the rule should be refused.

At the time of the argument it was contended by counsel that the magistrate had disregarded the judgment recently given in this Court in the case of *Bronfman* v. *Hawthorn and Att'y Gen'l for New Brunswick.*—(1921) 69 D.L.R. 277, 37 Can. Cr. Cas. 303. This contention does not appear to

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me to be sound. The effect of the judgment in that case was and in fact it was distinctly stated therein that a person who has the legal right to have liquor in his possession in this Province for the purpose of export has the right to sell that liquor provided the sale is *bona fide* for delivery in a Province in Canada outside of New Brunswick, or in a foreign country, and if he makes such a sale in all cases it is not incumbent upon him personally to deliver that liquor in the place in which he is selling it in a foreign country or another Canadian Province, but he has the right to deliver it at his warehouse or elsewhere to a person who is to carry it to the place where, under the terms of the sale, it is to be delivered.

The Police Magistrate of the City of Saint John did not act in any respect in defiance of this judgment, but came to the conclusion that the sale was not a *bona fide* one for delivery outside of New Brunswick, and having come to that conclusion, discharged his duty, and found the accused guilty of the offence which had been laid against him.

The rule should be discharged.

Judgment accordingly.

McARTHUR v. BANMAN.

Saskatchewan Court of Appeal, Haultain, C.J.S., and Turgeon, McKay and Martin, JJ.A. October 23, 1922.

CONTRACTS (§ IID—145)—DOCTOR'S ACCOUNT—SERVICES TO SISTER—BROTHER TELLING DOCTOR "I WILL SEE HER THROUGH"—LIABILITY OF BROTHER—STATUTE OF FRAUDS.

A person who, on consulting a doctor with his sister who is ill tells the doctor that "he will see her through" incurs a direct liability on his part to pay the doctor's account, where, as a result of the words used, credit is given to such party, and an account is opened in the doctor's books in his name.

INTEREST (§ IB—22)—INTEREST ON ACCOUNTS—WHEN ALLOWED.

Interest may be charged on an overdue account from the time notice is given that such interest will be charged, but where the Court is of opinion that the rate charged is excessive, it may reduce the rate to what is reasonable under the circumstances of the case. Where an account sent out contained a notice on its face in the following words "ten per cent. interest charged on all overdue accounts" the Court held such notice sufficient.

[*Toronto R. Co.* v. *Toronto Corp'n*, [1906] A.C. 117; *Last West Lumber Co.* v. *Haddad* (1915), 25 D.L.R. 529, followed; and see secs. 28 and 29 of the King's Bench Act, R.S.S. 1920, ch. 39.]

APPEAL by defendant from the trial judgment in an action on an account for medical attention to the appellant's sister. Varied.

A. Buhr, for appellant,

G. C. Thompson, for respondent.

The judgment of the Court was delivered by

MARTIN, J. A.—This is an appeal from the judgment of

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the Judge of the Judicial District of Swift Current awarding to the plaintiff the sum of $150, and costs, for medical attention to the sister of the defendant. The facts are that the sister of the defendant, one Justina Banman, a girl of 20 years of age while visiting at the house of the defendant became ill, and on consultation with the local doctor at Morse the illness was pronounced appendicitis, whereupon, it was decided that the young woman should be taken immediately to Swift Current. Her brother, the defendant, took her to Swift Current and consulted the plaintiff, and the plaintiff states that defendant said to him that "he would see her through." Accordingly, the medical fees were charged on the books of the plaintiff to the defendant and not to the sister. The plaintiff also states, "I always looked to him, never to her," and statements of account were accordingly sent to the defendant. The defendant, (and in this he is corroborated by his sister) denies that he used the expression "would see her through," and says he told the plaintiff he had a bad crop and could not help, and that his sister was working out. He also states that, after the operation, he went for the bill and told the doctor she (meaning the sister) had some money and if she got better could earn some more, and at that told the doctor that his sister wanted the bill. At the first interview the plaintiff asked the defendant for his name and the location and description of his farm. The evidence is of a conflicting character, but there is ample evidence upon which the trial Judge could make the findings he has made, and I do not think that such findings should, in this case, be disturbed by this Court. The trial Judge found as a fact that the time of the first interview in the plaintiff's office the defendant told the plaintiff that he "would see her through."

It remains to consider whether as a matter of law the use of such expression created a direct liability on the part of the defendant to pay the account, or whether it created the relationship of guarantor and was a "specific promise to answer for the debt, default, or miscarriage of another person" within the meaning of the Statute of Frauds.

The Statute of Frauds, 29 Car. II, ch. 3, sec. 4, provides:—

"No action shall be brought . . . upon any special promise to answer for the debt, default or miscarriage of another person . . unless the agreement upon which such action shall be brought or some memorandum or note thereof shall

be in writing and signed by the party to be charged therewith or some other person thereunto by him lawfuly authorised."

Does the fact that the defendant said "I will see her through" place the defendant in the position of answering for the "debt, default or miscarriage of another" and render a memorandum in writing necessary in order to be liable on such promise, or did the defendant place himself, by the use of such words, in the position of principal debtor? I am of the opinion, under all the circumstances of the case, that the defendant, by the use of these words rendered himself directly liable, and that the facts do not fall within the scope of sec. 4 of the Statute of Frauds. As a result of the use of the words in question, credit was given wholly to the defendant; an account was opened with the defendant on the books of the plaintiff, and the account was rendered to the defendant from time to time.

15 Hals. p. 458, sec. 889, says: "To bring a case within section 4 of the Statute of Frauds the primary liability of another person to the promisee for the debt, default or miscarriage to which the promise of guarantee relates must exist or be contemplated otherwise the Statute does not apply, and the promise is then valid and can be sued on though not in writing."

The promise made by the defendant in this case was an original one—as distinguished from collateral—because it bound the defendant to pay independently of the liability of any one else.

In *Hargraves* v. *Parsons*, (1844), 13 M. & W. 561, at p. 570, 153 E. R. 235, Parke, B., in delivering the judgment of the Court, said:—

"The statute applies only to promises made to the persons to whom another is already, or is to become, answerable. It must be a promise to be answerable for a debt of or a default in some duty by, that other person towards the promisee. This was decided, and no doubt rightly, by the Court of Queen's Bench in *Eastwood* v. *Kenyon* (1840), 11 Ad. & El. 438, 113 E.R. 482 and in *Thomas* v. *Cook*, 8 B. & C. 728."

In *Thomas* v. *Cook*, (1828), 8 B. & C. 728 at p. 732, 108 E.R. 1213, at p. 1215, referred to in the above mentioned case Park, J., in delivering judgment, said:—

"This was not a promise to answer for the debt, default or miscarriage of another person but an original contract between these parties, that the plaintiff should be indem-

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nified against the bond. If the plaintiff at the request of the defendant, had paid money to a third person, a promise to repay it need not have been in writing, and this case is in substance the same."

See also *Birkmyr* v. *Darnell* (1704), 1 Smith, L.C. 12th ed. 335; *Bampton* v. *Paulin* (1827), 4 Bing. 264, 130 E.R. 769; *Dixon* v. *Hatfield* (1825), 2 Bing. 439, 130 E.R. 375.

The trial Judge gave judgment for the amount of $150 because the bill had been sent out for that amount, together with interest from the date the first account was sent out, namely, May 22, 1919, at the rate of 10% and costs. The evidence discloses the fact that the sum of $25 had been paid on account of the bill apparently by the sister, Justina, who received the medical attention, and on the argument of the appeal, it was admitted by counsel for the plaintiff that the judgment should be reduced by that amount.

Interest on the account was claimed and allowed because the accounts sent not by the plaintiff contain a notice on their face in the following words: *"Ten percent. interest charged on all overdue accounts."*

In *Toronto R. Co.* v. *Toronto Corp'n*, [1906] A.C. 117, at p. 121, the question of the allowance of interest was dealt with per Lord Macnaghten as follows:—

"The result therefore, seems to be that in all cases where in the opinion of the Court, the payment of a just debt has been improperly withheld, and it seems to be fair and equitable, that the party in default should make compensation by payment of interest, it is incumbent upon the Court to allow interest for such time and at such rate as the Court may think right."

In *Last West Lumber Co.* v. *Haddad*, (1915), 25 D.L.R. 529, 8 S.L.R. 407, the trial Judge allowed interest at the rate of 10% on the claim from April 1, 1914, which was the date on which an account had been rendered claiming interest. The case went to appeal, and Lamont, J., in delivering the judgment of the Court, after referring to the judgment of the Privy Council in *Toronto R. Co.* v. *Toronto Corp'n.*, *supra*, stated (25 D.L.R. at p. 533), that, inasmuch as demand had been made for interest on April 1, 1914, interest should be allowed from the date of the demand. He fixed the rate of interest at 8%, which he considered reasonable under the circumstances.

In the case at Bar, the account containing the notice as to payment of interest in overdue accounts was sent out by the plaintiff on May 22, 1919. There will, therefore, be an

allowance of interest from that date, but at the rate of 5%, which I consider reasonable, under the circumstances of this case. Que. S.C.

The judgment of the trial Judge should therefore, be varied by reducing the amount awarded to $125, and interest at the rate of 5% from May 22, 1919. The plaintiff will have his costs of appeal.

Judgment varied.

COHEN v. STONE.

Quebec Superior Court in Bankruptcy, Panneton, J.
September 21, 1922.

SALE (§ IB—5)—OF GOODS BY WEIGHT—PASSING OF TITLE—PERFECTION OF SALE.

When things moveable are sold by weight, number or measure, and not in the lump, the sale is not perfect until they have been weighed, counted or measured, but the buyer may demand the delivery or damages according to circumstances.

ACTION to determine the ownership of certain scrap iron sold by the authorised assignor to the petitioner, and taken possession of by the authorised trustee, after the assignment.

J. E. Lafontaine, for trustee.

S. G. Tritt, for petitioner.

PANNETON, J.:—The petitioner alleges that on or about June 13, 1922, the authorised assignor sold to the petitioner a quantity of scrap iron and scrap steel described as follows, to wit:—

"All the scrap iron of all nature and description as inspected by your B. Cohen which consist of the following grades all sorts of steel, light and heavy malleable scrap, cast iron, car wheels, wrot scrap light and heavy, rails, beams, columns, shafting and all other sort of scrap iron, that it contained in the yard, with the exception of a lot of long and short pipe which is piled up, in the bin on the south side of the yard, and also a lot of cut up scrap, in one of the bins, consisting of scrap pipe and bushelings, with the exception also of the power shears, tools, scales, and all materials contained in office, and also in shed fronting on Conde St., we have also sold all the steel, of all descriptions which consist of beams, columns, scrap rails, and pipe and other steel of any sort with the exception of the relaying rails which are located at Bridge St. coal siding, this lot which we have sold will be included in the scrap sold at Centre St., all at the price of $8.50 per . . . per gross ton f.o.b. cars, Point St. Charles, Grand Trunk, railroad weight

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to govern settlement, cars to be ordered weight before loading. The entire lot of scrap sold is 350 tons."

The agreement of sales contains in addition to what is quoted the following:—

"Loading to begin on July 1, 1922, Terms of payment we received this date of three months note for $3000.00 to apply on account and at expiration we to settle amount either way. We further agree at Mr. Cohen's option to renew this note for three months on his paying interest and $500.00 cash on expiration. Further understood that car 71751 containing wrot scrap shipped to Steel Company is included in this steel and we turn this over to B. Cohen & Co.

This agreement is accepted and signed by both parties.

(Seller) North Amer. Iron & Metal Co.
(Signed) S. Kander, manager.

B. Cohen & Co. (Buyers)
(Signed) Benjamin Cohen.

This line means on completion of loading we are to determine the exact amount and settle with each other accordingly. (Signed) S. K."

Petitioner at that date gave his note for $3,000 to the vendor in accordance with the above agreement.

Materials in car 71751 have been paid for by the steel company to petitioner. There is no more question of what was contained in said car, except as being a part of the total quantity sold.

The promissory note of $3,000 has been discounted by the vendor.

As the vendor did not commence to deliver possession of the property sold on July 1, petitioner came to see the manager of the vendor on the 5th who told him that he had not time to deliver him said goods on that date, but he gave him the key to their yards where the goods were. On the morning of the 6th., petitioner commenced to load and carry the goods to the Grand Trunk station. He loaded about 40 gross tons of the said materials sold.

On the same day, July 6, the North American Iron and Metal Co. made an authorized assignment of its properties for the benefit of its creditors to the authorised trustee above mentioned who went on the premises and yards where the said materials were, stopped petitioner from loading any more and took possession of all materials which were in the yards. He has been ever since in possession of the same.

Petitioner concludes his present petition as follows:—

"Wherefore the petitioner prays that by the judgment to be rendered herein he be declared to be the owner of the scrap iron and scrap steel amounting approximately to three hundred tons now contained in the two yards of the authorised assignors and more particularly described in para. (2) of the present petition: that the trustees be ordered to hand over possession thereof forthwith to the petitioner, under all legal penalties, and subject to such conditions as this Court may order; that the petitioner, moreover, be declared to the legal holder and owner of scrap iron and scrap steel shipped by said car No. 71751 to the Steel Company of Canada, and to receive payment therefor from the said Steel Company of Canada, and to give valid discharges to whomsoever concerned in respect thereof; that this Honorable Court be pleased to permit the petitioner to place a guardian at his own expense to act jointly with any other person duly authorized in safeguarding the said scrap iron and scrap steel at the two yards of the authorized assignors aforesaid; and that all such further orders be made as may to law and justice appertain; the whole with costs against the estate of the authorized assignors."

The trustee opposes the petition upon the ground that petitioner is not the owner of the materials claimed by him, and that on the date of the abandonment, the assignor insolvent was still the owner of said property of which he, the trustee, became vested by virtue of the assignment.

The issue between the parties is who is the proprietor of the materials in question.

The law is laid down in art. 1474 C.C. (Que.). It reads: "When things moveable are sold by weight, number or measure, and not in the lump, the sale is not perfect until they have been weighed, counted or measured, but the buyer may demand the delivery of them or damages according to circumstances."

Notwithstanding the statement in the writing that the sale includes all the scrap iron, steel etc. with some excepted piles which are in the two yards, and includes what was shipped already to the steel company the positive declaration that the *entire lot of scrap sold is 350 tons* dominates the whole. There was no use to specify that quantity as being the *entire* lot sold, if the sale was not limited to it. It was all sold but it was not to exceed 350 tons. If there was more than 350 *tons*, the sale was not of the whole, if there was only that quantity then it covered all. The

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proof establishes that there was more, therefore it became undetermined what particular part of the piles belonged to the purchaser. The quantity sold was to be taken from a larger one. The exact number of tons at these places could not be fixed before weighing. If there was more than 350 tons, the purchaser was not bound to take the surplus, if there was less the vendor was not bound to get the material elsewhere to make the 350 tons. The fact that the buyer gave his note at once for $3,000 being $25 more than the amount of 350 tons at $8.50 a ton explains the mention made in the writing of a later adjustment either way of the amount due. Two or three tons more perhaps to complete a car load would have been included, but it did not change the character of the sale. It is also strongly urged that on July 5, the giving of the key of the yard to petitioner gave him possession and delivery of the material he had bought, and that he became, then the absolute owner irrespective of any weighing. The yards contained not only the material sold to petitioner, but also what was sold to other parties and specially what would remain after he had taken his quantity. His proposition would hold good if the property sold had been identified. The key gave him the power to proceed to such identification, as he did for so much as he carried to the Grand Trunk station.

Numerous authorities and decisions were quoted by both parties in support of their pretensions. No case reported is exactly like the present, and no opinion of authors helps us to construe the writing submitted which is *sui generis*.

Our art. 1474 C.C. (Que.), is clear, if there is any weighing the sale is not perfect. The demand of delivery referred to in the article refers to an identified moveable property. *Villeneuve* v. *Kent* (1892), 1 Que. Q.B. 136.

Considering that petitioner failed to establish the allegations of his petition, and that if there was any doubt about that proof, the burden of proof is on the petitioner.

The Court dismisses said petition with costs.

Petition dismissed.

LONG v. ZLATNICK.

Saskatchewan Court of Appeal, Haultain, C.J.S., and Turgeon, McKay and Martin, JJ.A. October 23, 1922.

CONTRACTS (§ IIIB—200)—SALE OF ANIMALS—VIOLATION OF ANIMAL CONTAGIOUS DISEASES ACT, R.S.C. 1906, CH. 75, SEC. 38—KNOWLEDGE OF DISEASE BY SELLER—VALIDITY OF CONTRACT.

A warranty as to the soundness of horses known to the seller to be suffering from mange at the time of the sale and from

which they afterwards die avoids the contract. Such contract is also void under sec. 38 of the Animal Contagious Diseases Act, R.S.C. 1906, ch. 75.

APPEAL by plaintiff from the trial judgment in an action to recover the price of certain horses sold by the plaintiff to the defendant, and a counterclaim for damages for breach of warranty. Affirmed.

T. A. Lynd, for appellant; No one contra.

The judgment of the Court was delivered by

HAULTAIN, C. J. S.:—The trial Judge has found that there was a warranty as to the soundness of the horses at the time they were sold. This finding is supported by the evidence, as the plaintiff did not deny the statements of the defendant that the horses were represented by the plaintiff at the time of the sale to be good and healthy. There also seems to be evidence to justify the finding that the horses were suffering from mange at the time of the sale and that this condition was known to the plaintiff. Both of the horses in question died of mange later on, and the other goods which were purchased with the horses were destroyed by order of the Government inspector under the Animal Contagious Diseases Act, R.S.C. 1906, ch. 75.

These facts, in my opinion, entitled the defendant to have the action dismissed and the note sued on and delivered up to him. The trial Judge also found that the sale came within the prohibition of sec. 38 of the above mentioned Act, and held that the contract in question was void. With this finding, I also agree.

The imposition of a penalty by Parliament for any particular act is practically equivalent to direct prohibition. *Bensley* v. *Bignold* (1882), 5 B. & Ald. 335, 106 E.R. 1214. This case decided that a printer could not recover for work or materials because he had not printed his name on the work as required by statute. Abbott, C. J., at p. 340 (106 E.R. at p. 1216) holding that a party could not sue on a contract made "in direct violation of the provisions of an Act of Parlament."

In *Cope* v. *Rowlands* (1836), 2 M. & W. 149, at p. 157, 150 E.R. 707 at p. 710, the Court of Exchequer per Parke, B., decided that:—

"Where the contract which the plaintiff seeks to enforce, be it express or implied, is expressly or by implication forbidden by the common or statute law, no court will lend its assistance to give it effect. It is equally clear that a contract is void if prohibited by a statute though the statute inflicts a penalty only, because such a penalty implies a prohibition.

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It was contended on the part of the appellant that there was no foundation for the defendant's counterclaim for damages, and the cases of *O'Mealey* v. *Swartz* (1918), 11 S.L.R. 376, and *Ward* v. *Hobbs* (1878), 4 App. Cas. 13, 48 L.J. (Q.B.) 281, were referred to. The facts of the present case, in my opinion, completely distinguish it from *Ward* v. *Hobbs*. Here, we have an express statement that the animals are healthy made by the plaintiff at the time of the sale, and, as found by the trial Judge, known by him to be false. In *Ward* v. *Hobbs*, by the conditions of sale the lots were sold "with all faults," and it was expressly stated in the conditions that (see 4 App. Cas. at p. 14):

"No warranty will be given by the auctioneer with any lot and, as all lots are open for inspection previous to the commencement of the sale, no compensation shall be made in respect of any fault or error of description of any lot in the catalogue."

No verbal representation was made by or on behalf of the vendor as to condition of the pigs which were the subject of the action. The pigs to the knowledge of the vendor were infected with a contagious disease, and by exposing them for sale at a public market he was liable to a penalty under the Contagious Diseases (Animals) Act, 1869 (Imp.), ch. 70. The purchaser brought an action against the vendor for damages caused by breach of warranty and false representation on the sale at a public market of the pigs which were suffering at the time from typhoid fever, and by the wrongful act of the defendant in offering the pigs for sale at a public market. It was held in *Ward* v. *Hobbs*, 48 L.J. (Q.B.) 281, under these circumstances, that

"a man who sends animals to market does not thereby impliedly represent to a purchaser that they are not as far as he knows suffering from infectious disease, at all events where they are sold subject to an express condition that no warranty will be given."

It was also held that the mere breach of a statutory duty did not give a foundation for a private action, (48 L.J. (Q.B.) at p. 289);

"The very nature of the condition that the buyer is to take the animals with all faults implies that they may be diseased, without any distinction between infectious and non-infectious disease, and I cannot think that the legislation which has recently taken place in the public interest, against particular acts tending to propagate such disease, can make that an actionable wrong, as between the parties

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to a private contract, which would not be so without it."

In the present case, we have a false representation in addition to the breach of the statutory duty, and the defendant is, therefore, entitled to succeed on his counterclaim. *Ward* v. *Hobbs*, 4 App. Cas. at p. 21, *per* Earl Cairns, L.C.

There is also authority for saying that the defendant, in spite of the fact that the contract was made in violation of the statute, has a right of action on the contract as he was not "a party to the transgression." Pollock on Contracts, 9th ed. p. 359, note (*f*). In any event, he is entitled to recover the amount paid by him on an illegal contract, not being *in pari delicto* with the plaintiff.

I would, therefore, dismiss the appeal with costs.

Appeal dismissed.

SUTHERLAND v. DAVISON.

Alberta Supreme Court, Walsh, J. October 10, 1922.

MECHANICS' LIENS (§VIII—60)—MECHANICS' LIEN ACT, 1906 (ALTA.) CH. 21—NOTICE POSTED UNDER SEC. 11—PERSON CONTINUING TO DO WORK AFTER POSTING OF NOTICE—SUBSEQUENT WORK AS KEEPING ALIVE LIEN FOR WORK DONE BEFORE POSTING OF NOTICE.

Where the registered owner of land gives notice under sec. 11 of the Mechanics' Lien Act, 1906 (Alta.), ch. 21, that he will not be responsible for works or improvements being made thereon, work which a claimant continued to do on the property, after the posting of the notice cannot avail him to keep alive his lien as to work done before the posting of the notice.

MECHANICS' lien action.

S. S. Cormack, for plaintiff.

L. S. Fraser, for defendant.

WALSH, J.:—In this mechanics' lien action a question of law arises the determination of which is desired by the parties before the trial as it may end the action, and so it has been argued before me.

The defendant, the registered owner of the land upon which the lien is claimed, gave notice under sec. 11 of the Act 1906 (Alta.), ch. 21, that he would not be responsible for the works or improvements being made thereon. The plaintiff, notwithstanding this notice, continued to work on the property as he had done before the notice was posted, but he makes no claim of lien for the wages earned in respect of this later work. He had worked on the property before the posting of this notice and it is only in respect of the wages then earned that he claims a lien. Under sec. 13 (as amended by 1915 (Alta.), ch. 2, sec. 27) such a lien ceases to exist after the expiration of 35 days after

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the claimant "has ceased from any cause to work thereon" unless, in the meantime he shall file his lien in the proper office. The plaintiff's affidavit proving his lien was not filed until more than 35 days from the doing of the last work in respect of which the lien is claimed, although it was filed within 35 days of the last work done by him on the property, after the posting by the defendant of the notice under sec. 11. His contention is that this work avails him to keep alive his lien for the work done before the posting of the notice, and that his affidavit in support of it was filed within the prescribed time because it was filed within 35 days after the time when he ceased to work on this land.

I think that the ceasing to work mentioned in sec. 13 refers to the work in respect of which the lien is claimed. The object of the section is to place a time limit upon the filing of a lien, so that the owner may know whether or not the claimant intends to enforce it against the property, and so protect himself, if necessary, with respect to it against the contractor. This view is strengthened by the particulars which the section requires to be set out in the affidavit, namely, the particulars of the kind of works done, which means, of course, the works in respect of which the lien is claimed and the time when they, (that is the works for which the claim is made) were finished or discontinued. It would quite defeat what I take to be the object of the section if the claimant could add to the period of the work for which a lien is claimed a further period of time covering his employment on the same construction, but in respect of which he does not and could not claim a lien, and by filing his affidavit within 35 days from the expiration of this later period, keep his lien alive.

In my opinion, the period of time covered by the plaintiff's work, subsequent to the posting of the defendant's notice, cannot be taken into account in determining the date within which the plaintiff's lien should have been filed. The defendant is entitled to the costs of this motion.

Judgment accordingly.

McKAY v. PROHAR (defendant) and SANSOM and PAINE (defendants appellants) and SCHAUMLEFFEL and SCHAUMLEFFEL (garnishees appellants) and McPHERSON (garnishee).

Saskatchewan Court of Appeal, Haultain, C.J.S., McKay, and Martin, JJ.A. October 23, 1922.

GARNISHMENT (§IID—50)—TECHNICAL DEFECTS IN GARNISHEE SUMMONS—PAYMENT BY GARNISHEES AFTER KNOWLEDGE—RIGHT TO AFTERWARDS ATTACK SUMMONS.

Where the garnishees long after they knew or should have known of alleged defects in the garnishee summons deliberately through their solicitor make payments on account of the summons they will not be allowed to attack the summons on technical grounds which do not go to the merits.

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APPEAL from an order of a Judge in chambers dismissing the appellants' motion to set aside a garnishee summons, and the service thereof and all subsequent proceedings against the garnishee appellants. Affirmed.

A. Allan Fisher, for appellants,

A. R. Tingley, for respondent.

(No. 1)

The judgment of the Court was delivered by

McKAY, J. A.:—This is an appeal from an order of a Judge in Chambers dismissing the appellants' motion to set aside the garnishee summons issued herein, and the service thereof and all subsequent proceedings against the garnishee appellants.

The writ of summons and the garnishee summons were issued on August 6, 1921. The writ of summons was served on appellant Paine on August 16, 1921. The garnishee summons was served on the appellants Schaumleffel on August 17, 1921, and on the appellant Paine on September 15, 1921.

The appellant Paine entered an appearance to the writ of summons on September 6, 1921, and delivered a defence to the action on September 20, 1921.

The defence was set aside by order of the Master in Chambers made and dated November 10, 1921, and judgment entered for the respondent against the appellant Paine only on Novmeber 16, 1921, for the sum of $1,422.11, debt and costs.

The appellants Schaumleffel by a statement in writing dated August 31, 1921, and filed with the local Registrar on September 3, 1921, acknowledged the service of the garnishee summons upon them, and that approximately the sum of $800, would be due and payable to appellant Paine from each of them the latter part of October, 1921.

The appellant Paul Schaumleffel paid the sum of $600, to the respondent's solicitor in respect of the garnishee summons on December 23, 1921, and the appellant John Schaumleffel paid the sum of $180, to the respondent's solicitor in respect of the garnishee summons on April 12, 1922. Both these payments were made through A. Allan Fisher, the solicitor for the appellants Shaumleffel, who

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was then and is still also the solicitor of record for the appellant Paine.

The appellants served their notice of motion herein to set aside said garnishee summons etc. on May 11, 1922, said notice of motion being dated May 11, 1922.

With regard to the appellant Sansom, it was admitted at the argument by both counsel that he was wrongly made an appellant, and the appeal is therefore dismissed without costs so far as he is concerned.

With regard to the other appellants, the grounds of appeal are, shortly, as follows:—1. That the affidavit filed on which the garnishee summons was issued does not comply with sec. 3, (2), R.S.S. 1920, ch. 59, in that it does not show that the deponent making the affidavit is plaintiff, plaintiff's solicitor or agent. 2. That the said affidavit does not show the nature of the plaintiff's claim as required by sec. 3, (2 (a)), R.S.S. 1920, ch. 59. 3. That the issuance of the garnishee summons and service thereof and all subsequent proceedings against the garnishees are void 4. That the affidavit of service of the garnishee summons on the garnishees did not show the time of service.

On perusal of the affidavits referred to in these objections, it will be readily seen that said objections are technical and do not go to the merits.

In my opinion, the defects, if they are such, complained of, were waived by the conduct of the appellants.

In Hardcastle's Statute Law, 3rd ed., at p. 84, it is there stated as follows:—

"But while courts of justice cannot dispense with or override the express provisions of a statute by construing its express terms as subordinate to considerations of common law or equity, there are certain cases in which it has been held. . . . .

(3) that a person may waive or be estopped by his conduct from setting up a defence given him by statute."

In *Wilson* v. *McIntosh* cited by Hardcastle for the foregoing proposition, (a case from New South Wales which went to the Privy Council, reported in [1894] A.C. 129,) the facts were shortly as follows: McIntosh on January 8, 1887, lodged an application in the office of the Registrar General to bring under the Real Property Act (26 Vic. No. 9) certain lands. On May 12, 1887, Wilson duly lodged a caveat against the land being brought under the provisions of that Act. On November 1, 1887, and more than 3 months after the lodging of the caveat, McIntosh, in pursuance of

sec. 21 of the Real Property Act (amendment 41 Vic. No. 18) stated a case for the opinion and direction of the Supreme Court, and in pursuance of an order obtained by McIntosh, Wilson stated and filed a case on November 18, 1887. No further steps were taken by McIntosh in this stated case, and he did not further proceed on his application. But on July 24, 1890, McIntosh moved to have Wilson's caveat set aside and removed, on the ground that Wilson having failed to take proceedings within 3 months after filing the caveat as provided by sec. 23 of the Real Property Act, the caveat had lapsed. The wording of said sec. 23 is in part as follows:—

"After the expiration of three months from the receipt thereof every such caveat shall be deemed to have lapsed unless the person by whom or on whose behalf the same was lodged, shall within that time have taken proceedings in any Court etc. . . . ."

On appeal to the Privy Council it was held [1894] A.C. at p. 133,

"That it was competent for the applicant [McIntosh] to waive the limit of the three months and the lapse of the caveat by sec. 23, and that the respondent [McIntosh] did waive it by stating a case, and applying for and obtaining an order upon the appellant [Wilson] to state her case, both which steps assumed and proceeded on the assumption of the continued existence of the caveat."

See also *Moore* v. *Gamgee*, (1890), 25 Q.B.D. 244, 59 L.J. (Q.B.) 505, 38 W.R. 699.

In this case, in appeal, the appellants, long after they knew or should have known (*Seeman* v. *Erickson* (1895), 3 Terr. L.R. 294) of the alleged defects, deliberately through their solicitor paid to the respondents' solicitor $600 and $180 on account of the garnishee summons attacked. In view of the foregoing cited authorities, these payments are a sufficient waiver of the alleged defects complained of to bar the appellants from now objecting to them.

The appeal will, therefore, be dismissed with costs.

Appeal dismissed.

(No. 2)

The judgment of the Court was delivered by

McKAY, J.A.:—This is an appeal from a Judge in Chambers dismissing an appeal from an order of the Master in Chambers extending the time limited for the service of the garnishee summons on the defendant Paine and giving

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leave to enter judgment against the two garnishees.

At the hearing of this appeal, it was admitted that Sansom had been wrongly made an appellant; the appeal is, therefore, dismissed without costs in so far as he is concerned.

In addition to the grounds of appeal urged in appeal No. 1 in this section, it was contended that the Judge erred in extending the time for service of the garnishee summons on the defendant Paine. It appears that this extension was made after service on defendant Paine and after the payments were made by appellants' solicitor to the respondents' solicitor on account of the garnishee summons.

In my opinion, it is not necessary for me to decide whether the Judge was right or wrong in granting such extension, as the appellants at the time of making the payments knew or should have known (*Seeman* v. *Erickson*, 3 Terr. L.R. 294) that appellant Paine had not been served within 20 days after service on the garnishees, and, consequently, even if the Judge erred in extending the time, it would not be a sufficient ground for setting aside the garnishee summons, under the circumstnaces of this case. The reasons given for dismissing appeal No. 1 in this action apply to this appeal.

I am, therefore, of the opinion that this appeal should be dismissed with costs.

Appeal dismissed.

REX (upon the relation of) L. G. PORTEOUS v. FITZALLEN AND THE TOWN OF GRANDE PRAIRIE.

Alberta Supreme Court, Tweedie, J. October 14, 1922.

TAXES (§ IIID—138)—ASSESSMENT OF TOWN COUNCIL ACTING AS COURT OF REVISION—APPEAL—DUTY OF ASSESSOR TO FORWARD NOTICE TO DISTRICT COURT JUDGE—THE TOWN ACT, 1911-12 (ALTA.), CH. 2, SECS. 274, 293 (1) (2) (13)—CONSTRUCTION.

Section 293 (2) of the Town Act, 1911-12 (Alta.), ch. 2, requiring the assessor to forward a list of all appeals against the Court of Revision to the Judge is mandatory, and his duty is to carry out the instructions therein contained, and the town council has no jurisdiction to adjudicate as to whether the notice of appeal is properly laid or not, or to instruct the assessor not to forward the appeal as required by the section. The decision as to whether the appeal is properly taken or not is a matter for the decision of the District Judge on the hearing of the appeal.

APPLICATION for a mandamus to compel the respondents to forward to the Judge of the District Court for the District of Peace River a notice of appeal from the decision of the Court of Revision for the Town of Grande Prairie. Application granted as against respondent Fitzallen, and dismissed as against the town.

G. B. Henwood K.C., for plaintiff,
F. C. Jamieson K.C., for defendant.

TWEEDIE, J.:—The applicant at the time of the assessment complained of resided and has since continued to reside in the town of Grande Prairie. In 1922 lots 31 and 32, block 5, plan 1410 A.C. Grande Prairie were assessed for $3,000 each. Against this assessment, he appealed as provided for by sec. 274 of the Town Act 1911-12 (Alta.), ch. 2, to the council of the town sitting as a Court of Revision, which met on May 12, 1922.

That section provides "if any person thinks that he or any other person has been assessed too low or too high, or that his name or the name of any other person has been wrongly inserted, in or omitted from the roll. . . . .he may within the time limited. . . . give notice in writing to the assessor that he appeals to the council to correct the said error. . . . . ."

Counsel for the applicant filed an affidavit of his own in support of this application in which he sets forth:—

"That L. C. Porteous took an appeal from the 1922 assessment covering lots thirty-one (31), and thirty-two (32) in block five (5) Grande Prairie . . . plan 1401 A.C. to the Court of Revision . . . . and I appeared on behalf of L. C. Porteous . . . .".

He further states that "the Court of Revision reserved judgment and I was not advised of the decision until I received the letter . . . . dated May 15th, 1922. . . . ." This is a letter from the assessor advising him of the decision of the Court of Revision.

There was also filed the affidavit of the applicant in which he states "That I am the owner of the lands and premises hereinbefore described and I am assessed for such by the Town of Grande Prairie." The lots described are the same as set forth in Smith's affidavit and the notice of appeal.

The assessment roll is not in evidence. The only reference to the appeal from the assessment in the minutes of the Court of Revision May 12, is as follows:—

"Porteous Hardware Co. Ltd. represented by W. F. Smith L.L.B. re lots 31 and 32, block 5, 1410 A.C., land only assessed at $3,000 each; assessment sustained on motion councillors Michelis and Spencer."

Affidavits of the mayor and councillors are to the effect that the matter was disposed of finally on that day. Three days later, on May 15, J. Fitzallen, secretary of the town,

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who was also the assessor, wrote to Smith, as follows:—"Re Porteous Hardware Co., lots 31-32 block 5 1410 A.C. Relative to the appeal made on behalf of the above by yourself at the Court of Revision on assessments, held in the council chamber on May 12, I beg to advise that after consideration the council found the two lots in question to be fair and equitable in comparison with other properties similarly located. The council by resolution sustained the assessment as made."

On the 23rd of that month, Smith forwarded a notice of appeal as follows:—"In the matter of appeal from the Court of Revision of the Town of Grande Prairie, Alberta, between: L. C. Porteous, appellant and the Town of Grande Prairie, Alberta, respondents

Take notice that I, L. C. Porteous, intend to appeal and do hereby appeal from the judgment of the Court of Revision rendered May 15, 1922, on the appeal from the assessment of $6,000 against lots thirty-one and thirty-two, block five, plan 1410 A.C. in the Town of Grande Prairie, Alberta, and I also appeal from the said assessment on said lots on the grounds that the assessment of $3,000 against each lot is too high and should not be more than $1,500 against each lot.

Dated the 23rd day of May, 1922. (Sgd.) L. C. Porteous.

To: The respondent.

And to J. Fitzallen, Esq.,

secretary treasurer, Town of Grande Prairie."

On July 1, 1922, Smith wrote to Fitzallen the assessor, asking him to include in the list of appeals as provided for by sec. 293, sub-sec. 2 of the Town Act the appeal of L. C. Porteous. On August 1, 1922, Fitzallen wrote to Smith:

"Replying to yours of July 31, re the appeal of Mr. L. C. Porteous against the assessment of lots 31 and 32, block 5, 1410 A.C., and of Mrs. L. C. Proteous against the assessment of lots 7 and 8, block 1, 1476 B.V., I would say that the council was advised by the town solicitor in the matter to the effect that the notice of appeal to the Judge was improperly laid, and I was therefore instructed to take no action in the matter."

On August 3, 1922, Smith wrote to Fitzallen asking him to let him know "in what respect the appeals were at fault and improperly laid." To this letter he received no reply, in consequence of which this application was made.

Three questions are involved on the application:—(1) Is the motion sustaining the assessment in the words as set

out above "Porteous Hardware Company, Limited represented by W. F. Smith re lots 31 and 32 . . . ." a disposition of an appeal entered by L. C. Porteous concerning the same lots which he alleges were assessed in his name? (2) Was the appeal disposed of at all, and if so, when? (3) If it was disposed of was the notice of appeal filed on May 23, 1922, within 8 days, within the meaning of the Act?

Section 293, sub-secs. 1, 2 and 13 of 1911-12 (Alta.), ch. 2, provides as follows:—"293. In all appeals under the provisions of the preceding section the proceedings shall be as follows: 1. The appellant shall in person or by agent serve upon the assessor within eight days after the decision of the court of revision a written notice of his intention to appeal to the Judge; 2. The asessor shall immediately after the time limited for service of such notice forward a list of all appeals to the Judge and the Judge shall fix a day for the hearing of such appeals; 13. The decision and judgment of the Judge shall be final and conclusive in every case adjudicated upon."

Counsel for the respondents contends that the question which has to do with the filing of the notice of appeal should be disposed of on this application and that if it is found that it was not filed within the prescribed time then the appeal would not lie and the order for mandamus should not be granted. To so decide would be to determine a question of fact upon which the very jurisdiction of the District Court depends, and by necessary implication decide that the assessment had been disposed of and that the minute above referred to was a valid disposition of the appeal. There may be surrounding circumstances to show or which would justify the appeal Court in holding that the actual date of the decision was other than which it appears to be.

This was what happened in the case of the *Nanten Consolidated School District No. 50* v. *Canadian Western Natural Gas Light, Heat & Power Co.*, decided by His Honor Judge McNeil, and finally passed upon by the Supreme Court of Canada in a decision unreported which affirmed Judge McNeil's decision. It was held, in view of all the circumstances, that the decision was made on the day upon which notice was given, and not on the day which the school district contended that it was made.

To determine these questions, would be to determine questions which of necessity arise out of the assessment or are incidental to the appeal from the decision of the

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Court of Revision and which can only be dealt with by the District Court Judge. It is for him to determine whether or not the notice has been filed within the proper time, and if so, to hear and determine the other questions arising in the appeal. The appeal lies direct to the Judge of the District Court of the Judicial District within which the town is wholly or partly situated. Section 293, sub-secs. 1 and 2 and sec. 2, sub-sec. 8. By sec. 293, sub-sec. 13 his judgment and decision are final and conclusive. This section expressly provides the procedure, by way of appeal from any assessment of property in Towns, to be followed and by implication a Judge of the Supreme Court is deprived of jurisdiction, and he cannot exercise indirectly those powers which he is prohibited from exercising directly.

Not even the appeal Court of this Province has jurisdiction to hear and determine questions by way of appeal from assessments, and the only remedy which either party has if he or it is dissatisfied with the decision of the District Court Judge is an appeal to the Supreme Court of Canada, provided that the appeal can be brought within the provisions of the Supreme Court Act, as amended by 1920 (Can.), ch. 32, sec. 37.

Should the order for mandamus be granted against the respondents or either of them? The applicant himself served upon the assessor the notice of appeal on May 23, 1922, and he contends that he served it within the required 8 days. The Act requires that "The assessor shall immediately, after the time limited for service of such notice forward a list of all appeals to the Judge." He was specially required to do so, but instead of doing so he refrains on the advice evidently of the town council which with the assistance of the town solicitor decides that the notice of appeal was improperly laid. The council adjudicates upon a matter concerning which it has no authority to adjudicate. It decides, virtually, that the District Court had no jurisdiction to hear the appeal, then instructs the assessor to take no action in the matter, or in other words to withhold it. The council had no authority to give any such instructions. The instructions to be followed by him are set forth in the Act. The words are mandatory.

He "shall immediately after the time limited for service forward a list of all appeals to the Judge." The words "immediately after the time limited" do not allow him to exercise any discretion. It is his duty to forward notices when he receives them. It is for the Judge to determine

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whether or not it has been served in time and whether or not he has jurisdiction to hear the appeal. The duties of the assessor are ministerial only and he can exercise no discretionary or judicial powers in connection with the notice and must forward it when received, the presumption being, so far as he is concerned, that the notice was filed within the time prescribed by the Act. He is the officer designated by the Act charged with a duty thereunder which he must perform, and the order for mandamus against him will go with costs. The application as against the town will be dismissed but without costs.

Judgment accordingly.

LYONS v. SMITH.

Saskatchewan Court of Appeal, Turgeon, McKay and Martin, JJ.A. October 23, 1922.

BILLS AND NOTES (§ IIIA—55)—SETTLEMENT—DISCHARGE OF PROMISSORY NOTE—CONSIDERATION—NECESSITY OF WRITING UNDER SEC. 142 OF THE BILLS OF EXCHANGE ACT. R.S.C. 1906, CH. 119.

If consideration is given for the discharge of a liability on a promissory note, it is not necessary that evidence of such settlement or discharge should be in writing, it not being a renunciation within the meaning of sec. 142 of the Bills of Exchange Act, R.S.C. 1906, ch. 119.

APPEAL by defendant from the trial judgment in an action on a promissory note. Referred back to trial Judge for judgment on question of fact.

L. McK. Robinson, for appellant.

P. H. Gordon, for respondent.

The judgment of the Court was delivered by

MCKAY, J.A.:—This is an action on a promissory note made by appellant in favour of respondent for $170. It appears that, prior to the giving of this note, the appellant purchased a farm from respondent, and the appellant being unable to carry out his contract therefor, the respondent released him from his contract upon the appellant giving a quit claim deed to the farm and a wheat ticket for $70.

The appellant alleges that at the time of the settlement of the farm deal in November or December, 1920, the note sued on was included in this settlement, whereby the respondent agreed to release appellant from payment thereof. This the respondent denies.

The trial Judge held that sec. 142 of the Bills of Exchange Act, R.S.C. 1906, ch. 119, governed this case, and no release in writing being put in evidence, he gave judgment for the plaintiff, without making a finding on the question of fact as to whether the settlement above referred to included a

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release of the appellant from his liability on the said note.

With great deference to the trial Judge, I do not think said sec. 142 applies to the case at Bar in the way he applied it. This section, being sec. 142 of R.S.C. 1906, ch. 119, reads as follows:—

"142. When the holder of a bill, at or after its maturity, absolutely and unconditionally renounces his rights against the acceptor, *the bill is discharged.*

2. The *Liabilities* of any party to a bill may in like manner be renounced by the holder before, at, or after maturity.

3. A renunciation must be in writing, unless the bills is delivered up to the acceptor.

4. Nothing in this section shall affect the rights of a holder in due course without notice of renunciation."

This section is made applicable to promissory notes by sec. 186, of the said Bills of Exchange Act.

It is practically the same as sec. 62 of the Imperial Act, and it deals with renunciation where there is no consideration given by the person whose liability is discharged. Subsection 1, deals with the discharge of the bill, and is limited to renunciation at or after maturity. Subsection 2, deals with the discharge of *the liabilities of any of the parties* to a bill by renunciation before, at, or after maturity.

Russell on Bills, 2nd ed. pp. 421-422 (sec. 142), says:—

"It will be observed that in dealing with the discharge of the bill by renunciation of the holder's rights against the acceptor the statute is confined to the case of a renunciation at or after maturity. The acceptor may be discharged from his liability on the bill by a renunciation either before, at, or after maturity, and so may the liability of any of the other parties to the bill. Before the passing of the Act this renunciation was complete and effective without any writing and without the surrender of the instrument, but it was thought well to require some formality. It still remains law that no consideration is necessary for such a discharge, but in order to be effective a renunciation must be in writing unless the bill is delivered up to the acceptor.

According to the evidence the alleged settlement took place in November or December, 1920, whereas the note did not mature until October, 1921; consequently the trial Judge must have invoked sec. 142 (2). But it is really immaterial what subsection the Judge purported to act under, as both subsections deal with renunciations without consideration.

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The statement of defence alleges that the said note was settled for in the settlement made in 1920, and the evidence for the appellant is to the effect that the quit claim deed to the respondent of the farm and the giving of the wheat ticket was taken in settlement of all claims against appellant including the note sued on. In other words, the appellant gave the quit claim deed and the wheat ticket in settlement or payment, among other things, of the note sued on. If this be the meaning of the appellant's evidence and if believed, he gave consideration for the discharge of his liability on the note, and it is not necessary that evidence of such settlement or discharge should be in writing. That would not be a renunciation within the meaning of sec. 142.

In my opinion, the trial Judge should make a finding on the question of fact as to whether the settlement referred to did include the note sued on, or whether or not consideration was given by the appellant for the release or discharge of his liability on the note.

It is also to be remembered that sec. 26 (7), of the King's Bench Act, R.S.S. 1920, ch. 39, provides that:—

"Part performance of an obligation, either before or after a breach thereof, when expressly accepted by the creditor in satisfaction or rendered in pursuance of an agreement for that purpose, though without any new consideration, shall be held to extinguish the obligation."

In my opinion, then, the judgment of the trial Judge should be set aside, and the case referred back to him to give his judgment on the question of fact as above indicated, as he heard and saw the witnesses give their evidence.

In the event of the appellant being eventually successful in the action, he will be entitled to his costs of this appeal. If the respondent be successful, he will not be entitled to any costs of this appeal.

Judgment accordingly.

REX v. COMMERCIAL BROKERAGE Co.

Alberta Supreme Court, Walsh, J. October 26, 1922.

INTOXICATING LIQUORS (§IIIH—90)— SEIZURE AND FORFEITURE—ALBERTA LIQUOR ACT, 1916, CH. 4—1922 ALTA. CH. 5, SEC. 12—1917 ALTA., CH. 22, SEC. 79 (4)—ALBERTA POLICE ACT, 1919, ALTA. CH. 26, SECS. 11, 21—CONSTRUCTION.

Although sec. 79 (a) of the Alberta Liquor Act, 1916 (Alta.), ch. 4, as enacted by 1922 Alta., ch. 5, sec. 12, cannot be relied upon to sustain an order of forfeiture where there has been no apprehension within the Act, if the officers making the seizure are municipal constables and as such authorised to exercise within the city limits the powers conferred by sec. 11 of the Police Act, 1919,

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Alta., ch. 26, and if the seizure is properly made under that Act an order for forfeiture under sec. 79 (4) of the Liquor Act, 1917, Alta., ch. 22, is valid and effectual.

[*Rex* v. *Moore* (1922), 63 D.L.R. 472; *Rex* v. *Nat. Bell Liquors*, 65 D.L.R. 1, [1922] 2 A.C. 128; *Reg.* v. *Weil* (1882), 9 Q.B.D. 701, referred to.]

MOTION to quash an order of forfeiture of liquor. Motion dismissed.

H. C. Macdonald, K.C., for the motion.

A. M. Knight, for the Attorney-General.

WALSH, J.:—Upon the conviction of the applicant of unlawfully keeping liquor for sale, an order was made forfeiting to His Majesty considerable quantity of beer, the subject matter of the conviction. The applicant, while submitting to the conviction, moves to quash the order of forfeiture. Counsel for the Attorney-General raised the contention by way of preliminary objection that *certiorari* does not lie to quash such an order unless the conviction upon which it is founded is also attacked.

I do not think this objection well taken and so I do not give effect to it.

This beer was seized under a search warrant which, upon the argument, was admitted to be bad under the authority of *Rex* v. *Moore* (1922), 63 D.L.R. 472, 37 Can .Cr. Cas. 72. In view of what was subsequently said on the subject in the Privy Council judgment in *Rex* v. *Nat Bell Liquors Ltd.*, 65 D.L.R. 1, [1922] 2 A.C. 128, 37 Can. Cr. Cas. 129, it may perhaps be that *Rex* v. *Moore* is no longer binding. I directed the attention of counsel to this when I noticed it.

Mr. Macdonald has submitted to me an argument against the view that the authority of *Rex* v. *Moore* has been disturbed at all, but I have not heard from Mr. Knight on this point. I assume, therefore, that the position taken by him on the argument has not been receded from and that he still makes no attempt to justify the forfeiture order under this admittedly bad search warrant. That being so, I will not further concern myself over this feature of the case.

On the argument sec. 79 (*a*) of the Liquor Act 1916 ch. 4, as enacted by 1922 (Alta.), ch. 5, sec. 12, was alone relied upon in support of the order. It warrants such an order as this "in any case where a peace officer apprehends a person in the act of committing any offence against this Act etc." The contention of the applicant is that the word "apprehends" in this section means "arrests" or "takes into custody", that it, being a body corporate, could not be and, in fact, was not arrested or taken into custody, but could only be, as it in fact was, brought before the magis-

trate by summons served upon it, and, therefore, this section cannot be relied upon to sustain the order in question, for the apprehension of the person committing the offence is a condition precedent to the exercise of the power of forfeiture conferred by the section and the applicant was not apprehended. The dictionary meaning of the word apprehend in its legal use as given in Murray's New English Dictionary, p. 411, is "to seize (a person) in name of law, to arrest", and as given in Funk & Wagnalls' New Standard Dictionary, p. 139 "to make a prisoner of (a person) in the name of the law; arrest by warrant, as to *apprehend* a thief." In Wharton's Law Lexicon p. 62 no interpretation of the verb is given but the corresponding noun "apprehension" is defined as "the capture of a person upon a criminal charge." This definition has judicial warrant in *Reg.* v. *Weil* (1882), 9 Q.B.D. 701, where Jessel, M.R., at p. 705 says: "The word [apprehension] strictly construed means the seizing or taking hold of the man . . . . . It means the taking hold of him and detaining him with a view to his ultimate surrender."

I can see no other meaning to give this word as here used than that for which the applicant contends. There is no definition of it in its physical sense that I have been able to find that makes it the equivalent of "see" or "discover". A peace officer who catches a person in the act of committing an offence cannot be said to apprehend him in that act if he turns away from him without putting him under arrest, though he afterwards has him summoned before a magistrate to answer a charge preferred against him for it. There is now power in a peace officer to arrest without warrant any person whom he finds actually committing an offence against the Liquor Act, and so no difficulty need be experienced on that ground in giving the word the meaning contended for. I think, therefore, that as the applicant was not apprehended in the act of committing this offence, sec. 79 cannot be successfully invoked to support this order of forfeiture.

Since the argument, Mr. Knight has, with Mr. Macdonald's consent, drawn my attention to secs. 11 and 21 of the Alberta Police Act, 1919 (Alta.), ch. 26, and sub-sec. 4 of sec. 79 of the Liquor Act as enacted by 1917 (Alta.), ch. 22, sec. 15. He has made no argument upon them nor has Mr. Macdonald, but they are, of course, relied upon to support the order in question.

Section 11 of the Police Act confers very large powers of

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seizure of liquor kept or dealt with contrary to the Liquor Act, but it confers them only upon a member of the Alberta Provincial Police Force. Section 21, 1919 (Alta.) ch. 26, however, provides that "every municipal constable . . . . . shall, within the limits of the territory for which he is appointed . . . . . have and possess all the powers of a provincial constable as defined by this Act." A "municipal constable" is defined sec. 2 (*e*) to be "a constable appointed for any municipality by resolution or by-law of the council of such municipality or in other manner provided for by charter or special Act applicable to such municipality." and a "provincial constable" means sec. 2 (*e*) any constable appointed as a member of the Alberta Provincial Police."

This seizure was made in the City of Edmonton by two men. One of them, H. B. Petheram, is described in the depositions, evidently by the reporter, as "Det. Sgt. City Police Edmonton". His evidence starts with the following question and answer. "Q. You are Sgt. Det. in the City Police Force? A. Yes."

The other one, John Watson, is described by the stenographer as "Det. Edmonton City Police" and in answer to the question "You are a detective in the City Police force" he answered "Yes."

This is all the evidence that there is of the status of these men. Though it is exceedingly vague and unsatisfactory, there is, I think, enough in it to show that each of these men was at the time a municipal constable of the City of Edmonton and so authorized to exercise within the city limits the powers conferred by sec. 11 of the Police Act.

One of these powers is, if he has reason to believe that liquor is being kept or dealt with contrary to the Liquor Act, to detain and search, amongst other vehicles any automobile or railway freight car in which the liquor is supposed to be contained, and search all kegs, barrels and other receptacles for liquor and seize any such found containing liquor. The beer in question was found in barrels and casks partly in a freight car and partly in a motor truck on which it had been unloaded from the freight car. These constables had ample reason to believe that liquor was being kept or dealt with contrary to the Liquor Act. I think, therefore, that though the search warrant under which they acted gave them no right to make this seizure, sec. 11, (1) of the Police Act did.

Beck, J. A., in *Rex* v. *Moore*, 63 D.L.R. says at p. 474: "A search warrant under sec. 79 of the Liquor Act is the

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foundation for an adjudication of forfeiture." In that case, I take it, that the search warrant alone was relied upon to support the seizure, which perhaps is the reason for this statement. Section 79 (4) 1917 (Alta.) ch. 22, is, however, much wider than this language suggests. It authorizes an order of forfeiture, following a conviction, "when an officer in making or attempting to make search under or in pursuance of any authority conferred upon him or under the warrant mentioned in this section finds in the house or place liquor which in his opinion is unlawfully kept for sale." This, I think, justifies a forfeiture order in any case in which a seizure is lawfully made, whether under search warrant or not, and as, in my opinion, this particular seizure was lawfully made in pursuance of the authority conferred by sec. 11 (1) of the Police Act, it constitutes a sufficient foundation for the adjudication of forfeiture.

The motion stands dismissed but as the applicant succeeds on all the points argued before me and the motion fails upon a new ground subsequently raised and with respect to which no argument has been made, I dismiss it without costs.

Motion dismissed.

GREENWOOD & GREENWOOD v. WELFORD.

Saskatchewan Court of King's Bench, Bigelow, J. September 28, 1922.

BROKERS (§ IIB—10)—REAL ESTATE AGENT—RIGHT TO COMPENSATION—UNDER EXCLUSIVE LISTING—UNDER ORDINARY LISTING—TERMINATION OF AUTHORITY—SALE OF PROPERTY BY OWNER.

The authority given to a real estate agent by an exclusive listing of property with him for sale is revoked by the sale of the property by the owner himself, and the agent is only entitled to recover on a *quantum meruit* for the work done, where there is not an exclusive listing the work for which the agent is to be remunerated is the finding of a purchaser, and where he does not find a purchaser, he is not entitled to commission or to remuneration for the work he has done.

[*Barager* v. *Wallace* (1919), 47 D.L.R. 158, 12 S.L.R. 301, followed. See Annotation, 4 D.L.R. 531.]

ACTION by a real estate agent for commission on the sale of land. Action dismissed.

G. W. Thorn, for plaintiffs.

A. T. Proctor, for defendant.

BIGELOW, J.:—This is an action for commission on a sale of land. The plaintiffs, as agents for one Lintott, brought about a sale of a farm near Moosomin to the defendant. The agreement for such sale was made and signed on August 5, 1921. Although this document was not put in evidence, I conclude from the testimony, that it

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was a completed agreement, providing for $2,000 cash payment and the balance in crop payments; and the defendant paid $50 as of the cash payment the next day. The document was held in trust by the plaintiffs, while the defendant obtained the balance of the cash payment, which he did on August 21, and paid it to the plaintiffs on that date. On or about August 10, the defendant acquired an interest in certain land in Regina. He conceived the idea of turning this over to Lintott in payment of the deferred payments under the agreement, and made this suggestion to the plaintiffs. At plaintiff's request the defendant then signed the following document:—"Listing for sale. Street: 1725 Scarth. No. of lot: 44-B. 285- plan 33. Size of lot: 25 ft. No. of rooms :5; and bath upstairs. No. of bedrooms: two stores on first floor. Improvements:..... Taxes:..... Title: . . . . Price: 25,000. Terms on bal.; arranged.

Remarks: Mtg. Confederation Life (balance) $7,000; Agreement of sale [Leasing] $6,500; Taxes & Interest to August 1; $1,427.

(sgd.) Dan Welford"

Witness: S. H. Greenwood.

—which is on a card with the headings printed. At the top of this card there is written "Listing for Sale". On the other side of the card these headings are printed: "Owner". "Address", "Exclusive Agency", "Commission", "Date". And this card is now filled out as follows:—"Owner: Dan Welford, address: 1869 Halifax—" and those two last words are scratched out and the word "Moosomin" written afterwards.

"Exclusive agency: Yes, for 60 days.

Commission: usual, 5% & 2½%. 5% on first $5,000; 2½% on balance.

Date: Aug. 12th, 21."

The plaintiffs saw Lintott about this property, but he refused to entertain the proposition. The plaintiff Samuel H. Greenwood swears that he took two trips to Moosomin to see Lintott about this. Very little else was done by the plaintiffs. On August 22, defendant sold the property himself, and informed plaintiffs of his sale, very soon after. Plaintiffs allege that they had an exclusive listing, and claim $750, the full commission, as if they had made a sale. It was conceded at the argument, and I think properly, that even if plaintiffs had an exclusive listing, that authority could be revoked by the sale of the property by the owner, in which case, the plaintiffs would only be entitled to

receiver on a *quantum meruit* for the work done. But, did the plaintiffs have an exclusive agency? The defendant swears that there was nothing written on the back of the card when he signed the face of it. S. H. Greenwood and his son say the back of the card was filled out when the defendant signed the face of it. If the back of the card was filled out, and it was intended to give the plaintiffs an exclusive agency, it would have been an easy matter to have had defendant sign that side of the card as well as the other. I have considerable doubt about the accuracy of the plaintiff's evidence. Both S. H. Greenwood and his son swore that the card is just the same now as when defendant signed it on August 12, 1921. It will be observed that, after the printed word "address", is written in "1869 Halifax." That is now stroked out, and the word "Moosomin" written in. The defendant moved to Moosomin on August 23, so the word "Moosomin" must have been written in after August 23. This is not in accordance with the evidence of the two Greenwoods, that the document is just the same now as when defendant signed it, on August 12. The condition of the writing and the ink in the word "Moosomin" and the rest of the back of the card appear to me as if it was all written at the same time. I find, then, that there was not an exclusive listing, that defendant did not agree to what was on the back of the card, that his attention was not called to it, nor did he sign it.

What, then, is the effect of the revocation of the agency by the owner selling it himself on August 22? The work of an agent for which he is to be remunerated by payment of the stipulated commission is the finding of a purchaser. In the absence of a special agreement that he is to be remunerated if he does not find a purchaser, the agent is not entitled to a commission or to be remunerated for what he has done. *Barager* v. *Wallace* (1919), 47 D.L.R. 158, 12 S.L.R. 301, decision of our Court of Appeal. Here the defendant found the purchaser, and there is no evidence that there was any other agreement by which the plaintiffs were to receive remuneration for services performed.

The plaintiffs' action is dismissed with costs.

Action dismissed.

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AMHERST BOOT & SHOE Co. v. CARTER.

New Brunswick Supreme Court, Appeal Division, Hazen, C.J., and White and Grimmer, JJ. June 8, 1922.

TROVER (§IB—10)—CHATTEL MORTGAGE—COLLATERAL FOR PROMISSORY NOTES—CONDITIONS OF MORTGAGE—PAYMENT OF NOTES—SEIZURE UNDER MORTGAGE.

Where a chattel mortgage on the goods, stock-in-trade, etc., is given as collateral security for certain promissory notes, bearing even date with it, and, clearly, provides that on payment of the notes and interest, the mortgage shall cease and become void to all intents and purposes; such mortgage cannot be treated as a continuing security covering subsequent accounts between the parties, and a seizure under such mortgage, long after the original notes have been paid, cannot be justified.

APPEAL by plaintiff from the judgment of the King's Bench Division in an action for the conversion by the defendant, trustee in bankruptcy, of certain stock-in-trade which the plaintiff had taken possession of under a chattel mortgage. Affirmed.

M. G. Teed, K.C., and *F. L. Milner*, K.C., for appellant.

I. C. Rand, contra.

The judgment of the Court was delivered by

GRIMMER, J.:—This action, which was tried before Chandler, J., without a jury at the Westmorland Circuit in August last, is for the conversion by the defendant, a trustee in bankruptcy, of the stock-in-trade of one, Delina Bourgeois, which shortly before her assignment, had been taken possession of by the plaintiff under a chattel mortgage, and the question involved is whether or not the mortgage had been satisfied and paid prior to the possession of the goods taken by the plaintiff.

It appears that in April, 1910 the plaintiff agreed to sell to Delina Bourgeois the stock-in-trade in question which had been owned by one Breau, and which the plaintiff had possessed under a chattel mortgage, as well as a house and lot in Moncton, and a farm a few miles therefrom, which had also been owned by Breau, for the sum of $12,500 which was to be paid within 5 years by a note for $2,500 in 3 months from April 27, 1910, and by five other notes for $2,000 each, payable in 1, 2, 3, 4 and 5 years. A chattel mortgage on the stock was given for $10,000, with interest at 6% as collateral security for the five notes, and the title to the real estate by agreement was retained by the praintiff in the name of one Campbell, its secretary-treasurer. From the date last mentioned until January 10, 1921, when the seizure of the stock was made, the plaintiff carried on business with Delina Bourgeois in boots and shoes, dealing tnrough her husband J. J. Bourgeois as her agent. The account was kept in the general ledger of the plaintiff com-

pany, in which was also charged and an account kept of the six notes covering the $12,500. Shortly after the purchase referred to was arranged, the plaintiff company in order to facilitate their banking business requested Bourgeois to give them a new note for the full $10,000, payable in 6 months, so that the same might be negotiated and renewed from time to time, the payments made thereon to be credited to the mortgage account. There were several renewals of this note, which was reduced by payments from time to time to $4,000 and the reductions compared with the payments made upon the original notes. It was claimed by the defendant, and the trial Judge found that according to the plaintiff's ledger accounts the first note for $2,000 which matured on April 27, 1911, was discharged by a payment of $1,000 made on March 16, 1911, and a further payment of $1,000 on April 26 of the same year, the interest being cared for by a note for $102.35, which was paid by Bourgeois; also that the second note for $2,000 due on April 27, 1912, was discharged by a payment of that sum on April 29, of the same year, the interest thereon being likewise provided by a note which was subseuently paid. He further found the ledger showed the payment in due course of the third note and interest, and that the fourth and fifth notes which were due respectively on April 27, 1914, and 1915 were paid on October 24, 1914, by a cheque from one E. A. Reilly. The money in this instance was realized on the sale of a portion of the real estate purchased by the Bourgeois' from the plaintiff as part of the original bargain, the interest on these notes being provided by two promissory notes which were subsequently paid. In making the payment of $4,000 to the plaintiff, Mr. Reilly reported the money as "in full of transfer of property on their account," meaning the Bourgeois', and upon the plaintiff's ledger under date of October 31, 1914, the entry appears as follows: "October 31st—C. K. cheque—Reilly $4,000 in full transfer of property."

The trial Judge found that the account as kept by the plaintiff company showed that the five notes for $2,000 each were finally paid and discharged by the said payment of $4,000 with the exception of a small amount of interest on the last note which was afterwards paid, and that, taking the account as it appears in the plaintiff company's ledger, the contention of the defendant is correct, and the notes secured by the mortgage were paid off at the times and in the manner claimed by the defendant, and in this finding

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AMHERST BOOT & SHOE CO. v. CARTER.

Grimmer, J.

I fully concur.

Apparently, to justify their course in taking possession of the bankrupt's goods, stock-in-trade, etc. the plaintiff company claimed or considered the chattel mortgage was good as a continuing security covering the whole account between them and Delina Bourgeois, but an examination of the document discloses that it provides that, if the mortgagor do and shall well and truly pay or cause to be paid unto the mortgagee, its successors or assigns the full sum of $10,000 with interest for the same at the rate of 6% per annum in accordance with five certain promissory notes for $2,000 each, bearing even date with the said chattel mortgage, and payable at the Royal Bank of Canada at Moncton, New Brunswick, made by the mortgagor in favor of the mortgagee or order with interest at 6% and payable respectively in 1, 2, 3, 4 and 5 years, then the said chattel mortgage and every matter and thing therein contained should cease, determine and become utterly void to all intents and purposes, and the trial Judge, very properly I think, found this contention to be erroneous under the wording of the mortgage itself. Thus, it appears that the amount secured by the mortgage to the plaintiff was paid off and satisfied in full many years prior to the seizure made thereunder by the plaintiff company, and the same could in no way be justified.

The only other matter involved in this suit is that of the appropriation of the payments made by the Bourgeois', and whether the plaintiff company is bound by the account which it kept with them. After considering this at some length the trial Judge says:—

"I have come to the conclusion that the plaintiff company is bound by the manner in which it has dealt with the transaction on its books. I do not think there was any prior arrangement as to how the moneys paid by Bourgeois & Co. should be appropriated, and I think that the plaintiff company itself appropriated the payments made by Bourgeois & Co. in the account which it kept, and the result is that the notes secured by the chattel mortgage were paid off at the times and in the manner already described, having been finally wiped out on or before October 31, 1914.

I am entirely in accord with the Judge in this finding, and without laboring the matter at greater length, in my opinion, the judgment rendered by him in this suit should not be disturbed.

The appeal is dismissed with costs.

Appeal dismissed.

DEACON v. CITY OF REGINA.

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Saskatchewan Court of King's Bench, Bigelow, J.
September 27, 1922.

JURY (§IA—8)—RIGHT OF PLAINTIFF TO TRIAL BY—FAILURE TO FILE DEMAND AND PAY JURY FEES WITHIN TIME FIXED IN ACT, R.S.S. 1920, CH. 39—EXTENSION OF TIME.

Where a plaintiff who is entitled to a trial by a jury under sec. 47 of the King's Bench Act, R.S.S. 1920, ch. 39, has served the demand for jury within the time required, but has failed to file it or pay the jury fees, the defendant is within his rights in serving notice of trial for the non-jury sittings, but if the plaintiff files the notice and pays the necessary fee within a few days after serving the demand, the Court will extend the time in order to allow him a jury trial upon payment of the costs of the adjournment of the trial and of the motion.

MOTION by plaintiff for extension of time in which to file demand for a jury and pay jury fees, and for trial by jury. Motion granted.

A. C. Ellison, for plaintiff.
G. F. Blair, K.C., for defendant.

BIGELOW, J.:—I think this is a case where the plaintiff has set forth such facts that, if he succeeds, the damages would be substantial and, therefore, the plaintiff is entitled to a trial by jury. *Jocelyn* v. *Sutherland*, (1913), 9 D.L.R. 457, 23 Man. L.R. 539; *Navarro* v. *Radford-Wright Co.* (1912), 8 D.L.R. 253, 22 Man. L.R. 730.

Section 47 of our King's Bench Act R.S.S. 1920, ch. 39, gives the plaintiff a right to a jury trial, if he demands a jury and files with the local registrar and leaves with the other party or his solicitor at least 15 days before the day fixed for trial a notice to that effect.

Here the plaintiff served a demand for a jury trial on September 9. He filed the demand and paid the necessary jury fees on September 12. In the meantime, on September 11, defendant served notice of trial for the non-jury sittings beginning September 26. What does "the day fixed for trial" mean? Can the defendant fix a day for trial after getting a demand for a jury, to take away the plaintiff's right? I would think not, if the defendant's procedure had been regular. On September 9, the plaintiff only served demand for trial. He did not file it nor did he pay the jury fees. So, the defendant was quite within his rights in serving the notice of trial for the non-jury term. The plaintiff has remedied that however, so far as he can, by filing the jury demand and paying the fees on September 12. I would extend the time for 1 day to allow the plaintiff to have a jury trial, and the trial will be postponed until

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the next jury sittings at Regina. But as plaintiff has had to ask for an indulgence to remedy the mistakes of the solicitor, plaintiff will pay the costs of this motion and of the adjournment of the trial.

Motion granted.

CLAUSEN v. CANADA TIMBER AND LANDS LTD.

British Columbia Court of Appeal, Macdonald, C.J.A., Martin, McPhillips and Eberts, JJ.A. October 3, 1922.

CONTRACTS (§VC—390)—TO PURCHASE AND CRIB LOGS—FAILURE TO PERFORM WORK—NOTICE OF INTENTION TO CANCEL IN ACCORDANCE WITH CONTRACT—NOTICE TREATED AS REPUDIATION.

An agreement for the purchase and cribbing of logs on a large timber limit, contained a clause that if default should be made on the part of the purchasers in any of the terms, provisions or conditions, and if such default continued for twenty days after notice was given of the intention of the vendor to cancel the contract, then at the end of such 20 days, the agreement was to be void, after six months of work dissensions arose amongst the purchasers, which resulted in some of them bringing an action for the dissolution of the partnership and in a receiver being appointed, and for the sale of the partnership assets. The vendor then served notice under the contract to the effect that at the end of 20 days, the contract would be treated as at an end. The Court held that, in the circumstances, the vendor was justified in sending the notice which was, at most, a notice of intention to cancel the contract, and that the purchasers were not justified in treating it as a repudiation of the contract, and that an action for damages for breach of contract based on such notice must fail.

[*Meadow Creek Lumber Co.* v. *Adolph Lumber Co.* (1919), 45 D.L.R. 579, 58 Can. S.C.R. 306; *Kum Jow* v. *Elliott* (1920), 55 D.L.R. 622, 29 B.C.R. 103, applied.]

APPEAL by defendant from the trial judgment in an action for damages for breach of contract. Reversed.

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

E. C. Mayers, for respondent.

MACDONALD, C.J.A.:—The action is one for damages for alleged breach of a contract entered into by the plaintiffs and the defendant Norton of the one part, and the defendant company of the other part. The contract is one for the purchase of timber on terms set out in the agreement. It contains a term, in effect, prohibiting the purchasers or any of them, from parting with their or his interest under the contract without the consent of the defendant company. Should a transfer take place without consent, the company was, by the agreement, entitled to cancel the contract upon notice as therein specified. Several months after the making of the contract, the defendant company gave such notice of cancellation, based upon the ground that the purchasers

whom the defendants allege were partners had caused their partnership to be dissolved and a receiver to be appointed of the partnership assets, which included the contract in question or the assets acquired under it.

The action for dissolution of the partnership was brought by the plaintiffs against the defendant Norton, so that if the defendant company is right in claiming that there was a transfer of interest to the receiver, that transfer was brought about by the plaintiffs. The agreement to purchase above referred to does not purport, on its face, to be made with the purchasers as partners. It was signed by the plaintiffs and defendant Norton on May 12, 1921; it bears date June 15 of the same year, but this is accounted for by the circumstance that the agreement had to be sent to Toronto for execution by the company, and it bears the date of the company's signature to it. The evidence shews that the purchase was negotiated some days before May 12. On May 12, the plaintiffs and defendant Norton, signed partnership articles, thus forming a partnership, styled "The Toga River Logging Company." Thereupon, the purchasers took possession of the timber lands and commenced their operations. The contention of the plaintiffs is that they did not purchase for or on behalf of their partnership, but were independent contractors.

As the Judge had said in his judgment, there was nothing to prevent these eight purchasers from employing the partnership of which they were the sole members to carry out their purchase agreement, and if they had done so, the Toga River Logging Co. would have been the mere agents of the purchasers to log off the lands for them. If this were the case, the dissolution of the partnership would, in no way, affect their status under the purchase contract. Such a state of affairs might have been created by the parties, but there is no evidence that that was what actually occurred.

The plaintiff Clausen, who was the principal man of business of his party, frequently speaks of the partnership in terms which I think imports that it was the partnership which had purchased the logs and were conducting the logging operations. There is no evidence of more than one partnership, and I think his evidence is inconsistent with the present claim of the plaintiffs, that the eight men were not partners in the purchase of the logs. If, technically, the purchase was by the eight men as individuals and not by the Toga River Logging Co. composed of these eight men in partnership, then the inference to be drawn from the evi-

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dence of Clausen, and, in fact, from all the evidence in the case, is that there was, in effect and in fact, an equitable assignment of the purchase agreement to the partnership, and that the partners were operating it entirely for the benefit of the partnership, and not upon an agency, but I am of the opinion that from the beginning, the contract, though not so in terms, was partnership property. This inference is to be drawn from the fact that there is not a word in the evidence consistent with any other hypothesis. When the plaintiffs and Norton disagreed in January, 1922, it was proposed by the plaintiffs to incorporate a joint stock company to take over the contract and complete it. At that time, according to the evidence of Clausen, the partnership, as he calls it, having cut 5,500,000 feet of the logs, there is no suggestion that these logs were not the logs of the partnership of which he speaks, which could only be the Toga River Logging Co., or the eight partners under a separate unwritten partnership, but as I say, there is no suggestion of any second partnership, and the only partnership to which the witness could refer was the one created by the articles.

The proposal which the plaintiffs made to the defendant company is set forth in a letter written by their solicitors to the solicitors of the defendant company. The plaintiffs' solicitors say in that letter:—

"The company (the new joint stock company), will purchase from the receiver of the Toga River Logging Co., all the logs now felled and bucked and the logs now in the river in the boom at Toga River, and all other assets of the partnership, including whatever rights the partnership may have under the old contract."

That, apparently, was the understanding of the plaintiffs who were the incorporators, with two others, of the new company. Whether, technically, that letter was written on behalf of the new company or on behalf of the plaintiffs, I think makes very little difference. The fact is that the plaintiffs recognized at that time that the logs cut under the contract did, in fact, belong to the Toga River Logging Co. and that the receiver was entitled to them. In other words, by some means which are not explained, and which are only to be inferred from the evidence, an interest in the purchase contract had passed to the partnership known as The Toga River Logging Company, and by the act of the plaintiffs in putting the Court in motion, the right to receive these logs was recognized by the plaintiffs themselves as being in the

receiver.

Mr. Cosgrove, the plaintiffs' solicitor in these transactions, giving evidence at the trial, of an interview with Mr. Burns, solicitor for the defendant company, said:—"So we discussed at that time how the contract was to be turned over and I suggested that it should be sold by the receiver."

It is quite true that the defendant company have by their pleadings withdrawn the notice of cancellation, but there is no admission that they were not entitled to insist upon the notice. If, as a matter of fact, anything had happened which entitled the defendant company to serve the notice, then clearly the company could not be charged with repudiation by serving it, and the withdrawal afterwards of the notice could not assist the plaintiffs in an action for breach of contract. It was strongly urged by counsel for the defendant company that, in any case, the notice did not amount to a repudiation, but only the expression of an intention to put an end to the contract at the expiration of the time therein mentioned. I, however, think that the notice amounts to a declaration of the intention of the defendant company not to perform the agreement. The company, in effect, said:—"At the end of twenty days, we shall treat this contract as at an end."

That was a declaration that the defendants would no longer be bound by the contract. Moreover, it was not withdrawn until after the expiry of the time named in it. The answer, it seems to me, to the plaintiffs' action is, that the defendant company was entitled to give the notice, and it does not help the plaintiffs now to say that it was afterwards withdrawn.

There was also an issue raised of collusion between the defendant company and Norton, but as I read the evidence, it was not established and has nothing to do with the question in issue.

I think the appeal should be allowed.

MARTIN, J.A. (dissenting):—In my opinion, the Judge has reached the right conclusion, and I only add to his reasons that even the contract should be regarded as a partnership undertaking between the eight adventurers, still that is not a matter which concerns the defendant company, because, in addition to other considerations, each of the eight is under clause 26 of the contract with the defendant, severally as well as jointly, liable, and might alone, or conjointly with one or more of his co-adventurers, have carried out all the terms thereof, had not the defendant repudiated it, and

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the legal proceedings resulting in a receivership would have been no bar, because, if the interest in the uncut timber be regarded as a partnership one, there is nothing to prevent the receiver from, *e.g.*, selling that interest to such of the adventurers as might wish to carry out the contract, or otherwise co-operating with them by leave of the Court; until there was a breach, the defendant could not complain or precipitate matters as it, unfortunately, undertook to do.

As to the assessment of damages: I am of opinion that, with all due respect, the learned trial Judge should have acceded to the request of the plaintiff's counsel and continued the trial so as to assess them in the ordinary way, without putting the parties to the unnecessary delay and expense of a reference to the Registrar—a course of procedure which has become too common of late and is an expensive innovation which ought to be discouraged. The plaintiff was ready with his witnesses here to prove his damages in the usual manner, but the defendant's counsel wrongly objected to that proper course being adopted, and, therefore, I think the case should be remitted to the Court below to continue the trial and assess the damages.

MCPHILLIPS, J.A.:—This appeal has relation to a contract whereby the appellant agreed to sell and the respondents agreed to purchase the logs to be cut by the respondents upon a very large area of Crown timber lands held by the appellant, a most valuable tract of timber lands, and it is clear that the contract was one calling for expedition in the logging operations, possession being given to the respondents, the agreement being that the logging operations should be carried on continuously, subject to any excessive snow conditions, and the respondents were to put in the river or on the river bank at least five million feet, board measure, of logs during the year 1921 and at least fifteen million feet during each successive year until the whole of the moneys constituting the purchase price should be paid, with a provision for cessation of logging operations when the market price of logs fell below the sum of $12 per thousand feet, board measure. Certain logging plant of the appellant was turned over to the respondents to be used in the operations. As is usual in all commercial contracts, it was stipulated that time should be of the essence of the contract. The provision governing in case of default reads as follows:—

21. "If default shall be made on the part of the purchasers in any of the terms, provisions, conditions, or stipulations of

this agreement, and if such default shall continue for twenty (20) days after notice shall be given to the purchasers by or on behalf of the vendor of its intention to cancel this agreement, then at the expiration of such twenty (20) days this agreement shall be void and of no effect and the vendor shall be at liberty to re-enter the said lands and premises or any part thereof in the name of the whole and shall retain all sums of money paid to the vendor by the purchasers under the terms of this agreement as and by way of liquidated damages for breach of this agreement and not as a penalty, and thereupon and upon such re-entry the purchasers shall deliver up the possession of the said lands and premises and all thereof and the said logging plant and equipment to the vendor, and the purchasers shall have no claim against the vendor whatsoever for or by reason of such cancellation or retainer of said moneys. The procedure provided in this paragraph for the cancellation of the rights of the purchasers under this agreement shall be concurrent with and in addition and without prejudice to and not in lieu of or substitution for any other right or remedy at law or in equity which the vendor may have for the enforcement of its rights under this agreement or its remedies for any default of the purchasers in the conditions herein."

Now the respondents, previous to entering into the contract for the purchase and cribbing of the logs, entered into a partnership, the articles of partnership being entered into on May 12, 1921, and the contract was entered into later, namely, on June 15, 1921, and it is to be noted that the partnership name adopted was "Toga River Logging Company" and the timber limits, to which the contract has reference, were in the vicinity of Toga River and the business of the partnership was that of general loggers, and it is clear that the contract was treated as partnership property, and a contract which enured to the advantage of the partnership —In truth, it was a contract of the partnership, although not executed in the partnership's name and later, as we shall see, was treated as a partnership asset. The timber limits carry a very heavy stand of timber, approximately 150 million feet, board measure, and it would take some five or ten years to wholly log off the timber—The contract, in its obligations upon the respondents, was both joint and several. The respondents went immediately after the execution of the contract and took possession of the limits and the logging plant and commenced operations, the work being prosecuted until the month of December—about six months of

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work being carried on—then dissensions amongst the respondents took place and the respondents, save as to one of their number, came down to Vancouver later, resulting in seven of the eight members of the partnership (the members of the partnership and the purchasers under the contract being the same), bringing an action for the dissolution of the partnership, and a receiver was appointed and provision made for the sale of the partnership assets. The situation appearing to be hopeless, and long delay having ensued with cessation of logging operations, it was reasonable for the appellant to treat the contract as abandoned or that the situation was such that the appellant could not, reasonably, be further held on its part to the terms of the contract, and on March 13, the appellant gave the following notice to the respondents:—

"J. C. Clausen and associates, Lund P.O., B.C.:—

"Take notice that default on the part of the purchasers under the agreement dated the 15th day of June, 1921, and made between Canada Timber & Lands Limited as vendor and J. C. Clausen, W. T. Morton, R. Buttorff, P. D. Cain, A. Brossman, W. J. Blundell, Charles Clausen and Andrew Clausen, as purchasers, has been made in respect of the condition or stipulation contained in paragraph No 25 of the said agreement to the effect that no purchaser shall be entitled to assign the said agreement nor any part thereof nor his interest therein except upon the written consent of the vendor previously obtained, such default consisting in the dissolution of the partnership of the purchasers and the vesting of the assets of the partnership in the Receiver thereof.

And take notice that the vendor intends to cancel the said agreement, as well as the second agreement made the said 15th day of June, 1921, by reason of such default at the expiration of twenty days after seven days from the mailing of this notice, in accordance with paragraphs 21 and 23 of the said agreement.

And take notice that this notice is given without prejudice to the position taken by the vendor under said agreement that the said agreement has been determined and abandoned by the purchasers by reason of such dissolution and appointment of receiver.

Dated at Vancouver, B.C., this 13th day of March, A.D. 1922.

Burns & Walkem, solicitors for Canada Timber & Lands, Ltd."

This notice was followed by a letter from the solicitors for the plaintiffs under date March 17, 1922, in the words and figures following:—

"Dear Sir:—

In re Clausen and others and Canada Timber & Lands Limited.

Mr. J. C. Clausen and his associates in the Toga River Logging Company have handed to us your letter containing the 20-day notice of cancellation of the contracts between the Canada Timber & Lands Limited of the one part and J. C. Clausen and others of the other part dated the 15th day of June, 1921.

On behalf of the said Julius C. Clausen, Rex Butorff, Charles Clausen, Andrew Clausen, Alexander Brossman, Philip Cain and William John Blundell, we beg to advise you that we deny absolutely that any assignment or vesting of interest has occurred as alleged in the said notice or any abandonment as suggested in the said notice. We consider the said notice as unjustified and without any foundation in fact.

The notice clearly evinces the determination of the Canada Timber & Lands Limited not to be bound by the terms of the said contracts and we are instructed by the above mentioned parties to accept the said notice as a complete repudiation by the said Canada Timber & Lands Limited of the said contracts dated the 15th of June last. You will please therefore regard this letter as an acceptance by the above named parties, Julius C. Clausen, etc., of the said notice as a repudiation of the said contracts. The said parties will forthwith proceed to enforce their rights under the said contracts.

Phipps & Cosgrove, per M. Cosgrove."

It is evident that the respondents eagerly adopted the course of treating the notice of the solicitors for the appellants as amounting to an unjustifiable repudiation of the contract. It is to be observed that the notice given was given by and in behalf of the appellant in the way of implementing the special terms of the contract and was procedure permissible to the appellant under the provisions of the contract, namely, paras. 21 and 23 thereof. The trial Judge treated the notice as constituting repudiation and that the action was well founded and that the respondents were entitled to damages for the wrongful breach thereof. The appellant, in its pleadings, withdrew the notice as given and relied upon the contention that the facts and circum-

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stances demonstrated that, in effect, there had been abandonment of the contract and that the appellant was entitled to contend that it should no longer be held to the terms thereof. In any case, the notice, as previously stated, was in pursuance of the terms of the contract, and it was not in its nature a repudiation—It was a notification that if there was a continuance of default for twenty days after notice the intention was to cancel, that is there would be cancellation only in case of continuance of default, and the respondents cannot achieve a right of action and damages built upon their own default. It cannot be said that the notice given on behalf of the appellant was an absolute and unequivocal intention of renouncing and repudiating the contract, and it was not in such terms as entitled the respondents to accept the same as renunciation of the contract upon the part of the appellant, the course the respondents wrongfully pursued. The respondents' duty and obligation, following the notice, was not continuance of default, but to proceed to carry out the terms of the contract and proceed with expedition in accordance with the declared terms of the contract, time being of the essence of the contract (*Jones* v. *Gibbons* (1853), 8 Exch. 920, 155 E.R. 1626; *Mersey Steel & Iron Co.* v. *Naylor* (1884), 9 App. Cas. 434, 53 L.J. (Q.B.) 497, at pp. 499, 501; *Cornwall* v. *Henson*, [1900] 2 Ch. 298; *Borrowman, etc.* v. *Free* (1878), 4 Q.B.D. 500; *Johnstone* v. *Milling* (1886), 16 Q.B.D. 460).

I had occasion to consider the question that arises in this case in *Meadow Creek Lumber Co.* v. *Adolph Lumber Co.* (1918), 25 B.C.R. 298, my judgment then being a dissenting judgment, but later the majority opinion of this Court was reversed by the Supreme Court of Canada (1919), 45 D.L.R. 579, 58 Can. S.C.R. 306. I there said and I adhere to the view then expressed and consider the reasoning applicable to the present case (25 B.C.R. at pp. 304-306):

"Time is of the essence in mercantile contracts, (see *Reuter* v. *Sala* (1879), 4 C.P.D. 239, *per* Cotton, L.J., at p. 249; Pollock on Contracts, 8th ed. p. 289); and, admittedly, there was default of shipment such as under the known circumstances rendered the position an impossible one for the respondent and highly inequitable that the contract should be on its part further complied with and there was the right of rescission. The language of the Earl of Selborne, L.C., in the House of Lords in the *Mersey* case, which completely meets the present case as I view it, is the following, 9 App. Cas. at pp. 439-440:

'But quite consistently with this view, it appears to me, according to the authorities and according to sound reason and principle, that the parties might have so conducted themselves as to release each other from the contract, and that one party might have so conducted himself as to leave it at the option of the other party to relieve himself from a future performance of the contract. The question is whether the facts here justify that conclusion?'

In my opinion, the facts in the present case fully justify that conclusion and are succinctly set forth in the trial Judge's judgment. Lord Blackburn, in the *Mersey* case, said, 9 App. Cas. at pp. 443-444:

'The rule of law, as I always understood it, is that where there is a contract in which there are two parties, each side having to do something (it is so laid down in the notes to *Pordage* v. *Cole* (1607), 1 Wm. Saund. 548, 85 E.R. 449) if you see that the failure to perform one part of it goes to the root of the contract, goes to the foundation of the whole, it is a good defence to say, 'I am not going on to perform my part of it when that which is the root of the whole and the substantial consideration for my performance is defeated by your misconduct.' '

In my opinion *Hoare* v. *Rennie* (1859), 5 H. & N. 19, 157 E.R. 1083, which was dissented from by Brett, L.J., but affirmed by Bramwell and Bagallay, L.JJ. in *Honck* v. *Muller* (1881), 7 Q.B.D. 92; (and see *Reuter* v. *Sala, supra; Brandt* v. *Lawrence* (1876), 1 Q.B.D. 344; Chitty's Law of Contracts, 16th ed. p. 777) is decisive in the present case. This case was also referred to by Lord Bramwell, 9 App. Cas. at pp. 446-447, in the *Mersey* case, *supra*. Then we have *Norrington* v. *Wright* (1885), 115 U.S. 188, a case very much in point in the Supreme Court of the United States. This case is referred to in Chitty's Law of Contracts, at p. 778, and we find it stated that:—

'In *Norrington* v. *Wright supra* the contract was for the sale of 5,000 tons of iron rails for shipment at the rate of about 1,000 tons per month, beginning February, 1880, but whole contract to be shipped before August 1st, 1880. The Court held that, the sellers were bound to ship 1,000 tons in each month from February to June inclusive, except that slight deficiencies might be made up in July; and that where only 400 tons were shipped in February, and 885 tons in March, and the buyers accepted and paid for the February shipment on its arrival in March in ignorance that no more

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had been shipped in February and were first informed of that fact after the arrival of the March shipments, and before accepting or paying for either of them, the buyers might rescind the contract for the non-shipment of about 1,000 tons in February and March.'

In Pollock on Contracts, 8th ed. at p. 285, reference is made to *Norrington* v. *Wright*, *supra*, the reference is:

'The Court [referring to the Supreme Court of the United States in *Norrington* v. *Wright*], went on to review the English cases, which did not in their opinion establish any rule inconsistent with the decision arrived at in the case at Bar. All will agree with them that 'a diversity in the law as administered on the two sides of the Atlantic, concerning the interpretation and effect of commercial contracts of this kind, is greatly to be deprecated' (per Gray, J., in 115 U.S. at p. 206). And although the decision is not authoritative in this country, we may expect that an opinion of such weight, and so carefully and critically expressed, will receive full consideration whenever the point is again before the Court of Appeal or the House of Lords. It is a notable addition of force to the modern tendency to eschew stiff and artificial canons of construction, and to hold parties who have made deliberate promises to the full and plain meaning of their terms.'

It is clear that upon the facts of the present case and bearing in mind the excerpts from the judgments in the *Mersey* case, *supra*, that there is no decision which is authoritative or binding upon this Court which prevents it being held in the language of the Earl of Selborne, L.C. (*Mersey* case, *supra*, 9 App. Cas. at p. 440) 'that the parties so conducted themselves as to release each other from the contract and that one party might have so conducted himself as to leave it at the option of the other party to relieve himself from a future performance of the contract.' "

Here there was default—and a complete breakdown and apparent inability to carry on the logging operations or comply at all with the terms of the contract—and it is not to be wondered at that the respondents seized upon the opportunity as they thought of accepting what they were pleased to treat as a repudiation of the contract upon the part of the appellant and out of the debacle the respondents appear as the injured parties—with a claim of damages against the appellant estimated, generally, at one million of dollars, and this contention has been given effect to by the trial Judge, a view with which, with great respect

to the trial Judge, I cannot agree. In the *Meadow Creek Lumber Co.* case, 45 D.L.R. 579, 58 Can. S.C.R. 306, Anglin, J., at p. 581, said:—"I would allow this appeal and restore the judgment of the trial Judge substantially for the reasons assigned by him and by McPhillips, J.A. I incline to think that, having regard to the circumstances known to both parties, necessitating punctuality in deliveries, there was such substantial default by the plaintiff as entitled the defendant to cancel the contract between them."

In *Kum Jow and Lee Dye* v. *Elliott* (1920), 55 D.L.R. 622, 29 B.C.R. 103, I also had to consider the question of whether there was "wrongful repudiation." At pp. 624-625, I said:—

"Finally, upon the point taken that upon the facts that there was wrongful repudiation of the agreement of sale by the plaintiffs, and that the defendants, having elected to accept that position, were entitled to the return of all the moneys paid: This contention is wholly untenable, there was no wrongful repudiation; the notice of cancellation was in effect merely a notice of intention under the terms of the agreement of sale upon the part of the plaintiffs of the exercise of the option given in para. 9 of the agreement of sale and the exercise of their right thereunder and it is in express terms recited therein that:—

'the said sum of $40,000 and all subsequent payments on account thereof shall at the option of the vendors upon giving the notice hereinafter mentioned, and notwithstanding any previous forbearance by the vendors, or demand by the vendors of the whole unpaid purchase price belong absolutely to the vendors any rule of law or equity to the contrary notwithstanding; and the vendors may thereupon resume possession of the said premises and all improvements thereon and hold the same freed from the present without any right on the part of the purchasers to any compensation therefor.'

Therefore it is plain that exercising the option there is the right in the plaintiffs to retain all moneys paid by the defendants. There is no particular magic in the words used in the notice, 'cancel the agreement,'—the notice was, after all, as previously stated, merely a notice of the exercise of rights granted under the agreement for sale."

Similarly, in the present case, there was no "wrongful repudiation," it was merely the notification of intention to insist upon the terms of the contract, and it was for the respondents to come forward and carry out the contract. They did nothing of the kind, and did not even ask for any

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extension of time, or express the intention of complying with the terms of the contract, but elected to treat this justifiable notice as a "wrongful repudiation" of the contract, a perfectly untenable position, in my opinion. Here, at the most, there was only notice of intention at the expiration of twenty days to cancel, and that was following the terms of the contract, and how could it be said to constitute repudiation?—The curative power resided in the respondents. All that they needed to do was to carry out the contract, and there could be no cancellation; but there was no intention upon the part of the respondents to carry out the contract. In truth, there was absolute inability upon their part to carry out the contract, but, notwithstanding that, that was the position. The respondents rush in and treat the notice as a repudiation of the contract upon the part of the appellant, and the contention is that the appellant was thereby guilty of a breach of contract, and that contention has been given effect to by the judgment under appeal. In *Moore* v. *Ullcoats Mining Co.*, [1908] 1 Ch. 575, Warrington, J., is dealing with the wording of a condition in a lease, and at p. 588 said:—

" I do not see how it is possible, on any construction of this proviso for re-entry, to say that the lessors have re-entered when all that they have done is to give a notice of their intention to re-enter, founded on a statement that the lease had determined which had not in fact happened, or a demand for possession founded on that notice."

I would, in the way of analogy, refer to what Parke, B., said in *Doe d. Murrell* v. *Milward* (1838), 3 M. & W. 328 at p. 332, 150 E.R. 1170:—"I am very strongly of opinion that there cannot be a surrender to take the place *in futuro*. In *Johnstone* v. *Hudlestone* (1825), 4 B & C. 922, 107 E.R. 1302, it was held that an insufficient notice to quit, accepted by the landlord, did not amount to a surrender by operation of law, and it was there agreed that there could not be a surrender to operate *in futuro*. The case of *Aldenburgh* v. *Peaple* (1834), 6 Car. & P. 212, was much shaken by the decision of this Court in *Weddall* v. *Capes* (1836), 1 M. & W. 50, 150 E.R. 341, for, although this precise point is not there determined, yet it is clear that the Court were of opinion that the instrument could not operate as a surrender *in futuro*."

It cannot be reasonably said that the appellant in giving the notice in pursuance of the terms of the contract was repudiating the contract—and that such action gave to the

respondents a right of action—in this connection I would refer to what Rigby, L.J., said [1900] 2 Ch. at p. 303, in *Cornwall* v. *Henson*:—"whether clause 8 of the contract merely gave an option to the vendor, or whether it pointed out his only remedy in case of the purchaser's default, I am not satisfied that the vendor had any intention of repudiating the contract. I cannot come to the conclusion that both parties or either of them intended to repudiate the contract."

In the present case, unquestionably, the appellant never had any intention of repudiating the contract. But it is apparent that the respondents were only too willing to seize upon the notice as amounting to a repudiation, and the trial Judge has so found, which, with great respect, in my opinion, is an unsound conclusion.

The notice given was not in its nature upon a fair reading a flat repudiation. It was given in pursuance of the contract, and the respondents were not entitled to treat it as a renunciation of the contract. Their duty was plain after the receipt of the notice, that was to proceed with expedition and carry on the logging operations. The failure to carry on the operations amounted to an abandonment, and upon all the facts and circumstances, the appellant was entitled to consider the contract at an end and the appellant was no longer under any obligation in respect thereto. There had been no sufficient performance and all was chaos and no attempt was made upon the part of the respondents to perform the contract, in accordance with its terms and spirit, a contract calling for continuance of operations, time being of the essence thereof, and with reason, this term was imposed, as otherwise a very valuable and very large tract of timber lands would remain unprofitable to the appellant. In *Jones* v. *Barkley* (1781), 2 Doug. K.B. 684, at p. 694, 99 E.R. 434, Lord Mansfield said:—

".....the question is whether there was a sufficient performance. Take it on the reason of the thing. The party must shew he was ready; but, if the other stops him on the ground of an intention not to perform his part, it is not necessary for the first to go farther and do a nugatory act."

Now, can it be reasonably said in the present case that there was readiness to perform the contract upon the part of the respondents? On the contrary, there was complete collapse, a throwing up of hands, a state of paralysis. The notice given did not amount to an intimation upon the part of the appellant that it did not intend to perform the contract. In Leake on Contracts, 7th ed., p. 655, we find this

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stated, "The notice for this purpose must express an absolute and unequivocal intention of renouncing and repudiating the contract. A mistaken construction of the contract or an imperfect tender which may be amended in time or an expression of present disability to perform it, is not sufficient."

Jones v. *Gibbons, supra; Mersey Steel Co.* v. *Naylor, supra; Cornwall* v. *Henson, supra; Borrowman* v. *Free, supra; Johnstone* v. *Milling, supra.*

The notice really in its nature was a notice to the respondents of default upon their part, and the respondents were not at liberty to treat it as they did, *i.e.*, as a notice of repudiation or cancellation upon the part of the appellant. Unquestionably, the contract was a partnership asset. The subsequent conduct of the respondents, the dissolution and action of the receiver in dealing with the contract as an asset of the partnership accentuates this, and all the facts and surrounding circumstances bear this out. In *Dale* v. *Hamilton* (1846), 16 L.J. (Ch.) 126, at p. 132, (see also 67 E.R. 955), Wigram, V.C., said:—

"In that case of *Lake* v. *Craddock* (1732), 3 P. Wms. 158, the Master of the Rolls said, 'Supposing one of the partners had laid out the whole money and had happened to die first, according to the contrary construction, he must have lost all, which would have been most unjust.' Lord Eldon, commenting on this case, in *Jackson* v. *Jackson* (1804), 9 Ves. 591, at p. 597, 32 E.R. 732, said the purchase of the land was made to the intent that they might become partners in the improvement; that it was only the substratum for an adventure, in the profits of which it was previously intended they should be concerned."

If it could be interpreted that the notice was a repudiation of the contract upon the part of the appellant for no sufficient reason, *i.e.*, that at the time there was no real default (although I am of the contrary opinion), I would refer to what Greer, J., said in *Taylor* v. *Oakes, etc. Co.* (1922), 38 Times L.R. 349, at p. 351, 27 Com. Cas. 261, 66 Sol. Jo. 556: "I have considered it desirable to make these observations about *Braithwaite* v. *Foreign Hardwood,* [1905] 2 K.B. 543, because I know that in actual practice it is frequently misunderstood, and sometimes supposed to be inconsistent with the rule of law to which I have referred, that a man who puts forward a bad reason for refusing to perform his contract *is not liable in damages* if there exist in fact sufficient grounds which in law justify his refusal. In my opinion,

the decision is not inconsistent with that rule."

In the present case, in view of all the facts and circumstances, there were undoubtedly "sufficient grounds which in law" justified the appellant in treating the contract as abandoned, further, upon the facts, the appellant was justified in treating the contract as being no longer binding upon it.

The notice, as I have more than once stated, in my opinion, did not amount to a repudiation nor renunciation of the contract, and the case is not covered by *Hochster* v. *De La Tour* (1853), 2 El. & Bl. 678, 118 E.R. 922—also see *Avery* v. *Bowden* (1855), 5 El. & Bl. 714, at p. 722, 119 E.R. 647, and at p. 728, Lord Campbell, C.J., said:—

"Was there any evidence that, on or before the 1st of April, a cause of action had accrued to the plaintiff for breach of the charter party? We think not. According to our decision in *Hochster* v. *De La Tour*, 2 El. & Bl. 678, 118 E.R. 922, to which we adhere, if the defendant, within the running days and before the declaration of the war had positively informed the captain of the "Lebanon" that no cargo had been provided or would be provided for him at Odessa, and that there was no use in his remaining there any longer, the captain might have treated this as a breach and renunciation of the contract; and thereupon, sailing away from Odessa, he might have loaded a cargo at a friendly port from another person; whereupon the plaintiff would have had a right to maintain an action on the charter party to recover damages equal to the loss he had sustained from the breach of the contract on the part of the defendant. The language used by the defendant's agent before the declaration of war can hardly be considered as amounting to a renunciation of the contract; but, if it had been much stronger, we conceive that it could not be considered as constituting a cause of action after the captain still continued to insist upon having a cargo in fulfilment of the charter party."

Now, as previously pointed out, the notice was not one of repudiation nor renunciation, as I view it, and the language of Lord Campbell, C.J., above quoted, is exceedingly apposite in the consideration of the present case; and in *Avery* v. *Bowden* (1856), 6 El. & Bl. 953, 119 E.R. 1119, Creswell, J., at p. 975, said (see 119 E.R., at p. 1127):—

"I observe that Lord Campbell relies on a double ground—he thinks the language can hardly amount to a renunciation of the contract by the defendant's agent; but he also adds

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that, if it were much stronger it would not constitute a cause of action wherein the master continued to insist upon having a cargo."

Here, of course, we have the respondents treating the notice as a repudiation and renunciation of the contract, but in that they were wrong, in my opinion, as the notice did not amount to a renunciation of the contract, but was given in pursuance of its terms, and it rested with the respondents to comply with the contract. They did not do this. The breach of contract has been on their part, and the appellant, in my opinion, is entitled to have it declared that it is freed from any obligation in respect of the contract.

The notice which the appellant gave admitted of the respondents' recommencing the logging operations within the time stipulated which was a time fixed in the contract, and if they had done so or any one or more of them had done so, the appellant could not have objected; in fact, everything points to the anxiety only upon the part of the appellant to have the contract performed and a desire to live up to its terms.

In my opinion, the case is one which admits of there being a declaratory judgment that the appellant is no longer bound by the terms of the contract, *i.e.*, that the counterclaim should be allowed and the action dismissed, (see *Guaranty Trust Co. of New York* v. *Hannay & Co.*, [1915] 2 K.B. 536.)

I would, therefore, allow the appeal.

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

Appeal allowed.

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British Columbia Court of Appeal, Macdonald, C.J.A., Martin, Galliher, McPhillips and Eberts, JJ.A. October 3, 1922.

COMPANIES (§ VIA—314)—RESTORATION OF COMPANY TO REGISTER—RIGHTS UNDER FORMER LEASE—PROPERTY IN HANDS OF OTHER LESSEES.

Section 21 of the Companies Act, 1913 (B.C.), ch. 10, amending sec. 268 (4) of R.S.B.C. 1911, ch. 39, where it says in the case of companies restored to the register, "that thereupon the company being an incorporated company, shall be deemed to have continued in existence as if its name had not been struck off," means that such companies shall be restored to their original position except insofar as the rights of others may intervene, and so where a proper re-entry has been made under a lease, at a time when the company was in a state of disorganization although prior to its being officially struck off the register, and the property has been leased to others, the restoration of the

company under the statute does not revive its former rights under the lease.

[See Annotation, 63 D.L.R. 1.]

LANDLORD AND TENANT (§ IA—9)—LEASE BY MORTGAGOR IN POSSESSION —RIGHT TO RE-TAKE POSSESSION ON DEFAULT—RIGHT OF DEVISEE OF LESSOR.

A mortgagor in possession may make a lease of his equity of redemption, and give the lessee possession on like terms and with like remedies for breach of covenant as where the lessor is the owner of the legal estate, and upon default may re-take the possession which until default under the mortgage and subject to the lease is his, and such right passes to his devisee.

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APPEAL by plaintiff from the judgment of Gregory, J., in an action by a company upon being restored to the register to be restored to its former rights under a certain lease. Affirmed.

E. C. Mayers, for appellant.

E. P. Davis, K.C., for respondent, M. W. Brighouse.

W. J. Taylor, K.C., for respondent, Brighouse Park Ltd.

MACDONALD, C.J.A.:—One S. Brighouse, since deceased, being the owner of the land in question herein, mortgaged it to the municipality of Richmond. Subsequently, in 1909, being the mortgagor in possession he leased the land to the appellant, plaintiff in the action, who took possession and paid rent for some years. The appellant was an incorporated horse-racing association. During the Great War, horse racing declined; the directors were scattered, the rent and taxes became in arrears, and, finally, the company was officially dissolved pursuant to a statute. Afterwards, it was revived under the statute which is more fully referred to in the judgment of the trial Judge.

One question raised is as to whether upon the reinstatement of the company, its former rights under the lease in question were revived? Before the action was brought, S. Brighouse had died, leaving a will by which he devised the lands in question to the defendant, M. W. Brighouse. The defendant Brighouse, it is contended, re-entered before the dissolution of the said company, and I think this has been proved and I am not, therefore, concerned with what would be the effect of re-entry during dissolution. Mr. Mayers argued that the taking of possession was pursuant to a license of one of the directors, and was not nor was it intended to be a re-entry under the lease, but I think that this is not borne out by the evidence.

In my opinion, the order re-instating the company did not have the effect, nor has the statute the effect of revesting the lease in the appellant. I agree with the trial Judge on this point.

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Mr. Mayers argued that the defendant Brighouse, had no status to make a re-entry; the right of re-entry being limited, he contended, to a legal assignee, which defendant Brighouse was not. *Matthews* v. *Usher* [1900] 2 Q.B. 535; and *Robbins* v. *Whyte*, [1906] 1 K.B. 125, are, in my opinion, not in point. In the first of these, the lease was prior in date to the mortgage, and, therefore, on the giving of the mortgage, the legal estate with the right of re-entry became vested in the mortgagee. The second case depends upon the Conveyancing and Law of Real Property Act, 1881 (Imp.) ch. 41, of which we have no counter-part in our legislation in this Province. The argument was two-fold, firstly, that only the owner of the legal estate could take advantage of a proviso for re-entry, and, secondly, that if an equitable owner may do so the right will not pass to his devisee. There are many conflicting opinions on the subject, but *Cuthbertson* v. *Irving* (1860), 6 H. & N. 135, 158 E.R. 56, is more nearly in point than any other I have been able to find. On principle, I can see no reason why a mortgagor in possession may not make a lease of his equity of redemption, giving the lessee possession, on like terms, and with like remedies for breach of the covenants as in the common case of leases where the lessor is the owner of the legal estate. When the lease is subsequent in time, as it was here, to the mortgage, the mortgagee is not affected or bound by it. When, therefore, the lessor of the equitable estate stipulates for the right to re-take the possession which, until default under the mortgage and subject to the lease, is his, what obstacle can there be in the way of his so doing? In the eye of the law, the lessee is the lessor's bailiff and so long as this contract does not affect others, why should it not be given effect to in full? When the mortgage is subsequent to the lease, the case is, I think, quite different. That case is fully dealt with in *Matthews* v. *Usher*, *supra*. *Cuthbertson* v. *Irving*, *supra*, is a case the *ratio decidendi* of which is, I think, applicable to this appeal, though I do not see the necessity for invoking the fiction. The controlling fact in each was that the lease was subsequent in date to the mortgage. The Court there held that the defendant was estopped from denying that his lessor had the legal title, and on the same principle, the title of the assignee of the lessor was sustained.

It was further argued that the appellant had abandoned its lease. I think the facts sustain that contention, and as they were referred to at some length by the trial Judge, I

will not go over them again. The abandonment was of an equitable right, not of a legal one, and, therefore, less conclusive proof of the abandonment was necessary.

But there is still another defence urged, that afforded by sec. 22 of the Land Registry Act, 1921 (B.C.) ch. 26. The defendant Brighouse, after the dissolution of the company, procured in good faith, the cancellation of the registration of the lease, in the Land Registry Office and obtained for himself a certificate of indefeasible title, subject to the mortgage. That is not a good defence *inter parties*, and the only interest of third parties is in the lease to the Brighouse Park Ltd., and the appellant's claims only subject to that lease which will soon expire. Whether or not this section is of importance depends on the date of re-entry which I have already dealt with in favor of the respondents. The facts do not, in my opinion, call for relief from the forfeiture.

MARTIN, J.A.:—I agree in dismissing the appeal and think it necessary to say only that the evidence warrants a finding that there was a re-entry before the company was struck off the register, and that such re-entry was lawful: I also agree that the case is not one for relief against forfeiture.

GALLIHER, J.A.:—In my opinion, sec. 21 of the Companies Amendment Act, 1913 (B.C.), ch. 10, amending sec. 268 (4) of R.S.B.C. 1911, ch. 39, does not—where it says in the case of companies restored to the register, "that thereupon the company being an incorporated company, shall be deemed to have continued in existence as if its name had not been struck off"—mean that such companies shall be restored to their original position without regard to rights of others that may intervene. This view is supported by the later words in the section:—"for placing the company *and all other persons* in the same position, etc."

It could not be the intention of the Legislature, and we should not so regard it, unless expressed in apt words, that rights revived which had become forfeited and which, in consequence, had been acquired by others.

In the next place, my view is that there was a proper re-entry under the lease, and at a time prior to the company being struck off the register.

Several other points were raised, but I think these two findings substantially dispose of the appeal, except as to relief against forfeiture. On this branch, it is not, in my view, a case in which we should grant such relief. That the

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original owners, or those claiming through them, have suffered no loss by reason of the company lapse, is not sufficient in itself. That they have not suffered any loss, and we will assume on the contrary that they have made a profit, may be due to better and more efficient management, in other words, is the fruits of their own toil, if I may so term it.

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The result might have been otherwise, and when we consider that nothing was done to revive this company until the undertaking had proved a success, I am unable to see why it should be taken out of the hands of those who had made a success of it and turned over to those who lay by and abandoned the enterprise.

I would dismiss the appeal.

MCPHILLIPS, J.A. (dissenting):—This appeal raises a somewhat difficult point of law when all the surrounding facts and circumstances are given careful attention. The appellant, a company incorporated under the Companies Act, R.S.B.C. 1911, ch. 39, was granted a lease of the property in question under date July 1, 1909, by one Sam Brighouse, now deceased—the term of the demise being 50 years. The respondent Brighouse is the devisee under the will of the late Sam Brighouse. The respondent, the Brighouse Park Limited, is a lessee under a demise from the respondent Brighouse of the same property for the term of 3 years from May 28, 1920, at a rental of $1 a year. The area of land was known for a considerable time as Minoru Park, later known as Brighouse Park. The demised premises were greatly improved by the appellant, and there was established thereon a modern race track to be used for horse racing and other suitable purposes, and the appellant would appear to have expended thereon a sum in the neighborhood of $150,000. The rent was duly paid up to September 1, 1913, but after that date, no rent has been paid, and at the time of the trial of the action, a sum approximating $25,000 was due in respect of rent and taxes. In the year 1913 British Columbia entered upon a period of depression; the real estate boom was at an end and then the Great War ensued in 1914, rendering it impossible to at all, profitably, carry on race meetings. Previous thereto the appellant company had met with success in its operations. The appellant company, following upon the changed condition of things, became disorganized and little, if any, interest, owing to the stress of the times, was taken in the demised premises. Most of the directors resigned and some of the

shareholders went to the war, leaving but two directors in office—Springer and Suckling—Springer being the managing director, and later again Springer went abroad, but, as it will be seen later, continued to interest himself in the property, it was impossible though to meet the rent and taxes. On April 29, 1918, the appellant company was under the provisions of the Companies Act struck off the register and dissolved. The sections of the Companies Act being amendments thereto which particularly require consideration read as follows:—

Section 268 (1), as amended 1913 (B.C.) ch. 10, sec. 20: "Where a company incorporated under any public Act in the Province, or an extra-provincial company, licensed or registered, has failed for any period of two years after such incorporation or licensing or registration to send or file any return, notice, or document required to be made or filed or sent to the Registrar pursuant to this Act or any former public Act, or the Registrar has reasonable cause to believe that such company is not carrying on business or in operation, he shall send to the company by post a registered letter inquiring whether such company is carrying on business or in operation and notifying it of its default (if any): (a) The period of two years hereinbefore mentioned shall in its application to companies already licensed be deemed to commence on the first day of March, 1913."

Section 268 (2), as amended 1914 (B.C.), ch. 12, sec. 22. "If within one month no reply to such letter is received by the Registrar, or such company fails to fulfil the lawful requirements of the Registrar, or notifies the Registrar that it is not carrying on business or in operation, he may, at the expiration of another fourteen days, publish in the Gazette a notice that at the expiration of two months from the date of that notice the name of such company mentioned therein, will, unless cause is shown to the contrary, be struck off the register, and the company, if one incorporated as aforesaid, will be dissolved, or, if licensed or registered as aforesaid, will be deemed to have ceased to do business in the Province under its license or certificate of registration."

Section 268 (3), R.S. B.C. 1911, ch. 39. "At the expiration of the time mentioned in such last-mentioned notice, the Registrar shall, unless cause to the contrary is previously shown by such company, strike the name of such company off the register, and shall publish notice thereof in the Gazette for one month, and on such last-mentioned publica-

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tion the company, being an incorporated company as aforesaid, shall be dissolved; or, being an extra-provincial company, shall be deemed to have ceased to do business in the Province, under its license or certificate of registration; Provided that the liability (if any) of every director, managing officer, and member of any such company shall continue and may be enforced as if the name of said company had not been struck off the register."

Section 268 (4), as amended 1913 (B.C.), ch. 10, sec. 21. "If a company or any member or creditor thereof feels aggrieved by the company having been struck off the register, the Court, on the application of the company or member or creditor, may, if satisfied that the company was at the time of the striking-off carrying on business or in operation, or otherwise that it is just that the company be restored to the register, order the name of the company to be restored to the register, and thereupon the company, being an incorporated company as aforesaid, shall be deemed to have continued in existence, or being an extra-provincial company, shall be deemed to be still entitled to do business in the Province, and if its name in either case had not been struck off; and the Court may by the order give such directions and make such provisions as seem just for placing the company and all other persons in the same position as nearly as may be as if the name of the company had not been struck off."

The appellant company was however restored to the register on September 29, 1920, by the order of Morrison, J. The trial Judge, Gregory, J., held that, during the dissolution of the appellant company the respondent Brighouse re-entered and took possession of the demised premises, sold a portion of the land, and rented other small portions of the land, and in 1920, as we have seen, leased the race course, stables, etc., to the respondent the Brighouse Park Limited. Further, during the period of dissolution of the appellant company, in pursuance of the provisions of the Land Registry Act, the respondent Brighouse obtained cancellation of the lease of the appellant company, and obtained a certificate of indefeasible title to the lands in question. In June, 1917, horse racing was prohibited by the Government of Canada—an Order-in-Council, in pursuance of the existent statute law having been passed to that effect, but such prohibition was removed in December, 1919, as and from January 12, 1920. The respondent company—the Brighouse Park Limited—in which the respon-

dent Brighouse is a large shareholder, holding 40% of the capital stock, held race meetings on the race course in 1920 and 1921, and the race meetings were very remunerative, although it is true some $20,000 had been previously expended in the way of betterments and improvements. Now the question is, what was the result of the statutory dissolution, coupled with the statutory revival (sec. 268 (4)) the language is "shall be deemed to have continued in existence" that is when the order has been made by the Court restoring the company to the register? The contention at this Bar was that whilst the appellant company had been restored to the register, yet it no longer was entitled to the demised premises, that the lease was cancelled, that, in fact, the restoration was ineffective to re-clothe the appellant company with any right or title to the demised premises. This argument, in the abstract, extends to saying that a company although restored to the register may find itself stripped of all its assets through steps taken during the time of dissolution. Can this be reasonably said to be the effect of the enactment? I am strongly impelled to come to a contrary conclusion. It may well be that, in respect to innocent third parties, the law should protect them; and it was conceded at this Bar that the intervening lease would be operative, and it might be equally well said that, if a lease had been made extending to the full period of the demise to the appellant company, that also would have been an effective demise, and would have displaced any rights of the appellant company, but such is not the situation. The lease granted during the dissolution will expire on May 28, 1923: this would leave 36 years of the 50 years' term of the lease to the appellant company still to run unless it be that that lease is now non-existent because of the dissolution of the company and the claimed re-entry during the dissolution. It has been argued here that the order of restoration should not have been obtained *ex parte*. In my opinion, this objection is without force (see *Re Conrad Hall & Co.* (1916), 60 Sol. J. 666, per Astbury, J., which was decided upon analogous statute law; also see *Re Brown Bayley's Steel Works Ltd.* (1905), 21 Times L.R. 374); In *Hastings Corp'n* v. *Letton*, [1908] 1 K.B. 378, 23 Times L.R. 456, Phillimore, J. (now Lord Phillimore), said, at p. 387:—

"So if property is given to a corporation for a term of years the term endures so long as the corporation is in existence to enjoy it; the reversion is accelerated if the

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corporation ceases to exist. Therefore, the lease in this case ceased to exist when the lessees ceased to exist."

Then at a later point in his judgment, at p. 387, Phillimore, J., said:—

"A corporation has no personal representatives, and when it is dissolved its lands revert to the grantors."

It is to be observed though that when the appellant company was restored to the register, the apt words of the statute must be given effect to "shall be deemed to have continued in existence"; this must result in reclothing the appellant company with all its assets, subject only to the recognition of all rights acquired in the interim of time, and as between the original parties, *i.e.*, as between the lessor and the lessee the demise revives or more properly must be deemed never to have reverted—save in the way of the preservation of existing equities—as it is not reasonable to assume that the Legislature intended to affect innocent third parties. In this connection, it is instructive to observe what Wright, J., said in *Re Higginson & Dean; Ex parte The Att'y Gen'l*, [1899] 1 Q.B. 325, at p. 331:—

"In the 17th and 18th centuries corporations aggregate, constituted by charter or letters patent, were numerous, and questions frequently occurred as to the effect upon their rights and obligations of dissolution, revival, and reincorporation, with or without change of name or constitution. Many references to such cases will be found in Anderson's Reports and in *Rex* v. *Pasmore* (1789), 3 Term. Rep. 199, 1 R.R. 688, 100 E.R. 531. I cannot find that in any case the rights or obligations of a corporation were held to be affected by a technical dissolution. Nor, on the other hand, can I find a case in which such a question has been decided, where the corporation had not been revived or some provision made by statute or charter with reference to its obligations. In *Mayor, &c. of Colchester* v. *Seaber* (1766), 96 E.R. 340, 1 Wm. Bl. 591, 3 Burr. 1866, 97 E.R. 1140, the revived corporation sued in its own name on a bond given to the dissolved corporations, and succeeded. Sir Fletcher Norton, for the plaintiff corporation, argued that the goods and chattels of the old corporation, including its choses in action such as the bond, had on its dissolution passed to the Crown, and that the Crown in granting a charter of revival had regranted them to the revived corporation. Mr. Dunning, on the other side, neither admitted nor denied this, and the Court is not reported to have expressed any opinion on this point, it

being held that there was only a qualified dissolution, and no absolute break of continuity."

It is to be noted that Wright, J., says: "not affected by technical dissolution." Unquestionably, this form of striking off the register under the Companies Act is nothing more than a "technical dissolution"—this is made plain when the restoration of the company is by the enactment made so simple of accomplishment. This is further accentuated when the Legislature used the words "shall be deemed to have continued in existence." This can only mean that the restoration is curative, and being the language of Parliament, supreme in regard to property and civil rights. It, in effect, might displace any changed titles acquired during the period of dissolution. In the present case, however, no interests, as affecting third parties, come in question as the counsel for the appellant company at this Bar stated that there was no intention to question the outstanding lease which will expire in 1923. Then we have Lord Kenyon, Ch.J., in *Rex* v. *Pasmore*, 3 Term. Rep., at pp. 241, 242 (100 E.R., at p. 553), saying:—

"But it does not follow that, because the corporation is dissolved to a certain purpose, the King cannot renovate it. Corporations are the creatures of the Crown: and on their dissolution their franchises revert to the Crown. But if the King choose that all their rights shall be revived, it is competent to him to do so, either with the old or new corporators; and thereby no person is injured, nor is any rule of law infringed. And by the new charter the King did not consider the old corporation as dissolved to all purposes; but he granted those rights to a new set of men, and superadded such other powers as he deemed necessary. It has been said that in the case of *The Mayor &c of Colchester* v. *Seaber* it was determined that the old corporation was not irrecoverably gone, though they had lost their magistrates; and that is the main ground on which the argument for the relator stands: but I think it is all reconcilable with this doctrine. Lord Mansfield did not say in that case that the corporation could act, or that it was not dissolved to some purposes; but only that the King might renovate it, and when renovated all the former rights would revive and attach on the new corporation, and amonst others the right of suing on the bond given to the old corporation. But it is said that, supposing this to be the case, the King was deceived in his grant, and that the grant is consequently void. But I think he was not. The

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recital in the new charter stated all those facts from whence the King's right arose, and from whence he drew his conclusion in point of law that the corporation was in danger of being dissolved. There is no doubt but that was the case. But there is no one fact there stated to the King which was not true. If the King be called upon to grant some part of his estate, and the interest which he has in it is greater than that which is represented to him, he is then deceived, and his grant is void; but that is not the case here. The old corporation was in danger of being dissolved, and no relief could be administered without the King's interference; his act was necessary to revive the corporation. Then it is said that the new charter cannot take effect, because the King has not used it in words of *grant* but only words of *confirmation*. This, in my opinion, reverts to what I have already said. To some purposes it was dissolved; it was so, if the King did not choose to renovate it. But he did so choose; and by his grant (which it was competent to him to make) he gave power to do such acts as were necessary for the government of the town. Then has this new charter been accepted or not? The majority of the grantees are stated to have accepted it; and the refusal by a few of the body was certainly not sufficient to repel the acceptance of the rest. Therefore judgment must be given for the defendant, who derives his title under this charter."

In *Mayor, etc., of Colchester Corp'n* v. *Seaber*, 3 Burr, 1866, at p. 1871, 96 E.R. 1140, Lord Mansfield, C.J., says:

"So it stands upon *general reason*. And *The King* v. *Mayor of London; Sir James Smith's* case (1692), 1 Show. 274, 89 E.R. 569, and in 4 Mod. Rep. 52, 87 E.R. 258, is in point, 'That corporation is not dissolved by the judgment.' Notwithstanding this judgment of ouster, a *right* may remain, so as to be capable of being again *raised* and *revived*. The corporation can not *act* without legal magistrates: but their rights may be *revived*, and put in *action* again, by a new charter from the Crown, giving them legal magistrates. I am clear, upon principles of law, that the old corporation was *not* absolutely dissolved and annihilated, though they had lost their magistrates; and by virtue of the new charter, they are so revived as to be *entitled to the credits*, and *liable to the debts* of the old corporation."

And in 3 Burr., at p. 1873, in this same case, Aston, J., said:—

"As to the statute of 11 G. 1, c. 4—The intent of it was

not to consider such corporations as dissolved, and to grant them *new* powers, or, as it were, new charters, as bodies dissolved; but to *revive their activity*, and to put them *again in motion*. Though a new charter should grant *new rights*, or a *new name*, yet the acceptance of it does *not* destroy the *former* rights, privileges or franchises of the corporation; but the corporation may use and enjoy them, as they did before. This is expressly laid down. . . . . in *Haddock's* case (1682), T. Raym. 435, 83 E.R. 227."

In view of the contention put forward in argument at this Bar that although the appellant company has been restored to the registrar, it stands restored in an emasculated state so far as its property and assets are concerned. I would refer to what Neville, J., said in *Spottiswoode, Dixon etc. Ltd.*, [1912] 1 Ch. 410, at pp. 414, 415, when discussing provisions of the Companies (Consolidation) Act, 1908 (Imp.) ch. 69, relative to dissolution and declaring dissolution void. The British Columbia Companies Act is analogous legislation, in fact, generally speaking, is, in all its principal provisions, the same as the English Act.

"The result of course is that the liability of the old company never passed to the new company and disappeared, to the great advantage of the new company (as no doubt it would be to the great advantage of other reconstructed companies), who thus were freed from an obligation which they had undertaken by their contract. If that is allowed by the law, and if the arm of the law is so short that it cannot interfere with such a transaction, then, speaking from this place, I have nothing to say about the action of the new company; they have discovered a way in which a liability can be got rid of by a solvent company without discharging it, and they are entitled to the benefit of their discovery. But sec. 223 of the same Act, which provides for the dissolution of the company under the circumstances that I have referred to, gives the Court power upon the application of any persons interested to declare the dissolution to have been void. Terms may be inserted if necessary, but the order simply declaring the dissolution to have been void would put matters back into the position in which they were when the proceedings were taken by the liquidator which resulted in the statutory dissolution of the company."

In *Leask Cattle Co.* v. *Drabble & Sons* (1922), 66 D.L.R. 791, Mackenzie, J., when considering similar legislation to that we are now considering, at pp. 795, 796, said:—

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"Counsel for the defendants argued, however, that even granting that such proof of restoration to the register could now be made, it could not give the plaintiff company a status to bring this action, which it did not possess at the commencement thereof. I cannot agree with this argument. It is to be noted that the words of the statute regarding the effect of the publication of the notice of restoration are: '*and thereupon the company shall be deemed to have continued in existence as if the name of the company had never been struck off.*' To my mind the intention of the Legislature in passing this provision was to make it as remedial as possible. It must therefore be held to be retrospective as well as prospective in its operation. See 27 Halsbury, p. 159, sec. 305, and *Quilter* v. *Mapleson* (1882), 9 Q.B.D. 672, therein cited. Accepting this as the law applicable to this statutory provision it cannot matter that notices of dissolution under sub-secs. (2) and (3) of above sec. 31 were published before the commencement of this litigation, for once the Court is satisfied that notice of this restoration has been subsequently published, it must treat it as if its corporate existence had continued without cessation since its incorporation."

I am satisfied, upon the evidence, that no re-entry ever took place of the demised premises as against the appellant company. The respondents contended that there was a re-entry before the dissolution, and, alternatively, if not before, after the dissolution of the appellant company. Upon this point the trial Judge held that the re-entry was after the dissolution. There is no cross-appeal, so that all that the appellant company has to meet is the finding that there was a re-entry after dissolution. In arriving at the conclusion that there was no re-entry, I rely greatly upon the letter of Springer, the managing director, written to the respondent Brighouse, of date October 17, 1917. The surrounding facts and the course of conduct, after the receipt of that letter, all going to show that everything that was later done was relative to the terms of that letter and the understanding come to—to bridge over the time of financial and business depression. The letter was as follows:—

"My dear Mike:—Have delayed answering your letter hoping that I might be able to get North, but I find it impossible at present.

As far as the race track is concerned, it is impossible for me to do anything at present. If you can't rent it for enough to at least pay the taxes, go ahead and when con-

ditions become normal again we will have to come to some new arrangements. I'm very sorry but it can't be helped. As for putting any—— in charge to look after the place—I didn't and no body else had any authority for doing so. Any arrangement you can make will be perfectly satisfactory to me.

Oct. 17th, 1917. H. E. Springer."

The dissolution of the appellant company did not occur until about 6 months after the receipt of the Springer letter by the respondent Brighouse and the claimed re-entry was in March, 1918. It is clear that all that was done by the appellant Brighouse was done in pursuance of the license given, and for that reason, it is incumbent upon the appellant company to recognise, as it does, the lease expiring in 1923, but there was no authority whatever or right in the appellant Brighouse to cancel the lease of the appellant company or proceed to get an indefeasible title to the land freed of the lease. Further, there is evidence of a claim made for rent after the time it was claimed that a re-entry had been effected. The re-entry is stated to have taken place at several different times, namely, in March, May or June, 1918, and sometime in 1919. In truth, the evidence upon the point of re-entry is so unsatisfactory that credence cannot be given to it. The evidence establishes that a profit of $80,000 was made by the respondents in 2 years of operation of the demised premises from race meetings, and the appellant Brighouse thereout received the sum of $35,764. Suckling, one of the directors of the appellant company, was in Vancouver all the time, and it is significant that, as late as 1919, the respondent Brighouse in conversation with Suckling spoke of leasing some of the property, and treated Suckling as being one who was interested in the land as a director of the appellant company. It is true that the appellant company was then dissolved, but upon the cases, dissolution does not mean annihilation, and there was the right to restoration, which actually took place as we have seen on September 29, 1920. I cannot say that I feel at all impressed with the evidence of the respondent Brighouse upon the question of re-entry, or the steps taken to cancel the lease to the appellant company—as late as the year 1919. In conversations with Suckling, he stated that he had received no rent or taxes, and that it was still due and running on, and increasing, and yet it is claimed that long prior to this a re-entry had occurred. The evidence is so contradictory and inconsistent throughout that

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no reliance can be placed upon it. If any conclusion can be come to at all about the situation of matters as the respondent Brighouse speaks to it, his idea was that, until the cancellation of the lease, under the provisions of the Land Registry Act, the lease to the appellant company was still outstanding and, in effect, with rent accruing throughout and up to the time of cancellation. The application for the cancellation of the lease was made on March 11, 1919. Rents and profits were received from the demised land by the respondents, and besides the $80,000 of profit made in the years 1920 and 1921, and in addition to this $80,000, other revenue came in from the property by way of rent, notably, one Chinaman paid $800 a year rent, and the taxes were only $600 a year. Some $3,000 was received from this one Chinaman, the lease being made to him in the spring of 1918, and rent was paid in 1918, 1919, 1920 and 1921. It is to be observed that the lease held by the appellant company is not under seal, and the contention advanced upon the part of the appellant company is that there was no right of re-entry after the death of the lessor in the devisee, the demised premises being subject to a mortgage (*Matthews* v. *Usher*, [1900] 2 Q.B. 535), and it was further contended that the mortgagee only could re-enter, and no such election is shown upon the part of the mortgagee (In *Robbins* v. *Whyte*, [1906] 1 K.B. 125, 75 L.J. (K.B.) 38, Warrington, J., at p. 40, 2nd col.).

The cancellation of the lease under the provisions of the Land Registry Act, R.S.B.C. 1911, ch. 127, sec. 150, was really a void proceeding. The provisions of the statute did not admit of cancellation upon the facts of the present case. There was no person to serve, the appellant company being then dissolved; and where effectual personal service could not be made, the Court will not order substituted service to be made. (*Sloman* v. *Governor and Government of New Zealand* (1876), 1 C.P.D. 563; *Re Anglo-American Exploration, etc., Co.*, [1898] 1 Ch. 100, at p. 102).

The cancellation of the lease of the appellant company was a futile proceeding, and, as previously stated, in my opinion, was a void proceeding, and cannot be allowed to prevail. (*Chapman* v. *Edwards* (1911), 16 B.C.R. 334).

The certificate of indefeasible title obtained by the appellant Brighouse unquestionably protects all acquired interests upon the faith thereof, but it is not permissible to the appellant Brighouse to maintain this title as against the appellant company. The appellant company is entitled to a

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declaration that the cancellation of its lease was ineffective, null and void and is entitled to a declaration of its title and right to the possession of the demised premises, subject only to the lease to the Brighouse Park Limited. There should be a declaration that the respondent Brighouse is the registered owner of the land comprised in the lease, subject to the terms and provisions of the lease to the appellant company—and the certificate of title should be delivered up for correction, and all proper rectification of the register in the Land Registry Office should be made, with the right to an accounting of all the rents and profits received in respect of the demised premises by the respondent Brighouse: (*Howard* v. *Miller*, 22 D.L.R. 75, [1915] A.C. 318, 20 B.C.R. 227, at p. 230).

The appeal, therefore, in my opinion, should be allowed.

EBERTS, J.A., would dismiss the appeal.

Appeal dismissed.

STANDARD TRUSTS Co. v. PULICE.

British Columbia Court of Appeal, Macdonald, C.J.A., Martin, Galliher, McPhillips and Eberts, JJ.A. October 3, 1922.

WILLS (§ ID—38)—CAPACITY OF TESTATOR—UNDUE INFLUENCE—BURDEN OF PROOF.

When it is proved that a will has been properly executed by a person of competent understanding, and apparently a free agent, the burden of proving undue influence rests upon the party alleging this. It must be shewn that a person having the power to overbear the will of the testator duly exercised such power, and by means of the same, obtained the will.

[*Craig* v. *Lamoureux*, 50 D.L.R. 10, [1920] A.C. 349, 26 Rev. Leg. 306, followed; *McHugh* v. *Dooley* (1903), 10 B.C.R. 537, referred to.]

APPEAL by the defendant from the trial judgment in an action to set aside a will. Reversed.

S. T. Hankey, for appellant,

H. A. Maclean, K.C., for respondent.

MACDONALD, C.J.A.:—I am convinced that the deceased was quite capable of making the will which is questioned in this action. It is true that the trial Judge came to a different conclusion, but I think on careful consideration of the case it will be seen that his conclusion is based upon inferences drawn from facts and circumstances which were either not in dispute or which had been sufficiently established. In sush a case the Appellate Court is in just as good a position to draw inferences as was the trial Judge whose opinion I differ from with great respect.

I agree with the trial Judge when he says that some of

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the medical evidence is not entirely satisfactory, because conclusions rather than evidence are stated therein. That is true of all the medical evidence; it is true of the evidence of Dr. Fraser, the attending physician, as well as of others who were not attending physicians. With regard to Dr. Fraser's evidence, it must be remembered that he is a very busy practitioner, and that his attendance on the deceased was 2 years before the date of trial. His recollection, therefore, is not very clear. He says bluntly that the deceased was not, at the time the will was made competent to make a valid will, but that opinion is not founded on any clear indications of incompetency. Of course, if this pronouncement were conclusive, there would be no necessity for Courts of Justice examining the evidence. Most of the medical evidence is in the category of expert evidence and subject to the observations to which such evidence is open. To my mind, the evidence of such a man as G. R. Naden, who knew the deceased for many years before his stroke, is much more valuable than the evidence of physicians given in the manner in which the medical evidence was given in this case. Having known the deceased when there was no question of the soundness of his mind, Mr. Naden was in a position to detect a change, if any, in that condition resulting from his stroke of paralysis. There is no question prior to the stroke that the deceased was perfectly competent to make a will. After the stroke his condition was that of physical infirmity, not of mental disease. After he had been in the hospital some days and had begun to think of the future and of his property, the deceased who had previously known and had been befriended by the appellant, asked the appellant to procure for him a notary as he wished to make his will. A notary was procured who was not theretofore even acquainted with the appellant. The will was prepared on the instructions of the deceased, who gave a clear and accurate statement of what he possessed and where it was, part being in the United States and part in Canada. He gave that part, valued at about $35,000, which was in the United States to his sister who lived in Massachusetts, and that part which was in Canada, valued at about $10,000, he gave to the appellant. Undue influence on appellant's part is also set up. There is to my mind no evidence, worthy of consideration, of undue influence, but in order to procure the setting aside of the will on this ground, an attempt was made not only to blast the character of the appellant, but that of the notary who drew the will, al-

though there is nothing on which to base it except suspicion which can always be called up in cases of this kind.

The sister of the deceased was very much commended as a witness by the trial Judge, but while she may be a most estimable woman, her evidence is not a deciding factor in the case. It is the kind of evidence that is apt to lead the mind astray. Her inference drawn from her brother's actions, in the presence of several persons when fondling the appellant's little girl is, to say the least, a most uncharitable one to draw from the circumstances as set forth in the evidence.

Without going minutely into detail, I wish to say that the evidence conveys to my mind the impression of a disinclination on the part of the deceased to put himself under the control of this sister. Whatever may have been the relationship between the deceased and his relatives for the 45 years during which he was separated from them, there was no evidence in the shape of letters, though such were alleged to have passed between him and his sister, to show the state of feeling which actually existed between them. The sister appealed to the Courts when she failed to persuade her brother to go home with her, and after perfunctory examinations of the deceased, an order was made and the sister took him with her to her home. He lived for more than a year after this and the evidence is that he was quite well aware that he had made the will and had given the bequest in question to the appellant, yet he did not revoke the will or make any change in the disposition of his property. The suggestion is that the sister did not wish to ask this owing to his condition, but that suggestion, in my opinion, is not entitled to very much weight.

I would allow the appeal and decree probate of the will.

MARTIN, J.A. (dissenting):—Though I am not prepared to adopt all the reasons of the Judge below, and though there are observations in the course of his lengthy oral judgment of 28 pages to which objection was fairly taken, nevertheless, I am of opinion that he reached the correct conclusion in holding that the testator was not possessed of testamentary capacity when he made the will in question, and even assuming that the onus is upon the respondents they have discharged it. The law upon the subject which I considered in the leading case of *McHugh* v. *Dooley* (1903), 10 B.C.R. 537, has not been altered by later decisions, and as I agree with the Judge below on this finding of fact I do not think it desirable to review the evidence or re-state the case

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in favour of the respondents in a stronger way, as might well be done, with all due deference, were that necessary. Such being my view, the further question of undue influence becomes immaterial, and so I shall not pursue it. It follows that the appeal should be dismissed.

GALLIHER, J. A. (dissenting):—This is as I view it, a case of testamentary capacity, and in all such cases the result depends largely on the view one takes of the evidence.

We have numerous authorities for our guidance, but in the end the decision is usually based upon the particular facts and circumstances in each case.

Mr. Hankey, counsel for the appellant, has urged everything that I think could be urged on his client's behalf, and I have considered his arguments and suggestions and the evidence carefully.

There is considerable conflict of evidence both between the doctors and laymen, and even the doctors themselves, upon which the trial Judge has found.

I think considerable weight should be given to the evidence of Dr. Fraser, who was the attendant physician. I do not require to go so far as to say that I agree with the findings of fact of the trial Judge, who heard the case. It is sufficient to say that I do not hold such findings unreasonable or such as could not reasonably be come to upon the evidence.

I think no good purpose would be served by entering into an analysis of the evidence, as I have satisfied myself that the appeal should be dismissed.

MCPHILLIPS, J. A.:—This appeal was exhaustively and ably argued by counsel upon both sides. I cannot arrive at any different conclusion than that I formed at the close of the argument and that was, and still is, that the testator was of sound and disposing mind and that no undue influence was exercised. There has been a very recent pronouncement upon the question here to be determined by their Lordships of the Privy Council—the judgment was delivered by Viscount Haldane and it was in an appeal from the judgment of the Supreme Court of Canada, (1914), 17 D.L.R. 422, 49 Can. S.C.R. 305, in *Craig* v. *Lamoureux*, 50 D.L.R. 10, [1920] A.C. 349, 26 Rev. Leg. 306—the headnote of the case [1920] A.C. 349, reads as follows:—

"When once it is proved that a will has been executed with due solemnities by a person of competent understanding, and apparently a free agent, the burden of proving that it was executed under undue influence rests on the person who so alleges. That burden is not discharged by showing

merely that the beneficiary had the power unduly to overbear the will of the testator; it must be shown that in the particular case the power has been exercised, and that execution of the will was obtained thereby.

The principles stated above applied in a case arising in Quebec in which a husband two days before the death of his wife and while she was seriously ill, was instrumental in having prepared, and in obtaining her execution of, a will under which he was the sole beneficiary."

In the judgment, as delivered by Viscount Haldane, the following language is used, 50 D.L.R. at pp. 14, 15 and 16:—

"The plaintiff appealed to the Supreme Court of Canada, where, unfortunately as their Lordships think, the majority of the judges, notwithstanding the dissent of the Chief Justice there, were much influenced by the view that the validity of the will in such a case as the present depended on whether the husband had discharged a burden which they held to be on him of proving that his wife, in making a will in his favour, had such complete appreciation of the consequences of her action as probably nothing short of independent advice could have given her. They applied what they took to be a principle of universal application, that a person who is instrumental in framing a will under which he obtains a bounty is placed in a different position in law from ordinary legatees who are not called on to support by evidence of its honourable and clearly comprehended character the transaction as regards their legacies. In their case they thought that it is enough that the will should be read over to the testator, and that he should be of sound mind and capable of understanding it. But they considered that there was a further burden resting on those who take for their own benefit after having been instrumental in framing or obtaining the will. For they have thrown on them the burden or proving the righteousness of the transaction. This they considered that the husband had not done in the present case, and in the light of the principle so laid down they reviewed the evidence and decided against the will.

No doubt a principle such as that relied on by the majority of the Judges in the Supreme Court of Canada is one which is very readily applied in cases of gifts *inter vivos*. But, as Lord Penzance pointed out in *Parfitt* v. *Lawless* (1872), L.R. 2 P. & D. 462, 27 L.T. 215, it is otherwise in cases of wills: When once it is proved that a will has been executed with due solemnities by a person of competent understanding and apparently a free agent, the burden of

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proving that it was executed under undue influence rests on the party who alleges this. It may well be that in the case of a law agent, or of a stranger who is in a confidential position, the Courts will scan the evidence of independent volition closely, in order to be sure that there has been thorough understanding of consequences by the testator whose will has been prepared for him. But even in such an instance a will, which merely regulates succession after death, is very different from a gift *inter vivos*, which strips the donor of his property during his lifetime. And the Courts have in consequence never given to the principle to which the Judges refer the sweeping application which they have made of it in the present case. There is no reason why a husband or a parent, on whose part it is natural that he should do so, may not put his claims before a wife or a child and ask for their recognition, provided the person making the will knows what is being done. The persuasion must of course stop short of coercion, and the testamentary disposition must be made with comprehension of what is being done.

As was said in the House of Lords when *Boyse* v. *Rossborough* (1857), 6 H.L. Cas. 2, 10 E.R. 1192, was decided, in order to set aside the will of a person of sound mind, it is not sufficient to show that the circumstances attending its execution are consistent with the hypothesis of its having been obtained by undue influence. It must be shewn that they are inconsistent with a contrary hypothesis. Undue influence, in order to render a will void, must be an influence which can justly be described by a person looking at the matter judicially to have caused the execution of a paper pretending to express a testator's mind, but which really does not express his mind but something else which he did not really mean. And the relationship of marriage is one where it is, generally speaking, impossible to ascertain how matters have stood in that regard.

It is also important in this connection to bear in mind what was laid down by Sir James Hannen in *Wingrove* v. *Wingrove* (1885), 11 P.D. 81, 55 L.J. (P.) 7, 34 W.R. 260, and quoted with approval by Lord Macnaghten in delivering the judgment of this board in *Baudains* v. *Richardson* [1906] A.C. 169, 22 Times L. R. 333, that it is not sufficient to establish that a person has the power unduly to overbear the will of the testator. It must be shown that in the particular case the power was exercised, and that it was by means of the exercise of that power that the will was ob-

tained.

Their Lordships are of opinion that the majority in the Supreme Court did not sufficiently bear in mind what is the true principle in considering the evidence in the present case. They appear to have applied another principle which was not relevant in the inquiry, and to have thrown a burden of proof on the appellant which was not one which he was called upon to sustain. Their Lordships agree with the course taken and the conclusions come to as the result in the judgment of the Court of King's Bench (1913), 14 D.L.R. 399. They think that the judgment under appeal (17 D.L.R. 422) must be reversed, and that the respondent must bear the costs here and in the Courts below of an action which was misconceived. They will humbly advise His Majesty accordingly."

The excerpt from the judgment as above quoted is very instructive and of course is an absolutely binding definition of the governing principle. In the *Craig* case the will was attacked by a sister of the testatrix—here the attack is made by the sister of the testator—there, as here, the allegations were that the will had been procured by fraud and undue influence and that the testator was not physically or mentally capable of making a will. In the present case, the sister of the testator is given, under the challenged will, all of the estate of the testator in the United States of America being the bulk of the estate—the appellant receiving the estate in British Columbia. It is true that the appellant is no relation by blood or otherwise to the testator but the will reads: "for good and kindly services rendered to me all the residue of my estate both real and personal of every kind whatsoever not otherwise disposed of by this my will."

The evidence discloses that at one time in the Northern wilds of this Province—the testator being a prospector and miner was taken with a serious illness when out in the hills and the appellant carried him on his back a considerable way—took him to the cabin and cared for him—undoubtedly, the appellant saved the life of the testator and it is evident that the testator always bore a great sense of gratitude to the appellant for what was truly the saving of his life. The sister of the testator had not seen him for years. It is true there was a fitful correspondence between the two, but nothing in the way of any personal care or attention at the hands of the sister. This, of course, was not possible as the sister lived thousands of miles away in the State of Vermont in the United States of America, and there is some

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evidence of dissatisfaction of the testator. However, the testator does not forget the sister, but makes a very substantion provision for her in his will.

That the testator was a person of competent understanding is overwhelmingly established. In my opinion, the testator was a recluse to a great extent, and not thought to be possessed of any appreciable estate. He was very secretive, and even after the serious illness which is claimed to have affected his mind, it was from the testator only that the extent of his estate was gleaned, and he had it all very methodically set forth. There is some variance in the medical testimony, but I am not at all satisfied that at the time the testator executed his will that he was other than of competent understanding. The evidence of Dr. Fraser, his attending physician, is not so complete as to cover the actual time of the time of the making of the will and Dr. Fraser was not in attendance upon the testator all the time.

In *McHugh* v. *Dooley*, 10 B.C.R. 537, at p. 543, Martin, J., dealing with the medical testimony in that case said:

"And in the very recent case of *Perera* v. *Perera*, [1901] A.C. 354, at p. 359 (17 Times L.R. 389), the Privy Council likewise refused to accept the statement of a physician of acknowledged eminence in his profession that the deceased in that case was not in a fit condition to execute a will, Lord Macnaghten remarking that '*The question, therefore, comes to this*: *Having regard to all the circumstances of the case, ought the diagnosis of Dr. Fonseka and Dr. Rockwood, who were not present when the will was executed, to outweigh and prevail over the testimony of eye-witnesses based upon the evidence of their own senses?*' It is only necessary to remark finally on this subject that on cross-examination Dr. Manchester admitted that there was a difference between mental capacity as understood in medicine and as understood in law."

The language of Lord Macnaghten, above quoted, from [1901] A.C. at p. 359, is very apposite to the facts of the present case. Here we have a large volume of evidence of eye-witnesses and friends of the testator's, men of high standing in the community, who testified to the capacity and competent understanding of the testator covering the time antecedent to at the time of the making of the will and subsequent thereto, and this testimony is also supported by the evidence of a number of physicians who, at a subsequent time to the making of the will, carefully observed the testator and who one and all testified to their opinion that the

testator was of competent understanding. In this case, and in the *Perera* case, the testator "gave very full directions for the disposal of his property" (see the *Perera* case, [1901] A.C., at p. 359). The present case is much stronger as to the understanding of the testator at the moment of making his will. The testator read the will over carefully and expressed his approval of it in the presence of the attesting witnesses—Paxton and Wyld, and the will, after execution by the testator, was in compliance with his instructions placed in an envelope, sealed up and delivered to the American Vice-Consul at Victoria. Captain Paxton, one of the witnesses to the will, knew the testator for about 44 years, a gentleman of admitted probity and, in describing the circumstances attendant upon the execution said as follows:—

"The Court: You were asked about the day it was signed? A. There was myself and Wyld and Roundy; and Pulice was in and out looking after his duty, I suppose. And when the will was signed—— The Court: Before you go any further—he would have no occasion to go out more than once unless there was something necessary; he was a private nurse to Mr. Roundy? A: Well, no one ever told me so, no. Q: You don't know that? A: No. The Court: I am only asking that from what I have heard already. A: I presumed he was; Roundy never told me he was a private nurse. Q: You did not understand that he was a nurse at the hospital in any way? A: Oh, no. Q: His duties were connected with Roundy only? A: I presumed so. Roundy did not tell me anything about it, and I never inquired. Mr. McGeer: Anyway, there were you and Wyld and Roundy, and Pulice was in and out? A: Yes: And at the time Wyld read the will he sent Pulice out of the room. He told Pulice to stay out for a few minutes. Q: What happened; will you just describe it to the Court what happened on that afternoon? How many will were there? A: Two; one was destroyed and one was signed. Q: What did Mr. Wyld do when he brought the wills in? A: He handed both the wills to Mr. Roundy. Mr. Roundy read them both, and one he said he wanted to sign—one suited him better than the other. And then Mr. Wyld read it over to him, after Roundy had read it himself. Q: Do you think that Roundy understood what he was doing? A: Oh, yes; no doubt about that.

Mr. Maclean: I object to that; let him tell what took place there.

Mr. McGeer: Well, this man knew him for a great many

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years? A: And before the will was signed Mr. Wyld tore one will up and put it on top of the fire—open fireplace there?"

Then there is the evidence of Naden—the Deputy Minister of Lands (Deputy to the Minister of Lands of the Government of British Columbia), he knew the testator in the north country, meeting him first at Naas Harbour in 1906, and "from 1910 onwards I saw a good deal of him" (Naden's evidence), and dealing with the testator as he appeared to him shortly after the time of the making of the will, we have Naden saying in answer to the trial Judge the following:—

"The Court: Did he speak clearly and distinctly: you have practically said not distinctly, but did he appear to understand what he said? A: Yes, he did. Q: In possession of his faculties? A: Yes, he did to me. For a little while, I could not quite understand what he said for a few minutes, but I finally got that I could understand quite distinctly; but his speech was not quite so clear; but it appeared to me to be rational.

Mr. McGeer: Now, did he discuss with you Mr. Pulice? A: No, except that he did say that Mr. Pulice was looking after him. Q: That Mr. Pulice was looking after him? A: Yes. And the discussion—I cannot say just who it was to, whether it was to me or to Mr. Wyld or Captain Paxton, but he said that he did intend to leave part of his money to Pulice for looking after him. Now that is the distinct impression I got; I couldn't use the words, but that is the impression I came away with, that he was going to leave Pulice part of his money to look after him.

The Court: To look after him? A: Yes; that was his intention, because he wanted somebody to look after him.

Mr. McGeer: Did you visit him at Pulice's home? A: Yes. Q: You heard the suggestion made by Mr. Maclean that Pulice kept a very close watch and control, and did not let people interview Roundy at will; what have you got to say?

Mr. Maclean: Not all people; I made no suggestion of that kind. I brought it out that he would let some in, and some he would not.

Mr. McGeer: Well, what would you say as to that? A: Well, so far as I was concerned, I went in with Mr. Pulice, and I wasn't alone with him long, but they were coming back and forwards; there was no——

The Court: No difficulty in your seeing him at all.

Mr. McGeer: Were you made welcome there by Pulice? A:

Well, I was asked to come by Pulice; I didn't know where he was, as a matter of fact, and I met Mr. Pulice on the street and he asked me to go and see the old man."

I do not propose to in detail go over the evidence, but it is clear to demonstration that there is ample evidence in the present case "of eye-witnesses based upon the evidence of their own senses" (*Perera* case, [1901] A.C., at p. 359) that the testator was of rational mind and competent understanding at the time of the making of the will and subsequent thereto, and it is to be noted that he lived for a couple of years thereafter, and then died consequent upon an accident and the will was never at any time attempted to be revoked. The evidence of old friends of the testator, that of Sanderson Cartwright and Mrs. Cartwright is very convincing. They saw the testator in the hospital, talked with him, and their evidence is uniform that he was of competent understanding. I would refer to what Lord Macnaghten said, [1901] A.C., at pp. 361, 362:—

"The learned counsel for the appellant did not contend that the witnesses in support of the will were acting in conspiracy or saying what they knew to be false. He said that the will may have been, and probably was, read over to the testator, but that there was nothing to shew that he followed the reading of the will or understood its meaning. He adoped the argument of Laurie, J., to the effect that it was not enough to prove that a testator was of sound mind when he gave instructions for his will, and that the instrument drawn in pursuance of those instructions was signed by him as his will, if it is not shewn that he was capable of understanding its provisions at the time of signature. That, however, is not the law. In *Parker* v. *Felgate* (1883), 8 P.D. 171, 52 L.J. (P.) 95, 32 W.R. 186, Sir James Hannen lays down the law thus: 'If a person has given instructions to a solicitor to make a will, and the solicitor prepares it in accordance with those instructions, all that is necessary to make it a good will, if executed by the testator, is that he should be able to think thus far: 'I gave my solicitor instructions to prepare a will making a certain disposition of my property; I have no doubt that he has given effect to my intention, and I accept the document which is put before me as carrying it out.' Their Lordships think that the ruling of Sir James Hannen is good law and good sense. They could not, therefore, hold the will invalid even if they were persuaded that Perera was unable to follow all the provisions of his will when it was read over to him by Gooneratne's clerk. But they desire to add that they see no reason to doubt or qualify the testimony of the witnesses who

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agreed in saying that the testator was of sound mind when the will was executed.

Their Lordships will, therefore, humbly advise His Majesty that the appeal must be dismissed."

The evidence in the present case is much stronger in support of the will than the evidence adduced in the *Perera* case, and I am of the opinion that in this case it can equally well be said that there is "no reason to doubt or qualify the testimony of the witnesses who agreed in saying that the testator was of sound mind when the will was executed." Then there is the testimony of Dr. Holden, Dr. Lennox and Dr. McMicking, who carefully observed the testator sometime subsequent to the making of the will within 3 months thereafter. Dr. Holden deals with the visit of the medical men upon the testator and said under examination as follows:—

"The Court: Just tell us who were there? A: Dr. McMicking, Dr. Higgins, Dr. Lennox and myself. We had a conversation with Roundy for about half or three-quarters of an hour, talking with him on various subjects, to estimate his mental capacity.

Mr. McGeer: Did you ask him any questions?

The Court: Please ask him what the questions were, and what the answers were.

Mr. McGeer: Did you ask him any questions? A: Yes. Q: What were the questions and the answers? A: I could not at this time say. We had general conversations at the time, about his condition, a little about his family, about his affairs. We asked him about the different senses. But as regards questions and answers I could not give it now. Q: What is specific. You say you asked him about his senses. What do you mean by that? A: We tested his sight, asked him to use it at near and distant objects. Q: Anything else? A: No, that was about all, as regards that. Q: What was his condition when you examined him, and the date. A: The date of examination was March 3, 1919.

The Court: March 3, I thought it was February 19? A: I wouldn't be sure. 1919 I think it was. I have not any memo of it.

Mr. McGeer: Did you get the history of his case at that time? A: No; I was not going into his physical condition at all. Q: Well, what was his mental condition then? A: He seemed to be perfectly lucid and normal mentally. He seemed to have a perfect grasp of what we asked him, and answered in a sensible manner. Q: What treatment

was he receiving at that time, do you know? A: I don't know of any treatment that he was receiving then. I did not go into his case medically at all. It was not my province to, I was only there to see what I thought of his mental condition. Q: Can you give me any opinion as to what his mental condition would have been as a result of your examination on January 28? You know, of course, doctor, do you not, that he had a paralytic stroke on December 28? A: I understood he had a paralytic stroke sometime in December, yes. Q: Now, from your examination of him, when you did, could you say what his condition would be on December 28? A: I should judge that he must have been steadily improving from the time of his paralytic stroke, that absorption must have taken place, whatever was causing the pressure—whatever the origin of the stroke was. Q: Well now, could you tell me what condition he would have been in on the 28th as to his intellect? That is on January 28, a month after the stroke? A: I should judge a steady improvement from the time of the stroke.

The Court: That does not tell us his condition. A: I should judge that he was mentally able to know what he was doing.

The Court: On January 28? A: On January 28, a month after his stroke.

Mr. McGeer: What were the living conditions in Pulice's house as far as you could see? A: The room he was in was a bright cheery front room with lots of windows. Q: Comfortable or uncomfortable? A: Comfortably furnished, yes."

It is clear that this medical testimony—uniform in its nature—that the testator was of competent understanding, supports the evidence of the eye-witnesses before and at the time of the execution of the will. I do not consider it necessary to go into an analysis of the many cases cited but I would refer to *National Trust Co.* v. *Taylor* (1922), 68 D.L.R. 339, 32 Man. L.R. 274. Mathers, C.J.K.B., of Manitoba, has ably collated the authorities. The will in that case was upheld where the will disregarded almost entirely the claims of kindred and left nearly all the property to a stranger. The present case is a very much stronger case. Here, we have the bulk of the estate going to a sister of the testator. For the foregoing reasons, I am satisfied that the will was duly executed, and that the testator was of competent understanding and a free agent. Unquestionably there was no undue influence. There is no evidence whatever to support any such contention (also see *Forman* v. *Ryan* (1912), 4 D.L.R. 27, 17 B.C.R. 130, affirmed on appeal

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to the Supreme Court of Canada but unreported. There, a very valuable estate—except as to $1,000 which went to a sister—went to a stranger). I would, therefore, allow the appeal. The will should be declared to be the last will and testament of the testator and should be admitted to probate.

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

Appeal allowed.

RE ESTATE OF D. W. MACDONALD.

Alberta Supreme Court, Walsh, J. November 9, 1922.

DOWER (§IB—10)—DOWER ACT (ALTA.), 1917, CH. 14—TO WHAT PROPERTY ATTACHES—NATURE OF ESTATE—RIGHT OF ESTATE TO PORTION OF RENT WHERE HOMESTEAD RENTED FURNISHED.

Under the Dower Act, 1917 (Alta.), ch. 14, a widow is only entitled to dower in the house and premises which was occupied by her husband as a residence. This does not include a house and premises separated from the homestead property and which is occupied by a tenant. The estate given by the Act to a wife who survives her husband is an estate for her life and all the incidents of a life tenancy attach to it. Where the homestead is rented as a furnished house the estate is entitled to such proportion of the rent as the value of the furniture in it bears to the value of the widow's furniture in it.

QUESTIONS submitted to Walsh, J., as to the right of a widow to dower in certain property.

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

J. K. Macdonald, for executors and the infants.

Frank Ford, K.C., for the widow.

WALSH, J.:—I answer the questions submitted to me as follows:—1. The homestead of the testator for the purposes of the Dower Act, 1917 (Alta.), ch. 14, is the three lots and the house on them occupied by him as a residence, except that part of the corner lot which is fenced off from the rest of it and on a part of which a bungalow now occupied by a tenant has been erected. Practically, the only argument before me as to this was over this excepted part of the corner lot. Under sec. 2 (a) of the Dower Act, 1917 (Alta.), ch. 14, the expression "homestead" means "land in a city, town or village, consisting or not more than four adjoining lots in one block, as shewn on plan duly registered in the property registry office in that behalf, on which the house occupied by the owner thereof as his residence is situated." For the purposes of this question the essential words are "land . . . on which the house occupied by the owner thereof as his residence is situated."

I do not see how it can be said that the house occupied by the testator is situate on this excepted parcel. Another

house occupied by another person is upon it. Although it forms a part of one of the lots comprised within the homestead (and that is all that can be said in favor of the widow's claim to dower in it), it is physically separated from the rest of that lot and the adjoining lot by a fence through which there is no opening into any part of the homestead. The test, I think, is whether or not the residence of the testator is situated upon it and it clearly is not.

2. The estate given by the Act to a wife who survives her husband is an estate for her life (sec. 4). All of the incidents of life tenancy attach, therefore, to it. She must pay all taxes imposed on the land during her lifetime except those imposed for local improvements, which being an encumbrance must be met by the estate. Although she has an insurable interest in the buildings which she may protect by insurance, she is not bound to do so. The executors would be well advised to keep up the insurance at the expense of the estate, as their failure to do so might, in the event of loss by fire, impose personal liability on them. The widow is not liable for permissive waste, as, for instance, waste resulting from ordinary wear and tear, or where the property is by neglect suffered to become dilapidated, but is, of course, liable for voluntary waste, that is waste resulting from an act of commission as distinguished from one of omission. The ordinary cost of upkeep and repair to which such a place is subject must be met by the estate. The charges of the character named in this question which the estate has to meet are payable out of the income of the estate.

It was suggested on the argument that a difficulty might arise in the matter of the taxes against the corner lot if the widow's claim of dower in the excepted part was not given effect to, as there is but one assessment of the entire lot. Any taxes that have accrued in respect of it and been paid since the testator's death should be borne by the estate and the widow, proportionately, having regard to the respective values of the excepted part and the rest of the lot which, by agreement, should be easily arrived at. For the future, I think that a separate assessment of the two parts of the lot should be insisted upon.

3. The estate is entitled to such proportion of the rent of the homestead attributable to the fact that it is rented as a furnished house as the value of the furniture of the estate in it bears to the value of the widow's furniture in it. Failing an agreement as to this, it is the right and perhaps the

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duty of the executors to remove from the house the furniture belonging to the estate. As the widow is not, in my opinion, entitled to the rent of the bungalow, I need not answer the rest of the question.

4. I was told on the argument that I need not answer this question.

5. Upon the claim of the widow as set up in her affidavit being corroborated in a material respect by the affidavit of some one else, the executors may admit and give effect to her claim to this property.

Nothing was said about costs. If there is no agreement as to them, the costs of all parties taxable under column 5 may be paid out of the estate.

November 10.—Since writing the above the affidavit of T. C. Fraser has been filed. It sufficiently corroborates the story of the widow with respect to the property mentioned in Question 5 to justify an order authorising the executors to transfer the interests of the estate in it to her, and the order will go accordingly.

Judgment accordingly.

CHIN TOY v. ARMITAGE.

British Columbia County Court, Thompson Co. Ct. J. June 2, 1922.

JUSTICE OF THE PEACE (§III—12)—OPIUM AND DRUG ACT, 1911 (CAN.), CH. 17, SEC. 5 (e)—CONVICTION UNDER—JURISDICTION OF STIPENDIARY MAGISTRATE NOT APPEARING ON FACE OF PROCEEDINGS—FATALITY OF DEFECT—QUASHING CONVICTION.

The stipendiary Magistrate in and for the County of Kootenay has no jurisdiction within the City of Cranbrook, unless in the illness, or absence or at the request of the Police Magistrate of the City of Cranbrook, and where such stipendiary Magistrate has made a conviction in a case which should have been tried by the Police Magistrate, and the jurisdiction of the stipendiary as above stated does not appear on the face of the proceedings the defect is fatal and the conviction will be quashed.

APPEAL from the decision of John Leask, acting as stipendiary Magistrate in and for the county of Kootenay, whereby the accused was convicted, that he did in the city of Cranbrook in the county of Kootenay on February 10, 1922, have in his possession without lawful authority a quantity of drugs, to wit, opium, without first having obtained a license contrary to sec. 5, sub-sec. 2, par. (e) of the Opium and Drug Act, 1911 (Can.), ch. 17, as amended 1920 (Can.), ch. 31, sec. 5. Reversed. Conviction quashed.

W. A. Nisbet, for appellant.

G. F. Spreull, for respondents.

THOMPSON, CO. CT. J.:—Mr. Nisbet moved to quash the

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conviction on the ground that the jurisdiction of the magistrate did not appear in the information, the warrant to search nor the conviction. Mr. John Leask is stipendiary magistrate in and for the county of Kootenay. The alleged offence took place within the city of Cranbrook. Mr. Nisbet contends that the trial should have been heard and the conviction made by the Police Magistrate of the city of Cranbrook, and that no person or persons could sit in his place except in the illness or absence or at the request of such Police Magistrate. Undoubtedly, no person or persons may sit for a Police Magistrate of a municipality except under such circumstances, and the fact that a stipendiary magistrate or justice of the peace does sit under these circumstances must be disclosed in the conviction. *Rex* v. *Smith* (1919), 27 B.C.R. 338. Nor can extrinsic evidence be admitted to show why some persons other than the Police Magistrate sat. Unless the jurisdiction of the magistrate appears on the face of the proceedings, the defect is fatal. *Rex* v. *Hong Lee* (1909), 15 Can. Cr. Cas. 39, 14 B.C.R. 248.

It was pointed out to me in argument that Mr. Leask is at the same time Police Magistrate in and for the city of Cranbrook and stipendiary magistrate in and for the county of Kootenay, but no evidence on this point was offered and I do not see how I can take judicial notice of this fact. Even though such evidence had been offered, I do not think it would affect the point in issue. In any event, the authorities have chosen to bring the charge before the stipendiary magistrate in and for the county of Kootenay who has no jurisdiction within the city of Cranbrook unless in the illness or absence or at the request of the Police Magistrate. This defect seems to me to be fatal; nor can it be cured by any amendment. The proceedings in the Court below were a nullity in that there is no jurisdiction shown in the convicting magistrate.

I direct, therefore, that the appeal be allowed, the conviction quashed with costs. The magistrate and informant will receive the usual protection.

Appeal allowed.

RE ENGINEERING PROFESSION ACT. RE JOHNSON.

Manitoba King's Bench, Dysart, J. October 10, 1922.

STATUTES (§IIA—95)—ENGINEERING PROFESSION ACT, 1920 (MAN.), CH. 38, SEC. 7 (2),—CONSTRUCTION—INTENTION OF LEGISLATURE.

The Engineering Profession Act, 1920 (Man.), ch. 38, was passed for the protection of the profession and the public against

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RE ENGINEERING PROFESSION ACT, RE JOHNSON.

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the admission of unqualified persons, and a person who is not a trained or technically qualified engineer, is not eligible for admission under sec. 7 (2) of the Act although he has for the required period been doing work for the Government which embraces part of the work of a professional engineer.

APPLICATION to compel the registration of the applicant under the Engineering Profession Act, 1920 (Man.), ch. 38, sec. 7 (2). Dismissed.

A. C. Campbell, for the applicant.

R. D. Guy, for the association.

DYSART, J.:—This is an application to compel the Association of Professional Engineers to register the applicant as a member of that association without examination. The application is made under the provisions of the Engineering Profession Act, 1920 (Man.), ch. 38, sec. 7 (2); and is resisted by the association on the ground that the applicant is eligible only after examination, as provided by sec. 7 (4) of the Act.

The two sections in question insofar as pertinent to this inquiry are as follows:—

"7 (2) Any person residing in the Province of Manitoba at the date of the passing of this Act, who is at that date and has been for one year previously practising as a professional engineer, shall be entitled to be duly registered as a member of the association without examination, provided that such person shall produce to the council satisfactory proof of having so practised.

(4) Any person not otherwise qualified as hereinbefore mentioned, and who may desire to become a registered member of the association, shall make application to the council, and shall submit to an examination, or shall submit credentials in lieu of examination, whichever the council may decide. . . . ."

The applicant is not in any sense a trained or technically qualified engineer, and he declines to submit to any reasonable examination that the council may prescribe. He has, however, had experience in some branches of work which fall within the scope of practical engineering. He has, since March, 1919, been continuously employed "as a civil and professional engineer" in the Department of Public Works, Province of Manitoba, "in the laying out of roads." His work in this capacity has been carried on in the field only in the summer months; in the winter months he has been employed within doors by the same Department but in what capacity does not clearly appear. On this record, and this record alone, he seeks admission to the association.

The question is, was he "practising as a professional engineer" within the meaning of sec. 7 (2)? The interpretation clause of the Act, sec. 2 (*b*), states that unless the context otherwise requires,

" 'Professional engineering,' or 'the practice of a professional engineer,' embraces the designing, supervision, the advising on the design or supervision, and the advising on the making of measurements for the construction, enlargement, alteration, improvement, maintenance. . . . of . . . . highways, roads . . . . and all other engineering works. . . ."

By the same section 2 (*a*) "a professional engineer means any person registered as a professional engineer under the provisions of this Act." "The laying out of roads" in which the applicant has been for some time employed, involves the taking of levels, measurements, making cross-sections, designing and building culverts, grading the roads, and such like. This work would seem to fall easily within the range of work embraced within "the practice of a professional engineer" as set forth in sec. 2 (*b*), and if we were to pursue our inquiry no farther it would seem that the applicant is entitled to registration.

On behalf of the association, however, it is argued that sec. 2 (*b*) is not conclusive; that it merely mentions some of the works which are to be regarded as falling within the meaning of "professional engineering"; and, chiefly, that the whole design of the Act is to incorporate only qualified engineers into an association for the common protection of themselves and of the public.

The present Act became law on March 27, 1920, and thereupon repealed and was substituted for the Manitoba Civil Engineers Act, R.S.M. 1913, ch. 32. This earlier Act, sec. 15, provided that:—

"No person shall be entitled within this Province to . . . . act as engineer in laying out, advising on, constructing or superintending the construction of any railway or public work, or any work upon which public money is expended, the cost of which shall exceed five hundred dollars, unless such person . . . ." had certain specified professional qualification or recognition, none of which this applicant ever had. While that Act was still in force, and in spite of its prohibitive clauses, the applicant, from March 1, 1919, was, according to affidavit evidence on file, "continuously in the employment of the Government of Manitoba as a civil and professional engineer in the Department

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of Public Works" in "the laying out of roads within the Province." It appears that the roads so laid out in each case involved the expenditure of more than $1,000.

From this state of affairs, only one conclusion can be drawn—either the applicant was not employed as a civil or professional engineer, or he was illegally so employed. If the former, then he is clearly not entitled to a registration under sec. 7 (2) of this Act; if the latter, then he bases his claim for registration on grounds illegal under the former Act. May he do so? May he now claim that this Act, in effect, deprives him of his right to follow his profession to earn his livelihood in his accustomed way? I think not. Under the former Act, he had no right to be employed "as a civil and professional engineer"; his employment as such could have been prevented or discontinued. Or may he claim that this Act legalizes his illegal employment, and so qualifies him as a professional engineer? Surely that was never the intention of the Act. The Act is not retroactive. True it speaks of "practising" as a professional engineer, but that must mean *lawfully* "practising."

The underlying principles to be considered in construing this Act are discussed in Craies Statute Law, 2nd ed., p. 104:

"The most firmly established rules for construing an obscure enactment are those laid down by the Barons of the Exchequer in *Heydon's* case (1584), 3 Co. Rep. 7 a, 76 E.R. 637, which have been continually cited with approval and acted upon, and are as follows: 'That for the sure and true interpretation of all statutes in general (be they penal or beneficial, restrictive or enlarging of the common law), four things are to be discerned and considered. (1) What was the common law before the making of the Act. (2) What was the mischief and defect for which the common law did not provide. (3) What remedy the Parliament hath resolved and appointed to cure the disease of the commonwealth. (4) The true reason of the remedy. And then the office of all the Judges is always to make such construction as shall suppress the mischief and advance the remedy, and to suppress subtle inventions and evasions for the continuance of the mischief and *pro privato commodo*, and to add force and life to the cure and remedy according to the true intent of the makers of the Act *pro bono publico*.' These rules are still in full force and effect, with the addition that regard must now be had not only to the common law, but also to prior legislation and to the judicial interpretation thereof."

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Applying these principles to this application, it cannot be justly said that this Act deprives the applicant of any right to practise as a professional engineer. He is not a civil engineer and never was. He is not now lawfully practising as such and never was. He loses no rights by the restrictions imposed by the Act. His employment is the same now as it was before this Act was passed. If his employment is civil engineering now, so was it under the former Act—in each case illegal; he cannot convert the former wrong into a present right. If his present employment is not civil engineering, neither was it so under the earlier Act, and so he was not so "practising" within the meaning of sec. 7 (2).

Of course, there is nothing in the Act to prevent the applicant from gaining admission to the association by qualifying under sec. 7 (4).

The whole spirit of this Act is to organise the profession of civil engineers. The motives for organization are no doubt protection of the profession and the public against the admission of unqualified persons who hold themselves out as engineers. If this application were allowed, the effect would be precisely what the Act aims to prevent.

The application will, therefore, be dismissed.

As to costs, inasmuch as the Act as framed has left it open to the applicant to seek registration with some expectation of success, there will be no costs allowed to either party.

Application dismissed.

NEWLANDS SAWMILLS Co. v. BATEMAN.

British Columbia Court of Appeal, Macdonald, C.J.A., Martin, Galliher, McPhillips and Eberts, JJ.A. October 3, 1922.

FRAUDULENT CONVEYANCES (§VII—35)—VOLUNTARY CONVEYANCE TO WIFE—HAZARDOUS ENTERPRISE—HUSBAND SOLVENT—SUBSEQUENT CREDITORS—RIGHT TO SET ASIDE.

A voluntary conveyance of his farm which comprised practically all his assets, by a husband to his wife, on the eve of his entering into a hazardous logging contract, may be set aside as fraudulent by creditors whose claims arise through such contract although at the time of the conveyance the husband was not insolvent.

[*McGuire* v. *Ottawa Wine Vaults Co.* (1913), 13 D.L.R. 81, 48 Can. S.C.R. 44, followed.]

APPEAL by plaintiff from the trial judgment in an action to set aside a conveyance as a fraud against creditors. Reversed.

E. C. Mayers, for appellant.

W. Martin Griffin, for respondent.

MACDONALD, C.J.A.:—This action was brought to set aside a conveyance by James Edward Bateman to his wife,

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Minnie Bateman of a farm, being the principal item of the assets of the grantor, on the ground that the same was made to defeat the plaintiffs who subsequently became the creditors of Bateman.

Just previous to the date of the conveyance Bateman had entered into a contract with the plaintiffs to cut and boom logs. The contract was rather an extensive one considering the financial position of the defendant Bateman and was, in my opinion, a hazardous one within the meaning of that term as used in cases of this kind. It is to be noted that the contract calls for the commencement of logging operations on May 10, 1920, and that the conveyance in question in this action was made, on May 22 of the same year.

The submission of counsel for the defendants was that as Bateman had no creditors at the time he entered into the contract he was entitled to make a voluntary conveyance to his wife of the property in question. The authorities to which we were referred do not sustain this contention. It is a question to be decided upon the proper inference to be drawn from the facts and circumstances of the particular case as to whether there was an intention to defeat creditors or not, and if there was the intention to defeat creditors, then it does not matter whether it was to defeat present or future creditors. See the observations of Lord Hardwicke, in *Townshend* v. *Windham* (1750), 2 Ves. 1, at p. 11, 28, E.R. 1, where he says:—"But if any mark of fraud, collusion or intent to deceive subsequent creditors appears, they will make it void."

In *Mackay* v. *Douglas* (1872), L.R. 14 Eq. 106, 41 L.J. (Ch.) 539, 26 L.T. 721, 20 W.R. 652, the facts there were that the transfer of the property was made at a time when the transferor had no creditors but was about to engage in the bakery business. This transfer was set aside.

In the *Sun Life Ass'ce. Co. of Canada* v. *Elliott* (1900), 31 Can. S.C.R. 91, reversing (1900), 7 B.C.R. 189, the facts were very similar as bearing upon the point at issue to those in this case. Counsel sought to distinguish that case because the grantor had conveyed away his entire property, while here it is said that the defendant Bateman had some property consisting of chattels left after conveying the farm to his wife. I do not think, however, that that decision was founded upon that circumstance, but rather upon the inference to be drawn from the whole transaction that the intent was to put the assets out of the reach of crediors.

The latest case to which we have been referred is *McGuire*

v. *Ottawa Wine Vaults Co.* (1913), 13 D.L.R. 81, 48 Can. S.C.R. 44 affirming (1912), 8 D.L.R. 229, 27 O.L.R. 319. That case, to my mind, is indistinguishable in principle from the case at Bar. I am bound by it, but apart from this, the decision is consistent with the authorities to which I have referred above.

In this view of the case, it is unnecessary to consider that portion of, the argument which dealt with the effect of the Land Registry Act upon the transaction. I think the conveyance was fraudulent.

I would allow the appeal.

MARTIN, J.A.:—On April 28, 1920, the male defendant entered into a contract with the plaintiff company to cut, log and boom all the merchantable timber on a certain lot, but differences having arisen between the parties in the execution of the contract the company on August 31, gave notice of cancellation thereof and on September 18, of the same year the said defendant began an action for damages against the company with the ultimate result upon appeal that he not only lost it, but the company recovered judgment on its counterclaim against him for money overpaid for $650.78, with $2,400 costs, and registered its judgment on November 4, 1921. On May 22, after the making of the said contract, said defendant executed a conveyance of his farm homestead (preempted in 1911) to his wife, subject to a mortgage of $1,500 to the Land Settlement Board, which conveyance was not registered till December 27, thereafter; at the time of the said conveyance, it is admitted that the said defendant did not owe the company, on the contrary, the company probably owed him.

The first question to be decided is whether or no the conveyance is to be regarded as a voluntary one, and, to satisfy myself in this distressing case, I have read all the evidence, in addition to that to which we were referred, with the result that, in my opinion, the Judge below correctly reached the conclusion that it was voluntary, being a gift to the wife. The further question then arises, can the gift be supported in the circumstances? It appears that the said defendant had been engaged in logging and farming on the Skeena river before he moved to his said preemption on Eaglet Lake, near Giscome, in 1911, since which time he has been solely engaged in farming it till he entered into the said logging contract. At the time he did so, his wife objected on two grounds; that it was dangerous to him personally, owing to the locality being a "very rough piece of ground, all

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hills and ledges and a dangerous place to work" and also that "I did not favour him going logging and leaving, the farm on my shoulders." At the time of the trial the judgment which is appealed from (November, 1921) the husband was 60 years old and the wife 56. Naturally, the husband expected to make money out of the contract, or he would not have entered into it, but it was apparent to him that there was considerable personal risk, at least in its execution, especially at his time of life, for he admits that his wife thought "I was liable to be killed any day," and hence he gave her the conveyance. This personal hazard it is impossible to distinguish from the business hazard of such a venture as this, because the personal supervision, experience and activity of the contracting party would inevitably be the decisive factors in success or failure, and if he were incapacitated, only failure would result. But, in addition to this, there is the evidence of the witness Bogue, that

"in logging contracts as a rule, they are more or less of a hazardous nature and it is customary with mill companies making contracts to hold back a certain percentage for fulfilment of the contract so that they won't take off a piece or do part of the work, and necessarily it costs more money to remove the balance if it is left....."

Moreover, there is the fact that the defendant was leaving his farm work after being engaged in it for 9 years to take up again another kind of work which he had long discontinued. It is impossible therefore, in my opinion, to regard this new venture as being otherwise than of a hazardous nature, however difficult it may be to give a definition to that expression, depending as it does upon the circumstances of each case, and, it is clear to me, at least, that the conveyance was made to protect his wife and himself from his future creditors in case of failure. The farm so conveyed admittedly comprised the bulk of his property; two witnesses deposed (without contradiction) that he stated to the representative of the plaintiff company during the negotiations preceding the contract, that it was worth $10,000, and all his remaining property was valued at only $1,500 in the bill of sale of it which he gave to his wife a little more than 3 months later, on August 2.

The leading cases in Canada on the subject are *Sun Life Ass'ce. Co. of Canada* v. *Elliott*, 7 B.C.R. 189, reversed by 31 Can. S.C.R. 91; and *McGuire* v. *Ottawa Wine Vaults Co.* 8 D.L.R. 229. 27 O.L.R. 319; 13 D.L.R. 81, 48 Can. S.C.R. 44;

in the former, the donor denuded himself of all his property while he had mortgages outstanding which were in arrear, so it differs considerably from the case at Bar; in the latter the facts much more closely approach those before us, the only material difference being that the conveyance was not made till 3 months after the new venture was embarked upon but the grantor at that time was found to be still in a solvent position, nevertheless, the conveyance was set aside as a fraud upon subsequent creditors because, as Anglin, J. puts it, 13 D.L.R. at p. 87:—

"this conveyance was made with the intent of protecting the property transferred from the claims of possible, if not probable, future creditors of the hazardous business in which the defendant John L. McGuire had shortly before embarked.....I agree with the Court of Appeal 8 D.L.R. 229, that this case is governed by the principles on which *Mackay* v. *Douglas* L.R. 14 Eq. 106 approved by the Court of Appeal in *Ex parte Russell, In re Butterworth* (1882), 19 Ch. D. 588, was decided."

And Duff, J., said, 13 D.L.R. at p. 87:—

"The burden was consequently upon the plaintiffs at the outset to shew that the conveyance was made by the debtor with a view to protecting himself or his family against the consequences of failure in the business into which he had a short time before entered. I think the fact that a collapse did come within a few months after the execution of the conveyance was sufficient to shift the burden to the appellants of shewing that such was not the intent of the transaction. I do not think that burden has been discharged."

The case of *Mackay* v. *Douglas*, to which we must look for the governing principle on a voluntary settlement, is reported in four reports, viz.: L.R. 14 Eq. 106, 41 L.J. (Ch). 539, 26 L.T. 721, 20 W.R. 652, and, as a whole, the best report of the judgment is to be found in the Law Times, but, in essentials, it is identical with that in the Law Journal and the headnote is the same: the headnote in the Law Reports is incorrect as will be noted later. In that case, the voluntary conveyance was made before engaging in the trade in question and so it is on all fours with the case at Bar. The questions involved is stated by Malins, V.C., at the beginning of his judgment, thus:—

"Can a man who contemplates trade—or who, in point of fact, whether he contemplated it at the precise moment when he executed the voluntary settlement or not, does, very soon after executing a voluntary settlement, enter into

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trade, thereby incurring liabilities which end in a disastrous state of affairs—make a voluntary settlement which shall be good against the creditors who become so in the course of his trade? I am not aware of any case upon the exact point, and very few of the cases cited have any immediate bearing upon it. But is the statute of Elizabeth so very short in its effect that it will not cover a case where a man, on the very eve of entering into trade, takes the bulk of his property and puts it into a voluntary settlement, and then becomes insolvent a few months afterwards? Is it to be said that that settlement cannot be reached by any principle of law? My opinion is, that the law is in a totally different condition, and that when a man gets into difficulties shortly after the execution of a voluntary settlement the practice of the Court is clear."

And this "clear practice" he thus sums up on p. 542, in adopting:

"The rule laid down by Lord Hardwicke in *Stileman* v. *Ashdown* (1742), 2 Atk. 477, 26 E.R. 688, is one which commends itself to one's judgment, and I read it thus, that if a man executes a voluntary settlement with a view to a state of things when he may become indebted, that makes it fraudulent just as if he were indebted at the time. In the present case Mr. Douglas made the settlement, I am perfectly satisfied, with the view that he was going into partnership; that in that partnership he might become bankrupt or insolvent, might be utterly ruined; he did it with the view that he might be indebted, and therefore in that view the settlement, in my opinion, was fraudulent and void against creditors. The conclusion which I arrive at in this case proceeds upon the broad ground that a man who contemplates going into trade cannot, on the eve of doing so, take the bulk of his property out of the reach of those who may become his creditors in his trading operations. His doing so, as Lord Hardwicke said, with a view to his becoming indebted, would be as fraudulent as if he owed the debts at the very time. In the present case, if Douglas had been at the time a member of the partnership which became insolvent, no question could have been raised, and I regard the settlement as having been made for the purpose of avoiding the consequences of that insolvency, and in my opinion, therefore, it is equally fraudulent.

And to make his application of the rule beyond doubt he had already stated (p. 542) conditions in which the settlement could have been supported, thus:—

"If Mr. Douglas had not gone into trade, and had not contemplated trade at the time, but some years afterwards, under a totally new state of things, had made up his mind to go into trade, I should have had no hestitation in coming to the conclusion that, inasmuch as he was solvent at the time, and had not entered into or contemplated any contract which could lead to insolvency, his subsequent insolvency could have had no effect in invalidating the settlement which he had made upon his wife and family."

And he concludes his observations with a reiteration of the broad ground upon which he bases his decision.

The expression "trade" is not, of course, used in a narrow sense, but includes any business venture, as *e.g.*, the hotel business in *McGuire's* case, *supra*.

It thus becomes apparent that the principle is based upon the contemplated entry into a trading or other venture which "might" lead to indebtedness merely, and it is not necessary that the business should be of a hazardous nature, and the use of that expression in the headnote in the Law Reports, and the consequent restriction of the principle to the special class of hazardous undertakings is not justified by anything in the judgment when it is closely examined, though it is true that the firm in which Douglas became a partner had been to his knowledge, and continued to be engaged in speculations in jute which made the business of a "rather reckless nature" as the Vice Chancellor said L.R. 14 Eq. at p. 120 nevertheless, the result would have been the same upon the "broad ground" clearly laid down if insolvency had resulted as one of the ordinary risks of the partnership's business operations, quite apart from the jute speculations. The headnotes in the other three reports property omit this restriction and simply state the principle upon the broad ground of a voluntary settlement executed on the eve of going into trade. It is desirable to notice this error because the Law Report's headnote was adopted by Garrow, J.A., in the Court of Appeal for Ontario in *McGuire's* case, 8 D.L.R. at pp. 230-231, 27 O.L.R. at p. 322 without reference to the other reports which are of equal authority; indeed the Law Journal because of its great seniority and high reputation may well claim precedence. In this province the case of *Lai Hop* v. *Jackson* (1895), 4 B.C.R. 168, is also based upon *Mackay* v. *Douglas*, and it was one in which it was found that the settlor was not only carrying on a hazardous business but was open to an offer to extend it; he had in fact, while carrying on a saloon busi-

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ness, been engaged in opium smuggling "the profits of which were large and the risk great" and while the saloon business was running behind he made the impeached voluntary conveyance to his wife, so on no ground could it have been supported. The latest case on the subject is *Jeffrey* v. *Aagaard* (1922), 68 D.L.R. 291, 32 Man L.R. 173, where again the erroneous headnote in *Mackay* v. *Douglas* is adopted though, in any event, it was well said that what the defendant had done was hazardous in handing over the management of his restaurant business to a young and inexperienced son under a new partnership agreement, and then leaving the country: Dennistoun, J.A., went the length of saying, 68 D.L.R. at p. 296 that:—"The restaurant business is a hazardous business inasmuch as it depends very largely upon the character of the management."

With all due deference, if that is the test, what business or undertaking is not hazardous? If there is no capable "head" at the top, the bottom will soon fall out of any enterprise.

In *Ex parte Russel*, 19 Ch. D. 588, the Court of Appeal approved *Mackay* v. *Douglas*, Lindley, L.J., saying, p. 601, that it is "one of the most valuable decisions that we have on the statute of Elizabeth. (12 Eliz. ch. 5). There, the settler was a thriving baker, but he decided to go into the business of a grocer about which he knew nothing, and as Lindley, L.J., puts it p. 601:—

"He was perfectly aware that entering upon a business to which he had not been brought up was a risky thing, and, therefore, he made a settlement, settling substantially the whole of his property upon his wife and children. What was that for? Obviously, not simply to benefit his wife and children, but to screen and protect them against the unknown risks of the new adventure."

Applying these authorities to the case at Bar, I can only reach the conclusion that the conveyance in question must be deemed fraudulent whether the "new adventure" of the logging contract be regarded as "hazardous" or not, though, in my opinion, it was so: I have drawn attention to the true extent of the decision in *Mackay* v. *Douglas* in case the contrary view should be taken: it is to be noted in *McGuires* case, *supra*, neither Idington, J., nor Duff, J., bases his judgment upon hazard.

It only remains to be said that I have no doubt that sec. 7 of the Fraudulent Preferences Act, R.S.B.C. 1911, ch. 94, authorizes these proceedings.

The appeal therefore should be allowed.

GALLIHER, J.A.:—The trial Judge has found as a fact that Mrs. Bateman was not a creditor of her husband, and that the deed to her was a voluntary conveyance. I am not prepared to say he is clearly wrong in that conclusion. Assuming then that there was a voluntary conveyance, the point seems to me to be covered by *MacKay* v. *Douglas*, L.R. 14 Eq. 106, approved of in *Ex parte Russell*, 19 Ch. D. 588.

The matter also came up in the Supreme Court of Canada in *McGuire* v. *Ottawa Wine Vaults*, 13 D.L.R. 81, 48 Can. S.C.R. 44. In each of these cases, the transaction was held to be a fraud upon creditors, and I see nothing in the facts of this case to take it out of the principles there laid down.

The appeal should be allowed.

McPHILLIPS, J.A. (dissenting):—I am of the opinion that the appeal should be dismissed.

I agree with the result arrived at by the trial Judge, Macdonald, J., that is that the conveyance to the wife effectively passed the title and that that title being subsequently registered is unaffected by the certificate of judgment. The conveyance of the husband to the wife though was, in my opinion, upon the evidence a conveyance for valuable consideration and is supportable upon that ground. The evidence is ample that advances of money were made by the wife to the husband and repeated requests were made for the transfer of the farm to her. The case would be an exceedingly hard one if it should be found to be intractable law that this transaction must be set aside. In my opinion, there is no such compulsion upon the facts of this case with the greatest respect to all contrary opinion. I am satisfied that the title of the wife is unassailable. The basis of attack—that the conveyance was executed coincident with the entry into a hazardous contract is not open or available in view of the proceedings had and taken and hearing had in a summary way in any case the contract was not hazardous to life or limb. In every other way, it was deemed to be a lucrative contract, I cannot view it that the case is one which comes within the *ratio decidendi* of the decided cases upon this phase of the matter, if this point was open, there was no attack upon the ground of fraudulent preference.

I would dismiss the appeal.

Appeal allowed.

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HART v. GOLDFINE Ltd., Re ROSENZWEIG.

Quebec King's Bench, Lamothe, C.J., Greenshields, Dorion, Tellier, and Bernier, JJ. May 18, 1921.

BANKRUPTCY (§II—18)—SALE OF GOODS—UNPAID VENDOR—RIGHT TO RECOVER GOODS FROM TRUSTEE—C.C. (QUE.) ART. 1543—CONSTRUCTION.

There is nothing in the Bankruptcy Act which takes away the right of an unpaid vendor of goods under art. 1543 (Que.) C.C. to ask for the dissolution of the sale and to recover the goods from the authorised trustee provided the right be exercised within thirty days of delivery.

[*Rosenzweig* v. *Hart* (1920), 56 D.L.R. 101 (Annotated), affirmed. See Annotations, 53 D.L.R. 135, 56 D.L.R. 104, 59 D.L.R. 1.]

APPEAL by an authorised trustee from the judgment of the Quebec Superior Court on a petition by an unpaid vendor to have a sale of goods to an insolvent debtor set aside and the goods returned to him. Affirmed.

The respondent had sold goods to the insolvent, the price of which was payable half cash and half in 30 days. The day the goods were delivered and before any payment was made, the buyer was served by a creditor with a bankruptcy petition under the Bankruptcy Act, 1919 (Can.), ch. 36.

The respondent company presented a petition demanding that the sale be declared null and set aside and that the trustee be ordered to deliver up to it the goods sold which were in his hands. The Superior Court granted the petition, 56 D.L.R. 101 (annotated).

Cohen, Gendron & Bernstein, for appellant.

Benjamin Benoit, for respondent.

LAMOTHE, C.J.:—The unpaid vendor of a moveable thing may in our law exercise three privileges: (1) The right to revendicate the thing sold within 8 days of delivery, or 30 days, in case of bankruptcy (art. 1998, C.C. (Que.)); (2) The right to be privileged on the price (art. 1998, C.C. (Que.)); (3) The right to ask the rescission of the sale if the goods are still in the possession of the debtor. This right must be exercised, in case of bankruptcy, within 30 days of delivery.

These three privileged rights of the seller are distinct from each other; only the last of these rights is involved in this case.

Has the new bankruptcy law made away with the privileged right conferred to the seller by art. 1543, C.C. (Que.). There is no text of the Bankruptcy Act 1919 (Can.), ch. 36, which says so. It is claimed that this right has been abolished by implication. Abrogation by implication, in civilized countries, is not easily admitted. It is admitted

only when the new law contains a provision inconsistent with former law, or when the new law contains express provision upon the particular matter to which the former law relates. Nothing of that kind is found in the Bankruptcy Act; the constitutional power of the federal Parliament to legislate on these matters is not put in question in the present cause.

It is possible that, in other provinces, there exists on certain matters civil laws different from those recognized in the province of Quebec, as to chattel mortgages, etc. The abrogation of those rights is not to be presumed.

The appellant says in brief: that there was a sale, and the sale has been made complete by the simple consent of the parties (art. 1472, C.C. (Que.)); that art. 1543 C.C. (Que.), creates a tacit resolutive clause which cannot be put into effect after bankruptcy.

What is the nature of the unpaid vendor's right? The authors do not agree. Some speak of that right as putting on the shoulders of the seller a right of retention, others consider it as part of the property right. It is certain that under our law the buyer of unpaid goods has not the "absolute" property of same. With the purpose of guaranteeing the seller, the law has created for him a special right in the thing sold, a right which exists even after delivery. The seller is a "secured vendor" in this sense.

In the present case the delivery of the goods appears to have been obtained through deceit and upon the false promise of the buyer to send immediately a cheque for half of the purchase-price, affirmation of which was made at the hearing and which was not denied; this taints that delivery; this fraud cannot give rights to the buyer. Though the sale of goods for cash be perfect by the consent alone of the parties, the right to take possession is transferred to the buyer only at the time of payment (art. 1544, C.C. (Que)). Will it be said that, in that case, if the buyer's bankruptcy intervenes, the seller loses every right in the thing sold. Then, he would be obliged to remit these goods to the official trustee, even without any payment. Such consequence is repugnant; it is sufficient to point it out. The simple consent to the sale is then not sufficient to cause the goods sold to pass into the bankrupt estate; a delivery, not tainted with error made after the sale, leaves a special right in the goods sold in favour of the seller, which right weakens by so much that of the buyer.

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HART v. GOLDFINE LTD. RE ROSENZWEIG.

Tellier, J.

This right acquired before bankruptcy, remains to the seller, in my opinion, after bankruptcy, seeing that no express provision deprives him of it. I share entirely the opinion of Panneton, J., 56 D.L.R. 101, who has rendered the judgment appealed from; his notes are amply sufficient to elucidate the question.

GREENSHIELDS, J., concurs in dismissing the appeal.

DORION, J.:—I am of opinion to confirm the judgment of the Court of first instance. The privilege of revendication does not exist, at least I incline to think so, because the sale was made on credit and privileges are to be construed according to strict law. However, I find nothing in the Bankruptcy Act which renders null conditional contracts and the rights resulting therefrom. Section 50 provides only for proof of debts payable at a future time; it does not deal with conditions which would revoke the sale. The rule *inclusio unius est exclusio alterius*, has no application against the common law, and the Bankruptcy Act contains nothing contrary to our provincial law on that subject. Consequently, the creditor, unpaid seller, can have the sale annulled, even though made without a resolutive clause for non-payment of the price. In that case, the thing which has been the subject of the sale, becomes again the property of the seller, with retroactive effect.

TELLIER, J.:—Is the right of the unpaid vendor to revendicate against his buyer the moveable thing which he has sold him, or to ask the rescission of the sale, affected by the bankruptcy and assignment of this buyer? This is the question which presents itself in this cause. The Superior Court has judged in favour of the seller. The trustee who represents the buyer appeals from this judgment.

What are, in the Province of Quebec, the privileged rights of the seller of a moveable thing of which purchase-price has not been paid? Section 1998, C.C. (Que.), recognizes two of them: (1) Rights to revendicate the thing; (2) Right to be privileged on the price of the thing if it happens to be sold judicially.

Section 1543, C.C. (Que.), in conformity, besides with the general principles applying to obligations, expressly recognizes a third right for the seller; the right to ask the rescission of the sale.

Let us examine, one after the other, each of these rights, in order to ascertain to what conditions they are subject:—

(1) The right to revendicate.—It is subject to four conditions: C.C. (Que.), art. 1999, *Re Henning* (1921), 61

D.L.R. 214, at pp. 215, 216 (a) The sale must not have been made on credit; (b) The thing must still be entire and in the same condition; (c) The thing must not have passed into the hands of a third party who has paid for it; (d) It must be exercised within 8 days after the delivery: saving the provision concerning insolvent traders contained in the last preceding article (art. 1889, C.C. (Que.)), in the case of insolvent traders the right must be exercised within 30 days after delivery (arts. 1998 and 1999, C.C. (Que.)).

(2) The right of preference.—If the thing is sold at a judicial sale, the proceeds of the sale go entirely to the unpaid seller, after payment of the costs and, in certain cases, of the lessor and pledgee.

(3) The right to obtain rescission of the sale.—This right is subject only to two conditions: (a) The thing must be still in the possession of the buyer; (b) If the buyer is insolvent, the action in rescission must be taken within 30 days of delivery of the thing sold.

These are, in a general way, the privileged rights of the unpaid seller. What are the rights of the seller, in the present instance? Has it the right to revendicate?

The affirmative, no doubt, could be sustained with enough reason, as only one-half of the purchase-price was payable at a future time the other half being payable in cash. It is not to be presumed that the seller has consented to deprive itself of its property right before payment of what it was to receive in cash. It is rather the contrary which appears by the evidence. According to the teaching of Pothier on Sale, in synallagmatic contracts every one is presumed to be willing to fulfil his undertaking only inasmuch as the other party will fulfil, at the same time, his own. Section 323, at p. 204, of Pothier on Sale, says:—

"323. It is peculiar to the delivery which is made in execution of the contract of sale, that it does not transfer the property to the buyer except when the seller has paid or satisfied the price. The reason is, that the seller who sells for ready money is considered not to have an intention to transfer the property except upon that condition."

Whatever may be the right of the petitioner to revendicate, be it founded or not, I do not wish to dwell on this point, because I am convinced that this case can easily enough be decided independently of the above right.

I am of opinion, like Panneton, J., in the Court below, 56 D.L.R. 101, that the petitioner is entitled to the rescission of the sale, after bankruptcy as well as before.

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The goods which the petitioner has sold have not ceased, notwithstanding the bankruptcy, to remain in the possession of the buyer Rosenzweig. It is still he who is proprietor, if he ever has become so, notwithstanding he has paid nothing of what he had to pay to become proprietor and to legitimately take possession of same.

He will continue to be so till the sale by the trustee or a settlement with his creditors. As for the trustee, he is only a mandatory. He is not a third party. Allow, if you wish, that he represents the creditors, still he has no more rights than they insofar as the property right is concerned. Now, they, the creditors, are not proprietors. The estate of the debtor does not belong to them. They have not acquired any real right on same. Above all they cannot claim any right on same beyond what the debtor himself could claim. They have no more rights than he had himself, being only his creditors. If there was in his estate something which did not belong to him, he has not become the proprietor of same by the fact of his bankruptcy. Equally, if his property right was subject to a resolutive condition before his bankruptcy, bankruptcy does not make that right absolute. This is precisely the case concerning the merchandise bought from the petitioner. The bankrupt had only a resolvable right in same, the resolutive condition being always implied in all moveable sales. His right remains after bankruptcy what it was before.

The Bankruptcy Act, 1919 (Can.), ch. 36, has effected no change in our former laws concerning sale. The privileged rights of the unpaid seller are still the same, they have not been affected. I am of opinion that there is nothing to find fault with in the judgment of the Superior Court, of which the trustee complains. I would consequently, dismiss the appeal with costs.

As to the motion for dismissal of the appeal, it loses all its utility since the Court disposes of the case on the merits. I would dismiss it without costs.

BERNIER, J., concurs in dismissing the appeal.

Appeal dismissed.

TRUSTEE COMPANY v. MANITOBA BRIDGE & IRON WORKS LTD.

Manitoba Court of Appeal, Perdue, C.J.M., Cameron, Fullerton and Dennistoun, JJ.A. November 15, 1922.

PARTIES (§ IIB—119)—ADDING PARTIES DEFENDANT—ACTION COMMENCED AGAINST PROVINCIAL COMPANY—DOMINION COMPANY

PURCHASING ASSETS AND ASSUMING LIABILITIES—MANITOBA KING'S BENCH RULE 220—DISCRETION OF COURT. Man.

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In an action for breach of contract against a provincial company, where it appears after the action has been commenced that a Dominion company has been incorporated bearing the same name as the provincial company, and has purchased the assets of the old company, and assumed certain of its liabilities, Manitoba K.B. Rule 220, para. 2, enables the Court or Judge to add the Dominion company as a party defendant, on an application to amend the statement of claim, and where the Referee in Chambers has allowed the amendment and his decision has been upheld by a Judge of the King's Bench, the Court of Appeal will not reverse such decision, the liability of the company added, being dependant on evidence to be given at the trial and not on mere interlocutory proceedings in the action.

[*Gas Power Age* v. *Central Garage Co.* (1911), 21 Man. L.R. 496, discussed.]

APPEAL by defendant from the judgment of the Court of King's Bench affirming the Referee in Chambers allowing the plaintiff to amend his statement of claim by adding a party defendant. Affirmed.

The judgment appealed from is as follows:—

This is an action for damages for breach of a contract made in 1915 by the defendants with Tremblay, McDermott Co. for the supply of steel for the construction of the Greater Winnipeg Water District aqueduct.

The plaintiff is the assignee under the Bankruptcy Act of the Tremblay, McDermott Co. The breach of contract complained of took place in the years 1916 and 1917. Subsequently, a company bearing the same name as the defendant company was incorporated under the Dominion Companies Act, R.S.C. 1906, ch. 79, and in the spring of 1918 the defendants assigned and transferred to this new company all its assets in consideration of its capital stock, and at the same time the defendants ceased to do business, the business thereafter being carried on by the new company.

After defence filed, the plaintiff applied and obtained from the Referee an order permitting it to add the new company as a defendant and to amend the statement of claim so as to claim damages against the new company. From this order the defendants appeal.

It is not charged that the incorporation of the new company and the transfer to it of the assets of the defendants was made with any fraudulent intent. Counsel for the plaintiff admitted that the situation is the same as though the sale and transfer of the defendants' assets had been made to a corporation of different name and different shareholders, which had no other relation to the plaintiff or defendants than that created by the agreement made between

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Perdue, C. J. M.

the defendants and the new company for the sale and transfer to the latter of its assets. He bases the right to add the new company as a defendant upon the ground that the new company is liable for the damage claimed (1) Because the contract was made with the defendants "its successors and assigns," and (2) Because by the agreement between the defendants and the new company the latter agreed to assume and pay all the liabilities of the defendants, including the liability arising under the original agreement.

The *ratio decidendi* of *Gas Power Age* v. *Central Garage Co.* (1911), 21 Man. L.R. 496, shews that if the plaintiff had joined the new company as a defendant at the commencement of the action it could not have had its name stricken out. If the plaintiff might have made the new company an original defendant it should now be permitted to add it.

I do not think that I should determine in a summary way that the plaintiff has no cause of action against the new company. That question can best be decided at the trial.

I think the order of the Referee was right and I, therefore, dismiss the appeal, but, under all the circumstances, with costs in the cause.

I. Pitblado, K.C., and *W. J. Moran*, for appellant.

E. K. Williams, for respondents.

PERDUE, C.J.M.:—The plaintiff, the Trustee Company, is the trustee in bankruptcy of the J. H. Tremblay Company, Ltd. The action is brought to recover damages alleged to have arisen from a breach of contract on the part of the defendants in failing to supply all steel reinforcing bars required by the plaintiffs, other than the Trustee Company, in connection with the construction of a 20 mile section of the aqueduct of the Greater Winnipeg Water District. The defendants, the Manitoba Bridge and Iron Works, Ltd., by their statement of defence, besides denying liability and raising other defences, stated that since May, 1918, they have not been carrying on any business. The company was incorporated under the laws of the Province of Manitoba, and I shall refer to it as the "provincial company." The affidavit of one of the solicitors of the plaintiffs, filed upon the motion to amend, states that he had made enquiry and had been informed and believed that in or about the month of April, 1918, the defendant desired to become incorporated or to carry on business as a Dominion company; that the new company, as incorporated under the Companies Act, R.S.C. 1906, ch. 79, took over the assets and liabilities of the defendant company which originally

was liable for the performance of its obligations under the agreement sued upon. This information came to the solicitor after the defence had been filed. It appears from the examination of an officer of the defendant company and from documents produced that in or about the month of May, 1918, a company was incorporated under the Companies Act of Canada bearing the same name as the provincial company, which new corporation will be referred to as the "Dominion company." A by-law was passed by the shareholders of the provincial company on May 14, 1918, enacting that the company should sell to the Dominion company the whole of its undertaking, business and assets and that the company might accept as consideration for such sales fully paid shares of the Dominion company. At the same time, a further by-law was passed to sell to the Dominion company all the real estate of the provincial company at the price of $250,000 payable in fully paid-up shares of the latter company. These by-laws appear to have been approved and confirmed at a special meeting of the shareholders of the provincial company. The terms set out in these by-laws appear to have been accepted by the Dominion company and the transaction carried through. An agreement was executed by the two companies on May 27, 1918, setting out the terms of the purchase by the Dominion company of the whole undertaking, business and assets of the Manitoba company. One of the recitals states that the Dominion company was formed for that purpose. The new company undertook to pay, satisfy and discharge all debts, liabilities, contracts, etc., of the old company.

On the application of the plaintiffs an order was made by the Referee in Chambers on April 16, 1921, allowing the plaintiffs to amend the statement of claim by adding the Dominion company as a party defendant and making the amendments set out in the order. By these amendments it is alleged that the incorporation of the Dominion company: "Was obtained with the intention and for the purposes of having it take over the undertaking and all the assets and assume all the liabilities of the provincial company, and such incorporation was granted subject to these conditions"; that subsequently:—"The Dominion company did agree to assume and pay all the liabilities of the provincial company, including the liabilities arising under the agreement referred to in para. 6 hereof," being the agreement to furnish the steel. The amendment further alleges that the Dominion company did take over the business, assets and

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undertaking of the provincial company, and did actually assume all the liabilities of the latter, and "did become and remained liable for all matters and things in the agreement referred to in para. 6 hereof and on the part of the provincial company therein agreed to be performed."

The provincial company appealed from the above order. The appeal was heard and dismissed by Mathers, C.J.K.B., and the same company now appeals to this Court from the dismissal.

Perdue, C. J. M.

One would naturally expect that in view of the facts and matters alleged in the statement of claim, the provincial company would desire, or at all events be willing, that the Dominion company should be made a party defendant, so that in the event of the first company being held liable in damages to the plaintiffs it might have relief over against the new company. But the opposition to the addition of the Dominion company as a party comes from the provincial company.

King's Bench Rule 220, para. 2, is as follows:—

"The Court or a Judge may, at any stage of the proceedings, either upon or without the application of either party, and upon such terms as may appear to the Court or Judge to be just, order that the name of any party, whether as plaintiff or defendant, improperly joined, be struck out, and that the name of any party, whether plaintiff or defendant, who ought to have been joined, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all questions involved in the action, be added."

Our R. 220 is English Order 16. R. 11. The decisions on the English rule show that it should be so construed as to effectuate what was one of the objects of the Judicature Acts, namely, to bring all parties before the Court at the same time so that the disputes may be determined without the delay, inconvenience and expense of separate actions and trials. See *Montgomery* v. *Foy, etc., Co.*, [1895] 2 Q.B. 321, per Lord Esher, M.R. at p. 324; *Byrne* v. *Brown* (1889), 22 Q.B.D. 657, at pp. 666-667. The power is discretionary; *Lancaster Banking Co.* v. *Cooper* (1878), 9 Ch. D. 594; *Wilson & Sons* v. *Balcarres, etc., Co.*, [1893] 1 Q.B. 422; *Robinson* v. *Geisel*, [1894] 2 Q.B. 685, at pp. 688, 689. As to the exercise of this discretion, it was held in *Edward* v. *Lowther* (1876), 45 L.J. (C.P.) 417, 34 L.T. 255, that if the plaintiff wishes to add as defendant any person not originally made a defendant, he can obtain leave to do so under

this rule, and in ordinary cases such application will be granted on the terms of his paying the costs of, and thrown away by reason of the addition. In the same case, Lindley, L.J., said that the practice in chancery was to add a party as a matter of course.

The main objections urged on the appeal from the order were: (1) That there was no privity of contract between the plaintiffs and the Dominion company sought to be added as a party; (2) That there was no novation whereby the plaintiffs could maintain an action against the Dominion company. To these objections, taken on a mere application to amend, the answer is two-fold: (1) The Referee exercised his discretion in adding the defendant and the Chief Justice has upheld the Referee; (2) If this Court were to reverse the order on the above objections it would be trying and disposing of the merits of the claim the plaintiffs are setting up against the Dominion company. It would, in my opinion, be improper to do so at this stage where the Court is only considering the propriety of allowing an amendment to the statement of claim. We do not know what evidence, documentary or other, may be adduced during the progress of the suit or at the trial tending towards establishing a direct liability on the part of the added defendant. It is important that the new company should be bound by the result of the issue between the plaintiffs and the old company. The questions arising between the different parties may be heard and decided in one suit and at one trial.

In furtherance of the above purposes, the plaintiffs should have leave to make such further amendments of the statement of claim as they may deem necessary. The appeal should be dismissed, the costs to be disposed of as set out in the judgment of my brother Cameron.

CAMERON, J.A.:—This action is brought to recover damages for breach of a contract by the defendant company incorporated under our provincial Act to supply the assignors of the plaintiff with all steel reinforcing bars in connection with certain work undertaken by them, and this is an appeal from an order of Mathers, C.J.K.B., ante p. 179, dismissing an appeal from an order of the Referee adding as defendant the Manitoba Bridge and Iron Works, Ltd., a company incorporated in April, 1918, under the Companies Act, R.S.C. 1906, ch. 79, and amending Acts, and allowing certain amendments to be made in the statement of claim.

Among the amendments set out in the Referee's order are the following:—

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"14. In or about the month of April, 1918, the Dominion Company was incorporated under and by virtue of the Dominion Companies Act, R.S.C., 1906, ch. 79, and amending Acts. Such incorporation was obtained with the intention and for the purpose of having the Dominion company take over the undertaking and all the assets and assume all the liabilities of the provincial company, and such incorporation was granted subject to these conditions. Subsequent to such incorporation and in or shortly after the month of April, 1918, the Dominion company did agree to assume and pay all the liabilities of the provincial company including the liabilities arising under the agreement referred to in para. 6 hereof.

In pursuance of such incorporation and agreement, the Dominion company did actually take over the business of the provincial company as a going concern and all the assets and undertaking of the provincial company, and did actually assume all the liabilities of the provincial company, and the Dominion company did become and remained liable for all matters and things in the agreement referred to in para. 6 hereof, and on the part of the provincial company therein agreed to be performed.

15. Until now, the plaintiffs have not been aware of the facts set out in para. 14 hereof.

By deleting the word 'defendant' occurring in the first line of claim (a) in said statement of claim, and by substituting, therefor, the following words 'defendants, the said provincial company and the Dominion company or one, or both.' "

The appeal is brought by the original defendant company on the ground that there is no privity of contract between the plaintiff and the Manitoba Bridge and Iron Works, Ltd. (Dominion company) which would result, it is alleged, in misjoinder of parties and of causes of action.

For the appellants it was argued that there were alleged in the amendments no such privity of contract and no such substitution of the Dominion company for the provincial company in the contract, the subject of the action, as would constitute a novation in law and subject the Dominion company to liability. It was contended that the Court should disallow amendments which did not disclose a cause of action.

As to novation it was argued that an agreement by the Dominion company to become liable would be necessary, and

that such agreement is not alleged. Now the amendment says:—

"The Dominion company did agree to assume and pay all the liabilities of the provincial company, 'including that under the contract in question.'"

That appears to allege a promise by the Dominion company to pay the liability on the contract in question. It further appears in the amended pleading that it was not until after the action was brought that the plaintiff had knowledge of these facts and thereupon the plaintiff proceeded to add the Dominion company as party to the action, and asked relief therein against either company or both. It may be that the amendments, as they are now drawn, can be read as sufficient to support a new contract on which the Dominion company is liable to the plaintiff, but they cannot be said to be in really satisfactory form for that purpose. If the plaintiff intends to rest its case on such a substituted contract it would be well to have the allegations with reference thereto set forth in clear terms. There is also the important question whether the legal position of the Dominion company as successor of the provincial company is not such as to make the former primarily liable for the debts of the latter. Decisions on this subject in England that might be of value in cases arising under laws governing the creation of corporations are difficult to find. There are distinctions between the rights and powers of companies in England and those of companies organised in this Province and under Dominion Legislation. In England companies are quasi-partnerships founded on a memorandum of association and governed by its special articles. With us companies (when not incorporated by special Acts) are created by the issue of letters patent pursuant to general Acts, and in that respect our law is similar to that prevailing in the United States and the tendency is to vest corporations with the fullest powers that may be necessary for their purposes.

On this question, the following is to be found in 10 Cyc., *sub tit* Corporations, p. 287:—

"With regard to liability for debts of the old corporation the general rule is that a new corporation organized to succeed an old one is not liable for the debts of the latter. The new corporation will, however, be liable for the debts of the old one: (1) Where the circumstances are such as to warrant the conclusion that the former is not a separate and distinct corporation, but merely a continuation of the latter, and hence the same person in law; and (2) where it has, in

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express terms or by reasonable implication, assumed the debts of the old corporation, where this liability is imposed by the statute under which the reorganisation takes place, or where such liability is imposed upon it by the decree of the Court on foreclosure."

In the case of a corporation that can be spoken of as a consolidated corporation, which this Dominion company may be, the statement is to be found in 14A Corp. Jur., sec. 3659, p. 1072:—

"A consolidated corporation is answerable for the debts, obligations, and liabilities of the constituent corporations, whether arising *ex contractu* or *ex delicto*. This is true not only where liability is imposed on the consolidated corporation by statute, or by the charter of the consolidated company, or by the agreement of consolidation, but also where the constituent corporations go out of existence without any arrangement as to payment of their debts and liabilities, and the performance of their obligations being made."

It is pointed out in Thompson on Corporations, 2nd ed., vol. 5, para. 6080, that in the treatment of the question of the liability of the succeeding corporation there is practically no difference between the rights, duties and liabilities of either the old or new corporations, whether the succession was brought about by re-organisation, merger or consolidation. And in para. 6083 it is said:—

"Whether or not the succeeding corporation will be liable for the obligations or torts of the old, depends on circumstances, etc. . . . . The consolidated corporations as a rule, even in the absence of statute or agreement, assumes all the liabilities of the constituent companies and then may be enforced by a direct action against it, as it is presumed to have notice of the rights of creditors."

There can be no question that a company may purchase the entire assets of another company without assuming its liabilities. That the consideration is paid in stock of the purchasing corporation can make little, if any, difference. It would be a matter of evidence at the trial whether a given transaction was an outright sale or purchase or whether it constituted a succession, merger or consolidation, or whatever might be the proper term to describe it, with its attendant legal implications. It may be that in this case the transaction was a purchase or acquisition of the assets of the provincial company without there being imposed on or assumed by the Dominion company a liability which the plaintiff can enforce. On the other hand, the identity of

the provincial company may be so preserved and continued in the Dominion company that the latter continues to bear the liabilities of the former and is bound thereby. But all these are matters proper for determination on the evidence at the trial and not on mere interlocutory proceedings in the action.

It is at least peculiar that the objection here is taken not by the new company but by the old. The Dominion company has not appealed from the order made. It is difficult to see how the provincial company can be prejudicially affected by the Dominion company being made a party to the record. Either the provincial company is liable on the contract pleaded or it is not, and its whole interest in the action lies in that issue. If it is not liable no question of any kind affecting the Dominion company arises. If it is liable then it would seem reasonable that the question of the Dominion company's liability should be tried out forthwith without putting the plaintiff to the necessity of commencing another action and proceeding to a second trial.

The amendments allowed by the order do not set out, as they should, with precision the material facts on which the plaintiff bases its claim against the added defendant. It would be reasonable, in the circumstances, to allow the plaintiff to make such further amendments to the statement of claim as it may deem advisable, and sufficient time should be given for that purpose. There may be serious questions of law arising in this matter affecting the Dominion company that must be settled some time, and there is no sound objection to having them disposed of in the same action in which the claim against the provincial company is heard and determined. As I see the situation, whatever objections there may be really simmer down to a question of costs, which can be adequately dealt with at the trial.

I would, therefore, dismiss the appeal, with the proviso that the plaintiff have leave further to amend the statement of claim within 10 days from the date of this order. The costs of this appeal should be in the disposition of the judge at the trial. The costs of making any further amendments to the pleadings should be costs to the defendant, the provincial company, in the cause.

FULLERTON, J.A. (dissenting) :—This action was brought against the Manitoba Bridge & Iron Works to recover damages for breach of a contract made in 1915, to deliver steel reinforcing bars. The statement of claim alleges that the breach occurred in February, 1917. The original defendant

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to the action, which I will hereafter refer to as the old company, was incorporated under the Companies Act, R.S.M. 1913, ch. 35. In April, 1918, a company was incorporated under the Dominion Companies Act R.S.C. 1906, ch. 79, bearing the same name as the old company. This company, which I will hereafter refer to as the new company, purchased all the assets of the old company, the consideration being the assumption of certain of its liabilities and the allotment to the old company or its nominees of 7,327 shares of fully paid-up shares in the capital stock of the new company.

After the defence had been filed the Referee on the application of the plaintiff made an order adding the new company as a party defendant and allowing the plaintiff to amend its statement of claim by alleging that the new company agreed to assume and pay the liabilities of the old company. Mathers, C.J.K.B., dismissed an appeal from the order of the Referee.

In his reasons for dismissing the appeal he says, ante at p. 179:

"It is not charged that the incorporation of the new company and the transfer to it of the assets of the defendants was made with any fraudulent intent. Counsel for the plaintiff admitted that the situation is the same as though the sale and transfer of the defendants' assets had been made to a corporation of different name and different shareholders, which had no other relation to the plaintiff or defendants than that created by the agreement made between the defendants and the new company for the sale and transfer to the latter of its assets. He bases the right to the new company as a defendant upon the ground that the new company is liable for the damage claimed: (1) Because the contract was made with the defendant "its successors and assigns"; and (2) Because by the agreement between the defendants and the new company the latter agreed to assume and pay all the liabilities of the defendants, including the liability arising under the original agreement.

The *ratio decidendi* of *Gas Power Age* v. *Central Garage Co.* (1911), 21 Man. L.R. 496, shows that if the plaintiff had joined the new company as a defendant at the commencement of the action it could not have had its name stricken out. If the plaintiff might have made the new company an original defendant it should now be permitted to add it.

I do not think that I should determine in a summary way

that the plaintiff has no cause of action against the new company. That question can best be decided at the trial.

With great respect for the opinion of the Chief Justice, I am unable to take the view he does of the effect of *Gas Power Age* v. *Central Garage Co.* In that case, the action was brought against the Central Garage Co. to recover damages for breach of contract to pay for advertising and against two individual defendants for damages for conspiracy to induce and inducing the defendant company to break its contract. The whole case turned on the construction of R. 219 of the King's Bench Rules (now 196), and the question was not whether the plaintiff had any cause of action against the individual defendants but whether such cause of action should be joined with the cause of action against the garage company. The existence of the causes of action was taken for granted. In the present case counsel for the old company did not attempt to argue that under R. 196 the two causes of action could not be joined. His whole contention was that the material filed in support clearly showed that the plaintiff had no cause of action against the new company. I do not think it at all follows from *Gas Power Age* v. *Central Garage Co.* that "if the plaintiff might have made the new company an original defendant it should now be permitted to add it." When an action is begun the plaintiff may make any persons he pleases defendants and providing he shows on the face of the pleadings a good cause of action, the Courts, in the absence of proof that the action is clearly frivolous or vexatious or in any way an abuse of the process of the Court, will not dispose of it summarily, but will allow it to go down to trial. When, however, after action begun, an application is made by the plaintiff to add a defendant, the material in support of such application must show at the very least a triable action against such proposed defendant.

Has the plaintiff here shown the existence of any cause of action against the new company? I am satisfied that he has not. The plaintiff was not a party to the contract between the old and the new company and even if it were the fact, which it is not, that the new company by that contract assumed liability for the very breach of contract in respect of which this action is brought, the plaintiff for lack of privity could not maintain an action upon it. On the argument before us, counsel for the plaintiff did not attempt to support the judgment on this ground, but raised an entirely new and novel ground. He said that liability followed as a

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matter of law from the purchase by the new company of the assets of the old. The only case cited by him in support of such an extraordinary proposition of law was *Cayley* v. *Cobourg, Peterborough, etc., R. Co.* (1868), 14 Gr. 571.

In that case an Act of the Legislature, 1865 (Can.), ch. 81, authorised two companies to unite and for the more effectual carrying into effect of the said union:—

"[To] 'consolidate their respective debts, and unite their stocks, properties and effects, and on such terms, either of complete or partial union, and either of joint or separate, or absolute or limited liabilities to third parties,' as the companies should deem meet; and any agreement for the purpose, under the seals of the companies, ratified by two-thirds of the shareholders of each, was declared to be 'valid and binding, to all intents and purposes, in the same manner as if the same had been incorporated with the Act.'"

A deed of union was executed which provided for the absolute union of the companies and declared that the statutes regulating the companies should continue to govern and regulate the new company. By an Act passed long prior to the merger the holders of the bonds of one of the companies had the option of converting their bonds into paid-up new stock. The action was brought by two holders of bonds on behalf of themselves and all the other bondholders, against the new company claiming under the Act to have their bonds converted into the stock of the new company.

Mowat, V.C., decided in favour of the plaintiff but the whole case turned on the proper construction of the deed of union and of the several statutes involved, and, in my view, is no authority for the proposition put forward by the plaintiff.

On the argument reference was made to a paragraph in 14A Corp. Jur., at p. 1072, which reads as follows:—(See judgment of Cameron, J.A., at p. 186):

Consolidation is defined in 14A Corp. Jur., sec. 3630, p. 1054, as follows:

"When the rights, franchises, and effects of two or more corporations are by legal authority and agreement of the parties combined and united into one whole and committed to a single corporation, the stockholders of which are composed of those, so far as they choose to become such, of the companies thus agreeing, this is in law and in common understanding a consolidation of such companies."

Clearly under the above definition there can be no question of consolidation between the two companies in the present case. There is merely a purchase by the new company of the assets of the old. In 14A Corp. Jur., sec. 3662, p. 1076, the law in the case of such a purchase is laid down as follows:—

"In the absence of a statute or contract imposing liability, one corporation which makes a *bona fide* purchase of all the property of another corporation for an adequate consideration is not liable for the debts of the selling corporation, nor does it hold such property subject to any lien or obligation toward the creditors of the selling corporation."

That this is the law here I think there can be no doubt.

Mitchell on Canadian Commercial Corporations states at ch. 33, p. 1374, that "amalgamation" is the English equivalent of the American term "consolidation," and at p. 1377, speaking of the effect of amalgamation, he says:—

"Apart from statute, the position of a company which amalgamates with another by agreement is analogous to that of a man who enters into partnership with another; the two companies do not become jointly liable to their respective creditors, and neither do the shareholders in one company become debtors to the creditors of the other. . . A creditor can only claim against the purchasing company where the latter has become liable to him by reason of some agreement, express or implied, between it and him."

By an amendment to the Companies Act of Manitoba, R.S.M. 1913, ch. 35, in sec. 2 of 1913-14 (Man.), ch. 22, it is provided that:—

"Every company . . . shall have power 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 the company, if authorised so to do, by the vote of a majority in number of the shareholders present or represented by proxy at a general meeting duly called for considering the matter and holding not less than two-thirds of the issued capital stocks of the company."

There is no provision in this statute making the purchasing company liable for the debts and obligations of the selling company and one would expect that if such liability were ever contemplated it would have been expressly provided for.

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The statement of claim is not framed in such a way as to cover the point which the plaintiff has apparently raised for the first time in this Court, and as I take the view that the purchase by the new company cannot possibly make it liable for the debts of the old company, nothing would be gained by allowing an amendment.

I would allow the appeal and set aside the order of the Referee.

Dennistoun, J. A.

DENNISTOUN, J.A.:—I was much impressed by Mr. Pitblado's argument on this case that there are here no sufficient allegations of privity of contract between the plaintiff and the added defendant; nor of novation, involving as it does the release of one obligation, and the substitution of another, with the consent of both debtor and creditor, and the *animus novandi;* nor of fraud; nor of the creation of a trust; nor of any clear-cut cause of action.

Mr. Williams admits that the amendments are "inartistic" and do nothing more than suggest a possible cause of action but contends that "as it is not obvious no cause of action will lie" the case should proceed to trial.

The Referee in Chambers and Mathers, C.J.K.B., have decided that there is something to be tried and I hesitate to take an opposite view upon a point of practice which involves the exercise of a judicial discretion.

I, therefore, agree that the appeal be dismissed, with to the plaintiff to further amend so as to make clear to the trial Judge the causes of action which he will attempt to establish when the time comes for so doing.

I agree with the disposition of the costs made by Cameron, J.A.

Appeal dismissed.

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REX v. BARRY; Ex parte LINDSAY.

New Brunswick Supreme Court, Appeal Division, Hazen, C.J., White and Grimmer, JJ.A. June 8, 1922.

CERTIORARI (§ IA—9)—TO JUDGE OF SUPERIOR COURT ACTING AS PERSONA DESIGNATA—RAISING QUESTION OF JUDGE'S JURISDICTION—STATUTORY POWER OF JUDGE TO REVIEW MATTERS OF SUMMARY CONVICTION UNDER PROVINCIAL LAW—SUMMARY CONVICTIONS ACT, C.S.N.B. 1903, CH. 123; INTOXICATING LIQUORS ACT, 1916, N.B., CH. 20.

The effect of sec. 176 of the Intoxicating Liquor Act 1916 N.B. ch. 20 is to provide a statutory review of the action of Justices and Police Magistrates by a Judge of the Supreme Court of New Brunswick or by a County Court in the cases to which it applies. Where the magistrate's order of dismissal of an information under, the Provincal Liquor Act is reviewed by a Judge of the Supreme Court he acts as *persona designata*, but *certiorari* will not be granted to bring up the conviction entered by him upon reversing the magistrate's order unless the Judge had no jurisdiction to make the conviction.

INTOXICATING LIQUORS (§IIIA—58)—CARRIER IN POSSESSION FOR EXPORT—PROVING LAWFULNESS OF DELIVERY TO CARRIER WITHIN THE PROVINCE—ONUS—INTOXICATING LIQUOR ACT, 1916, N.B., CH. 20, SECS. 42, 45, 141, 176.

Under the Intoxicating Liquor Act, 1916, N.B., ch. 20, the onus is upon a carrier of intoxicating liquor held for the purpose of exporting it from the Province to prove himself within the exception of sec. 42 of the Act upon a charge of unlawful possession in a place other than his private dwelling house. If the conveyance began outside of the Province and was to continue to another place outside of the Province he may show this in defence and if being conveyed from a place within the Province the carrier must prove the lawfulness of the keeping and delivery within the Province for export to a place where it may be lawfully delivered outside of the Province.

P. J. Hughes shews cause against an order *nisi on certiorari* to quash a conviction made by Barry, J., on an appeal under the Intoxicating Liquor Act, 1916 (N.B.), ch. 20, from an order of the Police Magistrate of the City of Fredericton, dismissing a charge under the said Act of illegal possession of intoxicating liquor.

J. J. F. Winslow, in support of rule.

The rule was discharged.

The judgment of the Court was delivered by

GRIMMER, J.:—This matter arose by reason of an information laid by one Saunders, an inspector under the Intoxicating Liquor Act, 1916 (N.B.), ch. 20, charging that the defendant Lindsay on the night of September 12, 1921, did have liquor in his possession in a place other than his private dwelling not having a license so to do and contrary to the provisions of the Intoxicating Liquor Act. The defendant was arrested and upon appearing before the Police Magistrate of Fredericton admitted the charge, but, in defence, gave evidence he had the liquor for the purpose of exporting it from this Province into the State of Maine

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as agent of one Calvin the owner thereof, and for no other purpose. The Police Magistrate accepted this statement and dismissed the charge and also ordered the restoration of the seized liquor. From this order, an appeal was taken under sec. 176 (4) of the Intoxicating Liquor Act to Barry, J., a Judge of the Supreme Court, who duly issued a summons requiring the parties interested to appear before him, and having heard the matter and the arguments of counsel, made an order upon January 10 last, quashing the order of dismissal granted by the said Police Magistrate and convicting the defendant for that he, the said defendant at the Parish of Kingsclear in the County of York on September 12, 1921, did have intoxicating liquor in his possession, in a place other than his private dwelling, not having a license so to do, contrary to the provisions of the Intoxicating Liquor Act, 1916 (N.B.), ch. 20. He also found the offence to be the first offence of the defendant against the said Act, and adjudged him, therefore, to forfeit and pay the sum of $50 and costs, and in default of so doing to be imprisoned for 3 months in the common jail, and also ordered him to pay the costs of the appeal. An application was made to this Court in February last for an order absolute for *certiorari* with rule *nisi* to quash the order of the said Barry, J., which rule was granted upon the following grounds:—

"1. That the Judge exceeded his jurisdiction in taking judicial notice of the cost of transportation of liquor from Fredericton to Houlton.

2. That the Judge exceeded his jurisdiction in taking evidence in the absence of the defendant or his solicitor and without the knowledge of the defendant or his solicitor that evidence would be taken.

3. That the Judge exceeded his jurisdiction in granting the summons for review and in proceeding with the review and in making the conviction without having before him the proceedings of the hearing before the magistrate or a properly certified copy thereof.

4. That the summons granted by the Judge on review does not show jurisdiction.

5. That the affidavit on which the application was based does not allege that substantial justice was not done to the applicant, and does not state that the application was made with the authority of the informant.

6. That no offence known to the law is charged.

7. That the Judge erred and exceeded his jurisdiction

in holding that on an information for having liquor in his possession elsewhere than in his private dwelling, the defendant in addition to proving that he had the liquor in his possession for a lawful purpose, namely for the purpose of exporting the same, is also required to prove from whence he obtained the liquor.

8. That the Judge erred and exceeded his jurisdiction in holding that the defendant should prove that the liquor originated outside the Province, or came from the bonded warehouse or other premises of a *bona fide* exporter."

When the return under the writ came before this Court it was objected on behalf of the appellant that *certiorari* did not lie when directed to a Judge of the Supreme Court, and the provisions of sec. 176 of the Intoxicating Liquor Act, sub-sec. (1), (2), (3) and (4), as well as the cases of *Ex parte Kane* (1882), 21 N.B.R. 370; *Smith* v. *Kinnie* (1890), 30 N.B.R. 226; and *Hallett* v. *Allen* (1902), 38 N.B.R. 349, were respectively cited in support of this contention.

Section 176 (4) of 1916 (N.B.), ch. 20, is as follows:—

"(4) An appeal when any order of dismissal is made shall be to a judge of the Supreme Court, sitting in chambers, without a jury, when the chief inspector so directs, in all cases in which an order has been made by a magistrate, justice or justices, dismissing an information or complaint laid by an inspector, or any one on his behalf, or by any prosecutor for contravention of any of the provisions of this Act, provided notice of such appeal is given to the defendant or his attorney, within fifteen days after the date of such order of dismissal. Within ten days after the notice of appeal, the judge shall grant a summons calling upon the defendant, and the magistrate, justice or justices making the order, to show cause why the order of dismissal should not be reversed, and the case re-heard. Upon the return of the summons, the judge, upon hearing the parties, may either affirm or quash the order or, if he thinks fit, may hear the evidence of such other witnesses as may be produced before him, or the further evidence of any witnesses as may be produced before him, or the further evidence of any witnesses already examined, and make an order affirming the order of dismissal, or may reverse such order and convict the defendant, and may impose such fine and costs, or other penalty, as is provided by this Act, and the order so made shall have the same effect, and be enforced in the same manner, as is provided in the case of convictions before magistrates under this Act."

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And sub-sec. 5 of the same section provides that the practice and procedure upon such appeal shall henceforth be governed by the law respecting the procedure on review before the Judge of the Supreme Court from summary convictions, so far as the same is not inconsistent with this Act.

Section 179 provides:—

"(1) In every case of appeal from any summary conviction or order had or made before any magistrate, justice or justices, the court to which such appeal is made shall, notwithstanding any defect in such conviction or order, and notwithstanding that the punishment imposed or the order made may be in excess of that which might lawfully have been imposed or made, hear and determine the charge or complaint on which such conviction or order has been had or made, upon the merits, and may confirm, reverse or modify the decision of such magistrate, justice or justices, or may make such other conviction or order in the matter as the court thinks just, and may by such order exercise any power which the magistrate, justice or justices, whose decision is appealed from might have exercised, and may make such order as to costs to be paid by either party as it thinks fit.

(2) Such conviction or order shall have the same effect and may be enforced in the same manner as if it had been made by such magistrate, justice or justices."

By sec. 44 of R.S.N.B. 1854, ch. 137, original legislation instituting proceedings on review in matters arising in Justices' Civil Courts designed to furnish a speedy and inexpensive method of correcting errors therein was created. With some alterations from time to time this has continued until and is in force today, having been included in the C.S. N.B. 1903. By sec. 6 of ch. 122 thereof it was made applicable to all inferior Courts and provided for a copy of the proceedings being laid before a Judge of the Supreme Court or a Judge of the County Court, who after hearing the parties is to "decide the cause according to the very right of the matter without regard to forms" unless the presiding Justice acted wholly without jurisdiction. He could direct that judgment be affirmed, altered or reversed or might enter a non-suit and remit the cause back to the Justice to have his order carried out.

By sec. 44 of the Summary Convictions Act, C.S. N.B. 1903, ch. 123, this right of review was extended to summary conviction cases, authorizing an application to be made to

a Judge of the Supreme Court or County Court in like manner as near as may be, as in case of review under C.S. N.B. 1903, ch. 122, with power to him to affirm, amend or set aside the order or conviction or remit the cause to the Justice to amend or set aside the same and grant a certificate of dismissal, but provision was therein also made that there should be no review from the decision of the inferior Court dismissing an information or complaint.

Section 176 of the Intoxicating Liquor Act, 1916 (N.B.), ch. 20, provides that a conviction or order made for violation of the Act shall be final and conclusive except when the person convicted is a licensee or the offence is committed on or with respect to premises licensed under the Act or when the person convicted has been sentenced to imprisonment or where an order of dismissal of the information or complaint has been made, the latter provision being directly the reverse of the provision last above referred to as being part of sec. 44 of the Summary Convictions Act and must have been included in the statute for a very special and distinctive purpose as it is the only legislation of its kind appearing in the statutes of this Province.

As pointed out, sub-secs. 4 and 5 of sec. 176, 1916 (N.B.), ch. 20, provide an appeal where there is a dismissal of an information as in this case, and the effect thereof is to provide nothing more or less than a review under another name, but they do relieve the proceedings of a large part of the formality required, under a review, to provide the Judge hearing the same with jurisdiction. Therefore, in my opinion, there can be no valid reason advanced nor contention successfully made why the law as it now stands in respect to matters on review before Judges of the Supreme Court or County Courts should not, subject to what has here been said, be applied in its entirety to cases of this nature, arising as this one has under the Intoxicating Liquor Act and a decision of this Court made where there has as yet been no formal decision. To this end, and in view of the objection taken that *certiorari* does not lie when directed to a Judge of this Court, it may be observed that at common law the prerogative writ of *certiorari*, being a beneficial writ for the subject which cannot be taken away without express negative words, issued in civil cases as of right to remove an action from an inferior Court to the high Court, and save in cases where the statute intervenes, this is still the law, but it is only applied to inferior Courts, and in *Ex parte Jacob* (1861), 10 N.B.R. 153, at p. 161, the

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Court stated "It is a clearly established principle with respect to the writ of *certiorari*, that it can only be issued to bring before the Court of Queen's Bench some *judicial* act of an inferior tribunal."

In comparatively recent years, the practice seems to have grown up of including in some statutes, particularly those of a criminal or quasi-criminal nature a provision removing *certiorari* insofar as certain convictions, judgments or orders are concerned, and in the case of the Intoxicating Liquor Act, sec. 111 thereof provides that no conviction, judgment or order in respect to any offence against the Act shall be removed by *certiorari* and I presume it was the intention of the Legislature thereby to create a more speedy and effective enforcement of the Act, particularly as it also removed any appeal on the part of a defendant in case of any ordinary violation thereof. Were it not, therefore, for the statute, there would be no question whatever, and the writ would not have issued, but this Court has held that in adjudicating in matters of review a Supreme Court Judge acts under a purely statutory authority as a *persona designata* and not in the exercise of powers pertaining to the Court of which he is a member.

It also declared the rule is: the Court will not entertain an application to bring before it by *certiorari* or otherwise the judgment on review of a Judge of the Supreme Court or County Court unless the Judge acted without jurisdiction. *Rex* v. *Wilson; Re Braithwaite* (1910), 39 N.B.R. 555. This decision was rendered in 1910, but previously, in the year 1882, in the case of *Ex parte Kane*, 21 N.B.R. 370, the Court held a *certiorari* would not be granted to bring up the proceedings on review before a Judge of this Court under the C.S. N.B. 1903, ch. 60, the proper relief being by motion to set aside the order, though it also held in the same term in *Ex parte Fahey* (1882), 21 N.B.R. 392, that *certiorari* would lie to bring up the proceedings in review before a County Court Judge under the C.S. N.B. 1903, ch. 60 if he had no jurisdiction to make the order, and the view of the Court in the *Kane* case was, as we have seen, modified in this respect, so far as a Judge of the Supreme Court is concerned, and the rule now is that a *certiorari* will not be granted to bring up proceedings had before a Judge of the Supreme Court acting as a *persona designata* unless he had no jurisdiction to make the order complained of.

In *Hallett* v. *Allen*, 38 N.B.R. 349, the Court held following *Smith* v. *Kinnie*, *supra*, that an order on review made by a

Judge of the Supreme Court under C. S. N.B. 1903, ch. 122, sec. 6 is final which now, in view of the *Braithwaite* case, 39 N.B.R. 555 would mean that the order must be final if the Judge had jurisdiction to make the same.

Applying the law then as established and enunciated in the above cases, as I would and as I think the Court should to cases of this kind (the appeal provided for in the Liquor Act through this method of procedure being as stated nothing more than or less than review), in my opinion, from an examination of the return, the rule in this case must be discharged, the Judge having full jurisdiction to make the order, and the same is final, so far as the defendant is concerned and *certiorari* will not lie.

In my opinion, there is nothing in the first or second grounds of the objection to the Judge's order, nor is there anything whatever in the return to establish that the Judge took any evidence on the hearing before him either in the absence of the defendant or his solicitor or otherwise.

As to the third and fourth grounds, the return, in my opinion, clearly establishes the jurisdiction of the Judge, and that the appeal was properly taken under the provisions of sec. 176 (4) of the Intoxicating Liquor Act, as it shows the order of the chief inspector directing the appeal to be taken, the proper notice of the appeal and service thereof, and that the information, the magistrate's report of the evidence taken and the order granted by him were duly laid before the Judge and his summons was issued calling upon the defendant and the magistrate making the order to show cause why the same should not be reversed, and the case reheard, and the defendant having appeared both personally and by counsel and the case having been heard on the merits without any objection to the jurisdiction of the Judge having been taken, and that, so far as it was not inconsistent with the Liquor Act, the practice and procedure followed by the Judge upon the appeal was governed by the law respecting the procedure on review before a Judge of the Supreme Court from summary convictions, thus complying with all the requirements of sec. 176 of the Act to establish his jurisdiction and with the provisions of sec. 179 in the conclusion he arrived at, and these grounds fail.

So far as 7 and 8 are concerned, while it is not necessary for the purpose of this judgment, I desire to add I fully agree and concur with the judgment of the Judge that "the idea that a person who is in possession of 20 cases of

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liquor at a place other than his private dwelling can avoid responsibility simply by proving that he is in possession of it as a carrier to transport it beyond the limits of the Province without anything more, is I think, a fallacious one, and one which, if followed, generally would have the effect of nullifying many of the express provisions of the Act."

Section 42 of the Intoxicating Liquor Act among other things relates to the transportation of liquor within the Province, and provides that nothing in the Act contained shall prevent common carriers or other persons from carrying or conveying liquor from a place outside of the Province to a place where the same may be lawfully received and lawfully kept within the Province, or from a place where such liquor is lawfully kept, and lawfully delivered within the Province where it may be lawfully delivered outside of the Province, or from a place where such liquor may be lawfully kept and lawfully delivered within the Province to another place within the Province where the same may be lawfully kept, or through the Province from a place outside of it to a place outside of it. As pointed out by the Judge, it is quite evident that the words "to a place" were omitted from the section in that paragraph thereof which may be termed the second provision for the transportation of liquor, and if these words are included the meaning and intention of the paragraph is clear, and the same would then read as follows: "from a place where such liquor may be lawfully kept and lawfully delivered within the Province to a place where it may be lawfully delivered outside the Province." The very marked characteristic running through all these paragraphs of the section is the lawful receiving, lawful keeping, lawful delivering of the liquor, and in the absence of these qualifications, some or all of them, a person found with liquor in his possession would be subject to a penalty for violation of the Act and under sec. 141, when so charged with such an offence, the onus is placed on him to prove he did not commit the offence.

Under the evidence in this case, I agree with the finding of the Judge, that accepting as true the statement of the defendant that he was carrying the liquor for delivery at a point in the State of Maine 2 miles beyond the international boundary line, he could not escape liability for a violation of the Liquor Act without showing that the liquor was being carried under the authority of the first or second paragraphs of sec. 42 relating to the transportation of

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liquor, or if the shipment originated in the Province, he could not escape liability without showing that the sale was made by a person who had a legal right to sell under sec. 45 (which relates to liquor kept in bonded warehouses for export purposes only), to a person who had a legal right to buy the same. There was no evidence whatever to show where the liquor came from, or where the sale was made—nothing whatever to indicate that the liquor either came from a place outside the Province or from a bonded warehouse or other premises of a *bonâ fide* exporter or anyone else who might lawfully make the sale of the liquor for export or for delivery where the same might be lawfully made to a person within the Province who might lawfully receive the same. In fact, none of the requirements of the statute that would establish the fact of the liquor being lawfully in possession of the defendant were proved in whole or in part, but there was, on the contrary, an entire absence thereof, and while the magistrate found the defendant was in possession of the liquor as a carrier for the purpose of export to a foreign country, I agree with the Judge who found this was not enough, the defendant being, by statute, required to further prove and bring himself within the provisions of sec. 42, and having admitted he had the liquor in his possession it was necessary for him in order to escape conviction for a violation of the Act to clearly establish he was lawfully in possession thereof as a carrier, which he wholly failed to do.

I am, therefore, of the opinion that the judgment of the Judge who heard the appeal was correct, that he had jurisdiction to hear the same, that his finding and conclusion was final, and that, under these circumstances, *certiorari* will lie, and that the rule must be discharged.

Conviction sustained.

WALPOLE v. CANADIAN NORTHERN R. CO.

Judicial Committee of the Privy Council, Viscount Cave, Lord Parmoor, Lord Phillimore, Clerk, L.J., and Duff, J.
October 24, 1922.

MASTER AND SERVANT (§ V—340)—ACTION UNDER FATAL ACCIDENTS ACT, R.S.S. 1920, CH. 62—WIDOW RESIDENT IN SASKATCHEWAN AT TIME OF COMMENCING ACTION—WORKMAN RESIDENT IN BRITISH COLUMBIA AT TIME OF ACCIDENT—RIGHT OF ACTION TAKEN AWAY BY B.C. WORKMEN'S COMPENSATION ACT, 1916 (B.C.), CH. 77—RIGHT OF WIDOW TO MAINTAIN ACTION.

By the common law, the legal personal representative of a person whose death is caused by the negligence of another has no right to sue for damages; and the Fatal Accidents Act of Saskatchewan confers this right on the representative only in cases

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where the deceased himself, if he had lived, would have been entitled to maintain an action and recover damages, and where such action would have been barred by the Workmen's Compensation Act of British Columbia where the deceased was residing at the time of the accident, the representative has no right of action in Saskatchewan under the Fatal Accidents Act.

APPEAL by plaintiff from the judgment of the Saskatchewan Court of Appeal (1921), 66 D.L.R. 127, 15 S.L.R. 75, affirming the trial judgment (1920), 60 D.L.R. 706, and dismissing an action under the Fatal Accidents' Act, R.S.S. 1920, ch. 62. Affirmed.

The judgment of the Board was delivered by

VISCOUNT CAVE:—This is an appeal from a judgment of the Court of Appeal (1921), 66 D.L.R. 127, 15 S.L.R. 75, for the Province of Saskatchewan, affirming the judgment of the Court of King's Bench (1920), 60 D.L.R. 706, for the same Province, whereby judgment was entered for the respondents in an action brought by the appellant for damages under the Fatal Accidents Act of the Province, R.S.S. 1920, ch. 62 (now 1920 (Sask.) ch. 29.)

The respondents are a railway company incorporated by a Dominion Act, 1901 (Can.) ch. 51, and operating a system of railways in British Columbia, Saskatchewan, and other parts of Canada. Thomas William Walpole (the appellant's husband) was a locomotive engineer in the employment of the respondent company, and, at the time of the accident which gave rise to this action, was resident at Lucerne in British Columbia. On April 17, 1919, he was in charge of a locomotive which was proceeding with a freight train on the respondents' railway, westward of the village of Lucerne; and when the train reached a high bridge supported by piles, the bridge gave way and the locomotive fell into the stream beneath, and Walpole sustained injuries which proved fatal. The appellant took out letters of administration of her husband's estate in British Columbia; but, shortly afterwards, she went to reside at Saskatoon in Saskatchewan, and her letters of administration were re-sealed in that Province. On November 4, 1919, she commenced in the Court of King's Bench of Saskatchewan an action against the respondents under the Fatal Accidents Act, R.S.S. 1920, ch. 62, claiming, on behalf of herself and her infant daughter, damages for the respondents' negligence and the resultant death of her husband, 60 D.L.R. 706.

The action was tried at Regina by Bigelow, J., and a jury. At the close of the case the respondents moved for a non-

suit on the ground that, having regard to the provisions of the Workmen's Compensation Act of British Columbia, 1916 (B.C.) ch. 77, the action did not lie. The Judge reserved his decision on this question, and put certain questions to the jury, who answered them as follows:—

"1. Was the accident caused by the negligence of the defendant? A. Yes. 2. If so, in what did such negligence consist? A. The negligence of the defendant consisted in not keeping the bridge in safe repair. 3. Damages: (*a*) for widow Edith May Walpole:—$10,000: (*b*) for infant Madeline Isabel:—$6,000."

The Judge, however, entered judgment for the respondents on the point of law, and upon appeal to the Court of Saskatchewan that Court affirmed the decision, 66 D.L.R. 127. Thereupon, the present appeal was brought to His Majesty in Council.

The Fatal Accidents Act of Saskatchewan, R.S.S. 1920, ch. 62, sec. 3, which is similar for all purposes material to this action to the British statute known as Lord Campbell's Act, 1846 (Imp.), ch. 93, provides as follows:—

"Whenever the death of a person has been caused by such wrongful act, neglect or default as would (if death had not ensued) have entitled the person injured to maintain an action and recover damages in respect thereof, in each case the person who would have been liable if death had not ensued shall be liable to an action for damages notwithstanding the death of the person injured."

It is provided by the Act that every such action is to be for the benefit of the wife or other dependents of the person whose death has been so caused, and is to be brought by the executor or administrator of such person. A similar statute is in force in British Columbia R.S.B.C., 1911, ch. 82.

Part I of the Workmen's Compensation Act, 1916 (B.C.), ch. 77, which applies to railways, provides by sec. 6 that:—

"Where, in any industry within the scope of this Part, personal injury by accident arising out of and in the course of the employment is caused to a workman, compensation as provided by this Part shall be paid by the Board out of the Accident Fund."

Accident is defined (sec. 2), as including a wilful and an intentional act, not being the act of the workman, and a fortuitous event occasioned by a physical or natural cause. Section 11 (1) of the Act is as follows:—

"The provisions of this Part shall be in lieu of all rights

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of action to which a workman or his dependents are entitled, either at common law or by any Statute, against the employer of such workman for or by reason of any accident which happens to him arising out of and in the course of his employment, and no action against the employer shall lie in respect of such accident."

The scale of compensation payable to a workman, or (when death results from the injury) to his dependents, is fixed by secs. 15 to 24. Later sections provide for the formation of the accident fund, which is raised by yearly assessments on the employers on the basis of their pay-rolls; and for the constitution of a Workmen's Compensation Board, which is to make and collect the assessments, and is to determine, without appeal, all questions relating to compensation.

The question raised in this appeal is whether, having regard to these provisions, the appellant, as administratrix of the deceased, can recover, in the Courts of Saskatchewan, damages for the respondents' negligence in British Columbia, which resulted in his death. In their Lordships' opinion, she cannot. By the common law, the legal personal representative of a person whose death is caused by the negligence of another has no right to sue for damages; and the Fatal Accidents Act of Saskatchewan confers that right on the representative only in cases where the deceased himself, if he had lived, would have been entitled to maintain an action and recover damages. Now, in the present case such an action if brought by Walpole himself, would have been barred by the provisions of the Workmen's Compensation Act of British Columbia, and particularly by sec. 11 (1) of that Act. The effect of that statute was that the deceased, who was resident and employed in British Columbia, held his contract of employment subject to the double condition—first, that he should be entitled to compensation for accidents, however caused, and, secondly, that he should have no other remedy. These conditions were, by virtue of the statute, incorporated in his contract, and were binding upon him wherever his action might be brought; and if he had lived and had himself commenced proceedings in Saskatchewan for the company's negligence, the condition would have been a sufficient answer to his claim.

From this it follows that the condition upon which alone the appellant was entitled to sue—viz., that the deceased

himself might have sued had he lived—is not fulfilled, and the action fails on that ground. The decisions of the Board in *C.P.R. Co.* v. *Parent*, 33 D.L.R. 12, 20 C.R.C. 141, [1917] A.C. 195, 23 Rev. Leg. 292, and *Workmen's Compensation Board* v *C.P.R. Co.*, 48 D.L.R. 218, [1920] A.C. 184, are in point.

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The difficulty may be put in another way. By the well-known rule laid down by Willes, J., in *Phillips* v. *Eyre* (1870), L.R. 6 Q.B. 1, an action will not lie in one country or Province for a wrong committed in another, unless two conditions are fulfilled. First, the wrong must be of such a character that it would have been actionable if committed in the country of the *forum*; and, secondly, it must not have been justifiable by the law of the country where it was done. It is unnecessary for the purposes of this appeal to consider the precise meaning of the term "justifiable," as used by Willes, J.; but, at all events, it must have reference to legal justification, and an act or neglect which is neither actionable nor punishable cannot be said to be otherwise than justifiable within the meaning of the rule. In the present case, the negligence of the company was not actionable in British Columbia; for, under the Workmen's Compensation Act of the Province, no action would lie against the company, but only a claim against the Board for compensation. It was, indeed, suggested that the negligence of the company might have been the subject of a prosecution in British Columbia under secs. 283 or 284 of the Cr. Code; R.S.C. 1906, ch. 146, but criminal negligence was neither alleged nor proved in the Canadian Courts, and the Board cannot assume its existence. This being so, then on this ground also an action by the deceased would have failed, and the appellant's action fails also.

It was further suggested on behalf of the respondent company that the Fatal Accidents Act of Saskatchewan, R.S.S. 1920, ch. 62, is confined to cases of negligence occurring within that Province; but this question was not fully discussed, and their Lordships, therefore, express no opinion upon it.

For the reasons above given, their Lordships agree with the conclusion of the Court of Appeal, 66 D.L.R. 127, and they will humbly advise His Majesty that this appeal fails and should be dismissed with costs.

Appeal dismissed.

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TAXES (§IE—47)—OF MINERAL RIGHTS—SCHOOL ASSESSMENT ORDINANCE (ALTA.)—CONSTRUCTION—APPORTIONMENT.

The School Assessment Ordinance as amended by 1917 (Alta.) ch. 43 sec. 2, authorising the assessment of the interest of the owner or lessee of mining rights, does not authorise the assessment of both the interests of the owner and also the interest of a lessee in the same mining right, but authorises the assessment of the mining rights as a totality when no exemption applies to them, and authorises the assessment of a lessee's interest when and only when the owner's interest is exempt. In regard to land, the liability for taxes as between landlord and tenant is in the absence of agreement, on the landlord. The taxes in respect of a mining plant whether real or personal property where the plant is owned by several persons, should be paid by the parties in proportion to the value of their portions of the plant.

[*Reach* v. *Crosland* (1918), 45 D.L.R. 140; *Fitzgerald* v. *Firbank*, [1897] 2 Ch. 96; *Riddell* v. *McRae* (1917), 34 D.L.R. 102, 11 Alta. L.R. 414; *Freeburg* v. *Farmers Exchange Bankers* (1921), 61 D.L.R. 79, 14 S.L.R. 342, affirmed (1922), 63 D.L.R. 142, 15 S.L.R. 318, referred to. See Annotation, 40 D.L.R. 144.]

APPEAL from the judgment of Tweedie, J., on a special case as to the liability of the parties as between themselves, in respect of certain taxes, the questions submitted are fully set out in the judgment of Beck, J. A.

Parlee, Freeman, Mackay and Howson, for appellant.

Hyndman, Milner and Matheson, for respondent.

The judgment of the Court was delivered by

BECK, J.A.:—This is an appeal from the decision of Tweedie, J. on a special case.

The question between the parties is as to the liability as between themselves in respect of certain taxes; the defendant being the landlord and the company the tenant. In England, there are and have been for centuries a variety of rates and taxes, in respect of which the burden is, apart from agreement or statutory provision, in some instances on the landlord, and in some instances on the tenant; the former being colloquially spoken of as "landlord's taxes"; the latter as "tenant's taxes". See Foa's Landlord & Tenant 5th. ed. pp. 182, 201, 208; Cockburn's Law of Coal and Coal Mining, p. 300. There is no doubt that in this jurisdiction, in the absence of agreement, the burden of paying the taxes arising from the assessment of land under our Municipal and School Assessment Acts, is on the landlord. This view of the law is traditional with us and is recognized and taken for granted in the Land Titles Act, 1906 (Alta.) ch. 24 sec. 55, providing for an implied covenant on the part

of the tenant to "pay all rates and taxes which may be payable in respect of the demised land during the continuance of the lease." That is, if there is no covenant, express or implied on the part of the tenant, to pay taxes the law places the obligation to pay the taxes. The particular Act which we have to interpret is the School Assessment Ordinance C.O. (Alta.) 1915, ch. 105. By sec. 26, all property real and personal, except certain exemptions, are made subject to assessment. In subsequent sections of the Ordinance, "land" is used as an equivalent for " real property." Section 2, clause 6 (amended 1917 (Alta.) ch. 43, sec. 2.) reads:—

"The expression 'land' means lands, messuages, tenements and hereditaments, corporeal and incorporeal, of every nature and description and every estate or interest therein, and whether such estate or interest is legal or equitable, *together with* all paths, passages, ways, water-courses, liberties, privileges, easements, mines, minerals and quarries *appertaining thereto*, and all trees and timber thereon or thereunder lying or being, and without in any way restricting the generality of this description land shall also include for the purpose of this Ordinance the interest of an owner or lessee of mineral rights."

The foregoing clause was inserted in the School Assessment Act for the first time in 1917 (Alta.) ch. 43, sec. 2. With the exception of the words with reference to "mineral rights" it is a verbatim copy of sec. 2, clause (a) of the Land Titles Act (Alta.), ch. 24.

I think it quite beyond question that, subject to some exceptions, which I will notice, the intention of this Assessment Act is that a parcel of land should be assessed as an objective totality and that is not intended that particular legal or equitable interests should be looked for and when found assessed to their respective owners; that it was never intended that, for instance, the respective interests of a tenant for life, remainderman, mortgagee, landlord, tenant, the owner of an easement, or of trees, should be separately assessed.

The purpose, therefore, of the wideness and inclusiveness of the definition is merely to make it clear that on the placing of the surface description of the land in the assessment roll all the things included in the definition are deemed to be included in the assessment. This view does not prevent an increase in the amount of the assessment on the ground of such of the things enumerated as are a benefit

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to the land assessed increasing its value or prevent an increase in the amount of the assessment of adjacent lands on the ground of such of the things enumerated as are a benefit to it while assessed as part of other lands increasing its value. See *A. J. Reach Co.* v. *Crosland* (1918), 43 O.L.R. 209; affirmed 45 D.L.R. 140 (annotated), 43 O.L.R. 635.

In the ordinance, there are some express exceptions to the principle of assessing an objective totality.

Section 26 (the exemption section) expressly provides for the assessment of the interest of the occupant or person interested in Crown Lands i.e. ordinary Crown lands and Indian lands.

Before pursuing the interpretation of the ordinance, I refer to the history of the amendment of 1917.

In January, 1917, in the case of the *Town of Coleman* v. *Head Syndicate* (1917), 11 Alta. L.R. 314, Harvey, C.J., held, and his decision was affirmed on appeal (see 11 Alta. L.R. at p. 319), that under the Town Act, 1911-12 (Alta.) ch. 2, minerals were not assessable.

As that Act then stood, it was enacted that all lands should be liable to assessment, subject to certain exceptions, (sec. 266). An interpretation of land was given in sec. 2, sub-sec. 9 as follows:—

" 'Land' includes lands, tenements and hereditaments and any estate or interest therein, and, for the purposes of assessment only, 'land' means land and any estate or interest therein, exclusive of the value of buildings or other improvements thereon."

In that case the defendant had a certificate of title for an undivided half interest in "all minerals, other than gold and silver, which may be found to exist within, upon or under" the lands.

The letters patent upon which this certificate of title was founded recited that "the grantees have applied for a grant of the *mining rights* in the said land," etc., and then granted "all *minerals* other than gold and silver, which may be found &c, subject to the payment of compensation to the owner or occupant of such lands as provided by any regulations of the Governor-in-Council on that behalf.

I interpose the observation that in the Patent "mining rights" and "minerals" are used equivalently and also that in the Regulations affecting Dominion Lands (Consolidation of 1889) not only are the same expressions used equivalently but "surface rights" is used as equivalent to the ownership of the surface. (See pp. 858 *et seq.* caption preceding sec.

44; secs. 44, 48, 49, 50; pp. 848 *et seq.* sec. 8; Dominion Mining Regulations pp. 896-7, form "Surface rights.")

No reasons are reported for the affirmance of the opinion of Harvey, C. J., which must, therefore, be taken to have contained nothing of moment with which the Appellate Division disagreed. After quoting the provisions of the Town Act quoted above, Harvey, C.J., 11 Alta. L.R., at p. 316, quoted the definition of "land" from the Land Titles Act, which I have quoted above; and referring to the two definitions—the one in the Town Act, the other in the Land Titles Act; in which latter he italicizes the words "*together*" with and "*appertaining thereto*" as I have done,—he says at pp. 316, 317,:—

"The expression 'estate or interest' in both Acts is the same, and apparently therefore has the same meaning in each. . . . . It is to be noted that in the extended definition of 'land' in the Land Titles Act the word is not stated to mean or include mines and minerals but rather to mean something which does include the mines and minerals which are stated not to be, but to 'appertain to' the land. Where they are excepted, they are not even included. They are in the same class as 'ways', 'watercourses' etc. It would not, I presume, occur to anyone that a person who had a right-of-way or other similar easement in respect of a particular parcel of land was, thereby, liable to be assessed as the owner of the land and to be called upon to pay the taxes. . . . In this view, we are still left with the consideration of whether 'minerals' are an 'estate or interest' in lands. They, quite clearly, are not the land because if they are all removed, the land will still be there. In a common meaning of the word 'interest' a person who owns them might be said to have or even own an interest in the land, but we would say that his 'interest' is as owner of the minerals, not that his interest is the minerals. Moreover, it appears to me that the use of the word in the expression 'estate or interest' limits its meaning to something of a character similar to 'estate'. The term 'estate' as applied to interests in lands has a well recognised meaning due to the fact that under our law a person is not deemed to be the absolute owner of land but only of something which has for a long time been designated as an 'estate' in it."

The Chief Justice, after some further observations, concluded with the opinion that minerals were not assessable under the Town Act not even if the extended definition of

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"land" in the Land Titles Act were to be deemed applicable to the former Act.

It was in consequence of the decision of the Court in the above mentioned case that the law was amended in 1917:—

The Town Act by adding in 1917 (Alta.) ch. 24, to sec. 2, sub-sec. 4 the words:—(a) 'Owner' shall also mean and include the holder of any lease of any mineral rights from the Dominion of Canada," and to sec. 2 sub-sec. 9 the words:—"And the interest of a holder of any lease of any mineral rights from the Dominion of Canada."

The Rural Municipality Act, 1911-12 (Alta.) ch. 3, was also similarly amended 1917 (Alta.) ch. 26, and the extended definition of land already quoted was introduced into the School Assessment Act.

The situation at the time of the amendment being made was then this:—This Court had held that minerals were not assessable, under an authority to assess land, even though land was expressly declared to include mines and minerals *appertaining thereto.*

It is perfectly clear then that the purpose of the amendment of 1917 was to make minerals assessable. This purpose was effected in a very clumsy way in amending the School Ordinance, and the amendment must, I think, be construed in this way. The ordinance makes real property assessable; "land" and "real property" are used interchangeably in the assessment provisions. The amendment means to declare that for assessment purposes—the Ordinance is directed only to assessment—"real property" or "land", which the Court had declared meant nothing but land, shall include also "mineral rights"—that is to say:—include in the sense, not that, if land is assessed, every estate or interest in it or thing appertaining thereto is enveloped in the assessment, because not separately assessable, but in the sense that "mineral rights" may be assessed as a distinct and separate object of taxation.

I think it clear for the reasons I have indicated, namely, the common use of the expression, and the historical reason for the amendment, that the expression "mining rights" or "mineral rights" means "minerals".

I think it also clear that the use of the expression "interest of the owner or lessee of mineral rights" is not intended to derogate from the fundamental principle of the Assessment Act, that it is the objective totality which is to be

assessed, unless, by reason of exemption, the interest of the owner is non-assessable in which latter event, and then only, can a less interest than the whole ownership be assessed. Consequently, I interpret the words authorizing the assessment of the interest of the owner or lessee of mining rights not as authorizing the assessment of both the interest of the owner and also the interest of a lessee in the same mining rights; but as authorizing the assessment of the mining rights as a totality when no exemption applies to them and as authorizing assessment of a lessee's interest when and only when the owner's interest is exempt.

The "natural resources" in this Province are generally speaking vested in the Crown in right of the Dominion; and so far as they still remain in the Crown they are, of course, not assessable. In some comparatively few instances, prior to the year 1887, the mineral rights have been granted to individuals and they were included, I believe, in the grants to the Hudsons Bay Co. and the Canadian Pacific R. Co., in whose hands they are, to a large extent, exempt. In recent years, mineral rights have, I think, been parted with by the Crown only by way of lease. It was, doubtless, primarily, to enable the interests in mineral rights held under lease from the Crown to be assessed that the amendments of 1917 were passed.

As in the case of land, so in the case of interests in Crown lands or other exempted lands, I think it is the objective totality of the interest which is not exempted that is assessable. So too, I think in the case of mineral rights it is the objective totality that is assessable, namely, the minerals themselves, if assessable, by reason of the Crown having parted with them, or, in case it has done so, if they are not otherwise exempted, the interest of a lessee only where the minerals themselves are not assessable. Where the minerals are themselves assessable, in my opinion, no interest can be carved out so as to assess both the minerals and that interest. To repeat, the objective totality alone can be assessed. In the present case, presumably the defendant owns the minerals, but by virtue of sec. 29, the plaintiff company, as being in occupation or possession of some part, at least, of them, was apparently properly assessed.

In making such an assessment, the fact that they were being worked would properly be taken into account in ascertaining their value for assessment purposes. The proper form or method of assessment, however, does not effect the respective right of different parties interested

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in the thing assessed. The Assessment Acts do not purport to touch that question. It must be determined by the general law applicable to the relationship between the parties. Now, what is that relationship? So far, I have gone, apparently, on the assumption that it was that of landlord and tenant as was virtually assumed throughout the argument. But I think this assumption is wrong. The document creating the relationship between the parties is called an "agreement". The defendant is called the "owner", Gilliland the predecessor of the plaintiff company is called the "operator". The agreement commences with words of covenant between the "owner" and the "operator" containing nineteen clauses. There is no grant or lease. The word tenant is not used. It seems clear that the document is not a lease. The effect of the document is to create that kind of a right which is called a *profit a prendre*; a right which is more than a mere license, more than a mere easement, but yet not a tenancy. See 19 Corp. Jur. *tit.* Easements, p. 870; *Fitzgerald* v. *Firbank*, [1897] 2 Ch. 96; 20 Hals. *tit.* Mines, Minerals & Quarries, pp. 567, *et seq.*

As I have already pointed out, apart from agreement in the case of land, the liability for taxes as between landlord and tenant is upon the landlord. It seems to me that it is unquestionable that if the owner of minerals grants a lease of them, that liability is likewise on the landlord. In the case of the owner of minerals granting a license in the nature of a grant of *profit a prendre* it is not open to argument that the same rule does not apply. Consequently, it would appear to be beyond question that the defendant in this case, being the owner of the mineral rights, must bear the taxes in respect of those rights.

In the result then, I hold that the taxes against the "surface rights" must be borne by the defendant and that likewise the taxes against the "mining rights" must also be borne by him.

With regard to the plant, it appears that some portion of the plant is the defendants and some portion the plaintiffs. In my opinion, the taxes, in respect of plant whether real or personal property, falls upon the owner.

With regard then to the plant, my opinion is, that each of the parties ought to bear the taxes in proportion to the value of his portion of the plant.

With regard to the right of the tenant paying taxes, which, as between himself and his landlord, the landlord ought to pay, reference may be made to the following authorities.

Riddell v. *McRae* (1917), 34 D.L.R. 102, 11 Alta. L.R. 414; 27 Am. & Eng. Ency. of Law 2nd. ed. p. 265; Sheldon on Subrogation, 2nd. ed., paras. 9, 36a; *Dunlop* v. *James* (1903), 67 N.E. Rep. 60; *Freeburg* v. *Farmers Exchange Bankers* (1921), 61 D.L.R. 79, 14 S.L.R. 342; affirmed 63 D.L.R. 142, 15 S.L.R. 318; 24 Cyc. p. 1074. The right is based upon the well established rule that one interested in property may protect his interest by paying charges against the property and is entitled to be subrogated to the rights, though not always perhaps to the precise remedies of the creditor.

In the result, the questions submitted to the Court should be answered as follows:—1. Does the lease impose any liability upon the Banner Coal Co. Ltd. for the payment of the taxes assessed against "Gervais' mining plant" and (or) the "company's mining plant?" and (or) the coal rights in or under the above described lands? A. No. 2. In the event of Q. 1 being answered in the negative, does the School Assessment Ordinance, read either with or without the lease, impose or create any liability on the Banner Coal Co. Ltd., or as between the company and Gervais, for the payment of such taxes? A. Yes, so far as the School District is concerned but not as between plaintiff and defendant, except as to the portion of the plant owned by the plaintiff. 3. In the event of questions 1 and 2 being answered in the negative, is the Banner Coal Co. Ltd., at liberty, by reason of the seizure of its property and threat of sale to deduct from the royalties payable to Gervais the amount of such taxes, paying the same to the School District? A. Yes except as to the portion of the plant owned by the plaintiff.

I think the defendant should bear the costs below and of the appeal.

Judgment accordingly.

November 28th.—BECK, J.A.:—Since the reasons for judgment were given in this case it has been brought to our notice that the assumption that the defendant Gervais was the owner of the minerals was incorrect—that he was the holder of a "lease" from the Dominion Government. This document is called a lease, Gervais is called the lessee, the words of grant are:

"Doth grant and demise unto the lessee, full and free and sole and exclusive license and authority to win and work all mines, seams, and beds of coal in, on or under the said lands;" . . . . .

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"Together with full and exclusive license and authority for the lessee and his agents, servants and workmen to search for, dig, work, mine, procure and carry away the coal in such mines, seams, and beds wherever the same may be found within the limits of the said lands, and to dig, sink, drive, open and work such excavations, pits, shafts, levels, drifts, tunnels, and other works within and to construct such buildings and erections, machinery and appliances upon the said lands as shall from time to time be necessary and proper for the efficient working of the said mines, seams and beds of coal and for runnnig, raising, removing and making fit for sale of the coal therein and with all and every the rights and privileges granted to lessees in and for the said Regulations," i.e. the Regulations made by order-in-council for the disposal of coal mining rights, the property of the Crown referred to in sub-sec. 2 of sec. 3 of the Dominion Lands Act, ch. 55.

In the recent case of *Little* v. *Western Transfer & Co.*, (1922), 69 D.L.R. 364, this Court pointed out the distinction between a grant having the effect of a grant of mineral strata and a grant having the effect of a grant of a mere right to take the minerals. My present impression is that the Government "lease" has not alone the effect of granting a mere license to take the coal, but has also the effect—to accommodate the words used in the above mentioned case—of granting the property and exclusive right of possession of the whole space occupied by the layers containing the minerals and after the minerals are taken out the entire and exclusive user of that space for all purposes, i.e. during the term of the lease, and consequently I am of opinion that the document is a lease. If it is, then the reasoning which we have already applied to the case on the assumption that the defendant was the owner applies equally if he is a lessee from the Crown. Even if upon a most careful dissection of all the terms of the Government "lease" it might be held not to be a lease of strata of coal yet in view of the provisions of the Dominion Lands Act, the Regulations; and the fact that the Standard Departmental form is used, it must be taken that the interest created by this instrument is the interest which is intended by the Provincial assessment provisions.

The decision already given must therefore stand.

HYNDMAN and CLARKE, JJ.A., concurred.

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British Columbia Court of Appeal, Macdonald, C.J.A., Martin, Galliher, McPhillips and Eberts, JJ.A. October 3, 1922.

INTOXICATING LIQUORS (§ IIIA—55)—UNLAWFUL SALE OF BEER—PENALTY UNDER GOVERNMENT LIQUOR ACT, 1921, B.C., CH. 30.

The penalty for a first offence of illegally selling beer in contravention of sec. 46 of the Government Liquor Act, 1921 B.C., ch. 30, sec. 46 is that prescribed by sec. 63, *i.e.* not less than $50 and not more than $100.

APPEAL (§ VIIIB—673)—FROM ORDER OF COUNTY JUDGE AFFIRMING A SUMMARY CONVICTION—POWER TO REDUCE EXCESSIVE PENALTY—GOVERNMENT LIQUOR ACT, 1921, B.C., 1ST SESSION, CH. 30, 1921, 2ND SESSION, CH. 28—COURT OF APPEAL ACT, R.S.B.C. 1911, CH. 51 AND AMENDMENTS—SUMMARY CONVICTIONS ACT, 1915, B.C., CH. 59 AND AMENDMENTS.

Where a penalty in excess of that authorized by law has been imposed by the magistrate in a summary conviction for an offence under the Government Liquor Act, 1921 B.C., ch. 30, and the conviction has been affirmed on appeal to a County Court Judge, the Court of Appeal for British Columbia has jurisdiction on a further appeal taken from the County Judge's decision to amend the penalty of the conviction by virtue of the Court of Appeal Act, R.S.B.C. ch. 51 sec. 6 and B.C. Practice Rule 868.

COSTS (§I—2C)—OF APPEAL TO COURT OF APPEAL—APPEAL FROM ORDER OF COUNTY JUDGE ON SUMMARY CONVICTION RE-HEARING—NO COSTS FOR OR AGAINST CROWN—SUMMARY CONVICTIONS ACT, 1915, B.C., CH. 59—CROWN COSTS ACT, R.S.B.C. 1914, CH. 61—COURT OF APPEAL ACT, R.S.B.C., 1911, CH. 51.

Where the Court of Appeal (B.C.) hearing an appeal from a County Court Judge upon the latter's re-hearing of a summary conviction proceeding under provincial law reduces the penalty as in excess of that authorized by law but otherwise affirms the conviction, the order of the County Court Judge as to costs will not be interfered with. The Crown Costs Act, R.S.B.C. ch. 61 does not permit a direction against the Crown to pay the costs of the appeal, taken to the Court of Appeal.

[*Re Van Horne Estate* (1919), 47 D.L.R. 529, 27 B.C.R. 269, and (1921) 61 D.L.R. 194, applied.]

APPEAL from an order of Lampman, Co. J., of June 12, 1922. Reversed.

H. B. Robertson, for appellant.

C. L. Harrison, for respondent.

MACDONALD, C.J.A. would allow the appeal.

MARTIN, J.A.:—According to our decision at the close of the argument the penalty for selling beer under sec. 46 of the Government Liquor Act 1921, (B.C.) ch. 30, is prescribed by sec. 63, and for a first offence it is "a penalty of not less than fifty dollars nor more than a hundred dollars . . . . ." But the accused being first offenders were wrongly sentenced to imprisonment under sec. 62 and the question is, have we the power to impose the proper penalty and amend the conviction accordingly? By secs. 77 and 80 of the Summary Convictions Act, 1915, (B.C.), ch. 59 the County Court properly appealed to under sec. 75 had that

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power and the proceedings are a re-trial *de novo* "as well of the facts as of the law in respect to such conviction", and upon fresh evidence, if desired, sec. 78.

By our Court of Appeal Act, R.S.B.C. 1911, ch. 51, sec. 6 sub-sec. 4 (*f*), "an appeal shall lie (to us) . . . . from any point of law taken or raised on an appeal to the County Court under the Summary Convictions Act."

The imposition of the proper penalty is clearly a point of law, and counsel for the Crown submits that, as this appeal to us is one in the exercise of our ordinary appellate jurisdiction, we should exercise the power conferred upon us by Rule 868 and "give (the) judgment and make (the) order" which the Judge below "ought to have made" in this respect as was done by the County Court Judge in *Rex* v. *Fleming* (1921), 65 D.L.R. 229, 36 Can. Cr. Cas. 335. This submission is, in my opinion, correct and is in accordance with the principle of our decision in *Alexander* v. *Vancouver Harbour Commissioners* (1922), 65 D.L.R. 355, and with my views at least in *Re Assignment of Kwong Tai Chong Co.* (1922), 65 D.L.R. 132.

In *Rex* v. *Sally* (1920), 33 Can. Cr. Cas. 350, 28 B.C.R. 268, where it was conceded (as it must be here after our decision) that a wrong penalty was imposed, we reduced the sentence to the proper term though that was not an appeal from a County Court but from a Judge of the Supreme Court refusing *certiorari* to quash a conviction, and we have, at least, as much power herein, and so I think the penalty should be $50, and, in default, imprisonment for 2 months with hard labour, and the conviction should be amended accordingly.

As to the costs: the present successful appellant paid them below to the informant, the Victoria Chief of Police, pursuant to the order of the County Judge appealed from, who had complete and express discretion over them, and as against "either party", conferred by said secs. 77 and 80, and I see no reason to alter this direction because the conviction was good though the penalty was bad. As to the costs of this appeal they stand on a different footing, and I do not see how we can order the Crown to pay them, though unsuccessful, in the light of our decision in *Re Succession Duty Act and Estate of Van Horne* (1919), 47 D.L.R. 529, 27 B.C.R. 269.* wherein we held that though a discretion in the Court below was there, as here,

*Editors note.
(See (1921), 61 D.L.R. 194 reversing (1920), 56 D.L.R. 226 and restoring 47 D.L.R. 529.)

"expressly authorised" by sec. 2 of the Crown Costs Act, R.S.B.C. 1911, ch. 61, yet that express authorization could not "be expanded to cover appeals in general" to this Court.

GALLIHER, J.A.:—The appellants were convicted by Police Magistrate Jay on a charge of selling liquor contrary to the Government Liquor Act 1921 (B.C.) ch. 30, and sentenced to six months' imprisonment. An appeal was taken to Lampman, Co. J., who dismissed the same. Appeal was then taken to this Court.

At the hearing it was decided that the appeal should be allowed, as the punishment imposed was as for an offence committed under sec. 26 of the Act, 1921 (B.C.) ch. 30, whereas it should have been under sec. 46 of said statute and was in excess of what should have been awarded, subject to the consideration as to whether this Court had power to affirm the conviction and impose the proper penalty.

Section 80 (1) of the Summary Convictions Act, 1915 (B.C.), ch. 59, is as follows:—

"80. (1) In every case of appeal from any summary conviction or order had or made before any Justice, the Court to which such appeal is made shall, notwithstanding any defect in such conviction or order and notwithstanding that the punishment imposed or the order made may be in excess of that which might lawfully have been imposed or made, hear and determine the charge or complaint on which such conviction or order has been had or made, upon the merits, and may confirm, reverse, or modify the decision of such Justice, or may make such other conviction or order in the matter as the Court thinks just; and may by such order exercise any power which the Justice whose decision is appealed from might have exercised, and may make such order as to costs to be paid by either party as it thinks fit."

Under this section there seems to be no doubt that the County Court Judge below could (had he come to the same conclusion as this Court) have so modified the conviction and this Court on appeal can make the order which the Judge below could have made.

The conviction, therefore, stands varied to this extent: that the penalty imposed shall be payment of the sum of $50 and in default of immediate payment, to imprisonment for 30 days, with hard labour. To this extent the appeal is allowed.

With regard to the costs below the special statute gives the Court below discretion to award costs to either party, and these are not interfered with.

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As to costs of appeal, this Court has already decided in the *Van Horne Estate* case *supra* that they come within provisions of the Crown Costs Act, and no costs can be given either party.

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

Appeal allowed and conviction varied.

MACINTYRE v. MILLER.

Alberta Supreme Court, Appellate Division, Stuart, Hyndman and Clarke, JJ.A. October 28, 1922.

PRINCIPAL AND AGENT (§ III—36)—AGENT UNDERTAKING TO PROCURE CERTAIN SHARES—NO DEFINITE TIME FOR COMPLETION OF WORK—RIGHT OF PRINCIPAL TO MAKE OTHER ARRANGEMENTS—AGENT'S WORK RENDERED VALUELESS—RIGHT OF AGENT TO RECOVER COMMISSION.

Where a person acting as agent for another undertakes to procure persons who will be willing to purchase certain shares and subsequently give an option the principal to sell same to him at a fixed increased price, there being no definite fixed period in which the work is to be completed and the agent proceeds to carry out the scheme but before it comes to fruition the principal makes other arrangements with other parties, rendering the agent's work valueless and putting an end to the necessity for his further services. The agent is not entitled to recover the commission agreed to be paid on the completion of the work, nor can he recover on a *quantum meruit* especially where no such claim is made in the pleadings.

APPEAL by plaintiff from the trial judgment in an action to recover, for services rendered, or damages for breach of contract.

The facts of the case are fully set out in the judgments reported.

A. M. Sinclair, K.C., for appellant.

F. C. Meyer, for respondent.

STUART, J.A., concurs with CLARKE, J.A.

HYNDMAN, J.A.:This is an appeal by the plaintiff from the judgment of Ives, J.

The appellant is a solicitor practising at the town of Drumheller and the respondent is a coal mine operator of the same place.

It appears that the respondent during the year 1917 was desirous of purchasing or gaining the control of certain shares in the Premier Coal Co. Ltd., about 15·000 in all, held by one Patrick and the others, and consulted the plaintiff relative to the acquisition thereof.

Originally, efforts were made to induce certain persons to agree to purchase these shares from the defendant providing he could first purchase them at a price which would net him a fairly substantial profit, but these efforts failed.

Subsequently, defendant requested plaintiff to try to evolve for him some scheme whereby he might become the owner of the shares and the former promised to take the matter under consideration.

What took place was related by the plaintiff as follows:—

"The negotiations with Erne went on for a very considerable time and latterly Miller got tired, after the negotiations with Erne, and I went over to Erne's store and Erne told me that he decided not to purchase the shares. I saw Miller after that and informed him of what Erne had told me, and then he put up this proposition to me 'can you tell me any way whereby I myself can become the owner of the shares?'. I said I would take the matter into consideration and outline a plan and that he should call to see me again in regard to it. He agreed to do that. When Miller called I told him that I had outlined a plan and that I would require a substantial fee before I would be prepared to disclose it to him. He said 'all right, let me know what it is'. So I outlined the proposition to Miller and as a consequence of the plan that I suggested to him, he stated that he would allow me or give me 5,000 of the shares to be purchased from Dr. Patrick. Q. What did you say to that? A. I agreed to take the 5,000 shares. Q. Now, what was the arrangement? A. The arrangement was to this effect. I was to introduce parties who would be prepared to take up certain of these shares but Miller first of all was to purchase the shares or make a proposition to Dr. Patrick and then these people were ready to furnish the money with an option to Miller to repurchase from them. Q. Now, did you make any effort to carry this out? A. As a consequence of what Miller told me, I approached two or three different men. The first proposition; if my memory serves me right, was this. I suggested that Miller should raise the money on a mortgage over his own house. He agreed to do that and executed a mortgage in blank. However, I did not know how much money I would get."

Plaintiff says that he succeeded in obtaining cash and promises to the extent of $5,750 and told defendant "we are now in a position to make a proposition to Patrick for the purchase of the shares." Miller then asked him to let the matter stand for "about 2 days."

It is not material to relate the particulars but the fact is that Miller, unknown to plaintiff, was working in conjunction with one Gibson to acquire the same shares and, apparently, did obtain them without in any way making

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use of the services of the plaintiff or the persons with whom plaintiff was negotiating, and the services of the plaintiff were dispensed with and, consequently nothing came of his efforts.

Plaintiff's evidence of what then took place is as follows:—

"The time spent in my office was very short, Gibson just stepped out and I said to Miller 'wait a minute, I want to talk to you in regard to this commission coming to me' and Miller came over and sat down on the chair to my right hand side. I said 'I want to put this in writing' and I had written only about one line when Miller got up to go out and he said this to me. 'This will have to be in cash now on account of this pooling agreement,' meaning whereby the commission coming to me would be in cash instead of in shares. Now, I agreed to take the cash instead of the shares. Q. And you were proceeding to put the agreement in writing? A. I had only about 1 line when he got up and he was afraid that Gibson might not come back. He was afraid because Gibson did not know of any of these negotiations going on between Miller and myself. Q. Then what happened after that? A. Well, Miller left the office after that, having made that promise."

After this, the parties met each other on several occasions, and according to the plaintiff's evidence, defendant promised to pay him commission, but the matter never got beyond a bare, and more or less indefinite, verbal promise to be deduced from their conversation and conduct.

There was, however, clearly no other or new consideration to support such latter promise, and I am unable to appreciate upon what ground any legal claim can be based in respect thereof. However as I understand it, it is not upon this promise the plaintiff really relies but upon the claim arising purely for commission as earned under the contract.

The promise referred to can, I think, be regarded merely as a circumstance in corroboration of the plaintiff's testimony as to the alleged contract.

In substance, I think, the claim resolves itself into this. With no limit as to time fixed, plaintiff acting as defendant's agent, was to procure persons who would be willing to purchase 15,000 shares then owned by Patrick *et al* and subsequently give an option to defendant to sell same to him at a fixed increased price. That plaintiff proceeded to carry out this scheme, but before it came to fruition defendant made other arrangements with other parties, rendering

plaintiff's work valueless and putting an end to the necessity for his further services.

Now, under these circumstances, I am inclined to think that a claim on a *quantum meruit* would lie. But no such claim is made and no amendment at the trial asked for, and whilst it was mentioned before us, was not strongly pressed. Furthermore counsel for defence objected to our allowing it and stated that in the event of our doing so he would have several amendments to the defence to move for

Considering the opportunities the plaintiff has had to set up this claim and the possible prejudice to the defence if allowed at this stage, I do not think we should now consider it.

The claim, therefore, must be restricted to a demand for the delivery of the 5,000 shares which plaintiff was to receive, or damages for the cancellation of his contract.

Admittedly, the shares were not acquired by defendant through any intervention of the plaintiff, but in another manner not disclosed. Therefore, it cannot be said that the plaintiff is entitled to an agreed remuneration accrued as the result of an executed contract because such is not the fact. Nor can he claim that the defendant purchased the shares by making use or taking advantage of any of the work done by plaintiff up to the time when the matter was taken out of his hands. If defendant had made use of any of the plaintiff's efforts then on the authority of *Burchell* v. *Gowrie & Blockhouse Collieries*, [1910] A.C. 614, I think he would have been entitled to his agreed remuneration. (See also *Kennedy* v. *Victory Land & Timber Co. Ltd.* (1922), 68 D.L.R. 201). But the evidence does not disclose that the plaintiff was the effective cause or at all of the purchase.

There seems then nothing left to consider but the right of defendant to cancel the arrangement and purchase the shares himself or through the agency of another party, the accomplishment of his purpose not being in any way traceable to the plaintiff. (See *Green* v. *Bartlett* (1863), 14 C.B. (N.S.) 681, 143 E.R. 613.

It cannot be denied that, unfortunately, there is a very great lack of definiteness or clearness of just what the arrangement was, but I take it that the very least to be expected was that before any commission could be said to have been earned, plaintiff must place himself in the position of being able to produce a person ready, able, and willing to enter into the proposed arrangement, that is,

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someone prepared to purchase Patrick's shares at 70, and further agreeable to execute an option in favour of defendant. To my mind, the evidence does not satisfactorily establish this as a fact, and the trial Judge so found.

At this stage then the contract if we can call it such, between the parties was terminated by defendant purchasing through another source.

There being no period fixed during which plaintiff was to complete the work, the agency was one at will and, therefore, I think terminable at any time.

In *Brinson* v. *Davies* (1911), 105 L.T. 134, 27 Times L.R. 442, 55 Sol. Jo. 501, it was held that:—

"Where the owner of property puts it in the hands of a house agent for sale upon commission, there is, in default of stipulations to the contrary, in the contract between the parties, an implied term that the owner shall be at liberty to sell the house himself or to employ other agents, and if a sale takes place by such means, the plaintiff is not entitled to commission although he has found a person prepared to purchase."

Pickford, J. at p. 135 said:—

"It seems to me that unless some specific terms were made between the parties to that effect, the putting of a house for sale into the hands of an agent does not prevent the owner of the house from selling it himself or from selling through another agent and if he does that before the relationship of purchaser and vendor arises between himself and the plaintiff's nominee, then the plaintiff has not found a purchaser, because the house has been already sold to someone to whom the owner had the right to sell it."

In *Wolf* v. *Tait* (1887), 4 Man. L.R. 59, Killam, J., delivering the judgment of the Court said. pp. 63-64:—

"Probably as good a statement of the law as can be found in the line of the cases just referred is that given by Field, J., in *Sibbald* v. *Bethlehem Iron Co.* (1881), 83 N.Y. 378. The duty he [the broker] undertakes the obligation he assumes as a condition of his right to demand commissions is to bring the buyer and seller to an agreement. . . . We do not mean that the broker must, of necessity, be present and an active participator in the agreement of buyer and seller when that agreement is actually concluded. He may just as effectually produce and create the agreement, though absent, when it is completed, and taking no part in the arrangement of its final details. In *Lloyd* v. *Matthews* (1872), 51 N.Y. 124 at p. 132, the phrase used was that the

broker was entitled to reward when the sale was effected through his agency as the procuring cause. And in *Lyon* v. *Mitchell* (1867), 36 N.Y. 235, at p. 237, the broad language is used that his efforts must have led to the negotiations which resulted in the purchase of the vessel. But, in all the cases, under all and varying forms of expression, the fundamental and correct doctrine is that the duty assumed by the broker is to bring the minds of the buyer and seller to an agreement for a sale and the price and terms on which it is to be made, and until that is done his right to commissions does not accrue. . . . It follows as a necessary deduction from the established rule that the broker is never entitled to commissions for unsuccessful efforts. The risk of failure is wholly his. The reward comes only with his success. That is the plain contract and contemplation of the parties. The broker may devote his time and labor and expend his money with ever so much of devotion to the interests of his employer, and yet, if he fails, if without effecting an agreement or accomplishing a bargain he abandons the effort, or his authority is fairly and in good faith terminated he gains no right to commissions. He loses the labor and effort which were staked upon success. And, in such event, it matters not that after his failure and the termination of his agency what he has done proves of use and benefit to his principal. In a multitude of cases that must necessarily result. He may have introduced to each other parties who otherwise would never have met; he may have created impressions which under other and more favorable circumstances naturally lead to and materially assist in the consummation of a sale; he may have planted the very seeds from which others reap the harvest; but all that gives him no claim. It was part of his risk that failing himself, not successful in fulfilling his obligation others might be left to some extent to avail themselves of the fruit of his labors. . . . Where no time for the continuance of the contract is fixed by its terms either party is at liberty to terminate it at will subject only to the ordinary requirements of good faith."

If the law as laid down in these decisions is correct, there being no time limit within which the plaintiff might operate, he was always subject to the risk of the defendant purchasing the shares himself or through the instrumentality of another, in which case, no claim to commission or compensation would ever accrue to him.

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Legally, at any rate, bad faith is not imputed to the defendant, although one would no characterize his conduct as highly moral or smacking of what we sometimes call "cricket". But the law being such as it is, the plaintiff should, before entering upon the business, have stipulated to avoid the very thing of which he now complains.

It was also contended that the real contract was that defendant should give 5,000 shares, if plaintiff would disclose the scheme which he had in his mind. But I do not think defendant could possibly have understood it in this light and such does not appeal to me as reasonable and, moreover, the statement of claim does not bear this out as it is expressly based on a contract of employment to find money for the aforesaid purposes.

Whilst it is regrettable that plaintiff should fail to reap any reward for his labour, nevertheless, if the law is on the side of the defendant, he is entitled to take advantage of it.

I would, therefore, dismiss the appeal with costs.

CLARKE, J.A.:—After much sympathetic consideration, I am unable to find any sufficient ground to justify a judgment in favor of the plaintiff. As the action is framed, the plaintiff is entitled to a sum approximating $3,500 or nothing. From the rather vague arrangement between the parties, I gather that the plaintiff's undertaking was to outline a plan whereby the defendant could acquire some 15,000 shares of the Premier Coal Co., then held by Dr. Patrick and his associates, which plan was that the plaintiff would procure persons who would contribute sufficient money to purchase the shares, the expected price being at the rate of 70 cts. per share and that upon the purchase being made the shares would be transferred to the contributors, who would, in turn, give an option to the defendant to purchase them, the price not being specified the plaintiff says "the idea was to buy them in at a dollar"—and for carrying out this arrangement, the plaintiff was to receive from the defendant one-third or approximately 5,000 of the shares to be purchased.

It is evident that the plaintiff could not receive these shares from the defendant until the latter acquired them and he could not acquire them unless the contributors furnished the money and actually acquired the shares and further, unless the defendant exercised the option to take them and actually acquired them from the contributors.

The plaintiff entered upon the carrying out of the plan and arranged for a considerable sum of money but that is far short of what was required to be done to entitle him to the shares for even if he had procured all the money necessary to obtain the shares, and had actually obtained them for the contributors, there still remained the exercise of the defendant's option, and his ability to carry it out before the plaintiff would be entitled to his reward. I do not see how it can be said the liability to hand over the shares to the plaintiff ever arose.

The plaintiff, however, makes an alternative claim based upon a promise by the defendant to pay the value of the shares in cash. I think no effect can be given to this promise for want of consideration. In my judgment, it was a mere *nudum pactum*. There remains the question of the plaintiff's right to recover for the services performed by him as upon a *quantum meruit* or as damages by reason of the defendant by his act preventing the plaintiff from earning his commission. I think this does not arise upon the pleadings, but if it were open I think the plaintiff must fail in this also.

It is not clear what interest the defendant eventually acquired in the shares procured from Dr. Patrick. It would appear that he did not obtain more than half of them and for all that appears, they may be encumbered for the purchase price. It is not shown that the defendant obtained them in his own right, and even if he did it was not by reason of any assistance from the plaintiff. It cannot be said that the plaintiff lost anything by being prevented from carrying out his plan. I think it very doubtful that the plaintiff would have procured the requisite money to obtain the shares under his plan, but even if he did, the defendant was not bound to exercise the option and as I think very probable, he may not have had the ability to carry it out even if exercised, and in either case, the plaintiff would have received nothing, his position is no worse by reason of the purchase of the shares in the manner they were purchased so that even if the defendant violated his agreement, the plaintiff suffered no damage by reason thereof.

I think the appeal must be dismissed with costs.

Appeal dismissed.

B.C.

C.A.

REX v. THOMPSON.
REX v. READER.

British Columbia Court of Appeal, Macdonald, C.J.A., Martin, Galliher, McPhillips and Eberts, JJ.A. October 3, 1922.

APPEAL (§IIIE—90)—BY CROWN FROM REVERSAL OF SUMMARY CONVICTION BY COUNTY COURT JUDGE—NOTICE OF APPEAL—SERVICE ON FORMER SOLICITOR FOR ACCUSED HELD INSUFFICIENT WITHOUT EVIDENCE OF HIS CONTINUED AUTHORITY—SUMMARY CONVICTIONS ACT, 1915, B.C., CH. 59 AND AMENDMENTS; COURT OF APPEAL ACT, R.S.B.C. 1911, CH. 51 AND AMENDMENTS; GOVERNMENT LIQUOR ACT, 1921, B.C., CH. 30; 1921; 2ND SESSION, CH. 28.

Where a person accused of an offence against the Government Liquor Act, 1921 B.C. ch. 30 was convicted by the magistrate but the conviction was quashed on appeal to a County Court Judge, a further appeal by the Crown to the Court of Appeal to re-instate the conviction cannot be heard unless notice of appeal has been served on the defendant. Service on the solicitor who had represented the defendant before the County Court Judge will not be sufficient in the absence of evidence that he still represented the accused; and where the latter had left the country immediately on his acquittal by the County Court Judge, the inference is that the solicitor is no longer acting for him.

APPEAL by the Crown from the judgment of Brown, Co. J. May 11, 1922.

W. D. Carter, K.C., for appellant (Crown).

No one appeared for accused.

MACDONALD, C.J.A. and EBERTS, J.A., would dismiss the appeal.

THOMPSON'S CASE.

GALLIHER, J. A.:—On February 24, 1922, the accused Pete Thompson, was convicted of selling liquor and sentenced to 6 months in the common gaol at Nelson by Neil McCallum, Stipendiary Magistrate for Yale County, B.C.

On motion by way of appeal to the County Court Judge of Yale, the conviction was, on May 3, 1922, quashed. From this judgment the Crown appeals to this Court. Counsel for the Crown (no one appearing for the respondent) stated that he had been unable to effect personal service of the notice of appeal upon the accused he having left the Province and gone to the United States, and that failing to make such service, after every effort to do so, he had caused a copy of the notice of appeal to be served on C. F. R. Pincott, who had appeared as solicitor for the accused on the appeal to the County Court. This is confirmed by an affidavit of service which appears in the appeal book.

There is no evidence or suggestion that Mr. Pincott was, at the time of service, acting in any capacity for the accused, and the inference is all the other way as the accused had left the country.

The question to be determined is: Is such service sufficient to give this Court jurisdiction to hear the appeal? In my opinion, it is not.

Our rules provide that notice of appeal shall be served on all parties affected by the appeal. Here there was no service upon the accused nor upon any person representing him.

The most recent case I have been able to find is *Godman* v. *Crofton*, [1914] 3 K.B. 803, 83 L.J. (K.B.) 1524, where most of the cases bearing on the point are considered. There it was held Coleridge, J., 83 L.J.(K.B.) at p. 1527, that there was *prima facie* evidence that the solicitors upon whom the notice was served were still acting on behalf of the respondent and, therefore, were acting as the agents of the respondent in receiving the notice of appeal, and in such a case, personal service was not necessary. With this view, the others, Avory and Atkins, JJ., concurred.

As I before pointed out, neither the accused nor any one that could be said to be representing him was served.

As will be seen by a reference to the cases cited, and referred to in *Godman* v. *Crofton*, *supra*, there is some conflict of authority on the point, but none of them go so far as to say that the Court can entertain an appeal on facts similar to those in the case at Bar.

READER'S CASE.

GALLIHER, J. A.:—In this case as the facts are similar to those in *The King* v. *Thompson* in which I have just handed down my judgment, the result will be the same.

MARTIN, J. A. (dissenting): These appeals are governed by our decision in *Rex* v. *Johnson* (delivered on June 29, last) unless we have no jurisdiction to entertain them because of the notice of appeal not having been served upon the respective respondents "within 10 days after the conviction" as required by sec. 76 (*b*) of Summary Convictions Act, 1915 (B.C.) ch. 59, as amended by 1918 (B.C.), ch. 87, sec. 3. It appears from the affidavits filed that everything that was reasonably possible to be done was, in fact, done to effect said service, but it was impossible to effect it because the respondents had left this country immediately after their acquittal and gone to parts unknown in the United States. Service was made within due time upon the solicitor who had acted for them at their trial, but we are informed that he said he had no authority to continue to do so, and as there was nothing to be done in the working out of the judgment (conviction) the service

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upon him was unauthorized and wholly ineffectual upon the principle we recently laid down in *Sunder Singh* v. *Macrae*, (1922), 65 D.L.R. 392.

We have been referred to the case of *Wills & Sons* v. *McSherry*, [1913] 1 K.B. 20, 82 L.J. (K.B.) 71, 28 Cox. C.C. 254, 29 Times L.R. 48, in support of the submission that it in principle covers the facts at Bar and after a careful examination of it, I am of opinion it does so, and hence, we have jurisdiction herein. There are additional facts, it is true, in the *Wills* case which are absent from these, and there has been an unfortunate conflict of authority in the English cases but from the *Wills* case there is to be extracted from the judgment of each of the three Judges who sat on it, the clear opinion, stripped of extraneous circumstances, that where "the appellant had done everything in his power to serve the respondent and it was shown that it was impossible to do so" then that "is a valid excuse for not complying with the section", as Lord Alverstone, C. J., puts it at pp. 22-23 and the other Judges concurred, which concurrence involved the overruling of *Foss* v. *Best*, [1906] 2 K.B. 105, 75 L.J. (K.B.) 575, to which Channell, J. had been a party and he stated the principle in question thus, [1913] 1 K.B. at p. 26:—

"The question is whether the statute has been sufficiently complied with; if the party has done everything in his power to effect service and it is clearly impossible for him to do so. There are authorities which support both views, but as my Lord has discussed them so fully I need not do so again."

I have considered the case of *Godman* v. *Crofton*, [1914] 3 K.B. 803, 83 L.J. (K.B.) 1524, 24 Cox. C.C. 424, which is not in point and the question did not arise therein, because as Atkin, J., says, p. 812 "in the present case it is clear the solicitors had, in fact, authority to accept this notice. That being so, it is unnecessary to go further and shew that the notice actually came to the mind of the client."

It follows that the appeal from the order of the County Judge should be allowed and the conviction restored.

MCPHILLIPS, J.A. (dissenting): I am in agreement with my brother Martin.

Crown's appeal dismissed.

McMILLAN v. CANADIAN NORTHERN R. Co.

Imp. P.C.

Judicial Committee of the Privy Council, Viscount Cave, Lord Parmoor, Lord Phillimore, Clerk, L.J., and Duff, J. October 24, 1922.

MASTER AND SERVANT (§ V—340)—CONFLICT OF LAWS—ACT COMMITTED ABROAD—ACTION IN SASKATCHEWAN—ACT NOT WRONGFUL OR UNJUSTIFIABLE WHERE COMMITTED—RIGHT OF ACTION—WORKMEN'S COMPENSATION ACT (ONT.).

In order to sustain an action in Saskatchewan for damages for personal injuries received in another Province, it is necessary to establish not only that the negligent act upon which the action is founded would have been actionable under the law of Saskatchewan if it had been committed within that Province, but also that it was not justifiable by the law of the Province where it was committed, and where such act committed in Ontario is neither wrongful nor unjustifiable so far as the employer is concerned being the act of a fellow servant. The action cannot be maintained in Saskatchewan. The liability created by the Ontario Workmen's Compensation Act being founded on accident simply and not on negligence or any other actionable wrong, and the character of the act, not being in any way changed, because the employer under the Act is made liable to pay compensation for the accident.

[*Walpole* v. *Canadian Northern R. Co.* (1922), 70 D.L.R. 201, affirming 66 D.L.R. 127, referred to.]

APPEAL by plaintiff from the judgment of the Saskatchewan Court of Appeal (1921), 63 D.L.R. 257, 15 S.L.R. 52, dismissing an action (1920), 56 D.L.R. 56, for damages for injuries received in the course of employment, the accident being caused by the negligence of a fellow servant. Affirmed.

The judgment of the Board was delivered by

VISCOUNT CAVE:—This is an appeal from judgment of the Court of Appeal of Saskatchewan (1921), 63 D.L.R. 257, 15 S.L.R. 52, affirming the judgment of the Court of King's Bench for the same Province (1920), 56 D.L.R. 56, whereby judgment was entered for the respondent company in an action brought by the appellant for damages for injuries. The action is similar in some respects to that of *Walpole* v. *C. N. R. Co.*, in which judgment has lately been delivered by the Board, ante p. 201; but there are material differences both of fact and law to which reference must be made.

The appellant, at the time of the accident giving rise to the action, and for some time prior thereto, was a resident in Ontario, and was employed by the respondent company as a locomotive fireman. On November 12, 1918, the appellant in the course of his employment, was working a switch engine on the respondents' railway at Rainy River in the Province of Ontario; and while he was so employed, some railway coaches, which were standing on an inclined side track and which had not been properly braked, ran down the track and struck the appellant's locomotive, causing him

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serious injuries. It is common ground that the failure to set the brakes on the coaches was due to the negligence of a switchman in the respondents' service. The appellant took no proceedings in Ontario, but on February 18, 1919, commenced this action against the respondents in the Court of King's Bench for Saskatchewan, claiming damages for the injuries caused to him by the negligence of the respondent company or their servants.

The action was tried by Bigelow, J., and a jury, and the jury fixed the damages sustained by the appellant at $10,700, but the Judge, nevertheless, entered judgment for the respondents, holding that the accident was not maintainable "because the plaintiff [appellant] was domiciled in Ontario at the time of the accident, and the Ontario Statute gave the Board under the Workmen's Compensation Act, exclusive jurisdiction in the matter in question (56 D.L.R. at p. 60)". On appeal to the Court of Appeal for Saskatchewan, that Court (consisting of Haultain, C.J.S., Lamont and Turgeon, JJ.A.) affirmed the judgment, but on somewhat different grounds, 63 D.L.R. 257, 15 S.L.R. 52, hence the present appeal.

Before examining the reasons given by the Court of Appeal for its decision, it was necessary to state briefly the statute law applicable to the case. By Part I. of the Workmen's Compensation Act of Ontario, 1914 (Ont.), ch. 25, which applies to railways, it is provided (by sec. 3 (1)) that:—

"Where in any employment to which this Part applies, personal injury by accident arising out of and in the course of the employment is after a day to be named by proclamation of the Lieutenant-Governor in Council, caused to a workman his employer shall be liable to provide or to pay compensation in the manner and to the extent hereinafter mentioned."

"Accident" is defined by (sec. 2 (a)) as including a wilful and an intentional act, not being the act of the workman, and a fortuitous event occasioned by a physical or natural cause. Other material sections are as follows:—

"4. Employers in the industries for the time being included in Schedule 2 [which includes railways] shall be liable individually to pay the compensation.

5. Employers in the industries for the time being included in Schedule 1, shall be liable to contribute to the accident fund as hereinafter provided, but shall not be liable individually to pay the compensation.

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13. No action shall lie for the recovery of the compensation whether it is payable by the employer individually or out of the accident fund, but all claims for compensation shall be heard and determined by the Board.

15. The provisions of this part shall be in lieu of all rights and rights of action, statutory or otherwise, to which a workman or his dependents are or may be entitled against the employer of such workman for or by reason of any accident happening to him on or after the first day of January, 1915, while in the employment of such employer, and no action in respect thereof shall lie" (as amended in 1915 (Ont.), ch. 24, sec. 8).

The Act fixes the scale of compensation, and sets up a Workmen's Compensation Board, which is to make and collect the assessments on employers in schedule 1, and is to have exclusive jurisdiction to determine all questions arising under Part I. of the Act. By Part II. of the Act the doctrine of common employment is excluded as to all employers falling within that Part; but this provision has no application to railway companies.

It will be seen from the above summary that the Workmen's Compensation Act of Ontario, 1914 (Ont.), ch. 25, differs from that of British Columbia, 1916 (B.C.), ch. 77, (which was in question in *Walpole's* case, *ante* p. 201) in one material respect, viz., that in the former Province claims for compensation for accident are, in the case of certain industries, including railways, to be made not against the Board, but against the employers individually; but the amount of compensation so recoverable is limited by the statute and is recoverable only by proceedings before the Board. It should be added that in Saskatchewan the doctrine of common employment is altogether excluded. The King's Bench Act, R.S.S. 1920, ch. 39, sec. 26 (14).

The action brought by the appellant in the present case is a common law action for tort; and it is well-established that in order to found such an action in this country for a wrong alleged to have been committed abroad, two conditions must be fulfilled which were defined by Willes, J., in *Phillips* v. *Eyre* (1870,) L.R. 6 Q.B. 1, at pp. 28-29, as follows:—

"First, the wrong must be of such a character that it would have been actionable if committed in England. . . Secondly, the act must not have been justifiable by the law of the place where it was done."

The same rule, of course, applies to an action brought in

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one Province of Canada for a wrong alleged to have been committed in another; and it is, therefore, necessary, in order that the present action may be sustained, to establish, not only that the negligent act upon which the action is founded would have been actionable under the law of Saskatchewan if it had been committed within that Province, but also that it was not justifiable by the law of Ontario. Whether the first condition is complied with in this case need not be considered if, as the Court of Appeal have held, 63 D.L.R. 257, the second is not fulfilled. The Judges of the Court of Appeal pointed out that up to the time of the passing of the Workmen's Compensation Act, 1914 (Ont.), ch. 25, the negligence in question, having been committed by a fellow servant of the appellant, would not have been imputed to the respondents or susceptible of any proceedings against them; and they held that the fact that, by the Act, the respondents were made liable to pay compensation for the accident in question did not make it otherwise than justifiable so far as they were concerned. The latter point was dealt with by Haultain, C.J.S., 63 D.L.R., at p. 262, as follows:—

"The liability thus created is not to pay damages for a wrongful act, but compensation for an accident. The right to compensation is founded on accident simply, not on negligence or any other actionable wrong. The act complained of in this case was the act of a fellow servant, which by the law of Ontario, is neither wrongful or unjustifiable so far as the employer is concerned, and in regard to which the employer may justly be said to be innocent or excusable. The accident which happened in this case was an unforeseen event, which neither of the parties has occasioned or could prevent. The mere fact that the employer is liable to pay compensation for such an *accident* does not, in my opinion, attach any character of wrongfulness or unjustifiableness or guilt (as opposed to innocence) to the *act* upon which an action in this Province, founded entirely on tort, can be supported. The gist of the action is negligence, the ground for compensation is the accident."

In their Lordship's opinion the reasoning of Haultain, C.J.S., 63 D.L.R., at p. 258 *et seq.*, which was, in substance adopted by the other members of the Court, is both sound in itself and sufficient to conclude this case. No action for the negligence in question could have been brought against the company in Ontario apart from the statute; and the claim given by the statute is not a claim for damages for

tort, but a claim (strictly limited in amount) for compensation for the accident. The statute, therefore, does not make the negligence of the fellow servant not justifiable by the employer. There is no question in this case of criminal liability.

For the above reasons, their Lordships will humbly advise His Majesty that this appeal fails and should be dismissed with costs.

Appeal dismissed.

BEGERT v. PARRY.

Alberta Supreme Court, Appellate Division, Stuart, Beck and Hyndman, JJ.A. November 11, 1922.

NEW TRIAL (§ II—6A)—GRANTING NON-SUIT—TRIAL JUDGE IN ERROR AS TO INFERENCE FROM EVIDENCE ADDUCED—SALE OF GOODS ORDINANCE C.O., 1915 (ALTA.), CH. 39.

Where an Appellate Court is of opinion that the proper inference from the defendant's conduct and all the circumstances of the case is that the parties intended the property in goods sold to pass when the goods were shipped, and that the trial Judge was in error in finding upon the evidence as far as it went that the property had not passed, and in non-suiting the plaintiff because he had not sued for damages for non-acceptance, the Court will order a new trial.

APPEAL by plaintiff from the trial judgment granting a non-suit in an action for the price of goods sold and delivered. New trial ordered.

I. B. Howatt, K.C., and *B. D. Howatt*, for appellant.

P. E. Graham, for respondent.

The judgment of the Court was delivered by

STUART, J.A.:—Plaintiff owned some baled hay piled on his farm. Defendant came and bought all this specific pile of hay so baled at $18 a ton. Plaintiff agreed to haul the hay to Bentley and there weigh it on the town scales and then deliver it to the railway company for shipment according to orders which defendant was to leave with the railway company's agent. Nothing at all was said about the time or manner of payment. Plaintiff hauled the hay, had it weighed as agreed and shipped it as instructed. Then he drew a draft on the defendant for the price, and attached the bills of lading to it with instructions to the bank to deliver the bills of lading on payment of the draft. By some means, the defendant got access to the cars and, apparently, found some defects in the hay, and refused to pay the draft. Plaintiff sued for the price of goods sold and delivered.

At the close of the plaintiff's evidence, defendant asked

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for a non-suit on the ground that sec. 6 of the Sale of Goods Ordinance, C.O. 1915 (Alta.), ch. 39 (sec. 17 of the Statute of Frauds), had not been complied with, and on the ground that the property had never passed and that the plaintiff's action should have been in any case for damages for non-acceptance. From what was said by defendant's counsel on the argument of the plaintiff's appeal he was rather surprised at the trial that the Judge adopted his view *in toto*, did not ask him to adduce evidence for the defence or give him an opportunity to do so, but dismissed the plaintiff's action with costs forthwith on both grounds. The plaintiff has appealed.

Upon the argument of the appeal, counsel for the respondent admitted that he was not entitled to succeed under sec. 6 of the Sale of Goods Ordinance, inasmuch as he had merely pleaded the ordinance generally without referring to any particular section. The defendant respondent in his defence first denied generally the sale and delivery and then pleaded alternately as follows:—"The defendant, L. A. Parry, agreed to purchase the said hay upon the condition that all of the pile of hay was of the same kind and quantity as the hay that could be seen on the outside of the pile, except certain bales thereof which, apparently, had been rubbed by cattle, which bales the plaintiff agreed to leave out. The purchase price of the said hay was to have been $18 per ton f.o.b. Bentley. The plaintiff thereupon loaded the said hay into two cars, one of which was shipped to Medicine Hat. The consignee of the said hay refused to accept delivery thereof on the ground that the hay was very poor quality, mixed and in a rotten condition. The hay was musty, evidently having been wet in the stack previous to having been shipped and the greater part of the hay was unfit for feed. This carload of hay was subsequently unloaded at Medicine Hat and sold for the best price obtainable and the net proceeds of the said car, after deducting cartage, labor, commission and $2 for telegrams, was $32.99, which sum the defendants bring into Court with their defence. They claim, however, that the said sum should be set-off against the defendant's counterclaim hereinafter referred to. "With regard to the hay loaded in the second car, the plaintiff, contrary to the instructions of the defendants, shipped both cars under one free freight certificate. As a consequence, one car was held up by the Canadian Pacific Railway Co. at Lacombe. While this car was so held up, the defendant, L. A. Parry, notified the plaintiff the condition

in which the car shipped to Medicine Hat was, and proceeded to Lacombe and examined the hay in the second car and found it in the same condition as the hay in the car shipped to Medicine Hat, and notified the plaintiff immediately that he would not accept the said hay. The hay in the second car was sold at Lacombe by the Lacombe North Western R. Co. for charges and the defendant, L. A. Parry, is informed by the railway company that there is held by the said company the sum of $28 in respect of the balance realised from the said hay after paying the railway company's charges.

"The defendants set up against the plaintiff in extinction of the purchase price of the said hay, or in diminution thereof, the breach of the condition in the contract that all of the hay purchased by the defendants should be of a kind and quality similar to the bales of hay on the outside of the pile of hay hereinbefore referred to."

The defendant also counterclaimed for damages for loss of profit and for telephone and telegram expenses and for loss of time.

The first question to be decided is whether the property in the goods had passed to the defendant. But, before dealing with this, I would like to observe that at the trial the plaintiff himself offered, in the first instance, and apparently as part of his case, evidence with regard to the quality of the hay. I think this course was rather unfortunate, and that it would have been better for the plaintiff to prove his sale and delivery and reserve his evidence as to the quality for his reply to the defence where it should properly have come in. Of course, he could not prevent the defendant from cross-examining his witnesses on that question, but the safer course even then would have been to wait till the defendant told his story about the quality and to recall his witnesses in rebuttal. If this had been done, I doubt if there would have been a non-suit. The course adopted rather confused, I think, the legal position of the parties.

Now were it not for one term of the contract, there would be no doubt that, under secs. 18, 19, 20 and *Rule 1* of sec. 20 of the Sale of Goods Ordinance, the property in the specific ascertained pile of baled hay would have passed at the moment the bargain was made. Except for the one term referred to, there was nothing in the contract, the conduct of the parties or the circumstances of the case to show any different intention, although, as I shall point out, there are circumstances which point to an intention that the property

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should pass. The one term mentioned was that the vendor should get the hay weighed on the town scales at Bentley. That being so, *Rule III.* of sec. 20, C.O. 1915 (Alta.), ch. 39, applies and it reads thus (being preceded however by the saving clause, "unless a contrary intention appears"). "Where there is a contract for the sale of specific goods in a deliverable state but the seller is bound to weigh, measure, test or do some other act or thing with reference to the goods for the purpose of ascertaining the price, the property does not pass until such act or thing be done *and the buyer has notice thereof.*"

The last phrase italicized is a change of the law effected by the English Sale of Goods Act, 1893 (Imp.), ch. 71, of which our ordinance is practically a copy. Prior to the Act, the simple doing of the thing by the vendor passed the property *ipso facto*. The phrase was added on a suggestion from Scotland "that it was unfair that the risk should be transferred to the buyer without notice." See Williston on Sales, paras. 265 and 266.

Now there is no direct evidence to shew that the plaintiff ever gave the defendant notice of the result of the weighing. The defendant does not seem to have been asked about this on his examination for discovery, and the plaintiff said nothing about it in his testimony. It is not clear whether the defendant actually got the bills of lading. If he did, it might be very reasonably argued that he was thereby notified of the result of the weighing because the total weight appears upon those documents.

The defendant either saw these bills of lading or he got access to the cars without their production. The bills of lading were sent to a bank with drafts attached and there is no evidence from the banker at all to shew whether or not he ever even shewed the draft and bills of lading to the defendant. If even this had been done, there would, thereby, probably, have been a notification of the result of the weighing. But after all *Rule III.* of sec. 20 is, as are the other rules in that section, subject to a contrary intention of the parties appearing, and by sec. 19 (2) "for ascertaining the intention of the parties, regard shall be had to the terms of the contract, the conduct of the parties and the circumstances of the case."

There are, indeed, very important facts to be observed in this connection. It was agreed that the plaintiff should weigh the hay and then ship, not according to instructions then given, but according to instructions which should be

left by the defendant with the railway agent at Bentley. The plaintiff did so. And one of the instructions was that the hay should be billed, not to the defendant at Red Deer where he lived, but a third party not before mentioned, viz., one W. Jachary, at Medicine Hat. With this party the plaintiff had no privity at all. So the defendant expected and indeed requested the plaintiff to ship the hay to this third person. And on his examination for discovery the defendant when asked: "Who rejected this hay, Mr. Parry?" replied: "I didn't reject it," and added that "the receiver rejected it."

In my opinion, as this evidence stands, the proper inference from the defendant's conduct throughout and the action of the plaintiff at his request and all the circumstances is that the parties intended the property to pass, at least when the hay was shipped. My inference indeed is that the defendant, after buying the plaintiff's hay, appropriated it to fill a contract he had made with Jachary. It cannot be suggested that Jachary was merely his agent at Medicine Hat, because the defendant's assertion that he (the defendant) had not rejected the hay precludes that suggestion.

With respect to the provisions of sec. 21 (3), I am unable to see how this applies to the facts of this case. The plaintiff did not send the bill of lading with draft attached to the buyer. He sent it to a bank, his own agent. The presumption in such a case is that the bank would never surrender the bill of lading, *i.e.*, transmit it to the buyer until the draft was paid. There is no evidence that the buyer ever got the bill of lading at all. In the bank's hands, it was still in the plaintiff's agent's hand and not "transmitted to the buyer." Moreover, the provisions of sec. 21 (3) are obviously for the advantage and protection of the seller and do not suggest something, *i.e.*, his own wrong, which the buyer can take advantage of to his own benefit on a point of pleading.

It may of course be argued that by sending the bill of lading, not to the buyer but to a bank, the seller gave an even stronger indication of his intention to retain the property. But, in my opinion, the intention revealed by that act was merely an intention to secure payment of the price, and to protect the vendor's lien therefor, not an intention to withhold the complete property in the goods. The matter is discussed in Williston on Sales, paras. 282 *et seq.*, and by Lord Parker of Waddington in giving the judgment of the Judicial Committee in *The Parchim*, [1918] A.C. 157, at pp.

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171-2. It is, undoubtedly, a question for the Court to decide upon all the circumstances as to what was the intention in fact, instead of attempting to decide it upon the words of some single section of the ordinance.

The defendant says that he should have been sued for damages for non-acceptance. The well-known measure of damages for non-acceptance is based on the theory that the seller can resell in the market. Section 48 (3). But just how the seller could do so in the circumstances disclosed by the evidence so far as it went (for ex. 4 is not evidence of the facts stated therein except as against the defendant) I find it somewhat difficult to understand. But be this as it may, my opinion is, with much respect, that the trial Judge was in error in finding upon the evidence so far as it went that the property had not passed, and in non-suiting the plaintiff because he had not sued for damages for non-acceptance.

Of course, the defendant might be able to adduce evidence which would cast another light upon the intention of the parties as to the passing of the property. But at the trial he did not do so, but by his application induced the presiding Judge to give a non-suit. It would not, I think, be extremely unjust to give judgment now for the price of the goods, leaving the defendant to proceed with his counterclaim as he might be advised, but on the whole I think the best course is to order a new trial generally. It is unfortunate that this is to be the result where so comparatively small an amount is involved. I think that in ninety-nine cases out of a hundred where the witnesses are all present it is better to hear all the evidence which can be adduced so as to obviate the expense of a new trial. But there would probably have to be a new trial anyway with respect to the counterclaim so that the case may as well go back generally. With the evidence all adduced and each party knowing full well what the real dispute is about, there should be no difficulty about the form of the pleadings, and necessary amendments ought readily to be ordered.

The appeal will be allowed with costs, and a new trial ordered. But I think the plaintiff should also have the costs of the first trial against the defendant because the latter requested the trial Judge to take the course which we think was erroneous.

Appeal allowed, new trial ordered.

THE DE LAVAL CO. v. ELIAS.

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Saskatchewan King's Bench, Bigelow, J. November 2, 1922.

WRIT AND PROCESS (§I—8)—WRIT OF SUMMONS—FAILURE TO SERVE—EXPIRY—APPLICATION FOR RENEWAL—DELAY IN MAKING APPLICATION.

On an application for the renewal of a writ of summons after the time of service has expired, the plaintiff must shew good reason for not serving the defendant. The application is not granted as a matter of course, and a delay of four months unaccounted for, from the expiry of the writ is fatal to an application to renew.

[*Loring* v. *Sonneman* (1896), 5 B.C.R. 135, applied.]

APPEAL by defendant from the refusal of a District Court Judge, to set aside an *ex parte* order renewing a writ of summons. Reversed.

P. H. Gordon, for appellant.

J. L. McDougall, for respondent.

BIGELOW, J.:—This is a contest over the renewal of a writ of summons. Plaintiff issued its writ April 29, 1921. On September 5, 1922, over 4 months after the writ had expired plaintiff obtained an *ex parte* order from Smyth, D.C.J., renewing the writ for 6 months from April 29, 1922. On October 23rd, 1922, defendant moved before Smyth, D.C.J., for a re-hearing, and "for such further or other order as to the presiding judge may seem just and expedient." *Jackson* v. *C.P.R. Co.* (1908), 1 S.L.R. 84. On that application, defendant applied to set aside the order of September 5, 1922. The application was dismissed, and from that order, the defendant appeals.

There is no doubt that such an order may be made after the time has expired. But where the Statute of Limitations would be defeated by such an order, exceptional circumstances should be shown. *Hewett* v. *Barr*, [1891] 1 Q.B. 98.

The Statute of Limitations, apparently, does not enter into this case. According to the plaintiff's affidavit, it sues for a debt due October 1, 1916, and alleges payments made December 19, 1917, and December 26, 1919. These payments are not denied by the defendant.

Rule 9, of our Rules of Court says:—

"The Court or a Judge, if satisfied that reasonable efforts have been made to serve such defendant, or for other good reasons, may order that the original writ. . . be renewed." No efforts were made to serve the defendant, but the excuse given for non-service is, "that since the date of the issue of writ of summons herein, defendant has, on numerous occasions, promised that he would pay the amount owing to the

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plaintiff, and as a result of these promises the plaintiff has withheld service of the writ."

In answer to that, defendant says he never promised to pay the account, and says that the only correspondence was a letter from plaintiff written from Winnipeg May 18, 1921, to the defendant at Pambrum, Sask., to which defendant replied that he did not owe plaintiff the amount claimed, but, if agreeable he would immediately forward them the sum of $100, and would come into Winnipeg in the fall of 1921 and adjust this claim with them; and the defendant further says that he never received any reply to this letter.

Even if plaintiff expected defendant to call in the fall of 1921 and adjust the claim, there is the long unexplained delay from the fall of 1921 to September 5, 1922. If plaintiff has any evidence showing that defendant has, on numerous occasions, promised to pay the amount owing, as alleged in his affidavit, between the time of the issue of the writ and the time for renewal, I think plaintiff should have shown that. The burden is on plaintiff to show good reason for granting this application; it is not granted as a matter of course.

The affidavit for the plaintiff is made by the collection manager at Winnipeg. Defendant has lived all the time in question at Pambrum, Sask. If there were any promises of payment, as alleged, they would probably be made by letter, which plaintiff could easily produce; or if the promises were made verbally, I think plaintiff should have shown when and where they were made. In *Loring* v. *Sonneman* (1896), 5 B.C.R. 135, Drake J. held that a delay of 4 months unaccounted for from the date of the expiry of a writ is fatal to a motion to renew the writ.

In my opinion, the District Court Judge should have set aside his *ex parte* order made September 5, 1922. The appeal is allowed and the said order set aside with costs.

Appeal allowed.

JAMIESON v. TAYLOR.

Alberta Supreme Court, Walsh, J. November 15, 1922.

COSTS (§I—14)—SECURITY FOR COSTS OF COUNTERCLAIM—DISCRETION OF COURT—CLAIM FOUNDED ON PLAINTIFF'S CAUSE OF ACTION.

In an action where a foreign plaintiff suing for the price of goods sold and delivered has been ordered to give security for costs and the defendant counterclaims for damages, it is for the Court to determine in the circumstances of the case and in the exercise of its discretion, whether the counterclaim is made substantially, by way of defence, or whether it is to be regarded as an independent claim, in respect of matters foreign to the action, and

where such counterclaim arises out of and is founded upon the transaction which constitutes the plaintiff's cause of action. The Court will not order the defendant to give security for the costs of such counterclaim.

[*New Fenix & Co.* v. *General Accident etc., Corp'n*, [1911] 2 K.B. 619, followed.]

APPEAL by the plaintiff from the refusal of the Master to order defendant to give security for costs. Affirmed.

D. J. Broomfield, contra.

WALSH, J.:—The plaintiff sues for $724.16 the price of goods sold and delivered. The defendant pleads that $281.25 of this sum represents the price of certain varnish for which he is not liable, because it was not reasonably fit for the purpose for which it was sold, that he ordered it as the plaintiff knew for the purpose of putting the final coat on automobiles and carriages, and that he relied on the plaintiff's skill and judgment to supply varnish fit for such purpose, that he used it for such purpose, but that it lost its gloss, turned white, became dead, cracked up and came off the automobiles on which it was used, necessitating the re-varnishing of the same by him at a cost to him of $1,850, in addition to which he has been injured to the extent of $5,000 in his name and reputation as a painter. By counterclaim, he asks judgment for the above sums of $281.25 and $1,850 and $5,000.

The plaintiff lives in Montreal and has been ordered to give security for costs of the action. The Master refused to order the defendant to give security for the costs of the counterclaim and from this refusal the plaintiff appeals.

It is only in respect of the claim for $1,850 and $5,000 that the plaintiff seeks this security as the item of $281.25 may, under the Sale of Goods Ordinance, be applied in payment *pro tanto* of the purchase price, of the entire shipment and so is, in effect, a defence to that extent to the plaintiff's action.

New Fenix Co. et al, v. *General Accident, etc. Corp'n*, [1911] 2 K.B. 619, a judgment of the Court of Appeal appears to be the last word of authority upon the question. The head-note states, I think with reasonable accuracy, the result of the various judgments. It says; "It is for the Court to consider in the exercise of its discretion whether having regard to the circumstances of the particular case, the cross-claim must be treated as made substantially by way of defence to the action against the claimant or whether it must be regarded as being in the nature of an independent claim made in respect of matters foreign to that action and, therefore, one with regard to which security for costs

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ought to be ordered to be given." The question really is whether as Farwell, L.J., put it, the counterclaim goes so far beyond the subject-matter of the original claim as to constitute in substance a fresh action.

This counterclaim arises out of and is founded upon the transaction which constitutes the plaintiff's cause of action. The only defence that is set up to the plaintiff's claim is the defective quality of a portion of the goods sued for which he says entitles him to reduce his indebtedness to the plaintiff by the sum of $281.25. His counterclaim is founded on the damage which he sustained by the use of this same defective material. If he cannot succeed in his defence, his counterclaim must fail. If he does succeed in his defence, he may, upon proof of some further essential facts, be entitled to recover upon his counterclaim. Under these circumstances, I think that the Master exercised a proper discretion in refusing to order security for the costs of the counterclaim, and so I dismiss the appeal with costs of it to the defendant in the cause.

Appeal dismissed.

MAJOR v. CANADIAN PACIFIC R. CO.

Supreme Court of Canada, Davies, C.J., Idington, Anglin, Brodeur and Mignault, JJ. June 17, 1922.

CARRIERS (§IIIK—510)—IMPORTATION OF LIQUOR INTO ONTARIO—INTENDED VIOLATION OF LAW BY CONSIGNEE—LOSS OF LIQUOR—FAILURE TO COMPLETE CONTRACT BY CARRIER—RIGHT OF CONSIGNEE.

A consignee of liquor imported into Ontario under an illegal contract, and intended to be sold in Ontario in breach of the law cannot recover damages against the carrier for loss of such liquor by theft from the car in which it is being shipped.

[*Holman* v. *Johnson* (1775), 1 Cowp. 341, 98 E.R. 1120; *Simpson* v. *Bloss* (1876), 7 Taunt. 246, 129 E.R. 99; *Taylor* v. *Chester* (1869), L.R. 4 Q.B. 309, applied.]

APPEAL by plaintiff from the judgment of the Supreme Court of Ontario, Appellate Division (1921), 67 D.L.R., at p. 347, affirming the trial judgment 67 D.L.R. 341, 51 O.L.R. 370, dismissing certain actions brought against the defendants as carriers to recover the value of intoxicating liquor shipped to the respective plaintiffs at Windsor from Montreal and stolen or destroyed while in the custody of the defendants. Affirmed.

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

Angus MacMurchy, K.C., for respondent.

DAVIES, C.J.:—For the reasons stated by my brother Anglin, J., with which I fully concur, I would dismiss this appeal with costs.

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Idington, J.

IDINGTON, J.:—The appellant induced, through his agents at Montreal, the respondent, to accept at Montreal a shipment of intoxicating liquor to be carried by it to Windsor, in Ontario, to be delivered to appellant at the latter place, by assuring it in the shipping bill as follows:—"We hereby undertake and declare that this shipment is of a class and shipped under conditions permitted by law."

The trial Judge, Lennox, J. (1921), 67 D.L.R. 341, at p. 342, 51 O.L.R. 370, finds that the said shipment of liquor was, in fact, intended by the appellant to be used by him in way of selling same in Ontario in violation of the statutes then in force prohibiting such resale, and hence also in violation of 1916 (Can.), ch. 19, secs. 1 and 2, designed to aid the existent prohibition enactments in force in Ontario.

Part of the goods so shipped were stolen from the respondent's car at Windsor, wherein same had been so shipped, and the appellant seeks to hold the respondent as a common carrier liable for such loss.

This pretension has been rejected both by the trial Judge, Lennox, J., and the second Appellate Division of the Supreme Court of Ontario (1921), 67 D.L.R. 341, 51 O.L.R. 370. Hence this appeal to us.

The relevant law is as was stated by Lord Mansfield in *Holman* v. *Johnson* (1775), 1 Cowp. 341, at p. 343, 98 E.R. 1120, as follows:—

"The principle of public policy is this: *ex dolo malo non oritur actio.* No Court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appears to arise *ex turpi causa*, or the transgression of a positive law of this country, there the Court says he has no right to be assisted. It is upon that ground the Court goes; not for the sake of the defendants but because they will not lend their aid to such a plaintiff."

That remains good law to the present, seems most aptly to answer the claim herein of the appellant, and should not be frittered away by any nice distinctions.

This statement of the law is none the less applicable though not applied therein to defeat the claim made because the contract there in question was one made abroad and violated no English law; yet the principles so enunciated have been adopted and applied in a long line of cases since.

If the goods in question had been stolen in the Province of Quebec and there had been no such Dominion Act as relied upon, possibly the respondent might have been liable,

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but who can question the intention of the law applicable to sale, or intention to resell, in Ontario, and the Dominion Act being prohibitive of such traffic unless for the private consumption by the consignee.

I need not follow the history of the application of the law so declared by Lord Mansfield in *Holman* v. *Johnson*, *supra*.

The appellant seeks to apply the exceptional cases cited in Broom's Legal Maxims, 8th ed., where only a penalty was attached to the Act, and prohibition was not intended.

It is quite true that there are many cases which have arisen, under some Revenue Acts for example, when it was held that the purview of the Act not being prohibition, therefore, the turpitude of which the Court must take notice did not exist.

I am afraid that is asking us to go blind in this case.

In like way conversely the case law relative to the results arising out of the Gaming Acts and other such Acts do not help much unless to confuse one and so mislead.

Again it is suggested that this action is founded on tort and not on contract.

I cannot so hold for it clearly is founded on the contractual relation between the appellant and respondent as a common carrier, though these relations are so often changed by statutory provisions.

I would dismiss the appeal with costs.

ANGLIN, J.:—In my opinion, however, the plaintiff's case is put upon the pleadings and facts in evidence his claim must be for breach by the defendant of its obligation to deliver certain of his goods to him at Windsor, Ontario. His sole cause of action consists of the duty so to deliver and its breach. To establish that duty, he is obliged to shew the placing of his goods with the defendant for the delivery alleged. But the placing of the goods with the defendant for that purpose was, upon the evidence, a contravention of the statute, 1916 (Can.), ch. 19, sec. 1 (*a*), inasmuch as it was a step in causing them to be sent or carried from one Province of Canada into another Province of Canada with the intention of there dealing with them in violation of the law of such latter Province.

The plaintiff is, therefore, in establishing his cause of action obliged to invoke an illegal act in which he participated and consequently cannot maintain his action. *Simpson* v. *Bloss* (1816), 7 Taunt. 246, 129 E.R. 99; *Taylor* v. *Chester*, L.R. 4 Q.B. 309, at p. 314, 10 B. & S. 237, (1869), E.R.A. 1272. The illegality is not in a collateral matter but in the

very transaction out of which the alleged duty arose of the nonfulfilment of which the plaintiff complains.

The defendant, being itself innocent in the matter, is not precluded from setting up as a defence the illegal intent of the plaintiff.

The statute 1916 (Can.), ch. 19, was passed in aid of provincial temperance Acts. Its penalizing clauses were enacted not merely for the purpose of revenue but to supplement and render more effective certain prohibitory provisions of such provincial enactments. They, therefore, impliedly prohibit and render illegal the acts they penalize. Broom's Legal Maxims, 8th ed., p. 579.

I have no doubt that the judgment appealed from is right and should be affirmed.

BRODEUR, J.:—In 1916, the Province of Ontario passed a law by which no person could sell liquor without a license. The same year, the federal Parliament, for the evident purpose of reinforcing the temperance sentiment of the Provinces, passed a law 1916 (Can.), ch. 19, sec. 1 (*a*), declaring that any person who sends, ships, in any Province from any other Province any intoxicating liquor "knowing or intending that such intoxicating liquor will or shall be thereafter dealt with in violation of the law of the Province into which such intoxicating liquor is sent, shipped . . . . shall be liable . . . . to a penalty."

In March, 1920, the appellant Major, who had been for years connected with the liquor trade in Ontario, bought in Montreal 100 cases of liquor from L. W. Young & Co. and had them shipped by the C.P.R. to Windsor, Ontario. The railway company would not undertake to carry these goods without having from the shipper a written guarantee that the liquor was "of a class and shipped under conditions permitted by law."

The goods arrived at destination at Windsor; but a part of the shipment was stolen in the yards of the railway company. There is no evidence that this robbery has been rendered possible by the negligence of the company in not properly guarding the yards or in not maintaining therein sufficient police protection. Major now sues the company to recover the value of the cases which have been stolen.

I should state also that in the month of May, 1920, Major was convicted under the Ontario Temperance Act, 1916 (Ont.), ch. 50, for having sold, in breach of the Act, all the liquor he had received from that shipment and from other similar shipments. The irresistible inference from this

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conviction is that Major was still busily engaged in the liquor business, but was now carrying out that business illegally without having the required license.

The railway company pleaded in answer to Major's action that the liquor had been purchased by Major with the intent of violating the Ontario Temperance Act, 1916 (Ont.), ch. 50, that he was of bad faith when he represented through his agents that the shipment was made for legal purposes, that the contract to carry that liquor was illegal and that he could not recover under it.

The trial Judge, Lennox, J., found that these goods had been bought by Major for an illegal purpose. The latter tried to establish that the liquor had been imported in Ontario for his own personal use; but the trial Judge did not believe him.

It was evident that he was engaged in an illicit trade and when he shipped these goods, he knew and intended that such liquor was to be dealt with in violation of the law of Ontario. As far as he was concerned, the contract of carriage which Major made with the C. P. R. of that liquor was illegal.

This finding of the trial Judge, Lennox, J., was concurred in by the Appellate Division, 67 D.L.R. 341, and there is certainly no justification for us to interfere with this finding.

Then could Major, who has induced an innocent defendant to enter into a contract involving violation of a law, recover damages from that defendant for failure to complete the contract?

As I have already said, no negligence is charged against the defendant railway company. I am of opinion that the plaintiff having delivered these goods under an unlawful agreement, he could not recover them back. *Taylor* v. *Chester*, L.R. 4 Q.B. 309, 7 Hals., p. 408, sec. 845, says:—

"No action can be brought for the purpose of enforcing an illegal contract either directly or indirectly, or of recovering a share of the proceeds of an illegal transaction, by any of the parties to it. Where the object of a contract is illegal the whole transaction is tainted with illegality, and no right of action exists in respect of anything arising out of the transaction. In such a case the maxim *In pari delicto, potior est conditio defendentis* applies, and the test for determining whether an action lies is to see whether the plaintiff can make out his claim without relying on the illegal transaction to which he was a party."

Applying those principles as laid down in *Taylor* v. *Chester* and in Halsbury to the facts of this case, I consider that the plaintiff Major made an illegal contract when he shipped his liquor to Windsor with the intent of violating the Ontario Temperance Act, 1916 (Ont.), ch. 50.

Mr. Henderson, in his able argument, stated that the action was in tort and that in such a case the principles above quoted would not apply. Whether his claim is for the recovery or delivery of the goods or whether it is for damages arising out of non-delivery, the plaintiff has to rely on the contract of carriage which he made with the company; and, as this contract is illegal, he could not recover, whether his action is in tort or *ex contractu*. In such cases, the Courts cannot lend their assistance to an action which appears to arise *ex turpi causa*, or the transgressing the law of this country. *Holman* v. *Johnson*, 1 Cowp. 341, at p. 343.

For those reasons, I am of opinion that this appeal should be dismissed with costs.

MIGNAULT, J.:—Notwithstanding Mr. Henderson's very ingenuous argument for the appellant, I cannot escape from the conclusion that to succeed he must rely on an illegal contract, although an innocent one insofar as the respondent is concerned.

Mr. Henderson argued that the shipment of liquor was not prohibited by the statute, 1919 (Can.), ch. 19, but that the person shipping it, with the intention that it be thereafter dealt with in violation of the law of the Province into which the liquor was sent, merely incurred a penalty. I cannot so read the statute; it is clearly prohibitive, as the context shews. So the intention of the appellant, when he made the shipment, to deal with the liquor, when it reached him in Windsor, Ont., in violation of the Ontario Temperance Act, 1916 (Ont.), ch. 50, rendered the shipment an illegal one.

Mr. Henderson also argued that he could claim damages from the respondent for non-delivery of the liquor without relying at all upon an illegal contract of shipment, but on the ground that the defendant having come into possession of the appellant's property and having by its negligence suffered it to be stolen, the appellant could proceed against the defendant in tort and not upon any contract of shipment. The refinement of this distinction shews the ingenuity of the counsel, but, to my mind, it is utterly impossible to get away from the contract. The appellant had the

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liquor shipped to him, and a portion of it was lost or stolen before it reached him. The liability clearly arises here out of the contract. The respondent, acting as a common carrier of goods, was in possession of this liquor by virtue of a contract of carriage. It was liable without proof of negligence, this liability being one at common law. It is true that an action of tort lies against a common carrier without proof of any contract (Hals., *sub tit* Carriers, p. 8, sec. 13), but it is impossible to disregard the contract in a case like this one, where a contract was made in violation of the law. Even if the plaintiff could state a cause of action without referring to any contract—on the contrary, in his statement of claim he expressly alleges the contract of carriage—still, if it appears from the evidence that there has really been an unlawful contract between the parties, the Court would be bound of its own motion to take the objection that the contract is void. *Montefiore* v. *Menday Motor Components Co.*, [1918] 2 K.B. 241.

I think, therefore, that the appeal should be dismissed with costs.

Appeal dismissed.

CITY OF MONTREAL v. ATT'Y-GEN'L OF CANADA AND ATT'Y-GEN'L OF QUEBEC.

Judicial Committee of the Privy Council, Viscount Cave, Lord Parmoor, Lord Phillimore, Clerk, L.J., and Duff, J. October 24, 1922.

TAXES (§IF—90)—CROWN LANDS—RIGHT OF TAX LESSEE—SEC. 362A. OF CHARTER OF CITY OF MONTREAL—SEC. 125 B. N. A. ACT, 1867—CONSTRUCTION.

Section 362A. of the Charter of the City of Montreal is *intra vires* the Legislature of the Province of Quebec and by it the city has power to tax a lessee of crown land, according to the actual value of the land, although the land itself is exempt from taxes under sec. 125 of the B. N. A. Act, 1867.

APPEAL by the City of Montreal from the judgment of the Quebec Court of King's Bench, Appeal Side ((1919), 57 D.L.R. 553, 29 Que. K.B. 350, 25 Rev. de Jur. 463), in an action by the city of Montreal to recover certain taxes. Reversed.

The judgment of the Board was delivered by

LORD PARMOOR:—The statutory Charter of the City of Montreal, as amended from time to time, down to, and including, the session of the Provincial Legislature of 1912, contains a series of provisions relating to "assessments and taxation," "valuation and assessment rolls," and "the sale of immovables for taxes and assessments." The sole ques-

tion involved in the present appeal is whether sec. 362A of the charter (as added by 1907 (Que.), ch. 63, sec. 19) one of the sections included under the heading "assessments and taxation," is *ultra vires* the Legislature of the Province of Quebec. The section is as follows:—

"362A. The exemptions enacted by art. 362 shall not apply either to persons occupying for commercial or industrial purposes buildings or lands belonging to His Majesty or to the Federal and Provincial Government or to the Board of Harbor Commissioners, who shall be taxed as if they were the actual owners of such immovables and shall be held to pay the annual and special assessments, the taxes and other municipal dues."

In the French version "the actual owners" are designated as "les veritables proprietaires," but it is not suggested that there is any distinction between the English and French versions. The language of sec. 362A of the charter is not clear. It has been construed in the Courts below to include properties, other than those exempted in sec. 362. This construction was not questioned in the argument before their Lordships, and it is on this construction that the question of *ultra vires* directly arises.

The relevant facts may be shortly stated. By indenture of January 9, 1913, the Minister of Railways and Canals for Canada, as representative of the Crown, demised to Andrew Baile, a coal merchant, certain Crown lands in the City of Montreal for the term of 5 years, from October 1, 1912, at a rent of $2,184 per annum. The lands so demised were assessed in the roll of immovable property and school taxes, for the years commencing May 1, 1912, and May 1, 1913, at a capitalised value of $27,000, and in respect thereof a demand was made upon Andrew Baile, as an occupant of Government ground, for an annual tax of $405 for each year, which amounted with interest to the sum of $850.61. The sum of $405 included $270, being 1 % on the capitalized value of $27,000, and a further sum of $135 as school taxes. The appellants brought an action to recover $850.61. Andrew Baile did not defend the action, but the Attorney-General of Canada intervened, claiming that sec. 362A, above set out, was *ultra vires* of the Quebec Legislature, and unconstitutional, insofar as it applied to occupants of lands belonging to the Crown in the right of the Dominion of Canada, and that the land, contained in the demise to Andrew Baile, was exempt by virtue of sec. 125 of the B. N. A. Act, 1867. The case came, in the first instance, be-

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fore the Recorder of Quebec, who decided against the contention of the Attorney-General for Canada, but this decision was reversed in a judgment of the Appeal Side of the Court of King's Bench for the Province of Quebec (1919), 57 D.L.R. 553, 25 Rev. de Jur. 463, 29 Que. K.B. 350. Special leave to appeal against this judgment to His Majesty in Council was granted on July 22, 1920.

The exhibits set out in the record contain the tax account for the years 1912-1913 directed to Andrew Baile, who is described as "occupant of Government ground," and as debtor to the City of Montreal "for annual assessments," amounting with interest in 1912 and 1913 to the sum of $850.61, and extracts from the valuation and assessment roll of immovable property and school taxes for the years commencing May 1, 1912, and May 1, 1913. These extracts show that the sum of $405 is made up of 1% on the capitalised value of the property, $270, and of $135 for school taxes. It is unnecessary to refer separately to the school taxes. They do not raise any special issue. Section 393 of the charter enacts that the roll for school taxes may be included in the register containing the assessment roll for immovables, and with the same formalities.

Section 362A of the Charter of the City of Montreal is one of a series of sections providing for assessments and taxation in the City of Montreal. Section 361 enacts that all immovable property situated within the limits of the City shall be liable to taxation and assessment, except such as may, by the subsequent provisions of the charter, be declared exempt therefrom. The appellants do not, under this section, claim to tax Crown property within the city occupied by the Crown or by persons occupying as holders of an official position under the Crown, or to question the immunity from provincial taxation of such property under sec. 125 of the B. N. A. Act, 1867. It is alleged, however, by the respondent, the Attorney-General for Canada, that although the appellant is making no claim to tax property of the Crown, occupied by the Crown, or by persons occupying as holders of an official position under the Crown, yet, in effect, the city is seeking indirectly to tax such property and that such taxation is *ultra vires* of the provincial Legislature. Their Lordships agree in the proposition that it would be *ultra vires* to attempt to impose indirectly taxation which cannot be imposed directly.

On the other hand, the respondent does not allege that persons occupying Crown property for commercial or in-

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dustrial purposes are not liable to provincial taxation in respect of their tenancy or occupation, provided that the taxation is imposed in such a form that it is in reality a taxation on the interest of the tenant or occupant, and not on the property of the Crown. It would not be possible after the decision of their Lordships in *Smith* v. *Rur. Mun of Vermilion Hills*, 30 D.L.R. 83, [1916] 2 A.C. 569, to contend that tenants who occupy Crown property, not as officials of the Crown, but for commercial or business purposes, are not liable to provincial taxation so long as the assessment is based on their interest as occupants.

In *Smith* v. *Vermilion Hills* it was held that the statutes imposing the taxation were not *ultra vires* of the Legislature of Saskatchewan. The following passage from the judgment designates clearly the contentions raised in that appeal, 30 D.L.R., at p. 85:—

"The appellant was duly assessed in respect of the land comprised in the two leases, and the question is whether the assessment was valid. It is contended for the appellant that the tax is sought to be imposed on the land itself, which belongs to the Crown in right of Canada, and not on any individual who is interested in it. For the respondent, on the other hand, it is argued that all that is taxed is the interest of the appellant as a tenant of the land and not the land itself as owned by the Crown."

Their Lordships decided in favour of the latter of these contentions on the construction of the Saskatchewan Statutes.

Section 361 (6) of the charter empowers the council of the city to make by-laws to impose and levy on taxable immovable property in the city an assessment not to exceed 1% of the annual value of such property according to the valuation roll, such assessment to be a charge upon the immovable property, and the owners thereof to be personally liable therefor. No copy of the by laws was attached to the case, but it was assumed throughout the argument that they had been made in due form. Section 362 exempts certain immovable property from the ordinary and annual assessments. Then follows the critical sec. 362A. It is not necessary to set this section out again, but the persons on whom the tax is imposed under its provisions are persons occupying, for commercial or industrial purposes, buildings or lands belonging to His Majesty, that is to say, occupants, and not owners. The taxation is imposed as an annual charge or rate, and the occupant is made liable to pay on an annual

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assessment. The assessments in question in this appeal are annual assessments, as shown in the exhibits of the tax account, and by the extracts from the valuation and assessment roll of immovable property.

The question raised in this appeal is, however, in the main dependent on the further enactment that the occupants shall be taxed as if they were the actual owners of immovables and shall be held to pay the annual and special assessments, the taxes, and other municipal dues. The effect of this is that the occupants are made liable to pay on an annual assessment, not to exceed 1% of the capitalised value of the occupied property. The method of assessment determines the amount for which an occupier is liable during his occupancy, but does not alter the incidence of the taxation or transfer the incidence from the occupant to the owner. There is no suggestion that the assessment, in the case under appeal, has not been fairly ascertained, or that there has been any attempt to differentiate between the tenants of the Crown lands and the tenants of private individuals or corporation, to the disadvantage of the Crown tenants.

The ultimate incidence of taxation imposed on tenants, as the occupants of lands, is a matter on which economic experts have expressed different opinions. If, however, municipal taxation is to be regarded as *ultra vires*, on the ground that the ultimate incidence of taxation, or some portion of it, may or will fall on the owner, it is difficult to see in what form such taxation could be validly imposed. The question to be determined is the simpler one, whether the taxation, which is impeached, is assessed on the interest of the occupant, and imposed on that interest. In the opinion of their Lordships the interest of an occupant consists in the benefit of the occupation to him, during the period of his occupancy, and does not depend on the length of his tenure. The annual assessment, to which objection is taken, is an assessment for which the tenant is only liable so long as his occupancy continues and which ceases so soon as his occupancy is determined. If on the cessation of his tenancy, the Crown chooses to leave the land unoccupied or to occupy the land by an official acting in his official capacity, there would be no further liability to taxation under sec. 362A of the charter affecting either the land or the Crown. In the case under appeal, the tenant is paying an annual rental of $2,184, but is assessed at an annual aggregate charge, including school taxes, of $405, which is somewhat less than one-fifth of the rental.

In assessing the annual interest for taxation of an occupant of land, every occupant is assessed as the person for the time being in beneficial occupation of the land taxed. Any method of assessment, based on variations in the duration of tenure, would inevitably result in an unequal distribution of the tax burden and, if applied to the occupant of Crown lands, would unfairly increase the burden on the occupants of lands owned by private individuals or corporations.

Their Lordships in this respect agree with the reasons given in the judgment of Meredith, C.J.O., in *Re Town of Cochrane and Cowan* (1921), 64 D.L.R. 209, at p. 213, 50 O.L.R. 169:— Lord Parmoor.

"I see no reason why a Provincial Legislature may not provide that, in assessing the interests of an occupant of Crown lands, or of any other person in them, it shall be assessed according to the actual value of the land, or in other words, that the taxes payable by him shall be based upon that value; the manifest injustice that would otherwise exist, at all events in the case of an occupant or tenant, is obvious. He would be assessed only for the value of his interest, which might be little or nothing, while his neighbour, who is an occupant or tenant of property owned by a private person, would be taxed on the actual value of the land."

The only remaining question is one of procedure. In the present case, an action was brought for recovery of the amount due, and no objection was raised to this form of procedure. In addition, the provisions to recover arrears of taxation by distress of the goods and chattels of the person bound to pay the same, and of all goods and effects in his possession in whatever place such goods and effects may be found, saving the exemptions provided by law under sec. 287 of the charter, would, in ordinary cases, be available against a tenant of the Crown in the same way as against any other tenant. The provision in sec. 18 of the charter would not be available against Crown property, but it has not been attempted to enforce this provision.

Their Lordships will humbly advise His Majesty that the appeal should be allowed and the judgment of the Court of King's Bench set aside, 57 D.L.R. 553, and that the judgment of the Recorder of the City of Montreal should be restored. The Attorney-General of Canada will pay the appellants' costs. There will be no costs of the intervener, the Attorney-General of Quebec.

Appeal allowed.

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THE KING v. MILLAR, FERGUSON & HUNTER.

Supreme Court of Canada, Davies, C.J., Idington, Duff, Anglin, Brodeur and Mignault, JJ. October 10, 1922.

SOLICITORS (§IIC—30)—SERVICES RENDERED TO GOVERNMENT—GOVERNMENT REQUESTED TO FIX REASONABLE COMPENSATION—COMPENSATION FIXED—ORDER IN COUNCIL PASSED—PAYMENT OF ACCOUNT—SOLICITORS ACT, R.S.O. 1914, CH. 159, SECS. 34 AND 48 ET SEQ.

Where solicitors upon completion of services for the Government there being no denial of the retainer make a copy of their docket entries which shews no money charges for services rendered, but gives full details of all disbursements and forward it to the Minister of Lands, Forests and Mines in whose name the agreement to purchase in connection with which the services were retained was made, and who gave the instructions and suggest that he should submit it to some competent person to settle the fee which should be paid, and the Minister selects a proper and competent person who advises the Minister as to the proper fee, and an Order in Council is passed which is an approval of the adjustment of the account and an acknowledgment of a prior valid retainer and so amounts to an agreement to pay, the Court will order payment of the account, although no bill has been rendered under sec. 34 of the Solicitors Act, R.S.O. 1914, ch. 159,—the offer and the Order in Council being sufficient writing to satisfy sec. 49 of the Solicitors Act as to agreements between solicitor and client.

[*Millar* v. *The King* (1921), 67 D.L.R. 119, 51 O.L.R. 246, affirmed.]

APPEAL by the Crown from the judgment of the Ontario Supreme Court, Appellate Division, 67 D.L.R. 119, affirming the judgment of Middleton, J., 58 D.L.R. 585, on a petition of right by a firm of solicitors to recover from the Province of Ontario a sum of money for services rendered. Affirmed.

Edward Bayly, K.C., for respondent.

DAVIES, C.J.:—I think this appeal fails and should be dismissed with costs. My conclusions are well stated and summed up in the reasons of Riddell, J., in the Appeal Court (1921), 67 D.L.R. 119, 51 O.L.R. 246, with which I concur.

IDINGTON, J.:—The Government of Ontario having negotiated for the purchase from the Electric Power Co., Ltd., of all the assets, undertakings, lands, plant, machinery, furniture, licenses, franchises, contracts, rights, privileges and businesses, of certain companies and corporations, described in an agreement, arrived at and confirmed by the Centre! Ontario Power Act, 1916 (Ont.), ch. 18, retained the respondent firm of solicitors to investigate the titles to what was had in contemplation by said agreement, seem to have been rather slow in recognising the claims of the respondents to compensation.

The respondents applied by petition to assert their right

to recover compensation for the services rendered under and by virtue of said retainer, and a fiat was granted them to prosecute said claim.

The trial Judge, Middleton, J. (1921), 58 D.L.R. 585, 49 O.L.R. 93, found in favour of respondents.

The Second Appellate Division of the Supreme Court of Ontario, 67 D.L.R. 119, by a majority, affirmed said judgment by dismissing the appeal therefrom, and the appellant asks us to reverse said judgments.

The respondents took the objection before us on appeal here that there was nothing but mere questions of practice and procedure involved and hence no appeal would lie or be entertained.

The objection as stated in respondents' factum is to our jurisdiction.

There never was in any of the numerous cases in which the question raised as to the matter involved being one of only practice and procedure and a refusal to entertain such an appeal, any serious objection on the ground of our jurisdiction, which was generally admitted, but only that this Court should not entertain questions of mere practice and procedure unless some violence done to natural justice seemed to be involved.

That jurisprudence seems established, if anything can be, but is not a question of jurisdiction.

There are one or two points made by the appeal which do not seem to me clearly to bring this case within the proper sphere of that settled jurisprudence.

Hence I think I had better proceed to deal with this case on its merits, if it has any, rather than take shelter under said doctrine relative to practice and procedure.

Indeed, I am not clear as to what the alleged practice and procedure feature relates to as raised herein.

Nevertheless, assuming we have jurisdiction, I am strongly inclined to think that in exercising it we should be very slow to reverse the findings of fact and rulings in law of two Courts below in relation to a subject-matter such as the duties of a solicitor, or the need for delivery of a bill of costs, or the application of the Solicitors Act to either, or to what constitutes a special agreement with a solicitor, relative to his compensation for services rendered.

The appeal before us arises out of the disposition of just such subject-matters as daily brought under the notice of the Courts below, involving often the jurisdiction of the Court in relation to its solicitors as officers thereof.

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Turning to the substantial questions discussed in the judgments of the several Judges in the Courts below, and in the factums presented herein, especially as the counsel engaged in arguing the preliminary objection, which I have dealt with, agreed to leave the appeal to be disposed of on their respective factums, without further argument, the first question I meet is the doubt cast by Meredith, C.J., C.P., in his dissenting judgment, 67 D.L.R., at pp. 121 *et seq.*, upon the propriety or necessity for such an exhaustive examination of titles when the Act cited above declared them good.

I do not, by any means, think that it would have been a prudent business act, to have left all such matters to rest upon the Act only, which leaves it open for much argument as to what it covers in fact and what might be held to have been intended thereby.

It might have turned out that what the selling company appeared to own, was not in fact owned by it.

And we find that part of the price was withheld, until after the investigation had been completed, as I read the evidence, though that might have been made clearer.

The questions of how far such an investigation was warranted, as a matter of business prudence, is not for us to decide.

If we turn to the pleadings in this case, we find the claim set out in the first three paragraphs of the petition, as follows:—

"1. By an agreement dated the 10th day of March, 1916, Your Most Excellent Majesty represented therein by the Honourable the Minister of Lands, Forests and Mines, agreed to purchase from the Electric Power Company, Limited, at and for the price of eight million three hundred thousand dollars ($8,300,000) all the assets, undertakings, lands, plant, machinery, furniture, licenses, franchises, contracts, rights, privileges, and businesses of certain companies and corporations referred to and described in said agreement.

2. Your petitioners were consulted by the officers of the Crown as to how best to carry out the said purchase and they advised in reference thereto and prepared and revised the necessary legislations. And the said agreement was by the Central Ontario Power Act, 1916 (Ont.), ch. 18, confirmed.

3. Your petitioners were instructed by the Government for the Province of Ontario to inquire into and report upon

the titles of the undertakings, properties, rights, contracts, licenses, privileges, franchises and businesses agreed to be purchased and to revise, prepare and draft the necessary legislation and Orders-in-Council in connection therewith and in connection with vesting the management of the said businesses in the Hydro-Electric Commission as managers and governors."

In the first paragraph of the statement of defence these three paragraphs are admitted, as follows:—

"1. His Majesty's Attorney-General on behalf of the respondent admits the allegations contained in the first, second and third paragraphs of the petition herein, but save as aforesaid His Majesty's Attorney-General denies the allegations contained in the said petition of right and puts the petitioners to the proof thereof."

I cannot understand how we can go behind such a retainer thus admitted or doubt the range of work to be done, or properly to be done thereunder, as falling within same. Surely, we cannot be expected to step in and protect the appellant as if an infant ward of the Court in such a case.

What else of substance is there in the defence?

The work done was extended over a year and a half and the Minister in charge was, presumably, in touch with what was going on.

The confusion of thought created by the transfer of the property to another department of the Government, even if that, as a matter of convenience and prudence, relative to the subject-matters involved, had been created a corporate entity to execute the public policy of the time, should not lead us away from the actual merits of the respondents' claim, as against the Crown on behalf of the Province of Ontario.

These side issues raised between the appellants' Ministers and his other corporate servant, cannot or, I respectfully submit, ought not to weigh with us in the disposition of this appeal.

When the respondents' work was done, a most elaborate bill of costs was prepared, shewing what was done in the most minute detail, consisting of two bound volumes each of three hundred or more pages, but the fee therefor was not stated, and the only items carried out were the disbursements, a very large item in the total. And the bill was signed, in typewritten letters, by the respondent firm and enclosed to the Minister with the suggestion that he name some trustworthy member of the legal profession to examine the whole work and vouchers, and decide what should

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be the proper amount to insert therein for the work.

That course was pursued, and the solicitor for the Hydro Corporation, already alluded to, was selected, and then the amount so determined by him might have well been inserted in the blank space in the bill and there could not have been a shadow of pretext for setting up this defence of no bill rendered, not a month, but 2 years later.

Both parties however agreed to take the prudent and proper course, which was pursued, and agreed to be bound by the result, we are told there was no contract thereby in sufficient form to bind the Crown.

If a busy man in pursuit of what concerned his business, had so entrusted or, impliedly entrusted, such a matter and such a bill to someone acting on his behalf, though probably not contractually bound until he had ratified it, I fail to see how he could set up such a defence of want of contract if he had ratified it all, as formally and expressly as was done herein by an Order-in-Council expressly ratifying and confirming the claim as there adjusted.

And if that is not enough, why was the fiat granted herein without a word being said so far as the evidence goes as to the omission to deliver a bill of costs?

If the Attorney-General advising such a fiat to be granted intended to rely on the non-delivery of a bill of costs, I most respectfully submit, he should then have asked for delivery of the bill.

I respectfully submit that if anything analogous to the foregoing had taken place between a business man and his solicitor, and thereafter the defence consisted only of the pretence, either of the failure to deliver a bill, or to evade the adoption and ratification of such a bargain as made on behalf of the business man, had been set up, the chances are, I suspect, that the hearing would have been short.

The retainer being admitted, the value of the services rendered being, by eminently respectable members of the profession, fixed at or above the amounts claimed, I respectfully submit that there is, under the foregoing facts and circumstances to which I have adverted, no necessity to consider the numerous other objections taken and passed upon below, and that this appeal should be dismissed with costs.

DUFF, J.:—The Order-in-Council of November 4, 1918, is a sufficient answer to this appeal.

As to sec. 6 of the Executive Council Act, R.S.O. 1914, ch. 13, the Order-in-Council establishes not only the existence of the contract but the approval of the Lieutenant-

Governor in Council as well.

The word "action" may, of course, be used in a very comprehensive sense and in a sense quite comprehensive enough to include proceedings by petition of right; but the effect of ascribing such a scope to the word "action" in sec. 56 of the Solicitors Act, R.S.O. 1914, ch. 159, would be to substitute for the proceeding by petition of right a new procedure for presenting and enforcing claim of a certain class against the Crown, and a procedure by which such claims could be enforced without the assent of the Crown having first been obtained to the exercise of jurisdiction. It would, I think, be contrary to sound principles of construction to give that effect to the enactment in the absence of words apt to express the intention of the Legislature to make such a change in the law. It is not, I think, an admissible construction of the general words we are called upon to construe.

The appeal should be dismissed with costs.

ANGLIN, J.:—The retainer of the petitioners on behalf of the defendant by his officers to render the services for which recovery is sought is admitted by the statement of defence. I, therefore, fail to appreciate the legal basis for the contention now put forward that payment should have been claimed from the Hydro-Electric Power Commission of Ontario.

For the reasons stated by Riddell, J., 67 D.L.R. 119, I am of the opinion that, upon the amount of the fees for their services being fixed by Mr. Kilmer at the instance of the defendant, the bill rendered by the petitioners sufficiently met the requirements of the Solicitors Act.

The finding of the trial Judge, 58 D.L.R. 585, amply supported by uncontradicted credible evidence and affirmed on appeal, that the sum so fixed by Mr. Kilmer was reasonable and proper to be allowed, is not open to attack.

The defendant, having, through his officers, instructed the petitioners to do the work for which they claim, it can scarcely now be urged on his behalf that such work was not required. Moreover, that defence is not pleaded.

I find it unnecessary to consider the further questions, whether a petition of right is an "action" within sec. 34 of the Solicitors Act and whether there was an acceptance by the Crown of Mr. Kilmer's report and a contract for payment to the petitioners based upon it.

The appeal, in my opinion, fails.

BRODEUR, J.:—I concur with my brother Anglin.

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MIGNAULT, J.:—In this case we did not have the benefit of an oral argument, the parties having requested the Court to allow them to submit the case upon the printed record and the factums. I have duly considered the judgments of the two Courts (67 D.L.R. 119, 58 D.L.R. 585), and my opinion is that they should not be disturbed. The Ontario Government agreed that the question of the value of the respondents' services should be submitted to an eminent counsel and they, unquestionably, accepted his valuation, and ordered payment of the amount so determined. The Government, after a change of ministry, now repudiate liability for reasons which appear to me highly technical. I am entirely satisfied with the disposal of the case in the Courts below, and would dismiss the appeal with costs.

Appeal dismissed.

ROBERTS v. CITY OF EDMONTON.

Alberta Supreme Court, Appellate Division, Stuart, Hyndman and Clarke, JJ.A. November 9, 1922.

APPEAL (§VIII—476)—NEGLIGENCE—PROXIMATE CAUSE—ISSUE OF FACT—FINDING OF TRIAL JUDGE—REVIEW BY APPELLATE COURT. Whether or not the negligence of the defendant was the proximate cause of the injury to the plaintiff is an issue of fact to be determined by the trial Judge on all the evidence adduced, and his judgment will not be reversed on appeal unless it is perverse, or so obviously contrary to the evidence that it ought to be set aside.

APPEAL by plaintiff from the trial judgment, dismissing an action for damages for injuries received while alighting from a street car. Affirmed.

J. A. Clarke, for appellant.

J. C. F. Bown, K.C., for respondent.

STUART, J.A.:—My inclination would be to order a new trial in this case. The reasons for judgment given at the close of the evidence by the trial Judge do not make it clear to me that he found that the plaintiff had not suffered any injury at all to her ankle, even a slight one, at the hole in the car. In some of his sentences he seems to look upon "the accident" as being merely the fall in the vestibule. But the plaintiff sued for a sprained ankle, and if the ankle was, in fact, sprained at the hole, even though that may not have caused the subsequent fall, the plaintiff would be entitled to damages. It may be that the trial Judge hesitated to tell the plaintiff to her face that he thought she was lying when she said she had sprained her ankle in the hole. But I think she was, after all, entitled to a specific finding as to whether or not she had done so. The trial Judge does not expressly say that she did not although that may be the implication

he intended. My trouble is that I am not quite sure from his language that he did intend to find that she did not hurt her ankle even slightly in that hole.

But as the other members of the Court think we cannot interfere I need say no more. The appeal must be dismissed with costs, although for myself, I should have ordered a new trial in the circumstances.

HYNDMAN, J.A.:—Had I tried this action I am not sure that I would not have decided in favour of the plaintiff.

The issue before the trial Judge sitting as a jury, however, was whether or not the injuries to the plaintiff were the result of her stepping into a hole in the floor of the street car, which defect in the floor was held to have amounted to negligence on the part of the defendant corporation.

It was not sufficient for the plaintiff to prove negligence merely, but to go further, and satisfy the Court that such negligence was the proximate cause of the damage. This was an issue of fact to be decided on all the evidence adduced.

Unless it is fairly certain that the judgment was perverse, or so obviously contrary to the evidence that it ought to be set aside, I do not see upon what ground the appeal can succeed.

A careful reading of the whole case shows that there were certain circumstances from which a jury might reasonably infer that the accident was not or might not, be due to the defect in the car. It was essential to find that such defect was the cause of the trouble. The trial Judge not having been satisfied of the proof of this essential element of the case, the plaintiff failed.

Whilst it would have been more satisfactory had the trial Judge found some other cause for the injury, still he was not obliged to do so.

With some regret, I would dismiss the appeal, with costs.

CLARKE, J.A.:—Appeal by plaintiff from the judgment of Simmons, J., dismissing plaintiff's action.

In order to succeed at the trial, the plaintiff was required to discharge the burden of proving (a) negligence on the part of the defendant and (b) that the defendant's negligence was the cause of or contributed to the plaintiff's injuries.

The negligence imputed to the defendant was the operation of a street car having a defective floor, and the trial Judge found that such negligence existed, but he found against the plaintiff, on the other branch of the case.

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Speaking of the plaintiff he says: "I have no reason to doubt her statement that she did step into the hole in the floor and may have tripped there, but I am not satisfied that that was the cause of the accident." The plaintiff stated that on going towards the door to leave the car, she caught her heel in the hole in question, and, in extricating it, wrenched her ankle, as a result of which her foot turned when she was getting off the car and she fell. There was no corroboration of her statement that she caught her foot in the hole. She made no exclamation, and did not, at the time, assign that as the cause of her fall, and some passengers sitting near the hole who gave evidence said their attention was not called to her catching her foot or tripping, nor anything unusual until she fell on the steps.

Had the trial Judge found in her favour, it would be difficult to disturb the finding, but having found that she had not satisfied him that the hole which constituted the defendant's negligence was the cause of the accident, I think this Court would not be justified in reversing his finding.

I would, therefore, dismiss the appeal with costs.

Appeal dismissed.

RATTENBURY v. KINCH.

Prince Edward Island Court of Appeal in Equity, Mathieson, C.J., Haszard, M.R., and Arsenault, V.C. November 2, 1921.

APPEAL (§VIII—476)—FINDINGS OF FACT OF TRIAL JUDGE—INTERFERENCE WITH BY APPELLATE COURT—DELAY IN EXECUTION OF JUDGMENT—TECHNICAL QUESTION—NO INJUSTICE.

The decision on questions of fact of the Judge who has heard the evidence and has had the opportunity of observing the demeanour of the witnesses will not be disturbed except for the very gravest reason or where it is manifest that a serious injustice will result.

[*Morrow Cereal Co.* v. *Ogilvie Flour Mills* (1918), 44 D.L.R. 557, 57 Can. S.C.R. 403, *dicta* of Anglin, J., approved.]

Where the appellant is conversant with all the transactions and intimately connected with every phase of the suit, and where no injustice will be caused, the Court of Appeal will not delay the proper execution of the judgment on a purely technical question of practice devoid of merits.

APPEAL from a decree for equitable execution on the grounds of alleged irregularities in procedure and lack of sufficient notice to enable defence to be prepared.

Donald McKinnon, for appellant.

J. J. Johnston, K.C., and *W. E. Bentley*, K.C. for respondent.

The judgment of the Court was delivered by

HASZARD, M.R.:—The pleadings in this case, together

with all the facts as submitted, are fully set out in the factums filed herein, as are also the various steps in the suit.

After hearing the evidence of the manager of the Bank of Nova Scotia and other witnesses, as also the evidence on behalf of the appellant, Lillian Rattenbury, the original bill as filed, was by leave of the Court amended making the appellant, Lillian Rattenbury, a defendant in the suit, and adding two new paragraphs to the bill, charging the appellant with having in her possession, or under her control, certain moneys, goods and chattels of the defendant, Arnold Rattenbury, and that such moneys, goods and chattels had been assigned and delivered by the defendant, Arnold Rattenbury, to the appellant for the fraudulent purpose of hindering, delaying or preventing the respondent from recovering back the said moneys, paid by the said respondent, for the purchase of the schooner "Beaver," and the moneys intrusted to the defendant, Arnold Rattenbury, as agent of the respondent, and claiming that the respondent then held the said moneys, goods and chattels, as a trustee for defendant, Arnold Rattenbury. Also that the said defendant, Arnold Rattenbury, had transferred, assigned and delivered all his property in the Province, to his wife, the appellant, with the intent of preventing the respondent from obtaining payment of respondent's just demands against defendant, Arnold Rattenbury.

Paragraphs 9 and 10 of the prayer of the bill were also amended, by asking for the appointment of a receiver and a restraining order and injunction, preventing the said defendant, Arnold Rattenbury, and the appellant, from collecting and receiving any moneys held by any person or persons, firms, banks or corporations, for or in trust, for the defendant Arnold Rattenbury, and the appellant or either of them and from disposing of any goods, or chattels referred to in the said bill of complaint as amended.

The restraining order was granted and duly served upon the appellant and other parties; the appellant filed her answer to the bill and the cause again came on for further hearing before the Vice Chancellor, the appellant being present and examined.

After hearing the evidence submitted (the defendant Arnold Rattenburg, although subpœnaed, having failed to appear) the Vice-Chancellor made his decree, declaring that in the circumstances appearing in evidence, and having regard to the fiduciary relationship existing between the respondent and the defendant Arnold Rattenbury, the contract

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made between the respondent and the defendant Arnold Rattenbury for the purchase by the defendant Arnold Rattenbury, for the respondent of the schooner "Beaver" ought to be set aside and rescinded and declaring and ordering *inter alia*, that the defendant Arnold Rattenbury repay to the respondent the sum of $13,,553.65, adjudged to be due from him to the respondent, upon this decree. A judgment was, therefore, entered in the Supreme Court, for the said sum of $13,553.65.

Subsequently, a motion was made on behalf of respondent for equitable execution against the appellant and that she be declared a trustee of the sum of $2,712.21, deposited in her name, in the Bank of Nova Scotia, and of a Chevrolet car and certain other goods and chattels under her control, found to be the property of defendant Arnold Rattenbury, and no further evidence being offered by her or on her behalf, or further defence made, the decree was made as asked for.

From this decree this appeal is taken, chiefly on the grounds of what is claimed to be irregularities in the procedure, and want of sufficient notice to enable her to make her defence.

It is quite evident that the Vice-Chancellor, in reaching the conclusion which he did, was impressed with the fraudulent nature of the whole transaction, on the part of the defendant Arnold Rattenbury, and the complicity of the appellant, in the attempt to make away with and conceal his assets, and, thereby, prevent the recovery back by the respondent Kinch, the moneys out of which he had been unjustly defrauded.

From a full examination of the evidence and factums, I am unable to see how the Vice-Chancellor could have reached any other conclusion. The transactions of the defendant Arnold Rattenbury, as they appear to me were of a most glaring and fraudulent kind. Having located assets of the defendant Arnold Rattenbury, the power of the Court to prevent them being further dissipated is undoubted and required to be effectively and promptly dealt with.

The questions of both law and fact, in cases of this nature, have to be decided by the trial Judge, and it has been well settled, that the decision on questions of fact of the Judge who has heard the evidence, and had the opportunity of observing the demeanour of the witnesses should carry with it the fullest weight and should not be disturbed except for

the very gravest reason or where it is manifest a serious injustice would result.

A recent case in the Supreme Court of Canada in which the rule was expressed with much force, was that of *Morrow Cereal Co.* v. *Ogilvie Flour Mills Co.* (1918), 44 D.L.R. 557, 57 Can. S.C.R. 403, in which Anglin, J., cites with approval, the remarks of the Judges in *Ruddy* v. *Toronto Eastern R. Co.* (1917), 33 D.L.R. 193, 21 C.R.C. 377. He quotes as follows (44 D.L.R., at p. 563):—

"From such a judgment an appeal is always open both upon fact and law. But upon questions of fact an Appeal Court will not interfere with the decision of the Judge who has seen the witnesses and has been able with impression thus formed fresh in his mind, to decide between their contending evidence, unless there is some good and special reason to throw doubt upon the soundness of his conclusions." Anglin, J., in 44 D.L.R., at p. 563, also cites the dictum in *Wood* v. *Haines* (1917), 33 D.L.R. 166, at p. 169, 38 O.L.R. 583, as follows:—"They [the Judges] say:—It must be an extraordinary case in which an appellate tribunal can accept the responsibility of differing as to the credibility of witnesses, from the trial Judge who has seen and watched them, whereas, the Appellate Judge has no such advantage." In these and numerous other cases the same rule has been laid down and is well established.

In the present case, there is, in my opinion, no doubt whatever as to the correctness of the finding of the Vice-Chancellor on the questions of fact.

As to the practice, there is nothing which would warrant any interference with the decree as made. Here, although not an actual party to the suit in the first instance, the appellant was intimately connected with every phase of it, was examined on several occasions regarding her complicity with the defendant Arnold Rattenbury, both with regard to the money in the bank and also as to the other property and effects which had been secured to her by bill of sale; and having been fully conversant with all the transactions and been afforded every opportunity to make such other or further defence as she saw fit and having failed to do so, this Court of Appeal would not be justified in further delaying the due and proper execution of the judgment on a purely technical question of practice, absolutely devoid of merits.

The appeal should be dismissed with costs.

Appeal dismissed.

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CANADIAN PACIFIC R. CO. v. CITY of WETASKIWIN.

Alberta Supreme Court, Appellate Division, Stuart, Beck and Clarke, JJ.A. November 1, 1922.

APPEAL (§XI—720)—APPLICATION FOR LEAVE—ASSESSMENT OF PROPERTY—JUDGMENT OF COUNTY COURT—SUPREME COURT ACT, 1920 (CAN.), CH. 32, SEC. 37.

In view of the fact that before the amendment to the Supreme Court Act. 1920 (Can.) ch. 32, there was a right of appeal to the Supreme Court of Canada in a case where the judgment appealed from involved the assessment of property at a value of not less than $10,000, and under the present sec. 37 there is an appeal in such a case by leave of the highest Court of final resort having jurisdiction in the Province in which the proceeding was originally instituted. The Court held that leave to appeal should be granted where the amount involved was many times that amount, and there was a question as to whether the assessor had not made a business assessment under the guise of assessing the land.

[*Girard* v. *Corp'n of Roberval* (1921), 67 D.L.R. 476, distinguished.]

APPLICATION by the appellant pursuant to sec. 37 of the Supreme Court Act, as amended by 1920 (Can.) ch. 32, for leave to appeal to the Supreme Court of Canada from the Judgment of His Honour W. A. D. Lees, Judge of the District Court of the District of Wetaskiwin, confirming the assessment of the appellant's property in the City of Wetaskiwin.

D. W. Clapperton, for appellant.

Frank Ford, K.C., and *C. W. Russell*, for respondent.

The judgment of the Court was delivered by

CLARKE, J.A.:—Section 41 of the Act, R.S.C. 1906, ch. 139, repealed by the amendment of 1920 (Can.), ch. 32, gave a right of appeal in such a case where the judgment appealed from involved the assessment of property at a value of not less than $10,000. Under the present sec. 37, there is an appeal in such a case by leave of this Court, where the proceeding was originally instituted in this Province.

In *Girard* v. *Corp'n of Roberval* (1921), 67 D.L.R. 476, 62 Can. S.C.R. 234, the opinion was expressed by some members of the Court special leave to appeal to the Supreme Court of Canada should not be granted by the highest Court of final resort in the Provinces under present sec. 41, Supreme Court Act, if neither an important principle of law, nor the construction of a public Act, nor any question of public interest is involved.

In that case, the appeal was from the judgment of the Court of King's Bench, Appeal Side, Province of Quebec

(1921), 32 Que. K.B. 65, and sec. 41 refers to cases within sec. 36.

I think that greater latitude may be allowed in dealing with applications for leave under sec. 37 where the parties have not had the advantage of a hearing before the highest Court of final resort having jurisdiction in a Province or of any Superior Court, especially where large interests are involved.

In the present case, the lands of the appellant in question have been assessed at $127,630 and witnesses on behalf of the city support that assessment. One parcel alone, block A, containing 5.11 acres being assessed at more than $100,000. Whereas witnesses on behalf of the appellant estimate the fair value of all the parcels at $27,625.50—a difference of approximately $100,000, on which the taxes at the 1921 rate would amount to approximately $4,000. The assessor states that, in arriving at the fair value he takes several things into consideration, such as the business done on the property, which suggests that he may have made a business assessment under the guise of assessing the land.

In view of this rather important principle of assessment, and of the large amount in question, it seems a proper case for leave. As before the amendment of 1920 there was an appeal by right where the property was assessed at not less than $10,000, it seems just that where the difference is ten times that amount leave should be given under the present law.

It was pointed out upon the hearing of the application that the time for bringing the appeal expired on that day viz. October 30. Judgment was not then given as the Court required time for consideration and for the reading of the transcript of evidence before the District Judge. Unless the time be extended, leave to appeal will be futile. The District Court, however, has power under sec. 71 to allow the appeal under special circumstances, although not brought within the time prescribed by sec. 69, and it seems a proper case for the exercise of such power, which cannot be done however, until leave to appeal be granted. See *Goodison Thresher Co.* v. *Corp'n of McNab* (1910), 42 Can. S.C.R. 694, and 44 Can. S.C.R. 187.

I would give leave to appeal as desired by the appellant, the costs of this application to abide the event of the appeal.

Leave to appeal granted.

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NAZZARENO v. ALGOMA EASTERN R. CO.

Supreme Court of Canada, Idington, Duff, Anglin, Brodeur and Mignault, JJ. October 10, 1922.

CARRIERS (§ IIID—406)—OF FREIGHT—NOTICE OF ARRIVAL—DELAY BY CONSIGNEE IN REMOVAL—LOSS BY FIRE—LIABILITY.

The 48 hours written notice in section 6, in the form of shipping bill furnished by the Board of Railway Commissioners, while it enables the railway company to protect itself by resorting thereto, does not render its use imperative, and where no written notice is given but only verbal notice of the arrival of a car, what is a reasonable time for paying the charges and unloading the car must be decided on the circumstances of each case. A delay of 36 hours in paying the charges and unloading the car, in spite of persistent demands of the agent, was held to be unreasonable delay under the circumstances, and debarred the consignee from recovering damages for loss of the goods while in the possession of the carrier.

APPEAL by plaintiff from the Supreme Court of Ontario, Appellate Division (1922) 21 O.W.N. 363, affirming the trial judgment and dismissing an action to recover damages for goods destroyed by fire in a freight car of defendants. Affirmed.

D. L. McCarthy, K.C., and *Mulligan*, for appellant.

McCrae, K.C., and *Valin*, for respondent.

IDINGTON, J.:—A company doing business in Montreal having sold to the appellant certain merchandise ordered by him to be shipped to Copper Cliff in Ontario, shipped same by way of the Canadian Northern Railway and the respondent's railway, and the car wherein so shipped reached about 9 o'clock in the forenoon of November 11, 1919, a point sworn to be within the yard of respondent's railway at Copper Cliff.

The respondent's local station agent, one Parent, immediately, or shortly after 10 o'clock, saw the appellant at his store and told him that he had the car in question there (meaning at the interchangeable switch, according to what the trial Judge Latchford J. (1920), 18 O.W.N. 142, finds was a practice well known to appellant) and how much the freight on it was.

Again in the afternoon of the same day he called him on the telephone and told him of the car awaiting him and wanted to know if he was going to come that day, and his reply was that his man had gone to Coniston and he could not came but that he would come the next day.

The next day he called him again—does not know whether afternoon or forenoon—and the reply was that his men had gone to the Murray Mine and, if Parent, the agent, telling this story, understood him correctly, they would call

at the station on their way back and that he would settle for the freight.

No one called as promised, but next morning (that of the 13th) appellant called on him and paid the freight, and asked him (Parent) when he was going to spot the car, and got the reply that it would be done right away.

It turned out that the car had been burnt between 10 and 11 o'clock the previous night and the goods therewith, in part.

The car when so burnt was on what is called the transfer or interchange switch, the property of the International Nickel Co. in a lonely place, and out of the way of any ordinary accident.

That switch is sworn to have been habitually used by said company for its own service and to serve the respondent, pursuant to some understanding between it and the said company, the exact terms of which are not in evidence.

There is evidence that at respondent's station, about a mile and a half away, there is no proper place for unloading a car, but that from this switch the International Nickel Co. could move any cars nearly into the Copper Cliff town and those doing business over respondent's line were habitually served by it.

There is no doubt, in my mind, that if the appellant had desired delivery he would have got it on payment of freight at any place thereabout on these tracks he chose to name where unloading was practicable and for him most desirable, within an hour or two.

Yet much is made in the appellant's factum of the irrelevant fact that the place or places where the car had been lying in the course of shunting it about after its arrival, were not proper places for its unloading. The trouble arose from the failure to first pay the freight and, thereby, become entitled to have it placed where the respondent desired to unload it.

I have little doubt that its being thus in the way of shunting cars by the International Nickel Co., over said International switch, was the case of the persistent demands of that station agent of respondent upon the appellant to pay freight and tell where he desired it to be spotted for unloading.

Indeed the whole question of law herein is whether or not the trial judge, Latchford, 18 O.W.N. 142, who held that the appellant had a reasonable time and opportunity if he desired to exercise it, to have secured the load and,

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in default of his doing so, could not recover.

I am unable, after giving due consideration to the questions argued (most of them irrelevant to the neat point thus raised) to hold that the trial Judge whose view is upheld by the unanimous decision of the Court of Appeal, (1922), 21 O.W.N. 363, was in error in the conclusion he reached, in view of the very peculiar local conditions, well known to the appellant.

The order of the Board of Railway Commissioners giving effect and vitality to the conditions endorsed on the shipping bill herein, was passed so long ago as July 15, 1909, and numerous decisions since seem to apply the rule of what is reasonable on the part of the consignee as the test, in default of the provisions of the conditions not being strictly followed.

Had the notice been given in writing to the consignee on the arrival of the car, and 48 hours elapsed (instead of only verbally and twice repeated by respondent, as herein) there would have been no possible claim by appellant to relief after 48 hours in such a case as this.

I am not at all sure that the 36 hours of verbal notice repeated twice thereafter in urgent terms, does not, in reason, stand as the just equivalent of that of the single written notice provided by said condition for debarring the consignee from claiming for relief, unless there happened to have been negligence on the part of the railway carrier; of which there was none here.

The result of the many decisions I have looked at and which are cited in the last edition of MacMurchy & Denison 3rd. ed. 1922, on the Railway Act, and in 10 Corp. Jur., seems to be that each must stand on its own bottom by reason of what is in evidence, unless where a form of shipping bill, different from that furnished by the Board of Railway Commissioners already adverted to, has been adopted, as might happen in international traffic.

The obvious reason for discarding the 48 hours' written notice therein provided, is that whilst it enables the railway company so to protect itself, by resorting thereto, that it does not render its use imperative; and that, again, is obviously left so, because it would not perhaps have been reasonable to have imposed absolutely its use relevant to every case of notification of the arrival of a car, and as the only condition of relief from negligence on the part of the consignee.

The peculiar facilities, or want of facilities, on the part

of respondent at Copper Cliff, seem in point.

And the reasoning upon which it is founded seem to me well illustrated by the terms of the third condition in the Form of Conditions rendered obligatory and used herein, whereby it provides that if the transit is held up by one entitled to stop it, then the railway company is not to be held liable so long as that stoppage lasts, unless for some act of negligence.

I think this appeal should be dismissed with costs.

DUFF, J.:—The result of the evidence and the findings of the Ontario Courts, 18 O.W.N. 142; 21 O.W.N. 363 is that the conduct of the appellant amounted to a request to the respondent company to deliver the appellant's goods to the International Nickel Co. in whose possession the goods were when they perished. The carriage contemplated by the bill of lading had then terminated and the possession of the respondent company as carriers under the bill of lading had come to an end. I express no opinion upon the very different question which would have arisen in the absence of the request which on the very exceptional facts of this case is to be imputed to the appellant; or if the goods had perished while in possession of the respondent company on its own railway.

The appeal should be dismissed with costs.

ANGLIN, J.:—The plaintiff claims damages from the defendant as a common carrier for non-delivery of a car load of canned goods purchased from the Italo-Canadian Trading Co. of Montreal, and consigned to him at Copper Cliff. The goods were shipped by the consignor from Montreal via. the Canadian Northern Railway System. At Sudbury, they were transferred to the defendant company to complete the transit to Copper Cliff. The shipment was upon the terms of a standard bill of lading in the form prescribed by order No. 7862 of the Board of Railway Commissioners, bearing the date July 15, 1909 and made under sec. 340 (3) of the Railway Act R. S. C. 1916, ch. 37, for use by all railways under the legislative jurisdiction of the Parliament of Canada.

The goods were destroyed by fire on the night of November 12, about 36 hours after the plaintiff had first been notified (verbally) on the morning of November 11 of their arrival at the Copper Cliff station of the defendant. There were no facilities for unloading at this station, which was situated a mile and a half from the plaintiff's place of business at Copper Cliff. The car containing the goods

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had been handed over by the defendant company to the International Nickel Co. which operated a private railway running into the town of Copper Cliff and was accustomed to bring cars consigned to Copper Cliff merchants into the town where it had some team tracks convenient for unloading.

The freight on the consignment had not been paid and the International Nickel Co. was instructed by the defendant not to "spot" the car for delivery until notified by it that the freight had been paid. To suit their own convenience the International Nickel Co.'s employees moved the car from the interchange tracks, where the defendant company had left it, towards the town and allowed it to remain at a point on its railway about midway between the defendant's station and the town and not suitable for unloading. While there it was burned without any fault of the defendant, the fire being probably, as the trial Judge found, of incendiary origin.

The plaintiff paid the freight to the defendant's agent on the morning of November 13, both he and the agent being at the time in ignorance of the destruction of the goods during the preceding night.

While I fully share the suspicions expressed by the trial Judge Latchford, J., and by Ferguson, J. A. in delivering the judgment of the Appellate Divisional Court, 21 O.W.N. 363, I think this case must be disposed on the basis of facts assumed by the former. He was "unable to find, in the absence of evidence to the contrary, that the transaction (for the sale of goods by the Italo-Canadian Trading Co. to the plaintiff) was not entered into.

But while assuming that the goods were shipped as claimed, he fixed their value at $6,500 instead of $14,000, the invoice price. The evidence justifies this valuation. By the terms of the bill of lading, the carrier's liability is to be computed "on the basis of the value of the goods at the place and time of shipment" (sec. 4).

Latchford, J., seemed inclined to hold that, at the time they were burned, the relation of the defendant to the goods had become that of warehouseman owing to the plaintiff's failure to arrange for their removal within a reasonable time after he had been informed of their arrival. But he dismissed the action without determining that question. His judgment concludes as follows (See 18 O.W.N. at p. 143):—

"All that the plaintiff had to do after being notified by

the defendants of the arrival of the car at their station was to send over a cheque for the amount of the freight. This he could easily have done on the afternoon of the 11th. Even then the car was in the actual physical possession of the transfer company to which as his agents, the plaintiff, when he directed the shipment to be made to the defendants' Copper Cliff station, intended that it should be delivered. The action, in my opinion, cannot succeed, whether the defendants are regarded as carriers or as warehousemen. As the latter, no negligence has been proved against them. As the former they discharged all their obligations when they delivered the car at its destination. Accordingly, the action is dismissed with costs."

While the defendant controverts privity of contract with the plaintiff, it seems clear that it accepted his goods for carriage on the terms of the bill of lading issued by the initial carrier, the Canadian Northern Railway Co. The bill of lading specifies the route as "C.N.R. and A.E.R." and the destination as "Copper Cliff". The Canadian Northern Railway does not reach Copper Cliff. At Sudbury, it transfers traffic destined for that point to the Algoma Eastern Railway, which has a station called "Copper Cliff" situate about a mile and a half from the business section of the town of that name. As already stated, the use by all railway companies subject to its jurisdiction of the form of bill of lading issued by the Canadian Northern Railway Co. is prescribed by the order of the Board of Railway Commissioners. Both the Canadian Northern Railway Co. and the Algoma Eastern Railway Co. are in this category. The latter should be deemed to have known that the goods were shipped subject to the terms of the bill of lading, which was made applicable to them throughout the entire transit, and on taking delivery of the car to complete the transit must be held to have accepted it, subject to those terms, of which it is, of course, likewise entitled to the benefit.

On the face of the bill of lading it is stated that "it is mutually agreed as to each carrier of all or any of said goods over all or any portion of said route to destination, and as to each party at any time interested in all or any of said goods that every service to be performed hereunder shall be subject to all the conditions, whether printed or written, herein contained (including conditions on back hereof) and which are agreed to by the shipper and accepted for himself and his assigns."

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It is not material whether the Canadian Northern Railway Co. should, in issuing this bill, be deemed to have acted as agent for the defendant or whether it should, in delivering the plaintiff's goods at Sudbury to the defendant for carriage to their destination, be regarded as agent of the plaintiff. In either view, the defendant accepted the goods for carriage on the terms of the bill of lading and must be deemed to have contracted on those terms with the plaintiff.

By sec. 1 of the conditions on the back of the bill it is provided that "the carrier of any of the goods herein described shall be liable for any loss thereof or damage thereto except as hereinbefore provided."

Although it is stipulated in sec. 2 that "the carrier issuing the bill of lading shall be liable for loss, damage or injury to such goods . . . . . through the neglect or default of any other carrier to which such goods may be delivered," it is also provided that "nothing in this section shall deprive the holder of this bill of lading or party entitled to the goods of any remedy or right of action which he may have against the carrier issuing this bill of lading or any other carrier."

With great respect, I am unable, upon the evidence, to accept the conclusion that delivery of the goods to the International Nickel Co. constituted delivery of them to the defendant. The International Nickel Co. is not a common carrier. Its railway is a private line. To accommodate merchants and others, it brings cars consigned to them over that line into the town of Copper Cliff and allows the use of its team tracks for unloading. The uncontradicted evidence however, of the plaintiff and of Richard Elliott, yard-master for the International Nickel Co., is that cars consigned to Copper Cliff merchants are not switched over its railway, unless orders are received from the consignees, and that in the case of the plaintiff, who did not have an account with the company, that service would not be rendered until he had paid the company's switching charges. No instructions were given by Nazzareno to the International Nickel Co. to take the car in question. Moreover, the defendant's agent instructed the International Nickel Co. not to "spot" the car for unloading until advised by him that Nazzareno had paid the freight. Upon this evidence, it seems to me impossible to hold that the International Nickel Co. was the plaintiff's agent to accept delivery and that delivery to it was delivery to him and terminated the defendant's liability.

I am also, with great respect, unable to assent to the view that when the goods were destroyed the responsibility of the defendant in regard to them had been changed from that of carrier to that of warehouseman. Section 3 of the conditions indorsed on the bill of lading contains this clause:—"For loss, damage or delay . . . . caused by fire occurring after 48 hours (exclusive of legal holidays) . . . . after written notice of the arrival of such goods at destination . . . . . has been sent or given, the carrier's liability shall be that of warehouseman only."

By section 6 it is provided that "Goods not removed by the party entitled to receive them within 48 hours (exclusive of legal holidays) . . . . after written notice has been sent or given, may be kept in a car, station or place of delivery or warehouse of the carrier, subject to a reasonable charge for storage and to the carrier's responsibility as warehouseman only."

In the Ontario Courts the view has been expressed that a clause in an express company's receipt somewhat similar to the provision of para. 6 above quoted was "not intended to extend and did not extend the common law liability of the carrier; it was intended to limit and did limit the duties and liabilities of the carrier by providing an additional method of establishing notice or knowledge and fixing definitely the period of time for taking delivery."

It was accordingly held in *Dayment* v. *Canadian Express Co.* (1922), 22 O.W.N. 7, that, on the expiry of a reasonable time to take away goods after notice or knowledge that the carrier is ready to deliver, the responsibility of the carrier, as such, ceases; and, notice of the arrival of the goods having been given on July 12, the carrier was held not liable for their loss by theft on the night of July 13.

I cannot take that view of the effect of the bill of lading now before us. I find in the provision of sec. 1 that the carrier shall be liable for any loss or damage "except as hereinafter provided", and in the provision of sec. 2 making the issuing carrier liable for loss and damage sustained while the goods are in the hands of any other (continuing) carrier "from which the other carrier is not by the terms of this bill of lading relieved," clear *indicia* of an intention that, at all events, in regard to matters for which it provides the respective rights and liabilities of the owner and of each carrier in the course of transit are meant to be defined by the conditions of the bill of lading. If so, the plain implication from the provisions of secs. 1, 3 and 6

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above quoted would appear to be that until the written notice mentioned in secs. 3 and 6 has been given and 48 hours thereafter have expired, the responsibility of the railway company shall continue to be that of a common carrier subject to the terms of the bill of lading. The owner of the goods may earlier become liable for demurrage under the Car Demurrage Rules of the Board of Railway Commissioners, but the carrier can assert the status and claim the rights of a warehouseman only on compliance with the conditions prescribed by clause 3 or clause 6, as the case may be.

This view of the construction and effect of the standard bill of lading appears to have been suggested by members of this Court in *C.P.R. Co.* v. *Hatfield & Scott* (1921), 61 D.L.R. 529, 62 Can. S.C.R. 524. I should, perhaps, note in passing, in order to avoid possible future misapprehension, that, in my own judgment in that case, the word "issuing" has, by some inadvertence, crept into the eleventh line on p. 532 of the report. That word should be struck out. Clause 1 applies not merely to the issuing carrier but to every carrier in the course of transit.

It would seem probable that the Board of Railway Commissioners in sanctioning and prescribing the use of the standard form of bill of lading before us regarded 48 hours after written notice as a reasonable time to allow for taking the delivery of goods, and thought it advisable to substitute that definite period for the somewhat vague and indefinite "reasonable time" which had theretofore been allowed. But, however that may be, the conditions on which the railway company's liability as carrier shall terminate and liability as warehouseman shall be substituted are distinctly expressed, and, in my opinion, those conditions are exclusive and prevent the carrier relying on the lapse of a reasonable time for removal after verbal notice. Written notice of the arrival of the goods was not given to the plaintiff and 48 hours had not expired since he had received the first verbal notice—indeed since the arrival of the goods—when the fire which destroyed them occurred.

Attention has also been directed to the provision of sec. 3 of the bill of lading, that "except in case of negligence of the carrier . . . . the carrier shall not be liable for loss, damage or delay occurring while the goods are stopped and held in transit upon request of the party entitled to make such request."

There was no stoppage in transit and no request for such

a stoppage within the purview of this provision. Delay in "spotting" for delivery because of non-payment of freight I cannot regard as such a stoppage.

Because I gravely doubt the merits of the plaintiff's case, I regret being obliged to come to the concluison that the defendant is liable as carrier for the amount of the damages assessed by the trial Judge, $6,730.30.

BRODEUR, J.:—A bill of lading had been issued by the Canadian Northern Railway for the carrying of a carload of canned goods from Montreal to Copper Cliff in Ontario, on the lines of the Canadian Northern and of the Algoma Eastern. These goods were consigned to the appellant Nazzareno who is carrying on business in the town of Copper Cliff. The railway station of the Algoma Eastern is about a mile and a half from the town itself, and the delivery of the goods consigned to some merchants in the town is usually made through the International Nickel Co., which has a private railway of its own running from the Copper Cliff station into the town.

When the carload in question arrived at the station it was handed over to the International Nickel Co. by the Algoma Eastern Railway. On the same day, the station agent of the Algoma Eastern notified twice Nazzareno of the arrival of the car and asked for the payment of the freight due for the carriage of the goods from Montreal to Copper Cliff. At the same time, he told the International Nickel people not to deliver the car unless the freight was paid. Another request for the payment of the freight was made the next day.

But the plaintiff did not move and he came only on the day following and then paid his freight and requested that the car be spotted to be unloaded in the town.

But it was immediately discovered that the car and its contents had been destroyed by fire under circumstances which proved that it was of an incendiary origin.

The evidence creates a very strong presumption that this car did not contain only canned tomato paste, as claimed by Nazzareno, but was mostly loaded with liquor, in violation of the laws of Ontario.

Nazzareno claims from the Algoma Eastern Railway the value of his goods.

The trial Judge Latchford, J., found that the car was placed in the ordinary course of its transportation to the point at which the plaintiff intended to have the contents delivered to him, and that, in transferring the car to the Nickel company's line the defendants were carrying out

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what the plaintiff expected and intended in the shipment of his carload lots by their railway from a point like Montreal to the plaintiff in the town of Copper Cliff.

This finding of the trial Judge was accepted by the Appellate Division, 21 O.W.N. 363.

The obligations of the Algoma Eastern Railway as carrier were at an end when they transferred, according to the tacit agreement or understanding existing between the consignee and themselves the car on the tracks of the International Nickel Co.; and, if the car was not delivered sooner to the consignee, it is due to his fault and negligence in not paying the freight and switch charges sooner.

For these reasons, the appeal should be dismissed with costs.

MIGNAULT, J. (dissenting):—In my opinion, the evidence stops short of shewing that the goods shipped to the appellant were delivered to him or to his agent or that they were at his risk at the time of the fire. The appellant probably prejudiced his case by excessive over valuation of these goods, and has thereby created an atmosphere of suspicion, but that is no reason to refuse to grant him judgment for the value assessed by the trial Judge, who, nevertheless, considered that there had been a sufficient delivery. This value having been determined, the only question is whether the goods, at the time of the fire, had been delivered to the appellant or his agent, or were at his risk. These two questions, in my opinion, should be answered in the negative.

I would allow the appeal with costs throughout, and give the appellant judgment for $6,730.30, which is the value placed on the appellant's goods by the trial Court.

Appeal dismissed.

CORISH v. TOWNSEND.

Prince Edward Island Supreme Court, Haszard, J. February 21, 1921.

NEGLIGENCE (§ ID—70)—TRAFFIC AND RAILWAY BRIDGE—REGULATIONS AS TO TRAFFIC IMPOSED—KNOWLEDGE OF BY RAILWAY EMPLOYEES—NEGLIGENT OPERATION OF HAND CAR.

Where certain regulations are imposed as to traffic upon a bridge constructed for the double purpose of a railway bridge and public highway, railway employees must be taken to know these rules and cannot plead orders to the contrary as a defence where negligence has been proved.

ACTION for damages.

K. J. Martin, K.C., for plaintiff.

J. D. Stewart, K.C., for defendant.

HASZARD, J.:—This is an action for damages brought by plaintiff against defendant for negligently and unskil-

fully driving a hand car upon the railway track, over and upon the Hillsboro Bridge, that the said hand car was driven and struck against a horse and carriage of the plaintiff, then being lawfully driven by the plaintiff over and upon said bridge whereby the same was injured and damaged.

The Hillsboro Bridge was constructed for the double purpose of serving as a railway bridge and also as a highway for use by the travelling public with horses, vehicles, and persons on foot and otherwise. For the right to use the said bridge as a highway, the Provincial Government, by an agreement, dated April 18, 1900, agreed to contribute annually to the Dominion Government, the sum of $9,750.

By a later agremeent dated December 20, 1906, made between the Dominion Government and the Provincial Government, it was agreed that the Dominion Government should, at its own cost and expense, provide gates at the shore of each approach to said bridge, to be used for the keeping back of highway traffic of all kinds from entering upon the bridge or the approaches leading thereto, whenever the bridge and its approaches would be required for railway purposes, or whenever the swing span of the bridge was about to be opened or was open, or whenever for any other reason it would be unsafe for highway traffic to be upon the bridge or the approaches thereto. Other provisions were also made for houses at the shore end of each approach to said bridge, to be used by the men to be placed in charge of the gates as gate keepers, also for providing telephones in the gate houses, etc. to be connected with the train despatcher's office at Charlottetown station, such telephone connection to be used for communicating between the train despatcher's office and the gate keepers' houses, with respect to the use of the bridge for railway traffic or other railway purposes, etc. It was also provided that a sufficient number of men, the number and efficiency of whom to be approved of by the general manager of Government Railways, etc. be stationed at each gate at the shore end of each approach to said bridge, and who, as employees of the Provincial Government should have charge of the opening and closing of gates and of the clearing of the bridge and its approaches and keeping them clear of highway traffic of every kind whenever the bridge and its approaches would be required for railway traffic or other railway purposes, etc. or when from any other reason, it

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would be unsafe for highway traffic to be upon the approaches or the bridge.

The agreement further provides that the Provincial Government would indemnify and save harmless, the Dominion Government from all and every damage arising out of or incidental to the interruption or of any interference with the railway use of said bridge or its approaches, such accident to any person or property or interference with the railway use of said bridge or its approaches, such accident to any person or property or interference with the railway use of the said bridge, *not being due to the negligence* of any of the employees of the Dominion Government or the said railway.

The facts as given in evidence before me are: That the plaintiff while driving his horse and carriage upon said bridge on a dark night in the month of September, 1919,—the weather being described as "dark and misty"; and while within a distance of about four spans from the Southport or south end of the bridge, his horse and wagon were struck by a car, which was approaching on the railway track, or rails from the south end of said bridge—the approach of which he had no notice until the accident happened—by the collision he was thrown out, his horse was knocked down and injured, and his carriage broken and damaged.

The defendant, by his plea, says:—1. He is not guilty. 2. That the alleged trespass was caused by the negligence and improper conduct of the plaintiff and not otherwise.

Defendant admits that he was in charge of the car and was driving same on the rails over the bridge from the Southport side, and claims to have had a railway lantern held by a man sitting at the front of the car. He also says that before leaving Fodhla—a station 25 miles from Charlottetown, realizing that he would be late, he rang up the gate keeper and the railway office, and found the gate keepers were not on duty, and on arrival at the south side of the bridge, without taking any further precaution proceeded to cross over the bridge with his car, the man who was with him, sitting at the front of the car, holding (he says) a lighted lantern in his hand, and while in the act of crossing, the collision took place.

Defendant admits that he made no arrangement with the gate keeper or anyone else on the north side to shut down the gates whilst he was crossing, and went so far as to say that it was not necessary, as his orders were to go on the

bridge at any time, only to protect himself against trains, also that when going over in the afternoon, he did not notify the gate keepers when he would be returning.

The fact however of defendant considering it necessary to telephone the gate keeper and the railway station, as he says he did before leaving Fodhla on his return, satisfies me that he knew that he had no right to cross over the bridge with his car, without first shutting off the highway traffic and ascertaining that the bridge was clear or at least there were no teams thereon and the gates closed.

Having entered upon the bridge without taking these precautions, he was wrongfully there and was guilty of negligence, and rendered himself liable for any damage committed by his unlawful act.

It is quite clear, from the evidence before me, that it never was the intention to allow a train or railway car to be on the bridge at the same time with teams, for the reason that if approaching from opposite directions and having to pass there is not sufficient room to do so with safety, if at all.

I find, in favor of the plaintiff, for the sum claimed, $44 for damages, for which amount a verdict will be entered.

Judgment for plaintiff.

NORTHERN GRAIN Co. v. CANADIAN NATIONAL RAILWAYS and GRAND TRUNK PACIFIC RAILWAY.

Alberta Supreme Court, Appellate Division, Beck, Hyndman and Clarke, JJ.A. November 9, 1922.

COSTS (§ I—2)—DISMISSAL OF ACTION AGAINST ORIGINAL DEFENDANT—OTHER DEFENDANT ADDED—SAME EVIDENCE USED IN SECOND CASE—RIGHT OF ORIGINAL DEFENDANT TO COSTS.

Where at the trial of an action it is discovered that the action has been taken against the wrong defendant, and the action against such defendant is dismissed but another defendant is added, and it is agreed that the evidence already taken as against the original defendant is to be used in the action against the added defendant, against which judgment is subsequently given, the original defendant is entitled to its costs, where it has not deliberately misled the plaintiff into commencing the action as originally taken.

CARRIERS (§ IIIC—385)—GOODS DELIVERED TO CARRIER—LOSS OF PORTION OF GOODS—FAILURE TO EXPLAIN—PRESUMPTION OF EVIDENCE—RES. IPSA LOQUITOR.

Where goods have been delivered to a railway company for carriage and they are not delivered and no explanation is furnished negligence will be presumed.

APPEAL by Canadian National Railways against that part of a County Court judgment, which deprived it of costs, and by the Grand Trunk Pacific R. Co. against the judgment generally, finding it liable for the loss of part of a car of

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wheat shipped over its Road; Appeal by Can. Nat. Railways allowed, appeal by G.T.P.R. Co. dismissed.

Maclean, K.C., for appellant; *Freedman*, for respondent.

The judgment of the Court was delivered by

HYNDMAN, J.A.:—This is an appeal from the judgment of his Honor Judge Crawford, who gave judgment in favor of the plaintiff against the Grand Trunk Pacific Railway for the sum of $248.40, and costs, and dismissed the action against the Canadian National Railways without costs.

The action arose out of the following facts:—The plaintiff owned and operated a country elevator at the town of Irma, on the main line of the Grand Trunk Pacific Railway, in this Province. The action was originally brought against the Canadian National Railways only, the plaintiff alleging that on May 12, 1920, it delivered to the Canadian National Railways 61,250 pounds of No. 1 northern wheat in car No 300976, Grand Trunk Pacific Railway at Irma aforesaid, to be safely and securely carried by the said railway to Fort William, Ontario; that the said railway undertook to carry said wheat as aforesaid, but that they did not safely and securely carry the same, and that during transit there was lost or stolen out of the said car 6,900 pounds or about 100 bushels of the said wheat.

At the conclusion of the plaintiff's case, the point was for the first time raised that the action was wrongly brought against the C.N.R., the contract in question having been made with the G.T.P. Railway. The bill of lading, undoubtedly, bore the name of the Grand Trunk Pacific Railway, and there is no mention of Canadian National Railways thereon, but the mistake no doubt in bringing action against the Canadian National Railways was due to the common impression which widely prevailed that the Dominion Government was operating the Grand Trunk Pacific as a part of the Canadian National Railway system. This, however, was not the case. The Grand Trunk Pacific was at the time of the matters in issue here operated by the Minister of Railways for Canada as receiver of the Grand Trunk Pacific and the same set of officials were largely, if not altogether, used as operated the Canadian National lines. The officer who was put forward by the defendant Canadian National Railways for examination for discovery happened also to be acting in a similar capacity for the Grand Trunk Pacific, and counsel for the defence states that neither he nor the officer examined appreciated the effect of his examination as tending, possibly, to mislead the plaintiff, and it was not until the trial that the real

situation was brought home to him. The fact, however, is that the Canadian National Railways never did have a contract with the plaintiff, and upon the evidence, could not be held liable for the damages alleged and were, undoubtedly, entitled to judgment.

The District Court Judge, accordingly, dismissed the action against the Canadian National Railways, but added the Grand Trunk Pacific as defendant, reserving the question of costs until the final disposition of the action. It was agreed that the evidence already taken as against the Canadian National Railways would be used in that against the Grand Trunk Pacific. At a later date, therefore, the trial proceeded and the defendant gave evidence. The trial Judge later gave judgment against the G.T.P. for damages for the loss of the grain in question in the sum of $248.40, with costs throughout, dismissing the action as against the Canadian National Railways, without costs.

The Canadian National Railways obtained leave to appeal from that part of the judgment which deprived it of costs, and its co-defendant appeals against the judgment generally.

As to the costs of which the first defendant was deprived, in my opinion, there was no effective reason why costs should not have been given in its favor. On the issues raised by the pleadings it was entitled to judgment. The only possible reason which could be urged in favor of disallowance of costs would be that the plaintiff was possibly misled, but no examination of the exhibits, including the bill of lading, shows that the plaintiff must or ought to have been aware that it was the Grand Trunk Pacific and not with the Canadian National Railways that it was contracting. There is no justification, as far as I can see, for saying that they were deliberately misled by this defendant or its solicitor.

I would, therefore, allow the appeal on this branch of the case and give judgment for the defendant the Canadian National Railways for its costs but would fix such costs at $50 in addition to the costs of this appeal, which I also fix at $50.

As to the second branch of the case. The trial Judge was satisfied on the evidence of the plaintiff that it did, as a matter of fact, load into the railway car in question 6,900 pounds of wheat in excess of what was in the car when weighed at its destination at Fort William. Such evidence as the defendant adduced to show lack of negligence on the

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part of the railway would tend to prove that the car in question was not tampered with and was not in a leaky condition; but the investigations made were not as thorough as they might have been, and the car was not traced throughout its journey so that every possible mischance could be accounted for. The evidence that the car was loaded with the quantity claimed by the plaintiff was entirely that of the plaintiff's manager at the point of shipment. The railway official at that point had nothing to do with the loading or weighing and there, apparently, is no method or system by which the weights at the point of loading can be checked at the time, and ,in fact, in this case, at any rate, no record of the amount as loaded was produced to the railway company until a claim for shortage was lodged. This seems to me to be a very great weakness in the railway system of doing business, and if there is no method of checking weights at the time of loading it seems to me it would be a wise precaution to insist upon a memorandum of the weights before the car is finally sealed and sent on its journey. Had I tried the case myself, I think, I would have required further proof of the quantity on general principles, especially if it were shown that the car was apparently in good condition as might be said in the present case. However, the trial Judge, having found as a fact that the quantity claimed was, in fact, loaded on to the car, it would not be proper for this Court to disturb such finding unless it was fairly clear that he was mistaken or likely to be wrong. That being so, it seems to me there is no alternative but to affirm the judgment, the amount of the damages being well within the amount which should be awarded, considering the price of wheat at that time.

It is not necessary for the plaintiff to prove negligence but it is sufficient to show that it delivered a certain quantity of wheat to the railway company for transportation and that it received back a smaller quantity. In *Ferris* v. *C.N.R. Co.* (1905), 15 Man. L.R. 134, at p. 138, Perdue, J., said:—

"It was strongly urged on the part of the defence that no negligence was shown and that negligence must be proved. The conditions on one bill of lading were also relied on. Finding, as I have, that, 1270 bushels of wheat went into the car, it rests upon the defendants to show what became of the difference. No evidence was offered which would enlighten me as to what actually happened which caused the loss of the grain or the non-accounting for same, and it is useless to speculate as to what casualty

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may have overtaken it or what error may have been made. In the absence of other evidence *res ipsa loquitor* applies and points to the loss as occurring through some act or default on the part of the defendants. . . . . Where goods are shown to have been delivered to a railway company for carriage and they are not delivered and no explanation is furnished negligence may be presumed."

This judgment was afterwards affirmed on appeal to the full Court of Manitoba (15 Man. L.R., at 139 *et seq.*). It seems to me that the law is as laid down in the case cited.

I would, therefore, dismiss the appeal of the Grand Trunk Pacific, with costs on column 1.

Judgment accordingly.

STAHN v. PEUTERT.

Saskatchewan District Court, Wood, Dist. Ct. J. March 20, 1922.

APPEAL (§ VIB—287)—FROM CONVICTION OF JUSTICE OF THE PEACE—CHARGE UNDER STRAY ANIMALS ACT, R.S.S. 1920, CH. 124—IRREGULARITIES IN PROCEEDINGS—JURISDICTION OF COURT TO QUASH ON APPEAL—SUFFICIENCY OF GROUNDS.

Failure of the presiding Justice on a charge of illegally impounding animals under the Stray Animals Act R.S.S. 1920 ch. 124, to reduce any of the evidence to writing as required by secs. 721 (3) and 682 (3) of the Criminal Code, is sufficient ground for quashing the conviction, there being no evidence of record to support the conviction, and an application to quash on these grounds may be entertained and given effect to on an appeal from such conviction.

Where the record does not shew that the notice required by sec. 34 of the Stray Animals Act was given to the pound keeper, the onus of proving which is on the complainant, the conviction is bad on its face as not shewing jurisdiction in the magistrate and will be quashed on appeal.

APPEAL from summary conviction, under the Stray Animals Act, R.S.S. 1920, ch. 124, for illegal impounding. Conviction quashed.

The facts of the case are as follows:—

Peutert impounded three bulls the property of Stahn on April 30, 1921. Stahn in order to get his bulls, which were over one year in age, out of pound, paid certain damages and pound fees under protest. He had the notice required by sec. 34 (2), R.S.S. 1920, ch. 124 typewritten and handed to the poundkeeper, retaining the original himself. He then laid the complaint against Peutert under the Saskatchewan Stray Animals Act for illegal impounding, it being alleged by Stahn that at the time Peutert took possession of his bulls, they were grazing on fenced lands which he, Stahn, held under lease. The case came up for

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hearing before the Justice of the Peace at Assiniboia on May 17, 1921. The presiding Justice refused to take the evidence down in writing as required by Part XV. of the Cr. Code. Peutert's solicitor took the objection, but the Justice overruled him. Stahn produced the notice to the poundkeeper but it was not put in evidence, the Justice returning it to him with the request that he keep it in his pocket. Peutert was found guilty of illegal impounding, and an order was made refunding to Stahn the moneys paid by him under protest to the poundkeeper, and mulcting Peutert with the costs.

A. E. MacKinnon, for appellant.

R. J. Hawthorne, for respondent.

WOOD, D.C.J.:—The appellant was convicted for illegally impounding bulls under the Stray Animals Act R.S.S. 1920, ch. 124, and now appeals from this conviction.

Upon the appeal being entered for hearing, Mr. MacKinnon for the appellant moved to quash the conviction upon the following grounds:—(1) That there is no evidence on the record to support the conviction, the magistrate not having reduced any of the evidence to writing as required by sec. 721 (3) and of sec. 682 (3) of the Cr. Code; (2) There is nothing on the record showing compliance with sec. 34 of the Stray Animals Act, so that the magistrate might have jurisdiction under sub-sec. (3) of that section to enquire into the compaint: (3) There is nothing to show compliance with sec. 35 (2) of the Stray Animals Act, R.S.S. 1920, ch. 124.

I went on and heard the appeal subject to these objections, and reserved my judgment upon them after hearing some argument, when it was arranged that counsel for both parties might file written arguments.

I was at first inclined to the view that the application to quash the conviction on the ground that there was no evidence to support it could not be entertained on an appeal from a summary conviction, this being limited to proceedings by way of certiorari, where there is not a hearing *de novo*, as in the case of appeals from summary convictions. The authorities cited on behalf of the appellant however seem to establish that such an application may be made and given effect upon such an appeal. As the evidence in this case was not reduced to writing, there is no evidence, therefore, of record which would support the conviction, which upon that ground alone should, in my opinion, be quashed without going into the merits.

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Apart from the fact that there is no evidence on the record to support the conviction, I am of the opinion that the failure of the magistrate to reduce the evidence taken on the hearing to writing as he is required to do by those provisions of the Criminal Code I have above referred to, is alone a ground for quashing the conviction.

If this were not enough I am of the opinion that as the record does not show that the notice required by sec. 34 of the Stray Animals Act was given to the poundkeeper, the onus of proving which was in my view on the complainant, the conviction is bad on the face of it as not showing jurisdiction in the magistrate to enquire into the complaint.

The conviction is, therefore, quashed with costs to the appellant.

Conviction quashed.

HICKS v. McCLURE.

Supreme Court of Canada, Davies, C.J., Idington, Duff, Anglin, Brodeur and Mignault, JJ. June 17, 1922.

WILLS (§IIIA—75)—DIRECTION TO EXECUTORS TO SELL FARM AND DIVIDE PROCEEDS—TESTATOR HIMSELF SUBSEQUENTLY SELLING FARM AND TAKING MORTGAGE—CONSTRUCTION—REVOCATION—DISTRIBUTION UNDER WILL.

By his will a testator directed that his executors should sell his farm and divide the proceeds between his sons as directed; after the date of his will the testator himself sold the farm, part of the purchase price being secured by a mortgage. The Court held affirming the decision of the Supreme Court of Ontario, Appellate Division, that the sale merely anticipated the conversion which the will directed and was in no way a revocation of the will, that the proceeds retained a form by which they could be identified and that the mortgage passed to the devisees in the proportions indicated in the will.

APPEAL from the judgment of the Supreme Court of Ontario, Appellate Division (1921), 67 D.L.R. 95, affirming the judgment of Middleton, J., as to the construction of a will. Affirmed.

Proudfoot, K.C., for appellant.

Nesbitt, K.C., and *Wallace*, for respondent.

DAVIES, C.J.:—For the reasons stated by my brother Anglin, J., with which I fully concur, I would dismiss this appeal with costs.

IDINGTON, J.:—Having considered the cases cited by appellant, as well as those by the Judges below, I agree with the reasons assigned by the latter in support of the judgment appealed from (1921), 67 D.L.R. 95. It seems to me that the cases of clear ademption relied upon in appellant's

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factum are beside the real question in issue.

That question is whether or not the testator, having bequeathed to the respondents the proceeds of the sale of his farm, directed by him to be effected by his executors, can be carried out by them, when he anticipated their selling by acting himself as seller, and took the mortgage now left in their hands as part of the purchase money so clearly designed by the terms of the will to become theirs.

I may add to those cited below and herein the decision in *Morrice* v. *Aylmer* (1874), L.R. 10 Ch. 148, affirmed (1875), L.R. 7 H.L. 717, as in line with a mode of thought more liberal than some earlier decisions and worth looking at in such a case as this.

This appeal should be dismissed with costs and, in any event, the executors to have their costs out of the estate.

DUFF, J.:—This appeal presents a question of will construction which is one of not a little difficulty. The testator William McClure, by his will directed that the executors should sell his farm and that the proceeds should be divided in a certain way. By another clause he disposed of cash on hand or securities for money and "all other property and estate." Before his death, he sold the farm which was the subject of the above mentioned trust and at his death part of the purchase money remained unpaid secured by a mortgage on the farm.

The question is whether the trust declared in respect of the farm applies to the mortgage. My conclusion is that the judgment of the Appellate Division, 67 D.L.R. 95, should be maintained. The question may fairly, I think, be stated by an adaptation of the language of Farwell, J., cited by Hodgins, J.A., 67 D.L.R., at p. 99, from *Re Dowsett*, [1901] 1 Ch. 398, at p. 401. Has the testator manifested his intention that his gift is not of the particular property only but of the proceeds of the property so long as the proceeds retain a form by which they can be identified as such. I think such an intention is manifest by the terms of the will.

ANGLIN, J.:—The circumstance that the devise to the respondent is not of the farm *in specie* but of the proceeds of the sale of it directed to be made by the executor distinguishes this case from *Re Clowes*, [1893] 1 Ch. 214, where the devise was of land *in specie*, subsequently sold by the testator (who had, as in the case at Bar, taken a mortgage on it to secure payment of part of the purchase money), sufficiently to afford opportunity for the application of sec. 26 of the Wills Act, R.S.O. 1914, ch. 120, and to bring this

case within the principles of such decisions as *Re Clifford, Mallam* v. *McFie*, [1912], 1 Ch. 29, at p. 35; *Re Leeming; Turner* v. *Leeming*, [1912] 1 Ch. 828; *Re Carter*, [1900] 1 Ch. 801; and *Re Johnstone's Settlement* (1880), 14 Ch. D. 162.

There seems to be enough in the devise here in question to indicate an intention that the funds representing the property dealt with should go to the beneficiary in whatever form they might be found at the testator's death. The "contrary intention" of sec. 27 of the Wills Act therefore appears. *Morgan* v. *Thomas* (1877), 6 Ch. D. 176, shews that, in a case such as this, a broad and even a lax construction of the terms of the will should prevail if thereby effect will more probably be given to the testator's intention. That case and *Manton* v. *Tabois* (1885), 30 Ch. D. 92, establish that partial ademption, owing to a portion of the property which is the subject of the devise being unavailable or to its identity having been lost, will not present the devise taking effect as to so much of it as still forms part of the testator's available estate and can be fully identified.

Looking at the substance of the devise in question, and giving effect to what appears to have been the probable intention of the testator, I am of the opinion that the mortgage in question passed to the respondents in the proportions indicated by the testator. Passages from the judgment delivered in the House of Lords in *Beddington* v. *Baumann*, [1903] A.C. 13, quoted by Hodgins, J.A. (67 D.L.R., at p. 97), confirm this view. Adapting the language of Lord Davey, [1903] A.C., at p. 20, the testator's will is "expressed in such language and in such large terms as to carry not only the property as it then existed, but also this property which has arisen from the particular dealings with it."

BRODEUR, J.:—This is an appeal concerning the construction of a will. William McClure had by his will directed his executor to sell his farm and to divide the proceeds between his two sons. Before his death he sold the farm himself and part of the purchase price was secured by a mortgage thereon. The question is whether the devise fails because the farm had already been sold.

If the farm itself had been devised to the legatees, the solution might be different.

Gale v. *Gale* (1856), 21 Beav. 349, 52 E.R. 894; *Farrar* v. *Earl of Winterton* (1842), 5 Beav. 1, 49 E.R. 476; *Blake* v. *Blake* (1880), 15 Ch. D. 481; *Re Clowes*, [1893] 1 Ch. 214; *Re Dods* (1901), 1 O.L.R. 7.

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But the testator's executor was called upon to distribute the proceeds of the farm. There is nothing to shew that the testator did intend, in selling his farm himself, to prevent his beneficiaries under the will from having the proceeds of the mortgage handed over by the executor to his legatees. *Re Graham* (1915), 8 O.W.N. 497.

The appeal should be dismissed. As there is some diversity of opinion as to the construction of such a will, the costs of all parties should be paid out of the estate.

MIGNAULT, J.:—The question here is whether a bequest whereby the testator directed his executors to sell his farm and divide the net proceeds among the respondents in the proportions therein stated, took effect, the testator having himself sold the farm and taken a mortgage for the balance of the purchase price. The mortgage was still unpaid at the testator's death.

In my opinion, the bequest was of the proceeds of the farm and not of the farm itself, and it is not defeated because the testator anticipated the sale which he had ordered his executors to make.

I would dismiss the appeal with costs.

Appeal dismissed.

EDWARDS v. CARTER.

Saskatchewan Court of Appeal, Turgeon, McKay and Martin, JJ.A. November 7, 1922.

INTERPLEADER (§I—10)—BY SHERIFF—WHEN PROPER PROCEEDING—CREDITORS RELIEF ACT, R.S.S. 1920, CH. 54—APPLICATION—JUDGMENT CREDITORS—DISTRIBUTION UNDER.

The Creditors Relief Act, R.S.S. 1920, ch. 54, is applicable to the distribution of moneys which have been realised under process of execution. Those who are entitled to share are persons who have executions in the hands of the sheriff at a time specified in the Act, and employees under the provisions of sec. 18, and sec. 13 can only apply to questions which may arise among creditors who under the Act are entitled to share in the monies which are in the hands of the sheriff. Where a creditor claims to be entitled to a part of the monies in the sheriff's hands by virtue of some consideration other than the fact that he is an execution creditor or an employee of the debtor, the proceedings should be under the Rules of Court relating to interpleader.

APPEAL by plaintiff from the judgment of the Judge of the Judicial District of Cypress.

The facts of the case are fully set out in the judgment of Martin, J. A.

P. H. Gordon, for appellant.

C. W. Hoffman and *G. W. Thorn*, for respondent.

The judgment of the Court was delivered by

MARTIN, J.A.:—The facts are: The sheriff of the Judicial District of Cypress, acting under certain writs of execution in his hands against the defendant Carter, did seize all the goods and chattels on the farm of the said Carter, namely, the s/w¼-22-9-21-w.3rd, on April 5, 1922. As the result of the seizure the sheriff realized $154.35 in cash, and $1,070 in notes. The seizure was made by the bailiff of the sheriff, and just prior to a sale, by auction, of the goods and chattels of the defendant which was advertised for that date.

Subsequently, a claim for wages was filed with the sheriff on behalf of one Claude J. Loomis, and by a letter dated April 18 the sheriff was notified on behalf of one Kokatt not to pay out any money on account of the seizure; the claim on behalf of the said Kokatt being that a garnishee summons had been served on his behalf on the auctioneer in charge of the auction sale prior to the seizure made by the sheriff.

The sheriff filed an affidavit setting forth the facts as above outlined, and, under the provisions of sec. 13 of the Creditors Relief Act, R.S.S. 1920, ch. 54, obtained a summons calling upon the said Kokatt and all the creditors having executions in his hands to appear before the presiding Judge in Chambers at the town of Shaunavon on Monday, May 15, at 10 in the forenoon, to settle a scheme of distribution of certain moneys in the hands of the sheriff of the Judicial District of Cypress realised out of the sale of certain goods and chattels of the defendant N. M. Carter on, April 5, 1922.

The affidavit filed by the sheriff, in part, was as follows:—"That as the said Loomis is requesting payment to him of the amount of his wages and as the creditors for whom I am acting are requesting distribution, and as the solicitors for Kokatt have notified me to hold said monies, I am *bona fide* in doubt as to how I should proceed with the matter."

On the return of the summons, it was contended on behalf of the claimant Kokatt that procedings should not have been taken under the Creditors' Relief Act, but under the Rules of Court with respect to interpleader.

The trial Judge held that the monies in the sheriff's hands should be distributed *pro rata* among the execution creditors, but the claim of the wageearner Loomis should first be paid; and as to the proceedings, he held that they were properly taken under the Creditors Relief Act.

From this judgment, the claimant Kokatt has appealed, and his one contention is that the proceedings were im-

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properly taken under the Creditors Relief Act, and that the sheriff should have proceeded under the Rules of Court with respect to interpleader.

Section 13 of the Creditors Relief Act, R.S.S. 1920, ch. 54, under which the proceedings were taken is as follows:—

"13.—(1) Where the money levied is insufficient to pay all claims in full and the sheriff is *bona fide* in doubt as to how the proceeds should be distributed or where any contest arises among the creditors as to the distribution of the proceeds among them or any other real difficulty arises as to such distribution the sheriff shall prepare a statement of the proceeds in his hands for distribution and the executions in his hands and the amount thereof and such other particulars as may be necessary to explain the contest or difficulty, to be verified by affidavit, and thereupon shall apply to a judge in chambers for a summons calling upon all parties interested to attend before the judge in chambers to settle a scheme of distribution and such summons shall be made returnable at such time and shall be served on such persons and in such manner and time as the judge may direct."

The word "creditors" in this section means creditors who have executions in the sheriff's hands, and employees whose rights are dealt with under the provisions of sec. 18. The Act is applicable to the distribution of monies which have been realised under a process of execution. Those who are entitled to share are persons who have executions in the hands of the sheriff at a time specified in the Act, and employees under the provisions of sec. 18. Section 13, in my opinion, can only apply to questions which may arise among creditors who, under the provisions of the Act, are entitled to share in the monies which are in the hands of the sheriff, and does not apply to some other creditor of the defendant who claims to be entitled to a part or to all of the monies in the sheriff's hands by virtue of some consideration other than the fact that he is an execution creditor, or an employee, of the debtor.

In my opinion, the proceedings in this case should have been under the Rules of Court relating to interpleader. I regret that the Court has no power to relieve against the mistake which has been made in proceeding under the Creditors Relief Act, as I have no doubt that the sheriff acted *bona fide* in taking the proceedings which he did.

The appeal, in my opinion, should be allowed with costs, and judgment entered in the Court below setting aside the proceedings therein, with costs. *Appeal allowed.*

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Re CARMICHAEL AND CITY OF EDMONTON.

Alberta Supreme Court, Walsh, J. November 10, 1922.

MUNICIPAL CORPORATIONS (§IIIC—66)—CITY CHARTER—PROVINCIAL ACT—RESOLUTION OF COUNCIL REPEALING—VALIDITY.

A resolution of a city council which in effect entirely repeals a section of a Provincial Act, amending the city charter, is *ultra vires* the council and will be quashed.

MOTION to quash a resolution of the City Council of the City of Edmonton. Resolution quashed.

F. C. Jamieson, K.C., for the motion.

J. C. F. Bown, K.C., for the city.

WALSH, J.:—I quashed the resolution at the close of the argument for reason then given orally, but, at the request of both counsel, I am stating them briefly in writing.

Section 239*a* of the Edmonton Charter as enacted by 1920 (Alta.), ch. 42, sec. 8, provides that "All places within the city wherein any manufacture, business, trade, profession, calling, occupation or means of livelihood is carried on, except barber shops and such other places as the council may by by-law or resolution exempt, shall be closed" at one o'clock every Saturday afternoon. The resolution in question, which was passed on the 11th of September, 1922, is "that council exempt all classes of business from the provisions of the City Charter in respect to half day closing as and from September 1st, 1922."

This resolution, in effect, entirely repeals sec. 239*a* of the charter and that is beyond the competence of the council. Every one of the places which is covered by the section is a "class of business" so that when the council assumed to exempt from the operation of the section "all classes of business" it sought to grant immunity from it to each one of the various descriptions of places that are mentioned in it. That is why I say that the resolution works a virtual repeal of the section. If that is not what it means, it is too vague and uncertain to be capable of enforcement. In my opinion, the places that are to be exempted must be specified in the resolution so that no doubt may exist as to what they are. Although I have not had an opportunity to consider with care Mr. Jamieson's argument that the places to be exempted must be *ejusdem generis* with barber shops, my present opinion is against it. I cannot, at the moment, think of any place of business that is *ejusdem generis* with a barber shop. It seems to me to stand in a class of its own. Section 239*a* (3) says that "in making exemptions the council may provide for the keeping open during closing hours for the sale of any articles of merchandise." The concluding

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words assume that places of business in which articles of merchandise are sold may be exempted from the operation of the section which lends strength to the contention that places other than those *ejusdem generis* with barber shops may be exempted. This, however, is not a considered opinion, but I am merely putting in writing what I said on the question at the close of the argument.

The restrospective aspect of the resolution is another feature of it that I think unjustified. It, in effect, assumes to absolve from liability for the penalty any one who between the 1st and the 11th of September had been guilty of a breach of the section, and this it was beyond the power of the council to do.

Judgment accordingly.

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Manitoba King's Bench, Curran, J. June 28, 1922.

HIGHWAYS (§IVA—120)—BRIDGE—CONSTRUCTION—LAND DRAINAGE ACT, R.S.M. 1913, CH. 56, SEC. 38—MUNICIPAL ACT, R.S.M. 1913, CH. 133, SEC. 625—NEGLECT TO REPAIR—NOTICE—INJURY TO TRAVELLER—LIABILITY OF MUNICIPALITY.

Where the erection of a bridge is not rendered necessary by reason of drainage work and is not constructed under sec. 38 of the Land Drainage Act, R.S.M. 1913, ch. 56, but is rendered necessary by the fact of a natural watercourse crossing a highway, it being part of the municipality's duty to provide reasonable transportation facilities by means of roads and bridges within the municipality, the municipality is not relieved from its duty to repair under sec. 625 of the Municipal Act, R.S.M. 1913, ch. 133, by secs. 45 and 46 of the Drainage Act, and such sections do not affect the right of civil action given by the former section to persons injured through the neglect to repair after that duty has arisen.

ACTION for damages for injuries caused to the plaintiff by the failure of defendant to keep a bridge in repair.

W. H. Trueman, K.C., for plaintiff.

F. Heap, for defendant municipality.

CURRAN, J.:—The bridge in question, upon the approach to which on the west side the accident complained of happened, appears to have been built under the provisions of the Land Drainage Act, R.S.M. 1913, ch. 56. The evidence submitted upon this point is very meagre and unsatisfactory but it seems reasonably certain that this bridge was not built by the defendant municipality.

The defendant's counsel claims, first, that no duty to repair this bridge or the approaches thereto rested upon the defendant municipality under sec. 625 of the Municipal Act, R.S.M. 1913, ch. 133, because it has not been shown as he

contends, that work has been performed or public improvements made upon it by the municipality; secondly, he contends that the only liability to repair the bridge in question is that created by secs. 45 and 46 of the Land Drainage Act, and that no liability to the plaintiff is created by these sections, or by this statute.

The sections in question impose a duty upon a municipality to maintain and keep in repair any drainage work, and in case of default, instead of making the municipality civilly responsible for all damages sustained by any person by reason of such default, as is the case under sec. 625 of the Municipal Act, the municipal commissioner may do or cause to be done everything necessary to maintain and keep in repair such drainage work and collect the expense thereof from the municipality by levies made in accordance with the Municipal Commissioner's Act, R.S.M. 1913, ch. 138.

As the contention is made by the defendant's counsel that these provisions in the Land Drainage Act override or supersede those in the Municipal Act relating to the repair and upkeep of highways, bridges, etc., it becomes necessary to examine this statute and see how far such contention is justified. The object and purpose of the Land Drainage Act was and is (R.S.M. 1913, ch. 56, sec. 3) :—

"Wherever satisfied that it will be of public benefit to drain, reclaim and render fit for occupation and cultivation any lands in the Province."

This object manifestly has nothing to do with transportation or travelling facilities by means of roads, highways and bridges within a municipality. A drainage work then, I take it, means any work necessary to carry out the object and purpose of the Act as just stated.

By sec. 38 it is provided that if any such drainage work crosses any public highway or the travelled portion of it, the Minister of Public Works may authorise the construction, enlargement or other improvement of any bridges or culverts rendered necessary by such crossing. Could it have been under the authority of this section that the bridge in question was constructed? I do not think so, for reasons which I will give later on.

These drainage works are not really government works at all; although the government initiates the necessary machinery under the statute and does what is necessary to carry them out, the cost is borne by the lands benefited and is levied annually by such municipality on such lands and collected as are the ordinary municipal rates. A drainage

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district may or may not be coterminous with a municipality in respect of area and boundaries; the one in question was not so with the defendant municipality. The bridge in question crosses what is known as Devil's Creek on a road allowance running east and west. This road, admittedly, has been accepted by the municipality on the east side of the bridge but it is denied that any such acceptance as is specified in sec. 625 of the Municipal Act has been made or undertaken by the municipality west of the bridge.

Secs. 45 and 46 of the Land Drainage Act provide for the maintenance of drainage works wholly within the municipality and also those inter-municipal in character. Is a bridge constructed under sec. 38, a drainage work, or part of a drainage work, because its construction becomes necessary by reason of a drainage work crossing a public highway? I do not think so. The work of draining the land would go on just the same without such a bridge, though the public might be seriously inconvenienced for want of a crossing.

The Devil's Creek is a natural watercourse and there was formerly a bridge across it at the place in question, built by the municipality of St. Clements and used for vehicular traffic many years ago. This bridge was replaced by the bridge in question. Just why does not appear, nor does it appear that the bridge in question was rendered necessary by the drainage work crossing a public highway in that district (see sec. 38). On the contrary, it was not rendered necessary for any such reason but was rendered necessary by the fact that Devil's Creek, a natural watercourse, crossed the highway at this particular point and the construction of a traffic bridge over it would be a necessary part of the municipality's duty to the public to provide reasonable transportation facilities by means of roads and bridges within the municipality when this particular road allowance was opened up for public use and travel.

What a municipality is required to do under secs. 45 and 46 in the matter of maintaining and keeping in repair a drainage work, relates, I think, to keeping that work in an efficient working condition to fulfil the object for which it was constructed and does not refer or relate to a duty to keep in repair bridges crossing such works which become part of the public highway and are not part of a drainage work. I cannot believe that the sort of repair and maintenance required by secs. 45 and 46 of the Land Drainage Act was ever intended by the Legis-

lature to be substituted for that required by sec. 625 of the Municipal Act, or that these sections in any way limit or affect the right of civil action given by this latter section to persons injured through a municipality's neglect to repair after that duty to repair has once arisen. I am clearly of opinion that the kind of repair required by secs. 45 and 46 of the Land Drainage Act has no reference whatever to the repair of bridges on public highways, even though constructed under sec. 38 of that statute, which I hold the bridge in question could not properly have been, because Devil's Creek being a natural watercourse existent before the drainage work was begun was not part of a drainage work and it could not be said, therefore, that the bridge was rendered necessary by such work crossing a public highway.

The question then to be decided first is this: Has work been performed or public improvements made by the defendant municipality on the bridge in question? The evidence submitted satisfies me that this is the case, such work being done in the year 1919 through the instrumentality of a councillor of the ward in which the bridge is situated, Jacob Winkler, and the pathmaster of such ward, George H. Brown, and paid for out of the municipal funds upon authorisation by resolution by the council. It is sought to be shown by the municipality that the work in 1919 was done by the Provincial Government and not by the municipality. I do not accept Winkler's evidence on this point. The evidence of the engineer Blanchard merely goes to show that the Provincial Government in 1919 made a grant of $350 for certain work in the defendant municipality benefiting the district in which the bridge in question was situate. He says he cannot recollect what was done on the road allowance between secs. 10 and 15, which is crossed by Devil's Creek, over which the bridge in question was built, but he says George H. Brown was the foreman employed by the government and if he did work here for the government it would appear in the payrolls connected with the grant. No such payrolls have been produced from Government sources but vouchers have been produced from municipal sources that clearly show the municipality has paid for this work and not the government.

I find that the work performed by the municipality upon this bridge or its approaches in 1919 consisted of the filling-up of holes caused by a washout on the east and west approaches of the bridge, and riprapping with stone or brick

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the abutment underneath to act as a retainer of the earth in the grade approaches to prevent further washouts. The approaches to a bridge are part and parcel of the bridge itself.

In the spring of 1921, high water caused a washout on the west side of the bridge similar to that in 1919, and a hole developed close to the framework of the bridge going right down to the water. The cause was apparently the same as in 1919. Volunteers filled up the hole, which was about 3 ft. long and 10 or 12 inches in width. This hole was filled up with stone and dirt and a tie placed lengthwise in the hole. A few days later it washed out again and another hole appeared close to the one recently filled up; this is the hole that the plaintiff alleges was the cause of the accident. This hole was about 10 inches by 12 at the top and about 3 ft. deep next to the plank wall of the bridge on the west side. The railing on the north side of the bridge was also gone at the time of the accident and had been for some time previous, and this fact, it is alleged by the woman Christina Nelson, who was driving the horse, contributed to the accident, because when the horse shied at the hole and started to back up she was afraid to use her whip to force the horse on to the bridge because the want of a railing on one side made her afraid of falling off the bridge. The condition as to the railing existed from the winter of 1921, according to the evidence of Victor Anderson and in the spring of 1921, about the middle of the month of May, he, Anderson, informed Jacob Winkler, a councillor, of the absence of the railing and the existence of the hole on the west side of the bridge. This witness also stated that the bridge had been in a very poor state of repair for years past and that in 1921 the condition of the bridge was very bad, so much so that, meeting Jacob Winkler, he made specific complaint to him about the dangerous condition of this bridge, upon which Anderson said Winkler promised to attend to the matter but neglected to do so. I think this notice to Winkler was sufficient to affect the defendant municipality with knowledge of the condition of the bridge and the need of prompt repairs so as to render the municipality guilty of negligence for non-repair under the circumstances and civilly responsible for all damages sustained by any person by reason of such default.

The plaintiff has, in my judgment, made out her case and is entitled to damages which I assess at the sum of $1,000. There will be judgment, therefore, in favour of the plain-

tiff for $1,000 with costs, which will include the costs of any examinations for discovery which have been taken.

Judgment for plaintiff.

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GRANBY CONSOLIDATED MINING, SMELTING & POWER Co. v. ATT'Y-GEN'L FOR BRITISH COLUMBIA.

British Columbia Court of Appeal, Martin, Galliher, McPhillips and Eberts, JJ.A. June 6, 1922.

STATUTES (§IIA—103)—TAXATION ACT, R.S.B.C. 1911, CH. 222, SEC. 103—CONSTRUCTION—"CURRENT YEAR'S ROLL"—MEANING OF —DISCOUNT—WHEN ALLOWED.

The meaning of the expression "the current year's roll" in sec. 103 of the Taxation Act, R.S.B.C. 1911, ch. 222, means the roll which was completed by the assessor under sec. 81 and finally revised by the Court of Revision under sec. 93 and certified under sec 97 and transmitted to the surveyor of taxes under sec. 98, and the supplementary roll authorised by sec. 103, while it may be made on July 12 following is not attached to the new roll then under preparation but to the current year's roll after the final revision thereof, and the supplementary roll in 1921, being part of the roll of 1920 finally revised in December, 1920, upon which the taxes were due January, 1921, and delinquent on December 31, 1921, discount can only be allowed if paid by June 30, 1921.

APPEAL by the Att'y-Gen'l for British Columbia from a judgment of Murphy, J., in an action for recovery of discount on taxes paid. Reversed.

W. D. Carter, K.C., for appellant.

E. C. Mayers, for respondent.

MARTIN, J.A.:—This case turns upon the meaning of the expression "the current year's roll" in sec. 103 of the Taxation Act, R.S.B.C. 1911, ch. 222, and after a very careful consideration of all the sections of the Act, I can only reach the conclusion that by it is meant the roll which was "completed" by the assessor under sec. 81 and "finally revised" by the Court of Revision "on or before the twenty-first day of December" (as the time then was) under sec. 93, and "certified" under sec. 97, and "transmitted" to the surveyor of taxes before February 15, under sec. 98. If so, then the "supplementary roll" authorised under sec. 103, while it may be made, as here, on July 12 following, yet it is not attached, so to speak, to the new roll then under preparation as directed by secs. 34 *et seq.*, but to the current year's roll "after the final revision" thereof, which can only relate to the said certified and transmitted roll. As applied to the case at Bar this construction means that the supplementary roll of July 12, 1921, in question is a "supplement" to the roll then in existence which is that for 1920. The difficulty has arisen from some ambiguity of expression in the pleadings and probably in the argument below, as here, which led

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the Judge to say mistakenly, with all respect, that "it is admitted in the pleadings that this is a supplementary roll for 1921"; it appears, however, after the very careful consideration we have given it, to be in truth, a supplementary roll made in 1921 for 1920.

It follows that the appeal should be allowed.

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

The trial Judge held that the plaintiffs fell within the provisions of sec. 29 of 1921 (2nd sess. B.C.), ch. 48. This it was admitted, in argument before us, was erroneous.

The Judge further says in his oral reasons:—

"It is admitted in the pleadings that this is a supplementary roll for 1921, and I do not think it could be anything else."

In the plaintiff's statement of claim, it is put thus, No. 3, p. 2:—

"The provincial assessor of the Province of British Columbia in respect of the year 1918 has on the 12th day of July, 1921, assessed the plaintiff company upon its income for the year 1918, etc."

This also applies to the 1917 taxes.

In the statement of defence, the defendant states that the income taxation for 1917 and 1918 was omitted and that, in pursuance of sec. 103 of the Taxation Act. R.S.B.C. 1911, ch. 222, the provincial assessor assessed and taxed the plaintiff company for the amount so omitted on July 12, 1921, upon a supplementary roll *for the then current year*.

The point to determine is: of what roll was this supplementary roll of July 12, 1921, a part?

The plaintiffs claim that it was the roll of 1921 upon which taxes would, under the Act, be due on January 2, 1922, and would not be delinquent until December 31, 1922, and that if paid, on or before June 30, 1922, they are entitled to 10% discount.

The defendant, on the other hand, says this supplementary roll on which plaintiffs were placed, is part of the roll of 1920, finally revised in December, 1920, upon which the taxes were due January 2, 1921, delinquent on December 31, 1921, and discount could only be allowed if paid by June 30, 1921.

There is no dispute as to the amount or that plaintiffs are properly on the roll, the question is, what roll is it? Upon the assessment roll of 1920 as finally revised, and taxes become due and payable in 1921. That was the only roll in existence on July 12, 1921, to which a supplementary roll

could attach. The roll to be prepared in 1921 and to be finally revised in December, 1921, and under which taxes would become due and payable in 1922 was not in existence at the time the supplementary roll was prepared.

It seems to me clear that it was not designed that this roll would be supplementary to a roll not then in existence. If it was intended to apply to the roll to be prepared and revised in 1921, the taxation would have been made a part of that roll in its preparation and revision and not supplementary to it.

The use of the words "for the then current year," in the pleadings is somewhat misleading, but the roll compiled in 1920 and upon which taxes were to be paid during the current year 1921, *i.e.*, current year in connection with the supplementary roll, is I think, what is intended.

McPHILLIPS, J.A.:—The operative part of the order for judgment appealed from by the Attorney-General reads as follows, and is explanatory of the subject-matter:—

"That the income taxes of the Province of British Columbia assessed and taxed against the plaintiff on July 12, 1921, in respect of the years 1917 and 1918, on a supplementary roll for the year 1921 at the sum of $437,353.02; and in respect of the year 1918; at the sum of $195,803.80, are not due and payable until January 2, 1922, and shall not be deemed to be delinquent until December 31, 1922; and the plaintiff shall be entitled to the discount of 10% on said sums of $437,353.02 and $195,803.80, provided by sec. 10 of ch. 222 of R.S.B.C. 1911, up to and including June 30, 1922, upon paying on or before such date the said sum of $437,353.02, less the sum of $113,049.03, already paid in respect of mineral tax for the year 1917 and also upon paying the sum of $195,803.80, less the sum of $88,866.28, already paid in respect of mineral tax for the year 1918."

It would appear that there was default upon the part of the officials of the Government to make the assessment under review, and that point is admitted and it is not a matter of contestation at all as to the assessment made or the quantum thereof. The whole matter in dispute, is, when can it be said the taxes as levied became due and payable. If the taxes were not due and payable until January 2, 1922, and will not be in arrears until December 31, 1922, which is the contention of the respondent and given effect to by Murphy, J., in the order for judgment above set forth—there is the right in the respondent to pay the taxes on or before June 30, 1922, with the further right to have allowed

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to it the discount at 10% as provided by sec. 10 of R.S.B.C. 1911, ch. 222, the Taxation Act.

The whole difficulty arises from the mistake made by the officers of the Crown in not assessing the respondent as it should have been assessed, and, in the result, the respondent has escaped taxation on its income for the years 1917 and 1918, and upon this being discovered, the provincial assessor, pursuant to the provisions of sec. 103 of the Taxation Act, upon a supplementary roll for 1920 in 1921 assessed and taxed the respondent for the taxes omitted, being the taxable income of the respondent for the years 1917 and 1918, of which assessment it would appear due notice was given to the respondent, *i.e.*, there were amended assessments made for 1919 and 1920.

Sec. 103 of the Taxation Act reads as follows:—

"103. If, after the final revision of the current year's roll the Assessor should discover that any person has escaped taxation (other than upon land), for which such person would have been liable had he been assessed and taxed, he shall, upon a supplementary roll for the current year, assess and tax such person for the amounts omitted, according to the information then had and obtained, but for a period limited to 10 years preceding the date of such supplementary roll; and due notice of such assessment shall be given to such person, who shall have the right to appeal to the special Court of Revision at its next or some subsequent meeting after said notice of assessment has been given, and such appeal shall be lodged with the assessor within 14 days after the date of the notice of assessment. Before making such assessment, the assessor shall have the right to examine the taxpayer on oath or otherwise, and to demand and obtain production of the taxpayer's books, paper, and accounts, and to examine the same. If, after such examination, it is proved that the taxpayer has wilfully evaded just taxation, or withheld correct information for the due assessment for which he would have been liable during any portion of the said period, the taxpayer shall be liable in the penalties mentioned in secs. 30, 31 and 32 of this Act; but if the omission has been caused unintentionally by the taxpayer, he shall be liable for the correct taxes only, and he shall have no right to claim that all the taxes for which he had been assessed had been paid in full by any official receipts which he may produce, if the omitted amounts, or any balance thereof, are not included therein."

The contention of the Crown is that the discount as con-

tended for by the respondent is not allowable, the taxes not having been paid before June 30, 1921, or before the extended period allowed in the amended assessment, viz., before July 20, 1921 (secs. 10, 104, 105, R.S.B.C. 1911, ch. 222).

It was stated by counsel at this Bar and agreed to by counsel for both sides, that the governing and controlling statute in this appeal is the Taxation Act, as contained in R.S.B.C. 1911, ch. 222.

The section which deals with delinquent taxes is sec. 211, which reads as follows (repealed in 1921 (B.C.), ch. 63, sec. 63):—

"211. All taxes on real property, personal property, and income which became due on the second day of January in each year, remaining unpaid on the following December 31, shall be deemed to be delinquent on the said December 31."

It is to be observed that sec. 103 which provides for the supplementary assessment for other than land, gives the right of appeal from any supplementary assessment but halts at any other provisions, save that if upon an examination there was wilful evasion or withholding of information the penalties mentioned in secs. 30, 31 and 32 may be imposed, but if the omission be unintentional then the taxpayer shall be liable for the correct taxes only with no right though to claim payment in full by any official receipts if the omitted amounts or any balance thereof, are not included therein.

Giving careful consideration to sec. 103, and reading secs. 30, 31 and 32, there is, in my opinion, clear interpretation of the intention of the Legislature, and that is that the supplementary assessment is deemed to be in the like situation to an assessment of the year before, *i.e.*, in the present case the supplementary assessment was supplementary to the roll of 1920, not supplementary to the roll of 1921 (secs. 104 and 105).

Although the right is given of appeal from the supplementary assessment, that is a concession made, and cannot be held to operate to any further extent, it is plain that what the Legislature is providing for is the addition to the roll upon which the assessment should have been made and as we have it in the appeal book before us, the notices of assessment as given to the respondent, read respectively, "Amended Assessment for 1919"; "Amended Assessment for 1920." I, therefore, with great respect, cannot agree with the determination arrived at by the trial Judge that the assessment

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in question "is a supplementary roll for 1921" and it was not argued at this Bar that there was any binding admission to that effect upon the pleadings—as a matter of fact, there would be an assessment of the respondent for income tax for 1921 upon the roll of 1921, quite independent of the supplementary assessment which is for 1920, the assessment in question here relates to the roll of 1920, that is, the respondent having escaped taxation and that being discovered is put down and assessed by way of supplementary assessment, that assessment to have relation to and be supplementary to the roll of 1920—not 1921—that as a matter of procedure it is done in 1921 cannot alter its effect, it is an addition to the roll of 1921.

It is to be noted that under sec. 10 the discount "shall apply only to the taxes of the then current year, and not to arrears." If the contention of the respondent is to have force then these taxes added by the supplementary assessment, to the roll of 1920, being really taxes for the years 1917 and 1918, shall equally with the taxes assessed upon the roll of 1921, be allowed the discount. This is a highly unreasonable contention and is against the plain reading of the section, which is, "apply only to the taxes of the *then current year.*"

The taxes of 1917 and 1918, being the subject-matter of the supplementary assessment cannot be said to be "taxes of the then current year," and subject to a discount of 10%, up to and including June 30, 1922. It is indeed questionable whether the discount could be said to be allowable in the year 1921—however, the Crown, by notice, offered to accept the taxes subject to the discount in respect of the supplementary assessments if paid before July 20, 1921.

The Crown apparently did not consider it a case of wilful evasion of taxation, and the supplementary assessment being made, the notice of assessment issued with the discount allowed and deducted from the taxes, viz., reductions of $43,735.30 and $19,580.38, respectively, from the taxes of the years 1917 and 1918.

It was pressed strongly at this Bar that it was highly inequitable that with the right to appeal from the assessment that nevertheless to get the discount payment would have to precede the appeal to the Court of Revision, and this was urged as giving some aid in arriving at the intention of the Legislature—but, as to this, it would only be matter of adjustment of accounts with the Crown, and no risk would attach to payment made before the determination of the

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Court of Revision if an appeal were taken. (Somewhat analogous statute law is to be found in the Income Tax Act, 1918 (Imp.), ch. 40, secs. 146 to 159, note sec. 149 [d] as to refund, and sec. 159 dealing with discount.) In the present case, evidently, there was no appeal as against the assessment and the amount of the taxes have not been disputed. It would seem to me that the contention of the Crown is most consonant with convenience, reason and justice, and is in no way in antagonism with the language of the statute or against legal principles, whilst with deference, the contention on the part of the respondent would seem to partake of absurdity. (See *Cory & Son.* v. *France, Fenwick & Co.*, [1911] 1 K.B. 114. Also see *per* Lord Halsbury, L.C., *Cooke* v. *Vogeler Co.*, [1901] A.C. 102, at p. 107, and Maxwell on the Interpretation of Statutes, 6th ed., p. 339.)

I would allow the appeal.

EBERTS, J.A., concurred in allowing the appeal.

Appeal allowed.

COX v. CITY OF WINNIPEG.

Manitoba King's Bench, Curran, J. October 9, 1922.

STATUTES (§ IIA—95)—WINNIPEG CHARTER—CONSTRUCTION—POWERS AS TO INCURRING EXPENSES FOR ADVERTISING AND PUBLISHING HYDRO NEWS.

The City of Winnipeg by its charter is clothed with the fullest legal powers possible to enable it to carry on its hydro-electric business and although the expense of advertising and publishing the hydro news is not specifically mentioned in the Act such expense being incident to the full and beneficent exercise of the powers actually given, and being included in the operating expenses is included in the Act.

INJUNCTION (§ II—134)—INTERLOCUTORY—AFFIDAVIT MATERIAL—NO GROUNDS FOR BELIEF SET OUT—INSUFFICIENCY—INADMISSIBILITY OF UNVERIFIED ACCOUNT OF COUNCIL MEETING ON EX PARTE APPLICATION.

An interlocutory injunction granted on affidavit material upon information and belief without setting forth the grounds of belief cannot stand but must be dissolved. Reports of what took place at a council meeting even if admissible on an *ex parte* application should not be considered by the Judge hearing the application unless properly verified as true and correct reports.

MOTION to continue an interim injunction until trial. Motion dismissed. Interim injunction dissolved.

T. A. Hunt, K.C., for plaintiff.

H. J. Symington, K.C., and *J. Prendhomme*, for defendant.

CURRAN, J.:—This is a motion by the plaintiff to continue until the trial of the action an interlocutory injunction granted *ex parte* by Macdonald, J., on September 6, 1922, restraining the defendant municipality as therein provided.

The defendant took certain preliminary objections to the

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propriety of the issue of this injunction order upon the material produced to the Judge who granted it. I have considered these objections carefully and am of the opinion that the following of them are fatal to the injunction:—(1) The statement of claim is referred to in the injunction order as part of the material upon which the Judge acted in granting the injunction, yet the allegations of this statement have not been verified by the oath of the plaintiff or anyone acquainted with the facts. In my opinion, it should have been disregarded entirely. (2) The affidavit referred to in the order as that of the plaintiff does not identify the deponent as the plaintiff and it does not verify the allegations of fact contained in the statement of claim. It also contains allegations upon matters of fact based upon information and belief without giving grounds of belief as required by K.B. Rule 529. Upon the authorities, it should not have been looked at and ought to have been disregarded altogether: *Dwyre* v. *Ottawa* (1898), 25 A.R. (Ont.), 121, at p. 126; *Bidder* v. *Bridges* (1884), 26 Ch. D. 1 at pp. 5-8; *Quartz Hill Consolidated Gold Mining Co.* v. *Beall* (1882), 20 Ch. D. 501, at p. 508; *Dobson* v. *Leask* (1897), 11 Man. L.R. 620, at p. 623.

Furthermore, clause 6 of the affidavit refers to and makes use of as evidence, upon which the Judge was asked to act in granting the interim injunction order, certain newspaper reports of the council meeting at which the report of the special committee was adopted by the council, without such reports being, in any way, verified by the oath of the party or parties who wrote or made them for the newspapers in question. These reports may have had a very decided influence upon the mind of the Judge who granted the injunction. It seems to me it was not proper material to use and the objection to it is well founded.

The authorities,some of which I have already cited, are very clear that an interlocutory injunction granted on affidavit material upon information and belief without setting forth the grounds of belief cannot stand but must be dissolved.

If the statement of claim is eliminated from the material used, can the affidavit be said to supply its place. I do not think so. I have compared the two documents and the affidavit contains very few, if any, of the material allegations in the statement of claim. I am clearly of opinion that the statement of claim without verification cannot be used as evidence on this motion and ought not to have been used

as material upon which the *ex parte* injunction was granted.

I also think the affidavit is insufficient to support an interim injunction order. Clauses 7, 8, 9, 10 and 11, disclose no grounds which would justify the interference of the Court by way of interim injunction. Clauses 12, 13, 14 and 15, are all upon information and belief but fail to state the grounds for the deponent's belief. I think the references to what certain aldermen said at the meeting of council which considered and adopted the report of the special committee were improperly submitted to the Judge upon the *ex parte* application. A municipal council can only speak by by-law or resolution. Here it was, by resolution, and that resolution is attacked as *ultra vires* and illegal. What any members of the council said during the debate is not evidence against the defendant in this matter. Even if these reports were admissible, they certainly must be verified as true, and correct reports of all that took place relating to the matters in question. They came to the Judge who granted the injunction wholly unverified and should not have been considered at all.

I hesitate a little to express an opinion upon the question of law as to the illegality of the expenditure for the publication and purposes complained of for fear of prejudicing the case when it comes to trial, but as this question was clearly argued, at length by counsel on both sides, evidently with the idea that the Court should consider it, I feel constrained to do so, in the light of the statutory powers conferred upon the defendant with regard to the manufacture and sale of electric power, and the facts disclosed in the affidavit material now before me. It is clear that the expense of publishing the hydro news has never come out of the taxes levied upon the ratepayers of the city but has been borne and paid as an item of overhead and operating expenses of the hydro-electric department of the city. It is further clear that for the present year ample funds from the earnings of of the hydro-electric have been set apart, as I hold, lawfully, for advertising purposes, out of which the cost of publishing the hydro news and the civic gazette and the establishment of the civic publicity bureau referred to in the statement of claim will be met without, in any way, adding one cent to the taxpayers' burdens, as no portion of such expenditures will come out of the moneys raised by taxation.

It is true all city revenue, from whatever sources derived, is legally the property of the municipality, but surplus revenue from a utility like the hydro-electric can only arise

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after all costs of operation have first been met. I know of no more important factor in the success of any business enterprise which depends upon public patronage than advertising, the city of Winnipeg by its charter is clothed with the fullest legal powers possible to enable it to carry on its hydro-electric business. I refer, particularly, to secs. 618 and 622 of the City Charter, which is 1918 (Man.), ch. 120, although advertising is not one of the powers specifically mentioned in the Act, I can see no legal objection to inferring—in fact I think it ought to be inferred—that such power is incident to the full and beneficent exercise of the powers actually given by the statute. I have not the least doubt in my mind that a reasonable and proper interpretation and construction of the city charter gives the city, or its lawful delegates, power to expend upon advertising out of the revenues derived from the hydro-electric system such moneys as it deems advisable and necessary, and so the resolution attacked is not, in my opinion, *ultra vires* the powers of the city council, and is not illegal, and cannot and ought not to be interfered with by this Court.

There are other grounds such as the question of the plaintiff's interest and status to bring this suit for an injunction, which might be urged against the continuance of the injunction, but I have given, I think, sufficient reasons for holding that the interim injunction granted by Macdonald, J., ought to be dissolved. The plaintiff's motion to continue that injunction is, therefore, dismissed with costs to the defendant in any event of the cause, and the interim injunction order will be dissolved.

Motion dismissed, injunction dissolved.

SCOTT v. TRUMBLEY.

Alberta Supreme Court, Walsh, J. November 16, 1922.

JUDGMENT (§IIC—89)—UNDER DROUGHT AREA RELIEF ACT, 1922 ALTA. CH. 43—COLLATERAL ATTACK FOR IRREGULARITY—APPEAL BY SPECIAL LEAVE PROPER COURSE.

In an action commenced by leave of a District Court Judge under sec. 8 of the Drought Area Relief Act, 1922 (Alta.), ch. 43, which leave was granted *ex parte*, the defendant having failed to defend and having been noted in default, and the Judge having refused an application to set aside this noting and for leave to defend and having entered judgment for the plaintiff, there is no appeal as of right from such order, but either the Judge who made the order, or a Judge of the Supreme Court may give special leave to appeal, and this is the proper procedure for the defendant, instead of attacking the order on the ground that it was made *ex parte* when sec. 10 of the Act provides that it shall be on notice of motion served on the resident and on the Commissioner or deputy commissioner for the district.

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APPEAL by defendant from the judgment of the trial Judge dismissing an application to set aside a noting of his default and for leave to defend, and entering judgment for the plaintiff. Affirmed.

L. E. Ormond, for the motion.

L. H. Fenerty and *C. A. Coughlin*, contra.

WALSH, J.:—This action was commenced by the leave of His Honour Judge Stewart under sec. 8 of the Drought Area Relief Act, 1922 (Alta.), ch. 43, he being the Judge to whom by Order in Council passed under sec. 9 of the Act all applications authorised by the Act are assigned for hearing in the Hanna Judicial District, the defendant being a resident within the meaning of the Act.

This leave was granted *ex parte* though sec. 10 of the Act says that it shall be by notice of motion served on the resident and on the commissioner or deputy commissioner for the district. The defendant did not defend the action and he was noted in default. Judge Stewart sitting as a local Judge of this Court dismissed his application to set aside this noting of his default, and for leave to defend, and by the same order directed the entry of judgment for the plaintiff for the relief claimed by him in the action including the payment out to him of some $1,700 paid into Court under a garnishee summons.

The defendant has no defence to the action on the merits. The merits appear to be all against him on the material before me. A building on the land which is the subject-matter of the action has been burned down, and the defendant's effort appears to be by bringing about the dismissal of this action to get for himself the amount of the insurance on it as represented by the above mentioned sum of $1,700 and let the plaintiff take back his land minus this building. His whole defence rests on the fact that the necessary leave to bring this action was obtained *ex parte*.

I am quite at a loss to know how this can avail the defendant as a defence to the action. So long as the order stands, it is the leave of the only person competent to give it for the bringing of the action. It must be got rid of, I should say, before the result which the defendant seeks to attain can be secured to him and I do not think this can be done by a collateral attack upon it by way of defence to the action. It was admitted on the argument that Judge Stewart, in making this order, was *persona designata*. It was said that there is no appeal from such an order. This is hardly correct. It is true that there is no appeal as of right as

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none is given by the Act, but sec. 6 of 1908 (Alta.), ch. 7, empowers the Judge who made the order or a Judge of the Supreme Court to give special leave to appeal, and that, I think, is the remedy the defendant should have pursued.

The appeal is dismissed with costs.

Appeal dismissed.

Re FLOOD.

Prince Edward Island Supreme Court, Mathieson, C.J., Haszard, and Arsenault, JJ. January 10, 1922.

INTOXICATING LIQUORS (§IA—5)—PROHIBITION ACT, 1918 (P.E.I.), CH. 1 CONSTITUTIONAL LAW—B. N. A. ACT—ULTRA VIRES—LEGISLATIVE JURISDICTION IN THE REGULATION OF TRADE AND COMMERCE—POSSESSION—CERTIORARI.

Section 52 of the Prohibition Act, 1918 (P.E.I.), ch. 1, provides as follows:—

"52. No person shall keep or have in his possession any liquor unless such liquor has been purchased from a vendor in accordance with the provisions of this Act. Any liquor in possession of any partnership or company shall be deemed to be in the possession of each member or shareholder thereof. All liquor purchased from a vendor shall, until actually used, be kept in the bottle or container on which the label has been attached by the vendor in accordance with the provisions of sec. 49.

Any person having in his possession any liquor which is not in a bottle or container on which such label is attached shall be presumed to have such liquor in his possession in violation of the provisions of this section....."

Under this section the applicant was convicted for unlawfully having in his possession intoxicating liquor which had not been purchased from a vendor in accordance with the provisions of the Prohibition Act.

An order *nisi* for a writ of *certiorari* being granted, on the hearing,

Held, that sec. 52 of the Prohibition Act was *ultra vires* of the Legislature of the Provinve as invading the exclusive field of the Dominion.

[*Att'y.-Gen'l. for Ontario* v. *Att'y.-Gen'l. for the Dominion of Canada*, [1896] A.C. 348; *Att'y.-Gen'l. of Manitoba* v. *Manitoba License Holders' Ass'n.*, [1902] A.C. 73; *Canadian Pacific Wine Co.* v. *Tuley*, 60 D.L.R. 520, 36 Can. Cr. Cas. 130, [1921] 2 A.C. 417; *Hudson Bay Co.* v. *Heffernan* (1917), 39 D.L.R. 124, 29 Can. Cr. Cas. 38, 10 S.L.R. 322, followed.]

APPLICATION by way of certiorari to quash a conviction under the Prince Edward Island Prohibition Act.

G. S. Inman, K.C., for applicant.

W. E. Bentley, K.C., for prosecutor.

The judgment of the Court was delivered by:

MATHIESON, C. J.:—On February 7, 1921, the applicant was convicted before the stipendiary magistrate for the City of Charlottetown of an offence against the provisions

of the Prohibition Act, 1918 (P.E.I.), ch. 1, and was adjudged to forfeit and pay the sum of $200 and costs and, in default of payment, to be imprisoned in the common jail of Queen's County for the space of 3 months.

An order *nisi* for a writ of *certiorari* was granted and served upon the prosecutor, the convicting magistrate and the Attorney-General. On the hearing, Mr. Bentley, K.C., appeared for the prosecutor, and Mr. Inman, K.C., for the applicant. The Crown was not represented.

The offence charged in the information and found by the conviction was that "The said Raymond Flood between the First day of December, A.D., 1920, and the twelfth day of January, A.D., 1921, in the said City of Charlottetown unlawfully did have in his possession intoxicating liquor which had not been purchased from a vendor in accordance with the Prohibition Act."

The grounds set forth in the rule are in effect that the magistrate had no jurisdiction in the premises because (1) There was no evidence, and (2) That sec. 52 of the Prohibition Act, under which the conviction was made, is *ultra vires* of the Legislature of this Province.

On the first ground, the jurisdiction of the Court is limited by sec. 159 of the Prohibition Act, 1918 (P.E.I.), ch 1, which is that:

"No conviction, judgment or order in respect of any offence against this Act shall be removed by certiorari or otherwise into any of His Majesty's Courts of Record."

It is settled law that, notwithstanding such a clause, the Supreme Court has inherent power to quash the judgments of inferior tribunals where there is a vital defect in their jurisdiction or proceedings. But, where the tribunal has jurisdiction over the person accused and over the subject—matter of the complaint and the procedure has been regular, the only question being upon the facts, this Court has no right to disturb the finding of the trial Court.

In *Re Dougherty* decided by the full Court here in November, 1902, it was held that the magistrate's finding on the evidence could not be reviewed even though he erroneously found a fact essential to the validity of his conviction; that the Legislature, having entrusted the jurisdiction on the merits to the magistrate, whatever his decision thereon might be, it could not be disturbed on *certiorari*, even if he erred on the facts. This case was followed in the subsequent decisions of this Court and particularly referred to with approval in *Re Arthur McKinnon*, 1916.

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The application in the present case discloses: An information for an offence against the form of the statute; a Court properly constituted to try the charge; the hearing of evidence relating to the charge, and a conviction made thereon. It was solely within the province of the presiding magistrate to determine upon the sufficiency of the evidence. It does not appear that there was any material irregularity in the proceedings. Upon this ground, therefore, no sufficient cause is shown for granting the rule.

The substantial question in this case is upon the second ground challenging the validity of sec. 52 of the Prohibition Act 1918 (P.E.I.) ch. 1, which is as follows:—

"52. No person shall keep or have in his possession any liquor unless such liquor has been purchased from a vendor in accordance with the provisions of this Act. Any liquor in possession of any partnership or company shall be deemed to be in the possession of each member or shareholder thereof. All liquor purchased from a vendor shall, until actually used, be kept in the bottle or container on which the label has been attached by the vendor in accordance with the provisions of sec. 49.

Any person having in his possession any liquor which is not in a bottle or container on which such label is attached shall be presumed to have such liquor in his possession in violation of the provisions of this section.

This section shall not apply to wine for sacramental purposes in the possession of a clergyman or church goods' agent, provided such wine has been obtained by such clergyman or church goods' agent in the manner provided by sec. 44; nor shall this section apply to liquor in the possession of a vendor licensed under this Act; nor to alcohol in the possession of a druggist in a package under seal or on which a permit has been affixed in accordance with the provisions of sec. 187."

Decisions of the Judicial Committee of the Privy Council from *Russell* v. *The Queen* (1882), 7 App. Cas. 829 to *Canadian Pacific Wine Co. Ltd.* v. *Tuley*, 60 D.L.R. 520, 36 Can Cr. Cas. 130, [1921] 2 A.C. 417, decided in July last have so far settled the distribution of legislative powers between the Dominion Parliament and the Provincial Legislatures in respect to the regulation and prohibition of the liquor traffic that it may be broadly stated that, except for sec. 52, the Prohibition Act of this Province in its general prohibitory provisions is within the competence of the Provincial Legislature.

But sec. 52 has gone outside the field covered by judicial decisions and beyond the furthest prohibitive enactments of any other Province of Canada.

Either tacitly or expressly the liquor laws of the other Provinces, with possibly one exception, permit or provide for the importation of liquors into the Province and the export of the same in the interprovincial or foreign trade, shortly referred to as the export trade. The Prohibition Act, without sec. 52, left an open but unguarded channel through which the export trade could flow.

The Act, including sec. 52, while not expressly prohibiting the importation of any quantity of liquor, yet after allowing a certain part to flow through the channels defined by the Act for consumption within the Province, subjects the balance to forfeiture and the possessor to penalties. In effect, the statute says, "You may import liquor for export or for your own personal consumption, but the moment it comes into your possession in the Province it will be confiscated." It matters not what the possessor's intention may be—whether to sell it, or to consume it, or export it—the condemnation is the same, unless the possessor is within the class of persons exempted by the Act. So far as the effect is concerned, the Act might as well expressly have prohibited the export trade for, if the law, as it now stands, were obeyed, no liquor that comes into the Province can find its way out again.

The leading case on the subject of provincial rights in this regard is *Att'y.-Gen'l. for Ontario* v. *Att'y.-Gen'l. for The Dominion*, [1896] A.C. 348. It was a case stated for the opinion of the Supreme Court of Canada involving seven questions. The fourth question, the one with which we are immediately concerned, is: "Has a Provincial Legislature jurisdiction to prohibit the importation of such [intoxicating] liquors into the Province?" This the Supreme Court answered in the negative. Their decision upon this and the other questions submitted was appealed to the Privy Council, and thus question 4 was answered [1896] A.C. at p. 371.

"4. Their Lordships answer this question in the negative. It appears to them that the exercise by the Provincial Legislature of such jurisdiction in the wide and general terms in which it is expressed would probably trench upon the exclusive authority of the Dominion Parliament." Lord Watson, who delivered the judgment of the Board, remarked at pp. 364-365, "The only enactments of sec. 92 [of the B. N. A. Act] which appear to their Lordships to have

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any relation to the authority of Provincial Legislatures to make laws for the suppression of the liquor traffic are to be found in Nos. 13 and 16 which assign to their exclusive jurisdiction (1) 'property and civil rights in the Province,' and (2) 'Generally all matters of a merely local or private nature in the Province.' A law which prohibits retail transactions and restricts the consumption of liquor within the ambit of the Province and does not affect transactions in liquor between persons in the Province and persons in other Provinces or in foreign countries, concerns property in the Province ..... and also the civil rights of persons in the Province. It is not impossible that the vice of intemperance may prevail in particular localities within a Province to such an extent as to constitute its cure by restricting or prohibiting the sale of liquor, a matter of a merely local or private nature and, therefore, falling *primâ facie* within No. 16."

The Manitoba Liquor Act of 1900 (Man.) ch. 22, was drawn and enacted in the light of that decision and its provisions, "stringent beyond precedent," were evidently intended to extend to the limit of provincial legislative power while conforming to the principles enunciated in the case. That Act went very far. It prohibited any person from having or keeping or giving liquor in any other place than in the private dwelling house in which he resided, unless he had a wholesale or retail druggists' license; but it avoided the conflict with Dominion jurisdiction which sec. 52 of our Act has challenged by enacting as its sec. 52 the following:—

"52. Nothing herein contained shall prevent any person from having liquor for export sale in his liquor warehouse, provided such liquor warehouse and the business carried on therein complies with the requirements in sub-sec. (1) hereof mentioned, or from selling from such liquor warehouse to persons in other Provinces or in foreign countries, or to a wholesale licensee under this Act.

(1) The liquor warehouse in this section mentioned shall be suitable for the said business and shall be so constructed and equipped as not to facilitate any violation of this Act, and not connected by any internal way or communication with any other building or any other portion of the same building, and shall be a wareroom or building wherein no other commodity or goods than liquor for export from the Province are kept or sold to such wholesale licensee and wherein no other business than keeping or selling

liquor for export from the Province is carried on."

The validity of the Manitoba Act was tried before the Court of Appeal of Manitoba in 1901 and it was pronounced to be *ultra vires*. This decision was appealed by the Attorney-General for Manitoba to the Privy Council and reversed in [1902] A.C. 73. Lord Macnaghten, delivering the judgment of the Board, quoted with approval at p. 78, from the judgment in *Att'y.-Gen'l. for Ontario* v. *Att'y.-Gen'l. for The Dominion*, [1896] A.C. 348, as follows:—"It is not incompetent for the Provincial Legislature to pass a measure for the repression, or even for the total abolition, of the liquor traffic within the Province, provided the subject is dealt with as a matter '*of a merely local nature*' in the Province and the Act itself is not repugnant to any Act of the Parliament of Canada."

Two features of the Manitoba Act of 1900 were especially noticed—the introductory recital declaring that "It is expedient to suppress the liquor traffic in Manitoba by prohibiting *provincial transactions* in liquor"; and the other, sec. 119 of the Act, 1900 (Man.), ch. 22, which is as follows:—

"119. While this Act is intended to prohibit, and shall prohibit, transactions in liquor which take place wholly within the Province of Manitoba, except under a license or as otherwise specially provided by this Act, and restrict the consumption of liquor within the limits of the Province of Manitoba, it shall not affect and is not intended to affect *bonâ fide* transactions in liquor between a person in the Province of Manitoba and a person in another Province or in a foreign country, and the provisions of this Act shall be construed accordingly."

Lord Macnaghten then continues at p. 80: "Now, that provision is as much a part of the Act as any other section contained in it. It must have its full effect in exempting from the operation of the Act all *bonâ fide* transactions in liquor which come within its terms. . . . It is enough to say that they are extremely stringent—more stringent probably than anything that is to be found in any legislation of a similar kind. Unless the Act becomes a dead letter, it must interfere with the revenue of the Dominion with licensed trades in the Province of Manitoba and, indirectly at least, with business operations beyond the limits of the Province."

Some expressions from the report to His Majesty in *Att'y.-Gen'l. for Ontario* v. *Manitoba License Holders' Ass'n*,

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[1902] A.C. 73, are referred to, namely (at p. 79):—

"There might be circumstances in which a Provincial Legislature might have jurisdiction to prohibit the manufacture within the Province of intoxicating liquors and the importation of such liquors into the Province."

But these *dicta* are thus disposed of by Lord Macnaghten in the judgment (at p. 79): "For the purposes of the present question it is immaterial to inquire what those circumstances may be."

The statement from the report above quoted is not related to any factor in the actual determination of either case and is at most a speculation as to what rights might arise out of unknown circumstances.

The decision was that the subject of the Manitoba Act was a matter of merely local or private nature in the Province and that the Act, having dealt with it as such, was therefore *intra vires*. This decision has been the guide of Provincial Legislatures in enacting prohibitory laws, and the Manitoba Act became the pattern which the Legislatures of the other Provinces generally followed. The case settled definitely that the jurisdiction of the Province to enact the legislation in question was founded upon sub-sec. 16 of sec. 92, "matters of merely local or private nature in the Province" and not on sub-sec. 13 "Property and Civil Rights in the Province."

The latest decision of the Privy Council on the validity of provincial prohibitory legislation is *Canadian Pacific Wine Co. Ltd.* v. *Tuley*, 60 D.L.R. 520, 36 Can. Cr. Cas. 130, [1921] 2 A.C. 417. The action arose out of the seizure of liquor by the police for a breach of the British Columbia Prohibition Act of 1916 (B.C.), ch. 49, and the amending Act of 1919 (B.C.), ch. 69. The first question for decision —the only one relevant to this case—was the constitutional validity of the British Columbia statutes under which the police purported to act.

Section 10 of the Act, 1916, prohibited in the usual terms the sale of liquor within the Province. Section 11 prohibited the keeping, having or giving of liquor in any place other than a private dwelling house where a person resides. Section 57 contains provisions equivalent to sec. 119 of the Manitoba Act. Sec. 19 of the Act of 1916 as amended by the Act of 1919 provides:—

"19. (1) Nothing in this Act shall prevent any person from having liquor for export sale in his liquor warehouse, provided such liquor warehouse and the business carried on

therein complies with requirements in sub-section (2) mentioned, or from selling from such liquor warehouse to persons in other Provinces or in foreign countries, or to a Vendor under this Act, [amended 1919 (B.C.), ch. 69] but no warehouse shall be deemed to be a liquor warehouse within the meaning of this section if the person having liquor therein has failed to comply with the provisions of sub-section (3).

(2) The liquor warehouse in this section mentioned shall be suitable for the said business, and shall be so constructed and equipped as not to facilitate any violation of this Act, and not connected by any internal way of communication with any other building or any other portion of the same building, and shall be a wareroom or building wherein no other commodity or goods than liquor for export from the Province are kept or sold to such vendor, and wherein no other business than keeping or selling liquor for export from the Province is carried on.

(3 Every person who now has or hereafter brings to or has liquor in a liquor warehouse as in this section mentioned shall forthwith furnish the commissioner with correct written information as to the location of such warehouse, the amount and description of the liquor therein contained, the place from which and the date when such liquor was brought, and its intended destination. He shall also forthwith from time to time furnish to the commissioner correct written information as to all removals of liquor from such liquor warehouse, including the amount, description, date of removal, and destination. The commissioner, or his agent duly authorised in writing, shall, for the purpose of obtaining or confirming any such information, at any time have the right to enter into any and every part of any liquor warehouse and to make searches in every part thereof and of the premises connected therewith as he may think necessary for the purpose aforesaid [as amended by 1919 (B.C.), ch. 69, sec. 5]."

The offence for which the appellants were convicted was for selling liquor from a wholesale warehouse to a person in the Province, in violation of the provisions of the law. The whole stock of liquor in the warehouse was, therefore, seized, the magistrate holding that, by virtue of the offence, it was being kept there for an unlawful purpose. His decision was upheld by the Appeal Court of British Columbia (1921), 60 D.L.R. 315, 36 Can. Cr. Cas. 104, 29 B.C.R. 472, at p. 477, and, upon appeal to the Privy Council, the judgment

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was confirmed, 60 D.L.R. 520, 36 Can. Cr. Cas. 130, [1921] 2 A.C. 417.

The essential differences between the legislation of this Province and that of Manitoba and British Columbia upon which the above decisions were based, is that they expressly provided for the export trade keeping an open but guarded channel through which it was to flow, while the legislation of this Province with which we have to deal attempts to extinguish the export trade. Even the declaration contained in sec. 119 of the Manitoba Act and sec. 57 of the British Columbia Act repudiating any intention of interfering with the export trade is so modified in the form in which it appears in sec. 162 of our Act that its meaning is carried into a circle and lost.

The three leading cases of 1896, 1902 and 1921 above quoted have settled conclusively that a Provincial Legislature is competent to enact legislation absolutely prohibiting the liquor traffic within the Province, provided the subject is dealt with as "a matter of a merely local or private nature in the Province."

The determining consideration in this case, therefore, is, does the Prohibition Act deal with the subject as "a matter of a merely local or private nature in the Province" or does it, by virtue of the provisions of sec. 52, unduly trench upon the field of Dominion exclusive jurisdiction?

The answer is to be found in the B.N.A. Act, 1867, which must be interpreted in the light of the purpose which it was intended to serve, namely, to evolve out of the self-governing Colonies and unorganised territory a united company with a central Government having exclusive legislative control over all subjects of common interest, leaving to the Provincial Legislatures certain specified subjects and classes of subjects and "generally all matters of a merely local or private nature in the Province" as set out in sec. 92 of the Act.

To serve the purpose of the Imperial Act, it was essential that all trade barriers between the Colonies should be swept away, so that commerce might have an uninterrupted course throughout the Dominion. This intention should be constantly kept in mind as a controlling principle in the interpretation of the B. N. A. Act. It was in furtherance of this intention that the regulation of trade and commerce was assigned to the exclusive legislative jurisdiction of the Dominion Parliament. The subject of the prohibition of the liquor traffic is not *expressly* assigned by the B.N.A. Act

to either the Dominion or Provincial exclusive jurisdiction, but it was decided by the Privy Council in *Russell* v. *The Queen*, 7 App. Cas. 829, that the Dominion Parliament had exclusive jurisdiction over the subject to enact prohibitory legislation applicable to *Canada as a whole* under their authority to legislate for the peace, order and good government of the Dominion; and by the Ontario, Manitoba and British Columbia cases above cited it was determined that each Province in the absence of over riding Dominion Legislation had the exclusive right to legislate upon the subject as a matter of *merely local or private nature in the Province*. As there is no such Dominion Legislation on the subject in effect in this Province, the field is clear in that respect. The conflict that does arise is between the Dominion exclusive control over the regulation of trade and commerce on the one hand, and of the equally essential right of the Province to legislate within the limits of its exclusive jurisdiction on the other.

It has been found, and, doubtless, was anticipated, that the Dominion, in legislating upon one of its exclusive subjects, incidentally involved one or more subjects assigned exclusively to the Provinces; and conversely a Province, in legislating upon a subject assigned to its jurisdiction, incidentally affected a subject falling within the Dominion jurisdiction.

The guiding principle in such cases clearly is that neither the Dominion nor the Province may invade the legislative field of the other further than is necessary in order to legislate effectively upon the principal subject. It is a fundamental legal principle of general application that rights *extra viam* shall not be pushed beyond necessity.

The present legislation affects interprovincial trade in liquor to the extent that it is effectual in reducing the consumption of liquors imported from the other Provinces. That is a consequence incidental to the exercise of the provincial right. But that right is co-extensive only with the need.

If it were absolutely necessary to the effective exercise of the provincial right that the export trade and the transportation of liquor through the Province from a point outside to another point outside the Province should be absolutely prohibited, a question would arise as yet undetermined by authority and which could be conclusively determined only by the Judicial Committee of the Privy Council. But the question in that extreme form has not arisen in this case.

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By keeping a channel open for the export trade and transportation, no undue interference with the trade and commerce of Canada will result, while by properly safeguarding that channel no export liquor may escape from its proper custody to undermine and destroy the effect of the Act. The safeguards thus imposed by Manitoba and British Columbia above quoted illustrate the conception which the Legislatures of those Provinces held as to the limitations on provincial powers and of the means that could be employed to make those powers effective without clashing with Dominion exclusive legislative authority.

So far as available authorities disclose, there appears to be but one Province that has directly challenged the Dominion authority on the same ground. The Legislature of Saskatchewan in 1917 raised the issue upon the right of a Province to prohibit the export trade by enacting that, "No person shall expose or keep liquor in Saskatchewan for export to other Provinces or to foreign countries," but this legislation was held by their Supreme Court to be *ultra vires* of the Provincial Legislature as an undue interference with trade and commerce. *Hudson Bay Co.* v. *Heffernan* (1917), 39 D.L.R. 124, 29 Can. Cr. Cas. 38, 10 S.L.R. 322.

The operation of the Act of this Province including sec. 52 would as completely suppress the export trade as would the statute of Saskatchewan, and the same conclusion as was reached by that Court is inevitable in this case. Section 52 in its effect unduly trenches upon the field of Dominion exclusive legislative jurisdiction and is, therefore, *ultra vires* of the Legislature of this Province.

Section 163 of the Act provides for this contingency and saves the remainder of the Act.

The summons will be made absolute for a writ of *certiorari*. In consideration of the proceedings having been taken under a statute of this Province, no costs will be allowed.

Judgment accordingly.

CAMPBELL v. GALLANT, CROCKETT and the ROYAL BANK of CANADA.

Re MILLIGAN ESTATE.

Prince Edward Island Supreme Court in Chancery, Haszard, M.R., acting as Vice-Chancellor. October 10, 1922.

FRAUDULENT CONVEYANCES (§III—10)—INSOLVENT DEBTOR—MORTGAGE —PREFERENCE—FRAUDULENT SCHEME—INVALIDITY—SETTING ASIDE.

Where the evidence shows that the taking of a mortgage was

a principal factor in an organised scheme on the part of certain creditors to obtain preferential payment of their claims, to the hindrance and injury of the other creditors, such creditors being fully aware of the debtor's insolvent circumstances at the time the mortgage was given, there being no *bona fide* advance of money within the meaning of the Act respecting Assignments for the Benefit of Creditors, 1898 (P.E.I.), ch. 4; such mortgage is null and void and will be set aside as against the assignee of the estate and effects of the debtor.

ACTION by the assignee of the estate and effects of a debtor to set aside a certain mortgage as a fraudulent preference.

W. E. Bentley, K.C., for plaintiff.

J. J. Johnston, K.C., for defendant Crockett.

A. E. Arsenault, K.C., for defendant Gallant and the Royal Bank of Canada.

HASZARD, M.R.:—The bill of complaint in this suit was filed in December, 1919, and the evidence herein taken before the late FitzGerald, V.C., in September, 1920. Nothing further was done up to the time of FitzGerald, J.'s death. Owing to the fact that the present Vice-Chancellor, Arsenault, J., had been engaged as counsel for one of the defendants in the suit at its inception, and was, consequently, incapacitated from hearing the case, it was argued before me, as Acting Vice-Chancellor on the evidence theretofore taken.

The bill seeks to set aside and have declared null and void as against the complainant a certain indenture of mortgage bearing date September 10, 1918, made by the defendant Colin Milligan and Ida G. Milligan, his wife, of the one part and the defendant J. Edward Gallant of the other part, given for the sum of $3,100 upon certain parcels of land in Summerside in Prince County in this Province, particularly described in said mortgage.

The bill alleges that the said mortgage was given by Milligan to the end, purpose and intent to delay, hinder, prejudice, defraud and deceive the creditors of the said Milligan or some of such creditors, and that the defendant Gallant took and accepted the said mortgage with such intent, and well knowing that the same was executed with such fraudulent intent and purpose, and that the giving and accepting of such mortgage had the effect of defeating, hindering, delaying and prejudicing the creditors of the said Colin Milligan or some of such creditors.

It is also alleged and claimed by the complainant that the payment or advance alleged by the defendant Gallant as having been made by him to Milligan was not a *bona fide*

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payment from the defendant Gallant to the said Milligan, but if any payment was made by Gallant as the consideration for said mortgage such payment was *mala fide* payment to the other defendants or some of them for the purpose of evading the Act respecting Assignments for the Benefit of Creditors, 1898 (P.E.I.), ch. 4, under the guise of a colorable or fictitious payment to the said Milligan and for the purposes aforesaid. Upon the argument, it was admitted that the only question to be decided was as to the validity of the mortgage before mentioned.

From a careful examination of the evidence concerning the procuring of the mortgage and the various circumstances in connection therewith and with the payment over of the $3,100, I am of the opinion that the taking of the said mortgage was a principal factor in an organised scheme on the part of the defendants—Crockett and the manager of the Royal Bank of Canada—and defendant Milligan to obtain preferential payment of the claims of Crockett and the Royal Bank against Milligan, to which purpose defendant Gallant lent himself as a willing tool in the hands of the other defendants, to the hindrance and injury of the other creditors, the said defendants at the time being fully aware of Milligan's insolvent circumstances. That defendants knew when the mortgage was taken that Milligan was on the eve of assigning is made apparent when it is known that the same solicitor who prepared and had executed the mortgage on September 10 also prepared the assignment for the benefit of Milligan's creditors which was executed the following day—these facts together with the further fact that the entire $3,100 (mortgage money) was on the afternoon of the said September 10, distributed between the said two defendants, Crockett and the Royal Bank, in payment of their claims. Gallant's own statement as appears in his evidence when asked regarding the mortgage made it clear to my mind that it never was intended as a loan. He stated that he had no money to loan, that he had never made a loan on mortgage in his lifetime, that he had not made an entry in a book concerning this mortgage, that he had not received a dollar for interest on it, that he had never received nor asked for payment either on account of principal or interest of said mortgage, that the money—$3,100—was raised on a note made by him payable on demand through the Royal Bank and endorsed by Crockett. This, and much other evidence to the same effect, conclusively shows that the mortgage was only a sham and that

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the money was not the *bona fide* money of Gallant.

There is another significant fact apparent from the evidence that while the mortgage bore interest at 7% and the interest thereon was payable yearly, the note in the bank made by Gallant and endorsed by Crockett bore the same rate of 7%, the interest whereof was payable monthly. Thus, it appears that the loan on the mortgage (if it could be called a loan) was made at a loss to Gallant instead of a profit which people loaning money usually look for.

In *Burns & Lewis* v. *Wilson* (1897), 28 Can. S.C.R. 207, wherein the judgment of the Court was delivered by Sedgewick, J., setting aside a chattel mortgage under circumstances in many respects similar to the present, it was held that money payable under such circumstances as existed in this case was not money paid as a present actual *bona fide* advance of money.

For the reasons given, I am of the opinion that there was no *bona fide* advance of money made by defendant Gallant within the meaning of the Act that the said mortgage was taken for the purpose of defeating the creditors and is null and void as against the complainant herein and should be set aside as against him. The decree of this Court is that the prayer of the complainant's bill be granted, that the said mortgage be declared null and void and be set aside as against the complainant as assignee as aforesaid, and that the Registrar of Deeds at Summerside do make an entry upon the copy of the said mortgage in the proper books of the Registry Office at Summerside and in all other necessary books in said office that the said mortgage has been set aside and declared null and void by the order and decree of this Court as against the complainant as such assignee; and it is further ordered that the defendants pay the costs of this suit.

Leave is also reserved to the complainant to apply for such further order as may be deemed necessary in the premises.

Judgment accordingly.

Re the SHERIFF of EDMONTON JUDICIAL DISTRICT (Applicant); DOM. LUMBER Co. and REVILLON WHOLESALE Ltd. (Claimants respondents); LIQUIDATOR OF McKENNA LATH & LUMBER Co. (Claimant appellant).

Alberta Supreme Court, Appellate Division, Stuart, Beck and Hyndman, JJ.A. November 9, 1922.

PREFERENCE (§I—I)—CREDITORS' RELIEF ACT, 1910 2ND SESS. (ALTA.), CH. 4—CONTESTING CREDITOR'S LIEN—WINDING-UP ACT, R.S.C. 1906, CH. 144, SEC. 84.

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Hyndman, J.A.

The provisions of the Creditors' Relief Act, 1910 2nd sess. (Alta.), ch. 4, which enacts that "where proceedings are taken by a sheriff for relief under any provisions relating to interpleader those creditors only who are parties thereto and who agree to contribute *pro rata* in proportion to the amount of their executions or certificates to the expense of contesting any adverse claim shall be entitled to share in any benefit which may be derived from the contestation of such claim so far as may be necessary to satisfy their executions or certificates, confers a preferential lien upon the contributing creditors of which in case of an order being made for the winding-up of debtor company under the Dominion Winding-up Act, R.S.C. 1906, ch. 144, such contributing creditors are not deprived by the general direction of sec. 84 latter Act.

[*Martin* v. *Fowler* (1912), 6 D.L.R. 243, 46 Can. S.C.R. 119, followed.]

APPEAL from the judgment of Tweedie, J. Affirmed

The facts of the case are fully set out in the judgment of Hydnman, J.A.

H. H. Parlee, K.C., for Dom. Lumber Co. and Revillon Wholesale.

Frank Ford, K.C., and *S. S. Cormack*, for the Liquidator of McKenna Lath and Lumber Co.

The judgment of the Court was delivered by

HYNDMAN, J.A.:—Prior to December 14, 1920, the respondents became the execution creditors of the McKenna Lath Co. and caused the sheriff to seize under their execution a quantity of lath. The goods were claimed by the Alberta Fish Co. On December 14, 1920, the sheriff applied before the Master in Chambers for and was granted an interpleader order directing the trial of an issue between the respondents and said fish company as to whether the property was that of the fish company or the respondents, the latter undertaking the costs incident to the trial of such issue. Two days later, an order was made for the winding up of said McKenna company under the provisions of the Dominion Winding-up Act, R.S.C. 1906, ch. 144, and the Montreal Trust Company was duly appointed liquidator.

After the winding up, the solicitor for respondents suggested that the appellant should apply to be added as a party to the said interpleader proceedings, but took no steps to have the appellant added, and the appellant took no steps to that end for the reason that it had no funds on hand.

The issue came on for hearing before Walsh, J., in November, 1921, who barred the claim of the Alberta Fish Co. on the ground that the sale from the McKenna company was not accompanied by an actual change of possession, no bill

of sale having been registered. Formal judgment thereon was entered December 2, 1921.

After considerable correspondence between solicitors as to the extent to which the liquidator was affected by this judgment, the liquidator lodged with the sheriff a formal claim to the lath in his hands and to the proceeds of such of it as had been disposed of, under sec. 84 of the Dominion Winding-up Act. Respondents disputed this claim, and the sheriff then applied to the Master for an interpleader order. The Master instead of deciding the matter, referred it to a Judge, and later coming before Tweedie, J., the application was dismissed.

The question for determination is whether or not the respondents are entitled as against the liquidator to the proceeds of the sale of the goods in question in the interpleader issue. This involves the interpretation which ought to be put upon sec 5 of the Creditors' Relief Act, 1910, 2nd sess., (Alta.), ch. 4, and sec. 84 of the Dominion Winding-up Act. Section 5, sub-sec. 4, of the Creditors' Relief Act enacts:—

"Where proceedings are taken by a sheriff for relief under any provisions relating to interpleader those creditors only who are parties thereto and who agree to contribute *pro rata* in proportion to the amount of their executions or certificates to the expense of contesting any adverse claim shall be entitled to share in any benefit which may be derived from the contestation of such claim so far as may be necessary to satisfy their executions or certificates."

Section 84 of the Winding-up Act, as amended by 1908 (Can.), ch. 75, sec. 1, enacts:—

"No lien or privilege shall be created,

(*a*) Upon the real or personal property of the company, for the amount of any judgment debt, or of interest thereon, by the issue or delivery to the sheriff of any writ of execution, or by levying upon or seizing under such writ the effects or estate of the company;

(*b*) Upon real or personal property of the company or upon any debts due or accruing or becoming due to the company, by the filing or registering of any memorial or minute of judgment, or by the issue or taking out of any attachment or garnishee order or other process or proceeding; if, before payment over to the plaintiff of the moneys actually levied, paid or received under such writ, memorial, minute, attachment, garnishee order or other process or proceeding, the winding up of the business of the company has commenced: Provided that this section shall not affect any lien

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or privilege for costs which the plaintiff possesses under the law of the province in which such writ, attachment, garnishee order or other process or proceeding was issued or taken out."

In *Martin* v. *Fowler* (1912), 6 D.L.R. 243, 46 Can. S.C.R. 119, in the Supreme Court of Canada, it was held that sec. 6 of the Creditors' Relief Act, 1909 (Ont.), ch. 48, similar in terms to the Alberta section above quoted, confers a preferential lien upon the contributing creditors of which, in case of the debtor making an assignment for the benefit of creditors, such contributing creditors are not deprived by the general direction of sec. 14 of the Assignments and Preferences Act, 1910 (Ont.), ch. 64, as to the precedence to be given to such assignment.

Section 14 just above referred to reads:—

"An assignment for the general benefit of creditors under this Act shall take precedence of attachments, garnishee orders, judgments, executions not completely executed by payments, and orders appointing receivers by way of equitable execution subject to the lien, if any, of an execution creditor for his costs where there is but one execution in the sheriff's hands or to the lien, if any, for his costs of the creditor who has the first execution in the sheriff's hands."

The *ratio decidendi* of the case cited was, that execution and certificated creditors, contesting the claim of a third party to goods seized under their executions, by virtue of the Creditors' Relief Act, obtain a special statutory preference, lien, prior charge or salvage as a reward for taking upon themselves the risk and expense of contesting adverse claims to the property or money in dispute, and such preference, lien, &c., does not arise simply out of an unsatisfied execution.

It will be noted that in that case, it was an assignment under the Ontario Assignments and Preferences Act, and not a liquidation under the Winding-up Act and the sections applicable in both Acts are not similar in form. But, in substance, I do not think there is any material difference between them.

Granting that the instituting of the interpleader proceedings raised a new and different right from that arising merely from an execution, it is clear that sub-sec. (a) of sec. 84 does not affect the respondent's rights. If at all it must be by virtue of sub-sec. (b), which includes the expressions—*minute of judgment, or by the issue or taking out of any attachment or garnishee order or other process*

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or proceeding; also *writ, memorial, minute.*

Unless the expression "other process or proceeding" is interpreted to embrace the aforesaid statutory preference or lien, then the liquidation would not affect the rights of the respondents acquired by virtue of the interpleader proceedings.

Allowing a wide latitude for the interpretation of the terms "process or proceedings" it seems to me that, whilst the preliminaries leading up to the grant of an interpleader order might properly be called "proceedings," nevertheless, the Judge's order itself directing the issue, in my opinion, cannot be strictly styled a proceeding as contemplated by the section in question. It is, in effect, a judgment, as distinct from the proceedings leading up to it, and a pronouncement that, if the claimant cannot, on the issue, establish his right to the property, then, as of course, the goods or their proceeds must go to the execution and certificated creditors only, who have risked their money in contesting the adverse claim.

Notwithstanding Mr. Ford's very able argument that inasmuch as judgment in the interpleader issue was not pronounced prior to the date of the winding-up order, and is, therefore, distinguishable from *Martin* v. *Fowler, supra,* in that respect, I do not think this makes any material difference.

From a careful examination of that authority I am unable to deduce that it expressly or impliedly decides that a judgment in the interpleader issue is a condition precedent to the acquisition by such creditors of the special statutory lien. In my view, it is the fact of the interpleader order having been granted which is the vital element. In the case before us, this order was in existence prior to the commencement of the winding-up proceedings.

In any event, after the order was made and before the trial took place, the liquidator was invited to become a party and declined. This, it seems to me, ought to be taken as the equivalent of an abandonment by it of any interest in the goods in dispute.

I would therefore dismiss the appeal, with costs.

Appeal dismissed.

KANEEN v. MELLISH.

Prince Edward Island Supreme Court, Mathieson, C.J., Hazzard and Arsenault, JJ. June 27, 1922.

BOUNDARIES (§IIA—5)—CONVENTIONAL LINE—ESTOPPEL.

A conventional line established between adjoining landowners

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and acted upon in such matters as division of fields, access of cattle to water and conservation and use of timber, derives its validity as constituting an estoppel and as evidencing the interpretation which the parties place upon their respective rights.

APPEAL by plaintiff from the trial judgment in an action for trespass. New trial ordered.

D. A. MacKinnon, K.C., and *W. E. Bentley*, K.C., for plaintiff.

J. J. Johnston, K.C., for defendant.

The judgment of the Court was delivered by

MATHIESON, C.J.:—This was an action of trespass by breaking and entering certain land of the plaintiff situate on township No. 51 in King's County thus described: "Bounded on the north by the Georgetown Road; on the east by land of Hamilton Myers; on the south by land of Robert Mellish; and on the west by land of Alexander Smith," and cutting down and carrying away trees growing thereon.

The defendant pleaded three pleas to the whole declaration:—1. Not guilty. 2. That the land was not the plaintiff's. 3. That the land was the freehold of the defendant.

The plaintiff joined issue upon the defendant's pleas, and replied specially to the defendant's third plea: 1. The Statutes of Limitation of Actions concerning real estate. 2. A conventional line fenced for over 20 years and consequent estoppel.

The case was tried before the late Fitzgerald, J., with a jury at the July term, 1920, in Georgetown, in King's County. At the conclusion of the Judge's charge and before the case was committed to the jury, the Judge ordered a verdict to be entered for the plaintiff upon the issues raised upon the third plea, counsel agreeing thereto. Three questions were submitted by the trial Judge to the jury. The questions and answers were:—"Q: 1. Do you find the documentary or true line of plaintiff's land north or south of the trespass complained of? A: North. Q: 2. Did the plaintiff acquire a title by possession of the lands on which the trespass was committed? A: He did not. Q: 3. By reason of any conventional line, is the defendant estopped from claiming that the land on which the trespass was committed is his land? A: He is not."

The jury also returned a general verdict, "We find for the defendant 'Not guilty.'"

The defendant now moves that the verdict be set aside and a new trial granted on the following grounds:—1. That the

verdict was against the weight of evidence. 2. That the verdict was contrary to the evidence and to the direction of the Judge. 3. For the erroneous admission as evidence for the defendant of: (Several specified title deeds of neighbouring lands). 4. For misdirection.

The case as it comes to us from the trial Court stands in this position: The verdict entered for the plaintiff on the third plea excludes the defendant from setting up any claim of title or right of possession in the land upon which the acts of alleged trespass were done. The verdict of the jury find specifically that the plaintiff had neither the title nor the possession. The effect of the whole proceeding at *Nisi Prius*, therefore, is to find that neither party had any rights in the area trespassed upon.

There is no doubt that, so far as the defendant is concerned, he is excluded from making any claim of title or right to possession in the disputed area. The verdict entered against him by consent at the trial stands unquestioned.

But what of the verdict in his favour? After the third plea was disposed of, the only issues that remained for the consideration of the jury were under the first plea, viz.:—Not guilty; and under the second plea, that part which denied the title and right of possession in the plaintiff. In other words, the plaintiff still had the burden of proving:—1. That the defendant did the acts complained of in the place mentioned; and 2. That the plaintiff was in possession of the land when the acts complained of were done thereon.

The places where the acts of alleged trespass were committed and the defendant's complicity in the acts were fixed and established by evidence undisputed in any essential part. There remained only the question of the plaintiff's possession. He sought to prove this in one of two ways, either of which, being successful, would maintain his case: 1. That he held the land in fee simple in possession by virtue of the following conveyances: (a) A conveyance from James Stewart and wife to John Kaneen dated May 5, 1869, of "All that tract, etc., of land commencing on the Town Road at the northeast corner of 100 acres of land owned and occupied by Alexander Smith and running from thence east along said Town Road for the distance of 10 chains, thence southwardly along the line dividing the said tract of land herein described from a farm formerly occupied by the late Donald McDonald for the distance of 100 chains, thence by a line at right angles therewith for the distance of 10 chains, thence northwardly along the eastern

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division line of the said Alexander Smith's tract of 100 acres of land for the distance of 100 chains to the place of commencement containing by estimation 100 acres of land a little more or less and is part of township No. 51 in King's County in Prince Edward Island." (b) A conveyance from John Kaneen and wife to the plaintiff dated January 28, 1884, in which the land is thus described: "All that tract piece or parcel of land at New Perth in said township 51, bounded and described as follows, that is to say: On the north by the Georgetown Road; on the east by land in possession of the said John Kaneen; on the south by — Mellish's land; and on the west by land in possession of Alexander Smith."

There is no ambiguity in the description when we take into account the elementary principle in interpreting descriptions of land that where the line is carried a specified distance (as in this case, 100 chains) to a natural boundary (as in this case, the Town Road), it will go to the natural boundary mentioned however far or near.

The evidence is clear and uncontradicted that part of the land upon which the cutting was done is included within the boundary lines of this deed.

No evidence was given of the title of James Stewart, nor is that material in this case. The plaintiff showed such a continuous actual possession by himself and his predecessor in title for a period of about 50 years of the cultivated area of the farm as, apart from any other considerations, would give them, in their time, constructive possession of all the lands included in their documentary title. The case is not in the same category with that of a squatter seeking to prove title by possession in wilderness land. Here, there is color of title which, in such a case, makes the possession of part an equal possession of all included in the description of the instrument of title. In other words, the predecessor in title of the plaintiff, by his actual possession of part, and by the effect of the conveyance first above mentioned, was in actual or constructive possession of the whole of the land within the bounds of his deed which included part of the area trespassed upon, and his title and right of possession were vested in and continued in the plaintiff up to the time of action. That is the title which the plaintiff had except for the effect of the conventional line.

On the second ground—a conventional line:—A conventional line is one which is established by agreement of adjoining owners of land. It derives its validity from either

or both of two considerations:—1. By estopped and 2. As evidencing the interpretation which the parties place upon their respective boundary rights.

It appears that about 50 years ago there was a fence to the rear of what is now the defendant's land. It followed the course of a stream flowing in an easterly direction. This fence, on its eastern half, was south of the brook; and, on its western half, north of the brook; but keeping as close to the brook as it could conveniently be built. The plaintiff's side lines connected with this fence. It was for many years the only fence between the land of the plaintiff and the land of which the defendant claims to be possessed. The fence appears to have been divided and each adjoining owner kept up his part, but sometimes they made the repairs in common. Though there is no evidence beyond this to show that the brook fence was ever established as a division line, it is shown to have served that purpose; and the evidence is that for many years the plaintiff and his predecessor in title exclusively had cut wood and timber up to the brook fence and had pastured and watered their cattle there. It was wilderness land for several chains north and for a much greater distance south of the brook.

In 1895, Robert L. Mellish, who then claimed to be entitled to the land immediately adjoining that of the plaintiff on the south, obtained the services of John P. Nicholson, provincial land surveyor, to run his northern line. He ran the line along the southern boundary of Cyrus Shaw's land and of land then owned by Alexander Smith taking a line parallel to the Town Road. When he reached the western side line of defendant's land, the latter objected at first, but it was at length agreed that the line should jog south for 43 links and then continue its course across the defendant's land parallel to the Town Road. This would let the plaintiff down to the stream at his eastern boundary. The effect of this agreement was that the plaintiff would have side lines of 102.20 chains instead of an eastern side line of 100 chains and a western line of 103½ chains and that he would cross the brook at his eastern side line instead of on the west, and that he surrendered all claims to the land between the Nicholson line and the brook.

A fence was erected upon this line. Robert L. Mellish who was then in possession of the southern land put up his half with wire fastened to trees where they were on the line and to stakes where no suitable trees were. That fence remained there down to about the time of the alleged tres-

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passes. The plaintiff erected and maintained his fence on the other half. This continued for over 20 years when the defendant, without any notice, cut down and removed the whole fence, crossed over into the adjoining lands and cut down and took away the trees growing thereon, which is the trespass complained of.

While it might be going beyond authoritative decisions to hold that the acts of the parties in this case worked an estoppel (and it is not necessary for the decision of this case to go so far), yet where a boundary line has been agreed upon, and on the faith of such agreement, the arrangement of the farm as to division of fields, access of cattle to water and the conservation and use of wood and timber, these acts may work an estoppel as effectually as the clearance of the land in question or the erection of a permanent building up to the line.

The question as to the conventional line (referred to herein as the Nicholson line) stands upon a firmer basis of authority. Draper, C.J., in *Wideman* v. *Bruel* (1858), 7 U.C.C.P. 134, at p. 135, states the general principle that "Compacts and arrangements of old standing, the maintenance of which prevents litigation, should be favourably viewed; and if moreover an actual possession of 20 years in accordance therewith can be shewn, it makes the plaintiff's a meritorious claim."

There are numerous cases decided in the older Provinces of Canada supporting and extending the principle enunciated by Draper, C.J., but it will suffice to refer to one, *Phillips* v. *Montgomery* (1915), 25 D.L.R. 499, 43 N.B.R. 229, decided by the Appeal Division of the Supreme Court of New Brunswick in which it was held that where adjoining occupants of land, fully cognisant of the dispute as to location of the line dividing their properties, agree upon a line as a division line and occupy up to and recognise such chosen line as a common boundary of their respective holdings, the successors in title of each of the parties so agreeing in the absence of fraud is bound by the line whether it be the true boundary line or not. That is a fair statement of the law applicable to this branch of the present case.

On the evidence presented, the plaintiff was entitled to prevail either upon his documentary title or upon the conventional line. In this view of the case, the other grounds in the rule are immaterial. The verdict for the defendant should be set aside and a new trial granted.

Appeal allowed; new trial granted.

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Supreme Court of Canada, Davies, C.J., Idington, Duff, Anglin, Brodeur and Mignault, JJ. June 17, 1922.

LANDLORD AND TENANT (§IIC—20)—OPTION OF RENEWAL—HOW EXERCISED—POSSESSION—CONSENT.

Two provisions in a lease, one providing for a monthly tenancy after the expiration of the term, and another giving the tenant an option of renewal for a further term, manifest an intention that the former is to apply when the option is not exercised. Where to the knowledge of the lessor, the lessee continues in possession after the expiration of the term, and in contemplation of the renewal has made improvements, his possession will be deemed sanctioned by the lessor for the purpose of exercising the option of renewal.

APPEAL from the judgment of the Appellate Division of the Supreme Court. Affirmed.

The judgment appealed from is as follows:—

Meredith, C.J.O.:—This is an appeal by the defendants from the judgment of Rose, J., dated the 17th November, 1921, pronounced after the trial before him sitting without a jury at Toronto on the 30th day of the previous month (1921), 69 D.L.R. 33, 51 O.L.R. 243.

The question for decision is as to the right of the appellants to a renewal of a lease from the respondent to them.

The lease is dated the 15th November, 1915, and is for a term of 5 years commencing on the 1st day of January, 1916. It contains, among others, the following provisions:—

"And it is hereby agreed that if the lessee shall continue to occupy the demised premises after the expiration of the term hereby granted with the consent of the lessor then unless there shall be some written agreement to the contrary the lessee shall be deemed to be a monthly tenant at a monthly rental equivalent to the monthly rent herein provided for payable in advance and all the terms and conditions hereof shall so far as applicable apply to such monthly tenancy.

"The lessees are hereby granted the option of renewing this lease for a period of five years from the expiration of the term hereby granted at a rental of $2,575 per annum on the same terms and conditions as herein set out except that as to renewal."

The lease is on a printed form, of which the first of these provisions forms part; the other provision is a later one and is type-written on a slip attached to the lease.

In my view, reading these provisions together, the first of them is intended to apply if the lessees do not exercise the option which the later provision gives, and does not, of course, have effect if the option is exercised.

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The contention of the respondent is that, if it is intended to exercise the option, it must be accepted during the term of the lease and that view was adopted by the learned trial Judge. The appellants contend that the option need not be accepted during the term, but that it may be accepted at any time, so long as the tenant has done nothing to shew that he does not intend to avail himself of it, or at all events so long as he continues in the occupation of the demised premises.

Before dealing with the legal question, it will be convenient to narrate the facts or such of them as are material to be considered in dealing with that question.

The demised premises are part of an office building owned by the respondent, in which it has its offices. In the month of June, 1920, the appellants desired to have some changes made in their offices, and the respondent at their request had them made at a cost of $348.50, which the appellants paid; further alterations were made in the following September, and were made in the same way and were paid for by the appellants, the cost being $24.82. It is beyond question that the appellants at this time intended to exercise their right to the renewal, and that they never abandoned that intention, though there is no evidence that it was, at any time before the expiration of the term, formally communicated to the respondent. Mr. Dawson, the respondent's secretary-treasurer, said on cross-examination that he "would think" that the appellants would not have paid for these alterations if they intended to leave the premises at the end of the year. The appellants continued to occupy after the expiration of the term, and this must have been known to the respondent. Nothing occurred until about the 5th January of the present year, when Mr. Dawson and the appellants met, and the former took the position that the lease had expired and that the option was gone, and the appellants insisted that they were rightly in possession under the option which they had decided to exercise. On the 7th January the appellants wrote to the respondent the following letter:—

"In accordance with our lease of offices, 504 and 505 Royal Bank building, dated the 15th November, 1915, we have duly accepted the option of renewing this lease for the period of five years from the expiration of the term therein granted, at the rental therein fixed, namely, $2,575 per annum, and on the other terms and conditions as therein set out, except as to a further renewal, and we herewith enclose our cheque for $214.58 in payment of rent for current month."

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On the 10th January the respondent returned the cheque with a letter which contained the following statement:—

"Our position has already been pointed out to you by the writer in a conversation which preceded your letter in which we notified you that your lease and option had expired and that you were in a position of overholding tenant.

"While we do not wish to inconvenience you, we wish to state that we do not propose to grant you a new lease on the terms of the expired option and, as you intimate that you do not care to take a lease on any other terms, we should be glad to take over possession of the premises at your convenience. In the meantime you occupy the position of overholding tenants and will be liable for double rent."

That letter was followed by a notice which reads as follows:—

"In the matter of the Landlord and Tenant Act.

"To Messrs. John Stark & Co.

"Take notice that pursuant to the provisions of the Landlord and Tenant Act we hereby demand that you forthwith deliver to us possession of office numbers 504 and 505 of the Royal Bank building formerly held by you under lease dated 15th November, 1915, which lease expired on December 31st, 1920.

"Dated at Toronto this 17th day of January, 1921.

"Guardian Realty Company of Canada, Limited.

"L. M. Wood, President

"W. C. Dawson, Secy.-Treas."

The cases relied on by the appellants are *Moss* v. *Barton* (1866), 35 Beav. 197, 55 E.R. 870, L.R. 1 Eq. 474; *Buckland* v. *Papillon* (1866), 35 Beav. 281, 55 E.R. 904, L. R. 1 Eq. 477; L. R. 2 Ch. 67; and *Brewer* v. *Conger* (1900), 27 A. R. (Ont.) 10 at pp. 13-14. [See also *Bennett* v. *Stodgell* (1916), 28 D.L.R. 639, 36 O.L.R. 45.]

In *Moss* v. *Barton* the facts were that by an agreement in writing the predecessor in title of the defendants agreed to let the premises to the plaintiff for 3 years from November, 1850, and at the request of the plaintiff to grant him a lease of the premises for 5, 7, 14 or 21 years from the expiration of the 3 years. The plaintiff occupied under the lease during the 3 years, and continued in occupation after they expired; the plaintiff for some time never attempted to exercise his option, and the defendants seemed to have treated him as a tenant from year to year. There were negotiations between the plaintiff and the defendants for the purchase of the premises, and in a letter to them written in

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February, 1862, the plaintiff stated that he had the option of quitting the premises at the end of the year or of taking a lease for a lengthened period, and he proposed taking a lease for 7, 14 or 21 years, at his option, if the rent were considerably reduced. Nothing came of this. In September, 1864, the defendants gave the plaintiff notice to quit, and in the following month he claimed a lease for the extended term.

The Master of the Rolls held that the plaintiff was entitled to a decree for specific performance unless he had done something to deprive himself of that right He pointed out that there was no time specified in the agreement within which he was to call for the lease, and said that "both parties may have considered that he was afterwards holding over as tenant from year to year"; that, if the landlord thought fit to allow him to hold the property from year to year, "there was nothing to prevent him from insisting on the lease; his right to take a lease would exist at any time, unless he gave it up. . . Why did they not . . . call on him to exercise his option? If they knew of its existence, they also knew that the right continued until positively waived; but they did nothing." (35 Beav. at p. 200).

The learned Judge referred to a previous decision of his own in *Hersey* v. *Giblett* (1854), 18 Beav. 174, 52 E.R. 69, which he said shews "that a person having such an option may exercise it at any time while he remains tenant, if the landlord does not call upon him either to exercise or decline it at an earlier period. That is when no time is specified in the agreement within which the option is to be exercised."

A reference to the report of that case shews that the right may be lost by laches.

In *Buckland* v. *Papillon* the Master of the Rolls followed *Moss* v. *Barton*, in which he said that he held "that the lessee, by holding over with the assent of the lessor, did not destroy the original agreement, or enable the lessor successfully to contend that it had been waived" (35 Beav. at pp. 286-287).

Buckland v. *Papillon* went to appeal (1886), L. R. 2 Ch. 67, and the judgment of the Master of the Rolls was affirmed. Delivering the judgment of the Court, the Lord Chancellor, after referring to the argument that the plaintiff was bound to exercise his option before the expiration of the term, said (p. 70):—

"Now, as to this, it must be observed that there was no

limitation whatever of the time within which Bloxam was to exercise his option. If, during the course of 3 years, he had determined to have a lease for 7 years, that would be from the date of the agreement, and he would only have it for the portion of time which remained to run. Undoubtedly, supposing that at the end of 3 years Bloxam had chosen to leave the place, that would have determined his option; but he continued in possession, and so became tenant from year to year, under the terms of the original agreement. I do not mean to include in those words the right to demand a lease, for that had nothing whatever to do with the tenancy from year to year; but I think that continuing in possession, with the sanction of the landlord, he was entitled to exercise his option. He had done nothing whatever to preclude him from demanding that lease at any time; and if the landlord wished to know upon what terms the tenant held, he might have called upon him to say whether he meant to have a lease or not. As the landlord did not choose to do so, it appears to me that the time was unlimited in which the tenant could demand a lease. As long as he continued tenant with the sanction of the landlord, so long he retained his option.

In *Brewer* v. *Conger* the question arose in a redemption action, out of a claim by the defendant Allen that she was lessee of the lands and entitled to redeem the plaintiff. The defendant Allen was lessee under a lease dated the 24th March, 1887, which expired on the 10th May, 1897. The lease contained a covenant that "they (the lessors) will, at the expiration of the term hereby granted, grant unto the said lessee, his heirs, executors, administrators, or assigns, another lease of the premises hereby demised for a further period of 10 years . . . provided the said lessee, his heirs, executors, administrators, or assigns, should desire to take a further lease of said premises." The land was vacant when the lease was made, and the lease provided for the lessee and his assigns being allowed two months after the expiry of the term or renewal term to remove any buildings he had erected on the lands. The defendant Allen was the assignee of the lease; she remained in possession by her tenants after the expiration of the term, and took no steps to remove the buildings that had been erected on the land. Delivering the judgment of the Court, Maclennan, J. A., referred to *Moss* v. *Barton* as a weaker case than the one he was dealing with, and relied on part of the passage from the judgment of the Chancellor in *Buckland* v. *Papillon* which I

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have quoted, in support of the opinion he expressed that all that was essential to entitle the tenant to a renewal was the existence of the desire to have it; though he added:—

"No doubt the lessor had a right to know, within a reasonable time, whether there was a desire or not. That could be ascertained by enquiry, if it was thought to be uncertain, or it might be plainly indicated by conduct and circumstances" (27 A. R. (Ont.) at p. 13).

It is to be observed that the defendant Allen had endeavoured to inform the plaintiff of his desire to have a renewal. She had, before the expiration of the term, written two letters to her, to an address in California where the plaintiff was, but they were returned through the dead letter office, and her desire to renew was communicated and known to the plaintiff's solicitor also before the expiration of the term.

Nicholson v. *Smith* (1882), 22 Ch. D. 640, was relied on by the respondent's counsel. It was there held that notice of the intention to renew before the expiration of the term was essential, but the provision for renewal in that case was that the lessor would at any time before the expiration of the term when required by the lessee, grant the renewal. It is clear that, as the renewal was to be granted before the expiration of the term, the request must have preceded the expiration of the term.

Lewis v. *Stephenson* (1898), 67 L. J. (Q. B.) 296, 78 L. T. 165, was also relied on by counsel for the respondent. In that case Bruce, J., delivering judgment, said that he thought that the provision of the lease, which was that the term was to be 3 years "with the option of renewal," "must be taken to mean within a reasonable time before the expiration of the original term." This statement was merely *obiter*, because the application for renewal was made before the expiration of the term.

In *Allen* v. *Murphy*, [1917] 1 I. R. 484, the Irish Court of Appeal dissented from that view unless it was confined to cases in which the provision is that the application for the renewal must be made before the expiration of the lease.

In *Re Leeds and Batley Breweries Limited and Bradbury's Lease*, [1920] 2 Ch. 548, 552, Peterson, J., discussed *Buckland* v. *Papillon*, and treated it as establishing that in order to entitle the tenant to exercise his option his retention of possession must have been with the sanction of his landlord.

If unfettered by authority, my view of the result of the

English cases would be that it is essential to the exercise of the option to renew after the expiration of the original term, that the retention of possession by the tenant must have been with the assent of the landlord. However, in *Brewer* v. *Conger* the rule is broadly stated without that qualification, and we are bound to follow that case. It is true that it is suggested that the landlord's knowledge of the tenant's intention to renew may be indicated by facts and circumstances from which that knowledge might be inferred, and indeed there was evidence that his intention to renew was in fact communicated to the plaintiffs' solicitor.

I am, however, of opinion that if the rule is qualified as I have said I think it is by the English cases, there were, in my opinion, in the case at Bar, facts and circumstances that justify the conclusion that the respondent knew of the appellants' intention to renew, and that the appellants' possession after the expiration of the term was with the sanction of the respondent. The nature of the alterations which at their request the respondent made, and for which they paid, was an indication to the respondent that they did not intend to leave the premises on the expiration of the term. According to the testimony of the appellant Harry L. Stark, in discussing the question of those alterations, the respondent's manager said that he thought that the appellants should pay for them "on account of the renewal of the term and the rent." The manager of the respondent was called as a witness after that testimony was given and did not contradict it. Then, as I have said, the respondent's office was in the same building, and the respondent must have known that the appellants did not remove from the demised premises on the expiration of the term, and knew that the appellants were continuing in possession and made no objection to their doing that, or gave any indication that it viewed the possession as wrongful, or otherwise than rightful, until the 5th January, when, at the interview between Mr. Dawson and them, they took the position that they were entitled to the renewal, and he for the first time contended that the lease had expired and the option was at an end.

The inference I draw from this is that the possession up to the 5th January, when the right to the renewal was insisted on by the appellants, was with the sanction of the landlord within the meaning of the English cases as I understand them.

For these reasons, I am of opinion that the appeal should

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be allowed with costs and that the judgment of the learned trial Judge should be reversed and that there should be substituted for it judgment dismissing the action with costs.

Maclaren, Magee, and Ferguson, JJ.A., agreed with Meredith, C.J.O.

Hodgins, J. A.:—The words in the lease are in themselves significant. They are, "the lessees are hereby granted the option of renewing this lease." In the cases discussed before us the phrasing was different and in each instance required that the lessee must ask for the renewal (*Moss* v. *Barton* and *Buckland* v. *Papillon*) or desire it (*Brewer* v. *Conger*), and when he did so he could then enforce his right. If, under those circumstances, it could be determined that, given a conditional option, the right to perform the condition did not terminate unless and until the lessee indicated by some act or by laches that he did not intend to perform the condition, or had no desire to exercise his option, it is not difficult to hold that, in this case, the right of the lessees to renew the lease, in the sense of causing it to continue, had not expired on the 5th January. If the question of reasonable time arises, then 5 days after renewal was possible cannot be said to be unreasonable.

Apart from this view, I agree with the analysis of the cases made by my Lord the Chief Justice and with the conclusions he draws from them and concur in allowing the appeal.

W. Nesbitt, K.C., and *K. F. Mackenzie*, for appellant.

R. J. McLaughlin, K.C., for respondent.

DAVIES, C.J.:—I am of opinion that this appeal must be dismissed with costs.

IDINGTON, J.:—The appellant seeks to eject respondents as overholding tenants from office premises which had been held by them under it by virtue of a lease for the term of 5 years to be computed from January 1, 1916, and they, by way of defence, rely upon the following option of a renewal given in and by said lease:—

"The lessees are hereby granted the option of renewing this lease for a period of 5 years from the expiration of the term hereby granted at a rental of $2,575 per annum on the same terms and conditions as herein set out except that as to renewal."

There is nothing restricting respondents to exercise said option within any specified time as usually is in the like cases of lease, and hence what is reasonable must be the limits of the right so existent.

Nothing was expressly said by either party as to renewal until January 7, 1921, when appellant's manager intimated it did not intend to renew, and respondents instantly expressed their intention to exercise the option so given and, by letter reiterating same and enclosing a cheque for the first month's rent, repeated the exercise of the option. Preceding this, there had been an expenditure of nearly $400 by appellant, at the expense of the respondents, in way of changes in the office partitions during the last few months of the expiring term which must have made plain to appellant the intention to renew.

The appellant was bound by the terms of the lease to perform many daily services in way of lighting, heating, elevating, supplying water, etc., which it does not pretend by any proof adduced to have interrupted and thereby asserted its claims as it might have done against a mere wrongful overholder.

In argument, its counsel stoutly asserts that there is no evidence on the point, and suggests the burden of proving that rested on the respondents.

With deference, I submit that in reply to anyone trying to apply the rather narrow argument, put forward, that respondents were debarred from exercising their option after January 1, 1921, unless they can and do shew that the appellant actually did something in way of assenting to their stay, it is not an unfair inference of fact in our climate, in order to meet such an argument, that if it had been possible to support it by evidence that would have been adduced.

In the Court below ante p. 334 there seems to have arisen an error as to the date of the first meeting between the manager of the appellant and one of the respondents. It is stated as having taken place on the fifth instead of the seventh, which counsel on each side are agreed is the correct date.

That shews how instantaneous the response on the part of the respondents was to the suggestion of the manager of appellant as to renewal.

It meets the situation which both the Master of the Rolls and Lord Chelmsford, L.C., respectively suggested as the duty of a landlord before setting up delay as an answer to the exercise of an option.

These possibly new features of argument adduced before us are all, I think, that are not amply covered by the reasons assigned in the judgment of Meredith, C. J. O., ante p 333 in dealing with the case as presented below and in which

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reasoning I fully concur and need not repeat here.

I think this appeal should be dismissed with costs.

DUFF, J.:—The operation of a covenant by a lessor to renew at the option of the lessee is a subject which has been much discussed and especially as touching the application of the rule against perpetuities. Such a covenant, even where the original lease is a lease for lives, does not come under the ban of the rule where it is wholly in the control of persons having vested interests in the lease. It has been said that this is an exception to the rule against perpetuities (Jessel, M.R., in *London & S. W. R. Co.* v. *Gomm* (1882), 20 Ch. D. 563, at p. 579); but the so-called exception has been supported upon another ground, namely, that the covenant to renew is part of the lessee's present interest. And in the case of an absolute covenant to renew a lease for years at the option of the lessee, it seems to be undeniable that the equitable interest created is not an interest to arise in future on fulfilment of a condition precedent but a present interest defeasible on a condition subsequent depending upon the right of the lessee to continue or to drop his possession. That is a vested right, not a right subject to a condition precedent. This is the view expressed in Gray on the Rule against Perpetuities, 1915, p. 203-204, and in Williams on Vendors and Purchasers and in an elaborate discussion of the subject in (1898), 42 Sol. Jo. 628 at p. 630. In support of it there is the statement of Jessel, M.R. in *Moore* v. *Clench* (1975), 1 Ch. D. 447, at p. 452, and of Farwell, J., in *Muller* v. *Trafford*, [1901] 1 Ch. 54 at p. 61.

This view of the effect of such a covenant is not without its bearing upon the question raised by the present appeal. It harmonizes with the reasoning upon which the decision of Sir John Romilly, in *Moss* v. *Barton* (1866), 35 Beav. 197, at p. 200, 55 E.R. 870, L.R. 1 Eq. 474, as well as that of Lord Chelmsford, L.C. in *Buckland* v. *Papillon* (1866), L.R. 2 Ch. 67 at pp. 70-71, is based. Both treat the covenant to renew as vesting a right in the lessee which the lessee may exercise so long as he has not lost his right by electing not to exercise it. By going out of possession at the end of the term he would obviously exercise his option against renewal. If he continue in possession, the lessor is in a position to call upon him at any time to say whether he will remain or take a lease; that the lessor is entitled to do, and the corelative obligation would rest upon the lessee to exercise his right by taking a lease or to lose it. This view appears to

have been acted upon by the Court of Appeal of Ontario in *Brewer* v. *Conger* (1900), 27 A. R. (Ont.) 10, at pp. 14-15.

It is now argued that the decisions in England in effect establish the rule that at the expiry of the term the right to exercise the option is gone if the lessee had not already exercised it unless he continue in possession with the consent of the landlord—consent meaning in this connection something more than a consent inferred from mere passivity.

I do not so interpret the decisions in question. The principle as appears sufficiently, I think, from the reasoning of Lord Chelmsford as well as that of Sir John Romilly, which, as I have intimated already, accords with the view that in other connections has been taken of the effect of such a covenant, is that the lessee's option remains open and exercisable until he has done something which concludes it. It is quite true that in both these cases the lessee who had remained in possession for some years after the expiry of the lease had been in possession with the active assent of the lessor who had accepted rent and given the lessee thereby the status of tenant from year to year. But there must have been a period in both cases in which the lessee was in occupation without the assent of the lessor. There is nothing, I think, in the language of the judgments to indicate that during this period the right of the lessee to renew was supposed to be in suspense. On the contrary, both the Lord Chancellor and the Master of the Rolls pointedly emphasise the power of the lessor over the situation by reason of the circumstance that he is entitled at any time to call upon the lessee to elect whether he will take a lease or not. That is something which could hardly have reference to a time when the lessee was in possession under a tenancy from year to year, but must refer to a time when the lessor was entitled to demand possession of the premises but for the lessee's right to have a lease. In the result, this view seems to accord with the convenience of the situation because the lessor, who admittedly remains up till the last day of the term in the hands of the lessee, as to the matter of renewal, is entitled, the moment the term is expired, to require the lessee to make his election; and it is entirely consistent with the view of such covenants that excludes them from the operation of the rule against perpetuities. There is, moreover, weighty evidence shewing that this is the accepted view. In Fry, Specific Performance, 6th ed. p. 516, para. 1105, it is laid down without qualification that where no time is limited and

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where the landlord has never called on the tenant to declare his option, mere lapse of time will not preclude the tenant or his assign from exercising it. To the same effect is a decision of the Irish Court of Appeal in *Allen* v. *Murphy*, [1917] 1 I. R. 484, at p. 487 and a long series of American decisions.

Indeed, the view advocated by the respondent seems necessarily to involve the proposition that the option, unless exercised, does terminate with the lease, in the absence of something done by the lessor to extend it. For the lessee who merely remains in possession does nothing indicating an intention to abandon his right to a lease; he fails to procure the lessor's consent, that is all.

This is not enough, because the basis of the cases above referred to is no mere verbal formula. It rests upon this very substantial foundation that the lease has a present interest arising from the covenant, and that this interest is not conditioned by his duty to ask for a lessee before the expiration of the term or within any limited period. His right to call for a lease is qualified by the condition that if he gives up possession at the end of the term he loses it because, thereby, he exercised his option. If he remains in possession, the landlord can force him to exercise his election by setting up his right to a lease in response to the landlord's demand for possession.

It is argued by Mr. Nesbitt that the principle of the English cases is excluded in consequence of the presence of a special provision that the lessee remaining in possession with the assent of the lessor should be deemed to be held as monthly tenant on specified terms.

I am unable to agree with this conclusion. The Lord Chancellor points out in *Buckland* v. *Papillon*, *supra*, that the right to demand a lease would not be one of the terms under which a tenant from year to year holds the premises after the determination of the original term. The right to demand a lease, he said, "had nothing whatever to do with the tenancy from year to year." The option continued to exist not because the lessee holding over had become a tenant from year to year, but because the option had not been determined by the conduct of the lessee.

The appeal should be dismissed with costs.

ANGLIN, J.:—Much can be said for the opinion that convenience and certainty in regard to the position of landlord and tenant on the expiry of the original term would have been promoted by holding that the right of election for

the renewal of a lease, under an option in which no time therefore is fixed, must be exercised before the expiry of the term to be renewed. The weight of American authority would appear to favour this view. The law, as so stated in 24 Cyc. p. 999, is approved or supported by the following authorities; *Robertson* v. *Drew* (1917), 34 Cal. App. 143; *Shaw* v. *Bray* (1918), 147 Ga. 567; *Renoud* v. *Daskam* (1868), 34 Conn. 512; *Perry* v. *Rockland and Rockport Lime Co.* (1900), 94 Me. 325; *Thiebaud* v. *First National Bank of Veray*, (1873), 42 Ind. 212. A similar opinion was expressed *obiter* by Bruce, J. in *Lewis* v. *Stephenson*, 67 L. J. (Q. B.) 296, 78 L.T. 165. But that opinion has been disregarded, if not overruled (*Allen* v. *Murphy*, [1917] 1 I. R. 484) and, at least since Romilly's decision is *Moss* v. *Barton*, 35 Beav. 197, 55 E.R. 870, it must be taken as settled that in English law the exercise of such an option is not restricted to the duration of the original term, if nothing else has occurred to determine it, but endures so long as the lessee continues in possession with the sanction of the lessor. In *Moss* v. *Barton*, Lord Romilly may have unwittingly extended the effect of his own previous decision in *Hersey* v. *Giblett*, (1854), 18 Beav. 174, 52 E.R. 69, as Mr. Mackenzie contends in his very able factum. The yearly tenancy created by the agreement which contained the option for the lease no doubt subsisted when the tenant, Hersey, sought to exercise the option. But *Moss* v. *Barton*, was expressly approved in *Buckland* v. *Papillon*, L. R. 1 Eq. 477, and no dissent from it was suggested by Lord Chelmsford, L.C., on the appeal in that case, L. R. 2 Ch. 67. There, an assignee of the tenant, who had continued in possession as a yearly tenant after the expiry of a 3 years' term, under an agreement for lease, was held entitled to exercise an option to take a lease for a further term. Lord Chelmsford says at p. 70.:—

"He continued in possession, and so became tenant from year to year, under the terms of the original agreement. I do not mean to include in those words the right to demand a lease, for that had nothing whatever to do with the tenancy from year to year; but I think that continuing in possession, with the sanction of the landlord, he was entitled to exercise his option. He had done nothing whatever to preclude him from demanding that lease at any time; and if the landlord wished to know upon what terms the tenant held, he might have called upon him to say whether he meant to have a lease or not. As the landlord did not choose to do so. it ap-

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pears to me that the time was unlimited in which the tenant could demand a lease. As long as he continued tenant with the sanction of the landlord, so long he retained his option."

The law appears to have been accepted as settled in this sense by leading English text writers; Foa, Landlord and Tenant, 5th ed. p. 307; Fry on Specific Performance, 6th ed., p. 516; 18 Hals. p. 393, sec. 845. It was so recognized in Ontario in the case of *Brewer* v. *Conger*, 27 A.R. (Ont.) 10.

Brodeur, J.

Insofar as the case last cited, notwithstanding the special circumstances mentioned in the judgment of Maclennan, J. A. at p. 14, indicative of communication having been made before the expiry of the lease of the tenant's intention to renew, should be regarded as authority for the proposition that an option for renewal, containing no time limit and no condition, may be exercised after the expiry of the term although the landlord's sanction to the tenant's retaining possession has not been shewn, I find it unnecessary to express an opinion upon the accuracy of the decision. Having regard to all the circumstances in the present case, some of which are noticed in the judgment of Meredith, C. J. O., ante p. 333 51 O.L.R. at p. 552 I accept the view of that learned Judge that when the landlord's agent, on the seventh day after the expiry of the term, notified the tenants that their lease had expired and they immediately asserted their right to a renewal and promptly sent a cheque for a month's rent at the renewal rate specified in the option, they were still in possession with the lessor's consent within the meaning of the English authorities. Their intimation of an intention to exercise their option was concurrent with the first intimation from the landlord that they could no longer hold possession with its consent and that they would be regarded as overholding tenants.

There is nothing to indicate that there had been any consent by the lessor to the creation of a monthly tenancy under the special provision therefor made in the lease. On the contrary, the notification of January 7 by the appellant's agent that the respondents would be regarded as overholding tenants negatives any such consent.

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

BRODEUR, J.:—The question to be decided is as to the right of John Stark & Co. to a renewal of a lease from the Guardian Realty to them.

The lease was made for 5 years from January 1, 1916, and it was provided that John Stark & Co., the lessees, had

the option of renewing the lease for a further period of 5 years on the same terms.

Some time before the expiry of the lease, the lessees asked for some somewhat extensive repairs which the lessor agreed to make provided their costs should be paid by the lessees. These repairs were made and paid for by the lessees, which shews the intention of the latter to remain on the premises and likely to exercise the option they had by the lease to renew it for a further period of 5 years.

The lessees remained in possession of the premises after the expiry of the lease on January 1, 1921; and on the 7th they wrote the lessor that they have duly accepted the option of renewing the lease and they sent their cheque in payment of rent for the then current month.

The lessor refused to accept the cheque and claimed that the lease and option had expired and that the lessees were liable for double rent as overholding tenants.

The question is whether the option should be accepted during the term of the lease.

The contract does not provide as to the date at which the option should be exercised. The law, as stated in 18 Hals. p. 393, is to the effect that, if a lease which creates a tenancy for a term of years confers on the lessee an option to take a lease for a further term, the exercise of the option is not necessarily restricted to the duration of the general original term.

This statement of the law is based upon the following decisions:—*Moss* v. *Barton*, 35 Beav. 197, 55 E.R. 870; *Hersey* v. *Giblett*, 18 Beav. 174, 52 E. R. 69; *Buckland* v. *Papillon*, L. R. 2 Ch. 67.

In the latter case, Lord Chelmsford, L.C., stated that the option continued after the expiration of the original term until something had been done to determine it and that it would continue so long as the tenant remaining in possession with the assent of the landlord; that if the landlord wished to know upon what terms the tenant held he might call upon him to see whether he meant to have a lease or not.

Fry on Specific Performance, 6th ed. p. 516 par. 1105, expresses a similar view in the following terms:—

"But where no time has been originally limited within which the tenant's option to have a lease must be exercised, and the landlord has never called upon the tenant to declare his option, mere lapse of time will not preclude the tenant or his assign or legal personal representative from exercising it."

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We have in Ontario the case of *Brewer* v. *Conger*, 27 A.R. (Ont.) 10, which is to the same effect and which holds that the option continues until something is done to terminate it.

In the case of *Lewis* v. *Stephenson*, 67 L. J. (Q. B.) 296, 78 L. T. 165, there is a dictum of Bruce, J., to the effect that the option should be exercised before the termination of the original lease. But this dictum has been dissented from in *Allen* v. *Murphy*, [1917] 1 I. R. 484 at p. 487.

In view of those authorities, I am of opinion that John Stark & Co. exercised their option and that the appeal fails.

The appeal should be dismissed with costs.

MIGNAULT, J.:—With some doubt, I concur in the judgment of my brother Anglin dismissing, the appeal. Independently of the authorities cited by him which, I think, conclude the matter, it would seem reasonable that an option to renew a lease should be exercised while the lease is still current, and not, as in this case, several days after it had come to an end. It is true that the lessees had remained in possession, but there was a clause in the lease stating that if they did so with the consent of the lessor they should be deemed monthly tenants. Now they say that having remained in possession with the consent of the lessor, they can exercise their option for a renewal terms and are not to be deemed monthly tenants. I bow to the authorities allowing them to do so, but I could not help feeling some doubt.

Appeal dismissed.

BENNETT v. SHAW.

Re WEST CALGARY ELECTION.

Supreme Court of Canada, Idington, Duff, Anglin, Brodeur and Mignault, JJ. June 17, 1922.

ELECTIONS (§IIC—72)—MARKING BALLOTS—NECESSITY OF MAKING CROSS—DOMINION ELECTIONS ACT, 1920 (CAN), CH. 46.

Section 62 (3) of the Dominion Election Act, 1920 (Can.), ch. 46, which requires the voter to mark his ballot with a cross in the white space containing the name of the candidate for whom he intends to vote is mandatory, and where the voter has shown a clear intention not to do this by putting an upright stroke his ballot cannot be counted.

APPEAL from the dismissal by Stuart and Ives, JJ. (1922), 67 D.L.R. 742, of an election petition claiming for the appellant the seat of West Calgary in the Dominion Parliament. Affirmed.

Aimé Geoffrion, K.C., and *A. McL. Sinclair*, K.C., for appellant.

Lafleur, K.C., and *Ross*, K.C., for respondent.

IDINGTON, J.:—This appeal arises out of the dismissal by Stuart and Ives, JJ. (1922), 67 D.L.R. 742, of an election petition claiming for the appellant the seat for West Calgary in the Dominion Parliament.

The first ground taken is that a recount had before the District Judge ought to have been confined to the objections taken before the deputy returning officer and, in turn, that the trial should have been restricted accordingly.

The like objections having been taken unsuccessfully long ago, and never successful when taken since, tends to arouse a suspicion that counsel feels his other grounds of appeal are not so strong as he would desire.

I see nothing in the grounds thus taken; and do see some useful purposes which sec. 70 (3) of the Dominion Elections Act, 1920 (Can.), ch. 46, serves, without making a basis for such objections.

Turning to the more arguable grounds taken, relative to the marking of the ballots, I am of the opinion that sec. 62 (3), 1920 (Can.), ch. 46, in the first sentence thereof, which reads as follows:—"(3) The voter, on receiving the ballot paper, shall forthwith proceed into one of the polling compartments and there mark his ballot paper by making a cross with a black lead pencil within the white space containing the name of the candidate or of each of the candidates for whom he intends to vote." means just what it says, in imperative terms, and is mandatory.

If there ever had been a doubt of what Parliament intended, it has, I submit, been entirely removed by the successive enactments spread over nearly 50 years, referred to in the judgment of Stuart, J., speaking on behalf of the trial Court, 67 D.L.R. 742, in each amendment using more distinct and imperative terms ending in that which I have just now quoted.

The course of said legislation may be summarised thus:—It began in 1874 with merely directing a cross to be placed opposite the name of the candidate for whom the vote was intended to be cast; that in 1878 directed the cross to be made by a pencil; that in 1894 directed a cross with a pencil on the white portion of the ballot paper, opposite or within the division containing the name of the candidate intended to be voted for; that in 1900 directed the elector to make a cross with a black lead pencil within said white space, and in 1920, as above stated.

The possible toleration of use of pen and ink only lasted

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4 years and for very obvious reasons ceased to have any semblance of right.

In light of such a course of legislation, I cannot see how any English decision, under an Act essentially different in its wording, and containing no such restrictions, can help us. And as no Canadian decision binding us upholds the right to use pen and ink in making the cross, I fail to see how any votes so made can be counted. And equally so, any made with a red pencil, or anything but a black lead pencil must be discarded.

The question of cross or no cross comes next to be considered, and in connection with that feature of this appeal, we are asked to count ballots marked with the figure 1 which was used instead of a cross in 29 Calgary ballots.

It is urged that this use of the figure 1 arose out of voters having to use it at municipal elections carried on under the proportional representation system adopted therefor in Calgary.

As an explanation of a curious development, when no better can be got, it is interesting, as the latest thing to be tried on Judges in an election case, but beyond that I do not see a good argument especially to induce them to ignore the plain provisions of a statute.

It happens to be a rather inappropriate one in fact, for under proportional representation the figure 1 is only used to express the first choice of the voter, and he is expected to go on and name his second and third choices by using the figures 2 and 3.

Seeing there were three candidates, at the election in question, one would have expected to find some one of the many voters using the figure 1, to have gone on, if acting in truth as if on the supposition of the voting being under the proportional representation system, and given the figures 2 and 3 also a chance.

The habit of using 1 in two (?) previous municipal elections does not seem a very satisfactory explanation for refraining from using a cross. I fear the right habit had not been fully formed. It may be better than none in the way of looking at the possible character of the Act, but I doubt if it is.

Long ago, many voters who had no choice, went to the poll merely as a means of getting rid of the importunities of the canvassers and, possibly, that is a better explanation for the peculiar form adopted.

So far as I am concerned, I cannot count the figure 1 as a

cross, or intended as a cross, and am of the opinion that all such ballots, so marked, ought to be discarded.

I observe Stuart, J., regrets that Parliament could not have used language that would have settled the matter of marking ballots, without leaving it to Judges to cudgel their brains over (67 D.L.R. at p. 748).

I am rather inclined to regret, with great respect, that some Judges in the past happened occasionally to be not satisfied with the common sense use and application of plain language, lest some perverse or stupid electors should by its application lose their votes.

Common sense says the loss of such electors' votes is no harm to the country, and it happens generally, though not here, that they are equally distributed between or amongst the candidates.

The conclusions I have reached render it unnecessary for me to pursue the matters in question further, for, in my opinion, the appeal fails and should be dismissed with costs.

DUFF, J.:—The appeal has been presented on behalf of the appellant in a manner which enables me to proceed at once to the consideration of the ground of appeal which admittedly, in the view I take, is decisive.

A certain number of ballot papers were marked by an upright stroke which, it may be assumed, was a figure representing the No. 1. All such ballots were rejected and the point upon which it is necessary to pass is whether or not they were rightly rejected. The argument on behalf of the appellant is two-fold. 1. It is said that the requirement of sec. 46, that the ballot papers shall be marked with a cross, is directory only and that if the paper is marked in such a way (that is to say, by some mark placed within the division containing the name of the candidate) as to indicate an intention to vote for that candidate and is not of such a character as to fall within the description of sub-sec. 2 (c) of sec. 66, of the Dominion Elections Act of 1920 (Can.), ch. 46, "upon which there is any writing or mark by which the voter could be identified," then the ballot ought to be counted. 2. It is said that the procedure in the counting of votes is exhaustively laid down by sub-secs. 2 and 4, of sec. 66, and that by those two sub-sections it is the duty of the deputy returning officer to count all ballots papers not rejected by him as falling within one of the classes (a), (b) or (c), enumerated in sub-sec. 2, which classes include only ballots not supplied by the deputy returning officer, ballots by which votes have been given for more candidates than are to

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be elected and ballots upon which there is some writing or mark by which the voter could be identified and it is contended that ballots marked as those which are now under consideration do not fall within any one of these categories.

In support of these contentions, the appellant appeals to the course of decision under the English Act of 1872 and the schedules thereto. If we were free to consider the question without reference to previous decisions and pronouncements of Judges of this Court, I should be disposed to attach a good deal of weight to the argument that it is not easy to distinguish, in substance and effect, the statutory provisions now before us from those upon which the English and Scotch Judges have, from time to time, been called upon to pass: and it is really not susceptible of dispute that the English and Scotch Judges have arrived at a view of the statute they are accustomed to administer under which the ballot papers now under consideration would be held to be sufficiently marked and would be counted as votes.

But we are, I think, relieved from the duty of approaching the question from that point of view. In *Hawkins* v. *Smith; The Bothwell Election* case (1884), 8 Can. S.C.R. 676, Ritchie, C.J., at p. 696, formulated a rule that where a voter had placed upon his ballot a mark indicating "a clear intent not to mark with a cross as the law directs, as for instance, by making a straight line or a round O, then such non-compliance with the law, in my opinion, renders the ballot null." There is only one branch of the rule enunciated there by Ritchie, C.J., with the object of providing a formula capable of practical application in determining the sufficiency or insufficiency of the marking of a disputed ballot. It is implied in what the Chief Justice says that it is essential that the mark shall be something capable of being described as a cross; he finds it impossible, he says, to lay down a hard and fast rule by which it can be determined whether a mark is a good or a bad cross and the test is, he thinks, to be found in the answer to the inquiry whether "the mark evidences an attempt or an intention to make a cross." That is the inquiry the result of which determines whether or not the mark is a sufficiently good cross. If there is evidence of such an attempt, then the ballot is to be counted, unless the mark or marks on the paper are of such a character as to exhibit an intention to provide means for identification, in which case the ballot should be rejected. But a mark made with the intention of making a cross is essential, and a straight line is, therefore, insufficient as

clearly shewing an intention not to do what the law requires, to make a cross. This pronouncement of Ritchie, C.J., was formally concurred in by Fournier, J., and by Gwynne, J. Fournier, J.'s judgment ((pp. 703 *et seq.*) is interesting as shewing that these three members of the Court explicitly adopted the rule enunciated by the Chief Justice as furnishing at least one test which deputy returning officers might apply in deciding whether disputed ballots should be counted or not counted. I emphasize this for reasons which will appear presently.

The decision in the *Bothwell* case followed a decision in the previous year, *Jenkins* v. *Brecken* (1883), 7 Can. S.C.R. 247, and on that appeal it had been decided by a Court including all the Judges who sat in the *Bothwell* case, 8 Can. S.C.R. 676, with the addition of Taschereau, J., that an upright stroke placed in the compartment containing the candidate's name was not a sufficient mark; and indeed was considered to be of so little importance or significance that where two candidates were to be elected and a cross was placed in each of two compartments containing the names of candidates and an upright stroke opposite the name of a third candidate in another compartment it was held that the upright stroke might be ignored and that the crosses should be counted as valid votes; and it was also held that an *x* as distinguished from a cross, a mark in which apparently there was no intersection of the lines, was not a sufficient mark.

There is in the report of this case no reasoned discussion of the questions raised touching the marking of the ballots. But in the *Bothwell* case we find they key, I think, to the decision; the marks referred to did not evidence an attempt to make a cross and were, therefore, treated as inoperative.

Mr. Geoffrion argued that the last sentence of the passage in the judgment of Ritchie, C.J., 8 Can. S.C.R. 676, in which he expounds his rule shews that the Chief Justice was not enunciating a rule of law but drawing an inference of fact and that the substance of his judgment upon this point is that the proper inference from the circumstance that a voter who has used an upright stroke, for example, to mark his ballot instead of attempting to make a cross, is that he is attempting to provide some means by which his ballot paper can be identified. It is undeniable that one sentence of the judgment is a little perplexing. After stating that non-compliance with the direction to make a cross in the sense above indicated evinces a wilful departure from the

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direction which nullifies the ballot paper, he proceeds, "the irresistible presumption from such a plain and wilful departure from the terms of the statute being that it was so marked for a sinister purpose (p. 696)."

This sentence is, I agree, at first sight a little puzzling; but reflection has confirmed the view I intimated upon the argument that the Chief Justice was not laying down what he conceived to be a just inference of fact in every particular case from the circumstance that a ballot is found to be marked with a single stroke or a round O, an inference which I am quite sure the Chief Justice would not have considered justified, but is stating what he conceived to be the theory upon which the statute, on his construction of it, might have been rested, namely, that the requirements of a cross in the sense explained might reasonably be made imperative because speaking generally people marking their ballots with an honest intention to vote and no desire to provide a means of identification would follow the direction of the law and attempt to make a cross.

I think Ritchie, C.J., while impressed on the one hand with the danger of excluding ballots marked only with an honest intention of giving a vote was, at the same time, fearful of opening a wide door to the employment of corrupt devices if the direction requiring a cross should be wholly disregarded.

But I do not think the method by which the Chief Justice arrived at his result is important. The rule itself is stated in a manner leaving no room for doubt. If it is clear that the voter has not attempted to make a cross, the ballot is not to be counted, if the mark by its character sufficiently evidences an attempt to make one, the ballot is to be counted unless there is adequate evidence of an intention to provide means of identification; and the exposition of the formula by his colleagues who concurred with him is equally clear. Fournier, J., 8 Can. S.C.R., at p. 706, says:—

"In the course of the discussion of this case the Honourable Chief Justice submitted to his colleagues for examination a rule formulated in such a manner as to almost cover all the difficulties that might be raised concerning the marking of ballots. All the members of the Court gave to this rule their approbation. The rule itself is not always capable of so general an application as the rule which is expressed in the case of *Woodward* v. *Sarsons and Sadler* (1875), L.R. 10 C.P. 733, because it cannot be invoked to validate a ballot as in the cases above cited since it applies, for example, only to

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a single perpendicular or horizontal line. In this case, following our rule we cannot consider whether or not there was a *bona fide* attempt to make a cross and ballots marked in this way should be rejected. I do not need to repeat the formula of this rule which the Honourable Chief Justice has already read in detail in his notes on this case."

And Gwynne, J., 8 Can. S.C.R. at p. 717, says:—

"To avoid therefore, as far as possible running the risk of avoiding an honest vote, I concur in adopting as the rule by which the Court shall be governed in all questions to arise as to the sufficiency of a mark upon ballot papers in order to constitute a good vote, the rule as laid down in the judgment of his Lordship the Chief Justice in this case."

Henry, J., pp. 713 *et seq.*, seems to have concurred with the judgment of the Chief Justice; Strong, J., at pp. 702-703, declined to express any opinion upon the point now under discussion.

It is quite true that for the purpose of deciding the *Bothwell* case, 8 Can. S.C.R. 676, it was unnecessary to express any opinion upon the question now discussed, although I am inclined to think that the two decisions referred to when read together constitute a binding authority upon it.

I do not, however, rest my decision upon that. The rule laid down by the Chief Justice and by at least two of his colleagues in the most explicit terms gives a concrete formula "by which," to quote Gwynne, J., 8 Can. S.C.R., at p. 717, again, "the Court shall be governed in all questions to arise as to the sufficiency of a mark upon ballot papers, in order to constitute a good vote"; and that rule must have passed into and governed election practice and has been the decisive factor in numerous cases depending upon the validity or invalidity of disputed ballots. In that sense, it is impossible to suppose that the rule has not become part of the election law of Canada. It was formally declared to be the rule of this Court in 1884 by three Judges of the Court, and it should be noted in passing that the appeal to this Court is given upon such questions with the object of providing a standard and attaining uniformity in decision. Meanwhile, the Dominion Elections Act has been consolidated and re-enacted many times: and it is a legitimate presumption of fact that the pronouncements of this Court on such a point are not unknown to members of Parliament and others responsible for the form of such legislation; and no amendment of the relevant enactments justifies a suggestion that Parliament did not accept the rule in the *Bothwell*

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case as a rule conforming to the spirit and intention of the law.

The force of these considerations is not, in my opinion, affected by the fact that circumstances are disclosed in this record which might have affected the minds of Ritchie, C.J., and his colleagues and led them to another view had they been before this Court in the *Bothwell* case. Whatever one may think of the reasoning upon which the rule is based, the rule itself is, I think, too firmly established to yield to anything less cogent than a statutory amendment.

My conclusion, therefore, is that the requirement of the statute providing for the marking of the ballot with a cross is obligatory in the sense indicated by the judgments in the *Bothwell* case, in the sense namely, that the mark made by the voter must at least be one evidencing an intention to comply with the statutory direction by making a cross; and that, in this sense, the requirement is imperative —nullity being the consequence of non-compliance.

The other points of substance involved, I do not discuss— a decision upon this point adversely to the appellant involving, as I have already said, the failure of the appeal.

The appellant's contention remains that the only objections open on the recount were the objections presented on the counting of the ballots by the deputy returning officers at the conclusion of the poll. This contention, I think, also fails, for a reason which may adequately be expressed in half a dozen words. The recount is, in my judgment, as its name implies, intended to be a re-examination of all the "ballot papers returned by the several deputy returning officers"; and in this the Judge is to be guided by "the directions of the Act set forth by the deputy returning officers."

The appeal should be dismissed with costs.

ANGLIN, J.:—The determination of this appeal depends upon whether the provision of sub-sec. 3 of sec. 62 of the Dominion Elections Act, 1920 (Can.), ch. 46, that "the voter shall . . . mark his ballot by making a cross with a black lead pencil" is absolute and imperative, or merely directory.

Twenty-nine ballots, disallowed by the Election Court, are marked with a single stroke (1) instead of with a (X) as the statute prescribes. Of these 20 are marked for the appellant and nine for the respondent.

Twenty-three ballots, likewise disallowed, are marked with pen-and-ink. Of these 18 are marked for the appellant and 5 for the respondent.

Nine ballots, also disallowed, are marked with coloured pencils. Of these 5 are marked for the appellant and 4 for the respondent.

Counsel for the appellant suggests no distinction between the nine coloured pencil and the twenty-three pen-and-ink marked ballots.

The majority against the appellant as found by the Election Court being seventeen, unless all the ballots now in question are held to be good, counsel for the appellant very properly concedes that his client's claim to the parliamentary seat cannot succeed.

Apart entirely from authority, I should be of the opinion that the provision of sec. 62 quoted is absolute and imperative—and equally so in both its prescriptions—that a ballot not marked with a cross, or, at least with something that can be regarded as an honest attempt to make a cross, or a ballot marked in ink or in lead pencil of any other colour than black does not fulfil its requirements and must be rejected. In this view I am confirmed by the judgments of this Court in *Jenkins* v. *Brecken*, 7 Can. S.C.R. 247, where, affirming the judgment of Peters, J., a ballot marked with *x* instead of a cross was disallowed, and in the *Bothwell Election* case, 8 Can. S.C.R. 676, at p. 696, where Ritchie, C.J., Fournier, Henry and Gwynne, JJ., concurring, held that "If the mark indicates no design of complying with the law, but on the contrary, a clear intent not to mark with a cross as the law directs . . . . then such non-compliance with the law . . . . renders the ballot null."

The soundness of the added remark of the Chief Justice: "The irresistible presumption from such a plain and wilful departure from the terms of the statute being that it is so marked for a sinister purpose," I regard as, at least, questionable. But that observation was unnecessary to the clear and precise decision that the statutory prescription is absolute and imperative (which therefore remains unaffected by it) and does not appear to have had the concurrence of the other members of the Court, who adopted the Chief Justice's conclusion. The rule thus formulated by this Court should, in my opinion, be accepted as decisive of the character of the prescription of sec. 62 (3) as to the marking of ballots, and as to what is essential in order to fulfil the requirements of a cross.

The enacting provision of the English Ballot Act, 1872 (Imp.), ch. 33, sec. 2, merely speaks of "the voter having secretly marked his vote on the paper." By r. 25 in the

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annexed schedule of rules he is simply required to "mark his paper." It is only in the "Directions for the Guidance of Voters" in the schedule of forms that there is any statement as to the kind of mark to be used by the elector in marking his ballot. The significance of this, notwithstanding the provision of sec. 28 that the schedules shall be construed as part of the Act, and the distinction between the effect of enactments as to the rules and forms which are directory only, and that of the absolute enactments of the sections in the body of the Act, is pointed out by Lord Coleridge, C.J., in *Woodward* v. *Sarsons and Sadler*, L.R. 10 C.P. 733, at pp. 746-8. English decisions, therefore, as to the form and method of marking ballots are scarcely applicable under our more rigorous statute. In England, the tendency of the decisions has been in the direction of treating as sufficient any mark, in whatever form, from which it can be deduced that the elector intended to vote for a certain candidate. In Canada, on the other hand, the tendency has been to make more rigid and precise the statutory prescriptions as to the form and method of marking the ballot.

Section 66 (2), 1920 (Can.), ch. 46, is, in my opinion, not so exhaustive of the grounds on which a deputy returning officer should reject ballots as to require him to count a ballot not marked in accordance with the imperative requirements of sec. 62 (3), unless, indeed, we should consider it to be the manifest intention of the Legislature that any marking not in conformity therewith should be deemed "a writing or mark by which the voter can be identified" within the meaning of the clause (c) of sec. 66 (2).

I am unable to accede to the view urged by Mr. Sinclair that the Judge on a scrutiny, or the Election Court on a petition where the seat is claimed, is restricted to the consideration of such objections to ballots as were taken before the deputy returning officers and dealt with by them under subsecs. 2 and 3 of sec. 66, 1920 (Can.), ch. 46. By sec. 70 the Judge is required to recount all the votes (sub-sec. 3) according to the directions set forth in the Act for the guidance of deputy returning officers at the close of the poll (sub-sec. 4). His duty is not confined to reconsideration of such ballots as were objected to and passed on by the several deputy returning officers. It is a recount that the statute provides for—not merely an appeal from the decisions of the deputy returning officers.

I am, for the foregoing reasons, of the opinion that this appeal fails and must be dismissed with costs.

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BRODEUR, J.:—I concur with my brother Anglin.

MIGNAULT, J.:—On the opening of the argument, the counsel for the appellant informed the Court that the rejected ballots could be conveniently placed in three classes, to wit:—1. 23 ballots marked in ink, 18 being for the appellant and 5 for the respondent; 2. 9 ballots marked with a coloured pencil, 5 for the appellant and 4 for the respondent; 3. 29 ballots marked with the figure "1," 20 for the appellant and 9 for the respondent.

Besides these ballots, there is the case of Mrs. Baird who testified that she had voted twice, each time for the respondent, and the appellant applies to have one of these votes deducted from the respondent's total.

The majority against the appellant, according to the judgment appealed from, was 17, so that unless he succeeds as to classes 1 and 3 above mentioned, he will be unable to overcome this majority.

This will simplify my consideration of the case, for, if the appellant cannot have the ballots marked "1" counted, his appeal fails.

After due consideration, I think we are bound by authority to reject these ballots. In the *Bothwell* case, 8 Can. S.C.R. 676, Ritchie, C.J., while disclaiming any intention to lay down a hard and fast rule, said at p. 696:—

"Whenever the mark evidences an attempt or intention to make a cross, though the cross may be in some respects imperfect, it should be counted, unless, from the peculiarity of the mark made, it can be reasonably inferred that there was not an honest design simply to make a cross, but there was also an intention so to mark the paper that it could be identified in which case the ballot should, in my opinion, be rejected. But, if the mark made indicates no design of complying with the law, but, on the contrary, a clear intent not to mark with a cross as the law directs, as for instance, by making a straight line or a round O, then such non-compliance with the law, in my opinion, renders the ballot null."

Fournier, Henry and Gwynne, JJ., concurred with the Chief Justice in formulating this rule which is, therefore, binding on us. I must, consequently, hold that the Court below rightly rejected these ballots. In so deciding, I follow the decision of this Court in the *Bothwell* case and do not think it necessary to pass upon the contentions of the parties as to the construction of secs. 62 and 66 of the Dominion Elections Act.

Mr. Geoffrion, for the appellant, said that in the City of

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Calgary there is a system of proportional representation, whereby voters indicate their first or second preference in figures, such as "1" and "2," and are told not to mark the ballot with a cross. This, no doubt, was a very unfortunate circumstance, but the law is the same for all the Dominion and no local circumstances can suffice to set aside so plain a requirement as the marking of ballots with a cross. I think, therefore, that these ballots were rightly rejected.

In view of the rejection of the ballots marked with the figure "1," the appellant cannot succeed, and I do not think it necessary to pass on the validity of the ballots marked with a pen instead of a black lead pencil nor on the validity of the other ballots. As I understand it, there are no decisions of this Court dealing with the validity of ballots marked with a pen and ink.

The result is that the appellant, although a considerable majority of those who marked the disputed ballots evidenced the intention of voting for him, loses the election and the appeal he has entered against the decision of the Election Court. At this late day, it is strange that citizens of this country should not be familiar with the manner of voting. And however regrettable it may be that the will of the majority should not prevail, still that will must be expressed in the required manner, otherwise it is of no effect.

The appeal must be dismissed with costs.

Appeal dismissed.

ROCKMAKER v. MOTOR UNION INSURANCE Co.

Ontario Supreme Court, Appellate Division, Maclaren, Magee, Hodgins and Ferguson, JJ.A. November 13, 1922.

INSURANCE (§IIIE—80)—PURCHASE OF AUTOMOBILE UNDER LIEN-AGREEMENT—INSURANCE AGAINST FIRE—ASSIGNMENT OF AUTOMOBILE FOR DEBT—ASSIGNMENT OF INSURANCE POLICY—DAMAGE BY FIRE—AUTOMOBILE NOT FULLY PAID FOR—REPRESENTATIONS AND CONDITIONS—ONTARIO INSURANCE ACT, R.S.O. 1914, CH. 183, SEC. 194—LIABILITY OF INSURANCE COMPANY.

An insurance policy in Ontario insuring an automobile against accidental fire, etc., is subject to the statutory conditions in the Ontario Insurance Act, R.S.O. 1914, ch. 183, sec. 194, and to these only, notwithstanding that it has certain general conditions to which it purports to be subject, and the assured is the "owner" of the automobile within the meaning of the Act although he has purchased under an agreement under which the property is not to pass to him until fully paid for, and has made an assignment of it as security for a debt, and has assigned his interest in the insurance to such creditor and these transactions do not avoid the policy, and the insurance company is liable for loss within the terms of the policy although it had not been fully paid for at the time the loss occurred.

[*Rockmaker* v. *Motor Union Ins. Co.* (1922), 69 D.L.R. 177, affirmed.]

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APPEAL by defendant from judgment of Riddell, J. (1922), 69 D.L.R. 177, dated 26th June, 1922, directing payment by the appellant of the amount to be found due by the Master in Ordinary under a policy of insurance upon a Chevrolet motor car. Affirmed.

T. N. Phelan, K.C., for appellant.

J. R. Cartwright, for respondent.

The judgment of the Court was delivered by

Hodgins, J.A.

HODGINS, J.A.:—The policy insured the respondent against claims by the public for damage accidentally caused by the automobile and as well the cost of repairing, or replacing damaged parts due to "accidental fire, lightning, &c.," each as more fully set out in the policy. There are certain exceptions, one of which is that the company shall not be liable for loss of use. In the policy is the following recital:—"Whereas the owner of the automobile . . . . has applied to (the company) by a proposal, the statements of which are incorporated herein as the warranties forming the basis of this contract; in consideration of the payment of the premium stated herein and subject to the exclusions and conditions hereinafter contained the company agrees to indemnify the assured in respect of" the matters insured against.

There are general conditions endorsed on the policy but the statutory conditions are absent and these general conditions do not appear as alterations thereof. One condition is to the effect that any sale, transfer or assignment of or any lien on the automobile "or any part of the interest in this policy" shall cause the policy to cease "unless consented to by the company in writing."

Certain declarations appear in the policy headed "Declarations of the assured which are the basis of the contract," one of which is: "(7) Assured warranted to be the sole and unconditional owner of insured automobile: Yes."

No application is produced although spoken of in the evidence and these declarations are not signed by the respondent. The automobile was stolen and found abandoned and burnt on the same night. Claim papers describing the loss as a "fire theft" which occurred on July 18, 1921, were sworn to on July 22, and filed with the appellants. The respondent's claim in the record is for loss by fire. The remaining facts are fully stated in the judgment appealed from (1922), 69 D.L.R. 177. The repairs it was sworn would cost $800.

The principal argument by the appellants was directed

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against the opinion of the trial Judge that the statutory conditions under the Ontario Insurance Act, R.S.O. 1914, ch. 183, sec. 194, applied to and governed this policy. The objection broadly stated is this: that where an automobile is insured as such it comes within what the Legislature has called "Automobile Insurance" (R.S.O. 1914, ch. 183, sec. 2 (5*a*) added in 1914 (Ont.), ch. 30, sec. 2), which is not "fire insurance" as understood in secs. 191-195, but rather something excepted or withdrawn therefrom, and therefore, it is contended, the contract is not subject to the statutory conditions set out in those sections. I do not agree that there is any such differentiation made in the Insurance Act. When the definition of "Automobile Insurance" is examined it will be found to be merely a collection of various classes or species of insurance some of which are not peculiarly or exclusively applicable to motor cars but are appropriate to the dangers to which the use of a motor car may expose it, or its owners. These classes of insurance are indicated as those which can be written in one policy by companies specially incorporated or licensed to do "automobile insurance." This is merely a departmental designation as appears from the sections referred to on the argument (sec. 13 (4*a*) (as amended by 1914 (Ont.), ch. 30, sec. 3), sec. 47 (5*b*) which provide that companies covering these classes of insurance will be required to have a capital stock of $100,000 and to make and keep a deposit of $20,000 with the Provincial Insurance Department.

An examination of the Insurance Act discloses the fact that there are many special varieties of insurance contemplated or provided for such as credit insurance, automobile insurance, accident insurance, endowment insurance, fidelity insurance, guarantee insurance, inland marine insurance and title insurance. In issuing policies it follows that different risks specially incident to any class may usefully and conveniently be combined, and, provided it be insurance as defined by the Act each individual hazard is thus covered.

Automobile insurance is a good example and so is "guarantee insurance" (sec. 2, sub-sec. 29). A policy issued for these grouped risks comprises each one as a separate hazard, but is none the less a policy of insurance against loss by fire, accident, theft, dishonesty, or validity of title as the case may be. The including of fire with other contingencies does not thereby impair the liability for a fire loss nor disentitle the insurance company to the protection

of the statutory conditions covering the case. The fact that the subject-matter of the insurance is a special and self propelled object and that accidents from its use are so common as to make it convenient to cover several hazards in one policy is no reason for considering it, as to fire, as different from any other chattel or as falling without the words "any property therein [i.e. within Ontario] or in transit therefrom or thereto," sec. 194. No doubt this sort of insurance has its peculiar moral as well as physical risks which have recently prompted indulgent legislative consideration (see 1922 (Ont.), ch. 61, sec. 14), but there has been no repeal of secs. 154 to 158.

The argument for the appellants pressed to its logical conclusion would seem to indicate that because the Legislature has permitted the grouping of various kinds of insurance in one policy it has swept away the safeguards which, after much trouble and litigation, were, as the result of experience, finally attached to each policy issued against loss by fire and that this reversal of policy has happened in the course of an attempt to serve the convenience of insurance companies in framing their contracts. I see no evidence of this in the legislation existing when this policy was issued and am of opinion that Riddell, J., 69 D.L.R. 177, was right and that sec. 194 as well as secs. 155 to 158 apply to this contract of insurance. I think the loss was one by accidental fire. The previous theft ending in a fire is equally insured against by the policy, because it covers the cost of repairing damage the direct result of the criminal act of any person not an employee nor a member of the insured's family. Here while in the hands of the thief or derelict because of its abandonment, it is burnt. If intentionally burnt while being stolen, it comes within the latter clause; if accidentally set on fire, it is covered by the former. What, then, is the effect of the policy as controlled by the sections I have quoted? Section 156 (5) is very far reaching; "No contract . . . shall contain . . . any stipulation . . . providing that such contract shall be avoided by reason of any statement . . . inducing the entering into of the contract unless such . . . stipulation . . . is, and is expressed to be [1915 (Ont.), ch. 20, sec. 19] limited to cases in which such statement is material to the contract and no contract shall be avoided by reason of the inaccuracy of any such statement unless it is material to the contract." This section deals generally with the way in which the terms and conditions of an insurance contract must appear in it and

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with their effect when so set out. It is provided that it is not to impair the effect of sec. 194 which effect is to add certain conditions to every policy which are in turn affected in their interpretation by sec. 156.

There has been much discussion and many decisions on the gradual tightening of statutory control over insurance contracts but the result is now clear. If I may repeat what is said in *Dworkin* v. *Globe Indemnity Co. of Canada* (1921), 67 D.L.R. 404, 51 O.L.R. 159, sec. 156 (as amended in 1915 (Ont.), ch. 20, sec. 19), "now requires both materiality in fact and by convention to be shown: that is, the statement must be material and must be expressed in the contract to be so. Materiality in fact without an admission of its importance in the contract, or agreement as to materiality without proof of the fact, does not afford any defence when a condition or term of the policy is relied on to avoid the policy." The history of the legislation on this subject is given by the Chief Justice of Ontario in *Town of Arnprior* v. *United States Fidelity Co.* (1914), 20 D.L.R. 929, 30 O.L.R. 618, where the decisions are discussed. The Court of Appeal had previously in *Hay* v. *Employers Liability Assurance Co.* (1905), 6 O.W.R. 459, decided that it was not necessary to stipulate in the application or proposal that any particular statement was to be deemed material giving as a reason that as the Judge or jury were in all cases to decide the question of materiality, such a statement would be useless. Subsequently to the judgment in the *Arnprior* case the Legislature amended sub-sec. 5 of sec. 156 by inserting the words "and is expressed to be" so as to make the section read "unless such term is and is *expressed to be* limited" to material statements.

Dealing now with the case in view of the present state of the law and of the applicability of secs. 156 and 194 the points raised may be disposed of. In this insurance policy it is provided that (2) "If there be any misrepresentation in, or material omission from the proposal for this policy the insurance shall be void." The statements in the proposal are by a term of the policy made the basis of the contract and as warranties forming such basis. The statement chiefly relied on as a misrepresentation is that the insured was "the sole and unconditional owner of an insured automobile" which statement is not expressed nor proved to be material and hence its untruth would form no defence.

I agree, however, with the trial Judge as to its immateriality, if one is left without evidence upon the point and bound

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to determine it upon what is common knowledge and common sense. Much indeed may be said in favour of its truth having regard to the peculiar terms of the sale contract and to the decisions referred to in the judgment appealed from as well as others. I am not able to see that whether this be a condition, a warranty, or merely a misrepresentation makes any difference either as to the applicability of the statute or its effect when applied. Everything was done here to make the statements of the assured warranties and as such the basis of the contract, similar in effect to those found in *Condogianis* v. *Guardian Assurance Co.*, [1921] 2 A.C. 125, and *Dawsons* v. *Bonnin*, 38, T.L.R. 836, [1922] W.N. 236. But they are never the less statements within the meaning of sec. 5 and nothing can take them out of its purview save some further legislation.

Condition 5 of the policy relates to the giving of a chattel mortgage by the insured and is sufficiently dealt with in the judgment below.

The judgment directs a reference and as we are not otherwise disturbing it, it is not necessary to interfere with this provision. No doubt the Master to whom it is referred will in dealing with the costs of the reference, give due weight to the fact that the appellants could have, at the trial but did not, give evidence controverting the statements as to the expense of the repairs by the witness Finmark.

Appeal dismissed with costs.

Appeal dismissed.

Re MUNICIPALITY OF ST. CLEMENTS v. HOLUBOWICZ.

Manitoba Court of Appeal, Perdue, C.J.M., Cameron and Dennistoun, JJ.A. October 31, 1922.

ELECTIONS (§IIA—20)—RURAL MUNICIPALITY—OFFICE OF REEVE—QUALIFICATIONS—MUNICIPAL ELECTIONS ACT, R.S.M. 1913, CH. 133, SEC. 52 (*c*) AS AMENDED BY 1917, CH. 57, SEC. 6.—CONSTRUCTION.

The words of the Municipal Act, R.S.M. 1913, ch. 133, sec. 52 (*c*), as amended by 1917 (Man.), ch. 57, sec. 6, requiring a candidate for the office of reeve in a rural municipality to be the owner at the time of the election of freehold real estate in the municipality rated in his own name on the last revised assessment roll of the municipality of at least the value of $200, is imperative, and mean that the candidate must be, not only owner at the time of the election, but also rated as owner in his own name on the last revised assessment roll of the municipality.

[*Re Stewart* (1922), 66 D.L.R. 76, 32 Man. L.R. 97; *Reg. ex rel, Carroll* v. *Beckwith* (1854), 1 P.R. (Ont.) 278; *Reg. ex rel. Metcalfe* v. *Smart* (1853), 10 U.C.Q.B. 89; *Reg. ex rel, Hamilton* v. *Piper* (1880), 8 P.R. (Ont.), 225, referred to.]

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RE MUN. OF ST. CLEMENTS v. HOLUBOWICZ.

Dennistoun, J.A.

APPEAL from the judgment of a County Court Judge declaring the election of a candidate for reeve of a rural municipality, void on account of want of proper qualification. Affirmed.

Ward Hollands, for appellant.

H. M. Hannesson, for respondent.

PERDUE, C.J.M., concurred in dismissing the appeal.

CAMERON, J.A.:—To have been qualified as a candidate at the election Holubowicz should have been the owner of freehold real estate which should have been rated in his name on the last revised assessment roll and should have been rated on such roll at the value of $200 at least. On production of the assessment roll it appears he was not assessed in his own name for any freehold lands or other lands, and he was, therefore, not eligible for election as reeve under sec. 52(*c*) of The Municipal Act, R.S.M. 1913, ch. 133. I agree in confirming the judgment of the County Court Judge.

DENNISTOUN, J.A.:—An election to fill the office of reeve of the municipality of St. Clements was held on April 27, 1922. The candidates running were Holubowicz, who received 288 votes, Flett, who received 269 votes, and Marko, who received 250 votes. Holubowicz was declared elected. An election petition under sec. 192 of The Municipal Act, R.S.M. 1913, ch. 133, having come on for trial before His Honour Judge Paterson, County Court Judge, it was held that Holubowicz was not qualified for the office of reeve, and the election was declared void. Holubowicz now appeals.

The qualifications for the office of reeve and councillor in rural municipalities are set forth in sec. 52 (*c*), as amended 1917 (Man.), ch. 57, sec. 6, of the Act, and the one which is in question on this appeal is set forth in these words:—

"Being the owner, at the time of the election, of freehold real estate, within the municipality, rated in his own name on the last revised assessment roll of the municipality of at least the value of $200."

The last revised assessment roll is that of 1921, which shows Holubowicz rated as a tenant, and Stella Holubowicz rated as owner of certain lands in the municipality. Evidence was given to show that Stella Holubowicz was a sister of the candidate Holubowicz and that the land in question was purchased in her name and held by her for her brother, to whom she assigned the agreement to purchase on November 11, 1921.

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It was contended that the assessment roll shewed the sister as owner and the brother as tenant in 1921, in error, and that being the real owner at the time of the election as well as at the time of assessment, he was qualified to hold the office of reeve.

In my opinion, the Judge was right in holding that the words of the statute are imperative, and mean that the candidate must be not only owner at the time of the election, but also rated as owner in his own name on the last revised assessment roll of the municipality.

The following cases were referred to the course of the argument: *Re Stewart* (1922), 66 D.L.R. 76, 32 Man. L.R. 97; *Reg. ex rel. Carroll* v. *Beckwith* (1854), 1 P.R. (Ont.) 278; *Reg. ex rel. Metcalfe* v. *Smart* (1852), 10 U.C.Q.B. 89; *Reg. ex rel. Hamilton* v. *Piper* (1880), 8 P.R. (Ont.) 225.

The appeal should be dismissed with costs.

Appeal dismissed.

COLONSAY HOTEL Co. v. CANADA NATIONAL FIRE INS. Co. UNION INSURANCE SOCIETY OF CANTON v. BRITISH CROWN ASS'CE Co.

Saskatchewan Court of Appeal, Haultain, C.J.S., Turgeon and McKay, JJ.A. November 7, 1922.

INSURANCE (§IIID—65)—FIRE—CONSTRUCTION OF CONTRACT—FIRE INSURANCE ACT, R.S.S. 1920, CH. 84, SEC. 82 (14).

The contract of a fire insurance company under sec. 82 (14) of the Fire Insurance Act, R.S.S. 1920, ch. 84, is one of indemnity, and the insured is not indemnified unless the building is reinstated and the duty of the insurer is to contribute towards that result up to the limit of the amount contracted for, the replacement value of the building is therefore the proper basis on which to estimate the loss.

[*Caldwell* v. *Stadacona Fire & Life Ins. Co.* (1883), 11 Can. S.C.R., 212, followed.]

APPEAL by three insurance companies from the judgment at the trial of actions to determine whether in cases of the destruction by fire of an insured building the insured is entitled to compensation on the basis of the replacement value of the building or on its market value at the time of the fire.

P. M. Anderson, K.C., for appellants.

G. H. Yule and *David C. Kyle*, for respondents.

The judgment of the Court was delivered by

TURGEON, J.A.:—The trial Judge held that the replacement value of the building was the proper basis on which to estimate the loss, and he directed the jury accordingly. The jury fixed this value at $16,500. Under the trial Judge's

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direction, they arrived at this figure by estimating what it would cost to erect a building to replace the one destroyed, and by deducting from this estimate a sum sufficient to allow for the depreciation suffered by the building up to the time of the fire by reason of age, usage, etc. It is admitted that if the replacement value is the proper basis of compensation, the amount fixed by the jury is not excessive. On the other hand, it is also admitted that the building in question, if offered for public sale at the time of the fire, could not have realised $16,500, or any sum within several thousand dollars of that figure. The building is an hotel, a comparatively large hotel, situated in a small town and built at a time when the hotel business was much more profitable than it has since become.

One of the statutory conditions made a part of every contract of fire insurance by the Fire Insurance Act, R.S.S. 1920, ch. 84, sec. 82, sub-sec. 14 (*a*), is as follows:—

"14. The company is not liable for the losses following, that is to say:—

(*a*) for the loss of property owned by any other person than the assured, unless the interest of the assured is stated in or upon the policy; *nor for loss beyond the actual value destroyed by fire* nor for loss occasioned by ordinance or law regulating construction or repair of buildings."

In my opinion, the words of this clause do not limit the right of the insured to the recovery of a sum of money based on what he might have obtained for his hotel had he offered it for sale at the time of the fire. I believe that the ruling of the trial Judge against this contention is correct, and that his judgment in favour of the respondent should be upheld.

Although the question involved is one of great importance I cannot see that there is much to be said in the way of elaborating the doctrine to be followed. The contract of fire insurance is one of indemnity. In the case of a building destroyed by fire the amount of the indemnity can usually be ascertained by finding the market value of the building, but this is not always the case. The loss which the insured suffers is the loss of his building. He is not indemnified against this loss unless the building is reinstated, or unless he receives a sum of money sufficient to reinstate it, and the duty of the insurer is to contribute towards that result up to the limit of the amount contracted for.

In this matter, I agree with the following statement taken from the American case of *Washington Mills Emery Mfg.*

Co. v. *Weymouth Fire Ins. Co.* (1883), 135 Mass. Rep. 503, at pp. 506-507:—

"So the market value of the property is not always a fair rule of adjustment. The contract of the insurer is not that, if the property is burned, he will pay its market value; but that he will indemnify the assured, that is, save him harmless, or put him in as good a condition, so far as practicable, as he would have been if no fire had occurred."

This conclusion, I think, follows also from the principles set out in the cases discussed in the text books to which we have been referred. I may refer, for instance, to the observations to be found on p. 292 of Welford & Otter-Barry on Fire Insurance, 1921 ed. In this same work the following opinion will be found at p. 290:—

"The view has been expressed that in all cases the basis of calculation is the market value of the property. This view leads to difficulties where the cost of reinstatement exceeds the market value and is, it is submitted, unsound. There are certain cases in which the loss cannot be made good except by reinstatement. The assured cannot be restored to his original position if he is unable to reinstate the property out of the proceeds of the insurance, either by repairing it, if damaged, or by replacing it, if wholly destroyed, by its equivalent."

The contention of the appellant is that the assured, in case of a loss by fire, must always, for the purposes of the contract of insurance, be dealt with as if he were forced into an immediate sale of his property. In my opinion, such a contention would, in many cases (and certainly in the case at Bar) prove unfair and would not have the effect of indemnifying the assured as he is entitled to be indemnified, that is, by being restored as nearly as may be to his original position. It is the building itself and not the market value of the real estate, which is covered by the insurance, and, as was stated by Ritchie, C.J., in *Caldwell* v. *Stadacona Fire & Life Ins. Co.* (1883), 11 Can. S.C.R. 212, at p. 229:—

"When the assured establishes an insurable interest in the property, he is entitled to recover the amount assured, and he is entitled to receive what would restore the property and make it what it was when he insured it, or at any rate what it was at the time of the loss, or as near as the amount insured will do it."

The appellants also contend that the valuation of $3,500 placed by the jury upon the insured contents of the building is excessive. These contents were made up mainly of

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furniture, consisting of bedroom furnishing for 23 rooms, kitchen and office furniture, etc. I have looked carefully into the evidence given in regard to these chattels and the remarks contained in the Judge's charge to the jury. When the respondents purchased this hotel in February, 1920, it was occupied by Kwong Wo, a Chinaman, and most of this furniture was bought from him for $950; additional purchases were made by the respondents amounting to approximately $450. The itemized proof of loss furnished by the respondents valued these chattels at slightly over $5,000. The jury expressly exonerate the respondents from any fraud or false statement in this proof of loss. The evidence as to value is, of course, indefinite, as the goods were destroyed. Mr. Loveridge, a furniture dealer, testified as to their value by description and by catalogue, taking into consideration the depreciation in their value through wear and tear. His valuation fully justifies the finding of the jury, and I do not see how we can reverse this finding on the ground that it is excessive, although one is thereby forced to the alternative conclusion that the respondents drove a hard bargain with Kwong Wo. In my opinion, the portion of the judgment which is based on this finding should also be allowed to stand.

I would dismiss the appeal with costs.

Appeal dismissed.

MONTREAL WATERPROOF CLOTHING Co. v. FLORENCE.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Hodgins and Ferguson, JJ.A. November 17, 1922.

DAMAGES (§IIIA—71)—CONTRACT—SALE OF MANUFACTURED ARTICLE —FAILURE TO DELIVER—MEASURE OF COMPENSATION.

On a contract for the sale and delivery of goods failure to deliver the goods does not give the purchaser the right to buy against the contract while it is still on foot and not repudiated by either party, and when the season for the sale of the goods is over before it becomes evident that the contract cannot be filled the purchaser is not bound to so buy, and is entitled to damages for breach of the contract.

APPEAL from the judgment of Latchford, J., involving only the damages which he allowed and directed to be deducted from the respondent's claim for goods sold and delivered.

J. S. Lundy, for appellant.

F. C. Richardson, for defendant.

The judgment of the Court was delivered by

HODGINS, J.A.:—The damages assessed at $250 for non-

delivery of certain rain coats are thus dealt with by the trial Judge:—

"After defendant and his manager became aware that the orders were not being filled, they could, if they desired, have procured from other manufacturers or jobbers rain coats of the style and material desired at prices but little in advance of those mentioned in the orders. The difference could not be greater I think than the amount the original Montreal company offered to the defendants $250."

After a perusal of the evidence and exhibits and considering both the oral and written arguments I quite agree with this passage in the judgment appealed from:—

"The oral evidence is contradictory and on both sides difficult to be believed. However from the documents filed I think it possible to reach though not without some doubt a conclusion as to whether the plaintiff company is liable upon the counterclaim, and if so, for how much."

There are some facts, however, which appear to be established:—

(1) That the cheap cotton gabardines to the extent of 198 were never delivered; (2) that the reason was, either that when the cloth was received from England the colours were such that the respondents would not make them up for the appellant (so stated in H. Wener's letter of May 5, 1921), or that, as stated by Miller & Cummings they were made up and sold to others at a higher rate; (3) that the respondents did not understand or treat the appellant's request to them to delay shipment (in letter of March 8, 1921) as a repudiation of the contract, and on 14th and 19th March there was a distinct request for shipment of these goods; (4) that as late as May 5 the repondents were promising to send on cheap cotton gabardines some of which were then being made; (5) that the respondents offered $250 as compensation for loss; this evidence is believed by the trial Judge though denied by Wener.

Under these circumstances it was not the duty nor was it the appellant's right to buy against the contracts while they were still on foot and not repudiated by either party: See *Samuel* v. *Black Lake Asbestos and Chrome Co.* (1921), 63 D.L.R. 617, 62 Can. S.C.R. 472.

I am not satisfied that at the date when it became quite evident that the contract would never be filled the appellant was bound to buy. The season for the sale of these goods was over and his business had suffered the loss caused by broken promises. It he were then bound to buy, the best

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evidence on the point is the statement of Wener, the respondents' president, in his letter of May 5, 1921: "We will fill the order for the 150 cotton gabardine coats at the price they were sold for" ($9.75) "although we are losing at least $2 a coat." This does not tally with the assertion that these coats were then readily purchasable at $9.75.

I think the appellant lost a large part of his season's trade and should, on the 198 coats undelivered, be entitled to damages. The evidence is that these were sold at $11 or $12 by the respondent's travellers and that they could be resold retail at $16.50.

I would estimate reasonable damages at the sum of $500.

The appeal should be allowed with costs and the judgment amended by substituting $500 for $250 as the deduction to be made from the respondent's claim. The appellant should have the costs of his counterclaim to be taxed.

Appeal allowed.

BELANGER v. MORIN.

Quebec King's Bench, Lamothe, C.J., Martin, Dorion, Allard and Howard, JJ. April 26, 1921.

POSSESSORY ACTION (§II—10)—PEACEABLE POSSESSION—ISOLATED ACTS AS CAUSING INTERRUPTION.

Where a person has peaceable annual possession of a piece of land at the time when another seeks to take possession, a single act on his part does not suffice to cause an interruption. In order that the annual possession be interrupted it is necessary that the other should last a year, and the isolated act repelled at once does not deprive the possession of its peaceful character.

APPEAL by defendant from the judgment of the Quebec Court of Review, reversing the judgment of the Superior Court in an action for unlawful interference with plaintiff's possession of certain land. Affirmed.

L. A. Rivest, K.C., for appellant.

Ladouceur and *Tellier*, for respondents.

Guibault and *Sylvestre*, for defendant.

LAMOTHE, C.J.:—This case turns on a question of fact, as indeed do all possessory actions. Which of the two parties had the annual possession of the disputed strip of land? Once this question of fact is answered, the case itself is thereby decided; for it is merely a question of the temporary possession of the immovable—the question of ownership is not in issue.

The respondents were undoubtedly in possession of this strip of land since 1913. They repulsed all the defendant's attempts to obtain physical possession. They destroyed a fence erected by the adjoining proprietor, thereby affirm-

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ing their right of possession; and that fence was not replaced. In 1915 the respondents threw into the river a wooden shed which the neighbour had just erected on the land, thereby once more asserting their right to exclusive possession. Later on the respondents blew up with dynamite a cement foundation which had been constructed, again asserting their right of possession. All these acts took place more than a year before the present action.

In spite of all this, the appellant pretends that the respondents' possession was not exclusive, because the public used a road situated upon the disputed strip of land and because the defendant company had erected a post on the river bank to carry electric transmission wires. The existence of the post in question, as the Court of Review remarked, is not in itself sufficient to render the respondents' possession precarious. Electric lighting companies have considerable arbitrary powers in this respect. The public endures or tolerates their exercise.

There was a passage leading to a mill and also to the respondents' farm house; but that passage did not lose its character of a private road. It did not lead to any public road. It served no useful purpose beyond that of a short cut to the mill and the farm.

As we are concerned with a question of annual possession and have not to pronounce upon a right of property—which latter question still remains to be decided—I am of the same opinion as the Court of Review. There was no ground for warranty, and the intervenant was not called upon to intervene in a question of temporary possession. I would dismiss the appeal.

MARTIN, J.:—The case turns upon the character of respondent's possession. Each party has produced its title deeds and while we cannot on this action refer to those deeds for the purposes of determining the rights of the parties, the deeds may be referred to to ascertain the nature, extent and character of the possession.

The proof establishes that this strip of land originally belonged to one Magnan who granted permission many years ago to one Grant to have a road or right of way over same to lead to the latter's mill. When the plaintiff bought this mill in 1904, his auteur sold him this strip of land, but when the appellant bought in 1906 from Magnan fils, the latter only quit-claimed his rights without any warranty. These facts, though not conclusive, serve in a measure to shew how the parties then considered the status of this

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strip of land. The respondent claims that since he bought the mill with land, house, and out-buildings to the east thereof, he has always retained and enjoyed possession of this strip of land as his property.

The main question resolves itself into determining the character of respondent's possession which I take it must be continuous, uninterrupted, peaceable, public, unequivocal and as proprietor. *Raymond* v. *Conway* (1907), 32 Que. S.C. 310, and authorities there cited, notably Curasson, *Actions Possessoires*, at pp. 84, 86 and 233, Baudry-Lacantinerie, Prescription. Nos. 217, 218, 219, 239 and 240.

The character of a person's possession may be determined by his deed and less will avail as a possession with a title than without one. Here there was a registered title vested in respondent. Appellant urges that he had possession or in any event that there was joint possession and invokes two isolated acts, one in 1913 and one in 1915, on one occasion when a fence was built and on another occasion when a species of construction, remise, was put up, but the defendant's right to claim possession from such acts was vigorously and violently contested by respondent, the fence and the remise both torn down, and the latter thrown into the river, leaving no doubt in the mind of the defendant that its right to possession of this property was challenged.

These acts did not serve to interrupt respondent's possession though he repelled them with violence and force with the object of dispossessing the intruder, which is a totally different thing from taking possession violently. Bioche, Actions Possessoires, Nos. 105 and 111.

"105. If I already have annual possession at the time when another seeks to take possession, a single act on his part does not suffice to cause an interruption. Such act would be a mere disturbance which I could have dealt with on a complaint. In order that my annual possession be interrupted it is necessary that the other should last a year.

111. But a few isolated claims silenced at once, a few acts repelled by contrary acts, are not sufficient to deprive the possession of its former peaceful character."

Whether or not in an action *reintegrande*, the possession must have all the characteristics of a possession to form the basis of prescription, is a much controverted question which does not arise here as it did in *Couture* v. *Brouillette* (1909), 37 Que. S.C. 521, where on p. 529, the authorities pro and con are collected. All authorities agree that the possession required to maintain an action *en complainte* must be of

the character required to prescribe under art. 2193 C.C., and the jurisprudence of this Court and of the Supreme Court is to this effect: *Price Bros.* v. *Leduc* (1915), 21 Rev. Leg, 484; *Delisle* v. *Arcand* (1906), 37 Can. S.C.R. 668; *Couture* v. *Couture* (1904), 34 Can. S.C.R. 716; *Parent* v. *Quebec North Shore Turnpike* (1901), 31 Can. S.C.R. 556; *Tremblay* v. *Sisters of Parish of St. Alexis* (1912), 21 Que. K.B. 284; *Paquet* v. *Blondeau* (1913), 23 Que. K.B. 330; *Boitard & Colmet Daage*, t. 1, Nos. 629 and 630.

Was the character of respondent's possession such as to form the basis of a possession sufficient to maintain a possessory action? I am of opinion it was. It is urged, though not specifically pleaded, that because most of this strip of land was a roadway over which the public passed, that the respondent did not have the exclusive possession of same. Probably if there had been dedication by respondent of this strip as a public road and user of the same by the public as such for many years, it would have interfered with the character of his possession, but it must be borne in mind that this passage way was established as a private roadway, a short cut, to respondent's mill and house. He permitted the public to pass over same not as part of the public road but by tolerance and as a convenient way to get to his mill. It was neither *de facto* nor *de jure* a public road and the use made of it by the public for such purpose did not alter or destroy respondent's possession any more than it would in the case of a private driveway from the public road to his house established for his convenience and that of persons having business with him, and it would hardly be contended that the passage of the public over same under such circumstances would interrupt or interfere with respondent's possession of his property, nor does the fact that the gate or bars across this driveway next to the public road were not kept up alter the character of the passage over same by the public or of the respondent's possession.

No one passing over this private way so established and maintained over the strip of land in question, could claim or pretend to have any possession sufficient to maintain a possessory action nor to defeat respondent's assertion of such an action, and the rights exercised by the public over this strip of land were those of simple tolerance and of an entirely different character from those established and found in the case of *Couture* v. *Couture*, 34 Can. S.C.R. 716, cited and relied on, and I think the present case is clearly distinguishable from that case. The isolated acts of 1913

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and 1914 and the conduct of respondent in respect thereto, while perhaps more vigorous than prudent, cannot be urged as an interruption of respondent's possession, as has already been pointed out. The act of disturbance of 1918 was of a more permanent character. Hence the present action.

I do not find in the installation by the defendants on this property of an electric wire pole an act of possession by the latter as proprietor sufficient to defeat respondent's right and possession, nor am I able to hold that there results from such installation a manifest intention on the part of the defendant to assume to act as owners of the strip of land. The respondent evidently did not so consider it or he would have demolished the pole as he did the fence and the remise.

The respondent had the exclusive and uninterrupted possession of this strip of land, openly, publicly and as proprietor, during the year and a day preceding the institution of the present action, and I would confirm the judgment of the Court of Review for the reasons therein contained and dismiss the present appeal with costs.

DORION, J.:—The respondents in their action do not claim the right of way to which they have no title, but possession of the very ground upon which they have exercised a right of passage by sufferance for a very long time.

Morin formally admits that he never did anything on the disputed land beyond using it as a passage and that it could not be put to any other use. This admission is enough to decide the question of possession. The practice of habitually crossing a piece of land does not in itself constitute an act of possession *animo domini*. It can only amount to an equivocal act of possession, *Paquet* v. *Blondeau*, 23 Que. K.B. 330.

The respondents seek to base their possession on their title of acquisition from Mrs. Boyce, who was the first of all the *auteurs* to undertake to sell this land. But this verbal usurpation on the part of Mrs. Boyce does not constitute an interversion of title as far as the respondents are concerned, for it was never brought to the attention of the appellant or his *auteurs*. I am therefore of the opinion that the Superior Court judgment should have been maintained and the respondents' action dismissed.

But the respondents oppose to the intervenant, who alone inscribed in appeal, want of interest in the action, and indeed, the vendor is not answerable for *troubles de fait*, and annual possession by a third party, subsequently to the sale, is not an act of the vendor or a right existing at the time of

the sale (art. 1508 C.C. Que.; Bioche, Procédure Civile, verbo Actions Possessoires, Nos. 311 *et seq.*; Fuzier-Herman, verbo Action en justice, Nos. 131 *et seq.*).

The appellant therefore has no interest in the present case (art. 77, C.C.P. (Que.)); and the fact that he was called in warranty is not sufficient to create such an interest.

It is therefore useless to pronounce on the merits of the appeal, for the defendant did not appeal from the judgment which condemned it. It did not even appear on the intervenant's appeal. Furthermore, judgment was not rendered in the action in warranty. The appeal should therefore be dismissed with costs.

ALLARD, J.:—[The Judge establishes the fact of possession by the respondents.] The appellant also pretends that since 1913 the respondents were not in peaceful possession, that their possession was only maintained by acts of violence against the defendant which, on three different occasions, performed acts of possession thereby asserting its rights in the said immovable.

To begin with, the first alleged act is the extension by the defendant of the fence between its land and that of the respondents, to the river, placing it on the disputed land. That took place in 1913. There is no doubt that the defendant erected this fence with the idea of taking possession of the land in question. That is what Venne, the manager of the defendant company, tells us in the course of his testimony. But the evidence shews that as soon as this fence was erected, or rather continued to the river, the respondents removed it and continued in possession of their land as it was defined before the fence was erected, and were not again disturbed by the defendant until 1915. Then again the defendant made another attempt to take possession of the land in question. It erected a small building on the land with the sole object, according to the same Venne, of taking possession of the disputed land. This time again, the respondents refused to allow themselves to be dispossessed and at once demolished the building erected by the defendant. Once more the respondents immediately served the defendant with a notarial protest calling upon it to respect their rights of property and possession and to cease its encroachments.

From 1915 to 1918 the respondents continued in peaceful possession without any disturbance from the defendant. Finally, in December, 1918, the defendant built the foundation of a house, partly on its own land and partly on that of

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the respondents. The respondents requested the defendant to remove this foundation and, when the latter ignored their request, instituted the present action.

I have already said that, at the time when the defendant performed its first act of possession on the disputed land, by extending the fence, the respondents were in peaceful, open, uninterrupted possession, as proprietors, and had been since 1904. Did the defendant's act in extending the fence have the effect of interrupting that possession? I answer, "No," and base that reply on Bioche who says (Actions Possessoires, No. 105): "If I already have annual possession at the time when another seeks to take possession, a single act on his part does not suffice to cause an interruption. Such act would be a mere disturbance which I could have dealt with on a complaint . . ."

In the present case, the respondents did not have recourse to a complaint but themselves repelled the aggression. They tore down and destroyed the fence and continued in peaceful possession for two more years.

In 1915 the company committed a further act of encroachment by erecting a small building which met the same fate as the fence. But, says the appellant, the acts of violence committed by the respondents in destroying these constructions erected by the defendant in 1913 and 1915, made the respondents' possession no longer peaceful. It is true that in theory peaceful possession does not include a possession disturbed by repeated contradictory acts or based on acts of violence. Bioche says (Actions Possessoires, No. 111): "But a few isolated claims, silenced at once, a few acts repelled by contrary acts, are not sufficient to deprive the possession of its former peaceful character."

See also Troplong, *Prescription*, No. 350.

Thus the defendant's acts in 1913 and in 1915, with more than two years between them, are isolated acts which, having been repulsed immediately by contrary acts, are insufficient to deprive the respondents' possession of its former peaceful character. And in any event, from 1915 until the last act of aggression in December, 1918, the respondents were not disturbed in their possession. And as regards the last act of aggression in 1918, the respondents repulsed it also as soon as it was committed and registered their protest by taking the present action.

But the appellant insists on the fact that in 1913 the defendant placed one of the poles of its electric transmission line on the bank of the river and on part of the land in dis-

pute, and that this pole has since remained in that position. This act, according to the appellant, constitutes a taking possession of the said land, and the fact that the post has remained and is in that position makes the respondents' possession no longer peaceful and exclusive. In the first place, nothing in the evidence shews that the defendant performed an act of ownership or possession in thus planting this pole. It was constructing an electric transmission line and placed poles at different points to support its wires. It had to place one on the property in question, which was in the public, peaceful and open possession of the respondents. It put the pole on the river bank where it could not interfere with the respondents in any way, and the latter tolerated the act. This act did not cause them any prejudice, did not interfere with their rights in any way and might be of use to the defendant. Consequently, the fact that the respondents allowed the pole to remain where it was put was an instance of good neighbourly feeling on their part. Laurent, vol. 32, p. 312, No. 293, says:—

"In cases of acts of enjoyment which benefit the person making them without in any way prejudicing the proprietor, possession cannot be invoked either by possessory actions or by prescription when, in reality, there is no possession. These are merely acts of tolerance which exclude the idea of right and with it the idea of juridical possession."

And if it had to be admitted that the defendant, in placing this pole on the disputed land, had a real possession, that possession could not be regarded as extending to the whole of the land, but would have to be limited to the ground on which the pole was placed. The fact that the respondents destroyed without delay every construction the defendant attempted to erect on the said land in 1913 and in 1915, shews that the pole in question was only there by tolerance on the part of the respondents.

On the whole, I have reached the conclusion that the respondents' action is well founded. In view of the opinion I hold on the merits of the present appeal, I do not think it is necessary for me to pronounce on the question as to whether there was ground for the action in warranty.

I would dismiss the appeal and confirm the judgment of the Court of Review, with costs of both Courts.

JUDGMENT:—"Considering that there is no error in the *dispositif* of the judgment rendered by the Court of Review sitting in Montreal, in the District of Montreal, on June 12, 1920, which is appealed from, dismisses the said appeal,

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and confirms the said judgment, with costs against the appellant in favour of the respondents."

SANSCHAGRIN v. ECHO FLOUR MILLS Co.

Manitoba Court of Appeal, Perdue, C.J.M., Cameron, Fullerton, Dennistoun and Prendergast, JJ.A. October 31, 1922.

CONTRACT (§IIA—125)—DELIVERY BY INSTALMENTS—PAYMENT ON DELIVERY—CONSTRUCTION.

Where a contract for the sale and delivery of goods is for delivery by instalments and payment for each instalment as delivered, drafts being made with bill of lading attached such contract will be treated as a separate contract as to each instalment and the contract so far as it applies to any particular instalment of the goods is discharged where default has been made in the delivery or acceptance of the instalment, and therefore where the contract was for delivery at the rate of 3 cars per week the Court held that the purchaser by his failure to order three cars in any particular week had lost the right to require delivery of that particular instalment in any subsequent week, there being no extension of time for ordering.

CONTRACTS (§IVB—330)—CONTRACT FOR THE PURCHASE OF FLOUR—PROVISION AGAINST ACCIDENTS—DESTRUCTION OF MILL BY FIRE—EXTENSION OF TIME TO COMPLETE—IMPOSSIBILITY OF PERFORMANCE—COMMERCIAL CONTRACT—REASONABLE DELAY.

An agreement for the purchase of flour contained a statement which was known to the parties at the time the contract was entered into that "all agreements herein contained or implied are contingent upon strikes, accidents and other delays unavoidable or beyond control." Shortly after the contract was entered into the defendants' mill was destroyed by fire. The Court held that this was an accident within the contemplation of the parties, which rendered performance of the contract impossible before the mill was rebuilt, that this could not be done in less than 12 months and that a delay of 12 months during which the delivery of the flour was suspended was too onerous a burden to impose in a commercial contract of this kind, where the prices of wheat and flour would fluctuate and could not be foretold.

APPEAL by plaintiff from the trial judgment (1921), 61 D.L.R. 609, in an action for damages for alleged breach of contract to supply a particular brand of flour and wheat by products. Affirmed.

C. K. Guild, for appellant.

A. B. Hudson, K.C., and *H. V. Hudson*, for respondents.

PERDUE, C.J.M.:—This is an action for the recovery of damages on two contracts for the delivery of flour and feed by the defendants to the plaintiff. The plaintiff is a flour, feed and grain merchant residing and carrying on business at Three Rivers in the Province of Quebec. The defendants owned and operated a flour mill at Gladstone in the Province of Manitoba. They manufactured a brand of flour bearing the trade name of "Gold Drop." The facts of the case are fully set out in the judgment of Mathers, C.J.K.B., before

whom the case was tried (1921), 61 D.L.R. 609. I will briefly recapitulate those I regard as of first importance.

In 1919, the plaintiff had purchased from defendants three carloads of flour and mill-feed which contract was fulfilled. On July 23, 1919, a correspondence by letters and telegrams commenced between plaintiff and defendants respecting a further contract for the sale and delivery of 10 carloads more of flour and feed. On July 26, plaintiff wrote and wired defendants enquiring as to the largest proportions of feed they could give in about 10 more mixed carloads, the prices to be the same as before. On the same day defendants replied stating the proportions in each carload and adding "three cars per week after 15th August." On July 28, 1919, plaintiff sent to defendants a code telegram meaning as follows:—

"Referring your telegram of 26th, book ten carloads more with the same proportions flour and mill-feed as the last three carloads for shipment as stated."

Defendants sent a reply to this which was not received by plaintiff. On August 12, plaintiff wrote saying:—

"I wired you on 28th asking you to book ten carloads more with same proportions of flour and mill-feed as the three cars ordered out July 26th for Three Rivers, for shipment three cars per week beginning August 15th."

In a postscript he added:—"I understand my order of the 28th also booked as instructed and am preparing to give you shipping directions in due course."

In the conduct of the plaintiff's business he followed the course of instructing the mill owner from whom he bought to ship a carload directly to the place where he had a customer requiring a carload.

On August 26, defendants wired to plaintiff:—"Referring your August 12th, can you send specifications for the ten cars booked July 29th." This fixes the date when the ten-car order was booked by defendants. On August 26, plaintiff telegraphed to defendants giving the places to which 3 cars should be shipped with specifications given in his letter of August 12. These three cars were shipped on September 1, 3, and 4. On September 12 defendants wired for shipping instructions for the balance of 7 cars but none were given until September 25 when the plaintiff personally at Gladstone gave directions as to the shipment of 2 more cars. On October 5, he gave instructions for 2 more cars to be sent, one to St. Prosper and to Lac Aux Sables. These 4 cars were sent, 2 on October 8 and one each on October 17

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and 20. No further orders were sent until November 27 when plaintiff by letter gave shipping instructions for the remaining 3 cars. The mill was burnt by an accidental fire on November 28 before the letter reached defendants.

The contract was one by which defendants agreed to manufacture and deliver 10 cars of flour and mill-feed at the rate of 3 cars per week, the plaintiff to give to defendants the necessary shipping instructions and specifications as to destination and contents of cars, so that defendants could make delivery. By the miscarriage of the defendants' telegram accepting plaintiff's order of July 26, the latter was not informed of defendant's acceptance until August 26. By that date the time for shipment of 3 cars on August 15 and 3 more on the following week had elapsed. But, as Mathers, C.J.K.B., finds, the parties treated the contract as commencing on August 26 and 3 cars were ordered and delivered in due course. No further order was given until September 25. At that date the time for the delivery of the 10 cars had elapsed. Two cars were, however, delivered on the order then given by the plaintiff and 2 more on October 5, leaving 3 cars of the 10 undelivered.

The correspondence shews that the carloads were to be shipped only upon the order of the plaintiff who would give the place to which the car should be consigned. This order usually specified also the quantity of flour, shorts and feed flour to be put in each car, the defendants sometimes finding it difficult to supply the mill-feed required. The shipments were paid for as made. Mathers, C.J.K.B., following *Doner* v. *Western Canada Flour Mills Co.* (1917), 41 D.L.R. 476, 41 O.L.R. 503; *Sierichs* v. *Hughes* (1918), 43 D.L.R. 297, 42 O.L.R. 608; *Gerow* v. *Hughes* (1918), 43 D.L.R. 307, 42 O.L.R. 621; and *De Oleaga & Co.* v. *West Cumberland Iron & Steel Co.* (1879), 4 Q.B.D. 472, held that the plaintiff had lost the right to claim damages for the non-delivery of the three remaining cars on the first contract sued upon. I agree with this conclusion. The contract, being for delivery by instalments and payment for each instalment as delivered (drafts being made with bill of lading attached), is to be treated as practically a separate contract as to each instalment, and: "the contract, so far as it applies to any particular instalment of the goods, is discharged where default has been made in the delivery or acceptance of the instalment; . . . Accordingly the seller cannot afterwards claim to deliver the instalment, nor can the buyer demand it," 25 Hals., p. 218, sec. 377, cited in the *Doner* case, 41 D.L.R. at p. 489.

There is nothing to shew that defendants were guilty of any default. The orders appear to have been filled promptly. The plaintiff was wholly to blame in neglecting to give orders as to the shipment and destination of the cars.

The second contract was verbally made on September 25, 1919, while the plaintiff was at Gladstone. It was confirmed by defendants' letter of the same date in which they say:—

"We enclose herewith memo. of four cars (our order Nos. 52, 53, 54 and 55), given by your Mr. H. L. Sanschagrin personally to-day, and hereby confirm purchase of 50 carloads flour and feed, 10% feed to flour at the following prices: Flour, $5.35; Feed Flour, $3.20; Shorts, $2.25; Bran, $2.02½, per sax basis Three River freights. Terms sight Dft. on arrival of goods. Two of the above orders are booked on the above contract and two on a previous contract not yet complete.

We thank you for the order and trust that shortly be able to double this sale to you. Yours truly, Echo Flour Mills Co., Ltd., per F. B. McKenzie."

In reply to this letter plaintiff wrote on October 6:—

"I note your confirmation of sale for the 50 cars and wish to hereby confirm purchase at the prices stated in your letter for those 50 cars which I understand to be made up of approximately 400 bags Gold Drop with . . . ," setting out the quantities of mill-feed to be put in each car. It will be noticed that plaintiff in confirming the contract carefully specifies the flour to be "Gold Drop."

The plaintiff claims that by the contract the defendant should ship the carloads as and when the plaintiff should require during the ensuing half year, but there is no such provision in the contract as it appears in the above letter of September 25 and in plaintiff's letter of October 6 confirming the terms.

Plaintiff admits that the correspondence in writing covers the whole contract as to the 50 carloads. No time is mentioned within which the delivery of the goods is to be made. Delivery should therefore be made within a reasonable time, the Sale of Goods Act, R.S.M. 1913, ch. 174, sec. 29 (2). What is a reasonable time is a question of fact: R.S.M. 1913, ch. 174, sec. 55. The determination of this question requires extrinsic evidence of the material circumstances: *Ellis* v. *Thompson* (1838), 3 M. & W. 445, at p. 456, 150 E.R. 1219. When the second contract was made the first contract (for 10 carloads) had not been fulfilled. That contract, as has been shewn, called for 3 carloads a week, the

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plaintiff to furnish instructions as to the places to which the carloads were to be shipped. It might, therefore, be taken that under the second contract the goods should be delivered at the rate of 3 carloads a week. The capacity of defendants' mill was 400 to 500 barrels a day. They could readily have furnished 3 carloads a week. If the plaintiff had ordered the shipments at that rate, the whole quantity would have been due for delivery before the end of January, 1920, but for the accident of the fire. There was no increase in the price of flour until December 27, 1919, and from that time it remained the same until April, 1920.

There is another very important term brought into this contract. At the top of each sheet of defendants' letter paper there is printed in red ink this statement:

"All agreements herein contained or implied are contingent upon strikes, accidents and other delays unavoidable or beyond our control."

Mathers, C.J.K.B., 61 D.L.R., at p. 614, finds as a fact that the plaintiff was aware of these conditions and it is not contended that plaintiff is not bound by them. The word "contingent" in this connection means "dependent upon a foreseen possibility," Century Dictionary, vol. 2, p. 1228; 9 Cyc., p. 72; 13 Corp. Jur., p. 114; *Verdier* v. *Roach* (1892), 31 Pac. 554, at p. 556. The foreseen possibility in this case is the occurrence of strikes, accidents, or other delays. The statement in the letter heading therefore means: "All agreements herein contained or implied are dependent upon the possibility of strikes, accidents or other delays occurring," that is, are dependent for their effect on the absence of strikes, accidents, or other delays during the time for their performance.

In *New England Concrete Construction Co.* v. *Shepard & Morse Lumber Co.* (1915), 107 N.E.R. 917, the seller's contract to fill an order for lumber was expressly "contingent upon strikes, fires, breakage of machinery and other causes beyond our control." Before any of the lumber had been manufactured or delivered to the plaintiff the defendant's mill was destroyed by fire. It was held by the Supreme Judicial Court of Massachusetts that the effect of this clause was not to extend the time of performance beyond the time limit, but wholly to relieve the defendant from the obligation to furnish the lumber called for by the contract, citing *Metropolitan Coal Co.* v. *Billings* (1909), 202 Mass. 457, at p. 462, 89 N.E.R. 115. In the last-mentioned case the plaintiff agreed to furnish defendant with coal to be delivered pre-

vious to November 1, but subject to terms and conditions relating to strikes, transportation, etc. Because of a strike extending to November 26 plaintiff could only obtain about a third of the coal required by its contract with its customers, which it apportioned amongst them, defendant receiving his proportionate share. It was held that plaintiff was excused from further performance of the contract, but that the case would stand differently if the strike had terminated before the time limited in the contract expired and the plaintiff could with reasonable effort have obtained coal enough to fill its contracts with defendant and others and supply its regular customers. The effect of the strike was not to extend the defendant's right of delivery beyond the time limited, but to relieve the plaintiff from the obligation which it otherwise would have been under.

In the case cited from 107 N.E.R. the word "fires" is specially mentioned. In the case at Bar the word "accidents" takes its place. The defendants' mill was accidentally destroyed by fire on November 28, 1919, nothing being left but the walls of the building. The plaintiff was immediately informed by telegram of the destruction of the mill. The mill has not been rebuilt.

The defendants have set up the above condition as relieving them from obligation to perform the contract. The burning of the mill was an accident covered by this condition. A fire is not considered to be "an act of God," although it may be the result of such, as where the fire is caused by lightning. A fire is in general regarded as an accident: *Forward* v. *Pittard* (1785), 1 Term. Rep. 27, 99 E.R. 953; *Vaughan* v. *Menlove* (1837), 3 Bing. (N.C.) 468, 132 E.R. 490. The contract in the present case was to supply a quantity of a particular brand of flour known as "Gold Drop," manufactured by defendants at their mill at Gladstone. They had no other mill or other means of making or supplying that particular brand of flour. The time within which the mill might have been rebuilt was estimated, by witnesses at from 8 to 12 months. Mathers, C.J.K.B., 61 D.L.R. 609, allowed the longer period. Now the plaintiff stated in his evidence his own view that he had the right under the fifty-carload contract to order the cars when he wanted them during the ensuing half year. In this view of the contract, the time for delivery would have elapsed twice over before the time allowed by the Chief Justice for the rebuilding of the mill had expired. It appears to me that giving an extension of a year would be making a new contract be-

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tween the parties under conditions of prices, freights, and other expenses not contemplated by the parties when the original contract was made, and which might prove to be ruinous to one or other of them.

In *Geipel* v. *Smith* (1872), L.R. 7 Q.B. 404, defendants had by a charter-party agreed with all convenient speed to load and deliver a cargo of coal at Hamburg, the restraint of princes and rulers (*inter alia*) excepted. War broke out between France and Germany and Hamburg was blockaded by the French fleet. Defendants threw up the charter-party and refused even to load the coal. It was held that defendants were justified under the exception. It was urged by the plaintiffs in that case that defendants should have been ready to sail as soon as the restraint was removed. As to this, Cockburn, C.J., said, at p. 410:—

"It would be monstrous to say that in such a case the parties must wait—for the obligation must be mutual—till the restraint be taken off—the shipper with cargo, which might be perishable, or its market value destroyed—the ship-owner with his ship lying idle, possibly rotting—the result of which might be to make the contract ruinous. At all events, it must be taken that the restraint must cease within a reasonable time, and that the duty of the defendants was to wait only a reasonable time."

It was held that defendants were justified in not performing any part of the contract.

Scottish Navigation Co., Ltd. v. *Souter & Co.*, [1917] 1 K.B. 222, was also a case of a charter-party whereby the plaintiffs let their steamship to defendants "for one Baltic round." The steamship came on hire on July 4, 1914. While she was at a port in Finland on August 1, 1914, war broke out and the Russian authorities would not allow her to leave. It was held that both parties to the contract contemplated a commercial adventure, namely, a Baltic round: that the enforced delay was of such indefinite duration as to completely frustrate the commercial adventure; and that the contract was consequently determined. Swinfen Eady, L.J., in giving judgment (at p. 238) held that the case came within the principle of *Taylor* v. *Caldwell* (1863), 3 B. & S. 826, 122 E.R. 309, and *Appleby* v. *Myers* (1867), L.R. 2 C.P. 651. In both of these cases the further performance of the contract had become actually and physically impossible. In the former case the use of a music hall could not be given because it had been destroyed by fire. In the latter a steam engine and machinery could not be erected

upon defendant's premises unless they continued in a fit state and they had in fact been burnt. Swinfen Eady, L.J. referred to the judgment of Vaughan Williams, L.J. in *Krell* v. *Henry*, [1903] 2 K.B. 740, who pointed out the wider application of the principle and said that it applied to cases where the event which renders the contract incapable of performance is the cessation or non-existence of an express condition or state of things going to the root of the contract and essential to its performance.

The contract under consideration in the present case was for 50 carloads, each containing 400 bags of Gold Drop flour, a brand of flour then made by defendants at their mill in Gladstone, and certain mill-feed obtained as a by-product in the manufacture of this flour. The contract and the conduct of the parties show that the contract depended upon an essential condition that defendant's mill should remain in existence and in a condition to produce the flour and other products mentioned. By the destruction of the mill the contract was, I think, commercially frustrated.

There were other elements that supervened in this case which, I think, lend force to the view I have just expressed. In the latter half of the year 1919, the Canadian Wheat Board was formed by the Governor-General in Council under the provisions of the War Measures Act, 1914 (Can. 2nd. sess.), ch. 2. The Board was given the widest powers in connection with the purchase and sale of wheat and flour, the fixing by regulation of the Board of the prices of wheat and flour and the prescribing of the standard quality of flour. The regulations made by the Board had the force of law. The Board had power to create offences and provide penalties in respect of the violations of any order or regulation made by the Board (Ex. 89, order in council of August 18, 1919). By regulation No. 58 of the Board, passed on November 15, 1919, it was order that the standard of flour manufactured in Canada for sale in Canada be the standard set by the Canadian Wheat Board and designated as (a) Government Standard Spring Wheat Flour; (b) Government Standard Winter Wheat Flour. Regulation 58 was cancelled on December 27, 1919, by regulation No. 68, and on the same day (December 27) by regulation No. 77 the same provision was re-enacted. The effect of these regulations is that the defendants, after November 15, 1919, were prevented from manufacturing Gold Drop flour, which was a patent flour, and were compelled to make Government Standard Spring Wheat Flour in accordance with the

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standard prescribed by the Canadian Wheat Board. All the carloads shipped by defendants were "Gold Drop Flour." After November 15, 1919, when only standard flour could be manufactured, the plaintiff still called for "Gold Drop": see letter of November 27.

I think these conditions add force to the defendants' contention that the contract had, by the accident of the fire, become impossible of performance. I think the action should have been dismissed, but there has been no appeal by defendants against the judgment pronounced at the trial giving nominal damages without costs. This appeal will therefore be dismissed with costs.

CAMERON, J. A.:—As to the contract for 10 cars, I agree with the disposition of the plaintiff's claim made by Mathers, C.J.K.B., at the trial, 61 D.L.R. 609, I think the plaintiff, by his delay, lost his right to delivery of the three cars in respect of which he claims damages. The contract had run out.

As to the claim in respect of the contract for 50 cars I have, after consideration, come to the conclusion that the defendant's contention that this contract was, in the circumstances, wholly discharged as against both parties was right and that an action thereon no longer lies.

I have read Dennistoun, J.'s, judgment and am in accord with it and with his disposition of this branch of the case.

The appeal should be dismissed with costs.

FULLERTON, J. A. (dissenting in part):—The main question raised by this appeal is whether or not the defendants have committed breaches of two separate contracts for the sale of flour and feed by the defendants to the plaintiff. In July, 1919, or earlier, the plaintiff had bought from the defendants a number of mixed cars of flour and feed. On July 23, defendants sent plaintiff a night letter reading as follows:—

"Refer your letter nineteenth all your orders will be en route by end of week can commence shipping more August 1st, sooner if not too much feed but at same prices as last order. Oct. wheat selling above fixed price in consequence cannot reduce."

On July 26, plaintiff wired defendants:—

"Referring yours 23rd.....Now wire quick largest proportions feed in about ten more mixed carloads. State earliest shipment."

Defendants answered by wire the same day stating the proportion of feed in each car, and that they were prepared

to ship 3 cars a week after August 15. On July 28 plaintiff wired defendants:—

"Referring to your telegram of the 26th book ten carloads more with the same proportions flour and mill-feed as the last three carloads for shipment as stated."

There was thus constituted a complete and binding contract for the sale by the defendants to the plaintiff of ten carloads of flour to be shipped at the rate of three cars per week after August 15. The practice was for the plaintiff to furnish the defendants from time to time with what the parties called "specifications," that is, the destination of the several cars and the respective quantities of flour and feed in each. On November 27, the defendants' mill was burned and the last 3 cars ordered by letter of that date were never delivered, and it is in respect of these three cars that the plaintiff claims damages. Mathers, C.J. K.B., 61 D.L.R. 609, who tried the action held that the failure of the plaintiff to deliver orders for the 3 cars within the contract period, disentitled him to call for delivery later and that, consequently, the plaintiff could not recover.

The authorities are clear that in a contract to deliver by instalments at stated periods, where orders must be given by the purchaser in respect of each instalment, failure to order any particular instalment loses the purchaser the right to insist on a later delivery. *Doner* v. *Western Canada Flour Mills Co.*, 41 D.L.R. 476, 41 O.L.R. 503; *Sierichs* v. *Hughes*, 43 D.L.R. 297, 42 O.L.R. 608; *Gerow* v *Hughes*, 43 D.L.R. 307, 42 O.L.R. 621.

Counsel for the plaintiff, however, contends that the defendants here have waived their right to rely on the failure of the plaintiff to order cars at the rate of 3 cars a week after August 15, and it will, therefore, be necessary to consider the evidence as to waiver. On August 26, no specifications for any of the 10 cars had been received by the defendants, and on that day, they wired for the same. Plaintiff immediately wired specifications for 3 cars. These were shipped out on September 1, 3 and 4. On September 12, defendants wired for specifications for the remaining 7 cars but none were sent. On September 25, plaintiff visited Gladstone where the defendant's mill was situate and personally ordered 2 cars, and on October 5, two more cars were ordered by wire. All 4 cars were shipped in October. Now, according to the strict terms of the contract the last order should have been given not later than September 12. Although, after September 12, defendants could have re-

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fused to deliver further flour they actually wired plaintiff on that day for specifications for the remaining 7 cars, thereby clearly showing that they recognized the contract as still in existence, and the term as to time of delivery of no importance. In a letter dated September 29, the defendants refer to this contract as "not yet completed." On defendants' invoice of a car dated October 8, there appears the following, "5th on old contract July 28th." On October 6, plaintiff wrote defendants confirming his telegram of the previous day ordering the last 2 cars shipped under the contract and stated:—

"This with orders given you personally for two cars to be hurried out to St. Tile and La Parade, will make up seven cars ordered to date on our old contract for ten cars as made July 28."

Two subsequent invoices of cars, one dated October 17 and the other October 20 bear the respective annotations: "6th on old contract—10 cars" and "7th on old contract." After the mill had been burned considerable correspondence took place between the parties in reference to the carrying out by the defendants of this and another contract in question herein but at no time did the defendants take the position that it was relieved from its contract by failure to get orders. Even after the matter got into the hands of their solicitors and correspondence took place between them in reference to their respective clients' rights no such answer to the plaintiff's claim for damages was suggested. Finally, neither in the original defence filed nor in the amendment permitted at the trial is there any such suggestion. Framed as the statement of claim in this action is in respect to the breach of this contract, it was essential that the defendants should plead in answer the failure to receive orders, and as the pleadings now stand, it is not open to the defendants to set up such a contention nor would it be fair to the plaintiff to allow an amendment at this stage.

In my view, however, there was a clear waiver of the provision of the contract as to deliveries. There was no attempt on the part of either to comply with it and they both treated it as non-existent. I think there was a breach of contract in respect of the three cars and that the damages should be assessed as of a date within a reasonable time for delivery after the receipt of the plaintiff's letter of November 27 ordering the last three cars. The evidence shows that there was no change in the market price of flour and feed between November 28 and December 24, and ac-

cording to a computation put in at the trial, the difference between the contract and market price on November 28 was $498.50. I would, therefore, allow the plaintiff $498.50 damages for the breach of this contract.

The second contract in question herein was for 50 cars of "Gold Drop" flour and mixed feed to be manufactured by the defendants and delivered at the rate of 2 cars a week. Before the burning of the defendants' mill 12 cars had been ordered and shipped. The plaintiff claims damages in respect of 38 cars undelivered.

The contract contained a condition that "all agreements herein contained or implied are contingent upon strikes, accidents and other delays unavoidable or beyond our control." That the fire which destroyed the mill was an "accident" within the meaning of the above condition there can be no question, but the difficulty is to determine the effect of this condition on the liability of the defendants. Mathers, C.J. K.B., 61 D.L.R. at p. 615, took the view that:—

"The defendants were not discharged from their obligation under the contracts by the burning of their mill but were entitled to such extension of time for their performance as was reasonably necessary to repair the damage and resume production."

I think the case of *De Oleaga* v. *West Cumberland Iron & Steel Co.*, 4 Q.B.D. 472, settles the law as to the effect of such a condition. The contract there was for the supply of about 30,000 tons of ore by plaintiffs to defendants, deliveries to be made at the rate of from 800 to 1,000 tons per month. The condition was:—

"No responsibility to attach to us should we be prevented from delivering all or any portion of the ore through any dangers and accidents of the mines, railway shoots, rivers, seas and navigation of whatever nature or kind, or through any circumstances beyond our own control."

It was held that the plaintiffs were not entitled to deliver quantities which they had previously been prevented from delivering from dangers and accidents of the mines, etc., such quantities being as much struck out of the contract as if they had actually been delivered.

Lush, J., in delivering the judgment of the Court, said 4 Q.B.D. at p. 475.

"It is clear that in such a case the seller could not afterwards claim to deliver, nor the buyer claim to have the quantities in respect of which the one had made default, and the other had had, or was entitled to have a substitute

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in damages. Those portions could be as much struck out of the contract as if they had been actually delivered.

The object of the clause is to protect the seller from such liability, and nothing more, leaving the rights of the parties in other respects as they would have been if no such clause existed. The non-delivery, under such circumstances, is not a suspension of performance, it is a breach, but one for which the buyer agrees he will not hold the seller responsible."

I think the above language strictly applies to the condition in question here. Failure to deliver two carloads a week was a breach which did not suspend the contract but in the absence of the condition would have given the plaintiff an action for damages. The Judge has found that it would have required from 8 to 12 months to rebuild the mill and resume operation. Long before this could have been done, the time fixed for deliveries would have expired and the contract be at an end. I think, therefore, that the plaintiff has no claim for damages in respect of the second contract.

I think the case in respect of the last contract might have been decided on the ground that the burning of the mill was a circumstance not contemplated by the parties when the contract was made and the delay necessarily resulting was so long as to put an end to it in a commercial sense. See *Jackson* v. *Union Marine Ins. Co.* (1873), L.R. 8 C.P. 572.

I would allow the appeal and direct that a verdict be entered in favour of the plaintiff for the sum of $498.50, together with the costs of the trial of the portion of the plaintiff's claim upon which he succeeds, the defendants to have the costs of the trial of the portion on which they succeeded. As success is divided on the appeal, I would allow no costs to either party.

DENNISTOUN, J. A.:—I fully agree with the conclusions of Mathers, C.J. K.B., 61 D.L.R. 609, in so far as the first, or 10-car, contract is concerned. He sums up in a paragraph as follows, 61 D.L.R. at p. 617:—

"Upon the principle of *Doner* v. *Western Canada Flour Mills*, 41 D.L.R. 476, 41 O.L.R. 503; *Sierichs* v. *Hughes*, 43 D.L.R. 297, 42 O.L.R. 608, and *Gerow* v. *Hughes*, 43 D.L.R. 307, 42 O.L.R. 621, it seems to me that the plaintiff has now lost the right to claim damages for the non-delivery of the 3 remaining cars on the first contract. The contract was for the delivery at the rate of 3 cars per week. If the plaintiff did not order 3 cars in any particular week, he lost

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the right to require delivery to be made of that particular instalment in any subsequent week, unless there was an extension of time for ordering, as to which I see no evidence. It is quite true that the defendants further than asking for shipping instructions made no complaint about the delay and when the belated order came, filled it. I think they were under no obligation to do this, and their filling the order is not to be construed as a waiver of their right to raise the objection when asked to fill any subsequent orders sent in out of time, or subject them to a claim for damages for breach of contract, if eventually they refused to fill orders that were not sent in in due time. For this reason, I think the action fails with respect to the 10 car contract."

Counsel for the appellant in an endeavour to escape from this conclusion of the Chief Justice, argued that the contract for delivery at the rate of 3 cars a week was never concluded, and that by the telegram of August 26 and the telegram in answer of the same date, the parties substituted a new contract which was silent as to time of delivery, and that delivery within a reasonable time, and not at the rate of 3 cars per week, was the result.

I am unable to accept this suggestion. The parties contemplated and agreed upon a steady flow of produce from the mill to the plaintiff, and the effect of the telegrams referred to was to postpone the time when the first deliveries should be made from August 15 to August 26 only. The parties did not vary any other term of the contract which they had previously made.

On this branch of the case, I think the appeal should be dismissed.

The second, or 50-car, contract is to be construed subject to a condition which was incorporated therein. At the top of each sheet of the defendants' letter paper there is printed in red ink this statement:—"All agreements herein contained or implied are contingent upon strikes, accidents, and other delays unavoidable, or beyond our control."

The word "contingent" is defined as meaning "dependent upon a foreseen possibility." Century Dictionary, vol. 2, p. 1228; 9 Cyc. p. 72; 13 Corp. Jur. p. 114; *Verdier* v. *Roach*, 31 Pac. 554, at p. 556. Applying this meaning the above statement will read as follows: "All agreements herein contained or implied are dependent upon the possibility of strikes, accidents and other delays....." The possibility foreseen and guarded against is stated in the expression used, and to my way of thinking includes delay by fire which

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is, unfortunately, a form of accident to be anticipated and guarded against by flour millers.

The real meaning of the statement is that the agreements are dependent for effect on the *absence* of strikes, accidents or other delays during the time limited for performance—the intention of the parties is obvious, though the words used are not particularly apt.

The fire which destroyed the defendants' mill on November 28, 1919, was an accident within the contemplation of the parties, which rendered performance of the 50-car contract impossible until the mill could be rebut. It never was rebuilt.

The trial Judge finds that 12 months would necessarily elapse before the rebuilding could have taken place, and he allows the defendant a delay of 12 months during which the delivery of flour and by-products is suspended. On the expiration of the year, he imposes the obligation of resuming deliveries and of paying damages for default in so doing, such damages being the difference between the contract prices and the market prices estimated on three cars on the last day of each week commencing with December 5, 1920, for 12 consecutive weeks.

The plaintiff insists that he is entitled to damages as of May 15, 1920, that being the date on which the defendants denied liability, and he claims something over $34,000.

There being no evidence upon which damages could be assessed subsequent to May 15, 1920, judgment has been entered for nominal damages without costs.

With much respect, I consider a delay of 12 months too onerous a burden to impose upon either party to a commercial contract of this kind. From year to year, the price of wheat and of flour varies in accordance with conditions beyond the control of the parties, and changes occur which cannot be foretold by the shrewdest of traders.

The delays which the parties had in mind when they made this contract were reasonable delays, and it is for a jury, or for a Judge sitting as a jury, to say what is reasonable under the circumstances.

If the delay which intervened by reason of the fire which destroyed the defendants' mill must necessarily be for an unreasonable period from a commercial point of view, then either party was at liberty forthwith to declare the contract at an end, and, in my view, this contract for the sale of 50 cars of flour and feed was at an end, because, within the meaning of the written words of that contract, an acci-

dent, unavoidable and beyond the control of the defendants, had occurred, the effects of which could not be overcome within a reasonable time.

There is, I think, ample authority for such a conclusion. The point has been well stated in these words in 25 Hals. p. 219, sec. 377:—

"Where postponement is made on the coming into existence of a specified state of affairs, and a reasonable time for the delivery and acceptance of the undelivered residue of the goods elapses before the state of affairs has come to an end, the contract is wholly discharged as against both parties."

This proposition of law is based upon numerous cases of which reference is made to the following:—

De Oleaga v. *West Cumberland Iron & Steel Co.*, 4 Q.B.D. 472, is a case which deals with the right of a plaintiff vendor to recover damages for the refusal of the defendants to accept delivery of ore which had been held back by the plaintiffs under the authority of the following clause in the contract between them (p. 473):—

"Deliveries to be made at the rate of from 800 to 1,300 tons per month, provided we [plaintiffs] are able to procure tonnage at or under the rate of 16s. 6d. per ton.

No responsibility to attach to us should we be prevented from delivering all or any portion of the ore, through any dangers and accidents of the mines, ...or through any circumstances beyond our own control."

It was held by Cockburn, C.J., Lush and Manisty, JJ.: (1) That the plaintiffs were entitled to deliver quantities of the ore which they had previously withheld while freights were above the limit, provided such deliveries were made within a reasonable time, having regard to the contemplated duration of the contract, the means which they had to make up arrears, etc.; (2) That they were not entitled to deliver quantities which they had previously been prevented from delivering from dangers and accidents of the mines, etc., such quantities being as much struck out of the contract as if they had been actually delivered.

King v. *Parker* (1876), 34 L.T. 887: In this case the contract was for the supply of coal at the average rate of 2 trucks per day; "in the event of a colliers' strike or accident the vendors do not bind themselves to keep up the daily supply." It was considered by Pollock, B., that a delay of 4 months owing to a strike was not under the circumstances such as to entitle the defendant to consider the contract at

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an end in a commercial sense and judgment was given for the plaintiff.

It seems fair to infer that had the Court considered the delay unreasonable in a commercial sense, the judgment would have gone the other way.

Geipel v. *Smith* L.R. 7 Q.B. 404, is a charter-party case. It was agreed that the defendants' vessel should, with all convenient speed, sail to a spot as directed by plaintiffs, and there load a full cargo of coals; and then as soon as wind and weather should permit, proceed to Hamburg and there deliver same, the restraint of princes and rulers (*inter alia*) excepted. The Port of Hamburg was blockaded by the French fleet and the defendants renounced the charter-party. They were held justified in so doing. Cockburn, C.J., L.R. 7 Q.B., at p. 410, says:—

"But then it is said that the exception must be taken to apply to the whole contract, and that, inasmuch as the defendants were bound to sail as soon as wind and weather would permit, that must mean, if there be no such restraint: and if there be, then so soon as wind and weather permit after the restraint is removed. But it would be monstrous to say that in such a case the parties must wait—for the obligation must be mutual—till the restraint be taken off—the shipper with cargo, which might be perishable, or its market value destroyed—the shipowner with his ship lying idle, possibly rotting—the result of which might be to make the contract ruinous. At all events it must be taken that the restraint must cease within a reasonable time, and that the duty of the defendants was to wait only a reasonable time prepared to carry out their contract should the restraint be removed..... It is a sufficient answer on the defendants' part that it was not likely to be removed within a reasonable time."

And Blackburn, J. says at p. 413:—

"The goods owner stipulates to get his coals delivered within a reasonable time, and it would be monstrous to say that, in the event of a blockade, he was bound to provide a cargo and keep it on board all the time, until, at the very least, all commercial profits would be at an end..... The object of each of them was the carrying out of a commercial speculation within a reasonable time."

Jackson v. *Union Marine Ins. Co.* L.R. 8 C.P. 572, is a case dealing directly with a policy of marine insurance, and incidentally with a charter-party in which there was a provision that the vessel was "to proceed with all convenient

speed—dangers and accidents of navigation excepted." The ship having been for a short time upon the rocks and extensive repairs being necessary, the jury were asked: (1) Whether there was a constructive total loss of the ship: (2) Whether the time for getting the ship off and repairing her so as to be a cargo-carrying ship was so long as to make it unreasonable for the charterers to supply agreed cargo at the end of such time; (3) Whether such time was so long as to put an end in a commercial sense to the commercial speculation entered upon by the shipowner and the charterers. The jury answered all these questions in the affirmative and judgment was given absolving the charterers from loading the vessel.

The case of *New England Concrete Construction Co.* v. *Sheppard and Morse Lumber Co.* (1915), 107 N.E.R. 917, construes a contract in which there was a provision that: "all contracts are contingent upon strikes, fires, breakage of machinery and other causes beyond our control." A fire having occurred it was held by the Supreme Judicial Court of Massachusetts that the effect of this clause was not to extend the time of performance beyond the time limit, but wholly to relieve the defendant from the obligation to furnish the flooring called for by the contract.

In the case at Bar, the condition deals with "delays" only, and is to that extent distinguishable from the Massachusetts case.

The trial Judge when considering the question of delay did not address himself to the question of "reasonableness in a commercial sense," and even had he done so and considered the delay unreasonable, the result would not differ in substance from that at which he arrived. Judgment has been entered for nominal damages without costs. In my view, the action should have been dismissed with costs, but as there is no cross-appeal, it is sufficient to say that this appeal should be dismissed with costs.

PRENDERGAST, J.A., concurred in dismissing the appeal.

Appeal allowed.

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Supreme Court of Canada, Davies, C.J., Idington, Anglin, Brodeur and Mignault, JJ. June 17, 1922.

FRAUDULENT CONVEYANCES (§VIII—40)—FRAUDULENT INTENTION—NECESSITY OF PROVING—STATUTE 13 ELIZ., CH. 5—FRAUDULENT CONVEYANCES ACT, R.S.O. 1914, CH. 105—CONSTRUCTION.

Under the statute 13 Eliz., ch. 5, and the Fraudulent Conveyances Act, R.S.O. 1914, ch. 105, where a conveyance is for valuable

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consideration, the fraudulent intention necessary to avoid the conveyance must be established in the particular case when it comes for decision. It is a question of fact in each case, and in its solution the necessity of establishing an actual fraudulent intention as distinct from a mere intention to prefer must be kept in mind.

[*Hopkinson* v. *Westerman* (1919), 48 D.L.R. 597, 45 O.L.R. 208, followed.]

APPEAL from the judgment of the Appellate Division of the Supreme Court of Ontario affirming the trial judgment which dismissed an action to set aside a bill of sale of stock in trade as a fraudulent preference. Affirmed.

The judgment appealed from is as follows:—

Meredith, C.J.C.P.:—The defendant, Abram Orpen, set his son Abram up in a business, of an extensive character, in the making and sale of electrical appliances, the business being carried on in the name of The Electric Specialty and Supply Company, the father, in a fatherly way, advancing money to, and going security for, the concern to the amount of apparently about $15,000.

Early in the year 1916, and during the first few months of that year, the son, trading in the name which I have mentioned, entered into contracts with the plaintiff to sell and deliver to him a large quantity of electrical appliances all of which were to be delivered in those months; but the contract was one of so disastrous a character that it was never performed, and eventually the plaintiff recovered against the Electric Specialty Co., a judgment for $7,150 damages and for costs, for the breach of them.

The breach occurred on March 27, 1916, the times for delivery having been extended at the defendant's request until that day; after that the defendant sought further delay, but the plaintiff, although he took no legal proceeding for months after, gave no further extension of time; and so on that day had a good cause of action on a mercantile contract for the damages which were afterwards awarded to him in that action.

In the month of April or May of the same year, a scheme was entered into by father and son under which the Electric Specialty and Supply Co., owned by the son, and backed by the father to a considerable extent, was substantially transformed into and became the Hessco Electric Manufacturing Co., owned by the father and in which the son appeared only as a paid employee.

A bill of sale, dated May 29, 1916, from the son, described as a merchant, to the father, described as a capitalist, of all the stock-in-trade and goods and chattels of the Electric Specialty and Supply Co., was made for the express

consideration of $15,000, and was filed on June 2, 1916.

It is said that the book debts were not included in this transaction, but that they were collected by the new company, or by the old employees of the other company, and applied in payment of its debt.

The affidavit of *bona fides*, entered on the bill of sale, and made by the father, states that it was made for good consideration, namely, $15,000, as set forth in the instrument, in which it is said to be $15,000 paid by the father to the son at or before the sealing and delivery of the instrument.

At that time the amount due by the son to the father was not $15,000 but was $6,544.51, as sworn to by the auditor; the father was indirectly liable for the rest, making in all about $15,000.

The father's testimony at the trial as to the real reasons and consideration for the bill of sale is fairly shown in these extracts from the reporter's notes of the trial:—

"Mr. Spence: You took these goods and took them to your own place of business? A: I leased that place of business. Q: And commenced a new business? A: No, I started to wind up this business. Q: You were not carrying on an electrical business prior to this time? A: No. Q: You took these goods and used them as a basis for a new business to be called the "Hessco Electric Company"? A: I took these goods for the purpose of selling them and paying the people who were owed, and myself; I didn't intend to carry on business any farther. Q: You have carried it on? A: Yes, to my sorrow.

Q: You did take these goods and start a new business called the "Hessco Electric Company"? A: In the first place, I had to change the name because the Hydro-Electric was suing me for using their name. Q: Suing you? A: The Electric Specialty & Supply Co. Q: You said they were suing you? A: We all make mistakes. Q: You took these goods and took them to a new place? A: New premises.

Q: And you called the company the "Hessco Electric Company"? A: Yes. Q: Did you register as the "Hessco Electric Company"? A: Yes, sir. Q: And your son, what did he do? A: Which son do you mean? Q: What did Abram Orpen, Jr., do? A: He worked for me for a while. Q: In the same business? A: To sell out the stock. Q: And he worked for you in the same business? A: You will take my answer. Q: I want you to answer my question: don't make any mistake as to that. He worked for you in this business? A: Yes, sir, and got a salary. Q: Did you take an inventory

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of those goods before you took them over there? A: I can't say. Q: You didn't take one? A: I understood the stock was taken at the invoice prices. Q: You don't know that? A: No. Q: You took them over at $15,000.00? A: Yes, sir. Q: Why did you take them over? A: Because to pay those people they owed, and I wanted pay myself. Another reason was that Isle was leaving. Q: Was it the intention to pay all the creditors? A: Yes, sir, all the creditors I guaranteed. Q: What about the ones you didn't guarantee? A: I didn't pay them. Q: You paid some? A: Yes, sure, they were paid out of the proceeds of the sale of those goods. Q: What ones did you pay? A: I can't say. Q: How much did you pay? A: I wouldn't know that either—whatever the documents say there. Q: Did you keep no track of the creditors you paid, that were not guaranteed by you? A: I suppose they were all kept in the books. Q: Just answer my question. A: I don't know. Q: You don't know whether you paid any creditors who were not guaranteed by you? A: I paid creditors out of the proceeds of the sale. Q: You paid creditors, and you were paying the creditors out of the proceeds of the sale? A. That was paid out of the proceeds of these sales. Q: How did you carry on then? A: I don't know how it was carried on. Q: Just answer my question again—did you pay any creditors except those who were guaranteed by you? A: Whatever the books show. Q: Answer the question? A: I can't recollect; all I recollect is this, everybody was paid. Q: Did you pay any that were not guaranteed by you? A: I suppose, the Hessco people. Q: Well, that is you? A: Yes. Q: So you did pay some of them that were not guaranteed by you? A: If there were any accounts there, they were paid. Q: And the only people whom you didn't pay was the landlord, and Perkins? A: The landlord was paid. Q: The landlord was paid up to the time? A: Up to the expiry of the lease. Q: He got judgment against the company since for an additional sum? A: Yes."

It is, therefore, very plain that neither the bill of sale on its face, nor the affidavit of *bona fides* endorsed on it, set out the transaction or the consideration truthfully. As no attack is made upon it, under the provision of the Bills of Sale and Chattel Mortgage Act, the lack of truth in it and in the affidavit is important only as bearing upon the question how much or how little credence should be given to the testimony of the father in this action, and upon that question it is important.

Throughout these transactions, as well as all the litigation

in any way connected with them, the father and son have been represented by the same solicitor when represented by any; a solicitor of much experience, and one as capable as any to guide a client amidst the straits, shallows and snags of financial embarrassments.

The son has entered no defence to this action, and he was duly noted in default. An attempt was made to examine him for the purpose of discovery, but though he attended upon the appointment, he would not submit to examination; in consequence of which, an application to commit him was made and an order obtained which cannot be executed because he is a fugitive from it and cannot be found; so it was stated at the trial, and appears in the reporter's notes of it.

The case is plainly one in which he should have been put in the witness box for the defence, as such cases as *Merchants Bank* v. *Clarke* (1871), 18 Gr. 594, shew.

The rights of the parties depend on the real purpose of the transaction; if it were made in consideration, and for the purpose, of payment of all the obligations of the son's business by the father, then the plaintiff is entitled to be paid by him; he is a trustee of the property for that purpose. If it were made for the purpose of defeating, hindering, delaying or defrauding the plaintiff, he is entitled to have it set aside: Fraudulent Conveyances Act, R.S.O. 1914, ch. 105, sec. 3.

If it were not made for the purpose of paying all obligations, for what other purpose could it have been made than to defeat the plaintiff's claim?

What other reason could there be for changing the name in which the business was carried on? The father at the trial, in a vague way, spoke of the Hydro Electric Commission objecting to the use by his son of the name in which he carried on the business; but he knew that that was long before this transaction and at a time when the son was using the word Hydro as the first word of the business name; and he knew also that that word had long before been dropped out of the name, and that the Commission was satisfied.

Another reason given was that a capable employee of the son, having also an interest in the profits of the business, had left it; but whilst that might possibly be an additional reason for giving up a business that was not found to be a profitable one, it could not be a reason for changing the name.

On the other hand, if the purpose were to escape from the bad bargain made with the plaintiff, the change of name

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would be the first and most helpful ruse. Finding that the concern contracted with had ceased to exist, the chances were that the person contracted with would make contracts elsewhere and deem it hopeless to look for damages from the defunct concern; but the plaintiff proved to be a more than ordinarily tenacious contractor. The game was well played and should have succeeded in nine cases out of ten, but the plaintiff proved to be one of the much less number who cannot be "bluffed."

Again I ask, what other reason than to defeat the plaintiff's claim could the defendant have had?

Neither the father nor the solicitor can plead innocence of a knowledge of the ways of the world and the tricks of trade, in others; the son might say that he was but a debutant, although described as a merchant, but neither of the others could hope to pass muster in any such disguise; with their keenness and knowledge and experience in business matters of all kinds, it is impossible that all that was done by them could have been done without a knowledge of the main, if not only, reason for the transfer of the business, the sudden cutting off of the son's business career in which his father had launched him; the paternal and filial relations between them continuing, as is shown by the son remaining in the business, apparently much as before, he being paid by the father by way of a salary.

In all the circumstances of the case, it is impossible for me to reach any other conclusion than that the transfer of the property and business was made for the purpose of defeating the plaintiff's claim, which then had existed for some time and needed only an assessment of damage to fix the amount of it in money. To borrow a simile employed by a Judge of this Province in an election case; I can no more believe that the father did not know of the disastrous contract and endeavour to escape it than I can believe that he could be immersed in the waters of the bay of Toronto and come out dry and clean.

It is, therefore, not necessary for me to apply the rule applicable to such cases as this and generally applicable to the affairs of life, that a person must, or at least ought to be taken to have intended that which is the natural consequences of his acts.

But it is said that the Fraudulent Conveyances Act is inapplicable; because it does not prevent preferring one creditor to another; but a conveyance in good faith to one creditor is a very different thing from a conveyance made

with intent to defeat another creditor, the latter cannot be supported unless made for good consideration to a person not having at the time of the conveyance to him notice or knowledge of such intent; sec. 5 of the Act: and here there is no pretence that the conveyance was made to prefer the father; that is rather repudiated; and the assertion is that it was made for the purpose of paying the creditors.

And it is immaterial how valuable the consideration given may be, or how strong the intention actually to transfer the property may be, if there is notice or knowledge of intent to defeat creditors or others: section 6 of the Act.

A good deal was said about the plaintiff not being a "creditor" under the Assignments and Preferences Act, R.S.O. 1914, ch. 134, but nothing turns upon that for the reasons just given; no consideration can support the transaction if entered into to defeat creditors or others. But why was the plaintiff not such a creditor? He had contracts with the son which the son had broken; the breaches were such as to give him a lawful claim at once against the son for the amount that was afterwards awarded: that is to say, on the day of the breach—March 27, 1919—the son owed the plaintiff that amount and owed it none the less because the amount had to be ascertained by the law's method before judgment could be entered and execution issued for the particular amount. Damages, and damages only, flow from every breach of contract and it can make no difference in principle that some may be ascertained easily and quickly and others with some difficulty and delay only.

We are in quite as good a position to consider the questions involved in this case as the trial Judge was, if not in a better position; and it is plain that, at the outset of his judgment his compass was not truly set—he misdirected himself to some extent, in these words: "In order that the plaintiff should succeed, he must establish that he was a creditor . . . . at the time the alleged fraudulent conveyance took place."

It is, I think, quite clear that he was; but it was not necessary that he should have been.

I am in favour of allowing the appeal.

Latchford, J.:—I agree.

Middleton, J.:—Appeal from the judgment of Orde, J., pronounced at the trial of the action on May 26, 1921, dismissing the action with costs.

The action was brought by judgment creditors of Abram Orpen, Junior, for the purpose of setting aside and having

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declared fraudulent and void a bill of sale of the stock-in-trade of Abram Orpen, Junior, to his father and co-defendant Abram Orpen, Senior, dated May 29, 1916.

The judgment recovered by the plaintiffs against the defendant Abram Orpen, Junior, who carried on business under the name of the Electric Specialty and Supply Co., was recovered on May 7, 1918, and is for $7,150 and costs.

The circumstances giving rise to the litigation resulting in this judgment appear in the report of the trial and upon the appeal in (1918), 14 O.W.N. 190; affirmed 14 O.W.N. 252. Shortly, the story is this:—Orpen, Junior, who was carrying on business in a small way as manufacturing, among other things, sockets for electric lights, entered into a contract to supply the Perkins company with a very large number of sockets at what appeared to be an exceedingly satisfactory price. For the purpose of manufacturing these sockets, he required a considerable quantity of sheet brass, and he had, as he thought, entered into arrangements to obtain the necessary brass at a price which would have left him a large profit. Owing to the sudden advance in the price of brass which had been foreseen by the plaintiffs but which Orpen did not reckon upon, he found himself unable to carry out his contract without sustaining large loss; he also found himself by reason of lack of funds unable to purchase the necessary supplies. The whole of this transaction took place early in 1916. At the time of the conveyance, it was probably manifest to Orpen, Junior, that unless he had some legal defence to the action, he was bound to face a substantial loss.

The action did not come to trial until some 2 years later when, notwithstanding strenuous argument on the part of counsel for the defendant, the plaintiff recovered the substantial damages already mentioned.

Owing to the conveyance in question, it is extremely unlikely that anything will ever be recovered upon the judgment unless the conveyance is set aside. The conveyance was, in this action, attacked as offending against the Provincial Act relating to preferences. This attack failed—and I think rightly failed—for the simple reason that at the date of the conveyance the plaintiff was not a creditor. There was then a contract but there had not then been a breach of the contract, and there had been no assessment of the unliquidated damages flowing from that breach. As all the members of the Court agree in this view, I do not need to elaborate it.

The conveyance was also attacked upon the ground that it offended against the statute R.S.O. 1914, ch. 105, sec. 3, *et seq.*, commonly called the Statute of Elizabeth.

I have considered with great care the judgment of my Lord in which he holds that a case within the statute has been made. I am however quite unable to agree with him in this respect. To understand the view that I entertain, the facts must be set forth with some little care. Orpen, Junior, was a young man with little business experience. He started in this business with the knowledge and approval of his father and with his father's pecuniary backing. The business established was the business of his own and not of the father. Possibly, owing to business inexperience, and possibly owing to the circumstances arising out of the war, the business from its inception resulted in a loss; its whole career was disastrous. Orpen Senior not only advanced considerable sums of money but became surety to the bank with respect to other advances, and also to certain creditors who had supplied goods.

At the time of the conveyance in question, Orpen Junior desired and required a further advance if the business was to be continued. The father refused to make this advance and determined to take the loss that confronted him. It was arranged that the business should be transferred to him. A lump sum was fixed as the price, $15,000, a sum which appears to be far more than could have been realised from the assets as they stood. Orpen Senior then arranged that he would pay, not merely the liabilities for which he was the surety, but all the other trade creditors of the business. His own evidence is not very clear as to how this worked out as he has apparently only a vague knowledge of the figures, but the accountant who gave evidence makes the situation plain. At the date of the transaction, the balance due to Mr. Orpen Senior for advances already made was $14,904.81; he made advances to pay the bank and other creditors of $6,940, the result being that after crediting the $15,000 allowed as the consideration for the bill of sale there is a balance due to him of $6,544.51. He then proceeded to realise as best he could on the assets, not realising the $6,000. Young Orpen was employed to assist in the realisation for some time at a salary of $50 per month.

At the hearing, Orpen Senior gave evidence, and stated that he did not know of the Perkins' contract or claim at the time of the transaction, and the trial Judge has believed him. There is no evidence whatever to contradict this, al-

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though it is suggested that this statement cannot be believed. For myself, I have little difficulty in believing the statement, for I do not think that Orpen Junior in any way realised that there was any such liability as that which materialised in the judgment against him, and I had some opportunity of understanding the situation owing to the fact that I presided at the trial of the first action.

Somewhat violent language has been used during the course of the discussion of this case in Court as to the story told and as to the conduct of the father. The attack made upon him is, I think, entirely without foundation. He helped his son in an attempt to start a business; when this proved disastrous, he took over the existing assets and paid the existing debts in full. Had he chosen to stand on one side, and permitted the assets to be sold through the shreiff, he would have had to face the loss on the accounts that he had guaranteed, but the creditors, unless secured by his endorsement, would have received but little, and he would not have been out of pocket anything like as much as he now loses. If I am right in the view which I entertain, that the onus was upon the plaintiff to prove the intention to defraud and that this onus could not be satisfied in the absence of positive evidence by the mere disbelief of the negative, then the plaintiffs' case is hopeless. *A fortiori*, his appeal should be hopeless when the trial Judge who saw the witness expressly believes his word.

But, even assuming that Orpen Senior had notice and knowledge of the contract and the breach and of a liability for damages, I still think that the plaintiff must fail. The bill of sale was made for valuable consideration, and the most that can be said against it is that there was some intention on the part of Orpen to prefer himself and to place himself in the position in which he could safely make advances to pay all those who had claims against the business for advances or goods sold. This is not enough; the cases, I think, establish that the mere intention to prefer one creditor or a class of creditors does not render a conveyance vulnerable under the Statute of Elizabeth merely because such payment exhausts the debtor's assets with the inevitable consequence that the less favoured creditors must go unsatisfied. We are so imbued with the spirit of the bankruptcy law and the provisions of our statutes regarding unjust preferences that we are in danger of forgetting the common law which is the foundation of the Statute of Elizabeth which regards even the preferential payment of a creditor as a righteous act.

The general question was discussed in *Hopkinson* v. *Westerman* (1919), 48 D.L.R. 597, 45 O.L.R. 208, and the law need not again be reviewed. I adhere to the conclusion there stated, which I do not think is disputed, that where a conveyance is for valuable consideration the fraudulent intention necessary to avoid the conveyance must be established in the particular case when it comes for decision. It is a question of fact in each case, and in its solution, as already indicated, the necessity of establishing an actual fraudulent intention as distinct from a mere intention to prefer must be kept well in mind. The familiar words of Fry, J., in *Re Johnson* (1881), 20 Ch.D. 389, at p. 393, may be quoted:—

"The effect on a deed of this sort of its being for good consideration is very great. It does not necessarily show that the deed may not be void under the statute, because in many cases good consideration has been proved, and yet the object of the deed has been to defeat and delay creditors; such has been, therefore, for an unconscientious purpose, and the fact that there has been good consideration will not uphold the deed. But nevertheless it is a material ingredient in considering the case, and for very obvious reasons: the fact that there is valuable consideration shows at once that there may be purposes in the transaction other than the defeating or delaying of creditors, and renders the case, therefore, of those who contest the deed more difficult."

The Judge then quotes the similar words of Turner, L.J., in *Harman* v. *Richards* (1852), 10 Hare 81 at p. 89, 68 E.R. 847: "Those who undertake to impeach for *mala fides* a deed which has been executed for valuable consideration have, I think, a task of great difficulty to discharge."

In the case of *Middleton* v. *Pollock* (1876), 2 Ch.D. 104, a solicitor found himself in trouble and owing many clients. He put in the hands of the trustee, certain funds for the purpose of paying certain creditors whom he desired to prefer, possibly because of peculiar affection for them, or possibly because he feared criminal proceedings if these clients remained unpaid. This transaction was attacked, and it was found that the only channel of escape was *via* the Statutes of Elizabeth now in question. Jessel, M.R., says, at pp. 108-109:—

"As between these preferred clients and the rest of his clients, whatever may be the morality of the case, as far as I know, there is no law which prevents a man in insolvent circumstances from preferring one of his creditors to an-

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other except the bankruptcy law. . . . . It has been decided, if decision were wanted, that a payment is *bona fide* within the meaning of the statute of Elizabeth, although the man who made the payment was insolvent at the time to his own knowledge, and even although the creditors who accepted the money knew it. Therefore, the mere fact of the deliberate intention of Mr. Pollock, if he entertained that deliberate intention, of preferring, in case of insolvency, this selected list of clients to the others, would not be sufficient to avoid this claim. Assuming, therefore, that it had been proved not only that he was insolvent but also that he was insolvent to his own knowledge, I think that, looking at the words of the statute and the authorities, the payment was *bona fide* if it was intended to be a payment, and the security was *bona fide* if it was intended to be a security. The meaning of the statute is that the debtor must not retain a benefit for himself. It has no regard whatever to the question of preference or priority amongst the creditors of the debtor."

In *Freeman* v. *Pope* (1870), L.R. 5 Ch. 538, a case determined by Hatherley, L.C., and Giffard, L.J., it was determined that the mere fact that a settlement had been made to the disadvantage of a creditor, even though a creditor at the date of the conveyance is not of itself sufficient to enable him to successfully attach the conveyance. It was also determined that if the settlement is not founded upon valuable consideration the proof of the actual intention might be inferred from the circumstances. It is to be inferred from the argument and discussion that where settlement is founded upon a valuable consideration positive and actual proof is necessary. This proposition in truth has been already determined in the cases of *Holmes* v. *Penney* (1856), 3 K. & J. 90, 69 E.R. 1035, and *Lloyd* v. *Attwood* (1859), 3 DeG. & J. 614, 44 E.R. 1405.

Upon all these grounds, I think the judgment should be affirmed, and the appeal should be dismissed with costs.

Lennox J., agreed with Middleton, J.

W. K. Fraser, for appellant.

J. M. Ferguson, K.C., for respondent.

DAVIES, C.J.:—I am to dismiss this appeal with costs. I fully agree with the judgment of Middleton, J. (1921), ante p. 403, in the Court of Appeal and do not think any good purpose will be served by adding anything additional to what has been said.

IDINGTON, J.:—For the reasons assigned by Middleton,

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J., in the second Appellate Division of the Supreme Court of Ontario, I think this appeal should be dismissed with costs.

ANGLIN, J.:—I entirely agree with the judgment delivered in the Appellate Divisional Court by Middleton, J., and cannot usefully add to it anything except a reference to *Mulcahy* v. *Archibald* (1898), 28 Can. S.C.R. 523, cited at Bar by Mr. Ferguson.

BRODEUR, J.:—I concur in the result.

MIGNAULT, J.:—In my opinion, the trial Judge arrived at the right conclusion on the evidence. I have fully considered everything stated by Mr. Fraser in his carefully prepared argument, but in a case such as this one the judgment of the trial Judge is deserving of the greatest weight. I have no hesitation in dismissing the appeal with costs.

Appeal dismissed.

SMITH v. CANADIAN PACIFIC R. Co.

Saskatchewan Court of Appeal, Haultain, C.J.S., McKay and Martin, JJ.A. November 7, 1922.

EVIDENCE (§VIIJ—640)—RAILWAY CROSSING—NEGLIGENCE—FAILURE TO BLOW WHISTLE—POSITIVE AND NEGATIVE EVIDENCE—VALUE OF—FINDING OF JURY.

The jury may properly consider and attach great weight to the evidence of witnesses who testify that a train did not blow its whistle at the proper place before crossing a highway and where the jury has found that the defendant was guilty of negligence in that the whistle was not blown to meet the statutory law, and where there is evidence on which such finding can be made, an Appellate Court will not interfere with such finding.

NEGLIGENCE (§IIB—86)—CONTRIBUTORY—WHAT CONSTITUTES.

A young girl riding with her father in his car, which he is driving, has a right to rely on him as a competent and careful driver, and is not guilty of contributory negligence in not keeping a lookout for approaching trains and warning the driver.

APPEAL by defendant from the trial judgment, in an action for damages for injuries received when the automobile in which plaintiff was riding was struck by defendant's train. Affirmed.

L. J. Reycraft, K.C., for appellant.

G. H. Barr, K.C., for respondent.

HAULTAIN, C.J.S.:—The facts of this case are fully set out in the judgment of my brother Martin. On the trial of the action the findings of the jury were as follows:—

"Q: Was the accident in which the plaintiff was injured caused by any negligence on the part of the defendant? A: Yes. Q: If so, in what did such negligence consist? A: The engineer did not blow the whistle to meet the requirements of the statutory law. Q: Was the plaintiff guilty

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of any negligence that contributed to the accident? A: No. Q: If so, in what did such negligence consist? A: ..... Q: At what amount do you assess the damages? A: $3,000."

The findings on the first and second questions were made on very conflicting evidence and should not, in my opinion, be disturbed. It was contended very strongly for the appellant that the evidence on this point given on behalf of the respondent was at best of a negative character, while the evidence for the appellant was of a positive and affirmative character. This distinction must not be drawn too finely. The witnesses Leibel and Lorlacher both swear positively that the whistle was not blown when the train passed the whistling post. They were in a position in relation to the train and the whistling post where they must have heard the whistle blow if it had been blown. Leibel, at least, says that he saw the train as it was coming past the whistling post, and in answer to the question, "Why were you watching it?" replied: "Because Mr. Smith ahead of us had made no attempt to either go fast or stop, so I kind of expected any time to hear the train—the whistle blow because that car" (Smith's) "was ahead of us and I could see it was getting in danger all the time." Again, on being asked his reason for saying the whistle was not blown, he said: "Because the train did not whistle, watched him all the way coming down and kind of expecting to hear him whistle because the car was ahead of us and I could see, pretty near see it was getting in danger more of the time."

The other ground taken in support of the appeal was that the plaintiff was guilty of contributory negligence, and that the finding of the jury as to her negligence was perverse and against the weight of evidence.

The evidence shews that the plaintiff, a girl of 16, was being driven into town by her father in his automobile. She sat on the back seat of the car, on the left hand side. There was a trunk in the back part of the car, between the front and back seats, which obliged the plaintiff to sit well to the left hand side of the car. The car was closed on the right hand side, that is, the curtains had been put on. Some of the mica in the curtain had been broken and was covered up with cloth, but there was some mica left through which a view of the railway track was possible. The plaintiff admitted that she did not keep a look-out watch for any train which might have been approaching the railway crossing, but added that she could not have done so very easily as she would have had to get up from where she was sitting, pre-

sumably because the trunk was between her and the curtain on the right hand side.

The charge to the jury on this point, which I think it desirable to quote nearly in full, was as follows:—

"The third question is, 'Was the plaintiff (that is, Mary Smith) guilty of any negligence that contributed to the accident?' You will bear in mind, of course, that it was the father who was driving the car, that she was sitting in the rear seat of the automobile. She is not responsible or answerable for any negligence on the part of her father. Was she negligent herself? Did she omit to take some care which the ordinary reasonable person in her position would have taken on the occasion in question? That is the question for you to consider. Was she justified in leaving all the responsibility, we will say, of driving and looking out for dangerous crossings to her father, who was driving the car, or should she as an ordinary person exercising reasonable care, being a passenger in the back seat of the car, have kept a lookout for herself and have observed the train or heard signals if the signals were given? It is entirely for you to say, gentlemen of the jury, as to whether—and I would hardly go as far as her counsel in saying that there should be much less care exercised on the part of a girl of sixteen of her grade of intelligence than by an older person —there was any lack of care on her part, such care as an ordinary person placed in her position would have taken on the occasion in question. The suggestions are that she should have looked out and seen the train, and of course if she saw the train, saw the danger, I think you will agree with me that it would have been incumbent on her, it would be her duty, it would be the duty of any reasonable person, to have notified the driver of the automobile. So practically it resolves itself into the question whether an ordinary person exercising reasonable care would have kept a watch or looked out to see whether any train was coming on the occasion in question. That is a matter of inference. You have heard all the evidence, you know how she was seated in the car, in the back seat; she thinks she was on the left side, if I recall the evidence properly, and the curtains were up on the right; apparently some of the mica had been destroyed, and where some of it, at least, had been patched over, according to her evidence, with cloth, but there still was some mica opposite the back seat through which she could have looked and seen the railway track. Now was

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she or was she not negligent in not looking out for the train in question?"

Leaving out of consideration, for the moment, the question of law which I will discuss later on, this portion of the charge was too much in favour of the defendant in several particulars, but mainly because it left to the jury to decide whether under all the facts of the case there was a duty cast on the plaintiff, a passenger and the infant daughter of the driver, of keeping a lookout for herself and warning the driver against possible danger from an approaching train.

In view of the foregoing, I cannot see any reason for questioning the finding of the jury on this point. I am further of the opinion that the plaintiff was entitled to succeed on this issue for the following reasons. The case on this point involved two questions; first, whether there was any duty on the plaintiff to take care, which was for the Judge to decide, and second, if there was such a duty, whether there had been a breach of it proved, which was a question of fact for the jury. In my opinion there was no evidence to go to the jury of the breach of any duty which the plaintiff was obliged by law to perform. Negligence consists in omitting to do something which ought to be done. If there is no duty to take care, there is no negligence in the legal sense of that word. *Blyth* v. *Birmingham Waterworks Co.* (1856), 11 Exch. 781, 156 E.R. 1047.

Thomas v. *Quartermaine* (1887), 18 Q.B.D. 685, Bowen, L.J., at p. 694, says:—"The ideas of negligence and duty are strictly correlative, and there is no such thing as negligence in the abstract, negligence is simply neglect of some care which we are bound by law to exercise towards somebody."

The Supreme Court of Canada, when this case was before it at an earlier stage in its history (1921), 59 D.L.R. 373, 62 Can. S.C.R. 134, decided on the authority of *Mills* v. *Armstrong; "The Bernina"* (1888), 13 App. Cas. 1, that the plaintiff was not liable for the negligence of her father, the driver of the automobile "as he was neither her servant nor agent but was the owner and the driver of the car having sole control of it with which she had neither the right nor the power to interfere." (59 D.L.R. at p. 377). It was further held that the law as stated in *The "Bernina"* case, with respect to the non-liability of passengers on board of an omnibus or a steamship, is applicable, in the absence of any special facts to the contrary, to those travelling in private

motors. *C.P.R. Co.* v. *Smith*, 59 D.L.R. 373, 62 Can. S.C.R. 134.

This case only decided that the contributory negligence of the father, who was neither the servant nor the agent of the daughter, was no defence in the daughter's action against the railway company. But it would also appear to be authority for the proposition that there was no duty on the part of the daughter to look out for an approaching train. (Per Davies, C.J., 59 D.L.R., at p. 377, distinguishing the case of *G. T. R. Co.* v. *Dixon* (1920), 51 D.L.R. 576, 47 O.L.R. 115).

In *The "Bernina"* case, Lord Watson, 13 App Cas. 1, at p. 18, said:—

"I am of opinion that there is no relation constituted between the driver of an omnibus and its ordinary passengers which can justify the inference that they are identified, to any extent whatever with his negligence. He is the servant of the owner, not their servant; he does not look to them for orders, and they have no right to interfere with his conduct of the vehicle, except, perhaps, the right of remonstrance when he is doing, or threatens to do, something that is wrong, and inconsistent with their safety. Practically they have no greater measure of control over his actions than the passenger in a railway train has over the conduct of the engine-driver. I am, therefore, unable to assent to the principle upon which the case of *Thorogood* v. *Bryan* (1849), 8 C.B. 115, 137 E.R. 452, rests. In my opinion, an ordinary passenger by an omnibus or by a ship is not affected, either in a question with contributory wrongdoers or with innocent third parties, by the negligence, in the one case, of the driver, and, in the other, of the master and crew by whom the ship is navigated, unless he actually assumes control over their actions, and thereby occasions mischief. In that case, he must, of course, be responsible for the consequences of his interference."

If the passenger has "no right to interfere" and "practically no control," there does not seem to be any legal obligation on his part to keep a look-out.

Pollock on Law of Torts, 11th ed., pp. 481-482, says:—

"No man is bound (either for the establishment of his own claim or to avoid claims of third persons against him) to use special precaution against merely possible want of care or skill on the part of other persons who are not his servants or under his authority or control." See also *Daniel* v. *Directors etc. of Metropolitan R. Co.* (1871), L.R. 5 H.C. 45.

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The negligence of the driver would not make the passenger liable to a third party, unless he actually assumed control over the driver and thereby occasional mischief. If the passenger is only liable for the "consequences of his interference," in such a case, it must follow that, in the absence of special facts creating such a duty, he is under no legal obligation to interfere. There are no such special facts in the present case, and I am, therefore, of the opinion that the plaintiff was not guilty of any negligence in not looking out for the train or warning her father.

The appeal should be dismissed with costs.

McKAY, J.A., concurs with MARTIN, J.A.

MARTIN, J.A.:—On September 29, 1919, Thomas Watson Smith, accompanied by his daughter Mary Smith, and his daughter Edna Smith, since deceased, while driving in an automobile came into collision with the train of the defendant at the intersection of a highway crossing over the defendant's railway a short distance northeast of the city of Regina. The plaintiff was injured in such collision, as was also his daughter and her sister, Edna Smith, who subsequently died by reason of the injuries received. The father of the plaintiff, and the plaintiff by her father as next friend, brought action against the defendant in the Court of King's Bench, Judicial District of Regina. The action was tried at Regina before Embury, J., and a jury on June 11 and 12, 1920. At the close of the plaintiff's case defendant's counsel moved for a non-suit. The trial Judge allowed the application for a non-suit and withdrew the case from the jury, and gave judgment dismissing the action with costs (1920), 53 D.L.R. 411. From this judgment the plaintiffs appealed to this Court, and the majority of the Court were in favour of allowing the appeal. The appeal was therefore allowed, and a new trial ordered (1920), 55 D.L.R. 542, 13 S.L.R. 535. The defendant appealed from the judgment of this Court to the Supreme Court of Canada. The Supreme Court allowed the appeal in so far as the action of Thomas Watson Smith was concerned, holding that he was the author of his own misfortune, but disallowed the appeal so far as the action of Mary Smith was concerned, holding that the daughter was not responsible for her father's negligence, and directing that a new trial be had so far as the daughter's claim was concerned. 59 D.L.R. 373, 62 Can. S.C.R. 134.

The new trial covering the claim of Mary Smith was held by MacDonald, J., and a jury, on February 10 and 11, 1922.

The jury found that the accident in which the plaintiff Mary Smith was injured was caused by negligence of the defendant; that the negligence consisted in that the engineer did not blow the whistle to meet the requirements of the statutory law, and assessed damages at $3,000. Judgment was accordingly entered in favour of the plaintiff, Mary Smith, for the sum of $3,000, and costs of the action. It is from this judgment in favour of the plaintiff Mary Smith that the defendant now appeals.

The facts, as they appear from the evidence taken at the trial, may be briefly stated. The plaintiff Thomas Watson Smith left his home, some miles from the city of Regina, on the afternoon of September 29, 1919, to take his daughters Mary and Edna to school in the city. He was driving a two-seater Reo car. On the front seat with him was his daughter Edna, and his daughter Mary occupied the rear seat, where there was also some baggage. The curtains of the car were closed on the right side, but there were mica windows through which persons sitting on both front and rear seats could see, although it also appears that the mica in the curtain on the rear of the car had been patched with cloth and it would only be with some difficulty that a person sitting on the rear seat could see; the left hand side of the car was open. The road over which the plaintiff travelled runs east and west and is intersected at a distance of about half-a-mile one from the other by two lines of railway: the Grand Trunk Pacific and the line of the defendant. The latter being west of the former. The country is level, and a person travelling west has a full view of defendant's line, there being nothing to obstruct the view. At the time the plaintiff crossed the Grand Trunk Pacific line the defendant's train was about a mile from the place of the accident, and was travelling in a southerly direction at a speed of about 30 miles per hour down a slight grade. After the car containing the plaintiff had crossed the Grand Trunk Pacific line it was followed at a short distance by another car, occupied by three persons and travelling at the same rate as the plaintiff. Two of these three persons were called at the trial and swear that they saw defendant's train from the time they crossed the Grand Trunk Pacific track, and they had no difficulty whatever in seeing it. They also say that the engineer did not whistle at any time until it gave two short "toots" immediately before the accident.

The plaintiff Mary Smith states that she heard no warning, neither whistle nor bell, from the approaching train;

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that she did not see the train, and that there was nothing that she knew of which would have prevented her from hearing the whistle if it had been sounded. She further states that she could not readily see out of the car because the mica in the curtain of the car had been patched with cloth. Her attention was apparently distracted by looking at the car coming behind, and this, perhaps, may account for the fact that she did not look for the train more carefully, if, in fact, she looked at all. Her evidence on this point is as follows:—

"Q: Did you see the train at all? A: No, I don't remember seeing it. Q: Did you look for it at all, look to see if it was coming? A: Well, I was watching the car behind. Q: I am asking now, did you look for the train, Miss Smith? Did you look for the train to see if the train was coming at all? A: I do not exactly remember looking for the train."

The following are the findings of the jury by question and answer: [See judgment of Haultain, C.J.S., ante p. 409.]

It was contended by counsel for the defendant that the evidence submitted on behalf of the plaintiff as to whether or not the whistle sounded is of a purely negative character, and that no weight should be attached to the same in view of the positive and affirmative evidence on behalf of the defendant.

It is quite true that the evidence submitted on behalf of the plaintiff on this point is largely of a negative character, but such evidence is entitled to be weighed with due consideration to the proximity of the witnesses, their occupation at the time, and generally any attendant circumstances which would or would not tend to give to such evidence a positive character. I am of the opinion that the evidence of Leibel and Lolacher, two of the men who were in the car immediately behind the car in which the plaintiff was being driven, is entitled to much more weight than the evidence of a witness who merely says "I did not hear it."

Part of the evidence of the man Leibel is as follows:—

"Q: Did you notice the train coming down the grade before the accident—the C. P. R. train? A: I did. Q: Did it whistle as it went by the whistling post? A: It did not." And again:—"Q: Did you see the train as it was coming by the whistling post? A: Yes. Q: Why were you watching it? A: Because Mr. Smith ahead of us hadn't made no attempt to either go fast or stop you see, so I kind of expected any time to hear the train—the whistle blow and I did not hear it. It did not blow." And again:—"A: Because I seen the train—watched him all the way coming down and kind

of expecting to hear him whistle, because that car was ahead of us and I could see—it as getting in danger more of the time."

Part of the evidence of the witness Lolacher is as follows:

"Q: Did you see the train as it was coming down the grade from the northwest? A: Yes. Q: Did you see it as it passed the whistling post? A: Yes. Q: Did it blow the whistle? A: No."

In my opinion the jury could properly consider and attach great importance to evidence of this character. These two men are disinterested witnesses; they both saw the train coming and watched it, and they watched it more carefully as they approached the railway crossing, and watching the train they both testify that it did not whistle.

Moore on Facts, 1908 ed., vol. 2, p. 1348, sec. 1201, says:—"The jury might very properly attach great weight to the testimony of witnesses who were observing at the time whether signals were being given and had special reasons for impressing the fact on their memories, and they declare that no signals were given."

In *Dublin, Wicklow & Wexford R. Co.* v. *Slattery* (1878), 3 App. Cas. 1155, at p. 1175, Lord Penzance makes the following statement:—

"It is, I think, impossible to say that on the question whether the whistle was sounded or not the oath of at least two witnesses who were on the spot and within hearing was not evidence which jurors were bound to consider in contrast with the positive evidence given by several witnesses on the other side that the whistle was in fact sounded as usual."

The jury found that the defendant was guilty of negligence in that the whistle was not blown, to meet the requirements of the statutory law. The defendant contends that this finding should be set aside, on the ground that it is perverse and that there is no evidence to support it. As indicated above, however, I am of the opinion that there was evidence on which such a finding could be made, and while an Appellate Court may feel that the preponderance of evidence is against a finding, or may even feel that such a finding should not have been made, still, as long as there is evidence to support the conclusion of the jury, such finding should not be disturbed.

In *Commissioner for Railways* v. *Brown* (1887), 13 App. Cas. 133, Lord Fitzgerald states the law as follows, at p. 134:—

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"There is no doubt about the principles of law which have been brought under the notice of their Lordships by the appellant's counsel, and which ought to govern this appeal. Chief Justice Tindal, about fifty years since, laid down a rule to this effect: that where the question is one of fact and there is evidence on both sides properly submitted to the jury, the verdict of the jury once found ought to stand; and that the setting aside of such a verdict should be of rare and exceptional occurrence. Their Lordships are not aware that the rule thus laid down has been abandoned."

In *G. T. R. Co.* v. *Griffith* (1911), 45 Can. S.C.R. 380, at pp. 399-400, Anglin, J., said:—

"We have, however, the fact that Parliament has deemed it wise to enact that railway trains approaching highway crossings shall give certain signals not for the purpose of attracting the attention of those who are already on the alert and need no warning, but for the purpose of arousing those who are distracted or whose attention is absorbed owing to whatever cause and who, therefore, need warning. Parliament has specified the particular signals which in its judgment are best fitted to serve this purpose. Where it is clearly proved that those signals have been omitted and that an accident, which the giving of them *might* have prevented, has occurred, it must, I think, always be within the province of a jury to say whether or not, having regard to all these circumstances, the breach of statutory duty should be taken to be the determining cause of the accident. The moment the decision is reached that the statutory signals, if given, might have prevented the accident and there is evidence of their omission, it is not proper for the trial Judge to withdraw the case from the jury (unless, indeed, what is incontrovertibly contributory negligence is admitted or is so clearly proved in the plaintiff's own case that it would be proper to direct a jury to find it) and if, upon the case being submitted to them, the jury see fit to draw the inference that the omission of the signals was in fact the cause of the accident, it is not competent for an appellate court to disturb that conclusion. Had I been trying this case without a jury I am by no means satisfied that I should have reached the conclusion at which the jury arrived. But, as has been pointed out time and again an appellate Judge should not, for that reason, interfere."

It is also contended on behalf of the defendant that the plaintiff herself was guilty of contributory negligence, and

that such contributory negligence was the cause of the accident.

The question was brought to the attention of the jury very explicitly in the charge of the trial Judge:—

"Was she negligent herself? Did she omit to take some care which the ordinary reasonable person in her position would have taken on the occasion in question? That is the question for you to consider. Was she justified in leaving all the responsibility, we will say, of driving and of looking out for dangerous crossings to her father who was driving the car, or should she as an ordinary person exercising reasonable care, being a passenger in the back seat of the car, have kept a look-out herself and have observed the train or heard signals if the signals were given? It is entirely for you to say. . . ."

The issue having been thus explicitly stated, the jury found that the plaintiff was not guilty of contributory negligence.

In *G. T. R.* v. *Griffiths*, 45 Can. S.C.R., at p. 398, Anglin, J., said:—

"It certainly cannot be laid down as an absolute rule that failure to look and listen before crossing a railway must in every instance and in all circumstances be held to be contributory negligence sufficient to debar relief. There may be circumstances which wholly excuse that omission. That the deceased might have been in a flurried state of mind owing to anxiety to procure a ticket for a friend was deemed a consideration which could not have been withdrawn from the jury in *Dublin, Wicklow and Wexford R. Co.* v. *Slattery*, 3 App. Cas. 1155."

I do not wish to cast any doubt upon the very proper rule which has been frequently laid down as to the duty which the law imposes upon persons travelling along highways and approaching crossings at rail level. They must act as reasonable beings, and must look before attempting to cross to see whether they can safely do so or not, unless there is any special circumstance which excuses them. In the case at Bar, without deciding the question as to whether or not the law places any duty upon a person situated as the plaintiff was on the occasion of the accident—and I do not consider it necessary to pass upon that question because the jury has found that there was no contributory negligence on the part of the plaintiff—there were, in my opinion, special circumstances which could be very properly considered by a jury in coming to a conclusion on the question of contributory

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negligence. At the time of the accident the plaintiff was 16 years of age; she was being taken to school at the city of Regina by her father, who was the driver and on whom she was entitled to rely as a competent and careful driver; her relationship to the driver was not that of master and servant or employer and agent; she had no control over the car; she was simply a passenger trusting that the driver would exercise proper care. Her surroundings at the time of the accident must be taken into consideration in arriving at a conclusion as to her duty at the time; the curtain was up at the side of the automobile on which the train was approaching; the mica in the curtain could only be seen through with difficulty, as some of it was gone and cloth had been used for patching. Her attention was distracted by the automobile coming from behind. Under all the circumstances, I do not think that the finding of the jury should be disturbed.

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

Appeal dismissed.

W. Y. McCARTER, BURR Co. Ltd. v. HARRIS.

Alberta Supreme Court, Appellate Division, Stuart, Beck and Hyndman, JJ.A. November 24, 1922.

DAMAGES (§IIIA—40)—CONTRACT FOR AGENCY OF PATENT MEDICINE—BREACH OF CONTRACT BY MANUFACTURER—MEASURE OF COMPENSATION.

Under an agency contract for the sale of defendant's "Wonder Health Restorer," a patent medicine under the Proprietary or Patent Medicine Act, 1908 (Can.), ch. 56 (and amendment 1919 (Can.), ch. 66), the defendant was to supply the plaintiff with certain quantities of the medicine either in bottles or in bulk as set out in detail in the agreement. After the agreement had been in force for some time the defendant wrote to the plaintiff refusing to send any more of the goods in bulk, and giving notice that if he did not receive an order by the 1st of June for the quantity required in bottles after that date he would not fill any orders sent in for goods either in bulk or bottles. On May 31 the plaintiff under protest sent in an order for a certain amount of the goods in bottles; this order was received on June 3rd and defendant refused to fill the order. The Court held that this was a breach of the agreement which entitled the plaintiff to damages although the Proprietary or Patent Medicine Act did not allow the sale of the goods in bulk the defendant was not justified in refusing to ship the quantity ordered in bottles, and that in estimating the amount of damages the Court should consider a term in the contract by which the plaintiff had the right to renew, at its termination for another 5 years, but that the damages assessed must not be such as to put the plaintiff in a better position than if the contract and renewal had been actually fulfilled.

LIBEL AND SLANDER (§IIIA—96)—QUALIFIED PRIVILEGE—NECESSITY OF PROVING ACTUAL MALICE.

In an action for libel where there is a qualified privilege the

plaintiff must successfully bear the burden of proving the existence of actual malice or ill-will or some wrong motive, and where a defendant is actuated by a sincere belief in the statements made, and the evidence shews that there is reasonable ground to support such belief the action will fail.

APPEAL by defendant from the trial judgment in an action for breach of contract and for libel. Allowed in part.

H. P. O. Savary, K.C., and *R. S. McKay*, for appellant.

A. McL. Sinclair, K.C., for respondent.

STUART, J.A.:—The male defendant was the patentee and manufacturer of a certain patent medicine called the "Wonder Health Restorer," and carried on business in Calgary. He had been selling the medicine in Alberta and British Columbia through the drug stores. On January 14, 1920, he entered into an agreement in writing and under seal with one W. Y. McCarter, of Victoria, B.C., whereby it was stipulated (1) that McCarter "is hereby constituted and appointed the sole and irrevocable agent of the principal (i.e. Harris) his heirs and assigns for the selling and distributing of the medicine and composition called Wonder Health Restorer, the Famous Herbal Treatment of Disease, for British Columbia for the term of five years, subject to a renewal thereof at the same price mentioned herein" (2) "The principal covenants and agrees to sell to and supply the agent with the said medicine or composition and ship and deliver the same f.o.b. Calgary during the continuance of the said term in such quantities, as may be required by the agent, with proper directions and in accordance with the order of the agent, that is to say, either in bottles, labelled and ready for sale, or in bulk, as the case may be, and of the same quality as the same has been hitherto composed, and in accordance with the first shipment made to the said agent, and always in compliance with the Acts of the Parliament of the Dominion of Canada or of any of the Provinces of the Dominion of Canada or of any Orders in Council which now exist or which may hereafter be passed, at the rates or prices following, that is to say: Wonder Health Restorer, in bulk, $25 per imperial gallon; Thymus Bitter Tonic, in bulk, $20 per imperial gallon." (3) that "the agent agrees with the said principal that after the expiration of one year from the date hereof his orders for the said medicine shall not fall below a minimum of $3,000 per year, the principal agreeing to supply the same in any further quantities that may be ordered" and (4) that "the agent shall be at liberty to assign the benefit of this agreement with the consent in writing of the principal."

There were other stipulations in the agreement which

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need not now be referred to.

McCarter appears to have proceeded for a time to act under this agreement but on March 10, 1920, he secured the incorporation of a joint stock company under the laws of British Columbia, which is the plaintiff herein.

On the previous day, i.e., March 9, a letter was sent to Harris by McCarter which was signed "The W. Y. McCarter Burr Co., per W. Y. McCarter," in which, after making some complaints about the way business was going on, it was said:—

"I have had to get the assistance of my son-in-law Mr. Burr whom I mentioned to you was a druggist to assist me in this business and we have had to organise a company known as 'The W. Y. McCarter, Burr Company Limited.' We are the only members of this company and would ask you to kindly consent to having our new company take over the contract of myself with you. If this is agreeable to you and I think it would be quite agreeable to you to have the assistance of my son-in-law who is a druggist would you kindly sign the enclosed consent and return it is us."

The document referred to reads, as put in evidence, as follows:—

"The W. Y. McCarter, Burr Co., B.C. Distributors. Wonder Health Restorer, Vancouver, B.C., March 19, 1920.

I, George F. Harris of 513, 24th Avenue, West, Calgary, Alberta, hereby consent that W. Y. McCarter, my agent for the whole of the Province of British Columbia, mentioned in a certain contract made on the 14th day of January, 1920, between myself as Principal and W. Y. McCarter, as agent, may assign and transfer the said contract as he so desires, to a company known as 'The W. Y. McCarter, Burr Company Limited' and I will accept the said company in the place of and in the stead of the said W. Y. McCarter and will perform all my agreements with the said company in just as business like a manner as I would with W. Y. McCarter himself.

Dated at Calgary this 19th day of March, 1920.

Geo. Harris."

On March 11 Harris signed the above document and wrote a reply to McCarter personally in which he enclosed the document signed, and, after making a reply to the other matters contained in McCarter's letter, he said: "I am returning the enclosed contract form which you sent for my approval and trust this will help you carry on to better advantage also be assured of my best cooperation in promoting

the sale of Wonder Health Restorer to our mutual advantage."

On March 26 McCarter executed an assignment in writing of the agreement in question to the plaintiff company. The terms of this assignment are not material.

On April 26 Harris sent to the plaintiff company the following document signed by him:—

"Calgary, Alta., April 26th, 1920.

To whom it may concern—

I have made arrangements with the W. Y. McCarter-Burr Co. Ltd., of Vancouver, B.C., to handle Wonder Health Restorer for the Province of British Columbia. All orders and business will now be transacted through them, as they are the sole distributors for this preparation.

Sincerely yours, Geo. Harris."

The exact reason for the execution and delivery of this document is not very clear upon the evidence but it is apparent that it must have been intended to convey to the public an assurance that the plaintiff company were the only persons entitled to handle the Wonder Health Restorer in British Columbia.

Thereafter the defendant Harris continued to do business with the plaintiffs and to accept and fill orders received from them and take payment therefor.

The plaintiffs have sued Harris for a breach of the contract and one contention raised in defence is that there was no notice in writing of the assignment ever given to the defendant in compliance with the provisions of sub-sec. 13 of sec. 37 of the Judicature Act, 1919 (Alta.), ch. 3, with respect to the assignment of a *chose in action*.

I think this defence is untenable. What happened here was, in my opinion, far more than a mere assignment of a *chose in action*. It was more even than an assignment of a contract and I do not think we need to concern ourselves with the question whether or not the contract was strictly assignable at law. The result of all that happened was, in my opinion, that a contract was created and entered into directly between the plaintiff and Harris. Harris in his letter of March 11, which enclosed his consent, which, of course, was before the assignment, told McCarter that if he assigned the contract to the plaintiff he (Harris) would still be bound by all the terms of the agreement. He undoubtedly knew that the plaintiff company proposed to take McCarter's obligations under the contract upon itself and must ultimately have known that an assignment had taken

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place. Then in his general announcement of April 26 he clearly intimated directly to the plaintiff that he considered that it was standing in McCarter's place under that contract. And by these proceedings and by all the subsequent correspondence between the plaintiff and Harris, it seems clear to me that the plaintiff and Harris must be held to have each impliedly if not expressly agreed with the other to be bound each to the other by the terms of the McCarter contract and that their mutual promises constituted reciprocal considerations.

Another defence raised was that the document of consent had been altered by what would be a forgery. But in the first place I am not sure, in the view I have taken of the true basis of the contractual relationship of the parties, i.e., as being rested upon all the transactions between the parties, that even if a forgery had been proven it would in such circumstances have constituted a defence. Even if the document did not exist at all it seems to me very probable that there would be enough to establish the contractual relationship. But be that as it may, the trial Judge did not find a forgery and, indeed, ignored the point entirely in his reasons for judgment. One would gather from his silence that the point was not pressed very seriously at the trial. The question, therefore, for us is whether we should now find that the document had been changed after execution and delivery. The change alleged is that the date had been changed from March 9 to March 19. There are, of course, circumstances of grave suspicion. The consent was enclosed in a letter of March 9. There is no spacing by the typewriting machine on either side of the figure 1 where it appears in the two places in the document where the date "19th" is given. The copy retained by the plaintiff is dated the 9th, but it is not a carbon copy. It was made by a second separate operation of the typewriting machine. The stenographer was not a witness and Harris (and this is the main point) does not swear that when he signed it it bore the date March 9. He could not and did not, swear that it had been altered after he signed it. In these circumstances I do not think this Court should now make a finding of fact that the document had been altered after delivery, and so proceed to defeat the plaintiff's action. Such a course would, in my opinion, be very unsafe. The inference from the circumstances ought to be quite inevitable before it would be justifiable. I, therefore, think this defence fails.

This brings us to the merits of the case. The contract, as

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will be seen, provided that Harris must deliver the medicine to the plaintiff in accordance with its order "either in bottles labeled and ready for sale or in bulk as the case may be. . . . . and always in compliance with the Acts of the Parliament of Canada. . . . . or of any Orders in Council which now exist or which may hereafter be passed at the rates or prices following, that is to say Wonder Health Restorer in bulk $25 per imperial gallon." There was no price stipulated for the medicine in bottles or packages. The contract is silent upon this point.

For a time the defendant supplied the medicine to the plaintiff in bulk as it was asked for. Then on October 23, Harris wrote to the company acknowledging receipt of an order for 10 gallons of the medicine but went on to say, "I don't intend to supply any more in bulk to any one as I have got to protect my own business. All bottles now must be sold in two sizes, two and five dollars, and my seal will be on every bottle which if broken is not genuine. . . . . If you still want to keep the agency for W. H. R. for B. C. I will allow you a fair profit. But it will be all bottled in future from my headquarters."

The plaintiff replied making a protest that the contract entitled it to ask for it in bulk. Then on October 29 Harris yielded and sent a shipment in bulk saying in a letter:—

"We sent you the shipment in bulk because my registered seal for the bottles is not completed yet. But as soon as it arrives, also cartons, I intend to leave for the coast and make arrangements with you. The reason I am making this change is a protection both to the public and myself . . . There are so much of my medicine going into drug stores now that it could easy be adulterated so I must have it protected. . . . I hope I have made it plain to you for I will allow you a fair profit to handle it but Bitter Tonic and all will be bottled from my headquarters after my seal and cartons arrives."

As late as February, however, Harris shipped another quantity in bulk and said in a letter:—"Now with regard to shipment in bulk the one you got on Saturday is the last I am going to ship that way. That was sent you so that you can use up all your bottles and printed matter. I will submit you prices in bottles in a few days."

About the end of March the plaintiff sent two telegrams ordering 5 gallons in bulk to Vancouver and Victoria respectively. Harris sent a short wire saying: "No more medicine in bulk, writing."

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Then correspondence ensued containing arguments and protests. This continued through April. Then Harris left Calgary for England, leaving his wife, the defendant Minnie Harris, in charge of his business. It is not necessary to quote further from the letters which passed, except to refer, perhaps, to an interesting statement in a letter sent by Mrs. Harris in her husband's name on May 10, in which she says:—"It does not matter what the contract calls for we can plainly see our mistake shipping the medicine in bulk."

Then on May 21 Mrs. Harris wrote again, repeating the refusal to ship in bulk and then saying:—

"Take notice that if we do not receive your order by June 1, 1921, for the quantity you require in bottles after that date we will not fill any orders you may send either in bulk or bottles. And on and after June 15 we will take charge of the British Columbia business ourselves. This is absolutely our final decision and there is no use wiring us any more regarding shipments in bulk. . . . You have just got to June 1, 1921, now to make up your minds whether you are through or not so an early reply will oblige as we will have to make our arrangements according to your decision."

On May 31 the plaintiff replied to this letter saying it was in a predicament as orders were coming in, and going on to say:—

"Therefore without prejudice we are sending you the order below. . . . Under clause 27 our contract dated January 14, 1920, and under protest and without prejudice to our rights to have orders filled in bulk please ship to us *via* Dominion Express to our address Vancouver 3 doz. Wonder Health Restorer large size."

This order, of course, did not reach Harris until the 2nd or 3rd of June and on the 4th Harris, through his wife, wrote refusing to fill any more orders of any kind. The letter also made direct charges that the plaintiff had been adulterating the medicine.

The defendants then proceeded to make arrangements with other dealers in British Columbia to handle the medicine. On July 16 Harris himself returned from England and sent a wire to the plaintiff asking for an interview in Vancouver but the plaintiff answered that he should see their solicitors in Calgary. The action was begun on October 24, 1921.

The substantial question is whether the defendant Harris committed breach of his contract for which he is liable in

damages. The trial Judge held that he was liable and assessed the damages at $12,000.

The first point to be considered is whether the provisions of the Proprietary or Patent Medicine Act 1908 (Can.), ch. 56, amended by 1919 (Can.), ch. 66, are so expressed as to forbid Harris from sending the medicine to the plaintiff in bulk and to make it imperative that he himself as the manufacturer should put the medicine in bottles or packages before delivery to the plaintiff. Although it will have been observed from the correspondence quoted that Harris did not base his refusal to deliver any longer in bulk upon the requirements of the law, it is clear that he can now justify his refusal upon that ground if the statutes do, in their proper interpretation, forbid his doing so. The contract itself provides that the deliveries must be in accordance with the statute but this, of course, does not advance the matter except to exclude from consideration any question of the illegality of the contract.

There is no doubt some ground for uncertainty as to meaning of the statutes. But after reading all the provisions together my view is that the delivery of the medicine to the plaintiff was itself a distribution within the meaning of 1908 (Can.), ch. 56, sec. 4, which says:—

"All proprietary or patent medicines shall be put up in packages or bottles, and every one of these, intended for sale or distribution in Canada, shall have placed upon it in conspicuous characters forming an inseparable part of the general label and wrapper, the name and number under which the medicine is registered with the words 'The Proprietary or Patent Medicine Act' and also the manufacturer's name and address, which name and number shall be sufficient identification as to the manufacturer thereof, for the purposes of sec. 14 of this Act."

In my opinion what happened between the parties was, indeed, both a sale and a distribution. It is true the contract refers to "principal" and "agent" as being the relationship of the parties. But we have to look at the substance of the matter. There was no commission on a percentage basis, provided for. The plaintiff had to pay in full at a certain price for all the medicine he got. There was no right of return. So that I think the essence of the matter was a sale and also a distribution. Harris was also distributing or selling the medicine elsewhere and his dealings with the plaintiff were a "distribution," not, perhaps, within British Columbia, but certainly within Canada.

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Then it was argued that even so there was nothing in the law to prevent the defendant selling in bulk in large bottles or packages with the necessary labels thereon because the statute does not limit the size of these. Technically, perhaps, this is correct but it is perfectly clear that the plaintiff never thought of this and did not intend to demand such a method of fulfilling the contract and the law, and Harris knew very well that such was not their intention. He would not, I think, have been bound to supply them in that way if he knew that they proposed to break open such large bottles and rebottle themselves. For sec. 14 clearly indicates to my mind that all persons selling or exposing any patent medicine for sale must sell it in the same condition they receive it and that this includes the manner of containing as well as the quality of the ingredients.

The words of the statute are, of course, not precise on the point but, considering the evil which was intended to be prevented I think the obvious meaning is such as I have indicated.

However, it really does not appear to make so very much difference so far as the question of breach is concerned. The parties were disputing as to their obligations under the contract, and so far as the plaintiff at least was concerned, it was so far as the evidence directly shews, a *bona fide* dispute as to its proper interpretation. The plaintiff never gave any indication whatever that it intended to repudiate its obligations under the contract, whatever they were. And while this dispute was still going on the plaintiff yielded and asked to be supplied with the medicine in bottles. In my opinion the defendant had no right to force the plaintiff to say within a limited time of very short duration whether it intended to accept the medicine in bottles. Assuming that it was bound to accept it in bottles its obligation under the contract was to take at least $3,000's worth of the medicine in a year. The second year began on January 14, 1921, and on June 1, 1921, the plaintiff still had over 7 months within which to give his orders in sufficient quantity to bring the total up to that sum. The plaintiff was not obliged to order any particular quantity each month. And while it was quite plainly insisting upon a mistaken view of its rights, it was also quite clearly giving no indication which would justify the defendant in believing that it intended to repudiate the contract altogether.

Leake on Contracts, 7th ed., ch. 5, p. 655, says:—"A *mis-*

taken construction of the contract or an imperfect tender which may be amended in time or an expression of present disability to perform it is not sufficient," that is, not sufficient to justify the other party in treating it as an intention to renounce the contract. And I think this principle is clearly recognised, if not explicitly stated in *Mersey Steel & Iron Co.* v. *Naylor* (1884), 9 App. Cas. 434.

In my opinion, therefore, the defendant himself committed a breach of the contract when he refused through his agent, his wife, to fill the order of May 31, even though it did not arrive until after June 1, and in refusing to fill any further order of any kind even for the medicine in bottles, and that he is liable in damages.

With respect to the amount of the damages, the first question is whether the trial Judge was right in assuming, as he evidently did, that the plaintiff had a right to renew the contract for another 5 years. I was at first inclined to think that the words were too vague but on further consideration my opinion is that the plaintiff did have a right of renewal for another 5 year term. It seems to me that the reasoning of Bruce, J., in *Lewis* v. *Stephenson*, 67 L.J. (Q.B.) 296, 78 L.T. 165, is fully applicable to the present contract. That case, of course, related to a lease but I see in this circumstance no ground for distinguishing it. I cannot find that this case has ever been questioned. Furthermore, if we observe the exact grammatical form of the clause in question, this conclusion will, I think, be strengthened. The defendant makes the plaintiff his agent or, in substance, makes a contract with it, for a certain purpose "for a term of five years subject to a renewal thereof at the same price mentioned herein." Now what can the words "a renewal thereof" really mean? A renewal of what? Obviously "thereof" can only mean, grammatically, "of that term." There is really nothing else for the word "thereof" to refer to. This phrase, therefore, can only mean "subject to a renewal of the term at the same price mentioned herein," i.e., a renewal of *the term of five years*.

Of course it is not stated which party could renew. But unless we hold that the defendant only could do so and not both parties, the plaintiff would have the right. The document was clearly a grant not, indeed, of land, but of an exclusive right in a certain territory to sell a patented article. As stated in *Lewis* v. *Stephenson*, a grant must be construed most favourably to the grantee. So that I think there was a clear right of renewal in the plaintiff.

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But I cannot avoid the conclusion that the amount of damages allowed was excessive. I can entertain no doubt in the world that, if the plaintiff had been given its choice of continuing its chance of profits under the contract during the next 8½ years or of accepting in hand at once in real cash the sum of $12,000, leaving its two officers and shareholders free to devote themselves to other occupations, it would not have hesitated a moment but would have taken the $12,000 and would have thought that it had got much more than a fair price for its chances of profit. And if the choice had been given of accepting half that sum in ready cash or of going on and of taking all the uncertain chances of the popularity of a patent medicine continuing, of going on with business expenses in the way of persistent and costly advertising and of seeking and filling orders and of paying salaries to its officers, I feel sure that it, the plaintiff, would have hesitated long before refusing it and would, in its consideration of the offer, not have felt so much certainty about its future business as its officers seemed at the trial to entertain.

Of course, this is not strictly the correct basis upon which to estimate damages for loss of profits. The plaintiff is not to be made to take merely what its contract would bring if put on the market for sale, nor is the defendant entitled to buy the contract back at what the Court may think a fair price by deliberately breaking it. The plaintiff was entitled to its chance of profits and to have the Court estimate its probable profits. But I cannot avoid the conviction that the plaintiff will be very much better off with $12,000 in cash now than with a continuance of the contract.

In my opinion, therefore, the damages should be reduced to $5,000. I think this disturbance of a trial Judge's finding as to damages is surely justified by what happened in *Royal Trust Co.* v. *C. P. R. Co.* (1921), 60 D.L.R. 379, 16 Alta. L.R. 523; reversed in part (1922), 67 D.L.R. 518. Personally I should have acquiesced in a larger sum, i.e., a less reduction, but my brother Hyndman does not think we should exceed the sum mentioned while my brother Beck, as will be seen, adheres to a much larger deduction. The judgment will, therefore, be for $5,000.

The very fact that the plaintiff on July 16 refused to see Harris himself when he returned from England, found what had been done by his wife and asked for a personal interview, obviously with the hope of adjusting matters and undoing his wife's mistakes, but instead referred him to

their solicitors, rather suggests to my mind that they preferred a judgment for damages to a continuance of the contract for 8 years, although the publication of the libel hereafter referred to may no doubt have had much influence upon their course of action.

But the plaintiff also sued both defendants for libel. About the middle of June, 1921, just after Harris had repudiated the contract with the plaintiff he, through his wife the defendant Minnie Harris, whom he had left in charge of his affairs while he had gone to England, wrote a number of letters to certain druggists in British Columbia, soliciting orders from them directly, stating that the plaintiff no longer represented him, and saying in each letter this:—

"Now if you have got any medicine on hand that McCarter Burr Co. has supplied you with lately kindly return it to them and get a refund. This is not my medicine they have been handling this past few months but some they manufactured themselves and used my name."

There were also other letters to other druggists in which somewhat similar language was used. And, there was, of course, an obvious innuendo pleaded.

Such is the libel complained of. There was no attempt to prove the truth of these statements. The defence was that the occasion was privileged and absence of actual malice.

The trial Judge assumed the occasion to be privileged and there was no serious contention made upon the argument before us that it was not privileged in the qualified sense.

The real point is concerning express malice. It is well established that where there is a qualified privilege the plaintiff must successfully bear the burden of proving the existence of actual malice or ill-will or some wrong motive which means the same thing. If the defendant is shewn to have actually known the statement to be untrue it will be assumed that he was malicious, that he did do a wrong thing from some wrong motive. In this case it was not shewn that the defendant Minnie Harris actually knew the statements to be untrue. Indeed, the circumstances were such that she could not very well have known that. The case turned upon the inferences to be drawn from the apparent meagreness of her knowledge. This is what the trial Judge said:—

"In the box this morning Mrs. Harris said she did not believe it when she wrote it and (also in?) the evidence given on her examination for discovery and she did not take any proper steps whatever to ascertain whether it was true

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or not. If it was necessary to establish malice surely there (it?) is sufficient to establish that it is a reckless statement made without any foundation and when people make such statements as that they expect to have to bear the consequences."

Now, I am not quite sure on reading that passage whether the Judge meant to say "She did not believe it to be true, and she made it recklessly and without having any foundation for it, therefore, I infer that in making it she was actuated by actual ill-will or some wrong motive whose nature I do not know," or whether he merely meant to say that the three facts (1) that she did not believe it to be true, (2) that she made it recklessly and (3) that it had no foundation, were in themselves sufficient to destroy the privilege and that there was what might be called "malice in law."

The trouble is that the trial Judge did not expressly say that he was forced to conclude that some such feeling must have existed and did exist in the defendant as a motive rather than any sense of duty to the British Columbia druggists or to the public. In one way of construing his words he does seem to leave it as a conclusion of law rather than as an inference of the existence of the necessary fact. The expressions quoted seem to be practically undistinguishable from the instructions to the jury given by the trial Judge in *Clark* v. *Molyneux* (1877), 3 Q.B.D. 237, which lead the Court of Appeal to grant a new trial although in that case the chief error was in the impression given as to the burden of proof.

But there is a particular point upon which with much respect I feel impelled to differ from the trial Judge and it concerns the first of the three statements of fact contained in the passage quoted. It was said that the defendant admitted that she did not believe her statement to be true. In making that admission the statement she referred to was that the plaintiffs had themselves manufactured the medicine which they were selling. But she insisted that she did honestly believe that they had tampered with or adulterated the medicine sent by her husband. I am unable to see any substantial difference between the two statements. If the plaintiffs had taken the medicine sent by the defendant and, instead of reselling it exactly as it was, had altered it by the addition of other ingredients of some kind, then, in my opinion, the *resulting substance* could quite truthfully be said to have been "manufactured" by the plaintiff even though they did use the defendant's medicine as an ingredient thereof.

So that, assuming that the trial Judge did intend to find the existence of actual ill-will or wrong motive, I think it is quite clear that in doing so he gave the admission considerably greater weight than it deserved.

Then with regard to the second fact that the defendant Minnie Harris made the statement without any foundation I am, with respect, of opinion that there were some circumstances shewn in evidence, not expressly adverted to by the trial Judge, which tend to throw some doubt upon the suggestion that there was no foundation for the statement. The defendant Minnie Harris was examined for discovery by the plaintiff. Counsel for the plaintiff sought to extract from her the reasons for her action. She said several things in reply which are these; "I had so many complaints while Mr. Harris was away that I had to do something," that she did not check up the statement made to her personally by a man whose name she did not know "because I had so many complaints that I believed in them—it was every day," and that she got a number of complaining letters which she had sent to the plaintiffs and which they did not return, and that the complaints were about the size of the bottles chiefly. She did, indeed, at one place say that she got no complaints about the quality but in answer to another question she added "and then they thought it was not the same but we did not bother ourselves."

Now, this evidence was put in by the plaintiff. It was, of course, put in to shew how little ground she had for her statements, but being put in by the plaintiff and nowhere contradicted by other evidence, it certainly must be taken as against the plaintiff as valid proof of what little ground she did have.

The plaintiffs put in this evidence stating that she had sent the complaining letters to them and had never got them back. They, therefore, had ample warning of what she would say at the trial. And at the trial she repeated these statements in her evidence for her defence. On cross-examination she was asked what grounds she had for believing the plaintiffs were tampering with the medicine and she answered "So many complaints," "they said it was not the same" and again she said "No, I did not get any complaints about the quality only people said it was not the same. They did not say anything about the quality of it."

Now, I quite see that the witness may have been hedging. She may have been treating a complaint about a difference in the size of the bottles as a complaint that "it was not the

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same." On the other hand, she may have understood her questioner when asked about a complaint as to "quality" to refer to the actual quality of the medicine which the complaining persons had secured as distinguished from a complaint that, whatever its actual quality, it was not the same as they had been used to getting.

The trial Judge, of course, heard all this evidence and no doubt did not forget it. But from the fact that he did not mention it, I think we may infer that he concluded that it had no real weight in the defendant's favour, or, the burden of proof being on the plaintiff, that it had no weight against the plaintiff. But in my opinion it has considerable weight. The question is: was the defendant actuated by ill-will or some improper motive in what she did, rather than the proper motive of protecting the British Columbia druggists and the public and the reputation of her husband's proprietary medicine.

The law seems well settled that the mere absence of any reasonable ground for a statement made on a privileged occasion is not of itself sufficient to justify an inference of express malice. *Clark* v. *Molyneux*, 3 Q.B.D. 237. But I think we must upon the authorities go further and say that it at least is not quite clear, that the law is that proof that a statement has been made recklessly with utter carelessness whether it is true or false is conclusive evidence of malice. Even if that were the rule the trial Judge did not on his finding put it as strongly as that against the defendant. This is the way Lord Esher, M.R., laid down the law in *Royal Aquarium and Summer and Winter Garden Society Ltd.* v. *Parkinson*, [1892] 1 Q.B. 431, at p. 444:—

"If a person from anger or some other wrong motive has allowed his mind to get into such a state as to make him cast aspersions on other people reckless whether they are true or false it has been held, and I think rightly held, that a jury is justified in finding that he has abused the occasion."

And Lopes, L.J., in the same case put it in this way at p. 454:—

"If it be proved that out of anger, or for some other wrong motive, the defendant has stated as true that which he does not know to be true, and he has stated it not stopping or taking the trouble to ascertain whether it is true or not—stated it recklessly by reason of his anger or other indirect motive—the *jury may infer* that he used the occasion not for the reason which justifies it [i.e., the privilege]

but for the gratification of his anger or other indirect motive."

In this passage Lopes, L. J., was quoting almost *verbatim* the words of Brett, L. J., in *Clark* v. *Molyneux*, 3 Q. B. D., 237 at p. 247, and this latter case received the direct approval of the Judicial Committee in *Jenoure* v. *Delmege*, [1891] A.C. 73.

Now, from these statements of the law if we take them as they stand, I am strongly inclined to the view that what is laid down is this, that where the occasion is privileged, *i.e.*, where there is a just and permissible motive, then there must be shewn some other wrong motive of anger or spite, etc., and that the fact of recklessness and absolute indifference as to the truth or falsity of the statement is merely something from which the jury may properly infer that, as between the two existing motives, the right one and the wrong one, it was really the wrong one that led the defendant to make the statement. But it is generally put, or intended at least to be put, less favourably, I think, for a defendant, and in this way, that the jury *may infer* from the recklessness and careless indifference that there *was* some wrong and improper motive without discovering what that motive was.

In any case I do not think it has ever been decided that the recklessness and indifference do in law by themselves constitute express malice. The House of Lord in *Hulton* v. *Jones*, [1910] A.C. 20, did, as I think, practically introduce a new concept into the law of libel and slander, *viz.*, that negligence in talking or writing may give a ground of action. But this idea has never yet been applied where the occasion is privileged, that is, where there does *ex hypothesi* exist a proper motive. And in *Royal Aquarium etc. Society* v. *Parkinson*, [1892] 1 Q.B. 431, the Court did find evidence of a sort of fanatical prejudice against the plaintiff's entertainment halls.

As I have pointed out, the trial Judge did not go so far as to find the existence of an utter indifference as to whether the statements were true or false. It may be that we ought not to attach too much weight to what may be merely phrases added by former Judges in their opinions for the sake of emphasis only and that we should rather consider that a finding that a statement has been made recklessly should be treated as finding that it was also made without caring whether it was true or false. But be that as it may, I am clearly of opinion that the law has been definitely set-

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tled that such recklessness (even if it must be taken to include the careless indifference) is at the most merely something from which a wrong or improper motive for the statement, rather than the right one, may be inferred. If we take the passages I have quoted as authoritative the law is, indeed, still stronger than this in favour of a defendant who has made an untrue statement on a privileged occasion recklessly and carelessly.

I am, therefore, of opinion that we are not here confronted with a finding of fact which precludes us from dealing with the case ourselves and coming to our own conclusion.

And what we have to decide is whether the evidence justifies us in saying that the plaintiff has proven that the defendant acted from some other wrong motive in sending the letters which she did send to the British Columbia druggists.

Now, is it significant that the plaintiff never ventured to suggest what the wrong motive would be unless it was pure spite and ill-will and a desire to injure the plaintiff. No other extraneous motive was suggested in evidence or on argument. Now, has the plaintiff shewn that the defendant did what she did out of spite and ill-will to the plaintiff rather than from a desire to protect the druggists, the public and the reputation of her husband's medicine?

It must be remembered that for many months the husband had been urging the discontinuance of the practice of shipping in bulk. He repeatedly said that he must protect himself and the public. At least the easy possibility of adulteration by some one was obvious. Though he may not have known it, the law was, as I think, on his side. The plaintiffs persisted in demanding the continuance of shipments in bulk. They must have been very obtuse if they did not suspect that what Harris was hinting at was that his medicine was being, or in danger of being, adulterated by them after its receipt and before being put up in bottles. There could be no danger in the circumstances from any one else's action. And the very persistence of their demand when he repeatedly offered to quote them a good price in bottles so as to make a fair profit might not unreasonably lead him to wonder what the real reason was for such persistence.

The defendant Minnie Harris eventually blurted out directly to the plaintiffs the suspicion she at least entertained. She told them in her letter of June 4, 1921, "But let

me tell you, Mr. Burr, we have got wise to what has been going on in Vancouver and Victoria. It might interest you to know we have a list of all the medicine you supplied to the drug stores in the past three months. Also what bottles you bought and the orders you sent here did not half supply the demand." And again in a letter of June 1, 1921, "We have proof that you were the one that manufactured this medicine and put it on the market and used our name and registration number to sell same. We also have one of your bottles here and this medicine is not the same. I am going to put you now just as far as the law can put you. For a man like you should not be allowed to go free." This last letter was just 4 days after the writing of the libel complained of, while the first letter was 10 days before.

In my opinion, instead of these letters being prejudicial to the defendant, they work in her favour. She was telling the plaintiffs to their face at practically the same time just what she told the druggists. She may have been rash, credulous, improvident or stupid, or she may not have acted as a man of the world (her husband for instance) would have acted on such an occasion (*Clark* v. *Molyneux*, *supra*) but these two letters written as they were directly to the plaintiffs, do tend strongly to shew, in my opinion, that she was sincere, not only in writing what she did to the plaintiffs, but in repeating it to the druggists.

Moreover, she swore that she sent the complaining letters to the plaintiffs. They never in their evidence denied the receipt of them and did not produce them. Their counsel did say himself that they did not exist but his clients should have said so and did not. The burden of proof was on them and it was their duty to produce them or prove their non-existence.

Upon the whole evidence I can find nothing serious to suggest any actual improper motive. It might be suggested that the dispute as to their rights under the contract may have made her angry or spiteful and a case like *Simpson* v. *Robinson* (1848), 12 Q.B. 511, 116 E.R. 959, might be quoted. But I cannot think that this should be carried beyond a mere suggestion and made an actual conclusion of fact. In *Clark* v. *Molyneux*, Brett, L.J., said the jury must go further and see not merely whether the expressions are angry but whether they are malicious (See *Shipley* v. *Todhunter* (1836), 7 C. & P. 680, at p. 690 per Tindal, C.J.).

Then in the absence of sufficient evidence of an actual improper motive I am unable to say that there was such reck-

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less indifference to the truth or falsehood of the statement that we ought to infer the existence of some improper but undiscovered motive, even if in the face of the words used in *Clark* v. *Molyneux*, *supra*, that would be a proper course to adopt.

I would, for these reasons, allow the appeal with respect to the libel and dismiss the action as to that. The defendant should have such costs of the action against the plaintiff as may properly in the opinion of the taxing officer be attributable to the claim of libel. The plaintiff should have its costs of the action so far as they relate solely to the claim on the breach of contract with this set-off of defendant's costs and the defendants should have their costs of the appeal.

BECK, J.A.:—This is an appeal from the judgment of Harvey, C.J., at the trial, directing judgment against the defendant, George Harris, for $12,000 damages for breach of contract, and against both defendants—the other defendant being Minnie Harris, the wife of George Harris, for $3,000 damages for libel.

George Harris is the manufacturer of a proprietary or patent medicine called "Wonder Health Restorer." On January 14, 1920, he entered into an agreement with W. Y. McCarter, whereby McCarter was constituted Harris' agent for the sale and distribution of the Wonder Health Restorer for the Province of British Columbia, for the term of 5 years, and "subject to a renewal thereof at the same price mentioned herein." Harris agreed to sell and supply to McCarter the said medicine and to "ship and deliver the same f.o.b. Calgary, in such quantities as may be required by the agent, with proper directions and in accordance with the order of the agent, that is to say, *either in bottles*, labelled and ready for sale *or in bulk*, as the case may be, and of the same quality as the same has been hitherto composed and in accordance with the first shipment made to the said agent, and always in compliance with the Acts of the Parliament of the Dominion of Canada or of any Orders in Council which now exist or which may hereafter be passed, at the rates or prices following, that is to say:—Wonder Health Restorer in bulk $25 per imperial gallon; Thymus Bitter Tonic, in bulk, $20 per imperial gallon." No prices were fixed for sale in bottles.

W. Y. McCarter incorporated the plaintiff company on March 10, 1920. Thereafter Harris dealt with the company as taking the place of McCarter.

On March 29, 1921, the company wired an order for 5

gallons of the medicine. On April 1 Harris wired a reply saying: "Order received. No more medicine in bulk. Writing."

The promised letter is as follows:—

"W. Y. McCarter Burr Co., Ltd., Victoria, B.C.

Dear Sirs:—Your letter to hand ordering five gallons of Wonder Health Restorer. In reply thereto I wired back immediately that I did not intend to ship any more Wonder Health Restorer in bulk. I have already given you plenty of notice about my intention to discontinue shipments in bulk, and in addition I sent to you samples of the bottles, both large and small, with quotation of prices which you must admit gives you just as much profit as getting the Wonder Health Restorer in bulk, however, I have received no acknowledgment from you, of my notification as to discontinuing the sale of this medicine in bulk, nor did you acknowledge receipt of the samples forwarded to you.

I have gone to a great deal of trouble and expense getting my seal and trademark registered, and in having the cartons made, and you can readily see why I insist on same being used, as this is the only way in which I can protect myself and the public who buy the medicine.

I have, however, thought that yourselves and distributors who purchased from you, and who may have quantities of this medicine on hand, might be unable to dispose of such medicine in your bottles as might at this time be in stock should I proceed immediately advertising in paper in British Columbia, warning the public that the Wonder Health Restorer is not genuine without my registered seal and trademark, and I have, therefore, decided to ship to Victoria five gallons and to Vancouver five gallons as requested in your two letters in order that you may be able to use up the bottles and labels which you may have on hand. I have also decided that I will delay advertising in British Columbia papers as warning to the public that Wonder Health Restorer is not genuine without my seal and trade mark for a short time only in order that you and your distributors or your dealers may have ample opportunity to dispose of the stock now on hand in your bottles and bearing your labels. If we had had this system in force earlier the trouble which you had with the medicine brought to British Columbia from the East by Macdonald could not have taken place as people would have refused to buy same without bearing my seal and trade mark.

I am not making this change in my method of distribut-

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ing this medicine with a view to interfering with your work as distributors of this medicine in British Columbia, but it is with the sole view of protecting yourselves and myself as well as the public. As I have already indicated to you the change in method of distributing this will not interfere with your profit whatsoever, but will standardise the size and appearance of the containers. I wish to notify you here in this letter, however, that after the expiration of two months I intend to start a campaign of advertising in British Columbia papers, notifying the public that no medicine is genuine unless same bears my registered seal and trade mark, and is in my cartons. You were notified of this about three months ago, and should not require any further time, but in order to be absolutely fair to you I am going to postpone any advertising, as indicated, here for a further two months.

Take notice also that this is positively the last shipment in bulk which I intend to send you, and anything further I send will be shipped in bottles sealed with my registered sale and trade mark.—Yours truly, Geo. Harris."

Other correspondence followed, that in Harris' name being written by his wife, with his general authority, he being away in the East.

On May 21 the company was notified that "If we do not receive your order by June 1, 1921, for the quantity you require in bottles, after that date we will not fill any orders you may send either in bulk or bottles."

The plaintiff company wrote on May 31 a letter received by the defendant on June 3, in which the company says:—

"Under clause 2 of our contract dated the 14th January, 1920, and under protest and without prejudice to our rights to have orders filled in bulk please ship to us via Dominion Express to our address in Vancouver, B.C., 3 doz. Wonder Health Restorer, large size."

On June 4 the defendant, by his wife, wrote refusing to fill the order and purporting to terminate the contract.

In my opinion it was contrary to the provisions of the Proprietary or Patent Medicine Act, 1908 (Can.), ch. 56, amended by 1919 (Can.), ch. 66, for Harris, the manufacturer, to supply his medicine in bulk (although he was quite unaware of this), and, therefore, he was justified in law in refusing to do so; but if this is so the question remains whether he was justified in refusing to fill the order of May 31 and to repudiate the contract.

I shall endeavour to explain the reasons why I think the Act prohibits sales in bulk, that is, sales in containers in which it is not intended that the contents should be offered for sale to consumers.

1919 (Can.), ch. 66, sec. 2, sub-sec. 1 (*d*), defines a "proprietary or patent medicine." Sub-section 2 provides that where the manufacturer of a proprietary or patent medicine is not resident in Canada, or has his chief place of business or head office in a place outside of Canada, such manufacturer shall file with the Minister the name of a person or corporation in or having its head office in Canada as the agent of such manufacturer for all the purposes of this Act. Section 3 (1) 1919 (Can.), ch. 66, provides that every manufacturer of a proprietary or patent medicine or the agent of such manufacturer shall before offering any medicine for sale procure from the Minister a numbered certificate of registration for each proprietary or patent medicine which he proposes to import into or offer for sale in Canada. (2) provides for the manufacturer filing a statement of the quantity of drugs contained in such medicine. (3) provides that whenever required by the Minster, for good cause shewn, the preparation of any medicine containing drugs included in the Schedule to the Act shall be continuously supervised by a pharmacist or a chemist. (5) Provides that the number under which any proprietary or patent medicine is registered shall be clearly printed on the wrapper and label of each bottle, box or other container in which such medicine is sold or offered for sale.

1908 (Can.), ch. 56, sec. 4, provides that all proprietary or patent medicines shall be put up in packages or bottles, and that every one of these, intended for sale or distribution in Canada, shall have placed upon it, in conspicuous characters forming an inseparable part of the general label and wrapper, the name and number under which the medicine is registered, with the words "The Proprietary or Patent Medicine Act" and also the manufacturer's name and address.

1919 (Can.), ch. 66, sec. 5, provides that every manufacturer of a proprietary or patent medicine shall apply annually for a license to sell such medicine &c.

Section 7 provides that no proprietary or patent medicine shall be manufactured, imported, exposed, or offered for sale or sold in Canada, if certain regulations as to contents are not conformed to.

1908 (Can.), ch. 56, sec. 9, prohibits the distribution of samples from door to door; provided that manufacturers or

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wholesale dealers may distribute samples to the trade. Section 9 (*a*), added by 1919 (Can.), ch. 66, sec. 3, provides that any proprietary or patent medicine found on sale in Canada not marked as required by sec. 4 or offered for sale or sold by any manufacturer who does not hold the license to sell required by sec. 5 may be seized.

1908 (Can.), ch. 56, sec. 14, provides that in the case of any person accused of selling, offering or exposing for sale any proprietary or patent medicine which is not in conformity with the provisions of the Act, and upon which there appear the name and number under which the medicine is registered, with the words "The Proprietary or Patent Medicine Act," and also the manufacturer's name and address, if the person so charged also proves that he sold the said medicine in the same state as when he purchased it and that he could not with reasonable diligence have obtained knowledge of such medicine being of a character contrary to the provision of this Act, &c., he shall be discharged &c.

Certain regulations were made in pursuance of 1908 (Can.), ch. 56, sec. 17 (See Orders in Council 1909 (Can.), at p. xxxix).

These regulations are made in respect of the sale of any proprietary or patent medicine in stock at the time the Act comes into force and provide that all such medicine in stock in the hands of the manufacturers thereof or dealers therein shall have attached thereto a special stamp.

"3." The stamps will be supplied upon application being made therefor on the form supplied by the department and such application shall, in part, be in the form of a solemn declaration that the firm or person shall have in possession the number of individual packages of medicines of the name or description therein included. . . . . These stamps are to be attached to the wrapper of each individual bottle, box or other package in such manner as to seal the package. When the bottle, box or package is not covered by a wrapper the stamp is to be attached in such manner that said bottle, box or package cannot be opened without breaking the stamp."

What is intended by the Act seems to be as follows:—

A manufacturer of a proprietary or patent medicine, manufacturing in Canada, must obtain a certificate or registration of any such medicine which he proposes to sell in Canada. If he manufactures outside of Canada and proposes to import the medicine into Canada, he must also obtain a similar certificate. The manufacturer having his medicine in Canada, manufacture in accordance with the

provisions of the Act and having such a certificate, is authorised to offer it for sale.

The medicine when ready to be offered for sale must of necessity and by express direction of the statutes be contained in bottles, boxes or other containers.

These bottles, boxes or containers must not be offered for sale *or distribution* unless there is printed on the wrapper and label of each, the registered number of the medicine, the name and address of the manufacturer and the words "The Proprietary or Patent Medicine Act."

"Distribution," I think, means not only distribution of samples either directly by the manufacturers or through wholesale dealers (sec. 9) but also—and this is the crucial question—distribution by the manufacturer to selling agents ; because, it seems to me, the whole purpose of the Act is to protect the public against harmful medicines or medicines which are harmful if taken in excessive quantities or improper combinations, &c.; and this purpose would not be effectively attained unless the marking and sealing of the containers in which the medicine is to be offered for sale is done before it leaves the factory of the manufacturer; and because the intention of the Act to this effect is plain from its general purview and in particular from sec. 4, which, being preceded by provisions relating to the manufacturer alone, seems, therefore, to refer directly to, and impose the duty upon, the manufacturer himself, of putting the medicine up in packages or bottles before offering the medicine for sale or distribution; and sec. 14, to which reference is made in sec. 4, seems to imply that a person *lawfully* selling such medicine has received it from the manufacturer already put up and marked in accordance with the Act.

Assuming this view of the effect of the Act to be correct, was the defendant justified in repudiating the contract? I think not. The agent was entitled to order the medicine in bottles when and in such quantities as he saw fit. He was bound by a particular provision of the contract after the expiration of one year to keep his orders up to a minimum of $5,000 a year. But there was in fact no breach of this provision. The dispute about the right to order in bulk was *bona fide* on the company's part and was not, on the defendant's part, based upon the ground that it was illegal under the statute. Clearly there was no intention on the company's part to refuse to be bound by the contract. It was insisting on the fulfilment of its terms. It would be strange, if because one party was *bona fide* insisting upon the fulfilment

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of a contract, the other party could treat such refusal as a repudiation and himself repudiate.

The dispute, having led the company to see that it was useless to expect the defendant to fill an order for medicine in bulk, the company reverted to the alternative allowed by the contract to order in bottles. There was no time limit which prevented the company from giving the order of May 31. I think the company was entitled to have that order filled according to its terms. (See 7 Hals., *tit* Contracts, pp. 438 *et seq.*)

A question was raised as to whether the plaintiff company could stand in the place of McCarter under the contract. The contract contains an express provision that the agent shall be at liberty to assign the *benefit* of the agreement with the consent in writing of the principal. There was, in fact, a written consent signed by Harris, but we are asked to infer that the date was altered and to hold consequently that it was void. It seems to me that it is of no consequence whether this formal consent was void or not; that there is quite independent evidence of a written consent equivalent to the formal consent almost immediately after the formation of the company substituting the company for McCarter. The actual assignment made was to that effect.

This brings us to the question of damages. But before considering the *quantum* of damages there are some previous questions calling for consideration.

(1) No prices are fixed except for sales in bulk. It seems to me that a term must be implied to the effect that the defendant is bound to supply the medicine in bottles at a price based upon the price in bulk, adding the cost of bottling, labelling, etc.

(2) Do the words: "Subject to a renewal thereof at the same price mentioned above," give the plaintiff company a right to extend the agreement for another 5 years?

Whether these words included in a lease would be deemed to give the tenant such a right, we need not enquire. This is not a case of landlord and tenant, but of agency—practically, as I shall have occasion to emphasise, of master and servant.

I doubt whether on the contract before us these words should not be treated as so vague that they must be discarded. But in the view I take on the question of the *quantum* of damages I think the question is of little importance.

(3) The only medicine the defendant is bound by the terms of the contract to supply is Wonder Health Restorer.

He fixes a price for and has in fact supplied the company with Thymus Bitter Tonic, out of which the company has made a portion of its profits in the past, and, doubtless, calculated to do in the future.

(4) As I have already suggested, the relationship created by the agreement is in substance that of master and servant, and certainly, I think, that the point of view from which the damages for breach of contract ought to be estimated, is that of analogy to the ordinary case of master and servant.

I think the effect of the substitution of the company for McCarter was never intended to, and ought not to be, deemed to have imposed any greater liability upon the defendant than he would have been under had he continued to deal with McCarter personally. Had that relationship continued, on a breach of the contract McCarter would not be entitled to have his damages assessed, at the amount of the present value of his probable net profits for the whole residue of the term of engagement. The company is in substance an *alter ego* for McCarter. It is incorporated under the laws of British Columbia and there are only two subscribers to the Memorandum of Association—McCarter and his son-in-law, Burr. The sale of medicine is only one of its objects. On a breach of the contract, McCarter would have been bound to seek other employment; his *alter ego* is equally bound to do so in order to minimise the damage.

Taking everything into account, and there was much discussion of the various items which ought or ought not to be taken into account, I think that the damages for breach of contract ought to be reduced to $3,000.

I now come to the claim for damages for libel. What is set up in the statement of claim is that:—

(1) On or about June 4, 1921, the defendant Minnie Harris, the wife of the defendant George Harris, in a letter to one Edward R. Davis, of New Westminster, B.C. (a druggist), falsely and maliciously wrote and published of the plaintiff the following words: "Look out for my registered seal and picture on every bottle, also enclosed in my carton. None genuine without," meaning that the plaintiff company was guilty of fraudulent, corrupt and dishonest practice, in their trade and business and in the conduct thereof.

(2), (3), (4). Similar letters to other druggists.

(5) Similar letter to a druggist in which the words were: "The goods sold by the W. Y. McCarter Burr Company Limited are not of the manufacture of George Harris

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but are of the manufacture of the W. Y. McCarter Burr Company Limited." with the same *innuendo*.

(6) Letter to a druggist in which the words were: "I am preparing a notice for all the papers through B.C. that McCarter Burr Co. is through with the agency of Harris's Wonder Health Restorer. I am the only manufacturer of this herbal medicine for Canada and U.S.A. and I intend keeping this from now on in my own hands so you need not be afraid of any more changes. Now if you have any medicine on hand that McCarter Burr Co. has supplied you with kindly return it to them and get a refund, this is not my medicine they have been handling lately but is one they manufactured themselves and used my name," with the same *innuendo*.

In addition to defences denying the *innuendos* the defendant pleaded privilege as follows:—

(1) That she wrote and published the words in the discharge of a social and moral duty which she owed to the several druggists selling medicine of the defendant George Harris, and (2) That each occasion was such as is mentioned in the next preceding paragraph, and that the defendant had an interest in the subject matter of communication, and that the person or persons to whom same were published, had a corresponding interest, and that each and all had a duty in connection with the matter, and that the said words were spoken *bona fide* and without malice and on a privileged occasion.

It seems to me clear that the occasion on which these letters were written was a privileged one and that consequently the plaintiff must, in order to succeed, prove express malice.

Mrs. Harris was asked:—

"Q: Now what grounds did you have for believing that these people were manufacturing this medicine and passing off on the public as your husband's? A: I did not believe they were manufacturing it but I believed they were tampering with it. Q: Then you did not believe when you wrote these letters that McCarter-Burr or Burr or anyone in this place was manufacturing some material and passing it off as your husband's health restorer? A: No sir. Q: And you had no reason for believing any such thing? A: No sir. Q: Now what grounds did you have for believing they were tampering with it then? A: So many complaints. Q: What were the complaints? That the people were not being cured? A: No, they said it was not the same. Q: Did you

ask them in what way it was not the same? A: Yes, some of them I did. Q: Where are all these letters that you got? A: The letters I got was returned to McCarter-Burr. Q: Did you write them along with them when you sent them? A: Yes. Q: Did you keep a copy of the letter you sent McCarter-Burr? A: No I did not. . . .

Q: Is it not a fact that you did not get a single complaint about the quality of the medicine that McCarter-Burr was selling? You can answer that 'yes' or 'no.' A: Yes, I did get complaints. Q: About the quality? A: Mostly about the quality. Q: I am asking if you got any complaint about the quality? A: No I did not, only people said it was not the same. They did not say anything about the quality of it. Q: And you did not make any investigation to see whether there was any basis for the complaints or any ground for the complaint being made? A: No sir, I did not. Q: Did you attempt to buy or procure any of the bottles that McCarter-Burr was selling at that time? A: Only the bottle the gentleman brought to the house. Q: What about the bottle that was brought to the house? Q: Well a gentleman brought a bottle. Q: Who was he? A: I don't know. Q: Did you ask him for his name? A: No I did not, he asked me to change the bottle. . . .

Q: You still have that bottle? A: Yes. Q: Has it been opened? A: Yes. . . . .

Q: What enquiries did you make at the drug stores? A: I checked up two months of their sales. Q: Two months of whose sales? A: Some of the drug stores. Q: Which drug stores? A: The Cunningham Drug Company. Q: Who else? A: The Eden Company. Q: Was it the sale to the Cunningham Drug Company that you checked up? A: Yes. Q: With a view of finding whether they were selling more than you? A: Yes the same period, were selling to McCarter-Burr & Company? Q: You found that the Cunningham Drug Co. had sold a lot in these two months didn't you? A: Yes. . . .

Q: The only ground that you had for writing these letters are these: 1st, somebody said that the medicine they got was different from what they had before? A: Yes. Q: Secondly, that some man, whom you never saw before or since, whose name you don't know and didn't even ask, asked you to change a bottle which had been opened when he brought it to you? A: Yes. Q: And thirdly, because you found that McCarter-Burr & Co. were not buying as much from you as they had for some time and because some drug

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company was selling more of your husband's medicine than had been bought from you for the same period, these are all of the reasons that caused you to write these letters? A: Yes. Q: Have you told us of all the enquiries and efforts you made to check the truth of these complaints as you call them? A: Yes. Q: You did nothing more than what you have told us? A: No. Q: And acting on that information you wrote these letters? A: Yes."

So far as I can discover it was not denied that the letters of complaint had been sent to the plaintiff company.

I think that the statement of Mrs. Harris that the goods sold were not of the manufacture of Harris but of the company, would not be a misstatement of the fact, had it been a fact, that the company was adulterating the medicine. So that in my opinion this difference of expression does not take this particular libel out of privilege.

Then I think, that upon the whole evidence express malice is not proved. Mrs. Harris clearly believed her statements to be true. She seems to have had some reasonable grounds for so believing—though this is not necessary for her protection. She may have been rash, improvident, credulous or stupid. The fact that what she had heard made her angry would seem to lead not towards malice but rather away from it and towards honesty. (See 18 Hals., *tit* Libel and Slander, pp. 712 *et seq.*) Honest anger surely is not evidence of malice; the anger spoken of in some of the cases is evidence of malice must mean unreasoning anger resulting in an intention to injure.

As to the liability of Harris for the libels published by his wife, I desire to add that even in the event of her ultimately being held liable, I am of opinion that Harris can be held liable only on the ground of agency, and not merely because he is the husband. The reason why in England a husband was liable for the torts of his wife is explained at length by Fletcher Moulton, L.J., in *Cuenod* v. *Leslie*, [1909] 1 K.B. 880. If the reason for the rule ever existed in this jurisdiction, it has long ago ceased owing to legislative enactments relating to married women. *Ratione cessante, Cessat lex.*

In my opinion, therefore, I think the plaintiff company fails in its claim for damages for libel.

In the result on the whole I would set aside the judgment in favour of the plaintiff and direct judgment to be entered for the plaintiff for $3,000 damages for breach of contract. I would give the defendant the costs of appeal.

HYNDMAN, J.A., concurs with STUART, J.A.

Appeal allowed in part.

THE ISLAND COLD STORAGE Co. v. MUTCH.

Prince Edward Island Supreme Court, Mathieson, C.J., Arsenault, J. June 27, 1922.

SALE (§IID—40)—OF GOODS—INSPECTION—CAVEAT EMPTOR—EVIDENCE—DISCRETION OF JUDGE IN REFUSING TO ADMIT—ADMISSION IN EVIDENCE OF PRICE LISTS AND MARKET REPORTS.

The defendant, a cattle buyer, offered for sale to the plaintiff company a quantity of veal. The price having been agreed upon, the defendant delivered 16 carcasses which were weighed and paid for by the assistant manager of the company. It appears by the evidence that the manager and the regular meat inspector were not present at time of delivering, but there is some evidence that, before weighing, the carcasses were inspected by a foreman in the employ of the plaintiff. Some time later, the plaintiff company claimed that the carcasses were not veal, and endeavoured to get a settlement from the defendant, and on failure brought an action for breach of contract. On trial before a jury verdict was given for the defendant. Upon application for a new trial the Court held that the plaintiff being a company organised for the purpose of dealing in meats must be presumed to have a knowledge of the commodity in which they deal. The sale is not a sale by description for the plaintiff did not buy on the faith of the seller's word but after taking in the goods and with full opportunity of inspection and examination. The doctrine of *caveat emptor* must be held to apply. When price lists and market reports are authenticated by the testimony of a witness, it is within the discretion of the Judge to admit such material as evidence.

APPEAL from the judgment of Haszard, J., and application for new trial. Refused.

J. J. Johnston, K.C., for plaintiff.

W. E. Bentley, K.C., and *D. A. MacKinnon*, K.C., for defendant.

The judgment of the Court was delivered by

ARSENAULT, J.:—This is an action for breach of contract tried Hilary Term, 1920, of this Court before Haszard, J., and a jury, when a verdict was rendered for the defendant. This is an application to set aside the verdict and for a new trial on the grounds set out in the application.

The facts are as follows:—The defendant, a cattle buyer, on January 20, 1919, called at the plaintiff's office in Charlottetown and, in the absence of the manager, inquired of the assistant manager, Quigley, if they wanted to buy some beef. On getting a reply in the negative, he said he had some veal for sale. The assistant manager told him he would inquire from the manager, and in the afternoon told the defendant they would buy veal at 15c per pound. The following morning, January 21, the defendant came with 16 carcasses which were taken in to the plaintiff's premises and weighed and a slip made out by the weigher setting out separately the 16 carcasses as veal with the weight of each. The defendant presented the slip to the assistant manager

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and was paid by cheque. There is evidence (although contradicted) that, before weighing, the carcasses were inspected by one Godkin a competent man in the employ of the plaintiff as foreman of the killing department. Nothing further seems to have been done in the matter until some 5 or 6 weeks later when Fraser, the president, came over from Halifax and claimed that the carcasses delivered by the defendant were not veal and endeavoured to get a settlement from the defendant and, on failure, this action was instituted.

On the argument, the plaintiff's counsel urged on the Court that the transaction disclosed a sale by description that the defendant had contracted to sell veal to the plaintiff and that the weight of evidence proved that what he had sold was not veal. I cannot take this view of the matter. The plaintiff is a company organised for the purpose of dealing in meats and must be presumed to have a knowledge of the commodity in which they deal. Their mode of buying, as appears by the evidence, is to have such meats inspected by their inspector before weighing. It was urged that, in this case, the manager and the regular meat inspector were away on the day in question. I cannot see that this makes any difference. The plaintiff is at all times open for business. The assistant manager was in charge and it is not contended that, even if the manager had been present, it was his duty to inspect the meat. What took place on January 20 did not constitute a sale and purchase; it was, at most, a negotiation for a sale. There remained two essential things to be done before the sale—that is an inspection and weighing. This was done the next day, a certificate made out and the price paid. This completed the purchase. The plaintiff had at hand the necessary machinery to protect itself at all points. They were buying an article with no latent defects; it was, to all intents and purposes, a sale and purchase over the counter with full and ample opportunity on the part of the plaintiff to protect its interest and see that it was getting what it bargained for. The doctrine of *caveat emptor* applies to this case, for here the plaintiff did not buy on the faith of the seller's word, but, after taking in the goods and with a full opportunity of inspection and examination. In the words of Channell, J., in *Varley* v. *Whipp*, [1900] 1 Q.B. 513, at p. 516: "The term 'sale of goods by description' must apply to all cases where the purchaser has not seen the goods but is relying on description alone." Here the plaintiff did not

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rely on the description given by the defendant for, according to plaintiff's own witness, the goods were to be purchased if the stock was good. How was it to be ascertained whether the stock was good? Manifestly by the defendant's bringing it in for the inspection of the plaintiff, which he did. If, in this case, the defendant had offered veal and the plaintiff had bought it and told him to ship it or make some other disposition of it without the plaintiff's seeing it, then if it turned out not to be veal, no doubt the action would lie; but the case here is very different. The plaintiff not only had the opportunity of inspecting but did inspect the goods before delivery. This disposes of the most vital grounds in the application.

Objection was raised as to the admission in evidence of certain price lists and market reports. It may be said that, without the supporting testimony of a witness, market reports published in journals or in pamphlets are not evidence; but, on the other hand, it is true that they are capable of furnishing the best evidence—superior it may be to the sum total of that of many witnesses where evidence is confined to their own knowledge or experience. At its best such evidence represents a tabulation of facts from sources wider than any reasonable number of witnesses could supply, at its worst, it is merely hearsay. The middle course must be found of requiring authentication by direct testimony of the source of the evidence proposed to be given by such trade circulars, journals or like material. The discretion of the Judge as to evidence required to lay the foundation must necessarily be wide. In the present case, the notes of evidence are not full, but it sufficiently appears from them that the trial Judge exercised his discretion in refusing to admit in evidence certain price lists and admitting others upon the supporting testimony of the witness, John Sims, president of the Sims Pork Packing Co., who appears to have given evidence to the satisfaction of the Judge in authentication of the lists admitted.

The application for new trial is refused with costs.

Application refused.

BISHOP v. WESTERN TRUST CO.

Saskatchewan King's Bench, Bigelow, J. October 23, 1922.

LAND TITLES (§I—10)—CAVEAT—NOTICE—PRIORITY OF SECURITY.

A caveat, when properly lodged, prevents the acquisition or the bettering or increasing of any interest in the land legal or equitable adverse to, or in derogation of the claim of the caveator, as it exists at the time the caveat is lodged, and a security,

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protected by a caveat properly registered has priority over an agreement to give a mortgage, or a mortgage purporting to be given before but not registered until after the registration of the caveat.

[*McKillop and Benjafield* v. *Alexander* (1912), 1 D.L.R. 586, followed.]

ACTION to recover payment of a debt secured by a transfer which, although absolute in form, was taken as security for the debt, or in default to foreclose the security.

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

W. B. Scott, for the defendant Saskatchewan General Investment & Agency Co.

No one for other defendants.

BIGELOW, J.:—The facts in order of time are as follows:—

W. G. V. Bishop has been the registered owner of the land in question since November 12, 1913.

On February 8, 1916, Bishop applied for a loan to the Saskatchewan General Investment & Agency Co. (whom I shall herein refer to as the defendant company) and signed the following document:—

"Saskatchewan General Investment and Agency Co. Ltd.

I, William Gordon V. Bishop of the city of Regina hereby apply for a loan of six thousand dollars ($6,000) on the security of the west half of section 9, township 10, range 3, west of the 3rd meridian, the south west quarter of section 14 and the south west quarter of section 2, both in township 9, range 7, west of 2nd meridian, on which I agree to pay interest yearly at the rate of 10 per cent per annum on the whole balance of principal and interest to be repayable on the 1st day of April A.D. 1916.

And I hereby undertake to give a first mortgage on these properties when required to do so. As it is my intention to repay this loan on the above date, I will, in the meantime give a promissory note for the sum loaned and surrender the duplicate certificate of title to the land, giving a transfer also if required to do so.

Dated at Regina, this 8th day of February A.D. 1916.

(Sgd.) W. Gordon V. Bishop."

A loan of $5,000 was made by the defendant company to Bishop, and I assume that the duplicate certificate of title to the land in question was delivered to the defendant company; when, it does not appear; but it is in evidence that the said duplicate certificate of title was delivered by the defendant company to the solicitors of the North American Life Assurace Co. on October 16, 1917, for the purpose of

registering a mortgage from Bishop to the North American Life Assurance Co.

On April 5, 1917, Bishop entered into an agreement for sale with the defendant Merrill Fraser to sell the said land for $8,500, payable $500 cash, and the balance in deferred crop payments.

On May 5, 1917, the plaintiff loaned $1,500 to Bishop and took his note therefor, and also took security on some property in Minneapolis.

On October 13, 1917, Bishop executed a mortgage on said land to the North American Life Assurance Co. for $2,500 which was registered October 17, 1917. The proceeds of this mortgage were paid to the defendant company.

On October 23, 1917, Bishop requested plaintiff to release her security on the Minneapolis property which she agreed to do on receiving the following document from Bishop:—

"Regina, Sask., Tuesday, 23 Oct., 1917.

Emma Reid Bishop, Regina.

Dear Emma:—Relative to your loan of $1,500 to me on my note and further secured by assignment of part of my equity in Minneapolis property, in consideration of your releasing this security I offer you herewith an agreement between one Merrill Fraser and myself which agreement was dated Apr. 5th, 1917, and has to do with a sale of land by me to Fraser. I have over a three thousand dollar equity in this land and expect to receive a payment this year sufficient to retire your note.

(Sgd.) W. Gordon V. Bishop."

There is in evidence a mortgage from Bishop to the defendant company for $3,382.35 covering the land in question and other land. The mortgage is dated January 2, 1918, and was registered June 1, 1918. Whether January 2, 1918, is the date the mortgage was executed or not, it is impossible to say. There is no evidence to show. The affidavit of the witness was sworn on May 27, 1918. Robert Inglis who gave evidence for the defendant company about the mortgage, when questioned about the date of the execution of the mortgage said he had nothing to go by but the date inserted in the mortgage. If this case were to depend on the fact whether or not the mortgage to the defendant was executed before the plaintiff's security (May 6, 1918) I could not find that it was executed before May 27, 1918, as there is no evidence to that effect. The fact that the date, January 2, 1918, is inserted in the mortgage does not, to my mind, prove it was executed then. It may have been pre-

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pared on January 2, 1918 and not signed until long afterwards. There is no explanation of the delay in registering the mortgage from January 2, 1918, to June 1, 1918. The certificate of title was in the registry office and the mortgage could have been registered at any time after it was executed. The mortgage was registered soon after Bishop took the homestead affidavit on May 27, 1918 and the witness completed the affidavit of execution on the same date. However, I will continue on the assumption that the said mortgage was executed on January 2, 1918.

On May 6, 1918, Bishop was going away for military training and plaintiff insisted on her security being completed, and Bishop assigned all his interest in the agreement with Fraser and did "grant, bargain, sell, assign, transfer and set over unto the assignee for ever all that certain parcel of land" (describing the land in question). It is admitted by the plaintiff, that, although this transfer is absolute in form, it was taken as security for the $1,500 debt.

On May 9, 1918, the plaintiff registered a caveat in the following words:—

"To the Registrar of the Moose Jaw Land Registration District, Moose Jaw, Saskatchewan.

Take notice that I Emma Reid Bishop of the City of Regina in the Province of Saskatchewan, married woman, claiming an interest as owner in the west half of section nine (9), township ten (10) range No. three (3) west of third meridian in the Province of Saskatchewan, under and by virtue of an agreement in writing, bearing date, the 6th day of May 1918, between W. Gordon V. Bishop of the City of Regina in the Province of Saskatchewan and myself, forbid the registration of any transfer or other instrument affecting such land, or the granting of a certificate of title thereto except subject to the claim herein set forth. My address is; 2120 Albert St., Regina, Saskatchewan.

Dated at Regina in the Province of Saskatchewan this 7th day of May, 1918.—(Sgd.) Emma Reid Bishop."

The plaintiff sues for payment, and, in default, to foreclose her security, and the defendant company claims priority to the plaintiff.

The defendant's claim is based on the document February 8, 1916, whereby Bishop agreed to give to the defendant company a first mortgage on the land when required to do so and to surrender the duplicate certificate of title in the meantime and that the said duplicate certificate of title

was lodged as security with defendant company. The mortgage dated January 2, 1918, and registered June 1, 1918, is not set up in defendant company's pleadings, and apparently not relied on. There may be good reason for this. "A mere charge created by deposit of deeds is extinguished by the taking of a formal mortgage." 21 Hals. p. 326, sec. 580.

As to the deposit of the duplicate certificate of title by Bishop to the defendant company, I have referred to the fact that on October 16, 1917, the defendant company delivered the duplicate certificate of title to the solicitors of the North American Life Assurance Co. for the purpose of registering a mortgage to the said North American Life Assurance Co. From this, it is evident that on that date October 16, 1917, the duplicate certificate of title was in possession of the defendant company and coupling this with the previous agreement, I conclude that the duplicate certificate of title was in possession of the defendant company as security for its loan. It is to be observed, however, that the duplicate certificate of title passed out of the possession of the defendant company on that date and was placed in the registry office where it has remained ever since, so that defendant company has never had possession of the duplicate certificate of title since that date.

Mr. Frame argues that possession of the title deeds is the essence of an equitable mortgage and the defendant company having given up possession that would be an end of their equitable mortgage. It seems to me that would be so if the equitable mortgage depended altogether on the deposit of the title deeds, but it would not apply where there is a written agreement to give a mortgage as well as to deposit the title deeds.

See Falconbridge on Mortgages, 1919 ed. p. 78:—"A written memorandum duly signed containing an agreement to deposit deeds as security is a valid charge without a deposit."

The defendant company contends that on May 6, 1918, plaintiff had notice of the indebtedness of Bishop to this defendant and of the security given therefor, and for that reason, plaintiff took her charge on the land subject to the defendant's charge. The letter from W. G. Bishop to the plaintiff, October 23, 1917, quoted above, is relied on. There is no actual notice here but it is contended that because the land was sold for $8,500 and the plaintiff was informed that Bishop had over a $3,000 equity in the land,

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that that was enough to suggest the existence of some other charge and that plaintiff should have made enquiries.

The law as to constructive notice is stated by Falconbridge in his Law of Mortgages, 1919 ed., pp.98, 99, as follows:—

"Constructive notice means that the circumstances surrounding the taking of a mortgage are such as to induce the court to treat the mortgagee who in fact has no actual notice of an earlier charge as if in fact he had actual notice. The circumstances which will affect a mortgagee with constructive notice are:—

(a) His knowledge of facts which would naturally suggest the existence of the earlier charge.

(b) His failure to make the enquiries which ought reasonably to have been made by him where, if he had made such enquiries, the existence of the earlier charge would have been disclosed to him."

It will be observed that the agreement for sale was for $8,500. $500 cash was paid at the time of the agreement. There was a first mortgage for $2,500 to the North American Life Assurance Co. of which plaintiff had actual notice as it was mentioned in the assignment of the agreement plaintiff took from Bishop. And it will also be observed that in the agreement between Bishop and Fraser it is provided that Fraser had the privilege of paying any sum or sums at any time without notice or bonus.

Under these facts I cannot conclude that plaintiff had knowledge of any facts which would suggest the existence of the charge to the defendant company or that she was negligent in not making enquiries. I, therefore, find that on May 6, 1918, plaintiff did not have notice, actual or constructive, of Bishop's indebtedness to the defendant company or of its security.

The question then comes down to this, which security is to prevail? Bishop's agreement February 10, 1916, to give the mortgage to the defendant company (or, in the alternative, Bishop's mortgage to the defendant company purporting to be made January 2, 1918, and registered June 1, 1918), or Bishop's security to the plaintiff made May 6, 1918, protected by the caveat registered May 9, 1918. This question seems to me to depend on the effect of the registration of the caveat. Sections 58, 63, 129, and 135 of our Land Titles Act, R.S.S. 1920, ch. 67 are as follows:—

"58. (1) After a certificate of title has been granted no instrument shall until registered pass any estate or

interest in the land therein comprised, except a leasehold interest not exceeding three years where there is actual occupation of the land under the same, or render such land liable as security for the payment of money except as against the person making the same.

63. Instruments registered in respect of or affecting the same land shall be entitled to priority, the one over the other, according to the time of registration and not according to the date of execution.

129. Any person claiming to be interested in land for which a certificate of title has been granted, may file a caveat with the registrar to the effect that no registration of any transfer or other instrument affecting the said land shall be made, and no certificate of title to such land granted, until such caveat has been withdrawn or has lapsed as hereinafter provided, unless such instrument or certificate of title is expressed to be subject to the claim of the caveator as stated in such caveat.

135. While a caveat remains in force the registrar shall not enter in the register any memorandum of a transfer or other instrument purporting to transfer, incumber, or otherwise deal with or affect the land in respect to which such caveat is registered, except subject to the claim of the caveator."

See also *McKillop and Benjafield* v. *Alexander* (1912), 1 D.L.R. 586, 45 Can. S.C.R. 551; *McDougall* v. *MacKay* (1922), 68 D.L.R. 245, and *Union Bank of Canada* v. *Lumsden Co.* (1915), 23 D.L.R. 460, 8 S.L.R. 263, where a subsequent encumbrance (and execution) prevailed over an unregistered equitable mortgage prior in point of time.

Anglin, J., in *McKillop and Benjafield* v. *Alexander*, 1 D.L.R. at p. 606, says:—

"I am of the opinion that a caveat when properly lodged prevents the acquisition or the bettering or increasing of any interest in the land legal or equitable adverse to or in derogation of the claim of the caveator—at all events, as it exists at the time when the caveat is lodged."

I am of the opinion that the plaintiff's right must prevail. The plaintiff will have judgment against the Western Trust Co. administrator *ad litem* of W. G. V. Bishop for the amount claimed, and interest as claimed, and costs of an undefended action, and a declaration that the plaintiff is entitled to priority over the defendant company's claim.

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There will be a reference to the local Registrar to ascertain the amount of Fraser's indebtedness under the agreement for sale and the amount of arrears; said amount to the extent of the plaintiff's claim against defendant Bishop and costs of an undefended action to be paid into Court within 3 months. In default, there will be foreclosure absolute against all defendants and cancellation of the agreement for sale. The defendant company to have leave to apply for a sale instead of foreclosure within 3 months if so advised, on payment of the arrears under said agreement for sale and costs within 3 months, defendant Fraser to be relieved of the consequence of his default.

As the issue in this case was between plaintiff and defendant company, the defendant company will pay the plaintiff's costs incurred thereby.

The defendant's counterclaim is dismissed with costs.

Judgment accordingly.

WINTER v. CITY OF TORONTO.

Ontario Supreme Court Appellate Division, Maclaren, Magee, Hodgins and Ferguson, JJ.A. October 17, 1922.

EXPROPRIATION (§IIIC—135)—COMPENSATION—MEASURE OF DAMAGES—EASEMENT.

A by-law of the City of Toronto reads as follows "For the purpose of grading Bloor Street from High Park Avenue to Jane Street, to a horizontal top of 86 feet in width, the right to enter upon, cut into and remove so much of the land hereinafter described as may be necessary or to spread the necessary fill thereon and maintain the same as hereby expropriated and taken and no further or other interest than to enter upon, cut into, remove or fill on the said lands as may be necessary shall be acquired under said by-law." The arbitrator allowed the claimant practically the full value of the property on the ground that the claimant had no right of his own motion to enter on and use the land taken for and occupied with the fill. The Court held that the by-law did not take away the land or the right to enter thereon, but merely limited the enjoyment thereof to a user which would not interfere with the grading of Bloor Street to a horizontal top of 86 feet in width and the maintaining of the street at such grade and width and that the compensation should be re-assessed on the principles laid down in *Re Coleman and Toronto and Niagara Power Co.* (1917), 38 D.L.R. 65, 40 O.L.R. 130.

APPEAL by the City of Toronto from an award of the official arbitrator. Referred back for re-assessment.

C. M. Colquhoun, for the appellant corporation.

G. H. Kilmer, K.C., and *C. B. Henderson*, for respondent.

MACLAREN, J.A., agreed with FERGUSON, J.A.

MAGEE, J.A.:—I am unable to find in the reasons of the official arbitrator any indication that he proceeded upon an

erroneous view of the effect of the by-law or upon any improper principle in arriving at the amount he awarded. As doubt was expressed as to these matters I would have been better satisfied to have asked him for an explanation of his reasons. As my brethren do not take the same view as myself it is evident that the situation needs clearing up and, therefore, I concur in sending the award back. It should be borne in mind by the arbitrator that there may be future deposits of material found necessary by the city and their probability should be considered.

HODGINS, J. A. agreed with FERGUSON, J. A.

FERGUSON, J.A.:—The grounds of appeal as set out in the notice of appeal, and as argued before us, read:—

"2. That the official arbitrator erred in deciding that the by-law in question prevented the claimant from entering on and using the land affected by said by-law, and in fixing the amount of compensation on the basis of such decision.

3. That the learned official arbitrator erred in fixing the compensation as if the claimant's lands to the full depth from Bloor Street were subject to the provisions of said by-laws, whereas in fact only the front portion of said lands were subject to said provisions."

The by-law to be interpreted, reads:—

"For the purpose of grading Bloor Street from High Park Avenue to Jane Street to a horizontal top of 86 feet in width, the right to enter upon, cut into and remove so much of the land hereinafter described as may be necessary or to spread the necessary fill thereon and maintain the same as hereby expropriated and taken and no further or other interest than to enter upon, cut into, remove or fill on the said lands as may be necessary shall be acquired under said by-law."

The arbitrator dealt with the meaning of the by-law, as follows:—

"The first point in issue is the legal effect of the by-law. Does the power to enter upon, spread the fill and maintain the same prevent the claimant from using the land so taken up for building or otherwise? Counsel for contestant argues that the claimant has a perfect right to use the land so filled as he pleases, notwithstanding the fact that he would have to enter on and displace the fill if and when he might build. Counsel for claimant argues to the contrary, that the claimant has no right to enter on the land and interfere with fill.

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I am of the opinion my self that according to the authorities the claimant herein has no right of his own motion to enter on and use the land taken for and occupied with the fill."

The claimant's land has a frontage on Bloor Street of 130 feet; the fill is upon the easterly 88 feet 11 inches thereof. The arbitrator's finding in reference to that 88 feet, 11 inches, reads as follows:—

"As far as I can judge from the evidence the easterly 65 feet was never at any time physically fit for building purposes. It is evident therefore, that the fill has made no difference in this regard. I look upon this portion of the property as an adjunct to the other portion to the west and deal with the case with that in view.

Having re-viewed the property and having in view the opinion I have formed as to the effects of the by-law in reference to the user of the property, I allow for the 23 feet 1 inch of the most westerly part of the fill a damage of $2,257. In regard to the easterly 65 feet the owner has sworn that before the fill was put in, there was a natural grass slope, with wild flowers and trees, giving a pleasing outlook to any apartment house or duplex houses that might have been (or that might now, on the 41 feet, 11 inches) be built. (As I think the evidence shows that a smaller apartment house could yet be erected thereon). For this has been substituted a sand or mud dump thus depreciating the outlook from any apartment house which might be built on the western part of the property. For this, I allow the sum of $1,950 making a total of $4,207 which I allow as full compensation of the injury done the property by reason of the by-law in question here.

The claimant is entitled to his costs of this proceeding."

Read in the light of the evidence, the award shows that the arbitrator has allowed to the claimant practically the full sworn value of the 88 feet, 11 inches, on the hypothesis that the westerly 23 feet, 11 inches thereof, which could have been built upon but for the fill, cannot now be built upon, and that the easterly 65 feet of the 88 feet, 11 inches, which he looked upon as a beauty spot, and as an adjunct to the apartment house which might have been built on the westerly 65 feet, cannot now be entered upon and beautified. Clearly if the easterly 65 feet may be entered upon, and what is now described by the arbitrator as an unsightly mud and sand dump may, at little expense, be turned into a beauty spot by sodding, seeding and surface grading,

then the value of that piece of property has not been materially affected by the fill, and if the claimant may enter upon and build over the westerly 23 feet, 11 inches of the 88 feet, without interfering with the grade of Bloor Street, then the whole value of that piece of property has not been lost, and compensation has been assessed on an improper basis, and on a mistake as to the meaning and legal effect of the by-law.

Mr. Kilmer for the claimant, did not contend that the by-law in its wording plainly excluded the claimant from possession; he argued that the legal effect of the by-law was to allow the city to place its property, that is, its fill, on the claimant's property, and to prevent the claimant trespassing upon or interfering with that fill, which Mr. Kilmer argued was and continued in place to be the property of the city.

In my opinion, the by-law will not bear the interpretation sought to be put upon it by the claimant. Se *Peterson Lake* v. *Dom. Reduction Co.* (1917), 41 O.L.R. 182; (1918), 46 D.L.R. 724, 44 O.L.R. 177; (1919), 50 D.L.R. 52, 59 Can. S.C.R. 646.

I think it is clear that the by-law only takes for the City, the right to put upon the land a fill for a specified purpose and that purpose is set out in the by-law, *i.e.*, maintain Bloor Street to a certain fixed grade, and so long as the claimant does nothing to interfere with the maintaining of Bloor Street at that fixed grade, the city has no right to complain; in other words, it seems to me the by-law does not take away the land or the right to enter thereon, but merely limits the enjoyment thereof to a user which will not interfere with the grading of Bloor Street to a horizontal top of 86 feet in width, and the maintaining of the street at such a grade, and width.

I am, for these reasons, of opinion that the arbitrator has awarded compensation on an erroneous view of the legal effect of the by-law, and that this award should be sent back with a direction that the compensation be re-assessed on the view that the claimant's right and title in and to the property is not interfered with more than is necessary to maintain the grade of Bloor Street as aforesaid, and that there is nothing in the by-law which prevents his entry on the land to beautify or improve it, or even to build upon the part on which the fill is, so long as the entry and work is not calculated to take away the support necessary to maintain Bloor Street at the grade stated. The

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principles which should govern the arbitrator are, I think, laid down in *Re Coleman and Toronto and Niagara Power Co.* (1917), 38 D.L.R. 65, 40 O.L.R. 130.

The appellant should have the costs of this appeal.

Referred back for re-assessment.

FLYNN v. FLYNN.

Supreme Court of Canada, Davies, C.J., Idington, Duff, Anglin, Brodeur and Mignault, JJ. June 17, 1922.

MORTGAGE (§IB—8)—DEED—ABSOLUTE IN FORM—CIRCUMSTANCES TO SHEW INTENDED AS A MORTGAGE—RIGHT OF REDEMPTION.

A deed absolute in form may be only a mortgage. The guarantor is not bound by its form but there must be proof of a convincing character before the Court will so cut down the deed and give the grantor the right to redeem.

APPEAL from the judgment of the Supreme Court of Ontario, Appellate Division, reversing the judgment of the trial Judge and allowing the respondents to have an account of an alleged partnership and to have a certain deed declared to be a mortgage and allowing the respondents to redeem. Affirmed.

The judgment appealed from which was delivered by Meredith, C.J.C.P., was as follows:—

"There are two questions involved in this case: whether the plaintiffs are entitled to share in the profit of the Garden City Canning Co. and whether they are entitled to redeem the property of the company, of which the defendants have a deed absolute in form: but when the latter question is solved the former is, or very nearly is, also.

The transactions in question are all transactions between members of one family, and virtually between two brothers and a sister on the one side, and one brother on the other. The three were owners of the property and business of the company, the business of which they have carried on for a good many years, living always in the building in which the business of "canning" has been carried on, at St. Catharines in this Province: the other brother lived and still lives in Buffalo in the State of New York and is said to be a man of means. He was not connected with the "company's" business and had no interest in the property in question before the transactions in question took place.

For some years, the canning business was not profitable, and the owners of it were obliged to borrow money to enable them to carry it on and keep their property. Naturally, they applied to their brother for loans and naturally he complied with their requests. They seem to have been on

affectionate and confidential terms with one another and entirely trustful of each other.

These loans were first secured by a mortgage upon the plaintiffs' lands for $8,000 made in March, 1915, and then by a mortgage for $2,000 on the lands, also made in July 1915.

In July, 1916, the lands comprised in the mortgages were conveyed by a deed absolute in form to the brother: and in September, 1916, a bill of sale was made to him of the business, its goodwill, and all its chattels. The expressed consideration for each of these deeds was "one dollar and other valuable consideration."

In July, 1917, a lease for one year of the dwelling-house, factory, buildings, and machinery was made by the one brother to the other two at a rental said to have been not more than one half of a fair rental, and a rental in amount about 7% of the aggregate amount of the loans made by him to them.

In September, 1916, the one brother registered his certificate of sole owner of the business of the Garden City Canning Co.

During all that time the plaintiffs resided as they always had done on the property in question, carrying on the business just as it always had been carried on by them: there was no outward and visible sign of these inward and generally invisible things having been done, or of any change in the ownership or ways or books of the canning company.

The plaintiffs say that the deeds are really mortgages: the defendants say that they are not, that they are only that which they purport to be.

A deed absolute in form may be only a mortgage. The grantor is not bound by its form; but there must be proof of a convincing character, before the deed should in any Court be so cut down.

The leading case of *Lincoln* v. *Wright* (1841), 4 Beav. 166, 49 E.R. 302; 4 Beav. 427, 49 E.R. 404, and many other cases, make plain the character of the evidence which ought to be given before the effect of a deed is so reduced.

And all the elements which have been deemed essential in that case and the other cases seem to me to concur in this case: and, upon the whole evidence, I can come to no other conclusion than that when these deeds were made they were intended by all parties and persons concerned in the making of them to be no more than securities for all the money that was owing by the plaintiffs to their brother.

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It is by no means an uncommon thing to take an absolute deed as security only especially when the debt secured approaches in amount the value of the pledge. It saves foreclosure or sale, things which are likely, and gives a feeling of greater security.

Then between such members of one family so nearly related and on such good terms, it was almost certain to be given as asked; apart from the fact that in the then state of the company's affairs the brothers were pretty much at their brother's mercy. So that there is no surprise at the statement made in 1918 by the brother to the solicitor, who had transacted some of the business, that "all we want is our $10,000 back." And so it appears in writing in an account of the brother for the years "1915-1916-1917" of money due to him.

Other "documentary" evidence is contained in the deeds themselves, which were drawn by the brother's careful and capable solicitors, in the fact that the consideration is said to be one dollar and other valuable consideration. Under all the circumstances, it is unbelievable by me that the true consideration should not have been set out if the deed were one of finality depriving the two brothers and the one sister of house, home, and business, a lifetime's house, home and business.

Nor does it end there: look at the lease: why is the rental not that which ordinarily it should have been, but is only a fair rate of interest on the amount the brother's account showed was due to him; the same amount which he said was all he wanted. Rates of interest ran high during the war; 7% could be procured on the best of security. And why allow all things to go on, apparently, as if no change had been made. It may be an answer to say that "blood is thicker than water"; but the reply is obvious; if so, it is too thick to deprive brothers and sister of house, home, and occupation; it is thick enough to say all we want is our $10,000 back and to live up to that saying.

Nothing militates against that view; with the large indebtedness, with the business being unsuccessfully, or rather unprofitably, carried out, it was neither unnatural nor improper for the brother to take a controlling hand, to put the business in such a position that the brothers could not borrow more money on its property or involve the business in debts or enterprises that might be disastrous: all that was done was altogether consistent with the brother's pro-

tection of himself as a large secured creditor and with a debt which without care might become more than could be realised from a mortgage only of all the assets of the company.

The finding on this branch of the case being in the plaintiffs' favour, their evidence is credited: and that should apply to the other branch of the case.

I would, therefore, allow this appeal with costs and give the usual redemption judgment and with a further reference to take an account of the business of the company for the purpose of ascertaining what, if any, sums are payable by any party to any other party in respect thereof, reserving further directions and all questions of costs on this branch of the reference until after the accounts have been taken: but if the parties desire it in any other form it should go in any form agreed upon by them."

Kingstone, K.C., for appellant.

Lynch-Staunton, K.C., and *McCarron*, for respondent.

DAVIES, C. J.:—At the close of the argument in this case I was rather inclined to think that the opinion of the trial Judge, Orde, J. (1921), 20 O.W.N. 499, was right. After much consideration, and after reading the evidence, and the unanimous judgment of the Court of Appeal delivered by Meredith, C.J.C.P. (1921), *ante* p. 462, I have reached the conclusion that this appeal must be dismissed with costs.

IDINGTON, J.:—This action was brought by the respondents to have an account of a partnership alleged to have existed for two years between them and the appellants and to have certain instruments declared mortgage securities and respondents entitled to redemption.

The trial Judge, Orde, J., dismissed the action and the second Appellate Division of the Supreme Court of Ontario upon appeal thereto, *ante* p. 462, reversed the findings of the said trial Judge and allowed the respondents herein the relief claimed in respect of both causes of action. From that, this appeal is taken.

The appellant, Thomas E. Flynn, and his wife, had in 1915, come to the financial assistance of the respondents who had been carrying on a canning business at St. Catharines, in property then vested in the female respondent, who is their sister.

It is not necessary to repeat in detail here all the story of the advances made and failures to repay them, and the different forms of security passed between the parties, for

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the main features thereof are set forth in the judgment of the trial Judge, Orde J., and that of Meredith, C.J.C.P., speaking on behalf of the said Appellate Division.

The appellant, Thomas E. Flynn, pretends that a search in the registry office disclosed to him a mortgage to one McCarron on the same property, upon which mortgages had been given to him and his wife respectively, to secure them for their respective advances, which induced him to ask for an absolute conveyance.

That was given by the "respondent sister" "for certain valuable considerations and of one dollar," on July 7, 1916, to the said Thomas E. Flynn and his wife.

If, as he pretends, that was intended to be an absolute relinquishment of the equity of redemption, it surely took a curious form, and does not, on its face, carry out the pretended intention he now sets up.

The question thus raised seems clearly disposed of by the evidence of the three respondents, against which there is only his oath.

It is claimed by counsel for appellants that, in addition to the oath of Thomas E. Flynn, there is the oath of his son and co-appellant. But all he can swear to is that he was present at the execution of the deed and nothing was said then and there; which, by no means, contradicts the oaths of the three respondents speaking of what had transpired on other occasions.

Again, there is a curious circumstance that the sister was induced to give a bill of sale, in September following, of property used in the factory for the like consideration "of one dollar and other valuable consideration" to the appellants.

This is quite inconsistent with the story set up as to the prior deed, which, if, in fact, for the advances previously made, would have wiped them out as a debt. What was it given for?

Again, when we turn to the denial of any partnership, we meet another inconsistency (with these documents being absolutely final) in the pretensions of the appellant, Thomas E. Flynn.

If he had connected them with something else relating to the partnership which respondents set up, but he absolutely denies, we might have found an explanation which certainly is not apparent.

Then, when we find accounts made out for the year's term

of alleged partnership, or whatever it was, under which the business was conducted, we find the advances making up the $10,000, supposed by the theory of the appellants to have been satisfied by the absolute conveyance of the land, charged in those accounts as if still a live chargeable debt.

Again, there is a separate transaction relative to some other real estate, referred to as the York Street property, for which, in some of these pretensions respondents would get nothing, looking at the matter from appellants' angle of vision as disclosed in these and other accounts.

In short, the appellants' story is quite inconsistent with so many other recognized facts to be gathered from their own evidence, as to destroy my confidence in it.

The evidence of Thomas E. Flynn is most unsatisfactory in his failure to answer many pointed questions, and in giving answers quite inconsistent with collateral facts as to accounts delivered.

Turning back to the execution of the deed and bill of sale, we find as to the former, Thomas E. Flynn was mistaken as to the then existence of the McCarron mortgage, for it appears to have been discharged, and ceased to be a motive for asking an absolute deed.

Its discovery may have suggested the possibility of further encumbrances being created which might render it desirable to prevent that without reference to him.

That motive would be quite consistent with his desire for an absolute conveyance to prevent further so doing, merely as a check upon his brothers' rashness in ways of business when he seemed to be willing to help them. He fails to present any such aspect.

But it hardly helps him herein to answer his statement made by an independent witness that he did not care so long as he got back his $10,000, they could have the property.

Nor does it get over his answer to their request to sign a document which would have rendered matters in question herein clear beyond doubt. His answer, when tendered such a document for signature, was that it was not necessary.

The plain implication in such answer to my mind is that his honour must be trusted and that was already implied in what had taken place.

And the argument of counsel that the failure to insist on its execution was an abandonment of all right, seems to overlook two things; first that the respondent brothers must

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have so understood the transaction or they never would have it prepared, and that it would, in face of such an answer, have been most imprudent further to doubt a brother's assurance that it was not necessary and by persistences in the request have added needless insult by thereby evidencing a doubt of his honour and sincerity.

All these suggestions, and many more, I might add in line therewith, lead me to conclude that the documents relied upon never were intended as an absolute abandonment of the property as claimed herein by the appellants.

Then we have the valuation of these properties far in excess of the amount due, sworn to and not contradicted, which is frequently an important element for consideration in such like cases of mortgage by way of an absolute deed, in order to determine whether likely to have been a mortgage transaction or a sale.

The appellant and his wife conveyed to the son, who is co-appellant with his father, Thomas E. Flynn, but sets forth no independent or higher claim than they would have been entitled to set up.

I think the appeal from the unanimous opinion of the Court below, *ante* p. 462, should be dismissed with costs.

DUFF, J.:—The trial Judge, Orde, J., 20 O.W.N. 499, has, I think, proceeded upon the view that the weight of evidence offered by the respondents was not sufficient to overcome the probative force of the documents themselves. He did not, I think, proceed upon any specific conclusions as to the relative credibility of the witnesses.

I think the judgment of the Appellate Division, *ante* p. 462, should be sustained. I am led to that conclusion mainly by two considerations. It is admitted by Thomas Flynn and by his son that down to a date, at least as late as the year after the execution of the deed upon which Thomas Flynn relies, he would have accepted from the respondents the payments of the respondents' indebtedness in redemption of the property. The accounts delivered to the respondents exhibit internal evidence of having been prepared with a view to showing the amount of that indebtedness long after the deed was executed, and young Mr. Flynn admits virtually that nearly a year afterwards an account was delivered to the respondents intended to show the amount of this indebtedness, an account which includes as a subsisting debt the very debt which the appellant contends was released as the consideration for the execution of the conveyance. Thomas Flynn's evidence at the trial as touching the point

whether or not he considered that the mortgage debt had been discharged in consequence of the execution of the deed is not without a good deal of ambiguity, but it creates in my mind the impression that even at the trial Thomas Flynn conceived the old mortgage debt as a debt which, at the time mentioned, was still alive. These two circumstances, the fact that Thomas Flynn would always have been willing, even after the execution of the deed, to accept payment of principal and interest in redemption of the property and that, in his own mind, and in the communications made by the son and himself to the respondents, the old debt was not treated as extinguished, lend, in my judgment, a great weight of probability to the evidence of the respondents that Thomas Flynn always represented the transaction to them as one intended for greater security.

The second consideration is this: The bill of sale was executed 2 months after the deed of the real estate; it was a transfer of all the chattels including the stock-in-trade, and if Thomas Flynn's story is true, the bill of sale was without consideration. On the other hand the giving of the bill of sale is entirely consistent with the case made by the respondents. Thomas Flynn was assuming responsibility for the conduct of the business, and, from the point of view of the brothers and sister, it might well appear to be a reasonable proposal that the title to the real estate and to the personal property as well, should be vested in him, and if, as they say, he made this a condition of further advances, which were urgently needed, one can understand their acquiescing in the proposal as well as his attitude later when the agreement for reconveyance was presented to him for signature. He was assuming responsibility for financing the business and was insisting that an *ex facie* complete title to the property should be vested in him for his protection. I think the facts in evidence definitely point to the conclusion that this was precisely his attitude. On this hypothesis, all the facts are easily explicable.

I think the appeal should be dismissed with costs.

ANGLIN, J.:—There are no doubt, features of this case which tend to support the judgment of the trial Judge, Orde, J., in favour of the defendant. In addition to the facts that when the defendant, Thomas Flynn, refused to execute the option for resale presented to him by the plaintiffs, they took no steps to assert their equitable rights, and that they subsequently took from him a lease of the

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property—both indicative of an assertion on his part of ownership and of acquiescence therein by them—there is the very cogent circumstance that, in a case where so much depends on the credibility of the opposing parties, who are practically the sole witnesses, the trial Judge, who saw them all in the witness box, found the plaintiff's testimony insufficient to meet the onus which, undoubtedly, rests heavily on them.

On the other hand, the accounts and statements in the record go far to sustain the plaintiff's position that their property was transferred to the defendant, Thomas Flynn, only as security for advances made by him and that this position during 1915-16-17 was not that of sole owner of the "Garden City Canning Company", as he alleges, but rather that of a partner with his brothers in the business carried on under that name. Except on the basis of such a partnership, it is very difficult indeed to understand the position of John A. and Joseph Flynn during that period. In the testimony of Thomas Flynn himself and in that of his son and co-defendant I find not a little indicating that, after he took the deed and bill of sale in 1916, he still regarded himself as a creditor of the plaintiffs, John A. and Joseph Flynn, and still recognized their right to redeem the property conveyed to him on repayment of what he had loaned them with interest.

On the whole, while not entirely free from doubt, I am not convinced that the unanimous judgment of the Appellate Divisional Court, delivered by Meredith, C.J.C.P., is erroneous. In the result reached, no substantial wrong is done the defendant, Thomas Flynn, who will, as the outcome of the accounting directed, receive whatever is due to him for principal and interest, whereas to debar the plaintiffs forever from the recovery of their property might do them a very gross injustice.

BRODEUR, J.:—The appellant, Thomas E. Flynn, is the brother of the respondents. The respondents, John A. Flynn and Joseph M. Flynn were carrying on business in St. Catharines as canners. The factory in which they were carrying out their business was in their sister's name.

In 1915, they became in financial difficulties and they applied to their brother, Thomas E. Flynn, the appellant, for help. As a good brother, he came to their rescue, advanced the necessary money and took a mortgage on their lands. The factory was re-opened; but Thomas E. Flynn

took, through his son, the appellant John J., an absolute control of the finances, though his two brothers, John A. and Joseph M., the respondents, looked after the practical running of the factory.

In July, 1916, the lands and premises on which he had a mortgage were transferred to Thomas E. Flynn and the business went on as formerly until July, 1917, when evidently the affairs of the factory were on a more prosperous basis.

Until the date of July, 1917, the contractual relations of the three brothers as to the running of the factory were somewhat indefinite. Was Thomas E. Flynn the sole owner of the business and were John A. and Joseph M. his employees or were the three of them partners? The time which elapsed from 1915, when Thomas E. Flynn advanced the money, until July, 1917, was a critical one for the success of that business venture and every one I see was doing his best to relieve it from the chaos it was found in in 1915 without asserting any specific contractual relations between themselves. But in July, 1917, the affairs were on a better footing. Profits had been made and they were divided between Thomas E. Flynn for one half and the two other brothers for the other half.

The plaintiffs, by their action, ask the Courts to declare that there was a partnership between themselves and that the conveyance which has been made to Thomas E. Flynn by the deed of July 7, 1916, should operate as a mortgage.

I have no doubt that the contractual relations which existed between the parties for a while were those of partners. As to the conveyance which has been made to Thomas E. Flynn by the deed of July 7, 1916, we have to decide whether it is absolute, or whether it should operate as a mortgage.

The facts of the case lead me to the conclusion that it was a mortgage. The sum which was due to Thomas E. Flynn was $10,000. It is then extraordinary that a property estimated at $30,000 should be absolutely conveyed to him for such a small sum. There is then inadequacy of consideration between the value of the property conveyed and the amount due to the purchaser.

There is also inadequacy of rent chargeable upon the lands. These lands have been leased to the respondents

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for $720 a year. This sum represents a fairly good interest on the $10,000 due. It is alleged and proved that the rental value of the property would be about $2,400 a year.

The indebtedness of the transferors to the transferee, the declarations made by the transferee and his son that all they wanted was their money back, all this shows that that deed of conveyance should not be treated as absolute.

I would dismiss the appeal with costs.

MIGNAULT, J.:—The main question in this case is whether a sale made by the respondents to the appellant, Thomas E. Flynn, was an absolute sale or, in reality, a security for the repayment of monies advanced by him to the respondents. There were contradictory statements made by the appellants and the respondents as to the nature of the transaction and the trial Judge, Orde, J., decided in favor of the former. This judgment was reversed by the Appellate Divisional Court, *ante* p. 462, and it was decided that the sale, although absolute in form, was really a security for the advances made to the respondents.

Under ordinary circumstances, I would give the greatest weight to the decision of the trial Judge on contradictory evidence, but, after carefully reading the testimony of the appellant, Thomas E. Flynn, and considering the statements made by him or by his order purporting to show that the respondents were indebted to him after the sale, I have come to the conclusion that the sale was made in order to secure the repayment of his advances.

I would, therefore, dismiss the appeal with costs, expressing my respectful concurrence in the judgement of Meredith, C.J.C.P., *ante* p. 462.

Appeal dismissed.

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Saskatchewan King's Bench, Taylor, J. October 23, 1922.

INTOXICATING LIQUORS (§IA—5)—SASKATCHEWAN TEMPERANCE ACT, R.S.S. 1920, CH. 194, AS AMENDED BY 1920 (SASK.), CH. 70, SEC. 75—CONSTRUCTION—EX PARTE ORDER FOR SUBSTITUTED SERVICE OF NOTICE OF APPEAL—IMPERATIVE NATURE OF.

The language of the Saskatchewan Temperance Act, R.S.S. 1920, ch. 194, as amended by 1920 (Sask.), ch. 70, sec. 75, is imperative, and where a Judge has made an *ex parte* order directing the notice of appeal to be served on certain persons by way of substitutional service, and the persons ordered to be served have not been served before the date set for trial, the case will be struck off the list.

APPLICATIONS to adjourn the hearing of two appeals from the dismissal by a Justice of the Peace of informations

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under the Saskatchewan Temperance Act. Application dismissed; cases struck off the list.

H. F. Thomson, for appellant. No one *contra*.

TAYLOR, J.:—The neat point for decision in this matter is whether I have jurisdiction to, and, having jurisdiction, should grant applications to adjourn, in two matters which purport to be appeals by the Director of Prosecutions on behalf of the prosecutor, from the dismissal of informations laid under the Saskatchewan Temperance Act, R.S.S. 1920, ch. 194.

Two informations were laid against the respondent on August 25, 1922, for separate offences alleged to have been committed on the same day against separate provisions of the Saskatchewan Temperance Act. Both were heard together on September 8, 1922, and dismissed after hearing evidence on the merits. On September 11, 1922, the appellant filed notices of appeal to the sittings of this Court to be holden at Regina commencing on September 26, 1922, then the next sittings and the sittings which would be nearest to the place of trial. Notice of appeal has never been served on the respondent personally, and on September 19, 1922, the Chief Justice, on the *ex parte* application of the appellant, ordered and directed that by way of substitutional service, notice should be served upon the wife of the respondent, upon the solicitor who had appeared for the respondent on the hearing before the Justice, and upon the Justice. The Justice and the solicitor were duly served, and when the case was called at the September sittings the solicitor appeared and informed the Court, in effect, that he had not been in communication with the respondent or his wife since the hearing before the Justice, and had no instructions, and, therefore, could not appear or instruct counsel. The wife of the respondent was not served as directed by the order or at all.

Embury, J., on September 27, 1921, one day after the opening of the sittings made an *ex parte* order in Chambers extending the time for service for 20 days from September 23, 1922. At that time, September 27, 1922, the sittings to which the appeal had been launched were in progress, presided over then by Bigelow, J., and I feel certain that in some way counsel must have overlooked the necessity of calling the Chamber Judge's attention to the fact that the appeal was to the September Court and that it had then been set down to be disposed of at that Court, as such applica-

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tions are not dealt with in Chambers, except on the request of the trial Judge.

The appeals were put close to the foot of the peremptory list and called on October 3, 1922. Counsel appeared for the appellant, and, after making his statement, the solicitor who had appeared before the Justice for the respondent withdrew. The records as above were put in, and a number of affidavits were filed to establish that the appellant had exhausted every reasonable means to serve the respondent and to comply with the directions in the order of the Chief Justice. It was contended that the appellant had endeavoured with all diligence to effect service and to give notice of appeal to the respondent, and had been deterred therefrom, by circumstances beyond his control, which rendered such service impossible. Some of the constables who endeavoured to locate the respondent go further and depose that the respondent is believed to be evading service, but I can find in the affidavits no true ground for drawing such a conclusion. No ground for the belief is stated in the affidavits and the allegation should be, therefore, treated as purely scandalous. It appears that the respondent and his wife ordinarily occupy a room in a lodging-house in Regina. The respondent has not been there since September 11, and his wife left about a week later. They still retained the room, have the key to it, and rental paid to the middle of October, and mail is still delivered there for them. At this time of the year, it is highly probable that, if they be people of small means, they are both busy in threshing operations in the country. Why assume otherwise?

Counsel bases his application on the English cases reviewed in *Wills & Sons* v. *McSherry*, [1913] 1 K.B. 20, and on the decisions in the Court of Appeal for this Province in *Kowalenko* v. *Lewis and Lepine* (1921), 59 D.L.R. 333, 35 Can. Cr. Cas. 224, and *Rex* v. *Sharpe and Inglis* (1921), 66 D.L.R. 521, 36 Can. Cr. Cas. 326, 15 S.L.R. 35, and it would relieve me from much difficulty if the question which I have to determine had been decided in any of these cases.

In *Wills & Sons* v. *McSherry* the Court had under consideration the right of the Court to hear a case stated by Justices at petty sessions under 1857 (Imp.), ch. 43, an Act based, as is stated in its preamble, to make provision "For obtaining the opinion of a Superior Court on Questions of Law which arise in the Exercise of Summary Jurisdiction by Justices of the Peace."

Either party to the proceeding may, if dissatisfied with

the determination as being erroneous in point of law, apply, in writing to the Justices to state and sign a case setting forth the facts and the grounds of such determination for the opinion thereon of one of the Superior Courts of law. The appellant is to transmit such case to the superior Court, "first giving notice of such appeal" to the respondent. Nine seamen had, *subject* to stating the case in question, been given judgment for wages at petty sessions. The seamen had forthwith gone to sea, but had left with the solicitor who acted for them, addresses to which the money was to be sent in the event of the appeal being successful. The solicitor had been served with notice of appeal, but had not been instructed thereon. Therefore, it would appear that that particular stated case involved no question of personal liberty. It was on points of law only, involving no determination of any question of fact. It was to set aside a conviction, and it, clearly, appeared that the respondents had left, knowing an appeal was imminent, without instructing counsel. Channell, J., [1913] 1 K.B., at p. 25, said that he could not help thinking that the decision might be quoted in support of propositions to which it never was intended to be applied, and it is clearly intimated that it is not intended that the decision is to go beyond the circumstances of that particular case.

To my mind, with all due respect for the opinions of those who have reached a different conclusion, this decision and the English cases referred to in it, cannot be taken as authorities upon the construction which should be placed upon the provisions of the Saskatchewan Temperance Act. In England they have no appeal on behalf of the Crown or prosecutor analagous to the appeal on questions of fact as well as law from a decision of a Justice or magistrate under the Criminal Code or provincial statute creating a "provincial crime." The appeal is usually allowed to any person aggrieved by a conviction on information or order following a complaint. See *per* Lord Herschell in *Boulter* v. *Kent Justices*, [1897] A.C. 556, at p. 567. The language of Coleridge, C.J. (in which Wills, J., cordially agreed) in *Reg.* v. *Keepers of Peace etc. of London County* (1890), 25 Q.B.D. 357, is pertinent to any appeal by a prosecutor in a criminal or quasi-criminal matter. There, the accused had been charged with wilfully obstructing a highway, and by the Act creating the offence 1835 (Imp.), ch. 50, sec. 105, "If any person shall think himself aggrieved by . . . any order, conviction, judgment, or determination made, or by

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any matter or thing done, by any justice or other person in pursuance of this Act . . . such person may appeal" to quarter sessions, in manner prescribed, and it was held that an informant had no right to appeal. I extract some of the remarks of Lord Coleridge, C.J., at pp. 359-361:—

"The question arises on the Act of 1835, and a claim to have an appeal after acquittal is now for the first time made . . . . A person is prosecuted for some breach of the law which is to be proved in a particular way. The general principle of law is that, if acquitted, he is not to be a second time vexed . . . a man acquitted is not to be again proceeded against with respect to the same matter . . . Is a person who cannot succeed in getting a conviction against another person 'aggrieved'? He may be annoyed at finding that what he thought was a breach of law is not a breach of law; but is he 'aggrieved' because some one is held not to have done wrong?"

At common law, it was considered that a man who had once been tried and acquitted for a crime might not be again tried for the same offence if he was in jeopardy on the first trial, and it is stated in Russell on Crimes, 7th ed., at p. 1983, that since the abolition of writs of error there is now no means in England of correcting an erroneous judgment of acquittal.

In 19 Hals.,*sub-tit* Magistrates, the cases referred to in *Wills & Sons* v. *McSherry*, *supra* (itself decided after the publication) are noted under sec. 1399, p. 653, dealing with appeals to the High Court by way of special case upon questions of law, and in the similar article on appeals to Quarter Sessions and the interpretation put upon the statutes conferring that right—and a perusal of those statutes discloses that in the main the language employed in Canada in creating similar rights of appeal has been borrowed therefrom—neither in sec. 1378 nor in the notes thereon, is there any suggestion that the cases on the stated cases have any bearing, and whilst reference is made to many cases on notice of appeal there is no reference to these other cases. And in one of the cases cited, *Reg.* v. *Oxfordshire Justices*, [1893] 2 Q.B. 149, it is held that the retainer of a solicitor appearing before Justices in petty sessions comes to an end upon the making of the order by the Justices, and his acceptance of service of notice of appeal on behalf of the respondent was insufficient even though he had acquainted the respondent therewith and advised her thereon. Surely, if anything might be taken as tantamount to the service required

by the statute, no stronger case could be suggested.

Then again the wording of sec. 75 of the Saskatchewan Temperance Act, R.S.S. 1920, ch. 194, as amended in 1920 (Sask.), ch. 70, sec. 39, differs from the wording of the section in the Act of 1857, even if the purposes of the two statutes could be considered analagous. The provision for notice in the English Act, 1857 (Imp.), ch. 43, sec. 2, is found in the words already quoted:—

"First giving notice in writing of such appeal, with a copy of the case so stated and signed, to the other party to the proceeding in which the determination was given hereinafter called the respondent."

In the Saskatchewan enactment, 1920 amendment, it reads (sec. 75 (1)):—

"By filing, in the office of the local registrar of the court appealed to, a notice in writing setting forth with reasonable certainty the conviction or order complained of and the court appealed to, within 15 days after the conviction or order complained of, and by serving the respondent, the justice who tried the case and (where the appeal is against a conviction) the Director of Prosecutions each with a copy of such notice or, in the alternative, upon such person or persons as a Judge of the Court appealed to shall *ex parte* direct."

The language of the Saskatchewan Act is plainly imperative; the language in the English enactment has been construed imperatively, but whilst so construing it that where compliance with the terms of the statute as to give notice is impossible, and the respondent cannot be said not to have had notice of the proceedings by way of stated case, that the Court has jurisdiction to proceed without a strict compliance with the statute. There is the further consideration that as sec. 75 of the Saskatchewan Temperance Act itself provides for the alternative if personal service cannot be effected, no other is left open. The field is covered by the legislation.

So far, therefore, as the English cases cited to me go, it does not appear to me that I can take them as authorities for the proposition for which counsel has contended. There is lack of similarity in the statutes and the appeal I have under consideration is radically different from that under consideration in the English cases.

As to the Saskatchewan cases: In *Kowalenko* v. *Lewis and Lepine*, 59 D.L.R. 333, the plaintiff brought action against Justices of the Peace on the ground that he had

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suffered damages by reason of their failure to transmit to the District Court the proceedings before them as required by sec. 757 Cr. Code R.S.C. 1906, ch. 146. On the argument before the Court of Appeal it was contended that the plaintiff had not proved that he had served a copy of notice of appeal upon the defendants and he could not, in any event, have proceeded with his appeal. It was held that this argument first having been made in the Court of Appeal an opportunity should be given to the plaintiff to complete his case by proving that he had perfected his appeal by serving the notice of appeal. Dealing with the objection, Turgeon, J.A., in delivering the judgment of the Court, said, 59 D.L.R., at p. 334:—

"This objection is a substantial one. If the plaintiff had failed to serve the defendants as required by the *Code*, his appeal could not have been heard, unless, at least, he could have shewn that he had endeavoured with all diligence to effect the service and had been deterred therefrom by circumstances altogether beyond his control, and which rendered such service impossible. *Wills & Sons* v. *McSherry*, [1913] 1 K.B. 20; *Reg.* v. *Joseph* (1900), 6 Can. Cr. Cas. 144. In that case, of course, he would have no action against the defendants, because he could not attribute his inability to proceed with his appeal solely to their negligence."

In using this language it would not appear to me that the Court of Appeal endeavoured to decide that where it has been established that an appellant had endeavoured with all diligence to effect service and had been deterred therefrom by circumstances altogether beyond his control and which rendered such service impossible, that service of notice would be dispensed with, for in the case then under consideration, it was apparently not contended that no notice had been given, but the plaintiffs were prepared to assume the responsibility of showing that notice had been served. The language quoted was used to reserve a moot point for further consideration.

Rex v. *Sharpe and Inglis*, 66 D.L.R. 521, was an appeal from an application for writ of prohibition restraining a District Court Judge from entertaining or hearing an appeal from a summary conviction. The notice of appeal served was two days late, and the District Court Judge had, after the time was up, extended the time for service and confirmed the service already made. All of the members of the Court, Haultain, C.J.S., Lamont and Turgeon, JJ.A., were agreed that nothing in the statute authorised the making of

such an order, and it would have to be treated as a nullity.

Haultain, C.J.S., held that the service was a nullity, and that the district Court Judge had no jurisdiction in the matter after 30 days from the date of the conviction. The statute did not give the Judge power to make an illegal service good *ex post facto*. There is no suggestion in his judgment that there are circumstances under which service of notice might be dispensed with. Lamont, J.A., however, went further and says, 66 D.L.R., at p. 525:—"In my opinion, however, the want of jurisdiction on the part of the District Court Judge to make the order does not, of itself, establish a want of jurisdiction to hear the appeal," and adopting the English decisions on stated cases, he expressed a clear opinion that failure to literally comply with the statutory requirements did not, however, in every case, deprive the District Court Judge of his jurisdiction to hear the appeal; and if the appellant could show that he had endeavoured with all diligence to effect service and had been deterred therefrom by circumstances beyond his control and which rendered such service impossible, there would be jurisdiction to hear the appeal; but as the failure to serve was not due to impossibility but to an oversight it was not within the exception.

Turgeon, J.A., 66 D.L.R., at p. 527, uses, it seems to me, designedly, very guarded language:—

"Even then if we should adopt the proposition laid down in *Wills & Sons* v. *McSherry*, [1913] 1 K.B. 20, and the cases therein referred to, that, under certain circumstances, impossibility of performance of a statutory condition by the appellant will be taken as the equivalent of performance itself so as to confer jurisdiction upon the Court, I do not see how the position of the appellant will be strengthened."

So that it would appear from this decision that two Judges in the Appellate Court, in effect, express contrary opinions, and the other found it unnecessary to deal with the point. I have to conclude, therefore, that I cannot relieve myself of the responsibility of giving effect to my own conclusion on the authority of anything stated in these decisions.

Counsel in his argument did not, in any way, beg the question. He admitted that unless there was power to hear there was no power to adjourn; that, unless an appeal was properly lodged, I had no power to make any order herein at all. In my opinion, the service of notice in the manner directed by the statute, or alternatively "upon such person or persons as the Judge of the Court appeal to shall

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direct," is imperative, and this conclusion I have reached not only because the Legislature has, by the expression of the one alternative, excluded others, but because of the very nature of the appeal under consideration; because upon such an appeal, the whole case is opened, and evidence adduced upon the merits, without such evidence in any way being confined or limited, or even necessarily guided by what has been adduced on the hearing before the magistrate. It is a new and different proceeding, and the hearing before the Justice cannot, in any sense, be taken as notice of the rehearing, or that either party intends to apply for such a rehearing on appeal. It is a trial of which, on the principle of what is termed "natural justice," due notice should be given to the party affected thereby. The very suggestion that a man may be retired for an offence of which he has been acquitted without actual notice and opportunity to answer is to suggest an injustice.

The appeal cases will be struck off the list.

Judgment accordingly.

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Alberta Supreme Court, Appellate Division, Stuart, Beck and Hyndman, JJ.A. November 24, 1922.

MECHANICS LIENS (II)—IRRIGATION DITCH—CONSTRUCTED UNDER DOMINION AUTHORITY—PROTECTION OF DOMINION PROPERTY—RIGHT OF LIEN UNDER PROVINCIAL ACT.

An irrigation ditch or canal being a work constructed under the authority of Dominion Legislation for the purpose of disposing of and using federal property, a mechanics' lien under a provincial Mechanics' Lien Act, 1906 (Alta.), ch. 21, will not attach to the ditch on which the work has been done: a declaration of the existence of such lien would be such an interference with federal property and federal legislation as could not be justified under any sub-section of sec. 92 of the B.N.A. Act, 1867, in any case the work being for the general benefit of a large number of land owners, and the Irrigation Districts Act, 1920 (Alta.), ch. 14, secs. 170 *et seq.*, having provided a method for realising upon a writ of execution against the district by levying a rate upon the land owners the declaration should be refused on grounds of public policy.

APPEAL from the trial judgment in an action for an account and for a declaration that the plaintiff is entitled to a lien on that portion of an irrigation ditch upon which the work had been done.

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

H. P. O. Savary, K.C., for Noehren & Mannix, appellants.

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

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The judgment of the Court was delivered by

STUART, J.A.:—The Lethbridge Northern Irrigation District, which I shall refer to as "the district," was incorporated under the provisions of 1920 (Alta.), ch. 14, and amendments thereto. Under the authority of this statute the district had expropriated a long strip of land running through its territory and had proceeded to construct an irrigation ditch or canal thereon. The contract for the whole work had been let to the defendants Grant Smith and Co. and Macdonell Ltd., who had sublet a portion of it to the defendants Noehren and Mannix, who in turn had sublet a portion of their contract covering some 1,500 ft. of the ditch to the defendants Farrelly Bros., Ltd.

The plaintiffs had supplied to Farrelly Bros. Ltd. some material consisting chiefly of wire rope, powder, detonators, dynamite and fuses, which were used by Farrelly Bros. Ltd. in excavating the portion of the ditch, i.e., the 1,500 ft., which they had contracted to excavate.

Not having been paid by Farrelly Bros. Ltd. for these materials the plaintiff company filed a claim of lien under the Mechanics' Lien Act, 1906 (Alta.), ch. 21, against the piece of land upon which they had done their work and which was registered in the name of the district.

The plaintiffs then brought this action wherein they claim personal judgment against Farrelly Bros. Ltd. for the amount of their account and also a declaration that they are entitled to a lien upon the land, that is, the portion of the ditch upon which Farrelly Bros. Ltd. had done their work.

Farrelly Bros. Ltd. did not defend but neither did the district. The only defendant which contested the action by filing a defence and appearing at the trial was the firm of Noehren and Mannix, against whom personally no judgment was sought and who were in no way interested in the land upon which the lien was claimed. This situation arises from the circumstance that the district has held back from head contractors Grant Smith and Co. and Macdonell Ltd. considerable money eventually coming to them under the contract and that these head contractors have in turn held back from Noehren and Mannix money coming to the latter on their sub-contract. If a lien in favour of the plaintiffs exists upon the district's property on account of material supplied to Farrelly Bros. Ltd. and not paid for, then the amount will be deducted from the money due to Noehren and Mannix. It was, therefore, a matter in which the latter

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firm were substantially interested and they have defended the action so as to prevent a declaration of the existence of the lien being made. Apparently the district and Grant Smith and Co. and Macdonell Ltd. were indifferent as to whether a lien were declared or not because in the circumstances they considered themselves sufficiently protected.

The trial Judge gave judgment declaring the existence of the lien for the sum of $1,182.70 being the price of the explosives but not for the price of the other material such as wire rope, etc.

Noehren and Mannix have appealed from this judgment and set up as their first ground the contention that a mechanics' lien cannot be made to attach upon the property of such a corporation as the irrigation district. This ground was not taken at the trial and is not referred to or dealt with in the reasons for judgment below. But being raised before us on appeal it must be considered and in my opinion it is worthy of serious consideration.

An irrigation district under the Act of 1920 (Alta.), ch. 14, is formed by a vote of the owners, occupants or purchasers of land within the district. The Act provides for the election of a board of trustees to manage the affairs of the district but this board is subject to the complete control of a council of three, apparently not necessarily ratepayers or residents, to be appointed by the Lieutenant-Governor in Council. The Lieutenant-Governor in Council may also under sec. 49 appoint an official trustee to act in place of the elected board and may appoint the council of three as such official trustee.

The board of trustees have power to expropriate land for the purpose of constructing an irrigation ditch, to levy rates upon the assessable land in the district, to borrow money upon the security of all lands in the district and upon the lands owned by the district itself and to construct the necessary ditches and canals. The board, however, does not seem to be clothed with the power of regulating the distribution of water. There is a separate Act called the Water Users' Districts Act, 1920 (Alta.), ch 16, under which the occupiers of at least one half the land in an irrigation district may form themselves into a water users' association with a board of managers and this board of managers is given by this separate Act power to make regulations regarding the receipt of the water delivered at the outlets from the canal and for the maintenance, cleansing and repair of the ditch so far as committed to their charge and

for the employment of the necessary officials and water masters, but being subject in all this to the approval of the board of trustees of the irrigation district. The board of managers of the association may also impose a rate per acre upon the area to be irrigated by the ditch committed to their charge.

It will be seen from the foregoing (and I have not enumerated all the provisions of the legislation which point in the same direction) that an irrigation district is a public municipal corporation of a special kind established to effect a definite public purpose. It is, therefore, much more than a so-called "quasi-public corporation" by which term is generally understood a private corporation which has received a franchise from a municipality for furnishing for example water, gas or electric light. It becomes in effect part of the local government machinery of the Province.

The question is whether the provision of the Mechanics Lien Act ought to be held to apply to the property of such a corporation and particularly upon the land whereon the ditch or canal for the maintenance and operation of which the district has been established as distinguished from a piece of land owned by the district upon which, for example, an office building might be located.

It will be seen at once that to make the Mechanics' Lien Act applicable to the ditch or canal itself would be going considerably further than holding it applicable to the right of way of a railway company. The latter is at least a private corporation managed and controlled by its shareholders as a private business enterprise, although, of course, intended to furnish transportation services to the public. But a railway company, as also a gas or light company, is a business enterprise operated for the profit of its shareholders. There is no suggestion that an irrigation district is intended or expects to make a profit out of the enterprise itself. It is intended to furnish a necessary material, i.e., water to the water users, the farmers, who by the use of it are assisted in their farming operations.

Furthermore, a careful examination of the relevant legislation will, I think, reveal the fact that while it is under the authority of the provincial Act that many of the powers of the irrigation district are held, the actual authority to construct the ditch is really given by the Dominion Irrigation Act R.S.C. 1906, ch. 61. Sections 29 and 30 of the Irrigation Districts Act 1920 (Alta.) ch. 14, read thus:

"29. A board may forthwith after the formation of an

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irrigation district make an application in accordance with the provisions of the Irrigation Act for the water necessary for the irrigation of the district or any portion or portions thereof and for authority to construct the necessary works for the utilization of such water. (2) A board may employ such surveyors, engineers, or other assistants as are required to draw up a general scheme for the irrigation of the district and to obtain the necessary information to enable them to make such application. (3) Every board shall comply in every detail with the procedure laid down in the Irrigation Act regarding matters preliminary or antecedent to the order granting such application. (4) A board instead of or in addition to making application for an authorization may, subject to the approval of the council, enter into any contract for the construction or operation of any works or the supply of water for irrigation purposes to or within the district, or for all or any such objects with any company (as defined in the Irrigation Act to which an authorization or license has been granted under the Irrigation Act, and all the provisions of this Act shall apply to those works or the supply of water under the said contract, to the extent necessary to enable the board to carry out any such contract according to the terms thereof.

30. The authorisation provided for in sec. 20 of the Irrigation Act together with a copy of the maps and plans required by the Irrigation Act as well as all the official records of the district shall be filed in the office of the secretary of the board and shall be open for inspection. (2) A copy of the authorization and a copy of the said maps and plans shall also be filed with the Minister and shall be open to the inspection aforesaid."

From this it plainly appears that the "authority to construct the works" is intended to be granted by the Minister of the Interior under sec. 20 of the Dominion Irrigation Act, as amended by 1908 (Can.), ch. 38, sec. 7. And sec. 24 of the Act, R.S.C. 1906, ch. 61, says:—

"The applicant, immediately after the receipt of the authorization, may proceed with the construction of the works authorized."

So that it is undeniable in my opinion that the irrigation ditch or canal is a work constructed under the authority, not of provincial, but of Dominion legislation. The situation is that the Provincial Legislature has under its powers in regard to municipal legislation provided for the erection of the district and the levying of rates etc. and has given the

district *power i.e. the capacity to apply for authority* to construct the works but that it is by Dominion legislation that the actual authority to construct is conferred.

And the legislation goes further still. In 1914 the Dominion Parliament amended the Irrigation Act (1914 (Can.) ch. 37) so as to provide (ch. 37, sec. 9) that any other person may be given the right to use the works constructed by a licensee and to enlarge the same at his own cost so long as the interests of the owner (here the irrigation district) are not affected. [See 1920 (Can.) ch. 55, sec. 6]. Then the Minister of the Interior has power to cancel the license of the district to use water if the works are not being used. Even the by-laws and regulations of the district (which is a "company" within the meaning of the Irrigation Act) are subject to the approval of the Minister of the Interior.

The Provincial Legislature has by its own legislation carefully avoided any possible contest over a question of constitutionality by merely empowering the irrigation district to get its authority to construct under the Dominion Act.

The consequence is—one not suggested or appreciated even upon the argument before us but quite inevitable—that the work in question was constructed under the authority of federal legislation. If it be said that this is not so serious as at first blush might appear because no one would suggest that merely because a corporation were incorporated under federal law and empowered to construct buildings, therefore, the provincial Mechanics' Lien Act would not apply to such buildings and because the Dominion did not in this case even create the corporation there are on the other hand still other circumstances which must impress one as of grave importance. The Federal Parliament, although it entered upon its legislation with regard to irrigation while the North West Territories still existed and, therefore, while there could be no question of its power to do so, has continued its statutes in existence and the federal executive is administering them under the reservation of Crown Land, mines and waters, which is made by sec. 21 of the Alberta Act 1905 (Can.) ch. 3, constituting the Province. Substantially the theory is that the water in the streams is the property of the Crown in the right of the Dominion and with the control, diversion and distribution thereof the Dominion alone can deal. So that here we have a work constructed by the authority of the Federal Parliament for the purpose of disposing of and using federal property.

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It will be seen at once that we have come practically to the situation which existed in the case of *Crawford* v. *Tilden* (1907), 14 O.L.R. 572, 6 C.R.C. 437, in which the Ontario Court of Appeal held that the Ontario Mechanics' Lien Act R. S. O. 1897, ch. 153, did not apply against a railway company incorporated under a Dominion Act, and declared to be for the general advantage of Canada. In my opinion the principle of that case applies to the facts of this case because the declaration of the existence of a lien, under our Mechanics' Lien Act, 1906 (Alta.) ch. 21 upon the works constructed under the authority and for the purposes which I have mentioned would be such an interference with federal property and federal legislation with respect thereto as could not be justified under any subsection of sec. 92 of the B. N. A. Act 1867.

But even if this were not so, I am still of opinion that the Mechanics' Lien Act would not be applicable to the works in question here. Our Mechanics' Lien Acts do not come to us from England where they never existed but from the United States. It appears to be undoubtedly the general rule adopted there in the various States that the Acts do not apply to the property of purely public corporations. (See 27 Cyc. p. 25, Jones' Law of Liens, 3rd ed. vol. 2 para. 1375).

The latter authority does, indeed, add this:—

"But as a general rule property of a corporation against which a judgment can be enforced by execution may be subjected to a mechanics' lien."

If we accept this principle it then becomes a question whether the land in question here against which a claim of lien has been filed could be seized and sold under a writ of execution. In 23 Corp. Jur. sec. 105, p. 355 the rule is stated as follows:—

"Where property of a municipal or other public corporation is sought to be subjected to execution to satisfy judgments recovered against such corporation the question as to whether such property is leviable or not is to be determined by the usage and purposes for which it is held."

And it is said that the rule is that generally everything held for governmental purposes is not subject to levy and sale under execution against such corporation.

For these statements only American authorities are given except *Scott* v. *School Trustees of Burgess* (1859), 19 U.C.Q.B. 28.

Some cases were cited to us which are distinguishable

In *McArthur* v. *Dewar* (1885), 3 Man. L. R. 72, a statute expressly provided that all real and personal property of the City of Winnipeg could be sold under execution and it was chiefly for this reason that Killam, J., held that a mechanics' lien could attach upon the city hall.

In *Lee* v. *Broley*, (1909), 2 S.L.R. 288, Wetmore, C.J., delivering the judgment of the full Court of Saskatchewan, held that a mechanics' lien would attach upon a school house and the land occupied thereby. He reviews the older Ontario cases. But he does not disagree with *Breeze* v. *Midland R. Co.* (1879), 26 Gr. 225; *King* v. *Alford* (1885), 9 O.R. 643, and *Peto* v. *Welland R. Co.* (1862), 9 Gr. 455. In his judgment Wetmore, C.J., said, 2 S.L.R., at p. 291:—

"I can very readily understand how it could be argued with very considerable force that the lands or buildings of a railway company which are being used for the purpose of carrying on and running the railway, could not be seized under execution or under a mechanics' lien because the company is chartered for the purpose of using a great public utility, and if persons who had judgments against them could take up the roadway or their buildings piecemeal here and there they could stop the running of the road. That, to my mind, however, does not apply to a board of school trustees or the property they control because if the property of a board of school trustees is taken from them under execution the most it can mean is that they have got to build another schoolhouse and they are in no worse position in that respect than any other judgment debtor."

Thus the judgment suggests very strongly that the full Court of Saskatchewan might have taken quite a different view if they had been dealing with such property as is in question here.

The same remark will apply to the judgments of Macdonald, C.J.A., and Galliher, J.A., in the British Columbia case of *Hazel* v. *Lund* (1915), 25 D.L.R. 204, 22 B.C.R. 264. In that case the statute provided that the property of the school trustees should not be liable to be taken in execution. The Court was evenly divided, the two Judges on the one side, and the two Judges on the other drawing exactly opposite inferences from this provision. On one side it was said that just exactly because it was declared expressly free from execution it should, therefore, be held to be subject to mechanics' liens and on the other it was said that a mechanics' lien was itself a method of execution and, therefore, it could not attach.

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Whichever of the opinions expressed in this latter case one may prefer, the case is distinguishable, just as *Lee* v. *Broley, supra*, is, upon the principle suggested in the citation above made from 23 Corp. Jur., viz., that it depends upon the usage and purposes for which the property is held. A school building is a distinct piece of property. The land upon which the claim of lien was filed in the case before us is only a small part of the land used for a widely extended undertaking. In my opinion it is not the schoolhouse or city hall cases but the railway cases which are analogous.

Now, there were two cases decided in the Judicial Committee to which reference should be made. The first is *Central Ontario Ry.* v. *Trusts and Guarantee Co., Ltd.*, [1905] A. C. 576. In that case the railway had been declared by the Federal Parliament to be a work for the general advantage of Canada. The appeal was from a judgment of the Court of Appeal of Ontario (1904), 8 O.L.R. 342, declaring the plaintiffs (respondents in the appeal) to be entitled to have the defendant's railway and undertaking sold under a mortgage. The judgment says that their Lordships saw no reason to doubt the correctness of the law laid down in Upper Canada and Ontario from 1862 onward to the effect that even where the land including the right of way of a railway company is included in the mortgage the exercise of the ordinary remedies of a mortgage of lands was not authorised because the vendee could not exercise the franchise by working and operating the railway. And it was only because federal legislation applicable to the railway in question had specifically provided a means of continued operation after a sale that the decree of the Ontario Court was upheld.

The other case is *Redfield* v. *Corp'n. of Wickham* (1888), 13 App. Cas. 467 a case from Quebec. In the judgment Lord Watson said, p. 474:—

"These cases (i.e., *Gardner* v. *London Chatham and Dover R. Co.* (1867), L.R. 2 Ch. 201, and *Re Bishop's Waltham R. Co.* (1866), L.R. 2 Ch. 382) . . . establish conclusively that in England the undertaking of a railway company duly sanctioned by the legislature is a going concern which cannot be broken up or annihilated by the mortgagees or other creditors of the company. The rule thus settled appears to rest upon these considerations, that, inasmuch as Parliament has made no provision for the transfer of its statutory powers, privileges, duties, and obligations from a railway corporation to any other person, whether individual or corporate, it

would be contrary to the policy of the legislature, as disclosed in the general railway statutes, and in the special Acts incorporating railway companies, to permit creditors of any class to issue execution which would have the effect of destroying the undertaking or of preventing its completion."

It was actually a writ of *fi. fa.* which it was sought in that case to stay by means of a proceeding referred to as *afin de distraire*. And here again it was merely because of the Dominion legislation which provided a method by which a continuation of the operation could be ensured that the Judicial Committee upheld the lower Courts in refusing to interfere with the operation of the writ of execution.

Moreover, it is to be observed that under the writ the sheriff had seized the whole railway and Lord Watson, 13 App. Cas. at p. 477, says that they [the statutes] clearly shew that the Dominion Parliament has recognised the rule that a railway or a section of a railway may, *as an integer*, be taken in execution and sold, like other immovables, in ordinary course of law."

By the expression "any section of the railway" it is clear that Lord Watson understood Parliament to mean a section which could be operated by itself and not merely a few hundred feet thereof.

But in any case we have no such legislation here as applicable to this irrigation ditch. We have no question of a seizure or possible seizure of the whole ditch although even then the old rule will be seen to go so far as to say that there being no provision for a purchaser operating the whole ditch it could not be sold under execution.

The Irrigation Districts Act 1920 (Alta.), ch. 14, does provide a method in secs. 170 *et seq.* for realising upon a writ of execution against the district by levying a rate upon the land owners. As Wetmore C. J. points out in *Lee* v. *Broley, supra* it is, indeed, true that the section is only permissive and if there were nothing more to be considered it might, I think, be very reasonably argued that this does not imply that this shall be the only method of executing the writ. But so far as direct creditors of the district are concerned it does provide a method for them to realise their debts without interfering with the operation of the enterprise and it furnishes an additional reason for applying what, I think, was the usual rule that it is against public policy that such an enterprise should be permitted to be practically destroyed by process of execution. It takes the

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place of a receivership with regard to railways.

I do not overlook the argument of Macdonald, C. J. A., in *Hazel* v. *Lund*, *supra*, that the present claimants have no direct remedy against the district and that—not the district —but the subcontractors, are their debtors. But the claimants have their own direct debtors, viz; Farrelly Bros. Ltd. and I do not see that the accident of their insolvency should affect the result in any way.

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I wish in concluding to emphasize again the point that the district is not even like a railway company, a commercial enterprise carried on to make profit out of the working of the enterprise itself. Its irrigation canal stands in closer analogy to the streets of a city where the fee simple is in the city. No one would ever suggest that a mechanics' lien could be filed in a street for work done in paving or repairing it. Of course, there is the general public right of travel but here there is at least the general right of the landowners to get their water supply and in addition thereto there is the right of the Department of the Interior which has granted the authority to construct and which supplies the water to pass through the canal and has under the legislation very wide powers of interference with the irrigation ditch itself.

It is to be observed also that the district has been given powers of expropriation merely "for irrigation purposes." There does, indeed, appear to be no express provision for a reversion of the land to the original owners in case of a complete cessation of operation but the case does in principle approach the theory of a "trust" as suggested by Robinson, C.J., and Burns, J., in *Scott* v. *School Trustees of Burgess* (1859), 19 U.C. Q.B. 28.

For all these reasons I am of opinion that quite aside from any constitutional questions we should not upon grounds of public policy hold that the provisions of the Mechanics' Lien Act can be made to apply in favor of the plaintiffs with respect to the individual portion of the right of way of the ditch against which their claim was filed. It is not strictly necessary to go so far as to say that they could not have filed it against the whole right of way, though had it been necessary I should have been quite ready to do so.

It was suggested that there is a difference between the mere declaration of a lien and the enforcement of it. But while this is true I cannot see how it should affect the matter. If we declare the existence of lien the statute provides for its enforcement and once the declaration is made I can-

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not see what could prevent the application of the enforcement provisions.

I think the defendants were entitled to raise this point of objection on the appeal as it is purely a point of law which might be raised without pleading and, indeed, might well have been raised on an interlocutory application.

It becomes, therefore, unnecessary to deal with the points dealt with by the trial Judge in his reasons for judgment.

I would, therefore, allow the appeal, set aside the judgment below and direct judgment to be entered for the defendant with costs.

But as the point on which the appellant succeeds, although some paragraphs in the statement of defence seem as if intended to cover it and, indeed, are clearly wide enough to cover it, was never argued until the appeal and inasmuch as if it had been argued at the trial it would almost surely have succeeded and so prevented the necessity of an appeal by the present appellants, I think there should be no costs of the appeal.

Appeal allowed.

PICHE v. LAMONTAGNE.

Quebec King's Bench, Lamothe, C.J., Greenshields and Dorion, JJ. March 28, 1921.

PLEADING (§IV—335)—DEFENCE—CROSS DEMAND.

By Quebec law short delivery and inferior quality of goods must be pleaded by way of defence to an action claiming the price of such goods, but unliquidated damages must be claimed by cross demand.

APPEAL from the trial judgment dismissing a cross demand. The appellant sued for the price of goods sold and delivered by the respondent, confessed judgment and then, by cross demand, claimed damages for inferior quantity and quality. Affirmed.

Bouffard, Godbout and *Bouffard*, for appellant.

Pacaud and *Morin*, for respondent.

LAMOTHE, C.J.:—At the time of the hearing, the appellant represented his cross demand to us as a claim in damages. He criticised the *considerant* whereby the Court of first instance declared that this claim should have been included in the plea to the action and not advanced as a cross demand. The appellant's criticism would have been right if it had really been a question of unliquidated damages; but the Superior Court judgment states that the appellant's claim is based on a "deficit in the quantity and inferior quality of the goods sold," and not on the damages sus-

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tained; and the Court is quite right. Failure to deliver the right quantity and diminution in value resulting from inferior quality are grounds of defence to an action claiming the price of goods. For a plaintiff cannot have judgment for goods which he has not delivered or for a value which he has not given. In such a case the defence does not raise a question of compensation: it operates a partial diminution of the claim in its very basis.

With damages, the case is otherwise. Damages result from other causes which vary considerably, as, for instance, delay in delivery, necessary consequences of hidden defects, etc., etc.

Unliquidated damages must be claimed by cross demand.

Short delivery and inferior quality of goods must be pleaded by way of defence to an action claiming the price of such goods.

Now the defendant admitted that the main action was well founded, which is equivalent to admitting that the plaintiff was justified in claiming the price of the goods. He made this admission under reserve of the compensation claimed in his cross demand. The defendant's intention was excellent: he sought to avoid costs; but the reservation he made in his admission cannot save him, for by admitting that the plaintiff's action for the price of the goods was well founded, he found himself admitting that the goods were delivered in accordance with the contract, both as regards their quality and their quantity. The judgment rendered on the main action is based on this admission and is not attacked before us. It is *chose jugee*. It cannot be admitted that the authority of this *chose jugee* can be set aside by means of a cross demand based on grounds which should have been pleaded to the main action.

I am of opinion that the judgment is well founded.

GREENSHIELDS, J.:—Unfortunately, the appellant has, himself, created a condition where it would seem impossible to grant him any relief. He was sued by the respondent for the sum of $603.60 for goods sold and delivered under contract. The respondent alleged the contracts covering the sale of some 600,000 cedar shingles. He alleged that he had made a complete delivery of the shingles according to the contract, and that the goods he delivered were of the quality and to the quantity mentioned in the contracts. He admitted certain payments, and alleged a balance due of $603.60, for which he prayed judgment.

The appellant did not see fit to contest the demand, but

on the contrary, admitted that all the respondent said against him was perfectly true; but he reserved, or purported to reserve his right to demand compensation by cross action. The admission is signed by himself, and reads as follows [Translated]:—

"For the purpose of the main action only, in order to simplify the hearing, the defendant admits that the main action is well founded, saving the claim in compensation by a cross demand, which will have to be adjudicated upon at the same time."

Having thus admitted his indebtedness, all the allegations of the declaration, he proceeds by what he calls "demande reconventionnelle" to say; that all he has already admitted is untrue, and instead of being a debtor of the respondent, the respondent is indebted to him in the sum of $59.40, and he prays for a condemnation against the respondent for that amount.

The respondent contested the cross demand, and, of course, the trial Judge did the only thing possible, he gave him judgment for debt, interest and costs. That judgment was accepted by the appellant, and has now the authority of *res judicata*.

The respondent contested the cross demand, both in fact and in law.

The appellant inscribed on the merits of his cross demand, and proof was made of the facts. By his cross demand he does not allege unliquidated damages; but what he says in effect is "You did not deliver to me goods to the quantity and of the quality called for by the contracts; in fact, there was short delivery and defective delivery to the extent of $703, and I pray that the judgment rendered against me upon my admission, and which is now *chose jugee* and executory, be declared extinguished and judgment intervene in my favour for $59.40."

The trial Judge again did, what in my opinion was the only thing possible, he dismissed the cross demand. Hence the appeal, and the appeal is taken only from the judgment dismissing the cross demand. The judgment in the principal action stands.

The general rule of our law is, that a person who wishes to assert a right or claim before a Court of competent jurisdiction must commence by the issue of a writ of summons, issued in the name of the King, calling upon the defendant to appear and defend himself against the asserted claim if he sees fit.

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There are some exceptions. One is, where a person has neglected to include in his action the whole amount of his claim; he may by simple declaration, without issuing a further writ, claim the increase. That is called an incidental demand. Arts. 215, 216, C.C.P. (Que.).

Again, a "defendant may set up by cross demand any claim arising out of the same causes as the principal demand, and which he cannot plead by defence." Art. 217, C.C.P.

One thing seems absolutely clear in the present case, that the grounds urged in the cross demand are classical grounds of defence to an action. I know of no better defence when established than a statement, "that you never delivered the goods; therefore, you never became a creditor of the amount you sued for."

If it were considered necessary to point out the clear distinction between what may be pleaded by way of defence and what should, according to the weight of jurisprudence be pleaded by a cross-demand, the distinction could easily be made. I proceed to do it, very briefly.

A man contracts to deliver on a fixed date, 1,000 bushels of No. 1 wheat. He delivers on June 1, 800 bushels of No. 2 wheat. He sues under his contract for the whole amount. Of course, it is manifest, the proper course for the defendant, under such circumstances, is to plead, alleging the short and the defective delivery, and if he proves them both, he will either succeed in defeating the whole claim, or at least reducing the claim. In any event, he will have a full opportunity of asserting his rights. So much for the defence.

As to the cross demand: The same illustration, 1,000 bushels of No. 1 wheat are delivered on the 20th instead of the 1st of June. The purchaser requires the goods, and he accepts the goods subject to his rights for late delivery. He does not pay, and is sued. Under our jurisprudence he may say: "It is true I received all the goods of the quality contracted for; but they were late delivered, and in consequence I suffered damages, and I make a cross demand to establish those damages, and I pay the price of your wheat, *pro tanto* by the amount of damages I have suffered." That is the occasion for the application of our code enactment touching cross demands.

I have contended that even the pretension of the defendant in the latter case could be urged by plea, and not necessarily by cross demand, but the majority of the members of

this Court, I understand, are of a different opinion. P.E.I.

I have already said that it is impossible for me to find any relief for the appellant, and I have nothing to add, except to dismiss the appeal with costs in both Courts. S.C.

Appeal dismissed.

WHITE SEWING MACHINE v. ROPER.

Prince Edward Island Supreme Court, Haszard and Arsenault, JJ. June 27, 1922.

JUDGMENT (§IIA—60)—PRACTICE—DETINUE—FAILURE TO FIND DAMAGES OR ASSESS VALUE OF GOODS DETAINED—MARRIED WOMEN.

The plaintiff company brought an action against the defendants for the detention of a sewing machine, property of the plaintiff. The action was tried with a jury and a verdict rendered for the plaintiff—no value being assessed nor damages found. After recovery of the verdict judgment was entered and execution issued for costs besides sheriff's fees and other legal incidents.

In a summons to shew cause why the judgment and subsequent proceedings should not be set aside objection was taken on the ground that there being no damages assessed by the jury the judgment was irregular and bad.

On the return of the summons at Chambers the matter was returned for hearing to the full Court.

Held that since the Court had no power to reverse the judgment and that to set aside the subsequent proceedings would render the present judgment fruitless and a bar to further action the Court would not interfere on grounds which were purely technical.

[*Phillips* v. *Jones* (1850), 15 Q.B. 859, 117 E.R. 683; *Chilton* v. *Carrington* (1855), 15 C.B. 730, 139 E.R. 612; *Hymas* v. *Ogden*, [1905] 1 K.B. 246, discussed.]

Held further, following the Rule in *Scott* v. *Morley* (1887), 20 Q.B.D. 120, that where a tort has been committed during coverture execution will issue against a married woman.

SUMMONS to shew cause why a judgment and subsequent proceedings should not be set aside, the action being for the detention of a sewing machine. Summons dismissed.

Gilbert Gaudet, K.C., for plaintiff.

J. J. Johnson, K.C., for defendant.

HASZARD, J.:—In this case a summons was issued returnable before a Judge at Chambers calling upon the plaintiff to shew cause why the *postea* and the judgment entered in this action and all subsequent proceedings should not be set aside on the following grounds or some or one of them: 1. That the record of judgment signed herein is irregular, null and void. 2. That the jury did not assess or value the goods alleged to have been detained. 3. That the verdict of the jury should have been that the plaintiff recover the said sewing machine or the value of the same, and the said verdict does not state its value at all. 4. That the

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jury on the trial of this action not having assessed any damages and not having found any value of the goods detained, the verdict was improperly entered for the plaintiff. 5. That the record of judgment signed herein does not contain any statement of any finding of the jury of the value of the goods detained by the defendants or of any assessment of damages for the detention, and is irregular, null and void. 6. That the defendant, Ethel G. Roper, was at the time of the detention of the said goods a married woman, and at the time the said judgment was signed was still a married woman and still is a married woman, and the record of judgment and form of judgment signed herein is irregular, null and void as against her as a married woman and is a record of judgment entered against her personally and as such is irregular, null and void.

Or in the alternative why the execution issued herein upon the said judgment and annexed to the said affidavit should not be set aside on the following grounds or some or one of them: 7. That the said writ of execution is irregular, null and void. 8. That the said writ of execution does not pursue the judgment and is not warranted by it. 9. That the defendant Ethel G. Roper was at the time of the detention of the said goods a married woman and was still at the time of the signing of the said judgment and still is a married woman, and the said execution is issued against her personally and the form of the same is not according to law and is irregular, null and void; and upon the further grounds disclosed in said affidavit; and why the plaintiff should not pay the costs of this application.

On the return of said summons at Chambers, with the consent of the attorneys of both parties the matter was referred for hearing to the full Court, and came up for argument at the last Hilary Term. The facts as disclosed are:

That the plaintiff company brought an action against defendants in detinue for the detention by the defendants from the plaintiff of a White Sewing Machine Style 85 F. R., No. 2526.179, and apparatus belonging to it—the property of the plaintiff. In the declaration, the plaintiff claims a return of the said goods or their value and $75 for their detention.

The defendants by their attorney pleaded two pleas, viz.: 1. That defendants did not detain the said goods or any of them as alleged, and 2. For a second plea the defendants

say that the said goods were not nor any of them the plaintiff's as alleged.

On these pleas issue was joined.

The action was tried with a jury in Hilary Term, 1921, and on January 28, 1921, a verdict was rendered for the plaintiff, no value being assessed nor damages found. From the evidence adduced on the trial, it appeared that the defendant Ethel G. Roper is the wife of the other defendant Leslie H. Roper, and that the contract or agreement for the hire of a sewing machine out of which the cause of action arose was made by the said Ethel G. Roper with the plaintiff (she being then the wife of the other defendant, Leslie H. Roper). After recovery of the verdict, judgment was entered on February 16, 1921, and, on February 25, 1921, execution was issued against both defendants for the sum of $143.10 costs besides sheriff's fees and other legal incidental expenses.

Objection is now taken to the form of the *postea* to the judgment and to the execution on the ground that, there being no damages assessed by the jury, the record of the judgment is irregular and bad. By the plaintiff it is claimed that objection should have been taken by way of an application to set aside the verdict within 10 days, under the Rule of Court.

As to the first 6 grounds, in so far as they relate to the verdict they cannot be considered on this application. No objection was taken by counsel for the defendant to the Judge's charge, nor upon the motion of plaintiff's counsel that the verdict be recorded, nor was any application made for a new trial. Proceedings in error were commenced on behalf of the defendant prior to the application and discontinued or abandoned. The verdict must, therefore, stand for such effect as it may have. Then as to the record, it is valid in so far as it pursues the verdict. It is, therefore, not open to objection upon the ground that the jury by their verdict did not find the value of the goods.

The case of *Phillips* v. *Jones* (1850), 15 Q.B. 859, 117 E.R. 683, cited on behalf of the defendant was a proceeding in error brought on a judgment in the Court of Queen's Bench by default in an action of detinue. A writ of enquiry was issued to ascertain damages, etc., but the value of the goods was not found. The record of the judgment nevertheless proceeded to state the judgment in these terms: "Therefore, it is considered that the plaintiff do recover against the defendant the said cattle, goods and chattels; or

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if the defendant should not render the same to the plaintiff, the value thereof," etc. These words "the value thereof," made the record as it thus stood utterly unmanageable. Cresswell, J., said (see 15 Q.B. at p. 861): "The judgment here is for the value of the goods and the value is uncertain." And *per* Parke, B.: "How could execution issue? It must follow the judgment." Parke, B., in delivering the judgment of the Court of Error, after expressing the opinion that the judgment for the plaintiff was erroneous in its form, considered the question of reversing the judgment in part, allowing it to stand only for the damages and costs, but concludes thus (15 Q.B. at p. 869): "If this judgment is reversed, the plaintiff may recover in a new action both the goods, or the value, and his damages for the detention; but, if he has judgment for his damages and costs only, he must either be barred altogether from a further action for the principal subject, which would be a hardship on him, unless he had consented to it; or he may bring another and recover the chattels or their value, which would be a hardship on the defendant, who ought not to be twice vexed for the same cause." In the present case we have no power to reverse the judgment if we would, and to set aside the subsequent proceedings would have this result that the present judgment would not only be utterly fruitless but would be a bar to any future action.

The case of *Chilton* v. *Carrington* (1855), 15 C.B. 730, 139 E.R. 612, cited on behalf of the defendant, is one in which the jury in an action in detinue, by consent of parties, returned a verdict without finding the value of the chattel. This case does not assist us very far. It is clouded throughout with the consideration of equitable interests between the parties, and the decision that an order could not be made by a Judge under the Common Law Procedure Act, 1854 (Imp.), ch. 125, sec. 78, was inevitable as there were no alternatives for him to adjudicate upon. In the present case a Judge's order would be equally ineffective and would certainly be set aside.

But the vital question in the present case is whether the finding of the jury on the one essential issue in the case should, on purely technical grounds, be rendered not only worthless but destructive of any further remedy. Nothing short of clear judicial authority would justify such a course, and I cannot find that the authority is clear. Reverting to the early authorities, it is laid down in Coke upon Littleton, vol. 2, sec. 498, p. 286 (*b*), that the right of the plaintiff

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is that he "shall recover the thing detained." Nothing is said as to the recovery of damages for the detention, or of the value in case the thing be not given up to the owner. The old procedure was to obtain an interlocutory judgment awarding the recovery of the thing itself and damages, if any, for the detention. This practice did not afford a remedy if the article itself could not be recovered or if the bailee misused the goods or restored them in a damaged condition. To meet any of these conditions, a writ of enquiry went out to ascertain the value and thus provide an alternative remedy. In course of time, the practice became common to anticipate the non-delivery or deteriorated condition of the chattel by fixing its value in the same judgment as awarded it to the plaintiff, but always in one form or another the plaintiff's right was recognised to insist upon the recovery of the chattel itself. Section 78 of the Common Law Procedure Act, 1854 (Imp.), ch. 125 (sec. 217 of 1873 (P.E.I.), ch. 22, sec. 271), is a recognition of the ancient right of the owner to recover his goods in specie.

In the case of *Hymas* v. *Ogden*, [1905] 1 K.B. 246, an action was brought in the County Court claiming the return of the plaintiff's dog alleged to be wrongfully detained by the defendant, or £40—its value—and £10 damages for its detention. Judgment was given for the plaintiff. The judgment was drawn up in the following form (p. 246): "Upon the trial of this action at this Court holden this day, it is adjudged that the plaintiff do recover against the defendant the following goods and chattels of the plaintiff wrongfully detained by the defendant, that is to say, the plaintiff's running dog Floss, and also costs. And it is ordered that the defendant do return the said dog to the plaintiff within seven days from this date and that, in default of his so doing, a warrant of delivery do issue." The defendant appealed to the Divisional Court and the appeal was dismissed. The defendant further appealed and upon the argument on his behalf it was contended among other things that the value of the goods should have been assessed, but the appeal was again dismissed. Collins, M.R., in his judgment, at p. 250, says: "It was further said that cases showed that it was a condition precedent to the making of an order for the delivery of a chattel that its value should be appraised. If that was ever the law, it was a highly technical matter which has been cured by Order 48, R. 1 of the Rules of the Supreme Court." This order has, of course, no operation here but it indicates, and so

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does the expression of that distinguished Judge, the emphasis which is given to substance over form.

As to the sixth ground set forth in the summons, viz.: "That the defendant Ethel G. Roper was at the time of the detention of the said goods a married woman, and at the time the said judgment was signed was still a married woman and still is a married woman, and the record of judgment signed herein is irregular, null and void as against her as a married woman, and is a record of judgment entered against her personally and as such is irregular, null and void." Detinue when founded on the wrongful act of the defendants, as in this action, is a tort—*Bryant* v. *Herbert* (1878), 3 C.P.D. 389—and the liability of husband and wife in tort is thus defined by Lord Esher, M.R., in *Scott* v. *Morley* (1887), 20 Q.B.D. 120, at pp. 124-125: "Up to the coming into operation of the Married Woman's Property Act, 1882 (Imp.), ch. 75, a married woman could be taken in execution upon a judgment recovered after her marriage against her and her husband in respect of a contract made by her before marriage and also upon a judgment recovered against her and her husband in respect of a wrongful act done by her during the marriage. . . . It seems to me that the Act of 1882 does not alter the legal liability of a married woman at all. . . . It does not affect the case of a wrongful act committed by a woman during marriage." The law was changed only in respect of remedies which arose by virtue of the Act of 1882 and it did not affect pre-existing remedies. The statute of this Province is identical with the English statute in that respect and justifies the form of the judgment in this case.

As to the 7th, 8th and 9th grounds of the summons the 9th is already disposed of and the 7th and 8th are ineffectual in as much as the execution pursues the record and is authorised by the statute.

The summons should be dismissed with costs.

ARSENAULT, J., concurred.

Summons dismissed.

MENNONITE LAND SALES CO. v. FRIESEN.

Saskatchewan Court of Appeal, Haultain, C.J.S., McKay and Martin, JJ.A. November 7, 1922.

APPEAL (§VIA—280)—FAILURE TO PERFECT—MOTION TO DISMISS. Notice of appeal, although irregular, given within the proper time, is curable by amendment under Rule 2. The same applies to notice of appeal given within the proper time but not perfected, as under Rule 41 the default may be waived by the opposite party or cured by the Court. In the absence of that

the practice in *such* instance is by motion to dismiss the appeal with costs.

COSTS (§II—20)—PREVIOUS DEMAND—RECEIVER.

The costs of a motion to dismiss an appeal cannot be allowed to a party who made no previous demand for it. Costs awarded against a receiver are payable out of the estate.

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MOTION to dismiss appeal from an order of Maclean, J. Appeal dismissed.

Bram Thompson, for appellants.

F. W. Turnbull, for receiver-respondent.

A. McWilliams, for defendants-respondents.

HAULTAIN, C.J.S.:—On April 26, 1922, the plaintiffs in this action served notice of appeal from the order of Maclean, J., settling the costs of the receiver. Notice of appeal was given for the sittings of the Court to be held on June 12, 1922. After serving notice of appeal, the plaintiffs took no further steps in the matter. On September 21, 1922, the receiver served a demand for the costs occasioned by the service of the notice of appeal above mentioned, and, as those costs have not been paid, now moves for an order dismissing the appeal with costs.

The notice of appeal of April 26, was given less than 15 days before the next sittings of the Court of Appeal, which was fixed for May 8, and, under the provisions of R. 1 of the Rules of the Court of Appeal of Saskatchewan, should have been given for the sittings of the Court to be held on September 18. There was no sittings of the Court fixed for June 12, the date mentioned in the notice of appeal. This mistake was probably due to the fact that, so lately as March 9, May 8 was substituted for June 12 as the date of the next regular sittings of the Court.

In my opinion, the notice of appeal, which was given within the time for appealing, although informal, was not a nullity and could have been amended by the Court.

Re Coulton; Hamling v. *Elliott* (1886), 34 Ch.D. 22; *Williams* v. *De Boinville* (1886), 17 Q.B.D. 180; *Re Stockton Iron Furnace Co.* (1879), 10 Ch.D. 335; R. 1, Court of Appeal Rules.

There has, however, been no attempt made by the appellant to cure this defect or prosecute its appeal.

The practice in the ordinary case of an abandoned appeal was settled by *Wessell* v. *Tudge* (1909), 2 S.L.R. 231, which adopted the rule laid down in *Griffin* v. *Allen* (1879), 11 Ch.D. 913. An appeal may be abandoned by express statement to that effect, or it will be considered to be abandoned if it is not duly prosecuted. *Norton* v. *London &*

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N. W. R. Co. (1879), 11 Ch.D. 118; *Turner* v. *Turner* (1851), 15 Jur. 1165.

It was argued on behalf of the appellant that the motion to dismiss the appeal is improperly brought because no proper notice of appeal was given, and there is, therefore, no appeal to be dismissed and this Court has no jurisdiction in the matter. Rule 41 of the Rules of the Court of Appeal is referred to in support of this contention. That rule, which was first enacted by the Judicature Ordinance of 1886, was taken from Nova Scotia (O. 58, R. 6). The practice relating to appeals coming within this rule was laid down by the Supreme Court of Nova Scotia *en banc* in *O'Neil* v. *Madore* (1893), 26 N.S.R. 129. The Court in that case held as follows, at p. 130:—

"The Court is of opinion that, under the provisions of O. 58, Rule 6, the appeal is to be considered as abandoned unless it is entered on the first entry day after the notice, and the motion made when the cause is called on the docket, or some effectual proceeding has been taken by the appellant to preserve his appeal; and, in such case, it shall not be necessary for the respondent to make any motion, or take any order dismissing the appeal, unless the proceedings have been stayed.

If the respondent has incurred any costs in preparing to oppose the appeal, he will be entitled to an order for their payment, but no costs of the application for the costs of the abandoned motion can be allowed unless the applicant has made a previous demand for payment, which has not been complied with."

The latter part of the judgment is in accordance with the rule laid down in *Griffin* v. *Allen*, *supra*, which had already been approved in *Stewart* v. *Morrison* (1892), 24 N.S.R. 406.

There is one difference between the practice usually followed here and that prescribed by the Nova Scotia Court. The motion with us is, as a rule, to dismiss the appeal with costs. The Nova Scotia Courts held that such a motion was not necessary where the appeal had been abandoned and that the application should only be for the costs of the abandoned appeal. This is not the practice in England, where the motion is almost invariably to dismiss or discharge the appeal with costs, and I do not see anything in the language of R. 41 to necessitate a different practice.

Re Oakwell Collieries (1878), 7 Ch.D. 706; *Re Blyth and Young* (1880), 13 Ch.D. 416; *Ex. parte Fardon's Vinegar*

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Co.; Re Jones (1880), 14 Ch.D. 285; *Charlton* v. *Charlton* (1881), 16 Ch.D. 273.

The notice of appeal in this case although irregular, was given within the proper time and being curable by amendment under R. 2 was not a nullity. The same may be said of a notice of appeal given within the proper time but not perfected because R. 41 provides that the default may be waived by the opposite party or cured by the Court.

Where in cases such as *Dirks* v. *Fast* (1915), 8 S.L.R. 343, and *Griffith* v. *Harwood* (1900), 30 Can. S.C.R. 315, there is no jurisdiction to hear the appeal, the proper practice is to move to quash the appeal.

A respondent is equally entitled to the costs necessitated by proceedings begun by an appellant whether those proceedings have been improperly taken in the first instance, or, if properly taken, have not been proceeded with as required by the rules, and it would seem to me more a question of verbal accuracy than of substantial importance whether the motion should be made for costs alone, or for an order to set aside the notice of appeal, or to dismiss or to quash or to discharge the appeal with costs.

The receiver is, therefore, entitled to an order dismissing the appeal, and to the costs incurred by reason of the notice of appeal as well as the costs of this application. The defendants are also entitled to an order dismissing the appeal with costs, but they are not entitled to the costs of the present applicaion as they made no previous demand for costs, as required by *Wessell* v. *Tudge*, *supra*.

The costs of the receiver should be paid out of the estate. Some objection was raised to this on behalf of the plaintiffs, but I do not see any reason for not following the usual practice in such matters.

MCKAY, J.A., concurred with HAULTAIN, C.J.S.

MARTIN, J.A.:—This is an application on behalf of the Western Trust Co., the receivers in the action, for the dismissal of the appeal of the plaintiffs, and for the costs occasioned by the service of a notice of appeal and of the motion. The appeal is from the order of Maclean, J., settling the costs of the receivers. There is also a motion on behalf of the defendants for the same purpose, and both of the motions may be disposed of together.

The notice of appeal in question was served on April 26, 1922, for the sittings of this Court of June 12, 1922. The plaintiffs have taken no step to perfect their appeal since the service of the notice of appeal.

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The notice of appeal of April 26, was given less than 15 days before the next sittings of the Court of Appeal, and, under the provisions of R. 1 of the Rules of the Court of Appeal, should have been given for the sittings of the Court fixed for September 18, as there was no sittings of the Court fixed for June 12, the date stated in the notice of appeal.

It was contended on behalf of the appellants that there was no appeal to be dismissed, and R. 41 of the Rules of the Court of Appeal was relied upon to support this contention.

Rule 41 is as follows:—

"A judgment, order, decision, rule or verdict appealed from or sought to be set aside shall stand as if no notice of appeal or notice of motion to set the same aside had been given, if such appeal be not perfected or such motion be not made within the time limited by these rules, unless such default in the appellant or moving party be waived by the other party interested or unless the Court shall otherwise order."

This rule was originally taken from the Rules of Court of the Province of Nova Scotia, and I find that the practice under this rule in Nova Scotia is set out in the case of *O'Neil* v. *Madore*, 26 N.S.R. 129. In that case it was held that an appeal will be considered abandoned unless it is entered on the first entry day after notice, and the motion is made when the cause is called on the docket, or some effectual step has been taken by the appellant to preserve his appeal. It was also held that in such case it shall not be necessary for the respondent to make any motion or to take any order dismissing the appeal unless the proceedings have been stayed. It was also held that when the respondent has incurred costs in appearing to oppose the appeal he will be entitled to an order for their payment, but no costs of the abandoned motion will be allowed unless there has been a previous demand for payment which has not been complied with.

In so far as the question of costs is concerned, the practice under this rule is the same in Nova Scotia as here, but if the statement that "in such case it shall not be necessary for the respondent to make any motion or to take any order dismissing the appeal" means that it is not proper for a respondent to move to dismiss an appeal under such circumstances, with the greatest of deference I cannot agree with the decision. I think where a notice of appeal has been

served and no steps have been taken to perfect the appeal in accordance with the rules, a respondent has the right to have the notice of appeal disposed of once and for all.

The practice of this Court was settled in the case of *Wessell* v. *Tudge*, 2 S.L.R. 231. In referring to the decision in *Griffin* v. *Allen*, 11 Ch.D. 913, Wetmore, C.J., stated, at p. 233:—

"We, however, consider the rule laid down in *Griffin* v. *Allen* to be a very proper one to follow in future, and we, therefore, state that we wish it to be understood that this Court will not, unless some good and sufficient reason is given, henceforth allow the costs of an application to dismiss an appeal on the ground that the motion of appeal has been abandoned, unless the applicant has made a previous demand for payment of his costs of the appeal, which has not been complied with."

The Western Trust Co., the receivers, by their solicitors, served a demand for the costs occasioned by the service of the notice of appeal on September 21, 1922, and, subsequently, launched a motion for dismissal of the appeal and for costs, and they are entitled to the order for which they ask. The notice of motion on behalf of the defendants was served on September 28, following a demand for costs by telegram on September 28. Counsel for the defendants stated on the argument that the defendants were not entitled to the costs of the motion under these circumstances.

It was urged on behalf of the plaintiffs that the order should not be for payment of the costs of the receivers out of the monies in the hands of the receivers.

24 Hals., p. 408, sec. 785, says:—"A receiver is entitled to be paid his remuneration, costs, and expenses out of the property, notwithstanding that it may be insufficient to meet all claims upon it. Such payment is postponed to the costs of realisation and to any overriding charges outside the action, but takes priority over all other claims, including costs of action of the parties thereto."

In *Courand* v. *Hanmer* (1846), 9 Beav. 3, 50 E.R. 242, it was held that a receiver is entitled to be indemnified out of the estate for the costs of an adverse application against him by a party to the suit which has been dismissed with costs.

I see no reason in this case for departing from the well established rule that a receiver is entitled to his costs out of the property in his hands.

The receivers will, therefore, have an order dismissing

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the appeal, and they are entitled to their costs occasioned by the service of the notice of appeal and of this motion and are at liberty to retain such costs out of the monies in their hands; the defendants are entitled to an order dismissing the appeal with costs, but will not have the costs of the motion.

Appeal dismissed.

COX v. J. I. CASE THRESHING MACHINE CO.

Alberta Supreme Court, Appellate Division, Stuart, Hyndman and Beck, JJ.A. November 11, 1922.

SALE (§IC—15)—CONDITIONAL SALE—SEIZURE FOR DEFAULTS—CONVERSION—RELEASE OF PURCHASER'S EQUITY.

A conditional vendor, who obtains a release of the purchaser's equity, has the right, so long as the release remains in effect, to seizure without legal process for defaults in payments. By giving the release the purchaser surrenders his right to the protection given by the Conditional Sales Ordinance and the Extra Judicial Seizures Act; and seizure by the vendor, in non-compliance with the statutes, does not, therefore, constitute actionable conversion.

APPEAL from a judgment dismissing plaintiff's action claiming damages for the conversion of a threshing machine. Affirmed.

I. B. Howatt, K.C., for appellant.

A. L. Smith, K.C., for defendant.

The judgment of the Court was delivered by

STUART, J.A.:—The plaintiff sues for damages for conversion of a threshing outfit which he had bought second-hand from the defendant in July, 1917, for the sum of $2,700. The plaintiff had also purchased some repairs later on which added to the cost of the outfit. Lien notes, the last of which fell due on November 1, 1919, had been taken as security and had been filed under the Conditional Sales Ordinance and a chattel mortgage on other property had been taken as well.

The plaintiff by May 9, 1921, had reduced his indebtedness for principal and interest to the sum of $1,275, of which somewhat less than $1,000 was for principal. The defendant's agent on that day went to the plaintiff's farm and after some conversation the plaintiff signed a document in the following terms:—

"I hereby release to the (defendant) all my interest in the following goods (the machinery in question) together with bolts and tools for the sum of $1,275 which is to be credited on the debt due to them namely $1,275 represented by notes number 33025 and 53325/6 and I remain liable for

the balance of the said debt namely nothing together with interest thereon in accordance with the terms of the notes above referred to.

Dated May 9th, 1921. (Sgd.) J. M. Cox."

On the same occasion the plaintiff signed the following document:—

"J. I. Case T.M. Co. Millet, May 9th, 1921.
Edmonton, Alta.

In the consideration of you extending my past due notes until this fall by me paying you $300 within two weeks I will give you a mortgage on 80 acres of barley which I am now seeding on my farm the s.e. 11-48-23 w4th clear of any other liens whatsoever.

(Sgd.) J. M. Cox."

One Colwell was the local agent at Edmonton of the defendant. Colwell received the sum of $30 from the plaintiff on June 17, 1921. The following correspondence took place:—

"J. I. Case Co. Millet, Alberta,
Edmonton. May 20, 1921.

I have been requested by J. Cox of Millet to write you and state that he will be in a position to pay you $300 as payment on threshing machine outfit within thirty days.

(Sgd.) A. P. Mitchell."

A. P. Mitchell, May 25, 1921.
Millet, Alta.

Yours of May 20 received regarding J. Cox, Millet, paying us $300 within 30 days. May say that Cox's time for making this payment has elapsed but may say that we are willing to allow him another 30 days providing he will send us a draft for $100 at once. We are also writing Cox to this effect.

(Sgd.) F. L. Colwell, sub. branch manager."

"Received from J. M. Cox, Edmonton, 6/17, 1921.
Thirty.....00/100 Dollars.
applied on note No. 53325.
J. I. Case Threshing Machine Co.
$30 Per F. L. Colwell."

"Edmonton, Aug. 9, 1921.

Received from J. M. Cox, check of J. Alexander $100, note $300 due Oct. 4, 1921, to be used for repairs for outfit

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and balance applied on notes if satisfactory to Calgary office.

J. I. Case Threshing Machine Co.
per F. L. Colwell.

$400

"J. M. Cox, Calgary, Alberta, August 26, 1921.
Millet, Alberta.

We are in receipt of a letter from our Edmonton office enclosing a check for $100 signed by J. Alexander also a note for $300, which you are turning over to us as collateral. The check and note we beg to return to you herewith as we now have the bill of sale covering these goods we have decided to resell them as we have allowed this claim of yours to drag along so long that we now must get the money out of these goods.

J. I. Case Threshing Machine Co.
(Sgd.) J. T. Atkinson, branch manager.

Atkinson was the Alberta manager of the defendant with his office in Calgary. The head office of the company is in Racine, Wisconsin, U.S.A.

There were some negotiations between plaintiff and Colwell in regard to some repairs for the machine during the summer, but whether Cox ever actually bought from the defendant and paid for any repairs is not very clear. He seems to have got some "fan hubs" through a Case agent at Millet. During the summer, Cox was also negotiating with the Excelsior Life Assurance Co. for a loan on a policy he held in that company. On September 13, Cox had secured the promise of a loan of $400 from Kilgour, the manager, but out of this an overdue premium was to be paid and there were still some formalities to be complied with before the money would be forthcoming. Cox's wife had to sign a document and the money had to come from Toronto. The same day Cox met Atkinson in Edmonton along with one Watt, Cox's solicitor. Atkinson seems to have there assented to receiving $660 in a few days if a mortgage on the outfit was given for the balance. During the next few days Watt made very strenuous efforts on Cox's behalf to raise the money necessary to satisfy Atkinson but he failed entirely.

On August 13, the defendant company had received an order from one McPhaden for the machine in question, but there was no acceptance of this by the defendant at the time. They were probably waiting till they were sure of their ability to deliver, and also probably waiting to see

if Cox might not after all raise the $660. All the time the machine was in Cox's possession.

On May 23, 1921, the defendant company entirely through its head office at Racine, Wis., had filed a renewal statement of the chattel mortgage which had been given at the time of the original purchase in 1917.

On August 23, 1921, the defendant company also through its head office at Racine had filed renewals of the lien notes still unpaid.

Of course, the plaintiff had never been informed of the filing of these renewal statements and the branch office at Calgary, the head office for Alberta, had had nothing to do with them and apparently knew nothing about them. Contrariwise, it was stated by Atkinson that the head office at Racine had never been informed of the release of May 9. He stated that it was not according to the course of the defendant's business to inform the head office at Racine of any such settlement as that of May 9, until the machine has been actually repossessed so that an account of all expenses connected therewith could be given and the whole matter transferred to what is called the "second hand" account.

It was stated however that upon the books of the defendant at Calgary the plaintiff's account had been credited with the $1,275 and that he was there shown as no longer indebted.

Now, after the failure of Watt to secure any money for the plaintiff, the defendant, through its agent, one Eggen, went to the plaintiff's farm on September 23, and seized and took away the machinery. This is the wrongful conversion complained of.

The action was dismissed with costs at the trial, and the plaintiff has appealed.

The case seems largely to turn upon the effect to be given to the documents of May 9. In making the seizure, the defendant company admittedly relied upon the first of the two documents as being in full force and effect and as, therefore, relieving it from any necessity of observing the requirements of the Act respecting Extra-Judicial and other Seizures, 1914 (Alta.), ch. 4, which provide that all seizures under lien notes and chattel mortgages, etc., must, in this Province, be made by the sheriff, and that no goods seized shall be removed or sold without the order of a Judge.

It is admitted that the defendant never, after May 9, made any claim upon the plaintiff for personal payment of money, so that, in this respect, it did nothing inconsistent

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with the release. The document itself does not contain a release by the company but, as it was throughout claiming that the release was in effect, it was, no doubt, impossible for it to make any further personal claim, unless the effect of the second document and subsequent occurrences was to nullify the release altogether.

The action of the defendant which stands out most clearly as possibly inconsistent with the absolute character of the release is the filing of the renewal statements. Under the statutes, these statements must be based upon affidavits of the continued existence of, at least, a portion of the original debt. But it is quite clear from the evidence that this was done by the head officials at Racine in entire ignorance of what their authorised Alberta agents had in fact done. If the statements were untrue in fact, owing to what had occurred in Alberta, I cannot see that this would justify the Court in treating them as true unless on some ground of estoppel which is not suggested. The contention was put forward that the filing of the statements was a notice to Cox that the defendants were still claiming the balance of the money from him. But while in some circumstances the filing might, or rather, of course would, be notice as against Cox as one of the public, I cannot see that they can be treated as notices in his favour unless they were in fact communicated to him, which they were not, for he knew nothing of them. Of course, if there had been a communication to him in the sense of a claim made upon him from the head office in Racine in ignorance of what the Alberta agents had done perhaps a different situation would have arisen. But that, in fact, was not the situation.

The crucial question is, after all, this—What was the effect of the second document and the conduct of the defendant's Alberta officials upon the release. Colwell, the agent who wrote and obtained the plaintiff's signature to the document, acted under the instructions given in a letter in which they leave it to Colwell's discretion as to whether he should take a release or leave the machinery in the plaintiff's possession until fall. In his evidence, Colwell swore that he had asked Cox if he had any money, that he said he had not, that he told him he thought the best thing they could do was to take a "bill of surrender," that Cox agreed to do this providing the company would release him from all other obligations in connection with the sale, that he Colwell had agreed to that, that after signing the "bill of surrender" Cox had said that he was desirous of keeping the

outfit and had asked "If I can pay you $300 in 2 weeks, will you still leave the machine with me?" That he, Colwell, had told him that if he could do that the company were willing, but that this was "purely and simply an option provided he came through with this $300 but that it affected the bill of surrender in no way." Colwell also denied Cox's statement that he Colwell had given him to understand that he the plaintiff was giving a security on the machine.

Now this evidence is somewhat inconsistent with the evidence of Cox. But the trial Judge gave no reasons for judgment and upon this appeal, therefore, we must assume that he decided every conflict of testimony in favour of the defendant wherever such a decision seems necessary to support the judgment in the defendant's favour.

Really, the appellant's argument before us amounted to a contention that, by some means, by the second document and subsequent occurrences, the first document, the so called "bill of surrender" was nullified altogether.

It is clear from Colwell's evidence that it was, at least, not nullified by the second document and what happened on May 9 after the signing. In my opinion, as the matter stood when Colwell and Cox separated on May 9, the legal position was that Cox had surrendered his equity in the machine for the sum of $1,275, that this was agreed to be credited on the balance of his debt so as to wipe it out and leave him clear; but that this agreement was made subject to a condition subsequent that if Cox paid $300 in 2 weeks, the release should be of no effect and void and the original agreement would be revived with the plaintiff still owing $975. The question of a chattel mortgage on his barley crop was dropped because that could not be given till the crop was severed.

Counsel for the appellant argued very earnestly that what really happened was that the plaintiff merely gave a mortgage, that while the release was absolute on its face there was a document of defeasance and cases were referred to which deal with the question whether a grant, absolute on its face, should be considered as really in substance a mortgage. But the defendant already had security. It was already the legal owner of the property. The plaintiff was still only an equitable owner. In actual substance the only thing the plaintiff actually transferred or surrendered by the release was his equitable interest and his right to the protection given by the Conditional Sales Ordinance, C.O. 1915 (Alta.), ch. 44, and the Extra Judicial Seizures Act,

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1914 (Alta.), ch. 4.

The clearest way to put the appellant's argument is probably this, that it was agreed that he could "redeem" his surrender by paying $300 in two weeks, that the principles of the law of mortgages should be applied to this and that even though there was default there could not be in equity any absolute forfeiture, but that—at least I presume this consequence is intended to be suggested—there must be a judicial proceeding before this "equity to redeem" the surrender could be final "foreclosed." But for my part, I think this is making too refined an application of the conceptions of redemption and foreclosure. The true legal position was, I think, what I have suggested, *viz.*: There was a condition subsequent, *i.e.*, the payment of $300 in 2 weeks, the occurrence of which would nullify or abrogate the release or surrender. The letter written by Colwell on May 25, to Mitchell the plaintiff's agent for correspondence purposes, did purport to extend the time for 30 days on condition that $100 was paid at once. On May 25, however, the two weeks had elapsed and nothing had been paid and the $100 was not, in fact, sent at once so that neither was there any consideration for the extension nor was the condition fulfilled upon which it was offered. The sum of $30 was indeed paid to Colwell on June 17. Here again, however, Colwell swears that Cox told him on that day that he had $30, and said "to show you my good faith that is all I have got, I will pay you $30," that he told Cox that he did not want to take it, but would take it only under one condition that it had no bearing whatever on this bill of surrender; that Cox spoke of getting money from the Excelsior Life Co.; that he told Cox that it looked fishy and it would be necessary to have the assurance company confirm it, but that he would give him an extension for another 30 days if he could raise another $120, that is to make up one half of the $300. At defendant's counsel's suggestion he then added that he told Cox that the $120 must be raised in a week. No more money was ever, in fact, paid. Colwell, however, took the $30 and sent it to the defendant at Calgary having marked the receipt given to Cox as being for a payment on one of the notes. He explained in his evidence that he could do nothing else with the money. It was, obviously, proper to make some reference in the receipt to show what the payment had relation to. But in view of Colwell's evidence as to what was said at the time, which, for the reasons already given, must be accepted now, I am unable to see that it can be

treated as having in any way invalidated the release. At the time the money was taken, a promise of further extension had been given upon a certain condition that was never fulfilled. But the condition might have been fulfilled and then the payment of the $30 would have had some effect. But as the event turned out, I am unable to see that it had any effect whatever. The defendant was simply in possession in the meantime of $30 of the plaintiff's money. It should, no doubt, have been returned, but the failure to return it only makes the defendant liable, in my opinion, as for money had and received. The $100 cheque of Alexander and Alexander's note which Colwell got later on were taken, as the receipt of August 9 shows on its face, "if satisfactory to the Calgary office" and the Calgary office by the letter of August 26 repudiated the matter and returned the cheque and the note to Cox saying that they proposed to insist upon the release. The later negotiations as to raising $660 and taking a mortgage show also rather clearly that the plan of paying $300 had been given up altogether and that the release was then considered as in effect. Otherwise, a new mortgage would not have been necessary at all. But nothing came of the proposal to pay $660.

The only remaining facts having any possible bearing upon the matter are (1) the continuance of Cox in possession and (2) the sale to him, if there was a sale, of a small item of repairs. But these facts are both explainable by the negotiations for an extension of time. It was but natural—in view of the condition granted, that the release would fall to the ground if certain moneys were paid, and in view of the negotiations and proffered extensions which took place—that the machine should not be removed in the mean time and that, if Cox cared to take his chance and to buy and pay for a small matter of repairs these should be sent to him. So that, I think, neither fact can be treated as having nullified the release.

There is no claim that Cox was induced by fraud or any illegal duress to sign the release. The evidence of Shaw, his banker, which also must be accepted, shows that he understood the matter perfectly well. In my opinion, therefore, the defendant was entitled to act under the release and to repossess the machine when it did.

But there is more than this. It must be remembered that the defendant could, even if the release had become invalid, have seized the machine at any time since Nov. 1st, 1919,

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through the sheriff. No Judge could have stopped this in the circumstances. A Judge could indeed have refused an order for removal and sale, but the seizure would have been there just the same and the plaintiff's threshing operation would have been as completely stopped if the defendant saw fit as by what was actually done. So that the damages claimed as resulting from the actual seizure would have equally resulted so far as loss of work is concerned by a seizure under the alternative procedure. I cannot see, therefore, how in any case the plaintiff can claim to have suffered these damages through the actual seizure, even if it were technically illegal. And as to the value of the machine there is also this to be remembered. If the defendant had proceeded under its lien notes and the Extra Judicial Seizures Act 1914 (Alta.) ch. 4, there would have been Court costs to pay as well as sheriff's costs of possession, the cost of removal and probably an auctioneer's commission. The price realized would have been only such as could be expected at a forced sale. Upon the evidence, I feel fairly confident that with all these expenses to consider it was quite improbable that there would have been left as much as $1,275 and the plaintiff might have become subject to a liability still for a deficiency under the lien notes, that is, if they contain the usual stipulations.

Of course, I do not mean to suggest this as an absolute defence. Technically, no doubt, if the release was void, a seizure in disobedience of the statute would be a trespass or conversion which would carry perhaps nominal damages and costs, but in so far as actual damages suffered are concerned, I do not see that the plaintiff was injured any more than he would have been by the legal process.

I would, therefore, dismiss the appeal with costs, but the $30 held by the defendant should be credited on the defendant's bill of costs.

Appeal dismissed.

COCKSHUTT PLOW CO. v. BEDINOFF.

Saskatchewan Court of Appeal, Haultain, C.J.S., Turgeon, McKay, and Martin, JJ. A. November 7, 1922.

MORTGAGE (§VIC—80)—ACTION FOR DECLARATION OF RIGHTS—INTEREST OF PARTIES—COSTS.

A bank holding an equitable mortgage, which it had released, cannot be added as a party defendant in an action for the declaration of mortgage rights; and where the bank joins as such party of its own accord, in order to try out an issue between it and one of the parties to the action, not pertaining to the action, it will be required to pay the costs of the day.

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COCKSHUTT PLOW CO. v. BEDINOFF.

Haultain, C.J.S.

APPEAL by plaintiff from a judgment in an action for the declaration of rights on a caveat for mortgage. Reversed.

D. A. McNiven, for appellant.

J. G. Banks, for respondents.

The judgment of the Court was delivered by

HAULTAIN, C.J.S.:—The defendant Bedinoff, being indebted to the plaintiff, entered into the following agreement:—

"Kamsack, March 17, 1921.

The undersigned hereby agrees and promises in consideration of an extension of his indebtedness to the Cockshutt Plow Co., Ltd., that if he is unable to pay to account at maturity he will give that company security by way of mortgage on his land and the north west quarter of section five (5) township twenty-nine (29) range thirty-two (32) west of the first.

(Signed) John Bedinoff.

(Signed) W. J. Thomas, witness."

On April 1, 1921, the plaintiff duly filed a caveat in the proper Land Titles Office claiming an interest in the land in question under the above mentioned agreement.

The indebtedness mentioned in the agreement was not met at maturity, and the defendant refused to carry out his agreement. The plaintiff accordingly brought this action, and by its statement of claim asked for the following relief:

"(a) Judgment against the said John Bedinoff, otherwise known as Even Bedinoff, and the said Wasil Antefeoff in the sum of $352.90, together with interest thereon at the rate of 10% per annum from March 17, 1921. (b) A declaration that the caveat registered as above set forth is a valid and subsisting charge against the said land as from the date of registration thereof. (c) A declaration that the plaintiff is entitled to a lien on the said land for the amount of the said claim as from the date of the said agreement."

On June 19, 1921, a mortgage from Bedinoff to the defendant mortgage company for the sum of $2,000 was registered against the said land. The defendant mortgage company did not enter an appearance or defend the action.

It appears from the material before us that the defendant was indebted to the Bank of Montreal, and on September 11, 1920, being unable to meet that indebtedness, in consideration of an extension of time, hypothecated the duplicate certificate of title and his interest in the land to the bank as security for his debt.

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To enable Bedinoff to secure a loan from the mortgage company, and on the consideration that the amount due to it by Bedinoff should be paid off out of the proceeds of the loan, the bank released its incumbrance against the land and delivered the certificate of title to the defendant mortgage company and received an assignment of the mortgage money from Bedinoff.

By his statement of defence, the defendant Bedinoff set up grounds of defence appropriate to the action against himself, but as alternative grounds of defence set up the above mentioned transactions between himself and the mortgage company and the bank, and claimed that the right of the plaintiff against the land (if any) was postponed to the respective rights of the mortgage company and the bank.

It is quite clear that this was bad pleading and did not constitute any ground of defence to the action. Moreover the mortgage company was a party defendant and in a position to take its own part if it so desired. The bank, as we have seen, had released its equitable mortgage on the land for the consideration stated, and, so far as I can see, was not concerned in or affected by any of the real issues raised in the action. A judgment in the action in favour of the plaintiff for the relief claimed could not affect the rights or priority of the bank or anybody else, except the defendants in the action.

The plaintiff is not asking for foreclosure of its mortgage, to be followed by registered ownership. It is simply asking that its right as a mortgagee should be declared, and for that reason, the decision in *Robinson* v. *Ford* (1914), 19 D.L.R. 572, 7 S.L.R. 443, has no bearing on this case.

I am, therefore, of opinion that the bank should not have been added as a party defendant to this action. I gather, however, from the notes of the proceedings, when the case came on for trial, that all parties concerned were willing to have the bank joined in the action and a new and distinct issue tried and that the main ground of contention was the question of costs of the day. I would not, therefore, interfere with the action taken in that respect. It follows from what I have already said that the plaintiff should not have been ordered to pay the costs of the day. The bank was added as a party at its own request and with its own consent, and having been granted the unusual privilege of being allowed to come in and try out a question between itself and one of the parties to an action, a question with which that

action had nothing whatever to do, it should pay for that privilege by paying the plaintiff its costs of the day.

Appeal allowed with costs.

Appeal allowed.

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K.B.

GUILDAY v. WINNIPEG ELECTRIC R. CO.

Manitoba King's Bench, Curran, J. October 23, 1922.

STREET RAILWAYS (§IIIB—25)—NEGLIGENCE—JERK OF CAR CAUSING PASSENGER TO FALL.

A sudden and violent jerk of a car when being started, thereby causing a woman passenger standing in the car, before being seated, to fall and injure herself, is negligence for which the railway company is liable.

ACTION for damages for personal injuries. Judgment for plaintiff.

W. S. Boyd, for plaintiff; *R. D. Guy*, for defendant.

CURRAN, J.:—The plaintiff's counsel contends that the maxim *res ipsa loquitur* applies, but I do not think it does. The plaintiff herself gave evidence as to the cause of the accident, and if her testimony is true, I think it discloses such a degree of negligence on the part of the motorman in starting the car as to render his employer, the defendant company, liable to the plaintiff.

The plaintiff's evidence as to the cause of the accident is flatly contradicted by the conductor and also in a measure by the motorman. The plaintiff swears that whilst she was still on her feet after entering the car, and seeking a seat, and whilst in the act of turning around, the car suddenly gave an "awful jerk" and threw her on her back into the vestibule. The conductor party saw the accident and his testimony virtually agrees with that of the plaintiff as to her falling but not as to the jerk of the car on starting for he says there was none. The motorman swears he heard the plaintiff say after the accident that the car started up smoothly enough and she did not know how she fell. I doubt the truthfulness of this statement. The conductor, to whom she was speaking after being assisted to a seat, says nothing of this except that the plaintiff said: "I do not know how I came to fall down."

The woman, undoubtedly, struck her head on something during the fall, for it broke her haircomb and raised a lump on her head. She says she was knocked flat on the floor of the vestibule, her feet only remaining in the body of the car. The conductor says she fell in a sitting posture; that he put out his hands to save or break her fall and was as-

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sisted in this by a passenger who was standing in the rear vestibule. This passenger was not produced as a witness. No report of the accident was made to the company by the conductor because he says the plaintiff refused to give her name and address and claimed she was not hurt and got off the car at Sherbrooke Street and walked off unassisted.

There is no doubt in my mind that the fall was a violent one and while it did not render the plaintiff unconscious, as she says, it stunned her which accounts perhaps for the contradiction between her evidence and that of the conductor and motorman as to what transpired after the accident.

The plaintiff was at the time of the accident 62 years of age and weighed about 195 pounds. She would not likely be as sure on her feet as a younger and lighter woman. The conductor says he gave the motorman the bell to start the car just as the plaintiff gave him her transfer, thus putting the car in motion before the plaintiff had time to take a seat. This does not agree with the plaintiff's account for she says she had got some 4 or 5 feet into the car when it started, but there is really not much discrepancy between the two. I have no doubt at all that the starting of the car overbalanced the plaintiff as she was in the act of turning to take her seat; the question is—was the car started with so violent and sudden a jerk as to endanger a passenger who had not then got seated?

The plaintiff was the only passenger inside the car; the conductor was seated and had his back to her till he heard the noise, as he says, of scuffling of her feet which caused him to look around and put out his hand to ease or prevent her fall. The plaintiff's account of the accident and its cause clearly put it up to the defendant to explain the cause if it claimed the plaintiff's account was incorrect. The defendant has attempted to do so, first, by denying that the car started suddenly and violently, and secondly, by giving evidence of the use of a device known as a controller in the mechanism for starting the car which, according to the evidence of Watson, superintendent of rolling stock, made it impossible to give the car a severe jerk in starting. Theoretically and relatively, this may be true of this device, but is it always infallible in action or in perfect working order, and just how much sudden motion can be given to a car so equipped by opening the lever one notch at a time, and how fast can these notches be negotiated?

I am not at all satisfied that the defendant's evidence makes it clear that this controller device rendered the plain-

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tiff's accident impossible in the way she says it occurred. In my mind, the defendant has not explained how the plaintiff came to fall as she did if the car was started as quietly and smoothly as the conductor and motorman say it was. What was it that precipitated the plaintiff violently backwards a distance of 4 or 5 feet and caused her to fall on her back into the car vestibule, the floor of which was 6 inches lower than the level of the car floor? In my opinion, the cause alleged by the plaintiff was the true cause, a sudden and violent jerk in starting the car after the plaintiff had boarded it and while she was still on her feet seeking a seat. The jerk or jar of starting, if not violent, might have easily overbalanced the plaintiff causing her to stagger but would not, in my judgment, throw her backward from where she stood clear into the vestibule; to do this, it seems to me, required much more violence in the shock of starting than the defendant admits. I accept the plaintiff's evidence as to the cause of the accident which seems to be confirmed by the thing which actually happened to the plaintiff. It confirms the plaintiff's evidence, in my opinion, in a very satisfactory and striking manner.

Having reached this conclusion on the facts, I have but to add that I find that there was negligence on the part of the defendant's servants in starting or operating the car, and that such negligence caused the accident to the plaintiff and her consequent bodily injuries. Under such circumstances, she is entitled to succeed in the action and I assess her damages at $525.

There will, therefore, be judgment for the plaintiff for $525, together with costs.

Judgment for plaintiff.

CARRELL v. BARNES.

Alberta Supreme Court, Appellate Division, Beck, Hyndman and Clarke, JJ. A. November 16, 1922.

ELECTIONS (§IV—90)—CONTEST—HOSPITAL SCHEME—JURISDICTION—STATUTORY REMEDIES.

The contest of a hospital scheme election, not instituted under the provisions of the Controverted Municipal Elections Act, is not within the jurisdiction of a District Court Judge. The Municipal Hospital Act makes the provisions of the former statute applicable to such election, and provides a remedy by a recount of the ballots under the direction of the Minister.

APPEAL by defendant from the judgment of Harvey, C. J. Reversed.

G. H. Van Allen, for appellants.

S. B. Woods, K.C., for respondent.

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BECK, J. A.:—I concur in the result reached by my brother Clarke.

The Municipal Hospitals Act 1919 (Alta.) ch. 8, provides for the submission to a vote of a "hospital scheme." It enacts that all proceedings at the poll and preliminary and subsequent thereto and for the purposes thereof shall, subject to the provisions of the Act, be conducted in the same manner, as nearly as may be, as at an election of the councillors for a municipal district, or, in the event of other directions being given, by the Minister (of Health), then in accordance with such directions. (sec. 25).

Then it provides that: (1) "the provisions of the controverted Municipal Elections Act 1911-12 (Alta.), ch. 20, shall be applicable to all elections held to ratify or reject a hospital scheme (1919 (Alta.), ch. 8, secs. 25 (2) as amended 1922 (Alta.), ch. 31, sec. 13). (2) that the Minister may direct a recount of the ballots (sec. 27)."

I think for the reasons given by my brother Clarke that these remedies exclude any jurisdiction in this Court or in the District Court exercising its ordinary general jurisdiction.

The fact that the Municipal Hospitals Act says that the Controverted Elections Act "shall be applicable," I think, excludes any argument that it is not applicable; it is applicable, and, being applicable, then, insofar as it is not applicable when read literally, it must be taken to be applicable *mutatis mutandis*, that is, changes called for by the necessities of the case must be made; again, that is, the provisions for enquiring into, adjudicating upon, and affirming or quashing an alleged election of a member of a municipal council, must be modified and adapted in accordance with analogy, reason and convenience so as to produce a workable method of procedure suitable for enquiring into, adjudicating upon and affirming or quashing an alleged ratification or rejection of a hospital scheme.

HYNDMAN, J.A., concurred with BECK, J.A.

CLARKE, J. A.:—The action is brought by the plaintiff on behalf of himself and all the other ratepayers of the Grande Prairie Municipal Hospital District against the members of the Hospital Board of the said district and the returning officer appointed by the Minister (meaning the Minister of Health) to hold a poll for the purpose of obtaining a ratification or rejection of a hospital scheme prepared by the Board.

The statement of claim was issued out of the Supreme

Court on June 2, 1922 and sets out certain alleged irregularities and illegalities in connection with the election, namely, that the returning officer did on May 22, 1922, certify that two-thirds of the voters voting thereon had approved of the scheme, which was contrary to the fact; that the lists prepared for the election were not proper lists and were not prepared pursuant to the provisions of the Municipal Hospitals Act 1919 (Alta.), ch. 8, and from time to time during the polling, such lists, or some of them were altered by the inclusion therein of persons and institutions not entitled to vote upon the said scheme; that the proceedings at the polls were not according to law but on the contrary there were numerous irregularities and improprieties; that many of the ballots cast after having been returned to the returning officer and prior to the time when he purported to sum up the number of votes cast for and against the said scheme and to declare the result thereof were tampered with and altered, with the result that a number of ballots marked as being against the scheme were spoiled and counted as spoiled ballots by the returning officer; that many of the ballots were counted in favor of the scheme which were not initialed by the deputy returning officers at the various polls, that the certificate of the returning officer incorrectly gives a majority of some 6 or 7 votes over and above two-thirds of the voters voting thereon which is contrary to the fact; that the returning officer did not, as required by law, sum up the number of votes cast for and against the scheme but recounted the votes and purported to declare the result. As a result of such recount and during such recount he excluded votes against the scheme which he should have counted and counted votes in favor of the scheme which he should not have counted; that some of the ballot boxes, while within the custody of the returning officer, were broken open prior to the time when he should have opened the same for the purpose of summing up the votes; that votes were cast in favor of the scheme by persons in a representative capacity for estates by minors and by persons who were not *bona fide* resident ratepayers; and that the returning officer did not properly conduct the summing up of the votes but on the contrary excluded certain persons from being scrutineers at such summing up who were entitled to be present thereat and otherwise failed to properly conduct the said election and poll and the proceedings for the summing up of the votes thereat.

The following relief is sought. 1. That the defendants

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be restrained from acting upon the result of the poll as certified by the returning officer and from taking any proceedings based upon the ratification of the scheme. 2. A declaration that the election was invalid and void and that the certificate of the returning officer is invalid, void and of no effect. 3. A declaration that the scheme was not carried by two-thirds of the voters voting thereon and in favor thereof or alternately that the election resulted in the scheme being defeated or rejected by the ratepayers.

The defence denies all allegations or irregularities and illegalities and in paras. 13 to 21 inclusive sets up a number of objections to the plaintiff's right to maintain the action of which in the view I take of the case it is only necessary to refer to the following.

"(13) This honourable Court has no power to grant the relief claimed in this action and has no jurisdiction over the matters alleged in the statement of claim. (15) The relief claimed in this action is asked on grounds which are not grounds for such relief. (21) The plaintiff has or had two other appropriate and sufficient remedies under the provisions of the said Act, and the injunction will not lie."

The order for directions provides that the questions of law raised by paras. 13 to 21 inclusive of the statement of defence be decided prior to the trial of the action.

The questions were argued before Harvey, C. J., who decided them adversely to the defendants and from this judgment the defendants now appeal to this Division.

The Municipal Hospitals Act 1919 (Alta.), ch. 8, provides that the Board constituted as provided by the Act shall forthwith, upon organization, prepare a scheme as outlined by sec. 16 of the Act for the establishment and maintenance of a hospital, and that, after publication and the approval of the scheme by the Minister, he shall fix a date for taking a poll for the purpose of obtaining a ratification or rejection of the said scheme and shall appoint a returning officer who shall divide the hospital district into polling divisions and name a polling place in each division and appoint the time and place, when and where the returning officer shall sum up the votes given for and against the scheme.

The persons entitled to vote are those whose names appear upon the district list to be prepared as directed by the Act and all persons who on the day of the poll subscribe the

declaration set out in Form D. (added 1921 (Alta.), ch. 15, sec. 26.) in the schedule of the Act.

The poll and all proceedings thereat and preliminary and subsequent thereto and for the purpose thereof subject to the provisions of the Act to be conducted as nearly as may be as at an election of the councillors for a municipal district, or in the event of other directions being given by the minister, then in accordance with such directions.

The following sections of the Act, 1919 (Alta.) ch. 8 and amendments, have an important bearing on the subject of this action.

"25(2). The provisions of the Controverted Municipal Elections Act, being 1911-12 (Alta.) ch. 20, shall be applicable to all elections held to ratify or reject a hospital scheme: Provided, however, that the site receiving the largest number of votes shall be the site of the hospital. (As amended 1922 (Alta.), ch. 31, sec. 13).

26. No scheme shall be adopted unless it is approved by two-thirds of the voters voting thereon, and the returning officer shall at a time and place to be named by him sum up the number of votes cast for and against the hospital scheme, and shall then and there declare the result and shall forthwith certify to the Minister under his hand whether or not two-thirds of the voters voting upon the by-law have approved of the same. (As amended 1921 (Alta.), ch. 15, sec. 12).

27. If it is made to appear to the satisfaction of the Minister within 14 days of the date of the certificate aforesaid that a necessity for a recount exists and a deposit sufficient in the opinion of the Minister to cover the expense of a recount be made by the person requesting the same, then the Minister may direct a recount and the place, time and method of making the recount. (As amended 1921 (Alta.), ch. 15, sec. 13).

28. Upon the receipt by the Minister of a certificate as to the result of a count or of a recount of ballots (if such be directed), the scheme shall stand ratified or rejected as the case may be, and in the former event shall be binding upon the hospital district and all the included areas therein and contributing councils and ratepayers thereof in manner by this Act provided.

41. Upon the ratification of a scheme the board of any hospital district shall become a body corporate."

The Controverted Municipal Elections Act 1911-12 (Alta.) ch. 20, defines what shall constitute corrupt practices and prescribes punishment by the imposition of penalties to be

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recovered in the District Court and disqualification and enacts that in case the validity of an election of a member of any municipal council or his right to hold the seat is contested the same may be tried by a District Court Judge and the practice to be followed is prescribed, sec. 31 provides that in case the election complained of is adjudged invalid the Judge shall, by the judgment, order the respondent to be removed and his seat shall *ipso facto* be vacated; and in case the Judge determine that any other person was duly elected the Judge shall forthwith order such other person to be admitted to the office and in certain events he is required to order a new election.

Shortly, the defendants' contention is that no remedies are open to question proceedings under the Municipal Hospitals Act 1919 (Alta.), ch. 8, except those provided by that Act, viz: a recount as provided by sec. 27 or a proceeding before a District Court Judge under this Controverted Municipal Elections Act, 1911-12 (Alta.), ch. 20, by virtue of sec. 25(2) of the Municipal Hospitals Act, 1919.

The plaintiff's position is that the Controverted Municipal Elections Act (other than the sections relating to corrupt practices), is inapplicable to the election here in question, and that the remedy by recount is ineffectual for want of authority on the recount to deal with many of the matters complained of.

In Beal's Cardinal Rules of Legal Interpretation, 2nd ed., at p. 429, the rule is thus stated:—"If a statute creates a new right, obligation, duty or liability and a new remedy, the new remedy must as a general rule be exclusively followed."

Considerable assistance may be derived from a reference to decisions under the Canada Temperance Act, 1878 (Can.), ch. 16, and in the R.S.C. 1906, ch. 152, which is somewhat analogous to the Municipal Hospitals Act now under consideration.

Prior to the amendment 1914 (Can.), ch. 53, sec. 6, which declared that the Superior Courts of record shall have jurisdiction to try any action brought to set aside the proceedings in connection with a polling of votes under Part I of the Act and to declare such proceedings void and which provided the procedure in such an action; the only remedy to question an election under the Canada Temperance Act was by a scrutiny before a Judge, penalties were provided for corrupt practices and neglect of duties in connection with

the election but no other effect was given to such practices and neglect.

In *Chapman* v. *Rand* (1885), 11 Can. S.C.R. 312, the question raised on appeal from the Supreme Court of New Brunswick involved the right of the Judge holding the scrutiny to go beyond the mere counting of ballots and deal with complaints made in the petition for a scrutiny, namely: that in consequence of an insufficient number of ballots having been furnished at one or more polling places many electors were unable to vote; that divers persons were admitted to vote who were not qualified to vote, some of whom personated others who were entitled to but did not vote; and that persons were induced to vote against the petition by bribery and other corrupt practices; and that many persons entitled to vote were deceived by the nature and form of the ballot papers used and in consequence voted against the petition unwittingly. The New Brunswick Court granted a mandamus to compel the officer holding the scrutiny to enter into the consideration of the said complaints, but on appeal the Supreme Court of Canada held that the scrutiny provided for only extended to the counting of the ballots and that the complaints referred to could not be dealt with in such a proceeding. It was not decided in that case whether or not there was any other remedy but Henry, J., who was the only Judge who discussed that phase of the case seemed to be of opinion there was not. He is reported as using these words, 11 Can. S.C.R., at p. 320.

"Under the Canada Temperance Act, the Judge has power to decide whether the vote shall remain or be altered, but there is no power given to void the election, unless it be implied from the words of the Act. The result is that bribery and all sorts of corruption may be practised, but the election will not thereby be avoided, unless power is given to somebody to inquire into such acts, and alter or not the result of the election accordingly," and in arguing for the power to go into these matters on a scrutiny he says at p. 321:—

"Nobody else has any authority to try out the question. Parties may prosecute under the Act, but that has no reference to the result of the election. . . . . If the judgment of the Court below is wrong, then corrupt or irregular practices will not avoid an election such as this."

The question of the right to question an election under the Canada Temperance Act by an action came up squarely before the Appellate Division of the Supreme Court of

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Ontario in *Murdock* v. *Kilgour* (1915), 22 D.L.R. 752, 33 O.L.R. 412, where by a unanimous decision of the Court it was decided in the words of the headnote (O. L. Report), that "The Canada Temperance Act, R.S.C. 1906, ch. 152, provides its own Code of procedure; and the provision which it makes for an inquiry as to whether or not a majority of the votes was or was not given in favour of the petition to the Governor-in-Council to bring Part II. of the Act into force in a county affords the only way in which by a judicial proceeding the result of the voting can be inquired into," and Meredith, C.J.O., says, 22 D.L.R., at p. 758:

"The provision for the scrutiny and absence of any other provision for questioning the result or the validity of the voting, point clearly, I think, to the conclusion that Parliament did not intend that any other means should be available for questioning the result of the voting than the scrutiny for which—inadequately as it has turned out—the Act provides."

It may be noted that at the time the decision in appeal was given (March 15, 1915), the amendment of 1914 (Can.), ch. 53, already referred to, had come into effect. Apparently, the Court did not consider it as declaratory of the previous law.

It may be regrettable that in so close a contest as here exists, there may be no means of investigating beyond a recount of ballots, the serious irregularities charged by the plaintiff and giving them their proper effect, but I think that is a matter for the consideration of the Legislature.

I have considerable doubt as to the applicability of the provisions of the Controverted Municipal Elections Act, in the nature of *quo warranto* proceedings, to the election in question in this action, not only by reason of the difficulty in applying them, but more on account of the effect given to the certificate of the returning officer by sec. 28 of the Municipal Hospitals Act 1919, upon the receipt of the certificate by the Minister the scheme shall stand ratified or rejected as the case may be, the only qualification is in case of a recount under sec. 27 and then it is the certificate on the recount that governs. If it were intended that the result would be affected by proceedings other than the recount, one would expect some reservation in respect thereof. As it is, a statutory effect is given to the certificate, and it is difficult to see how that effect can be altered by any proceeding of a Court not provided for.

As the present action is admittedly not a proceeding

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within the provisions of the Controverted Municipal Elections Act, it is unnecessary to decide in this action to what extent the provisions of that Act are applicable. I have merely indicated some difficulties of a serious nature which may arise in cases where the last mentioned Act is invoked for the purpose of contesting a hospital scheme election.

If the charges in this action can be dealt with under the Controverted Municipal Elections Act, the plaintiffs are, I think, bound to resort to the tribunal named therein.

But, if no such remedy is available, my opinion, based upon the authorities I have referred to, is that the plaintiffs have no remedy other than a recount of the ballots under the direction of the Minister.

Under either view of the matter this action cannot succeed.

I would, therefore, allow the defendants' appeal and dismiss the action, both with costs.

Appeal allowed.

NORTH VANCOUVER v. CARLISLE.

British Columbia Court of Appeal, Macdonald, C.J.A., Galliher, McPhillips and Eberts, JJ. A. October 3, 1922.

MORTGAGE (§VIA—70)—FORECLOSURE—PROCEDURE—TITLE OF MORTGAGEE—"CHARGE."

That the legal estate of a mortgagor passes to the mortgagee subject to the mortgagor's equity of redemption has not been affected by the provisions of the Registry Act, which merely makes a mortgage a "charge"; and an action for its enforcement is one of foreclosure and governed by the rules applicable to that procedure.

APPEAL by the defendant from the judgment of Macdonald, J., of May 4, 1921. Affirmed.

H. R. Bray, for appellant; *W. E. Burns*, for respondent.

MACDONALD, C.J.A.:—When the appeal was argued I had no doubt about its disposition except upon one point: It was contended by Mr. Bray that there had not been due service of the process on his client, the defendant. It was conceded that the practice as laid down by Order 67, Rule 4, had not been complied with, but Mr. Burns pointed out that the service was governed by the amendment made to that Rule on March 27, 1917. Mr. Bray's answer was that the action was not a foreclosure action; he contended that under our Land Registry Act a mortgage does not transfer the legal estate to the mortgagee, but merely creates a charge upon it in his favour. Without deciding the question of whether or not it is necessary to convey the legal estate to the mortgagee when creating a mortgage, it is enough to say that the

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mortgage in question does convey it to the mortgagee and hence the action was one for foreclosure and falls within the said amended Rule.

The appeal should be dismissed.

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

Mr. Bray's contention is that under sec. 2 (1) of the Land Registry Act, 1921 (B.C.), ch. 26, that the legal estate no longer passes to the mortgagee under a mortgage and cites the definition of "charge" in the interpretation clause above referred to and also secs. 33, 34, 27, 40 and 53 of the Act.

It does not seem to me that any of these sections tend to that construction. The language used would have to be much plainer to even contend that such was the intention of the Legislature.

By the Trust Property Act, 1862, New South Wales, Statutes, ch. 12, sec. 25, it was declared: "That all mortgages of real or personal estate shall hereafter be deemed at law, as now in equity, pledges only of the property thereby mortgaged, etc."

And the construction placed upon that section by the Courts of New South Wales, *Re Fergusson* (1882), 3 N.S.W.L.R. 43, was that as regards title in devolution, the section of the New South Wales Act has not made any difference. I cite from the judgment of Wright, J., with whom Phillimore, J., agreed in *Farmer* v. *Inland Revenue Comm'rs.*, [1898] 2 Q.B. 141, at p. 146, 14 Times L.R. 408 (the New South Wales Reports not being in the library).

In my opinion, the law remains as it was, unaffected by our Land Registry Act, that by mortgage the legal title passes to the mortgagee subject to an equity of redemption in the mortgagor.

MCPHILLIPS, J.A.:—I agree in dismissing the appeal.

EBERTS, J.A., would dismiss the appeal.

Appeal dismissed.

RAT PORAGE LUMBER CO. v. LORMAN. CANADA LIFE ASSURANCE Co. v. RUR. MUN. OF STONEHENGE

Saskatchewan Court of Appeal, Turgeon, McKay and Martin JJ.A. November 7, 1922.

LIENS (§II—5)—PRIORITIES—SEED GRAIN LIEN—"INCUMBRANCE"—CROP LEASE.

A crop payment lease, being a charge upon the crops, is an "incumbrance" within the meaning of sec. 5 of the Municipalities Seed Grain Act, which gives a seed grain lien under it priority over "any incumbrance whenever created."

APPEAL by the claimant, the Canada Life Assurance Co.,

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RAT PORTAGE LUMBER CO. v. LORMAN. CANADA LIFE INS. CO. v. RUR. MUN. OF STONEHENGE.

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from a judgment of the acting Judge of the Judicial District of Gravelbourg. Affirmed.

F. L. Bastedo, for appellant.

W. A. Beynon, for respondent.

The judgment of the Court was delivered by

MARTIN, J.A.:—The facts are as follows: Acting under several executions in which one S. J. Lorman was defendant, the sheriff of the Judicial District of Gravelbourg did on or about August 8, 1921, seize the following chattels: 50 acres of wheat in stook on sect. 5, tp. 9, range 3, west of the 3rd meridian. Subsequently, on September 9, 1921, a notice of claim to the grain so seized was received by the sheriff, claiming on behalf of the Canada Life Assurance Co. a one-half interest in the grain grown on the east half of sect. 5, tp. 9, range 3, west of the 3rd meridian.

On October 29, 1921, a notice of claim to the grain so seized, or the proceeds thereof, was received by the sheriff from the Rural Municipality of Stonehenge No. 73.

The amount realised from the sale of the grain was $257.70, less the sheriff's costs, which amounted to $20.85, leaving a balance of $236.85 in the hands of the sheriff.

The sheriff sought relief by way of interpleader, and the trial Judge directed that the money in the hands of the sheriff be paid out to the Rural Municipality of Stonehenge No. 73.

At the time of the execution of the lease under which the Canada Life Assurance Co. claims, the defendant S. J. Lorman was the registered owner of the east half of section 5, in tp. 9, range 3, west of the 3rd meridian, and in possession thereof, and he had executed a mortgage on the said land to the Canada Life Assurance Co.; it was a term of the said mortgage that, if default were made in any of the covenants contained in the said mortgage, the mortgagee should be entitled to make any lease of the said land, and at the time of the making of the lease default in the performance of the terms of the mortgage had been made, and such default had continued up to and was in existence at the time of the making of the lease. The Canada Life Assurance Co. has received none of the crop grown on the land for 1921. The lease was made on April 13, 1921, and contained the following provision:—

"The company doth hereby demise and lease unto the lessee.....to hold the said lands from the date hereof until January 1, 1922, yielding and paying therefor

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during the said term unto the company, its successors or assigns, the annual rental or sum of one-half of the crops sown on the said land in each year up to the net value of $950 delivered as hereinafter set out."

The document constituted a crop payment lease, and falls within the provisions of the Crop Payments Act R.S.S. 1920, ch. 126.

The claim of the Rural Municipality of Stonehenge is based on a seed grain lien made under the provisions of the Municipalities Seed Grain Act, R.S.S. 1920, ch. 100. The lien under which the rural municipality claims was made by the defendant S. J. Lorman on April 9, 1921, and was given to the municipality in return for seed wheat and seed oats sold and delivered by the municipality to the defendant Lorman.

The question to be answered is: Does the lien given for the purchase price of seed grain, and created under the provisions of the Municipalities Seed Grain Act, give the Rural Municipality of Stonehenge a claim to the crop grown on the north half of sec. 5 prior to the claim of the Canada Life Assurance Co. under the crop payment lease made to Lorman?

The Crop Payments Act, R.S.S. 1920, ch. 126, secs. 2 and 5, contains the following provisions:—

"2. In all cases in which a *bonâ-fide* lease has been made and a *bonâ fide* tenancy created between a landlord and tenant, providing for payment of the rent reserved or any part thereof, or for payment in lieu of rent, by the tenant delivering to the landlord a share of the crop grown or to be grown on the demised premises, or the proceeds of such share, then, notwithstanding anything contained in *The Chattel Mortgage Act*, [R.S.S. 1920, ch. 200] or in any other statute, or in the common law, the lessor, his personal representatives and assigns shall, without registration, have a right to the said crops or the proceeds thereof to the extent of the share or interest reserved or agreed to be paid or delivered to him under the terms of such lease, in priority to the interest of the lessee in said crops or the proceeds thereof, and to the interest of any person claiming through or under the lessee, whether as execution creditor, purchaser, mortgagee or otherwise.

5. Nothing herein contained shall impair or be held to have impaired the priority given by *The Chattel Mortgage Act*, to mortgages, bills of sale, liens, charges, incumbrances,

conveyances, transfers or assignments, made, executed or created as a security for the purchase price and interest thereon of seed grain, or the priority given to charges in favour of His Majesty under *An Act respecting Seed Grain, Fodder and other Rleief*, being chapter 33 of the statutes of 1915."

The Municipalities Seed Grain Act, R.S.S. 1920, ch. 100, sec. 14 (5), provides as follows:—

"5. The agreement for a lien mentioned in subsection (1) shall create a charge upon the crops covered thereby, enforceable by seizure and sale thereof. Such charge shall not be affected by any execution in the sheriff's hands at the time of registration of the lien agreement or by any incumbrance whenever created except mortgages or incumbrances given as security for seed grain or for meat, groceries, flour, clothing or binder twine or seed grain advances previously made under any seed grain advances Act."

On the argument, counsel for the claimant the Canada Life Assurance Co., contended that the lease in question was not an "incumbrance" and, therefore, the seed grain lien of the municipality could not take priority over the claim of the Canada Life Assurance Co. to the crop, inasmuch as sec. 14 (5) of the Municipalities Seed Grain Act does not include a crop payment lease or agreement among the charges which shall not affect a seed grain lien.

If this contention is correct, then it is possible for every mortgagee—where there has been default in any of the covenants contained in the mortgage—to enter upon the mortgaged premises, lease the same on terms of crop payment, and defeat the claim of the municipality for the supply of seed grain.

Wharton's Law Lexicon, 12th ed., p. 438, defines "incumbrance" as:—"a claim, lien, or liability, attached to property; as a mortgage, a registered judgment, etc."

It is not necessary, in my opinion, to decide whether or not the lease in question constitutes an incumbrance on the land affected, but whether the terms of such lease relative to the crop create an incumbrance in so far as the grain grown on the land is concerned.

Before the passing of the Crop Payments Act in 1915 (Sask.), ch. 34, the law with respect to such agreements was as settled in the case of *Robinson* v. *Lott* (1909), 2 S.L.R. 276. In that case, the defendant was the owner of a

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farm which he leased on terms that he was to receive one-half of the crop when threshed, by way of rent. Being indebted to one Emerson, he executed a deed by way of security whereby he did "assign and grant . . . . all that certain parcel of land . . . . together with the residue unexpired of the said term of years and the said lease and all benefit and advantage to be derived therefrom."

The sheriff, under a writ of execution at the suit of the plaintiff seized the defendant's half of the crop, which was claimed by Emerson and the sheriff interpleaded. Whether the crop was standing or not, threshed or divided, did not appear on the material before the Court. It was held that until the grain was threshed and divided the property therein remained in the lessee, and, in the absence of evidence of division or delivery, there was no evidence that the debtor had any interest in the crop liable to seizure.

The Crop Payments Act, sec. 2, provides in part that:—

"The lessor.....shall, without registration, have a right to the said crops or the proceeds thereof to the extent of the share or interest reserved or agreed to be paid or delivered to him under the terms of such lease, in priority to the interest of the lessee in the said crops or the proceeds thereof, and to the interest of any person claiming through or under the lessee, whether an execution creditor, purchaser, mortgagee or otherwise."

The Act gives the lessor the right to the "said crops or proceeds thereof." In fact, the lessor may follow the crop as long as it can be identified, and claim his share as reserved in the agreement. The crop is charged with the payment of the share of the lessor, and that "without registration;" or, in other words, a "claim," or "liability" is attached to the crop grown on the land which is the subject-matter of the crop payment agreement.

In my opinion, therefore, an incumbrance is created in so far as the grain grown on the land is concerned, and the lease or agreement in question must be included in the words "by any incumbrance whenever created," in sec. 14 (5) of the Municipalities Seed Grain Act.

The appeal of the claimant the Canada Life Assurance Co. should, therefore, be dismissed, with costs.

Appeal dismissed.

PLAWIUK v. ADVANCE RUMELY THRESHER Co.

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Alberta Supreme Court, Walsh, J. November 7, 1922.

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NEGLIGENCE (§IC—55)—ALLUREMENT TO CHILDREN—ENGINE.

An old steam-ploughing engine, stored on unfenced city ground freely resorted to by children for purposes of play, but incapable of harm in the position it was left there, is not *per se* an allurement or trap as will render the owners thereof liable for injuries to a child struck by a weight therefrom while seeking another child supposedly hiding under it, the weight having been raised from its position unknown to the defendant.

ACTION for personal injuries sustained by child. Dismissed.

A. C. Grant, for plaintiffs.

S. W. Field, K.C., for defendant.

WALSH, J.:—The plaintiff Lazarus Plawiuk, a boy 7 years of age, was playing with some youthful companions on unfenced land in the City of Edmonton, leased and used by the defendant for the storage of its machines. On this day, there was on this land a second-hand steam-ploughing engine of the defendant which had been there for some time. This boy and his comrades were playing hide and seek, he being at this time one of the seekers. Thinking that the hiders might be under this engine he tried to look under it and to support himself while stooping to do so he put his right hand on the engine, when a 20 pound weight forming one of its attachments fell upon it and cut off the end of his index finger at the first joint. General damages are claimed for him against the defendant because of this, and special damages by his father who is also a plaintiff.

This ground was quite open to children, and the evidence is that it was freely resorted to by them for purposes of play. The infant plaintiff and his older brother had played there several times before. The defendant's local manager said that he had often seen small children playing on this land and he had never ordered them off. There was no notice forbidding children to play there, nor was there any guard around the engine to keep them off it. One of the defendant's salesmen said that he had warned children away from machinery for fear that they would harm it. This is the only evidence of any attempt on the part of the defendant to keep children away.

The weight which fell was a counter weight for the suction hose with which the engine, when in operation, was equipped. It was 8 inches high with a hole in the centre through which a pipe ran. This pipe was about 4 feet high and the weight was raised and lowered on it when working by a cable attached to it. Another pipe ran from the top of

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and at right angles to this pipe to the outside of the engine, the cable to which the weight was attached being carried along it to the hose.

No one knows how this weight happened to be raised on this occasion. The engine was not then and had not been for some time in use. I think I am right in saying that there was no suction hose on it then. In its proper position, the weight should have been resting on its own bottom on the spot where the boy placed his hand. By some unknown means, it had been elevated high enough to do this damage when it fell. A piece of wire which formed no part of the equipment of the engine was found fastened to the cable and stretching down from it towards the ground. It was a crude affair of fence wire twisted around the cable. One witness said it looked like a child's job. The plaintiff's theory is that the weight was raised by some means to the top of the pipe where it wedged and stayed until loosened by the child's contact with the engine. I doubt the accuracy of this view. It would take great force to drive the weight into a position at the top of the pipe in which it would stick. My own idea is, though it is the merest speculation, that the weight was raised by someone by means of this wire, the free end of which was tied loosely to some part of the engine until released by the vibration from the boy's contact with the engine and then, of course, the weight fell.

However, this may be, it is quite clear to me that this wire was not attached to the cable nor was the weight raised by any one in the defendant's employ or with the knowledge and consent of the defendant, and that the first information of the attachment of the wire and the raising of the weight came to the defendant as a result of this accident. I am satisfied that when the engine was left on the land this weight was in its proper position, a position in which it was incapable of doing this or any other harm. I do not think that the defendant had any reason to anticipate danger from this thing, harmless in itself, in its proper position, and only made capable of harm by the mischievous interference of some outsider.

Upon the facts of this case, so far as they are disclosed by the evidence, I do not feel justified in imposing liability upon the defendant for this unfortunate accident. There is a very full review of the authorities on this branch of the law in the recent House of Lords case of *Glasgow Corp'n* v. *Taylor*, [1922] 1 A.C. 44. Lord Atkinson says, at p. 58:—

"The liability of defendants in cases of this kind rests, I

think, in the last resort upon their knowledge that by their action they may bring children of tender years, unable to take care of themselves yet inquisitive and easily tempted into contact in a place in which they, the children have a right to be, with things alluring or tempting to them and, possibly, in appearance harmless, but which unknown to them and well known to the defendants are hurtful or dangerous if meddled with."

Now the only respect in which this engine as it stood on the land on the day of this accident could be said to be dangerous if meddled with was that out of which the accident arose, and as to it the defendant had not, I think, either knowledge that it was or reason to fear that it might prove hurtful to any children playing on or around it. The boy was not lured or attracted to the place by this machinery, nor was he tempted to meddle with it whilst there. The use which he was making of it when hurt was merely incidental to and had no part in the game which he was playing. The case is more like *Latham* v. *R. Johnson*, [1913] 1 K.B. 398, in its facts than any that I have come across, and in it the plaintiff was held disentitled to recover. He was, as was the plaintiff here, a licensee. Farwell, L.J., at p. 407, after a review of the authorities says:—

"If the law be as I have stated and believe it to be, there is nothing in this case to raise any liability in the defendants. There is neither allurement nor trap, invitation or dangerous animal or thing. The use of the land for depositing stones is a normal user and stones are no more dangerous than cows or donkeys, if indeed as much. It is impossible to hold the defendants liable unless we are prepared to say that they are bound to employ a groundkeeper to look after the safety of their licensees, and the result of such a finding would be disastrous, for it would drive all landowners to discontinue the kindly treatment so largely extended to children and others all over the country."

This language *mutatis mutandis* so aptly fits this case that I need add nothing to it.

I dismiss the action. Though I would be glad to know that the defendant does not insist on its right to its costs, there is no ground upon which, in the exercise of a judicial discretion, I can deprive it of the same, and so if it insists, the father of the infant plaintiff, who as well as suing on his own behalf has allowed the use of his name as next friend, must pay them.

Action dismissed.

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K.B.

K. v. K.

Manitoba King's Bench, Galt, J. October 10, 1922.

JUDGMENT (§VIIA—270)—RELIEF AGAINST—MARITAL DECREE—ABSOLUTE MAINTENANCE—ACQUIESCENCE.

A clause for the maintenance of a child inserted in a final decree for the dissolution of marriage, not called for by the decree *nisi*, will be struck out on application therefor within a reasonable time after service of the decree absolute. But failure to object and abiding by its terms for a year and a half will be deemed an acquiescence in it, particularly where relief against it had been already denied in a garnishment proceeding brought for the enforcement of the maintenance provision thereof.

APPLICATION by respondent for relief from a clause inserted in a final decree of dissolution of marriage, being an order against respondent for maintenance of a child. Dismissed.

Ward Hollands, for applicant.

T. A. Hunt, K.C., for petitioner.

GALT, J.:—In this case the respondent W. H. K. seeks relief from a clause inserted in a final decree of dissolution of his marriage with the petitioner K. K.

The application is made under somewhat peculiar circumstances. On May 19, 1920, a decree *nisi* was pronounced by the Chief Justice of this Court that the marriage between the parties be dissolved on the ground of the adultery and cruelty of the respondent, unless sufficient cause be shown to the Court why this decree should not be made absolute within 6 calendar months of the date thereof, and the Court did further decree that V. W. K., the child of the petitioner and respondent, do remain in the custody of the petitioner until further order of the Court; and the Court did further order that the respondent pay the petitioner her costs.

The decree *nisi* was granted on petition asking (1) Dissolution of the marriage; (2) The custody of the petitioner's child V. W. K.; and (3) Further and other relief. No defence had been put in by the respondent.

On December 8, 1920, a motion for final decree was made before me. This decree embodies the provisions of the decree *nisi*, but there is also added the following additional provisions:—

"And the petitioner having applied for maintenance of her said child V. W. K., and having filed her affidavit this 8th day of December, 1920, regarding such maintenance, this Court by its final decree doth adjudge that the respondent do pay to the petitioner on the first day of each and every month, commencing on January 1, 1921, the sum of $50 per month for the maintenance of the said child

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V. W. K., until the said child attains the age of 21 years."

Upon the present application made by Mr. Hollands on behalf of the respondent to vary or vacate the additional clause in the decree absolute, it was shown that the above decree absolute was duly served upon the respondent and that he has been making payment of the maintenance mentioned in the decree for the last year and a half. Mr. Hunt appeared on behalf of the petitioner and urges both delay and acquiescence on the part of the respondent.

The petitioner had asked for "further and other relief." The Court was empowered under the provisions of 1866 (Imp.), ch. 32, sec. 1, to order the respondent "to make a monthly or weekly payment to the wife during their joint lives." But no such relief was applied for at the hearing, when the decree *nisi* was pronounced.

If the application had been made within a reasonable time after service of the decree absolute upon the respondent, I think he would have been entitled *ex debito justitiae* to an order striking out the clause now objected to; See *Anlaby* v. *Prætorious* (1888), 20 Q.B.D. 764. But by his acquiescence and delay he seems to have brought himself fully within the maxim *qui non prohibet quod prohibere potest assentire videtur.*

In addition to the above circumstances of acquiescence and delay, I find amongst the papers an order, not mentioned to me by either of the counsel, purporting to have been made by Macdonald, J., on August 24, 1922, and entered on September 9. The order reads as follows:—

"Upon application of the respondent and upon reading the affidavits of the petitioner and the respondent, and upon reading the garnishing order herein issued August 4, 1922, and upon hearing what was alleged by counsel for both parties,—

(1) It is ordered that the application of the respondent to set aside the said garnishing order and to reduce the amount of maintenance provided by the decree absolute of this honourable Court, dated December 8, 1920, herein, be, and the same is, hereby dismissed with costs to be paid, including costs of the garnishing order, by the respondent to the petitioner forthwith after taxation thereof.

(2) And it is further ordered that the sum of $316.03, being the amount attached by the said garnishing order, be paid over to the petitioner forthwith."

Under the circumstances above set forth, I must dismiss the application with costs.

Application dismissed.

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HILDEBRAND v. FRANCK.

Saskatchewan Court of Appeal, Turgeon, McKay and Martin, JJ. A. November 7, 1922.

INFANTS (§III—40)—MARRIED WOMAN AS GUARDIAN OR NEXT FRIEND.

A married woman has no legal capacity to act as guardian *ad litem* or "next friend," the Married Woman's Property Act not having changed her common law disability in that particular.

DISMISSAL AND DISCONTINUANCE (§I—1)—POWER OF COURT—WANT OF NEXT FRIEND—REVIEW ON APPEAL.

An action on behalf of infant, brought without a properly qualified "next friend," may be dismissed by the Court under the provisions of Rule 658, and such dismissal will not be interfered with on appeal therefrom.

COSTS (§I—1)—LIABILITY OF SOLICITORS.

The action not having been properly instituted, the costs thereof must be borne personally by the solicitors for plaintiff.

APPEAL by plaintiff from a judgment dismissing the action. Affirmed.

A.Allan Fisher, for appellant.

C. H. J. Burrows, for respondent.

The judgment of the Court was delivered by

TURGEON, J.A.:—The principal point to be determined in this appeal is whether a married woman is qualified to act as the next friend of an infant plaintiff under the provisions of R. 44 of the King's Bench Rules.

The District Court Judge held that she is not so qualified, and, in my opinion, he was right in so holding. At common law, a married woman was clearly incapable of acting as next friend or guardian *ad litem*, and, while the Married Woman's Property Act of this Province, R.S.S. 1920, ch. 153, has made important changes in the status of married women, I have reached the conclusion that there is nothing in it or in any other statute which has the effect of removing this particular disability.

This matter was dealt with at length in England by Chitty, J., in *Re Duke of Somerset; Thynne* v. *St. Maur* (1887), 34 Ch.D. 465. I think that the reasons given by the Judge in that case for holding that a married woman has not acquired the capacity to act as a next friend notwithstanding the Married Woman's Property Act of 1882 (Imp.), ch. 75, apply to the state of the law in this Province. A "next friend" is necessary in actions brought on behalf of an infant in order to provide somebody against whom the defendant may have recourse for the costs of an improper action. A married woman cannot assume this responsibility.

It was also urged by counsel for the appellant that the District Court Judge should not have dismissed the action

with costs, as he did, but that he should have granted the application made by the appellant at the trial to have the trial adjourned and leave given to substitute another person as next friend of the infant plaintiff. We were asked to alter his ruling upon this point by restoring the action and allowing the amendment applied for. Here again, I think, the appellant must fail. The error committed by the plaintiff's solicitors in bringing the action as it was brought, without a properly qualified next friend, was a non-compliance with R. 44. It was consequently an irregularity with which the trial Judge had power to deal under the provisions of R. 658. (*Durie* v. *Toronto R. Co.* (1914), 15 D.L.R. 747, 16 C.R.C. 334, 25 O.W.R. 789; *Toll* v. *C.P.R. Co.* (1908), 1 Alta. L.R. 318, at p. 329). Rule 658 is as follows:—

"658. Non-compliance with any of these rules or of any rule of practice, for the time being in force, shall not render any proceedings void unless the Court or a Judge shall so direct but such proceedings may be set aside either wholly or in part as irregular, or amended, or otherwise dealt with in such manner and upon such terms as the Court or Judge may think fit."

The trial Judge had power under this rule to set aside the proceedings, as he did, with leave to the plaintiff to bring a new action; and I do not see upon what ground an order so made by him in the exercise of the jurisdiction conferred by the rule can be set aside or modified by this Court. He was, no doubt, moved to make such an order, instead of granting leave to amend, by the circumstances of the case, as the plaintiff's solicitors were apparently aware from the beginning that Lena Hildebrand was a married woman and that the defendants objected to her acting as next friend. It is not in every case that the Court will treat such an irregularity with leniency. (*Fernée* v. *Gorlitz*, [1915] 1 Ch. 177.)

The appeal should be dismissed with costs. Under the circumstances I must add that these costs will have to be borne by the appellant's solicitors. The respondents are entitled to their costs, and nobody else appears on the record who can be made liable for them. The infant herself is not liable, and Lena Hildebrand likewise is relieved from liability by the fact that she is a married woman. I regret to have to make this determination of the matter, as I have no doubt that the action of the solicitors throughout

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is merely the result of a mistaken view of the law, but I see no other course open to me.

Appeal dismissed.

CALPER v. EDMONTON DUNVEGAN BRITISH COLUMBIA R. Co.

Alberta Supreme Court, Walsh, J. November 16, 1922.

RAILWAYS (§IID—35)—COLLISION AT JOINT SECTION—SPEEDER VEHICLES—NEGLIGENCE—SECTION MEN—DEATH.

Two companies, operating their lines of railway at a joint section, are jointly liable for the death of a section foreman, caused by the collision of a speeder vehicle, in operation by the latter when conveying a superior officer, with a velocipede proceeding on the track at night without any lights or signal devices and without clearance leave from the despatcher. The accident having been primarily caused by the negligence of the operator of the velocipede, the companies are liable notwithstanding the negligence of the deceased, but not contributing thereto.

[*Jackson* v. *C.P.R. Co.* (1919), 49 D.L.R. 320; *G.T.P.R. Co.* v. *Morreau* (1921), 59 D.L.R. 458, referred to.]

ACTION for negligence causing death. Judgment for plaintiff.

G. B. O'Connor, K.C., and *S. B. Smith*, for plaintiff.

G A. Walker, K.C., and *J. J. Frawley*, for the Dunvegan Co.

H. H. Parlee, for the Waterways.

WALSH, J.:—This action is brought on behalf of the widow and infant children of Thomas Calper, who was accidentally killed by the negligence, it is alleged, of the defendant companies. He was a section foreman in the employ of the defendant, Alberta & Great Waterways Railway Co., to whom I will refer as the waterways company. The accident which caused his death took place on what the defendants call the joint section, being a part of the line of the defendant the Edmonton Dunvegan & British Columbia R. Co., to whom I will refer as the Dunvegan company, over which the Waterways company had running rights under the terms of a working agreement. It was caused by a collision between a speeder (which is a small car of the hand-car type but operated by gasoline) of the Waterways company which he was operating and a railway velocipede owned by the Dunvegan company and operated by one Kusuk, a man employed as a section man on the joint section.

On the morning of the day in question, one Irwin, the claims agent of the Waterways company was at Lac La Biche, the northern terminus of that company's road, on the business of his company when he was ordered by wire to report on the following morning without fail at the man-

ager's office in Edmonton. The only train to Edmonton that day had left before his receipt of this wire and the only way that he could reach Edmonton in obedience to his instructions was by travelling on a speeder. He procured a written order from the assistant road-master directed to all section foremen to carry him from section to section, he already having a pass of his company good on its freight trains and speeders. He left Lac La Biche on a speeder which carried him to the nearest section gang when he transferred to a speeder of that gang which carried him under the operation of one of its crew to the next section and so on from gang to gang until he met Calper at Mile 14 on the Waterways Road. Calper's own speeder was out of order, but he assumed control of the speeder which brought Irwin to him and undertook to carry him to Edmonton on it. They reached Edmonton and were in the Dunvegan yards and approaching the station when the collision with the velocipede took place. It was then nearly 11 o'clock and the night was dark. Irwin, who was seated at the front of the speeder, carried a lighted lantern on his knee. There was no light or signal device on the velocipede. Irwin was the only witness of the accident, who gave evidence at the trial. All that he knows, so he says, is that he saw the third or guide wheel of the velocipede coming straight at him in the air and he shouted and jumped as the collision took place.

The evidence as to how the velocipede came to be travelling over this line at this time is very meagre, consisting merely of portions of the examination for discovery of Mr. McGregor, the manager of the Dunvegan company. Kusuk was returning from the Dunvegan yards in Edmonton to the section house at mileage 10 on the joint section, where he was employed. He did not obtain any permission from the operator at Dunvegan yards before clearing from the yards and proceeding out on the track. This is all of the evidence there is on the point.

I think enough appears from this to make the defendants liable in damages to the plaintiff if he is otherwise entitled to recover. Kusuk was under sec. 28 of the working agreement a joint employee of the defendants. His act in setting out on this journey without a clearance order and on an unlighted vehicle on this dark night was an undoubtedly negligent one. He was on the joint section of which the defendants were in the joint and equal possession in charge of a machine, the property of one of them. In the absence of evidence to the contrary, and there is none, it must be

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presumed that he was acting as such employee in what he did, and so, if liability arises through his negligence, it must attach to his employers. The only evidence that he went without a clearance order is in McGregor's examination for discovery and that, of course, is not evidence against the Waterways company. In the examination for discovery of Mr. Callahan, the general manager, of the Waterways company, it is stated, however, that Kusuk's velocipede was not equipped with a lantern, and that is evidence of his negligence in that respect as against that company.

The defendants raise many objections to the plaintiff's right to recover even if negligence for which they are liable is brought home to them. They say, in the first place, that Calper had no right to run his speeder over the joint section at all, as he was but a section foreman of the Waterways company alone, whose section was his territory and when he got beyond it, he got where he had no right to be. It is also suggested that, under the terms of the working agreement, such an employee of the Waterways company, as he was, had no right at all upon the joint section. I am not able to agree with this contention. It may be that, as a section foreman, his duties were confined to his section. But that surely did not make him a wrongdoer if he got beyond the limits of his territory, either upon his company's own line or on the joint section, assuming the right of such an employee to go on the joint section. Much less can this be said of him when, as on this occasion, he was not in the performance of his usual duties as section foreman, but was under instructions of a superior officer doing something quite outside them. I think that, under the terms of the working agreement, an employee of the Waterways company has just as much right to use the joint section for all proper purposes in that company's operations as an employee of the Dunvegan company has. I can find absolutely nothing in the agreement which is at all restrictive of the Waterways company's rights in this respect. I think, therefore, that Calper had a perfect right to use the joint section for the purpose for which he was on it on this occasion.

It is said that he was travelling at an excessive rate of speed. The evidence proves the contrary of this to be the case.

Then, it is argued that he, by his own negligence, contributed to this accident. It is said that he should not have attempted to make this trip after dark, when by starting out from his own home early next morning he could have

landed Irwin in Edmonton by the time he was ordered to be there. Unless I can say that the mere fact of his travelling after dark on this line of rail was negligence, I cannot give effect to this argument. It is quite impossible for me to say that. It is a generally known fact that railway traffic of all kinds is carried on by night as well as by day, and I can see absolutely no negligence in Calper's conduct in this respect.

It is contended that he was guilty of negligence in travelling over this joint section without getting leave to do so from the despatcher at Edmonton, and this he did not do. When he got to Carbondale, the junction point, his helper turned the switch and he pushed the speeder over it on to the line of the joint section and proceeded to Edmonton without reporting his presence on the line, without getting leave to do so and in absolute ignorance of the traffic conditions between Carbondale and Edmonton. That was negligence just as gross and inexcusable as that of Kusuk at the other end of the line. The difficulty, however, is that it cannot be said that this negligence contributed to the accident. The evidence is, as I have said, that Kusuk started his ill-fated journey without getting a clearance order from the Dunvegan operator in Edmonton. If Calper had asked for instructions he would, undoubtedly, have been told that the line was clear as it then was so far as Kusuk was concerned for he did not leave Edmonton until an hour after Calper left Carbondale. No information that the line was clear, no order from the despatcher to proceed would have averted this disaster because of Kusuk's negligent venture upon the line an hour later. If Calper had done what he should have done, exactly the same thing would have happened as did happen, and so, as I have said, his negligence did not contribute to the accident. The negligence of a plaintiff which avails a defendant as an answer to his own is only that which contributes to the accident. Negligence of a plaintiff however gross, which is not contributory to the happening of which he complains cannot be made use of to defeat his action.

Finally, it is said that he got on the joint section in violation of a rule of his company and so no duty was owed to him by the defendants as he was, because of this, where he had no right to be. The only proof of this rule is that it is set out in a working time table of the Waterways company issued for the information and government of its employees in the following words:—

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CALPER v. EDMONTON DUNVEGAN BRITISH COLUMBIA R. Co.

Walsh, J.

"Telephone is located at junction with the E.D. & B.C. Railway at Carbondale connected with the dispatching office at Edmonton, which conductors must use before bringing their trains on the joint section." Irwin, a witness for the plaintiff, proves the copy of the time table produced and says as a former officer of the Waterways company, that Calper should have had a copy of it and that it was his duty to familiarize himself with it.

If it had been proved that this rule had been properly made by the Waterways company and notice of it given to Calper and I thought that it applied to him, I would be of the opinion that this argument was sound. In such case, I would say that the defendants owed him no greater duty than it owed to a trespasser and that duty has been defined by the Privy Council in *G. T. R. Co.* v. *Barnett*, [1911] A.C. 361, and by the Supreme Court of Canada in *Herdman* v. *The Maritime Coal Co.* (1919), 49 D.L.R. 90, 25 C.R.C. 206, 59 Can. S.C.R. 127, to be not to wilfully injure him or unnecessarily and knowingly increase the normal risk by deliberately placing unexpected dangers in his way. See also *Jackson* v. *C. P. R. Co.* (1919), 49 D.L.R. 320, 12 S.L.R. 433. The difficulty is though that neither the making of this rule nor notice of it to Calper is, in my opinion, proved. The Waterways is a provincial company. The power to make such a rule as this is conferred by sec. 199 of the Railway Act of the Province, 1907 (Alta.), ch. 8, but under the following sections it must be in writing signed by the chairman or person presiding at the meeting and have the company's seal attached and be approved by the Lieutenant-Governor in Council after report by the Board of Public Utility Commissioners. I do not feel at liberty to assume that all of these things were done simply because this notice is embodied in the working time table, especially as sec. 205 provides a very simple mode of proving it. Then sec. 202 (2) enacts that "a printed copy of so much of any by-law, rule or regulation as relates to the conduct of or affects the officers or employees of the company shall be given to every officer and employee of the company thereby affected." I think that the statement of a witness that Calper should have had a copy of the time-table in which this rule is printed falls far short of proof that he actually had it. Of course, he should have had it if it affected him, but that is a very different thing from proving that he did, in fact, have it, and that is the duty that the Waterways company was under to him if it

intended that his conduct should be governed by it. The judgment of the Supreme Court of Canada in *G.T.P.R. Co. v. Morreau* (1921), 59 D.L.R. 458, is I think very much in point.

In any event, I doubt very much if this rule applied to him. In terms, it applies only to the conductor of a train. This speeder may perhaps have been a train under the statutory definition of the word which "includes any engine, locomotive or other rolling stock," sec. 17 (2), and if so he, as the man in charge of it, might properly be called a conductor. I hardly think that this statutory interpretation can be applied to this rule, but as it is unnecessary, I do not express a decided opinion upon it.

In the result, the defendants are, in my judgment, liable in damages. I have reached this conclusion with great reluctance. That the defendants should be held liable for such an occurrence as this under the circumstances here present works, in my opinion, a tremendous hardship upon them and if I could have freed them from it I would gladly have done so. I am here, however, to administer the law as I understand it regardless of my sympathies and as, in my opinion, the defendants are under this legal liability, I must of course so decide.

Having regard to the ages of Calper and his wife and children and his earning power and taking into account all of the other matters which under the decisions I am bound to consider in such a case, I think that $15,000 is a fair and reasonable assessment of the plaintiff's damages of which $10,000 will go to the widow and $2,500 to each of the two children. There will be judgment accordingly against the defendants.

As the widow is still an infant, the whole sum must be paid into Court to be paid out to the parties entitled as they respectively attain the age of 21 years, subject to any order with reference thereto that may be made in the meantime. The plaintiff will have the costs of the action under col. 5 (Rule 27 not to apply), including the costs of the examinations for discovery. There will be a stay of execution until the time for appeal has expired, and if notice of appeal has then been given, there will be a further stay until the appeal has been disposed of with leave to the plaintiff to apply for security if so advised.

Judgment for plaintiff.

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C.A.

STANLAKE v. RINGHAND.

Saskatchewan Court of Appeal, Haultain, C.J.S., McKay and Martin, JJ. A. November 7, 1922.

VENDOR AND PURCHASER (§II—30)—ENFORCEMENT OF AGREEMENT—EFFECT OF ASSIGNMENT—NEW AGREEMENT.

An assignment of the agreement of sale by the vendor will not debar him from recourse against the purchaser, where the assignment had been discharged by a new verbal agreement made in substitution thereof.

CONTRACTS (§IE—65)—STATUTE OF FRAUDS—DISCHARGE OF WRITTEN CONTRACT BY PAROL.

Where parties to a written contract enter verbally into a new agreement, which is to be substituted for the old written agreement, even where the old agreement is required by statute to be in writing, such new verbal agreement has the effect of discharging the written contract.

APPEAL by plaintiff from a judgment dismissing the action. Reversed.

C. E. Gregory, K.C., for appellant.

P. G. Hodges, for respondent.

The judgment of the Court was delivered by

MARTIN, J.A.:—This is an action under an agreement for sale dated August 13, 1920, whereby the plaintiff agreed to sell to the defendant lots 7 and 8, in block 4, in the townsite of Limerick, Saskatchewan, for the sum of $1,000; the sum of $1 payable on the execution of the agreement; the sum of $250 payable on November 1, 1920, and April 1, 1921, and the balance of $500 on November 1, 1921.

The defendant made payment of the sum of $250 on November 1, 1920, but has paid nothing since that date, and on January 17, 1922, the plaintiff commenced action, alleging in his statement of claim that the amount due on the agreement on January 15, 1922, was $841.23, and claiming a declaration as to the amount due, a vendor's lien for unpaid purchase money, and an order requiring the defendant to pay into Court the amount, and, in default of payment, cancellation of the agreement.

On February 28, 1922, the defendant delivered his statement of defence, in which he raised a number of defences to the action, all of which were abandoned at the trial except that contained in para. 11 of the defence, which is as follows:—

"In the alternative the defendant says that the agreement for sale referred to in the statement of claim was prior to the commencement of this action by agreement in writing (the exact date of which is unknown to the defendant) assigned to one George Staves of Limerick, Sask., who at the commencement of this action held and now holds the legal

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estate in the said agreement as vendor and that no right of action under the said agreement lies in the plaintiff."

The trial Judge held that there was an assignment of the agreement for sale by the plaintiff to Staves; that at the time the action was brought the assignment was still in force, and that the plaintiff could not maintain the action. From this judgment the plaintiff appeals.

The facts with respect to the assignment of the agreement for sale in question are, that on December 24, 1921, the plaintiff executed in a real estate office in Limerick an assignment of the agreement for sale in favour of one Staves. The documents were retained by a clerk in the real estate office. On December 27, 1921, three days after the execution of the assignment, the plaintiff and Staves made new arrangements whereby Staves accepted the plaintiff's promissory note, it being understood between them that the note would take the place of the assignment of the agreement and that the assignment was thereupon at an end. The agreement for sale was not returned to the plaintiff on that occasion because the documents were in the custody of the clerk in the real estate office, and it was not until March 4, 1922, that the agreement for sale was returned to the plaintiff. According to the testimony of Staves, on March 4, he went to the real estate office in question to get the documents, whereupon he was informed by the clerk that they were not completed, as Ringhand, the defendant, had not signed them. Ringhand's signature was then procured, and Staves, after endorsing a re-assignment of the contract on two copies of the assignment, handed them back to the plaintiff.

The evidence as to what took place on December 27, 1921, as given by both the plaintiff and Staves is uncontradicted, and I can only conclude that on that date the plaintiff gave Staves a note which was to take the place of the assignment of the agreement for sale which had been made on December 24, 1921, in favour of Staves and as security for him. From that time, therefore, it was intended by the plaintiff and Staves that the assignment of the agreement should be at an end.

In arriving at this conclusion as to the evidence of the plaintiff and Staves, I cannot see that any finding of fact made by the trial Judge is being disturbed. I do not understand him to question the evidence of these men at all, for he says in his judgment, referring to the fact that an endorsement in writing purporting to be a re-assignment of

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the agreement for sale was placed on two copies of the assignment on March 4, and signed by Staves:—

"There is no such endorsement upon the copy in the defendant's possession, and I cannot help but reach the conclusion from the evidence that whatever may have been in the mind of the plaintiff and his assignee as to re-assigning, it, in fact, did not take place, and the endorsement purporting to re-assign the agreement was not made on the document until after the action was commenced. . . ."

From this statement, I think it fair to assume that the trial Judge proceeded on the assumption that the date of the re-assignment in writing which was endorsed on some of the documents was material to the question as to whether, as between the plaintiff and Staves, there had, in reality, been a re-assignment of the agreement in writing. Inasmuch as such a re-assignment could be made by parol, the question of the time of the re-assignment in writing referred to does not appear to me to be material.

Leake on Contracts, 6th ed., p. 583, says:—

"A total rescission and discharge of the written contract on both sides may be effectually made by a mere verbal agreement to that effect, though the original contract is one within the statute; for all that the statute enacts is, that no action shall be brought upon such contract unless it is in writing and as there is no clause in the Act which requires the dissolution of such contracts to be in writing, it should rather seem that a written contract may still be waived and abandoned by a new agreement not in writing so as to prevent either party from recovering on the contract which was in writing."

In *Goss* v. *Nugent* (1833), 5 B. & Ad. 58, at p. 65, 110 E.R. 713, at p. 716, Denman, C.J., says with reference to the Statute of Frauds:—

"It is to be observed that the statute does not say in distinct terms that all contracts or agreements concerning the sale of lands shall be in writing; all that it enacts is, that no action shall be brought unless they are in writing. And as there is no clause in the Act which requires the dissolution of such contracts to be in writing, it should rather seem that a written contract concerning the sale of lands may still be waived and abandoned by a new agreement not in writing and so as to prevent either party from recovering on the contract which was in writing."

In Fry on Specific Performance, 6th ed., p. 478, sec. 1022, the author says:—"An agreement to rescind a contract

which is in writing or under seal may clearly in Equity be by parol."

And at p. 479, sec. 1024:—

"Again, it has been urged that the Statute of Frauds precludes parol evidence of rescission of contracts relating to land; for a contract to waive a purchase of land as much relates to land as the original contract. But it is replied that the rescinding contract is not the contract on which the action is brought, and that whilst the statute provides that no action shall be brought on any contract of the descriptions there specified, except it be in writing, it does not provide that every such written contract shall support an action. In the result it is perfectly well ascertained that a contract in writing, and by law required to be in writing, may in Equity be rescinded by parol; and waiver by mutual parol agreement therefore furnishes a sufficient defence to an action for specific performance."

In *Clements* v. *The Fairchild Co.* (1905), 15 Man. L.R. 478, Perdue, J., said, at p. 481:—

"This" (referring to a verbal agreement), "must be regarded as a distinctly new agreement which had the effect of discharging the written one, and this, even though the new verbal agreement could not be enforced by reason of the Statute of Frauds. It was a rule in Equity that a contract required to be in writing might be rescinded by a parol agreement."

The effect of all these authorities appears to me to be that, if the parties to a written contract enter verbally into a new agreement which is to be substituted for the old written agreement, even where the old agreement is required by statute to be in writing, such new verbal agreement has the effect of discharging the written agreement.

The verbal agreement made on December 27, between the plaintiff and Staves was in substitution of the assignment of the agreement for sale in question in this action. An entirely new agreement was made and a promissory note given by the plaintiff in place of the security already set aside for Staves. The assignment of the agreement was, therefore, terminated at that time, and the plaintiff was at liberty to bring the action under the agreement, which he did.

The appeal should, therefore, be allowed with costs; the plaintiff is entitled to the relief sought in his statement of claim. If the parties cannot agree upon the amount due under the agreement for sale, there will be a reference to ascertain the amount. As to the Court below, I think the

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plaintiff should have the costs of the action and counterclaim, but without the costs of trial.

Appeal allowed.

SMITH v. WHITE OWL DRUG CO.

Manitoba King's Bench, Curran, J. October 23, 1922.

MASTER AND SERVANT (§IC—10)—WAGES—BONUS—PROFIT SHARING PLAN—COMMON FUND.

One employed under a hiring whereby he is to receive as part of his salary a bonus of the net profits, who has resigned his employment after the profits had been earned, held, there being no evidence shewing his employment under a straight salary, nor his guilt of any act disqualifying from participation in the bonus, he was entitled thereto, that the shares of those who forfeited their rights reverted to the common bonus fund for the benefit of those entitled to participate therein.

ACTION by an employee on a contract of hiring for a bonus or a share of the profits as parts of his remuneration. Judgment for plaintiff.

G. B. Monteith, for plaintiff; *S. H. Green*, for defendant.

CURRAN, J.:—The only question to be decided is whether or not the plaintiff is entitled to participate in the bonus representing one-fifth of the actual net profits of the defendant company up to December 31, 1920, said one-fifth amounting to $15,900, according to admissions of parties. The defendant claims he is not so entitled, (1) Because it was not so agreed when he was hired; (2) That, if entitled, he has forfeited his right because he was dishonest, disloyal and inefficient and appropriated to his own use moneys and goods of the defendant and only escaped dismissal from the company's employ by resigning.

I find against the defendant on both of these grounds. The evidence of the plaintiff and Slaney is clear that plaintiff was hired originally at a wage of $125 and share of bonus. As to the second ground, there is no evidence whatever to support the charges made against the plaintiff of dishonesty, disloyalty and inefficiency, and I think these charges have been somewhat recklessly made upon wholly insufficient grounds, or rather upon no ground of fact whatever that has been brought forward at the trial.

The plaintiff was hired and went to work on July 15, 1920, and resigned his employment on May 15, or June 15, 1921. He was, unquestionably, an employee in good standing on December 31, 1920, and entitled to participate in the bonus, consisting of one-fifth of the actual profits made in the business up to that date and which I take it, by consent of par-

ties hereto, was the sum of $15,900. I find that, in so hiring, the plaintiff became bound by the terms of the circular letter (ex. 2), with regard to the right to bonus. The first two clauses of this document read as follows:—

"As outlined before, we have inaugurated a profit sharing system whereby we pay our clerks besides their usual salaries as decided from time to time, a special bonus representing one-fifth part of the actual net profits to be reckoned on or about the 31st day of December of each year, and divided *pro rata* to the salaries paid during the period between stock taking. This will be retroactive to July 1, date of last stock adjustment.

It is understood, however, that in case a clerk severs his connection with our business of his or her own accord previous to the coming stock taking, or is dismissed for dishonesty, disloyalty or inefficiency, lack of interest or any other reason which we judge is detrimental to the success of our business, the above mentioned bonus is forfeited and becomes part of the profit of that store."

There was evidence adduced to show that some of the clerks hired during the before-mentioned period were so hired on straight salary without bonus participation, having had the two methods of hiring put to them by Slaney, who had full authority to hire or dismiss employees, i.e., either to accept a stated salary and participation in bonus, or a straight salary of larger amount without bonus.

Exhibit 1 purports to be a correct list of all the defendant's employees on the dates of hiring employed during the bonus period. It contains the names of some who hired on straight salary contract without right of bonus participation and may contain the names of some who were not in the employ of the defendant at the time of stock taking. This list was prepared by the defendant and purports to shew everyone in it entitled to bonus, including the plaintiff. No doubt when the circular letter was first compiled in 1919, as was the case, the intention was to adopt the profit-sharing plan to employees, but when it came to be used, and put in the hands of employees in 1920 by Slaney, who was president and manager of the defendant company in 1919 and 1920, this was only done in cases where the employees agreed to this plan. As before stated, some clerks objected to the plan, and preferred certainty of a greater salary to the smaller salary with uncertain bonus addition. It was quite within Slaney's power to give this option to intending employees, and it would certainly seem to be unfair to those who took

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the lower salary and chance of a bonus to have these other clerks, who expressly refused that plan of hiring, ring in on the profit-sharing and receiving a share of the bonus based on their larger salary.

The plaintiff appears on ex. 1 as entitled to a bonus of $303.12. He says this amount was offered to him by E. H. Bate, but declined because Slaney told him his share should be about $600.

I find that the plaintiff has not been proved guilty of any act which would prejudice or deprive him of his right to this sum of $303.12, or to any larger sum that an examination into the accounts might show him to be entitled to.

I have said that the one-fifth share of net profit has been taken to amount to $15,900; but this is on the assumption that ex. 1 is a correct list of all entitled to share. That it contains the names of some who were hired on straight salary without right of profit sharing is clear because two of them, J. H. Boardman and Harold Snell, both went into the witness box on the plaintiff's behalf and stated that they had been paid bonus by Bate & Bate, the beneficial owners of the defendant company, although not entitled to it. Boardman got $154.06 and Snell $162.66. Slaney says the tea-room girls were all employed on straight salary and also a number of druggists who said they could not live on the bonus salary. All such should not be included in the list of those entitled to participate, yet the defendant has done so and proposes to pay bonus to each one regardless of the terms of hiring, and as a matter of fact has paid out a large amount of money for this purpose.

The defendant contends that all shares in the bonus forfeited in accordance with the second clause of ex. 2 belong to the company, and that such forfeitures do not affect the amount of the bonus to be shared in by the others. I do not agree to this contention, but hold that 20% or one-fifth of all such shares belongs to the bonus fund and should be shared in by those entitled to participate in that fund. My construction of the clause is that only those clerks who hired on a basis of salary plus bonus and who were in the defendant's service on December 31, 1920, were or are entitled to share in the bonus. I hold that none of those clerks who hired on a straight salary basis have any right of participation in the bonus and that 20% of the share of any clerk who had forfeited his or her right to participate under ex. 2 reverted to the common bonus fund to enure to the benefit of all who were entitled to participate.

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As I cannot ascertain who these clerks are, there will be a reference to the Master to ascertain: (1) Which of the clerks in the defendant's employ shown on the list ex. 1 are entitled to share in the distribution of the bonus: (2) By what sum the amount of such bonus of $303.12 due to the plaintiff will be increased by forfeited shares; and (3) What the plaintiff's share will be in view of the foregoing findings?

Of course, if the parties can agree upon the last of these points, a reference may not be necessary. I reserve further directions and costs until after the Master shall have made his report.

Judgment for plaintiff.

GRANT v. MATSUBAYASHI.

British Columbia Court of Appeal, Macdonald, C.J.A., Galliher, McPhillips and Eberts, JJ. A. October 3, 1922.

PAYMENT (§IV—30) — APPROPRIATION — ACCOUNT — PARTNERSHIP — DISSOLUTION.

Payments by cheques signed in a new firm's name are of themselves appropriations to the latter's indebtedness, and cannot be applied to the running account of the old firm which has been dissolved.

APPEAL by defendant from judgment of Ruggles, Co. J., of May 22, 1922. Reversed in part.

F. C. Saunders, for appellant; *T. E. Wilson*, for respondent.

MACDONALD, C.J.A.:—I agree with the result arrived at by my brother Galliher (without adopting his reasons) on the question of the appropriation of the several payments made after the defendant retired from the firm of Sun & Co.

I observe that these payments were made by cheque and were signed, not in the style of the old firm, "Sun & Co.," but "The Sun Co." In other words, the goods bought after the dissolution of February 12, were bought by "The Sun Co." and paid for by that company's cheques. Such payments would, I think, be in themselves, appropriations to "The Sun Company's" indebtedness.

I would therefore allow the appeal in part.

GALLIHER, J.A.:—The trial Judge has given no reasons for judgment, but we must assume that he has found, as a fact, that the plaintiff had no knowledge of the dissolution of partnership between the defendants on February 12, 1921.

With every respect, I do not think he was justified in coming to that conclusion.

The defendants, Tanaba and the other partners Fukanaga

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and Matsubayashi, have all given evidence, giving time and place where they swear to having notified Grant of the dissolution. There is also the clerk, Feramoto, who gives evidence as to time, place and conversations. The plaintiff does not deny that conversations took place with these respective parties at the time and place stated, but does deny the nature of such conversations in some instances and in others varies it. These circumstances are all summarized in examination of plaintiff in rebuttal.

Outside of such denial and variance, there is nothing to indicate that the defendants and the clerk were not telling the truth, while on the other hand, there are some facts and circumstances, which I feel should be taken into consideration in weighing the testimony of the plaintiff.

In the first place, when he started doing business with the Sun Company (composed of Fukanaga, Matsubayashi and Tanaba) he found Fukanaga in charge and did not know or concern himself as to who or whether there were other partners, as he puts it himself, he saw some $5,000 worth of stock on the premises and he was doing business with the company on the strength of that and not on who the partners might be. Later, he discovered who the partners were and according to his own admission was aware that for some time before dissolution there was dissension among the partners. Further, at the time of the dissolution, there was in stock some $7,000 worth of goods, with liabilities of about $2,000, a better standing than when he gave credit on the strength of the goods in stock in the first instance, when he did not know these men were partners. Moreover, when he says he did find out they had dissolved, he did not take the matter up with any of the partners and made no demand for payment on the retiring partners. Of course, this latter would not alter his rights against them, but it is a circumstance.

Again, the first cheque issued in his favour after dissolution, dated February 23, 1921, was signed, "The Sun Co., S. Fukanaga," whereas prior to that they were signed "Sun & Co., S. Fukanaga." This might not have been noticed by him, but one would expect a wholesale business man to note the change, and no notice was taken of it.

I am only putting these forward as circumstances upon which I conclude that the story of the Japanese is, as I view it, the correct one.

As to time and place, they are confirmed by the plaintiff himself (or rather their statements as to this are not

denied) and it is only when we come to the conversations that we find any variance.

With nothing to throw discredit on these witnesses, it does not seem likely that they all could have been mistaken as to what took place. This disposes of anything supplied after dissolution and leaves only the question of $579.56, which was admittedly due plaintiff by the old firm at the time of dissolution. Whether this has been wiped out by subsequent payments will have to be determined as a question of law dependent on the rule governing appropriation of payments, sufficient having been paid since by the remaining partner to liquidate the debt.

The creditor kept the old account on and continued it as a running account giving credits thereon for payments made. No appropriation was made of these payments at the time of payment by either debtor or creditor. Subsequently, some months after the dissolution, *viz.*, in April or May, the creditor says he applied the subsequent payments to the later debt. He must have done this in his mind, for the accounts rendered do not show anything but a general credit on account, nor did he notify the partners of this. He did, however, in the particulars rendered, after writ issued, state that he had so applied them.

In the *"Mecca"* case; *Cory Bros.* v. *Owners of S.S. "Mecca,"* [1897] A.C. 286, at p. 294, 8 Asp. M.C. 266, Lord Macnaghten says:—

"But it has long been held and it is now quite settled, that the creditor has the right of election 'up to the very last moment,' and he is not bound to declare his election in express terms. He may declare it by bringing an action or in any other way that makes his meaning and intention plain."

I think we must hold that he was entitled to make the appropriations when he did. In the case of *Hooper* v. *Keay* (1875), 1 Q.B.D. 178, 24 W.R. 485, the facts, except in one important particular, are very similar to the facts here. I can find nothing in the evidence here to show that before action any account was rendered to any of the partners or to the new firm after dissolution, which shows a debit and credit account, and my recollection is that it was so stated at the argument before us.

In the *Keay* case, *supra*, where such account had been rendered, and where the statement showed debit and credit in one continuing account, as the books here do, it was held that appropriation should be made to the earlier and not

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the later items of the account. Blackburn, J., 1 Q.B.D., at p. 181:—"Had this account been only in the plaintiffs' ledger, it would not have bound them, but they sent the copy to Keay."

And further, at p. 181:—

"In the present case, the plaintiffs have blended the two accounts, and sent it in to Keay, striking a balance on the whole, consequently the subsequent payments which were made by the defendant Keay without appropriation by him, should be applied to the different items on the debit side of the account in order of date."

Quain, J., at pp. 181-2:—

"The two accounts have been blended by the plaintiffs, and this was communicated to the defendant Keay, consequently the general principle applies that the payments are to be appropriated in order of date to the items of credit, in order of date."

And in discussing the rule in *Clayton's* case (1816), 1 Mer. 572, 35 E.R. 781, he continues, quoting from *City Discount Co.* v. *McLean* (1874), L.R. 9 C.P. 692, at p. 698:

"'In [that] case there had been a change of parties and the account was apparently continued as if no alteration had happened, and it was, under the circumstances of [that] case reasonable to hold that the earlier items of debit were extinguished by the earlier items of credit.' In the present case, the old and new accounts were made one by the plaintiffs to the knowledge of Keay, on the 23rd of October, 1874, and the subsequent payments must follow the same appropriation."

Field, J., at p. 182, says:—

"The facts of the present case are very clear, there was no appropriation by the payer and the plaintiffs who received the payments appropriated them to the general account in their ledger. But not only did they do that, they also sent a copy of the account thus treated as one to Keay, so that the account became one by the consent of both parties and there is no further room for any question as to the appropriation, because the law says that in such a case the payments or credits must be appropriated to the items of debt in order of date."

Had the account been rendered here as in the *Keay* case, it would, I think, be a direct authority, but I deduce from that case that no account having been rendered here, it was still open to the plaintiff to appropriate when he did.

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See also *London & Westminster Bank* v. *Button* (1907), 51 Sol. Jo. 466.

In my opinion, the plaintiff is not estopped by filing his claim in bankruptcy. In the result, I would allow the appeal and reduce the judgment below to $579.56.

MCPHILLIPS, J.A.:—I agree in the proposed disposition of this appeal.

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

Appeal allowed.

STARR Co. of CANADA v. MERRILL.

Saskatchewan King's Bench, Bigelow, J. October 30, 1922.

ASSIGNMENT (§II—20)—EQUITABLE ASSIGNMENT—COMMUNICATION.

The mere writing of a letter assigning a fund, without proof of its communication to the assignee, is not sufficient to constitute an equitable assignment.

EXECUTION (§II—20)—PRIORITIES—ASSIGNMENT—CREDITORS RELIEF ACT—NOTICE OF MOTION.

Where money has been paid in Court under a garnishee summons, and afterwards the action is settled, notice of motion by an execution creditor, to subject the fund in payment of executions under the Creditors Relief Act, will not bind the fund in Court as against a valid assignment thereof before the order could be obtained. The proper practice to prevent the assignment is to obtain a stop-order.

[*Wayne* v. *Ballantyne* (1922), 63 D.L.R. 232, 15 S.L.R. 116, referred to.]

APPEAL from a Master's order in a garnishment proceedings. Reversed.

H. Ward, for Mackenzie, Thom, Bastedo & Jackson.

R. E. Turnbull, for the Dominion Bank.

BIGELOW, J.:—In this case $66.28 was paid into Court by the garnishee. The action was afterwards settled, and the plaintiff had no further interest in the fund in Court. It then became a fund belonging to the defendant under the Creditors Relief Act, R.S.S. 1920, ch. 54, sec. 8.

On October 7, 1922, a notice of motion was served in this action for an order that the monies paid into Court under the garnishee summons be paid over to the sheriff of the judicial district of Regina to be applied by him on any execution in his hands under the provisions of the Creditors Relief Act, and from the affidavits filed it appears that the Dominion Bank has an execution for $1,048. Said notice of motion is signed by "Turnbull & Turnbull, solicitors for the plaintiff"; but, at the hearing before the Master, Turnbull & Turnbull stated that they were appearing for the Dominion Bank and not the plaintiff.

Mackenzie, Thom, Bastedo & Jackson appeared on the

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return of the motion and claimed the fund, first under an assignment by a letter dated August 22, 1922, and second under a written assignment dated October 11, 1922. The Master allowed the application of the Dominion Bank and made the following fiat:—

"In view of the provisions of sec. 8, R.S.S. 1920, ch. 54, I allow the application with costs out of the fund in Court as against the defendant Merrill.

From this order Mackenzie, Thom & Co. appeal.

First, they claim an assignment of the fund to them on August 22, 1922. Merrill swears that on August 22, 1922, he was in Ontario and made a settlement of the litigation with the Starr Company whereby he became entitled to the fund in Court, and that he wrote Mackenzie Thom & Co. on that day "enclosing a copy of the written agreement of settlement of the said actions and instructing my said solicitors to obtain all monies coming to me that have been garnisheed in the hands of the Bank of Montreal, etc., and apply the same on my indebtedness to my said solicitors for $100 cash loaned on June 30, 1922." (etc.)

But there is no allegation that Merrill mailed this letter or that Mackenzie Thom & Co. received it. Before that letter would constitute an equitable assignment it would have to be communicated to the assignee. 4 Hals. p. 376, sec. 798, says:—

"An equitable assignment does not become binding as between the assignor and assignee unless and until it is communicated to the assignee. . . . ."

Then there is the written assignment from Merrill to Mackenzie Thom & Co. dated October 11, and delivered before the motion was returnable.

The question is whether the service of the notice of motion on October 7 is sufficient to bind the fund for the sheriff, or whether Merrill's assignment on October 11 to Mackenzie Thom & Co. is to prevail.

To prevent an assignment before the order could be obtained, I think the proper practice would be to obtain a stop order. Annual Practice 1922 O. 46, sec. 13, p. 802; *McDougall & Secord* v. *Inglis* (1909), 2 Alta. L.R. 341; *Pinnock* v. *Bailey* (1883), 23 Ch. D. 497; *Wayne* v. *Ballantyne* (1922), 63 D.L.R. 232, 15 S.L.R. 116. I am of the opinion that the notice of motion served October 7 was not sufficient to bind the fund in Court, and that the defendant could afterwards assign the fund, with the result that when the motion was heard on October 11, the fund in Court did

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not belong to the debtor. The appeal should be allowed, and the fund in Court paid out to Mackenzie Thom & Co.

As to costs: Mr. Turnbull contends that up to the time of the return of the motion, his client had no knowledge of the claim of Mackenzie Thom & Co., and, for that reason, there should not be any costs against his client. I would agree with this if he had abandoned his claim when he became aware of Mackenzie Thom & Co's. assignment, but he still asserted his claim, and obtained the order from the Master, which, in my opinion, is wrong and which necessitated this appeal. The Dominion Bank will pay Mackenzie Thom & Co's. costs of the motion below and of this appeal.

Appeal allowed.

THE KING ex rel. READ v. MUN. DIST. OF PEMBINA.

Alberta Supreme Court, Appellate Division, Stuart, Hyndman and Clarke, JJ.A. November 16, 1922.

MANDAMUS (§ID—25)—TO MUNICIPAL CORPORATION—OFFICERS AS PARTIES—TAXES.

In bringing mandamus against a municipal corporation to compel the collection of taxes, the officers of the corporation, upon whom devolve the duties required to be performed, should be made parties to the proceedings, and notice of the application for the writ served upon them.

[*Canada National Fire Ins. Co.* v. *Hutchings*, 39 D.L.R. 401, [1918] A.C. 451, referred to.]

APPEAL from order of Tweedie, J. dismissing application for mandamus to compel the defendant to collect taxes due by The North America Collieries Limited.

G. H. Steer, for appellant.

C. C. McCaul, for respondent.

The judgment of the Court was delivered by

CLARKE, J. A.—The application was not dealt with on the merits, but was apparently dismissed on the ground that mandamus proceedings do not lie against a corporation.

I think this is not a correct view, see *Rex* v. *Poplar Borough Council*, [1922] 1 Q.B. 72 at p. 95. In that case, the duty was required to be performed by the defendant corporation, but here the duties sought to be enforced devolve upon the council and treasurer of the corporation and as their allegal delinquencies are involved, and they, or some of them, are the persons against whom attachment proceedings should be taken if such become necessary, it seems the better practice is to have them made parties to the application.

In Spelling on Injunctions and other Extraordinary Remedies, 2nd ed. 1901, p. 1410, it is stated that all the

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duties of municipal corporations are performed by their officers, and while derelictions of duty by the latter are in many cases attributable to them in their corporate capacity, yet in order to render the proceeding by mandamus effective and insure obedience to the writ, it is invariably directed to the particular municipal officer at whose hands performance is due.

In *Canada National Fire Ins. Co.* v. *Hutchings* 39 D.L.R. 401, [1918] A.C. 451, the proceedings were taken against the corporation, although the duties devolved upon the directors. While it may not be improper and in many cases may be advisable to join the corporation, I think, in this case, the council and the treasurer in their official capacities should be parties as well as the North American Collieries Ltd.

Rule 13 of the Crown Practice Rules, relating to mandamus, provides that notice of the application shall be served upon every person who shall appear to be interested or likely to be affected by the proceedings, and that the Court, or a Judge, may direct notice to be given to any other person or persons and adjourn the hearing for that purpose.

I think, in this case, notice should be given to the said council and treasurer and the said company, accompanied by a copy of the affidavit in support of the motion, and a copy of this memorandum, and that each of them should have an opportunity of making answer and being heard. They should serve their material on the plaintiff's solicitors, and the plaintiff should have liberty to file material in reply, with liberty to any party to cross-examine upon affidavits, pursuant to Rule 382, and upon the completion of the new material the appeal to be further heard. If the parties do not agree further directions as to further evidence and the fixing of a date for further hearing will be given, upon application therefore on the next Chamber day at Edmonton on the 25th inst., or such other time as the parties desire.

In order that the Court may be more fully informed of the facts it is suggested that in addition to the assessment roll and the council's resolution of July 2, 1922 (probably in error for 1921) already produced on and after the previous argument, there should be produced any existing authority (if any) by the council other than the said resolution authorizing the treasurer to levy the 1921 taxes also the notices of appeal to the Court of Revision and to the District Court Judge concerning the company's assessment, the minutes of the Court of Revision with evidence of the date

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of its being held showing whether before or after the resolution of July 2, and the tax notices sent to the company on August 13, 1921 and November 25, 1921 and other dates (if any), and explanation should be furnished of the sending of the notices on the different dates above mentioned and of the long delay in bringing the appeal to the District Judge to a hearing also what transpired after the notices of November 25, 1921, leading to the passing of the resolution of December 3, 1921.

Judgment accordingly.

VILLAGE OF LESLIE v. BRONFMAN.

Saskatchewan Court of Appeal, Haultain, C.J.S., Turgeon, McKay, and Martin, JJ.A. November 7, 1922.

TAXES (§IIIB—110)—ASSESSMENT OF "OWNER"—MORTGAGEE—BURDEN OF PROOF.

A mortgagee has an interest in the land as "owner" within the meaning of sec. 2 (12) of the Village Act, and taxable as such. But he is entitled to show, even after the completion of the assessment roll, that he is not an "owner," the burden of proof being upon him to show that he had no other "right, title, estate or interest" in the property assessed.

TAXES (§IIIE—140)—ACTION FOR ARREARS—SALE—REDEMPTION—ARREARS OF TAXES ACT.

Under the Arrears of Taxes Act, when land is sold by a municipality in lieu of taxes which have been assessed against it up to that time, the owner of the land loses it, subject only to his right to redeem, and only in case of redemption by him can he be called upon to pay the arrears of taxes, costs and penalties, and any taxes levied against the land subsequent to the time of sale.

[*Smart Hardware Co.* v. *Melfort* (1917), 32 D.L.R. 552, 10 S.L.R. 40, referred to.]

APPEAL by defendant from a judgment in an action for arrears of taxes. Reversed.

D. A. McNiven, for appellant,

F. L. Bastedo, for respondent.

The judgment of the Court was delivered by

MARTIN, J. A.:—This is an action to recover the sum of $476.78, being arrears of taxes from January 1, 1917, to December 31, 1920, on lots 15 and 16, block 3, in the village of Leslie. According to a statement of particulars delivered, and which appears in the appeal book, the amount should be $421.09 and not $476.78. The action went to trial on admissions filed by both parties. The defendant admitted that he was assessed for the lots in question for the years 1917, 1918, 1919 and 1920, and the assessment and tax notices were duly sent to him; that he did as martgagee in possession lease the premises to one Bokopsky for the year 1920;

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that the amounts set out in the statement of particulars delivered by the plaintiff are correct as to the amounts of taxes levied against the said lots and are also correct, in so far as the penalties claimed are concerned, and that the taxes for the 4 years have not been paid. The admissions of the plaintiff are: that the defendant was not the registered owner of the said lots in the proper Land Titles Office at any time material to the action that the said lots were sold for taxes under the Arrears of Taxes Act on November 4, 1916, and that the said property was sold for taxes under the Arrears of Taxes Act by the plaintiff on October 16, 1920, and was purchased by the plaintiff; that one G.B. Dalton applied for title to the said property and notice thereof was served on the defendant.

In his statement of defence the defendant raises two defences: (1) that he is not the owner of the lots and is wrongly assessed, and (2), that the plaintiff did, on October 16, 1920, sell the lots for arrears of taxes; and he says that the said arrears of taxes or such part thereof for which the lots were sold became paid and were merged in the tax sale. While denying all liability, the defendant paid into Court with his defence the sum of $77.97, saying that that sum was sufficient to answer the plaintiff's claim. This amount was apparently intended as the taxes levied for 1920, although the taxes for that year, according to the statement of particulars, were $72.20.

On the argument, it was contended by counsel for the plaintiff that defendant had no defence to an action brought for the taxes because he was regularly assessed, the assessment roll was completed and certified, and the defendant had not exercised his rights under the Village Act R.S.S. 1920, ch. 88, to appeal from the assessment to the Court of Revision.

Section 257 of the Village Act is as follows:—

"When the roll is finally completed and the time during which complaints and appeals against the assessment has elapsed, the secretary treasurer shall, over his signature, enter at the foot of the last page of the roll the following certificate filling in the date of such entry: 'Roll finally completed this day of 19 '; and the roll as thus finally completed and certified to shall be valid and bind all parties concerned notwithstanding any defect or error committed in or with regard to such roll or any defect, error or misstatement in any notice required by this Act or any omission to deliver or to transmit any such notice."

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As to the effect of this section, it is only necessary to refer to the statement of the law made by Lamont, J.A., in *Brehaut* v. *City of North Battleford* (1920), 51 D.L.R. 609, at p. 613, 13 S.L.R. 202, where a similar provision in the City Act, 1915 (Sask.), ch. 16, sec. 406 [R.S.S. 1920, ch. 86], was under consideration:—

"If, therefore, the defendant had no taxable interest in the property for which he was assessed, sec. 406 would not avail to render him liable for the tax although he took no appeal against the assessment to the Court of Revision. The city cannot by assessing property to a person who has no interest therein make it obligatory on that person to appeal to the Court of Revision on pain of being liable for the tax if he fail so to do. But where a person has a taxable interest in the property assessed, but is assessed for an interest greater than or different from his real interest, or where he is entitled to have the name of some other person joined with his own in the assessment, his proper course is to appeal to the Court of Revision, and if he fails to avail himself of that remedy the roll as finally passed will be binding on him."

A similar section in the Ontario Assessment Act, R.S.O. 1887, ch. 193, came before the Supreme Court of Canada in *City of London* v. *Watt & Sons*, (1893), 22 Can. S.C.R. 300. In that case Strong, C.J., at p. 302. said:—

"I agree with the Court of Appeal in holding that the 65th section of the Ontario Assessment Act (R.S.O. ch. 193) does not make the roll, as finally passed by the Court of Revision, conclusive as regards question of jurisdiction. If there is no power conferred by the statute to make the assessment it must be wholly illegal and void *ab initio* and confirmation by the Court of Revision cannot validate it."

The defendant is, therefore, entitled to show that he is not an "owner" of the lots for which he was assessed within the meaning of "owner" under the provisions of the Village Act. The question is, has he succeeded in doing so.

Section 274 of the Village Act provides:—

"(1) Any taxes or arrears of taxes due to the village or levied by it may be recovered by suit in the name of the council as a debt due to the village in which case the assessment roll shall be *primâ facie* evidence of the debt."

The onus of proof was, therefore, on the defendant to show that he was not an owner under the provisions of the Village Act.

Section 2, sub-sec. 12 of the Act defines "owner" as in-

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cluding "any person who has any right, title or estate or interest other than that of a mere occupant." [See amendment 1920 (Sask.), ch. 36 sec. 2.]

The admission of the plaintiff is that the defendant was not the "registered owner" of the property at any time material to this action. The admission is not that the defendant was not the "owner." At the trial an abstract of title was put in by counsel for the defendant showing that the defendant was a mortgagee of the property since 1910. In order to satisfy the onus which was upon him, the defendant should have gone further and shown he had no other right, title, estate or interest in the property during any of the years for which he was assessed. This he did not do and on this branch of the case he must fail.

The second contention of the defendant is, that the plaintiff did on October 16, 1920, sell the lots for arrears of taxes, and he says that the said arrears of taxes or such part thereof for which the lots were sold became paid and were merged in the tax sale. In other words, it is claimed that, having elected to sell the lots for arrears of taxes, the plaintiff cannot now bring an action to recover the taxes as a debt.

In order to arrive at a conclusion on this point it is necessary to examine the provisions of the Arrears of Taxes Act, R.S.S. 1920, ch., 103. The Act applies to cities, towns and villages and rural municipalities.

Section 3 of the Act provides:—

"3. (1) Whenever the whole or any portion of a tax on any land has been due and unpaid for more than six months after the thirty-first day of December of the year in which the rate was struck, such land shall be liable to be sold for arrears of taxes unpaid thereon up to the time of making up the list hereinafter in this section mentioned and the costs of advertising; and the treasurer shall submit annually to the mayor, overseer or reeve a list in duplicate, of all lands within the municipality so liable to be sold, with the amount of arrears against each lot, block, acre, quarter section, half section, or number of lots, blocks or acres, as the case may be, set opposite to the same."

Provision is then made for the mayor, overseer or reeve to authenticate each list by affixing the seal of the corporation and his signature and for advertising the property for sale, and sec. 12 imposes a penalty on the clerk or treasurer and on the mayor, overseer or reeve for non-compliance

with the provisions of the sections in respect of the list and the procedure necessary for sale.

Section 14 provides for sale to the highest bidder; and sec. 20 provides that:—

"If the land when put up for sale will not sell for the full amount of arrears of taxes and costs, the treasurer may then and there sell for any sum he can realise, and shall, in such case, accept such sum as full payment of such arrears of taxes and costs; but the owner of any land so sold shall not be at liberty to redeem the same except upon payment to the treasurer of the full amount of arrears of taxes and costs, together with the additional penalties for redemption; and, in the event of redemption as aforesaid, the purchaser shall be entitled to receive from the treasurer the amount of his purchase money and taxes paid by him, with the additional penalties thereon, as provided in section 37."

The fact that the property being sold for arrears of taxes may be sold for less than the full amount of taxes and costs and such amount accepted by the treasurer as full payment of such arrears and costs, is an indication that the property is being sold by the municipality and the proceeds of such sale taken in lieu of the taxes. No provision is made for proceeding against the owner for the balance; the only provision which is made is that the owner, if he desires to redeem, shall still be called upon to pay the full amount of the arrears of taxes and costs, together with the penalties.

Section 21 of the Act gives a municipality power to bid up to the amount due on any property for arrears of taxes and costs, and provision is made that, in a case where a municipality buys at a tax sale, it shall not be necessary for any payment of the purchase money to be made; but in such case a certificate shall be issued to the municipality and the provisions of the Act with respect to redemption apply to such sales.

Sub-section 3 of sec. 21 is important because it provides that the school tax due at the time of the tax sale or levied subsequently upon lands sold to a municipality shall form a charge against the same until the amount has been paid for by the municipality to the school district in which the lands lie, and no certificate of title shall be issued for such lands until a certificate that such payment has been made, "signed by the secretary-treasurer of the school district. . . ." is filed with the registrar.

The effect of this section is, that all school taxes in arrears at the time of sale and school taxes levied subse-

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quently to the sale up to the confirmation of the sale continue to form a charge upon the land, and must be paid by the municipality before title is issued to the municipality. The effect of the section is that, no matter whether the owner redeems or not, school taxes must be paid and the municipality must pay the same before it can obtain title.

Section 26 makes provision that if the land sells for a greater sum than the arrears of taxes and costs, the purchaser shall only be required to pay at the time of sale the amount of arrears and costs, but if the land is not redeemed from tax sale the balance of the purchase money must be paid to the registrar before certificate of title is issued.

Section 37 makes provision for redemption at any time by paying arrears of taxes and the costs and penalties as provided by the Act, and it is provided that before redemption takes place, the treasurer shall be entitled to demand from the party redeeming all taxes on the said lands in his hands for collection subsequently to the taxes for which such lands were sold. Provision is also made in the Act for the registrar of Land Titles keeping a separate fund, to be known as the "tax sales fund," a statement of which is to be sent to the treasurer of the municipality in the month of January each year. Procedure is set forth for applications for surpluses deposited in such fund, and sec. 63 of the Act provides that:—

". . . . . the person who shall be considered to be entitled to apply under sections 61 and 62 for any money standing in the tax sales fund to the credit of any parcel of land shall be the person who was, at the expiration of the time for redeeming said land from said tax sale, the owner of the land or a person who held any incumbrance, security or lien under judgment, execution or otherwise thereon, or who is the assignee or legal representative of such owner or person."

From a perusal of the whole Act, I can come to no other conclusion than that, where a municipality has exercised its right to sell land for arrears of taxes, it elects to look to the land itself for arrears of taxes and costs subject to the right of the "owner" to redeem in accordance with the provisions of the Act. The "owner" by such sale virtually loses the property, subject to his right to redeem.

In *Smart Hardware Co.* v. *Melfort* (1917), 32 D.L.R. 552, 10 S.L.R. 40, the effect of certain provisions of the Town Act, R.S.S. 1909, ch. 85, under what were commonly known

as "tax enforcement proceedings" were considered. The facts there were that during the year 1914 the defendant instituted proceedings for the confirmation of the tax enforcement returns for taxes in arrears on January 1, 1914. In the return was included the taxes for 1912 and 1913 which were in question in the action. The return was subsequently confirmed by the District Court Judge on March 1, 1915. On May 10, 1915, the defendant municipality seized a stock of hardware and other chattels which had been the property of Sidney Smart for arrears of taxes for 1912, 1913, and 1914, together with penalties to May 10, 1915. It was admitted that the taxes for which the seizure was made were taxes on the real estate covered by the tax enforcement confirmed by the District Court Judge. At p. 555 Elwood J. stated, in delivering the judgment of the Court:—

"I am also of the opinion that the plain intention of the Act is that, as soon as the return is confirmed by the Judge, the municipality receives the land for all taxes then overdue with respect to the land, and assumes responsibility for all taxes assessed against the land subsequently to the taxes that have been so confirmed. . . . . The result of the confirmation is that the owner of the land, in respect to which the confirmation has been made virtually loses his land, subject to redemption."

Under the proceedings which were in question in the case above referred to, the council had the right to fix a date not less than 6 months after the confirmation at which the land would be offered for sale. It was pointed out in the judgment referred to that if distress could be made for the taxes on land which were included in the tax enforcement return, the land might be sold by the municipality during the year in which the confirmation was made and the owner still be liable for the taxes for that year.

Under the Arrears of Taxes Act, R.S.S. 1920, ch. 103, now in question, the same reasoning applies with respect to the confirmation of the tax sale in the land titles office; that is, that a title might be issued to the tax sale purchaser during the third year after the sale has taken place, whether to the municipality or an individual, and the owner be held responsible for the taxes levied during that year. I am of the opinion that, under the Arrears of Taxes Act, when land is sold by a municipality in lieu of taxes which have been assessed against it up to that time, the owner of the land loses it subject only to his right to redeem, and only

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in case of redemption by him can he be called upon to pay the arrears of taxes, costs and penalties, and any taxes which have been levied against the land subsequent to the time of sale.

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

Appeal allowed.

CALLOW v. HICK.

British Columbia Supreme Court, McDonald, J. November 9, 1922.

GARNISHMENT (§IB—5)—LIQUOR BOARD AS GARNISHEE—"PERSON"—CORPORATION—CROWN.

The Liquor Control Board, being a corporation by implication, is a "person" within the meaning of sec. 3 of the Attachment of Debts Act, R.S.B.C. 1911, ch. 14, and the salaries of its employees are therefore subject to garnishment under the Act. The proceedings not affecting the "rights of His Majesty," the exception of the Crown by sec. 27 of the Interpretation Act, has no application.

APPLICATION by The Liquor Control Board, garnishee, to set aside an attaching order made by Morrison,, J., on October 25, 1922. Dismissed.

P. R. Leighton, for plaintiff,

W. D. Carter, K.C., for garnishee.

MCDONALD, J.:—Application by the Liquor Control Board, garnishee, to set aside an attachment order by which the salary of one of its employees—a travelling auditor—was attached. The garnishee takes the ground that the Liquor Control Board is not a person within the meaning of the Attachment of Debts Act, R.S.B.C. 1911, ch. 14, which provides under sec. 3 for the attachment "of all debts, obligations and liabilities owing, payable or accruing due from such third person to the defendant or judgment debtor." The garnishor contends that the Liquor Control Board is by implication created a corporation by secs. 92 and 93 of the Government Liquor Act, 1921 (B.C.), ch. 30.

If it is a corporation it is, of course, a person. See The Interpretation Act, R.S.B.C. 1911, ch. 1, sec. 26 (19). With gravest doubts, I have come to the conclusion that the Board was by implication created a corporation. See *Ex parte The Newport Marsh Trustees* (1848), 16 Sim. 346, 60 E.R. 907; *The Conservators of the River Tone* v. *Ash* (1829), 10 B. & C. 349, 109 E.R. 479.

It is further argued for the applicant that the Attachment of Debts Act does not apply to the Crown inasmuch as sec. 27 of the Interpretation Act, provides that—

"No provision or enactment in any Act shall affect in any

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manner or way whatsoever the rights of His Majesty, his heirs or successors, unless it is expressly stated therein that His Majesty shall be bound thereby."

It does not seem to me that the "rights of His Majesty" are in any way affected by the attachment proceedings taken herein.

It follows from the above that the application is refused with costs.

Application dismissed.

HUTTON v. RUR. MUN. of STONEHENGE, No. 73.

Saskatchewan King's Bench, Macdonald, J. October 27, 1922.

HIGHWAYS (§IVA—150)—LIABILITY FOR NON-REPAIR—HOLE—INJURY TO TRAVELLER—CONTRIBUTORY NEGLIGENCE.

Failure of a municipality to remedy a hole in a public road constitutes a breach of its statutory duty to keep its highways in repair, rendering it liable for injuries to a vehicular traveller thrown from the vehicle when passing over it. A team driven at four miles an hour cannot be regarded as driven at an excessive speed, and mere knowledge that there was a bad place in such part of the road without actual knowledge of the existence of the hole, is not sufficient to constitute contributory negligence. The plaintiff, not being the driver, cannot be charged with the driver's negligence.

[See Annotation, 46 D.L.R. 133.]

ACTION against a municipality for personal injuries. Judgment for plaintiff.

C. E. Gregory, K.C., and *A. F. Bailey*, for plaintiff.

N. R. Craig, for defendant.

MACDONALD, J.:—This is an action for damages for injuries received by the plaintiff from being thrown out of a buggy while driving along a highway in the defendant municipality.

In the evening of April 13, 1922, the plaintiff, her son and grandchild were going along the highway between secs. 19 and 20 in Tp. 8, Range 2, west of the 3rd meridian, in the defendant municipality. They were in a buggy, drawn by two horses, and plaintiff's son was driving. It was somewhat dark, but the driver could see the wagon tracks on the road. The team was "jogging" along at about 4 miles an hour. Coming to the point in question the horses hesitated, the driver turned them slightly to the left following the tracks on the road, the horses gave a little jump, the front wheels of the buggy went into a hole in the road and the plaintiff was thrown out.

The hole in question existed in the road for about two weeks, or at least 10 days to the knowledge of the councillor for the division of the municipality through which the

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road ran. A culvert a short distance away from the place where the hole existed was frozen up so that the water could not pass through, and the water passed over the top of the grade of the road, wearing the same down until the hole in question was formed, some 20 inches to 2 ft. deep, and extending all the way across the road. The said councillor states as the reason why the road was not repaired that if the hole were filled up before the culvert became thawed out, the water from the melting snows and spring rains would wash-out the road again, either at the same point, or at a near one. Section 196 of the Rural Municipality Act, R.S.S. 1920, ch. 89, reads as follows:—

"196. Every council shall keep in repair all public roads, highways, streets and lanes, and also all public bridges, culverts, dams and reservoirs and the approaches thereto which have been constructed or provided by the municipality or by any person with the permission of the council, or which have been constructed or provided by the province; and in default of the council so doing the municipality shall be civilly liable for all damage sustained by any person by reason of such default."

The evidence clearly establishes that the defendant did not keep the highway in question in repair; it also establishes that at least temporary repairs which would have made the locus safe for a time could easily and cheaply have been effected; in fact the highway was repaired the day following the date of the accident, and it took a man only 2 hours to do it.

Contributory negligence is charged against the plaintiff. She is alleged to have driven at excessive speed and carelessly where the roads were necessarily in a dangerous condition; and to have been well aware of the condition of the highway and not to have taken precautions to avoid the accident.

The only evidence as to speed is that the horses were going about 4 miles an hour, which, ordinarily, would certainly not be an excessive rate of speed. It is claimed, however, that the plaintiff had knowledge of the existence of the hole, and there is evidence that several persons who knew of it were able to walk their teams across in safety.

The only evidence as to plaintiff's knowledge is that some 10 days previous to the date of the accident the plaintiff was driven over the road in question by her daughter-in-law, and that the latter remarked to her husband (who was the driver at the time of the accident) in the presence of the

plaintiff that there was a "nasty" place in the road at "Shaw's" land. The road runs for a half mile between two pieces of land owned by a Mr. Shaw and in that half mile was the hole in question.

I am not at all satisfied that this was sufficient to bring to either the plaintiff or her son knowledge of the presence of the hole, so as to constitute it negligence to travel at 4 miles an hour. Moreover, the plaintiff is an old lady, 73 years of age; the driver was her son, of mature years, and she would naturally leave it to him to drive according to his judgment. Any contributory negligence on the part of the driver would not defeat her claim. *C.P.R. Co.* v. *Smith* (1921), 59 D.L.R. 373, 62 Can. S. C. R. 134.

I am therefore of opinion that the defendant failed to discharge its statutory duty to keep the road in question in repair and that the plaintiff was guilty of no negligence. She is therefore entitled to recover damages.

As to the quantum of damages, the only special damage proved amounted to $22.

After the accident the plaintiff remained in bed some 5 days; during these 5 days no physician was called, but subsequently the plaintiff consulted a local doctor. She complained of pains in the chest. The local doctor gave no treatment but suggested that she should have an x-ray taken. Early in May she had an x-ray taken by Dr. Ross of Assiniboia but the same disclosed no fracture or other injury. She, however, still complained of pains in the chest, and the physician, thinking the ligaments binding the ribs to the sternum might be torn, bandaged her. On the day before the trial, another x-ray was taken by Dr. Ross and again this disclosed no injury. She still complained of pain in the chest but apart from her complaint the doctor was not able to find any evidence of same.

No doubt, being thrown out of a buggy would cause some shock and pain to a lady of the age of plaintiff, but I am not satisfied that anything more serious than discomfort and pain for a short time resulted. I think that $350 is ample compensation for the pain and suffering she endured.

There will be judgment for the plaintiff for $372. and costs.

I was asked to make an order as to costs, under R. 683 of the Rules of Court. I, however, see nothing in the case which would justify me in making an order, and said rule is left to its operation.

Judgment for plaintiff.

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MURRAY v. WAITE.

Prince Edward Island Supreme Court, Mathieson, C.J., Hazzard and Arsenault, JJ. November 7, 1922.

HUSBAND AND WIFE (§IIA—50)—WIFE'S SEPARATE ESTATE—TITLE TO PERSONAL PROPERTY ACQUIRED BY HUSBAND MANAGING WIFE'S PROPERTY.

G. K. died in June, 1880, having disposed of his property, consisting of a farm and live stock in the following manner: "I give and bequeath to my beloved wife M. for her sole use and support of my three children all my earthly possessions in real estate, livestock, farming implements and to (*sic*) whatsoever to me belongeth and at my beloved wife's death if any of the remaining effects remain to be equally divided among the said children."

In March, 1881, the plaintiff married the testator's widow. At the time of the marriage he added to the wife's personalty which consisted of live stock, certain live stock of his own. He remained in charge of and operated the farm until the death of M. and after her death until time of action brought by assignee of the children's interests.

HELD that the management of the personal property for thirty years vested the title thereto in the plaintiff.

[See Annotation, 13 D.L.R. 824.]

APPEAL from the trial judgment in an action on a *common indebitatus count* and for conversion. Affirmed.

D. MacKinnon, K.C., for plaintiff.

J. J. Johnston, K.C., for defendant.

The judgment of the Court was delivered by

ARSENAULT, J.:—The declaration in this action is on the *common indebitatus count* and for conversion. To this the defendant pleaded:—1. Payment; 2. Not guilty; 3. Goods not plaintiff's.

The case came up for trial at the Trinity Term, 1920, in Charlottetown before the late Fitzgerald, J., and a jury when a verdict was brought in for the plaintiff for $650.

This is an application to set aside the verdict and that a non-suit be entered, or, in the alternative, that the verdict be set aside and a new trial granted on the grounds set out in the notice of motion.

George Knipe died on June 14, 1880, leaving him surviving his widow and 3 children aged respectively 13, 9 and 6 years, and by his last will and testament disposed of his property in the following manner:—"I give and bequeath to my beloved wife, Margaret, for her sole use and support of my three children—Eliza, Harriet and Mary Alice—all my earthly possessions in real estate, live stock, farming implements and to whatsoever to me belongeth, and at my beloved wife's death if any of the remaining effects remain to be equally divided among the said children."

On March 16, 1881, the plaintiff married the testator's widow and remained on and operated this farm so bequeath-

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ed till the death of Margaret Knipe (Mrs. Murray) on December 10, 1918, and during that time he brought up the children until two of them married; the other girl, who is somewhat defective in mind, continued to live with him.

On Mrs. Murray's death, by arrangement the defendant purchased the three girls' interest in the farm and personalty for $2500. The defendant further says that he was to account for the proceeds and pay over to the girls their share of whatever was realised over and above $2500. No question arises in this suit as to the real estate. The plaintiff claims the personalty from the fact that he originally owned part of it and that he reduced the balance into possession and increased it by his own work and efforts during his residence on the place, that is about 36 or 37 years. The defendant claims that, by the will, a trust was created in favor of the children and that at their mother's death they became entitled to the personalty as well as the real estate and that he purchased this interest from the children of the late George Knipe on the death of the mother, or that even if the plaintiff had any interest in the personalty he (the defendant) purchased this interest for $700. and that, on the purchase of the farm by the plaintiff, this $700. was deducted from the purchase price of the farm. The plaintiff on his part admits the deduction of $700 from the purchase price, but contends that this was allowed him for the improvements he had made on the farm.

The evidence of the plaintiff (which is uncontradicted) is that at the time George Knipe died the farm was for the most part uncleared and that it was worth about $1,000, and that by his work and industry this farm at the death of Mrs. Murray had increased in value to about $4,000.; that at Knipe's death the personalty consisted of one cow, one heifer a year old, a calf, a mare 15 years old, a young beast (horse) a year old, and no machinery; that on his marriage to Mrs. Knipe he brought to the farm one cow, one heifer and two sheep. At the time Mrs. Murray died, the personalty had increased to a considerable amount and to the value of from $1200 to $1300.

Without going into the question as to the interest of the children of the late George Knipe in the personal property at the time of their mother's death, I am clearly of opinion that Henry Murray after thirty odd years had acquired if not a right to all the personal property, at least an interest equal to the verdict in this case. The question arises as to whether he sold this interest to the defendant, and there is

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conflicting evidence on this point. This fact the trial Judge rightly left to the jury, and the jury evidently chose to believe the plaintiff and his witnesses and brought in a verdict for him for $650. It seems to me that this verdict was rightly found and must stand. The application is, therefore, refused with costs.

Application refused.

GALIPEAU v. LA COMMISSION DES LIQUEURS DE QUEBEC.

Quebec Superior Court, Duclos, J. May 29, 1922.

INTOXICATING LIQUORS (§IIIG—85)—QUEBEC STATUTES—"OWNER OF PREMISES"—LESSEE—OWNER OF BUSINESS.

The "owner of the premises where the offence was committed," within the meaning of the Quebec liquor laws, is not intended to apply to an innocent proprietor of a building leased to a third party. The owner of the business where the offence was committed, though not the real offender, may be convicted, but not the owner of the building in which the business was being carried on.

APPEAL from a conviction under the Quebec Liquor laws. Reversed.

L. Cousineau, for appellant,

J. N. Beauchamp, for respondent.

DUCLOS, J.:—In this case, the defendant appellant was accused and convicted of having, on August 20, 1921, sold alcoholic liquors contrary to the statute in such case provided, and was condemned to be imprisoned in the common jail in the District of Hull, for a period of one month and to pay the costs, failing payment of such costs to imprisonment for a further period of three months.

Section 91 of the Alcoholic Liquor Act. 1921 (Que.) ch. 24, provides that "in any prosecution under this Act, the real offender as well as the owner, lessee or occupant of the premises where the offence was committed, ... shall be personally responsible for the fines and penalties which may be imposed for any offence under this Act."

The evidence clearly establishes that the defendant was not the real offender, but he was condemned as the owner of the premises where the offence was committed.

By deed of lease passed before Barrette, notary, on May 12, 1921, the defendant had leased the property where the offence was committed to one Oscar Philippe, who had been in possession since May 1, 1921.

How must we interpret the words "the owner of the premises where the offence was committed"? Surely the Quebec Legislature never intended to punish an innocent

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proprietor of a building under lease to a third party for offences committed by this third party, without the owner's knowledge or consent. It would seem only fair and reasonable to interpret these words as the owner of the business where the offence was committed, rather than the owner of the building in which such business is being carried on.

As a matter of fact, the Quebec Legislature has thus interpreted this section, for by the statute 1922 (Que.) ch. 31, sec. 24, the said sec. 91 is amended by adding thereto the following paragraph:—

Whenever a person has been convicted of selling alcoholic liquor without a permit in any premises, the provisions of the Act, 1920 (Que.) ch. 81, and its amendments, respecting the owners of houses used as disorderly houses shall apply *mutatis mutandis*.

Now the statute 1920 (Que.) ch. 81, sec. 3, provides "Any person knowing or having reason to believe that any building or part of a building is being made use of as a disorderly house may send to the registered owner, or to the lessor, or to the agent of the registered owner, or to the lessee of such building, a notice accompanied by a certified copy of any conviction as aforesaid, if any there be, by registered mail to the last known address of the said owner, lessor, agent or lessee, as the case may be."

And sec. 4 of the same Act provides "if such building or any part thereof still continues to be used as a disorderly house, any person may apply for and obtain an injunction directed the owner . . . . . restraining [him] from using or permitting the use of such building or any other building for the purposes above mentioned."

In my opinion, the effect of this amendment is merely to state, in express terms, the real meaning and intention of sec. 91 prior to the said amendment.

The owner of the business where the offence was committed, although not the real offender, may be convicted, but not the owner of the building in which such business is being carried on.

For these reasons, the appeal is maintained and the conviction is quashed.

Appeal allowed.

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JAMES v. OCEAN ACCIDENT & GUARANTEE Co.

British Columbia Court of Appeal, Macdonald, C.J.A., Martin, Galliher, McPhillips and Eberts, JJ. A. August 2, 1921.

INSURANCE (§IIIB—50)—VARIATION OF CONTRACT—BURGLARY—LIMITATION AS TO LIQUORS—BINDING EFFECT—"COMMON IN RESIDENCES."

Where an application for burglary insurance has been accepted and the risk "covered" in accordance with the terms thereof, a clause inserted in the policy by the manager of the insurer, prior to the delivery of the policy, limiting liability thereunder for "wines and liquors," at variance with the terms of the application, is not binding upon the assured. (The Court (per Macdonald, C.J.A.) commenting but not passing upon the question whether $1,500 worth of liquor in these days, is "common" in a residence, within the meaning of such limitation as to family stores "common in residences generally.")

APPEAL by plaintiff from the decision of Murphy, J. of January 12, 1921, in an action to recover $1,515 on a burglary insurance policy. On August 12, 1920, the plaintiff, intending to take a trip, consulted a neighbour, one Watson, whom he knew to be an insurance agent as to obtaining $4,000 burglary insurance on contents of his house during his absence. Watson undertook to get the insurance for him, and immediately communicated with one Hannah by telephone, who was provincial superintendent for the defendant corporation, and told him he wanted a burglary policy for the plaintiff for $4,000 covering the plaintiff's household property generally, the only specific property mentioned being a considerable quantity of silverware. Watson then gave Hannah certain details which Hannah filled into a formal application. Hannah then told Watson the plaintiff's property was covered and that the premium would be $30, and he then sent the application to Watson's office for signing and filling in the approximate total value of the property insured and the applicant's business address. Watson filled in the value of the property at $15,000 and the applicant's address and signed it. The application set out the articles to be covered which included liquors the only limitation being for money or securities to $50. On being advised that the property was covered, Watson told the plaintiff that his property was insured as set out in the application and the plaintiff went away on his trip. On receipt of the application duly signed, Hannah made out the policy, but inserted in it without the plaintiff's or Watson's knowledge, a clause limiting the liability for "wines and liquors" to the extent of $50 only. The policy was then sent to Watson, who without seeing the change that had been made in it from the application, forwarded it to the

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plaintiff. On the following day the plaintiff's house was entered by burglars and wines and liquors valued at $1,515 were stolen. Reversed.

R. S. Lennie, for appellant.

E. J. Grant, for respondent.

MACDONALD, C. J. A. (dissenting):—There was, to my mind, no agreement on the part of the defendant to cover the risk pending the issue of the policy. While Mr. Hannah, the defendant's manager, filled out the application form on information furnished him by Mr. Watson over the telephone, there was one item of information lacking to enable Mr. Hannah to say whether he would take the risk or not; that item was the value of the plaintiff's property. When the application was finally completed and returned to Mr. Hannah he was then, for the first time, in a position to deal with it finally, he might then either accept or reject it or, to put it in another way, he might then have offered the plaintiff a policy on the exact terms of the application or on different terms, which policy would become binding upon the parties only if and when accepted by the plaintiff.

I do not think the evidence sufficient to justify the conclusion that there was an acceptance of any risk whatever in the absence of the particulars of value upon which Mr. Hannah insisted.

I would therefore, dismiss the appeal.

MARTIN, J.A.:—On August 12 last the plaintiff, who was going away that night for a short time from his home in Vancouver, applied to an insurance agent, J. H. Watson, for $4,000 burglary insurance on his household furniture effects, and supplies, etc., and Watson forthwith made application on plaintiff's behalf by telephone to the defendant corporation, through its provincial superintendent, J. R. Hannah, for a policy to that extent covering insurance on plaintiff's household property generally, no particular kind of property being specified except that there was a large quantity of silverware. In the course of that conversation, Hannah asked for and was given by Watson certain details which Hannah took down and wrote into a formal application (known as a pink sheet form) which states, *inter alia*, that:—"The insurance under this policy shall attach to and apply specifically as follows: On gold and silverware, watches, precious stones, jewelry, plated ware, wearing apparel, ornaments, glassware, furs, laces, rugs, tapestries, paintings, etchings, engravings, mirrors, and their frames, piano, organ, pianola, lyraphone, drawings,

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library books, clocks, bronzes, bric-a-brac, china and fancy crockery, furniture, beds and bedding, linen, carpets, mattings, curtains, shades, awnings, sewing machines, trunks, valises, cameras, umbrellas, canes, stoves, range and furnace, articles de vertu, statuary, baby carriage, music, musical and professional instruments, tools, sporting outfit, billiard and pool tables, cues, racks, and balls, guns, fishing rods, and reels, bicycles, lamps, electric light, plumbing, gas and water fixtures, household goods, kitchen utensils and supplies, provisions, fuel, wines, liquors, cigars, cigarettes and personal effects and family stores common in residences generally, including fifty dollars ($50) in money and securities for money.....Premium $30."

After so doing he, Hannah, told Watson, still over the telephone, that the plaintiff's property was covered and that the premium would be $30 and Watson thereupon communicated that fact to the plaintiff who was satisfied with the assurance that his property was covered and went away in that belief for about a week. Hannah says that after he told Watson "it was alright, we shall cover him" (*i.e.*, the plaintiff), he sent the application over to Watson's office for signing and completing some information ("details") which Watson could not give over the telephone, and that Watson filled in the required information, and signed the application and sent it back to Hannah, who says that after he received it in that completed shape, "we looked into the details and proceeded to issue a policy," without further conversation. "The application came to us on the 12th and on the 13th it would be issued and sent over to him," *i.e.*, Watson, whose office was across the street, and Watson mailed it to the plaintiff without noticing that as regards liability for liquors it did not conform with the application. The only information that Hannah desired was the business address of the insured in answer to question 8, and particularly "the approximate value of the property being covered," in answer to question 12 of the application, that being, he says, "a very important feature as this is a big policy for burglary." This information, *viz.*, of "the approximate total value of the property covered by this assurance" in clause No. 12 of the application, was supplied and written in to said question clause 12 by Watson as "$15,000," and he also wrote the word "retired" in answer to question 8, all the other writing therein, except Watson's signature, Hannah admits is his, and he also admits that he sent nothing to Watson except said application. The position is then

clear, to me at least, that a contract for insurance was entered into at the time Hannah told Watson the plaintiff was "covered" and the only policy that could be issued would be one which was in accordance with the terms set out in the application form which was filled out by Hannah and accepted by him as completely satisfactory, even in all its details, when it was returned to him by Watson after he correctly supplied the only further information that was asked for. If there was anything that was not satisfactory, then was the time for Hannah to object to anything, either in substance or in detail. But it clearly appears from his cross-examination that he knew that the policy was to be a general covering one, including valuable silverware, and that the question of the moral hazard (as regards the plaintiff's character) had been raised and settled, upon Watson's recommendation, to his satisfaction as Hannah admits leaving only the total amount of the value of the property covered to be filled in:—

"He wanted a covering, including his silverware, and knowing the amount of $4,000 was a large amount, we wanted that answer to the question No. 8 [12] I think it is, giving us the total amount of—The value of his property? Yes. But you did not object to the moral hazard, or to the amount, or anything else? No, we didn't object any. It was not discussed? Well, I asked Mr. Watson as to the moral hazard. He said Mr. James was a friend of his and a neighbour and he recommended him to us.

And that satisfied you? That quite satisfied me, yes."

The dispute arises from the fact that Hannah undertook to insert in the policy, unknown to Watson or the plaintiff, a clause limiting liability for "wines and liquors to the extent of $50 only." In my opinion, however, this was an unwarranted attempt to vary a contract which I regard as complete in all respects according to our decision in *Westminster Woodworking Co.* v. *Stuyvesant Ins. Co.* (1915), 25 D.L.R. 284, 22 B.C.R. 197; the principles of which cover this case, and Hannah had no more right to limit his company's liability on, say, a cask of port than on a sofa or a silver epergne, or a piano, which beyond all question would be covered by the policy. It would be strange, indeed a sinister thing, in business morality, if the principal representative of an insurance company were to tell an applicant for insurance that his application was "all right" and his property "covered" and yet escape liability by the insertion in the policy issued immediately in pursuance of such

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a contract of a clause of limitation respecting a matter which was not even mentioned when the application was under discussion and consideration. The decisions cited by my brother McPhillips in his judgment, with which I agreed, in the *Westminster* case, 25 D.L.R. 284, shew that a company cannot shelter itself behind private instructions, unknown to the assured, given to its officers not to issue a policy without such a reservation as regards liquor, and as the Judge below has found that Watson had no notice of such a reservation, there is nothing to prevent the operation of said principle which is invoked by the plaintiff.

The only other point requiring notice is that the application purports, it is submitted, to restrict liability for wines and liquors thus:—"On.....plumbing, gas and water fixtures, household goods, kitchen utensils and supplies, provisions, fuel, wines, liquors, cigars, cigarettes, and personal effect and family stores common in residences generally, including $50 in money. . . ."

On this submission, I am of opinion, in the first place, after careful consideration of the construction of the whole clause, that the words of limitation, "Common in residences generally," apply only to the next antecedent class of "family stores"; if they do not, then they apply equally well to all the preceding classes of property because there is no line of demarcation; and in the second place, even if they are to be given a wider ambit, there is no evidence whatever to shew what amount of wines or liquors is "common in residences generally" in this Province. And I think it would be impossible to adduce satisfactory evidence on such a point, because it is common knowledge, gleaned during these recent years of prohibitory and temperance legislation and agitation, that in a great many (it may possibly be in most, for all I know) residences, no wines or liquors are kept at all, and furthermore, there would be a vast difference in those residences where they are kept between the custom or practice of the rich man in his big residence and the poor man in his small one. If the expression "common" use can be given any sensible application at all (and I think it cannot and therefore should be disregarded), that can only be accomplished by restricting this application to different classes of residences, because it is an obvious impossibility to arbitrarily jumble "uncommon" residences together and attempt then to extract a "common" user therefrom and therein. What might be a most unreasonable store of wines and liquors in one residence would be quite a reasonable

one in another, having regard to the means and habits of their respective owners. But I do not think such a special and limited construction can properly be given and the clause in the fact of its positive statement that "residences generally," and not in particular, are to be taken as the test of "common use," and as the point comes back to something that is not, in my opinion, susceptible of legal proof and, therefore, should, as I have said, be disregarded. But in any event it is perfectly clear to me the Court should not attempt, without evidence, to embark upon such a wild speculation as is involved in the expression under consideration, and I for one must decline to express any opinion whatever (even if I were qualified to do so, which I am not) upon the question whether $1,500 worth of wines or liquor, in these days of greatly increased prices of such liquids, is "common" in a residence of the class in question, which must be a high one, for the personal property therein is of the value of $15,000.

It follows that, in my opinion, the appeal should be allowed.

GALLIHER, J.A. (dissenting):—In my opinion, the trial Judge came to the right conclusion. I cannot find upon the evidence, that Hannah at any time accepted any risk or gave any covering other than as contained in the policy issued. When the application came back to him with the value filled in it was then up to him to accept or reject. He accepted with the limitation as to wines and liquors, and it was then for the plaintiff to accept or reject the policy. Unfortunately, James was away and Watson, who seems to have been acting for him, gained the impression that the policy was at large as to the liquors, but if he were to be treated as acting for the corporation he would only be a sub-agent at most and could not bind the corporation in this regard. The trial Judge had dealt with this phase of the case, and I agree in his conclusions.

I would dismiss the appeal.

MCPHILLIPS, J.A.:—I have had the opportunity of perusing the reasons for judgment of my brother Martin, and I am in entire agreement with them, and feel that I cannot usefully add anything thereto. It follows that, in my opinion, the appeal should be allowed.

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

Appeal allowed.

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HUTTON v. DENT.

Ontario Supreme Court, Appellate Division, Maclaren, Magee, Hodgins and Ferguson, JJ.A. November 13, 1922.

CONTRACTS (§VIA)—ASSIGNMENT OF AGREEMENT FOR SALE OF LAND—COVENANT OF INDEMNITY AGAINST DEFAULT OF PURCHASER—DEFAULT OF PURCHASER—SALE OF LAND BY MORTGAGEE—LIABILITY UNDER COVENANT.

Where the purchaser under an agreement for the purchase of land agrees to assume a certain mortgage on the land, and the assignor upon an assignment of the agreement covenants to pay to the assignee any sums which shall become in default under the articles of agreement, and the purchaser makes default, and the land is sold by the Court, and by leave of the Court bought by the assignor and subsequently resold, the assignor is liable under the covenant for the amount due after being credited with the sum realised at the sale. The fact that the assignee was not at the time of bringing the action in a position to convey the lands to the assignor when the sums covenanted to be paid had been paid cannot be pleaded by the assignor by whose fault together with that of the purchaser the inability arose. The action being an ordinary action on a covenant the rules as to contract apply and govern.

JUDGMENT (§IV)—FOREIGN—ACTION ON—CONSIDERATION BY COURTS OF MATTER WHICH SHOULD HAVE BEEN BROUGHT BEFORE THE FOREIGN COURTS.

In an action on a foreign judgment the Court will not entertain any matter which should have been raised by way of defence to the foreign suit, or which being properly a ground of appeal is cognisable only by the appellate tribunal of the country in which the judgment was pronounced.

APPEAL from the judgment of Mowat, J. (1922), 22 O.W.N. 339, by which he directed judgment to be entered for the respondent for $5,582.32, and interest upon the appellant's covenant. This covenant was contained in an assignment dated May 21, 1913, to the respondent of an agreement for the purchase of certain lands in the Northwest by one H. W. Boles from the appellant. Affirmed.

Slaght, K.C. and *J. P. Walsh* for appellant.

F. H. Thompson, K.C., for respondent.

HODGINS, J.A.:—The covenant is in the following words: "And the said assignor (the appellant), doth further for himself, his heirs, executors, administrators and assigns covenant, promise and agree with the said assignee his heirs, executors, administrators and assigns that in case of default by the purchaser in payment of any sum or sums of money which shall become due or owing under the articles of agreement and that (*sic*) he will forthwith on demand well and truly pay or cause to be paid to the said assignee his heirs, executors, administrators or assigns any sum or sums so in default."

(Note: The agreement provides that wherever the masculine term is used it shall include the feminine).

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On reference to the original agreement which was thus assigned, it would appear that the purchaser Boles, bought the property from the appellant for $5,635, which he was to pay as follows: $900 cash; $1,000 by assuming and paying off a mortgage to the Canadian Mortgage and Investment Co. and the balance by instalments during 1914, 1915 and 1916, together with interest.

In the Saskatchewan action a judgment was recovered upon this covenant and an order was made for the sale of the lands and payment by the appellant of any deficiency after crediting the money realised at the sale. The respondent having obtained the leave of the Court to bid bought the property at the Court sale for $500. The trial Judge here, while declining to permit the respondent to recover upon that judgment, allowed him to succeed upon the original consideration (the covenant in question) upon which, as well as upon the judgment, this action has been brought.

It would appear that the mortgage referred to in the agreement as being made to the Canadian Mortgage and Investment Co. having become in default, proceedings were taken on it after the purchase by the respondent and the land was sold. In consequence of this the respondent is unable to convey the land to the appellant should she be prepared to pay the judgment.

It was very strongly urged that the respondent by his purchase had taken the land in satisfaction of the debt or that he was bound to have kept it at all hazards, so as to be able to hand it over to the appellant when she was asked to pay. And further that not having done so he could not recover either upon the judgment or the covenant.

Recovery in this action upon the Saskatchewan judgment is open to the objection, given effect to by the trial Judge, that it is, so far as formal proof goes, uncertain in amount, but the effect of what took place under it must be considered. The action of that Court which had jurisdiction over the parties, was in effect to realise the value of the purchaser's interest in the lands and give him the benefit of that value upon his debt and the appellant got the like advantage. This result is in accordance with the old settled practice in this Province and in England in similar cases. *Sanderson* v. *Burdett* (1871), 18 Gr. 417; *Skelly* v. *Skelly* (1871), 18 Gr. 495; Sugden on Vendors & Purchasers, 14th ed., p. 267. It calls for no comment except to say that it is not inequitable to ask payment of the balance of the purchase price, if the interest which the purchaser acquired

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under the sale agreement is liquidated and applied to reduce his indebtedness. As the appellant attorned to the jurisdiction of the Saskatchewan Court she cannot complain of its procedure, and in this case she not only does not do so but contends that she is relieved of liability by what was done.

Whether or not, if the respondent had remained owner of the property by the combined effect of the assignment of the appellant's interest to him and of his acquisition of the purchaser's interest, he would now be bound to convey the land to the appellant as a condition of enforcing his rights upon the covenant, it is useless to discuss. But it cannot be contended that his purchase at the Court sale put him in the position of a person who was bound to indemnify the appellant against prior mortgage. By virtue of the covenants of Boles and of herself in the sale agreement and in the assignment thereof to the respondent, Boles in the first place and then the appellant were, as to the respondent, required to pay off this encumbrance. By the sale agreement he became entitled to have the covenant of Boles to discharge the mortgage performed by him and if not by him then by the appellant and to enforce that right. It seems, however, that after his purchase at the sale he paid $200 and $300 on this mortgage, after which the mortgagee therein exercised his power of sale and sold the property, thus cutting out the estate of the respondent as well as that of the appellant and Boles if they still retained any interest therein. Hence by no fault of his but by the default of Boles and of the appellant, the respondent was not at the time when this action was begun in a position to convey the lands to the appellant if and when she paid what she had convenanted to pay.

If this were a case between mortgagee and mortgagor the facts would bring it within the exception to the equitable doctrine set forth in *Palmer* v. *Hendrie* (1859), 27 Beav. 349, 54 E.R. 136; (1860), 28 Beav. 341, 54 E.R. 397; *Walker* v. *Jones* (1866), L.R. 1 P.C. 50, 16 E.R. 151. This exception allows recovery to be had in cases where the land has by the default of the party liable to pay the debt passed out of the hand of the mortgagee.

In Coote on Mortgages, 8th ed., ch. 47, at p. 993, this statement is made:—

"The inability of the mortgagee to reconvey will not bar his right of action on the covenant, or other remedies, if such inability arises from any default of the mortgagor. So, where a mortgagee of leaseholds has after foreclosure of

subsequent mortgagees, been ousted from the estate for breach of covenants which the mortgagor's executors should have kept, the mortgagee may prove against the mortgagor's estate."

See also Fisher on Mortgages, Can. ed. 1910, vol. 2, pp. 985-988; 21 Hals., p. 271, sec. 478; *Worthington & Co.* v. *Abbott*, [1910] 1 Ch. 588, Sir W. M. James, V.C., said in *Re Burrell; Burrell* v. *Smith* (1869), L.R. 7 Eq. 399, at p. 408, the case upon which the text of Coote is founded: "He (the mortgagee) has simply by *vis major* or rather by the default of his mortgagor been deprived of the thing which he held as security for his debt." And in *Rudge* v. *Richens* (1873), L.R. 8 C.P. 358, a plea by a mortgagor that the mortgagee has sold under her power of sale and having thus parted with the property was disabled from suing for the balance of the debt after crediting the proceeds of the sale was struck out.

In this Province the following cases established this exception: *Pegg* v. *Hobson* (1887), 14 O.R. 272; *Beatty* v. *Bailey* (1912), 3 D.L.R. 831, 26 O.L.R. 145.

I think the principle upon which this exception depends is one which obtains between vendor and purchaser for it is one of reason and common sense. This is an ordinary action on a covenant and the rules as to contract apply and govern the rights of the parties. In Fry on Specific Performance, 6th ed., p. 442, secs. 940, 941, it is said "A defendant who has waived the performance by the plaintiff of what was on his part to be performed cannot, of course, use the non-performance as a defence. . . . Still more clearly if possible is non-performance by the plaintiff excused when that has resulted from the neglect or default of the defendant. So where the purchaser prevents the vendor from completing his title, he will be compelled to forego an objection he may raise on the score of that incompleteness."

This statement is founded in *Hotham* v. *East India Co.* (1787), 1 Term. Rep. 638, 99 E.R. 1295, and *Murrell* v. *Goodyear* (1860), 1 De G. F. & J. 432, 45 E.R. 426, 125 R.R. 498. The former case was one of contract. Ashhurst, J., in speaking of the necessity for a certificate of short tonnage says, p. 645: "It is unnecessary to say whether the clause relative to the certificate be a condition precedent or not; for granting is to be a condition precedent, yet the plaintiffs having taken all proper steps to obtain the certificate and it being rendered impossible to be performed by the neglect and default of the company's agents, which the

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jury found to be the case, it is equal to performance."

The headnote of *Murrell* v. *Goodyear* is as follows:—

"The assignees of an insolvent put up for sale an estate, which had been impressed with the character of personality, and which, if it retained that character, belonged absolutely to the insolvent. A purchaser upon investigation of the title discovered that there was good reason to contend that a prior owner had elected to take the estate as realty, in which case the fee belonged to the heir of the insolvent's late wife, the insolvent himself being only tenant by the curtesy. The purchaser, after some correspondence in which he required the concurrence of the heir abruptly gave notice to determine the contract, and immediately afterwards bought up the title of the heir. Held, that he could not avail himself of this purchase to defeat his contract, but that he had thereby removed the objections to the title, and specific performance was decreed against him, allowing him the expenses of his purchase from the heir."

In 27 Hals., p. 58, sec. 99, dealing with Specific Performance the deduction made from the same cases is thus stated. "Non performance by the plaintiff cannot be relied on by the defendant where . . . . . it has been caused by breach of contract or by prevention on the part of the defendant." In *Mackay* v. *Dick* (1881), 6 App. Cas. 251, it is decided that if, in the case of a contract for sale and delivery, which makes acceptance of the thing sold and payment of the price conditional on a certain thing being done by the seller, the buyer prevents the possibility of the seller fulfilling the condition the contract is to be taken as satisfied.

The cases of *Thomas* v. *Fredricks* (1847), 10 Q.B. 775, 116 E.R. 294, and *Bradley* v. *Benjamin* (1877), 46 L.J. (Q.B.), 590, are based upon the same principle. In the latter case (at p. 591) the decision proceeded on the fact that "the defendants by their own voluntary act put it out of the plaintiff's power to procure and disabled themselves from receiving the benefit for which they engaged to pay."

Here the mortgage proceedings which resulted in the loss to the respondent as well as to the appellant of the land in question were taken under the mortgage to the Canadian Mortgage and Investment Co. which, under the agreement for sale was to be assumed and paid off by the purchaser, Boles. It is the mortgage money secured by this mortgage that the appellant in the agreement between her and the respondent dated May 21, 1913, covenanted, promised and agreed to pay in cases of default of payment thereof by the

purchaser Boles. The appellant is therefore not in a position to raise the objection which was so strongly argued before us as a bar to recovery against her. The amount due on the covenant after crediting the price paid by the appellant at the sale, is practically the same as would have been recoverable in case Boles had refused to carry out the contract and had been sued for damages.

The two weeks allowed for election to take a reference as to amount will be extended until two weeks after the delivery of this judgment, otherwise the appeal must be dismissed.

MACLAREN, J.A., concurs with HODGINS, J.A.

MAGEE, J.A.:—I agree with my brother Hodgins that this appeal should be dismissed. It is not necessary to express an opinion whether the plaintiff was precluded from recovering upon the Saskatchewan judgment by reason of uncertainty in amount. The amount was certain and execution could have issued upon it, but that amount was reduced by subsequent events at the sale under the Court's order at which the plaintiff happened to be the purchaser. The amount realised by sale had to be credited on the judgment just as a subsequent payment of money would be credited or moneys realised from collateral securities but those subsequent credits though arising out of concurrent relief granted to the plaintiff hardly seem to render the judgment uncertain.

The defendant was a party to the judgment unappealed from which allowed the plaintiff to become purchaser and he was not acquiring the property by title paramount. It is not necessary to consider what would be the result if it were a case of mortgagee suing the mortgagor upon this covenant for payment.

FERGUSON, J.A.:—I agree in the result proposed by my brother Hodgins, and have little to add to his reasons. The Saskatchewan judgment awards the plaintiff a sum certain, $4,563.52 and interest. On the entry of the judgment that sum was presently payable, and execution might have been issued therefor. The judgment further directs that the lands which form the subject matter of the contract, should be sold by the Court, and the proceeds applied towards payment of the amount awarded to the plaintiff.

The judgment allowed the plaintiff to bid at the sale, and the plaintiff became the purchaser at a sum less than his claim. It is argued that the paragraph in the judgment which allowed the plaintiff to bid at the sale was unequit-

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able, unjust and contrary to law, in that it permitted the plaintiff to purchase the lands without releasing his claim for the balance, and that the effect of the transaction was to allow the plaintiff to have both the lands and his moneys. For the proposition that this was contrary to law, the defendant relies upon *Sayre and Gilfoy* v. *Security Trust Co.* (1920), 56 D.L.R. 463, 61 Can. S.C.R. 109.

In the reported opinions of the Judges of the Supreme Court of Canada, there are several statements that indicate that had the defendant appealed, it would have been held that a judgment allowing the plaintiff to purchase at less than his claim was not in accordance with the laws of Saskatchewan, but the parties to this action were both before the Court in Saskatchewan. No appeal was taken, and it seems to me that the objection now raised could and should have been raised in the Saskatchewan Court, and not having been raised in that Court, cannot be raised in this Court, for this Court cannot sit in appeal from a Saskatchewan Court. See the cases collected and reviewed in Piggott, Foreign Judgments, 2nd ed., vol. 1, pp. 100-3, where the law is stated as follows:—

"In an action on a foreign judgment the English court will not entertain any matter which should have been raised by way of defence to the foreign suit, or which, being properly a ground of appeal, is cognisable only by the appellate tribunals of the country in which the judgment was pronounced." (p. 102).

"The tribunals of all nations must in their several degrees be considered equal in their dignity and in their powers of administering justice:—'The courts in this country have no right, praising themselves to say, we will administer the law better and do more justice than the other court will. Courts must respect each other.'" (p. 103). [Per James, L.J., in *Fletcher* v. *Rodgers* (1878), 27 W.R. 97.]

I am also of opinion that had there been no sale, or if the Court sale was held to be invalid, and the first mortgagee had foreclosed or sold, so that the plaintiff was unable to convey, yet because it was the duty of the defendant to pay off the first mortgage she cannot in an action on the covenant, set up the plaintiff's inability to convey. To allow her to do so would be to allow her to take advantage of her own default.

Appeal dismissed.

Re ELECTION of CROSMAN and of McLEOD; Ex Parte HOWARD. N.B.

New Brunswick Supreme Court, Appeal Division, Hazen, C.J., White and Grimmer, JJ. June 8, 1922. App. Div.

ELECTIONS (§IV)—MUNICIPAL COUNCILLORS—QUO WARRANTO PROCEEDINGS—DISCRETION OF COURT—DELAY—MUNICIPALITIES ACT, 1912 (N.B.), CH. 6, SEC. 36—CONSTRUCTION.

An application for rule *nisi* for *quo warranto* on a county councillor to shew cause by what right or authority he claims office will not be granted where there has been unnecessary delay in making the application. Where the election was held in October and the application was not made until the following April there having been two previous sittings of the Court at which it might have been made, the councillor having been before the application sworn in and taken his seat without objection is unnecessary delay sufficient to defeat the application.

An election will not be invalidated on the ground that the councillor was not sworn in within 30 days after the election, where he was duly sworn in at the first council meeting in accordance with the custom throughout the Province.

MOTION for rule *nisi* for *quo warranto* calling upon Crosman and McLeod to shew cause by what right or authority or warrant they did claim to represent the Parish of St. Martins in the County Council of the City and County of St. John. Rule refused.

E. Allison MacKay, for relator.

W. M. Ryan, contra.

The judgment of the Court was delivered by

HAZEN, C.J.—These two cases were argued together. In each an application was made for a rule *nisi* for a *quo warranto* calling upon Robert B. Crosman and Reuben E. McLeod respectively to shew cause by what authority they claim to represent the Parish of St. Martins in the County of the City and County of Saint John as county councillors in the county council of the said City and County of Saint John. An election for the municipal council was held on October 18, 1921, and the vote in the Parish of Saint Martins was as follows:—Crosman, 159; McLeod, 155; Shanklin, 149; Kane, 125; Mosher, 108; Black, 106; Howard, 94.

The two councillors against whose elections proceedings are taken were at the head of the poll, while Howard, the relator, was the candidate who received the fewest votes. The parish clerk returned Shanklin, Crosman and McLeod as duly elected. The motion for a rule was made on the grounds that neither Crosman nor McLeod were qualified to become candidates at the election through not possessing the qualification required by the Municipalities Act. In the view I take of the matter I do not consider it necessary to consider this question.

The election, as previously stated, was held on October

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18, 1921, and application for a rule was made for the first time on April 11, 1922, nearly 6 months afterwards, and it was claimed by counsel acting on behalf of Crosman and McLeod as a preliminary objection that the application for a rule should not be entertained as there was unnecessary delay in making it, and that it was open to the Court to exercise its discretion in the matter. Application might have been made at the sitting of this Court in the month of November or in the month of February, but no application was so made, and the matter was delayed until the last term, which opened on April 11. It appears that a session of the municipal council was held on January 17, 1922, 3 months after the date of the election, and that the said Crosman and McLeod were then, without objection, sworn in as councillors before the county secretary, and took their seats and acted as such at that meeting and have continued to discharge such duties as may be necessary since that date. I think there has been unnecessary delay in making the application, and that in the exercise of its discretion the Court will be fully justified in refusing the rule on this ground.

In the case of *The Queen* v. *Hodson* (1842), cited in *Reg.* v. *Greene* (1843), 4 Q.B. 646, at p. 648, 114 E.R. 1042, at p. 1043, fully reported 11 L.J. (Q.B.) 219, the Court refused *quo warranto* against a burgess who was enrolled in November where the application for the rule was not made until the last day of the succeeding Hilary Term. In this case Lord Denman, C.J. said, 11 L.J. (Q.B.), at p. 219:—

"In this case cause was shewn against a rule for a *quo warranto* which had been moved for against a burgess of Lichfield who had been inrolled in November, 1841, and a motion was not made for a *quo warranto* until the last day of Hilary Term. We do not say that we will under no circumstances entertain such an application, but we shall require proof of some good reason for the delay, and it certainly is in the first instance apparently very vexatious and improper that such a matter should be kept back for an unnecessary time * * * * * We think, acting upon a discretion which we always have exercised as to *quo warranto* we ought to discharge the rule."

In *Rex* v. *Rowlands*, [1906] 2 K.B. 292, 75 L.J. (K.B.) 501, at p. 503, Lord Alverstone, C.J., said:—

"I think further that the delay in applying for this order *nisi* raises a serious difficulty. Notice of the intended election was published on January 11, a candidate for the office was proposed and was elected on February 3. Yet this

rule *nisi* was not moved until April 27, upwards of ten weeks later. It was the duty of the prosecutor to apply as promptly as possible. Therefore this rule ought to be discharged."

This last case was an application for an order *nisi* to shew why an information in the nature of a *quo warranto* should not be exhibited against one William Rowland to shew what authority he claimed to exercise the office of a guardian of the Board at Buckley in the County of Flint upon the ground that the office was full at the date of his election.

In the present case no good reason—in fact no reason at all, was shewn on behalf of the relator, Howard, for the delay of nearly 6 months in moving in the matter, and it is certainly, in the language of Lord Denman, C.J., apparently very vexatious and improper that such a matter should be kept back for such an unnecessary time.

Another ground on which it was sought to have the election set aside was that the provisions of sec. 36 of the Municipalities Act, 1912 (N.B.), ch. 6, had not been complied with. This provides that no councillor shall act as such until he has subscribed to the oath a form of which is given, which oath may be administered by any Justice of the Peace for the County, and shall be filed forthwith with the county secretary, and unless such councillor shall subscribe such oath within 30 days after his election, he shall be deemed to have refused to serve, and shall be liable to pay the secretary-treasurer a fine not exceeding $40, as the by-laws of the council may prescribe.

In the present case Crosman and McLeod were not sworn in until the municipal council met for its first semi-annual meeting on January 17, 1922, and were then sworn in together with the other members of the county council elected on the same date before the county secretary. If this point should prevail none of the members of the county council would be qualified to act and the proceedings of the council at its January meeting and at the meeting that will be held during the present month before this judgment is delivered would be absolutely illegal. The practice of the councillors being sworn in together at the first meeting after the election has, I believe, prevailed for many years, and is the custom which prevails not only in St. John County, but in other municipalities throughout the Province. In any event, the rule being a discretionary one, I would certainly not be dis-

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posed to set aside the election of any county councillors on such a ground.

In the case of *The Queen* v. *Ward* (1873), L.R. 8 Q.B. 210, 42 L.J. (Q.B.) 126, it appears that Ward was chairman of the local board, and it was his duty to conduct and complete the election of members for the ensuing year, and if the chairman became unable to act some other person was to be appointed by the local board to perform such of his duties as then remained to be performed. F. was appointed by the local board to act as returning officer in case of nomination of the chairman as a candidate. Ward published a notice fixing the date of the election and the day for receiving nomination papers. He received a nomination paper nominating himself, and afterwards continued to receive other nomination papers. More candidates were nominated than there were vacancies. Ward filled up the form of voting paper and sent it to be printed, with directions for the printers to return it to F, and from that time forward everything was done by F. Ward was elected and returned by F. No improper motive was imputed to Ward nor did his acts produce any inconvenience or in any way influence the result of the election. The Court in the exercise of its discretion refused leave to file an information in the nature of a *quo warranto* and I think exercising our discretion in the present case we should do the same. The affidavits in support of this rule imputed no corrupt, fraudulent or indirect motive for the act complained of as irregular, nor do they allege that they have produced injustice, inconvenience or even any one result different from what would have followed the fullest compliance with the law. This is the language of the Court in the case of *The King* v. *Parry* (1837), 6 Ad. & El. 810, 112 E.R. 311.

In the case of *The Queen* v. *Rector et al of Lambeth* (1838), 8 Ad. & El. 356, 112 E.R. 873, the Court discharged the rule upon the ground that nothing was stated to shew that the result of the election was different from what it would have been if the irregularity had not taken place, and the same rule has been acted upon in the case of *The Queen* v. *Cousins*, reported (1873), L.R. 8 Q.B., at p. 216. In this case an information in the nature of a *quo warranto* in respect of an annual office of guardian of the board the election to which on May 14 on the ground that the mode of election adopted was not a proper one, was not applied for until January 13 following, and it was then not shewn that any ratepayer had been prevented from voting or that the

result of the election was affected by the mode adopted and in the exercise of its discretion the Court discharged the rule.

The rule must be refused.

Rule refused.

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PICHE v. LA COMMISSION DES LIQUEURS DE QUEBEC.

Quebec Superior Court, Duclos, J. May 29, 1922.

INTOXICATING LIQUORS (§IIIA—55)—PENALTIES FOR ILLEGAL TRANSPORTATION—INCOMPATIBLE STATUTES—QUEBEC ACTS.

Two distinct and incompatible penalties cannot be imposed by law for the same offence. An offence for illegal transportation of liquor being punishable by fine of $100 under the provisions of Alcoholic Liquor Act, 1921 (Que.), ch. 24, sec. 51, the penalty of $1,000 provided for the same offence by the Alcoholic Possession and Transportation Act, 1921 (Que.), ch. 25, sec. 3, being incompatible with former, has no application by virtue of the provisions of the former statute.

APPEAL from a conviction under the Quebec liquor laws. Reversed.

L. Cousineau, for appellant; *J. N. Beauchamp*, for respondent.

DUCLOS, J.:—In this case, the defendant-appellant was accused and convicted of having, on October 28, 1921, in the city of Hull, illegally transported alcoholic liquor contrary to the statute provided in such case, and was condemned to a fine of $1,000 and costs, failing payment of said costs to an imprisonment of three months in the common jail in the District of Hull.

The Quebec Statute, 1921 (Que.), ch. 24, known as the Alcoholic Liquor Act, sec. 51, sub-sec. (*l*), provides that whosoever keeps or transports any alcoholic liquor in contravention of sec. 44 of this Act, shall be guilty of an offence and liable, in addition to the payment of costs, to a fine of not more than $100.

The Quebec statute, 1921 (Que.), ch. 25, known as the Alcoholic Possession and Transportation Act, sec. 3, provides that no alcoholic liquor shall be kept, possessed or transported in the Province (with certain exceptions therein contained which do not apply to the defendants in this case), and by sec. 5 provides that whosoever contravene any provision of this Act shall be liable, in addition to the costs of prosecution, to a fine of $1,000 and on failure to pay such fine and costs, to imprisonment in the common jail for a term of 3 months.

Both of the statutes were passed at the same session of

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the Quebec Legislature. Both came into force on May 1, 1921.

We have thus two distinct and incompatible penalties imposed by law for the same offence. These two penalties cannot exist together, and furthermore sec. 140 of 1921 (Que.), ch. 24, provides that "every provision in any general or special Act which is incompatible with this Act, is declared not to apply thereto."

It follows that the defendant was illegally condemned to a fine of $1,000 and costs.

The appeal is therefore maintained; conviction quashed with costs.

Appeal allowed.

CITY OF HAMILTON v. TORONTO, HAMILTON & BUFFALO R. Co.

Board of Railway Commissioners. October 30, 1922.

RAILWAYS (IIB)—HIGHWAY CROSSED BY RAILWAY—SEWER UNDER TRACKS—RAISING TRACKS—SENIOR AND JUNIOR—RAILWAY ACT, 1919 (CAN.), CH. 68, SEC. 269—GENERAL ORDERS Nos. 74, 75.

Where a Dominion railway crosses a public highway the municipality interested cannot require the railway company to pay any part of the cost of laying a sewer under the railway tracks or of raising the tracks to the new street grade. The senior and junior rule applies to such a case. Section 269 of the Railway Act, 1919 (Can.), ch. 68, and General Orders of the Board Nos. 74 and 75 also apply. Section 268 does not apply.

APPLICATIONS of the City of Hamilton for orders for the construction of sewers crossing the tracks of the C. P., T. H. & B. and G. T. R. Cos. and for payment by the companies of the cost occasioned by the presence of the railways.

The applications were heard at Hamilton, June 8, 1922.

F. R. Waddell, K.C., for the City of Hamilton.

J. A. Soule, for the T. H. & B.

John D. Spence, for the C.P.R.

W. C. Chisholm, K.C., for G.T.R.

F. R. Waddell, K.C., for the City of Hamilton. The Board should apply the same principle as in cases where the railway company is senior to the municipality. The city is entitled to use the street for ordinary purposes below the surface.

W. C. Chisholm, K.C., for the G.T.R., relied upon the standard regulations. In order to get the proper level for the sewer it is proposed to raise the G.T.R. tracks about 3 feet. The accepted principle has been in connection with

putting wires overhead, wires underneath, and sewers underneath the railway, that the municipality has paid all expenses. This is important as it has been a factor in determining the principle of contribution. A contribution by the railways would involve an expenditure of millions of dollars which have been paid by municipalities in the past without challenge. The G.T.R. has an easement which is used for the general advantage of the public and should not be put to expense in connection with its use. There should be no departure from the principle laid down in previous decisions.

J. D. Spence, for the C.P.R. There is a very great difference between the right of a municipality in respect to a sewer and its right in respect to a highway. The use of land situate on the highway for sewer purposes is not a highway use, it is something incidental to their rights in the land whatever they may be. Where they have a fee in the land it seems the most natural thing that they should lay sewers on their own property. Apart from the easement to cross we get, among other rights, the right to construct, and if by reason of our constructing under our plain rights to do so, we are made liable for very great costs in respect of works done by the municipality, then our right to construct on that highway is very seriously interefered with, it is to a very great extent taken away. If the municipalities wish to construct sewers across our right of way it should not be at our expense. If the cost of works which the municipality may imagine later on is to be placed upon us at all it must be by direct legislation. On the principle as to distribution of cost between the municipality and the railway the effect of the rules and regulations of the Board should govern.

MR. COMMISSIONER BOYCE:—These cases were heard together, the arguments of counsel being confined to the question as to the distribution of the cost of the works, which the city asked for permission of the Board to carry on. The work, common to all the applications, was the laying of a sewer, or a "storm overflow sewer," under the tracks of the railways, respectively, where they cross the streets in the city of Hamilton, referred to in the application of the city.

There is no dispute in any of the cases as to the necessity for the work. In every case the railway concerned raises no objection to the work being performed, and were it not for the special feature of the application by the city in insisting

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that the railway company should pay the cost of the work involved in extending the sewer across its tracks, and, where necessary (as in two of the applications), the cost of raising the railway tracks, the application would, upon the consent to the work, be of a nature provided for by sec. 269 (3) of the Railway Act, 1919 (Can.), ch. 68, and the regulations passed thereunder, and no order of the Board would have been necessary.

In each case, therefore, an order of the Board was made authorising the work, and reserving the question of the apportionment of the cost thereof for further consideration.

The main contention of the city to which argument was directed at the hearing, and in subsequent submissions, was that, the city street involved in each case being senior (a statement not disputed by the railway concerned) its seniority continued and subjected the railway concerned to the payment of the extra cost involved in the crossing of that railway by the storm overflow sewer which the city was laying along the street, by analogy to the principles generally followed by the Board in applying what is known as the "Senior and Junior rule" to the crossing of the railways by highways. The argument of Mr. Waddell, K.C., for the city involved, *inter alia*, the contention that the soil and freehold in the city street, crossed by the railway was vested in the city, and that the freehold carried with it the right to the subsoil, and that the placing of a storm overflow sewer by the city under its streets was a necessary and proper user of its own property to which the railway, at its crossing, became subject, as junior in point of time of establishment, with consequent liability to contribute the additional cost involved in carrying such sewer along the street under the railway.

Argument was also directed to the question as to the status and title of the city as regards its streets, and while a conclusion one way or another upon such contentions as were advanced, respectively, on behalf of the city and the railways, may not conclude the question of contribution to cost, more directly involved, it is desirable that due consideration should be given to what is involved in these respective contentions.

The status and title of the municipality as regards the street at the time of its crossing by the Dominion railway depends upon the construction to be placed upon the appropriate sections of the Municipal Act then in force as defining such title. The Municipal Act of 1903 (Ont.), ch. 19, secs.

598, 599, 601, carries forward the same definitions as are contained in R.S.O. 1897, ch. 223, secs, 598, 599, 601, and in the former enactments there consolidated. These are, in the form of the 1903 consolidation, traceable back far enough to govern conditions at the time of the crossing of the Hamilton streets by the railways in question.

The apparent variation in definition as to title contained in secs. 599 and 601 of these enactments led to considerable discussion, and was the subject of judicial doubt as to just what was intended by the two sections: *Abell* v. *Municipal Corp. of York* (1920), 57 D.L.R. 81, 61 Can. S.C.R. 345; Biggar's Municipal Manual, 1900, at p. 818.

There is some ground in the wording of the two sections of the Act, 1903 (Ont.), ch. 19, referred to for the contention that a lesser interest is intended by sec. 601 than by sec. 599, especially as the words "soil and freehold" used in sec. 599 are not carried into sec. 601, thus leaving it open to the construction that whereas by the former section the "soil and freehold" were vested, at that time, in the Crown, by the latter section, the street was placed in the possession and control of the municipality for local purposes, that is, that the freehold, by sec. 599 was vested in the Crown, possession, by sec. 601, in the municipalities for municipal purposes, which is in agreement with the respective headings to each section, as far back as the R.S.O. 1897, ch. 223, viz: sec. 599; "Freehold in the Crown"—sec. 601, "Possession in municipalities." If, by sec. 599, as it then stood, the "soil and freehold" of a highway were, by statute, vested in the Crown, the same title in the same highway could not be in the municipality.

The difference of interpretation of these sections, doubtful as they seemed, led to a new section being introduced into the Ontario Municipal Act 1913 (Ont.), ch. 43, reproduced in the R.S.O. 1914, ch. 192, as sec. 433, providing as follows:—

"Unless otherwise expressly provided, the soil and freehold of every highway shall be vested in the corporation, or corporations, of the municipality or municipalities, the council or councils of which for the time being have jurisdiction over it *under the provisions of this Act.*"

This enactment was not in the form of a declaration to settle the law owing to the conflict of interpretation of the former sections in the old Acts referred to, and therefore it was not retroactive but spoke from date of its coming into force (1913), and its effect was to vest the "soil" and "free-

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hold" of the highway in the municipality, "for the time being, having jurisdiction over it *under the provisions of this Act*" (viz., the Act of 1913 (Ont.), ch. 43). It would seem, therefore, that the contention as to seniority or rights (as to the railways involved) to use the subsoil of the streets of Hamilton for the purpose now proposed rests (in Ontario) upon the legislation of 1913 above referred to, and that, from the date of the coming into force of the 1913 Act, such rights as are vested thereby accrued *then* to the city, and therefore, there would seem to be force in the contention urged by the railways, that *qua* the railway, then in place, under Dominion authority, the municipality had acquired no seniority in the subsoil, but was junior to it, though senior as regards surface rights for highway purposes, and that the laying of water pipes under the street was not an incident to the city's title to the street, as defined by the Act.

Such is the condition of the legislation in one Province (Ontario). In all the Provinces of the Dominion the soil and freehold is not vested in the local municipality; e.g., Quebec, where it is vested in His Majesty (in right of the Province), and in Manitoba, Saskatchewan and Alberta, the right of His Majesty (in right of the Dominion) to the soil and freehold of highways, has never been taken away. Seniority of a Dominion railway traversing various Provinces of Canada over highways would, therefore, depend upon the state of the Provincial law applicable to title in the highways of each Province, if seniority is to depend, as to the use of the highway for other than general travel, upon the local law governing title in soil and freehold. The question raised must, I think, be capable of decision upon more stable and uniform ground than this.

The provisions of the B.N.A. Act, 1867, relied upon in argument of counsel for the city are of importance as regards the railways concerned, all of which are "Works and Undertakings" of one or other of the classes specified in the exceptions (*a*) and (*c*) of sub.-sec. 10 of sec. 92 of the B.N.A. Act, but these provisions, themselves, and as interpreted and applied by judicial decision, do not seem to me to strengthen the city's contention on the constitutional ground suggested in the argument. By sec. 92 of the B.N.A. Act, sub-sec. 13, "Property and Civil Rights in the Province" is one of the classes of subjects as to which the Provincial Legislatures may exclusively legislate, but by sub.-sec. 10 specific exception is made of the works and undertakings

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of Dominion Charter of the classes mentioned in (*a*), (*b*) and (*c*) thereof, and sub-sec. 29 of sec. 91, and the concluding paragraph of that section following, make it clear that these railways are within the exclusive legislative authority of the Parliament of Canada.

By Acts of the Parliament of Canada the railways concerned derived their powers in carrying out their respective works and undertakings, and in virtue of those powers, and subject to the provisions, conditions and safeguards prescribed by the Railway Act, 1919 (Can.), ch. 68, the city streets of Hamilton were intersected, and upon these streets, at such intersections, became established, not subject to provincial law, but by the paramount power of Parliament. By the Railway Act of Canada provisions are made for the conditions upon which railways under the jurisdiction of the Parliament of Canada may invade the rights of private individuals, or private or public corporations—including municipal corporations, created by provincial authority (*e.g. vide*, secs. 255-258 of the Railway Act). These conditions are for the safeguarding of, say, public rights as represented by municipal (or local) control or government. A Dominion railway crossing a public street without conforming to the requirements of Dominion enactments is, *ipso facto*, a trespasser and may be restrained, but once it receives by properly constituted Dominion authority (whether the Railway Committee of the Privy Council, before the constitution of this Board, or by this Board in whom the power is now vested to grant or refuse such permission according to varying conditions) it is there, as a Dominion work, by the paramount power and authority of the Parliament of Canada, and is not subject to the provisions for municipal control contained in any provincial statute. It thereby, under such paramount power, and under the provisions of the B.N.A. Act, 1867, I have cited, acquires the right to interfere with property and civil rights in the Provinces. And, having acquired that paramount right, it cannot, I think, be argued with any consistency or cogency that such paramount right can, many years afterwards, be affected, interfered with or diminished by the assertion by the municipality of what might be termed a "slumbering or inchoate right" in the sub-soil of the street across which the railway is so established by superior legislative authority. *C.P.R.* v. *The King* (1907) 7 C.R.C. 176; *C.P.R. Co.* v. *Corp. of Parish of Notre Dame de Bonsecours*, [1899] A.C. 367, *City of Toronto* v. *Bell Telephone.*

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Co. (1902), 3 O.L.R. 465, reversed (1903), 6 O.L.R. 335; *Tennant* v. *Union Bank of Canada*, [1894] A.C. 31; *Canada Atlantic R. Co.* v. *Corp. of City of Ottawa* (1901), 2 O.L.R. 336, 1 C.R.C. 298; *Madden* v. *Nelson & Fort Sheppard R. Co.*, [1899] A.C. 626, at p. 628.

And where by Dominion authority, the railway crosses a highway, it has the right to cross without expropriation proceedings and without making compensation to the municipality. The lesser, or local, interests of the people of the latter, being, by force of law referred to, made subject to the greater interests of the people of the whole state, as represented in a work, the nature of which is, by statute, declared to be a work for the general advantage of Canada. *Canada Atlantic R. Co.* v. *City of Ottawa*, 1 C.R.C. 298, 2 O.L.R. 336, affirmed (1902), 1 C.R.C. 305, 4 O.L.R. 56. Also see *Mayor etc. of Birkenhead* v. *L. & N.W.R. Co.* (1885), 15 Q.B.D. 572, per Brett, M.R., at p. 578.

The contention, therefore, pressed upon us in the argument of counsel for the city, that the provisions of the B.N.A. Act, with respect to the preservation to the exclusive jurisdiction of the Legislatures of the various Provinces of questions affecting property and civil rights of and in the Provinces, may be invoked to aid in the city's contention as to contribution to cost, does not appear to be a cogent one, because—(*a*) Whatever rights the city had at the time the railway came to lay its sewers are not impaired now by the presence of the railway, except to the extent of any extra cost involved in carrying out the municipal work by the presence of the railway; (*b*) By the Dominion Railway Act, 1919 (Can.), ch. 68, power is vested in this Board, as successor to the jurisdiction and functions formerly exercised by the Railway Committee of the Privy Council, to impose such terms and conditions, as by the Railway Act, and the Special Act are provided as proper for the purpose of safeguarding, in a variety of ways, applicable to various conditions, the rights and interests of the Municipality.

There must, therefore, be found in the Dominion legislation, the Railway Act of Canada, the jurisdiction to afford the remedy the city is seeking. That is apparent by the application to this Board by the city, under the Railway Act of Canada. By the application the city recognises the legal situation, as I have endeavoured to point it out, *viz;* that the railway being constructed, under authority of Dominion law, across this street, the city must apply to that duly constituted authority for permission to interfere with that rail-

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way in the exercise of its municipal powers—derived from the Provincial Legislature, in the use of its street—to the extent of that part of it occupied by this railway, and over which, but for the presence of the railway under authority cited, the city would have complete jurisdiction and control by force of Provincial law. It is clear, therefore, that there is no conflict of laws, Dominion and Provincial, involved in the argument of counsel upon the question as to the rights of the city under that Provincial law.

The city's application must, I think, fall within and be governed by the provisions of sec. 269 (*b*), of the Railway Act, 1919 (Can.), ch. 68, as the only section applicable to the main object sought, *viz;* permission to lay an overflow storm sewer under a railway. "A Storm Overflow Sewer" is, as its name implies, an auxiliary means of drainage (common to the city at large, and for the benefit of the city as a whole), of the surplus, or emergent, quantity of water brought into the city drainage system by storms. It is not applicable to the drainage of any particular area, and, therefore, is not in contemplation in such of the sections of the Railway Act as deal with drainage obligations incident to the particular area occupied by the railway, consequently it is purely a municipal drainage scheme and the railway does not contribute to its necessity nor is it concerned in its utility.

Section 268 is not applicable, in my opinion, for the obvious reason that (*a*) it applies only to construction period, and (*b*) neither the drainage of the area of land in the vicinity of the railway, nor the obligation therein referred to, of the railway to drain it, is in any way involved. Section 270 is not applicable also, for the obvious reason that such proceedings as are therein provided, are under Provincial Drainage Acts, in so far as they, or any of them, are applicable, a discussion as to the constitutionality of which would not be important here. The relevancy of sec. 270 is disposed of as regards this application, by the fact that it has not been invoked—no procedure taken thereunder, and this Board having now made orders approving the city's application, the provisions of that section (sec. 270 (2)) render the section inapplicable.

The applicable sec. (269 (*b*)) provides as follows:—

Whenever—(*b*) "any municipality or landowner desires to obtain means of drainage, or the right to lay water pipes or other pipes, temporarily or permanently, through, along, upon, across or under the railway or any works or land of

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the company, etc."

The application, under this section, by the city is "*to obtain the right*" &c. to lay water pipes. The contention of the city, therefore, as to its freehold estate, carrying that right, is merged in this application.

Now, as I have pointed out, there is no dispute as to the carrying out of the work, i.e., the railway made no objection to permission being granted to the city to carry its storm overflow sewer, under its tracks—proper engineering safeguards being settled. By sub-sec. 3 of sec. 269, in case of consent of the railway, no order of this Board is necessary and the procedure is governed by the standard regulations of the Board applicable to such a case.

Section 269, in the Act of 1919 (Can.), ch. 68, was formerly sec. 250 of the former Consolidated Railway Act R.S.C. 1906, ch. 37, but sec. 250 of the old Act did not contain sub-sec. 3, as above referred to, but the old section *did* contain the other provisions in the section now invoked as well as what is provided for in section 268 of the present Act.

Provision for compensation to an owner injuriously affected, provided by latter part of sub-sec. 2, sec. 269, of the present Act was not included in sec. 250 of the old Act. No questions arise as to compensation between the city and an owner, so far, in these applications.

In the exercise of its powers, this Board, by General Order No. 74, dated April 19, 1911, provided Standard Rules and Regulations to govern the laying of water pipes, &c., under sec. 250, and that order adopting those regulations, which were passed under power of the statute (sec. 34), provides as follows:—(General Order No. 74, sec. 3).

3. "That every order of the Board granting leave to place or maintain any pipe or pipes across any railway subject to the jurisdiction of the Board be, unless otherwise expressed, deemed to be an order for leave to place or maintain the same under and according to the said conditions and specifications, which conditions and specifications shall be considered as embodied in any such order without specific reference thereto, subject, however, to such change or variation therein or thereto as shall be expressed in such order."

And, that part of the regulation so adopted, relating to cost of the work—section 5—is as follows:—

5. "All work in connection with the laying, maintaining, renewing, and repairing of the said pipe and the continued supervision of the same shall be performed by, and all costs and expenses thereby incurred be borne and paid by, the

applicant; but no work at any time shall be done in such a manner as to obstruct, delay, or in any way interfere with the operation of any of the trains or traffic of the railway company or other company using the said railway."

Those regulations were in force when the amendment 1911 (Can.), ch. 22, introducing what is now sub-sec. 3 of sec. 269 was passed, and in order to meet any question as to the application of General Order No. 74—with the rules and regulations then promulgated—to the amendment, the Board, by General Order No. 75, dated May 26, 1911, provided as follows:—

"Whereas, for the purpose of dispensing with the necessity of an Order of the Board where water pipes or other pipes are laid under railways, the said sec. 250 of the Railway Act was amended by sec. 8 of the Act to amend the Railway Act, assented to May 19, 1911, by adding thereto the following sub-section; "An order of the Board shall not be required in the cases in which water pipes or other pipes are to be laid or maintained under the railway, with the consent of the railway company, in accordance with the general regulations, plans or specifications adopted or approved by the Board for such purposes.

"Therefore, it is ordered that the Standard Regulations Regarding Pipe Crossing Under Railways, approved by Order of the Board No. 13494, dated April 19, 1911, be, and they are hereby adopted and approved pursuant to the said amendment."

And the same rules and regulations became effective under General Order No. 75 as had been authorised under General Order No. 74, and those rules and regulations governing the whole section 269, as it now stands in the Railway Act of 1919 (Can.), ch. 68, are now in force and govern the application of the city, as general regulations made by Dominion authority, and specifying the conditions and terms under which a work of the character contemplated by the section is to be carried out.

As I see it, the city in making this application submitted itself to the jurisdiction of this Board and thereby became subject, as well to the provisions of sec. 269 as also to all that is contained in General Orders 74 and 75 and general regulations thereby authorised, as the conditions and terms —contemplated to be imposed by statute—sec. 34—for carrying into effect the provisions of sec. 269, as to the laying of the pipes, and as to the provision for the cost thereof —"having regard to all proper interests" in this instance the

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railway there established by authority of Dominion law under the Railway Act. Holding this view, I can see nothing in all that has been urged by the city which would, in the circumstances, disturb or interfere with the application of those general orders and regulations to these applications.

What is contained, specifically, in the regulations is in accord with the practice of the Board. *Maritime Telegraph & Telephone Co.* v. *Dominion Atlantic R. Co.; Baird* v. *C.P.R. Co.* (1916), 20 C.R.C, 213; *City of Vancouver* v. *Vancouver, etc., R. Co.* (1914), 18 C.R.C. 296, at p. 306.

The facts are very similar to those in question in two applications, made to the Board as far back as 1907, by the Town of Brampton, for permission, under sec. 250 of the Railway Act (as it then stood, R.S.C. 1906, ch. 37), to lay sewer pipes under the tracks of the C.P.R. and of the G.T.R. where the tracks of those railways crossed Queen St., along which street the municipality was constructing a sewer (Board Files 5383 and 5390).

The question arose then as to distribution of cost of the work under the railways' tracks. Argument of these cases was heard by the Board at Toronto, November 6, 1907 (vol. 53, pp. 6839-6846 record), as to form of order and what is contained in sec. 5 of the present regulations was adopted, practically word for word, in the orders then made governing cost of the work as far as the railways were concerned, under conditions practically the same as those now presented. I quote sec. 2 of Order No. 4061—File 5383:

"2. That all work in connection with the laying, maintaining, renewing, and repairing of the said sewer pipe and the continued supervision of the same be performed by, and all costs and expenses thereby incurred be borne and paid by, the Applicant, subject however, to any right of assessment in respect thereof under the provisions of the Municipal Act of the Province of Ontario; but that no work at any time be done under the authority of this Order in such a manner as to obstruct, delay, or in any way interfere with the operation of any of the trains or traffic of the Railway Company or other company using the said railway."

In a judgment directed to the settlement of the form and terms of the orders in these cases the late Killam, J. (then Chairman of this Board), said:—

"The railways cross Queen Street, and the Town is constructing a sewer along that street and wishes to carry it under the tracks of the two companies. This is presumably

not a case, then, in which the companies own the land, but one in which they have merely rights to maintain and operate their railways across the street. They interfere thus with the ordinary right of the town to carry the sewer under the street, and the Town is obliged to obtain the authority of the Board to enable it to do this. In such a case the terms should be as little onerous upon the Town as possible."

The only question, as will appear from the judgment—para. 3—was as to the right of the town to assess the railways for a portion of the cost of the sewer under the Municipal Act. To safeguard this right the words "subject, however, to any right of assessment in respect thereof under the provisions of the Municipal Act of the Province of Ontario" were inserted into sec. 2 of the orders, as above.

The question of the rights of the City of Hamilton as to assessment is not raised in this case, and I do not think that any provision could be made in the orders disposing of these cases. Whatever power the city possesses as to assessment of railway property is, of course, preserved to it. The subject is independent of this Board's functions.

I have referred to the *Brampton* cases at some length because they appear so apposite to the present case and because a comparison of the wording of sec. 2 of the orders therein made, with that of sec. 5 of the regulations approved by General Orders Nos. 74 and 75 passed in 1911, leads one to the conclusion that the wording of those regulations was adopted as a result of the decision in the *Brampton* cases.

The cost of the work, in each case, for which the Board's permission had already been given by order, and all other conditions and details thereof as affecting the railways, will be governed by the general regulations promulgated in General Orders 74 and 75, including the cost of such raising of tracks of the railway as may be necessary, and as to all other questions affecting the work, in case of dispute, the Board's engineer will act, pursuant to the Regulations, as final arbitrator.

Orders will go accordingly.

MR. MCLEAN, ASSISTANT COMMISSIONERS—Some consideration of the history leading up to the issuance of General Orders Nos. 74 and 75, and some account of the practice antecedent to the issuance of these orders is pertinent.

The steps leading up to the issuance of General Order No. 74 date back to October 21, 1908, when the Board took

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up the consideration of drafting a standard form to deal with the very considerable number of applications arising under sec. 250 of the then Railway Act, R.S.C. 1906, ch. 37, and by November 25, 1908, a draft order was agreed upon by the Board. For a time there were separate orders for water, sewage and manufactured gas on the one hand, and natural gas on the other. In both forms of order the full cost of construction and maintenance was on the applicant. While the general form of the order was then agreed upon, discussions took place in regard to certain of the engineering features, and the result was that Order No. 74, embodying the standard regulations regarding pipe crossings under railways, was finally approved by order of the Board dated April 19, 1911.

In general, the practice prior to 1908 had been that the order made was based upon an agreement entered into between the railway company and the municipality. See, in this connection, *Application of the City of Calgary to lay water pipes and sewer pipes under the tracks of the C.P.R. Evid., vol. 50, p. 5031*, more particularly the statement made by the late Chief Commissioner Killam, at pp. 5033-5034. The hearing in question was held at Calgary on July 26, 1907.

As pointed out by Commissioner Boyce in his judgment, a matter analogous to what is involved in the present application arose in the *Brampton* case. This case, so far as the records of the Board shew, was the first case in which the question was raised before the Board.

In applying to carry sewer pipes under the tracks of the Canadian Pacific Railway and the Grand Trunk, the Solicitor for the Town of Brampton, in dealing with the applications against the Grand Trunk, stated:—

"2. That by reason of the fact that the company's railway crosses Queen Street in the said town, it is necessary to have the question of the rights of the parties ascertained by the Board, as the railway company refuses to consent to an amicable arrangement thereof. . . . ."

"5. . . . . That the Corporation of the town of Brampton herein applies for an Order as to how, where, when, by whom, and upon what terms and conditions the said sewer pipes shall be laid, constructed and maintained, having due regard to all proper interests, and requesting that the same may be disposed of with all convenient speed."

The Grand Trunk Railway submitted a draft order in accordance with its usual form. The draft order, para. 2

thereof, provided that all work in connection with the laying, maintaining, renewing and repairing of the said work, and the continued supervision of the same were to be performed by, and that all costs and expenses thereby incurred were to be borne and paid by the applicants; that is, the municipality.

In the answer of the solicitor for the town, dated Sept. 19, 1907, in criticising the position taken by the railway, the following words were used:—

" . . . . It seems to me that the Order proposed is a very one-sided one. It would seem to me to be drafted on the assumption that the railway owns the street, whereas, I presume, the fact is that the corporation, or the public owns the street, and that every person has an equal right to it."

In the sitting at Calgary, already referred to, Mr. Bennett, who appeared for the C.P.R., further stated that the company had a standard agreement which prevailed all over the system. The Chief Commissioner, in commenting on this, said: "Something of that kind should be done when it is under the company's right of way. When it is a highway, over which you have the right to cross, it is different."

In the *Brampton* case, notwithstanding the position taken by the town, as already set out, in regard to its rights as affected by the matter of seniority, an order issued in accordance with the draft as submitted by the Grand Trunk. Thereafter, a hearing was asked for by the town.

In the draft form which the municipality submitted, exception was not taken to the cost being upon the applicants, but it was desired that a clause should be inserted providing that the assessment of cost upon the applicant municipality should be subject to the provisions of the Municipal Act respecting local improvements.

In the argument presented at the hearing in Toronto on November 16, 1907, Mr. Blain, who appeared for the Town of Brampton, said, *inter alia*, *Evid. Vol. 53, p. 6844*, "Then the next question as to the cost. We submit that the statute provides that we shall not be put to any cost in using what we have as much right to use as the company has." Then he referred to the superintendence in connection with putting in the work, and criticised the position taken by the railway in asking that the municipality should pay the cost of superintendence. The following discussion, however, took place on this point at the same page:—

"Hon. Mr. Killam: Why should they be put to unnecessary expense for looking after their track where you put through

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a sewer? Is it not reasonable to require you to look after that?

Mr. Blain: That is not unreasonable. I would not press that."

The material portion of the judgment, rendered by the late Chief Commissioner Killam which seems pertinent in the present application has already been quoted by Commissioner Boyce, *ante* p. 604.

When the proceedings were initiated in 1908, as already referred to, in connection with the standard form of order, the Board's attention was specifically directed to the form of the orders which had been used by the railways, as well as to the form of order which issued in the *Brampton* case after rendering of judgment, as above referred to.

When the drafting of the rules was under consideration, and a point was raised as to whether the municipality should be responsible for the cost of an inspector for the railway company where a main was being laid under railway tracks upon the street, the latter being senior to the railway, the late Chief Commissioner Mabee, on November 18, 1908, ruled that the municipality should not be so subject; and he continued that different considerations arise where a private corporation applies to lay a main under the tracks upon a street, or where either the latter or municipal corporation applies to lay a main under tracks where the railway company owns the right of way.

Substantially the same point arose in connection with a claim made by the Canadian National Railway against the City of Belleville for the wages of a watchman watching the track while water pipes and sewer pipes were being installed under the tracks of the railway in question. The ruling in question, which was dated March 24, 1920, will be found on *Board's File No. 9473.21, Board's Orders and Judgments, April 15, 1920, Vol. 10, No. 2, p. 31*, and it was held that since the work was being carried out on the highway which was senior to the railway, that notwithstanding that the expense of the watchman was in the public interest in connection with the work, at the same time the city, in carrying on this work and in exercising the right attaching to its ownership of the highway, should not be subjected to the expense of the watchman, but that the said expense should be borne by the railway company, whose right is junior.

It would appear then, that in the steps leading up to the regulations of the Board as now embodied in General

Orders 74 and 75 which, insofar as obligation in regard to cost is concerned, set out the Board's construction of sec. 269 of the present Act (which was sec. 250 of the antecedent Act), that the Board has had before it the contention as to the incidents of cost attaching to municipal senioriy. That with this clearly presented before it in the *Brampton* case, the only modification was by way of safeguarding the rights of the municipality in respect of any right of assessment under the provisions of the Municipal Act.

It appears further, that when the whole question was being gone into in the light of the antecedent practice of the Board, a modification was made in regard to inspection. Subject to this, the burden of expense, under the orders in question, is on the municipality.

The *Brampton* case was the only one in which, prior to 1908, the question of the incidents of cost attaching to municipal seniority was raised. Owing to the amendment made to sec. 250 of the former Railway Act, made by sub-sec. 3, which amendment is continued in sub-sec. 3 of sec. 269 of the present Act, there have been very few cases in which the matter of sewer pipe crossings have come before the Board for formal orders. Judging from the records the practice of the municipalities, in applications falling under Orders 74 and 75, has been to accept the burden of cost as one attaching to the Municipality.

On September 17, 1913, an application was launched, by the City of Hamilton for an order authorising the construction of a 20-inch water main under the tracks of the T. H. & B. Ry., at Main Street West. Main Street is senior at this point. See the Board's judgment, February 17, 1920, in the *Application of the Toronto, Hamilton & Buffalo Railway Company for an Order authorising the company to reconstruct overhead bridge at Main Street, Hamilton, Ontario. Board's Orders and Judgments, Vol. 9, No. 24, p. 437.*

The street is carried across the tracks of the railway by a bridge, and there is nothing on file to shew whether it was contended by the railway that the rights of seniority of the municipality attached only to the substituted highway afforded by the bridge, and were extinguished insofar as a crossing on the level under the tracks of the railway was concerned.

With the application made by the ctiy for an order there had been filed a draft order, initialled by the parties, pro-

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viding that the work was to be done in accordance with the provisions of General Orders 13494 and 13731 (these are now General Orders 74 and 75). In view of the amendment which had been made to sec. 250 of the Railway Act, no order was necessary.

The location of para. 5 in the Standard Regulations regarding pipe crossings approved by General Order 74, might suggest that the provisions as to cost being on the municipality related only to pipes for oil and natural gas, because paragraphs 4 and 5 are under the heading "Pipes for Oil and Natural Gas." However, it is clear from the record leading up to the issuance of the order that this descriptive heading, "Pipes for Oil and Natural Gas" simply applies to para. 4. The descriptive heading is not to be found in the draft form of order formally approved by the Board.

The wording of para. five, subject to the provisions of para. seven regarding the wages of the inspector, applies generally in respect of the incidents of cost to the municipality in connection with the various matters of pipe crossings under the order, and it explicitly places the cost of construction and maintenance upon the applicant. Were there ambiguity in phrasing the Board would be justified, I think, in construing the order strictly against the railway, but there is no ambiguity.

I agree in the judgment of Commissioner Boyce.

MR. COMMISSIONER LAWRENCE concurred.

JUSTIN alias ROBERTSON v. COMMISSION DES LIQUEURS DE QUEBEC.

Quebec Superior Court, Duclos, J. May 29, 1922.

INTOXICATING LIQUORS (§III I—91)—REVIEW OF FACTS ON APPEAL—"OWNER."

Under the Quebec liquor laws, a Judge of the Superior Court, sitting in appeal from convictions thereunder, has the power to examine witnesses and decide upon the merits as if upon a trial *de novo*, in order to establish the status of "owner of the premises" chargeable with the violations.

APPEAL from a conviction under the Quebec liquor laws. Affirmed.

L. Cousineau, for appellant; *J. N. Beauchamp*, for respondent.

DUCLOS, J.:—In this case, the plaintiff-appellant was accused of having, on November 19 and 26, 1921, illegally sold alcoholic liquor contrary to the statute in such case provided, and was found guilty of both said offences and condemned to three months imprisonment in the common jail

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of the District of Hull, for each offence, the sentences to run concurrently. She was also condemned to pay the costs and in default of payment, to a further imprisonment of three additional months.

The evidence in this case fully and completely sustains the complaint and conviction.

On the hearing of this appeal, an interesting question arose, which it might be advisable to dispose of. The accused was convicted in great part upon the evidence of one John Perreault, then serving sentence for a certain infraction to the Quebec Liquor Act 1921 (Que.), ch. 24. Upon a prosecution and complaint against himself, the said Perreault had sworn that he was merely a tenant of the premises in question on this appeal and, at the time of the alleged infraction, had sub-let the same to one Desjardins. An application was made in this case to re-examine the said Perreault. Objection was made to this re-examination on the ground that the evidence of this witness had already been taken down in writing.

The Alcoholic Liquor Act, 1921 (Que.), ch. 24, sec. 131, provides in certain cases for an appeal to a Judge of the Superior Court from any judgment rendered in any prosecution or action instituted under this Act; and sub-sec. 7 of sec. 131, provides that "a Judge of the Superior Court before whom the appeal is taken must hear the witness upon the questions of fact, if the evidence of such witnesses has not already been taken in writing, in accordance with sec. 100 of this Act. He must decide the question of the merits."

This provision shews that this is not an appeal strictly speaking, but in reality a new trial, and that the Judge in appeal who must hear the witnesses upon the questions of fact and decide the question on its merits, should allow either party to make such further evidence as they deem advisable.

In consequence, the evidence of Perreault was allowed and he frankly admitted that the evidence given by him in the case against himself was false, untrue, and that the pretended lease to himself and sub-lease to Desjardins were simulated; that the accused in this case was the real owner and occupant of the premises in question.

The appeal is therefore dismissed and the deposit made by the appellant is hereby declared confiscated and forfeited in favour of the Quebec Liquor Commission.

Appeal dismissed.

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McCRINDLE v. LONDON SCOTTISH CANADIAN INVESTMENT SYNDICATE.

Alberta Supreme Court, Appellate Division, Stuart, Beck and Clarke, JJ.A. November 24, 1922.

PRINCIPAL AND AGENT (§IIC—20)—COMPANY'S AGENT—MONEY IN TRUST FOR PARTICULAR INVESTMENT—BREACH OF TRUST—BENEFIT OF COMPANY—LIABILITY OF COMPANY.

A company whose agent holds money in trust for a particular investment in breach of such trust pays the money to the company to be applied on an unauthorised investment, and in so doing acts for the benefit of the company and not for his own benefit, is liable for such wrongful act of its agent, and for the return of the money so improperly used, to the investor.

APPEAL by defendant company from the trial judgment, in favour of the plaintiff for $5,000 and interest and costs. Affirmed.

The facts of the case are fully set out in the judgments following.

A. McL. Sinclair, K.C. and *A. H. Goodall*, for appellant.

H. P. O. Savary, K.C., for respondent.

STUART, J.A., concurs with BECK, J.A.

BECK, J.A.:—This is an appeal by the defendant company from the judgment of Harvey, C.J., at the trial, directing judgment to be entered for the plaintiff for $5,000 with interest and costs.

The defendant company's head office is in Glasgow, Scotland. For some time it carried on a loan and investment business in Alberta through an office in Calgary of which one Alexander Robertson was the manager, and there was a local Advisory Board consisting of Robertson and A. H. Goodall. It had no other official in Canada, and as stated by Goodall, who was examined for discovery as the selected or appointed officer of the defendant company for the purpose of examination, "the whole thing was run from Canada," meaning the Alberta office.

By an agreement bearing date March 10, 1913, one John Steinbrecher contracted to sell to one Marie Collyns certain subdivided property in or near the city of Calgary, for the sum of $16,000 and received a down payment of $3,000. The remainder of the purchase price was payable $4,000 on September 10, 1913, $4,000 on March 10, 1914, and $5,000 on September 10, 1914, with interest at 8% per annum. On September 10, 1913, Robertson and Goodall, on behalf of the defendant company, purchased for the sum of $7,000 the balance remaining unpaid by Marie Collyns under this agreement, which according to the evidence of Goodall, amounted at that time to about $7,500. Instead of taking an assignment of the moneys to the company, Goodall and

Robertson took the assignment in their own names "as trustees," the reason for this being that it was anticipated that titles to lots in the subdivision would be required from time to time, and by holding title in their own names they could give transfers without having to send them to Scotland for execution under the seal of the company.

The plaintiff, who came to Calgary from Scotland sometime in the year 1913, met Robertson in Calgary and subsequently made a number of investments on Robertson's recommendation. The last investment, preceding the transaction in question in this action, was a short term loan of $5,000 to the Rocky Mountain Cement Co., the funds for which were transmitted by the plaintiff to Robertson from Scotland as the result of cables which passed between them early in May, 1914. Robertson submitted the proposal for the loan, stating amount, rate of interest, name of borrower, &c. The plaintiff cabled the money.

This loan matured on August 1, 1914, at which time the plaintiff was in Vancouver. Robertson was looking after the collection of the money for the plaintiff, and had, the plaintiff asserts, specific instructions as to the disposition of it. The exact terms of these instructions, so far as they may have been in writing, were not shewn because the plaintiff was unable to produce the telegrams which passed between himself and Robertson. The nature of them, however, seems to be evident from the plaintiff's letter of August 3 to the manager of the Bank of British North America at Calgary. The letter is as follows:—

"A check for approximately five thousand dollars should be paid into my account to-day. Mr. Alec. Robertson who will pay in the check has my permission to hold the money in your bank, but, unless he request you to hold the money, kindly return it at once to the North of Scotland Town and County Bank, Ayr, Scotland, from where it is borrowed. The high rate of interest demanded there necessitates returning it, unless Mr. Robertson can place the money. I enclose check for $5,000, also pass book. Kindly deduct expenses of sending the draft to Scotland from my account and return the pass book made up."

The plaintiff says that he had two accounts in Calgary, one in the Bank of British North America in his own name, and one in the Royal Bank in Robertson's name in trust; that whenever Robertson had as much as $500 in the trust account in the Royal Bank he was to transfer it to the plaintiff's account in the Bank of British North America,

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over which Robertson had no control of any kind. The meaning of the letter to the Bank of B.N.A., therefore, was that Robertson was to pay the $5,000 into the plaintiff's account, but that the bank was to hold the deposit—not transmit it to Scotland—if Robertson so requested, as negotiations were pending between the plaintiff and Robertson for the investment of the $5,000.

During this time the plaintiff was in Vancouver. He heard from Robertson by telegram about August 4 that the money had been paid by the Rocky Mountain Cement Co. He was in Calgary for a few hours about September 14, and had an interview with Robertson, who told him that he proposed to lend the $5,000 to one McDermid and four associates, a banker, a lawyer and two ranchers, on a mortgage on real estate; but the papers were not yet completed and he was to send full information to the plaintiff in Scotland, whither he was *en route*. The plaintiff distinctly says that no other disposition of the money than the loan to McDermid and his associates was discussed or mentioned. The plaintiff remained in Scotland about a month and served in the British Army from November, 1914, till he was discharged on May 1, 1919, having had only three weeks leave and that in 1916.

On August 14, 1914, Robertson wrote the plaintiff. Under the heading "Rocky Mountain Loan," he says the above company had paid $5,000 and that he hoped to obtain the small balance in a day or two; going on to say:—

"I am sorry if you had any use for the $5,000, as I had promised to place the money for you at 10% and if I had a like sum I would have sent the money on to you, but unfortunately I had no company (defendant company) money to take up the loan and the borrower (McDermid and associates) was inclined to cut up rough, hence the reason why I telegraphed you. The loan has not yet been closed as the title has not been found by Bernard & Goodall."

The plaintiff having in November or December, 1916, received from Robertson a report indicating that a loan had been made to "Marie Collyns" but none to McDermid, placed the matter in the hands of Lougheed & Bennett and instructed them "to look into it." This was the first time he had heard of the transaction.

He returned to Calgary in September, 1919, and then received from Lougheed & Bennett:—agreement Steinbrecker to Collyns; an assignment from Steinbrecker to Robertson & Goodall and a declaration of trust from Robertson & Goodall to himself.

The action was commenced on December 2, 1921. There is no evidence of what was done by Lougheed & Bennett beyond the fact that they received delivery of the above mentioned documents or of what was done by the plaintiff after his arrival in Calgary in September, 1919.

Though the defence alleges generally ratification no mention is made of delay. Estoppel is not pleaded. The two things are distinct. I think in any case that mere delay would not prejudice the plaintiff and that the burden of proving estoppel from delay and other circumstances—and I think none appears—would be upon the defendant, and in view of pleadings and of the examination and cross-examination of the plaintiff I think it is proper to presume some explanation of the delay owing, perhaps, to absence of the plaintiff from Calgary or negotiations for settlement.

On these facts what strikes me as the proper aspect of the case is this:

Robertson, who held $5,000 belonging to the plaintiff, held it as a trustee for the plaintiff. Robertson paid it to the defendant company in breach of his trust. Stopping here, the plaintiff, *prima facie* has a right to demand that the defendant company give him back his money. What answer—what defence can the company set up? The company answers in effect that it was agreed between the plaintiff and the company that in consideration of the payment by the plaintiff of the $5,000 the company would assign to the plaintiff a $5,000 interest in the Steinbrecker-Collyns agreement and that the agreement was fulfilled. The plaintiff in effect replies: Not so. Personally, I certainly did not agree to anything of the kind. Robertson had no authority whatever to make any such agreement or to pay the money to the company. In doing so he committed deliberately a breach of trust for which probably he would be liable to conviction under Cr. Code, R.S.C. 1906, ch. 146, secs. 355, 357, 390. Then this being the condition of things the company in making the alleged agreement was represented wholly and solely by Robertson, who therein was acting, so far as the company was concerned, not for his own benefit but for the benefit of the company, that is to say, the case is quite different from the case of an agent of a company deceiving the company for his own benefit and of the knowledge of the agent in the circumstances being held or not held to be imputed to the company.

In my opinion the principle properly applicable is that stated by Lord Selborne in *Houldsworth* v. *City of Glasgow*

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Bank (1880), 5 App. Cas. 317, at pp. 326-328, as follows:—

"The principle . . . . . was thus stated by Mr. Justice Willes [in *Barwick* v. *English Joint Stock Banking* (1867), L.R. 2 Ex. 259]. 'The master is liable for every such wrong of his servant or agent as is committed in the course of his service, and *for the master's benefit* because, although the master may not have authorised the particular act, he has put the agent in his place to do that class of acts, and he must be answerable for the manner in which that agent has conducted himself in doing the business which it was the act of the master to place him in.' . . . . It is a principle not of the law of torts, or of fraud or deceit, but of the law of agency, *equally applicable whether the agency is for a corporation* (in a matter within the scope of the corporate powers) or for an individual; and the decisions in all these cases proceeded, not on the ground of any imputation of vicarious fraud to the principal, but because (as it was well put by Mr. Justice Willes in *Barwick's* case, 'with respect to the question whether a principal is answerable for the act of his agent, in the course of his master's business, no sensible distinction can be drawn between the case of fraud and the case of any other wrong.' . . . The real doctrine which, Lord Cranworth, in *Addie's* case [*Western Bank of Scotland* v. *Addie*] (1867) L.R. 1 H.L. Sc. 145, meant (as I understand him) to affirm was one of substance and not of form: 'An attentive consideration' (he said) 'of the cases has convinced me that the true principle is that these corporate bodies, through whose agents so large a portion of the business of the country is now carried on, may be made responsible for the frauds of those agents to the extent to which the companies have profited by those frauds.'"

See also Bowstead on Agency, 6th. ed., p. 329, art. 98, and notes: Lindley on Companies, 6th ed., pp. 251-2; Buckley's Companies Acts, 9th ed., p. 89.

This view excludes the application of all the cases cited on the question of the company having or not having *notice* through Robertson as its managing director of the breach of trust for the reason that he was not dealing for the benefit of himself with the company as independent of himself.

On the foregoing view of the facts and the law the necessary conclusion is that the judgment of the trial Judge is right and consequently I would dismiss the appeal with costs.

CLARKE, J.A.:—This is an appeal by the defendant from the judgment of Harvey, C.J., awarding the plaintiff $5,000,

and interest.

The defendant is a body corporate having its head office at Glasgow, Scotland, and for some time prior to 1913 had an office in Calgary for Canadian business. The active manager of the company was Alexander Robertson, who had come from Scotland and he and A. H. Goodall, barrister, of Calgary, composed the company's advisory board in Canada.

The plaintiff, who resided in Scotland, first came into contact with Robertson in 1913, while the plaintiff was temporarily in Canada, and in that year and 1914 the plaintiff made some investments, principally loans on real estate security, with the assistance and upon the advice of Robertson, not as manager of the company, but in his private capacity as a financial agent, the amount of the loan and the nature of the security in every case being submitted to the plaintiff personally or by correspondence, for his approval.

The plaintiff returned to Scotland after his visit in 1913 and remained there until May, 1914, when he again came to Canada, arriving at Calgary about the end of the month or the first of June, where he remained about 10 days and then went to Vancouver, where he remained until the following September.

Early in May, 1914, before the plaintiff left for Canada, a loan was arranged by cable between the plaintiff and Robertson of $5,000 to the Rocky Mountain Cement Co., repayable August 1, 1914, which amount the plaintiff cabled to Robertson, who completed the loan. In August, 1914, while the plaintiff was in Vancouver, some telegrams passed between the plaintiff and Robertson about the re-investment of this money. These were not available at the trial and upon objection being taken on behalf of the defendant to secondary evidence of their contents such evidence was rejected. It appears, however, that on August 3, 1914, the plaintiff wrote to his banker at Calgary, as follows:—

See judgment of Beck, J.A., *ante* p. 613.]

There is a further letter from the plaintiff to the same bank, dated August 11, 1914, as follows:—

"With further reference to my letter of the 3rd instant, I have heard from Mr. Robertson that he has placed the money so it will not come into your hands at present. . . . ."

On August 14, 1914, Robertson wrote to the plaintiff, who was still at Vancouver, reporting on different loans under their respective headings. The following is an extract:—

See judgment of Beck, J.A., *ante* p. 614.]

The plaintiff spent a few hours in Calgary about Septem-

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ber 14, 1914, on his journey to Scotland and had an interview with Robertson, as shewn by the following extracts from his evidence:—

"Q: Did you have any conversation with him about the $5,000 collected from the Rocky Mountain Cement Co.? A: Yes. Q: What was the conversation? A: He talked a lot, but all he told me was that the money was to be placed with McDermid, who was well connected. Q: What was the conversation between you and Mr. Robertson on that occasion with regard to this money now in question? A: Merely he was going to place it with a man known as McDermid and mentioned some associates of his. Q: What associates did he mention? A: I forget their names, their professions. Q: What professions did he mention? A: Two ranchers, a lawyer and a banker. Q: Did he give you their names at the time? A: It is my recollection that he gave me the names of two of them. Q: Was the loan completed at that time, what information did Mr. Robertson give you, if any, as to whether the investment had been made or not? A: He told me that the loan was not completed, the papers were not completed.

Q. By the Court: What kind of a loan was it to be? A: Secured in real estate.

Q. Mr. Savary: Did he give you any reason why it was not completed? A: He said the papers were not. Q: Give us all the conversation as far as you can remember? A: The loan had not been completed, the papers were not in order and the associates of McDermid were a banker, two ranchers and a lawyer, and that is all the conversation I got.

Q. By the Court: What did you tell him about it? A: When you put that question to me I realise there was another part of the conversation. He was going to send the whole information on the next mail but he could not possibly give me full particulars. Q: He was going to send this information by mail to you to Scotland? A: That was his promise.

Q. Mr. Savary: Now up to that time would you be good enough to tell me whether any other investment of this money was discussed between yourself and Mr. Robertson? A: No."

The plaintiff on his return remained about a month in Scotland and then joined the British forces and served during the entire period of the war, receiving his discharge May 1, 1919, his only leave being for 3 weeks in the latter

part of 1916. This leave was spent in Scotland and while there he received a letter from Robertson of November 18, 1916, which is the first information there is any evidence of his receiving after he left Canada in September, 1914. This letter refers to a report which he had sent to the plaintiff's mother the previous week, and in referring to the different investments, he says:—

"With regard to No. 6 (Collyns), as mentioned in my report, it is very unsatisfactory, and on Bernard, Bernard & Goodall's recommendation I was induced to take an interest with Goodall to the extent of a half interest in $2,500. Your interest is $5,000. I had the security valued by Nowers, and I don't see how we can improve matters in the meantime by starting proceedings. I had to pay arrears of taxes on the property and you will notice in the statement your proportion is $176."

The report referred to in the foregoing letter contains the following clause:—

"VI—Marie Collyns—$5,000. This investment has also turned out very bad. The property was valued by E. B. Nowers at $13,500 and in addition to the amount advanced by you, Goodall and myself, have also invested with you in the property. Collyns shortly after the loan went to California for her health and she has not yet returned to Calgary. Goodall and I thought it would not serve any purpose to start proceedings until after the war, as we couldn't do anything with the property until then. I had to pay taxes amounting to $134.35."

The plaintiff says he had never heard anything of a loan to Marie Collyns before the receipt of this letter and report and when asked:—"Q: What did you know about that investment?" He answered: "I could not make head or tail of it." and stated that he instructed his solicitors in Scotland to look into it, who in turn instructed their correspondents in Calgary, Lougheed & Bennett.

The evidence of what occurred after this is very scanty. There is no report by either firm of solicitors and no evidence of any action by either firm, other than the plaintiff's statement that he first learned that $5,000 had been paid to the defendant between 1916 and his arrival back in Canada about September, 1919, when he received from Lougheed & Bennett the documents presently referred to, nor is there any evidence of any action on the part of the plaintiff of his conduct towards the transaction until the commencement of this action on December 2, 1921, other than a casual

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reference by Mr. Goodall to the time when McCrindle first made his claim.

Having referred to the plaintiff's version I shall now turn to the dealings with the plaintiff's money by Robertson, which are complained of in this action.

By agreement in writing dated March 10, 1913, one John Steinbrecker agreed to sell to Marie Collyns a parcel of land subdivided into lots in the outskirts of Calgary, said to contain about 11 acres, for $16,000, payable $3,000 cash; $4,000 September 10, 1913; $4,000 March 10, 1914, and $5,000 September 10, 1914, with 8% interest. It was provided that title would be issued for any lot or lots upon payment of prorated balance of money payable thereon.

This agreement, so far as it affected lots not already transferred to purchasers, was assigned to Robertson & Goodall as trustees by instrument dated September 10, 1913. The consideration was $7,000, but about $7,500 of the purchase money was still payable.

The consideration was paid by the company, on whose behalf the assignment was taken, to the said trustees so as to facilitate transfers being made to purchasers of lots without the delay of sending the transfers abroad for execution by the proper executing officers of the company. Accompanying these documents when handed to the plaintiff by Lougheed & Bennett was a declaration of trust, dated August 31st, 1914, in favour of the plaintiff, executed by the said trustees of the said agreement of sale to the extent of $5,000 and interest from August 31, 1914, and in favour of the company for the balance due and owing under the agreement. The document recites that the plaintiff on August 3, 1914, paid to the company $5,000 for an interest in the agreement.

This declaration was prepared and executed by Mr. Goodall about the time he left Calgary for service in the war overseas in November, 1915, and dated back. I think it should be stated that Mr. Goodall acted in perfect good faith and nothing improper can be imputed to him. He was not beneficially interested in the Collyns agreement as stated by Robertson in his letter to the plaintiff of November 18, 1916, and had no knowledge of Robertson's lack of authority to invest the plaintiffs money upon this security. He says that the Collyns agreement was in arrear and the investment was not as good as when the company went into it and the Glasgow Board of Directors were getting impatient with investments in arrears and as a member of the advi-

sory board he told Robertson he would authorise a sale of this or a number of other investments of the company. He was not aware of the sale of any investment of the company except the one in question in this action. His recollection was that before the entry in the company's books Robertson had mentioned to him that he was going to discuss McCrindle taking an interest in the agreement. Some time afterwards, in looking over the journal pages, he found an entry of this $5,000 as of August 31, 1914, and on enquiry of Robertson the latter said "Oh, McCrindle has taken an interest in the Marie Collyns agreement." This conversation might have been in September or October.

Melvin, the valuer, who gave evidence at the trial, stated that in August, 1914, he would have valued the property at $200 an acre, total $2,200. Real estate was dead and outside lots were not marketable. That condition had existed since the summer of 1913 and had never revived. At the time of the trial (June, 1922) his valuation would be $40 an acre. He would not take it in a present.

Robertson did not give evidence at the trial and it does not appear what had become of him. The company apparently had discontinued the Calgary agency but it does not appear when. Mr. Goodall says that on his return from the war there were a few old letters and documents not relating to this action that were found in the office of a person, which office Robertson shared. The complete Canadian file could not be found nor anything in connection with the report of the investment to the company or anything down to the time that McCrindle first made his claim.

Upon the foregoing state of facts the plaintiff sued for the recovery of his money, which the defendant resists on three grounds, namely:—1. That there was no evidence upon which the Court can decide on what terms the money was entrusted to Robertson and that consequently the plaintiff failed to establish a breach of trust.

I think this objection is sufficiently answered by the positive evidence of the plaintiff that he never authorised the investment of any of his money in securities represented by the documents I have referred to, and the conduct of Robertson and his letters and reports confirm this view. I think the trust was fully shewn without the production of the telegrams of August, 1914, secondary evidence of which was objected to by the defendant. If there was anything in them to authorise the investment in question it was, I think, for the defendant to shew it.

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2. That the company had no notice of the breach of trust by Robertson, his knowledge, not affecting the company, on the principle that where the agent is guilty of fraud his knowledge is not notice to his principal and the defendant relies amongst other authorities upon *Thomson* v. *Clydesdale Bank*, [1893] A.C. 282; *Cave* v. *Cave* (1880), 15 Ch.D. 639; *Re European Bank* (1870), L.R. 5 Ch. 358; *London County & Banking Co.* v. *London & River Plate Bank* (1888), 21 Q.B.D. 535, 57 L.J. (Q.B.) 601; *Fenwick Stobart & Co.; Deep Sea Fishery Co.'s Claim*, [1902] 1 Ch. 507, 71 L.J. (Ch.) 321; *Rural Municipality of Mount Hope* v. *Findlay* (1921), 66 D.L.R. 660, 15 S.L.R. 40.

I am inclined to think that the case at Bar is distinguishable from the cases cited by the fact that here the breach of trust was committed by Robertson, not for his own benefit but on behalf of and for the benefit of his principal—the company.

The fraud was not upon the company but upon his other principal, the plaintiff; and the reason given by the authorities for not imputing the agent's knowledge to the principal may be turned in favour of the plaintiff.

In *Espin* v. *Pemberton* (1859), 3 De G. & J. 547, 44 E.R. 1380, the Lord Chancellor, in referring to *Kennedy* v. *Green* (1834), 3 My. & K. 699, is reported as saying, at p. 555:—

"I would rather say that the commission of the fraud broke off the relation of principal and agent, or was beyond the scope of the authority, and therefore it prevented the possibility of imputing the knowledge of the agent to his principal."

Here, as the fraud was upon the plaintiff instead of the defendant, the commission of it broke off the relation of agent for the plaintiff or it was beyond the scope of the agent's authority. So that we have a fraud committed by Robertson acting on behalf of and for the benefit of the company and within the scope of his employment upon the plaintiff. It seems to me under such circumstances the company should be held liable for the wrongs of its agent.

But the ground I prefer to base my judgment on is that the defendant obtained the plaintiff's money and holds it without consideration and in that view of it the question of the company's knowledge of the fraud is immaterial. *Banque Belge pour l'Etranger* v. *Hambrouck*, [1921] 1 K.B. 321.

The only answer can be that the company transferred an interest in the Collyns agreement as consideration, but that

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was never accepted nor assented to by the plaintiff nor anyone authorised on his behalf and, therefore, it falls. The company retains the security, the money is the plaintiff's.

3. The plaintiff ratified his agent's acts.

It is in connection with this defence that the evidence is rather scanty. I find no act of ratification and if it exists it must be found in the plaintiff's silence when he learned of the unauthorised investment of his money. But we do not know whether he was silent or not or what occurred prior to the action. For all that appears he may have repudiated promptly by himself or his solicitors. Certainly Goodall speaks of his having made a claim. I judge both parties knew the facts in this connection and neither thought it important to disclose them at the trial. The statement of defence alleges that the plaintiff ratified the payment to the defendant. This is probably sufficient as a pleading to include ratification by silence, but one would expect if it were so intended some evidence would be offered or in some way the question would made prominent at the trial. I find nothing to suggest that the plaintiff's silence would be used against him.

In *Prince* v. *Clark* (1823), 1 B. & C. 186, 107 E.R. 70, relied upon by the defendant, all the facts relied upon were clearly proved and the jury found that notice rejecting the agent's act was not given within a reasonable time, which the Court sustained, but here the defendant alleges the ratification but does not prove that no objection was made after knowledge of the facts, or that the plaintiff did not at once repudiate, and I would hold that the company has not discharged the burden of such proof. There is no suggestion that the defendant has been in any way prejudiced by any delay.

On all grounds I would dismiss the appeal with costs.

Appeal dismissed.

CARON v. LA COMMISSION DES LIQUEURS DE QUEBEC.

Quebec Superior Court, Duclos, J. May 29, 1922.

INTOXICATING LIQUORS (III I—91)—OFFENCES—EVIDENCE OF BLACKMAILERS.

A conviction for violations of the liquor laws cannot be made upon evidence of blackmailers.

APPEAL from a conviction for violation of the Quebec liquor laws. Reversed.

L. Cousineau, for appellant.

J. N. Beauchamp, for respondent.

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DUCLOS, J.:—The defendant-appellant was accused of having, on July 22, 1921, sold alcoholic liquor contrary to the statute in that case provided. He was found guilty and fined to one month imprisonment and costs, on the evidence of four witnesses Martin Lanigan, his brother Willie Lanigan, Albert Séguin, and his brother Napoleon Séguin. These four informers were not and are not in the employ of the Quebec Liquor Commission.

In the hope of gain, they banded themselves together to make cases against unsuspecting victims. After the pretended sale to them by the appellant of one bottle of "whisky blanc," they advised him that they were going to lay a complaint. Subsequently they accepted from the appellant a sum of $25 promising not to lay a complaint, and alleging that the bottle of whisky had been broken and could not be used in evidence. This sum did not satisfy their greed and the complaint was nevertheless laid.

The same procedure was adopted in the case of one Adolphe Nault, (Nault was convicted but, in appeal, the conviction was quashed for the same reasons as in the present appeal) who gave them $100 to drop the complaint. This again was deemed insufficient and the complaint was laid against him.

They tried the same on one Boutin, but he was more generous and gave them $200 to drop the complaint. This was deemed apparently sufficient and no complaint was laid against him.

It is urged by the prosecution that the very fact that the appellant gave them $25 to stop the prosecution is, in itself, an acknowledgment of guilt. That may be so. On the other hand, the accused being entirely innocent, but finding himself alone against four crooks, whose false evidence might convict him, concluded that discretion should be a better part of valour.

The Quebec Liquor Commission is doing good work in the Province and, if possible, should be sustained in every way. It must necessarily employ parties of doubtful character to make cases, but, upon the evidence of these self constituted detectives, blackmailers and liars, I would not hang a cat.

The appeal is maintained and the conviction is quashed.

Appeal allowed.

PROULX v. LA COMMISSION DES LIQUEURS DE QUEBEC.

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App. Div.

Quebec Superior Court, Duclos, J. May 29, 1922.

INTOXICATING LIQUORS (§IIII—91)—OFFENCES—EVIDENCE OF BRIBED INFORMER—CORROBORATION.

A conviction for violations of the liquor laws will not be made upon the evidence of a bribed informer; but if corroborated by other evidence the conviction will be sustained.

APPEAL from a conviction under the Quebec liquor laws. Affirmed

L. Cousineau, for appellant.

J. N. Beauchamp, for respondent.

DUCLOS, J.:—This case is somewhat analogous to the case of Caron and the two Naults, *ante* p. 623, in which the appeals were maintained, but two very material distinctions can be made in this case. The case for the prosecution rests upon the evidence of two witnesses Amherst McDonald and Léo Lamoureux. On the day of the trial, McDonald accepted a bribe of $40 from the defendant to leave the town and, owing to his absence, the case was continued. A warrant was issued for his appearance and placed in the hands of detectives who found him after weeks' delay. His testimony was given under compulsion. This fact distinguished this case from the *Caron* case, because in the latter the informer accepted a bribe before laying the information and after having promised not to do so.

If the case rested upon the evidence of McDonald alone, I would hesitate to maintain the conviction, but his evidence is corroborated by that of Léo Lamoureux, against whom, as far as the evidence is concerned, there is nothing to make one doubt his testimony. Moreover, the house kept by the defendart is of very doubtful character making it more than probable that the offence was committed.

I find the evidence sufficient to maintain the conviction and, in consequence, the appeal is dismissed and the deposit of $300 made by the appellant is hereby declared confiscated and forfeited in favour of the Quebec Liquor Commission.

Appeal dismissed.

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Alberta Supreme Court, Appellate Division, Stuart, Beck and Hyndman, JJ.A. November 24, 1922.

INTOXICATING LIQUORS (§IIIH—90)—UNLAWFUL POSSESSION OF SPIRITS—SUMMARY CONVICTION—JURISDICTION OF POLICE MAGISTRATE—PENALTY OR FORFEITURE NOT EXCEEDING $2,000—INLAND REVENUE ACT, R.S.C. 1906, CH. 51 AND AMENDMENTS, 1920 (CAN.), CH. 52, SEC. 6—1921 (CAN.), CH. 26, SEC. 12.

A proceeding for judicial condemnation of spirits unlawfully

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held in possession contrary to the Inland Revenue Act, R.S.C. 1906, ch. 51, and amendments, is a proceeding *in rem* which is separate and distinct from a prosecution for the pecuniary penalty for the offence of having the spirits in possession unlawfully.

Where a charge of the latter offence only is before a police Magistrate exercising jurisdiction under secs. 132 and 185 of the Act, as amended by 1920 (Can.), ch. 52, and 1921 (Can.), ch. 26, the maximum penalty which he may impose in that proceeding is $500 and this is within his jurisdiction in summary conviction proceedings authorised by the amending Act of 1921 (Can.), ch. 26, sec. 12, without regard to the question whether the statutory forfeiture of the spirits and of the vehicles and appliances used for the purpose of removing the same would involve a total penalty or forfeiture exceeding $2,000 upon which the Magistrate would have no jurisdiction to adjudicate under amended sec. 132, 1921 (Can.), ch. 26, sec. 12 .

APPEAL by the Crown from an order of Ives, J., quashing a summary conviction for unlawful possession of spirits contrary to the Inland Revenue Act, R.S.C. 1906, ch. 34, sec. 185, as amended 1920 (Can.), ch. 52, sec. 6. Appeal allowed and conviction restored.

C. J. Ford, K.C., for the Crown, appellant.

L. E. Ormond, for the accused, respondent.

STUART, J.A.:—I agree that this appeal should be allowed. My brother Hyndman has set forth the circumstances and I need not more specifically refer to them.

I do not think it was incumbent on the Magistrate to endeavour to ascertain the non-existence of forfeitable goods in order to establish his jurisdiction. Nobody ever suggested, and no one has suggested even to us, the existence of goods forfeitable under R.S.C. 1906, ch. 51, sec. 185, and amendments. The affidavit filed in support of the motion to quash does not suggest their existence. If it be said that they must have been in existence at some time, or otherwise the defendant could not have had them in his possession, the answer is that though they were undoubtedly in existence at the date charged as being the date of the offence, it does not follow that they were in existence at the date of the information. Even if defendant had denied guilt, the prosecution could conceivably have proved its case without shewing that any officer had ever seen any goods at all though, of course, some witness must have testified thereto.

Section 185 speaks of the goods being forfeited "wherever found." There is nothing to shew that any goods were ever "found" at all. It seems to me quite an untenable position to suggest that the accused on such a charge may come up and plead guilty and then afterwards raise doubts as to the

jurisdiction of the Magistrate, by saying "There may have been goods in existence which were forfeitable, there may be still in existence somewhere goods which are still forfeitable, I do not allege that there are or were but there may have been or may be such goods and as the conviction does not on its face negative their existence or does not state that though in existence they are not worth more than $1,500, in consequence the conviction is invalid."

I do not think a Police Magistrate was by sec. 132 ever intended to be obliged to pursue such hypothetical enquiries into the possible existence of facts that would be, so far as appears, in the knowledge of the accused only, in order to satisfy himself of his jurisdiction. It is not like the case of a charge of theft where the Magistrate has jurisdiction only if the goods stolen do not exceed $10 in value. In that case the theft may be punished no matter what has subsequently become of the goods stolen or where they are or whether they still exist or not. Here we have to do, not with value of the goods which accused had in his possession at the time charged and with whose possession he is charged, but with the value of goods which are subject to forfeiture and to be the subject of forfeiture the goods must still continue to exist and must be "found" *somewhere*.

It is true that the general rule is that jurisdiction must appear upon the face of the conviction. But in my opinion this rule has never been and should not be carried so far as to insist that the non-existence of a certain fact, the existence or non-existence of which is peculiarly within the knowledge of the person charged, must be stated on the face of the conviction even though its non-existence is essential to jurisdiction. It is not necessary to deny bias or interest in the justice upon the face of the conviction. I gather that the Judge at Chambers must have inferred from the fact that the accused was charged with having had spirits in his possession on July 29 that there must, necessarily, have been some spirits in the possession of the accused or of the police on July 31, and that the Judge, therefore, concluded that it ought to appear that these were not worth more than $1,500. But these conclusions are surely not necessary. The spirits may have been poured out on the ground in the meantime by someone. We do not know that any were seized. And as we must not intend bias or interest unless it is shewn, so I think the Court will not assume that when the information was laid there were in existence any spirits or other goods which were forfeitable under sec. 185. As

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Lord Ellenborough said in *Rex* v. *Hazell* (1810), 13 East 139, at p. 141, 104 E.R. 321: The Court "can intend (*i.e.*, assume) nothing in favour of convictions, and will intend nothing against them."

Of course, we have no formal conviction before us. I do not understand why Justices of the Peace and Magistrates in this Province do not themselves obey the law as they are appointed to force others to do, and why they do not draw up convictions and send these and all other proceedings to the Clerk of the District Court as the Code commands them to do. In this case, however, it was admitted that the production of a proper formal conviction would not alter the situation so that there is no object to be gained by insisting, as we might, that the Magistrate first make a proper return before we deal with the matter.

I would allow the appeal without costs and dismiss the application to quash also without costs. I have concluded that costs should not be given because the legislation is admittedly obscure in many of its phrases.

BECK, J.A.:—The defendant was convicted for that he had spirits in his possession knowing them to have been unlawfully manufactured contrary to sec. 185 of the Inland Revenue Act, R.S.C. 1906, ch. 51, and amendment, 1920 (Can.), ch. 52, sec. 6.

On *certiorari* Ives, J., quashed the conviction, saying:—

"The Magistrate's jurisdiction conferred by sec. 132 must be apparent upon the record. The forfeiture under sec. 185 is automatic and imperative and the value thereof must be determined and must appear before the conviction can be made."

Section 132, R.S.C. 1906, ch. 51, as amended by 1921 (Can.), ch. 26, sec. 12, substituting $2,000 instead of $500, is as follows:—

"Every penalty or forfeiture incurred for any offence against the provisions of this Act or any other law relating to excise, may be sued for and recovered or may be enforced: (a) before the Exchequer Court of Canada or any Court of record having jurisdiction in the premises; or (b) if the amount or value of such penalty or forfeiture does not exceed $2,000, whether the offence in respect of which it has been incurred is declared by this Act to be an indictable offence or not, by summary conviction, under Part XV of the Criminal Code, before a Judge of a County Court or before a Police or Stipendiary Magistrate or any two Justices of the Peace having jurisdiction in the place where

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the cause of prosecution arises, or wherein the defendant is served with process."

After careful investigation I have come to the following conclusions: (1) Section 132 applies both to the recovery of pecuniary penalties and the enforcement of forfeiture of goods; (2) A proceeding for the recovery of a pecuniary penalty for an offence under the Act and one for the enforcement of a forfeiture of goods are distinct in their nature, the former being a proceeding *in personam* and the latter a proceeding *in rem*, and are independent the one of the other.

The Inland Revenue Act, 1867 (Can.), ch. 8, sec. 156, provides that " all penalties and forfeitures, incurred under this Act or any other law relating to excise, may be prosecuted, sued for and recovered in the Superior Courts of Law or Court of Vice Admiralty having jurisdiction in that Province in Canada where the cause of prosecution arises or wherein the defendant is served with process: And if the amount or value of any such penalty or forfeiture does not exceed $500 the same may also be prosecuted, sued for and recovered in any County Court or Circuit Court having jurisdiction in the place where the cause of prosecution arises or where the defendant is served with process."

Sections 165 and 166 provided that "the pecuniary penalty or forfeiture" might be recovered before two or more justices of the peace or in any court having civil jurisdiction to the amount of such penalty or forfeiture. These provisions were substantially repeated in the Inland Revenue Act of 1880 (Can.), ch. 19, secs. 175 and 184. They were again substantially repeated in the Consolidated Inland Revenue Act of 1883 (Can.), ch. 15, secs. 99 and 108.

By an amending Act of 1885 (Can.), ch. 62, sec. 27, both secs. 99 and 108 were repealed and sec. 5 enacted that:—

"Every penalty or *forfeiture* incurred for any offence against the provisions of the said Act, or any other law relating to excise, may be sued for and recovered or may be enforced before any Court of Vice-Admiralty, or any Court of Record having jurisdiction in the premises or if the amount or *value* of such penalty or forfeiture does not exceed $500 * * * before a Judge or junior Judge of a County Court or before a Police or Stipendiary Magistrate or any two Justices of the Peace, &c."

This section evidently was intended to deal with both pecuniary penalties and forfeiture of goods and to place the jurisdiction in respect of each in the same tribunals.

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This provision was carried into the R.S.C. 1886, ch. 34, in sec. 113, which is noted as a consolidation of 1885 (Can.), ch. 62, secs. 5, 6, and 7.

Section 132, R.S.C. 1906, ch. 51, is in substance a re-enactment of sec. 113 of R.S.C. 1886, ch. 34.

It seems clear, then, that it must be taken that sec. 113 and sec. 132 are intended to deal both with pecuniary penalties and the forfeiture of goods.

Under the Inland Revenue Act the word forfeiture is many times used with reference to the forfeiture of goods. It is also sometimes used of a pecuniary penalty, as it is used for instance in the statutory form of conviction under the Criminal Code (Form 31) "forfeit and pay the sum of $....." The word is so used in sec. 181: "forfeit and pay, for the use of His Majesty, double the amount of excise duty and license duty." That was the section which was under consideration in *Rex* v. *Hartfeil* (1920), 55 D.L.R. 524, 35 Can. Cr. Cas. 110, 16 Alta. L.R. 19. That case dealt solely with a pecuniary penalty.

The charge in the present case is laid under R.S.C. 1906, ch. 51, sec. 185, as amended 1920 (Can.), ch. 52, sec. 6, having spirits in one's possession knowing them to have been unlawfully manufactured. That section, after creating the offence and providing a pecuniary penalty, continues: "And all spirits so unlawfully manufactured or imported, wheresoever they are found, and all horses and vehicles and other appliances which have been or are being used for the purpose of removing the same, *shall be forfeited to the Crown and shall be dealt with accordingly.*"

Words the same as those italicised occur in several sections of the Act, *e.g.*, secs. 102, 105, 106, 109, 112, 113, 118, 183.

In some instances there is express power given to a collector or other officer to seize the things declared to be forfeited, *e.g.*, secs. 103, 109, 112, 113, 118, 184 and probably sec. 84 is wide enough to cover.

In one instance at least—it seems to be the only one—the officer is authorised to destroy the things seized (sec. 180 (2)).

Section 130, R.S.C. 1906, ch. 51, reads as follows:—

"All vehicles, goods and other things seized as forfeited under this Act or any other Act relating to excise, or to trade or navigation, shall be deemed and taken to be *condemned* and may be dealt with accordingly, unless the person from whom they were seized, or the owner thereof, within one

month from the day of seizure, gives notice in writing to the seizing officer, the collector in the Inland Revenue division in which such goods were seized, or superior officer, that he claims or intends to claim the same."

Several sections speak of the disposition to be made of the goods "until condemned or released by competent authority" (sec. 84) or use similar words (secs. 83 and 126).

Condemnation may result not only from the operation of sec. 130 but in consequence of a judicial condemnation following upon an information filed for the condemnation of the goods or things (secs. 129 and 98) or, in other words for the enforcement of the forfeiture (sec. 132), or doubtless as the result of an adverse decision in an action brought by the owner of the goods (secs. 94 *et seq*). Proceedings taken for condemnation under sec. 129 are proceedings *in rem*. As I have said, I think it clear that proceedings for forfeiture or condemnation of the goods are quite independent of proceedings for the pecuniary penalty; either proceeding may be taken alone; and consequently the limitation put upon the jurisdiction of a Judge of a County Court or a Police or Stipendiary Magistrate or any two Justices of the Peace, namely, $2,000, in the case of the *amount* of a *pecuniary penalty* and the same sum in the case of the *value* of the *forfeiture* is a limitation to be applied distributively in separate proceedings.

It may be well to note, in view of the words "by summary conviction under Part XV of the Criminal Code" used in sec. 132, that sec. 706 of the Cr. Code makes that part applicable to cases in which the justice has authority by law to *make any order* for the payment of money *or otherwise*," which, I think, can quite readily be interpreted to cover an order for condemnation of goods forfeited.

The maximum pecuniary penalty under sec. 185, R.S.C. 1906, ch. 52, as amended 1920 (Can.), ch. 52, sec. 6, is $500.

In the result, then, I am of opinion that the proceeding before the Magistrate being for the pecuniary penalty only and the amount of the maximum pecuniary penalty recoverable before a Magistrate being $2,000, the Magistrate had jurisdiction; the question whether or not there was a forfeiture of goods, and whether or not the Crown had or had not proceeded or intended to proceed in respect of such a forfeiture—which I think must in any case have been by separate proceedings—being for the reasons I have endeavoured to explain, quite immaterial.

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I would, therefore, set aside the order of the Judge of first instance. I would give no costs.

HYNDMAN, J.A.:—This is an appeal from the order of Ives, J. Respondent was convicted on July 31, 1922, by C. N. Tingle, Police Magistrate for the Province, for that the said respondent on July 29, 1922, at Hanna in the said Province did have spirits in his possession knowing them to have been unlawfully manufactured, contrary to sec. 185 of the Inland Revenue Act of Canada, R.S.C. 1906, ch. 51, as amended 1920 (Can.), ch. 52, sec. 6.

The defendant did not offer any defence to the charge but pleaded guilty and was fined $250 and costs amounting to $43.25, or 6 months imprisonment. No formal conviction was drawn up or returned to us. The minute of adjudication, however, is as follows:—Pleaded guilty, $250 and costs, $13.75 or six months, $15.00, $3.50, $11.00—total $293.25.

It is common ground that no order of forfeiture was made but merely the conviction and fine as aforesaid.

Whilst it would be more satisfactory to have a formal conviction before us (and we could of course require one to be filed), nevertheless no objection having been raised on that score and there being no doubt as to its fact and terms as disclosed in the minute of adjudication, I do not think it necessary in this case.

The only ground raised in the notice of motion before the Judge appealed from was:—(1) "That the said Police Magistrate had no jurisdiction to hear the said charge and make the said conviction as the penalty and forfeiture to which the said John Keen was liable exceeded in amount $2,000 which said sum is the limit of liability in respect of an offence, to try which, a Police Magistrate has jurisdiction under the said Act."

Section 185 of the Inland Revenue Act, R.S.C. 1906, ch. 51, as amended by 1920 (Can.), ch. 52, sec. 6, enacts:—

"185. Every person who sells or offers for sale, or who purchases any spirits, or has any spirits in his possession, knowing them to have been unlawfully manufactured or imported, shall for a first offence, incur a penalty not exceeding five hundred dollars, and not less than two hundred dollars, and for each subsequent offence, a penalty of five hundred dollars; and all spirits so unlawfully manufactured or imported, wheresoever they are found, and all horses and vehicles and other appliances which have been or are being used for the purpose of removing the same, shall be for-

feited to the Crown and shall be dealt with accordingly."

The jurisdiction of a Police Magistrate to entertain and try prosecutions under this Act is created by sec. 132, as amended by 1921 (Can.), ch. 26, sec. 12, which now reads:—

"132. Every penalty or forfeiture incurred for any offence against the provisions of this Act or any other law relating to excise, may be sued for and recovered or may be enforced,—

(a) before the Exchequer Court of Canada, or any Court of record having jurisdiction in the premises; or,

(b) if the amount or value of such penalty or forfeiture does not exceed two thousand dollars, whether the offence in respect of which it has been incurred is declared by this Act to be an indictable offence or not, by summary conviction, under Part XV. of the Criminal Code, before a Judge of a County Court, or before a Police or Stipendiary Magistrate, or any two Justices of the Peace having jurisdiction in the place where the cause of prosecution arises, or wherein the defendant is served with process.

2. Any such penalty may, if not forthwith paid, be levied by distress and sale of the goods and chattels of the offender, under the warrant of the Court, Judge, Magistrate or Justices having cognisance of the case; or the said Court, Judge, Magistrate or Justices may, in its or their discretion, commit the offender to the common gaol for the period of six months, unless the penalty and costs, including those of conveying the offender to such gaol and stated in the warrant of committal, are sooner paid."

It is clear that if the only thing involved was the penalty for an infraction of sec. 185 of the Act no objection as to jurisdiction could arise. But it was urged before the Judge of first instance that, not only was the defendant subject to a fine, but the spirits, and all horses, vehicles and appliances, &c., used in connection therewith, must be forfeited to the Crown, and, as there is nothing on the record to shew the value of the spirits and other goods to be less than $2,000, that therefore the Magistrate was without jurisdiction.

The Judge gave effect to this argument, and quashed the conviction, holding that the Magistrate's jurisdiction must be apparent upon the record; that the forfeiture of the goods under sec. 185 is automatic and imperative, and the value thereof must be determined, and must appear before the conviction can be made.

With great respect I am unable to agree to the correctness

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of this decision for the reason that I do not think forfeiture of the goods provided for in the section was intended to be a judicial one, at least at the time of the conviction, but statutory purely, the goods being liable to confiscation, wheresoever and whensoever found, and not dependent upon a conviction of the offender who may or may not be prosecuted. The conviction of accused for contravention of the Act and imposition of a penalty not exceeding $500 are the only matters with which the Magistrate is concerned.

A careful consideration of sec. 132, which gives the Magistrate jurisdiction, I think, makes it clear that the words "penalty" and "forfeiture" are used interchangeably and mean a pecuniary penalty for forfeiture, for it speaks of them as being "sued for and recovered" before certain tribunals, and provision is also made for the recovery of such penalties. This obviously cannot mean forfeiture of goods found illegally in possession of the accused for they are seized and forfeited on the spot when found.

In *Rex* v. *Hartfeil*, 55 D.L.R. 524, 35 Can. Cr. Cas. 110, 16 Alta. L.R. 19, the conviction was under R.S.C. 1906, ch. 51, sec. 181. It was held on appeal that the penalty incurred must be prosecuted for along with any penalty incurred under 180; and that as the total of the money penalties exceed $500 (the then maximum) that the Magistrate was without jurisdiction.

And it must be observed that sec. 180 (2) provides "that all stills, worms, &c., &c. . . . . that are found in the possession of any unlicensed person, or in any unlicensed place, shall be forfeited to the Crown, and shall be *seized by any officer of Inland Revenue and may either be destroyed when and where found* or removed to some place of safe-keeping in the discretion of the seizing officer." The question of value of goods of course was not raised in that case, but from the reading of the section it would seem clear there is no necessity for any judicial forfeiture.

Similar provision for automatic forfeiture of goods are also found in other revenue statutes such as the Customs Act, R.S.C. 1906, ch. 48, sec. 166; Government Works Tolls Act, R.S.C. 1906, ch. 40, secs. 7 *et seq.* A consideration of these various statutes makes it apparent that forfeiture of goods is a proceeding or matter entirely distinct from the pecuniary penalty or forfeiture to which a party found guilty of an offence is subjected. A forfeiture imposed on a convicted person is one thing, and forfeiture of goods another. In the one case the person convicted must forfeit

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the fine, but as to the illicit goods, the accused may or may not own them, but may be merely in temporary possession thereof. Consequently in order to avoid possible injustice provision is made for judicial condemnation of the goods, proceedings *in rem*, in order to determine any rights of property which interested parties may have in the goods seized as forfeited. This procedure is separate and distinct from the prosecution for the offence of having such goods in possession unlawfully.

Having come to the conclusion, therefore, that the maximum penalty or forfeiture to which an accused person is subject under sec. 185 in question, is less than $2,000, namely $500, I think the appeal should be allowed without costs and the application before the Judge of first instance dismissed without costs.

Appeal allowed.

THE KING v. FRANK A. GILLIS Co., Ltd.

Exchequer Court of Canada, Audette, J. November 7, 1922.

CARRIER (§III—I)—GOVERNMENT RAILWAYS—CANADIAN CAR DEMURRAGE RULES—CONDITIONS UNDER WHICH DEMURRAGE IS RECOVERABLE.

Under the Canadian Car Demurrage Rules, authorised by the Board of Railway Commissioners for Canada, and approved by Order in Council of the 12th July, 1918, for use on Canadian Government Railways, where a railway has given notice to the consignee of the arrival of his car, the consignee has 24 hours free time within which to direct the placement of such car. Thereafter he is allowed 48 hours to take delivery of his goods, provided the car has been placed "in a reasonably accessible position for unloading" during such 48 hours. If the consignee fails to take delivery under such conditions within the 48 hours, demurrage begins to run whether or not the car is kept on a suitable delivery track after the 48 hours, or is thereafter placed on a storage track.

Quaere:—Having in view the provisions of sec. 1 of 1919 (Can.), ch. 13, does the Railway Act, 1919 (Can.), ch. 68, become applicable to the Canadian National Railways before the appointment of directors is made in conformity with the enactment first mentioned?

[See Annotation, 54 D.L.R. 16.]

INFORMATION by the Attorney-General of Canada seeking to recover the sum of $5,011 for demurrage charges alleged to be due by the defendant by reason of his failure to unload goods consigned to him, within the statutory delays.

W. C. McDonald, for plaintiff.

W. L. Hall, K.C., for defendant.

AUDETTE, J.:—This is an information exhibited by the Attorney-General of Canada, whereby it is sought to recover (by amendment) the sum of $5,011 for demurrage

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charges alleged to be due, by the defendant, for cars placed for unloading in Willow Park yard, in the City of Halifax, in the Province of Nova Scotia, during the year 1920.

The defendant, who carries on, at Halifax, the business of builders' and contractors' supplies, was, in the year 1920, acting as agent for the Pictou County Construction Supply Co., selling and delivering sand and gravel shipped mostly from Seaforth beach. He was the consignee of such commodity in all cases.

Under the provisions of the Canadian Car Demurrage Rules, on the arrival of these cars at Rockingham yard, which is considered as a sorting terminus for the whole of Halifax, the railway company issued advice notes which were promptly delivered by messenger to the (defendant) consignee who gave receipt therefor and who had then 24 hours (R. 3) to order his car to any point. In all cases, except in respect to five cars, he ordered them to be placed at what he termed Cotton Factory Siding.

"Car placed" or "placement" has a well understood meaning in railway vernacular, and it is defined in the demurrage rule as "a reasonably accessible position for loading or unloading."

After the car is placed the consignee is allowed 48 hours (2 days) free time for unloading.

These regulations are to be found in the Canadian Car Demurrage Rules authorised by the Board of Railway Commissioners for Canada and approved by an Order in Council, of July 12, 1918, for use on the Canadian Government Railways.

The controversy in the present case arises from the charges made by the Canadian National Railways for demurrage after these 48 hours had elapsed.

The defendant contends that the cars in question were either placed on storage sidings or on sidings other than those assigned or named by him, or on sidings unfit to be used for unloading.

The Crown, on the other hand, contents that as the defendant had no place to take the sand and gravel and store it before delivering to a purchaser, it became of great advantage to him to keep it in the railway yard until he found a customer, and that he was negligent and dilatory in taking delivery when the sand and gravel was not wanted.

The consignee has no right to delay unduly taking delivery of his cars with the object of serving his own purposes, at the expense of the carrier. Yet the carrier has no

right to expect to be entitled to collect demurrage when he cannot give ready delivery "*without delay and without* furnishing adequate and suitable accommodation," that is, *without placing the car in a reasonably accessible position* for unloading." Nor has the carrier any jurisdiction for delaying teams sent by the consignee for unloading, for a full morning, as was proved in this case, these teams being paid by the hour by the consignee.

Is there not an implied warranty that before demurrage can be charged that the carrier has in all respects the goods ready for delivery? And does not the law look with a jealous eye upon any effort of the carrier to lessen his contractual obligations, either express or implied? Yet the primary duty of a carrier is to carry; it is not his duty as such to furnish storage beyond a reasonable time necessary for unloading and removal. *Cleveland etc. & St. Louis R. Co.* v. *Dettlebach* (1916), 239 U.S. 588; *Southern R. Co.* v. *Prescott* (1916), 240 U.S. 632; *American Paper & Pulp Ass'n.* v. *B. & O. R. R. Co.* (1916), 41 Inst. Com. Com. 506, at p. 512.

Diligence is expected from both parties respectively.

In arriving at the determination of the present controversy we must bear in mind that no one has a right to unduly enrich himself at the expense of others. That is, on the one hand it would appear that the railway company could hardly ask demurrage upon a car which is not placed "in a reasonably accessible position for unloading," and on the other hand the defendant after his car had been duly placed on a proper siding for unloading during 48 hours, after the 24 hours following the advice notice, has no right to expect that the railway will keep his car indefinitely either on that siding or even on storage siding without making charges therefor, in the nature of demurrage. The defence set up at Bar was, *inter alia*, that demurrage did not run unless the cars were *continuously* kept standing on "a reasonably accessible position for unloading," or as more especially put by counsel, on the main line and on the long and short team tracks. This is a view with which I am unable to agree having due regard to the course and natural exigencies of the carrier's trade and business. Hence the cars after they have been kept accessible for unloading during 48 hours, after the 24 hours' notice, need not be kept upon team tracks but may be kept on storage tracks, kept accessible for delivery within shortest practicable time, on demand by the dilatory consignee.

In other words I find a railway company is entitled to

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recover demurrage only after the car has been for these 48 hours, available for unloading by the consignee from a proper and reasonable team track. That it is not necessary thereafter for the railway company to keep the car on a team track to entitle it to claim demurrage and the consignee has no right to ask the railway to keep his car indefinitely upon a team track, thus paralysing the business of the railway company. After the expiry of the 48 hours, the railway company may place the cars on storage tracks, charge demurrage or storage therefor and when the consignee thereafter comes to unload, the railway company is to be taken as if the cars had at all times been accessible on team track for unloading, provided the carrier is always ready to deliver within shortest practical time. Once the carrier has placed the cars during 48 hours upon a reasonable position for unloading, on a team track, he can charge demurrage thereafter.

Counsel on behalf of the plaintiff cited at Bar the case of *Miller & Co.* v. *Georgia Railroad and Banking Co.* (1891), 88 Ga. Rep. 563, and relied upon the same. Canadian Courts, like the English Courts, are accustomed to treat the decisions of the American Courts with great respect, although they are in no manner bound by them. That case, however, must be distinguished from the present one in very many respects. Indeed the rules of demurrage had there been made by the carrier himself and it was a question whether they were reasonable or not and the most important point in that decision which comes within the range of appositeness is to be found at p. 576, under para. 5, wherein it appears that the point was there narrowed as to whether "the time required to place cars in position should not be included in computing demurrage."

That American case must be distinguished. The question submitted for determination in the present case is much wider and comes within the scope of rules that have the force of law and not rules made by the carrier itself. Indeed under our Canadian rules, it is provided by R. 4 "(c) that on cars held for unloading *time shall* be computed from the first 7 a.m. *following placement on public delivery tracks.*"

There is no ambiguity. The time for reckoning or counting demurrage runs only from the placement on *public delivery tracks.* The rules direct that no demurrage can be reckoned before complying with this requirement.

Moreover, under sub-para. (h) of the same rule, there is

a further general clause which embodies the principle of justice and rectitude with which such computation is to be made, by further stating that "Time lost to the consignor or consignee through switching of cars or *through any other cause for which the railway company is responsible*, shall be added to the *free time allowance*." See also 26 Hals., p. 120; *Robinson* v. *C.N.R.* (1910), 19 Man. L.R. 300.

This provision brings the controversy within the scope of what I said at the opening, and that is, in other words, that a person guilty of negligence or derelict in doing his full duty cannot afterwards avail himself of such conduct to assert and build up a claim thereon. And that applies correspondingly and equally well to the plaintiff and defendant in the present case.

The Canadian Rules further provide that a "placement" is made—that is when the 48 hours of free time begin to run—"when a car is placed in a reasonably accessible position for loading or unloading."

The plaintiff in the present case has assumed the burden of proof and has established where the cars were during the whole period for which demurrage is claimed, and both parties have adduced evidence in respect of what should be taken to be public team tracks.

However conflicting that evidence may be that brings us to the consideration of that very question.

It results from the evidence, as illustrated by plan exhibit No. 2, that there are 13 tracks at Willow Park used as storage and unloading, and I shall have now to determine which are unloading tracks within the intent, meaning and spirit of the Regulations.

I may say as a prelude, it has been beyond peradventure established by overwhelming evidence that the use of the words or expression "Cotton Factory Siding" in the present case, means Willow Park. It is an old generic name which is a denomination comprehending all species of sidings at Willow Park. Before the establishment of the Round House, the whole district was known as Cotton Factory Siding. The most that can be said is that one line could be used to go to the Cotton Factory Siding proper. The Cotton Factory which has been destroyed at the time of the explosion is at some distance from the *locus in quo* in this case.

The General Railway Act, 1919 (Can.), ch. 68, sec. 312, dealing with the questions of accommodation for traffic, provides, among other things, that the railway company *shall furnish adequate and suitable accommodation for un-*

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loading such traffic, without delay, and with due care and diligence deliver all such traffic.

Does the General Railway Act apply to the C.N. Railway as provided by 1919 (Can.), ch. 13, before the appointment of the directors as enacted by sec. 1 of that Act? This is a question that came before the Courts in the case of *Mount Royal Tunnel Terminal Co. et al* v. *Rosa* (1922), 69 D.L.R. 244, 32 Que. K.B. 458, and upon which a formal decision was not given, notwithstanding the views expressed by some of the Judges.

But whether the Act applies to the Government Railways or not, that railway system cannot rid itself of the duty cast upon all carriers by rail to afford suitable and reasonable facilities for delivery of goods carried to the consignees and to use due care and diligence in making such delivery. It may be that the provisions of the general Railway Act above cited are simply declaratory of the common law duty and no more.

In construing and applying these rules and regulations reference must be had to the general body of the rules, and bear in mind the fundamental obligations of the carriers.

I shall now have to determine which out of the 13 tracks mentioned at trial and shewn on plan exhibit No. 2, were in the spring of 1920, on the one hand "unloading tracks" and on the other, mere "storage tracks." This has become a very difficult task owing to the especially conflicting evidence upon this point and the further difficulty of making a finding upon the actual state of these tracks, not at the date of the trial or during trial, but dating back two years ago, that is during the months of April, May, June, July and August, 1920, with the then prevailing conditions involving the congestion at Willow Park for the well known reasons mentioned in the evidence.

The thirteen tracks at Willow Park, in question in this case are:—1, Main Line; 2, Short team track; 3, Long team track; 4, No. 3; 5, No. 4; 6, No. 4½; 7, No. 5; 8, No. 5½; 9, A; 10, B; 11, C; 12, Hennessy Siding; 13, City Field.

The first track, the main-line, can be used for unloading at intervals, when not otherwise used, for shunting, etc., as its very name clearly indicates.

The three tracks over which I experience most difficulty in arriving at a conclusion are Tracks A, 4½ and 5, and I confess I have with great hesitation classified them as storage in 1920. They appear to have been in a bad state in the spring. They might have been fit to be used in an

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emergency under temporarily favourable weather conditions. Yet the fact that it was possible to use them in an emergency when the yard was congested, does not necessarily bring these tracks within the definition of the rules and with what is contemplated by the statute. Moreover, the fact, as established by the evidence, that only half a load, or part of a load, could be hauled or drawn from such tracks, would not be a compliance with or satisfaction of the statute and the regulations—especially when the consignee pays the teams by the time—which in the result would, through the railway's negligence, cost him double the amount for delivery.

Track A is, properly speaking, a car-repair track, leading to the shops—as indicated upon the plan exhibit No. 2, and as put by the yard-master Lovet part of it has been used in an emergency.

With respect to tracks 4½ and 5 there is a deal of conflicting evidence, and it is almost impossible to arrive at satisfactory conclusion upon the same.

Witness McLeod took delivery at tracks 4½, 5 and A, but had trouble at A—too high. Witness Wright considers 4½ as hauling. Witness Bishop hauled from it and declares it is not fit for trucks and it is a question of the size of the load. It was difficult to get out with ½ a load. Witness Craig says one could not take a full load from it at the time, as it was not in good condition, and witness McDonald contends it could be used for unloading provided there would be no running train; but he does not consider 4½ and 5 as unloading tracks. They are storage. It is a fill which they were grading at the time, both on 4½ and 5. Witness McCann testifies it was not in good condition that season. Witness Bigelow states they are both storage tracks. Witnesses Wright and Craig would consider them as hauling sidings, while witnesses Bigelow, McDonald and Seaforth consider them as storage.

These sidings A, 4½ and 5 were not in 1920 properly speaking, except perhaps in an emergency, fit for unloading, while they have been improved since and could now be considered as unloading sidings.

Having regard to the expression and qualification found both in the regulations and in the statute (which seems to embody the common law in that respect) I find that the 13 sidings above recited must be classified as follows during the months of April, May, June, July and August, 1920, namely:—Unloading: 1, Main-line; 2, Short-team track; 3,

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Long team track; 4, Hennessy Siding; 5, City Field. Storage: No. 3, No. 4, No. 5½, A, B, C, 4½, 5.

Therefore, there will be judgment ordering and adjudging that the plaintiff do recover from the defendant all demurrage charges for the days after which a car has been placed during 48 hours (following the 24 hours' notice of arrival) upon a fit and proper siding and in a "*reasonably accessible position for unloading*," namely, upon sidings or tracks known as: The Main Line, Short team track, Long team track, Hennessy Siding and City Field. The whole with costs in favour of the plaintiff.

If the parties fail to agree in adjusting the amount of demurrage recoverable, leave is hereby given to either of them to apply to the Court, upon notice, for further direction in respect of the same.

Judgment accordingly.

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Saskatchewan Court of Appeal, Haultain, C.J.S., McKay and Martin, JJ.A. November 20, 1922.

VENDOR AND PURCHASER (IB)—PAYMENT OF PURCHASE MONEY—DELAY IN DELIVERY OF TITLE—ELECTION BY PURCHASER TO COMPLETE CONTRACT—LOSS OF CHATTELS GIVEN AS PART PAYMENT BEFORE DELIVERY—LIABILITY—RATE OF EXCHANGE—ACCOUNTING.

An agreement for the sale and purchase of land contained a provision that part payment was to be made by the delivery of certain chattels "at the time and upon delivery of said contract of said land to the party of the first part by said party of the second part" and that if a satisfactory title was not shewn before a certain time the purchaser had the option of avoiding the contract. The vendor was not able to shew title at the time named and the purchaser elected to carry out the contract and subsequently entered into possession. The Court held that the property in the chattels did not pass at any time during the delay in furnishing title, and that the purchaser must bear the loss of two horses which died during this time, and could not claim for maintenance, also that as no place of delivery was specified in the agreement, such delivery must be made in Montana where the contract was made and where the vendor resided. If under a contract for the sale of land made in a foreign country, at the time the vendor tenders title to the purchaser, neither of the parties know accurately the amount of money which should be paid, and an action is brought, on which a reference is necessary to ascertain the amount due, the rate of exchange should be the rate on the date when the accounting is completed and the Registrar signs his certificate setting out the amount due.

[*Manners* v. *Pearson*, [1898] 1 Ch. 581, applied. *Di Ferdinando* v. *Simon, Smits & Co.*, [1920] 3 K.B. 409; *Toronto General Trusts Corp'n.* v. *Regina City* (1922), 69 D.L.R. 542, referred to.]

APPEAL by plaintiff from the trial judgment in an action on an agreement for the sale and purchase of land. Varied.

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F. H. Bence, for appellant. *W. H. McEwen*, for respondent.

HAULTAIN, C.J.S., concurs with MARTIN, J.A.

McKAY, J.A.:—The appellant and respondent, both residents of Kalispell, Montana, U.S.A., entered into the following agreement at Kalispell aforesaid on July 12, 1917:—

"This agreement entered into this twelfth day of July, 1917, by and between L. W. Wilson of Kalispell, Montana, party of the first part, and Grover H. Collins, administrator of the estate of Mary Jane Collins, deceased party of the second part, witnesseth that the terms and the conditions of this agreement are as follows:—That L. W. Wilson hereby agrees to purchase of Grover H. Collins, administrator of the estate of Mary Jane Collins and that Grover H. Collins agrees to sell a certain section of land in the Province of Saskatchewan described as follows:—

Section 35 in Tp. 37, R. 18 west of the second principal meridian, at $6.50 per acre and that L. W. Wilson does hereby deposit certified check in the amount of $100 to be held in escrow in the First National Bank of Kalispell until said Grover H. Collins party of the second part clears chain of title as to Mary Jane Collins and delivers said section of land to party of the first part.

That in payment of said land said Grover H. Collins does hereby agree to take as part payment six horses, one colt, one pair sleighs, one wagon, one set of harness, one set of collars at thirteen hundred dollars ($1,300) part payment and the balance five hundred fifty-six ($556) dollars including the $100 left in escrow at the First National Bank of Kalispell at the time and upon delivery of said contract of said land to party of the first part by said party of the second part.

Said party of the first part is to deliver said personal property to said party of the second part and also give bill of sale for same and is to pay said $556 at that time including the $100 left in escrow to the said party of the second part.

It is further agreed that if the negotiation is not completed or a satisfactory title shown on or before August 15, 1917, then this contract is both null and void at the option of the party of the first part.

In witness whereof said parties have hereunto set their hands this twelfth day of July, 1917.

(Signed) L. W. Wilson,
(Signed) G. H. Collins."

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On the date of the agreement the title to the land was in the name of His Majesty the King in the right of and to the use of the Province of Manitoba, and there was due to the Province of Manitoba the sum of $2,304 for principal, together with interest thereon at the rate of 6% per annum from April 22, 1917, under a contract of sale of said lands made by the Province of Manitoba with Mary Jane Collins, deceased.

It was clearly understood by appellant and respondent, although not so expressed in the agreement, that respondent was assuming the said contract of sale with the Province of Manitoba.

The respondent offered to deliver the chattels to appellant on August 15, 1917, and again later that fall. The appellant refused to take them. The respondent came to Canada in November, 1917, and rented a place near the land in question, and took possession of said land in June, 1918.

As a fact, on July 12, 1917, there was due to the Province of Manitoba, not only $2,304 for principal, but interest thereon at 6% per annum from April 22, 1917, which the trial Judge found to amount to $30.62. He also found that there was owing by the appellant for taxes against the said land on January 1, 1917, the sum of $347.65, and the taxes levied against said land in 1917, $169.15.

The respondent deposited $100 in the First National Bank of Kalispell on July 12, 1917, to be held in escrow in pursuance of the agreement, where it still remains, and later paid into the same bank $456, but he withdrew this latter amount in the spring of 1918.

Two of the horses referred to in the agreement died while in the possession of the respondent in 1919. These two horses are valued at $170. The respondent sold two of the others for $350, which he paid into Court, and appellant is willing to accept this amount for these two horses.

It is admitted appellant (since July 12, 1917) paid to the Province of Manitoba $648.20.

On June 24, 1921, the appellant tendered to the respondent a duly approved assignment of the contract with the Province of Manitoba, and demanded payment of the sum of $2,348.54 and United States exchange. The respondent refused to pay that amount, and appellant brought this action for specific performance and that an account be taken of what is due to the appellant.

The respondent counter-claimed for expenses incurred

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in caring for and removing said chattels to Saskatchewan, owing to the refusal of appellant to accept same, and his delay in completing title.

The trial Judge held that the appellant must bear the loss of the two horses that died valued at $170, and found that on June 24, 1921, the respondent owed the appellant $2,133.79; and that on the agreement the appellant was entitled to $833.79 and the $350 paid into Court for the team sold, and the $100 which was paid into the bank, amounting to $1,283.79, and the delivery of the rest of the chattels, not including the two horses that died, and that delivery was to be made at the respondent's farm, near Watson, Saskatchewan.

The respondent's counterclaim was dismissed. The respondent was given the costs of the action, and the appellant the costs of the counterclaim.

The appellant now appeals from that part of the judgment which ordered:—1. That the appellant bear the loss of the two horses that died. 2. That delivery of the chattels be made at respondent's farm near Watson, Saskatchewan. 3. That the appellant was entitled to the sum of $1,283.79 without ordering that appellant was entitled to said payment with United States exchange added. 4. That respondent have costs of the action.

As to No. 1. Under ordinary circumstances I think that the law of Montana, U.S.A., where the agreement sued on was made, would have applied in this case, in deciding who should bear the loss of the horses that died. What the law of Montana is, is a matter of evidence; but no evidence was given at the trial as to this, and in the absence of such evidence I must apply our law.

Dicey on Conflict of Laws, 1922, 3rd ed., p. 789, says:—"The rule of English law is that any difference between English and foreign law must be averred and proved by the party who relies upon it, and in the absence of such proof it is assumed that English law is applicable."

Simon v. *Phillips* (1916), 85 L.J. (K.B.) 656, 114 L.T. 460, 32 Times L.R. 243; *The King* v. *Naguib*, [1917] 1 K.B. 359, 25 Cox C.C. 712.

The first and second clauses of sec. 22 of the Sale of Goods Act, R.S.S. 1920, ch. 197, reads as follows:—

"22. Unless otherwise agreed the goods remain at the seller's risk until the property therein is transferred to the buyer but when the property therein is transferred to the buyer the goods are at the buyer's risk whether delivery has

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been made or not:

Provided that where delivery has been delayed through the fault of either buyer or seller the goods are at the risk of the party in fault as regards any loss which might not have occurred but for such fault."

According to the agreement the chattels were to be delivered to appellant "at the time and upon delivery of said contract of said land" to the respondent by the appellant. No time was fixed for the delivery of the contract, and in the absence of any time being fixed the law requires that it should be delivered within a reasonable time from July 12, 1917. I would think that, under the circumstances of this case, a reasonable time for delivery of the contract would be at any rate not later than April 1, 1918. And up to this time the evidence shews the respondent was ready, willing and able to deliver the chattels and make the cash payment, but appellant refused the same as he had not yet completed the contract to be delivered, and respondent could not at that time compel him to accept the chattels or the money. Under these circumstances it seems to me the delivery of the chattels was delayed through the fault of the appellant. After April 1, 1918, the chattels, in my opinion, were at the risk of the appellant "as regards any loss which might not have occurred but for such fault."

In dealing with this clause in sec. 20 of the English Sale of Goods Act, 1893 (Imp.), ch. 71, in Benjamin on Sale, 6th ed., p. 465, the author states that "this provision seems to throw on the party in fault the onus of showing positively that the loss would have occurred independently of his fault."

No evidence was given by or on behalf of appellant to satisfy this onus.

The author goes on to say, at p. 465:—

"The following case, decided in America, may throw some light on these words. In *McConihe* v. *New York and Lake Erie R. Co.* (1859), 20 N.Y. 495, the plaintiff had agreed to build for the defendant company fifteen lumber cars, to be fitted with certain special boxes which the defendants only could supply, and which they agreed to furnish. The cars were to be completed within a certain time. The defendants, though repeatedly requested to do so, never furnished the boxes, and the cars were never completed; but seven of them were completed so far as they could be without the boxes, and, more than two months after the date when all the cars were to have been finished, the seven cars were de-

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stroyed by an accidental fire on the plaintiff's premises for which the plaintiff was not responsible. *Held*, that the property in the cars had not passed to the defendants, as not being complete; and the risk had not passed either, as the fire was not the *necessary* consequence of the defendants' delay. Moreover, had the cars been burnt on the defendants' premises after delivery, while the plaintiff was completing them, the risk would not have been on the defendants.

Under the Code, it would seem that in a similar case the buyers would be liable, as the loss 'might' not have occurred had the cars been delivered. Their default in furnishing the boxes, by delaying delivery, rendered the loss by fire possible."

In the present case the evidence is that the horses died at or near Watson, Saskatchewan, of swamp fever. Had the appellant not delayed the delivery of the horses, they might not have contracted this swamp fever and died, as they would likely have been at Kalispell, Montana, and not at Watson in Saskatchewan.

Under these circumstances, in my opinion, the appellant should bear the loss of these horses, valued at $170.

As to No. 2. The agreement between appellant and respondent, as already stated, was made in Kalispell, Montana, U.S.A., where they were both residing at the time, and, no place for delivery of the chattels being mentioned in the agreement, it is presumed that it was the intention of the parties that delivery should be made there. The appellant is still residing there.

In Benjamin on Sale, 6th ed., p. 874, the author states that: "Where no place of payment is specified, the general rule is that the buyer must pay the seller wherever the latter may happen to be," etc.

In *Pearson* v. *O'Brien* (1912), 11 D.L.R. 175, at p. 177, Lord Atkinson, in delivering the judgment of the Court, said:—"No place having been named in this letter at which the purchase-money was to be paid, the law implies that the residence of the vendor is the place of payment."

In my opinion the same rule would apply in this case with regard to the delivery of the chattels, and, with great deference to the trial Judge, I think he was wrong in ordering the chattels to be delivered at the respondent's farm near Watson, Sask. They should be delivered to the appellant at Kalispell, Montana, U.S.A., and the judgment below should be varied accordingly.

As to No. 3. Counsel for respondent contends that, as

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there is no evidence as to rate of exchange, none should be allowed, or, if allowed, it should be the rate as of the date of judgment when the amount due was ascertained. Whereas counsel for appellant contends the rate of exchange should be that existing at the time of the alleged breach, namely, June 24, 1921, and not the date of judgment.

For the reasons given under the foregoing heading No. 2, the money found due to the appellant is payable to him at Kalispell, Montana, U.S.A., and the rate of exchange to that point should be added to the amount found due. While I think it would have been well to give evidence of the rate of exchange at the trial, I am of the opinion this Court can still direct a reference on this point under the circumstances of this case.

In actions for debt or breach of a contract, the general rule is to allow the rate of exchange prevailing at the date of maturity or default, and not the date of the judgment. See *Manners* v. *Pearson & Son*, [1898] 1 Ch. 581; *Di Ferdinando* v. *Simon, Smits & Co.*, [1920] 3 K.B. 409, and *Société des Hotels du Touquet-Paris-Plage* v. *Cumming*, [1921] 3 K.B. 459; *Toronto Gen'l Trusts Corp'n* v. *Regina City* (1922), 69 D.L.R. 542.

But where, as in this case, it is an action for an account, it has been held that the rate of exchange should be that prevailing at the date of the accounting, when the amount due is ascertained. See *Manners* v. *Pearson*, *supra*. As this judgment will change the amount due by the trial Judge, and there will have to be a reference to ascertain the correct amount due to the appellant, and it cannot be said there has been any settled account to the present, the rate of exchange allowed will be that prevailing on the concluding date of the reference hereinafter ordered to be taken by the Local Registrar at Humboldt, and if counsel cannot agree upon what that rate is, the said Local Registrar will ascertain the rate when holding the said reference.

As to No. 4. Subject to the provisions of the King's Bench Act, R.S.S. 1920, ch. 39, and the Rules of Court, the costs of all proceedings are in the discretion of the Court or Judge. See Rule of Court 672.

But this discretion must be exercised judicially. One of the most recent cases dealing with this question is *Ritter* v. *Godfrey*, [1920] 2 K.B. 47, at p. 53, wherein Lord Sterndale, M.R., in his judgment, said:—

"The discretion must be judicially exercised, and therefore there must be some grounds for its exercise, for a dis-

cretion exercised on no grounds cannot be judicial. If, however, there be any grounds, the question of whether they are sufficient is entirely for the Judge at the trial, and this Court cannot interfere with his discretion . . . . The principle as to the exercise of discretion is the same in the case of plaintiffs and defendants, but it is clear that considerations sufficient to justify a refusal of costs to a plaintiff are not necessarily sufficient in the case of a defendant, for the former initiates the litigation while the latter is brought into it against his will."

And in *Civil Service Co-Operative Society* v. *Gen'l. Steam Navigation Co.*, [1903] 2 K.B. 756, 9 Asp. M.C. 477, 72 L.J. (K.B.) 933, at p. 936, Earl of Halsbury, L.C., said:—

"No doubt, where a Judge has exercised his discretion upon materials before him in depriving a successful party of his costs, there may be no power in the Court of Appeal to overrule his decision, but there must be materials upon which that discretion can be exercised."

Harnett v. *Vise* (1880), 5 Ex.D. 307, is authority for the proposition that, in exercising his discretion to deprive a successful party of his costs, the Judge is not confined to the consideration of the conduct of the party in the course of the litigation, but may consider his conduct previous to and conducing to the action.

And in this case the material which the trial Judge had was that the appellant had, without any explanation, delayed delivery of title from July 12, 1917, to June 24, 1921, nearly 4 years, and but for his delay beyond a reasonable time there would have been no necessity for this litigation, as respondent had been ready, willing and able to carry out his agreement.

I am therefore of the opinion that, in so far as the judgment of the Judge deprived the appellant of his costs of the action, he had material upon which to exercise his discretion; but in view of the authorities I think he had no material before him to go so far as to make the appellant pay the costs of the respondent in the action. From the authorities, I gather that it is only when the plaintiff brings a vexatious or unnecessary action, even if successful to some extent, that he may be ordered to pay the defendant's costs. Such as in the case of *Harris* v. *Petherick* (1879), 4 Q.B.D. 611, where plaintiff sued for £85 6s., and was non-suited in the first action and in the second recovered only 6s.; and *Fane* v. *Fane* (1879), 13 Ch.D. 228, where, while plaintiff

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was entitled to judgment, the action was held to be unnecessary.

In this case important issues had to be settled, even if the appellant's delay was the cause of the complications arising.

With considerable hesitation I have come to the conclusion that the judgment as to costs appealed from is subject to review to this extent, and that the judgment as to costs should be varied so as to limit it to depriving the appellant of his costs of the action.

It was admitted that since July 12, 1917, the appellant had paid to the Province of Manitoba for interest payable in respect of the said land the sum of $648.20. The trial Judge allowed this sum to the appellant, with interest thereon amounting to $56.66.

The respondent cross-appeals, claiming: 1. That he should not pay the interest on the interest paid by appellant to the said Province of Manitoba. 2. That he is entitled to recover on his counterclaim.

As to No. 1. The objections raised on that are, there are no dates shewing when the sum or sums making $648.20 were to be paid to the Province of Manitoba, and no evidence of how the sum of $56.66 is arrived at, and no evidence that in Montana the law allows interest without a contract to pay it. I have already deal with the lack of evidence as to law of Montana, and in the absence of the same our law in Saskatchewan applies.

I am of opinion that respondent is liable to appellant for interest on the $648.20, less the amount due to the Province of Manitoba, from April 22, 1917, to July 12, 1917, at the rate of 5% per annum from the time or times the appellant made the payments to the Province of Manitoba. The correct amount due will be ascertained on reference to the Local Registrar at Humboldt, as no dates are given in the evidence shewing when the payments were made.

As to No. 2. I am of the opinion that the trial Judge was right in dismissing the counterclaim with costs to the appellant, as the property in the chattels did not pass to the appellant. They were always the property of the respondent, and the time for appellant to accept delivery had not arrived until June 24, 1921, when the assignment of the land contract was first tendered.

The respondent being the owner of the chattels cannot, under the circumstances of this case, charge the appellant for the expenses he incurred in caring for and moving them

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to the Province of Saskatchewan.

There will be judgment herein ordering: 1. Taxation of the appellant's costs of his defence to the counterclaim, and of this appeal. 2. Reference to the Local Registrar at Humboldt to ascertain the amount due to the appellant, on the basis as figured out by the trial Judge, to be varied as above set forth. 3. The appellant to deposit on or before the taking of the reference herein with the said Local Registrar, the said assignment of the said land and of his interest as said administrator, in the said contract between the said Mary Jane Collins, deceased, and the said Province of Manitoba. 4. Payment into Court by the respondent of the amount found due by the said Local Registrar from respondent to the appellant and the appellant's taxed costs and costs of said reference, with exchange on the amount found due under the said agreement (exclusive of costs) between Humboldt, Sask., and Kalispell, Montana, U.S.A., at the rate prevailing on the date of the said Local Registrar's certificate on said reference; and delivery of the said chattels to the appellant at Kalispell aforesaid. Said payment and delivery of chattels to be made within 3 months from the date of the said Local Registrar's certificate of amount found due. 5. If the above amounts are paid into Court and the said chattels delivered as ordered, the said assignment will be delivered to the respondent, and the said monies paid into Court will be paid out to the appellant. 6. The appellant or respondent to be at liberty to apply to a Judge of the Court of King's Bench in Chambers for further directions.

The appellant will be entitled to his costs of appeal.

MARTIN, J.A.:—This is an appeal by the plaintiff from the judgment of Bigelow, J. The plaintiff, as administrator of the estate of Mary Jane Collins under letters of administration granted to him by the District Court of the 11th Judicial District of the State of Montana, U.S.A., on January 25, 1917, and resealed by the Surrogate Court of the Judicial District of Humboldt, Sask., on October 18, 1918, entered into an agreement in writing with the defendant whereby he agreed to sell to the defendant all of Sect. 35 in Tp. 37, in R. 18, west of 2nd meridian, at the price of $6.50 per acre, or a total of $4,160. The agreement is as follows:—

[See judgment of McKay, *ante* p. 643.]

The title to the land in question was in the name of His Majesty the King in the right of and to the use of the

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Province of Manitoba, and at the time that the agreement was entered into there was due to the Province of Manitoba the sum of $2,304, for principal, together with interest at the rate of 6% per annum from April 22, 1917. There is no statement in the agreement to the effect that the defendant was to assume the contract of sale with the Province of Manitoba, but this was thoroughly understood by both parties when the agreement was entered into. On July 12, 1917, there was due to the Province of Manitoba not only the sum of $2,304 for principal, but interest thereon at the rate of 6% per annum from April 26, 1917, which the trial Judge found to amount to $30.62. There was also due by way of taxes on the land on January 1, 1917, the sum of $347.65, together with the taxes for the year 1917, which amounted to $169.15. At the time of the agreement the defendant deposited in the First National Bank of Kalispell, to be held in escrow according to the terms of agreement, the sum of $100; this sum is still in the bank. Later the defendant paid into the bank the sum of $456, but in the spring of 1918, prior to his entering into possession of the lands in question, he withdrew this sum from the bank. During the year 1919 two of the horses referred to in the agreement died, and two horses were sold by the defendant for the sum of $350, which amount he has paid into Court and which amount the plaintiff is willing to accept in place thereof.

After the agreement was entered into on July 12, 1917, interest fell due from time to time on the contract with the Province of Manitoba, and it is admitted that the plaintiff has paid to the said Province the sum of $648.20, by way of interest. The plaintiff was not able to have the assignment of his contract for the land with the Province of Manitoba approved of by the Province of Manitoba until the year 1921; in fact it appears that the plaintiff's solicitors were advised of the approval of the assignment by a letter from the Deputy Commissioner of Provincial Lands, dated May 3, 1921. On June 24, 1921, the plaintiff tendered to the defendant a duly approved assignment of the contract with the Province of Manitoba, and demanded payment from the defendant of the sum of $2,348.54 and United States exchange. The defendant refused to pay the amount demanded, and accordingly the plaintiff brought this action for specific performance and for an account. The defendant counterclaimed for expenses incurred in caring for and removing the chattels in question to the Province of Saskat-

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chewan, owing to the refusal of the plaintiff to accept the same, and the delay in completing title.

The trial Judge held that the loss of the two horses which died and were valued at $170, must be borne by the plaintiff, and he found that on June 24, 1921, the defendant owed the plaintiff $2,133.79, and that, according to the terms of the agreement, the defendant should pay the plaintiff $833.79, together with the sum of $350, which was paid into Court for the team sold, and the sum of $100 which was in the bank at Kalispell, Montana, amounting in all to $1,283.79. The trial Judge also directed the delivery of the remainder of the chattels, with the exception of the two horses which died; such delivery to be made at the farm of the defendant near Watson, in the Province of Saskatchewan. He dismissed the counterclaim of the defendant with costs, but gave to the defendant costs of the action. From this judgment the plaintiff appeals on four grounds, namely: 1. That the defendant should bear the loss of the horses which died; 2. That the agreement was made at Kalispell in the State of Montana, and delivery of the chattels should be made at the residence of the plaintiff in Kalispell aforesaid; 3. That the agreement provides for payment of the money at the First National Bank, Kalispell, and the plaintiff is entitled to payment there; 4. The plaintiff is entitled to the costs of the action.

No. 1. The agreement for sale contains a provision which, to my mind, is of very great importance in deciding at least some of the questions at issue between the parties. The provision referred to is as follows:—"It is further agreed that if the negotiation is not completed or a satisfactory title shown on or before August 15, 1917, then this contract is both null and void at the option of the party of the first part."

The defendant was anxious to carry out the agreement, and he offered to deliver to the plaintiff the chattels referred to therein on August 15, 1917, the time at which, if title to the land were not furnished by the plaintiff, the defendant had the right to declare the contract at an end. Later in the same fall he made a second offer of the chattels, and again on April 18, 1918. On the last mentioned date, according to the evidence of the plaintiff, the defendant told him that he was ready to deliver the chattels, but the plaintiff says, "I told him I was not ready to accept them, I did not have title in shape and I did not know when we could get it."

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The defendant could have elected to avoid the contract on August 15, 1917. He did not do so; on the contrary he elected to carry out the agreement, knowing that the plaintiff was not in a position to make title, and in the month of June, 1918, he actually went into possession of the land and has been in possession of the same ever since. The agreement itself fixes no time for the delivery of title, and the defendant by his conduct must be held to have acquiesced in the delay that has taken place on the part of the plaintiff.

There is a provision in the contract which has a very strong bearing on the question of which party should bear the loss of the horses. The following is the provision referred to:—

"That in payment of said land said Grover H. Collins does hereby agree to take as part payment six horses, one colt, one pair sleighs, one wagon, one set of harness, one set of collars at thirteen hundred dollars ($1,300) part payment and the balance five hundred fifty six ($556) dollars including the $100 left in escrow at the First National Bank of Kalispell at the time and upon delivery of said contract of said land to the party of the first part by said party of the second part."

The agreement therefore provided that the plaintiff would take as part payment for the said land the chattels therein referred to "at the time and upon delivery of said contract of said land to the party of the first part by said party of the second part." With full knowledge of this provision and knowing that the plaintiff would not accept the said chattels the defendant elected to carry out the contract and went into possession. The property in the chattels did not pass at any time during the delay in furnishing title, and I do not think that the risk should be held to have transferred. In my opinion the defendant must bear the loss of the two horses which died, the value of which was $170. The judgment of the trial Judge should be varied accordingly.

No. 2. The agreement between the plaintiff and defendant was made in Kalispell, Montana, where both of the parties were residing at the time. The agreement itself makes no provision for the delivery of the chattels mentioned therein, and it must be presumed that it was the intention of the parties that delivery should be made at that place, as the plaintiff is still residing there.

In Benjamin on Sale, 6th ed., at p. 874, the author says:—

"Where no place of delivery is specified the general rule

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is that the buyer must pay the seller wherever the latter may happen to be, even though the seller may be abroad, if the seller were not in this country at the date of the contract."

See also *Pearson* v. *O'Brien*, 11 D.L.R. 175.

I am of the opinion that the chattels in question should be delivered to the plaintiff at Kalispell, in the State of Montana, and the judgment of the trial Judge should be varied accordingly.

No. 3. As to the question of exchange. The contract, as before stated, provides that the purchase money is payable at the First National Bank, Kalispell, Montana. The general rule is that, where a foreign creditor obtains a judgment in an English Court, the amount due on the judgment must be converted into English currency, not at the rate of exchange prevailing at the date of the judgment, but at the rate of exchange prevailing when the debt became due. *Di Ferdinando* v. *Simon, Smits & Co.*, [1920] 3 K.B. 409; *Société des Hotels du Touquet-Paris-Plage* v. *Cumming*, [1921] 3 K.B. 459; *Toronto Gen'l Trusts Co.* v. *City of Regina* (1922), 69 D.L.R. 542.

In *Manners* v. *Pearson*, [1898] 1 Ch. 581, however, it was held that when a plaintiff sues a defendant in England on a contract made abroad, under which periodical payments in foreign currency ought to have been made to him in a foreign country, and the Court orders an account, he is not entitled to have this sum treated as converted into English money at the rate of exchange which prevailed at the date when the payment ought to have been made under the contract, but at the time when the balance is found on the account. Lindley, M.R., [1898] 1 Ch., at p. 587, said:—

"But it does not follow that the sum to be inserted in the order is the equivalent at that time of the moneys payable by the terms of the contract, for the defendants may be liable not only to pay those sums, but also damages in the shape of interest or otherwise for not having paid them at the proper time. The obligations, if any, of the defendants in this respect must be determined before the amount for which they are liable can be calculated and expressed in any judgments or order for payment."

While in the case at Bar no question of periodical payments arises, at the same time, on June 24, 1921, when the plaintiff tendered the duly approved assignment of contract to the defendant, neither the plaintiff nor the defendant knew accurately the amount of money which should be paid

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by the defendant. There had been a delay of approximately 4 years since the agreement was entered into. During that time the account between the parties had very materially altered. The plaintiff had paid a large sum in interest on the principal moneys to the Province of Manitoba; two of the horses had died, and an accounting was necessary before the amount due by the defendant could be definitely ascertained. Under all the circumstances of the case, I am of the opinion that the conversion should take place at the time when the accounting is completed, and, as a reference will be necessary to the Local Registrar at Humboldt, that date will be fixed by the day when the said Local Registrar signs his certificate setting out the amount that is due by the defendant to the plaintiff. No evidence was given at the trial as to the rate of exchange prevailing at any time during the course of the proceedings, but the Local Registrar should ascertain the rate on the date when the account is completed.

No. 4. As to costs. I have had the privilege of reading the judgment of my brother McKay, and I agree with him in his disposition of this question.

The defendant cross-appealed on the question of the allowance of interest on the interest paid by the plaintiff to the Province of Manitoba. It is admitted that the amount of interest paid is $648.20, and the allowance of interest on this interest made by the trial Judge is $56.66. I think the plaintiff is entitled to interest on the amount of interest he has paid to the Province of Manitoba, but the interest should be calculated at the rate of 5% per annum. There is no evidence as to whether the interest paid to the Province of Manitoba was paid in one sum, or paid at different times, and on this point it will be necessary to ascertain on a reference to the Local Registrar the date or dates on which the payment or payments were made by the plaintiff, and interest should be allowed at 5% per annum from the time or times at which such payment or payments were made. The amount of $648.20, however, includes interest on the contract with the Province of Manitoba from April 22, 1917, to July 12, 1917. This was calculated by the trial Judge to amount to $30.62, and no interest should be allowed on this sum.

The defendant also cross-appeals contending that the counterclaim should not have been dismissed by the trial Judge. As to the counterclaim, I am of opinion that the defendant cannot recover. The chattels were the defend-

ant's; the plaintiff had refused to accept them, and he was at liberty to do this until he was in a position to deliver the assignment of the contract for the purchase of the land from the Province of Manitoba. The property in the chattels at no time passed to the plaintiff, and the defendant cannot charge the plaintiff with any expense he incurred in caring for the chattels.

In my opinion judgment should be entered varying the judgment of the trial Judge as follows:—1. By allowing the plaintiff the sum of $170 for two horses which died during the year 1919. 2. By ordering the delivery of the remainder of the chattels to the plaintiff at Kalispell, in the State of Montana. 3. By directing a reference to the Local Registrar at Humboldt to ascertain the amount due under the contract, and when the amount is so found, to ascertain the amount of Canadian currency necessary on the day of the completion of the reference to purchase the amount so found in American money. No exchange, however, will be allowed on the costs to which the plaintiff is entitled. 4. The interest on the interest paid to the Province of Manitoba by the plaintiff will be calculated at the rate of 5% per annum and will be ascertained by calculating the same on the amounts paid and from the date or dates when the payment or payments were made. No interest will be allowed on the interest from April 22, to July 12, 1917, and which, according to the trial Judge, amounted to $30.62. 5. The plaintiff will deposit with the Local Registrar assignment of the contract for the said land with the Province of Manitoba, duly approved by the Province of Manitoba, before the reference is held. 6. The defendant will be allowed three months from the date of the completion of the reference to pay into Court the amount found due on the reference, together with the taxed costs of the plaintiff as hereinafter provided for; together with exchange on the amount (exclusive of costs) between Humboldt, Saskatchewan, and Kalispell, Montana, at the rate of exchange prevailing on the day the reference is completed; 3 months from the date of completion of said reference will be allowed the defendant for delivery of chattels aforesaid at Kalispell. 7. When the amount found due together with taxed costs is paid into Court and the chattels delivered as above provided, the assignment of the contract with the Province of Manitoba will be delivered to the defendant and the money in Court paid to the plaintiff. The plaintiff is entitled to the costs of the appeal and to his costs of defending the counterclaim, but is not entitled to

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the costs of the action. He will, however, have the costs of the reference. The costs to which the plaintiff is entitled will be taxed and paid into Court, with the amount found due by the Local Registrar, as above directed.

Judgment below varied.

Re WHITFIELD.

British Columbia Supreme Court, McDonald, J. October 11, 1922.

INFANTS (§IC—10)—CUSTODY — ADOPTION — VERBAL AGREEMENT—PARENT'S RIGHT—CHILD'S WELFARE.

Though a verbal agreement giving up the custody of a child is not binding upon the parent, still where such agreement has been acted upon for six years, and the child is better situated at the home of her adoption than she would be with her parent, the Court, having regard for the child's welfare, will not restore the custody of the child to the parent.

APPLICATON by father for the custody of his child. Refused.

J. S. MacKay, for plaintiff. *J. A. Russell*, for defendant.

MCDONALD, J.:—This is an application by the father to obtain possession of his daughter 11 years old, who has, since the death of his wife, some 6 years ago, resided with Mr. and Mrs. Smyth at Ladysmith in this Province. When the mother died, the father was unable through force of circumstances to provide a home for the child and she was placed in the Alexandra Orphanage in the city of Vancouver. She remained there for some months and was thence taken by the Smyths, under a verbal agreement, as I find upon the evidence, made with the father that he would not at any time afterwards claim her. The law appears to be clear that such an agreement is not binding upon the parent. *Re Porter* (1910), 15 B.C.R. 454, but it is equally clear, as stated in the judgment in that case, at p. 455, that if such an agreement be "acted upon for such a length of time and under such circumstances as to bring about a condition of things which would make it hazardous to the child's welfare to remove [her] from the custody of those who have, in fact, had charge of [her] upbringing, the Court will not, as of course, order [her] restoration to the parent."

The case has caused me much reflection and the best conclusion I have been able to reach is that it is one coming within what may be called the above exception. All the parties concerned, including the child, appeared before me The child expressed a great affection for her foster father and mother and a great unwillingness to leave them. Mr.

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Smyth is a contracting painter living at Ladysmith where the child attends school and where she will later be able to attend the High School. The Smyths have no other children and are, in my opinion, able to maintain and educate her suitably according to her station in life. The father is a teamster residing in Vancouver. He has no home and boards with a widow, a Mrs. Scranton, who also appeared before me and expressed her willingness that the child should come to her house and live with the father. The child has an older sister, married and living in Seattle. This sister also appeared and expressed a great desire that the child should come to live with the father. She stated that she was employed by a telephone company in Seattle and that her husband is an accountant. Their joint earnings amount to about $275 per month and she stated that she would be willing to contribute towards the maintenance of her sister, if the infant should come to live with her father. It appears clear, from the evidence, that it was this older sister who first induced the father to endeavour to obtain possession of the child as the letters written by the father to the Smyths in May and September of this year shew that it was at the married sister's instigation that he sought possession of the child.

The situation being, therefore, that the child is now settled in a comfortable and happy home and that the only home offered her by her father is one that on its face is more than likely to prove of a temporary nature, it would, in my opinion, be hazardous to her welfare to remove her from the custody of those with whom she now resides.

The application is, therefore, refused but I feel confident that, under all the unhappy circumstances costs will not be asked.

Application dismissed.

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Saskatchewan Court of Appeal, Haultain, C.J.S., Turgeon, McKay and Martin, JJ.A. November 20, 1922.

VENDOR AND PURCHASER (§II—30)—VENDOR'S LIEN FOR SURVEY FEES —CAVEAT—INNOCENT PURCHASER.

A vendor's lien for unpaid survey fees does not extend as against an innocent sub-purchaser of the land without notice of the claim, and no caveat therefor can in such case be lodged by the vendor against the land.

DAMAGES (§IIIK—205)—WRONGFUL FILING OF CAVEAT—CARRYING CHARGES—PUNITIVE DAMAGES.

Damages for the wrongful filing of a caveat cannot be awarded on the basis of the carrying charges of the land during the time the caveat was registered, in the absence of evidence shewing

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that such charges were occasioned by the existence of the caveat, and can only be confined in such instance to the costs incurred in connection with the removal of the caveat; nor can punitive or exemplary damages be allowed where no malice or improper motive is shewn.

APPEAL by defendant from the judgment of Taylor, J. (1921), 60 D.L.R. 607, 14 S.L.R. 459. Varied.

G. A. Cruise, for appellant.

H. E. Sampson, K.C., for respondents.

HAULTAIN, C.J.S., concurs with MARTIN, J.A.

TURGEON, J.A.:—Two questions are to be determined in this appeal. Did the appellant have to right to file his caveat against the lands in question, the title to which had become vested in the respondents? Under the facts of the case as they appear from the evidence given at the trial (1921), 60 D.L.R. 607, 14 S.L.R. 459, and the correspondence filed, I am of opinion that he had no such right. He allowed the title to be transferred to the respondents pursuant to the agreement for sale made by them with his purchaser, James A. Powell, without informing them of his intention to retain any claim against the lands; thereby electing to look to James A. Powell personally for the satisfaction of any right which he might still have by reason of his contract with him.

But, having filed his caveat and maintained it through a period of several years, as he did, ought the appellant, under the circumstances, to be visited with the heavy damages, designated by the trial Judge as punitive and exemplary damages, which have been awarded against him? I think not. The respondents in instituting their action founded no claim whatsoever on such grounds. The idea of it seems to have originated with the trial Judge upon what I conceive, with all respect, to be a mistaken view of the law and an erroneous appreciation of the facts. The respondents brought this action to recover special damages, only, which they itemised in their statement of claim, and which aggregate $68,137.71. Out of this large amount, it seems clear to me that they are entitled to recover one item only, that of $53.78 for solicitors' fees incurred in having the caveat removed. The reasons for granting exemplary damages which existed in the several cases cited by the trial Judge, Taylor, J., 60 D.L.R. 607, are totally absent from the case at Bar. I agree with all that my brother Martin says upon this point, and I would reduce the judgment in favour of the respondents to this sum of $53.78 on the terms respecting costs which he suggests.

McKAY, J.A., agrees with MARTIN, J.A.

MARTIN, J.A.:—This is an action to recover damages for the alleged wrongful filing of a caveat on certain lands in the Prince Albert district owned by the plaintiffs, and consisting of 8,244 acres. At one time the defendant was the owner of these lands, and on June 1, 1911, he entered into an agreement to sell the lands to one James A. Powell for the sum of $84,431.20. The purchase price is particularly set forth in the agreement for sale as being "for the sum of $10 per acre and survey fees amounting to 10 cents per acre payable with final instalment of purchase money."

There is a further provision contained in this agreement, dated June 1, 1911, between the defendant and the said James A. Powell, which agreement was apparently intended to be a part of the agreement for sale. The further provision referred to is as follows:—

"If, however, there are any portions of the said lands now owned by the party of the first part (the defendant) in the ranges set out in the schedule hereto in excess of the acreage set out in the said schedule, or if there are any portions of land omitted from the said schedule . . . . . then the party of the first part shall deliver the same to the party of the second part who shall account and pay for the same at the said rate per acre. Nevertheless the total acreage bought under this agreement shall not exceed 8,800 acres."

On the same date the said purchaser, James A. Powell, entered into an agreement in writing to sell the said lands to the plaintiffs, John E. Lundy and George B. McLeod, for the sum of $113,589.25. The price per acre in this agreement is stated to be: "The sum of $13.50 per acre and survey fees, if any, amounting to 10 cents per acre, payable on the final instalment of purchase money." No provision is contained in this agreement with respect to the purchase by the plaintiffs of any portions of land in the ranges set out in the schedule to the agreement and in excess of the acreage therein set out, such as is contained in the agreement made between the defendant and his purchaser, James A. Powell.

During the early part of 1914, the plaintiffs arranged to obtain a loan on the said lands from the Independent Order of Foresters, with the object of paying off the defendant in full, and giving to the said James A. Powell a second mortgage on the said lands for the balance of his purchase money. The defendant was requested to convey the lands

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by transfer directly to the plaintiffs, as a matter of convenience and for the purpose of saving one registration. For this purpose, the defendant sent a transfer to the Imperial Bank at Edmonton, Alberta, such transfer to be delivered to the solicitors who were closing the loan from the Independent Order of Foresters, on payment of the balance of the money due the defendant under his agreement for sale with James A. Powell. Before the transaction was finally closed, by letter dated July 6, 1914, addressed to the solicitors who were closing the loan at Edmonton, the defendant stated: "I supposed that we were entitled to have survey fees if they were stated in the contract, and at 10c per acre. We can agree upon this, however, without difficulty, as it must be a question which can be settled by lawyers without much difference of opinion when all the facts are known."

On September 25, 1914, after the delivery of transfer, and the closing of the loan, and after the defendant had again communicated with the solicitors on the question of the payment of survey fees, the solicitors wrote the defendant and made the following statement referring to the survey fees:—

"You are correct in your statement that your form of contract provides for this, but as we advised you in a telegram of July 4, 1914, it is not usual to charge survey fees on transactions concerning lands in the Western Provinces, as under our system here this survey is entirely unnecessary."

The telegram of July 4, 1914, referred to in the above quoted letter does not appear in the evidence, and apart from this telegram so referred to there is no evidence that the solicitors who were closing the loan refused the payment of survey fees before the delivery of transfer. The trial Judge, Taylor, J., 60 D.L.R. 607, 14 S.L.R. 459, however, found that payment of survey fees was refused, but he also finds that the defendant "reserved the survey fees for further consideration," and this latter finding is supported by the evidence.

Taylor, J., also finds as a fact, at p. 608, that:—"He [meaning the defendant] never in any way communicated his claim to the plaintiffs in this action, and he was not called at the trial (though present in Court) to substantiate his claim."

The fact that the defendant did not communicate his claim for survey fees to the plaintiffs is a matter, to my

mind, which should not be adversely commented upon. The defendant did, in this case, what the ordinary man would do under similar circumstances; that is, he communicated his claim to the solicitors who were engaged in closing the loan, and with whom he was in communication with respect to the matter of the furnishing of a transfer for the lands in question.

Furthermore, the statement of Taylor, J., that "he [the defendant] was not called at the trial (though present in Court) to substantiate his claim," is not correct, for the defendant did give evidence at the trial and was examined and cross-examined at considerable length.

On the transfer being delivered to the solicitors who were closing the loan for the Independent Order of Foresters, the transfer was deposited in the proper Land Titles Office by the solicitors, and certificate of title was issued in the name of the plaintiffs on August 10, 1914. After this date the defendant continued his correspondence with the solicitors with respect to the payment of survey fees, and for the first time by letter dated June 12, 1915, mentioned a fractional portion of land consisting of 32 acres. In this letter the following occurs:—"I first realised that I owned this when I received a tax notice this year and had not received any before."

In the meantime, on May 27, 1915, the defendant executed a caveat covering "an equitable estate or interest in an estate in fee simple in possession under and by virtue of an agreement for sale made between Max Leon Powell and James A. Powell, dated June 1, 1911, covering the lands described in the agreement in writing and registered in the name of Lundy, McLeod & Co., and I forbid the registration of any person or transferee or owner of any instrument affecting the said estate or interest unless such instrument be expressed to be subject to my claim."

While the caveat is dated May 27, 1915, it was not registered until November 9, 1915. In his evidence given at the trial, the defendant stated that he filed the caveat because "I thought we were not getting anywhere," referring to the correspondence he had conducted with the solicitors. He also stated in his evidence at the trial: "I heard that Lundy and McLeod were friends of Powell's and that he was involved financially and was putting the property out of his hands for the reason that he didn't want any property on his hands, and that he had guaranteed the mortgage to the Foresters himself and was operating with the land just the

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same after this pretended sale to Lundy and McLeod as before. I learned that from an independent source."

Q: "Then you filed your caveat?" A: "Yes."

In any event, the caveat was filed affecting all the lands, consisting of 8244 acres, and was filed in an endeavour on the part of the defendant to protect himself for the sum of $824.40, survey fees, and also because he had found that he still owned 32 acres of land in the ranges referred to in the schedule to the agreement with James A. Powell, and the defendant claimed that he was entitled to be paid for such 32 acres under the special provisions contained in his contract with James A. Powell above referred to. The caveat filed, however, did not state definitely the claim of the defendant, and did not set out any sum of money to which he claimed to be entitled.

After the filing of the caveat on November 9, 1915, the defendant heard nothing from the plaintiffs about the caveat, nor from anyone else, until October 5, 1917, when the plaintiffs wrote, saying:—"We find there is a caveat filed on this property. Kindly let us know if it is your intention to remove this and for what reason it is filed."

On October 11 the defendant wrote in reply, setting forth fully his reasons for filing the caveat, and stated:—"I shall not remove my caveat unless these matters have been adjusted."

Shortly afterwards, the plaintiffs took steps to have a notice issued under the provisions of the Land Titles Act R.S.S. 1920, ch. 67, calling upon the defendant to remove the caveat. When the notice was received by the defendant, he employed a solicitor in Saskatoon and states: "I took the advice of my counsel." Proceedings were taken by the solicitor to have the caveat continued, considerable delay ensued, until finally the caveat was allowed to lapse on January 8, 1919.

The plaintiffs claim that they incurred solicitors' costs in connection with the removal of the caveat, amounting to $53.78, and, in addition, that in the year 1917 they lost sales of the said lands by reason of the caveat being registered against them. The trial Judge, Taylor, J., 60 D.L.R. 607, held that, with respect to the alleged opportunities of selling the lands, the plaintiffs had failed to establish any special damage, and by way of special damage he awarded only the sum of $53.78, the amount incurred for solicitors' fees in connection with the remoal of the caveat. He awarded, however, in addition, the sum of $5,000 by way of exemplary,

punitive or vindictive damages. From this judgment the defendant appeals on two grounds:—

1. That the defendant was entitled to a vendor's lien for unpaid purchase money, made up of survey fees, amounting to $824.40, and the purchase price of the 32 acres which were found to be owned by the defendant in one of the ranges set out in the schedule to the agreement for sale with James A. Powell:

2. That the trial Judge erred in awarding punitive, or exemplary damage, and that, in any event, the damages awarded were excessive.

The defendant contends that he is entitled to a vendor's lien for unpaid purchase money for 32 acres, because the agreement with James A. Powell provided for the purchase by the said James A. Powell of such portions of land as might be found to be owned by the defendant in certain ranges set out in the schedule to the agreement for sale. This provision, however, was not included in the contract between James A. Powell and the plaintiffs, and no reference is made in the contract made with the plaintiffs to the agreement for sale between the defendant and James A. Powell, and the plaintiffs had no notice of any such provision, and no claim was ever made to the plaintiffs on such grounds before the transfer for the lands was delivered to the solicitors who were closing the loan in the summer months of 1914. In fact, the subject was not brought to the attention of the solicitors until the defendant wrote the letter of June 12, 1915, and which is above referred to.

I am of the opinion, therefore, that the defendant, whatever his remedy may be as against James A. Powell, has no claim as against the land in the hands of the plaintiffs in so far as the purchase of the 32 acres is concerned.

As to the matter of survey fees, the contract of the defendant with James A. Powell specially provides for such payment as a part of the purchase price, and the defendant, I think, unless he waived his right, was entitled to a vendor's lien against the land in the hands of the purchaser James A. Powell for the amount of the survey fees, as a portion of the purchase price; but is not entitled to such lien against the lands in the hands of the plaintiffs unless the plaintiffs had notice of the claim.

Williams on Vendors & Purchasers, 2nd ed., p. 1030, says:

"The vendor's lien, like other equitable interests, is enforceable as a rule, against all persons who claim under the purchaser's estate in the land sold, either for a legal estate

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or interest by operation of law, by gratuitious assignment or as purchasers for value with notice of the lien or for an equitable estate or interest; but not against any person who has acquired a legal estate or interest in the land sold in good faith as purchaser for value without notice of the claim."

In *Kettlewell* v. *Watson* (1884), 26 Ch.D. 501, the vendors of land in Yorkshire executed a conveyance and allowed it to be registered with the object of enabling the purchaser to resell the land in lots, and the conduct of their solicitors, to whom they left everything, was such as to induce sub-purchasers to believe that the purchasers had power to deal with the land. It was held that they could not assert their lien for unpaid purchase money as against sub-purchasers taking an equitable interest in the land without notice of the vendor's intention to insist on their lien. Lindley, L.J., at p. 507, said:—

"The *primâ facie* right of an unpaid vendor of land to an equitable lien upon it for the amount of his unpaid purchase money is too well established to be disputed; the right arises whenever there is a valid contract of sale and the time for completing that contract has arrived and the purchase-money is not duly paid. There is no necessity for the vendor to stipulate for the lien; and although the lien arises from, and may in one sense be said to be created by, the contract of sale, still no contract to confer the lien is necessary, and in that sense the lien may be said to arise independently of contract."

Did the plaintiffs have any notice of the defendant's claim to be paid the amount set out in the contract with James A. Powell as survey fees and as a portion of the purchase money? I think, on the evidence, they had no such notice.

It does not appear that the solicitors who were closing the loan were acting as solicitors for the plaintiffs. In fact, the evidence is that the plaintiffs employed other solicitors. Under such circumstances, notice to the solicitors as given by the defendant would not constitute notice to the plaintiffs. While I think that the defendant did what anyone would be reasonably expected to do under similar circumstances, that is, communicate his claim to the solicitors who were closing the loan, and while this fact should be taken into consideration in dealing with the matter of the amount of any damages to which the plaintiffs may be entitled, I think it must be held that the plaintiffs had no notice. The defendant was, therefore, not entitled to a ven-

dor's lien against the lands in the hands of the plaintiffs, and was not entitled to file the caveat.

The trial Judge in awarding damages to the amount of $5,000, apparently proceeded on two principles: (1) he awarded damages on the basis of the carrying charges of the land during the time the caveat was registered; (2) he awarded exemplary, punitive or vindictive damages.

As to the carrying charges, the judgment, 60 D.L.R. at pp. 610-611, reads:—

"It seems to me, however, that as the effect of a caveat is to tie up the title and prevent any dealings with the land, that a caveator who unreasonably lodges a caveat against lands which are on the market for sale might well be saddled with the cost of carrying the lands during the period in which his caveat wrongfully clouds the title; that it follows as a natural result of the filing of the caveat that the owners must carry the land during that period, be out the payment of taxes imposed, and have in addition to meet any interest charges and hold their investment without return in that period."

And again at p. 613:—

"The carrying charges to which I have referred would, for the period which the plaintiffs were embarrassed by the defendant's caveat, I refer to what seems to me a reasonable time in which to procure its removal, amount on the evidence to at least $5,000."

With all deference, I desire to say that "carrying charges" constitute an entirely wrong basis upon which to assess damages in this case. Had there been payments due by sub-purchasers, withheld from the plaintiffs by reason of the caveat, the matter of "carrying charges" which the plaintiffs were forced to pay—such as interest—by reason of the withholding of payments, might reasonably enter into the question of the assessment of damages. There is, however, no evidence of any such condition of affairs, and as far as the taxes are concerned, they were not affected by the caveat; in fact the caveat had no effect at all on carrying charges. The trial Judge has acted under a misconception, with the result that he has assessed damages under an entirely wrong principle. Under the circumstances, I have no hesitation in coming to the conclusion that this Court may very properly review the assessment of damages.

In *Crerar and Patterson* v. *Braybrook*, affirmed on appeal in (1919), 48 D.L.R. 683, 15 Alta. L.R. 441, it was held that damages caused by the filing of a caveat should be allowed

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for interest on a sum of money held back by a purchaser until the caveat was removed, and for certain solicitors' fees and disbursements incurred upon an application to have the caveat discharged, the same to be the subject of taxation between solicitor and client unless the parties agreed upon the amount.

The trial Judge has assessed damages on the principle that punitive, exemplary or vindictive damages should be allowed. The judgment states, 60 D.L.R., at p. 613:—

"I have no hesitation in concluding that this caveat was wrongfully filed at least with a reckless indifference to the rights of others, equivalent to *mala fides*, and I am not so sure that it was indifference merely. It seems more, that the defendant must have intended to so embarrass the plaintiffs in handling the whole tract of 8,244 acres that they would quickly meet his claim, which would be less than $20 against any one quarter-section. Otherwise, why blanket the whole tract, when any section would have afforded ample security."

In actions for trespass, punitive or exemplary damages are allowed where the defendant has acted from a malicious motive, or where his conduct has been violent or insulting.

10 Hals., p. 341, sec. 628, says:

"The rule that only such damages are recoverable as are the natural and probable result of the wrongful act is somewhat obscured in its application to actions of trespass by the fact that the amount of damages in such an action may always be indefinitely enhanced by evidence of malicious motive or violent and insulting conduct on the part of the defendant."

In Mayne on Damages, 9th ed., p. 42, the author says:—

"For instance a man's goods may be seized under circumstances which involve a charge of a criminal nature or a trespass upon land may be attended with wanton insult to the owner. Any species of aggravation will, of course, give ground for additional damages. In general, however, injuries to property, when unattended by circumstances of this sort, and especially when they take place under a fancied right, are only visited with damages proportioned to the actual pecuniary loss sustained, measured by what might have been reasonably anticipated as probable."

The action at Bar is one for the wrongful filing of a caveat, and may be considered akin to an action for trespass to the extent, at least, that exemplary damages may

be awarded if the defendant acted with a malicious or improper motive. Taylor, J., has found that the defendant acted with *mala fides*, but inasmuch as there is no conflict of evidence, and as the trial Judge acted under a misconception in using "carrying charges" as a basis for the assessment of damages and stated the principle on which he acted in such a manner that if so stated to a jury in a trial by jury, there would have been grounds for a new trial, I think the evidence may very well be reviewed by this Court with the object of ascertaining in what the *mala fides* of the defendant consists, and for the purpose of determining whether or not the defendant acted from a malicious or improper motive.

The facts have already been fully stated, but as to the conduct of the defendant the following matters are important. He communicated his claim for payment of survey fees to the solicitors who were closing the loan before the transfer was delivered and reserved the question for future consideration. He continued corresponding with the solicitors for some months ofter the closing of the transaction, only resorting to the caveat when, as stated in his evidence at the trial, "I thought we were not getting anywhere." When the plaintiffs wrote him on October 5, 1917, with respect to the caveat, he replied by letter of October 11, 1917, setting out fully his claim, and stated "I shall not remove my caveat until these matters have been adjusted." Later, after receiving a notice under the provisions of the Land Titles Act R.S.S. 1920, ch. 67, to the effect that the caveat would lapse at the expiration of 30 days unless in the meantime he should file with the registrar a Judge's order providing for the continuing of the caveat beyond the period of 30 days, he consulted a solicitor, and, as he states: "I took the advice of my counsel." An order was obtained continuing the caveat till December 8, 1918, and, apparently, the time was further extended till January 8, 1919, when the caveat was allowed to lapse. Considering all the circumstances of the case, it appears to me that the defendant might very reasonably think that he had the right to file a caveat, and until all the facts were known to him as to the relationship between James A. Powell and the plaintiffs Lundy and McLeod, and until the question of whether or not the plaintiffs had any notice of the defendant's claim with respect to the survey fees was determined, there might reasonably exist in the defendant's mind a bona fide belief that the right to file a caveat existed. I must say that a

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careful perusal of the evidence has failed on my part to discover any indication of malicious or improper motive such as would justify the assessment of punitive or exemplary damages, and, this being the case, the only damages to which the plaintiffs are entitled are such as are the natural and probable result of the wrongful act, namely the filing of the caveat, and as the learned trial Judge has found that the plaintiffs are entitled to the amount of $53.78, being solicitors' costs incurred in connection with the removal of the caveat, I will fix the damage at that amount.

The judgment in the Court below, 60 D.L.R. 607, will, therefore, be varied by reducing the damages awarded to the sum of $53.78, with costs on the appropriate district court scale no costs to defendant in the Court below. The defendant is entitled to the costs of the appeal, which when taxed will be set off against the amount of damages and taxed costs to which the plaintiffs are entitled, and the party in whose favour there appears a balance will have judgment for such balance.

Judgment varied.

LAMB v. TOWN OF ESTEVAN.

Saskatchewan Court of Appeal, Haultain, C.J.S., McKay and Martin, JJ.A. November 20, 1922.

MUNICIPAL CORPORATIONS (§IIF—180)—PURCHASE OF LAND—POWERS UNDER TOWN ACT—ULTRA VIRES—RESTORING BENEFITS.

The purchase of land by a municipal corporation for the purpose of reselling it to a company as an inducement to its establishing a "branch office and warehouse" thereon, is not within the corporate powers conferred upon it by sec. 169 (15) and (78) of the Town Act, R.S.S. 1909, ch. 85, and being *ultra vires* the agreement of sale is unenforceable against it. The principle of restoring benefits a corporation has received under an invalid contract only applies when the remedy is sought in *rem*, for the recovery of the specific property, and not when in *personam*, for the recovery of the purchase price thereon; and does not apply at all when the property had been resold with the privity of the vendor for which the corporation received no benefits.

APPEAL by plaintiff from a judgment dismissing the action. Affirmed.

P. M. Anderson, K.C., for appellant.

T. D. Brown, K.C., for respondent.

The judgment of the Court was delivered by

MARTIN, J.A.:—This is an action by the plaintiff for the sum of $4,500 and interest, the balance of the purchase price of block 35 in the town of Estevan, which property was purchased by the defendant from the plaintiff for the sum of $10,000. The defendant paid to the plaintiff on account of the purchase price $5,500, but has refused to pay the balance.

The action was brought against the defendant as the maker of a promissory note dated April 20, 1913, whereby the defendant promised to pay the plaintiff on demand at the Union Bank of Canada, Estevan, the sum of $4,500, together with interest at the rate of 6% per annum. In the alternative, the plaintiff claims under a certain agreement in writing dated April 9, 1913, whereby the plaintiff agreed to sell to the defendant lots 1 to 20, inclusive, in block 35, in the town of Estevan; and in the further alternative, the plaintiff alleges that at the request of the defendant he transferred the said lots to the J. I. Case Co. and said company is now the registered owner thereof, and the plaintiff says there is an obligation on the defendant to pay the plaintiff compensation therefor, or to re-convey the said lots to the plaintiff and to pay for the use thereof since the month of May, 1913.

The trial Judge dismissed the plaintiff's claim, holding that the promissory note in question was barred by the Statute of Limitations (R.S.S. 1920, ch. 47, sec. 1) and, in so far as the alternative claim under the agreement was concerned, he held that the money was payable on the happening of a certain event, which event did not happen through no fault of the defendant. He also held that the whole transaction was an attempt to bonus certain individuals, which is forbidden by statute and the plaintiff was fully aware of this.

The appeal of the plaintiff is confined to that part of the judgment dealing with the claim under the agreement for sale. No appeal has been taken in so far as the promissory note is concerned.

The agreement for sale was made on April 9, 1913, and was made between the plaintiff as party of the first part and the defendant as party of the second part. It first of all recited the fact that the purchaser has entered into a contract with the J. I. Case Threshing Machine Co. of Racine, Wisconsin, for the sale to the said company of lots 1 to 20, inclusive, in block 35, in the town of Estevan, for the sum of $4,500, to be paid to the town when certificate of title for the said land was delivered. The fact that the town had agreed with the said J. I. Case Co. to provide a railway spur to give the block traffic facilities with the Canadian Pacific Ry. is also referred to. The purchase price is stated as $10,000 if the purchaser builds the railway spur, but $12,000 if the purchaser does not construct the said spur.

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The consideration is agreed to be paid in the following manner:—$"4,500 when the purchaser shall receive from the said Threshing Machine Co. the said sum of $4,500. The sum of $5,500 to be paid by a note for that amount made by the purchaser in favour of the vendor bearing even date with this agreement, with interest at the rate of 6% per annum payable on the 1st day of January, 1914."

There is also a covenant that:—"immediately upon the execution of this agreement by the purchaser the vendor doth covenant, promise and agree to and with the purchaser to convey and assure or cause to be conveyed and assured to the said J. I. Case Threshing Machine Company the said parcel of land by transfer under the Land Titles Act (R.S.S. 1909, ch. 41) . . . . ."

The agreement for the sale of the said block between the defendant and the J. I. Case Threshing Machine Co. is dated the month of October, 1912, but in fact was not signed until February or March, 1913, as appears from the minutes of the meetings of the town council of February 12 and March 12, 1913. Under the agreement the defendant agreed to convey to the J. I. Case Co., free of all encumbrances, all of block 35 for the sum of $4,500. The defendant also agreed to connect the property by spur tracks giving direct connection with tracks of the C.P.R. and C.N.R., as soon as the latter company had constructed its line into the town. The J. I. Case Co. agreed to establish "a branch office and a distributing warehouse" on the property in question. $4,500 was agreed to be paid as soon as the title to the land was approved of by their solicitors and the trackage facilities supplied. There is also a provision that the agreement is subject to the assent of the burgesses of the town.

The property was therefore purchased by the defendant from the plaintiff for the purpose of re-selling the same to the J. I. Case Threshing Machine Co., and as an inducement to the J. I. Case Co. to establish "a branch office and distributing warehouse" thereon. The fact is that the agreement with the J. I. Case Co. was executed some time before the plaintiff entered into his agreement with the defendant of April 20, 1913.

The question at once arises, did the defendant under the provisions of the Town Act, as they existed at the time of the transaction, have any power to purchase land for any such purpose?

The Town Act in force at the time of the transaction is found in R.S.S. 1909, ch. 85, and the only provisions as to the

acquiring of property are found in sec. 169 (15) and (78).

Section 169 (15), is as follows:—"Acquiring so much real property as may be required for highways, roads, streets, bridges, alleys and byways in the town and for parks and acquiring any real property for the purpose of preventing the operation of any and all such coal mines and coal pits within, upon or under any portion of the limits of the town as in the opinion of the council injuriously affect or endanger property within the limits of the town making due compensation therefor to the parties entitled thereto;"

Sub-section 78 is as follows:—"Acquiring any estate in landed property within or without the town for a public park, garden or walk or for a place for exhibitions and for the disposal thereof when no longer required for the purpose or when the council of the town may deem it advisable to dispose of the same; and for accepting and taking charge of landed property within the town dedicated for a public park, garden or walk for the use of the inhabitants of the town;"

These sub-sections only confer power on the town to acquire land for the purposes of highways and parks, and an examination of the Act shows that there is no other power to acquire land conferred by the Act. The town, being a corporation created by statute, has only such powers as are given it by statute.

In *Trustees of the Harbour of Dundee* v. *Nicol*, [1915] A.C. 550, at p. 556, Lord Haldane said: "It is now well settled by the judgment of this House in the appeal in that case *The Directors of the Ashbury R. Carriage etc. Co.* v. *Riche* (1875), L.R. 7, H.L. 653, and by subsequent decisions which this House has given, that the answer to the question whether a corporation created by a statute has a particular power depends exclusively on whether that power has been expressly given to it by the statute regulating it, or can be implied from the language used. The question is simply one of construction of language, and not of presumption. See also *Swift Current* v. *Leslie* (1920), 52 D.L.R. 532, 13 S.L.R. 176.

The defendant therefore had no power to enter into the contract with the plaintiff for the purchase of the property in question. The contract is *ultra vires*, and the plaintiff cannot recover on it.

It is contended, however, on behauf of the plaintiff, that the plaintiff is entitled to recover on the ground that the defendant has received property of the plaintiff which it should account for, there being no intention on the part of

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the plaintiff to make a gift to the defendant.

In support of this contention the following cases are relied upon:—*Sinclair* v. *Brougham*, [1914] A.C. 398; *White* v. *Jachansky* (1917), 34 D.L.R. 271, 10 S.L.R. 81; *Schuman* v. *Drab* (1919), 49 D.L.R. 57, 12 S.L.R. 409; *Gnaedinger* v. *Turtleford Grain Growers Co-op. Ass'n.* (1922), 63 D.L.R. 498, 15 S.L.R. 207.

The principle upon which these cases have been decided is, that a person who is not directly liable must account for the benefits he has received from an invalid transaction and pay to the other party the amount or value of the benefits which he has received. The principle is an equitable one, and applies to persons under disability, to corporate transactions which are irregular, and to transactions in themselves invalid which have resulted in transferring goods, materials, or labour to a corporation. The remedy in such cases is in *rem* and not in *personam*. On this principle a plaintiff has a right to follow and recover the property with which in equity he had really never parted.

I cannot see how the equitable principle referred to in the cases above cited can be applied to the case at Bar; the defendant has not the property in question. The property was sold to the J. I. Case Co. with the knowledge and privity of the plaintiff, and at the request of the defendant the plaintiff facilitated the obtaining of transfers for the lots directly to the J. I. Case Co. Nor has the defendant received any money in payment for the property, nor has any benefit accrued to the defendant by reason of the transaction. Under such circumstances I do not think that the doctrine of equity with respect to property sold under an invalid contract can be applied.

I would dismiss the appeal with costs.

Appeal dismissed.

MUELLER Mfg. Co., Ltd. v. CANADIAN DETROIT LUBRICATING Co.

Supreme Court of Canada, Idington, Duff, Anglin, Brodeur and Mignault, JJ. October 10, 1922.

CONTRACTS (§IID—175)—TO SUPPLY MUNITION FORGINGS—"REPLACEMENT" OF DEFECTIVES.

A contract to supply forgings for war munition purposes, containing a provision for the replacement of all forgings found defective, which had been terminated by a new agreement, does not entitle the seller to claim for loss of profits on deliveries of forgings returned as defective but not replaced under the old contract; such returns not having been replaced were properly charged off as "replacements."

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APPEAL by plaintiff from the judgment of the Appellate Division of Ontario, reversing the judgment of Rose, J. Affirmed.

The judgment appealed from is as follows:—

MEREDITH, C.J.C.P.:—When the real character of that which has been called "replacements" is understood there ought not to be any difficulty in reaching a just conclusion as to the rights of the parties in regard to the matters in question in this action: the rather misleading word "replacements" is apt to set one at the outset upon a wrong course.

The defendants are brass-founders, and in war-time contracted with the plaintiffs to make for and deliver to them a great quantity of brass "forgings," as they were called by the witnesses, to be used by the plaintiffs in making munitions of war for the British armies: and all such contracts were subject to provisions for their cancellation.

The forgings, according to the letter of the contracts, were to be paid for on or about the time of delivery; but defective forgings, of which there were great numbers, were to be returned to the defendants at their cost and were to be replaced by them.

The important feature of the replacement is this: that the defective parts returned were quite useless as forgings, and were really only so much scrap brass of no value except to go into the "melting pot" again: so that in effect each defective forging returned was simply the case of a forging not supplied.

Occasion arose for the cancellation of the contract, and the parties to this action then entered into a new contract for another very large number of forgings at a new and reduced price. The reduction in price was made at the defendants' request by way of a payment in cash by them for the difference, leaving the stated price as it was, but that makes no difference: it is not the mode of reduction but the fact of reduction that affects the question involved.

At this time a large number of defective forgings had been returned to the defendants, and had not been replaced: the practical result of which was that the defendants had actually supplied not the number of forgings they had charged for but only that number less the number of such returns; and were really entitled to payment only for the value given, the perfect forgings delivered and accepted; and the rights of the parties depend upon the question: whether, notwithstanding the new arrangement, the defendants were bound to go on delivering under the old con-

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tract until the number of defective forgings had been made up: if they were not so bound to deliver, the plaintiffs were not bound to accept. No more forgings were delivered under the old contract, but the defendants say that if the plaintiffs would have accepted them they could have delivered them and that if they had made and delivered them they should have made a profit on them for the amount of damages awarded to them, in this action, upon their counterclaim.

And, apart from the testimony on the subject, I should have thought this an extraordinary and unwarrantable claim: should have thought the new contract as to quantity and price was substituted for the former one; that under it work on the old order of things ceased and began again under the new order, which was for a very large quantity, requiring much energy and exertion on the defendants' part to perform it.

The case would be very different if the defective castings could be profitably cured of their defects, but they could not, for all practical uses and purposes the position of the parties was just the same as if these defective forgings had not been delivered, as if the defects had been discovered at the defendants' foundry and such forgings had been at once returned to the furnace. Provision for payment on delivery could make no difference, if payment had been made it must have been returned in case of no replacements.

There is nothing to indicate that these "replacements" were to be added to the number of forgings provided for in the new contract and to be paid for at the higher price; there was no reason why they should be: reproducing them would cost no more nor any less than producing under the new contract.

In all the circumstances of the case, therefore, I find no difficulty in accepting as true the testimony of the plaintiffs' secretary and treasurer that the agreement was "to absolutely clean the slate and start afresh," and that that included "replacements" and everything of that sort: and that that was necessary, as otherwise the plaintiffs would have had left on their hands a lot of material they could not have used.

And there is, and to my mind conclusive, corroboration of that in the subsequent acts of the defendants. In winding up the business between the parties, through the munitions board, which was much concerned in it, a release of the

plaintiffs by the defendants from all claims was drawn up and executed by the defendants, but they withheld it until the plaintiffs should execute a release of them from all claims in respect of the "replacements." That was a very formal admission by them that they had no claim against the plaintiffs in respect of these replacements, but that they desired to guard themselves against a claim by the plaintiffs in respect of them.

It seems that the release by the plaintiffs was not given, and it is said that the defendants' release is not binding upon them; but, however that may be, it does not at all detract from the effect of the release and the circumstances attending it as an admission by the defendants of the true state of affairs existing between them and the plaintiffs in respect to these "replacements."

But it is said that the plaintiffs have done something altogether inconsistent with the position they now take in having at one time joined with the defendants and others to make a claim for compensation from the munitions board in respect of these replacements; but that is really evidence only of another attempt to get something out of the government to which those seeking it were not entitled: it proves nothing to say that the plaintiffs joined in this scheme to get something for the defendants when the defendants joined in the same scheme to get something for plaintiffs. But the scheme failed. And it may be that the attempt makes against instead of in favour of the defendants, for, if the plaintiffs owed them, what need to supplicate the government for compensation?

The defendants have, as I find, wholly failed to establish their counter-claim; therefore I am in favour of allowing the appeal.

LATCHFORD, J.:—I agree.

MIDDLETON, J.:—Appeal from the judgment of Rose, J., pronounced on May 4, 1921. At the trial a judgment was given for the plaintiffs on their claim for $13,751.38, and for the defendants upon their counter-claim for $20,679, these sums to be set off *pro tanto*.

The appeal is limited to the judgment upon the counter-claim.

The Canadian Detroit, as I shall call the plaintiff company, contracted for the manufacture of time fuses for the Imperial Munition Board and the American Ammunition Co. They made several sub-contracts with the Muellers, as I shall call the defendant company, for the supply of forged

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bodies for these time fuses. These were to be supplied in the rough.

Three contracts have been proved, one of May 4, 1916; the second of January 19, 1917; and the third of August 16, 1917. The second and third appear to be identical in form and the first is not fundamentally different. All these contracts contemplated payment for the forgings soon after delivery, but this was found to be impracticable, and, by mutual consent, the account between the parties seems to have been kept as a general debit and credit account, payments being made by the Canadian Detroit as and when it was in funds.

In a like way the account with reference to the different contracts do not seem to have been kept entirely separate. Forgings were supplied and charged from time to time and without apparently consideration as to the contracts upon which the goods were to be taken to be supplied save that the price corresponded with the slightly varying prices stipulated for.

In all these contracts there is found a provision which entitled the Canadian Detroit to return to the Muellers all defective forgings and which called upon the Muellers to replace defective forgings without further charge, they paying the carriage both ways. All forgings so to be furnished came to be called, as between the parties, "replacements."

The course of dealing adopted was that when forgings were returned credit was given for them by Muellers at the contract price at which they had been supplied. This course of dealing was undoubtedly to the advantage of the Canadian Detroit company; and, had the terms of the contract been lived up to as to payment, the forgings would have been paid for at the time of delivery and before they were found to be defective. At the same time it is a very convenient course, for it enabled forgings to be received without any enquiry being made as to whether they were to be treated as replacements which were not to be charged for, or as goods supplied for which a charge would probably be made. Everything that came in was in this way carried into the account as an item to be paid for.

An indirect result of this mode of dealing was that, while it was known that a very large number of replacements had to be made, there was no discussion in the course of dealing as to the allocation of goods sent as replacements or otherwise.

The contracts also contain another provision based upon the fact that these time fuses would only be required so long as the war should continue, or they should be found desirable for the purposes of the war by the Munition Board. The provision in this respect in the different contracts is not identical, though probably, for the purposes of this litigation, there is no real difference. In the 1916 contract it reads: "It is understood and agreed that in the event that the order given to the purchaser by the American Ammunition Co., heretofore referred to, is cancelled if the delivery of the said metal forging hereby contracted for has not been completed for any reason other than the default of the seller, the purchaser at his option may terminate this agreement," but in that event the seller shall be entitled to receive the unpaid price of parts actually manufactured which comply with the contract, and shall turn over the unmanufactured metal at stipulated price with a further allowance for the actual costs of manufacture of goods in the course of manufacture.

The provision in the other two contracts has not any preamble, and commences, "In case of cancellation of this contract for any other reason than the default of the manufacturer" and provides for the purchase of the raw material at the stipulated price, payment for all goods completely manufactured but not delivered, and for the costs of manufacture of goods partly manufactured in addition to the costs of the raw material.

Things having gone under these contracts with a reasonable degree of smoothness until the greak bulk of forgings had been delivered, on September 21, 1917, the Imperial Munition Board called a halt, and on that day the Canadian Detroit Co. communicated with Muellers: "Confirming a telephone conversation of this morning regarding future deliveries on our present contract, owing to instructions from the Imperial Munition Board we will require no further deliveries of forgings. Regarding liability on contract for the undelivered forgings the Fuse Department state that they will guarantee the manufacturers against loss for material under contract." This was followed by much negotiation looking to the adjustment of the rights of the parties under the contracts. In the course of it, it soon became apparent that there was a matter of vital importance giving rise to this litigation. Muellers contended that they were entitled not only to the provisions for their indemnity upon the termination of the contract under the clause to

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which I have referred, but also to some further and other rights in respect to replacements. They pointed out that had the contract been lived up to, and had the Canadian Detroit paid for all the forgings that had been received, they would have had in their pockets the price of the defective forgings and their whole obligation would have been to replace them. They would, therefore, have made whatever profit they were entitled to under the contract upon such replacements. By the change of the system of accounting no replacements had been paid for, and they contended that no replacements had, in fact, been supplied, and so the formidable claim now set up arose. This claim was not recognised by the Imperial Munition Board, which has satisfactorily adjusted and settled for everything that the Muellers were entitled to receive save in respect of the claim for replacements.

At the trial, and before us, an endeavour was made to show that this claim was, in fact, released by the dealings between the Muellers and the Imperial Munition Board, but the finding was that it had not been released, and in this result I concur. It seems to have been thought that upon this finding it necessarily followed that the claim should be allowed; and, as the amount of the claim, assuming it exists, appears to be not unreasonable, judgment was given accordingly.

I am, however, quite unable to think that this disposes of the matter, and in my view there is no foundation whatever for the claim. As I would interpret the contract, the clauses quoted indicate the whole remedy of the vendor upon the contract being terminated, and it makes, in my opinion, no difference whether the parts yet undelivered are to be called replacements or are called goods supplied under the contract. The contract is terminated for all purposes, and relieves the vendor from the obligation to supply, and relieves the purchaser from the obligation to take and pay, and *à fortiori* it relieved from any liability for profits that might have been earned.

Although the claim, as presented, suggests some hardship upon the Muellers by reason of their generous treatment of the Canadian Detroit with reference to the payment of the account, the idea of hardship is, I think, without foundation. They manufactured at the highest possible speed, and everything that they manufactured has been paid for. If the mode of dealing that I have outlined had not existed, it is inconceivable that the Canadian Detroit, if it

had paid for a large number of defective forgings, would have continued to pay for the new forgings coming in, without insisting upon the first received being treated as what was due for replacements, which they would be entitled to receive without making any further payment. If the account were taken in what appears to be a logical way, that is, treating the first forgings received after a batch of defectives had been returned as replacements for these defectives, the same result would be arrived at. The underlying principle was that what should be paid for were all the sound forgings which were supplied, and this has been done. The contract then provides, "If the contract is ended for any reason other than your own default you shall be paid for your raw material and your actual labour as well as for complete forgings that may then be on hand." This payment has been made.

There is also a seeming hardship which cannot be avoided. The contract, in addition to other things I have already indicated, provided that the scrap brass resulting from the manufacturing operations of the Canadian Detroit should be purchased by the Muellers at a named price, and the plaintiffs' claim is for a balance due in respect to this scrap brass. I should have thought that this was material on hand which would have been taken over by the Munition Board at the stipulated price much in excess of 17c, but apparently it has not been so dealt with, and it is suggested that it is not marketable now at 17c. I do not think that this throws any light upon the main controversy.

At the time of the taking of one of the later contracts there was a payment made of something over $8,200 for the purpose of making an adjustment between the price that would have been received under the old contract and the new contract price. It is contended that this contemplated the whole contract being carried out, and that there ought to be an apportionment. I cannot find any foundation for any legal rights arising upon what took place. As a matter of fair dealing an apportionment may well be proper, but it is not so stipulated in the bond. The amount was paid unconditionally, the parties apparently taking their chance as to the way in which the contract might work out in the future.

It follows that the appeal should be allowed, and the counter-claim should be dismissed, and the plaintiffs should have their costs of the action and the counter-claim throughout.

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LENNOX, J.:—I have gone very thoroughly into this matter, and I am unhesitatingly of the opinion that the appeal should be allowed.

The point most dwelt upon by counsel for the contractors was well taken.

The true meaning of the provision as to replacements was that the contractors would not pay for forgings which turned out to be useless. There is no doubt that the manufacturers could have substituted forgings for the defectives if they had done so promptly, but there is equally no doubt that it was competent to the parties to vary the original terms, as they did, for their mutual convenience. Having done this by a system of mutual debit and credit, it cannot be undone except by a like mutual consent: and certainly the Court cannot now at the instance of one of them work the flagrant injustice contended for, upon the other.

This is not however the outstanding reason why the manufacturers should fail in an attempt to compel the contractors to accept thousands of tons of useless junk or put up a penalty of $20,000.

These men say, "We stand by the wording of our agreement, and so must you." Very well. The second agreement provides that shipments under it are only to commence after the first agreement has been performed, and so in the third agreement in reference to the second. Shipments, enormous shipments, were made under the second and the third agreement, and no word was said about an uncompleted first or second agreement until all agreements were put an end to by the Munitions Board, as stipulated and provided for in the said several contracts. Can these parties be now heard to say we ignore all these provisions? This is a minor point, and so is the next, but suggestive. The counter-claim is the same as an action, the equivalent of a writ.

The amount awarded is damages for breach of contract, and to be entitled to recover the manufacturers must have been ready and willing, and, during the currency of the contracts, must have offered, to deliver the replacement forgings. Were they ever able or ready to deliver them? They certainly never offered to deliver them, if they ever did any time, until after the Munitions Board had stepped in and terminated the contracts: as is provided for in the contracts. How were they as to delivery afterwards? It is very simple—they had nothing—the board took over every pound of material and every forging manufactured and in

process of manufacture.

There is however no purpose to be served by multiplying words as to the position of the parties to this action. Without reference to any of the matters referred to, all to be regarded, I think, as subordinate, there is, to my mind, this insuperable difficulty in the way of these manufacturers, namely, that what has happened, the conditions as they are, is exactly what was contemplated and agreed to by the parties. It was intended and agreed and specifically stated that both would submit themselves to the action of the Munitions Board, whatever it might be and whenever it might happen. It does not matter at all how the accounts were kept or how much or how little had been done: the manufacturers' right to forge or ship another casting came to end the moment the Munitions Board terminated its contracts with the plaintiff company.

The counter-claim should be dismissed with costs here and below.

D. L. McCarthy, K.C., for appellant.

J. A. Worrell, K.C., and *P. W. Beatty*, for respondent.

IDINGTON, J.:—The respondent having a contract with those engaged in procuring the supply of certain munitions of war for the British army, on May 4, 1916, entered into a contract with appellant whereby the latter agreed with the former to manufacture for it and deliver f.o.b. at Sarnia, at the rate of speed stated in detail but all to be so completed and delivered by October 7, 1916, at the prices named and to be paid for by mode of payment specified.

In that contract there was the following provision:—"Any defective forgings shipped by the seller to the purchaser shall be replaced free of expense to the purchaser."

The said parties, now appellant and respondent herein, were called, in that and other contracts respectively the "manufacturers and contractors."

Another contract of the like nature was entered into between the parties on January 19, 1917, whereby the deliveries were to be of 500,000 sets of forgings at the rate of 6,000 a day, "beginning at such a time as shipments have been completed on contract dated May 4, 1916, between the contractor and the manufacturer and continuing until the full 500,000 bodies, caps, top rings, bottom rings and base plugs have been shipped."

In that contract the provision for replacements of defectives was as follows:—

"In the event that any of the forged bodies shipped by

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the manufacturer to the contractor shall be defective all such defective forgings shall be returned by the contractor to the manufacturer at the expense of the manufacturer, but all such defective forgings so returned shall be classified and tagged by the contractor with respect to each separate and particular defect, and the manufacturer shall replace, f.o.b. Sarnia, Canada, freight paid to Walkerville all defective forgings shipped by it under this contract without any cost to the contractor."

On August 16, 1917, a third contract of same nature was entered into between said parties for the delivery of 300,000 sets of forgings of which the delivery was to be at the rate of 10,000 per working day which was, by mutual agreement of September 1, 1917, reduced to the rate of 5,000 per day.

In the lastly mentioned contract the provision as to defectives was as follows: —

"In the event that any of the forged parts shipped by the manufacturer to the contractor shall be defective all such defective forgings shall be returned by the contractor to the manufacturer, at the expense of the manufacturer. All such defective forgings shall be classified by the contractor with respect to each particular kind of defect and each separate defect in each forging shall be conspicuously indicated by marking around said defect with red paint or blue pencil. The manufacturer agrees to replace f.o.b. the plant of the contractor at Walkerville, all such defective forgings without cost to the contractor."

Before the last contract was entered into, but when it possibly was in sight, a conference was had between the respective representatives of these parties in which their respective defaults of payment and of delivery were discussed as also the lower market price of material which entered into the manufacture of these forgings and that resulted in an agreement to reduce the price to what was equivalent to a total of $8,250 on 100,000 sets of forgings.

To carry out the agreement reached to reduce accordingly the appellant gave two cheques to respondent to cover such reduction in price.

The representative of respondent who, at the trial, said he had no longer any interest in the company, testified that he understood that the agreement so reached was to clean the slate as between these parties as to their respective defaults then possible of giving rise to complaint.

A letter, dated July 27, 1917, from the appellant to the representative of the respondent which recited all this and

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in which were enclosed the cheques making good said $8,250, does not make as clear as it might have done the real conclusion reached, but it does, however, taken in connection with the relevant testimony and admitted facts, convince me that it was so agreed then that the slate was cleaned up so far as anything in question herein is concerned, and that all appellant had then to deliver was 100,000 sets of forgings.

The trial Judge however reached another conclusion and held that there was no such cleaning of the slate as claimed; but this is not a case, in that regard, dependent upon the demeanour of witnesses, but really upon the inference to be drawn from the undisputed facts and the Appellate Division arrived at the same conclusion as I do and have just stated.

These 100,000 sets of forgings were delivered, but meantime the third contract had been entered into and hence all that can be raised by the counterclaim of the appellant must rest on the last contract of August 16, 1917.

I must therefore proceed to consider what happened in relation thereto.

That contract contained, in para. 5 thereof, the following:—

"5. In case of cancellation of this contract for any other reason than the default of the manufacturer, the contractor shall forthwith purchase from the manufacturer all metal required to complete the contract and unmanufactured at the time of cancellation at the price of 25c per pound, and shall also forthwith purchase and accept delivery of all forgings then manufactured by the manufacturer, and undelivered and shall pay therefor at the price herein contracted for, and for all partly manufactured forgings the contractor shall pay to the manufacturer at the rate of 25c per pound, plus all cost for such partial manufacturing. Payment for all manufactured forgings and metal under this clause shall become due when a statement or invoice of the same is delivered to the contractor, and deliveries shall in the case of the manufactured and partly manufactured forgings be made as called for by the contractor which must not be later than two weeks after the cancellation of the contract under this clause, and in the case of metal deliveries shall be made as soon as the metal is received at the plant of the manufacturer; all deliveries shall be f.o.b. care Sarnia, Ontario."

This in fact was one of the munitions contracts upon

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which so much depended in respect of the due fulfilment or termination thereof, upon the action of the Imperial Munitions Board, as all the parties concerned well knew, and therefore we can the better understand the existence of such an unusual provision and also the sequel to the story; consisting in what happened and which I am about to relate in part.

The Imperial Munitions Board, on September 21, 1917, cancelled respondent's contract with it and as an incidental result the contract between the parties hereto was also cancelled and in the course of adjusting accounts with each of these parties seems to me to have amply covered and paid all that the appellant was entitled to under the terms above set forth of the obligations the respondent would be under to it in the event of cancellation.

Indeed there was a release from the appellant to the respondent, signed by the former, and delivered to the Board when it made such payment.

It now pretends, however, that it had a right under each of said contracts to continue the performance of same by delivering replacements for each of the defectives it had delivered and had been returned as such.

Under the expressions above quoted from the first of said contracts relative thereto, I do not think it ever had such a right unless and until the respondent had so requested, which it never did, unless in the assistance it gave appellant, in way I will presently refer to, when the latter was before the Board.

And as the time for exercising such right by appellant had long passed, if it ever existed in regard to either the first or the second contract, I fail to see what ground it can pretend, under all the foregoing circumstances, to have for making such a claim.

The Board when trying to deal justly with respondent and incidentally with appellant, by reason of the relations between it and respondent, properly refused absolutely to entertain any such claim.

There never was manufactured by appellant any one of these particular replacements in respect of which it now claims, and hence there never was any tender thereof, even if what I am about to refer to, could be taken as a recognition of such a claim in any legal sense as basis of any claim for damages for breach of contract.

There seems to have been some countenance given, if not active assistance, by respondent, to the appellant's claims

herein for recognition thereof by the Imperial Munitions Board when it was presenting its other claims above referred to.

Accustomed as one gets to the presentation of rather extravagant demands, when to be got out of the resources of the Crown, we must not take such countenance or assistance given by respondent too seriously.

That claims for damages which could never up to then have been held in law as within the reasonable contemplation of the parties surely cannot be said to have acquired vitality by virtue of the unreasonable contemplation of the parties when looking to the bounty of the Crown to relieve its disappointed hopes and expectations founded on no legal basis.

I think the appeal should be dismissed with costs.

DUFF, J. (dissenting):—The appeal should be allowed.

ANGLIN, J.:—On consideration of the terms of the contracts between the parties of this litigation I am convinced that upon the Imperial Munitions Board cancelling its orders placed with the plaintiffs, as it was entitled to do, the defendants' only rights (in addition to an accounting on the basis of goods already delivered and accepted) to be paid for were:—(a) "Forgings" actually manufactured and not yet delivered; (b) Material on hand, at stipulated prices, and (c) The actual cost of manufacturing already incurred in the case of goods in course of manufacture.

The clauses so providing are summarised by Middleton, J.—In my opinion they applied equally to all goods to be furnished under the contracts—including so-called "replacements." That I understand to have been the view taken by Middleton, J., in the Appellate Divisional Court, in whose judgment, speaking generally, I concur.

In the course of dealing between the parties, their respective rights and liabilities in regard to "replacements" seem to have been put upon the same footing as their rights and liabilities in regard to other "forgings" yet to be delivered under the uncompleted contracts. There appears to have been no distinction made between them.

No good reason has been suggested why the defendants, though relieved of the obligation to take "forgings" contracted for but not manufactured, should yet remain bound to accept and pay for "replacements" still to be made, which would be equally useless to them.

The appeal in my opinion fails.

BRODEUR, J.:—I concur with my brother IDINGTON.

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MIGNAULT, J. (dissenting):—I have read the whole of the voluminous testimony and considered the material exhibits filed, and I can state my conclusions very briefly.

The whole question is as to the right of the appellant under the contracts to replace defective forgings. That some of the forgings manufactured by the appellant for the respondent would prove to be defective when machined by the latter was contemplated by the parties, and it is not suggested that a certain amount of defective forgings were not inevitable under the circumstances. The defective forgings were to be returned to the appellant and replaced by it by other forgings, and thus the parties contemplated that the full quantity of forgings mentioned in the contracts would be manufactured by the appellant and paid for by the respondent.

It may be added that had the respondent made the stipulated payments within the time agreed upon, it would have paid for all the forgings before it had been determined how many of these forgings were defective. Thus all the forgings manufactured and shipped would have been paid for, and the respondent would not have had a claim to be reimbursed for what it had paid for forgings which had proved to be defective, but merely to have these forgings replaced by the appellant.

The respondent, however, not having paid for the forgings within the time agreed upon, the course of dealing of the parties was that the appellant would credit the respondent for all forgings returned which were really defective and the appellant's accounts were paid from time to time, less this credit. That the parties adopted this course of dealing in view of the delay of the respondent to pay for the forgings, does not appear to me to affect the right of the appellant under the contracts to replace the defective forgings and to be paid for the forgings thus replaced, for otherwise it would not be paid for the whole quantity of forgings mentioned in the contract, and it would lose the amount expended by it in manufacturing the forgings which had been found defective and which were returned.

The case of the respondent is really that a new agreement was made by the parties in July, 1917, whereby to use the language of some of the respondent's witnesses, it is suggested that the parties agreed to absolutely clean the slate and start afresh, and that that included replacements and everything of that sort.

But the question whether such a new agreement was

really made rests on the credibility of the respondent's witnesses by whom it was sought to prove it and of the appellant's witnesses who denied its existence. The trial Judge believed Mueller's statement that no agreement of that nature was ever made, and that the question of replacements was never discussed at the meeting between the representatives of the parties on July 25, 1917. And I cannot find that the respondent's witness, Wright, does more than to give his understanding or construction of the letter written by Mueller to Hodges on July 27, or that Hodges goes any further than to say that his impression was that everything was to be wiped off the slate.

I therefore think, with great respect, that the appellate divisional Court should not have set aside the finding of the trial Judge on this question of fact, based as it was on his belief of Mueller's statement in the witness box.

I would merely add this further observation. The contracts stipulated that the appellant should purchase from the respondent all the scrap brass remaining on its hands. The respondent insisted upon the fulfilment of this stipulation of the contracts and shipped the scrap brass to the appellant with the obvious object of wiping out its debt towards the appellant for forgings manufactured by the latter and accepted by the respondent. The right to replace defective forgings was a right of the appellant under the contracts, and the respondent cannot insist on its right to sell its scrap brass to the appellant and deny to the latter its right to make the replacements, both these rights arising under the contracts on which the claim of the respondent against the appellant is based.

The respondent obtained judgment for the full amount of the scrap brass which it had shipped to the appellant, and the trial Judge gave to the latter damages for the breach of contract involved in the respondent's refusal to accept replacements. The whole question is therefore whether the counterclaim of the appellant was rightly allowed by the trial Judge. In my opinion, with great respect, the appellant was entitled to the sum which the trial Judge granted for this breach of its contractual rights.

I would therefore allow the appeal with costs here and in the appellate divisional Court and restore the judgment of the trial Judge.

Appeal dismissed.

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BEAVER LUMBER Co. v. SASK. GENERAL TRUSTS Co.; Re SOLOMON ESTATE.

Saskatchewan Court of Appeal, Haultain, C.J.S., Turgeon, McKay and Martin, JJ.A. November 20, 1922.

MECHANICS' LIEN (§V—30)—INTEREST AS "OWNER"—BUILDING OF TRESPASSER.

One erecting a building upon projected townsite land, in the expectation of receiving title to the property when the townsite had been surveyed, has no estate or interest therein as "owner" within the meaning of sec. 7 of the Mechanics' Lien Act, R.S.S. 1920, ch. 206, as to which a lien for materials furnished can attach; having located upon such property without permission he was a trespasser at the time the materials were furnished.

FIXTURES (§II—5)—MOVABLE BUILDING—TRESPASSER.

A frame store building, erected by a trespasser and capable of being moved, but intended as a permanent structure upon the site where it was situated, is a fixture permanently annexed to the land which passes with the land.

APPEAL by plaintiff from the judgment of Mackenzie, J., (1922), 67 D.L.R. 699. Reversed.

D. H. Laird, K.C., for appellant; *G. H. Barr*, K.C., for respondent.

The Judgment of the Court was delivered by

MARTIN, J.A.:—This is an appeal from the judgment of Mackenzie, J. (1922), 67 D.L.R. 699, in an issue directed by MacDonald, J., in bankruptcy. The issue stated was as follows:—

"The plaintiff affirms and the defendant denies:—(1) That the Beaver Lumber Co. had on February 11, 1921, a mechanic's lien against lot No. 1, block No. 1, in the townsite of Leroy, in the Province of Saskatchewan, according to a plan of record in the Land Titles Office for the Humboldt Land Registration District as Number T. 667, and against the building thereon erected by the said Harry Solomon above referred to, and is entitled to rank as a secured creditor in the said assignment in respect to the said lien. (2) That the plaintiff now owns the said building erected by the said Harry Solomon situate on the said lot."

The facts are that in the month of July, 1920, one Harry Solomon went from Lanigan to what subsequently became the townsite of Leroy to locate. Shortly afterwards he returned and went to the plaintiff's office and ordered lumber and building materials with which to erect a store building in Leroy. The lumber and building materials so obtained were to construct the building which forms the subject matter in dispute in this action. At the time when Solomon commenced the erection of the building, the townsite of Leroy had not been surveyed, and while the building

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was being erected the C.P.R. Co. made a survey of the townsite, and it was found that one of the streets passed through the building which was in course of erection. It being apparent that if the building remained where it was it would project on to the street, immediate steps were taken to move the building and have it conform with the survey. In order to do this, it was necessary to jack up the building, put poplar trees under it as skids and haul it round about one quarter of its width, until it conformed to the survey. It was then placed upon a foundation of stones and blocks. Some of the blocks were dug into the ground a depth of about 6 inches and the earth dug out to permit the sills to set squarely on the stones. After the completion of the main building, which was 24 feet by 30 feet in dimensions, two additions were constructed; one in the rear 14 by 24 feet, which was to serve as a residence and was firmly attached to the main building by spiking the joists and sills, and the other at the side, 12 x 16 feet, which was to serve as a flour house in connection with the store and which was also firmly attached to the main building. A small cellar was dug under the main building, 4 feet wide, 5 feet long and 6 feet deep, and the outside of the building was banked with earth. Solomon had no title whatever to the location. The ground on which the building was erected, according to the survey which was made during the course of its erection, became lot 1, block 1, in the townsite. Solomon relied entirely on his chance of obtaining the lot from the railway company when the townsite was offered for sale. A number of others had erected buildings in Leroy with precisely the same expectation. It appears in the evidence that when the townsite was put up for sale the railway company did ascertain who had put up the various buildings, and these persons were given the first opportunity of purchasing the lots on which they had erected buildings. There was, however, delay in finally completing the survey, as a second survey was asked for by a number of the residents of the village, and it was not until the month of April, 1922, more than a year after Solomon assigned, that the lots were offered for sale. As soon as the lots were put on the market, the plaintiff in this action purchased lot 1, block 1, on which the Solomon building was erected, directly from the railway company, obtained a transfer therefor, dated February 14, 1922, and registered the same in the Land Titles Office on March 15, 1922, having paid the railway company as consideration for the said lot the sum of $300.

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Solomon made an assignment to the defendant Trust Co. on January 4, 1921, and in the month of February, 1921, the plaintiff registered a mechanic's lien against lot 1, block 1, townsite of Leroy. The lumber and materials for which the lien is claimed were supplied in the month of July, 1920, and therefore the plaintiff did not comply with the provisions of sec. 22 of the Mechanics' Lien Act, R.S.S. 1920, ch. 206. But the plaintiff was still entitled to file its lien under the provisions of sec. 23 of the Act, subject to the rights "of intervening parties." The fact that an assignment was made by Solomon prior to the time the lien was registered can make no difference, as the assignee can stand in no better position than the assignor.

Two questions are to be considered:—(1) Did Solomon have any estate or interest in lot 1, block 1, Leroy, to which the lien could attach? Or in other words, was he an "owner" within the meaning of sec. 4 of the Mechanics' Lien Act? (2) Was the building erected by Solomon on the said lot a fixture thereon; or, in other words, did it become a part of the realty?

It is clear, I think, that, if the building is a fixture and became a part of the realty, it could not pass to the assignee under the assignment made by Solomon, but passed with the transfer of the lot by the railway company to the plaintiff.

The Mechanics' Lien Act, sec. 2 (6), defines "owner" as a person having an estate or interest in the lands upon or in respect of which the work or service is done, or the materials are placed or furnished, and sec. 7 provides that the lien shall attach upon "the estate or interest" of the owner as defined by the Act.

I am of opinion that Solomon had no "estate or interest" in the land on which the store building was erected. He selected the land as a suitable place for a store building, and relied entirely on his chance of obtaining the lot from the railway company when the townsite was offered for sale. He had no permission from anyone who could give him permission to locate on the lot in question, and he was, therefore, a trespasser at the time the materials were furnished. I am, therefore, of the opinion that he was not an "owner" under the provisions of the Mechanics' Lien Act. *Galvin Walston Lumber Co.* v. *McKinnon* (1911), 4 S.L.R. 68; *Galvin Lumber Yards Co.* v. *Ensor* (1922), 65 D.L.R. 687, 15 S.L.R. 349.

On the argument counsel for the plaintiff cited the case

of *Blight* v. *Ray* (1893), 23 O.R. 415, and *Reggin* v. *Manes* (1892), 22 O.R. 443; but both of these cases deal with a set of facts entirely different from the facts in question in this action. In both cases there was a verbal agreement to purchase land, the purchaser agreeing to proceed to erect buildings thereon, which he accordingly did, and procured work and materials in connection therewith. It was held that, notwithstanding the Statute of Frauds, there had been sufficient acts of part performance to constitute the purchaser the owner in equity of the lands, and that the purchaser was an "owner" under the meaning of the Mechanics' Lien Act of the Province of Ontario. R.S.O. 1914, ch. 140.

There remains to be considered the question of whether the building was a fixture and passed with a transfer of the realty. There is no doubt, I think, and it was so found by the trial Judge, that Solomon put up the building in the month of July, 1920, on a portion of land for which he hoped ultimately to obtain title; and this is so although the land was not surveyed. When it was partially erected a survey of the townsite was made, and, as hereinbefore stated, it became necessary to move the building to conform to the survey. This was done and the building was then completed as above stated. The trial Judge finds, 67 D.L.R., at p. 702, that:

"Solomon did all this . . . . having the pious hope and expectation that he would not have to move the building again, and to that extent gave the building, upon its new location, some permanence: no such great permanency, however, that it could not be moved again without much difficulty if the necessity arose."

The trial Judge, however, found that the building was a chattel, on the grounds that whether the building could remain where it was or not was a question of contingency, and a contingency of which Solomon was fully aware; it depended upon whether Solomon could purchase from the railway company or not; it depended upon the survey of the townsite finally adopted; and he emphasised in his judgment the fact that at the time in January, 1921, when Solomon was making the assignment in bankruptcy, he made a statement to the representative of the defendant Trust Co. referring to the building: "I have had to change it once, and there is an agitation to have it changed. I may have to move it again."

This evidence was admitted by the trial Judge on the ground that it showed the state of Solomon's mind.

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What the state of his mind was in January, 1921, is not material with respect to what his intention was when he completed the building in July or August, 1920. His view of the matter in January, 1921, would be influenced by the events of the months which had just passed. The important question is, what was his intention when he completed the building after he had caused it to be moved to conform with the survey? At that time he was not influenced by the question of another survey, which became a question at a later date. The only matter which influenced him while he was completing the building was the fact that he had no title, and all he could hope for was that when the townsite was sold he would then have a first opportunity to purchase the lot on which the building was erected. He had perhaps more than hope, he had, as the trial Judge has found, 67 D.L.R., at p. 702: "An expectation that he would not have to move the building again, and to that extent gave the building, upon its new location, some permanency." What Solomon said at the time he was erecting the building may be material, as indicating his intention, and it is in evidence that he "wanted to stay."

In *Holland* v. *Hodgson* (1872), L.R. 7 C.P. 328, 41 L.J. (C.P.) 146, Blackburn, J., 41 L.J. (C.P.) at p. 148, said:—"There is no doubt that the general maxim of law is that what is annexed to the land becomes part of the land; but it is very difficult, if not impossible, to say with precision what constitutes an annexation sufficient for this purpose. It is a question which must depend on the circumstances of each case, and mainly on two circumstances as indicating the intention, *viz.*, the degree of annexation and the object of annexation."

And again, at p. 149:—"Perhaps the true rule is that articles not otherwise attached to land than by their own weight are not to be considered as part of the land unless the circumstances are such as to show that they were intended to be part of the land, the onus of showing that they are so intended lying on those who assert that they have ceased to be chattels; and that on the contrary, an article which is affixed to land even slightly is to be considered as part of the land, unless the circumstances are such as to shew that it was intended all along to continue a chattel, the onus lying on those who contend that it is a chattel." See also *Hobson* v. *Gorringe*, [1897] 1 Ch. 182.

In *Stack* v. *T. Eaton Co.* (1902), 4 O.L.R. 335, at pp. 338-9, Meredith, C.J., sets out the law as follows:—

"(1) That articles not otherwise attached to the land than by their own weight are not to be considered as part of the land unless the circumstances are such as shew that they were intended to be part of the land.

(2) That articles affixed to the land even slightly are to be considered part of the land unless the circumstances are such as to shew that they were intended to continue chattels.

(3) That the circumstances necessary to be shewn to alter the *primâ facie* character of the articles are circumstances which shew the degree of annexation and object of such annexation, which are patent to all to see.

(4) That the intention of the person affixing the article to the soil is material only so far as it can be presumed from the degree and object of the annexation.

. . . . . These propositions are the result of the decisions in *Bain* v. *Brand* (1876), 1 App. Cas. 762; *Holland* v. *Hodgson* (1872), L.R. 7 C.P. 328, and *Hobson* v. *Gorringe*, [1897] 1 Ch. 182, and are in accordance with the view of the Supreme Court of Canada in *Haggert* v. *Town of Brampton* (1897), 28 Can. S.C.R. 174, which was decided in the same month as *Hobson* v. *Gorringe*, though a few days before the judgment in that case was delivered."

According to the foregoing authorities the store building in the case at Bar, although only slightly affixed to the land, would become part of the land unless the circumstances are such as to show that it was intended to continue a chattel. The circumstances to indicate or to show the intention are two: the degree of annexation, and the object of annexation. As to the degree of annexation, the building was of frame construction, resting on 6 x 6 inch sills with stones and blocks underneath, some of the blocks being buried in the ground to the depth of 6 inches. It is covered with shiplap both inside and out; it is roofed with rubber roofing; it has shiplap ceiling and shiplap floor. It is called by one witness "a substantial, permanent building." The two additions constructed after the building was moved were attached to the main building by having the joists laid on two-by-fours secured to the main building; the rafters were laid on the heels of the rafters of the main building. According to the evidence the building is practically the same "as most store buildings in new towns." It can of course be moved, but the additions would have to be taken off for this purpose. It was also banked up with earth on the outside. It is, in

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my opinion, sufficiently attached to the soil to raise the presumption that it became a part of the realty.

Then as to the object of annexation. In *Haggert* v. *Town of Brampton*, 28 Can. S.C.R., at p. 182, King, J., said:—"In passing upon the object of the annexation, the purposes to which the premises are applied may be regarded."

In the case at Bar it cannot be said that the building was put upon the land for a temporary purpose. It was placed there by Solomon for the purpose of conducting a store business, and, apart from the question of a new survey which was being asked for by some of the residents of the village but which could not and did not affect his purpose, when he completed the building after it had been moved in the course of construction, and apart from the question of whether or not he would be able to obtain title from the railway company for the land, his intention was to use the building as a store and as a home, and he had no intention of moving the building unless subsequent events forced him to do so. Remembering that articles affixed to land very slightly are considered part of the land, unless the circumstances are such as to show that they are intended to continue as chattels, it seems to me that the circumstances of this case instead of meeting and rebutting the presumption that the building was a part of the land and leading to the conclusion that it was a chattel, rather strengthen the presumption that it was a part of the realty. The degree of annexation and the object of annexation were, I think, patent for all to see.

I am of the opinion that the building in question became a part of the realty, and passed to the plaintiff with the transfer of lot 1, in block 1, in the township of Leroy.

The answers to the questions in the issue are as follows: 1. The plaintiff has no lien against the land, namely lot 1, block 1, in the townsite of Leroy, nor upon the building erected thereon by Solomon. 2. The building erected on the said lot became a part of the realty, and passed to the plaintiff with the transfer of the said lot by the C.P.R. Co. to the plaintiff. The plaintiff is entitled to the costs of the appeal. The order of the learned trial Judge as to costs in the Court below will be set aside and judgment will be entered for the plaintiff with costs.

Appeal allowed.

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New Brunswick Supreme Court, Appeal Division, Hazen, C.J., White and Grimmer, JJ. June 8, 1922.

NEGLIGENCE (§IIF—120)—COLLISION—STREET CAR AND BUS—PROXIMATE CAUSE—LAST CHANCE.

Where the driver of a bus attempts to cross a track in front of a street car approaching at great speed, without first looking around for the approach of the car and without signalling to the motorman of his intention to cross, thereby resulting in the street car colliding with the bus, the former will be deemed to have had the last chance to avoid the accident and therefore not entitled to any recovery; and it is error of the Court to charge the jury that the defendant's negligence should be taken to be the proximate cause of the collision, because the defendant's motorman might have reasonably anticipated the plaintiff's moving his car onto the track.

APPEAL by defendant and motion to set aside verdict entered for plaintiff before Crocket, J., and a jury, and to enter verdict for defendant, or for a new trial. Appeal allowed.

D. Mullin, K.C., for plaintiff.

F. R. Taylor, K.C., for defendant.

The judgment of the Court was delivered by

GRIMMER, J.:—This action was brought to recover compensation from the defendant for damages caused the plaintiff's motor bus through alleged negligence of the defendant's servants while engaged in driving one of the company's electric street cars on Douglas Ave., in St. John. It was tried before Crocket, J., and a jury, and resulted in a verdict for $225.13 being entered in favour of the plaintiff against which the appeal is taken.

The defendant company owns and operates a street railway in the city of St. John. On the evening of August 26, last, one of its cars was proceeding along Douglas Ave. towards the bridge over the St. John River in charge of one Bailey, who had with him one Rowley as instructor. The Avenue at that time was being repaired, and while it is double tracked only the northern or right hand track proceeding from Main Street to the bridge could be used, the left being obstructed with plant of the contractor in charge of the street repairs. Motor and horse drawn vehicles were prohibited by the city road engineer from using the avenue, and the prohibition was in force on the evening mentioned. As the street car proceeded and approached a building, called the Observatory, the plaintiff's motor bus crossed from the left to the right hand side of the street, about 50 or 60 feet in front of it and at or nearly opposite the Observa-

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tory, and continued along the street at a speed of 4 or 5 miles an hour about 30 feet to the right of the car track. From the Observatory for about 300 feet towards the bridge the street has a slight slope or incline when it continues practically level. About 400 feet from the Observatory the plaintiff without any warning to the street car driver attempted to cross the street from right to left when his motor bus was struck by the street car and damaged. The defendant company claims that neither it nor its employees were guilty of negligence, but on the contrary that the accident was caused solely by the negligence of the plaintiff in attempting to cross the track immediately in front of the moving car without giving any warning to the driver thereof by holding out his hand or otherwise of his intention so to do and without looking back to see if a car was coming or not.

It is claimed by the plaintiff the street car was driven at an excessive rate of speed or at about 30 miles an hour, while the motor bus was going at about 4 or 5 miles an hour, while the defendant company claims the car was only going at about 7 or 8 miles and that as the driver had it under control it lost rather than made momentum on the incline, but at the foot thereof both vehicles were proceeding at a moderate speed the street car gradually overtaking the motor bus. As the bus was going along on the level street it met and passed another bus driven by one McAdam, which was on the same side of the street going towards Main Street. The plaintiff to pass McAdam was forced to keep close to the car track, at which time the street car was only a few feet behind him. The driver of the car saw the bus in front of him and after the two busses passed it gained on the plaintiff's bus until the fender of the car was on a level with the rear wheels of the bus, when without holding out his hand as a signal as required by sec. 12 of the "Law to Regulate Street Traffic in the City of St. John" or giving any other indication of his intention so to do, and without looking around to see if a street car or any other vehicle was approaching from behind, and notwithstanding the noise of the car and the sounding of the bell by the motorman, suddenly turned his bus sharply to the left in front of the car, when the only thing possible that could result happened and the collision occurred despite the efforts of the motorman, who applied his brakes as soon as he saw what the plaintiff was attempting to do and brought his car to a stop within not more than two lengths of itself.

The law in cases such as this is well settled. The plaintiff must prove that the damage was caused by some negligent act of the defendant company or its servants, or that the accident was occasioned through some negligent act of commission or omission on the part of the defendant company or its servants. Should this not be proved or if the circumstances are equally consistent with the allegation of the plaintiff and the denial of the defendant company, the plaintiff must fail. *Wakelin* v. *London and South Western R. Co.* (1886), 12 App. Cas. 41, at pp. 44, 45; and 21 Hals., p. 437, where it is stated that if the plaintiff in proof of negligence only establishes facts which are equally consistent with the true cause of the accident being his own or the defendant's negligence he cannot succeed, nor can he recover when the cause of the damage is left in doubt or attributable with equal reason to some cause other than the defendant's negligence. See also cases there cited, and *Ramage and Ferguson* v. *Forsyth* (1890), 28 Sc.L.R. 26, where it was held the question whether the injured person was negligent depends upon his knowledge at the time of the accident, and owing to his death direct proof of such knowledge being impossible, the action will fail if the circumstances raised an inference that he knew or ought to have known of certain dangers or precautions imposed in respect thereof, and that the accident happened by reason of his failure to act reasonably by the light of that knowledge. If then the defendant proves or if it appears from the plaintiff's own case that the accident occurred through some negligence on the part of the plaintiff which directly contributed to it, then the plaintiff cannot recover unless it appears the defendant company might by care have avoided the accident. It is for the plaintiff to show that the accident which happened to him was caused by the negligent act of the defendant or of those for whose negligent acts the defendant company is liable, and that the accident was produced, as between him and the defendant company, solely by the defendant's negligence in this sense, that he himself was not guilty of any negligence which contributed to the accident, because even though the defendant were guilty of negligence which contributed to the accident yet if the plaintiff was also guilty of negligence which contributed to the accident, so that it was the result of the joint negligence of the plaintiff and the defendant then the plaintiff cannot recover, it being understood that if the defendant's servants could by reasonable care have avoided injuring

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the plaintiff, although he was negligent, then the negligence of the plaintiff would not contribute to the accident. *Davey v. London & South Western R. Co.* (1883), 12 Q.B.D. 70.

The questions submitted to the jury with their answers are as follows:—1. Was the defendant's motorman guilty of negligence? A: Yes. 2. If so, in what respect? A: That he did not use the necessary precaution in reducing the speed of the car so as to stop quickly if necessary. 3. Did such negligence cause or materially contribute to the cause of the accident or collision? A: Yes. 4. Was the plaintiff guilty of contributory negligence? A: Yes. 5. If so, in what respect? A: In that he did not take the necessary precaution to avoid danger in crossing. 6. If you find that the plaintiff was guilty of contributory negligence could the defendant's motorman by the exercise of reasonable care and skill have avoided the consequence of such negligence? A: Yes. 7. At what sum do you assess the damages which the plaintiff sustained? A: $225.13.

The defendant company claims that the answers to questions 1, 2 and 3 and 6 are against the weight of evidence, and that the effect of the answers to 1, 2 and 3 is that the defendant company's motorman was guilty of negligence in that he did not use due precautions in reducing the speed of the car so as to stop it quickly if necessary, and this negligence caused or materially contributed to cause the collision. The plaintiff's action was based on the negligence of the defendant company's motorman; (a) In failing to ring the bell as a warning as the street car approached the plaintiff's motor bus from behind. (b) In driving at an excessive speed of 35 miles per hour.

There is, however, no finding by the jury as to the first of these grounds of negligence, but it has been entirely overlooked or ignored, and is therefore not a matter of consideration in this appeal. It has practically found the other as alleged, or as they express it in their answer "the defendant's motorman did not use the necessary precaution in reducing the speed of the street car so as to stop quickly if necessary." The evidence submitted was gathered from the observation of the witnesses and their various opinions as to the rate of speed of the car while in motion before the accident.

In respect of the second allegation, there is the evidence of McAdam, the driver of the other bus, that was proceeding along Douglas Ave. in the opposite direction to the plaintiff whom he met just ahead of the street car, and he states that

when the latter passed him it was going, he should judge, at somewhere around 30 miles per hour. Also that of the plaintiff who says when the car struck him it was going, in his estimation, at about the same rate. It is also claimed this evidence is corroborated by the Conolly sisters, who were riding with McAdam. One of them, Eileen, stating that she thought the street car was going quite fast and that it stopped in almost half the length of the Court Room beyond where it struck the jitney, possibly not quite so far, and that the latter stopped where it was struck. The other girl, Kathleen, said she did not notice the jitney, that is the plaintiff's bus, or the street car, until they had gone by, when hearing her sister scream she looked and saw the jitney which was then stopped. There is no help or corroboration in this evidence.

In respect to the evidence of McAdam it may be observed that in addition to his estimation of the speed of the street car he said at p. 13: "It went about two car lengths after it struck the jitney before it was stopped" and that a car length is 35 feet. Mr. McLean, superintendent of the defendant company railway stated that a car going on the level at 30 miles an hour might be stopped in 150 feet. Going at 20 miles an hour in 75 or 100, three car lengths, and at 7 or 8 miles an hour two car lengths would be a good stop. In view of this evidence and of McAdam's evidence that the car stopped in twice its length after the collision, there is but little value to be placed in his estimate of the speed of the street car; so far as the estimate made by the plaintiff is concerned it cannot be of any possible value because he, according to his evidence, did not see the street car coming behind him, did not hear any bell nor noise of the moving car, and did not know there was one coming along until one of his passengers called out "look out for the car" and at this time he was driving his bus at between 3 and 4 miles an hour. It was only when the car passed after having struck his bus that he saw it or knew it was there. Under these circumstances it is asking almost too much when one is invited to accept his estimate as to the speed of the car as of any value. Also in his evidence if his statement is correct and the car was moving at 30 miles an hour and his bus at only 3 or 4, in view of the space covered from where the bus crossed the street car at the Observatory at a distance of only 50 feet in front of the car, to where it was struck, viz: 400 feet from where it got on the right hand side of the street, with the street car going 8 or 9 times as fast as the bus was travel-

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ling, it must have passed it long before it reached the collision point, and there would have been no accident.

Opposed, however, to the evidence of these two witnesses, was the evidence of four witnesses for the defendant company, two of them passengers on the car and one of whom, Mrs. Austin, described the car as "going lovely, going nice," —"I thought it was just going along ordinary—very nice I thought," at p. 198, and one Hanson, who says he did not know how fast the car was going, he would imagine about 5 miles an hour. Then there was the positive statement of Bailey, the motorman, who says at p. 168, that at the time the plaintiff turned his bus to cross the track the car he was driving was not going more than 7 or 8 miles an hour, and at no time while he was going out the avenue on that occasion did the speed exceed 9 or 10 miles an hour. This is corroborated by the evidence of John Rowley, who was instructing Bailey in driving the car, stood beside him all the way out the avenue, was at his left hand side by the controller to be prepared for an accident or case of emergency, and who swears the speed of the street car going out the avenue did not exceed 8 or 9 miles, and at the time of the collision the speed in his judgment was 7 or 8 miles.

From the facts and the evidence stated it is very patent the answer of the jury to questions 1, 2 and 3 are clearly against the weight of evidence and should not be seriously regarded. In respect to question 6, it may be observed the jury by their answers to questions 4 and 5, that the plaintiff had been guilty of contributory negligence in that he did not take the necessary precaution to avoid danger in crossing, still say by answer No. 6 in spite of this the motorman by the exercise of ordinary care and skill could have avoided the consequence of the plaintiff's negligence.

From the evidence it appears that the plaintiff's bus after passing McAdam, continued along the street about 50 feet with the wheels of his bus on the left hand side thereof about one foot from the street car track before the plaintiff turned to the left to cross the track. At this time the fender of the street car was on a level with the rear wheels of the plaintiff's bus, the speed of the bus, as the plaintiff says, being 3 or 4 miles an hour and that of the street car 7 or 8. Under these circumstances, without holding out his hand as a signal to the car driver of his intention to cross the track in front of the car, as required by the city by-law and as general custom and regard for his own and his passenger's safety both require and demand, without looking

around to see if any car or other vehicle was coming behind him, without paying any attention to the sound of the bell by the motorman, of which there is evidence or the noise of the car itself, and without any warning of any kind, without paying any attention to the right of way of the street car over its tracks, and the duty of the citizen whether on foot or in a vehicle to give unobstructed passage thereto, the plaintiff suddenly with a recklessness that cannot be understood or imagined turned his bus to the left on to the car track directly in front of the street car. The inevitable collision followed, and under the evidence and circumstances it would not have made any difference whatever if the car had been going only at 1 mile per hour instead of 7 or 8, the same result would have followed, and the bus would have been struck. It is perfectly clear and all the undisputed testimony shows it was utterly impossible for the defendant's motorman by the exercise of the greatest care and skill on his part to have avoided the accident after the plaintiff through his gross carelessness and negligence had placed his bus in the position of danger.

In my opinion there was no evidence whatever to warrant that finding, and the plaintiff, not the defendant company had the last chance to avoid the accident, because the car was so near him when he turned upon the track it could not avoid striking his bus, and he alone was to blame for what followed. The evidence as I understand it does not disclose negligence on the part of the defendant's motorman, but rather the undisputed facts show the accident was caused solely by the omission of the plaintiff to use the ordinary care any reasonable man would have used, and that the negligence was in not looking behind him to ascertain if any street car was approaching before he attempted to cross the track, combined with an utter disregard of rules for safeguarding life and property that general custom demands under circumstances such as existed in this case. I think the answers to questions 1, 2 and 3 were absolutely against the weight of evidence, and that there was no evidence at all to justify the finding under No. 6. I also think the plaintiff must fail in that it is manifest in cases of this nature that the plaintiff who gave evidence of a state of facts which is equally consistent with the wrong of which he complains having been caused as much by—in the sense that it could not have occurred without—his own negligence as by the negligence of the defendant, it is not proved that it was caused by the defendant's negligence. There is no

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legal presumption that people are careful and looking before them in crossing a street railway track, or even when they do see cars approaching that they never cross when the car is dangerously near, yet if one of these hypotheses were established in a case of this kind the plaintiff must fail, while on the other hand it would be extremely difficult to lay down as a matter of law that precautions which the Legislature has not enjoined should be observed by a street railway company in the ordinary conduct of its traffic. The case of *Ryder* v. *St. John Railway Co.* (1913), 13 D.L.R. 11, 42 N.B.R. 89, is almost in line with this case, and the principles which are laid down in the case of the *Commissioners etc. of the United Kingdom* v. *Owners of S.S. Volute*, [1922] 1 A.C. 129, which is the most recent decision of the House of Lords on the subject of contributory negligence, are also in my judgment very applicable to this case. While this decision is not binding upon this Court, yet it is reported as being a great and permanent contribution to the law on the subject of contributory negligence and to the science of jurisprudence. The case arose out of a collision between the S.S."Volute" and the battleship "Radstock," and without stating all the facts in connection therewith, the finding of the House of Lords was that both vessels were to blame, apparently considering the acts of navigation in the two ships as forming parts of one transaction, and the second act of negligence as closely following upon and involved with the first. They decided that there did not appear to be a sufficient separation of time, place and circumstances between the negligent navigation of the "Radstone" and that of the "Volute" to make it right to treat the negligence on the part of the "Radstone" as the sole cause of the collision; the "Volute" in the ordinary plain common-sense of this business having contributed to the accident, it would be right for their Lordships to hold both vessels to blame for the collision. While I am not expressing my opinion that these facts are directly applicable here, the principles which are stated in this decision are of very material value in so far as the conclusion which I have reached in this matter is arrived at. It was held in *Reynolds* v. *Tilling* (1903), 19 Times L.R. 539, that when both parties by their negligence equally contribute to the cause of the injury the plaintiff cannot recover, so that in any view in which this case is presented or presents itself, in my opinion the verdict cannot be maintained but should be set aside and a verdict entered for the defendant company with costs.

As a second ground of appeal the defendant company contended that the trial Judge misdirected the jury in that he told them the defendant's negligence should be taken to be the proximate cause of the collision if the defendant's motorman might have reasonably anticipated when the plaintiff would move his car on to the track. The full charge in respect of this at p. 264 of the record is as follows: "The original negligence may or may not be the proximate and direct cause of that injury. If the circumstances were such that the motorman should have foreseen or anticipated that the plaintiff's car would be upon the railway track, then notwithstanding that this act of negligence intervened between the original negligence and the ultimate injury, the original negligence might under ordinary circumstances still be held the effective proximate cause of the injury." That is to say, if the subsequent act of the plaintiff in moving his car on to the track might reasonably have been foreseen or anticipated by these motormen, then in that event the original negligence in running the car at that rate and without warning might be held to be the proximate, immediate and effective cause of the injury. But unless it could be foreseen, reasonably have been foreseen or anticipated, then the negligence in running the car down the hill would not itself be enough to make that negligence the sole, proximate and effective cause of the injury.

With all due respect I cannot agree that this is a correct statement of the law as from the authorities it is clear, I think, the question as to whether the defendant's motorman could have reasonably anticipated the plaintiff would without notice turn his bus on to the railway track is relevant to this suit only upon the question of the negligence of the motorman, and does not bear at all upon the question whether the speed at which the car was going was the proximate or effective cause of the accident. The recent case of *Re Polemis and Furness, Withy & Co., Ltd.*, [1921] 3 K.B. 560, is very much in point in this respect, quoting from *Smith* v. *London & South Western R. Co.* (1870), L.R. 2 C.P. 14, where Channell, B., said, at p. 20:—"Where there is no direct evidence of negligence the question what a reasonable man might foresee is of importance in considering the question whether there is evidence for the jury of negligence or not. . . . . When it has once been determined that there is evidence of negligence, the person guilty of it is equally liable for its consequences, whether he could have foreseen them or not." Bankes, L.J., in [1921] 3 K.B., at p. 572,

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said:—"Given the breach of duty which constitutes the negligence and given the damage as a direct result of that negligence the anticipations of the person whose negligent act has produced the damage appear to me to be irrelevant"; and Lord Warrington, L.J., in the same case, [1921] 3 K.B., at p. 574, said: "The presence or absence of reasonable anticipation of damage determines the legal quality of the act, as negligent or innocent. If it be thus determined to be negligent, then the question whether particular damages are recoverable depend only on the answer to the question whether they are the direct consequence of the act." This seems to determine and rule that the fact that a person committing the act might reasonably have anticipated certain damages to result or follow does not make the act the proximate or effective cause of the damage. It may show negligence in the person, but does not show that the negligence is the direct cause of the damage.

So here, admitting that the motorman might reasonably have anticipated (of which there can be no justification whatever under the circumstances of this case) that the plaintiff would attempt to cross the track in front of his approaching car without any warning or signal to that effect, this mere fact did not make his act to continue to move his car forward the proximate and effective cause of the accident. It would be simply an element going to show negligence in that such negligence was the direct cause of the collision. It also seems to me that the charge in this respect may have had a serious effect upon the jury in arriving at their findings on the sixth question, as under all the circumstances which have been pointed out, there could exist no reason why the motorman should think, expect or anticipate that the plaintiff might or would attempt to cross the track in front of his car, particularly as he enjoyed the free and unobstructed right of way and use of the track, but on the contrary he would have every reason to believe the plaintiff would not be guilty of any such recklessness and would keep his position on the street free and clear altogether of the railway track. If this ruling had, and I really see where it might have exercised a great influence upon the jury in respect to their answer to the sixth question, and had I not come to the conclusion that the verdict should be entered for the defendant company, I would upon this direction of the Judge have felt that the defendant company was entitled to a new trial.

The appeal will be allowed with costs. *Appeal allowed.*

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Saskatchewan Court of Appeal, Haultain, C.J.S., McKay and Martin, JJ.A. November 20, 1922.

VENDOR AND PURCHASER (§IE—25)—DIFFERENCE OF REMEDIES—RESCISSION—DETERMINATION—CHATTEL MORTGAGE.

There is a distinction between "rescission" and "determination" of the agreement of sale. Rescission can only take place where there can be *restitutio in integrum*, with the result that the vendor gets back his land and the purchaser his purchase money, except, as a rule, the deposit. But in case of determination of the agreement, the vendor generally retains the purchase money paid, and takes back the property as well. Where, therefore, a vendor merely asks for determination of the agreement for default in payments, he thereby affirms the agreement and is not entitled to an order for possession. The same applies to mortgaged chattels on the "premises," the right to possession under the chattel mortgage not having been pleaded.

APPEAL by defendant from the order of a Judge in Chambers. Reversed.

F. W. Turnbull, for appellant.

W. R. Kinsman, for respondents.

The judgment of the Court was delivered by

MCKAY, J.A.:—By an agreement in writing dated June 14, 1920, the respondents sold to the appellant certain lands and chattels therein mentioned for $46,400 payable $1,000 on the execution of the said agreement and the balance in certain instalments with interest. The agreement does not say what is the consideration for the land, and what for the chattels. It however provides that the appellant was to have the right to possession of the "premises" on July 15, 1920, and that he would give a chattel mortgage on the chattels. The appellant did give a chattel mortgage to respondents on said chattels, dated July 14, 1920, the day before the day fixed for taking possession.

The appellant made default in his payments, and the respondents commenced this action on January 24, 1922, basing their cause of action entirely on the said agreement. No mention is made of the said chattel mortgage.

Amongst other things, the respondents claim:—1. Judgment for the sum of $43,501.15 and interest thereon, and in default of payment of said judgment that the said agreement be determined and cancelled and that the said lands and premises revert to and revest in the respondents, without any right on the part of the appellant or any one claiming through or under him to any repayment or compensation for the money paid under the said agreement; 2. Immediate possession of the said lands and chattels.

The appellant filed a statement of defence, and on applica-

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tion to the Local Master to strike out this defence, and for other matters. The Local Master dismissed the application. On appeal to a Judge in Chambers an order *nisi*, in part as follows, was made:—

"It is further ordered that the defendant's defence entered herein be and the same is struck out. And it is further ordered that the defendant do pay into Court to the credit of this cause on or before the 15th day of August, A.D. 1922, the sum of $3,476.99, together with interest thereon at the rate of 6% per annum from the 16th day of May, A.D. 1922. . . . . And it is further ordered and decreed that in default of payment into Court as aforesaid, the agreement for sale sued on herein be cancelled and determined, the defendants and all persons claiming through or under him in possession to give up possession of the said premises to the plaintiffs within twenty days from the service upon them of a copy of the final order.

It is further ordered and decreed that the plaintiffs be at liberty to renew their application for possession of the lands in question upon completion of the reference herein."

This order is dated April 18, 1922.

By notice of motion dated June 7, 1922, application was made by the respondents to the Local Master at Arcola for the immediate possession of the lands and chattels. This application was dismissed. The respondents appealed to a Judge in Chambers from the Local Master's order dismissing their application, and also made a new motion for the immediate possession of the said lands and chattels, and in the alternative to restrain the appellant from selling, etc., the said chattels or any of them.

The two motions were heard together, and the Judge in Chambers ordered that, in default of payment of the amount required to be paid under the order *nisi*, the respondents should get possession of the chattels, and that in the meantime the sheriff should have them in his custody to be delivered to the respondents or appellant according to whether or not the appellant made default under the order *nisi*. He also ordered that the respondents have their costs against the appellant of and incidental to their application for injunction and for the interim preservation of the chattels, together with the costs of the sheriff. From this order the appellant appeals.

With regard to that portion of the order directing that in default of payment as required by the order *nisi* the chattels were to be delivered to the respondents, it appears from

his reasons for judgment, the Judge construed the order *nisi* as a rescission of the agreement sued on, and based that portion of his order on what would follow as a result of rescission.

With great deference I think the Judge was wrong in holding that said order *nisi* was rescission of the agreement. It was, in my opinion, a determination of the agreement, the results of which are very different from rescission. Rescission can only take place where there can be "*restitutio in integrum*," and such is the result of rescission. The vendor gets back his land and the purchaser his purchase money, except, as a rule, the deposit. But in the case of determination of the agreement, the vendor generally retains the purchase money paid, and takes back the property as well. The right to retain the purchase money on determination is generally provided for by the agreement, as is the case in the case at Bar.

McCaul in his Remedies of Vendors and Purchasers 1915, 2nd ed., deals with the distinction between "rescission" and "determination" of an agreement and the different results thereof, at pp. 55 to 66, and at pp. 63-64 states as follows:—

" 'Rescission' then, which results from the *disaffirmance* of the contract is to be carefully distinguished from 'Determination' *where the vendor is not disaffirming, but expressly standing on the contract, and basing his rights upon its express or implied terms, covenants and conditions.*

This distinction is pointed out by Bowen, L.J., in *Boston etc. Co.* v. *Ansell* (1888), 39 Ch.D. 339, at p. 365—a case of master and servant. He says:—

'Some confusion always arises, as it seems to me, from treating those cases between master and servant as instances of a rescission of the original contract. It is not a rescission of the contract in the way in which the term is ordinarily used, viz., that you relegate the parties to the original position they were in before the contract was made. That cannot be, because half the contract has been performed. It is only a rescission in this sense that an act which determines the relation—for the future—you may regard it under *the more general law, which is not applicable to contracts of service alone*—you may treat it as the wrongful repudiation of the contract by one party being accepted by the other, and *operating as a determination of the contract from that time*, that is, from the time the party who is sinned against elects to

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treat the wrongful act of the other as a breach of the contract, which election on his part emancipates the injured party from continuing it further.'

Thus, when a plaintiff comes into Court asking that a contract for sale of goods by instalments, some of which instalments have, let us say, been delivered and paid for, be put an end to on the ground of the refusal of the purchaser to accept and pay for future instalments, he is not asking for *rescission* at all, and it is idle to attempt to apply the doctrine of *restitutio in integrum* to the case.

Similarly, when a vendor of land, having received instalments of purchase-money under a contract providing that in case of determination he may retain the instalments, comes into Court asking that the contract be put an end to on account of repudiation by the purchaser, or default in payment of the balance, he is not asking for *rescission*—because so far as the instalments already paid are concerned, he is asking the Court to *affirm*, not to *rescind*, the contract —and hence, it is submitted that here again a discussion of the principle of *restitutio in integrum* is beside the issue."

See also *Zimmer* v. *Karst* (1910), 3 S.L.R. 304.

In the case at Bar the respondents do not ask for rescission, but they, in effect, say, owing to the default in payment of the moneys due by appellent, we ask that the agreement be determined and we be allowed to retain the purchase money paid, as provided for in the agreement. They ask for what they claim to be their rights under and by virtue of the agreement.

As Lamont, J., said in *Zimmer* v. *Karst*, 3 S.L.R. at p. 307:—"In such a case the vendor is not rescinding the contract at all when he puts an end to it, but is affirming the contract and standing squarely on its provisions."

The order *nisi* then was made in affirmance of the agreement, and not in rescission, and the results of rescission do not follow in this case. Consequently, so far as this action is framed, I do not think the respondents would be entitled to an order for possession of the chattels, as they do not set up any right in their statement of claim to entitle them to such order. As above stated, they base their cause of action on the agreement only.

In my opinion, when they made the agreement of June 14, 1920, sued on, they sold the chattels to the appellant on credit, and the ownership in the chattels then passed to the appellant, as no different intention appears in the agreement. R.S.S. 1920, ch. 197, sec. 20, Rule I. In fact what

appears in the agreement as to intention is to the effect that it was the intention of the parties that the property in the goods was to pass to the appellant at the time the contract was made, as appellant gave and respondents accepted a chattel mortgage from him on July 14, 1920, before the time fixed for his taking possession. The time fixed for the appellant to take possession was July 15, 1920, and as the evidence shews that he was in possession of the chattels at the time of commencing the action, the presumption is he took possession on that day. Other than the lien which the respondents would have in the chattels until they gave up possession to the appellant, they had none, as the agreement does not provide for any except what they would get under the chattel mortgage, and the right of possession, if any, which clause 10 of the agreement may possibly give them on their giving appellant certain notice. Hence, after they gave up possession they had no lien in the chattels except the chattel mortgage, and so far as this appeal is concerned their claim is not based on the chattel mortgage. They do not even mention their chattel mortgage in their statement of claim. Clause 10 of the agreement, above referred to, in so far as it is material to this appeal, is in part as follows:—

"Provided that in default of payment.....the vendor shall be at liberty to determine and put an end to this agreement and to retain any sum or sums paid thereunder..... in the following manner, that is to say; by mailing in a registered package a notice signed by or on behalf of the vendor intimating an intention to determine this agreement, addressed to the purchaser at Howard Post Office.....and if at the end of thirty days from the time of mailing..... thereof the amount so due be not paid, then the said purchaser shall deliver up quiet and peaceable possession of the said lands and premises or any part thereof to the vendor or agent immediately at the expiration of the said thirty days....."

Even if the word "premises" in this clause is taken to include the chattels, the respondents do not plead or base their right to possession in their statement of claim, on this clause. I do not think they could have done so when they issued their writ, as there is no evidence that the required notice was given before writ issued. There is, however, evidence that a notice was mailed to appellant on April 27, 1922, but no application was ever made to amend the statement of claim so as to base the claim to possession of the

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chattels under this clause. And even if such application had been made, I doubt if it could be granted in view of what was held in *Hargreaves* v. *Security Investment Co.* (1914), 19 D.L.R. 677, 7 S.L.R. 125.

Consequently when the respondents base their right in their statement of claim, on the agreement only, under which they have no lien in the chattels, they cannot succeed in their prayer for possession of the chattels, and the trial Judge was, in my opinion, wrong in ordering that the chattels be delivered to the respondents in case of default in payment of the amount required to be paid on August 15, 1922, by the order *nisi*.

As to the other part of the order, that the sheriff should have custody of the chattels. In his reasons for judgment the Judge, while dealing with this portion of the order, after stating that the chattel mortgage was collateral to the agreement, said:—

"The plaintiffs' right to the said implements, live stock, and chattels must, therefore, stand or fall on the said agreement independently of the said chattel mortgage . . . . . Moreover it is to be noted that the plaintiff in his statement of claim pleads and relies on said agreement and says nothing about the chattel mortgage. It seems to me, therefore, that the chattel mortgage need have nothing whatever to do with this matter as it stands.

It is obvious, from the above, that the Judge conceived that the respondents had some right to the return or possession of the chattels under said agreement, and based his order on said alleged right. But as I have already pointed out, they had no such right under the agreement as pleaded. Had they pleaded the chattel mortgage and claimed under it, they would likely have been able to shew some right to possession under it, but, as before stated, this they did not do.

In my opinion then, with deference, I think the Judge was also wrong in making this portion of the order.

During the argument it was contended by counsel for appellant that the order *nisi* when taken out had the effect of cancelling the agreement, and as the chattel mortgage purports to be collateral to the agreement, the chattel mortgage falls with it. I have purposely refrained from expressing any opinion on this point, as it is not necessary to decide this, for the purpose of disposing of this appeal. It may be that the chattel mortgage is still in force, owing to the clause in the same that any termination or breach of said

agreement shall be a default under the chattel mortgage, and the respondents may still be able to seize under the chattel mortgage.

The appeal, in my opinion, should be allowed with costs, and the order of the Judge in Chambers set aside with costs to the appellant and that respondents pay the costs of the sheriff.

Appeal allowed.

RUNDLE v. MIRAMICHI LUMBER Co.

New Brunswick Supreme Court, Appeal Division, Hazen, C.J., White and Grimmer, JJ. June 8, 1922.

COMPANIES (§IVD—85)—POWERS OF PRESIDENT—CONTRACTS—AUTHORISATION—COLLUSION.

The powers of the president of a corporation, under its by-laws, to "sign all contracts" ordered by the Board, do not confer upon him authority to enter into or negotiate a contract binding upon the corporation. Having been authorised to enter into such contract with a certain firm, he cannot make the contract with a member of the firm in his individual capacity. Where the contract has been regularly executed and the corporate seal affixed, the authority to make it cannot be inquired into. But lack of good faith, and collusion of the president with his brother, in whose favour the contract was made, avoids the contract.

APPEAL by plaintiff from a verdict entered for defendant before Chandler, J., without a jury. Affirmed.

I. C. Rand and *Jas. Friel*, K.C., for appellant.

P. J. Hughes, for respondent.

The judgment of the Court was delivered by

HAZEN, C.J.:—This is an appeal from the judgment of Chandler, J., who tried the case without a jury at Newcastle in October last, and directed that a verdict be entered for the defendant with costs. The action was brought to recover damage for a breach of an agreement dated June 27, 1912, alleged to have been made between the appellant and respondent whereby the latter licensed and permitted the appellant to cut on certain Crown timber lands licensed to it, all the princess pine growing upon the same. By the said agreement the plaintiff, Rundle, agreed to pay to the defendant (respondent) the sum of one dollar per thousand superficial feet in addition to the Government stumpage on the lumber that was cut. This agreement was to continue until the expiration of the Crown Land licenses in August, 1918, or until the expiration of any renewals thereof. The plaintiff's claim was that the defendant (respondent) had refused to carry out the agreement and prevented him from cutting any lumber thereafter and claimed damage therefor.

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At the trial it was claimed by the defendant that John T. Rundle, who signed the agreement on behalf of the defendant company as president, had no authority to enter into the agreement with the plaintiff and it was further contended that there was collusion between the plaintiff James A. Rundle and his brother John T. Rundle in executing the agreement. The trial Judge came to the conclusion that at the time John T. Rundle undertook to execute the agreement he had no authority to bind the defendant company and he also came to the conclusion that there was collusion between the plaintiff and his brother.

The defendant is a company organised under the laws of the State of Maine and is a subsidiary of the International Paper Co., and its business control appears to have been in the office of that company in the State of New York. There was a local organisation in New Brunswick, the Miramichi Lumber Co., receiving orders from the office in New York. John T. Rundle was the president of the Miramichi Co. and for a short time general manager. At a meeting of the company which was held on June 6, 1912, John T. Rundle resigned as president, and this resignation was accepted to take effect on the 30th day of the same month, his salary to be paid to December 31 of the same year. At this meeting J. W. Brankley was made general manager of the company and a few days later he went to Chatham, took over the management of the company's business under the direction of the officers in New York, and John T. Rundle took no further part in its management. On July 27, 1912, or about that date, John T. Rundle called at the office of the defendant company in Chatham and left there an envelope addressed to Brankley, containing the contract sued on in this suit, which contract purported to be dated June 27, 1912, and was executed by John T. Rundle as president. This was the first knowledge the company had had that any such contract had been entered into and no such agreement had been authorised. The agreement purported to authorise James A. Rundle, a brother of John T. Rundle, to cut the princess pine on a large area of timber lands held by the defendant under license from the Crown, the period of cutting to extend over the life of the lease and any renewal thereof. Nothing was paid for this right, and James A. Rundle was not obliged to cut any amount in any particular time. When this contract came to the notice of the defendant it endeavored to have a new agreement made with James A. Rundle by which the right to cut would be limited to a year, as was

the case with all other contracts made by the company, and when Rundle refused to agree to this the whole transaction was repudiated by the company, as it claimed he (John T. Rundle), had no authority whatever to enter into the agreement. It is contended that no communication was made to the office in New York of the intention to make this agreement, but it appears that on October 19, 1911, John T. Rundle wrote to the president of the International Paper Co., 30 Broad St., New York, a letter which is set out in full in Judge Chandler's judgment, stating he had an application for a contract on princess pine on Little South Miramichi from J. A. Rundle & Co., who would pay one dollar per thousand superficial feet stumpage, beside the Government charge. In the letter Rundle stated that the firm was composed of "James Robinson, a lumberman and lessee of the South-West Boom," and his brother J. A. Rundle, and because he was related to one of the firm he thought it advisable to ask the president of the International Paper Co. to whom the letter was addressed if there would be any objection to sell to them, J. A. Rundle & Co., the other member of the company being James Robinson. To this letter President Burbank replied that the price mentioned seemed rather low, but if that was the proper price and the most that J. T. Rundle could secure he would advise him to sell. This was on October 27, 1911, and if it was an authority to sell it was an authority to sell not to Rundle but James A. Rundle & Co., the other member of the firm being as before stated James Robinson, a man of position and business standing on the North Shore. Nothing more was done until June 27, 1912, three weeks after Rundle's resignation as president of the company had been accepted and three days before the time at which his resignation was to take effect, and as far as I can ascertain from the evidence after June 6, when his resignation was accepted John T. Rundle transacted no further business for the company, and its affairs were administered by J. W. Brankley, who, as I have just stated, had gone to Chatham and taken over the management of the company's business, and from that time forward John T. Rundle took no further part in its management. The agreement was sealed with the common seal of the defendant company and signed by J. T. Rundle, president of the Miramichi Lumber Co., and was also executed by J. A. Rundle, and there does not appear to have been any communication between John T. Rundle and the defendant company as to this particular transaction in the writing of the

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letter of October 19, 1911. A by-law of the company provides that "the president shall have the general supervision and direction of all departments of the company's service. He or the vice-president shall sign all certificates of stock and all contracts, obligations and other instruments except as from time to time otherwise ordered by the Board." It is claimed, though I cannot entertain the view, that there is more in this by-law than merely the direction as to the ministerial act of signing or executing an instrument, and that there is a specific declaration of authority in the president to act for the company in the negotiating and concluding of contracts as well as in their formal execution.

I concur in the opinion of Chandler, J., to the effect that this by-law of itself was not sufficient to give authority to John T. Rundle to enter into the contract which he did with his brother, and that so far as direct authorisation was concerned his only right was to enter into a contract with James A. Rundle & Co., that firm to include James Robinson.

Chandler, J., finds that James T. Rundle's authority was limited to signing contracts made by the company, and that the by-law quoted does not say that the president shall make all contracts with the company, but simply that he shall sign them, meaning, Chandler, J., concludes, the same as if the word was "countersign," and that as he at the time, had practically given up the office of president and general manager and had nothing whatever to do with the affairs of the company, he did not think that John T. Rundle had any authority to make this agreement, and so held.

It is contended, however, by the appellant, that even if there was no authority to negotiate such a contract, and if it was not within the apparent scope of John T. Rundle's authority that the company cannot now set up the invalidity of such an instrument in answer to the plaintiff's claim, for the contract was clearly within the powers of the company to execute, and there therefore was no question of *ultra vires*. Such a contract if in fact authorised by the Board of Directors, it was argued, would be executed in the same manner as that in which it was, viz., under the seal of the company attested by the hand of the president, and this being so a third party dealing with the company was entitled to assume that the necessary action had been taken by the company to authorise its execution, and the third person was not bound to investigate the indoor management in such a case.

It appears that on June 18, 1912, John T. Rundle wrote to

the company at New York a letter asking them to send him three seals imprinted by the corporate seal of the Miramichi Lumber Co.—"which are required to complete an agreement of contract we are making with a party to whom we have sold stumpage of princess pine lumber," and three such seals were sent accordingly to John T. Rundle from New York, one of which was used in executing the agreement in question. The seal itself was kept at the office of the company in New York, and was never under John T. Rundle's control.

Now I think there is a great deal of force in the contention which the respondent makes as last herein stated. In the case of the *Gloucester Banking Co.* v. *Rudry Merthyr Colliery, etc. Co.* (1895), 64 L.J. (Ch.) 451, it was held that:—

"Where articles of association of an incorporated company empower the directors to make regulations as to the quorum of directors necessary to authorise the affixing of the common seal, an outside person taking a deed under the company's seal signed by two directors and the secretary is entitled to assume that the regulations (if any) made by the directors have been complied with. A plea of *non est factum* cannot be sustained by evidence that regulations have been made requiring a quorum of three directors."

Lord Halsbury in the course of his judgment said, 64 L.J. (Ch.) at p. 452:—

"Upon the point that has been argued last but which stands first in order, namely, whether this was a valid mortgage or not—I am of opinion that nothing has been urged before us which would induce us to hold that the authority of the company was not given to the making of this mortgage—at least in the sense that an outside person, who had no other means of knowledge, was entitled to regard the company as having performed its functions in the making of the mortgage by whatever means it could lawfully do so."

The case of the *Royal British Bank* v. *Turquand* (1856), 6 El. & Bl. 327, 119 E.R. 886, was also referred to on the argument, as an authority for the claim that a contract under the seal of a joint stock company cannot be voided merely by showing an excess of authority on the part of the directors by whom the contract was made, and that to affect the right of the other contracting parties to enforce the contract, some prejudice to the shareholders to the knowledge of such parties should be shown.

It had been the custom of the company to grant licenses

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for parties to cut princess pine on their holdings, these being signed by John T. Rundle as president, without any seal of the company being affixed, and the contention, therefore, based upon the authorities I have cited is that there was nothing to put James A. Rundle on his inquiry in connection with the matter, the document being signed by the president as in previous cases, and in addition to that the seal of the company having been affixed, and that therefore everything was regular upon the face. This contention might prevail were it not for the peculiar circumstances of the present case, which I think amply justified the trial Judge in coming to the conclusion that there was collusion between John T. Rundle and his brother James A. Rundle. The writing of the letter asking for authority to enter into a contract with James A. Rundle & Co. and the putting forward of the name of James Robinson as president of the South-West Boom Co., as one of the company, the fact that no agreement was executed until three weeks after Rundle's resignation as president had been accepted, and three days before June 30, when the resignation was to take effect, the fact that the agreement was then entered into not with James A. Rundle & Co., but with James A. Rundle alone, and the fact that the attention of the new manager, Brankley, was not called to this agreement nor was he placed in possession of it by Rundle until July 27, 1912, one month after it had been executed and nearly two months after John T. Rundle had resigned as president, that the company was not informed that any such contract had been made previous to this time, and the further fact that the agreement entered into with John T. Rundle did not contain the covenants and conditions contained in other licenses previously issued for the cutting of princess pine upon the lands of the defendant, all point to collusion between the plaintiff and his brother, and an attempt on the part of the plaintiff which must have been with the knowledge of his brother.

Chandler, J., in the course of his judgment says that a few months before the agreement was entered into an agreement had been made between the defendant company, by J. T. Rundle as president, and one David J. Buckley, to provide for the cutting by Buckley on certain premises leased to the defendant, of lumber growing upon the same. The trial Judge says that he carefully compared this last agreement with the agreement in question, and finds that important clauses that were contained in the Buckley agreement for the purpose of safeguarding the company's interests are

entirely omitted from the agreement with James A. Rundle, and other agreements put in evidence with other parties show the same state of affairs.

The question of collusion was a question of fact. There was ample evidence in my opinion to justify it, and I do not think there can be any justification with interfering with the trial Judge's conclusion on that ground. Apart from this, had the learned trial Judge come to a different conclusion, and had verdict been entered for the plaintiff, I do not see on what principle the damages could have been assessed. The licenses held by the defendant were issued under Order-in-Council of June 29, 1893, and were issued for one year with the right of renewal from year to year under certain conditions for a period of twenty-five years. In 1913 the Legislature enacted that two new kinds of timber licenses might be issued, one a saw-mill license and the other a pulp and paper license, and that these could be issued upon cancellation of the then existing licenses. The defendant was therefore compelled to elect whether it would come under the new arrangement or remain under the old and lose all claim to the timber licenses in 1918. The defendant elected to come under the new arrangement, paid to the Province the amount required on the bonus, and the old licenses were thereupon cancelled and new licenses issued for twenty years, with the right of renewal for ten years more.

In the case of *Snowball* v. *Sullivan* (1921), 48 N.B.R. 253, I practically decided that under similar circumstances new licenses could in no sense be regarded as renewals of the old ones, and therefore the claim of the plaintiff company, if any, would be confined to the period between 1912 and 1918, when all the licenses which were in existence from the Province at the time the agreement was made were cancelled. Therefore I think it is quite clear that no cause of action could arise with regard to anything that occurred with respect to these licenses after the year 1918.

In the course of his evidence, at p. 13 of the record, I find the following:—"Court: I understand Rundle you did no work on the land of any kind either through contracts or yourself? A: No," and the only expenses which he apparently incurred were for cruising on the Tabusintac and making certain preparations, amounting to a sum according to James A. Rundle's evidence, of about $125, an amount which falls certainly very far short of the $25,000 damages which he claims in his statement of claim. In the course of his evi-

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dence, too, he states that he went out of the lumber business in 1916, and his claim for damages is based upon the idea that large profits would have accrued from the cutting of the princess pine had not the license been cancelled, in consequence of which he could not get financial backing to carry on the work. The evidence of this, however, is of a very meagre character, and even taking the view that is most favorable to the plaintiff, if Chandler, J., had found in his favor it must have been for a very small amount.

There being in my judgment ample evidence to support the finding that there was collusion between James A. Rundle and his brother John T. Rundle, and that the agreement was made with the intention of defrauding the defendant, and not in good faith, I am of opinion that the appeal should be dismissed with costs.

Appeal dismissed.

J. I. CASE THRESHING MACHINE Co. v. BRILLON and BRILLON.

Saskatchewan King's Bench, MacDonald, J. November 30, 1922.

SALE (§IIA—25)—BREACH OF WARRANTY—"REPAIRS"—FARM IMPLEMENT ACT, R.S.S. 1920, CH. 128.

Oversize pistons required by the purchaser of a tractor for the efficient working of the engine are "repairs" within the meaning of the Farm Implement Act, R.S.S. 1920, ch. 128, and a warranty of the vendor to supply all "necessary repairs" for the machinery. The vendor's failure to supply them within a reasonable time constitutes a breach of warranty entitling the purchaser to recover for the loss of time while the machinery remained not working, deductible from the purchase price.

ACTION for the purchase price of a tractor. Judgment for plaintiff less damages for breach of warranty.

H. Ward, for plaintiff; *J. B. Crepeau*, for defendants.

MACDONALD, J.:—This is an action to recover the purchase price of a tractor and plough purchased by the defendants from the plaintiff, for which the defendants gave the plaintiff their lien note, dated October 1, 1919, for $750 with interest at 9% per annum both before and after maturity.

The agreement under which defendants purchased said machinery did, pursuant to the Farm Implement Act, R.S.S. 1920, ch. 128, contain the following warranty:—

"The vendor warrants that all necessary repairs for said machinery, other than standard bolts and nuts or straps or other iron or wooden parts usually made by blacksmiths and carpenters, will for a period of ten years from the date of this order be kept at Regina, in Saskatchewan, and that

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MacDonald, J.

at said place the purchaser will be able to obtain them within a reasonable time."

In October, 1920, the defendants ordered from the plaintiff oversize pistons which defendants required to make the engine work efficiently. A parcel containing pistons and other repairs ordered at the same time was received by the defendants, but the same was laid aside until the following spring, when defendants, preparatory to the spring work, overhauled their engine and discovered that the pistons sent by plaintiff were not oversize pistons at all, but the ordinary standard size. Defendants then got into communication with the plaintiff, but were advised by the plaintiff that the same were not carried in stock. Defendants then had the same made by the Roman's Machine Co., at Moose Jaw, but in consequence of not getting the oversize pistons sooner the machinery remained idle from April 12 to June 10.

Subsequently the oil-pan in the machine was broken, and defendants ordered a new one, along with other repairs, from plaintiff. The other repairs were forwarded in due course, and on the bill was a notation that the oil-pan would go forward as soon as possible. Considerable time, however, elapsed before the oil-pan arrived, and in consequence the machine remained idle from July 7 to July 23.

Allowing the plaintiff a reasonable time for filling the orders, defendants estimate that, in consequence in the one case of the failure of the plaintiff to fill the order at all, and in the other of the delay in filling the order, defendants lost 36 days when they might have worked with the machine. There is also evidence that there was work which they could have done during this time, and that the profit on a day's work of the engine amounted to $15. This evidence I accept. Defendants therefore claim for breach of warranty the sum of $540.

Plaintiff submits that oversize pistons are not "repairs" at all. The evidence shows that when a machine of this kind has been worked for some time it is customary to re-bore the cylinder and use oversize pistons. Moreover, in the catalogue or list of repairs said to be kept by plaintiff, given to the defendants at the time of the purchase of the engine, oversize pistons are named. I am therefore of opinion that oversize pistons are "repairs" within the meaning of the Act and of the warranty.

The evidence further satisfies me that though the time lost was very long, there was nothing that the defendants could be reasonably expected to do that they did not do to

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mitigate the damages.

There will, therefore, be judgment for the plaintiff for the amount claimed, less $540, with costs.

Judgment for plaintiff.

ZEIGLER v. CITY of VICTORIA.

British Columbia Supreme Court, Morrison, J. November 23, 1921.

MASTER AND SERVANT IE—DISMISSAL OF SERVANT—1914 (B.C.), CH. 52, SECS. 25 (D) 54 (3) AND 49.

A fire captain is an employee of the city and is subject to dismissal by the fire chief and where such dismissal has been for cause after due enquiry and after confirmation by the council is a due exercise of authority and an action for wrongful dismissal will not lie. Section 49 of the Municipal Act, 1914 (B.C.), ch. 52, as re-enacted by 1916 (B.C.), ch. 44, sec. 5, applies to officers appointed for the carrying on of the good government of the municipality as distinguished from employees.

ACTION for a declaration that the dismissal or suspension of the plaintiff from his position as captain of the fire department is invalid or in the alternative for damages for wrongful dismissal. The facts are as follows:—

On July 26, 1921, the chief of the Victoria fire department dismissed the plaintiff on the ground of alleged reckless and improper conduct in the control and direction of a fire-truck. On July 19, 1921, in answering a fire call, the fire-truck was being driven easterly along the narrow portion of Fort Street (known as the Dardanelles) behind an easterly bound street-car, being at that time on the left track. The street-car stopped suddenly at the wrong stopping place at St. Charles St., and the driver of the fire-truck, in order to avoid a collision with it, turned quickly to the right, but upon doing so he was suddenly confronted by a westerly bound street-car coming at some speed and an unavoidable collision took place, causing considerable damage to both street-car and the fire-truck. Although the fire-truck was in the plaintiff's charge, an experienced fire-truck driver was at the wheel.

J. R. Green, for plaintiff.

M. B. Jackson, K.C., and *H. S. Pringle*, for defendant.

MORRISON, J.:—The plaintiff, at the time of the accident in question, was a captain in the fire department of the city, and after an investigation, which for the purposes of this case I find was sufficiently regular and adequate, he was dismissed. That is, assuming there was good cause for his dismissal, the action by the council was in conformity to the letter and spirit of the Municipal Act, 1914 (B.C.), ch. 52, and perfectly legal.

The section of the Municipal Act which was invoked is sec. 25, sub-sec. (*d*), 1914 (B.C.) ch. 52, which defines the power conferred upon the mayor but which powers are not exclusive.

By sec. 54, sub-sec. (3), of the same Act, the council of the corporation have power to pass by-laws for regulating the removal of its officers and servants. Pursuant to this power a by-law, No. 535, was passed authorising rules in which provisions were made for the removal of members of the fire department. These rules were invoked by the fire chief on the occasion in question, by virtue of which he first suspended the plaintiff and later, after further inquiry, dismissed him, which acts were duly confirmed by the council. Section 465 was also referred to by counsel on behalf of the defendant in his submission that the fire chief has the power to dismiss a subordinate officer or member of his department.

And last, sec. 49, 1914 (B.C.) ch. 52, as re-enacted by 1916 (B.C.), ch. 44, sec. 5, Municipal Act Amendment Act, which provides that:

"49. (1.) The Council may by by-law provide for the appointment and the method of appointment of officers of the corporation to fill or occupy such positions as may from time to time become vacant, or such positions as may be deemed necessary or expedient for the carrying-on of the good government of the municipality and the carrying-out of the provisions of this Act, and may also in the same manner provide for the appointment of a water commissioner and a commissioner or commissioners to superintend sewerage or drainage.

(2.) Any person who has been properly appointed by the Council to any such office or position shall hold the same during the good behaviour and efficiency: Provided, however, that, notwithstanding any contract or agreement to the contrary, the Council or the employee may terminate any engagement by giving to the other one month's notice in writing.

(3.) Officers and commissioners of a municipality shall, in addition to any duties which may be assigned to them by Statute, perform all other duties required of them by the by-laws and resolutions of the Council or by the instructions of the Mayor or Reeve or Board of Control."

The powers therein given would seem to be confined to officers appointed for the carrying on of the good government of the municipality, as distinguished from employees, such as I find the plaintiff to have been: *Speakman* v. *City*

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of Calgary (1908), 1 Alta. L.R. 454. As to the proviso in sub-sec. (2), see *Vernon* v. *Corporation of Smith's Falls* (1891), 21 O.R. 331, at p. 334.

From the letter of the legislation appertaining to municipalties as well as from the philosophy underlying that legislation, I agree with the submission that the enactment dealing with these powers should receive a liberal interpretation to the end that the department may function effectively on behalf of the public.

There is nothing in the Municipal Act or amendments thereto which is not in consonance with the principle of law that from the reason of the thing, from the nature of corporations and for the sake of order and government, the power to remove is one of the common law incidents of all corporations: Lord Mansfield in *Rex* v. *Richardson* (1758), 1 Burr. 517, 97 E.R. 426; Dillon on Municipal Corporations, 5th ed. p. 455, sec. 240. I find there was no delegation of this power, as counsel for the plaintiff submitted there was, but rather that it was a due exercise by the defendants of the authority reposed in them by law.

I now come to the question as to whether there was good cause for the plaintiff's removal. The gravamen of the complaint, it seems to me, is not so much that damage was caused to the property of the corporation or to that of the British Columbia Electric Railway, but that by the alleged conduct of the plaintiff he disabled himself from attending to the prompt and effective discharge of his perilous duties, thus tending to endanger the public safety. One of the instructions given firemen by the chief was to exercise due care, to avoid collisions and accidents of any kind in circumstances such as obtained on the occasion in question, for as he stated, it would be better to arrive at the scene of a conflagration late than not to arrive at all. Whilst neither the danger nor the arduousness of the duties of firemen can well be minimised, nor their gallantry in discharge of those duties be gainsaid, yet when, as in this case, their conduct is investigated and passed upon regularly by the council, a Court sitting as it were as a jury, must not be astute in nullifying the result. The test is not what one would have done had one been charged with the duty of passing upon his conduct, but were the council unreasonable in the conclusion to which they came, having regard to all the circumstances: Per Channell, J., in *Baster* v. *London and County Printing Works*, [1899] 1 Q.B. 901, 68 L.J. (Q.B.) 622, at p. 623:—

"It is impossible to give an exhaustive definition of neglect or misconduct which would justify dismissal. The particular act justifying dismissal without notice must depend upon the character of the act itself, upon the duties of the workman and upon the nature of the possible consequences of the Act":

From the evidence which the council apparently accepted, it would appear that the plaintiff was following too closely to and directly in line behind the tram car—thus narrowing his field of vision; that had he taken due care under the circumstances, he should reasonably have expected the tram car ahead of him would come to a stop either before or at the time it did, and that in all reasonable probability another car or vehicle would be approaching. Had he kept out in the fairway so as to have had a clear view ahead, he himself would be able to see approaching vehicles and as well would be giving the drivers of such an opportunity of seeing him. This would be particularly so when proceeding along such a narrow thoroughfare and when approaching a curve or bend in the street, the existence of which he would be supposed to know.

There is, I suppose, no doubt that what made the plaintiff turn out when he did was the somewhat unexpected stop of the tram car which he was following. That then brings one back to the plaintiff who should reasonably have anticipated such an imminent contingency, even though hurrying to a fire. The nature of the damage to the tram car with which he collided would give a fair indication of the speed he was travelling. These are all matters for the council to consider and if, in addition, they accepted the evidence of the deputy chief, who was trailing behind the plaintiff, as they apparently did, I cannot say they were not justified in finding that the plaintiff was not exercising due care; nor that they were wrong in considering the incident sufficiently serious, having regard to the maintenance of the strict observance of the rules promulgated for the safety of the lives and property of the citizens of Victoria, to justify his dismissal. As to whether the public safety would not have been as well safeguarded by his mere temporary suspension or by giving him another chance without even a suspension, are matters, it seems to me, again entirely for the defendants, who are trustees for the public in such cases. Without some hesitation, I venture the gratuitous opinion that the only semblance of a remedy or at least satisfaction which the plaintiff has, is the inalienable right of every citizen to

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try by constitutional method to alter the personnel of the council.

I dismiss the action, again venturing upon a gratuitous suggestion, that as a tribute to the plaintiff's past services and conduct, they do not ask for the costs, of which, although I have the inclination, I fear I have not the power of depriving them in this particular case.

Action dismissed.

NOTE:—The plaintiff appealed from the above decision and contended (a) that the dismissal was by the fire chief and wardens only, not by the city council; (b) that the Municipal Act does not provide for fire wardens or confer any powers on them; (c) that the mayor can only suspend and cannot dismiss, and the fire chief cannot do more; (d) that notice and hearing were essential to a valid dismissal and none was given; (e) that the rules and regulations of the fire department purporting to confer such power to dismiss on the fire chief were *ultra vires*, and (f) that there was no good cause for the dismissal.

After argument the action was settled, the city reinstating the plaintiff in his position as fire captain and paying his salary since his dismissal to date and costs.

WALDRON v. RUR. MUN. of ELFROS.

Saskatchewan King's Bench, Bigelow, J. November 25, 1922.

NEGLIGENCE (§IIC—95)—DEFECTIVE HIGHWAY—DEATH OF MOTORIST—NON-COMPLIANCE WITH THE VEHICLES ACT, R.S.S. 1920, CH. 182—TRESPASSER.

Failure of a municipality to keep the grade of a highway in proper repair, thereby resulting in the driver of a motor-car going over a bank on the highway, is negligence which will render it liable for his death occasioned thereby, notwithstanding his non-compliance with the requirements of the Vehicles Act, R.S.S. 1920, ch. 182, as to brakes and lights, the jury having found that such non-compliance had not contributed to the accident. The mere non-compliance on the part of the driver in those particulars did not render him a trespasser on the highway.

DAMAGES (§IV—370)—ASSESSMENT BY JURY—TERMS.

A jury, assessing damages for death, cannot by the verdict impose terms as to the payment of the damages.

ACTION for negligence causing death. Judgment for plaintiff.

A. E. Bence, for plaintiff.

J. F. Frame, K.C., and *W. Nicol*, for defendant.

BIGELOW, J.:—This is an action under The Fatal Accidents Act, 1920 (Sask.), ch. 29, by the administratrix of Edmund Henry Waldron, claiming damages for the death of her husband. The accident was caused by a motor-car

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driven by the deceased going over a bank on a highway in the rural municipality of Elfros. It was alleged that the highway was not kept in repair as required by the statute, R.S. S. 1920, ch. 89, sec. 196.

The action was tried with a jury at Wynyard, and the jury found that the death of Waldron was caused by the negligence of the defendant, the negligence consisting in "neglecting to keep the grade in question in proper repair." And the jury also found that there was no contributory negligence, and assessed the damages at $6,000—$5,000 for the widow and $1,000 for the child, Vernon Waldron.

At the conclusion of the plaintiff's case, counsel for the defendant moved that the case be withdrawn from the jury, and for judgment (and this motion was renewed at the conclusion of all the evidence), on the ground that Waldron was driving a car that did not comply with the Vehicles Act, R.S.S. 1920, ch. 182, as regards lights and brakes. I reserved judgment on this motion, and put certain questions to the jury. The following are the questions and answers:—1. Q: Was the death of Edmund Henry Waldron caused by the negligence of the defendant? A: Yes. 2. Q: If so, in what did such negligence consist? A: In neglecting to keep the grade in question in proper repair. For proper protection of the travelling public danger signs should have been placed at each end of the said grade. 3. Q: Was Waldron guilty of contributory negligence? A: No. 4. Q: If so, in what did such negligence consist? A: 5. Q: Was Waldron's car equipped with adequate brakes sufficient to control it? (a) At the time of the accident? A: Yes. (b) At all times? A: No. 6. Q: Did Waldron's car at the time of the accident (a) carry on the front two lighted lamps shewing lights visible under normal atmospheric conditions at least two hundred feet in the direction towards which his car was faced? A: No. (b) Carry at the rear a lighted lamp? A: No. 7. Q: At what do you assess the damages? A: $6,000. (a) for the widow, Grace Maud Waldron, $5,000; (b) for the child, Sadie Waldron, none; (c) for the child, Vernon Waldron, $1,000.

Five thousand dollars payable to Mrs. Grace Maud Waldron in 10 annual instalments of $500, without interest. First payment for the year 1922 to be paid January 2, 1923. Balance payable on January 2, in each of the following years: 1924, 1925, 1926, 1927, 1928, 1929, 1930, 1931, 1932.

These payments to cease in the event of her death or marriage.

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One thousand dollars payable to Vernon Waldron or to his guardian; $250 per year for 4 years, without interest. First payment for the year 1922 to be paid January 2, 1923. Balance payable on January 2 in each of the following years: 1924, 1925, 1926; payments to cease in the event of his death.

The same motion by the defendant was renewed after the jury's findings. Defendant's motion is made on the ground that the same principles as were decided by the Court of Appeal in *Etter* v. *City of Saskatoon* (1917), 39 D.L.R. 1 (annotated), 10 S.L.R. 415, should apply to this case. In that case the plaintiff was operating a car without a license. Section 5 of the Vehicles Act, 1912 (Sask.), ch. 38, then in force, provided that:—

"No motor vehicle shall be used or operated upon any public highway, which shall not have been registered under this Act, or which shall not display thereon the number plate as prescribed by this Act."

Brown, J., 39 D.L.R., at p. 3, states:—

"Under the circumstances the plaintiff was distinctly prohibited by statute from operating his car at the time of the accident. He was therefore operating it illegally, and the defendants owed him no other duty than not to wilfully or maliciously injure."

The sections of the Vehicles Act, R.S.S. 1920, ch. 182, dealing with lights and brakes, are as follows:—

"23. Every motor vehicle shall be equipped with adequate brakes sufficient to control it at all times, and also with a suitable horn or other device which shall be sounded only when it is reasonably necessary to notify pedestrians or others of the approach of the vehicle.

25.—(1) Every motor vehicle other than a motorcycle shall, while in operation on the public highway, during the period from sunset to one hour before sunrise and at all times when fog or other atmospheric conditions render the operation of such vehicles dangerous to the traffic on, or use of, the highway:

(*a*) carry on the front at least two lighted lamps, shewing lights visible under normal atmospheric conditions at least 200 feet in the direction towards which the vehicle is faced; and

(*b*) carry at the rear a lighted lamp exhibiting one red light plainly visible for a distance of 200 feet towards the rear, and so constructed and placed that the number plate carried on the rear of the vehicle shall be illuminated by a

white light, and that the number thereon shall be plainly distinguishable at a distance of not less than 60 feet towards the rear."

The finding of the jury as to brakes, read with the evidence, means that there was no emergency brake on the car, but there was a foot-brake in good condition, which plaintiff contended was sufficient to control the car at the time of the accident,—some of the defendant's witnesses contending that an emergency brake could have been used to advantage at the time of the accident. As to the lights, there was no dispute that Waldron did not comply with the statute, but there was also the evidence that he had a spotlight on the car which, it was contended, was just as useful as the statutory lights.

If the absence of the statutory light or sufficient brakes had anything to do with the accident, that would be contributory negligence, as I explained to the jury. To make this a good defence, I would think that there must be some relation between the violation of the law on the part of the deceased and the accident, and that relation must have been such as to have caused or helped to cause the accident. The jury has found that there was no contributory negligence, so they must have concluded that the absence of the statutory lights or the emergency brake did not contribute to the accident in any way. There is plenty of evidence to support their finding.

But Mr. Frame wants to go further, and contends that, because Waldron did not comply with the statute as to lights and brakes, plaintiff cannot recover. I cannot agree with that contention. The section of the Act (1912 (Sask.), ch. 38, sec. 5), referred to in the *Etter* case, 39 D.L.R. 1, prohibits the operation of the motor vehicle unless that section is complied with. A person operating a motor car without a license is called a trespasser, and in some cases an outlaw, having no right to use the road at all. The sections in question referring to brakes and lights are entirely different. In my opinion, these sections indicate that it is intended to require those operating motor vehicles to observe these requirements, and failure to do so subjects the offender to the penalties set out in the statute, but does not make him a trespasser, as he would be if operating without a license. If the Legislature intended to go that far they could have used the language of the Alberta Act, 1911-12 (Alta.), ch. 6, sec. 17, which reads:—

"No person shall operate a motor vehicle upon a public

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highway after this Act takes effect, unless such person shall have complied in all respects with the requirements of this Act."

Mr. Frame relies on the case of *Marion* v. *Rural Municipality of Montcalm* (1915), 34 W.L.R. 683. In that case a threshing engine weighing 13 tons went through a bridge. A by-law of the municipality provided that "all owners of traction engines and outfits shall carry three-inch planks to be placed over the bridges to protect them." It was held that the plaintiff having failed to do this could not succeed. This decision followed *Goodison Thresher Co.* v. *Tp. of McNab* (1910), 44 Can. S.C.R. 187. The basis of the latter decision was that such provisions were obligatory and a condition precedent to taking the engine across the bridge, and not having been observed, the engine was on the bridge unlawfully. As Idington, J., says, at pp. 192-193:—

"I am, with great respect, unable to apprehend how a man can recover damages suffered by him from doing that in an illegal manner which, if done in a legal manner, would have caused him no injury."

Another case relied on by defendant is *Sercombe* v. *Tp. of Vaughan* (1919), 46 D.L.R. 131 (annotated); 45 O.L.R. 142. In that case a motor truck 96 inches wide broke through a bridge. The statute in Ontario, 1916 (Ont.), ch. 49, sec. 6, provided that no vehicle shall have a greater width than 90 inches. It was held that the plaintiff had no right to have such a vehicle on the highway at all, and in respect thereof he was a mere trespasser.

I cannot think that a person operating a car without a rear lamp, for instance, is a trespasser. As Boyd, C., says in *Ricketts* v. *Village of Markdale* (1900), 31 O.R. 610, at p. 615:—

"In the matters foregoing there may be regulations or there may be restrictions according to local requirements, but the permission to be on the streets is assumed, unless the particular by-law prohibits."

The statute in this case does not prohibit, it only regulates. I cannot conclude that Waldron was a trespasser on the highway, and therefore hold that plaintiff can recover.

As to damages: it will be observed that in assessing the damages at $6,000, $5,000 for the widow and $1,000 for the child, the jury added a clause saying the amount should be paid in instalments extending over 10 years, without interest, and that the payments should cease in the event of the

death of the respective parties or in the event of the marriage of the widow. Counsel have not assisted me with any authorities on such a verdict, I suppose, because they can find no precedent—I know of none—and I can only consider such an addition to their finding as mere surplusage and beyond their jurisdiction.

The plaintiff will have judgment for $6,000, $5,000 for the widow and $1,000 for the infant Vernon, and costs. Plaintiff's counsel asks that I should provide for the costs of the examination for discovery, but there is no need of that. Rule 290 provides that the costs of every examination for discovery shall be costs in the cause unless the Court or a Judge shall otherwise order or unless the examination shall appear to the taxing officer to have been unnecessary.

Judgment for plaintiff.

SIMPSON BALKWILL & Co., et al v. CANADIAN CREDIT MEN'S TRUST ASS'N LTD.

British Columbia Supreme Court, Murphy, J. November 24, 1921.

COMPANIES (§VI—A)—TRUST DEED—DEBENTURE STOCK—APPOINTMENT OF RECEIVER—TRUSTEE'S POSITION AND REMUNERATION.

The appointment of a receiver for a company does not discharge the trustee for the debenture holders, and the continuance of the trustee's remuneration after the appointment is a question of contract to be arrived at from the provisions of the trust deed relative to the trustee's remuneration.

[*In re Anglo-Canadian Lands Ltd.*, [1918] 2 Ch. 287, followed.]

APPLICATION by the liquidator to disallow the remuneration of the trustee for the debenture holders of the Burrard Saw Mills Co. Ltd. after the appointment of a receiver.

McTaggart, for liquidator.

A. D. Taylor, K.C., for company.

MURPHY, J.:—It seems clear from the cases, of which *In re Anglo-Canadian Lands Ltd.*, [1918] 2 Ch. 287, is 287, is the latest, that the mere appointment of a receiver does not oust the trustee. In Palmer's Company Precedents, 11th ed., vol. 3, Debentures, p. 106, it is stated that such appointment does not change the *status* of the trustee. It seems equally clear from the case cited and other cases referred to therein, that the question whether the trustee's remuneration continues after the appointment of the receiver is a question of contract to be arrived at from the provisions of the trust deed relative to the trustee's remuneration. In the deed before me the *quantum* of remuneration is, I think, fixed by sec. 3, at $100 per month.

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The duration of the trustee's employment is, I think, fixed by sec. 6. By this section the trustee is bound to carry out the trusts of the indenture, unless and until discharged therefrom by resignation or in some other lawful way. If I am right in the view that the mere appointment of a receiver does not discharge the trustee, then the applicant here remained bound to carry out the trusts imposed upon him in so far as he could, despite such appointment of a receiver. Admittedly, he has continued to act in that capacity in co-operation with the receiver. True, it is said he was requested to do so by the debenture holders, but this is an irrelevant fact if my construction is correct, that he was bound to do so in any event since he had not been discharged in any lawful way.

Having so acted, my view is the registrar was right in allowing him remuneration at the rate fixed by the trust deed for the period he so acted.

Judgment accordingly.

Judgment accordingly.

PALMER v. RICHARDS.

British Columbia Court of Appeal, Macdonald, C.J.A., Martin, Galliher and Eberts, JJ.A. October 6, 1921.

LEVY AND SEIZURE (§II—30)—MONEY IN HANDS OF SHERIFF—EXECUTIONS—RETURN—ESTOPPEL.

Money in the hands of the sheriff is not subject to seizure under execution. The sheriff's return admitting possession of surplus funds in his hands, but not levied on under the execution, is not a return of his seizure and not conclusive as an estoppel of record.

APPEAL by defendant from the decision of Lampman, Co. Ct. J., of May 23, 1921, in an action against the sheriff of the County of Victoria for $279.70 as money had and received, or alternatively as damages. The circumstances upon which the plaintiff based his claim were as follows: Prior to the action, in December, 1918, two distress warrants against the goods of one George D. Davis were placed in the defendant's hands as bailiff, upon which he made a seizure and sold the goods for more than enough to satisfy the warrants. Before the surplus moneys were paid over to Davis, one Brethour obtained judgment against Davis in the Supreme Court and placed a writ of *fi. fa.* in the defendant's hands for execution. Shortly after, the plaintiff obtained judgment in the County Court of Victoria against Davis and placed a warrant of execution in the defendant's hands. No other executions were issued against Davis. A

dispute then arose between the execution creditors and the defendant as to the amount of the surplus moneys in the defendant's hands payable to Davis. The defendant delivered a statement claiming he had only $138.70 surplus, after deducting various charges, including one for $141 possession money. The plaintiff contested the defendant's right to this charge for possession money and after proceedings under the Distress Act, R.S.B.C. 1911, ch. 65, and certain *certiorari* proceedings (reported *sub-nom. Rex* v. *Barton* (1919), 27 B.C.R. 485), succeeded in having the $141 charge disallowed. The plaintiff then claimed there was $279.70 seizable under the execution and demanded payment from the defendant of a proportion of this sum under the Creditors' Relief Act, R.S.B.C. 1911, ch. 60. This was refused by the defendant, and on the plaintiff's demand the defendant made a return stating the validity of the executions were disputed and that the amount to be distributed could not be arrived at until the result of an appeal in certain *certiorari* proceedings were determined. To obviate the objection that Brethour contested his claim, the plaintiff obtained from Brethour a release and assignment of the latter's rights under his execution and gave the defendant notice thereof. The defendant still refused to pay, and the plaintiff brought action to recover the sum of $279.70, claiming that if the defendant had seized this sum under Brethour's execution, the plaintiff was entitled by virtue of the assignment, that if the defendant had seized under the plaintiff's warrant, the plaintiff was entitled to the whole as there were no other execution creditors; and if the defendant had made no seizure, he was liable for his failure to do so, as he had the money available for seizure. The defendant's dispute note placed in issue the fact of seizure and on examination for discovery admitted having the surplus moneys in his hands at the time of receiving the executions, but swore he had made no levies, because he had notice that the executions were disputed. At the trial the plaintiff put in the defendant's statement shewing a surplus of $138.70 and the certiorari proceedings to shew that this should be increased to $279.70. The defendant put in no evidence. It was not suggested at the trial that there was any doubt as to the defendant's legal power to seize the $279.70, but the issue was contested as one of fact.

Mayers, for appellant; *D. M. Gordon*, for respondent.

MACDONALD, C.J.A.:—I think the appeal must be allowed. It is perfectly clear to my mind that the sheriff cannot seize

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a chose in action. Under what circumstances he may seize specie I need not discuss. Unless therefore there is something appearing upon this record against the sheriff asserting the contrary to what his so-called return has shewn, it is impossible to sustain the judgment below. Now, I do not think there was estoppel, for two reasons; the authorities seem to shew that the return, made by the sheriff, even where it is a formal return, is not a conclusive estoppel. In a certain class of cases, as Mr. Mayers has pointed out, it may be regarded and has been regarded as an estoppel of record; but in a case of this character it has not been so regarded.

As to costs, Mr. Mayers has very properly and very frankly stated that he cannot ask for them in view of the attitude he has taken on this appeal. We are, therefore, not called upon to decide the question at all. As far as I am concerned, I do not decide it.

MARTIN, J.A.:—My view is that moneys in the sheriff's hands in the circumstances of this case are not available to seizure at common law, quite apart from the Distress Act Amendment Act of 1915 (B.C.) ch. 18. As to the so-called return, I do not regard it in the proper sense of the word as being a return at all. It is simply a recital of certain facts and statements which are intended to explain the fact that the moneys are not available for the execution creditor. And, moreover, even if it were to be regarded as a return, it is self-contradictory, and shews upon its face such facts which would prevent its being regarded as a statement of a return that these moneys actually were seized and had become available to this execution, because the all-important statement is that these moneys which he purported to seize (which, as a matter of law could not be seized), were surplus moneys in his hands, and there is nothing at all to shew, and it is not necessary for me to shew, that they were in any way under the control of the judgment debtor.

GALLIHER and EBERTS, JJ.A., agree with MARTIN, J.A.

Appeal allowed.

FOURNIER v. EVERETT and ROBINSON.

New Brunswick Supreme Court, Appeal Division, Hazen, C.J., White and Grimmer, JJ. September 22, 1922.

CONTRACTS (§VB—375)—ABANDONMENT—SUBSTITUTION OF WRITING BY PAROL—DELIVERY OF PULPWOOD—FINDINGS OF JURY—CONCLUSIVENESS.

Where a written contract for the delivery of pulpwood has been abandoned by the substitution of a verbal agreement pro-

viding for smaller quantities at a lesser price, the findings of the jury to that effect, there being evidence to warrant their findings and no mis-direction by the Court, will not be disturbed on appeal.

APPEAL AND MOTION by defendant to set aside a verdict entered for the plaintiff before Crocket, J., and a jury and to enter the verdict for defendant, or for a new trial. Affirmed.

P. J. Hughes and *H. A. Carr*, for appellant.

A. T. LeBlanc, for respondent.

The judgment of the Court was delivered by

GRIMMER, J.:—This was an action for goods sold and delivered and was tried before Crocket, J., and a jury at the Restigouche Circuit in April last, resulting in a judgment for the plaintiff for $2,107.40, against which this appeal is taken.

It appears that on August 11, 1920, the plaintiff and the defendant Walter Everett entered into a written agreement, which was afterwards adopted by the defendant Robinson, for the sale and delivery of from 500 to 1,000 cords of peeled pulpwood to be delivered on cars at Eel River Crossing. The price was to be $22 per cord until the first of October, and $21 afterwards—the pulpwood to be well made and perfectly sound. $1,500 was to be paid within 15 days from the date of the agreement, and the balance "as the scale came in."

The respondent entered upon his contract but before he proceeded very far disputes arose between him and the defendants in respect to the contract, which resulted as it is claimed in an entire abandonment of the written contract and the substitution of a verbal contract therefor. From this verbal contract it appears, the defendants, having come to Eel River, told the plaintiff to get all the pulpwood he could for them and they would pay him $20 a cord for the wood delivered in the yard at Eel River. The original agreement was as follows:—

"Eel River Crossing, New Brunswick, August 11, 1920.

This agreement made this day and year above written by and between Arthur Fournier of Eel River Crossing in this County of Restigouche and Province of New Brunswick, hereinafter called the seller, and Walter Everett, of Bury in the County of Compton and Province of Quebec, hereinafter called the buyer, witnesseth:

The seller agrees to sell and deliver and the buyer agrees to buy and receive from 500 to 1,000 cords of pulpwood peeled, delivered on cars at Eel River Crossing station. The

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buyer agrees to pay $22 till October 1, 1920, and $21 after said date. One thousand and five hundred dollars to be paid the seller inside 15 days from above mentioned date. Balance to be paid as scale comes in. All pulpwood delivered to be well made and perfectly sound.

(Sgd.) Arthur Fournier
his mark.

Witness (Sgd.) Anna Poirier Walter Everett."

Evidence was given of the abandonment of this contract and the substitution of the verbal one, and the jury in answer to Question 1 by the Judge to them found that it was the intention of the plaintiff, and of the defendants when they agreed to the delivery of a smaller quantity of pulpwood than that provided by the written contract in the yard at Eel River instead of on the cars, at $20 per cord, to wholly abandon the written contract and rely entirely on the new verbal contract.

The appeal is taken on the grounds that the verdict is against evidence and the weight of evidence; that there is no evidence of the total abandonment of the original contract and the substitution of another; that there is no evidence of abandonment of the terms as to (a) quality of the wood or (b) that balance was to be paid as scale comes in; or that if the written contract was abandoned then the plaintiff has not shewn the quantity of wood which he had at Eel River; also that the plaintiff had not shewn delivery of the wood to the defendants; also that there was no evidence to support Question 2 which should not have been put to the jury. No question of misdirection is raised, no objection to the admission of evidence or to the Judge's charge is stated, and therefore nothing is involved in the case for the consideration of this Court except a question of fact, and this has been passed upon by the jury.

In my opinion there was evidence upon which the jury could find as they have that there was a total abandonment of the original contract and a substitution of another. It clearly appears that as claimed by the plaintiff the defendant Robinson came to Eel River in the month of January, 1921, and that he there and then told the plaintiff to get out all the pulpwood he could for which they would pay him $20 a cord when the same was delivered in the yard at Eel River. The defendant Robinson admits having been there and therefore there can be no doubt as to the truth of the statement made by the plaintiff in this respect. The effect then of this agreement clearly would be or would shew that the

original contract had been abandoned that provided for from 500 to 1,000 cords of wood for which the buyer was to pay $22 until the first of October, and $21 after that date. Under the new contract a lower price was to be paid for the pulpwood, and the defendants were to pay thereafter $20 instead of the $22 and the $21 per cord. It also shews that a different arrangement was made as to the place of payment. The defendant Everett stated that the words "as the scale comes in" meant by usage among pulp dealers the scale of the wood at the mill. It must appear and does appear to be very evident that this was abandoned when the arrangement was made to pay for the wood when delivered in the Eel River yard, and viewing all these facts I can come to no other conclusion than that the jury was fully justified in answering Question 2 as they did in respect to the abandoning of the contract.

There is no claim anywhere so far as I can discover throughout the entire proceedings that anything was said in respect to the quality of the wood, other than as stated in the original agreement, nor does it appear anywhere in the evidence that the wood which was delivered in any way fell short of the requirements of the original agreement that the same was of good quality, well made and perfectly sound. It also appears to me to be very plainly the result of the evidence given that the quantity of the wood furnished and delivered at the yard in Eel River was very fully established. The plaintiff states that on one occasion when both the defendants Everett and Robinson were present he was also at the yard with a man by the name of Arseneau, that the defendants had a tape measure or line with which they proceeded to measure the wood which was piled in this yard. The results of their measurements were given by them to Arseneau, who in their presence computed the amount of the wood when the measurements were completed, and also in their presence and the presence of the plaintiff Fournier delivered him a slip or statement which was put in evidence and which shewed that at that time there was 255 cords of wood in the yard. Evidence was also given to shew conclusively to my mind that the plaintiff had also supplied 115 cords of wood previous to this action which had been delivered and loaded upon cars for shipment.

These matters were fully before the jury, and I am satisfied that as reasonable men they were absolutely justified in the conclusion they arrived at as to the quantity of the wood. It is also abundantly evident from the evidence that

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the wood was delivered according to the terms of the substituted agreement, and in my opinion none of the grounds upon which it is sought to set aside this verdict have been established. I am therefore of the opinion that the appeal must be dismissed with costs.

Appeal dismissed.

RAINES v. B.C. ELECTRIC R. Co.

British Columbia Supreme Court, Morrison, J. November 19, 1921.

CARRIERS (§IIH—150)—EJECTMENT OF PASSENGER—REFUSAL TO MOVE UP—CROWDED CAR—ASSAULT.

The forcible attempt of a conductor to eject a passenger for his refusal to move up in a crowded street car is an unjustifiable assault for which the railway company is liable, particularly where such passenger is an elderly person.

ACTION for damages for injuries sustained by reason of a conductor on a street car of the defendant company attempting to put the plaintiff off the car by force.

Kappele, for plaintiff; *McPhillips*, K.C., for defendant.

MORRISON, J.:—The plaintiff, a man 63 years old, was taken on board an eastbound Grandview car of the defendant company at the corner of Dunsmuir and Richards Sts. in August last. With him was a lady who was in attendance on his wife as nurse. They were somewhat encumbered with small parcels. There being no seats available, they took hold of the straps at the open space at the entrance furnished by the defendant company for the purpose. As the car proceeded more passengers entered so that the aisle and other spaces appeared to be filled. The conductor in charge of the car called out to those inside to move forward. The plaintiff thereupon remarked that it was no use urging people to move up as the car was full. The conductor, it appears, resented being given this bit of gratuitous information. When the car was approaching the Woodward Departmental Stores on Hastings St. and upon a number of passengers seeking to get on board the conductor came up to the plaintiff and told him if he did not move up he would put him off. The plaintiff remained where he was, and upon the car coming to the next stop the conductor came to the plaintiff, caught hold of him and attempted to put him off. A struggle ensued and in the fracas they both got into the vestibule. The motorman not being able to come through the car owing to its congested condition, got off and came back by way of the street to the scene and courageously caught hold of the plaintiff and attempted to pull him off also. Some of the passengers approached the policeman

who came along then and, apparently in consequence of what they said as to the incident, he ordered the car to proceed. The plaintiff resumed his former position in the car, which continued on its course. The plaintiff sustained certain injuries and his clothes were torn. Several of the younger men who witnessed all this and any one of whom the defendant might as well have picked on to move up, have given evidence fully corroborating the plaintiff's evidence, particularly as to the congested condition of the car. The main evidence for the defence is that of a young man by the name of Sidney Hopkins, an insurance agent, who said he was standing with his back to the door partition inside, and was calmly viewing the incident. He stated that it was when near Woodward's that the plaintiff made the statement in question, and that at the time there was room ahead of him in which to move up, and that a passenger entering would have to push him away. I do not accept the evidence of this witness, who, to say the least, was most disingenuous. Another witness was a Mrs. Perry, of Bellingham, and whose powers of observation were so defective that she insisted that she saw the motorman come back to the scene of the struggle down the car aisle, the motorman himself stating he came along the street from the front of his car. Her evidence, in my opinion, is not reliable and I reject it. On the whole, I accept the plaintiff's evidence and that of his witnesses. I find that the assault upon the plaintiff was wholly unprovoked; that the plaintiff, having regard to his age and the congested condition of the car, was violating no rule of the company nor committing any act of misconduct in supporting himself by hanging on to the strap provided in that particular part of the car for passengers' support and convenience; that the plaintiff was not blocking any passage nor interfering in any way with the influx of passengers allowed by the conductor to enter the car, because as he stated that his instructions were that there would "always be room for one more." It was an unreasonable request for the conductor to demand that the plaintiff should, under the circumstances, relinquish the position he occupied, in which he was not preventing anyone from passing by him if they desired, and to resume one in which his comfort and perhaps his safety might be affected. Having seen the conductor in question, I cannot refrain from commenting adversely upon the fact of a young man of his physique treating an elderly inoffensive gentleman, such as I find Mr. Raines to have been on that occasion, in the man-

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ner alleged, not only by assaulting him but by humiliating him in the presence of fellow-passengers. There will be judgment for the plaintiff for $500 and costs.

Judgment for plaintiff.

McNEIL v. SHARPE and McNEIL.*

Supreme Court of Canada, Fitzpatrick, C.J., Davies, Idington, Duff and Brodeur, JJ. February 2, 1915.

PARTNERSHIP (§IV—15)—PARTNERSHIP REAL ESTATE—FRAUDULENT CONVEYANCE—INSOLVENCY.

Land purchased with partnership funds, the title to which had been taken in the name of a sister of one of the partners, who claimed it for an apparent valuable consideration, held to be partnership property recoverable by a curator of the insolvent firm.

APPEAL from a judgment of the Supreme Court of Nova Scotia reversing the judgment of the trial Judge and maintaining the respondent's action.

Sparrow & McNeil were contractors carrying on business in the City of Montreal in the Province of Quebec. On April 13, 1911, the firm borrowed from their bankers $2,000 to purchase certain gypsum property in the County of Victoria in the Province of Nova Scotia. The partner Francis T. McNeil obtained for his firm the $2,000 and had the conveyance of the lands made to his sister, the appellant. The firm of Sparrow & McNeil made a judicial abandonment of their property and the respondent on July 12, 1911, was appointed curator by the Superior Court at Montreal. The present action was brought against Francis T. McNeil and Jane E. McNeil by the curator claiming that the lands so conveyed were paid by the moneys of the insolvent firm, that the defendant had caused the conveyance to be made to the appellant in fraud of the firm and its creditors.

The trial Judge discredited the evidence of the defendant F. T. McNeil, but found that the defendant J. E. McNeil had acted in good faith throughout and had no knowledge that the $2,000 used in the purchase was the property of the firm; that as between her and her brother there was good consideration for the conveyance being made to her, as she had supported her younger brothers and sisters for many years at an expenditure of $1,500 under an agreement with her brother that he was to buy a farm for her. He also found there was no evidence that the firm of Sparrow & McNeil were insolvent when the bargain was made between brother and sister,—and that accordingly the transaction should stand. The majority of the Supreme Court of Nova

*EDITOR'S NOTE.—This case was not available for publication earlier.

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Scotia held that the $2,000 was advanced by the bank to buy partnership property and that defendant F. T. McNeil had fraudulently taken the conveyance in the name of his sister and that she as regards the property was a trustee for the curator and the creditors of the insolvent firm.

J. L. Ralston, K.C., for appellant.

E. L. Newcombe, K.C., for respondent.

FITZPATRICK, C.J.:—I am of opinion that the appeal should be allowed for the reasons given by Mr. Justice Russell.

DAVIES, J.:—During the argument of this appeal I felt that the appellant's case was a meritorious one, the trial Judge had found strongly in her favour and there was a strong dissent by Russell, J., from the judgment of the Supreme Court of Nova Scotia reversing that of the trial Judge.

I have not, however, after reading and studying the appellant's evidence which the trial Judge fully accepted and believed, been able to convince myself that she had established either a legal or equitable contract between her and her brother capable of being enforced either at law or in equity.

I cannot help expressing my regret at being forced to this conclusion because it results in the loss by the appellant of all the time given and money spent by her in the bringing up and education of her young brothers and sisters. Meritorious as her case may be, it fails, nevertheless, for the reasons I have stated and I therefore concur in the dismissal of the appeal.

IDINGTON, J.:—This action was brought by respondent as curator of an insolvent estate which had been the property of a Montreal firm of contractors and was abandoned there. The law of the domicile of such insolvents must *prima facie* determine the rights of the creditors in such cases.

There may arise in the pursuit of such rights in another Province, which is also *prima facie* to be looked upon in that regard as a foreign state, many different and difficult questions of law either in relation to the administration of the insolvent's estate found there when creditors in such Province may have also taken proceedings, or in many other cases in relation to the real estate of the insolvent in such other Province.

Here we have no such difficulties raised save in the most incidental way for there are no creditors in Nova Scotia

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where the action was brought who have taken any action and the real estate in question is not alleged to have been so affected by any local law as to render it non-exigible by any creditor or especially any foreign creditor.

In short, there does not seem to be raised any legal objection which would throw an impediment in the way of the Courts of Nova Scotia acting upon the ordinary well recognised comity of nations and aiding the curator resting for his rights upon Quebec law and the direction of Quebec Courts to take such action as he may have been advised to be his duty to take.

Such local laws as exist bearing upon the questions raised are in harmony with the law upon which the curator's title to relief rests. It is only in this sense that the statutes of Elizabeth can be properly referred to or relied upon herein.

It is the debtor's property in the Quebec legal sense of the term that measures the right of the curators here in question.

And even if the *lex fori* might in a given case give creditors as such a wider and more effective measure of relief than the curator can assert claim to without that given by Quebec law, he could not claim the benefit thereof.

If again there happened to be in the *lex fori* some provision which furnished a bar to attacking and realising out of immovable property the claims of the curator, he might fail even though under the law of Quebec such a defence could not be maintained if the immovable property were situate there. No such conflict is apparent in the case we are dealing with.

It is unnecessary, therefore, to dwell at length upon the authorities maintaining the several propositions I have put forward. They are collected and discussed in such well known works as Westlake's "Private International Law," Foote's "Private International Jurisprudence" and Story's "Conflict of Laws."

It is only necessary for our present purpose to have a clear apprehension of the general principles of law applicable to the rights of the respondent under the facts presented herein.

It is, as I view the facts, the law of Quebec to which we must look in this case. That law is given by a local expert in a brief and summary manner testifying thereto. And though his evidence may fall short of covering the whole ground upon which we must proceed yet we are entitled and indeed bound in this Court to recognise judicially the law of

each Province as we decided in the case of *Logan* v. *Lee*, (1907), 39 Can. S.C.R. 311, following *Cooper* v. *Cooper* (1888), 13 App. Cas. 88, referred to therein.

Coming to the facts in evidence as I agree in the main with the analysis thereof in the judgment of Meagher, J., in the Court below, I need not go into details.

The money which paid for the land in question, except possibly $100 to which I will presently refer, was got by the insolvents as a firm and for the express purpose of paying for the land in question. I accept entirely the evidence of Mr. Johnson the agent of the bank from which it was got. And his letters to the Royal Bank providing therefor 5 days before the deed in question was got and the transaction completed so far away as North Sydney in Nova Scotia, indicate no time was lost.

The appellant never paid any part of the purchase money, yet in answer to the interrogatories delivered before the trial, answered as follows:—

"43.—Did you purchase a piece of land at Island Point, Victoria County, from John McLeod, April 18, 1911; and if so, what did you pay for same, how was it paid, by whom and when? A: I purchased a piece of land at Island Point from John McLeod, and paid him $2,000 for it; my brother, I think, handed him the money, and I think the date was on or about April 18, 1911. 44.—Was the transaction and negotiation, if any, for purchase carried through by you personally and how long did same take? A: I carried on personal negotiations for purchase of said property, I cannot say how long. 45.—How long since your brother Francis T. McNeil has been in Cape Breton so far as you know? A: April, 1911. 46.—Did you ever see a cheque for $2,000 dated April 18, 1911, drawn by W. F. Sparrow on the Molson's Bank, Montreal, in favour of Francis T. McNeil; if so, under what circumstances? A: No.

When we find that her brother, who was one of the said firm of Sparrow & McNeil in question, managed personally and through his solicitor, and agent, the whole transaction relative to getting the deed executed and paid the money got as above mentioned, I submit that these statements under oath can hardly be properly described as counsel suggested as being merely "uncandid."

It rather shocks one to be asked in face of such a perversion, under oath, of the truth by the appellant, to treat her as a credible witness when testifying relatively to the same transaction. And still more so when we find she is

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not ignorant or stupid, but a school teacher of such attainments that at eighteen years of age she was earning a salary of nearly $600 a year, and was not in making such answers driven by the nervous excitement so often incidental to a cross-examination in a public crowded Court. When later at the trial she abandons this version and seeks to set up that she had some correspondence by letters with her brother, and later some conversation with him in which he or she proposed buying a farm to put the younger members of the family upon and that she was to help out of her earnings to pay for their keep and did so help and in course of doing so paid $1,500 and she rests her claim upon that, I must in view of her former testimony, be permitted to doubt the whole story so far as having any relation to the transaction now in question. To do her justice she says without any special questions as to it, that she would have done so anyway and I quite believe that.

But when we find that she tells us that the brother destroyed the letters she wrote him and she fails to tell anything of the answers thereto, and that there is no corroboration of her story, except by him, and even taking her statement of earnings up to the time of the transaction and deducting her admitted expenses, the balance could not reach any such sum, how can we rely on it for anything beyond the obvious truth that she would have done so anyway. Besides she got $200 from him on account of help needed for the family. It is not as if she had paid out in this way $2,000 and then been repaid for it by the brother advancing this money to her. In that case her first oath would have had more semblance of justification though quite inaccurate.

Even if she had been the most accurate, trustworthy person in all her statements, how could she maintain a contract by this later version upon which she could bring an action?

The whole story furnishes nothing upon which to rest any legal claim to fulfillment of it by this purchase. And when she must have been a minor at the time how much less can she be allowed to put it forward as a binding contract upon which to furnish not a good, but a valuable consideration?

This story is at best a loose and rather inchoate thing, but her way of looking at her oath forbids us attempting to found thereon something definite and rational by inferring things not expressed.

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I do not see my way to accept the story or to found upon it anything which can be called a valuable consideration needed to uphold her right to the land in question.

And we find evidence scattered through the case shewing almost as clearly as the learned trial Judge has expressed his opinion of him, how utterly wanting in the truth is the brother who has misled the unfortunate plaintiff and I cannot help thinking, is still doing so.

The story of his having paid some months before the sum of $100 deposit and got a receipt for it, ought to have been followed up in a way it was not, but taking it as told, where is the receipt? In whose name was it given? If in the appellant's name no doubt we would have had it produced and pressed on the Court as proof of the alleged agreement at a time when insolvency was not so close at hand, or at least so apparent. I think the fair inference is it was in the name of this insolvent brother if not of the firm. The vendor of the property was not called, nor were the facts and circumstances bearing upon the condition and maintenance of the family gone into as they might have been had the story now put forward been given in answer to the interrogatories. To allow it now to succeed would be putting a premium upon answering untruly such interrogatories which are intended as a means of discovery.

I think the transaction in question was clearly a gift or simulated to cover a fraud.

In view of all the facts and especially the obvious unfitness of this property to serve as the suggested home farm for a family, possibly unfitted for it, and the fact that within three weeks after the deed was executed to appellant, her brother was offering an option for that part of the land, possibly the whole, which could be mined for gypsum, at an extravagant figure and Sparrow signing that option as a witness, I incline to the opinion that the latter view represented the actual truth in regard to the matter and appellant but a tool in the hands of an unscrupulous brother.

In the former view the insolvent condition of the firms renders the transaction one entitling respondent to succeed herein.

In either way of looking at the matter the result must be the same.

The circumstance that the partner Sparrow subscribed as a witness to the option given for the gypsum bed, counts for nothing when we find that he was active in getting if not the man who got the money from the bank.

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To concoct theories which would help such men to exploit their creditors is not generally what Courts endeavour to accomplish. Yet that seems to me what we are invited to attempt herein on the curious and dubious import of this incident in a career of fraud which ended in leaving creditors to the amount of $40,000, and but 4 or 5 thousand dollars and perhaps not that to pay them.

The members of the firm were acting in harmony till sometime later. Then we have the desperate financial condition of the firm and in face of that and no legal obligation to her, a gift to appellant of $2,000 for which the bank had to be drawn upon and representations made to it which, if the story now set up by appellant and her brother be true, I am not disposed to rate this man McNeil's integrity very high, but I do not credit him with being such a deliberate rascal as the established facts and a belief in the story now set would imply.

We have heard of something akin to men plundering a bank to give their friends or relations what they wished them to enjoy. Such a thing is possible.

The option sold three weeks after these men had got the money out of the bank to lay the foundation for such a sale of an option rather indicates another purpose operating in their minds. They were insolvents, ruined men, gambling on any chance, needing some one to hold the stakes, the appellant was such—merely the stake-holder. The story now set up was not then planned. It was never then supposed to be needed. Hence, at first it seemed necessary for both appellant and her brother to deny by implication in their statements, that the money was got from the source it came from and to pretend she paid the price. Later the present story was put forward. When was it invented? Why?

Passing these suggestions which furnish ground for believing it a case of simulation I may say it is not necessary to solve exactly what was the moving cause.

The money of the firm paid for the property and the illustration of a resulting trust put forward by Townsend, C.J., is very apt as shewing how in our English law such a transaction might be looked at. The result according to the common-sense of every system of law must inevitably lead to the same conclusion, that is, that this property became the property of the firm unless displaced by something stronger than has been brought forward.

Stress is laid in appellant's factum upon Sparrow's not

contradicting things told by McNeil at the trial. As the former was examined by way of commission and later at the trial, there does not seem much force in such an argument especially in light of answers by him and the appellant to the interrogatories.

Was the firm insolvent when the deed was made?

The respondent presents an estate of such hopeless insolvency, three months later, which is unexplained by any losses meantime, as to render it easy to answer that the firm was seemingly just as hopelessly insolvent at that time the gift was made, as one sometimes, but seldom, finds. The respondent is therefore entitled on the foregoing view of the facts to succeed.

The appeal should be dismissed with costs.

DUFF, J.:—I agree that the appeal should be dismissed. The property having been purchased with funds which were held to be—and I am convinced that the finding was right—the property of Sparrow and McNeil; and being property which in the circumstances either of them was, I think, entitled as against the other to have applied in payment of partnership debts, the appellant could only succeed as against Sparrow by shewing that she was a purchaser for value without notice of Sparrow's rights. I think she has not shewn that by satisfactory evidence. The ground on which the appeal was supported by Mr. Ralston therefore fails.

It seems right to observe that the point as to the status of the respondent mentioned during the argument from the Bench is not passed upon. If taken at an earlier stage it could have been met by adding Sparrow as a party plaintiff and that no doubt accounts for the fact that it was not taken and in any view of the merits of this objection would be sufficient reason for not giving effect to it now.

It is only necessary to say that Sparrow's equitable interest in real property in Nova Scotia arising from his right to have the property applied in payment of partnership debts the partnership assets proper being insufficient could only become vested in the respondent by some process which would be effective for that purpose according to the law of Nova Scotia; whether the supplementary abandonment of September 7, 1911, was sufficient for that purpose need not be discussed. The point is mentioned only to avoid the appearance of sanctioning the view that a curator appointed pursuant to an abandonment of property under the provisions of the Civil Code of Procedure of the

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Province of Quebec has vested in him *virtute officii* all the debtor's equitable interests in real property situated in other Provinces.

BRODEUR, J.:—I concur with the Chief Justice.

Appeal dismissed.

LOVEROCK v. WEBB.

British Columbia Court of Appeal, Macdonald, C.J.A., Martin, McPhillips and Eberts, JJ.A. October 28, 1921.

TRESPASS 1A—BRANCHES OF TREE PROJECTING OVER ADJOINING LAND—RIGHT TO CUT—RIGHT OF OWNER TO ENTER PREMISES AND REMOVE.

There is no obligation on one who cuts off the branches of his neighbour's tree which project over his lot to return the portions cut off to his neighbour, but the neighbour has a right to enter on his lot and take them away.

APPEAL by defendant from the decision of Grant, Co. J., of April 13, 1921, in an action for damages for cutting, retaining, and destroying a tree. The Court below gave judgment for $10 but gave the plaintiff costs of the action. Affirmed.

Hamilton Read, for appellant.

W. P. Grant, for respondent.

MACDONALD, C.J.A. (dissenting):—This is a case in which one neighbour has brought an action in the County Court against another for an alleged wrong in cutting down that portion of a tree which overhung the boundary. The trial Judge thought the defendant should have returned the loppings which he had cut, the value being found to be $10. It is a most trivial action in the first place to bring and in the second place to appeal. But we have to hear cases which are within our jurisdiction and if parties choose to come here with a case of this kind, we cannot properly and with propriety refuse to hear it, but I must now say that I am astonished this case has been brought to this Court and still more that it should have got into any Court. I have, however, to deal with the case now presented, and the first point, although perhaps not the most substantial point in one sense, is the question of whether the trial Judge was right in awarding $10 damages for not returning the portion of the tree and branches which fell upon the defendant's land. We have before us a map or plan which shews this tree as having its roots, apparently its whole trunk, wholly within the plaintiff's land. It is not a boundary tree. It leans very decidedly over the defendant's land and, if a horizontal line

be drawn from the boundary line up, it would cut this tree at some distance above the ground. Now the defendant, in cutting it off, cut it a few inches below the point at which the trunk would be intersected by this horizontal line. In other words, if he had cut the tree a few inches higher he would have cut only that portion of it which was over his own land. Now the difference between those few inches, of course, is not a matter of compensation at all. The cutting of the tree at either point would result in destroying it. I think the Court would be drawing altogether too fine a line in finding that damages should be assessed because the tree had been cut a few inches lower than it might have been cut. The trial Judge does not find damages for the trespass. He might have found that there had been a technical trespass, it is true. And there may be something in his reasons to indicate that he thought there was a trespass, but he assessed the damages entirely upon the ground that the defendant did not take the portion of the trunk and branches which he had lopped off and were on his land and deliver them to the plaintiff. I do not think there is any warrant for any such finding. The defendant was under no obligation to take these branches and the other portion of the tree back and deliver them to the plaintiff and as that omission was the basis of the trial Judge's assessment of damages, the judgment must necessarily, in my opinion, fall. Therefore, as I see the case, the trial Judge ought to have dismissed the action and ought to have dismissed it with costs. In that view of the case it becomes unnecessary to review the other branch; that is, whether an appeal would lie to this Court against the disposition of the costs below. I have already expressed my opinion during the argument that I thought on the assumption that the Judge had exercised his discretion, that there was no appeal to this Court. I may say I do not find anything in the appeal book which shews that the trial Judge did not exercise his discretion. In a case before us some time ago of *Young Hong* v. *Macdonald* (1910), 16 B.C.R. 133, we remitted a case to the trial Judge for the purpose of dealing with the question of costs because in that case he had declared in express and implicit terms that he did not think he had any right to deal with the costs in the way proposed. We came to a different conclusion Therefore, we said, the Judge had not tried that question at all; had not fixed his mind upon it, but here there is nothing to indicate that the Judge has not exercised his discretion with regard to the defendant's costs. How-

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ever, so far as I am concerned, it is not necessary to decide that point. My judgment would be that the action should be dismissed with costs.

MARTIN, J.A.:—This is an action for trespass. It is important to understand what it is. It is an action for trespass brought for the destruction of a certain tree and nobody wishes shade ornamental trees to be destroyed by any person, therefore, it is not to be expected that a man finding his property is being destroyed, especially shade ornamental trees around his home, that he should not resent it and not regard it as a matter of substance. Such being the nature of the action, it comes before us in rather a peculiar way, because we are not furnished with the notes of evidence. But both sides have agreed that for the purposes of this appeal, we must take the statements made by the trial Judge in his reasons for judgment as being the facts of the case upon which our judgment ought to be applied. But I say that because that being the case, I am not going to look at any other evidence or plans of any kind, because I would be only misled and it would not be proper for me to do so, after the parties have agreed what the evidence is. Looking then at the reasons of his Honour for the facts upon which he gave judgment, I find most distinctly laid down there that this defendant did trespass upon the plaintiff's property and cut down the tree which the plaintiff had inside. Now, of course, the trespass is in plain terms found by his Honour. Such being the case what his Honour should have done under the circumstances, if there had been nothing more than that in the case, he should have found —if he was not satisfied there were substantial damages, for that trespass he should have awarded nominal damages. Nominal damages have always been regarded in the modern history of our jurisprudence as 40 shillings in the Old Country and $10 here. And upon the moment that was established, the plaintiff would be entitled to a verdict of $10 nominal damages for trespass to his property. Unfortunately, without especially allotting that damage, which would have been perfectly proper, his Honour proceeded to regard it from another aspect, which is, I think with all respect, erroneous in this respect, that his Honour seemed to think there was an obligation cast upon the defendant, after he had cut certain low branches, which he was entitled to do, to carry those branches off his property and give them to the plaintiff. Now, of course, I do not think there is anything to warrant his Honour, with all respect, taking the

view that there was such an obligation put upon the defendant and, therefore, I think in that respect that his Honour's judgment cannot be upheld and the judgment of damages his Honour gave for that amount cannot be supported. But it just turns out coincidentally and happily, that the amount his Honour awarded would be precisely the amount he should have awarded for the trespass which he had undoubtedly found. Therefore, since the judgment cannot be supported upon his second view, it can and ought to be supported upon the primary view of the trespass and nominal damages, and therefore, pursuant to R. 868:—

"The Court of Appeal shall have power to draw inferences of fact and to give any judgment and make any order which ought to have been made, and to make any such further or other order as the case may require."

Obviously the order which ought to have been made below is that judgment should have been entered for nominal damages. His Honour might have been able to give judgment for more, but at the least he should have given nominal damages. Therefore, as we ought to make the order the trial Judge should make below, our duty is to make that order and that order in this case is, that damages should be recovered for this trespass of $10, and that would carry costs, and therefore his Honour's judgment could be supported in that respect also. In regard to the authorities that have been mentioned, they have been quoted in *Mills* v. *Brooker*, [1919] 1 K.B. 555, in *Lemmon* v. *Webb*, [1895] A.C. 1, and *Att'y.-Gen'l. for B.C.* v. *Corp. of Saanich* (1921), 56 D.L.R. 482, 29 B.C.R. 268, where I go into the question of boundary trees and the rights of trespass, and cite numerous English and American authorities on the subject.

MCPHILLIPS, J.A.:—In my opinion the appeal fails. I am not at all embarrassed by anything that the County Court Judge has found. The action is plainly one for trespass. The dispute note is a denial of the trespass. The payment of the $10 into Court is to meet the action and reads this way:—

"Defendant says that if plaintiff has suffered any damage the same is amply compensated for with the sum of $10, and defendant brings the said sum of $10 into Court with a denial of liability, and says that the sum is sufficient to meet any damage or any cause of action as alleged by the plaintiff against the defendant."

Now, here is the cause of action which is alleged:—

"On or about March 3, 1921, the defendant caused to be

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cut down and destroyed without notice to the plaintiff one large alder tree. . . . . On Saturday the 5th day of March, 1921, the defendant caused without notice to the plaintiff to be destroyed by cutting and otherwise mutilating a medium-sized ornamental tree, situated and growing on the plaintiff's property."

Therefore, the action was one of trespass and if proved entitled damages to be assessed. The plaintiff himself said $10 was sufficient for it. The fixing of the damages by the trial Judge, in my opinion, was not a differentiation in the cause of action but was in compliance with the proof, when the cause of action had been established, and the trial Judge says:—"While the tree may have been of no value as a shade it was of value as fuel and this value the plaintiff fixes at $10, a sum I cannot say is exorbitant."

And he concludes by saying:—"Judgment for plaintiff for $10 and costs."

Now, I cannot read that in that he disassociated the fixing of these damages from the trespass, because he could not have fixed a dollar of damages unless he found trespass, no possibility of his doing so. What was the cause of action? The cause of action was trespass and there being a cause of action proved, his Honour gave judgment for the amount paid into Court. Now, what right was there to cut this tree over the area owned by this neighbour? That was a tortious act, a cause of action when well founded that the Courts favour. Why do they favour such causes of action? Why, because they are liable to give rise to breaches of the peace. Many men value ancient or ornamental trees beyond price—the sanctity of the home should not be invaded, and the Courts of law therefore, as a deterrent, favour such causes of action. Now in this case, admittedly, this defendant invaded that right of property and cut that tree. I do not propose to refine the question at all. If a cause of action is established, damages flow from it and, I think, in this case the trial Judge has been very considerate in assessing the damages. When I was a student I remember thinking at that time that it was a very heavy verdict when the case was that of a man entering the front gate and going out of the rear gate of his neighbour's premises, I think the verdict was £50. He had not done any damage to the premises at all, but he did it contumaciously. He did it against that neighbour's privacy. Now, here there was no right to cut the tree, it was a clear case of trespass; the tree was upon a neighbour's land, the land of the plain-

tiff, the respondent in the appeal. The appeal should be dismissed.

EBERTS, J.A.:—I agree with the remarks of the County Court Judge where he says:—

"As to the trunk of tree number 1, even if the defendant had a right to have cut off the tree at a point above where it extended wholly into and over the defendant's property he had no right to cut beyond the line in the property of the plaintiff which he did for nearly one half of the diameter of the tree."

He committed a trespass. For that trespass his Honour has given nominal damages, and I agree in dismissing the appeal.

Appeal dismissed.

ANDREWS v. THE CITY OF CALGARY.

Alberta Supreme Court, Appellate Division, Stuart, Hyndman and Clarke, JJ.A. November 24, 1922.

HIGHWAYS (§IVA—150)—SNOW AND ICE—AUTOMOBILE SKIDDING—RUTS—NEGLIGENCE VEL NON.

Where accumulations of snow and ice on a highway were being removed by city workmen, and there being no ruts or any dangerous condition in the highway rendering it unsafe for vehicular travel, no negligence of disrepair is shewn on the part of the city to charge it with liability for injuries to persons thrown from an automobile skidding on the highways and colliding with a passing street car.

APPEAL from the judgment of Simmons, J., who dismissed the plaintiffs' action with costs. Affirmed.

A. McL. Sinclair, K.C., and *F. E. Eaton*, K.C., for appellants.

C. J. Ford, K.C., for respondents.

The judgment of the Court was delivered by

HYNDMAN, J.A.:—The claim arises out of an automobile accident which occurred in the subway between 9th and 10th Avenues on 1st St. West in the city of Calgary, on March 13, 1919, as a result of which the said Edith Andrews, wife of the plaintiff, W. H. Andrews, suffered very severe and painful injuries.

The female plaintiff, and a lady friend, were proceeding on foot towards the business centre of the city along 17th Ave. when at the corner of 4th St. West they were invited to occupy the hind seat of the automobile driven by W. who was going in the same direction. The motor then proceeded along 17th Ave. to 1st St. W. and thence northerly until it reached a point just north of the overhead bridge

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at said subway when it collided with a street car, which was going south on the westerly side of the street.

It is alleged by the plaintiff that owing to the dangerous condition of the street, due to ruts in the snow and ice, which had accumulated in the depression under the overhead bridge, the automobile was thrown against the passing street car. The driver W. says that when he attempted to steer to the left in order to pass a man who was working on the street about a third of the way up the incline north of the bridge, owing to ruts on the surface of the pavement he lost control of his car with the result that it skidded and turned suddenly, almost at right angles, to the left, striking the street car near the front end of the latter, the impact causing the women to be thrown out of the car.

Various theories were advanced as to just what caused the accident, such as inattention by the driver, applying the brakes and the accelerator simultaneously, &c., &c., but the one and only issue of fact upon proof of which the plaintiffs' action depended was that there was an accumulation of snow and ice in which ruts, estimated from 2 to 6 inches in depth, had formed and which was the proximate or contributing cause of the mishap.

The plaintiff's right to a verdict in her favour rested on the finding of fact in the affirmative on this issue alone.

A number of witnesses were examined on both sides. Five testified on behalf of the plaintiff that there was snow and ice and ruts in the street at the time, and that it was in generally bad condition. Four persons, on behalf of the defendant, gave evidence to the effect that the snow and ice had practically all been removed before the accident happened and that the pavement was as smooth and clean as it was possible to make it, two of these witnesses being city employees, who had actually done a good deal of the work themselves and emphatically stated there were no ruts whatever there. There was a direct conflict between these two sets of witnesses as to the essential facts in issue.

The trial Judge having heard this lengthy evidence came to the conclusion, first, that the driver of the car was himself negligent in that he did not use ordinary or reasonable care in operating the vehicle. This, of course, would not preclude the plaintiff from recovering damages (See *C.P.R. Co.* v. *Smith* (1921), 59 D.L.R. 373, 62 Can. S.C.R. 134), but unfortunately for her the trial Judge also found, secondly, that the defendant was not chargeable with negligence. He said: "I find that the defendant was not charge-

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able with negligence. Men were at work in the subway during the day of the accident and up to the time of the accident in the afternoon removing the snow and ice and the conflicting evidence in regard to the condition of the street at the time of the accident does not satisfy me that the street was in a dangerous condition for vehicular traffic."

I have read all the evidence bearing on this point carefully and I am bound to say that in my opinion the conclusions of the trial Judge with reference to the condition of the roadway are amply justified.

Whilst it is true that some of the defendant's witnesses were employees of the city, I fail to find anything in their testimony to warrant the suggestion that they were unreliable, and judging from observations made by the trial Judge during the progress of the case he seems to have regarded them very favorably.

Frequently findings of fact of a trial Judge are reversed, but only when it is clear that he has made some mistake, or overlooked an important fact, or drawn a wrong conclusion, but in the case at Bar none of these elements appear.

The fact necessary to be proved in order that the plaintiff might succeed was that the street was in a state of disrepair in the manner alleged, and that such was the cause, or, as to this plaintiff, one of the contributing causes of the accident. This plaintiffs failed to establish to the satisfaction of the Court.

In the circumstances, therefore, I can come to no other conclusion than that the appeal should be dismissed with costs.

Appeal dismissed.

REX v. ROBINSON.

British Columbia Court of Appeal, Martin, Galliher and Eberts, JJ.A.

December 21, 1921.

NEW TRIAL II—CRIMINAL ACTION—EVIDENCE BY ACCOMPLICE—PROMISE OF RECOMMENDATION FOR PARDON—CONDITIONS—"SOMETHING CONTRARY TO LAW"—SECTION 1019 CRIMINAL CODE—SUBSTANTIAL WRONG OR MISCARRIAGE OF JUSTICE.

The trial Judge in a criminal action may at any stage of the presentation of a case by the Crown, and even after a *prima facie* case has been made out, direct that an accomplice be examined on the understanding that if he gives his evidence in an unexceptionable manner he shall be recommended for pardon, but conditions stated to such accomplice which gave him the impression that unless he told the same story to the Court as he had previously given to the Magistrate the recommendation for pardon would not be given is the doing of "something not according to law" within the meaning of sec. 1019 of the Criminal Code, which

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resulted in a substantial wrong or miscarriage of justice which entitles the accused to a new trial.

APPEAL by way of case stated from the trial Judge and the verdict of a jury in a trial for murder.

The case stated was as follows:—

"That a murder had been committed, was not disputed and the only question was whether the accused was one of the guilty persons.

At the said trial the Crown first called all its corroborative evidence and I ruled it had made out a *prima facie* case against the accused. The accomplice Paulson was then called. Sears appeared for the witness and stated that he had advised the witness not to answer questions unless he was promised a recommendation for pardon. This counsel for the Crown declined to do, whereupon the hearing proceeded as follows:—

The Court:—Now, the question I do not think is entirely free from difficulty. The language of the statute, with such consideration as I have been able to give it, by reference to our Act, does not in so many words say that this man is compellable or competent. However, I propose to carry out the practice as laid down by Roscoe. If the Crown is not willing to give an undertaking that the man be recommended for a pardon, I have no hesitation in saying that I will recommend it, if necessary. Subject to that I shall allow him to be called.

Sears:—I ask for the usual protection, that any evidence Paulson gives here will not be used against him.

The Court:—Yes, he shall receive the usual protection.

Sears:—He wants an interpreter.

O'Dell:—I think this witness can speak English.

The Court:—Just sit down. Now, Sears, of course you will not have to have any further part in this trial, but I want to make it perfectly clear as to whether you are withdrawing your objection or are you still insisting?

Sears:—As to answering the questions, my Lord?

The Court:—Yes.

Sears:—No, on the understanding that he is recommended for a pardon, and that the evidence will not be used against him.

The Court:—Well, I will give that undertaking.

Alexander Paulson, a witness called on behalf of the Crown, being first duly sworn, testified as follows:—

B. Protich, interpreter, sworn.

The Court:—Now, before the witness is examined I want

you (interpreter) to tell him that it has been represented to us by counsel who is to defend him in his trial, that he does not wish to give evidence without an understanding, which I give, that is, he is examined on the understanding that if he gives his evidence in an unexceptionable manner, he shall be recommended for a pardon and the clemency of the Crown.

The Interpreter:—Yes, my Lord, I have told him that. He is willing to give evidence.

The Court:—And you thoroughly understand that by unexceptionable, I mean in a manner frank and fair, not necessarily that he is to give evidence against the accused, but is to tell his story freely, frankly, fully and fairly, as I judge it.

The Interpreter:—Yes, my Lord.

Later on in the course of the said Paulson's evidence, the following took place:—

The Court:—Just let me ask a question first, please.

You understand, do you, that I am only going to recommend you for a pardon if you tell your story freely and frankly and in an unexceptionable manner? I am telling you exactly the story to the best of my recollection. He (witness) said I might have forgotten something.

You told the police all about the affair, did you not? Yes, my Lord.

Did you have an interpreter present or did you not? I told the story to the police, but there were some words that I wanted explaining.

Did you have an interpreter there? Was there an interpreter there? No, my Lord.

Now, I have not seen the statements that you made the police, but of course I will look at it before I make any recommendation. Tell him that. I think, he says, I think that I am telling the same story.

Are you sure you did not have your revolver with you on the night of this affair? I did not have my revolver with me when this shooting took place, but before that I had my revolver. I told Robinson that I am going to put my revolver away in my room, put it away. Robinson made the remark, he said 'you don't need to carry your revolver.'

The Court:—Please, gentlemen of the jury, pay particular attention to what I have said. I asked him the question about the revolver, and I have drawn his attention to the fact that I will make no recommendation unless he gives his evidence in a proper manner, and I have already told him, which is a fact, that I have not seen the statement which

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he made to the police. I do not want you to draw any inference from my question that I have seen the statement, whether it says anything about the revolver or not.

1. Was I right in giving my undertaking as above set out and as shewn by the evidence of Paulson herewith, in the presence of the jury, to the witness Paulson and to his counsel, that I would recommend him for a pardon?

2. Was I right while the said Paulson was giving his evidence, in questioning the said Paulson in the manner shewn in the said evidence?

Upon the above grounds or any of them, should there be a new trial."

S. Livingston, for appellant.

H. S. Tobin, for the Crown.

MARTIN, J.A.:—This is a case reserved by Gregory, J., from the recent Fall Assizes at Vancouver, whereat the appellant was convicted of murder. Upon the trial one Paulson, who was an accomplice of the accused, was called as a witness against him after "the Crown had called all its corroborative evidence and I ruled it had made out a *prima facie* case," as the trial Judge states in said case.

The witness, though it is conceded he was a compellable one, objected to give evidence without the promise of a recommendation for a pardon, which promise the Judge (not being clear, as he says in said case, that the witness was compellable) proceeded to give him, "if he gives his evidence in an unexceptionable manner," going on to explain to the witness, through the interpreter, what he meant by that expression, thus:—

"You thoroughly understand that by unexceptionable, I mean in a manner frank and fair, not necessarily that he is to give evidence against the accused, but is to tell his story freely, frankly, fully and fairly, as I judge it."

In so acting the Judge relied upon the statement of the practice—based doubtless upon *Tonge's* case (1662), 6 How. St. Tr. 225 (see note at pp. 225-8 containing Kelyng's partial report, and Lord Hale's note, and note in 84 E.R. 1061); *Layer's* case (1722), 16 How. St. Tr. 93, at pp. 153-63; and *Rex* v. *Rudd* (1775), 1 Leach C.C. 115, 1 Cowp. 331, 98 E.R. 1114, as set out in Roscoe's Criminal Evidence, 14th ed., 155, as follows:—

"The practice now adopted is, if a *primâ facie* case cannot otherwise be made out . . . . for the Court to direct that he shall be examined on an understanding that if he gives his evidence in an unexceptionable manner he shall be re-

commended for a pardon. . . . ."

It is objected that the giving of such an undertaking is thus restricted to cases where a *primâ facie* case cannot otherwise be made out, and therefore it cannot be given here, because the trial Judge has certified that such a case had been made out. It is a strange thing that in the preceding edition of the same work, 1908, 13th ed., pp. 111-112, there is no mention of such a restriction, the language being:—"The practice now adopted is for the magistrate or for the Court to direct that . . . . if he gives his evidence," etc.

No good reason has been suggested why, in general, there should be such a restriction upon the way the Crown may present its case, or be limited to a presentation of it in a way which would be less than its full strength; indeed, it would appear to be fairer to the accused that he should know as early as possible in the trial all the evidence that is to be adduced against him. I can find nothing in any of the authorities I have examined to conflict with this view and I am fortified in it by the following extract from that very high one, Chitty's Criminal Law, 1826, vol. 1, p. 768:—

"But, except in these cases [*i.e.*, by statute or proclamation] accomplices who are, according to the usual phrase, admitted to be king's evidence have no absolute claim or legal right to a pardon. A justice of the peace, before whom the original examination is taken, has no power to promise an offender pardon on condition of his becoming a witness against others. They cannot even control the authority of the judges before whom the prisoners are tried, so as to exempt the offender from prosecution; but if an attempt is made to try him, it will be for the Court to decide under the circumstances how far he is entitled to favour. Even the Superior Courts have no power to assure him of mercy. He gives his evidence *in vinculis*, in custody, and it depends entirely on his own behaviour whether his confession will save or condemn him. There is, however, no doubt, that when an accomplice admitted by the magistrates or the Court to give evidence, appears, under all the circumstances of the case, to have acted a fair and ingenuous part, and to have made a full and true disclosure, he has an equitable claim to the mercy of the Crown, and the Court will, on application, put off his trial to enable him to apply for a pardon. These instances of pardon granted either expressly by statute and proclamation, or impliedly by usage, are derived from the old practice of approvement to which we

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have already alluded."

The Crown counsel has no control over the discretion of the Court to give such a promise, even though it may affect his presentation of his case, and the fact that said counsel has refused, as here, to give it (relying, presumably, on being able to prove his case without the necessity of extending clemency to a participant in a murder) does not affect the power of the Court to assume the very grave responsibility, in such circumstances, of so doing. It must be borne in mind that, as I pointed out in *Rex* v. *Hayes* (1903), 11 B.C.R. 4, at p. 17, "A Judge of Assize has powers of a very unusual and ample kind" which properly appertain to an office of such dignity and antiquity, representing as he does the King himself as the authorities cited shew.

I am of opinion, therefore, that the objection to the Court having done so here must be overruled, and the first question reserved answered in the affirmative.

The second question reserved is still more difficult. It appears that after the undertaking was given, the examination of the witness proceeded and in the course of it the Judge interpolated the following questions and observations, through the interpreter:—(given in statement)

The necessity for this second warning to the witness does not appear, but what is specially objected to is the reference to some statement (evidently in writing) the witness had made to the police, which was not in evidence, and which the Judge says he had not seen, but which nevertheless he must have had some knowledge of, otherwise he would not have introduced it, and moreover said that he intended to look at it before he gave the promised recommendation for a pardon to the witness, directing the interpreter to "tell him that."

It is submitted that the Judge, in unmistakable and dread effect, gave the witness then and there to understand that if his statemen in the box varied from that which he had given to the police, he would not be pardoned, and that the witness so understood the Judge is shewn by his answer to him:—"I think I am telling the same story."

This submission has occasioned me long and anxious consideration, with the result that I am forced to the conclusion that it is, having regard to all the delicate and dangerous surrounding circumstances, well founded. In cases of this description it must never be forgotten that, as Lord Mansfield, C.J., pointed out in *Rudd's* case, 1 Cowp. at p. 336, 98 E.R. at p. 1117.

"The accomplice is not assured of his pardon; but gives his evidence *in vinculis*, in custody; and it depends on the title he has from his behaviour, whether he shall be pardoned or executed."

It is obvious that if the witness did get the impression from the Court that unless he told the same story to the Court as he did to the police, he would be executed, then his testimony was tainted beyond redemption and could not, in a legal sense, be weighed by the jury, because the witness was no longer a free agent and there was no standard by which his veracity could be tested or estimated. This is not merely a matter going to the credibility of the witness, but something fundamentally deeper, *viz.*, that by the action of the Court itself the witness was fettered in his testimony and put in so dire a position that the value of his evidence was not capable of appraisement, the situation being reduced to this, essentially, that while at the outset he was adjured to give his evidence freely and fully, yet later on he was warned that if it was not the same as he had already told the police he would be executed. Such a warning defeated the first object of justice, because what the witness should from first to last have understood was that, at all hazards, he was to tell the truth then in the witness box, however false may have been what he had said before in the police station. It is this element of uncertainty and the impossibility of determining the extent of it that makes this case so peculiar and unsatisfactory, and it cannot properly, in my opinion, be viewed as a question of credibility for the jury but one of frustration of their right to pass upon credibility. If the warnings complained of had taken place after the witness had finished his evidence, they could be said not to have had any harmful result, because they came too late to affect him, but unfortunately, if I may say so with all possible respect, the Judge went on to question him about a crucial matter—what he did with his revolver at the time of the shooting. How can anyone say if he gave a truthful answer to that question, and as to what occurred between him and the prisoner concerning it, when, in his fear, he made a fettered reply which had necessarily to be "the same" as that which he had already told the police, if the shadow of the gallows was to be removed from him by his interrogator?

It would seem that the trial Judge realised quickly that something not according to law had been done, because he at once turned to the jury and addressed them thus:—

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"The Court: Please, gentlemen of the jury, pay particular attention to what I have said. I asked him the question about the revolver, and I have drawn his attention to the fact that I will make no recommendation unless he gives his evidence in a proper manner, and I have already told him, which is a fact, that I have not seen the statement which he made to the police. I do not want you to draw any inference from my question that I have seen the statement, whether it says anything about the revolver or not."

I am, with all respect, quite unable to see the necessity or advisability of saying anything to the jury in explanation of what had been said to the witness, or that the error was remedied at all by any observations to them, because the mischief had been done by those which were addressed to the witness, whereby his evidence had been illegally influenced beyond remedy, and no repetition of the warning, in a less objectionable manner, to the jury or any explanation could recall what had been said to the witness or remove its effect upon him. Therefore, I think the said observations to the jury should be disregarded as being irrelevant as well as irregular and hence without any bearing upon the question before us.

It cannot be denied that the accused was entitled, on every principle of natural as well as forensic justice, to this—that the witnesses brought forward against him should not have been influenced, least of all by the Court itself, however unwittingly, and that such a thing did nevertheless occur, comes clearly, in my opinion, within the expression "that something not according to law was done at the trial"—Cr. Code, sec. 1019, R.S.C. 1906, ch. 146.

It was recognised so far back as in the severe days of 1662, in *Tonge's* case, 6 How. St. Tr., at p. 227 [n.], and so "advised" (*i.e.*, decided) by all the Judges that there should not be "any threatenings used to them [accomplices] in case they did not give full evidence," even in cases of treason, which were specially relentless. With every respect, I can only regard what happened here as also coming within this prohibition; whether what was said to the witness may be euphemistically styled a warning or an admonition, nevertheless it was also minatory and hence, in its practical and legal effect, indistinguishable from a threat.

Being then of opinion that "something not according to law was done at the trial," I have still to find, under sec. 1019, Cr. Code, that in my "opinion . . . . some substantial wrong or miscarriage was thereby occasioned" before the

conviction can be set aside and a new trial ordered as prayed. This question engaged our attention in the fourth case heard by this Court, *Rex* v. *Walker and Chinley* (1910), 15 B.C.R. 100, which is an unusual and instructive one in several respects. It must, I think, be apparent that if the view I have taken of the matter be correct, then undoubtedly a "substantial wrong," and hence a "miscarriage of justice," was "occasioned" at the trial and, therefore, the appellant is entitled to a new one. The interpretation placed upon said sec. 1019 by the Supreme Court of Canada, reversing the decision of this Court ((1911), 16 B.C.R. 9) in *Allen* v. *The King* (1911), 44 Can. S.C.R. 331, and by which we are bound, is that if what has occurred (in that case the admission of evidence) "may have influenced the verdict of the jury," as Fitzpatrick, C.J., puts it at pp. 340, 341, then there must be a new trial, and the majority of the Court agreed with him, pp. 358 and 361, Anglin, J., drawing the distinction, in favour of the accused, between saying that the jury "must" or "may" have been influenced by what was done "not according to law" (p. 360), as follows (p. 361):—

"But it is said on behalf of the Crown that under sec. 1019 of the Cr. Code the conviction should not be set aside unless the Court is satisfied that the jury *must* have been influenced in reaching their verdict by the matter improperly put before them. There being other evidence sufficient to support the conviction, it is manifestly impossible to say that the jury *must* have acted upon, or were in fact influenced by, the matter which now forms the subject of the appellant's objection. On the other hand, it is equally impossible to say that the minds of the jury *may* not have been, or were not in fact, affected prejudicially to the appellant by matter so pertinent to the main issue before them—impossible indeed to say that it may not have been this matter which with some juryman turned the scale against the defendant."

Applying this guiding principle to the case at Bar, I am forced to the conclusion that what was done here "not according to law," in the unusual way I have indicated, not only may have, but probably did prejudicially affect the appellant, and therefore "some substantial wrong or miscarriage was thereby occasioned" within the meaning of the statute, and so the second question must be answered in the negative and a new trial ordered.

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GALLIHER, J.A. (dissenting):—Two questions were reserved by the trial Judge for the opinion of this Court: [already set out in statement].

In connection with these questions certain evidence and statements by the Judge were subjoined which, as it is quite short, I will set out in full, with the exception of that part of the discussion which deals with the request to recommend pardon, which summarised amounts to this, that the Crown having refused to recommend the witness Paulson (an accomplice) for pardon the trial Judge undertook to do so on the understanding that he (Paulson) should give his evidence in an unexceptionable manner. With this exception, the evidence subjoined is as follows: [already set out in statement].

The trial Judge seems to have had some doubt as to whether Paulson was a competent or compellable witness under our statutes. I think there can be no question that he was. The statutes seem to be clear upon that point, and see also *Ex parte Ferguson* (1911), 17 Can. Cr. Cas. 437.

With regard to the first question submitted to us, I would answer it in the affirmative.

There is little authority upon the subject, but we have been referred to what is known as *Tonge's* case, a memorandum of which is reported in 84 E.R. 1061 and 1062, and at length in 6 How. St. Tr. 225, which would seem to indicate that it was within the discretion of the Court to receive evidence of an accomplice on the understanding that he be recommended for a pardon. This is further dealt with in Roscoe's Criminal Evidence, 14th ed., p. 155, in these words:

"The practice now adopted is, if a *primâ facie* case cannot otherwise be made out (for the magistrate—Atkinson, Mag. Prac., 1916, p. 174—or) for the Court to direct that he shall be examined on an understanding that if he gives his evidence in an unexceptionable manner he shall be recommended for a pardon or, as all the Judges put it, he 'ought not to be prosecuted for his own guilt so disclosed by him' . . . ."

Mr. Livingston, counsel for the prisoner Robinson, dwelt on these words: "If a *primâ facie* case cannot otherwise be made out," and pointed to the fact that the trial Judge had stated, as appears in the case submitted to us, "at the said trial the Crown first called all its corroborative evidence and I ruled that it had made out a *primâ facie* case against the accused," and urged that it was only where such *primâ facie* case had not been made out that the Judge could take

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the course taken here.

I do not think this limitation pertains nor do I find it borne out by the case I first referred to, nor in Best on Evidence, 11th ed., at pp. 163-164. The Crown is entitled to adduce all legal and proper evidence to place the facts fully before the jury. The evidence of an accomplice is legal and admissible, and it is for the jury to determine the weight to be attached to it. If it is within the province and jurisdiction of the trial Judge to promise a recommendation for pardon, and it seems to me that it is, then I find nothing to warrant me in saying that promise may not be made at any time during the presentation of the Crown's case.

With regard to the second question submitted, I take it to mean not only the questions put directly to Paulson by the trial Judge, but also to include the statements made by the Judge in the presence of the jury in the course of such questioning.

The first statement made is a request to the interpreter to inform the witness that if he (the witness) will give his evidence in an unexceptionable manner, he (the Judge) will recommend him for a pardon and the clemency of the Crown. There is nothing in this to which exception can be taken.

The Court then proceeds to explain what it means by unexceptionable, and that is "in a manner frank and fair, not necessarily that he is to give evidence against the accused, but is to tell his story freely, frankly, fully and fairly, as I judge it." I attach some significance to the words, "not necessarily that he is to give evidence against the accused," and I carry them through and bear them in mind where the Judge later makes reference to the manner in which the witness is expected to give his evidence. There is nothing, I think, exceptionable in this statement of the trial Judge. Then the Judge proceeds and again draws prisoner's attention to the manner in which his evidence is to be given before he can expect a recommendation for a pardon, and the witness replies:—"I am telling you exactly the story to the best of my recollection, I might have forgotten something."

Up to this time, so far as the record before us shews, nothing had been said about any story told by the witness to the police. So I think it is proper to conclude that the witness, when he says, "I am telling you exactly the story," means the story connected with the occurrence. Right up to this point I can see nothing objectionable. The trial Judge, then, for some reason proceeded to ask the witness if he had not

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told the story to the police, and upon the witness replying that he had, the Judge went on to say:—"Now I have not seen the statement that you made the police, but of course I will look at it before I make any recommendation." and the witness replied:—"I think I am telling the same story."

Counsel for the accused asks us to construe this as equivalent or that the jury might have thought it equivalent to a pressing upon the witness the fact that if he did not then tell the same story as he had previously told the police, he would swing for it. I do not take that view, nor do I think the jury would take that view, bearing in mind the words of the trial Judge, where he says:—"You must give your evidence freely and frankly, not necessarily against the accused."

What I think the Judge was trying to impress upon the witness and what I think is the correct conclusion was, that he (the Judge) was going to look at the statement to the police in order that he might judge whether the witness had given his evidence in an unexceptionable manner, so that he might or might not recommend a pardon.

Whether these questions and remarks last alluded to were necessary or unnecessary (and I am inclined to think they were not necessary), it remains for us to decide first, was there anything done not according to law, as expressed in the Code, sec. 1019, and I find myself unable to say that there was, but should I be wrong in that view, I would still say, even in the light of the interpretation put upon sec. 1019 of the Cr. Code by the majority of the Court in *Allen* v. *The King*, 44 Can. S.C.R. 331, that there was nothing in my opinion which occurred that might have influenced the verdict of the jury.

I would further remark that there is a great difference in the facts connected with the *Allen* case and in the case before us. Here I regard it as going largely to the credibility of the witness.

The trial Judge then proceeded to ask the witness as to whether he carried a revolver on the night in question, and on receiving a reply in the negative and evidently thinking that asking this question (which he undoubtedly had a right to) after having questioned the witness as to his having made a statement to the police, the jury might have inferred that there was some reference to a revolver in the witness's statement, the Judge proceeded to disabuse their minds as to that, by reiterating that he had not seen the statement and that they should not draw the inference that the state-

ment said anything about the revolver.

I would, therefore, answer the second question in the affirmative and against the accused.

EBERTS, J.A., would grant a new trial.

New trial granted.

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Alberta Supreme Court, Appellate Division, Beck, Hyndman and Clarke, JJ.A. December 9, 1922.

AUTOMOBILES (§IIIB—254)—COLLISION WITH PARKED CAR—EXCESSIVE SPEED—ACCIDENT—DRIVER'S SLEEVE CAUGHT.

Turning a corner at an excessive rate of speed, and failure to reduce speed and keep proper control of the car when danger is imminent, is negligence which will render the driver liable for a collision with a parked car, although the driver lost control accidentally owing to his sleeve catching on the throttle of his machine.

APPEAL from a judgment dismissing the plaintiff's action. Reversed.

R. E. McLaughlin, for appellant.

Guy B. Patterson, for respondent.

The judgment of the Court was delivered by

CLARKE, J.A.:—This is an appeal from a judgment dismissing the plaintiff's action claiming damages for injury to his automobile. At the time of the accident which occurred about 10 o'clock a.m. on September 7, 1922, the plaintiff's car was standing, parked, against the curb on the west side of 100a St. in the city of Edmonton about 75 or 80 ft. north from the northerly limit of 102nd Ave., as stated by one witness. Another car, a Gray Dort, was standing in the middle of 100a St. facing north and parallel therewith, about 25 or 30 ft. from 102nd Ave., as stated by another witness, but from the diagram in evidence the distance between the cars does not appear quite so great as these estimates would indicate. The passage between the Gray Dort car and the easterly curb of the street was clear. The defendant in the company of two others, was driving a Ford automobile westerly on 102nd Ave., intending to turn northerly on 100a St., but instead of going along the easterly side of the street and keeping on the right side thereof he drove to the opposite side and ran into the plaintiff's car, causing the injuries complained of.

The defendant's evidence is that as he was about to turn to the north he saw a car to his left travelling north, which was being driven by one Godfrey along 100a St. He (defendant) tried to turn and then saw the Gray Dort car,

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and to avoid both cars he turned wider, not seeing the plaintiff's car. In trying to avoid the Gray Dort car he tried to throw back the throttle and at the same time his foot pressed down on the brake pedal, but his sleeve caught the throttle and gave more gas and he hit right into the plaintiff's car. When recalled he stated that he did not see the Gray Dort car until he turned his car; that after he turned he would hit the Gray Dort car and he turned his car a little wider and saw plaintiff's car; by the time he shoved up the throttle to reduce the gas his sleeve pulled the throttle and gave more gas; he was very close to the plaintiff's car when his sleeve caught; had just turned around the rear of the Gray Dort; he was on the left hand side of the centre line of the street when he caught his sleeve. When asked: "Why didn't you turn down your proper way?" he replied: "First I went this way there; I didn't notice this car standing in the middle of the street; I turned to get away from it, you see." He says at the time he came to the corner to make the turn he was travelling around ten miles speed. When asked: "You did not look before you started to turn?" he replied: "I was looking at the left hand side."

Godfrey states that he was not going north on 100a St. but was travelling east on 102nd Ave and he noticed a car from the east and when it got to the turn the driver seemed to lose control of the car altogether; the further it came around the curve the faster it went. He stopped at the corner of Ramsey's (being the southwest corner of 102nd Ave and 100a St.) and watched it go until it hit the plaintiff's car. The defendant's car was travelling about 18 miles an hour and as soon as he got to the corner he went faster and faster. He estimated the speed when the collision occurred at 20 to 22 miles an hour.

The trial Judge found that the speeding up of the car was purely accidental; that but for the sleeve incident the defendant could have passed between the two cars and that the last act which caused the damage was the accidental act of the defendant catching his sleeve on the lever and it was that which caused the accident, a pure accident and not the defendant's negligence at all.

I find it very difficult to believe that this accident happened without negligence on the part of the defendant. He was in charge of a dangerous machine travelling in a busy part of the city and it was his duty to take every reasonable precaution to avoid damage to others.

A good deal of latitude is allowed for mistakes made under

excitement caused by sudden dangers but it is the duty of a driver to so conduct himself that he will not run into such difficult situations.

In my opinion the defendant was guilty of negligence contributing to the accident in the following respects:—1. In turning the corner he was exceeding the statutory limit of speed of ten miles an hour. 2. He should have seen the Gray Dort car and had his car under control before he turned his car towards it. 3. Being unable to see what was beyond the Gray Dort car he should have reduced his speed much earlier than he did and before immediate danger was imminent. 4. He should have passed between the Gray Dort car and the easterly curb, instead of going to the left of the Gray Dort car.

Had the defendant observed any of these precautions it is evident to my mind the accident would not have occurred. I think he must be held liable for the damage to the plaintiff's car which I would fix at $562.50.

I would therefore allow the appeal with costs, set aside the judgment below and direct judgment against the defendant for the said sum of $562.50 with costs of action.

Appeal allowed.

CARLIN & STRICKLAND v. McAUSLAND & SPENCE.

British Columbia Supreme Court, Hunter, C.J.B.C. November 10, 1921.

SALE (§IIA—25)—DELIVERY OF WRONG ARTICLE—SALT FOR CATTLE—NITRATE OF SODA—LIABILITY OF SELLER.

Mistake of a storekeeper in delivering nitrate of soda instead of salt, intended for cattle, resulting in the poisoning of cattle fed therewith, will render him liable to the customer for the damages he sustained thereby, although there was no warranty expressed or implied nor negligence on his part.

[See Annotation, 58 D.L.R. 188.]

ACTION for damages for the loss of cattle caused by eating nitrate of soda. The facts of the case are set out in the following judgment.

P. McD. Kerr, for plaintiffs; *H. C. DeBeck*, for defendants.

HUNTER, C.J.B.C.:—According to the evidence of one of the plaintiffs, on October 27 of last year he went into the defendant's store and asked Spence whether he had any block salt for cattle. His reply was that he had not, but that he had some loose salt, and that he went to the rear of the store and brought out 80 pounds in a sack—a sack which had evidently been opened before this particular occasion. I think that I must accept that statement as it accords with the natural probabilities of the case. There is no doubt that

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Strickland did go into this store for the purpose of purchasing salt for his cattle, and I think it is in the highest degree likely that he would have informed the storekeeper that it was cattle salt that he wanted, rather than table salt or refined salt.

On the other hand there is a discrepancy between his testimony and the testimony of Spence as to what passed when the salt was brought out. Strickland says that he did not look at it at all and did not handle it, and that he did not even see the colour of it, whereas Spence says that he drew his attention to the fact that the salt was dirty, to which Strickland replied that it was all right and took it away. However that may be, I am satisfied there was no real inspection by the buyer, and there is no gainsaying the fact that the salt was taken away and paid for. There is also no gainsaying the fact that the salt turned out to be a different substance entirely, namely, nitrate of soda; and there is also equally no doubt that by consequence of eating this stuff all these cattle perished.

The question then is as to whether the plaintiffs have a good cause of action against the defendants. Now it seems to me that there are no questions whatever of warranty, either express or implied, involved in this case. It often happens that when people buy commercial articles the question whether there was a general or special warranty given arises in connection with the transaction; but it seems to me that this is not that kind of transaction at all. It is a case where a given article has been called for, and an article of an altogether different character has been supplied under mutual mistake, just as if a druggist were to supply nitric acid when the request was for vinegar. It seems to me that the plaintiffs were entitled to assume and did assume that it was salt that was being supplied; and no doubt it was a very unfortunate thing for the defendants to have supplied an article which they no doubt also assumed was salt. I think that under the circumstances the defendants are responsible for what ensued.

I do not think that any charge of negligence can be attributed to either party in connection with the matter. The material, to ocular inspection, looks like loose salt. It is somewhat dirty in colour, but that does not protect the defendants, because one can easily imagine that salt that was dirty would have a very similar appearance; in fact, according to the evidence given on commission by one of the experts or chemists who was called on to examine the sub-

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stance, it was, in his opinion, quite a likely thing for any ordinary person to mistake one substance for the other, and that the only easily ascertainable difference between the two was that the one substance has more affinity for water than the other. I therefore think that no question of negligence in the ordinary sense arises in connection with the matter. It was quite a natural thing for the plaintiffs to assume that it was salt, and salt fit for cattle, and equally natural for the defendants to suppose that it was that article that was being supplied. I do not think either that it was an imprudent act for the plaintiffs to go on feeding the stuff to the cattle after some three of them had died. There was nothing, I think, to warn the plaintiffs that it was this particular substance that was causing the trouble in fact, it was evident that they themselves had no suspicion that that was the cause, because after two of the cattle had died Strickland had started using the substance for pickling pork for his own personal use and the use of his family.

I think the defendants must answer in damages, and I will direct a reference to the registrar—the damages to be assessed at the market value of the cattle at the time of their destruction. That market value will, of course, be decided by considering what a willing purchaser would pay a solvent vendor.

Judgment for plaintiffs.

ROTHERY v. NORTHERN CONSTRUCTION Co.

British Columbia Court of Appeal, Macdonald, C.J.A., Galliher and Eberts, JJ.A. October 10, 1921.

LIENS I—WOODMAN'S LIEN—MAN AND TEAM.

A person hired with his team is entitled to claim a lien under the Woodman's Lien for Wages (R.S.B.C. 1911, ch. 243, sec. 3) for the amount agreed to be paid him as hire for himself and his team.

APPEAL by defendant from the decision of Swanson, Co. Ct. J. (1921), 30 B.C.R. 152, in an action to enforce a woodman's lien.

The facts of the case are as follows:—

One Cardon contracted with the defendant company to take out ties and lumber from the Mount Olie District. Two men, Loveway and Wolstenholme, were employed by Cardon to assist in the work, Wolstenholme being paid at the rate of $9 a day for himself and team of horses and Loveway at the rate of $7 a day for himself and one horse. Both Loveway and Wolstenholme obtained the horses they used on the

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work from the plaintiff Rothery under an arrangement with him. When they had finished their work they each assigned in writing to Rothery the amount due and payable to them from Cardon, of which due notice was given the defendant company. Rothery then filed woodman's liens for the amounts so assigned to him.

Reid, K.C., for appellant; *P. McD. Kerr*, for respondent.

MACDONALD, C.J.A.:—I think the appeal must be dismissed. I quite agree with what Mr. Reid has just said, that the company is more or less at the mercy of the contractor, of the plaintiff and the other two men concerned in this proceeding. There is positive evidence on the part of the parties, that is to say, the contractor Cardon, Rothery, the plaintiff, and the two men in question, that the latter were the employees of Cardon, and not the employees of Rothery, and there is evidence as to what their relationship was with Rothery in connection with the teams of horses. Looking at the whole case, it cannot, I think, be said that the Judge who tried the action could not have reasonably come to the conclusion to which he did come. In other words, while there are inconsistencies in portions of the evidence of Loveway which, if looked at without reference to the rest of his evidence or the evidence of the other witnesses, might lead one to an opposite conclusion, yet it cannot be said that the trial Judge, upon the whole of the evidence which was before him, could not find as he did.

As to sec. 3 of the Woodman's Lien for Wages Act, R.S.B.C. 1911, ch. 243, I think the true construction of that section is that a person who is hired with his team by another is within the purview of that section, and that he is entitled to claim a lien for the amount agreed to be paid him as hire for himself and his team.

GALLIHER, J.A.:—I agree in dismissing the appeal. I would also say that, while there are some parts of the evidence that are inconsistent with the hiring of men and teams by Cardon, yet when you take all the evidence you may come to the conclusion, as I do, that this was simply a hiring of men and the teams by Cardon at so much per day—a stated sum of $9 and $7 per day. Now, they, not having teams of their own, went and procured teams from Rothery and agreed that out of that $9 a day they would receive from the sub-contractor they should be paid for their actual work as between Rothery and themselves $70 and $85 a month respectively. Now, on that view of the case, I think the evident inconsistencies are reconcilable, and I would have

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to, as Macdonald, C.J.A., has said, come to the same conclusion on the evidence as the trial Judge.

On the question of law, I have no doubt. I had no doubt whatever outside the authorities cited by Mr. Kerr that, where a man has a team and uses it to perform services such as in this case, the amount he receives for team and self is within the Woodman's Lien for Wages Act. In fact, as I put it myself, they are for the moment the tools with which the person is working, they are the tools that he has to employ and without which he could not perform the work that he was engaged to do. Under these circumstances it does seem to me under the wording of our Act that there can be no question as to the right to a lien here.

EBERTS, J.A.:—I agree with my brothers to the effect that the contract was made by Cardon, Cardon with Loveway and Wolstenholme, and they in turn got the horses from Rothery to do the work they had agreed to do for Cardon. I would, therefore, dismiss the appeal.

Appeal dismissed.

VILLE ST. MICHEL v. SHANNON REALTIES.

Supreme Court of Canada, Davies, C.J., Idington, Duff, Anglin, Brodeur and Mignault, JJ. October 10, 1922.

TAXES (§IIID—135)—REVIEW OF ASSESSMENT—JURISDICTION OF COURT—ACTION—APPEAL.

The Superior Court of Quebec has no power under art. 50, C.C.P. (Que.), to entertain an action to set aside a municipal assessment because of an overvaluation of the property; the remedy in such case is by appeal from the assessment within the delays prescribed by law.

APPEAL by defendant from the judgment of the Court of King's Bench of Quebec (1921), 32 Que. K.B. 520, affirming the judgment of Maclennan, J., of the Superior Court, maintaining the plaintiff's action. Reversed.

L. E. Beaulieu, K.C., for appellant.

G. H. Montgomery, K.C., and *Mailhiot*, K.C., for respondent.

DAVIES, C.J.:—I am of the opinion that this appeal should be allowed with costs here and in the Court of Appeal (1921), 32 Que. K.B. 520, and the action dismissed with costs.

Had I been able, as one of my colleagues has, to reach the conclusion that the valuation of the plaintiff's lands in question for the years 1915, 1916, 1918 and 1919 were merely "fictitious valuations" and fraudulent exercises of the power to make assessments conferred on the assessors, I might

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have reached the conclusion that the Superior Court had the "power" under art. 50 to set them aside as void and illegal.

But I have not, on the record before me, been able to reach such conclusion. On the contrary, I think such valuations were made honestly and without fraud in the light of the boom which existed with regard to lands within the municipality of St. Michel during the years mentioned, and before that boom had actually, as it is said, "burst."

A long experience in this Court in dealing with the "real value" of lands in towns and municipalities where a boom in land prices had existed has taught me how difficult it is to reach a conclusion of what the "real value" is. Experts giving their evidence on the question differed widely and their various opinions were reflected frequently in the opinions of the several Courts called upon to review the assessments made by those whose duty it was in the first instance to make them. These differences of opinion were very pronounced and very great and convinced me that it is difficult indeed during the existence of boom periods, and before the boom has "burst" to reach anything like a unanimous opinion.

In the cases now before us I think it fair, on the facts, to conclude that notwithstanding an appeal was made successfully by the plaintiffs in one year, 1917, to reduce the valuation in that year; and as in each and all the years 1915, 1916, 1918 and 1919 no action at all was taken by the plaintiff respondent to call the valuations for those years in question, they may well be held to have acquiesced in those valuations on the ground that it would or might assist them in selling their lots to prospective purchasers at a very high figure.

However that may be the facts are that in all those years, and until the present action was taken, no steps at all were taken by the plaintiff respondent to appeal from the valuations or to call in question the fairness or unfairness of these valuations.

The law had provided a very simple method of their doing so, first, by an appeal to the municipal council and then from the determination of that body to the Circuit Court whose judgment was to be final and binding. As I have said, no such appeal was ever taken in the years I have mentioned.

Subject to what I have said in the foregoing reasons, I think the Superior Court had no power under art. 50 C.C.P. (Que.) to entertain the plaintiff respondent's application to

set aside their valuation.

I concur generally in the reasons and conclusions of Brodeur, J.

IDINGTON, J.:—The respondent is the owner of a farm of nearly 80 acres which was subdivided, in 1913 or thereabouts, into lots each of about a tenth of an acre in size and possibly by reason of the subdivision having proved an unprofitable venture, for only some 30 lots were sold, the tenant who had long carried on the farm has been induced to continue farming there despite the subdivision.

The market value of the property seems to have increased so rapidly for some years that from having been bought in July, 1911, for the price of $1,000 per arpent, it passed to the respondent in May, 1914, for the price of $2,200 per arpent.

The assessor or succession of assessors seem to have been induced thereby, and by the price list of the respondent, to raise the assessed value of the whole to the total sum of $528,104 in the years 1915, 1916, 1917 and 1918.

The respondent never, until 1917, took any of the regular and proper steps provided by statute for complaining against over assessment.

In 1917 it did take some steps provided, but what is not clear, for there is nothing relative thereto presented in the case before us, save a certificate of judgment in the Circuit Court, whereby it appears that the Judge had reduced the assessment to $500 per arpent.

As the result of that it is argued that the said assessors should have adopted that very low figure for the rolls of 1918 and 1919.

A very obvious answer seems to me to be as to 1918 the roll probably was completed by the assessors before July 9, 1918, when that judgment was delivered.

I am unable to say why, under such circumstances, the respondent did not avail itself of the means provided by law for appealing to the Court of Revision for the roll was not homologated until September 11, 1918.

The assessment roll of the assessor for 1919 fixed the entire valuation of said property for that year at $347,578. The respondent does not seem to have taken any appeal against that assessment.

The appellant had instituted a suit on September 18, 1917, in the Superior Court, to recover from respondent the taxes in arrear for the years 1913, 1914, 1915 and 1916, making, with interest thereon, the sum of $9,697.60.

On February 20, 1920, the respondent instituted this

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action whereby it seeks to have said action lastly referred to joined and that the assessment rolls and collection rolls for the years 1913, 1914, 1915, 1916, 1918, and 1919, be held illegal, irregular and null *ultra vires* quashed and annulled.

When the case came before Maclennan, J., for trial in the Superior Court, the case as to the rolls for the years 1913 and 1914 was abandoned, and after hearing the evidence adduced, he maintained the action and adjudged and declared that the valuation and collection rolls of the defendant, appellant, for the years 1915, 1916, 1918 and 1919 are, and each of them is and always has been illegal, irregular, null and *ultra vires* and are set aside and annulled.

Upon appeal therefrom the Court of King's Bench by a majority upheld the said judgment in its entirety though Guérin, J., one of that majority, seems to have had some doubts as to going further than dealing with the claim of partial exemption of the respondent, by reason of the lands in question being farm lands, 32 Que. K.B. 520.

The said Courts seem, as to the facts, to found said judgments upon the excessive valuation by the assessor and as to the law upon the power given by art. 50, C.C.P. (Que.).

As to the facts, I cannot, after a perusal of the entire evidence, agree that there is therein anything to support such a drastic judgment which if upheld must lead to great confusion; indeed so great as probably to require legislation to carry on the affairs of the appellant as is intimated by the Chief Justice.

I, with respect, cannot agree that art. 50 C.C.P. (Que.), which reads as follows:—"50. Excepting the Court of King's Bench, all Courts, Circuit Judges and Magistrates, and all other persons and bodies politic and corporate, within the Province, are subject to the superintending and reforming power, order and control of the Superior Court and of the Judges thereof in such manner and form as by law provided," where there is a specific power given elsewhere, in the statutes relevant to the subject matter involved, supplying an adequate remedy, and indeed evidently intended to be the only remedy to rectify any wrong doing on the part of the assessor of a municipal corporation in the way of under or over valuation. I cannot think that in such like cases resort to this article was ever intended; unless possibly in the cases of actual fraud or *ultra vires*.

And especially would that seem to be the case when, as here, the roll is declared binding when homologated, pre-

sumably after hearing any appeals tendered, as were in some other cases, and the more so when that homologated roll in turn seems to be subject to an appeal to the Circuit Court.

I cannot help thinking that this specific code as it were eliminates any ground for the interference of the Superior Court under art. 50, unless in the possible exceptions I have referred to, and by no means do I hold that these exceptions either in law or fact apply to such a case as presented herein.

There is no evidence herein to support any charge of fraud relative to the assessment of respondent's property, much less that the whole of these rolls as to every ratepayer were fraudulent. Indeed fraud is not seriously argued. Illegality may cover that or, in a sense, over or under assessment.

I will deal presently with the other of said possible exceptions confining myself to the only one that appears herein arguable on the facts.

I find the cases relied upon by the Court below, 32 Que. K.B. 520, and counsel before us, as follows:—

The case of *Roman Catholic Arch. Corp. of St. Boniface* v. *Transcona* (1917), 39 D.L.R. 148, 56 Can. S.C.R. 56, was an ordinary appeal to us from the Courts below in due course of executing the specific remedy given for just such cases as presented here.

If that course had been followed herein, possibly the essence of all involved might have come here if not duly and properly settled by the Court of last resort in the Province.

The *Montmagny* case; *La Companie d'Eau* v. *Ville de Montmagny* (1915), 25 D.L.R. 292, 24 Que. K.B. 416, and that of *Rivard* v. *Corp. of Parish of Wickham-West* (1915), 25 Que. K.B. 32, are, so far as I can see, the only cases in which the Court below has ever acted upon such grounds as exists herein.

In the former case the course of events was rather provoking, for the party aggrieved pursued his specific remedies without desirable results, but that furnishes no foundation for the assertion of a jurisdiction which a Court has not.

In the latter case the reasoning in the judgment of Pouliot, J., at the trial (1915), 47 Que. S.C. 441, who dismissed the application and rested upon a long line of authorities followed up to that time, has my assent as correct.

And when we come to the case of *Laberge* v. *City of Montreal* (1917), 27 Que. K.B. 1, we find another basis of right

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asserted by the appellant, namely, the general exemption. In joining in that judgment the late Cross, J., expressly excludes the case of a mere error in the amount of assessment, and rests his judgment upon the case therein presented of partial exemption created by a statutory provision for a term of years which seems to have arisen out of circumstances very similar to those which gave rise to the partial exemption in question herein.

These three cases being all so recent as five or six years before the respondent launched this case, and no prior decisions expressly in point having been cited, has induced me to try and trace, if possible, any previous exercise of the power asserted in them, but I have been unable to find any.

I find many cases asserting authority over municipal corporations in many ways, by virtue of said art. 50, C.C.P. (Que.), reaching back for fifty years or more, but nothing analogous to what is involved in that presented by this appeal.

The excessive valuation in question herein reminds me of a recent case before us in which judicial authorities passing upon valuation by assessors of a certain property in a city suffering from the same causes as appellant, were found to differ as much as four or five times in regard to the value to be placed upon a certain property.

One Court thought $100 an acre excessive, and another thought $400 or $500 an acre was not.

I cannot, for my part, accept such excessive valuations even if they are the aftermath of a mad race in speculation.

But it comes with an ill grace, I submit, on the part of those who have done their part to develop the situation, to refrain from discharging the duty of trying to rectify the results apparent in the assessor's roll year after year and then seeking to overturn the whole basis of the financial structure upon which the affairs of the municipality rest.

I do not think, even if the supervising jurisdiction of the Courts could be extended so far, it should be exercised under such circumstances as presented.

Unless in the cases of fraud or what falls properly within the *ultra vires* rule, no relief should, I submit, be given to suitors so acting, for in such cases a wise discretion may be properly exercised.

However all that may be, I still adhere to the principles upon which we proceeded in the case of *Town of Macleod* v. *Campbell* (1918), 44 D.L.R. 210, 57 Can. S.C.R. 517, cited in argument herein. In that case, I expressed my own view

that to hold a mere excess of value an illegality such as to render a roll void, is quite impracticable. Indeed it would surprise a great majority of rural municipalities to be told that taxes could not be collected because the assessor had assessed far below the actual value. Yet that is, in strict law, quite as illegal as assessing too high.

The doing so in either case does not give rise to any application of the doctrine of *ultra vires* unless in the case of him entitled to claim an exemption.

The duty, of him claiming it, is to bring the claim before the Courts entrusted with the jurisdiction of settling the roll or correcting it.

But if he fail to do so I am of the opinion that he can resist the collection of taxes imposed in violation of his exemption and that he does not need such relief as sought herein for his protection.

The respondent has, I think, on the evidence before us, shewn it is entitled to be taxed on the basis of such exemption, and can insist thereon without being given any such relief as sought herein.

I was at first inclined to agree with Rivard, J.'s, suggestion, 32 Que. K.B. 520, at p. 529, in his well considered judgment, if I may be permitted to say so, with which I almost entirely agree, but on reflection I do not think the application of his solution of the problem is necessary herein, though the principle thereof must be observed in determining the amount the appellant is entitled to recover in the suit it has taken.

I would therefore allow this appeal and dismiss the respondent's action with costs throughout.

DUFF, J.:—The trial Judge found (see 32 Que. K.B. 524) as follows:—Considering that the valuation of the plaintiff's property on the basis of over $6,000 per arpent is and was a fictitious valuation far in excess of its actual or real value and the assessors of the defendant in so valueing plaintiff's property proceeded upon a wrong principle and ignored the real or actual value of said property and thereby exceeded the powers given to said assessors and to the said defendant by its charter and bylaw.

I am not quite sure whether the Judge means that for ulterior purposes the assessors and the municipal council had deliberately combined to assess the property in the municipality at a grossly excessive valuation.

If this is the proper construction of the finding, then I think the evidence is inadequate to support it. There is

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nothing to shew that either the assessors or the council were actuated by any specific improper motive, such for example, as that suggested in the pleadings, namely, that the statutory limit of the municipal indebtedness should be illegally elevated. An inference that there was such wrongdoing would necessarily be an inference based upon the conclusion reached by the trial Judge that the valuation was grossly excessive. I am not sure that in this sense the finding is concurred in by more than one of the judges of the Court of Appeal; but assuming that in this sense there are concurrent findings of two Courts I should still be forced to the conclusion from a perusal of the evidence and the reasons that there are no adequate grounds for such a conclusion. The question whether or not there has been such impropriety must always be a very delicate one. We have had in this Court a very wide experience of the divergent views which people honestly entertain (valuators and the professional men of unquestioned integrity charged with official responsibilities in the matter of valuation for taxation purposes) as to the proper method in particular circumstances of ascertaining "actual value"; and it must be obvious to anybody who gives the matter a moment's thought that the whole subject, both in theory and in practice, is beset with difficulties. The questions—Is current price an exclusive test? Is a great augmentation or diminution in the number of transactions a merely temporary aberration or the result of factors likely to be permanent?—and others of a like nature are questions which may well give officials trying to do their duty the most anxious concern. Everybody knows how tenaciously at the close of a period of inflation people cling to their faith in a restoration of price levels after all legitimate grounds for such faith have disappeared.

The respondent's property was in a suburb of Montreal which began to receive the attention of speculators in land as early at least as 1911. Prices had risen with great rapidity during the years in respect of which the questions agitated in this litigation arise; lands were assessed by the municipality at values based largely upon an estimate made in the years 1913 and 1914. The evidence is that the prices fetched from time to time by sales of small areas formed a starting point from which the valuations were made. It now seems to be quite clear that everybody (the respondent and other speculators and those who purchased lots from them, as well as the officers of the municipality) was over sanguine and held absurdly extravagant ideas as to the value of pro-

perty. But while it may very well be that, as a result of the evidence now offered, the proper conclusion is that $500 an acre was the real value of the property assessed at the rate of $6,000 an acre, it would be quite unfounded to suppose that anybody, the respondent or anybody else, had a suspicion that there was any such disparity between the real value and the assessed value. Indeed property which is now said to have been worth $500 an acre was admittedly sold in 1914 at the price of about $2,500 an acre.

A circumstance to which I think weight has not been sufficiently attached in the Court below is the circumstance that these valuations which are not attacked were not during all these years impeached by the ratepayers affected by them in appeal to the Circuit Court as provided by the statute. The Court of Appeal, it may be observed, has concurred with the trial Judge in setting aside the rolls *in toto*. They have proceeded, so the respondents argue, upon the assumption that conscious and intentional overvaluation and violation of duty governed the municipal officers in respect of all the valuations in the municipality. No appeal has been taken against these valuations which are now attacked. No evidence was given of such appeals and I assume that the decisions of the Circuit Court are not impugned. It is not only a fair deduction, it is, I think, the only legitimate inference that the views of the municipal officers as indicated by the valuators were not grossly inconsistent with the values which would have been ascribed to the properties affected by the general opinion of those most concerned, namely, the owners who by statute were made personally responsible for the payment of taxes. I do not suggest that it would be fair to infer that a particular assessment was always accepted as a perfectly just assessment but the inference is, I think, a plain one that there was no such disparity between the general opinion as to value and the assessment of the properties as in itself would justify the inference that the municipal officers were consciously departing from their duty and improperly fabricating an assessment roll with fictitious valuations for an ulterior improper purpose.

I repeat, that having read with care the evidence and the reasons given by the Judges in the Court below I see no escape from the conclusion that (if the respondents rightly construe the findings of fact) the consideration which in my opinion is the predominant consideration arising from the undisputed facts of this case is one to which sufficient

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weight has not been attached. It might be that a case of actual fraud would afford an answer to an action for the recovery of taxes. I desire to make it quite clear that I reserve entirely any question as to the right of the respondents if such a case of actual fraud had been established. I observe only that if such a question were raised it would be necessary to consider whether by the law of the Province of Quebec a plaintiff who had declined to avail himself of the statutory remedy by way of appeal could lie by for years while all sorts of rights were being created on the faith of the assessment roll and then demand as of right that the roll should be set aside *in toto* without any sort of excuse or explanation of his quiescence. For the present I give no opinion upon the point, nor upon the question whether a finding of actual fraud such as that suggested might not afford an answer to a claim for the payment of taxes.

I am, however, unable to say that there is not evidence to support the conclusion of the trial Judge that the assessors have not observed the principle laid down by the statute, and by that I mean this. I think there is evidence to justify the conclusion that the valuation was so excessive that if competent valuers and a competent municipal council applied their minds to the question of the actual value of the property with anything like a correct appreciation of what is implied in "actual value" they would not have made an assessment in the figures actually arrived at. That is a result quite consistent with the assumption of an absence of bad faith. Such being the state of the facts, it is convenient first to address oneself the question whether you have here a case of legal incompetence. The Cities and Towns' Act, R.S.Q. 1909, secs. 5256 to 5288, includes provisions dealing with the subject of the values and assessments. Secs. 5696, 5707 and 5708 deal with the authority of the assessor and of the council in relation to the valuation roll. To the assessors is committed the duty of assessing the taxable property of the municipality and to the municipality is committed the duty of hearing and deciding all complaints against valuations made by the assessors and to consider whether or not the roll should be maintained or altered, and authority to revise the same whether complained of or not. It is clearly within the authority of the assessors and the council to consider and to decide upon the valuation of property for the purposes of taxation and to record the result in the valuation roll. Now the Act by sec. 5696, expressly provides that the taxable property shall be assessed "accord-

ing to its real value." It is argued that where there is a departure from this statutory mandate there is a case of want of competence, that the acts of the assessor and the Council are *ultra vires* and *ab initio* null. That is a conclusion to which I cannot agree. All through the law there runs a distinction between incompetent acts and acts which though competent are wrongful or it may be illegal. Where you have authority to do a certain class of acts coupled with a rule prescribing the manner in which the act is to be done or prohibiting the doing of it in a given way, you may always have the question whether the rule imports a limitation of authority and whether it does or does not import a limitation of authority is a question to be decided on the construction of the instrument creating the authority viewed in light of the circumstances and the object and purpose for which the authority is given. Now it is quite clear that this statute does not treat it as a nullity (it is almost too obvious for remark), a valuation which in fact is not based upon the actual value of the property. The statute does not treat it as a nullity because the statute provides a means for complaining against such a valuation and correcting it. First, there is the right to complain before the municipal council and then from the decision of the municipal council there is a right of appeal to the Circuit Court. If the valuation were a nullity there would be nothing upon which either appeal could operate. I think this applies whatever be the circumstances under which the irregular and wrongful valuation is made. Even if it were shewn that an assessor had overvalued property in consequence of corrupt influence, I cannot doubt that it would still be open to the municipality to correct the valuation by resorting to the statutory appeal. It is not conclusive of course of the point of competency or no competency to say that such a valuation is not a nullity because an incompetent act may be only relatively null. For the present I am concerned only in making it clear that there is no case of nullity *ab initio*, and that, I think, is plain. I think it is also quite clear that there is no case of incompetency because it was the duty of the assessor in the first place to enter the valuation in the valuation roll and in the second place it was the duty of the council to revise it; that is the very thing committed to them by statute. If in performing that duty the statutory rule were consciously disregarded that would be an illegality of a very grave kind. If there is incompetence or negligence such that in effect the statutory mandate is disregarded

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there may be illegality also, but in neither of these cases is there for that reason alone incompetency in the legal sense. I can entertain no doubt that giving due weight to the provisions for correcting wrong and improper valuations it is quite impossible to hold that in any of these cases there is either legal incompetency or nullity *ab initio*.

The point has been the subject of so much discussion that I think it worth while to refer to a single case to shew the view which heretofore has been taken upon this distinction between incompetency and illegality as these words are found embodied in Quebec legislation. In *Déchêne* v. *City of Montreal*, [1894] A.C. 640, the Privy Council had to consider a resolution of the Corporation of Montreal under sec. 101 of the Montreal Charter which authorised the corporation to make an annual appropriation of an amount necessary to meet the expenses of municipal administration during the current year. The self same clause which authorised the appropriation imposed a restriction that such appropriation should never exceed an amount to be ascertained in a manner prescribed by the section. The council of the corporation made an appropriation in excess of the maximum fixed in the section. Proceedings were taken to set aside the resolution and the corporation answered that the proceedings were prescribed in three months by force of a certain statutory provision, 1879 (Que.), ch. 53, sec. 12, which gave to a municipal elector the right in his own name to procure a judicial anullment of municipal proceedings on the ground of illegality and imposed a prescription of three months where the proceeding was within the competence of the corporation. It was contended among other things that the resolution in question being incompetent the prescription did not apply. The promoters of the litigation insisted that the resolution was incompetent at least in so far as the amount of the appropriation exceeded the statutory maximum. By both the Quebec Courts and the Judicial Committee it was held that the complaint was a complaint of illegality and not of incompetence. Lord Watson said, [1894] A.C., at p. 644, that the resolution "was plainly within their competence, seeing that it exclusively relates to matters committed to the council by statute." In the Court of Queen's Bench, Blanchet, J. delivering the judgment of the Court in (1892), 1 Que. Q.B. 206, at pp. 214 and 215, said:—

"The appellant claims moreover that the 3 months limitation does not apply to the present case because in adopting

its resolution the appellee had exceeded its jurisdiction. The section cited from the charter says in fact that the right to complain would be limited to 3 months and that the resolution would be held provided that it was within the competency of the corporation. It is not necessary to confound the question of "being able to" with the question of "competence" the council had evidently the right to determine its budget, adding to it the sums necessary for the expenditures of the then current year. This subject was entirely within its competence and jurisdiction. From that it included a sum that it had not the right to include, it does not follow that the resolution was not within its competence. There was rather an illegality which permitted a Court of Justice to intervene to take away that which is illegal from that which is legal but not to set aside the whole resolution. The illegalities or the irregularities committed on this subject could be impugned by the ratepayers in the 3 months fixed by the statute, with the help of a special mode of procedure, but that period past, the right to impugn is forfeited. The law has given to them a summary and effectual control over the acts of their representatives. But, since it is to the public interest that these proceedings of the corporation be, after a certain time considered valid, the Legislature has willed that this delay once expired should result in complete forfeiture with regard to the special remedy which it furnishes, since it declares valid and obligatory all that which has been done in the bounds of the jurisdiction of the council leaving to the interested parties the ordinary resources, to the others remedies which may exist." [Translated.]

I come now to art. 50 C.C.P. This article is one that confers jurisdiction, a jurisdiction which, by the terms of the article itself is to be exercised subject to the special provisions of the law. It does not profess to give and it would be an unwarrantable extension of its purport to read it as giving an unrestricted and unqualified right to any subject of the realm to require the Superior Court to review the proceedings of public and private corporations; nor can it properly be read as giving to each elector or ratepayer in a municipality without regard to the qualifications and conditions laid down by the statutes dealing with municipal institutions the right to invoke such jurisdiction in relation to the proceedings of the municipality; and I think that where in relation to a given municipal proceeding or even a given class of municipal acts a special recourse is given to

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a specified class of persons as affording a remedy for error or illegality then the Superior Court in exercising its jurisdiction under art. 50 C.C.P. (Que.) is governed by the conditions and the qualifications attached by law to that right of recourse. At all events I think it is quite clear that where a special remedy is given by statute if that remedy sufficiently appears either from the express terms of the statute creating it or from the nature of the case to be intended to be the exclusive remedy for those to whom it is given then the jurisdiction of the Superior Court is limited accordingly.

It is not necessary, as I have already said, to consider what the remedy of the aggrieved owner may be in a case of actual fraud and I put that case aside. In all other cases whether the valuation be the result of error of judgment or of negligence or of reckless inattention or incompetence the statutory remedy is in my judgment: the exclusive remedy; unless it be, and that is the point to which I will come in a moment, that a right to impeach the assessment is given under sec. 5591. I think this follows from a consideration of the nature and objects of the procedure itself. The object is to get a valuation of the taxable property of the community for the purpose of enabling the tax rate for special taxes as well for general municipal taxes to be struck as well as the school rate. Once the roll is complete that is to say, once all appeals and complaints provided for by statute have been disposed of the roll becomes the foundation upon which the levying and the collecting of taxes proceeds. It is also that basis which determines the limit placed by the law upon the municipal indebtedness. Now if it be open to any owner of property who has allowed the roll to be closed without taking advantage of the statutory procedure to complain of excessive valuation it is obvious that a very wide door to uncertainty and confusion is opened up. Cases of fraud being eliminated if an assessment is open to attack upon the ground that the assessor "has proceeded upon a wrong principle" it will in practice be a hopeless task to assign a limit to the class of cases which might be entertained by the Courts. I think when the Legislature provides for the making of a valuation roll and a special procedure for disposing of complaints and then makes the valuation roll the basis of taxation, it is implied that all questions of valuation as such are as between the owner and the municipality to be considered set at rest when the express statutory remedies made available have been exhausted.

I come now to sec. 5591. I am disposed to think that an-

overvaluation or an undervaluation made through sheer negligence in the sense of neglect on part of the assessors and of the council to give any consideration to the question of actual value might not improperly be described as an instance of "illegality." I do not think, however, that in such a case of improper valuation the remedy given by sec. 5591 is available to an aggrieved owner because his remedy is explicitly provided for by the section of the Cities and Towns Act already referred to and the operation of sec. 5591 for his benefit is excluded impliedly by those provisions.

If I am wrong in this however I concur with my brother Brodeur in thinking, as I have already said, that the complaint preferred is a complaint of illegality rather than incompetency and that in so far as the respondent prefers its complaint *qua* ratepayer that article applies. The conditions governing proceedings under that article would not, however, affect any right the aggrieved owner might otherwise have to resist a claim for taxes on the ground of fraud nor would noncompliance with such conditions be an answer to a proceeding by the Crown in the public interest on the same ground.

There remains the argument based upon the Municipal Charter, sec. 28. This section deals with the subject of taxation rather than the subject of valuation. It can afford no basis for impeaching the assessment roll. Nor do I think it is a ground for impeaching the collector's roll except as an answer to a claim for taxes. The contention now raised will be open to the respondents in answer to such a claim.

The appeal should be allowed and the action dismissed with costs.

ANGLIN, J.:—I have had the advantage of reading the carefully prepared opinions of my brothers Brodeur and Mignault. After full consideration of the record, factums and oral argument, I am satisfied to accept my brother Mignault's conclusions that the valuations of properties in the impugned assessment rolls were purely fictitious and were made in utter disregard of real value.

The case presented is not one merely of excessive valuation, the result of mistake of judgment in endeavouring to exercise the powers conferred by the law. It is a case of flagrant and wilful abuse of those powers for an ulterior purpose. It is not a case of mere irregularity but one of absolute nullity *ab initio*, resulting from the attempt to do what the statute not only does not permit, but clearly forbids.

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The evidence fully warrants this view which prevailed in the Superior Court and with a majority of the Judges in the Court of Appeal, 32 Que. K.B. 520. On this aspect of the case I cannot usefully add to the opinions of my brother Mignault and of Lamothe, C.J., and Martin, J., in the Court of Appeal.

I also accept the statement of my brother as to the scope and operation of art. 50 C.C.P. (Que.). Its purview and the limitations upon its application were stated by Lamothe, C.J., in the passages quoted by my brother from his judgments in *La Ville de la Tuque* v. *Desbiens* (1919), 30 Que. K.B. 20, and were briefly reiterated by Greenshields, J., in the recent case of *Neville* v. *School Trustees of New Glasgow* (1921), 33 Que. K.B. 140, at p. 144.

I agree that the remedies afforded by R.S.Q. 1909, secs. 5707 and 5715, and by sec. 5591, are not, under the circumstances of this case, exhaustive, and that the right to invoke art. 50, C.C.P. (Que.), remains unaffected by the three months prescription which R.S.Q. 1909, sec. 5634, imposes. Where an assessment is void *ab initio*, the tribunals provided by R.S.Q. 1909, secs. 5707 and 5715, have no jurisdiction to deal with it. They can neither amend nor confirm it or give it validity. *Toronto R. Co.* v. *Toronto*, [1904] A.C. 809, at p. 815. No doubt it is in the public interest that ratepayers should ordinarily be restricted to the method prescribed by the Cities and Towns' Act, R.S.Q. 1909 *tit.* XI., ch. 1, for obtaining redress in cases of overassessment or of irregularities. But this is not an ordinary case; it is a most extraordinary case of deliberate abuse of a statutory power amounting to a fraud upon such power. The supervising control conferred by art. 50 on the Superior Court is designed to provide for such cases.

I do not overlook the restrictive words "in such manner and form as by law provided," which are appended to "the superintending and reforming power, order and control of the Superior Court" conferred by art. 50. But those concluding words of the article do not import that resort to it cannot be had wherever a special means of redress of limited scope is afforded by the statute which confers the power the exercise of which the Court is asked to supervise —at all events where, as here, it is established that the impugned act was beyond the competence of the corporation. *Déchène* v. *City of Montreal*, [1894] A.C. 640, at p. 642. No question of the sufficiency of the plaintiffs' interest under art. 77, such as was dealt with in *Robertson* v. *Montreal*

(1915), 26 D.L.R. 228, 52 Can. S.C.R. 30, arises in this case. I cannot assent to the suggestion that in every case of *ultra vires* action under art. 50 C.C.P. (Que.) must be at the instance of the Attorney-General.

The only serious difficulty that I perceive arises from the plaintiff's delay in seeking relief, which, it is urged, warrants an inference of acquiescence by them in the assessment of which they complain. But such an inference should not be drawn merely from failure to take advantage of the special means afforded by the Cities and Towns' Act for obtaining relief against irregularities in the preparation of the rolls or in a case of mere overvaluation. If it should, art. 50 could never be invoked in such cases.

Apart from the failure to proceed either under R.S.Q. 1909, secs. 5707 and 5715, or under sec. 5591, I do not find in the record anything to sustain the plea of acquiescence. While high assessments may have tended to improve the plaintiff's prospects of selling their lots, there is no proof of such collusion on their part as might have amounted to a *fin de non recevoir*, or have precluded them from averring that the defendant had committed an abuse of its statutory power or a fraud upon it. An absolute nullity does not acquire life and vigour because it is not attacked. Enforcement of it may be successfully resisted when the attempt to enforce it is made. To allow mere delay without proof of collusion or acquiescence to defeat the plaintiff's demand for action under art. 50 C.C.P. (Que.), which neither rests on equitable grounds nor involves the exercise of discretionary power, would be to introduce a prescription for which the law does not provide.

But, with respect for the contrary opinion of my brother Mignault, I prefer the view, which prevailed in the Court of King's Bench, 32 Que. K.B. 520, that the relief to be granted the plaintiffs should not be restricted to avoidance of the assessments of their own properties. Their claim rests on nullity of the assessment roll resulting from the utter disregard of the requirement of the statute that property shall be assessed at its true value (sec. 5696) which the evidence, notably that given by the appellant's Secretary-Treasurer, Joseph A. Pesant, and by Francois C. Laberge, shows prevailed generally in the preparation of it by the municipal authorities. Excessive valuation in violation of art. 5696 renders futile the provision limiting the annual rate of taxation to 2% (R.S.Q. 1909, sec. 5730), *Corp. of St. Boniface* v. *Town of Transcona*, 39 D.L.R. 148,

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If the excess in valuation had merely affected the plaintiffs' subdivision, I should have had some difficulty in holding that the case did not fall exclusively within R.S.Q. 1909, secs. 5707 and 5715, or within sec. 5591, and that it was not merely a case of mistaken overvaluation. It is because gross overvaluation is shewn by the defendants' plea (para. IIb) and by the evidence to have been systematic that a case of flaunting restrictions on a statutory power such as results in absolute nullity has been clearly established. In such a case, a plaintiff in my opinion is entitled to invoke the supervising control conferred by art. 50 C.C.P. (Que.). As put by Lamothe, C.J., in *La Ville de la Tuque* v. *Desbiens*, 30 Que. K.B. 20, "C'est l'action populaire."

The collection rolls, of course, fall with the assessment rolls. I also concur, however, in the view that as to the respondents the collection rolls are invalid because clearly in contravention of sec. 28 of 1915 (Que.), ch. 109.

I would for these reasons dismiss the appeal with costs.

BRODEUR, J.:—In its action, taken February 25, 1920, the respondent, Shannon Realties, asked that the valuation and assessment rolls for the years 1915, 1916, 1918 and 1919, which were homologated by the municipal council of the town of St. Michel, be declared irregular, illegal and *ultra vires*.

The town of St. Michel pleads the legality of these rolls and alleges that the Shannon Co. acquiesced and that this action was taken too late.

The company's action was maintained by the Courts below, Allard and Rivard, JJ., dissenting in the Court of Appeal, 32 Que. K.B. 520.

The town of St. Michel is governed by the Cities and Towns Act, R.S.Q. 1909, secs. 5256 *et seq.* It is also governed by a special charter which provides that lands under cultivation shall be taxed on the basis of one quarter of the value shewn on the valuation roll.

The assessors of the municipality prepared the valuation roll for the years in question (R.S.Q. 1909, sec. 5696). The required notices were given, but the plaintiff did not deem it expedient to complain and did not appeal to the Circuit Court which had jurisdiction under R.S.Q. 1909, sec. 5715 *et seq.* to have the valuation affecting its property changed.

It allowed several years to elapse without paying any taxes; and now, after being sued by the town of St. Michel for taxes, it takes the present action to quash all these valua-

tion and assessment rolls. It complains that the assessors and the municipal council over valued the properties in the municipality and that the rolls did not give effect to the provision in the charter whereby land under cultivation must not be taxed for an amount exceeding one quarter of its value.

The question is, can the plaintiff now exercise this right of action or is the right prescribed?

If we consult the Cities and Towns' Act, we see that the Legislature carefully indicated the course to be followed in preparing the valuation rolls and to safeguard the rights of interested parties. The assessors must prepare the valuation roll of taxable properties at the time ordered by the council (R.S.Q. 1909, sec. 5696). After the roll is completed they deposit it in the office of the council and public notice that it has been so deposited is given by the clerk during the two following days, and interested persons are notified that these rolls will remain open for their inspection for thirty days after they are deposited (R.S.Q. 1909, sec. 5705). Then, if anyone wishes to complain of the roll, he may appeal to the council during these 30 days (R.S.Q. 1909, sec. 5706), and the council, at its first general meeting, hears and determines these complaints (sec. 5707). But the complainants have a recourse by way of appeal to the Circuit Court from the decision of the council; and there, before the Circuit Court, the proceedings must be taken with the greatest diligence (secs. 5715, 5716, 5717, 5720).

As can be seen, the plaintiff complains that its property has been assessed at too great a value, and that is the motive which led it to take the present action in the Superior Court; and it invokes for this purpose art. 50, C.C.P. (Que.), which provides that corporations are subject "to the superintending and reforming power, order and control of the Superior Court."

This power of the Superior Court is not absolute, for art. 48 of the Code says that the Superior Court "has original jurisdiction in all suits or actions which are not exclusively within the jurisdiction of the Circuit Court."

Article 54, C.C.P. (Que.), which treats the jurisdiction of the Circuit Court, indicates certain cases where that Court "has ultimate jurisdiction to the exclusion of the Superior Court."

The jurisdiction of the Superior Court is therefore not absolute; and art. 50 states clearly that this right of supervision and control over inferior corporations and tribunals

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must be exercised "in such manner and form as by law provided."

In the Fifth Part of the Code, arts. 978 *et seq.*, we find the proceedings affecting corporations and public offices. Article 978 gives the Attorney-General the right to prosecute a corporation which violates the statutes to which it is subject. Article 987 gives any interested person the right to complain when an individual exercises illegally a public office.

Inferior Courts which exceed their jurisdiction are subject to the writ of prohibition (art. 1003). Chapter 65 gives us a means of recourse against the procedure and judgments of inferior Courts and states the cases in which a writ of *certiorari* can be issued (arts. 1292 *et seq.*).

That is how the legislator has fixed the jurisdiction of the Superior Court in the Code of Procedure.

We have, however, in our statutory law, formal dispositions relating to the jurisdiction of the Courts. Thus, for example, the Cities and Towns' Act gives jurisdiction in matters of municipal valuation to the municipal council and the Circuit Court (R.S.Q. 1909, secs. 5706, 5709, 5715).

Is this jurisdiction exclusive and has the Circuit Court a right of ultimate jurisdiction in such matters to the exclusion of the Superior Court?

This question of the respective jurisdictions of the Circuit and Superior Courts has been the subject of numerous discussions before our Courts, especially as regards rural municipalities which, as we know, are governed by the Municipal Code.

The Circuit Court had, by art. 100 of the old Municipal Code, the right to quash any by-law or resolution, but that article added:—

"This article does not exclude the right of causing a resolution of procès-verbal of a municipal council to be set aside by the Superior Court; provided that the costs incurred in the suit shall not exceed the costs and disbursements which would have been payable if the suit had originated in the Circuit Court."

This last disposition has given rise to great uncertainty in the jurisprudence.

Nevertheless there can be no doubt that under the Municipal Code the Superior Court and the Court of Review have jurisdiction over the resolutions of the municipal council.

A great number of these decisions have been cited in the present case—decisions which were rendered under the

Municipal Code. I do not think that they apply here for the excellent reason that our Cities and Towns' Act has no such disposition as is found in art. 100 of the Municipal Code.

In the case submitted to us, the Shannon Co. had the right by virtue of the Cities and Towns' Act to bring a complaint against the valuation roll within the delay provided by the Revised Statutes. It could also appeal from the council's decision to the Circuit Court. It did not see fit to do so.

This jurisdiction which the statute gives to the Circuit Court appears to me to be absolute and cannot be the object of a suit before the Superior Court under art. 50 C.C.P. (Que.) It seems evident to me that the procedure indicated in the Cities and Towns' Act for the valuation of properties and for the contestation of the valuation roll must be used in as summary a manner as possible so as not to delay the levying of the taxes and paralyse the proper functioning of the municipal administration.

It seems to me evident that in the present case the Cities and Towns' Act, by giving the Circuit Court the jurisdiction it has over the valuation of property, clearly shows the intention on the part of the legislator to deprive the Superior Court of its common law jurisdiction in order to give that jurisdiction to the Circuit Court.

The plaintiff, the Shannon Co., complains that its property is over valued. It should then have complained to the municipal council and afterward, by way of appeal, to the Circuit Court. Now, having failed to do that, it finds itself deprived of the right to bring its case before the Superior Court.

It is a matter of principle that the jurisdiction of the Superior Court is not removed by a statute unless there is a positive text or unless the statute contains expressions which show clearly the intention on the part of the legislator to that effect, or unless a new tribunal is created with a jurisdiction incompatible with the common law jurisdiction of the Superior Court.

I have therefore reached the conclusion that the Superior Court did not have the power to hear this question of land valuation which was within the exclusive jurisdicton of the Circuit Court.

But the plaintiff also pleads that the valuation and assessment rolls were not made in accordance with law and that

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it has the right to appeal to the Superior Court to have them quashed.

There is no room for doubt that, if the rolls are illegal the plaintiff could ask to have them quashed by action before the Superior Court, R.S.Q. 1909, sec. 5591, says: "Any *procès-verbal*, roll, resolution or other order of the council, may be set aside by the Superior Court of the district in which the municipality is wholly or partly situated, by reason of illegality, in the same manner, within the same delay, and with the same effect as a by-law of the council, and shall be subject to the provisions of secs. 5603 and 5633."

Sections 5623 *et seq.* R.S.Q. 1909, indicate the manner of contesting these by-laws and sec. 5624 declares positively that the right to take such action is prescribed by three years.

The plaintiff did not see fit to complain within this delay. I am even persuaded to believe that it was satisfied to have its municipal evaluation as high as possible so that it might sell the property at a higher price; but now that the "boom" in real estate which existed at the time has come to an end, is seeks to set aside the valuation rolls which it probably used at the time to find purchasers at a very high figure.

This question of prescription was the object of an important decision in the case of *Déchéne* v. *City of Montreal*, [1894] A.C. 640. The Privy Council, called upon to examine in that case the provision of the charter of the City stating that a municipal elector might demand the annulment of an appropriation for money expended within three months for cause of illegality but that after that delay the right was prescribed and the appropriation was valid, held "that on the expiration of the 3 months the elector's statutory right was at an end, and could not be extended by any procedure clause (see art. 3 C.C.P. (Que.)) which presupposed an existing right of action and regulated its exercise."

Lord Watson, in rendering judgment, says [1894] A.C. at p. 642, of these provisions of the law:—

"They confer upon each and every municipal elector the right, which he had not at common law, to challenge on the score of illegality, any corporate appropriation of money to meet the expenses of the current year, subject to the

condition that the right shall prescribe, if not exercised within three months from the time when the appropriation comes into force. They also confer upon the corporation an absolute immunity from liability to have the legality of the appropriation questioned, at the instance of any person whatsoever, after the lapse of these three months."

Now in the present case, the law relating to town corporations declares explicitly that the rolls can be contested for illegality within the three months following their coming into force. The plaintiff was therefore late in taking action and that action should have been dismissed. The right to do a thing and the exercise of that right must not be confused. When the law says that a right will be lost if not exercised within the delay it fixes, it establishes a *déchéance*, Dalloz, Repertoire, *verbo* "Prescription," sec. 1, para. 1, no. 3.

This question of prescription has produced an unsettled body of jurisprudence. Thus in 1907 the Court of Review, Tellier, Lafontaine and Hutchison JJ., confirmed the judgment of Curran, J., in the case of *Emard* v. *Boulevard St. Paul*, 33 Que. S. C. 155, which had decided that the action in nullity cannot be taken thirty days after the coming into force of a resolution of a municipal council unless taken by a rate payer having a direct and special interest.

In the case of *Allard* v. *St. Pierre*, (1909), 36 Que. S.C. 408, four Judges of the Superior Court were equally divided on this question, the majority of the Court of Review being of the opinion that every rate payer may demand by direct action the quashing of a municipal by-law which is *ultra vires*, notwithstanding the special recourse by way of petition provided by the act.

In a case of *Aubertin* v. *La Ville de Maisonneuve* (1905), 7 Que. P.R. 305, the Judges were also equally divided on the question as to whether or not a rate payer had a recourse by way of direct action.

The Court of Appeal has more recently decided that the Superior Court has jurisdiction in an action to pronounce valuation rolls illegal, even after the delays, and that this action escapes the prescription by three months which applies in the case of a petition to quash for cause of illegality.

La Compagnie d'Eau v. *Ville de Montmagny*, 25 D.L.R. 292, 24 Que. K.B. 416; *La Ville de la Tuque* v. *Desbiens*, 30 Que. K.B. 20; *Northern Lands Co.* v. *Town of St. Michel* (1919), 28 Que. K.B. 378, 26 Rev. de Jur. 137; *Laberge* v. *City of Montreal*, 27 Que. K.B. 1.

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This recent jurisprudence of the Court of Appeal appears to me contrary to the decision rendered in the case of *Déchêne* v. *City of Montreal*, [1894] A.C. 640. It is necessary, in the interests of municipal administration, that persons having complaints, who are not satisfied with the decisions of municipal councils, should appeal to the Courts within the legal delays. They should not wait for years before doing so.

I think that the plaintiff's action is tardy and that the judgment which maintained it should be reversed with costs.

MIGNAULT, J.:—There are few legislative dispositions which are appealed to more often than art. 50 C.C.P. (Que.) especially in matters coming under the Municipal Code and the Cities and Towns' Act.

In a recent decision, *Ville de la Tuque* v. *Desbiens*, 30 Que. K.B. 20, Lamothe, C.J., at p. 21, made a statement of principles which it is important to cite at length. He said:—"Two great principles have been laid down in previous decisions and by them we must be guided. Article 50 C.C.P. may always be appealed to in matters of absolute nullity. In matters of illegality resulting from informality or irregularity, recourse must be had to the special procedure provided by the Act."

Further on Lamothe, C.J., says:—"The Courts have often annulled municipal decisions which produced crying injustice as regards one or more rate payers. The fact that a decision appears arbitrary, oppressive and abusive may lead the courts to regard it as null *ab initio*. The tendency of the jurisprudence has been to consider a crying abuse of power as equivalent to an excess of jurisdiction. The words *ultra vires* have thereby been given a broader meaning. Article 50 C.C.P. is the text always relied on when such decisions are attacked. To take advantage of art. 50 C.C.P., must a plaintiff show a special interest, different from that of the other rate payers? If the decision attacked is tainted with absolute nullity, the plaintiff is not obliged to allege or show a special interest. That is the popular action. If the decision is oppressive, unjust and abusive in respect of several rate payers, it is only one of these who can complain. All that I have said above has been sanctioned by many decisions, and the jurisprudence thereby established is no longer open to question."

If we only consider the jurisprudence of the Court of Appeal 32 Que. K.B. 520, I think the Chief Justice's state-

ment of principles constitutes a faithful resumé of that jurisprudence.

I shall only mention a few cases. There are many others which are mentioned in a note to the opinion of Martin, J. in *Les Commissaires d'écoles de St. Félicien* v. *Hébert* (1921), 31 Que. K.B. 458, at p. 461 (affirmed (1921), 68 D.L.R. 173, 62 Can. S.C.R. 174). See also: *Carpentier* v. *La Corporation de St. Pie* (1920), 31 Que. K.B. 335 where the distinction is made between relative and absolute nullity in respect of municipal acts.

In two cases which the respondent cites, *La Compagnie D'Eau* v. *Town of Montmagny* 25 D.L.R. 292, 24 Que. K.B. 416 and *Rivard* v. *Corp. of the Parish of Wickham-West*, 25 Que. K.B. 32, it has been held that a municipal valuation roll in which the taxable properties are, taken as a whole, given a value less than their true value, is illegal and null; that the remedy in this case is the action to quash and not the appeal to the Circuit Court; that any one who is a rate payer has, by that fact alone, sufficient interest to bring the action.

In *Laberge* v. *City of Montreal*, 27 Que. K.B. 1, it was held that the Superior Court has jurisdiction in an action to declare illegal the municipal valuation of an immovable by the assessors of the city of Montreal when the object of the action is not only to decrease the amount shown on the valuation roll, but also to have it declared that the principle of valuation itself is erroneous, as in the case where the municipal assessors have ignored the owner's right to have his property valued as land under cultivation and treated it as building lots.

In *Northern Lands Co.* v. *La Ville St. Michel*, 28 Que. K.B. 378, the Court of Appeal held that the recourse given by the Cities and Towns' Act against a valuation roll is not limitative and that the Superior Court has jurisdiction to annul such a roll when in its entirety it is composed on an illegal basis.

Finally, in *Corporation of St. Alexis des Monts* v. *McMurray* (1919), 29 Que. K.B. 18, prescription by three years (art. 433 M.C.) was held inapplicable in the case of an action before the Superior Court to quash a municipal by-law, brought by a person who had a special and direct interest in attacking that by-law, and the following principle, which I quote from the summary, was laid down:—"Although the courts should abstain from interfering with municipal matters, it is their duty to interfere with the

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exercise of powers conferred upon municipal councils where the latter acts are so unreasonable, unfair or oppressive as to constitute an abuse of those powers."

Surely the jurisprudence is firmly established on this point, and no person doubted it when I was practicing as an advocate at the Montreal Bar. It remains to be determined if this is according to law.

R.S.Q. 1909, sec. 5591 (Cities and Towns' Act) says that reports, rolls, resolutions or other pronouncements of the council may be quashed by the Superior Court for cause of illegality, in the same manner and within the same delay and with the same effect as a by-law of the council.

And sec. 5623 enables any municipal elector, by a petition presented in his name to the Superior Court or one of the Judges thereof, to have any by-law of the council quashed for cause of illegality, with costs against the municipality. The right to take this action is prescribed by three months from the coming into force of the by-law (sec. 5634).

If we compare these dispositions with those of the Municipal Code, we find that it is to the Circuit Court of the county or district, or to the District Magistrate's Court that recourse must be had to quash by-laws or other municipal acts "for cause of illegality" (art. 430). The procedure is by way of ordinary action, and any elector or interested person may sue (art. 431). The right of action is prescribed by three months from the passing of the act or proceeding complained of as being illegal (art. 433, para. 1), and the special recourse given by these articles does not exclude the action in nullity in cases where it lies by virtue of art. 50 C.C.P. (Que.); but the costs of the action in nullity cannot in any case exceed those of a fourth class action in the Superior Court (art. 433 para. 2.).

The provision of the second paragraph of art. 433, which is taken from art. 100 of the old Municipal Code, does not figure in the Cities and Towns' Act, but the Superior Court, in the case of cities and towns, as of other municipalities, has always taken cognisance of the action in nullity on the authority of art. 50 C.C.P., (Que.), without regard to the prescription by three months, in cases of radical nullity of municipal acts, or when such acts are done without jurisdiction or when they constitute an abuse of power or are oppressive. And although the Cities and Towns' Act and the Municipal Code speak of quashing for cause of illegality, that is understood to mean defects which involve relative

nullity only and are therefore susceptible of being covered by inaction during the delay prescribed for the recourse in nullity.

It seems to me impossible to condemn this jurisprudence without ignoring the general and positive scope of art. 50, which mentions amongst other persons subjected to the right of supervision and control of the Superior Court, bodies politic and corporate within the Province. It is true that the right of control is to be exercised, according to the terms of the article, "in such manner and form as by law provided," but that does not mean, in the case of municipal bodies, that there is no other recourse than the petition to quash. This power of control, I believe, nevertheless has in view unforeseen cases or cases which are not sufficiently covered by the special dispositions which I have cited; but if there is absolute nullity, want or excess of jurisdiction, abuse of power or oppression, the Superior Court will be within the limits of its jurisdiction in taking cognisance of the action in nullity, and to deny it this right would be equivalent to nullifying the effect of art. 50 which, before the Code was enacted (it goes back as far as 1849 (Can.), ch. 38, sec. 7), was always regarded as a fundamental rule of the jurisdiction of the Superior Court.

I may add that in the case of *Déchêne* v. *City of Montreal*, [1894] A.C. 640, even if sec. 2329, R.S.Q. 1885, now art. 50 C.C.P., had not been cited, the Privy Council recognized that the dispositions of the Charter of Montreal permitted a municipal elector to attack, within three months, a vote of money, for cause of illegality.

"Do not interfere with any right existing by law to impeach the appropriation, after the expiry of the three months, upon the ground that it was beyond the competence of the corporation." (per Lord Watson at p. 642.) I have not lost sight of the decision of this Court in *Robertson* v. *City of Montreal*, 26 D.L.R. 228, 52 Can. S.C.R. 30. There it was a question of a demand in nullity of a resolution adopted by the council authorizing the passing of a contract with an autobus company in certain streets of the city. This resolution was attacked by a rate payer who pretended to have the right to take action in consequence of the fact that several shares of the Tramways Company had been transferred to him to enable him to sue, but who, in the course of the suit, had renounced (his right?) to avail himself of his quality of shareholder in that company. It was held, confirming in that respect the judgments of the pro-

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vincial Courts, that in the absence of proof of a special interest prejudiced by the resolution attacked, Robertson could not sue.

In that case, the opinion was expressed that an efficacious remedy in such a case would be an action by the Attorney-General under art. 978 C.C.P. (Que.) I do not think this decision is sufficient to overrule the jurisprudence I have cited. Even supposing that article 978 C.C.P. did authorise the Attorney-General to sue a corporation which acted contrarily to its charter or which abused its corporate powers—and that article has never, so far as I know, been invoked in practice to obtain the intervention of the Superior Court in the cases covered by art. 50 C.C.P.—I see nothing to prevent a person having the required interest from himself asking the Superior Court to exercise the power of supervision and control which belongs to it by virtue of art. 50. And certainly the decision in *Robertson* v. *City of Montreal*, 26 D.L.R. 228, does not condemn the jurisprudence firmly established in the Province of Quebec to which I have already referred.

I have felt that this statement of principles would be useful for a better appreciation of the case before us. The plaintiff-respondent derived its authority from the fact that it was owner of immovables in the city of St. Michel, seized the Superior Court in 1920 of an action complaining of its assessment in the municipal valuation roll in respect of its property for the years 1913, 1914, 1915, 1916, 1918 and 1919, and further alleged that that valuation was made in contravention of sec. 28 of the Act 1915 (Que.) ch. 109, the respondent's property being land under cultivation or farm land or pasture land; that in order to obtain a borrowing power denied it by law and so deceive its bond holders and other creditors, the appellant had raised the general valuation of the properties in the municipality to a multiple of their real value, in contravention of R.S.Q.. 1909, sec. 5696 to such an extent that the Courts had reduced assessments made at $6,000 and $3,000 per arpent to $500,000; and that the compilation of the rolls on this basis was an abuse and an excess of power on the part of the appellant. The respondent concludes for the annulment of the valuation and assessment rolls.

The evaluation of the immovables in the municipality for the purpose of compiling the valuation roll is one of the functions of the municipal council and must be carried out according to the real value of the property (arts. 5696

et seq.). The municipal council revises the roll and hears the complaints of interested persons (art. 5707), and an appeal lies from its decision to the Circuit Court of the county or district or to the District Magistrate's Court (sec. 5715).

The respondent took a similar appeal against the assessment of its properties in 1917 and succeeded in obtaining a reduction in the valuation to $500 per arpent; but the value mentioned in the roll in the following years was nevertheless raised to a figure greatly exceeding that sum. It is appropriate to add that the respondent desisted from its attack against the valuation and assessment rolls for 1913 and 1914, for the reason, we are told, that the taxes for those years were prescribed.

The Superior Court reached the conclusion that the valuation of the respondent's properties was fictitious; that the assessors had valued the properties "upon a wrong principle," falsifying their real value, and had exceeded their powers; and that the valuation rolls for 1915, 1916, 1918 and 1919 had been made in excess and abuse of the appellant's powers, and were *ultra vires*, null and void.

This judgment was confirmed by the Court of King's Bench, 32 Que. K.B. 520, Allard and Rivard, JJ., dissenting as to the annulment of the valuation rolls, but holding the opinion that the assessment roll should be quashed as regards the respondent for cause of violation of the rule of sec. 28 of the Act, 1915 (Que.), ch. 109.

If it is true that the valuation of the respondent's property is fictitious, I would have no hesitation in saying that the Superior Court could annul it. To determine this capital fact I have read all the evidence attentively. Relying on the subdivision of the property into town lots, although its agricultural destination was not changed, the appellant's assessors, with the approbation of the council which homologated the roll, valued lots of 25 feet frontage by 95 feet in depth at sums varying from $365 to $600, which means that the whole property was valued at something like $6,685, per arpent. Besides that, the assessors valued the streets shown on the subdivision plan at 10 cents a foot and the lanes at 5 cents a foot. The valuation for 1919 is a little less, namely $347,578 for the whole property, while in the preceding years it was valued at $528,104 for 1918, $523,529 for 1917, $526,085 for 1916 and $528,011 for 1915. This property, when speculation in real estate was at its height, had been purchased, together with a part sold

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several years ago to the school commissioners, for the sum of $207,500. It has been shown that for several years no purchasers have been found for subdivision lots. With the exception of the part sold to the school commissioners, only six lots out of nine hundred were sold and paid for. The streets and lanes shown on the plan had been under cultivation for two or three years before the action was taken, like the rest of the land, for the whole, with the exception of what was sold, is leased to a farmer named Scott, who has occupied and cultivated it for some thirty years, for an annual rental of $225. In these circumstances, to value a piece of land under cultivation, even though it may have been subdivided at the time of the purely transitory real estate "boom," at over $6,000 per arpent, does not constitute a real valuation such as is contemplated by R.S.Q. 1909, sec. 5696. On the contrary it is a fictitious valuation and bears no relation whatever to the real value of the land. The Circuit Court reduced the valuation for 1917 to $500 per arpent, and the following year, in 1918, the assessors and the council reverted to the fantastic valuation of more than $6,000 per arpent. I do not think it is possible to find a recorded case of such flagrant and oppressive abuse of power.

If in the circumstances the Superior Court could not exercise the power of supervision and control given it by art. 50, it would be tantamount, as I have already said, to striking that article from the Code. The objection is raised that the respondent could have done in 1915, 1916, 1918 and 1919 what it did in 1917, namely, appeal to the Circuit Court. The evidence shows that negotiations were carried on between the parties with a view to reaching an agreement, but these negotiations failed. There was certainly no acquiescence on the part of the respondent. And the appeal to the Circuit Court shows that there must have been an error of judgment on the part of the assessors. But if the law was flouted, if, instead of valuing the respondent's property in a proper manner the assessors gave it a purely fantastic and arbitrary value, if they abused their power, I cannot, for my part allow this fictitious value and abuse of power to subsist on the ground that no appeal was taken to the Circuit Court. In such circumstances, it belongs to the Superior Court to protect the citizens against oppression and the arbitrary exercise of power. As I have said, the jurisprudence of the province of Quebec has recognized for a great many years this jurisdiction of the Superior Court, and I think, with

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great respect, that that jurisprudence must be accepted by this Court.

Furthermore, there has been violation of sec. 28 of the Act 1915 (Que.) ch. 109, of which the first paragraph reads as follows:—"All land under cultivation or farmed or used as pasture for live stock, as well as all uncleared land or wood lots within the municipality, shall be taxed, for a term of ten years, to an amount proportionate to one-fourth of its value as entered on the valuation roll, upon the condition that such proportionate amount shall not exceed one hundred and fifty dollars per acre, including the buildings thereon constructed."

The property in question is undoubtedly land under cultivation or used as pasture for live stock, and the respondents could not be taxed for a value exceeding $150 per arpent.

It has been said that that would involve the nullity of the assessment roll. For the reasons I have given, I think the valuation roll itself should be set aside.

However, I would not annul that roll except insofar as the respondent is concerned. It took its action as owner of immovable property in the municipality and its interest is limited to obtaining a reduction in the valuation of its property. It does not seem to me that the respondent has taken the popular action (*action populaire*), despite its conclusions which exceed its interest, and the other proprietors in the municipality, several of whom have appealed to the Circuit Court, are not in the case and do not complain of the valuation rolls. The appellant's valuation rolls are not before us, but only extracts which concern the respondent, and the proof regarding the other valuations does not seem to me sufficient to quash the whole roll. I would therefore modify the judgment of the Superior Court and would only annul the valuation of the respondent's property; and it follows that the assessment rolls in posing taxes upon the respondent based on that valuation must also be annulled as regards the respondent. This change is sufficiently important to give the appellant half of its costs in this Court and in the Court of King's Bench 32 Que. K.B. 520. The respondent is entitled to all its costs in the Superior Court.

Appeal allowed.

LANGLOIS v. CHAPUT.

Quebec Court of King's Bench, Martin, Flynn, Allard, Tellier and Howard, JJ. April 26, 1921.

VENDOR AND PURCHASER (§III—35)—RIGHTS AS INTERVENENT—DEED OF DONATION.

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A father who has made a donation *inter vivos* of his farm property to his son, reserving to himself the right of habitation and usufruct, and a hypothec on the property as security, has no interest as intervenant in opposition to an action against the son for the enforcement of an agreement for the sale of the property by him, the donor's rights under the deed of donation not having been affected by the sale.

VENDOR AND PURCHASER (§IC—10)—DEED TO PROPERTY—MARITAL STATUS—DESCRIPTION—FARM—CERTIFICATE OF TITLE.

A vendor's duty to sign a sufficient deed for the property sold is not affected by the change of his civil status by marriage since the contract; nor can he object to the signing of the deed because it contained a declaration of superficial area, the property sold being a "farm" and described the same way as in the deed of donation under which it was acquired; nor can he refuse signing the deed because it required him to deliver a certificate of title free and clear of all encumbrances, having agreed only to a certificate of hypothecs under the contract.

APPEAL from the judgment of Guerin, J.

On June 4, 1911, Louis Chaput senior, the intervenant, made a gift *inter vivos* to his son Joseph Chaput, the respondent, of a piece of land at Varennes, reserving to himself a right of servitude, habitation and usufruct. The donee was to pay him a sum of money and to furnish security in the form of an hypothec on the property. On June 16, 1919, Joseph Chaput, wishing to sell the property, went with Langlois, his architect, to see a notary. After discussion, they instructed him to prepare the deed of sale which they afterwards signed, but at that time they only signed the following writing:—

"Chaput sells his 'Petit Bois' property $15,000: $4,000, on November 1, 1919 and the balance $11,000, on demand, on or about November 2 of each year and not at any other time, after one month's previous notice.—Interest 5% per year from November 2, 1919.—The vendor leaves on the premises 15 loads of hay which the purchaser shall cut himself at the next harvest. Chaput the elder must free the land, and should he fail to do so, the vendor promises to see that the purchaser shall not be called upon to perform any of the vendor's obligations towards his father: and if the purchaser is obliged to perform any of these obligations, the vendor must indemnify him. The vendor shall furnish the certificate of hypothecs concerning the property."

The appellant, after putting the respondent in default to give him a deed of sale in accordance with the written agreement, took action to secure title. He had a notarial deed prepared and offered it to the vendor to sign. He asked that the respondent be condemned to sign the deed or

another in the terms of the promise of sale, and that in default by him to do so, the judgment of the Court should take the place of such deed. The first payment of $4,000 which fell due November 2, 1919, which was a Sunday, was deposited in Court on the third.

The respondent pleaded: (1) that the writing of June 16, did not contain all the terms of the agreement; (2) that the sale was not to take place if the defendant's father did not renounce his rights, and he refused to do so; (3) that the draft deed produced with the action was not in conformity with the writing of June 16, 1919; (4) that the respondent's signature to this latter writing was obtained by fraudulent means; (5) that the respondent was ready to indemnify the appellant for any damages suffered.

Louis Chaput, the respondent's father, intervened in this action and supported the defence, he justified his intervention on the following grounds (a) he had rights in the property which were not mentioned in the writing of June 16; (b) he had an interest in exacting performance of his son's obligations towards him by the son himself.

The appellant contested this intervention on the ground that the intervenant had no interest as his rights were not affected and that, furthermore, he had acquiesced in the sale by his son.

The Superior Court maintained the action for costs only and dismissed it insofar as it affected the charges in favour of the intervenant, and maintained the intervention with costs.

Perron, Taschereau, Rinfred, Vallée and Genest, for appellant.

D. A. Lafortune, K.C., for respondent and intervenant.

MARTIN, J.:—Dealing first with the intervention, I would hold that the judgment of the Superior Court thereon is erroneous and cannot be maintained. While it may be true that the intervenant had an interest to have his rights under the deed of donation recognised, there was a sufficient recognition of those rights in the deed in question which are quite as specifically enumerated in the agreement and draft deed as they are in the intervention; the intervention did not serve any useful purpose.

Inasmuch as the intervention was in my opinion clearly erroneous and unfounded, and as the intervenant by his factum in the present appeal seeks and urges to maintain that judgment, the latter should bear the costs of appeal on this issue.

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The reason why the action was dismissed upon the assertion of rights by the intervenant was that the obligation to do was personal to the defendant and that the creditor intervenant had an interest in having the same done by the debtor himself and that the latter could not substitute a stranger in his place without the consent of the creditor, the Judge evidently overlooking the fact that if the intervenant did not renounce to his rights, his son, the donee, still remained bound to fulfil his personal obligations towards the donor. Whether or not the sale would render the fulfilment of these obligations by the son more inconvenient or not, is not a matter with which we are concerned. The father was to be taken care of in the future as in the past and if the purchaser, the appellant, was called upon to recognise or fulfil any of these obligations, the son undertook to indemnify him in respect thereto.

The defendant by the execution and registration of the deed of donation became the owner and proprietor of the farm in question subject always to the rights and charges of the donor intervenant. The latter did not urge that his right of habitation and usufruct to one arpent should be specifically recognised and does not ask that the deed contain a clause to such effect, his main objection being based upon his right to exact fulfillment by his son personally of the obligations and charges to which the donor was entitled to look to him for fulfilment and which, as I have pointed out, the son is still liable to see to the fulfillment of same.

I can see no valid objection to the recognition of the donor's right of habitation and usufruct of one arpent being made in the deed if it is deemed advisable or necessary to do so, but I see no particular necessity or advantage to the donor in doing so. His rights as enumerated in the deed of donation are all recognised and protected and a more specific and detailed enumeration of the same than he himself makes in his intervention is in my opinion superfluous and unnecessary. The property and ownership of the farm passed from the defendant to the plaintiff when they signed the agreement of June 16, 1919, subject to the charges and rights of the father, the donor.

Having reached the above conclusion, the determination of the issue between the plaintiff and the defendant does not admit of any difficulty. The latter has not established any of the reasons invoked by him why he should not be bound by the terms of the agreement of sale made *sous-*

seing privé. The appellant was clearly entitled to a deed of sale in notarial form for purposes of registration and record. The necessity for same was recognized by the parties, at the time of the agreement of June 16 was signed, and it was agreed that a notarial deed of sale in due form would be executed subsequently.

The defendant, without right or reason, neglected and refused to sign such a deed. By his factum he now objects for the first time to certain declaration in that draft deed: 1st, that his marital status is not correctly stated; 2nd, that it contains a declaration of the superficial area of the farm, and 3rd, that the registrar's certificate which he is required to produce is of different character from that which he agreed to furnish according to the terms of the agreement of June 16.

It may be observed that none of these objections were urged by the defendant when the draft deed was tendered to him. None of them are urged in his written plea or defence to the action. What was contemplated by the parties and the natural mode of completing the deed would be that the parties should meet together at the notary's office, hear the deed read and discuss the terms of same. The respondent refused to do this without saying why, giving what was probably a true and honest reason, namely, that he had no reason, and he should not be permitted at the present time and on this appeal to invoke technical errors of declaration in the draft deed. Had he made these objections when the deed was tendered to him for signature, I have no doubt the appellant would have freely and frankly discussed the same and made any alterations to conform to the facts, just as he does by the conclusions to his action, praying the Court to make such alterations in form and conditions which shall make it agree with the contract of the parties.

The defendant says that he is asked to declare that he has not changed his civil status since he acquired the farm from his father and that as a matter of fact he had done so, and while he was then unmarried, he is now married. Surely this will not serve to relieve him of his solemn obligations, and I would suggest that the declaration in the draft deed as to civil status be amended to conform to the fact that the defendant is not married to Dame Azilda Dalpé by ante-nuptial contract made before Aime Langlois, notary, on September 4, 1912, stipulating community of property with creation of a conventional dower of $50 in favour of his wife and children.

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As to the declaration of superficial area of the farm said to contain 166 arpents in superficies, more or less, it is true that neither that nor the cadastral number was mentioned in the deed *sous-seing privé*, but it is the description contained in the defendant's deed of donation by which he acquired the farm from his father, and whether it is mentioned or not in the deed of sale in question does not in any way affect the defendant. What the appellant bought was a certain and determinate thing, the farm "Du Petit Bois," and the defendant could never and would never be called upon to deliver anything but that farm, be the superficial area of same what it may.

I see no objection, if it will please the defendant that the words in the description:—"Contenant environ 166 arpents en superficie," be struck out.

The other objection is that while he was required by the deed *sous-seing privé* to furnish a registrar's certificate respecting the property, the draft deed added the words that the same should establish that the property belonged to him and was free from all debts, privileges and hypothecs.

The question whether or not a seller is obliged to deliver a registrar's certificate when there is no stipulation in the contract to that effect is one that has given rise to much diversity of opinion. Demers, J., in the case of *Poirier* v. *Archambault* (1914), 23 Que. K.B. 495, held that he was not. This Court reversed the judgment of the Court of Review upon the question of the completion of the contract, and it would appear from the notes of the late Cross, J., that in his opinion, the seller might be obliged to deliver certificate of search if he had one in his possession but he was not obliged to go and get one. This view was not concurred in by Sir Charles Fitzpatrick, C.J., and Brodeur, J., when the case came before the Supreme Court *sub-nom Lareau* v. *Poirier* (1915), 25 D.L.R. 266, 51 Can. S.C.R. 637, per Fitzpatrick, C.J., 25 D.L.R., at pp. 266-268, and Brodeur, J., 51 Can. S.C.R., at pp. 648-651.

If it were necessary to decide this point, namely, the obligation of the seller to deliver a certificate in the absence of stipulation to that effect I would incline to the opinion of Brodeur, J., but here it is not necessary to decide this contraverted question. There was a stipulation in the agreement of sale importing an obligation on the seller to furnish a Registrar's certificate. Now the object and purpose of such a certificate is to give information as to the state of the property in question. Does it belong to the seller and

is it free from all privileges and hypothecs? No prudent purchaser would ever pay the purchase price without first ascertaining if there were any charges and hypothecs registered against the property, and the importance of such a certificate is apparent to protect the buyer and enable him to deal intelligently in the matter of the sale, and I should say that the obligation put upon the respondent in the draft deed of sale tendered him would follow from his obligation in the contract of sale to furnish a registrar's certificate. It may moreover be observed that the objection now made by the respondent was not made by him at the time the deed was tendered him for execution.

There would appear to be a mortgage in favour of the father on the property in question for $4,166.66, and it would hardly be contended that the appellant was bound to pay the full price of $15,000 without having this hypothec discharged. Of course, it was not expected that the property would be free of the charges, reserves and obligations in favour of the intervenant which were recognised and admitted to exist as stated in the paragraph of the draft deed immediately preceding the paragraph respecting the production of a registrar's certificate. None of these objections are matters of substance which affect the validity of the deed or increase the defendant's obligations thereunder.

I would dismiss the defendant's appeal with costs and would modify the judgment of the Superior Court upon the principal action and maintain the conclusion of the declaration against the defendant and condemn the latter to sign the draft notarial deed of sale herein produced with the modifications as to civil status and area above referred to, and that failing so to do within a delay of fifteen days from the judgment to be rendered herein, that such judgment avail in lieu thereof *à toutes fins que de droit*.

TELLIER, J.:—(The Judge holds, in the first place, that it was not agreed that the sale should only take place if the elder Chaput renounced his rights, and that there was no proof of fraud and that the respondent was the owner of the property and had the right to sell it).

I have already said enough to shew that in my opinion the defendant is irrevocably bound by the said writing. He cannot therefore avoid the obligation to give the plaintiff a title based on that writing. That is the rule of art. 1476, C.C. Que. It is also in conformity with the agreement. It was well understood, in fact, that a notarial deed of sale should follow the said writing. That follows clearly from

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the evidence of the defendant and the writing itself.

Is the defendant bound to sign the deed of sale prepared by the plaintiff? Is it true that that deed is not in conformity with the writing? I think the defendant is right on this point. The draft notarial deed differs substantially from the private writing which sets out the conditions of sale. I am not speaking of the form of the deed, of course, but of the conditions of sale themselves. Let us see what the difference is.

A. The promise of sale said:—"The vendor shall furnish the certificate of hypothecs concerning the property," in place of which the deed contains the following clause: "The vendor undertakes by these presents to furnish without delay a certificate from the registry office of the county of Verchères, establishing that the immovable sold belongs to him and is free from all debts, privileges and hypothecs."

It will be readily seen that that is not the same thing. By the promise of sale the defendant bound himself to furnish a certificate of hypothecs, which evidently means a certificate showing the privileges and hypothecs with which the property might be incumbered; whereas the deed which it is sought to force the defendant to sign would not only oblige him to do that but also to show by the certificate: (a) that the land belonged to him; (b) that it was free from all debts, privileges and hypothecs.

(a) It is not always easy to show one's right of property in a certificate from the registry office. That would involve extensive searches in the first place, and would also mean that all the titles must be regular and all the registrations properly made. And then, where must the search begin? In an old parish such as Vareenes, that might involve a great deal. The task is infinitely simpler when two persons dispute the ownership of the same property. In that case it is only necessary to compare their respective titles and choose the better of the two. The law does not oblige a vendor to establish his right of property by a registrar's certificate. Such an obligation can only result from an agreement, and in the present case the promise of sale which the defendant signed contains no such agreement. He is therefore not obliged to accept that condition. It follows that the draft deed of sale which the plaintiff signed and which he seeks to have the defendant condemned to sign, is defective.

(b) Nor did the defendant bind himself by the promise of sale to furnish a writing establishing that the land sold

was free from all debts, privileges and hypothecs. In the absence of any agreement on this subject, he is only held to legal warranty. Now there is an enormous difference between legal warranty and that which results from a clause like that which the plaintiff wishes to insert and which is generally known as a clause of free and clear. What is that difference? Legal warranty does not expose the vendor to any action unless he has sold a thing belonging to another or the purchaser has been evicted or disturbed.

The clause of free and clear, on the other hand, obliges him to remove any charge which might appear at the registry office as affecting the immovable sold, and gives the purchaser a right of action to compel him to do so, even though there might not be the least danger of disturbance or eviction. In the case of legal warranty, the vendor may exact payment of the purchase price notwithstanding any entry in the books of the registry office, provided he gives security in accordance with art. 1535 C.C. Que. Where a sale is made free and clear, the vendor cannot demand any payment until he has deposited in the registry office the last discharge or the last deed of *main levée*, even though it may refer to real rights long since extinguished, or, as sometimes happens, absolutely erroneous entries. What I have just said is hardly susceptible of discussion, I think, in view of the established nature of the jurisprudence on the subjects. Here are some of the precedents I have consulted:—

Beaudette v. *Cormier* (1890), 16 Que. L. R. 69; *G.T.R.* v. *Brewster* (1883), 6 Leg. New. 34; *Millar* v. *Gohier* (1901), 7 Rev. de Jur. 396; *Lalancette* v. *Lalancette* (1894), 6 Que. S. C. 274; *Drolet* v. *Belleau* (1884), 11 Que. L. R. 190; *Vail* v. *Baker* (1902), 6 Que. P.R. 159; *Deschamps* v. *Gould* (1897), 6 Que. K.B. 367; *Trust & Loan* v. *Quintal*, 2 D.C.A. 190; *Poirier* v. *Archambault*, 23 Que. K.B. 495; affirmed *sub-nom. Lareau* v. *Poirier*, 25 D.L.R. 266, 51 Can. S.C.R. 637.

It is easy to reach the conclusion that with the clause the plaintiff inserted in his draft deed, the defendant's position would be much less advantageous than if the deed were in conformity with the promise of sale on this point. Hence it follows that the draft deed is not acceptable.

B. The proposed deed also contains a declaration by the vendor which is not provided for in the promise of sale and which the defendant could not sign without telling an untruth. It is as follows:—"The vendor declares that he has

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not changed his civil status since acquiring the said immovable."

That is not true, because the defendant married after receiving his father's gift, and his wife is still living. This declaration is doubtless of no importance, since the marriage contract provides for a prefixed dower, and does not affect the immovable sold; but that does not render the statement less untrue.

I do not see how the defendant could be compelled to sign such a deed.

Last question: Can the Court modify the draft deed of sale prepared by the plaintiff to make it conform to the promise of sale? I do not think so. A purchaser who wishes to sue his vendor to obtain title must first discharge his own obligations relative to the execution of the deed. The reason for this is that in all bilateral contracts, neither party can force the other to discharge his obligations without discharging such of his own as are presently exigible. That is what the plaintiff pretends to have done. Having had a deed of sale prepared, he put the defendant in default to sign it. The latter refused, whence the action. It is now a question of determining if the defendant was right or wrong in refusing to sign. He is not in default if, as is the case, the deed presented with the protest and produced with the action does not faithfully reproduce his agreement. He cannot then be condemned. To modify the deed now would really amount to changing the object of the action. The plaintiff might doubtless have done so in the first instance, with the permission of the Court, on condition of paying the coats occasioned by the mistake; but it is too late to amend when an appeal has been taken.

Finally, on what authority would the Court change the projected deed of sale? There is no conclusion to that effect in any of the pleadings. To do so would be to decide *ultra petita*. Again, supposing that the Court were to order the deed to be changed, what would happen to the signature of the plaintiff? It would become worthless, of course, and the defendant would find himself in the absurd situation of being condemned to sign a deed which did not bear the plaintiff's signature and which the latter need not sign unless he wanted to. In other words, the judgment would bind the defendant, whilst the person who purported to contract with him remained free. No, that cannot be. See on this point the following authorities: *Marcoux* v. *Nolan* (1883), 9 Que. L. R. 263; *Foster* v. *Fraser* (1890), 19 Rev.

Leg. 392; *Peloquin* v. *Genser* (1898), 14 Que. S.C. 538; *Munro* v. *Dufresne* (1876), M.L.R. 4 Q.B. 176; *Charlebois* v. *Emond* (1915), 49 Que. S. C. 256; *Perrault* v. *Arcand*, (1854), 4 L. C. R. 449 *Cousineau* v. *Gagnon* (1914), 23 Que. K. B. 309; *Royal Paper Box Co.*, v. *Les Allumettes de Drummondville* (1919), 56 Que. S.C. 259; *Derome* v. *C. N. Que. R. Co.*, (1908), 10 Que. P. R. 59.

What ground had the elder Chaput for intervening in this case? I see no such ground. His interests were not threatened or even concerned. The judgment could not affect him in any way. His rights remained the same whether the sale was made or not, so long as he did not renounce them. He alleges that his gift was duly registered: so much the better. That is enough to secure his rights. Why then should he intervene? He says he does not wish the obligations stipulated in his favour in his deed of gift to be discharged by anyone but his son. Quite right, but that is precisely what is provided for both in the writing of June 16, 1919, and in the deed of sale which the action seeks to have executed. The intervention is therefore unfounded, in my opinion. Here are my conclusions regarding the whole matter: 1. I would maintain the plaintiff's appeal as regards the intervention, and would dismiss the intervention with costs of both Courts against the intervenant; and 2. I would maintain the defendant's appeal and dismiss that of the plaintiff, as well as his action, with costs of both Courts against the plaintiff.

ALLARD, J.:—Let us first study the arguments advanced by the defendant in his factum.

As regards the first, it is true that the writing of June 16 constitutes a perfect sale, but there are two reasons why the plaintiff is entitled to a notarial deed: first, because the defendant bound himself to give him one, and second, because the writing of June 16, as it has been drawn, cannot be registered, is not *en minute*, and the plaintiff must have a title capable of being registered in order to be legally put in possession of the said land, as against third parties.

Plaintiff's second argument. The draft deed submitted to the defendant for signature contains declarations and conditions which do not appear in the writing of June 16. In the first place, the defendant, when required to sign the deed, declared that he had no reason to give [for refusing?] If he had had such reasons and had declared them, it would have been easy to make all the changes necessary to make the deed conform to the terms of the writing of June 16,

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Again, in his declaration, the plaintiff asked that the defendant be condemned to sign the deed submitted to him "or any other deed conforming to the terms of the contract between the parties." It was easy for the defendant to indicate in his plea the changes he wished to have made, if he really desired to carry out the sale he had made.

But what are the conditions or declarations contained in the draft deed to which the defendant objects? The first is that in the draft it is declared that the defendant has not changed his civil status. As a matter of fact he was married since his father made the gift to him. The writing of June 16 does not mention his civil status. Furthermore, that declaration is not essential to the contract. It could be changed, and that might even be done by the judgment. I would suggest amending the clause in the draft deed which mentions the defendant's civil status so as to make it read: "The vendor declares that he has been only once married since acquiring the said immovable and that his wife is still living."

The second point is that in the deed of June 16 there is no mention of the area of the land sold and that it should be measured by French measure. We must not forget that the writing of June 16 was to be followed by a notarial deed, and is not complete as regards the description of the immovable sold. But it is quite certain that the defendant sold his "Petit Bois" property, and that the terms of the writing of June 16 leave no room for doubt that the sale was of a thing certain and determinate, without reference to what it contained. The vendor cannot demand a greater amount of land than is contained in the "Petit Bois" property, whatever may be the area stated in the contract. This second point is therefore no point at all and could not justify the respondent in refusing to sign the draft deed.

As a third proposition, the respondent maintains that he cannot be forced to sign the deed of sale in question because it involves the alienation of a thing belonging to another. This proposition seems to me to be unfounded in law. The respondent is owner of the land sold, having acquired it from his father, the intervenant. The latter reserved to himself the right of habitation in part of the house and the usufruct of an *arpent* of land. These rights are personal to the respondent and will be extinguished at his death. Usufruct, says art. 443 C.C., is the right of enjoying things of which another has the ownership, and the right of habitation is the right to enjoy a thing belonging to another.

art. 487. The respondent is therefore owner of all the land and buildings which he sold to the appellant. The intervenant reserved to himself the usufruct of an arpent of land and the right to inhabit part of the house; and in the draft deed submitted to the respondent for signature and which the appellant himself has signed, the respondent sells only what belongs to him, that is to say the land and buildings subject to the charges, reservations and obligations in favour of the intervenant.

It is true that a clause was inserted in the draft deed whereby it is stated that the vendor declares that he holds the land sold under a deed of gift from his father and that there are charges reservations and obligations which the vendor assumes personally, adding that if the appellant is called upon to discharge them or any of them, the respondent must indemnify him.

In my opinion, all the rights of the respondent's father are reserved by this clause; but even if they were not so reserved in the draft deed the respondent could not invoke that ground in support of his defence.

The sale is perfect as between him and the appellant. The respondent sold his thing and must give the appellant a notarial deed evidencing the sale he made.

Finally the respondent says: In the proposed deed the appellant tried to make me furnish a Registrar's certificate establishing that my land is free from all debts, charges and hypothecs. The writing of June 16 lays upon the respondent the obligation to furnish a certificate of hypothecs affecting the property in question. The respondent says to the appellant:—You knew that my father had a hypothec for $4,166.66, you could not therefore require a certificate establishing that my land was free and clear of all hypothecs. The proposed deed submitted to the respondent for signature contains a clause whereby the plaintiff acknowledges that the immovable sold him by the respondent was hypothecarily affected in favour of the intervenant for the fulfilment of certain charges, reservations and obligations. The appellant further knew from the respondent that the intervenant had an hypothec on the said immovable for $4,166.66 and there is no doubt that what he wished to require and what he did require was a certificate establishing that the property really belonged to the respondent, according to the chain of titles registered in the registry office and how it was affected and incumbered. And again, if the respondent had considered the insertion of this clause

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to be contrary to the agreement between himself and the plaintiff, he should have said as much to the notary who protested him and who presented the proposed deed to him. Finally, these reasons failed in the Superior Court, and the Judge who rendered the judgment *a quo* appears to have disposed of them as I have done; but while holding that the defendant is bound by the agreement of June 16, the Superior Court refused to give it effect, at least for the time being.

The defendant acquired the said immovable from his father by deed of gift dated June 4, 1911. In that deed the intervenant reserved to himself: 1. The usufruct of the South-West side of the house erected on the said immovable. 2. The right to have it divided into two dwellings; 3. To have it rebuilt in case of fire or demolition; 4. To have it repaired at the expense of the donee; 5. The usufruct during his lifetime of an *arpent* of land, to be chosen by himself, in the said immovable. And the donee charged himself with the payment of the taxes and other assessments.

The donor reserved to himself also the right to keep a horse and carriage and a cow and to put these animals to graze on the said immovable; and the donee was obliged to keep them during the winter at his own expense. The donor also reserved the right to go wherever he liked in the said house and, finally, he charged his son, the defendant, so long as he, the donor, should remain in occupation of the part of the house he had reserved, with the obligation to harness his horse for him on demand, to "faire son train," to drive him wherever he might wish to go, to fetch the priest and the doctor for him, to harness and unharness the horses of friends and relations who came to visit him and to lodge and feed such horses. These reservations thus made by the intervenant and the obligations he imposed upon the defendant do not constitute a prohibition to alienate. Therefore the defendant was owner of the said land and had the right to sell it. He only sold what belonged to him. The intervenant's rights were explained to the plaintiff and were reserved both in the writing of June 16 and in the proposed deed. In this writing of June 16, the defendant undertook to carry out himself his obligations towards his father in the event of the latter refusing to free the land, the defendant obliging himself towards the plaintiff to indemnify the latter in case he should perform any of these obligations. And in the proposed deed submitted

to the defendant for signature, the same clause is repeated in the same sense. So the defendant, in selling to the plaintiff, did not transfer to the latter the obligations he had assumed towards his father. In fact none of these obligations is of such a nature that it could not be performed by a third party, or of such a nature as to give the donor an interest in having it performed by the debtor himself.

The proof also shows that the intervenant virtually consented to the sale by his son and declared himself satisfied.

For these reasons I would reverse the Superior Court judgment on the principal action, maintain the conclusions of the plaintiff's action, maintain his appeal, dismiss the cross-appeal of the defendant-respondent and condemn the latter to sign the proposed deed of sale produced in the record, after changing it as indicated above in respect of the clause relating to the defendant-respondent's civil status, within 15 days from service of the judgment of this Court, and in default by the defendant-respondent to do so, that the said judgment should avail in lieu of a contract between the parties.

It remains for me to study the question, on the plaintiff's appeal, of the judgment maintaining the intervention.

I am of opinion that the intervention was useless. The rights of the intervenant are recognised and respected in the deed of sale. The defendant had the right to sell the property which the intervenant had given him. If the intervenant had been content to intervene in the case for the protection of his rights and interests, without asking for the dismissal of the plaintiff's action, I would understand his intervention up to a certain point, although I would not be disposed to consider it necessary in the circumstances. But he did more than that. He asked that the plaintiff's action be dismissed because he had certain rights affecting the immovable by virtue of his gift. The intervenant can no more prevent the voluntary sale by his son than he could prevent a sale by authority of justice. All he could ask in the latter case would be that the sale by the sheriff should be made subject to the assumption by the purchaser of the obligations assumed by the donee or imposed upon him. He cannot do more when the sale is voluntary. Since all his rights were reserved in the deed of sale to which the defendant consented, he should not have intervened in the present case, and above all, he could not ask in his intervention for the dismissal of the plaintiff's action.

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For these reasons I would reverse the judgment on the intervention, maintain the contestation of the plaintiff-appellant, dismiss the intervention and maintain the appeal of the plaintiff-appellant, with costs against the intervenant.

Judgment:—Adjudicating upon the intervention and the contestation thereof:—

Considering that the deed of donation did not contain any stipulation that it could be revoked by reason of the non-fulfillment of the charges and obligations undertaken by the donee and it did not contain any prohibition to alienate or other resolutive condition; that the draft deed of sale contains a sufficient recognition of the rights of the intervenant and the said intervention does not serve any useful purpose and is unnecessary, and in so far as it prays for the dismissal of the plaintiff's action, is unfounded; that there is error in the judgment of the Superior Court by which the plaintiff's contestation of such intervention was dismissed and the intervention was maintained and the plaintiff's action dismissed.

This Court doth annul and set aside the said judgment, and proceeding to render the judgment which the said Superior Court ought to have rendered, doth maintain the plaintiff's contestation of the said intervention, and doth dismiss the said intervention and doth condemn the intervenant to pay plaintiff the costs of such contestation in the Superior Court and the costs upon that issue before this Court; adjudicating upon the issue raised between the plaintiff and the defendant:—Considering that the defendant signed the agreement of June 16, 1919, *en pleine connaissance de cause* and is bound thereby; that the defendant is bound to sign and execute a notarial deed of sale of the said immovable property in conformity with the agreement of June 16, 1919; that the objections made by defendant: (a) that his marital status is not correctly stated; (b) that the draft deed of sale contains a declaration of the superficial area of the farm; and (c) that the Registrar's certificate which he is required to produce is of a different character from that which he agreed to furnish according to the terms of the agreement of June 16, 1919; are not sufficient grounds to support the defendant's refusal to sign said draft deed of sale, and it is ordered that the draft deed as to *etat civil* be amended by striking out the following words after "declare" that he has not changed his civil status since he acquired the said immovable, and replacing the same by

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"that he had married only since he had acquired the said immovable and that his wife still lived," and that the words "containing about 166 acres in area" in the designation be erased and that the words "establishing that the property sold belonged to him and was free from all debts, immunities and mortgages" in the paragraph at the end of such deed respecting the Registrar's certificate be erased and replaced by the words: "concernant la propriété," and that the plaintiff do sign or initial such changes in the said draft deed; considering that there is error in the judgment of the Superior Court by which the plaintiff's action was dismissed; This Court doth reverse and set aside the said judgment of the Superior Court herein rendered on September 1, 1920, and proceeding to render the judgment which the said Superior Court ought to have rendered, doth maintain the plaintiff's action, and doth condemn and order the defendant to sign and execute the draft notarial deed of sale herein produced after the modifications as to civil status, area of property and Registrar's certificate above referred to have been made, within a delay of 15 days from the service upon defendant of the judgment herein rendered and in default on the part of the defendant so to do within such delay, that the present judgment avail in lieu thereof as the contract between the parties and as plaintiff's title *à toutes fins que de droit*, and that the registration of such draft deed of sale as herein ordered amended and of a copy of the present judgment both certified by the prothonotary, shall avail as registration of such draft deed of sale as herein ordered amended and of a copy of the present judgment both certified by the prothonotary, shall avail as registration of plaintiff's title, and doth dismiss the counter appeal herein made by the defendant with costs, and doth condemn the defendant to pay plaintiff his costs in the Superior Court and in appeal before this Court.

FLYNN and TELLIER, JJ. (dissenting) would dismiss the appeal. *Appeal allowed.*

AUSTIN v. McCASKILL.

New Brunswick Supreme Court, Appeal Division, White, Crocket and Grimmer, JJ. June 8, 1922.

TRUSTS (§ID—20)—CONVEYANCE TO PASTOR—UNDUE INFLUENCE—CONFIDENTIAL RELATIONSHIP—ACCOUNTING.

A pastor acting as spiritual advisor to a member of his congregation, whom he had received at his home to be cared for as a member of his family, stands in confidential and fiduciary relationship to such person as carries the presumption of undue influence to stamp the transfer of the latter's property to him as void, in the absence of evidence shewing that the transferor acted upon competent independent advice; such relationship, because of

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the family kinship and spiritual influence, continues even after the retirement of the pastor from the pastorate, and the transfer cannot be validated by the acquiescence or ratification on the part of the transferor subsequent to the removal of the clerical presence. The grantee under such conveyance is accountable to the estate of such grantor for the property thus conveyed and for the proceeds of mortgages placed by him thereon.

APPEAL by plaintiffs from judgment and decree of Hazen, C.J., in the Chancery Division. Reversed.

W. R. Scott and *F. R. Taylor*, K.C., for appellant.

G. H. V. Belyea, K.C., for respondent.

The judgment of the Court was delivered by

CROCKET, J.:—This action was originally brought in the Chancery Division by Catherine Austin, a sister, and six others of the next of kin of Alexandrina Clark, deceased, a widow, who died at St. John intestate and without issue on March 1, 1920, for a declaration that six leasehold properties, which Mrs. Clark had transferred to the defendant John J. McCaskill in the year 1912, and a freehold property which he had acquired in the year 1910, were held by him in trust for the said Alexandrina Clark deceased, and that goods and chattels, of which the two defendants had taken possession, were the property and estate of the intestate, and for an account of the said property or the proceeds thereof together with the rents and profits received therefrom, and for the administration of all the goods and effects of the intestate and the appointment of an administrator, and a decree vesting all properties held by the defendant John J. McCaskill in the administrator to be appointed. W. B. Wallace was afterwards appointed administrator by the Probate Court and added as a party plaintiff to the action.

The six leasehold properties mentioned in the statement of claim were three-story tenement houses situate on Adelaide St. in the city of St. John, and were acquired by Mrs. Clark as sole legatee under the last will and testament of her deceased husband, Robert Clark, who died in 1907. Mrs. Clark lived after her husband's death in a flat in one of these houses and the others were occupied from time to time by different tenants and yielded her, it appears, a gross rental of from $1,800 to $2,160 a year.

After Mrs. Clark transferred these leasehold properties to McCaskill the latter mortgaged one of them to the amount of $1,500 by a mortgage deed dated April 22, 1913, and another of them to the amount of $1,000 by a mortgage deed dated August 23, 1913, and the statement of claim alleges that the proceeds of both these mortgages were appropriated

by McCaskill to his own use.

The freehold property acquired by McCaskill in December, 1910, was situate on Alexandra St., and was purchased from the Fenton Land and Building Co. at a price of $4,400 or $4,500, according to his evidence, of which he paid $400 or $500 or $600—he was not sure which—out of monies which he had at the time, while the balance was covered by a first mortgage of $2,500 to the Robertson estate and a second mortgage for the difference—the return does not show the precise amount, although the statement of claim states it at $1,500—to the Fenton Co. payable in quarterly instalments of $75. This equity of redemption in this property McCaskill sold in December, 1919, or January, 1920, for a price, which the return does not show, though one witness, Brown, who had an option on the property, said he asked him $7,000 for it. It was sold after he had paid off the second morgtage to the Fenton Co.

The personal property claimed included a piano, sideboard, divan, sewing machine, a table, a bedroom set, a number of chickens, an interim receipt for $70 paid on account of a $100 Victory Bond, and a cash balance drawn from the Bank of Nova Scotia, North End Branch, by McCaskill on the day of Mrs. Clark's death from a joint account in the name of Mrs. Clark and Mrs. McCaskill.

The action was tried before Hazen, C.J.N.B.

The transfers of the leasehold properties were impeached upon two principal grounds, 1st, that they were obtained by undue influence, 2nd that they were void as being an attempt at a testamentary disposition, and it was contended also that under the evidence of both defendants that, if they were not invalid, they constituted the transferee the trustee of Mrs. Clark until the time of her death and as such liable to account for all his dealings with the property.

As to the Alexandra St. freehold property it was claimed that this was acquired by McCaskill as agent and trustee of Mrs. Clark.

Regarding the personal property alleged to have been converted, the defendants claimed that some of the chattels named were their own property and had never been Mrs. Clark's; and that the piano, sideboard, 6 walnut chairs, the mahogany table, the divan and other articles of furniture, which had been her property, had been given either to one or other of them by Mrs. Clark in her lifetime. They also claimed the interim Victory Bond receipt and the joint account balance as gifts from Mrs. Clark, Mrs. McCaskill

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declaring that Mrs. Clark had told her some months before her death that she had subscribed for a $100 Victory Bond as a surprise for her husband and that whatever money was left in the joint account at her death was to be hers, Mrs. McCaskill's.

The Chief Justice found all the issues against the plaintiffs except those regarding the Victory Bond and the balance of the joint bank account. As to the rest of the personal property claimed, he found that some of it belonged to the defendants or to one or other of them and had never been the property of Mrs. Clark, and that neither of them took any articles which did not either belong to themselves or had not been presented to one or other of them by Mrs. Clark in her lifetime. He particularly mentioned the piano as having been presented to Mrs. McCaskill.

With reference to the Alexandra St. freehold property the trial Judge stated that he had been unable to find from the evidence any substantiation for the assertion that that property was the property of Mrs. Clark and was held by Mrs. McCaskill in trust.

Upon the question of the transfers of the leasehold properties he found that there was absolutely nothing to support the claim of undue influence outside of the fact that Mrs. Clark was a communicant and an attendant at St. Matthew's Presbyterian Church, of which Mr. McCaskill was the pastor, and that she was not forced, tricked or misled in any way, and that if there was a presumption of undue influence because of the relationship of pastor and member of a congregation between the parties, that that presumption was rebutted by the evidence of Mr. and Mrs. McCaskill and other witnesses and by all the circumstances surrounding the case and that Mrs. Clark herself, far from being unduly influenced, was the influential and dominating factor in the transaction. He also found that after the influence, if there was an influence, of McCaskill's clerical presence was removed, Mrs. Clark acquiesced in the arrangement that had been made, approved of it and confirmed it, and for that reason also refused to make the order requested by the plaintiffs.

Upon the question of McCaskill's to account for the proceeds of the two mortgages placed on two of the leasehold properties in the spring and autumn of 1913 His Honour accepted McCaskill's statement that all this money was spent in repairs and in connection with those properties, though he had practically no bills or vouchers and was un-

able to account in detail for anything like the whole amount.

From this judgment of the Chief Justice, the plaintiffs have appealed.

Dealing first with the most important branch of the case—the transfers of the leasehold properties—it will be observed that the Chief Justice did not expressly find that there was or that there was not such a fiduciary or confidential relation between the transferor and the transferee as carried the presumption of undue influence, but found that if there was such a presumption, that presumption was rebutted by the evidence of Mr. and Mrs. McCaskill and other witnesses. I think that the evidence of Mr. and Mrs. McCaskill shows that such a confidential relation did exist. Mc. Caskill was not only Mrs. Clark's pastor and spiritual advisor, but she was an inmate of his household, received by him into his home, according to his own testimony, as a member of his family. Whether this was simply in consequence of her desire to live in his home because he was a minister and she had not been used to a minister's home for a large part of her life—a desire which, according to Mc. Caskill's testimony, she expressed to him—or whether it was because of his interest in her physical as well as her spiritual welfare and of his opinion that if she had a home with him and his wife she would have a better physical condition, as he swore, or for both reasons combined, the relations between them, even before she became a member of his family, were apparently of the closest confidential character. That Mrs. Clark not only reposed the most implicit confidence in McCaskill but that she relied upon him for guidance in the management of her business affairs is plainly evidenced by the latter's own testimony.

When first asked by his own counsel as to what took place between them regarding the transfer of these properties, he said she used to speak of her properties and when she came down to live with them the city collector used to call every now and then for water rates and city taxes, and she got talking to him about her affairs and telling him the difficulty she was having in carrying on,—in the discharging of bills—and urging him to take over her property "and work it and assist her with it." That was the primary reason influencing her to propose transferring all the property on which she depended entirely for her income and subsistance, as first given by McCaskill himself, and, although the transfers, when they were, subsequently, made, pur-

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ported on their face to be absolute unconditional transfers, they in reality, according to McCaskill's own testimony, created him a trustee of the property for Mrs. Clark's benefit during the remainder of her life.

Whatever may have been the motive which prompted her in desiring to have McCaskill "work" the property "and assist her with it"—whether to avoid embarassment in the collection of rents from tenants with whom she had got very intimate, or to "introduce a more business system" in the management of the property, or to obtain the advantage of his superior ability to "look after the repairs in a large way," all of which considerations, according to him, she spoke of in connection with her proposal to transfer the property to him, or whether it was simply that she "would work with better enthusiasm in trying to remove the debt on the property" if he would agree to let her transfer the property to his name, or that she wanted to do away with any possibility of difficulty with her deceased husband's relatives after her death, and whatever may have been his motive in agreeing to take it—whether "only because Mrs. Clark was happy and contented and had a home," or otherwise—it was beyond question the intention of both, according to McCaskill's own statement, that Mrs. Clark should continue to rent and re-rent the property and collect the rents as long as she lived, and that he should acquire no beneficial interest until her death.

"Yes," was his answer to the question: "You agreed on this arrangement—the title to be vested in you as you say—she to collect the rents and the property to be entirely yours after her death?" Q: "And she was to live with you?" A: "She was to live with us in our house."

Mrs. Clark had been making her home with Mr. and Mrs. McCaskill for nearly 2 years before the transfers were made, and according to his evidence, he had told her, when she proposed the transfer of the property to him so that he might "work it and assist her with it," that she had a home with them as long as they had a home, apart from the question of her property at all.

I find it very difficult to see how Mrs. Clark was to be in any way benefited by irrevocably transferring, when she did, all the property upon which she wholly depended for her subsistence, to McCaskill under such an arrangement as he deposed to, McCaskill himself suggested that she "received a large benefit from the transfer in happiness and content," and I confess that I can find no other possible

advantage which could have accrued to her from it in her lifetime.

If her expectation was that it would result in the removal of the debt against the property, as suggested, though there seems to have been no debt whatever against the property at the time of the transfers, apart possibly from taxes and water rates and some small bills for repairs, it found its only realisation in the execution of a $1,500 mortgage on one of the properties within 6 months and of a second one for $1,000 on another of them 4 months later, all presumably for the purpose of making repairs, though there can be no doubt from his evidence that immediately or very shortly after he deposited the proceeds of the first mortgage of $1,500 to the credit of his private bank account he made a cheque for $1,750 to cover his own and his father-in-law's shares in the purchase of the Seaview Syndicate property, in which they were speculating, and that when he deposited the proceeds of the second mortgage to the credit of the same bank account, it was overdrawn to the extent of over $500. If her hope was that it would bring about "the introduction of a more business system" in the management of the property, that hope was deemed to rest in the consciousness of the admitted fact that the proceeds of these two mortgages were deposited to the credit of her confidante's private bank account, which he opened in September, 1912, shortly before the first leasehold transfers went through and which was closed out in August, 1916, when he was overseas, with a balance of $177 lying to his credit, and which covered from time to time not only monies in which he was alone privately interested, but monies of an Archaeological Society which he said he and Dr. Quigley were running, as well as a number of accommodation note discounts, including 3 or 4 notes, admitted by him to have been endorsed by Mrs. Clark for his accommodation, one of them for $400, besides rents received and deposited by Mrs. Clark and against which account he drew indiscriminate cheques for purpose of his own and for trust purposes alike, and in the consciousness of the further admitted fact that he kept no account of the running expenses and had no bills or accounts covering disbursements made on Mrs. Clark's properties and no vouchers of any kind beyond his bank pass-book, which he could not locate, and a bundle of cancelled cheques, which covered only part of the debit items. It may be, though, I should not have looked for it in the case of an ordinary woman of intelligence and propriety that such results pro-

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duced a large benefit to Mrs. Clark in the form of happiness and content, as suggested by McCaskill, who described her at different times in the course of his testimony as "very innocent," as "careless" and "indifferent to her own physical welfare," and as a "masculine woman" and "strong willed"; and it may be also, if one has no regard for pecuniary considerations, that the most valued benefit, which Mr. and Mrs. McCaskill upon their part received, lay in their "having her in the house," as suggested by him. "Whether that woman had property or not, she was the finest type of household servant, of a faithful person, and she was very useful to us in the house," he said, but whatever the motive of either might have been, the admitted facts establish, I think, beyond all doubt, such a fiduciary relation between Mr. McCaskill and Mrs. Clark, as stamps the transfer to him by her of all her income-earning property as presumptively void.

When such a confidential relation is established between the transferor and the transferee of any substantial or material part of the transferor's property I am of the opinion, with the utmost deference to the contrary view of the Chief Justice, that the presumption of undue influence which arises from such a relationship cannot, under the authorities, be rebutted by any evidence which fails to shew that the transferor acted upon competent and independent advice. In *Liles* v. *Terry*, [1895] 2 Q.B. 679, in a case where the client of a solicitor, without independent advice, made a voluntary conveyance to him of leasehold premises in trust for herself for life and after her death in trust for his wife, who was the donor's niece, for her separate use absolutely, it was distinctly held by the Court of Appeal (Lord Esher, M.R., and Lopes, and Kay, L.JJ.) that there was a positive rule of equity that while a person is under the influence or presumed influence of another person in consequence of a confidential relation between them, a voluntary conveyance of property to that other person is void in the absence of proof that the donor had competent and independent advice in making it. Notwithstanding that the trial Judge, Charles, J., found in that case that the difference between an irrecovable deed and a will, which might be revoked, was fairly and fully explained by the solicitor to the donor before she executed the deed, so that she did precisely what she intended to do, and that no undue influence whatever was exercised over her, the transfer of the leasehold premises, which was there impeached, was declared void upon

the ground that it was not shewn to have been made upon competent independent advice. That rule appeared to Lord Esher, M.R., to have been so firmly established that, notwithstanding that he thought it unfortunate that such a rule should have been laid down because, in particular instances, it might work great injustice, he felt he must submit to it. Lopes, L.J., who came to the same conclusion, differed from the comment of the Master of the Rolls upon the question of the rule being an unfortunate one. "It appears to me," he said, at p. 684, "to be a hard and fast rule which is founded on public policy. In exceptional cases, it may possibly work hardship; but in the generality of cases, it is, in my opinion, highly beneficial, and I should regret to see it altered." Kay, L.J., concurred in the view of Lopes, L.J. This rule was recognised also in *Wright* v. *Carter*, [1903] 1 Ch.D. 27, where a deed of bargain and sale, whereby the whole of the plaintiff's property was conveyed to trustees to be held in trust for two of his children and for his solicitor, whom he expressed a wish to benefit for services rendered but not paid for, in consideration of a covenant by them to pay the plaintiff a certain annuity during his life, was held void as being a transaction of bargain and sale entered into by the plaintiff without having been properly advised as to the sufficiency of the consideration and without the advice of an independent solicitor fully cognizant of the facts. See judgment of Stirling and Cozens-Hardy, L.JJ. In 15 Hals. p. 103, sec. 204, the rule is stated in the following terms:—"It is a general principle of equity that persons standing in a confidential relation towards others cannot entitle themselves to hold benefits which those others have conferred upon them unless they can shew to the satisfaction of the Court that the persons by whom the benefits have been conferred had competent and independent advice in conferring them. In cases where a confidential relation is shown to exist, the Court is concerned to see that the grantor was in a position to form an entirely free and unfettered judgment independent of any sort of control. The party seeking relief has not to prove that actual fraud or coercion or even direct persuasion was employed; he has but to prove the existence of the confidential relation, and then the onus falls upon the party seeking to uphold the conveyance of proving that the power conferred by the relation was not abused. To discharge that onus it must be shewn, not merely that the grantor was aware of the effect of his action, but that he had independent advice and at the

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time of making the grant was removed from the influence of the party in whose interest the grant was made." This I take to be an accurate summary of the law upon this subject as it is to be gathered from the various cases dealing not only with the relation of solicitor and client, but with all classes of confidential relations (see *Huguenin* v. *Baseley* (1807), 1 White & Tud. L. C. (8th ed.), 259; *Allcard* v. *Skinner* (1887), 36 Ch. D. 145; *Rhodes* v. *Bate* (1865), L. R. 1 Ch. 252; *Mitchell* v. *Homfray* (1881) 8 Q.B.D. 587), and I can conceive of no case which better exemplifies the wisdom of the rule than the present one, for it seems to me that with the existence of such a confidential relation as that above indicated, proof that the grantor acted upon wholly disinterested and independent advice is the only possible means of rebutting the presumption that in making the transfers she was acting entirely under the subtle influence of that relationship.

It is not pretended in this case that Mrs. Clark had any independent advice. Dr. Campbell was consulted by Mr. and Mrs. McCaskill and Mrs. Clark to see how the transfers could most conveniently be made and employed to make them. He was called as a witness, and when asked for whom he was acting in making the transfers, replied that he presumed he was acting for both of them. To the question: "Was anything said by Mrs. Clark or Mr. McCaskill during the course of the execution of these documents with reference to the purpose for which they were being executed?" he replied, "Nothing whatever." When asked whether he knew whether the transfer was gratuitous or for a consideration, he answered that he didn't know anything about that—"they didn't tell me and I didn't ask them." Mrs. McCaskill was asked if she could recall what Mrs. Clark said to Dr. Campbell about the properties when she was present, and replied that she said "I want you to make them secure so that the McCaskills will have no trouble with them when I am through with them." The fact, however, that the transfers were put through as absolute transfers to take effect at once, whereas the intention was, as plainly appears from the evidence of both Mr. and Mrs. McCaskill, that Mrs. Clark was to have control of the rents during her lifetime, itself shews that Dr. Campbell could not have been fully advised of the terms of the arrangement, and, even if he had been, and had advised the transfers in the form in which they were executed, his advice clearly could not be considered independent advice, in view of the

circumstances under which Mrs. Clark went to his office, accompanied by both Mr. and Mrs. McCaskill, as detailed by them, and the fact that he rendered his account to Mr. McCaskill and that the latter paid him for his services. The only explanation vouchsafed by Mr. and Mrs. McCaskill of Mrs. Clark going to Dr. Campbell, was that when she asked who she could go to, and he replied that he didn't know—that he had no lawyers—(though Dr. Campbell had, in fact, previously acted for him in at least one matter)—she suggested Dr. Campbell, "because she said it was a good Scottish name," but whether it was Mr. McCaskill or Mrs. Clark, who suggested Dr. Campbell, makes no material difference in view of the facts already stated. Mrs. Clark clearly was not removed at the time from the influence of Mr. McCaskill and was not acting upon independent advice in making the transfers.

I am of opinion, therefore, that, notwithstanding the Chief Justice's finding that if there was a presumption of undue influence that presumption was rebutted by the evidence of Mr. and Mrs. McCaskill and by all the surrounding facts and circumstances, that the transfers were void for want of proof that Mrs. Clark in making them was acting upon competent and independent advice and free from the influence of the relation existing between herself and the McCaskills. The necessity of the fullest disclosure and the most thoroughgoing legal advice to a proper appreciation of the effect and possible consequences of an unconditional, irrevocable transfer of one's property under such an arrangement as that described by the defendants, irrespective of any question of confidential relationship or undue influence, is well illustrated by *Phillipson* v. *Kerry* (1863), 32 Beav. 628, 55 E.R. 247.

I regret that I also find myself unable to agree with the opinion of the Chief Justice that the conveyances were validated by acquiescence and confirmation upon the part of Mrs. Clark after the influence of McCaskill's clerical presence was removed. It was not only McCaskill's position as pastor of St. Matthew's Church which created the confidential relation between him and Mrs. Clark and raised the presumption of undue influence, but the fact, as well, of his having received her into his home as a member of his family and of the tender regard, which he developed, not only for her spiritual welfare as well, and indeed for all her affairs, which won for him such ascendancy in Mrs. Clark's affections, as to cause her to transfer practically everything of

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value which she owned, to either himself or his wife. That relation did not, by any means, cease, in my judgment, when he gave up the pastorate of his Church in St. John and went to Montreal to join the Highland Battalion in 1915 or when he went overseas in 1916. He sought Mrs. Clark's consent and approval even for this purpose, while his wife remained on this side of the ocean only out of consideration for Mrs. Clark's wishes, according to their statement, and if the relation of pastor and parishioner terminated with his departure, the influence of his position as her spiritual advisor and of his treatment of her as a member of his family still obtained, and he was still, in fact, during the whole period of his absence, and up to the time of her death, a trustee of all her revenue-earning property, and according to his own evidence, he had, before going overseas, added to this relation still another—that of Mrs. Clark acting during his absence as his agent, not only in connection with the renting and management of the Alexandra St. property, but as his agent in his capacity as her own trustee in connection with the leasehold properties, "and a good agent she was," he incidentally testified. The method, which seems to have been adopted for the operation of this peculiar agency, is explained by Mrs. McCaskill. The bills for the ground rent and the insurance would come to her from the different lessors to Fort Kent in the State of Maine, her former home, where she went to reside during her husband's absence. She got no bills for taxes, but made it a point to pay all the insurance out of her own allowance by cheque, she presumed on the Fort Kent Trust Co., though she really could not recall, and for the bills for the ground rent she would write out a cheque on the Bank of Nova Scotia, North End, St. John, enclose that cheque addressed to the company to whom the money was due, mail that envelope with the enclosures to Mrs. Clark and usually write her and tell her that it would be as well to cover this as soon as she could because they were due.

Q: That is to say, the cheque would be drawn on your and your husband's joint account in the North End? A: And she would cover the amount of the cheque—she always did—she would go in and deposit the amount. Q: That was the general course of meeting these expenses? A: Yes. Q: And you have no recollection of anything about the taxes? A: No.

And this course of business continued right up to the time of McCaskill's return, and indeed until the time of

Mrs. Clark's death, according to Mrs. McCaskill, for her husband was busy.

Not only did this peculiar relationship continue between them, but that the influence of their former relationship still obtained after McCaskill's departure is shewn by the fact that upon the occasion of Mrs. McCaskill's visit to Mrs. Clark on her way through to Halifax to meet her husband on his return from overseas in November, 1919, of which intended visit Mrs. McCaskill advised her by telegram, Mrs. Clark informed her that she had fainted when she got her telegram, because apparently the word "Halifax" suggested the possibility of McCaskill having been killed or wounded and that upon that occasion, notwithstanding that she herself had been regularly depositing money in a joint account of Mr. and Mrs. McCaskills which she could reach only through cheques signed by either one or other of them, she sought Mrs. McCaskill's permission to add her name to her own little savings bank account so that she might have the right to draw upon this account as well, and informed her at the time of the $100 Victory Bond upon which she was making payments as a "surprise to the boy" McCaskill. It is quite evident that at that time she still regarded Mr. and Mrs. McCaskill in the same light as when she proposed to transfer her leasehold properties to them, when Mrs. McCaskill swore that she said to them, "You are the dearest people in the world," and that she was still labouring under the spell of their influence, notwithstanding the fact that McCaskill had written her but one or two letters during his absence overseas, though he said he kept in touch with her all the time through his wife. As for McCaskill himself, we find him, according to his own statement, when he called for her after his return from overseas, and when he says he found her aged, and he was much concerned about her health, assuming to take charge of her by insisting "that she hire Mrs. Connor, one of her tenants, or give Mrs. Connor one of her flats and pay her some money to live with her and look after her," and informing her that failing that, he would send her to his mother in Cape Breton to look after until they got settled in Montreal and that he would be back tomorrow and that she must do as he said. This was the time, he explained, that he probably shook his hand at her, of which the witness, Mrs. Logan, had told. Mrs. Clark, he said, promised him that "she would get Mrs. Connor with her and she did not get better after that time."

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The whole evidence, I think, shews not only that there was no severence of the confidential relation between McCaskill and Mrs. Clark, but that the influence of the former continued unimpaired during his absence overseas, so that she was quite as incapable of exercising her own free, unfettered judgment, apart altogether from that influence, in approving and confirming the transfers as she was in making them in the first place.

With regard to the mortgages which McCaskill effected on two of the leasehold properties, it follows from what I have already said that McCaskill is liable to account to the administrator of Mrs. Clark's estate for their proceeds. The history of these mortgages, as detailed by McCaskill, is interesting and illuminating. There was, he said, no talk about mortgaging any of the property before the transfers. One of the reasons for the transfer was, he explained, "to avoid, not to make a mortgage." Notwithstanding this, the necessity of making a mortgage appears to have arisen very soon after the transfers were made. "No repairs—not much repairs," he said, "were undertaken that winter," but when the spring opened he looked over the property, and she spoke of the need of doing a lot of plumber's work. A shed was found to be in need of tearing down and rebuilt and a new roof put on. She was also changing another barn—there were a great number of repairs to make that summer. "We began talking about the question of a mortgage." They discussed the subject very fully. "She said she thought $1,000 would be sufficient for the present repairs at that time. I said also that I thought it would be. That $1,000 would set us up and get us so we could get a fair start." This came about the decision to make the first mortgage. McCaskill went to Dr. Campbell's office to arrange for a mortgage loan of $1,000. The latter informed him during their interview that he had $1,500 that had come in a few days before that, and that he could give him $1,500 for investment at 5 or 6%. McCaskill went back and reported this information to Mrs. Clark. "I thought the rate was fair and the opportunity good," he said. "The mortgage would not cost much more for the larger sum than for the smaller sum and she said, "You better get the $1,500." He did so and gave the mortgage. It must, I think, be taken to have been effected by him for the purpose of making the repairs spoken of, notwithstanding that it was $500 more than the amount both considered necessary for that purpose. The mortgage was executed April 22, 1913,

and the same day it was shewn by the production of the bank records. McCaskill deposited $1,982.50 to the credit of his account with the Bank of Nova Scotia, North End. When this fact was brought to his attention he said the amount included proceeds of the mortgage and items added by himself. His cheque for $1,750, already referred to, followed 4 days later to provide for his own $1,250 and his father-in-law's $500 in the Seaview Syndicate speculation.

McCaskill was not so clear in his explanation of the decision to make a second mortgage on another of the properties 4 months later. When asked by his counsel if he recalled anything about that he said: "We still as far as I recollect, although my recollection is not so clear on that second one. We still found a good number of bills outstanding and didn't have the properties in the condition in which we hoped to keep them—property values were going up in St. John."

(Mr. Taylor—if the witness will only say what he did.)

"Q: Was anything said between you and Mrs. Clark about property values advancing? A: Yes, that it would pay us to go forward with our improvements. That is the reason we got the new mortgage. Q: Was the making of this second loan discussed between you and Mrs. Clark? A: It was. Q: She knew of it? A: Knew of it and agreed to it and I think was the first to suggest it because she was much more interested even than I was. She was very active."

Mrs. McCaskill was unable to throw any additional light upon the subject of the mortgage loans, except possibly to shew a little more precisely that Mrs. Clark first conceived the happy thought of raising money by mortgage. Asked to whether she could remember at any time her husband or Mrs. Clark ever suggesting making a mortgage on the property, she replied that she could remember Mrs. Clark coming in one evening and they were discussing repairs. There were always roofs and foundations and things. Mrs. Clark said, "I will tell you, boy, why can't we raise some money on one of the buildings." She always, Mrs. McCaskill said, called them shacks.

The proceeds of the second mortgage, which seem to have been $958.50, were also deposited by McCaskill to his credit in his Bank of Nova Scotia account, which within a few days was overdrawn to the amount of $504.77, including the $958.50.

While the Chief Justice states in his judgment that he acecpted McCaskill's direct statement on oath that all the

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mortgage moneys were spent in the repairs and in connection with the properties, notwithstanding that there were withdrawals and deposits in his bank book that he could not clearly explain, and finds as a fact that all the moneys were so expended, I do not think that such a finding ought to relieve McCaskill from a full and proper accounting for funds which were clearly held by him as trust funds.

I may also say that I have been unable to find in the record any direct statement by McCaskill that all of the moneys raised on the two mortgages were spent in the repairs and in connection with the properties. He detailed the repairs which were made, the most important of which seem to have been made on the house on the corner of Victoria and Adelaide Sts. When asked if he could tell without taking up too much time how much he spent on that house, he answered: "I suppose—I don't know—we spent a very considerable amount. It was more considerable than we thought it would be—it would be a guess. I would guess between $1,100 and $1,200 and $1,300 went into that house, counting the improvements in closet arrangements and counting the work of the plumber." He could not remember who the plumber was, only that he was not Oatey. He could not remember whether he or Mrs. Clark or the plumber bought the material or how it was done. His examination proceeded:—

"Q: You were speaking of one house—did you make repairs on the other houses as well—on some of them at all events? A: We made repairs on the house in which Mrs. Clark lived. Q: Did the $1,500 mortgage—or I mean the net amount—I suppose there were some expenses paid out of it—would that be correct. A: Yes. Q: What are you prepared to say as to the use of that $1,500, that was the net amount of the loan you received—what became of it?

A: I couldn't say only in a very general way. I have the impression—I think with the first we paid taxes—some old bills with it—some outstanding bills. Q: Are you able to say whether or not all of it, or practically all of it was used in connection with those properties? A: Yes. Q: Either repairs or bills—did you disburse all the moneys or did Mrs. Clark disburse some of them? A: I disbursed some of them and Mrs. Clark disbursed some. Q: Did you work together in regard to this? A: Always—yes—with the revenue received from the house. It seems to me that we didn't keep it in a separate amount, but we spent about $1,100 that summer, in my estimate, on this one house, and paid bills

and taxes. Q: Some of it was paid out of rents? A: Yes. Q: Substantially the whole of that loan went into those properties in some shape or other? A: Yes."

As to the proceeds of the second mortgage, he was asked to tell, as far as his memory served him, of the disbursement of those moneys. He answered, "As far as I recall a part of that was spent in No. 110—the furthest out house—the one that had first been mortgaged. We got that in very good repair—one of the best houses there."

He had no bills or receipts or vouchers of any kind, and was able to give no details of the disbursement whatever until the plaintiffs produced the bank's record of his account, when he was able to identify a number of $40 cheques charged as cheques paid to a Mr. Walker who had charge of the carpenter work, and some others.

It will be observed that there is not in this evidence any direct statement that all of the mortgage moneys, or for that matter all of either of the loans, were spent in repairs or in connection with the properties, and, had he made such a statement, I still think that he should be required to account in detail for the whole of the mortgage funds, as I think also he should be required to account for all the rents of the properties, which were deposited to the credit of his account, and to pay over to the administrator any portion of the mortgage or rental moneys which he cannot prove was expended upon these properties or for Mrs. Clark's benefit during her lifetime.

With regard to the Alexandra St. property, I agree with the conclusion of the Chief Justice that there was not sufficient evidence to support the plaintiff's claim that this property was hers and that McCaskill simply held it in trust.

There is evidence, which points very clearly, I think, to the fact that much of Mrs. Clark's money went into the Alexandra St. property after it was purchased by McCaskill in the form of payments by cheque on the latter's bank account, in which the proceeds of the two mortgages on the Adelaide St. properties and rentals from these properties were deposited in common, for the purpose of paying off the instalments of the second mortgage to the Fenton Co., and for the payment of taxes and perhaps other charges upon the Alexandra St. property. The testimony of both Mr. and Mrs. McCaskill themselves establishes that a number of cheques were drawn by them on this account for these purposes. There is, furthermore, the evidence of the witness, Hilda R. Williams, and Mrs. Clark told her in the win-

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ter of 1920 that McCaskill had sold the Alexandra St. property without consulting her and that she had money in it and had a right to be told when it was sold, as well as the letter, which McCaskill wrote to Mrs. Clark from New York on December 9, 1919, containing a statement of the fixed charges against the Adelaide St. properties and the Alexandra St. property, in which no distinction is made between them, and which seems to me was calculated to give the impression that McCaskill was treating Mrs. Clark as being equally interested with him in all these properties alike.

The Alexandra St. property, however, was bought by Mc. Caskill in 1910 before there was any suggestion of his taking over the leasehold properties, and, although the facts just mentioned would establish an indebtedness upon the part of McCaskill to Mrs. Clark's estate, and might tend to discredit the former's sworn statement that not a cent of Mrs. Clark's went into the Alexandra St. property, if that statement had reference to anything more than the original cash payment of $400, or $500 or $600—whichever it was—they would be quite insufficient to warrant a finding, either that there was any agreement or arrangement between him and Mrs. Clark that he was to buy this property for her and take the deed in his name as her trustee or that Mrs. Clark furnished and advanced out of her own funds the original cash payment, as was alleged in the statement of claim. A finding that she did would have rested entirely on conjecture. As to any moneys of Mrs. Clark's which were or may have subsequently been appropriated by Mr. or Mrs. McCaskill through McCaskill's or Mr. and Mrs. McCaskill's joint bank account in the Bank of Nova Scotia to the payment of the Fenton mortgage instalments or of any other charges upon the property, these would be covered by an accounting for the proceeds of the two mortgages on the leasehold properties and for such leasehold rentals as found their way into either of these bank accounts.

Upon the question of the plaintiff's claim respecting the articles of furniture, and household effects, the Chief Justice stated that the only property which he could find from the evidence, which Mrs. McCaskill took, was the property which belonged to herself, received from other sources, or had been presented to her by Mrs. Clark, and that would include the piano, upon which Mrs. Clark made certain payments by instalments, and handed it over to the McCaskills on the condition that they would complete the payments,

which they did. He found that some silverware and a china tea-set, which Mrs. McCaskill removed from Mrs. Clark's flat after her death, and which it was said, had been taken there from the Alexandra St. house for safekeeping when the McCaskills vacated the latter place, had never been the property of Mrs. Clark, but had been presented to Mr. and Mrs. McCaskill, the silverware by the people of St. Matthews and the china set by some gentleman in Sydney as a wedding present. His Honor did not specify any other furniture or household effects except the piano, which had been the property of Mrs. Clark, but Mr. and Mrs. McCaskill had given evidence of Mrs. Clark's having given to one or other of them a mahogany sideboard with a marble top, a round mahogany table, 6 walnut chairs, and a walnut divan, which Mrs. Clark had had re-covered and a sewing machine. Both Mr. and Mrs. McCaskill gave evidence as to the alleged gift of the sideboard. The former stated that Mrs. Clark took some furniture to the Alexandra St. house as soon as they moved in. "There was another piece of furniture she took," he said, "then she came into the dining room and saw a situation for a sideboard. She said 'I have a sideboard will fit there—I want to give it to you.' Mrs. McCaskill and I were there. We didn't want it, we said. She insisted on giving us that sideboard. We said 'it is too high for our house—a mahogany sideboard with a marble top on it.' She had that sent out that first week or second week we were in the Alexandra St. house, besides the property she brought there herself to furnish her room." Mrs. McCaskill said, "there was a sideboard I think she gave to McCaskill—I don't really remember to whom she gave it—it was sent down. She marked out a place in the dining room, 'there I have a sideboard that will fit'—it was sent down. 'I am going to give it to you.' She spoke once or twice." I do not think the evidence of either Mr. or Mrs. McCaskill is such as to justify a finding that the title to this sideboard passed as an absolute gift to either Mr. or Mrs. McCaskill. According to McCaskill, there was no more than an offer of it as a gift, which both he and Mrs. McCaskill told her they did not want. The fact of the sideboard having been afterwards sent down to the house in which Mrs. Clark was to live with the other furniture which Mrs. Clark brought to furnish her own room, and that the sideboard was placed in the position, in which she thought it would so nicely fit, cannot, I think, properly be held, in the circumstances, to constitute such a delivery and acceptance of it

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as to have passed the title to it by gift.

As to the round mahogany table there is only the testimony of Mrs. McCaskill, from which it appears that some time after Mrs. Clark had taken up her home with the McCaskills in the Alexandra St. house, Mrs. McCaskill one day went to see Miss Irvine, a dressmaker, who was at the time living in the flat which Mrs. Clark occupied before going to Alexandra St. and which she had let to Miss Irvine partly furnished, and that Mrs. McCaskill's attention was struck by this mahogany table, which was then there. Miss Irvine, she explained, was from the old country, and then she proceeded: "As I am rather fond of furniture of that kind," I said, 'I suppose you brought that over with you.' I think that perhaps Mrs. Clark was in the room at the time—I presume she was, and anyway she must have been in the room at the time when I mentioned the table. Mrs. Clark said, 'if you like that table you can have it—it is no use to me—too big for me' or something of that sort. I was a little bit embarrassed at the time—I thought perhaps I had hinted for it, but I hadn't—so she sent it down after the Irvines gave up the flat." This evidence is entirely too indefinite, it seems to me, upon which to found a gift of the table to Mrs. McCaskill, having regard to the fact that when Mrs. Clark "sent it down" she was sending it down to the house in which she had her home, any more than the taking of her sewing machine to that house, and Mrs. McCaskill's evidence in regard to it proved a gift of that article, as Mrs. McCaskill evidently took it from the dialogue which took place between them regarding Mrs. McCaskill's statement that she thought she would like to make a dress. "I have a sewing machine," said Mrs. Clark. "I think I will bring the sewing-machine down." She could not sew herself. "Very glad to have it," said Mrs. McCaskill, and thus it was suggested the property in the sewing-machine passed from Mrs. Clark to Mrs. McCaskill.

As to the piano the defendants claim this both as a gift from Mrs. Clark and as a purchase from the Willis Piano Co., from whom Mrs. Clark had bought it under a conditional sales agreement, whereby the title was to remain in the company until the purchase price should be fully paid by monthly instalments of $10 each. It is clear that it could not have been the subject of an absolute gift by Mrs. Clark while $240 or more of the purchase price remained unpaid. It is equally clear from Mc. Caskill's evidence that there was not even a conditional gift of the piano before the visit of

Willis, the company's representative, to repossess it, for, notwithstanding Mrs. Clark's pains to secure a truckman after telling McCaskill that she wanted to give the piano to his wife and to hurry the instrument into the house before Mrs. McCaskill came in, he stated that he "found later that the full payments on the piano had not been made, and Mrs. Mc. Caskill, when we found there was a considerable amount of money due on the piano considered it best to take her own piano from Fort Kent and let Willis take this one and regard the payments as rent for the time used." Despite Mrs. Mc. Caskill's decision to take her own piano and let Mrs. Clark's piano go with all her payments to the vendor as rent for its use, Mc. Caskill states that when Mr. Willis called and "was going to take the piano," he (McCaskill) bought the piano from Willis for $240, gave him a cheque and received a receipt for that amount. Mrs. Clark, of course, was present, and, according to the evidence of both, was a consenting party to the new purchase, Mrs. McCaskill putting it that she was there agreeing to what was taking place" absolutely—very much pleased." The receipt was produced. It bears date August 28, 1913, and acknowledges the receipt of the money "from Mrs. Clark per Rev. Mr. McCaskill in full of piano account." The receipt does not on its face accord with the statement that McCaskill re-purchased the piano from Willis on his own account, while the bank's record shows that McCaskill had on August 23 covered an overdraft of his bank account, against which the $240 cheque was drawn, by depositing the proceeds of the second mortgage on the Adelaide St. leasehold properties—money which he held in trust for Mrs. Clark. Under these circumstances, and having regard to the relationship then existing between McCaskill and Mrs. Clark, I do not think that the evidence sufficiently proves that McCaskill bought the piano on his own account and paid for it with his own money. To hold otherwise, I think, would be to relax to altogether too great an extent the rule requiring the closest scrutiny by the Courts of all transactions between persons standing in a confidential relation.

With regard to the walnut divan, Mrs. McCaskill's statement was:—"I don't know whether she spoke to me about sending it to me or not—did she give it to me—she spoke to me one day—wouldn't that fit into your hall. I said if it would fit beside the radiator in the hall. She said, 'if you like, I will have it recovered and let you have it,—give it to you' and I said 'Thanks very much—I think it would be

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very nice,' She had it covered and sent to me."

Regarding the 6 walnut chairs, Mrs. McCaskill swore that Mrs. Clark gave them to her "because they matched the walnut bedroom set. Though they seem not to have been bedroom chairs she says she always kept two or three in the bedroom."

It may be that following the conversations regarding the divan and the walnut chairs, as related by Mrs. McCaskill, the sending of these chattels by Mrs. Clark to the house in which she resided with Mr. and Mrs. McCaskill would constitute a delivery of them to Mrs. McCaskill, though I am disposed to doubt it in view of the strictness of the proof which it has been the practice of the Court to require for the establishment of the transfer of the title to personal chattels by gift, and especially where the alleged donor is dead, but, whether it does so or not, I am of opinion that all the alleged gifts of personal chattels ought to be held void in the circumstances of this case, as having been induced by the influence of the confidential relation already referred to. It may be that the same presumption of undue influence does not attach to individual gifts of personal chattels to a donee standing in a confidential relation to the donor as to a transfer of a substantial and material part of one's estate, but when it is considered that the chattels here claimed by gift—McCaskill claimed that Mrs. Clark had given him even her husband's gold watch, which, however, he handed over to her nephew after her death—comprised the most valuable part of the deceased lady's personal effects, and that, in the course of time, the defendants between them found themselves in possession of practically the whole of her property, I find it impossible to avoid the conclusion that the same influence operated upon all alike.

I am of opinion, therefore, that no part of the personal property, which the evidence shews that Mrs. Clark owned, should be held to have validly passed to either of the defendants.

I am of opinion that this appeal should be allowed, and that there should be a decree vesting in the administrator of Mrs. Clark's estate the five leasehold properties, which are still in the name of Mr. McCaskill, and the piano, mahogany sideboard, mahogany table, walnut divan, sewing machine, the 6 walnut chairs, and the other chattels mentioned, which were claimed by Mr. or Mrs. McCaskill as gifts from Mrs. Clark, and ordering McCaskill to account for all rentals of the leasehold properties received by

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him during the lifetime and since the death of Mrs. Clark, and for the proceeds of the two mortgages of April 23 and August 22, 1913, and the proceeds of the sale of the leasehold property, which he transferred to Lewis D. Brown after Mrs. Clark's death, and that for the purpose of such accounting there should be a reference to a Master.

I agree with the judgment of the Chief Justice upon the question of the $100 Victory Bond, and the cash balance lying to the credit of Mrs. Clark in the North End Branch of the Bank of Nova Scotia at the time of her death, for both of which Mrs. McCaskill must account to the administrator of Mrs. Clark's estate.

In my opinion, the appeal should be allowed with costs, and a decree made to the above effect, with costs of the trial below to the plaintiffs.

Appeal allowed.

LEMAY v. HARDY.

Supreme Court of Canada, Idington, Duff, Anglin, Brodeur and Mignault. June 17, 1922.

EASEMENTS (§IIB—10)—PASSAGE—RIGHTS OF ADJOINING OWNERS—PRESCRIPTION.

Where a lane or passage has been used in common by adjoining owners from time immemorial, a sufficient property right therein exists in favour of each owner which entitles him to maintain an action for an obstruction thereof by the other.

APPEAL from the judgment of the Court of Appeal of Quebec, (1921), 32 Que. K.B. 311, affirming the judgment of the Superior Court maintaining plaintiff's action. Affirmed.

L. Moraud, K.C., for appellant.

Demers, K.C., and *P. Marchaud*, K.C., for respondent.

IDINGTON, J.:—For the reasons assigned by Guerin and Bernier, JJ., constituting the majority of the Court below, I think this appeal should be dismissed with costs.

DUFF and ANGLIN, JJ., concur with BRODEUR, J.

BRODEUR, J.:—This is an action concerning a lane which severs the properties of the parties to the case and of several others as well. This lane is in one of the oldest parts of the city of Quebec; and if we are to judge by the walls which line it and the paving which covers it, it has been in existence from time immemorial and probably dates back two centuries or more. The titles have been lost and cannot be traced.

When the city of Quebec was cadastrated in 1870 by virtue of the provisions of arts, 2166 *et seq.*, C.C. (Que.), this lane was shown on the plan as a "*passage*" but the administrative authorities, as in the case of public streets, did not see

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fit to give it a number or indicate who was the owner. In the official book of reference which accompanies the plan, we see that in the descriptions of lots 3,023, 3,023-2 and 3,026 this lane is mentioned as a passage between Nos. 3,023-3,024, 3,025-3,026-3,027.

The persons whose properties adjoined this passage have always used it in a spirit of good neighbourliness, without molestation or hindrance; but in 1918 the defendants, the Lemays, bought one of these properties, No. 3,023 of the cadastre, and apparently demanded that their vendor should include with it one half of the passage. But the vendor was sufficiently cautious to declare in the deed that he gave no warranty whatever "as to his title and his rights thereto."

Some time after their purchase, the defendants began to obstruct the lane by leaving vehicles and other objects in it, thereby rendering it difficult if not impossible for the other neighbouring proprietors to use to and to gain access to their properties.

The plaintiff, Mrs. Emilie Hardy, then felt obliged to take the present action, alleging that she was owner of No. 3,026 which bordered on the lane in rear and asked that the defendants be condemned to put an end to the nuisance. To this end she alleged that she "has always been in possession of a right of passage in a lane . . . . which lane has always served as a passage in common for the use of all the adjoining properties, and amongst others that of the defendants."

The defendants pleaded that they are owners in common with the proprietor of No. 3,022 of this right of passage and that the plaintiff's titles do not establish in her favour any servitude or right of passage.

The Superior Court maintained the plaintiff's action and that judgment was confirmed by the Court of Appeal which held that the defendants must "cease their interference with the exercise of the right of passage which the plaintiff had in common in the said lane."

The question which presents itself is therefore whether the plaintiff had a right in this lane or passage entitling her to have the obstructions which the defendants placed in it removed.

The defendants were very insistent before this Court on the fact that the plaintiff's action, which is of a possessory nature, asked that she be declared possessor of a right of passage, in other words, of a right of servitude for which she held no title.

It is true that the expression "right of passage" found its

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way into the declaration; but it seems to me evident from the pleadings, and especially from the defendants' plea, that the real question at issue is whether the plaintiff has a right of property in this lane or passage, or whether she has sufficient rights to enable her to ask that the defendants be held to allow her to have free use of the lane.

It is a rather interesting circumstance that the terms "passage" and "right of way" are often used in an equivocal sense, even by the authors and the Courts, and that there is therefore no room for surprise if we find the same want of precision in the declaration.

Thus, for example, Pardessus, Traité des Servitudes, vol. 1, No. 231, says:—

"The word "*passage*" is equivocal, since it may be explained with grammatical nicety in the sense of ownership in the land on which one passes, or in the sense of a servitude consisting in passing over land belonging to another. . . . . It would be for the judges to decide" (in which sense the word was used in any particular case).

The *cour de cassation* decided in 1836 (Sirey, 1836-1-1867) that the right of passage recognised as being necessary over communal land (*terrain communal*) for the purpose of watering cattle may be regarded not as a servitude of passage but rather as a mode of enjoyment of a thing owned in common.

Fuzier Herman, Repertoire, *verbo* Servitudes, No. 17, tells us that the distinction between the use of a thing in the exercise of a servitude and its use as owner is sometimes difficult to determine.

"It might happen," he says, "that a plaintiff, being unable to prove without titles certain servitudes such as those of passage or the right to draw water, relies on acts done in exercise of these rights as evidence in support of a claim of ownership in a road or a well." Laurent, vol. 7, No. 162.

I think the Court of Appeal (1921), 32 Que. K.B. 311, put the question in the proper light when it held that the plaintiff had joint possession of the passage. Guerin, J., cited in his notes many authorities which show considerable work and research.

As I have already said, this lane or passage has been in existence from time immemorial. It has always been used by the neighbouring proprietors, and the paving in it gives evidence of use during a long period of time. It seems to me that the defendants are very ill advised in endeavouring at this late date to appropriate to themselves the exclusive

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use of this lane and to destroy the friendly relationship which has always existed between all the persons whose properties bordered upon it.

But apart from the moral and equitable aspect of the case which I have just referred to, there are established legal principles which give the plaintiff the right to complain and to ask for the relief she claims.

The *cour de cassation*, called upon to decide a similar case to the one before us, declared in an action *en partage* (Sirey 1842-1-311) that if two owners of contiguous properties have enjoyed for thirty years without interruption and *animo domini* a passage made for their joint use and composed of a part of each property, such enjoyment obviates the necessity for any title and constitutes a presumption *juris et de jure* that there was originally on the part of both proprietors an intention to allow the lane to subsist forever and that neither party can demand a partition. (Sirey, 1891-1-122; 1899-1-85.)

Principles of doctrine teach us that there is common ownership in all courts, lanes, alleys, passages and roads destined for the use of several houses and in courts and canals devoted to the development of several properties.

Aubrey et Rau, 4th ed., vol. 2, p. 413, par. 221; Demolombe, No. 444, vol. 11; Baudry-Lacantinerie et Walh, Succession, 3rd ed., vol. 2, No. 2153; Fuzier Herman, verbo *Passage*, No. 65, teaches us that "the impossibility of acquiring a right of passage by repeated acts of possession has led litigants to hold that what they thus prescribed was not a right of servitude but a right of property, or at least of ownership in common, in the land on which they exercised the right for a period of thirty years after it was paved or macadamised. And the Courts have endorsed this pretension." He quotes, in No. 67, several judgments of the *cour de cassation* to the effect that a "demand to be recognised as owner of a right of passage in a road may be interpreted in the sense of a demand to be recognised as co-proprietor of the road itself and, consequently, based on prescription, as distinct from the case where it is merely a question of a simple right of servitude."

The question has arisen in France, in connection with these roads, as to whether the *commune* could acquire a right of property or of servitude over such a road (*chemin de desserte* by the more fact of passage by its inhabitants from time immemorial. The neighbouring owners claimed, on the contrary, that the road belonged to the adjoining pro-

prietors. The legislator felt called upon to put an end to the discussion by a law passed August 1, 1881, whereby it was declared that the road was presumed to belong to the adjoining proprietors.

It follows therefore from theory and jurisprudence that the circumstances which have been proved in the present case show that the plaintiff had a right of ownership in common in the land or passage in question. She had the right then to complain of its obstruction by the defendants, and she then appealed to the Courts for relief. But if we came to the conclusion that this lane, instead of being private property belonging to the adjoining proprietors, could be regarded as a public lane, the plaintiff could still bring the present action, as was held in the case of *Johnson* v. *Archambault* (1864), 8 L.C.J. 317.

The judgment rendered by the Court of Appeal is well founded and the appeal should be dismissed with costs.

MIGNAULT, J. (dissenting) :—The respondent, Mrs. Dion, is owner of lot No. 3,026 of the official cadastre of the quartier du Palais in the city of Quebec, which she bought on February 2, 1910, from Dame Fabiola Smith, widow of E.F.E. Roy. The deed describes this property as being bounded in rear by a passage or lane leading to St. Helen St., now MacMahon St., and confers upon the respondent no right of passage or other right in the lane. The deed of sale says that Mrs. Roy acquired this property by the will of her husband, but does not trace the chain of title any further. Nevertheless it would appear from an extract from the cadastre filed in the record that at a date which is not mentioned this lot belonged to a widow of the name of Vanderheyden and her children. This extract states that it is bounded in rear by a *mitoyen* passage between lots 3,023, 3,024, 3,025, 3,026 and 3,027.

The appellants are owners of No. 3,023, subdivision No. 2 of the same cadastre, having acquired it from Walter John Ray by sale dated March 23, 1918. The deed describes the property as being bounded on the south-west by a *mitoyen* passage. By the same deed Ray sold to the respondents, without warranty even as regards his title or his rights, the undivided half "of a strip of land now and which in the future can only be used as a common passage between the said lot No. 3,023, No. 2 . . . . and the lot No. 3,022 belonging to the congregation of St. Patrice Church, which said strip of land is indicated as forming part of a passage bearing apparently no cadastral number, but whereof the larger part

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(east side) ought to form part of the said lot 3,023-2."

Ray had bought lot No. 3,023-2 from Dame Annie Sophia Bell, wife of Roderick McLeod, on February 11, 1896, and had also acquired from her, also without warranty, the rights in the *mitoyen* passage which he later transferred to the respondents. In the deed of sale, Mrs. McLeod says that she had acquired the property from G. E. Borlase, March 28, 1890, and that Borlase had bought it from the sheriff of Quebec by deed passed March 31, 1890 (there is perhaps an error in this date). These two last mentioned titles are not produced and we do not know if they purported to convey any right in the passage in question in this case.

From extracts from the cadastre which are in the record we learn that Mrs. McLeod was owner of lot No. 3,023 and that she had subdivided it into two lots, 1 and 2, and in selling No. 2 to Ray she stipulated a right of passage over No. 2 in favour of No. 1, to give access to the latter from the passage which has been mentioned and thence to McMahon St.

If we consult the plan of the cadastre, a copy of which is also in the record, we see a piece of land marked "passage" between No. 3,022, on which St. Patrice Church is situated, to the south-west, and the line of lot No. 3,023-2 and the rear of lot No. 3,026 to the north-east. At the end of the passage is a part of lot No. 3,022 and a part of lot 3,027, belonging to Alphonse Pouliot. All these properties, it is said, have doors opening on this passage. The parties cannot throw any light on the history of the passage, but it seems unlikely, if it is really *mitoyen*, that there would be no mention in the titles derived from the *auteurs* of the parties or in the titles of the congregation of St. Patrice to indicate how the passage was established. The deed of sale from Mrs. Roy to the respondent obliges the latter to pay a ground rent constituted in favour of the Hotel Dieu of Quebec. Could the history of the passage have been found in the archives of the Hotel Dieu? I do not know. I may add that the extracts from the cadastre cannot prove the *mitoyenneté* of the passage, but may serve as a guide in making searches, for those who made the cadastre doubtless consulted the old titles which the parties do not appear to have found.

In any case, it is clear that the documents produced do not establish any servitude in favour of the respondent in respect of this passage; and without a title she cannot claim

a right of passage as a servitude, nor bring a possessory action as owner of a dominant land, for since a servitude cannot be created without a title, possession, even immemorial being insufficient for that purpose (art. 549 C.C.), there can be no question of a possessory action based on mere possession where a servitude is concerned.

It is enough for my purpose to quote Pothier, Traité de la Possession, No. 90, para. 1 (para. 2 treats of the case where the person who has enjoyed a right of passage produces a title to justify his enjoyment):—

"Although rights of servitude upon real property are *real rights* which we have in a property, nevertheless he who has enjoyed a right of passage or other servitude, no matter for how long a time, without having a title, cannot complain if he is deprived of his right because, by the principles of our French law, a person's enjoyment of a right of passage or other servitude, without title, is presumed to be an enjoyment by pure tolerance, and that is not sufficient to give a right of action. The article of the Ordinance of 1667 quoted above denies this action in formal terms to anyone who has only a precarious possession."

The article of the Ordinance mentioned by Pothier is art. 1 of title 18, which is the source of our art. 1,064 C.C.P. (Que.).

The respondent, in the action which she took against the appellants, alleges her title as owner of lot No. 3,026, and says that since she bought the property she has always been in possession of a *right of passage* in the lane in question, that the defendants are disturbing her in the use and possession of the said *right of passage*, and that she has called upon the defendants to leave the said passage free and to permit her to *enjoy freely and continuously the said right of passage for the use of her above mentioned property* (héritage) *in the said lane*.

The respondent claims, then, the enjoyment of the said right of passage "for the use of her above mentioned 'héritage,'" that is to say, of lot No. 3,026.

Now a real servitude is a charge imposed upon one property for the benefit of another property belonging to a different owner (art. 499 C.C. (Que.)). Obviously the respondent pretends to exercise the possessory action in order to claim the enjoyment of a servitude. There is no other way of interpreting her action if we consider the ordinary meaning of the words the respondent uses, and she claims this right of enjoyment for the advantage of her property, and

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therefore by way of servitude.

In spite of this the judgment of the Court of King's Bench, 32 Que. K.B. 311, Dorion, J., dissenting, treats the respondent's possessory action as an action asking, as possessor and co-proprietor of the passage, that the appellants be forced to cease disturbing her in her enjoyment. That amounts to changing the very basis of the respondent's action, without any amendment having been made or even asked for.

The theory adopted by the Court of King's Bench is that there may exist passages between two or more properties which are possessed by the owners of those properties in forced undivided ownership. These passages are called common passages and are common to the proprietors concerned, and one of the co-proprietors may exercise the possessory action to protect himself against disturbances to his enjoyment, even though such disturbances are caused by one of the co-proprietors. Jurisprudence, which seems to have been established in France, has been referred to; and that jurisprudence presumes quite readily that this community or forced undivided ownership is created by agreement between the proprietors concerned.

This jurisprudence, which incidentally was by no means unanimous, was recognised by the French law of August 20, 1881, dealing with roads and paths of access *d'exploitation*, sec. 33 of which reads as follows (see Duvergier, Collection des lois, vol. 81, p. 363) :—

"Roads and paths of access (*d'exploitation*) are those which serve exclusively as means of communication between different properties or for their use. They are, in the absence of title, presumed to belong to the owners of the adjoining land, each in his own right; but their use is common to all persons interested. The public may be denied the use of these roads."

There being no similar law in the Province of Quebec, it is clear that the presumption which it establishes cannot be applied here. Such a presumption, being a legal presumption, could only be sanctioned by a specific text of law (art. 1239 C.C. (Que.)).

Given the nature of the plaintiff's action, it is not a matter for surprise that the proof of possession in common ownership by her should be null. The respondent proves that she uses the lane as do other adjoining proprietors. But, seriously, can such acts of passage, somewhat equivocal as they are—since they are acts such as are ordinarily per-

formed by the creditors of a servitude rather than by property owners—ever lead to the prescription of this piece of land which is called a passage or lane? It is evident that they cannot; and it is clear that such acts cannot lead to prescription of a servitude which is a lesser right than that of ownership.

Logically then, and notwithstanding the French jurisprudence on the subject of forced undivided co-ownership, I cannot help the respondent. This I regret, for the appellants are evidently bad neighbours, and their claim that they acquired an undivided ownership in one half of the passage by the titles they allege is ridiculous. With such titles they could never prevent the respondent from using the lane. But the respondent's action fails of itself. From a juridical point of view it is untenable. But the respondent is not deprived of the right to an *action confessoire* if she can find, on searching the titles of her *auteurs*, a title to a servitude of passage which would be an accessory of her right of ownership in lot 3,026.

I would maintain the appeal and dismiss the respondent's action with costs of all Courts.

Appeal dismissed.

RUSSELL v. ARNOLD.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Hodgins and Ferguson, JJ.A. November 17, 1922.

PRINCIPAL AND SURETY (§II—15) — CONTRIBUTION — DISCHARGED SURETY—NOTE.

A surety on a note, who has been discharged because of a renewal of the note to the principal debtor, cannot be held for contribution to a co-surety who paid the renewal note, but on which the former never became liable.

APPEAL from judgment of C. S. Tapscott acting Judge of the 3rd Division Court of the County of Brant after trial with a jury. Reversed.

A. L. Shaver, for Alex Arnold, appellant.

Mason, K.C., for respondent.

The judgment of the Court was delivered by

HODGINS, J.A.:—The judgment was for $152.50 as "contribution in respect of a certain promissory note made by the plaintiff for the accommodation of the defendants (the appellant and his brother)."

The respondent together with the appellant and his brother Robert, on June 21, 1920, signed a note for $200 at 6 months with interest at 6% for the accommodation of Robert to whom one Smith advanced the money. When due, Robert Arnold took to Smith a note signed by himself and the respondent for $200 at 6 months with interest at 8%

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which Smith accepted in lieu of the old note which he gave to Robert. This note matured and the respondent having been sued to judgment on it paid the judgment and now claims as against the appellant for a contribution of one half the original advance on the first note, plus one half of $80, for "costs of a certain suit *Smith* v. *Russell*." Clearly no recovery is sustainable for these costs on the evidence in this case.

It appears that when Robert Arnold asked the respondent to sign the second note he promised to get the appellant to sign it also. This promise was not kept, the appellant was not asked to sign and the respondent was not informed of that fact. Smith's acceptance of the second note and his handing over of the first note released the parties in it and satisfied it so far as he was concerned. It clearly discharged the appellant because it gave time to the principal debtor for the debt without his consent. The respondent, when sued by Smith, was sued on the renewal or second note and paid the judgment recovered on it. He now contends that as that part represents the amount for which he became liable in the beginning he can seek contribution from the appellant as originally a co-surety with him.

I think he is not so entitled. True the first note was in fact paid by the respondent, as surety, and not by the party accommodated. Bills of Exchange Act, R.S.C. 1906, ch. 119, sec. 139. Assuming that it was not thereby satisfied, although given back to Robert Arnold, then upon the dishonouring of the renewal note the liabilities of the parties to the original note were revived, excepting that of a surety who had been released by an extension of the time given to the principal debtor. See Maclaren on Bills and Notes, 5th ed., p. 356, Falconbridge on Bills of Exchange, pp. 723-4.

It was, however, urged that as the respondent signed the second note on the understanding that the appellant would become liable upon it he had a right to the first note when paid and can recover against the appellant upon the original consideration. I think the answer to that argument is that the respondent constitutes Robert Arnold his agent to procure a renewal of the original bill, and is bound by what his agent did. The agent effected a renewal of the note, in fraud of his principal and contrary to his instructions, but that cannot affect the appellant who was by that renewal, discharged from liability upon the note, and consequently upon the consideration therefor as well. The right of contribution involves the fact that the surety has paid money

which the co-surety could have been compelled to pay. In this case the appellant could not have been compelled to pay the original note after his discharge and what the respondent paid was the amount of the second note for which the appellant never became liable.

The appeal should be allowed and the action dismissed with costs.

Appeal allowed.

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REX v. HOLMES.

Alberta Supreme Court, Harvey, C.J., October 9, 1922.

EVIDENCE (§IE—40)—JUDICIAL NOTICE—ARTICLE SUITABLE FOR MANUFACTURE OF LIQUOR.

That a copper coil, known as a worm, is suitable for the manufacture of spirits, is not such matter of common knowledge as will warrant the Court to take judicial notice of such fact, and base a conviction upon such evidence alone for illegal possession thereof in violation of the Inland Revenue Act, R.S.C. 1906, ch. 51.

STATED CASE by a magistrate from a conviction on a charge under sec. 180 (*c*) of the Inland Revenue Act. Conviction quashed.

M. M. Porter, for appellant.

E. F. Ryan, K.C., for respondent.

HARVEY, C.J.:—This is a case stated by a magistrate under sec. 761 of the Cr. Code, R.S.C. 1906, ch. 146. The charge was that the accused "did without having a license have in his possession a worm rectifying or other apparatus or parts thereof suitable for the manufacture of spirits without having given notice thereof as required by the Inland Revenue Act, R.S.C. 1906, ch. 51, contrary to sec. 180, subsec. (c) of the Inland Revenue Act."

The stated case in the magistrate's words sets out the following:—

"The actual production of the worm, which was filed as an exhibit and which opportuned me to note its very apparent suitability for the manufacture of spirits, and which had been sworn to be suitable for the manufacture of spirits by the informant, along with the bearing the weight of evidence adduced had on the alleged offence being tried, was the basis of my finding of a conviction.

As to the question of the defendant that I erred in holding I could of my own knowledge take judicial notice that the article in question was suitable for the manufacture of spirits; I do not admit this is an error, as it appears to me, in considering the bearing the evidence adduced had on the charge in its entirety, and considering such bearing along with the proper production of the article in question in

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Court, I contend that I had the right to take judicial notice of a common article, such as this worm, to be suitable for the manufacture of spirits, as I understand, that a magistrate has the right to take judicial notice of a common article, for example, a rifle, as to its suitability for discharging bullets, on its proper production in Court as an exhibit, and I know of my own knowledge that the article produced in Court as exhibit 'A,' called a worm, is suitable for the manufacture of spirits.

The solicitor for the said Rolland Cleol Holmes desires to question the validity of the said conviction on the ground that it is erroneous in point of law, the questions submitted to this Honourable Court being that there was no legal evidence to warrant said conviction being made, and in particular that no evidence was given or submitted to the Police Magistrate that the article put in as an exhibit and described by the witness for the prosecution as a copper coil which he considered to be a worm, is suitable for the manufacture of spirits; further, that the Police Magistrate erred in holding that he could out of his own general knowledge take judicial notice of the fact that the article in question aforementioned is suitable for the manufacture of spirits."

The question thus raised is whether the magistrate was entitled to conclude without evidence that what was described as a worm was "suitable for the manufacture of spirits."

Phipson on Evidence, 6th ed., ch. 2, at p. 19, under the head of Judicial Notice, states "Courts will take judicial notice of the various matters enumerated below, these being so notorious or clearly established that evidence of their existence is unnecessary" and "Although, however, judges and juries may, in arriving at decisions, use their *general* information and that knowledge of the common affairs of life which men of ordinary intelligence possess, they may not, as might juries formerly, act on their own *private knowledge or belief*."

The rule is stated in 23 Corp. Jur. at p. 59, sec. 1810, as follows:

"Courts may properly take judicial notice of facts that may be regarded as forming part of the common knowledge of every person of ordinary understanding and intelligence."

It may be that the article in question called a worm is suitable for the manufacture of spirits, as the magistrate says that it is within his knowledge that it is, but that is a matter of private and not of common knowledge. It may be

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that at some time the manufacture of spirits may become so common that its methods will be known to all ordinarily intelligent persons but at present that can hardly be said to be the case. It may be difficult at times to determine whether some fact known to the magistrate or Judge is of such common knowledge as to be accepted without proof, but there can be no difficulty in determining that some fact not known to him is not so for he is bound to ascribe to himself ordinary understanding and intelligence.

Without evidence I would be unable to say that the article in question is suitable for the manufacture of spirits being quite unfamiliar with the process of such manufacture. I conclude without doubt, therefore, that it is special and not common knowledge which permits one to find that it has such suitability.

In my opinion, therefore, the magistrate was in error in basing his conviction upon that knowledge and the fact that the words of the statute enacting the offence were set out in the sworn information cannot strengthen the evidence. The information is not evidence. Though sworn there is no opportunity to cross-examine and in the present case it was sworn before another Justice. It is merely the foundation for the institution of the prosecution.

Under sec. 765 the only proper course seems to be to quash the conviction, which rests, as the magistrate states on a view of the law which I hold to be erroneous.

Conviction quashed.

STEVENSON v. TAYLOR; Re CANADA CAP Co. Ltd.

Ontario Supreme Court in Bankruptcy, Fisher, J. December 8, 1922.

BANKRUPTCY (§IV) — FRAUDULENT PREFERENCES — PAYMENTS — KNOWLEDGE OF INSOLVENCY—"THEY."

Payments received by a creditor within three months of the bankruptcy of the debtor, with knowledge at the time of the debtor's "ceasing to meet his liabilities as *they* become due," are fraudulent and recoverable by the trustee in bankruptcy. The word "they" is to be read as singular, and applies to such knowledge or notice of the creditor in his singular case.

[See Annotations, 53 D.L.R. 135, 56 D.L.R. 104, 59 D.L.R. 1].

APPEAL by trustee in bankruptcy to recover payments made within three months prior to an assignment under the Bankruptcy Act.

A. G. Slaght, K.C., for Taylor.

S. H. Bradford, K.C., and *F. Greenberg*, for trustee.

FISHER, J.:—This is an appeal by the trustee to compel repayment to him by one Max Taylor of $1,933.45 paid by

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the debtor company to Taylor within three months prior to the authorised assignment.

I took *viva voce* evidence. The facts are as follows:—

The debtor company carrying on business as manufacturers in Toronto, having purchased goods from Taylor, a merchant carrying on business in Hamilton, on February 10, 1922, to the value of $3,674.66, gave seven promissory notes of $500 each, and one of $174.66 to Taylor. Taylor delivered the goods to the company. The first note of $500 fell due on April 23, 1922, and $250 was paid thereon, and the note renewed for the *balance*. Two notes of $500 each due in the month of May, 1922, were returned *unpaid*. Three notes of $500 each, payable on different dates in the month of June were returned *unpaid*. The next payment made by the company to Taylor was $600 on July 7, on customer's paper of the debtor company, amounting to $930.68, and which was given by the company to Taylor some time previous. The $692.62 was paid on July 11, 1922, so that the total amount received by Taylor on his account prior to the authorised assignment was $1,542.62, leaving a balance owing him of $2,132.04. When Taylor received the customers' paper for $930.68 he gave credit for that sum but owing to some adjustments made between the customers and the debtor Taylor only received $692.62.

There is no question raised that the goods were not purchased, delivered, and the notes given.

The trustee contends that when Taylor received the first payment of $250, the $600, and the $692.62 Taylor knew or should have known, or must be taken to have known, that the company was in insolvent circumstances, and as all these payments were made within 3 months prior to the authorised assignment they are fraudulent and void as against the trustee. The authorised assignment was made on July 19, 1922. On the evidence I have no doubt whatever the debtor company was insolvent to the knowledge of the president and vice-president, who were the active managers of the company, when they made these payments to Taylor. Shapiro, the president admitted that thousands of dollars were due to trade creditors in the months of May, June and July, which they were unable to pay. The failure appears to be a disastrous one from the standpoint of the creditors. According to the trustee's evidence on his examination of the books, the company, between February 1, 1922, and July 19, 1922, the date of the assignment, purchased goods amounting to $44,853.39, and during that period they only

paid to trade creditors $12,609.62, and between June 1, 1922, and July, 19, 1922, about $9,200 was paid out as follows:—$4,000 to Jacob Sherman, father of the vice-president; $2,000 to one Cohen; $1,292.62 to Taylor (this was not included in the $12,609.62); and about $1,875 to Sherman and Shapiro, the president and vice-president, claimed by them on account of services rendered. The trustee's statement also shews that the capital stock of the company is wiped out, and the company is indebted to unsecured creditors in the sum of $34,194.03.

The question I have to decide is, did Taylor know or should he have known, when he received from the company the payment above referred to, that the company was insolvent, within the meaning of the Bankruptcy Act, 1919 (Can.), ch. 36. I find on the evidence he did not know when he received the first payment of $250 on April 23 that the company was in an embarrassed financial condition, and that he acted *bonâ fide* in so far as receiving this payment. As to the other payments made to him, namely: $600 on July 7, 1922; and $692.62 on July 11, 1922, these two were *bonâ fide* so far as Taylor was concerned, unless these payments can be brought within the meaning of sec. 3 (*j*) of 1922 (Can.), ch. 8. This is an amendment by adding to sec. 3 of the Bankruptcy Act, 1919, making the following paragraph:—(*i*) if he gives notice to any of his creditors that he has suspended or that he is about to, suspend payment of his debts; (*j*) If he *ceases* to meet his liabilities as *they* become due."

Does this amendment mean that the creditor must have knowledge of other creditors of the debtor not being paid as their debts become due in addition to his knowledge that the debts due to him have not been paid? In the construing of a statute the plural is to be read as singular whenever the nature of the subject matter requires it. The word "they," therefore, in the amendment can be construed as singular. The amendment of 1922 came into force on June 28, 1922. There is no doubt Taylor knew on April 22, 1922, that he had only received $250 on his $500 note due on that date, and he was obliged to accept a renewal for the balance. Taylor also knew that the two notes of $500 each due in May, 1922, had not been paid, that the three notes of $500, due on June 2, 12, and 23, had not been paid. He employed a solicitor named Sweet, at Hamilton, on June 19 and on July 5 and 8, 1922, to demand payment of the moneys owing him. Taylor had interviewed the

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president on two occasions. He was put off without payment. There is a letter written by the company to Taylor acknowledging they were unable to pay the balance owing. I, therefore, hold that Taylor had ample notice in May and June, 1922, that the debtor had ceased to meet its liabilities as they became due within the meaning of sec. 3 (j) of the Act of 1922, (Can.) ch. 8. Section 32 of the Bankruptcy Act casts the onus upon Taylor of shewing that he had no notice "of any available act of bankruptcy" at the time he received the payments. I hold that he had. He knew that the company had ceased to meet its liabilities as they became due, and this is an available act of bankruptcy under the 1922 amendment, the payments of $600 on July 7, 1922, and $692.62 on July 11, 1922, are fraudulent and void as against the creditors of the debtor company.

The trustee's appeal is allowed with costs and there will be judgment in his favour, against Taylor, for $1392.62 with interest. Taylor shall be entitled to rank on the estate as an unsecured creditor for $3424.60 upon returning to the trustee the two accepted drafts of Charles Shapiro, and amounting to $390.83, or otherwise he must file an affidavit valuing his security and proving for the balance against the estate.

Appeal allowed.

HAYWARD LUMBER Co. Ltd. v. HAMMOND.

Alberta Supreme Court, Walsh, J. November 24, 1922.

MECHANICS' LIENS (§III—10)—PRIORITIES—VENDOR'S LIEN—INCREASED VALUE.

Under sec. 9 of the Mechanics' Lien Act (Alta.), a mechanic's lien is prior to a vendor's lien under an agreement for the purchase of land, as against the increase in value of the land by reason of the works or improvements, but not further unless the same are done at the request of the vendor in writing. Under sec. 11 of the Act such works and improvements shall be held to have been constructed at the request of an owner who, having knowledge of the fact of their construction, fails to post a notice that he will not be responsible for them. The cases provided for by sec. 9 constitute an exception to the general provisions of sec. 11, and, therefore, the interest of an unpaid vendor is subject to a mechanic's lien only to the extent of the increase in value, unless the work done or materials furnished were at his written request.

ACTION on a mechanic's lien.

G. H. Van Allen, for plaintiff.

Frank Ford, K.C., and *R. D. Tighe*, for defendants.

WALSH, J.:—In this mechanic's lien action the materials in respect of which the lien is claimed were supplied to the

defendant Hammond, who has not defended. The plaintiff's case is fully proved as against him. The land upon which the lien is sought is held by him under agreement of sale from the defendant Henley, who holds under agreement of sale from the defendant Dykes, who in turn holds under agreement of sale from the defendants Campbell & the Eastern Trust Co., the registered owners of the same. The plaintiff claims that his lien attaches in Henley's entire interest in this land, but as to the other defendants it simply claims a lien on the increased value of the land by reason of these improvements. Dykes has not defended the action but these others have.

Although the plaintiff has proved its case clearly as against Hammond I think it has failed to do so as to the greater part of its claim as against the defendants who defend. Its case is established only by his written acknowledgments of the receipt by him of the various deliveries of the material for the price of which the lien is claimed. His liability is put beyond question by this proof. That is, however, insufficient, in my opinion, to establish the case against the other defendants. It is at best an admission by one defendant, which, while binding him, does not bind the other defendants. The plaintiff, who seeks to have its lien attach to some interest which these other defendants have in this land, is bound, in my opinion, to prove its claim by competent evidence, a burden which is not discharged simply by the admission of the principal debtor that the materials in respect of which the lien is claimed were delivered to him.

The plaintiff has proved otherwise than by Hammond's receipts the delivery on October 23, 1920, of materials to the value of $6.75 and no more. To this extent only is the plaintiff, in my judgment, entitled to such a lien as the Act gives to him on the interests in this land of the defendants Henley, Campbell and the Eastern Trust Co. I might end my judgment here as the plaintiff will doubtless not think it worth while to pursue further such claim of lien as it may have for this insignificant sum, but a question has been raised as to the extent and character of the lien which attaches to Henley's interest in the land which, in view of certain earlier decisions of mine, I think I should deal with.

It is proved that though Henley knew that these buildings were being put up on this land by Hammond, he did not post a notice in writing in some conspicuous place on the

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land or the buildings that he would not be responsible for the same. It is contended for the plaintiff that because of this these buildings must be held to have been constructed at his request, for that is what sec. 11 of the Mechanics' Lien Act, 1906 (Alta.) ch. 21 says. For Henley it is argued that under the extended meaning given by sec. 9 (2) to the word "mortgage" in sec. 9 the only lien to which the plaintiff is entitled upon these facts as against his interest is upon the increase in value of the land by reason of these improvements on the basis laid down by sec. 9, the materials not having been supplied on his written request and he being the seller under an agreement of purchase with his purchase money largely unpaid.

Two decisions of my own have been cited to me by the plaintiff in support of his contention that Henley's entire interest in this land is chargeable under sec. 11. One of these is *Revelstoke Saw Mill Co.* v. *Alberta Bottle Co.* (1915), 9 Alta. L.R. 155. If that decision is in point, it is binding upon me and conclusive of this case, for it was affirmed on appeal, as will be seen by reference to p. 162 of the above report. That case is, however, very different in its facts from those of this case. That land was not under agreement of purchase in the strict sense of the term but was under agreement on the part of the owner, the City of Medicine Hat, to give it by way of bonus to the defendant to whom the materials in question were sold. Neither was there any question of a vendor's lien for there was no purchase money. As sec. 9 (a) only extends the meaning of the word 'mortgage' in the main section to a vendor's lien and an agreement for the purchase of land, I think the *Revelstoke Saw Mill* case is on the facts distinguishable from this case.

The other judgment of mine is *Rohl* v. *Pfaffenroth* (1915), 31 W. L. R. 197, in which I made liable to the lien the estate of the registered owner under sec. 11, the materials having been supplied to defendants holding simply, under agreement of purchase. When this case was cited to me in argument I stated my recollection to be that sec. 9 had not been relied on or even brought to my notice by counsel for the owner. I have since confirmed this recollection in conversation with the counsel, Mr. Clifford T. Jones, K.C., who tells me that the real issue in that case was the personal liability of two sets of individual defendants, of whom his client, the owner of the land, was one, and in the circumstances it was really a question of no importance to

him whether a lien if declared was on the fee under sec. 11, or on the increased value under sec. 9, and so the latter section was not mentioned to me at all. I must frankly confess that though I was quite aware of the provisions of sec. 9 I did not know until shortly before the trial of this action of the extended meaning given to the word "mortgage" by sec. 9 (2), never having had occasion to consider it. Now that it has been brought to my notice I must, of course, give effect to the opinion that I hold of it, regardless of any earlier ruling made in ignorance of it.

Under sec. 9 a mechanic's lien is prior to a vendor's lien under an agreement for the purchase of land as against the increase in value of the land by reason of the works or improvements but not further unless the same are done at the request of the vendor in writing. What that means, of course, is that even if the vendor knows that the works or improvements are being done the lien attaches to nothing as against him beyond the increase in value unless they are done at his written request. Under sec. 11 such works or improvements shall be held to have been constructed at the request of an owner who, having knowledge of the fact of their construction, fails to post a notice in the terms of the section that he will not be responsible for them. What that means is that mere knowledge not followed by the notice imposes liability on the owner, for his request is in that event presumed, though I think that does not mean the request in writing made necessary by sec. 9.

Henley is within both sections. He is a seller of the land under an agreement for its purchase from him and he has a lien for his unpaid purchase money. This brings him within sec. 9. He is an owner or a person having or claiming an interest in the land, who having knowledge has not posted the notice necessary for his protection. This brings him within sec. 11. But for sec. 9 his liability would be determined under sec. 11. *Limoges* v. *Scratch* (1910), 44 Can. S. C. R. 86. But for sec. 11 the plaintiff's rights would be governed by sec. 9, *Marshall Brick Co.* v. *York Farmers Colonization Co.* (1917), 36 D.L.R. 420, 54 Can. S.C.R. 569. Henley cannot, of course, be made liable under both of these conflicting provisions. The question is which one of them governs the rights and liabilities of these litigants.

The general rule in the construction of inconsistent statutory provisions is that if later enactments are so inconsistent with those of an earlier date that they cannot

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stand together the earlier stand impliedly repealed by the later. The latest illustration of this that I can find is in the judgment of the Privy Council in *B. C. Electric R. Co.* v. *Stewart*, 14 D.L.R. 8, [1913] A. C. 816. But where a general intention is expressed and also a particular one which is incompatible with the general one the particular intention is considered an exception to the general one. Maxwell, 6th ed. and cases there noted. The rule is stated very clearly by Romilly, M. R. in *Pretty* v. *Solly* (1859), 26 Beav. 606, at p. 610, 53 E. R. 1032, in these words:—

"The general rules which are applicable to particular and general enactments in statutes are very clear, the only difficulty is in their application. The rule is, that wherever there is a particular enactment and a general enactment in the same statute and the latter taken in its most comprehensive sense would overrule the former, the particular enactment must be operative and the general enactment must be taken to affect only the other parts of the statute to which it may properly apply."

I think that is the rule which I should apply to these conflicting provisions of the Mechanics' Lien Act. It is my duty to give effect to every part of the statute if that is possible, and that may be done by the application of the above canon of construction. Section 9 expresses a particular intention, namely that a certain class of owner shall have his interest affected only to a limited extent by a lien unless the work is done at his written request. Section 11 expresses the general intention that all owners with knowledge shall be liable in the absence of a posted notice. I must hold that the cases provided for by sec. 9 constitute an exception to the general provision of sec. 11, and, therefore, that the interest of an unpaid vendor under an agreement of purchase is made subject to a lien only to the extent of the increase in value unless the work was done or materials supplied at his written request. This leaves all other owners subject to the provisions of sec. 11 and there are many such, e. g., the owner in *Limoges* v. *Scratch*, *supra*, or one who stands by and lets a mere stranger erect a building on his land. Being of this opinion, I must hold the plaintiff entitled as against Henley to a lien only upon this increased value and to this extent *Rohl* v. *Pfaffenroth*, *supra*, is overruled. Upon the evidence before me I think it would be absolutely futile to put this property up for sale under the conditions imposed by sec. 9, even if the plaintiff decided to proceed in respect of so small a lien as I have

given it for I am satisfied that nothing would be realised for it by such a sale.

In the result, therefore, I find that the plaintiff's lien for $6.75 has priority over the interests of the three defending defendants, Henley, Campbell and the Eastern Trust Co. only as against the increase in value of this land by reason of the furnishing of the material represented by this sum but I refuse to make any order for the sale of the land. These defendants are entitled to an order vacating registration of the lien so far as it affects their interests in the land.

The plaintiff must pay the cost of these defendants.

Judgment accordingly.

MEMORANDUM DECISIONS.

Memoranda of less important Cases disposed of in superior and appellate Courts without written opinions or upon short memorandum decisions and of selected Cases.

CRISTAL v. SIMOVITCH.

Alberta Supreme Court, Appellate Division, Beck, Hyndman and Clarke, JJ.A. November 8, 1922.

BILLS AND NOTES (§VIB—155)—*Discharge of note and debt thereof by accepting note of original indorser—Accord and satisfaction.*]—Appeal from a judgment in an action on a promissory note. Affirmed.

I. B. Howatt, K.C., for appellant.

J. Wilson, for respondent.

The judgment of the Court was delivered by

CLARKE, J.A.:—Upon conflicting evidence the trial Judge has accepted generally the story given on behalf of the defendant, and I see no sufficient ground for disturbing his finding. Indeed the uncontradicted evidence that the note of November 21, 1921, was signed by Rodnunsky as maker, and the original note of the defendant endorsed by Rodnunsky given up and destroyed rather corroborates the defendant's story.

Accepting the facts as found by the trial Judge I think the proper conclusion of law is that the original indebtedness of the defendant, whether for money borrowed or upon the note of July 20, 1921, was discharged, and the note of Rodnunsky accepted not as a renewal but in satisfaction. See *Smith et al* v. *Ferrand* (1827), 7 B. & C. 19, 108 E.R. 632.

The appeal should be dismissed with costs.

Appeal dismissed.

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MAZIN v. HRIH ERIEW.

Alberta Supreme Court, Appellate Division, Stuart, Beck and Clarke, JJ.A. November 24, 1922.

EVIDENCE (§VIE—535)—*Written contract—Parol or extrinsic evidence explaining bargain—Articles used in connection with hotel business—Car.*]—Appeal from the judgment of the trial Judge in an action upon a contract. Affirmed.

J. D. Matheson, for appellant.

D. G. McKenzie, for respondent.

The judgment of the Court was delivered by

STUART, J.A.:—We think this appeal will have to be dismissed with costs. Even if the writings alone must be taken as shewing the agreement it was still open to the defendant to shew what articles were in fact used in the business of the hotel in order that the Court might be able to apply the terms of the document to the facts as found. And the trial Judge found, as we think upon evidence, which, if believed, as it must have been, was sufficient to enable a Judge reasonably so to find, that the car was used in connection with the hotel business.

And further if the documents were such as to admit extrinsic evidence of the true bargain the evidence was contradictory and we could not say that the trial Judge was wrong in the result he arrived at although, of course, he does not make an express finding upon the point whether the car was orally mentioned or not. Even if we went outside the documents which, in the circumstances and in view of the express finding as to the use of the car, would be a course rather more favourable to the plaintiff, we cannot on appeal venture to accept the plaintiff's story rather than that of the defendant and his witness because we can find nothing on the record to justify a certain choice and as the burden of proof was on the plaintiff the judgment will have to stand. *Appeal dismissed.*

CASTLEMAN v. JOHNSON et al.

British Columbia Supreme Court, Murphy, J. November 23, 1921.

MANDAMUS (§ID—25)—*As remedy against Liquor Control Board—Enforcement of hiring contract by employee thereof—Pleading duty—Remedy by prerogative writ—Dismissal of action.*]—Application to dismiss the action on the ground that the statement of claim disclosed no cause of action. The plaintiff was an employee of the Liquor Control Board and having been dismissed brought action against the members of the Board claiming a remedy by way of *mandamus*.

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S.C.

J. A. MacInnes, for plaintiff; *E. C. Mayers*, for defendant.

MURPHY, J.:—In my opinion the point of law is well taken that the statement of claim herein discloses no cause of action and in consequence these proceedings must be dismissed. I agree that on this application all statements of fact in the statement of claim must be taken as true. The facts asserted here, however, I think, shew only a single legal right in the plaintiff, *viz.*, that based on a contract of hiring. Plaintiff cannot, I think, by asserting as he does in para. 7 of the statement of claim that defendants have failed and neglected to perform their duty in regard to the plaintiff without setting out what duty known to the law defendants have failed and neglected to perform found an action for *mandamus* or for any other relief. Authority is not needed for the proposition that Courts only enforce rights known to the law. I if am correct in this view, the case is governed by the decision in *Gidley* v. *Lord Palmerston* (1822), 3 Brod. & Bing. 275, 129 E.R. 1290.

In any event I do not consider an action for *mandamus* can lie on the facts set out in the statement of claim. If plaintiff has any remedy by way of *mandamus* such remedy must be by application for a prerogative writ. *Smith* v. *Chorley District Council*, [1897] 1 Q.B. 532, particularly at p. 538. The action is dismissed. *Action dismissed.*

ADAMS RIVER LUMBER Co. Ltd. v. KAMLOOPS SAWMILLS Ltd.
British Columbia Supreme Court, Hunter, C.J.B.C. November 17, 1921.

SALE (§IV—90)—*Bulk Sales Act—Sale in ordinary course of business—Raw material and plant—Books for private use.*]—Action to avoid a sale *en bloc* of the assets of a sawmill, except the lumber, as being in contravention of the Bulk Sales Act, 1913 (B.C.), ch. 65.

A. D. Macintyre, for plaintiff.

J. R. Archibald, for defendants.

HUNTER, C.J.B.C.:—I think that the Act, 1913 (B.C.), ch. 65, applies only when the goods in question were kept for sale in the ordinary course of business. The raw material and the plant of a sawmill are not kept for sale, but for the purpose of manufacturing goods for sale. A stock of books kept by the owner for his private use would not be within the Act, but it would be otherwise if kept for sale by a bookseller. Had the lumber been included in the sale a different question would have arisen.

Action dismissed.

THOMPSON v. HULL.
British Columbia Supreme Court, Hunter, C.J.B.C. November 17, 1921.

DAMAGES (§IIIJ—200) — *Trespass — Illegal distress—*

B.C.
S.C.

Amount within County Court Jurisdiction—Action in Supreme Court—Costs.]—Action for damages for trespass, the defendant the owner of a hotel in Kamloops having distrained for rent, and carried off a portion of the goods and chattels of the lessee (plaintiff).

A. D. Macintyre, for plaintiff.

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

HUNTER, C.J.B.C.:—It has come down to this, that the only question is as to the amount the Court ought to allow for damages. I have come to the conclusion that the trespass, so called, was of an unwitting character, that is, was owing to lack of information given to the solicitor, and that there was nothing in the shape of insults or reckless disregard of other people's rights in connection with the seizure. With regard to the value of the articles taken which should not have been taken, it is quite apparent that they were of little or no value. Mr. Thompson himself was offering $680 for Dobson's interest in the furniture, and after the seizure offered $400 for both that and what remained, so that in his opinion at all events the furniture so called was of little or no value. At the same time one cannot overlook the fact that it would have cost him some considerable amount to have replaced the furniture which ought not to have been taken in order to render the hotel useful for the purpose for which it was leased. On the other hand, Mr. Thompson says that he estimates his damage at about $2,000. As far as I can see, on the evidence given, that is ridiculous. It is idle for the proprietor of this bug-house to present any such claim as that. On the whole, I think the sum of $250 will amply cover any possible loss that he proved.

With regard to costs, it is true enough that this action might have been brought in the County Court; at the same time I think that when rights of this character are invaded, with the possible result of a breach of the peace, it is proper enough to bring the action in the Supreme Court, even though the damages recovered may be small. I therefore think that I ought to give judgment for $250 and costs, and there will be a set-off against any rent that is overdue.

Judgment for plaintiff.

STANFORD v. CLAYTON.

British Columbia Supreme Court, McDonald, J. September 25, 1922.

PARTNERSHIP (§V—20)—*Agreement as to contribution towards partnership assets—Logging contract—Timber*

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S.C.

rights—Dissolution of partnership.]—Action on partnership agreement.

M. Cosgrove, for plaintiff; *A. Bull*, for defendant.

MCDONALD, J.:—Admittedly the plaintiff and defendant in this case entered into a partnership. The real question I have to decide is, what were the terms of their agreement. The plaintiff contends that his contribution to the partnership should be the benefit of his experience as a logger and the prospects he had of obtaining a logging contract from the Bella Coola Logging Co., and certain equipment which it appears was worth probably not more than $1,000 and that the defendant's contribution was $5,000 in cash, a block of timber of which the defendant was possessed and a further block of timber which the defendant agreed to procure from the Cliff estate and afterward did procure. It is not contended, on behalf of the defendant, that if he made a bad bargain he can escape therefrom but nevertheless when plaintiff sets up a bargain which was so greatly, on its face, to his advantage and to the disadvantage of the defendant, the plaintiff must satisfy the Court that the bargain was actually made in the terms contended for by him.

I have considered the evidence carefully and the plaintiff has failed to convince me that the defendant's own timber or the Cliff timber were to be contributed by the defendant to the assets of the partnership. It was no doubt discussed and intended that, if the venture was a success, they would log that timber but when the partnership was dissolved (as I find it was) in February, 1922, the partnership ceased to have any further interest in that timber. There will be judgment in accordance with the above findings with the usual reference to the Registrar, and if the parties cannot agree upon the form of judgment, the matter may be spoken to again.

Judgment accordingly.

KELOWNA GROWERS' EXCHANGE and OKANAGAN UNITED GROWERS v. DE CAQUERAY.

British Columbia Supreme Court, McDonald, J. October 11, 1922.

CONTRACTS (§IIIE—275)—*Restraint of trade—"To market" fruit by growers association—Co-operative arrangement—Principal and agent—Specific performance—Injunction—Receiver.*]—Application by the plaintiffs for an interim injunction restraining the defendant from disposing of his 1922 fruit crop to any person other than the plaintiffs

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and in the alternative for the appointment of a receiver.

J. G. Gibson, for plaintiff; *R. MacDonald*, for defendant.

McDONALD, J.:—The plaintiffs sue upon an agreement dated March 1, 1921, made between the defendant (therein called the grower), the Kelowna Growers' Exchange (therein called the District Association) and the Okanagan United Growers Ltd. (therein called the Central Association).

"The grower agrees 'to market' through the Central Association all the fruit grown by him on certain lands during the year 1921 and every year thereafter continually."

Provision is made for cancellation on March 1 in any year by notice in writing.

"The grower agrees to cultivate and harvest his crop and to deliver the same at the warehouse of the District Association." It is agreed that the fruit shall be "marketed" by the Central Ass'n which in turn, after deducting the expenses incurred in handling and selling, shall render an account of the sales to the grower and pay him any net balance due. It is contended by the defendant that the contract was cancelled and that, in any event, it is a contract which is unenforceable as being in restraint of trade.

The conclusion which I have reached on the construction of the contract makes it unnecessary that I should decide these questions on the present application. It is conceded by the plaintiffs that if this is a contract made between the grower, as principal, and the plaintiffs, as his agents, such an agreement ought not to be specifically enforced and admittedly the effect of granting an injunction or appointing a receiver, would, to all intents and purposes, be the same as if specific performance were ordered. In my opinion the contract amounts to nothing more than an agreement by which the plaintiffs shall act as agents for "marketing," *i.e.*, selling the defendant's crop.

It was strenuously argued that inasmuch as plaintiffs have entered into similar agreements with many other growers in the same district, the agreement is not one of agency but a co-operative arrangement between all the growers and the association. This contention, in my opinion, cannot prevail as each grower has his own separate agreement with the associations and the growers are not parties to any agreement as between themselves. It follows that the application must be refused with costs to the defendant in any event.

Application dismissed.

REX ex rel SING v. HENLEY. B.C.

British Columbia County Court, Thompson, Co. Ct. J. April 3, 1922. Co. Ct.

APPEAL (§IVE—130)—*Conviction under Liquor Act—Service of notice of appeal—Affidavit of merits—Jurat—Sworn before notary—Evidence Act.*]—Appeal from a conviction made by the Stipendiary Magistrate at Wilmer, B.C., under sec. 28 of the Government Liquor Act, 1921 (B.C.), ch. 30. Dismissed.

H. G. Lockwood, for appellant; *W. A. Nisbet*, for Crown.

THOMPSON, Co. Ct. J.:—Mr. Nisbet raised four preliminary objections to the notice of appeal:—

(1) That the notice of appeal was not properly served on the Magistrate. With some hesitancy I overruled this objection. (2) That the affidavit of merits did not expressly negative the charge in the terms used in the conviction. This objection I overruled. (3) That the affidavit of merits contained no date in the jurat. With hesitancy I overruled this objection, in view of the fact that the affidavit must have been sworn before it was filed. (4) That the affidavit of merits was sworn before a notary public, instead of before a Justice, as provided by sec. 89 of the Act. This objection I think is fatal to the appeal. *Rex* v. *Lai Cow* (1921), 30 B.C.R. 277. Paraphrasing the language of Gregory, J., in this decision, I find that, if there is any conflict between the Evidence Act, R.S.B.C. 1911, ch. 78, and the Government Liquor Act, the language in the latter Act must govern, as it deals explicitly in sec. 89 with practice in appeals, while the British Columbia Evidence Act is general.

Should this decision go to a higher Court, and should I be wrong in my finding on this preliminary objection on the merits I would have quashed the conviction in view of the fact that there was no evidence whatsoever that the appellant was ever in possession of the liquor.

The appeal is denied and the conviction sustained.

Appeal dismissed.

Re LEGACE and LEPINAY.

Manitoba King's Bench, Macdonald, J. July 19, 1922.

BANKRUPTCY (1)—*Auxiliary jurisdiction of bankruptcy Courts—Request of Court seeking jurisdictional aid—Bankruptcy Act, sec. 71 (2).*]—Motion for an order in aid of jurisdiction.

[See Annotation, 53 D.L.R. 135, 56 D.L.R. 104, 59 D.L.R. 1.]

C. K. Guild, for Coulson.

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A. E. Hoskin, K.C., and *J. S. Hanna*, for the trustees.

MACDONALD, J.:—A motion, similar to this motion now made, was made before me on June 8 last and an order, as then moved for, granted and reasons therefor given.

Under sec. 71 (2) of the Bankruptcy Act, 1919 (Can.), ch. 36, it is provided:—

"All courts having jurisdiction in bankruptcy in all provinces of Canada and the officers of such Courts respectively shall severally act in aid of and be auxiliary to each other in all matters of bankruptcy and in proceedings under authorised assignments, and an order of the Court seeking aid, with a request to another of the said Courts, shall be deemed sufficient to enable the latter Court to exercise, in regards to the matters directed by the order, such jurisdiction as either the Court which made the request or the Court to which the request is made could exercise in regard to similar matters within their respective jurisdictions."

The motion was argued without any reference to this request or to non-compliance with this section, and in granting the order I assumed that the request provided for by this section had been made.

The present motion is with the object of remedying this omission and the granting of the order after compliance with the section, the request of the Court of Quebec to this Court having since been obtained.

I can see no useful purpose in a refusal of this remedy, as if the motion failed by reason of such omission it would necessitate duplicating the proceedings already taken.

I am asked by counsel for Mr. Coulson to review and rescind the order made, but upon further consideration I find no reason to vary the order or any reason for granting it.

KENNEDY v. VICTORY LAND & TIMBER Co.

Supreme Court of Canada, Idington, Duff, Anglin, Brodeur and Mignault, JJ. May 31, 1922.

BROKERS (§IIB—5)—*Right to commissions—Employment of—Authority of directors.*]—Appeal by defendant from the British Columbia Court of Appeal (1922), 68 D.L.R. 201. Reversed without written reasons.

E. Lafleur, K.C., and *A. D. Macfarlane*, for appellant.

Stuart Livingston, for respondent.

PARKHILL v. McCABE.

Ontario Supreme Court, Appellate Division, Maclaren, Hodgins, and Ferguson, JJ.A., and Rose, J. November 17, 1922.

SALE (§IIC—35)—*Warranty of merchantable quality—*

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Sale by description—Onions—Acceptance of goods—Inspection—Breach of warranty.]—Appeal from judgment of Madden, County Judge of Frontenac, dismissing appellant's action to recover $291 for breach of warranty on a sale of a car of onions. Reversed.

W. F. Nickle, K.C., for appellant.

J. M. Bullen, for respondent.

The judgment of the Court was delivered by

HODGINS, J.A.:—The description of the goods was settled between the parties by telephone as a car of good Canadian onions and the car was bought by the respondent from a company in Leamington, Ont., and shipped to Kingston.

The onions were received in Kingston and unloaded, and their condition at once reported to the respondents. The appellant, however, so dealt with them as to necessitate the conclusion that he accepted them.

The evidence is sufficient to justify recovery for the damages claimed if the respondents are held to have warranted the onions to be of merchantable quality.

I think this was a sale by description within sec. 16 (b) *Smith* v. *Baker*, (1878), 40 L.T. 261, at p. 263, per Grove, J., Falconbridge on Sale of Goods p. 87, Benjamin on Sale, 6th ed., p. 699; *Varley* v. *Whipp*, [1900], 1 Q.B. 513, per Channell, J., and that the warranty of merchantable quality attached to the sale—Quality includes condition (Sec. 2 Sale of Goods Act 1920 (Ont.), ch. 40.

What happened as to inspection when the goods arrived cannot be considered as an inspection such as was held to bar recovery in *Thornett and Fehr* v. *Beers*, [1919] 1 K.B. 486.

The appeal must be allowed and judgment entered for the appellant for the amount claimed.

Appeal allowed.

Re DOMINION SHIPBUILDING AND REPAIR Co. Ltd. HENSHAW'S CLAIM.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee, Hodgins and Ferguson, JJ.A. October 24, 1921.

COMPANIES (VIF—348)—CONTRACTOR FOR DEBTOR COMPANY—WINDING-UP ACT R.S.C. 1906, CH. 144, SEC. 70—ARREARS OF SALARY OR WAGES—CONTRACTOR OR SERVANT.

A contractor for the doing of certain work which he is engaged to do, who is not bound to work personally and exclusively on the job, there being no term fixed for the duration of the employment, and the contractor being at liberty to work elsewhere if he chooses, is not a clerk or other person in the employment of the company to whom wages are due within the meaning of the Winding-up Act, R.S.C. 1906, ch. 144, sec. 70.

[*Re Dominion Shipbuilding and Repair Co., Ltd.*, (1921), 64

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D.L.R. 420, 50 O.L.R. 350, reversed; *Saunders* v. *City of Toronto* (1899), 26 A.R. (Ont.) 265, followed; *In re Field* (1887), 4 Morr. (Bkcy.) 63, distinguished.]

RE DOMINION SHIPBUILDING AND REPAIR CO. LTD. HENSHAW'S CLAIM.

Meredith, C.J.O.

APPEAL by liquidator from an order of Masten, J. (1921), 64 D.L.R. 420, 50 O.L.R. 350. Reversed.

G. M. Willoughby, for the appellant, argued that the claimant was not a clerk or other person within the meaning of the Winding-up Act, R.S.C. 1906, ch. 144, sec. 70, but was an independent contractor: that he was not claiming in respect of wages earned by him personally, but in respect of piece-work, agreed by him to be completed at an agreed rate per piece; and that the claimant personally engaged and paid the labourers engaged upon the piece-work, and there was no agreement by the company to pay these labourers. Section 70 of the Act presupposes the worker to do the work himself, whereas here it was done by the employees of the claimant. Reference to *Saunders* v. *City of Toronto* (1899), 26 A.R. (Ont.) 265; *Cairney* v. *Back*, [1906] 2 K.B. 746; 13 Corpus Juris, p. 211; *Hale* v. *Johnson* (1875), 80 Ill. 185.

W. Zimmerman, for the claimant, respondent, contended that he was not an independent contractor, but was a clerk or other person within the meaning of the Act. Having men working for him did not make him an independent contractor: *In re Field* (1887), 4 Morr. (Bkcy.) 63. He was under the control of the general manager and superintendent of the company, and he was subject to direction, control, and dismissal by these officers. The contract was one "for service, not for services," as found by the Judge below. He referred to the following authorities: *Ex p. Allsop* (1875), 32 L.T. 433; *Re Parkin Elevator Co. Ltd.; Dunsmoor's Claim* (1916), 31 D.L.R. 123, 37 O.L.R. 227; *Re Western Coal Co. Ltd.* (1913), 12 D.L.R. 401, 7 Alta. L.R. 29.

The judgment of the Court was delivered by

MEREDITH, C.J.O.:—This is an appeal by the liquidator from an order of Masten, J., dated April 28, 1921, reversing an order of an official referee (Cameron) dated March 8, 1921.

The question for decision is as to the right of the respondent to rank as a privileged creditor in respect of his claim against the company.

The respondent was collocated by the liquidator on the dividend-sheet as an ordinary creditor, and an appeal was dismissed by the referee, whose order was reversed by the order of my brother Masten.

Section 51 of the Bankruptcy Act of Canada, 1919, provides that, after payment of the fees and expenses of the trustee and certain costs of an execution creditor, there shall next be paid, "all wages, salaries, commission or compensation of any clerk, servant, travelling salesman, labourer or workman in respect of services rendered to the bankrupt or assignor during three months before the date of the receiving order or assignment."

The proceedings, however, have been under the Winding-up Act, R.S.C. 1906, ch. 144, sec. 70 of which provides that "clerks or other persons in or having been in the employment of the company in or about its business or trade, shall be collocated in the dividend-sheet by special privilege over other creditors, for any arrears of salary or wages due and unpaid to them at the time of the making of the winding-up order, not exceeding the arrears which have accrued to them during the 3 months next previous to the date of such order;" and it has been assumed throughout that that section, and not sec. 51 of the Bankruptcy Act of Canada, 1919, is the provision upon which the rights of the respondent depend.

As the correctness of that assumption was not challenged by counsel for either party, I shall deal with the case on the footing that sec. 70 of the Winding-up Act is the section to be applied.

I am, with great respect, unable to agree with the opinion of my brother Masten.

I do not take the same view of the facts as was taken by him.

The respondent was not, as I understand the evidence, to work exclusively for the company.

Asked: "Did you work all the time?" the answer of the respondent was: "I couldn't work all the time. I had to take care of my mills. Had to be away from my work 50 per cent. of the time."

The fair assumption from this is that he was not bound by his arrangement with the company to give his personal attention to the work he was to do for it, but that it was open to him to work elsewhere if he chose to do so.

My brother Masten adopted the view that the respondent was to work personally and exclusively "on this job." He also accepted the respondent's view that the evidence established that "he worked under the general rules of the company as to hours, time-checks, and other matters, did his work under the supervision in all respects of the general

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manager and of the superintendent of the company, and that he was subject to direction, control, and dismissal at any time by these superior officers—in other words, that his contract was a contract for service, not for services, to be paid for at piece-work rates; further, that the company had control not only over the claimant but also over the subsidiary workmen whom the claimant employed; and that they also worked subject in all respects to the rules of the company."

I am unable to agree that what the Judge so finds is supported by the evidence.

There was a good deal of loose testimony as to how the work was carried on, and there were opinions expressed as to what the rights and duties of the parties were, but even these did not go so far as the findings.

A perusal of the evidence satisfies me that there was no interference by the company or its manager or superintendent with the respondent, beyond that to which he was properly subject as a contractor for the doing of the work which he undertook. There was no term fixed for the duration of the employment, and it was therefore open to either party to put an end to it at will. In the very nature of the contract, it rested with the company to say at what work the respondent should be employed. Various kinds of work were to be done by him—furnace-work, angle-work, and liner-work—and this necessitated the putting him by the company at the particular kind of work he was to do; and, as I read the evidence, no more than this was done by the manager or by the superintendent. And so, too, if the work was not properly done, what the manager or superintendent did was not to pass it until it was properly done, just as would be done in the ordinary case of a building contract. I find no warrant in the evidence to support the conclusion as to the position of the subsidiary workmen. The respondent employed whom he chose and the only interference, if it can be called interference, by the company, was to give advice as to the character of the men whom he desired to employ. The respondent's men were sometimes taken off his work and put to work by the company at something else that the company had to do; but this was not done as a matter of right; indeed, all that is relied on by the respondent is just what would happen between the company and a contractor who had to do his work on the premises of the company, where each would naturally accommodate the other where it was reasonable to do that.

Reliance is placed on the respondent having worked under

the general rules of the company as to hours, time-checks, and other matters. What those rules were is not shewn, and one would expect that a contractor employed to do such work as the respondent had to do on the premises of the person for whom he was doing it, and his workmen, would conform with the rules of the employer, especially in a large yard where many men were employed.

In my view, the rights and duties of the parties are to be determined not by opinions of the general manager or of the respondent as to what these were, or even by what happened in the working out of the arrangement between the parties, but by the terms of the agreement which was entered into between them. What this was is stated by the general manager to have been for the respondent "to do furnace-work, angle-work, liner-work which is in his line at so much per piece;" and what was contemplated was that the respondent should bring his men—his organisation, as the respondent termed it—to do the work. According to the testimony of the respondent, the arrangement was that he should bring his men with him and "take on work on piece-work" at the price he was getting at Port Arthur and $400 per ship extra.

My conclusion is that the respondent was not a clerk or other person in the employment of the company to whom salary or wages were due, within the meaning of sec. 70, but that he was a contractor with the company for the doing of the work.

I am unable to distinguish this case from *Saunders* v. *City of Toronto*, 26 A.R. (Ont.) 265. *Stephen* v. *Thurso Police Commissioners* (1876), 3 Ct. of Sess. Cas., 4th ser., 535, was referred to in that case, and the view of the law taken by Lord Gifford (p. 542) was concurred in by Burton, C.J.O.; and Osler, J.A., agreed with the views of the Lord Justice-Clerk and Lord Ormidale.

On the facts, as I view them, none of the cases referred to by my brother Masten has any application, and I have no doubt that had my brother taken my view of the facts his conclusion would have been against the claim of the respondent. I judge so from what he said in *Re Parkin Elevator Co. Ltd.; Dunsmoor's Claim*, 31 D.L.R. 123, at p. 128 *et seq.*

In re Field (1887), 4 Morr. (Bkcy.) 63, is distinguishable. In that case the employer could discharge the claimant at a week's notice, and he had the right to discharge and engage all men working in the brickyard, and to make

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alterations in the rate paid per thousand for the bricks, which was the way in which the claimant was paid.

The observations of Walton, J., in *Cairney* v. *Back*, [1906] 2 K.B. 746, referred to by counsel for the appellant, seem to be inconsistent with what was decided by the Chief Justice in *Ex p. Allsop*, 32 L.T. 433. That case was not referred to in *Cairney* v. *Back*, and it may be that the decision of Walton, J., is not good law.

On the whole, my conclusion is that the respondent is not entitled to the special privilege mentioned in sec. 70, and I would reverse the order of my brother Masten and restore that of the official referee, and I would leave the parties to bear their own costs of the appeal to my brother Masten and of this appeal.

Appeal allowed.

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