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ANNOTATED

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VOL. 40

EDITED BY

C. E. T. FITZGERALD

C. B. LABATT *and*

I. FREEMAN

CONSULTING EDITORS

E. DOUGLAS ARMOUR, K.C.

ALFRED B. MORINE, K.C.

TORONTO

CANADA LAW BOOK CO., LIMITED

84 BAY STREET

1918

CASES REPORTED

IN THIS VOLUME.

TABLE OF ANNOTATIONS

(Alphabetically Arranged)

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DOMINION LAW REPORTS

HOOK v. CITY OF PRINCE ALBERT.

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Saskatchewan Supreme Court, Appellate Division, Haultain, C.J.S., Newlands, Lamont and Elwood, JJ.A. March 27, 1918.

MASTER AND SERVANT (§ V—340)—INSTRUMENT TO RECORD FIRE ALARMS —FIRE ENGINES—MACHINERY—FIRE HALLS—WORKMEN'S COMPENSATION ACT—FACTORY.

An apparatus for changing an alternating electric current into a direct current, and an instrument for recording fire alarms, are not "machinery used" within the meaning of the Workmen's Compensation Act (Sask.), and they, installed in a fire hall, and fire engines kept therein, do not constitute the fire hall a "factory" within the meaning of that Act.

APPEAL from the judgment of the trial Judge in an action under the Workmen's Compensation Act. Affirmed. Statement.

P. H. Gordon, for appellant; *P. M. Anderson*, for respondent.

The judgment of the court was delivered by

NEWLANDS, J. A.:—This is an action under the Workmen's Compensation Act. The plaintiff alleges that in the course of his employment with the defendant he was engaged in the basement of the City Central Fire Hall, which basement was a factory within the meaning of the Workmen's Compensation Act, repairing a Ford car belonging to the City of Prince Albert and used for the purposes of the city fire brigade. In connection with the repairing of the said car, which was an engineering work within the meaning of the Workmen's Compensation Act, a file then being used by the plaintiff broke and a piece of metal from either the file or part of the said motor car, flying off, entered the plaintiff's left eye and destroyed the sight thereof. Newlands, J.A.

The trial judge in his judgment says:—

> It is admitted that in the workshop where the accident took place no machinery driven by steam, water or other mechanical power is used, nor was the automobile which was being repaired there, but only the part which was being repaired.

This applies to the whole basement, which the plaintiff, in his statement of claim, says is a factory, and, therefore, the plaintiff is not entitled to recover as his action now stands.

Plaintiff, however, claims that there is machinery in other parts of the fire hall, and that the premises should be con-

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sidered as a whole, and that so considered they come within the definition of a factory in the Workmen's Compensation Act.

For the plaintiff to succeed upon this principle would require an amendment of the statement of claim.

In support of the other theory (the trial judge says), that the premises were a factory within the meaning of the Act, the plaintiff advances several propositions. There are installed in the fire hall of the defendant two mechanisms, one known as a "mercury arc rectifier" and the other an "electric fire alarm instrument."

The former is an apparatus which changes the alternating current which comes into the fire hall over the electric lines of the defendant into a direct current, which is then used in the fire hall for charging storage batteries and the like. There are no moving parts in this machine, the operation being that of simply passing the current through the machine from whence it issues, as I have said, as a direct current. Undoubtedly, electricity can be and is extensively used as a mechanical power in operating machinery, but there can be in my opinion no justification for holding that the apparatus in question is within that catagory.

I agree with the trial judge's finding that the mercury arc rectifier is not a machine within the meaning of the Workmen's Compensation Act.

The other instrument is an apparatus for recording fire alarms, and is a clockwork arrangement, the motive power of which is a spring which is set in motion by the action of an electric current. The same current operates to release the bolts on the doors of the stables where the department horses are kept.

There is no evidence how this machinery is operated, but it would naturally be started outside the building by some one sending in a fire alarm.

The language of the statute is "when machinery is used." In my opinion that means, used by the workmen in the factory.

The first meaning assigned to the word "use" in Johnson's Dictionary is "to employ for any purpose;" it is, therefore, a word of wide signification. Stirling, J., in *British Motor Syndicate* v. *Taylor*, [1900] 1 Ch. 577 at 583.

There is no evidence that the workmen have anything to do with this machinery. They cannot, therefore, be said to use or employ it for any purpose, and if they do not, then it is not, in my opinion, a "factory" under the terms of the Act.

As to the further contention that there are four gasoline engines kept in the fire hall. All of them form part of the fire-fighting apparatus of the city, and are used for the suppression of fires. They are not used for that purpose in the fire hall, but outside of it.

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In *London & Eastern Counties Loan Co. v. Creasey*, [1897] 1 Q.B. 768, Esher, M.R., said: "Therefore a cab proprietor's horses are not 'plant used in' his mews, for their sole use is in the streets where cabs are hired and the profits of the business are earned. They may be harnessed or unharnessed on the premises, but they are not used for the purpose of the business there."

Neither are the engines in question used in the fire hall.

I am, therefore, of the opinion that the fire hall in question is not a factory under the Workmen's Compensation Act, and that the appeal should be dismissed with costs.

Appeal dismissed.

ENNIS v. BELL.

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Nova Scotia Supreme Court, Russell, Longley and Drysdale, J.J., and Ritchie, E.J. March 12, 1918.

DEEDS (§ II D—35)—REASONABLE DESCRIPTION—EASEMENTS OR PRIVILEGES —"WAY" INCLUDED.

A deed which specifically and reasonably describes the lot, together with the buildings and all easements or privileges appertaining thereto, includes a way in the rear of the house which need not be specifically described.

Statement.

APPEAL from the judgment of Harris, C.J., in favour of plaintiff in an action claiming specific performance of an agreement for the purchase of land. Affirmed.

C. J. Burchell, K.C., and *F. D. Smith*, for appellants.

T. R. Robertson, K.C., and *R. F. Yeoman*, for respondent.

The judgment of the court was delivered by

Drysdale, J.

DRYSDALE, J.:—This action is for specific performance of an agreement to sell the lot of land and premises known as No. 87 Hollis St. in the City of Halifax. The agreement is expressly to sell

> that lot of land and premises known as No. 87 Hollis St. in the City of Halifax together with the buildings thereon and all easements or privileges appertaining to the land for the price or sum of $7,000.

There is undoubtedly a way in the rear of the house running from Salter St. that is appurtenant to the house in question. The whole difficulty between the parties seems to have arisen over the fact that the defendant's solicitor refused to accept a deed of the agreed upon property unless this way was specifically described. Plaintiff's reply was, and I think quite a proper one, that my contract calls for the lot of land and premises known as No. 87 Hollis St.

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with the buildings thereon and all easements or privileges appertaining thereto; I tender you a deed which specifically and reasonably describes the lot together with the buildings and all easements or privileges appertaining. I decline to describe the way or any other easement appurtenant; this deed carries all easements, way included. Defendant's counsel refused to accept a deed and over this sole point the litigation arose.

I think the property in question, that is the lot of land sold, was specifically and reasonably described; that the deed tendered carried all that the purchaser could reasonably call for. I agree with the trial judge in this respect. Although it is clear that the refusal to describe a way was the sole ground upon which the parties split, and the sole objection to the title tendered; the defendant by his pleadings raises alleged defects in plaintiff's title, none of which will bear the test of examination. The trial judge has disposed of these and I agree with him. Defendant's counsel frankly admits he refused the title because he could not get the alleged way appurtenant specifically described in the deed tendered. On this, I think, in this case he must stand or fall. I do not think a vendor need describe specifically easements appurtenant where they do not appear to be the subject of contract. In fact I think it would be bad practice, and any such attempt would probably be to the detriment of the purchaser.

I would dismiss the appeal. *Appeal dismissed.*

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ROYAL BANK OF CANADA v. BANQUE D'HOCHELAGA.

Saskatchewan Supreme Court, Appellate Division, Haultain, C.J.S., Newlands, Lamont and Elwood, JJ.A. March 27, 1918.

INTERPLEADER (§ I—10)—BY SHERIFF—NOT SEPARATE ACTION—AMOUNT —RIGHT OF APPEAL.

An interpleader by a sheriff who has seized goods in an action is to be considered a proceeding in such action, not a separate action, and no appeal lies from a District Court if the amount in controversy in such action is less than the amount in respect of which the District Courts Act (Sask.), grants a right of appeal, though the value of the goods seized may exceed such amount.

Statement.

APPLICATION to dismiss an appeal from an order made by the District Court Judge at Prince Albert on an interpleader issue, on the ground that no appeal lies.

P. H. Gordon, for appellant; *J. F. Frame*, K.C., for respondent.

Lamont, J.A.

LAMONT, J.A.:—The facts are: The Banque d'Hochelaga re-

covered a judgment against the Prince Albert Club for $42.25, and on July 10, 1915, issued execution thereon and placed the same in the sheriff's hands. The Royal Bank had a chattel mortgage on the furniture of the club, and on April 17, 1917, seized the same under its mortgage. While the bailiff of the claimants was in possession, the sheriff's bailiff appeared on the scene with the defendant's execution, and, disputing the validity of the claimants' mortgage, seized and took away 4 upholstered chairs, the property of the club, valued at $35 each. These chairs the claimants demanded from the sheriff, and he applied for and obtained an order allowing him to interplead. An issue was directed by the Judge of the District Court to determine whether or not the 4 chairs seized by the sheriff were, at the time of the seizure, the property of the claimants as against the defendants. The issue was tried by the District Court Judge and determined in favour of the claimants, and the sheriff was ordered to release his seizure and deliver the chairs to the claimants or its agents. From that order an appeal was taken to this court.

At the opening of the court, the claimants moved to have the the appeal taken dismissed, on the ground, as I have said, that no appeal lies.

The argument on behalf of the claimants briefly is: that an interpleader is not an original action, but simply a proceeding in the action in which the judgment was recovered on which execution was issued; that the District Courts Act gives a right of appeal in civil actions *only* in cases where the amount in controversy is over $50, that the amount in controversy in the action was the amount of the judgment recovered, and, being under $50, no appeal lies.

On the other hand, the defendants contend: (1) that an interpleader cannot be regarded simply as a proceeding in the original action; that the parties to it are not the same, and the question to be determined is an entirely different one; that it should be treated as a separate action, and the amount in controversy should be held to be the value of the goods seized, as the ownership of these goods is the only question involved in the issue; and (2) that by r. 572, which is made applicable to district courts by s. 44 of the District Courts Act, a right of appeal is given to this court in *any* interpleader proceeding.

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S. 56 of the District Courts Act (R.S.S. 1909 c. 53, as amended 6 Geo. V. 1915, c. 11, s. 2) reads as follows:—

56. In every civil action in the District Court where the amount in controversy is over fifty dollars an appeal shall lie:

(*a*) In the case of an interlocutory order, judgment or decision, to a judge of the Supreme Court of Saskatchewan in Chambers;

(*b*) In the case of a final order, judgment or decision, to the Supreme Court *en banc*.

Without this statutory provision, no appeal would lie from any order or decision of the District Court, and this section does not give the right to appeal if the amount in controversy is $50 or under. If, therefore, an interpleader proceeding is merely a proceeding in the original action, it follows, I think, that no appeal will lie unless the amount in controversy in the original action is over $50.

Is an interpleader a proceeding in the original action?

In *Hamlyn* v. *Betteley*, 6 Q.B.D. 63, we have the statement of Selborne, L.C., that it is. In that action, the question was whether or not the issue should have been tried without a jury. In giving the judgment of the Court of Appeal, at p. 66, the Lord Chancellor said:—

O. XXXVI., r. 3, relates to quite a different thing, its words plainly referring to an action properly so called, and not including interpleader, which is not an action either in the strict or in any conventional sense. S. 100 defines an action as "a civil proceeding commenced by writ, or in such other manner as may be prescribed by Rules of Court." I find no Rule of Court prescribing the commencement of interpleader proceedings in any other manner. On the contrary, interpleader is treated by O. I., r. 2, as a proceeding in an action, and not as an action itself.

On the other hand, in *James* v. *Ricknell*, 20 Q.B.D. 164, the opposite view prevailed. There, the question was whether or not a solicitor, who had recovered judgment for a client under an ordinary retainer, had authority, without special instructions, to engage in proceedings in interpleader. It was held that he had not. Wills, J., in his judgment, at p. 166, says:—

Proceedings in interpleader are substantially a second action, and nothing but very strong authority would induce me to hold that the plaintiff as a solicitor had any right to embark in them without express instructions from his client . . . The fact that proceedings in interpleader are a second litigation is not disposed of by suggesting that for some technical purpose they are regarded as part of the original action. Names are nothing. Interpleader at the instance of the sheriff is not a natural consequence of a judgment in favour of the plaintiff in an action. It is another proceeding, and it rests with the plaintiff to say whether he will or will not become a party to the new issue.

And the judgment of Grantham, J., is as follows:—

I am of the same opinion. If the precise point has not been already settled I think we may very safely declare the law to be that under an ordinary retainer a solicitor is not entitled to engage in proceedings in interpleader without consulting his client and receiving special instructions. The only authority which the industry of counsel has discovered to the contrary is the dictum of Lord Selborne in *Hamlyn* v. *Betteley*, 6 Q.B.D. 63, to the effect that interpleader is "not an action, but a proceeding in an action." This dictum, however, refers not to the present question, but to the forms of procedure under the Interpleader Acts.

In Hals'. Laws of England, vol. 1, at p. 4, both the above cases are referred to, and the author there states the law as follows:—

An interpleader issue ordered in an action is technically a "proceeding" in that action, and not itself an "action." It is, however, sufficiently distinct from the original action to be regarded for many purposes (*e.g.*, a solicitor's retainer) as a separate litigation.

In *Shupe* v. *Heller*, 10 W.W.R. 874, my brother Newlands, in determining the scale upon which the costs of an interpleader issue should be taxed, said:—

The District Courts Act does not confer upon that court any original jurisdiction in interpleader actions. Therefore that court's jurisdiction upon this subject is limited to the powers conferred upon the court by the Rules of Court in actions that are properly before the court.

It therefore follows that interpleader proceedings in the District Court must be proceedings in a particular action and the costs of all proceedings in that action must be governed by the same scale, unless otherwise provided in the rules.

The language of the District Courts Act and Rules of Court is, in my opinion, not without significance. By s. 2, (3) of the Act, the expression "action" is declared to have the same meaning as it has in the Judicature Act. In the Judicature Act it is defined as follows:—

3. "Action" shall include suit and shall mean a civil proceeding commenced by writ or in such other manner as is or may be prescribed by this Act or by Rules of Court.

R. 1. of the Rules of Court provides that: "Every action, except as otherwise provided, shall be commenced by writ of summons on form 1 in the appendix."

Neither the Act nor the Rules of Court have provided for commencing interpleader proceedings by any other process than a notice of motion in the original action. And the forms prescribed shew the style of cause to be the same as in the original action, with the claimant added.

I am, therefore, of opinion that, while in certain aspects and

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for certain purposes, an interpleader proceeding may be treated as though it were a separate action, yet, generally speaking and for the purpose of determining the question as to a right of appeal, an interpleader by a sheriff who has seized goods under an action is to be considered as a proceeding in the original action. It follows, therefore, that no appeal lies unless the amount in controversy in the original action is over $50.

The amount in controversy in this case is the amount of the judgment recovered, exclusive of costs. *Bank of N.S. Wales* v. *Owston*, 4 App. Cas. 270.

The answer to Mr. Gordon's second contention is this: R. 572 of the Supreme Court Rules, which provides for an appeal to the court *en banc* from the decision of a court or judge in *any* interpleader proceeding, is made applicable to the district courts if, but only if it is not otherwise provided in the District Courts Act. Rules of District Courts, r. 1.

As the District Courts Act has given the right of appeal only where the amount in controversy is over $50 the Rules of Court cannot give a right of appeal contrary to the statutory provision.

The application should, therefore, be allowed with costs, and the appeal dismissed with costs.

Haultain, C.J.S.

HAULTAIN, C.J.S.:—I agree in the result arrived at by my brothers Newlands and Lamont. I think, however, that the power to grant relief by way of interpleader in any action or proceeding in a District Court is given by s. 37 of the District Courts Act (c. 53 R.S.S.). The Rules of Court only provide the procedure by which this relief can be sought and obtained.

Elwood, J.A.

ELWOOD, J.A.:—I concur in the result.

Newlands, J.A.

NEWLANDS, J.A.:—In *Shupe* v. *Heller*, 10 W.W.R. 874, I held that the jurisdiction of the District Court in interpleader "is limited to the powers conferred upon the court by the Rules of Court in actions that are properly before the court. It therefore follows that interpleader proceedings in the District Court must be proceedings in a particular action."

S. 56 of the District Courts Act gives an appeal from the District Court from every judgment, order or decision where the amount in controversy is over $50.

The amount in controversy in this action being under $50, there is no appeal from the decision of the judge in this case unless r. 572

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applies. This rule gives an appeal in all interpleader proceedings, and was applied to the District Court by the District Court Rules, r. 1, which provides:—

> Unless otherwise provided in the District Courts Act the rules of the Supreme Court shall apply *mutatis mutandis* to the practice and procedure in the district courts.

As it is otherwise provided in the District Courts Act that an appeal shall only lie where the amount in controversy in the action is over $50, I do not think that this rule confers any additional right of appeal in interpleader proceedings.

S. 54 (3) of the Supreme Court Act, which provides that the judges of the Supreme Court shall have power to make rules for the District Court, including rules "relating to appeals to and from District Courts," does not, in my opinion, confer upon that court powers to allow appeals in cases not provided for in the District Courts Act, but only to make rules providing the procedure in cases where an appeal is given by that Act.

I am, therefore, of the opinion that, the decision in this case being the decision of a judge in a case where the amount in controversy was under $50, there is no appeal.

Appeal dismissed.

INMAN v. WESTERN CLUB.

B. C.

C. A.

British Columbia Court of Appeal, Macdonald, C.J.A., and Galliher, McPhillips and Eberts, JJ.A. April 2, 1918.

MORTGAGE (§ VI—90)—SOCIAL CLUB—MORTGAGEE—FORECLOSURE—WAR RELIEF ACT.

A mortgagee of the real property of a club incorporated under the Benevolent Society's Act is not affected in his proceedings to realize his security by foreclosure, by the provisions of the War Relief Act (B.C.) as amended in 1917, the land being held for the use of the corporate body.

Statement.

APPEAL by the plaintiff from an order of Murphy, J., refusing leave to proceed in an action for personal judgment and for foreclosure against a club incorporated under the Benevolent Society's Act. Reversed.

A. H. MacNeill, K.C., for appellant; *C. M. O'Brian*, for respondent.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—The neat point in this case is whether the mortgagee of the real property of a club, incorporated under the provisions of the Benevolent Society's Act, is affected, in

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his proceedings to realize his security by foreclosure, by the provisions of the War Relief Act (6 Geo. V. 1916, c. 74 (B.C.)) as amended in 1917 (7 & 8 Geo. V. c. 74, s. 9), by reason of the fact that several of the club's members had joined His Majesty's forces. S. 8 of the Benevolent Society's Act provides that the members of a society incorporated under this Act may, in the name of the society

> acquire and take by purchase, bonus, devise or otherwise, and hold for the use of the members of the society, or any branch society, and according to the by-laws, rules and regulations thereof, all kinds of personal and also real property in this province.

The property in question here is held by the society under the power conferred by the language quoted. It is contended, on behalf of the club, that property vested in the society "for the use of the members" is property vested in the trustee for the members jointly and severally, and that applying the language of the said amendment to the War Relief Act to this situation, the mortgagor cannot proceed with the action. The Act prohibits or stays proceedings to enforce a lien or encumbrance "(*d*) against any trustee of such person." Had the statute used the words for the use of the society, instead of for the use of the members, I am quite satisfied that the club's contention would not even be arguable. Unlike societies registered in England under the Friendly Societies' Act, 59 & 60 Vict., the club is a true, not a *quasi* corporate body. Its members bear the same relationship to the corporate body in general as do the members of a company incorporated under the Companies Act, and it is settled law that the shareholders of the latter have no property in the legal sense in the assets of the company: *Re George Newman & Co.*, [1895] 1 Ch. 674; *Watson* v. *Spratley* (1854), 10 Ex. 222. Did the legislature mean then by the words "for the use of the members" to give the members a particular right of property in the real and personal estate of the club? Reading the whole Act (Benevolent Society's Act) with special attention to s. 4 (6) and s. 13, I cannot give any other interpretation to it than that the expression "for the use of its members" means nothing more nor less than "for the use of the corporate body"—the members collectively constituting the legal entity.

But for s. 13 of the War Relief Act as amended as aforesaid the decision of this appeal would be of far-reaching importance.

That amendment gives power to the Judges of the Supreme Court to grant relief from the intolerable delays which sometimes ensue from advantage being taken of an Act crudely drawn and open to conflicting constructions. This amendment opens the way to a wise and just disposition of the many rights affected by the Act. It permits a reasonable application of the provisions of the Act while doing full justice to those who are really deserving of its protection.

I would allow the appeal.

Galliher, J.A.

GALLIHER, J.A.:—The sole question here is: Are the defendants entitled to the benefit of the War Relief Act, c. 74 of 1917, B.C. statutes? The claim is made under s. 2 (*d*) of the Act.

The defendants are a body corporate incorporated under the Benevolent Society's Act, being c. 13 of R.S.B.C. 1897, and are the registered owners of certain real estate with the building thereon which is used as the club premises.

The transfer was direct to the company. The company mortgaged to the plaintiff, and the mortgage money and interest being in arrears, action was brought for a personal judgment and for foreclosure. Application was then made for leave to proceed, and defendants claimed the benefit of the War Relief Act. Murphy, J., refused the application and from his order this appeal is taken.

Several members of the club are on active service overseas. The first point is: Is the club a trustee of the property for its members?

In *Watson* v. *Spratley* (1854), 10 Ex. 222, at 244, Parke, B., says, in speaking of companies incorporated under the Companies Act (Imp.):—"In all such cases the individual shareholders are quite distinct from the corporation. They are entitled to no direct interest in the land. No part of the realty is held in trust for them . . ." Martin, B., and Alderson, B., although they differ from Parke, B., on another phase of the case do not do so on this.

The words relied upon in s. 8 of our Benevolent Society's Act are:—

> The members of any society incorporated under this Act may in the name of the society . . . acquire and take by purchase . . . and hold for the use of the members of the society . . . real property.

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If it were not for this provision there could not, I think, be any question that the society being a legal entity its assets are its property and not the property of its members.

Do the words "hold for the use of the members of the society" alter that position and create the society a trustee of the property for its members?

In my opinion, the ownership of the property is vested in the society. No individual member has any ownership or right to ownership in the property. The society holds it as owners and the trusteeship that is imposed by the Act is that when owned it shall be held for the use of the members for the time being, or they are further empowered by the Act to sell or dispose of it or exchange mortgage or lease and with the proceeds acquire other lands, etc.

I do not think the word "trustee" in the War Relief Act should be extended so as to cover a case where the member on active service has no property interest in the land but merely an interest to have it retained as a club to which he can resort for social purposes.

I would allow the appeal.

McPhillips, J.A. MCPHILLIPS, J.A.:—I agree with the Chief Justice that the appeal should be allowed.

Eberts, J.A. EBERTS, J.A.:—I would allow appeal. *Appeal allowed*

ONT.

S. C.

TESSIER v. CITY OF OTTAWA.

Ontario Supreme Court. Appellate Division, Maclaren, J.A., Lennox, J., Ferguson, J.A., and Rose, J. December 7, 1917.

NEGLIGENCE (§ II C—95)—CITY CORPORATION—WORK ON ROAD—EXPIRY OF LICENSE—LIABILITY.

A city corporation is not liable for negligence in the performance of work after the expiry of a license it has given therefor.

Statement. APPEAL by plaintiff from the judgment of a County Court Judge, dismissing an action to recover damages for personal injury sustained by the conductor of a street-car, by coming against an obstruction in a highway upon which the street-car was running, as he was attempting to pass along the foot-board of the car. The obstruction was said to have been placed in the highway by the defendants Neate and Wentzloff, in the course of doing some work upon the highway, by the authority of the defendants the Corporation of the City of Ottawa.

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TESSIER v. CITY OF OTTAWA.

Taylor McVeity, for appellant; *F. B. Proctor*, for defendants, the City of Ottawa.

[The appeal as against the corporation was dismissed by the Court.]

G. F. Henderson, K.C., and *A. C. Fleming*, for individual defendants, respondents.

Lennox, J.

LENNOX, J.:—This is a very simple case. Mr. Henderson intervened when the argument of the appeal was resumed on the second day, and took the ground that a part of the evidence only was shewn by the Judge's notes, and there should be a new trial. This was not the proper time to raise this question; but, when this is said, the paramount question still is: is the record of the trial in sufficient detail to enable us to know and appreciate what was deposed to and put in evidence, and are we in a position upon the record as it is to do justice between the parties? I have read the Judge's notes of the evidence of these witnesses, and I have carefully read his reasons for judgment, which were written when all that took place at the trial, and its effect, as it appeared to the learned Judge, must have been fresh and clear in his mind. He finds for the defendants. I have read all the other evidence, and I do not propose to disturb or question his findings or conclusions of fact. I think it is only necessary to review and consider his conclusions of law; and, this being so, there is no need to direct, and there would be no propriety in directing, a new trial.

The main facts are not numerous or complicated. The defendants Neate and Wentzloff, desiring to construct a drain from their premises north of Creighton street to connect with the city sewer in that street, in the city of Ottawa, obtained a conditional permit from the defendant corporation, under the provisions of by-law 3865, on the 9th February, 1916.

They did not, however, go on with the work, and the permit, which was limited to 30 days, expired about the 11th or 12th March.

In June of 1916, evidently about the 13th or 14th, these defendants, without again obtaining the sanction of the corporation by renewal of the permit, new permit, or otherwise, commenced to open up the ditch, and, working intermittently, the work

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dragged on from day to day until the 21st June. I say "dragged on" because, although the whole work of digging, piping, cementing, and refilling was to cost $19, at the end of a week not more than half, if a half, of the work had been performed, and the work was again at a standstill. There is a double track of railway on Creighton street. These defendants had erected a barrier constructed of trestles and two-inch plank, laid on the flat, over or around their open drain and extending to within 2 or 2½ feet of the most northerly rail of the railway tracks. It was 3½ feet high. The trestles were picked up by these defendants on their premises; the planks were not fastened. There was no precaution taken to keep them in place, and it is suggested by the cross-examination, and it is quite possible, that they were moved closer to the track by school-children. There was nothing to prevent it; and, if it was so, the intervention of a third party, in the way suggested, and upon the facts of this case, would not relieve the defendants from liability for the condition of the structure at the time of the accident: *Rigby* v. *Hewitt* (1850), 5 Ex. 240; *Hill* v. *New River Co.* (1868), 9 B. & S. 303; *Clark* v. *Chambers* (1878), 3 Q.B.D. 327. They were liable to be moved, and, if they were moved, it was "a natural and direct outcome of the neglect to fasten them for which these" defendants are responsible: *Harrison* v. *Great Northern R.W. Co.* (1864), 3 H. & C. 231; *Collins* v. *Middle Level Commissioners* (1869), L.R. 4 C.P. 279; *Paterson* v. *Blackburn Corporation* (1892), 9 Times L.R. 55 (C.A.); and *Illidge* v. *Goodwin* (1831), 5 C. & P. 190.

The plaintiff is a street-car conductor in the service of the Ottawa Electric Railway Company, and on the 21st June was upon an open car running westerly along Creighton street.

Acting in the discharge of his duty as a conductor, and while attempting to pass along the foot-board of the car from the rear to the front, the plaintiff came in contact with one of the planks forming part of the barrier referred to, and was seriously injured. He knew of the existence of this erection, but had momentarily forgotten it.

Assuming, or advised, that the corporation, as well as the individual defendants, were liable, he brings action against both.

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The defendant corporation in their statement of defence denied that they had permitted or authorised the obstruction complained of, and there is no evidence that they did.

The permit was of no force or effect at the date in question; and, although one of their officers, Sherwood, assumed to supervise the work in a way, it is not shewn that he had any instructions to do so, and his acts do not bind the corporation; and, although he was doubtless very properly called as witness as to what he saw, his doings have no legal bearing whatever upon the issues to be determined in this action; and his opinion as to negligence or the absence of negligence—and the same may be said as to other witnesses—should not have been taken, or, if taken, acted upon. He had no authority; and his seeing the work, without objection, cannot properly be spoken of as what we understand by the term "an inspection."

It follows that Neate and Wentzloff were wrongfully upon the highway, and their ditch and barrier were unauthorised. They had no legal right to make excavations or erect barriers or obstructions of any kind. Their conduct, if it were necessary to pursue the inquiry, involves more than a mere question of negligence, it amounts to what is known as "malfeasance," and in such cases there is actionable liability without proof of negligence, and generally the wrong-doer or trespasser is liable for all the consequences: *Clark* v. *Chambers*, 3 Q.B.D. 327.

As stated by my brother Maclaren at the conclusion of the argument, I think the cause of action against the corporation is not made out.

As to the other defendants, I am, with deference, of opinion that a cause of action is clearly established. There were no men at work on the day of the accident, and this was not by any means the first idle day. On the tardy and dilly-dally method in which the work was executed, however, I need not dwell; for, although, but for the delay, the plaintiff would probably not have been injured, yet it may be that this is not a determining factor. But it is not to be overloooked that, even if these defendants had obtained a permit, what they are shewn to have done could not be regarded as done in compliance with the city by-law.

I have referred to the haphazard supports and unfastened planks. But, aside from this, it does not appear that fencing

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of any kind, with the menace it necessarily involves, was the method of protection during the busy traffic hours, contemplated by the city council. One day was sufficient in which to do all the work in the vicinity of the track, and one man with a flag would not occasion an extravagant expenditure.

Condition (1) of the permit authorised by the by-law reads: "The trench shall be dug at the location and to the dimensions directed by the City Engineer, and shall be kept well fenced and lighted daily from sun-set to sun-rise."

It was shewn that these defendants fenced it in when La Prés abandoned the work; that it was fenced on the day of the accident, when the men were again not at work; and, the trial Judge having found that the occasion spoken of by Coté was after the happening of the accident, a finding dependent upon the credibility of the witnesses which I am not at liberty to question, there is no evidence, and there was no suggestion, that these defendants maintained a barrier or obstruction of any kind in the day-time when the work was being regularly carried on, or that it was necessary or proper to have it there in the day-time if the men were at work; and, if I invoke the evidence of what I see about me in centres of population, it is not the method usually adopted where public convenience and the exigencies of traffic have to be taken into account. I am not of course at liberty to infer that the Municipal Council of the Capital City of Canada, particularly when presided over by a gentleman so notably definite and exact in expressing himself as counsel for the plaintiff is, failed to express just what it intended to provide for.

That the barrier in question was negligently and improperly constructed and maintained, and that at the time of the accident it was in a condition and position calculated to occasion injury to persons employed as the plaintiff was on the day in question, is, I think, on the evidence of the defendants and their own witnesses, beyond reasonable doubt. It is a case of *res ipsa loquitur*. Take their estimates of the distance from the rail as correct (although there is no certainty about it), take it just as they think it was—2 feet or 2½ feet from the rail, I care not which—allow for the overhang of the car, the extension of the foot-board, and the projecting wall or "fence" of the car that had to be rounded to get from the rear to the front of the car,

and the most that can be argued for the defendants is, that a conductor of moderate dimensions, who never forgets, who is always on the alert, and always on the look-out, glues his arms to his sides, and never sways from the perpendicular, might scrape through without injury. I think it is quite possible, but I do not think it enough—it does not shew a "sufficient margin of safety," to adopt an expression frequently used.

The result is:—

1. That, accepting the evidence of the defendants and their witnesses as to facts, but not their opinions or "arguments" as to what occasioned the injury—statements which are quoted and apparently adopted by the trial Judge—I am of opinion that negligence was established against these defendants.

2. That the defendants were wrongfully upon the highway and unlawfully obstructed it by the structures complained of, and, whether negligent or not, are liable for the injury, unless it was caused by the plaintiff's negligence.

3. That in either case the onus of proving the plaintiff's negligence, and that this was the cause of the injury, was upon the defendants: *Morrow* v. *Canadian Pacific R.W. Co.* (1894), 21 A.R. 149.

There remains the question of contributory negligence; and, although it was upon this, wholly or mainly, that the learned Judge based the dismissal of the action, it requires no lengthy discussion.

The finding turns upon the "possibility" of passing in safety, the doubt as to whether he looked or not, and the evidence of Samuel Kennedy to the effect that the plaintiff "swung out carelessly." "Carelessly" does not mean anything, and particularly is it meaningless or worse in the mouth of this witness.

Mr. Henderson saw the force of this, and suggested that possibly that was not exactly what he said. I am satisfied that upon a point so important the Judge was careful and exact. He took note even of matters comparatively unimportant.

To be exact the note of this evidence, so far as material, is:—

"I saw the car approaching, but paid no great attention to it. I saw the conductor take hold of the handle and swing himself clear out carelessly. I heard a shout and saw the conductor take a step to the car and swing on."

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This was the man with an injured hand and broken ribs; and, if the motorman and the plaintiff told the truth, the car had to be backed to the place of the accident. "Swing" appears to be a favourite word. However, continuing he says: "Car did not drive back; he picked up his hat and went off"—carelessly, I presume. "I saw the conductor, but was careless, for I should have gone to see about his hurt." Here we have "careless" again; evidently another favourite word. "I did not see the accident happen." Why? He was there before and after and saw everything else. I would not be disposed to believe this witness, contradicted as he was by two witnesses upon a point which was not essential to the case, and in the teeth of every probability, but the Judge who hears the witness is in a better position to weigh credibility than an appellate Judge can be: he believed him, and I will not take the responsibility of saying that he was wrong. It proves nothing. The conductor must grasp the handle, and he is necessarily some inches from it in getting round. How far out he was from the post was not asked, and we are not told. All that is said is, that he was clear of it. He had to be clear of it and by some inches, as I have said. He had narrow shoulders indeed, if they did not measure 18 inches or more. Add the overhang of the car, and the projection of the post, and the 24 or 30 inches is taken up, and more than taken up, without one inch for extra swing. It is of no consequence whether the conductor responded to the call of the passenger as one free from care or burdened with the weight of it. He was rightfully on the car and acting in discharge of his duty to his employers, who held the right of way. With respect, I am of opinion that there is no evidence of negligence, much less of negligence occasioning the accident, to be charged against the plaintiff. Conjecture is not enough: *Montreal Rolling Mills Co.* v. *Corcoran* (1896), 26 S.C.R. 595; nor inadvertence: *Denny* v. *Montreal Telegraph Co.* (1878), 42 U.C.R. 577; nor intoxication: *Ridley* v. *Lamb* (1863), 10 U.C.R. 354; "nor that it would have been quite possible to pass it (the obstruction) in safety:" *Rowan* v. *Toronto R.W. Co.* (1899), 29 S.C.R. 717. Nor is knowledge *per se*—*Gordon* v. *City of Belleville* (1887), 15 O.R. 26—or forgetfulness—*Scriver* v. *Lowe*, 32 O.R. 290—contributory negligence.

The learned Judge assessed the plaintiff's damages at $175.

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The individual defendants may be thankful that something more serious did not occur. If the car had not been running at about half its ordinary speed, a fatality might have resulted. The servant of the corporation assumed to act, and, from the lapse of time, the municipal council must be assumed to have been aware of what was going on. The plaintiff had no means of knowing the actual state of affairs until the trial. The practice, however, is, that the Court will not interfere with the judgment as to costs if the judgment in other respects is affirmed. When the plaintiff appealed, he knew all the facts.

The defendants the Corporation of the City of Ottawa are entitled to the costs of appeal, and must have costs in the Court below, as well, if demanded.

The judgment entered should be set aside, and for it there should be substituted a judgment dismissing the action as against the defendants the corporation, with costs; and for the plaintiff against the other defendants for $175, with costs here and below.

Maclaren, J.A. Ferguson, J.A.

MACLAREN and FERGUSON, JJ.A., agreed with LENNOX, J.

Rose, J.

ROSE, J. (dissenting):—The appeal against the judgment in favour of the defendants the Corporation of the City of Ottawa was dismissed at the hearing, but the question of costs was reserved. The trial Judge gave the city corporation the costs of the trial, and I do not know of any principle upon which we can interfere with his order, nor do I know of any reason why the city corporation should not have the costs of the appeal.

The only matter, then, to be considered is the case against the defendants the contractors, Neate and Wentzloff. There is no evidence that the barrier with which the plaintiff came in contact had been moved from the position in which it was set up by the servants of these defendants, and these defendants must accept responsibility for its being where it was. The questions therefore are: first, whether, as between themselves and the plaintiff, the contractors were guilty of any wrong-doing in so placing the barrier; and, second, if the first question is answered in favour of the plaintiff, whether the casualty resulted from the defendants' wrong-doing, or whether the plaintiff's negligence

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was a contributory cause. The trial Judge has answered both questions in favour of the defendants, finding that they were not guilty of any wrong-doing, and that the plaintiff brought the injury upon himself by his own negligence. In the circumstances of the case, the two findings mean virtually the same thing: the foundation of the first being a finding of fact that the barrier placed as it was was not a source of danger to a tram-car conductor occupying the position which he might be expected to occupy on his car; and the second being a holding that the plaintiff might have passed safely "unless he extended his body beyond the running-board, an entirely unnecessary and negligent act."

If the trial Judge correctly describes the plaintiff's conduct, the defendants had a right to assume that the plaintiff would not be where he was at the moment of the accident; and so, in having the barrier where it was at that moment, they did not fail in any duty that they owed to him: *Grand Trunk R.W. Co.* v. *Birkett*, 35 S.C.R. 296. This, I think, is the logical effect to be given to the learned Judge's statement, but practically it makes no difference whether the statement is so treated or is regarded as a finding of contributory negligence; in whichever way it is treated, the appellant must displace it or the appeal fails.

The evidence adduced by the plaintiff makes, if believed, a fairly clear case. There was a trench crossing the roadway at right angles. On each side of this was a hurdle. On the hurdles was a plank parallel with the tramway. The plaintiff's case was that the plank was nearer to the rails than was the lower part of the hurdle; that it was higher than the steps on the side of the open car, and projected some two or three inches over the lower one of those steps; that the plaintiff had seen the obstruction previously, but had not had occasion to be on the side-step—"running-board"—when passing it, and had not observed how close it was to the car; that on the occasion in question a passenger in the front part of the car beckoned to him, and that he started forward in answer to the summons, and was in the act of stepping from the rear-platform to the running-board when he came into collision with the plank, which he had not noticed, and the proximity of which was not present to his mind at the moment; that he was not leaning out over the side of the car at the time.

As I have said, if this evidence is accepted the case is a plain

one in favour of the plaintiff. What the trial Judge had to decide was, whether, in view of all the evidence, it ought to be accepted; and the problem presented to us is, whether his refusal to accept it ought to be reversed.

Unfortunately, in addition to the usual difficulty in which an appellate Court finds itself by reason of not having seen the witnesses, there is the further difficulty that we have no full report of the evidence adduced by the defendants. The short-hand notes of the evidence given on behalf of the plaintiff were preserved and extended, but the notes of all that occurred after the close of the plaintiff's case were lost, and we have only such memoranda as the trial Judge made. Counsel for the defendants the contractors stated to us that it was only on the evening preceding the argument that he became aware that the case had been certified in this incomplete condition, and he asserted that a perusal of the complete record of what was sworn to would convince the Court that the evidence supported the judgment. Illustrating his statement, he said that a witness, whom the Judge notes as saying that the plaintiff acted "carelessly," really described the plaintiff's action, and that the expression "carelessly" is the Judge's memorandum of the result of the evidence. The defendants' solicitors are not responsible for this incomplete state of the record. They had ordered a copy of the notes in the usual way, but no copy had been furnished them, and they did not know and would not know that a mere memorandum of what their witnesses had said was being certified to this Court. I think, therefore, that, if we came to the conclusion that the evidence as reported would not support the judgment, we ought not to enter judgment in favour of the plaintiff, but ought to direct a new trial upon proper terms. However, in my opinion, the judgment can be supported upon a fair reading of the material that is before the Court.

As the trial Judge points out, no one furnished to the Court any very accurate information as to the measurements. We are told the distance of the hurdle from the rails, but we are not told the width of the car, and we cannot check the plaintiff's statement as to the proximity of the hurdles to the edge of the running-board, except by what we have of the statements of the witnesses whom I am about to mention.

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There were five witnesses called for the defence. The first of them is the one already mentioned, who says that "he saw the conductor take hold of the handle and swing himself out carelessly." The second says: "It is not possible for a man to be struck in ribs if he holds handle-bar; if he was swinging out he could." The third: "I heard Tessier say where he stood. It was not possible for planks to hit him in that position, and unless he swung out it would not happen." The fourth says: "If Tessier had one foot on floor of car and other on step and not swung out, the trestle could not strike him—he might be struck if he swung out—otherwise not possible for plank to strike him." The fifth: "Tessier could not be hit in way he says."

These are very bald statements, but if they mean, as probably they do, that the plaintiff was not acting as a reasonably careful conductor would, but was unnecessarily and carelessly putting himself in a position of danger, and if the Judge, hearing not only the statements quoted, but also whatever explanation the witnesses gave and what they said upon cross-examination, was satisfied that the charge against the plaintiff was established, he was right in holding that the case made by the plaintiff's witnesses was displaced. He says that he "cannot find that (the plaintiff) was knocked off the car by the guard or any part of it, if he was in the position he described in any of his statements;" and also, as already mentioned, that the plaintiff would not have been injured "unless he extended his body beyond the running-board, an entirely unnecessary and negligent act."

It would not be fair to assume that counsel of Mr. Henderson's experience argued, or that the learned trial Judge held, that the conductor of an open car must at his peril maintain a rigidly upright position when moving along the "running-board" of his car, and can have no cause of action if, in going from one end of the car to the other and swaying outward no more than is usual and reasonable, he comes in contact with an obstruction. Mr. Henderson before us repudiated any such contention; and, as I have said, I do not think it would be fair to assume that the trial Judge meant to give effect to anything so absurd. I cannot find in the long reasons for judgment anything that satisfies me that the learned Judge misdirected himself as to the law; and, as there was certainly some evidence on which he

might find that the accident did not occur in the way in which the plaintiff said it occurred, and some evidence that the plaintiff was unnecessarily and unreasonably leaning out over the side of the car, and as we must assume that this last-mentioned evidence was elaborated and that the witnesses were cross-examined upon it, I do not see how, without knowing more then we do know about what was actually sworn to, we can take it upon ourselves to say that the Judge was wrong in the conclusion that he reached; and, unless we are satisfied upon that score, we certainly cannot direct judgment to be entered in favour of the plaintiff.

I would dismiss the appeal.

[In the result, the appeal of the plaintiff against the city corporation was dismissed with costs, and the appeal of the plaintiff against the other defendants was (ROSE, J., dissenting) allowed with costs, and judgment directed to be entered for the plaintiff against those defendants with costs.]

STOKES v. LEAVENS.

Manitoba Court of Appeal, Perdue, Cameron and Fullerton, JJ.A. April 15, 1918.

HUSBAND AND WIFE (§ III A—141)—ALIENATION OF WIFE'S AFFECTIONS—DESERTION—WAR RELIEF ACT AS DEFENCE.

The War Relief Act (Man.) 5 Geo. V. c. 88, refers only to matters arising out of contract; its benefits cannot be claimed in actions for tort.

Statement.

APPEAL by defendant from a judgment of Metcalfe, J., refusing a stay of proceedings in an action for damages for alienation of affections. Affirmed.

F. M. Burbidge, for appellant; *W. H. Trueman*, for respondent.

Perdue, J.A.

PERDUE, J.A.:—This is an action in which damages are claimed by the plaintiff from the defendant for the alleged alienation of the plaintiff's wife's affections by the defendant and for causing her, as it is alleged, to desert her husband and children and to go and live with defendant. The defendant claims the benefit of the War Relief Act, 5 Geo. V. c. 88. Accordingly, he made an application to the Referee in Chambers to stay proceedings in the action under s. 2 of the Act. The application was dismissed and, on appeal to Metcalfe, J., the dismissal was affirmed. The defendant now appeals to this court.

The question raised on the application turns on the meaning of the words in s. 2, "it shall not be lawful to bring any action or take any proceeding . . . against a person who is . . . a

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resident of Manitoba . . . and has enlisted . . . as a volunteer . . . for the enforcement of payment by any such person of his debts, liabilities and obligations existing or future." The question is, are these words wide enough to include a pure action of tort like the present? The cause of action in this case is not a "debt." Neither can it be included in the term "obligation" which refers to something in the nature of a contract, such as a covenant, bond or agreement. It would therefore, if at all, have to be included in the meaning of the word "liability." The statute speaks of an action or proceeding for the "enforcement of payment" of a liability. This implies that there is an existing liability, payment of which may be demanded and enforced. But in a pure action of tort like this there is no liability to pay on the part of the defendant, until a verdict has been found and the damages have been assessed. I think the Act refers only to matters arising out of contract. If the intention of the Legislature was to stay proceedings in actions of tort, it would have expressed that intention in clear words. See *McIntyre* v. *Gibson*, 17 Man. L.R. 423.

I agree with the decision of Hunter, C.J., in *Nelson* v. *Balderson*, [1917] 3 W.W.R. 448, which is a direct authority in support of the plaintiff's contention.

The appeal should be dismissed with costs.

Cameron, J.A.

CAMERON, J.A.:—This action is brought by the plaintiff against the defendant to recover damages for the alienation of his wife's affections. The defendant applied to the referee for a stay of proceedings on the ground that he was entitled to the protection of "An Act for the Protection of Volunteers serving in the Forces raised by the Government of Canada in aid of His Majesty and other persons," being c. 88, 5 Geo. V. The referee refused the order and his decision was confirmed by Metcalfe, J., on appeal. The order made dismissing that appeal is now before us on appeal.

The preamble to the Act says that it is desirable that an Act shall be passed for the protection and relief of all such persons (volunteers or reservists) and their families from proceedings for the enforcement of payment by all such persons of debts, liabilities and obligations existing or future, however arising . . . during the continuance of the war.

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Sec. 2 of the Act provides [see judgment of Fullerton, J.A.]

It is quite clear to me that the actions and proceedings referred to in that section are restricted to those arising out of contract. It was sought on the argument to make the word "liabilities" include liabilities for torts; but the whole tenor of the section is against such an extension of meaning. Moreover, the expression "for the enforcement of payment by any such person of his liabilities" seems to me to exclude from the term "liabilities" claimed for damages arising in tort which cannot be fixed and determined until they have been reduced to judgment. I agree with the decision in *Nelson* v. *Balderson*, [1917] 3 W.W.R. 448, where it was held by Hunter, C.J., that an action for libel was not within the terms of a similar British Columbia statute. The object of the statute was to prevent enlisted men from being harassed for money demands arising out of contracts they may have made; it disclosed no intention of shielding them from the consequences of any tortious acts.

In my opinion the appeal must be dismissed.

Fullerton, J.A.

FULLERTON, J.A. (dissenting):—The sole question involved in this appeal is the construction of s. 2 of the War Relief Act, c. 88 of the statutes of Manitoba for the year 1915.

The action is in tort and the defendant contends that s. 2 applies and prevents the action being proceeded with.

S. 2 provides as follows:—

2. During the continuance of the said war and for one year thereafter it shall not be lawful for any person or corporation to bring any action or take any proceeding, either in any of the civil courts of this province or outside of such courts, against a person who is, or has been at any time since the first day of August, 1914, a resident of Manitoba and has either enlisted and been mobilized as a volunteer in the forces raised by the Government of Canada in aid of His Majesty in said war or has left Canada to join the army of His Majesty or of any of his Allies in the said war as a volunteer or reservist, or against the wife or any dependent member of the family of any such person, for the enforcement of payment by any such person of his debts, liabilities and obligations existing or future, or for the enforcement of any lien, encumbrance or other security, whether created before or after the coming into force of this Act, or for the recovery of possession of any goods and chattels or lands and tenements now in his possession or in the possession of his wife or any dependent member of his family, and, if any such action or proceeding is now pending against any such person, the same shall be stayed until the expiration of one year after the termination of the said war.

The recital to the Act states that "it is desirable to pass this Act for the protection and relief of all such persons and their

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families from proceedings for the enforcement of payment by all such persons of debts, liabilities and obligations, existing or future, however arising, ..."

S. 13 of the Manitoba Interpretation Act (R.S.M. 1913, c. 105) provides that:—

> . . . every Act and every provision or enactment thereof shall be deemed remedial, whether its immediate purport be to direct the doing of anything which the legislature deems to be for the public good, or to prevent or punish the doing of anything which it deems contrary to the public good, and shall accordingly receive such fair, large and liberal construction and interpretation as will best insure the attainment of the object of the Act and of such provision or enactment, according to its true intent, meaning and spirit.

The words of the Act appear to me wide enough to include an action of tort.

I would allow the appeal and stay the action.

Appeal dismissed.

GEARHART v. KRAATZ.

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Saskatchewan Supreme Court, Appellate Division, Haultain, C.J.S., Newlands, Lamont and Elwood, JJ.A. March 27, 1918.

CONTRACTS (§ VC—402)—FALSE REPRESENTATION—REPUDIATION—TIME—DETERIORATION WHILE RETAINED.

Where there has been a false representation entitling a purchaser to repudiate a contract, the repudiation need not be immediate, and natural deterioration of the article while it is retained will not disentitle to rescission.

[See annotation 21 D.L.R. 329.]

Statement.

APPEAL by defendant from the trial judgment in an action on promissory notes, for the purchase price of mules.

B. H. Squires, for appellant; *C. M. Johnston*, for respondent.

The judgment of the Court was delivered by

LAMONT, J.A.:—The plaintiff sues on two lien notes, or agreements, given to him by the defendant for the purchase price of two span of mules sold by the plaintiff to the defendant on April, 1916.

The defence is that the lien notes were given as the purchase price of two mules which were represented by the plaintiff to be aged 12 and 13 years respectively; that this representation was entirely false; that the defendant knew absolutely nothing about mules, and was unable to judge their ages from their appearance; that the mules were so old that they were useless, and that, upon discovering that they were not as represented, the defendant returned them to the plaintiff, and he now asks that the agree-

ment be declared rescinded and the notes returned to him; that the plaintiff represented the mules as being of the ages of 12 and 13 years respectively is not disputed. With his own hand he wrote on the lien notes the following words: "Given for one sorrel and one brown mule age 12 and 13 years." The veterinary surgeon who gave evidence at the trial placed the ages of the mules at between 30 and 50 years, and the trial judge found as a fact that they were very much older than represented.

In his testimony at the trial, referring to his entering the ages on the lien notes, the plaintiff was asked:

Q. And you put down there 12 years? A. Yes. Q. And he (the defendant) asked you if that was correct, and you said? A. Yes.

That the defendant was relying on the representations made by the plaintiff as to the age of the mules is shown not only by the testimony of the defendant, but by the testimony of the plaintiff himself.

The defendant's evidence is as follows: "He showed me the mules and I said: 'How old are they?' and he said 'They are 11 and 12 years old.' I said: 'How do you know?' 'Well,' he says, 'the man over here, Mike Stack, raised them.' . . . We talked for a while, about an hour, and during this conversation he said he met Mike Stack when he first came into the country, met him on the road, and he said he asked Mike how old the mules were, and he said Mike told him they were 3 and 4 years old. He (plaintiff) said: 'I jumped off the wagon and I seen they had the coltish mouth . . . and I knew then they were 3 and 4, and I was rather surprised.'"

In his evidence the plaintiff said: "I knew the mules that he (Mike Stack) had brought into the country—at least that I had seen—were young mules, and it was on the strength of that that I sold them." He was asked:

Q. Did you not know that he was depending on the age you told him? A. I expect he was depending on it.

After buying the mules, the defendant started to take them home, but, after he had gone several miles he found the mules were playing out, so he telephoned back to the plaintiff and wanted him to take them back. The plaintiff admits this, and said that he told the defendant to take the animals for 2, 3 or 4 weeks, and if they were not all right he would take them back. The defendant found the mules unable to do much work. They

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were not eating properly, and about July 1 he sent for a veterinary to come and fix their teeth. When the veterinary surgeon looked at their mouths he told the defendant that what they required was a new set of teeth entirely; that in one of the mules the molars were practically worn away, and, in the other, that only about one-fourth of the chewing surface was in fair shape. The teeth were so far gone that they could not chew their food, and nothing could be done for them. Shortly after the visit of the veterinary, the defendant informed the plaintiff that the mules were twice the age he had represented them to be, and demanded that he make good his representation. The plaintiff did nothing, and the defendant notified him again by registered letter. This having no effect, he returned the mules to the plaintiff on October 2nd. A short time afterwards they died.

The contention on behalf of the plaintiff was, that he simply passed on to the defendant the information he had received concerning the age of the mules from Mike Stack. In his judgment, the learned trial judge held that the representations as to age was more in the nature of an expression of opinion, on which the defendant could use his own judgment, than a statement of fact which would entitle him to rescission.

In my opinion, this view cannot be upheld. The plaintiff entered the ages of the mules on the lien notes as of 12 and 13 respectively. He was then asked by the defendant if that was their correct age, and he replied in the affirmative. This, to my mind, makes the representation much more than a mere expression of opinion. It is a statement of fact, to the correctness of which the plaintiff pledged his word, and he did it, knowing that the defendant was relying on his statement. The representation was most material, and was entirely false, and by reason of it the defendant was induced to enter into the contract.

In 20 Hals. 737, the law is stated in the following words:—

> 1745. Where the representee has been induced by misrepresentation, whether fraudulent or innocent, to enter into a contract or transaction with the representor, which, unless and until rescinded, would be binding on the parties, such contract or transaction is voidable at the option of the representee. This means that the representee, on discovery of the truth, has a right to elect whether he will affirm or disaffirm the contract or transaction, and, if he adopts the latter course, is entitled to give notice to the representor of repudiation, and demand from him a complete restoration of the *status quo*.

To the defendant's counterclaim for rescission the plaintiff did not set up any affirmative plea, but contented himself with merely denying that any representation had been made, and that the defendant had repudiated the contract and returned the animals.

On the argument before us it was contended that he had elected to affirm the contract after becoming definitely aware of the misrepresentation, and that his election was shown by the fact that he had retained the mules for a period—in all—of six months, and that he had worked them. Even had the plaintiff pleaded election to affirm on the part of the defendant, the evidence, in my opinion, would not have supported such plea.

Merely retaining the property after becoming aware of the misrepresentation is not alone sufficient to deprive the defendant of his right to rescind.

In *Consolidated Investments, Ltd.* v. *Acres*, 32 D.L.R. 579, at 580, Walsh, J., states the result of the authorities in the following words:—

> Apart from that, as a matter of law, the defendant was not bound to disaffirm the contract immediately upon the discovery of these misrepresentations. That gave him the right to either affirm or disaffirm it. Until he decided to avoid it it remained binding, but he had a right to keep his election open so long as he did nothing in the meantime to affirm the contract, subject to this, that delay in disaffirming might be treated as some evidence, and a long delay as conclusive evidence, of his election to affirm; and further, that if the position of the parties had been affected by the delay or the right of an innocent party had arisen during the delay, his right of rescission could not be exercised.

Nor can an inference be drawn that by using the mules the defendant intended to affirm the contract after he became aware of the misrepresentation, because there is no evidence whatever that between the time the veterinary surgeon informed him as to the true age of the mules and the time he complained to the plaintiff the mules had done any work, even if working them would justify the drawing of such inference.

It was also contended that there could not now be rescission because complete restitution had not been made, as one of the mules when returned was in very poor condition.

The rule is that where the representee has lost or destroyed the subject matter of the contract, or so dealt with it as to produce an entire alteration in its physical, commercial or legal character, quality or substance, as distinct from mere depreciation, decay or

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deterioration in the ordinary course of events, the representee is not entitled to his rescission. 20 Hals. 750-51.

The evidence satisfies me that the poor condition in which the animals were when returned was due to old age, and the fact that they were unable to properly eat or digest their food. In 1915, while the plaintiff still owned the mules, one of the witnesses, Frank Schrodi, worked this team for the plaintiff, and he testified that at that time they were unable to eat properly and he told the plaintiff they were playing out.

Assuming, therefore, the representation was not fraudulent, it was material; it was false and induced the contract, and the defendant is entitled to have it rescinded.

The appeal, in my opinion, should be allowed with costs; the judgment of the court below set aside, and judgment entered for the defendant, with costs.

The notes should be delivered up to be cancelled.

Appeal allowed.

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PARISH OF ST. PROSPER v. RODRIGUE.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Idington, Duff and Anglin, JJ. November 13, 1917.

MUNICIPAL CORPORATIONS (§ II C—113)—SUNDAY OBSERVANCE — RESTAURANTS—POWERS OF DOMINION PARLIAMENT—ULTRA VIRES.

A by-law of a municipal corporation forbidding the opening of restaurants and the sale therein of any merchandise on Sundays is *ultra vires*, as it deals with the observance of Sunday or the Lord's Day, a matter within the legislative powers of the Dominion Parliament which has been dealt with.

[*Rodrigue* v. *Parish of St. Prosper*, 37 D.L.R. 321, affirmed.]

Statement.

APPEAL from the judgment of the Court of King's Bench, appeal side, 37 D.L.R. 321, 26 Que. K.B. 396, reversing the judgment of Belleau, J., in the Superior Court for the district of Beauce, 51 Que. S.C. 109. Affirmed.

The respondent is a restaurant-keeper, doing business in the municipality appellant, and took an action to set aside a by-law passed by the appellant, by which were prohibited the opening of the restaurants on Sunday, and the sale therein of any merchandise. The principal grounds invoked by the respondent were that such by-law was regulating the Sunday observance which was a matter of federal jurisdiction only, and *ultra vires* of the powers of municipalities. The trial judge dismissed the

action, and held that the by-law was only in relation with public peace, good order and good morals, and was within the police power of the corporation appellant. But this judgment was reversed and the by-law quashed by the majority of the Court of King's Bench, which found that they had to follow the ruling in *Ouimet* v. *Bazin*, 3 D.L.R. 593, 46 Can. S.C.R. 502.

Statement.

The questions in issue on the present appeal are stated in the judgments now reported.

Louis Morin, K.C., for appellant.

Belcourt, K.C., for respondent.

FITZPATRICK, C.J.:—I am of opinion that this appeal should, on the merits, be dismissed with costs for the reasons given by Anglin, J., on the question of jurisdiction, I am bound by the judgment of the majority in *Shawinigan Hydro-Electric Co.* v. *Shawinigan Water and Power Co.*, 43 Can. S.C.R. 650. The motion should be dismissed without costs, having been heard on the merits.

Fitzpatrick, C.J.

DAVIES, J.:—In this case a motion has been made to quash the appeal for want of jurisdiction, but as there was some question raised as to the constitutionality of the provincial law, under which the by-law in question was said to have been passed, the motion was allowed to stand over, and the argument on the merits took place.

Davies, J.

I have no doubt that the appeal should be dismissed. The by-law in question is a prohibitive one, and deals with the observance of Sunday or the Lord's Day. That is a subject matter which it has been determined is within the legislative powers of the Dominion Parliament. That parliament has already dealt with the subject matter and the Privy Council has decided in favour of the validity of the Act.

In the case of *Ouimet* v. *Bazin*, 3 D.L.R. 593, 46 Can. S.C.R. 502, at 504, I stated my view as to the construction of this federal Act, namely, that while it enacted prohibitive legislation for the whole of Canada, it also delegated to the several provincial legislatures the power to declare that any act or thing prohibited by the Dominion Act might be exempted from the operation of the Act, and permitted to be done by provincial legislation either existing at the time the federal Act came into force or subsequently enacted.

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The question raised in this case was not as to the validity of any such permissive legislation, for none such was invoked, but as to the validity of a by-law forbidding the opening of restaurants and the sale therein of any merchandise on Sundays.

Such a by-law is a direct dealing with Sunday observance, and therefore *ultra vires*. Provincial legislation attempting to authorize it would itself be *ultra vires*.

I concur, therefore, in dismissing the appeal.

Idington, J.

IDINGTON, J.:—This appeal involves only the question of the validity of a by-law of the appellant.

The judgment from which appeal is taken rests upon the view that there is a constitutional question raised within the meaning of s. 46 (*a*), of the Supreme Court Act.

Unless there is such a question involved in the appeal, we have no right to hear it for we have no jurisdiction to review the work of the Court of King's Bench relative to the validity of municipal by-laws, unless incidentally something else is in controversy between the litigant parties to an appeal.

So far as the constitutional question, if any, involved in this appeal is concerned, the decision in the case of *Ouimet* v. *Bazin*, 3 D.L.R. 593, 46 Can. S.C.R. 502, as I understand it, is conclusive against the appeal.

In that case I thought, and still think, it was possible to reduce all that was involved therein to the single question of the power to prohibit a theatre from carrying on its business on a Sunday, for which offence the appellant had been condemned.

This court held it was not possible to maintain the distinction between a single item of the numerous prohibitions in the Act there in question giving rise to the issue involved in that case, and the general scope of the Act upon which the prosecution therein was founded.

Be that as it may, I cannot read the several opinions which led to the decision without feeling that it was founded in truth upon the common notion of a peculiar sanctity found in the religious obligations to observe the day as one devoted to religious observances, which leads to viewing its desecration with such abhorrence as to constitute that something criminal in its nature and hence legislation relative thereto as criminal legislation.

If we analyze the history of legislation, designed to secure

the observance of what is commonly called the Lord's Day and the judicial decisions thereupon, which ostensibly founded the opinions I refer to as leading to the decision in *Ouimet* v. *Bazin, supra*, it is hard to escape the conclusion that it is impossible in face of the general conception I have tried to express, to frame the most moderate attempt at legislation relative to what men may be prohibited from doing on that day without being met by the objection that it is of the class falling within what has been thus judicially declared criminal legislation.

If we could imagine the Legislature of Quebec taking up each item at a time of what was prohibited in the Act in question in said case, and thus by half a dozen or more Acts covering the same ground as that Act, could such Acts, or any of them, now be upheld in face of such a decision? I think not. In my own judgment in that case I tried an analogous experiment. My attempt was fruitless. I must now observe the law as laid down therein.

It seems idle now to say that in the case of *City of Montreal* v. *Beauvais*, 42 Can. S.C.R. 211, we upheld similar legislation relative to prohibiting certain work or business on weekdays within specified hours. No one questions that power when duly exercised as to weekdays.

There is no reason for denying it in relation to Sunday, except the distinction judicially made between that and other days.

Hence, so far as the judgment appealed from rests upon *Ouimet* v. *Bazin*, 3 D.L.R. 593, 46 Can. S.C.R. 502, it seems well founded, and leaves no escape from dismissing the appeal.

If, as suggested in course of the argument, the by-law is not within the scope of the Municipal Act, no harm has been done.

But upon that I express no opinion. We have no jurisdiction to deal with it from that point of view.

In any way I can look at the appeal it should be dismissed with costs.

The motion to quash failed, because effect could not properly be given to it without hearing the appeal, and hence should be dismissed, but I think without costs under the very peculiar circumstances which seemed to invite it lest the court might complain of its not having been made.

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Anglin, J.

DUFF, J.:—I am of the opinion that this appeal should be dismissed with costs.

ANGLIN, J.:—The appellant, a municipal corporation, seeks the reversal of the judgment of the Court of King's Bench of the Province of Quebec, which quashed one of its by-laws, whereby the opening of restaurants and the sale therein of any merchandise on Sundays is forbidden, on the ground that this by-law deals with Sunday observance, and is, therefore, beyond the jurisdiction of a municipal council.

If the purpose and purview of the by-law are what they have been held to be (as I think correctly) by the Court of King's Bench, its invalidity as an invasion of the domain of criminal law, assigned exclusively to the Dominion Parliament, is not open to question in this court. *Ouimet* v. *Bazin*, *supra*. No provision of the Quebec statutes warranting the enactment of any such by-law has been referred to, and it is in conflict with the spirit, if not with the letter, of s. 4466 of the R.S.Q. 1909.

On the other hand, if this be not the true character and object of the by-law—if it be merely a local police regulation passed for the maintenance of peace, order and good government in the Parish of St. Prosper—nobody would dream of questioning the validity of the provisions of the Quebec Municipal Code empowering the municipality to enact it. The proper construction of the impugned by-law does not "involve the question of the validity of an Act of the Parliament of Canada or of the legislature," Supreme Court Act, s. 46 (*a*). On no other ground can the appeal be brought within any of the several clauses (*a*), (*b*) or (*c*) of s. 46 of the Supreme Court Act, and, as held in the *Bell Telephone Co.* v. *City of Quebec*, 20 Can. S.C.R. 230, accepted as binding by the majority of this Court in the recent case of *Shawinigan Hydro-Elec. Co.* v. *Shawinigan Water & Power Co.*, 43 Can. S.C.R. 650, the judgment in an action brought to set aside a municipal by-law is not appealable to this Court under the special provision of s. 39 (*e*), which is excepted by s. 47 from the operation of s. 46. In other words, the right of appeal in such an action must depend upon the general jurisdiction of the court conferred by s. 36, which is subject, in appeals from the Province of Quebec, to the limitation imposed by s. 46. It therefore does not exist where the case does not fall within one or other of the negatively permissive clauses of the latter section.

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Either the impeached by-law is an enactment dealing with Sunday observance and, as such, has rightly been held *ultra vires*—and there is no suggestion that any provincial legislation purports to sanction it if that be its character—or it is merely a local police regulation, and, as such, its enactment would be warranted by provincial legislation of unquestioned validity. In neither aspect of the case is it within s. 46 (*a*) of the Supreme Court Act, and we are, in my opinion, without jurisdiction to entertain the appeal.

I understand, however, that the majority of the court is of the opinion that the appeal should be dismissed on the merits. If the court has jurisdiction, I would concur in that result.

Although the respondent moved to quash, he did so only after the costs of printing had been incurred, and a few days before the appeal was due for hearing upon the merits. Moreover, he failed to make it apparent, upon the presentation of his motion, that the appeal did not involve a question of the validity of an Act of the provincial legislature, and, without disposing of the motion, the court accordingly directed that the appeal should be heard on the merits. Under these circumstances, while now satisfied that the motion to quash should succeed, I do not dissent from the order refusing costs of it. *Appeal dismissed.*

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Nova Scotia Supreme Court, Harris, C.J., and Longley, Drysdale and Chisholm, JJ. March 27, 1918.

DAMAGES (§ III—222)—CLOSING UP DITCH—WATER OVERFLOWING ONTO NEIGHBOUR'S LAND—INJURY.

One who by artificial means causes water to be collected on his land and discharged onto his neighbour's land thereby causing damage is liable for the damage caused.

Statement.

APPEAL from the judgment of Ritchie, E.J., in favour of plaintiff in an action for collecting water on defendant's land and causing it to be discharged upon plaintiff's land, thereby causing damage. Damages were assessed in plaintiff's favour at the sum of $350.

V. J. Paton, K.C., for appellant; *W. E. Roscoe*, K.C., and *A. L. Davison*, for respondent.

Harris, C.J.

HARRIS, C.J.:—The defendant owned a large tract of land at Middleton, Annapolis County, out of which he sold a small lot

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to a Mrs. Page who built a house on it which has since been transferred to the plaintiff, and he has occupied it for several years past.

Many years ago there had been a ditch put through defendant's lands, apparently to drain water from the railway line.

This railway ditch started a long distance north of the lot now owned by the plaintiff, and after running in a southerly direction for some distance was then deflected in a southeasterly direction. About 1908, the defendant, for some reason, cut off the latter part of this railway ditch and continued the original ditch in a straight line to the road which runs in front of what is now the plaintiff's property. This ditch passed within a few feet of the plaintiff's eastern side line. On the north side of, and immediately adjoining the plaintiff's property, there was a swamp or low place which extended easterly to a point very near the ditch referred to. When the defendant cut off the part of the railway ditch referred to a dam was placed in this ditch which prevented any water flowing down it, and thereafter the water followed the new ditch in a southerly direction toward the road, and some of the water passed out from this ditch through a culvert into the road ditch.

After some years, the defendant filled up the portion of this ditch through his property between the road and the swamp.

The plaintiff's contention is that the water coming down the open ditch from the direction of the railway, on meeting the part of the ditch filled in, was turned into the swamp; that the level of the water in the swamp was thereby raised and flowed over his lawn and injured it as well as the foundations of the buildings on his lot.

The trial judge, after a very lengthy trial, found that the plaintiff's contention was correct and he awarded the plaintiff $350 damages, and the defendant has appealed. Counsel for the defendant strongly urged that on account of the configuration of the land it was impossible for any greater quantity of water to get into the swamp after the ditch was filled in than before. I am, however, absolutely unable to agree with this, and I think the evidence is overwhelmingly in favour of the plaintiff's contention. It is, I think, certainly proved that after the straight ditch was dug much water flowed down it which formerly flowed in a different direction, and the evidence shews that, after the lower part of the ditch was filled in, the water flowing down the ditch was deflected into the swamp to a greater degree than before and the level of the water

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was raised until it flowed in increased quantities over the plaintiff's lawn.

There is, I think, no doubt about the law applicable to the case. It is clear that a person cannot, by artificial means, gather water upon his property and throw it upon his neighbour's land, and this is so whether the grade of the neighbour's land is higher or lower than his.

Harris, C.J.

As Cotton, L.J., said in *Hurdman* v. *North Eastern R. Co.*, 3 C.P.D. 168, at 173:—

> If anyone by artificial erection on his own land causes water, even though arising from natural rainfall only, to pass into his neighbour's land, and thus substantially to interfere with his enjoyment, he will be liable to an action at the suit of him who is so injured.

I agree with the findings of the trial judge and think they are amply supported by the evidence. I have had some difficulty about the amount of the damages, but it is a case in which exactness cannot be attained and I am not prepared to say that the estimate of the damage made by the trial judge after a very long inquiry into the facts is not more nearly correct than any estimate I can make after the most careful reading of the evidence.

I would dismiss the appeal with costs.

LONGLEY, J.:—I have to concur in the judgment of the Chief Justice in this case, and I see nothing in the facts which warrants any other conclusion. The action has assumed large dimensions, and could have been avoided by the expenditure of from $10 to $20 by either party. I had thought that the verdict should be reduced as I do not see any such sum as $350 has actually been incurred in loss by the plaintiff. But, as my brother judges do not concur in this view, it is sufficient for me to have stated it.

Longley, J.

CHISHOLM, J.:—I concur with the Chief Justice.

Chisholm, J.

Appeal dismissed.

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Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart, Beck and Hyndman, JJ. April 5, 1918.

TRIAL (§ V C—290)—CONVICTION UNDER CRIMINAL CODE—SUFFICIENCY—QUASHING BY APPELLATE COURT.

A conviction under sec. 355 C.C. will be quashed where the evidence does not shew that the person who receives the money is a person who stands in the relation of an agent to the person to whom he is to pay or account, but shews that he is a person who by virtue of some contract under which there are mutual obligations is under an obligation arising out of the contract to pay or account.

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Harvey, C.J.

CASE STATED by the trial judge on a conviction for theft under sec. 355 C.C., for receiving money on terms requiring an accounting and not accounting for or paying over the amount received or any part thereof. Conviction quashed.

H. H. Parlee, K.C., for Crown; *G. E. Winkler*, for accused.

HARVEY, C.J. (dissenting):—I find myself unable to agree with the conclusions of any of my brother judges. In the main I agree with the views expressed by my brother Stuart except in the conclusion that there was no evidence from which a fraudulent intent on the part of the accused can be inferred. He never repudiated his liability to pay Sullivan a part of the moneys received. Whether he could have been held civilly liable appears to me to be beside the point. The arrangement between them is admitted by both to be that each of the parties was entitled to a part of the moneys and the evidence for the defence is that the share to which Sullivan was entitled was paid over to him. The trial judge decided that this was not the fact. That, perhaps, if not probably, meant that accused was setting up a dishonest defence and committing deliberate perjury to support it. That coupled with the facts stated by the witness Sullivan that accused admitted his further liability and agreed to pay it, and as to accused's conduct afterwards, as mentioned in the reasons of my brother Beck, if true, in my opinion, are quite sufficient to justify an inference that he knowingly neglected to pay over to Sullivan moneys which belonged to him, and as he had no excuse or justification for it, such neglect would appear to be fraudulent.

Stuart, J.

STUART, J.:—It seems to me that the gist of this case lies in the proper answer to the questions: When the accused received the money from the government, was it all his own property in the legal sense, with a mere contractual liability in debt on his part to pay Sullivan so much money, or, on the other hand, was the money, when received by the accused, the joint property of him and Sullivan to the knowledge of the accused?

If the evidence was such that no reasonable inference could be made that the relationship between the parties was anything else than that which would be expressed by an affirmative answer to the first question then, no doubt, there was no evidence upon which the accused could be properly convicted. If, on the other hand, there was evidence to sustain an affirmative answer to the

second question, then there was evidence sufficient to sustain the conviction.

Now, there are two ways of seeking the proper answer to the above questions: First, one may endeavour to look upon the money received from the government by the accused as representing in another form the ties for which it was paid and thus proceed to enquire into the question of the legal property in or ownership of the ties. One may say that there is nothing to shew that Sullivan ever became in any sense the owner of the ties in the sense of having an actual property in or legal title to them and that, therefore, the money, when paid by the government to Mackay for them, must be taken to have been Mackay's own money.

On the other hand, one may disregard altogether the question of the ownership of the ties and look solely to the terms of the bargain between Mackay and Sullivan. One may say that wherever the legal title in the ties may have been at different times or at different stages of the negotiations or dealings that question is really immaterial; and that if the substantial effect of the bargain was, that when Mackay received the money from the government, it was to his knowledge the joint money of himself and Sullivan then he would be liable to account for Sullivan's share of it and not having done so but having used it for his own purposes of which there was no doubt sufficient evidence, if believed, he would be guilty under the Code.

Now, I have no doubt whatever that there was no sufficient evidence to sustain any reasonable inference that Sullivan ever became in any sense the legal owner of the ties. Even assuming that there was evidence to shew that there was a bargain made by him to buy 5,000 ties from Mackay at 27 cents apiece, as to which I have very grave doubt indeed, it is clear that there were no specific ties identified, that there were more ties than that number belonging to the accused at Chip Lake and that, until certain specific ties were appropriated to the contract, the property in them never passed away from the accused. The property passed immediately from Mackay to the government upon the appropriation. There was no single instant of time during which the property can be said to have been in Sullivan because the appropriation was made for the purposes of delivery to the govern-

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ment at the same moment, that it was made, if we can conceive it as having ever been ideally made, for delivery to Sullivan. I think it is clear from the evidence, and that it is impossible to make any other reasonable inference, that the title to the ties passed directly from the accused to the government. I, therefore, also think that were it not for the special effect of the bargain between the accused and Sullivan the money paid by the government to the accused ought clearly to be considered as having come into the hands of the accused as his own money in exchange for the property in the ties.

But, from the other point of view, there is much more to be said. If there was evidence from which the trial judge could reasonably infer that the bargain between the accused and Sullivan was that the money when received by the accused from the government should in reality be the joint property of the two of them, I can see no reason why the accused should not be considered as having brought himself within the terms of the section of the Code under which the charge was laid.

Now, I think it is no doubt the case that the parties, not being lawyers, were not thinking the matter out as carefully as I am now attempting to do. There were undoubtedly no specific technical terms used by them and it is, I think, the case that there was not sufficient evidence to shew that they had really and consciously agreed to a joint legal ownership of the fund. But was there not evidence from which the judge could reasonably infer that what the parties substantially agreed to was that Sullivan should be paid by Mackay 18 cents a tie, whether as profit or commission or whatever one likes to call it, and that this payment, even if strictly a debt only, *should be made out of the particular fund* received by the accused from the government, in other words, that that fund was to be especially charged with the payment of the money coming to Sullivan?

If this were a civil case I think I should be inclined to say at once that there was enough evidence to justify such an inference or at any rate to justify a declaration that in equity the fund ought to be so charged which is of course a very different thing. But this is a criminal case. The Crown must adduce evidence to shew that the accused was "*fraudulent*" and in order to do that I think the evidence must be such as to shew that the accused

was consciously, *i.e.*, knowingly, agreeing that the actual money he was to receive from the government was to be charged with the payment of what he was to pay to Sullivan.

The distinction between a mere contractual obligation to pay to Sullivan 18 cents per tie and to pay it at once as soon as he got money from the government, and, on the other hand, a contract consciously made that the money he was to receive was charged with the payment of that amount and was, therefore, in a real sense, the joint property of himself and Sullivan, is a fine one and, perhaps, appreciable more readily by the trained legal mind than by the man in the street; and yet, in order to convict the accused, there must be evidence to shew that the accused was conscious of and thoroughly appreciated the distinction.

The only traces in the evidence of any express reference in words to such a subject in the conversations between the parties are to be found in the two following passages: First, Sullivan states that he said to the accused: "I will take you down and put the deal through right through you and all that you have got to do with me is to give me the difference between 27 cents and 45 cents *as you get it*." There is no evidence as to any verbal response by the accused to this remark, but Sullivan said that they at once went to see the government agent. I confess that it would be with some difficulty that I would conclude that this was sufficient to sustain an inference that the accused consciously appreciated the distinction referred to.

Secondly, there is Sullivan's account of the subsequent interview at Chip Lake. He stated that Mackay "said he was sorry he had'nt paid me but he had used the money to buy some ties or timber up the line but he would come to town with me and give me my money."

Is there really anything more to be reasonably inferred from this than that Mackay was giving a reason why he could not, at the moment, pay Sullivan what was coming to him, that is, that he meant anything more than that, of course, he could have paid him if he had not used the money he got from the government for another purpose?

These are the difficulties which have appealed to me in regard to the matter. Take the case of a man with a farm for sale. He is willing to sell at $30 an acre. A real estate agent knows of

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a man who is willing to pay $32 an acre for it. So he goes to the owner and asks him what he wants for his farm and is told "$30 an acre." The real estate agent says, "All right, I will take it at that—but does it really make any difference to you what I get for the farm if I re-sell it?" And the owner answers "Not a bit." Then the agent says, "Well I know a man who is willing to pay $32 an acre for it. Let's go down and see him. You can sell to him and get the money and all you have to do is to pay me the difference of $2 an acre *as you get it.*" Then the owner gets the money and uses it and simply considers himself indebted to the agent for the amount at $2 an acre. Has he been guilty of theft? I think not. But if he understood clearly that that portion of the selling price represented by $2 an acre was the agent's money as soon as it was received from the purchaser and not his own then I think he could properly be said to be guilty of theft.

Now, it will not do to say that Mackay *ought* to have known, if he didn't, or that he *ought* to have appreciated the situation, if he didn't. It is not enough for this Court or the trial judge to say: "18 cents per tie of that money was Sullivan's own money." That is an inference of fact or law or both which the court is drawing from the circumstances. We must go further and say that Mackay really in fact knew and appreciated this situation just as we understand and appreciate it or rather, in this court, that there was evidence to sustain the inference that he did.

Even in the reasons for judgment given by the trial judge, the significance of the distinction as to actual knowledge of the legal situation on the part of the accused is not considered. The judge said:

> I have not any doubt *in my own mind* that the contract between them was that Sullivan was to get these ties for 27 cents, that Mackay was to collect 45 cents from the railway company and *he was to pay over* 18 cents to Sullivan.

As I have said, I do not think there was evidence sufficient to sustain the inference that Sullivan ever became a real purchaser of the ties as is stated in the above extract. But, aside from that, there is nothing more than an implication and not a direct statement in these words that Mackay really knew and appreciated the fact that he was getting from the government money which belonged to Sullivan as distinguished from a knowledge of mere indebtedness to Sullivan in respect to it. Even one of ourselves, Hynd-

man, J., is convinced that there was nothing more than a contractual liability or debt. It seems hard to say that there was evidence to sustain the inference that Mackay knew that the contrary was the fact.

The whole case was tried as a civil one. In no part of the cross-examinations was the distinction I make adverted to. The Crown never pressed the accused as to his knowledge or appreciation of the ownership of the money.

After some hesitation I have come to the conclusion that there was not sufficient evidence to justify an inference of this knowledge on the part of the accused and therefore of his *mens rea* or fraudulent intent.

I wish to add, however, that I feel unable at present to assent to the interpretation of s. 355 of the Code which is suggested by Beck, J. I doubt if the word "requiring" refers to a person at all. It is the "terms," or conditions of some bargain or contract—not a person—that are said to "require" an accounting.

I think the conviction should be quashed.

Beck, J.

BECK, J.:—This is a case stated by Scott, J.

The defendant was tried before him without a jury at Edmonton on January 29, 1918.

The charge was one under s. 355 of the Criminal Code, for that he did between September 6, 1917, and December 1, 1917, having theretofore received from the Lacombe & Blindman Valley Railway Co. the sum of $580 on terms requiring him to account for or pay the same to Patrick B. Sullivan fraudulently omitted to account for or to pay the same or any part thereof to the said Sullivan and did thereby steal the same.

The defendant was convicted and sentence suspended; and the judge stated the following question:—"Was there evidence to support a conviction for the offence mentioned in the charge and did I err in convicting the appellant?"

Sullivan was the private prosecutor.

Sullivan in his evidence says that: Some time in September, 1917, some one connected with the railway company had asked him if he could supply railway ties—about 5,000; for which there would be paid 45 cents a tie. Then, hearing that the accused had ties, he got the accused to come to the Northern Hotel, Edmonton, and was there introduced to the accused by Peter

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Mackay, the manager of the hotel. (The judge after quoting the evidence at length continued.)

It seems to me quite plain that there was no concluded contract between Sullivan and the accused for the sale of any specific logs; they had not agreed upon and had apparently not discussed some of the very essential elements of such a contract; Sullivan saw that there was little doubt of Harvey accepting Mackay's ties and consequently took him to Harvey's office where all the particulars were ascertained and the bargain made direct between the accused and Harvey; if it had turned out that Harvey was not satisfied it is quite unreasonable to suppose that Sullivan would have considered himself bound to buy the ties from the accused. There was then and there made the only concluded agreement between the accused and Sullivan, namely, that the accused was to account to Sullivan for the difference between 45 cents a tie and 27 cents plus the cost of putting them on the cars. Whether the effect of this arrangement was to give Sullivan an interest in the specific moneys to be received by the accused or merely to constitute the accused the debtor of Sullivan and so bring the accused within the second clause of s. 355 I find it unnecessary to discuss by reason of the opinion I have formed of the proper interpretation of the first clause; and of course I have omitted reference to the story of the accused, which contradicts that of Sullivan.

In my opinion, the first clause of s. 355 C.C. by its terms makes it reasonably clear that the person who receives the money, valuable security or other thing is a person who stands in the relation of agent, in the proper sense of the term, to the person to whom he is to pay or account; and not merely a person who by virtue of some contract between the two in which both are under mutual obligations, is under an obligation, arising out of that contract, to pay or account. In the latter case, my mind is clear, it is quite inappropriate to say of one of the two contractors that money or property coming to his hands in pursuance of the contract is received by him "on terms *requiring*" him to account or pay and the money or property, is money or property "which he was *required*" to account or pay for.

The use of the word "terms," the expression "terms *requiring*," and the word "required" indicate to my mind something more and something different from a mere obligation arising out of an or-

dinary contract—something involving a superiority in the person requiring, and a right to require, that is, to direct ,arising not out of a contract respecting the particular money or property but out of an already existing legal relationship conferring that superiority.

The section appears in exactly the same form as s. 308 of the Criminal Code as originally passed in 1892 and though marginal notes are, it is said, not properly referred to to assist in interpretation, I nevertheless call attention to the fact that the marginal note to s. 308 is "Theft by agent" and I am not at all sure that the reason for the rule applied by the Courts in England is applicable to statutes passed by the Dominion or provincial legislatures as government bills.

A confirmation of the view I have expressed comes, also, from the fact that there are other sections of the Code, *e.g.*, 352-3, theft by owners, co-owners, partners, etc.; 356-7, theft by the holder of a power of attorney for the sale of property, which would be quite unnecessary if under section 355 any mere contractual obligation to pay or account was intended to be comprised in the words "terms requiring." And again when we come to s. 358 providing the punishment for offences under this section, the marginal note again is: "Agents and attorneys," to s. 320 of the original Code, which it is to be noted falls under a subsequent part of the Code intituled "Punishment of theft and offences resembling theft committed by particular persons in respect of particular things in particular places;" and such captions as these can admittedly be used in aid of construction. *Eastern Counties, etc., R. Co.* v. *Marriage* (1860), 9 H.L. 32, 11 E.R. 639.

Furthermore, all the cases decided under the section which I have been able to find, ten in number, were cases of an agent in the proper sense of that word.

There are a variety of cases in which a court exercising equitable jurisdiction would lay hold of a fund the creation of a contract between the parties, *e.g.*, by way of a declaration of lien, injunction or receiver and direct an account—and perhaps the present is an instance—and I cannot believe that it was intended to make this large class of cases subjects of criminal prosecutions, though involving charges of fraud. In the former Larceny Act, C.S.C. (1886), c. 164, there was a s. 85—offences not otherwise provided for—which used to be referred to as the omnibus section

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which probably would have covered such a case but which, being very generally considered to be much too comprehensive, finally, and happily I think, disappeared.

In my opinion, therefore, the Crown fails in the present case because the evidence fails to establish that the accused stood on such relationship to the private prosecutor as agent, or, in other words, to use the words of the section, received the moneys in question *"on terms requiring him"* to pay or account to the private prosecutor. On this ground I would quash the conviction and discharge the defendant.

Hyndman, J.

HYNDMAN, J.:—The facts are I think sufficiently set out in the judgment by Beck, J., with whom I agree in the result, but I wish to state briefly how I regard the situation as appears to me on a consideration of the whole case.

The evidence for the Crown does not establish that there was any concluded agreement of sale of the ties to Sullivan by the defendant. I do not think it ever was the intention of Sullivan himself to purchase them, and, in my opinion, the sale was made direct by Mackay, of his own logs, to the government. Such being the case, then it cannot be said that Sullivan and Mackay were partners in the ownership of the goods sold; neither can it be said that Mackay was the agent for Sullivan to sell his logs and received the money for them for part of which he must account as an agent to Sullivan. Sullivan then having no direct or indirect ownership in the logs, what is the foundation of his claim against the accused?

In my opinion, the situation resolves itself into this:—that Sullivan, knowing the government was open to purchase ties, was anxious to take advantage of the opportunity to make some profit out of it; ascertaining that Mackay had ties he arranged that Mackay should sell them to the government through his introduction or intervention and for such services Mackay should pay him a commission or remuneration or whatever you like to call it, when the money was received by him. This seems to me to amount, at most, to a promise or agreement to pay a certain amount of money calculated, not as usual on a percentage basis, such as 5% or 10%, but as the difference between (in this case) 27 cents or 37 cents and 45 cents per tie. It is a claim for services rendered or some act or thing done by Sullivan for the benefit

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of the defendant; in other words, for assisting him to dispose of his goods. I think one is apt to become confused because of the method adopted by the parties for fixing the amount of commission or remuneration. If the terms of the bargain had been a percentage, instead of so much per tie, I fail to see how it could be argued that any part of the money was Sullivan's.

In my opinion, the case is simply one of contract or agreement on the part of Mackay to pay Sullivan an amount of money ascertained in a particular manner under certain circumstances and the failure on defendant's part to pay such moneys was a mere breach of contract on his part giving rise to a civil claim on the part of Sullivan against him, but not in any sense constituting a relationship between them as contemplated by the section of the Code in question, *i.e.*, as principal and agent or trustee in any sense.

His liability at most was to pay Sullivan so much money after having sold the ties and received the price thereof from the purchasers as an ordinary debt but not necessarily the actual money received by him. *Conviction quashed.*

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Ontario Supreme Court, Middleton, J. December 1, 1917.

DAMAGES (§ III P—340)—BREACH OF CONTRACT—LOSS OF PROFITS—MEASURE OF DAMAGES.

Ordinarily the measure of damages for breach of contract is the loss of profits that would have been made if the contract had been carried out; the party damaged, must, however, do what is practicable to minimise the loss.

ACTION to recover $14,482.50 damages for breach of a contract. The defendant company admitted liability, but said that the plaintiff company's demand was too large.

The plaintiff company entered judgment for the recovery of damages upon the breach.

I. F. Hellmuth, K.C., for the defendant company.

MIDDLETON, J.:—The plaintiff is an incorporated company, dealing in glass. It is not a manufacturer, but what is called a "fabricator;" that is to say that it takes glass manufactured by others and cuts it to the dimensions required for particular purposes and grinds and bevels the edges.

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The defendant company carries on business at St. Catharines, and, among other things, manufactures parts of automobile bodies. At the time of the making of the contract in question,

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in May, 1916, the defendant company thought it had secured an order for the manufacture of wind-shields for the Chevrolet automobile, but unfortunately it had not then a firm bargain. Acting upon this misapprehension of the true situation, it made a firm contract with the plaintiff company to purchase 75,000 feet of polished plate glass, to be cut to special sizes and shapes, for use in the manufacture of these wind-shields. These pieces of glass were comparatively narrow strips, approximately 9 inches by 35½ inches.

Plate glass is generally manufactured in large sheets, and if these sheets had to be cut up to make these comparatively small pieces the price stipulated for would probably not have covered the cost of manufacture; but in the cutting down of the original large plates for ordinary commercial uses there is accumulated in factories and warehouses a quantity of strips of glass of different sizes, and the small pieces of plate glass have not the same market value per square foot as the large pieces, the value per square foot in small pieces being less than 50 per cent. of the value per square foot of the large sheet.

Having secured this order, the plaintiff company went upon the American market, where plate glass was scarce and high-priced owing to the cessation of manufacture in Belgium by reason of the war, but, fortunately for itself, secured a contract for the supply of the glass required from the Toledo Plate and Window Glass Company, which had a large quantity of small glass upon hand and was ready to dispose of it at a comparatively low price. The result of this bargain was that, if the contract had been carried out by the defendant company, the plaintiff company would have secured a net profit of something like 28 per cent. upon its outlay, amounting to $11,482.50.

When the defendant company found that it had not secured its contract with the Chevrolet concern, it immediately gave instructions to the plaintiff company not to manufacture, and refused to give definite instructions as to the exact dimensions required, as called for by the contract. To manufacture the glass called for by the contract would have been absolutely suicidal; it would have had no market value whatever, as it would be cut to the dimensions required by the Chevrolet concern for its immediate purpose; and would have been unsuitable for any other purposes and probably unsuitable for the Chevrolet people

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themselves, as the exact dimensions of wind-shields used change from year to year. Negotiations followed, which I think were conducted with absolute good faith on the part of both parties. The plaintiff company did not desire to damage its credit in the market by seeking relief from the contract with the Toledo people, but placed the whole situation before them. The Toledo company insisted upon its contract, but suggested that the glass might be marketed, and every endeavour was made by the defendant company to market, but these endeavours came to nothing, although the market price was advancing. The reason is not far to seek. The defendant company failed to realise the large element of profit arising in the way that I have indicated, and sought to market this small glass at a price which would save it from loss, and was naturally unsuccessful.

In the end, and after much delay, all this came to nothing, and the plaintiff company had to negotiate the best settlement it could make with the Toledo company, and it finally abandoned its contract on payment of $3,000 cash. In this action, the plaintiff company sues to recover the loss of profit and this $3,000. The defence admits liability, but alleges that the plaintiff's demand is unreasonable. Judgment has been signed for the recovery of damages upon the breach—the damages to be assessed at the sittings; and the hearing before me was the assessment.

There is no controversy as to the figures that have been given; the contention is that there is no right to recover so large a sum. The liability for the $3,000 is not seriously disputed, but the objection is to what is regarded as the abnormally large sum claimed as profits, and I am asked to award, in addition to the $3,000, only some fair sum to compensate for the loss of time and trouble in connection with the transaction.

I think the case is one falling under the fundamental principle well explained by Lord Haldane in *British Westinghouse Electric and Manufacturing Co. Limited* v. *Underground Electric Railways Co. of London Limited*, [1912] A.C. 673, where he says (p. 689) that, where there is a breach of contract, the first broad principle is that, as far as money can do it, the other party to the contract shall be placed in as good a situation as if the contract had been performed, this being accomplished by the award of compensation for the loss naturally flowing from the breach; this principle

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being subject to the qualification that the plaintiff has cast upon him the duty of taking all reasonable steps to mitigate the loss consequent upon the breach.

This is no new principle, and the law is stated in substantially the same words in the case of *Roper* v. *Johnston* (1873), L.R. 8 C.P. 167, where the earlier cases are fully reviewed, and it is stated (pp. 177, 178) that, where there is a repudiation of a contract before it has been carried out, the promisee may, if he chooses, treat the notice of intention to repudiate as inoperative, and await the time when the contract is to be executed, and then hold the other party responsible for all the consequences of non-performance. In that case, the contract is kept alive for the benefit of both parties, and the repudiating party may if so advised, and notwithstanding his previous repudiation, perform it, and he may take advantage of any supervening circumstances which would justify him in declining to complete it. On the other hand, the promisee may, if he thinks proper, treat the repudiation of the other party as a wrongful putting an end to the contract, and may at once bring an action for the breach; and he is then entitled to such damages as would have arisen from non-performance at the appointed time, subject to abatement in respect of any circumstances which may have afforded him the means of mitigating his loss.

These principles were applied to a case practically identical with this in some aspects, *In re Vic Mill Limited*, [1913] 1 Ch. 183, and, in appeal, *ib.* 465. There it was held that the loss of profits was the measure of damages, but from what is said it is plain that if the vendor had gone to expenses in getting ready to perform his part of the contract he was bound to do what was practicable to minimise the loss, and could recover the amount of this loss, so minimised. Here it is unquestionable that the arrangement made with the Toledo company minimised the loss; for, if the goods had been manufactured as called for by the contract, they would have been scrap and waste material merely, and the loss would have been many times the $3,000 paid for the release from the contract.

In all aspects of the case I can find nothing to justify any reduction from the damages claimed. There will therefore be judgment for the sums claimed and costs.

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Exchequer Court of Canada, Audette, J. June 2, 1917.

EXPROPRIATION (§ III C—140)—CROWN GRANT—RESERVATIONS—ABANDONMENT—ADVANTAGES—COMPENSATION.

In an expropriation by the Crown of lands held under a Crown grant subject to a reservation in favour of the Crown of the right to retake the lands if required for public purposes, the owners are entitled to have their rights duly adjusted without fixing the actual value of the rights remaining in the Crown under the grant and want of registration does not affect the validity of the conditions or reservations. Where expropriation has been abandoned, but no legal rights are invaded and no damage suffered, compensation cannot be allowed; all advantages to the property by the construction of a railway crossing are to be taken into consideration in estimating the amount of compensation.

PETITION OF RIGHT to recover compensation in an expropriation by the Crown. Statement.

Baillargeon, K.C., and *F. O. Drouin*, K.C., for suppliants; *Alleyn Taschereau*, K.C., for respondent.

AUDETTE, J.:—The suppliants, by their Petition of Right, seek to recover the sum of $50,000 as representing the value of a certain piece or parcel of a beach lot, expropriated by the Crown, for the purposes of the National Transcontinental Railway, at Levis, P.Q., covering also all damages resulting from such expropriation, including damages arising from the detention of the whole property during a few months together with all damages resulting from the erection of a pier in front of the property, as the whole is hereinafter more clearly set forth. Audette, J.

On January 9, 1913, the Crown expropriated the whole lot, No. 314, at Windsor Indian Cove, Levis, P.Q. This property is a beach lot, lying between high and low water marks of the St. Lawrence, and according to the original Crown grant contains an area of 149,000 ft. more or less, —and according to the suppliant's title from their immediate *auteurs*, contains an area of 162,482 ft., more or less without warranty as to measurements.

Having expropriated the whole lot in January, 1913, the Crown, on May 13, 1913, abandoned the expropriation of the same and returned the lot to its owners, the whole in pursuance of s. 23 of the Expropriation Act.

Then on December 31, 1914, the Crown, by depositing plans and descriptions in the registry office, for the County of Levis, expropriated 17,000 sq. ft. of the said beach lot No. 314—as shewn coloured red on the plan filed herein as ex. "B."

The Crown having erected a pier or "Fender Crib" opposite

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the northern boundary of the lot 314, but outside of the boundary of the said lot and below low water mark, the suppliants claim damages for such erection, contending that it interferes with the access to their property.

Therefore, the suppliants' claim may be stated as follows, to wit:—

1. For the damages resulting from the expropriation of the whole of lot 314 which remained vested in the Crown between January 9, 1913, and May 13, 1913, when it was abandoned and returned to them. 2. For the value of the 17,000 sq. ft. expropriated on December 31, 1914, and for damages resulting from such taking. 3. For the damages resulting from the erection of the said "Fender Crib" below low water mark.

The Crown, by the statement of defence, traverses all the *claims* set up by the suppliants, denies any liability and makes no offer of any amount of money in compensation for the said expropriations, relying upon the Crown grant, under which this lot left the hands of the Crown, whereby this beach lot No. 314 was granted to the suppliants' predecessors in title (*auteur*), on July 23, 1859, subject to a number of provisos and conditions, amongst which the following is to be found, namely:—

> Provided further, and we do also hereby expressly reserve unto us, our heirs and successors, full power and authority, upon giving twelve months' previous notice to our said grantee, his heirs or assigns, to resume for the purpose of public improvement, the possession of the said lot or piece of ground hereby granted, *or any part thereof*, upon payment or tender of payment to him or them of a reasonable sum as indemnity for the ameliorations and improvements which may or shall have been made on the said lot or piece of ground, or on such part thereof as may be so required for public improvements, and upon re-imbursement to our said grantee, his heirs or assigns, of such sum as shall have been by him or them paid to our Commissioner of Crown Lands for such lot or piece of ground or such part thereof so required for public improvements; and in default of the acceptance by our said grantee, his heirs or assigns of such sum so as aforesaid tendered, the amount of indemnity, whether before or after the resumption of possession by us, our heirs or successors, shall be ascertained by two experts. . . .

No improvements or ameliorations have been made upon this property as contemplated in the said letters patent.

Therefore, the Crown concludes that since a portion of this lot is required for the purposes of the National Transcontinental Railway, *for the purpose of public improvement*, no indemnity is due the suppliants under their title for the land so taken.

However, at the opening of the trial, counsel at Bar, on behalf of the Crown, offered the suppliants the sum of $4,250 for the $17,000 sq. ft. expropriated, this amount to cover all damages resulting from the said expropriations, and the damages, if any, for the time the whole property remained vested in the Crown, under the first expropriation, etc.

This offer, the suppliants, through their counsel, then declined to accept.

The expropriation is in the nature of a second invasion, the Grand Trunk having already, for a long period, intersected the property by its line of railway.

The question of damages resulting from the neighbourhood of a railway with respect to this lot is to-day only one of degree, as compared with the time when the expropriations herein were made. There was a railway adjoining the property before the expropriation, and there is one more to-day, and the owner over which one railway has obtained a right of way is entitled to other and different damages from a second railway expropriating land alongside the first, the property having already adjusted itself to the first invasion. *Re Billings & C.N.O.R. Co.*, 15 D.L.R. 918; 16 Can. Ry. Cas. 375; 29 O.L.R. 608 (reversed in 32 D.L.R. 351).

On behalf of the suppliants the following witnesses were heard in respect of value and damages.

E. Lamontagne values the land taken at 15 to 20 cents a square foot, stating it should not be too much for one who needs it; but to give the property any value wharves must be erected. His attention being called to the proviso of redemption in the Crown grant, he says that with such a provision the property is worth less. He would not purchase. It is a great risk for a purchaser.

George Peters values the piece taken at 20 cents a foot and adds that the remaining portion would retain the same value as before, if there was a good crossing. He would not have bought with the proviso, unless it had been for two or three years.

Eugene Trudel values the piece taken at 20 cents a foot; with a crossing the damages to the balance would be greatly reduced.

Charles J. Laberge also places a value of 20 cents a square foot.

On behalf of the Crown, Robert H. Fraser, the right of way agent of the Department of Railways and Canals, values the Fugere property at 5 cents a foot. He bought the two adjoining

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lots at 5 cents a foot for the land, and $3 a yard for the wharf, adding 10 per cent. to that price and interest. He was offered a property at Hadlow, ½ mile higher, at 2½ cents a foot. He did not take it because it was not opposite the Quebec landing of the "Leonard."

E. Giroux was offered the Bennett property at Hadlow at 2½ cents a foot, and values the Fugere property at 10 cents a foot, and he reckons the damages at 10 to 15 cents on the 17,000 feet. He further adds that the "Fender Crib" is an advantage and not a source of damage.

A good deal of evidence was adduced in respect of a crossing over the Grand Trunk Railway, and over the Transcontinental, from the King's highway to the suppliants' property. Some of the witnesses even testified on the assumption that such a crossing was impossible. Surveyors were sent to the *locus in quo*, with the result that the following undertaking was made and filed on behalf of the Crown. This undertaking reads as follows, to wit:—

I, the undersigned counsel for the Attorney-General of Canada, in pursuance of s. 30, Expropriation Act of Canada, hereby undertake to build, give or cause to be built and maintain a crossing for heavy and small vehicles over the railway constructed on the piece of property taken from lot No. 314 of the Cadastre of the City of Levis, Province of Quebec, the property of the petitioners and expropriated from the petitioners.

The undersigned counsel, Alleyn Taschereau, further undertakes to build, cause to be built and maintain said crossing over the branch of the Transcontinental Railway, constructed on the south part of said lot No. 314, and over the main line of the Grand Trunk Railway Co. to the public road, as shewn on a plan attached to the present document, and in accordance with the regulations of the Railway Act.

This crossing, as explained by witness Dick, is of a length of 170 ft., with the following grades: From the King's highway fence to the centre of the Grand Trunk, for 16 ft., there is a grade of one foot in 8.07; then it is level for 8 ft. Thence it falls one foot in 50 for a distance of 13 ft. Then it is level for another 8 ft., and thence falls one foot in 10 for a distance of 125 ft. All of this appears on plan ex. "D."

Such a crossing is a great boon to the property, since it assures a good crossing over the two railways, and gives a perfectly good access to the balance of the suppliants' property. Not only does it reduce the damages, but it is an advantage to the suppliants in respect of the balance of the property.

It is true that the only question put to the witnesses who were asked to testify in respect of the value of this property, that their attention was only called to the proviso of redemption by the Crown, as mentioned in the grant; but on looking over this Crown grant, it will be seen there are a number of other conditions and reservations therein mentioned which would certainly go to again reduce the market value of that property, looked at with such a title. Indeed, on looking over the grant, it will be seen, among other things, that it is made subject to the express conditions of—1, building, and erecting and maintaining wharves upon this beach lot within three years. 2, in default of erecting such wharves, an additional yearly rent would become due. 3, in default of maintaining wharves in certain cases—exception being made when the property is used for storing logs—the land reverts to the Crown and the grant becomes void. 4, the grant is further subject to any right any previous grantee of the land in rear of said beach lot may have. 5, it is also subject to the delivery of the necessary ground for a 36 ft. width road on the whole length of the beach lot. 6, subject furthermore to the rights, privileges and easements or servitudes of a railway company more particularly provided by 13-14 Vict., etc.

All of these conditions and reservations are in addition to the proviso respecting redemption, and there is no evidence as to whether the original grantee, or his successor in title, ever paid this additional rent or whether or not such additional annual rent ever became due and what use was made of the property.

This property was sold by the sheriff on February 14, 1891, to the Fabrique de St. David de l'Auberivière, for the sum of $195, under the usual legal title in such case made and provided by the Code of Procedure.

On August 10, 1912, the said Fabrique sold to the suppliants the same property for the sum of $25,000, of which $7,500 were were at that date paid—the balance, bearing interest at 5%, is made payable on demand upon 3 months' notice.

Therefore the suppliants in August, 1912, bought the whole of the property at a figure of about 15 cents and a fraction of a cent, or between 15 and 16 cents a foot. The suppliants are manufacturers of men's clothing, and it is testified they had so bought to sell to a lumbering company for which they were promoters. And one

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of the suppliants heard as a witness testified they never used the property—it yields them nothing, and never did yield them any revenue. The company was formed and it bought a property at Cap à la Madeleine.

The suppliants did not have the property long in their hands before, as we have seen, they were troubled by expropriation. However, there is not on the record any clear and direct evidence that their scheme, as promoters, did actually suffer therefrom, and there is no such contention in the suppliants' written argument. Whether or not the suppliants, when they bought, at a figure between 15 and 16 cents a foot, contemplated, as promoters, to ever sell that property to their company at a profit, is not in evidence; but what is quite certain they purchased at a higher figure than property was held in the neighbourhood, as established by the respondent's evidence—and, after all, there is no more cogent evidence than the evidence of sale of property immediately adjoining the property in question and of the same nature.

The suppliants' evidence, as a whole, would not justify any more than 15 cents a foot. Even some of the suppliants' witnesses who, after fixing a value of 15 to 18 cents upon the property, when their attention was being called to the proviso of redemption in the Crown grant, said they would not purchase with such a title.

At the date of the expropriation, the property, with the conditions and reservations enumerated in the Crown grant, would hardly be worth 15 cents a foot, the price paid by the suppliants n 1912. Could it be explained from the fact the Fabrique sold to the suppliants with covenants? It may, however, be a fair price for the small piece taken in 1914, as the sale of a small piece always commands a somewhat higher price than where the sale is made for a large one or for the whole property.

The Crown did not choose to exercise this right of redemption under the grant, but proceeded under the provisions of the Expropriation Act, therefore the value of the property is to be determined with reference to the nature of the suppliants' title. *Samson* v. *The Queen*, 2 Can. Ex. 30; *Corrie* v. *MacDermott*, [1914] A.C. 1056; *Stebbing* v. *Metropolitan Board of Works*, L.R. 6 Q.B. 37; *Penny* v. *Penny*, L.R. 5 Eq. 227, at 236. It is also a right which is still alive and which the Crown could exercise with respect to the balance of the property.

For the reasons mentioned in the case of *Raymond* v. *The King*, 16 Can. Ex. 1 at 5, 29 D.L.R. 574, the suppliants are found entitled, under their petition of right, to have their right duly adjusted herein, without fixing the actual value of the rights remaining in the Crown under the grant.

Now it is contended on behalf of the suppliants that the provisos containing the conditions and reservations in the Crown grant are of no effect for the want of registration, in the registry office, of their Crown grant. This appears to be a mere forensic assertion in face of and contrary to a clear text of law, as enacted in art. 2084 of the C.C. I cannot read such meaning in this statutory enactment. This art. 2084 must be read in its plain grammatical sense, without restriction or addition. And, as is so well said by Mignault, vol. 9, p. 195, Droit Civil Canadien:—

C'est l'ancienneté de ces titres qui les a fait exempter de la formalité de l'enregistrement. D'ailleurs, personne ne songerait à les contester.

And Langelier, Cour de Droit Civil, vol. 6, at p. 324, says:—

Les titres originaires de concession d'un immeuble sont exemptés d'enregistrement, parce que tous ceux qui acquièrent des droits réels sont au droit du concessionnaire primitif, et qu'ils n'ont point d'interêt à invoquer le défaut d'enregistrement.

See also *Corp'n. of Quebec* v. *Ferland* (1888), 14 Que. L.R. 271.

If the original title need not be registered, how can it be contended that the charges, or conditions and reservations in favour of the Crown, be subject to such registration? The title is but a unity and the right of redemption and other conditions and reservations form part of the title, which is in its very essence an original title from the Crown, and which is indivisible in that respect. There is no more necessity under the law as enacted, to register in one case than in the other. And, indeed, are not most of these grants made under some reservation or another? Under the law as it stands, the the maxim *caveat emptor* obviously applies and the prospective purchaser is, under art. 2084, put upon his inquiry to ascertain what the original Crown grant contains. He has constructive notice under art. 2084, and he should search his title. If he does not do so, he has but himself to blame.

Moreover, the Crown, under the grant, retained real rights upon the lot No. 314, and these rights still form part of the public domain, and are clearly set out in the grant and are imprescriptible. The Crown could grant an absolute title, but it chose in this case not to do so—it retained certain rights in the property.

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These rights so reserved to the Crown under the grant are imprescriptible, since they form part of the public domain; and they do form part of the public domain, since the land in question comes within the ambit of art. 400 C.C.—"*Banks, sea-shore, lands reclaimed from the sea, ports and harbours,*" and are as such considered as being dependencies of the Crown domain—and as such, under arts. 2212 and 2213, they are imprescriptible—the property being in a public harbour, and a part of the shore or bank of a navigable river—*nullum tempus occurit regi.* Moreover, the reservation, condition or provision in the grant are rights in the Crown which form part of the public domain and as such are not subject to prescription. *Lachapelle* v. *Nault*, 6 Rev. de Jur. 3, and statutes of limitations are not binding without apt language therefore in the case of the King.

How could prescription run? The grantee and his successor in title were always rightly and legally in possession under the terms and tenure of the grant, and there was never any adverse possession. *Coppin* v. *Fernyhough*, Bro. C.C. 291, 29 E.R. 159.

It is further contended that the sheriff's sale in 1891, to the Fabrique, the suppliants' direct *auteurs*, has discharged the property from all real rights, under the provisions of art. 781 of C.C.P., and that therefore the reservation mentioned in the provisos of the grant have been discharged. With this contention I cannot agree. This art. 781 must be read in the light of art. 2084 C.C., and, moreover, the sheriff's sale, as usual, only transferred and conveyed to the purchaser the rights to the property which the judgment debtor might have exercised. Therefore the sheriff's sale only conveyed such rights which originally were mentioned in the grant when the property left the hands of the Crown, under the conditions and reservations therein mentioned. Nothing but what left the hands of the Crown under the grant was or could be sold by the sheriff.

Pigeau, 2nd ed. vol. 2, at p. 145, says:—

L'adjudication definit ve ne transmet a l'adjudicataire d'autres droits a la preprieté que ceux qu'avait le saisi; si donc il n'etait pas propriétaire ou s'il ne l'était qu'en partie, ou sa propriété etait conditionnelle, résoluble ou grevée d'usufruct, l'adjudicataire ne serait propriétaire ou ne le serait que comme l'était le saisi.

Coming now to the fixing of the compensation. There is a claim made for the time the whole lot 314 remained vested in the Crown, that is, between January 9, 1913, and May 13, 1913, when

the Crown abandoned and returned the same to the suppliants. The Crown derived no benefit from the expropriation and did not interfere with the possession of the lot. This property never yielded any revenue to the suppliants, and there is no evidence of any damage suffered by them during the interval in question. Such a claim does not lie in tort, and does not arise out of the violation of a legal right or a contract. There was no invasion of any legal right. For the reasons given in the case of *The King* v. *Frontenac Gas Co.*, 15 Can. Ex. 438, affirmed, 51 Can. S.C.R. 594, 24 D.L.R. 424, no compensation or damages under the present circumstances can be allowed.

The evidence upon the question which may result from the "Fender Crib," although meagre, is controverted. Some witnesses say it is a source of damage, and others say it is an advantage. The Crown has dredged to the east of the crib, which is obviously an advantage to the suppliants' property. Counsel for the Crown, in his argument was willing to allow $500 for the same. No doubt the Crown could not derogate from its grant and erect a pier or wharf in the immediate front of the suppliants' property without due compensation. *North Shore R. Co.* v. *Pion*, 14 App. Cas. 612, and *Lyon* v. *Fishmongers' Co.*, 1 App. Cas. 662.

It is not the value of the full fee, the whole interest in these 17,000 feet which has been expropriated by the Crown, that has to be ascertained; it is the value of the interest in this land which was vested in the suppliants at the date of the expropriation. There is a separate and distinct interest in the land which is not vested in the suppliants as controlled by their title with the conditions and reservations in question. What is the value of that interest held by the Crown it is herein unnecessary to ascertain; but, what has to be determined is the value of this land under the suppliants' title, at the date of the expropriation, and the court, acting as a jury, must decide.

In order to arrive at the value of the land taken, all the circumstances above mentioned, which it is unnecessary to repeat here, must be taken into consideration. And, in view of the fact mentioned several times, by the witnesses for the suppliants, that their valuation was on the assumption it was impossible to establish a proper crossing, it must be found that a very good crossing has been given the suppliants, not only over the Transcontinental, but also

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over the Grand Trunk, and that the Crown is for all time to maintain the same. That is a very great advantage to the property as a whole, which under the provisions of s. 50 of the Exchequer Court Act, should be taken into consideration. This piece of land was expropriated in January, 1914, and the evidence shews there was no difference in the value of that property in 1913 as compared to 1914.

The taking of this strip of 17,000 ft., alongside the Grand Trunk Railway right of way, is no detriment to the balance of the property under the circumstances. Before the expropriation the tide came up to the Grand Trunk Railway embankment, and since the expropriation of these 17,000 ft., which were formerly submerged at high tide, the Crown has erected an embankment for the railway and given the crossing. If the balance of this property is to be used for warehouse, industrial or other purposes, the fact of having access to an additional railway is another advantage to the property.

If 16 cents a foot were allowed for the part taken it would amount to $2,720, and if the amount of $500 suggested by counsel is allowed in respect of the "Fender Crib," that would give a total of $3,220, leaving a large margin still between that amount and the offer by the Crown of $4,250, which was made before the undertaking for the crossing was filed.

The suppliants are in any event entitled to their costs, the Crown having made no offer by the statement in defence. They would also be entitled to costs even if they did not accept the sum of $4,250, at the opening of the trial, because at that time the Crown had not offered the undertaking to build and maintain the crossing, which crossing of itself is of very great value to the suppliants' property. I am, however, of opinion to fix the compensation at the sum of $4,250, the unaccepted offer made by the Crown, but in order to make the compensation more liberal under all the special circumstances of the case, I will allow the 10% for the compulsory taking, making in all the sum of $4,675.

Therefore, there will be judgment as follows, to wit:—

1. The lands expropriated herein, namely, the 17,000 sq. ft. taken from the beach lot No. 314, are declared vested in the Crown from December 31, 1914. 2. The compensation for the said land so taken is hereby fixed at the sum of $4,675 with interest thereon from December 31, 1914, to the date hereof. 3. The suppliants

are entitled to be paid the said sum of $4,675 with interest as above mentioned, upon giving to the Crown a good and satisfactory title free from all hypothecs, charges or incumbrances whatsoever. 4. The suppliants are further entitled to the performance and execution of the obligations on behalf of the Crown, set forth in the abovementioned undertaking. 5. The suppliants are further entitled to their full costs. *Judgment for suppliants.*

CLAVELLE v. RUSSELL.

Saskatchewan Supreme Court, Appellate Division, Haultain, C.J.S., Newlands, Lamont and Elwood, JJ.A. March 27, 1918.

VENDOR AND PURCHASER (§ I B—5)—AGREEMENT TO SELL LAND—CONSIDERATION—HOLDER FOR VALUE—CHEQUE.

To agree to a sale of land upon receiving the cheque of the agent who brings about the sale is good consideration for the cheque, and the vendor of the land is a holder of the cheque for value.

Statement.

APPEAL from a judgment of a District Court Judge dismissing an action on a cheque given in payment of land agreed to be purchased and allowing a counterclaim for commission. Varied.

T. D. Brown, K.C., for appellant; *B. D. Hogarth*, for respondent.

Haultain, C.J.S. Newlands, J.A.

HAULTAIN, C.J.S., and NEWLANDS, J.A., concurred with ELWOOD, J.A.

Lamont, J.A.

LAMONT, J.A.:—The facts of this case are practically undisputed. The plaintiff is the registered owner of the S. ½ 23-18-1-W2nd, and the defendant is a real estate agent. Prior to October 7, 1916, an arrangement was entered into between the parties hereto, by which the defendant was authorized to sell the plaintiff's half-section. The plaintiff was to get $18 per acre, clear, with a cash payment of $500, and the balance at $700 per annum, and the defendant was to have all over and above that price as his commission. The defendant found one Peter Morrison, who agreed to buy at $6,450, and on October 7, 1916, the plaintiff, defendant and Morrison met and an agreement of sale was drawn up and executed. As soon as the papers were signed, the defendant drew his own cheque for $500, the cash payment, and handed it to the plaintiff, saying: "Here is my cheque." Morrison and the plaintiff each took away one copy of the agreement of sale. The plaintiff, knowing that the defendant's cheque was good, immediately paid it over on an account which he owed. Two days

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later, the defendant telephoned him and said that he could not finish his deal with Morrison, and asked plaintiff to hold the cheque. The plaintiff said he had already transferred it. The defendant then stopped payment of the cheque at the bank on which it was drawn. When the cheque was presented, payment was refused and it was returned to the plaintiff. The plaintiff then brought this action on the cheque.

The defendant denied liability on the cheque, but counterclaimed for commission on the sale. The District Court Judge held that the cheque was a voluntary payment made by the defendant, and, having been countermanded, the plaintiff had no right of action on it. At the same time, he allowed the defendant $640 commission on the sale.

If the defendant is entitled on the counterclaim to his commission, it can only be upon the basis that the plaintiff accepted his cheque as the cash payment to be made by Morrison. Morrison had no money of his own, and, unless the defendant's cheque was given and received as Morrison's cash payment, the defendant never found a purchaser ready and willing to buy and put up a cash payment of $500 and therefore never earned his commission. On the evidence, there is no doubt whatever that the cheque was given and received as the cash payment, and the deal was closed on that basis. Neither is there any doubt that the reason the defendant countermanded payment of the cheque was because Morrison subsequently refused to secure him in the way he thought he should be secured for this $500 cheque. Under these circumstances, is the defendant liable on his cheque?

The two cases on which the trial judge based his judgment are, in my opinion, clearly distinguishable.

In *Cohen* v. *Hale*, 3 Q.B.D. 371, the railway company owed Hale a certain sum of money, for which they gave him a cheque. After giving the cheque, but before it was presented, the plaintiff served a garnishee order on the railway company. The company immediately countermanded payment of the cheque. It was held that, having countermanded payment of the cheque, the state of account between the company and Hale was the same as before the issue of the cheque, and there was therefore an existing garnishable debt.

Elliott v. *Crutchley*, [1903] 2 K.B. 476, is to the same effect.

Both these were cases of the countermanding of a cheque given on account of an existing obligation between the parties. That, however, is not the case here. The cheque in question here was not given on account of any obligation on the part of the defendant to the plaintiff. It was a payment made on account of Morrison's liability under the agreement of sale then being completed. Without the cash payment of $500 there could have been no concluded agreement. The consideration for the defendant's cheque was the completing of the agreement by the plaintiff. It was the intention of both parties that the property in the cheque should pass to the plaintiff. The plaintiff was, therefore, a holder for value.

In *McLean* v. *Clydesdale Banking Co.*, 9 App. Cas. 95, one Cotton had overdrawn his account with the banking company. He saw one McLean, who agreed to give him his personal cheque on the Bank of Scotland for £265, to assist in covering the overdraft. McLean gave his cheque to Cotton, who paid it into the banking company, which credited Cotton with the amount, thus reducing his overdraft. Before the cheque in the ordinary course of business reached the Bank of Scotland, McLean had countermanded payment. The banking company sued McLean on the cheque. It was held they were entitled to recover, on the ground that they were holders for value. In his judgment, in appeal, Lord Watson, at p. 113, said:

> I think that in law the position of the appellant is the same as if he had gone to the bank and had there undertaken to pay and had professedly paid the overdraft with his cheque, handing it across the counter to the bank.

I am of opinion the principle there enunciated applies here. Morrison owed the cash payment of $500. In payment of that, the defendant handed his cheque to the plaintiff, who took it as the cash payment. He thus became a holder for value. As against a holder for value a cheque is not revocable. *Ex p. Richdale*, 19 Ch. D. 409.

The judgment on the counterclaim was appealed against on the ground that the commission was not payable until the plaintiff had received his $18 per acre.

On this point, the evidence of the plaintiff himself leaves no doubt in my mind as to the correctness of the judgment. After the papers were signed and the cheque given, the defendant spoke

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of his commission and the plaintiff asked him when he wanted it. The defendant answered that any time would do, that he was going to Whitewood. The plaintiff told him when he came back he would settle with him.

The evidence is wholly that of the plaintiff, because the defendant was not present at the trial. On cross-examination the plaintiff's evidence was as follows:

> I did not know what he meant by settling with me and as soon as I had a chance I asked him what he meant. He said, he sold the land for $20 and $2 an acre is coming to me and I said "When do you want it?" and he said any time at all will do for me to pay him. I told him when he came back I would settle with him for this. I owed him $2 an acre for commission. I told him I could not pay him this until I got payment on my land.

Re-examined by his own counsel, he said—

> After agreement signed I asked defendant what he meant by settlement and he said "I got you $20 an acre, $2 more than you wanted. I should get then $2 an acre for myself" and I said "How do you want to fix it?" He said "Next time I come in we settle. You did not get much cash." I said I could not pay until I got some money and he said "All right, we will make a settlement next time I come to Whitewood."

On his examination for discovery he said: "Well, I don't owe him anything until I get my payment next fall." At the trial, however, he said this statement was a mistake.

There is no question as to the construction which should be placed upon the contract if all that appeared had simply been that the plaintiff was to get $18 per acre and that the defendant was to have the balance he obtained over and above that sum. In such a case, no commission would be payable until the plaintiff received his $18 per acre. But the above evidence, to my mind, shows conclusively that it was not the understanding of the parties that the defendant should wait for his commission until the plaintiff received $18 per acre. The trial judge found as a fact that the commission was due when the sale was completed, although there was some discussion as to extension of time for payment until the fall. The evidence, I think, amply warrants the finding of the trial judge, and it should not be disturbed.

The appeal, therefore, in my opinion, should be allowed with costs; the judgment below set aside, in so far as the plaintiff's claim is concerned, and judgment entered for the plaintiff for the amount of the cheque, with costs. The parties to have a right of set off.

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ELWOOD, J.A.:—I agree with my brother Lamont that the plaintiff is entitled to judgment for the amount of his claim against the defendant, with costs, including the costs of the appeal. I, however, cannot bring myself to the same conclusion that he has come to with regard to the counterclaim. The evidence, to my mind, clearly shows that, prior to the actual signing of the agreement of sale between the plaintiff and Morrison, the only arrangement entered into between the plaintiff and the defendant with respect to commission was that the plaintiff was to get $18 an acre clear, and that the defendant was to get anything that the land sold for over that sum.

Evidence was given at the trial of a conversation that took place after the signing of the agreement of sale to Morrison, in which it was suggested that the plaintiff would make a settlement for the commission next time he came to Whitewood.

To my mind, that conversation has no bearing upon the case. If the plaintiff, at that conversation, had definitely promised to pay next day it would not, in my opinion, make him liable to pay next day. We have to look to the bargain the parties made as to commission prior to the completion of the sale, and the evidence of that bargain shows that nothing was said as to when the commission should be paid.

The case, to my mind, comes clearly within what was held by the Court of Appeal in Manitoba in *Chalmers* v. *Machray*, 26 D.L.R. 529 (affirmed 55 Can. S.C.R. 612, 39 D.L.R. 396), and in my opinion the counterclaim should be dismissed with costs.

Judgment varied.

CITY OF CALGARY v. DOMINION RADIATOR Co.

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Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Idington, Duff and Anglin, JJ. November 28, 1917.

MECHANICS' LIENS (§ I—1)—MECHANICS' LIEN ACT (ALTA.)—AMENDMENT 1908—CONSTRUCTION.

In order to enforce a mechanic's or materialman's lien under the Alberta Mechanics' Lien Act, s. 32, as amended in 1908, a "notice *in writing* of such lien and of the amount thereof" must be given to the "owner or person having superintendence of the work on behalf of the owner."

APPEAL from the judgment of the Appellate Division of the Supreme Court of Alberta, 35 D.L.R. 410, 11 A.L.R. 532 *sub. nom. Dominion Radiator Co.* v. *Payne*, reversing the judgment of

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Statement.

Harvey, C.J., at the trial, and maintaining the plaintiff's action. Reversed.

The respondent's action was brought against the appellant to enforce a lien under the Mechanics' Lien Act of Alberta, recorded against property owned by the appellant on which a building known as the "Children's Shelter" had been constructed. The respondent had supplied for this building the steam boiler and radiators necessary for a heating system and a pumping equipment.

The principal issue submitted by the appellant is that respondent's claim was barred by failure to give written notice as required by s. 32 (as amended in 1908), of the Mechanics' Lien Act of Alberta. The respondent contends that s. 32 is merely a provision made to protect an innocent owner from having to pay money a second time; that the lien given by s. 4 of the Act has its commencement as soon as the material is furnished, and that, when fyled, such lien is an encumbrance upon the land.

The trial judge held against the respondent, and dismissed the action; but, on appeal, the Supreme Court of Alberta unanimously reversed this decision.

F. E. Meredith, K.C., and *C. F. Adams*, for appellant; *R. S. Robertson*, for respondent.

Fitzpatrick, C.J.

FITZPATRICK, C.J. (dissenting):—Under the terms of the Mechanics' Lien Act, as I read it, the materialmen and labourers acquire, from the moment that the material is furnished or the labour performed (s. 4), an interest in the contract price limited to the sum actually owing to the person entitled to the lien (s. 8), which interest cannot be for any greater sum than the owner has agreed to pay by his contract (s. 19). The lien to secure that interest becomes effective upon registration under s. 2 (*g*) and (*k*) and s. 41 of the Land Titles Act.

But the appellants contend: 1, that the claim of lien was filed too late: and 2, that the claim was barred by reason of the failure to give written notice. S. 32, as amended.

Dealing with the first point. I find that s. 13 of the Act, fixing the time within which the materialman's lien must be filed, provides that the lien shall cease to exist on the expiration of 35 days after the claimant has ceased from any cause to place or furnish the material. In other words, the date from which the

delay runs is not that from which the purchase price becomes due and exigible but from the date at which the materialman has ceased to place or furnish the material, and that, of course, depends on the facts of each case.

There can be no dispute about the facts here. When the city authorities gave the order to supply the heating system for the Children's Shelter in July, 1914, they had then in contemplation the installation of a pumping system to supply the water without which the heating system could not be operated. A well was then dug, and the subject of a pumping system was discussed with the company before they supplied the radiator for the heating. As a matter of fact, the pump was actually ordered about November 14, 1914, at which date the radiator and boiler were being installed. The one system was necessarily complementary of the other: the heating system could not be operated without the pumping system. As one witness observes, "it is difficult to use radiators and boilers without water."

Although the material required was ordered at different times, the parties had in contemplation from the outset the purchase and supply of a complete set of pumps, boilers and radiators to heat the building by hot water. This explains why a price for the pump was obtained from the respondent at the outset. It is difficult to read the evidence without coming to the conclusion that, as found below, there was what Boyd, C., calls in *Morris* v. *Tharle*, 24 O.R. 159, at 164, "one entire prevenient governing contract of which the respective deliveries are merely the execution."

Once that conclusion was reached by the Appellate Division, then, I think, there can be no doubt that, as found, the claim was filed within the delay (*en temps utile*). The pump was delivered in December, 1914, but when tested it was found to be defective; and in February the shaft and wheel were returned to the manufacturer. In a letter written in February, 1915, by the contractor, he says:

> It (the pump) was running about five minutes, when the pinion became jammed and when they stopped the machine it was all chewed up the way it was mailed to you.

It was not until March, 1915, that a complete pump was furnished and the lien was filed on April 1, 1915, well within the statutory

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delay. Idington, J., in the case of *Day* v. *Crown Grain Co.*, 39 Can. S.C.R. 258, at 263, says:—

> The test question here is whether or not the appellant could in law have sued on the 20th April and recovered from Cleveland as for a complete contract. I am of opinion he could not. Trifling as the parts unfinished were, the party paying, in such a case, was entitled to insist on the utmost fulfilment of the contract and to have these parts so supplied that the machine would do its work.

Now, dealing with the second objection to the effect that the claim is barred by reason of failure on the part of the materialman to give notice in writing. By supplying the material, an interest or lien on the money in the hands of the owner is acquired by the furnisher, and by registration that lien becomes, under the Land Titles Act, an incumbrance on the owner's title to the land so that under the provisions of the two statutes the furnisher of material acquires, by registration in the Land Titles Office, an incumbrance on the owner's land for the price of his material.

Anglin, J., said in *Travis* v. *Brakenbridge* (unreported). [See 2 A.L.R. 71; 43 Can. S.C.R. 59.] "Registration may be deemed notice to the owner."

In this case, the materialman not only registered his claim, but also gave actual notice to the owners through Sylvester, their representative on the work, that he looked directly to the fund for the payment of his claim. There is nothing in the statute that requires him to do more than to register his lien to acquire this incumbrance; and, as Mr. Robertson argued here, there is nothing in the statute which states that the interest in the fund so secured by an incumbrance on the land ceases to exist or that the incumbrance on the land is discharged, if a notice in writing is not given under s. 32. That section, as it formerly stood, read as follows:

> No lien . . . shall attach so as to make the owner liable for a greater sum than the sum owing and payable by the owner to the contractor.

As amended it now reads:

> No lien . . . shall attach so as to make the owner liable for a greater sum than the sum owing by the owner to the contractor at the time of the receipt by the owner or person having the superintendence of the work on behalf of the owner of notice in writing of such lien and of the amount thereof or which may become owing by the owner to the contractor at any time subsequent thereto while such lien is in effect.

The section was amended in 1908, I strongly suspect, because of the judgment of the Alberta appeal court in *Travis* v. *Brackenbridge*, which condemned the owner to pay twice over.

Those amendments, especially in view of the conditions in the various sub-sections, were intended not to effect the lien, but to determine the amount for which the owner would be liable. His liability is limited to the amount due at the moment the notice was served; taken literally, that is all the language means. The Act does not say when the notice should be served to be effective. It does not in terms make the validity of the lien depend upon the service of a notice in writing upon the owner, nor does it say that failure to give notice discharges the encumbrance on the land. The Act says merely (s. 32):

> No lien . . . shall attach so as to make *the owner liable for a greater sum than the sum owing by the owner to the contractor.*

The notice is not intended to affect the validity of the lien, but merely to determine the extent of the owner's liability, and for his interest only.

Whatever may have been the purpose of the legislature in enacting the amendments to cl. 32 as it originally stood, it seems to me obvious that the notice in writing was not intended to protect the contractor or his assignee. The construction contended for by the bank would, in the circumstances of this case, give to a general contractor a preference over the materialman who had a lien under the statute for the price of his material, and of which lien the owner had particular notice, as is evidenced from the terms in which the receipt taken from the bank is drawn.

The appeal should be dismissed with costs.

DAVIES, J.:—I concur in the opinion stated by Anglin, J. Davies, J.

IDINGTON, J. (dissenting):—This is an appeal from a judgment maintaining a claim of respondent to enforce a lien for material, under the Alberta Mechanics' Lien Act. Idington, J.

The only serious difficulty I find in the case turns upon the question of whether or not a transaction between appellant and the Bank of British North America (which, as assignee of the contractors with the city, admittedly stands in the same position as the contractor), represented by an instrument which reads as follows,

> The Bank of British North America hereby acknowledges to have received from the City of Calgary $1,457.98, the balance due as certified by the city engineer on the contract between Grant Brothers, Limited, and the city for plumbing, heating and water supply in connection with the Children's Shelter; and the bank hereby undertakes and agrees with the City of Calgary that if any claim shall be made and established against the city under the Mechanics' Lien Act under said contract not exceeding the said sum of

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$1,457.98, the same shall be paid by the said bank, and if any action is brought against the city to establish any such lien the bank will either pay the amount claimed, or, at its own costs and charges, contest said claim and indemnify the city against the same and any costs occasioned thereby not exceeding the amount hereinbefore mentioned—the city on receipt of said claim, or on being served with any proceedings in Court, to notify the bank thereof.

Dated the fifth day of May, A.D. 1915,

is clear evidence of payment absolving appellant from all liability under the Act.

There is no evidence, unless it be the admitted fact that the said sum of money was paid to the bank, of how or why the appellant should be held to have so paid, in face of the clearest evidence that both the appellant and the bank knew, at the time of said payment, that the respondent had duly registered the lien, under the Act, now sought to be enforced.

There were two fairly arguable points of law which may have been present to the minds of those concerned relative to the right of the respondent to maintain the lien so registered as to any part, or at all events as to the larger item, of the claim.

It has been stoutly contended throughout, first, that the lien was registered too late to be effective, and secondly, in any event, that the first item of the account had been delivered and for a short time in use, two months or so before registration of the lien.

I agree for the reasons assigned in the judgment of Beck, J., in the court below, that the account was, under the circumstances in question, of that continuous nature and in relation to the same work as to render the lien under s. 4 of the Act valid if registered within 35 days from the completion of the entire work and that by reason of the inefficiency of the machine which constituted the second item thereby needing a substitution of one of its parts, that the time for registration only began to run from a date clearly within 35 days preceding registration.

Were these the only questions which confronted the appellant and the bank and were present to the minds of those concerned in framing the above mentioned instrument? If so, then there is an end of the appeal.

But in the absence of any evidence, we are left to conjecture or to draw such inferences as we may relative to the intention and meaning of the transaction.

However that may be, it is now claimed that under s. 32 which reads thus:—

S. 32:—No lien, except for not more than six weeks' wages in favour of labourers, shall attach so as to make the owner liable for a greater sum than the sum owing by the owner or the contractor (at the time of the receipt by the owner or person having superintendence of the work on behalf of the owner, of notice in writing of such lien and of the amount thereof; or which may become owing by the owner to the contractor at any time subsequent thereto while such lien is in effect),

inasmuch as there was no written notice to the appellant, the lien never attached.

That has been answered by holding the statement of claim was a written notice and so it would be literally within the language of the Act.

That is answered again by saying that no lien attaches so as to make the owner liable for a greater sum than the sum owing by the owner or the contractor at the time of the receipt by the owner or person having superintendence of the work . . . of notice in writing of the lien, etc.

What does this mean? Clearly the contractor owed, and still owes, the entire sum. And just as clearly under the statute, a lien did attach unless we are to hold that in the case of a contractor paid in advance by the owner, no lien is intended by the statute to attach under s. 4 by virtue of the respondent's furnishing the material.

It is not the registration that makes it attach. That is only a requirement for its continuation beyond 35 days after completion.

It may be said this is hypercritical, and that the intention of the statute must be looked to in order to make it workable. I incline to agree therewith, but I submit that those relying upon such a doubtfully worded instrument as that now in question ought, in the same spirit, to have made plain what they intended.

It can, in every word of it, be made operative by referring the questions of what it, negatively as it were, provided should nullify the operation of the lien, to the obvious questions I have referred to, as all the document had in contemplation under the circumstances.

To insist upon more renders it necessary to impute to the appellant, having full knowledge of the fact that the lien existed, the most unworthy motive of resorting to a trick for the purpose of unjustly depriving respondent of its money.

For my part, I will not put that construction (which will wear the appearance of an intent akin to fraud) upon the document, and short of that, in my view, the appeal fails.

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It comes to this that, despite all the growing tendency of public corporations, like the appellant, to promote honesty and fair dealing with those serving the city, as we had illustrated in the contract we had before us in the recent case of *Union Bank of Canada* v. *Ritchie Contracting & Supply Co.*, which specifically provided (and we upheld its doing so) that such claims must be paid, there is room to argue that materialmen may be beaten out of their rights under the Mechanics' Lien Act if the contractor can induce such corporation to aid them.

Leaving aside the broad question of whether or not it is possible to so contract that the lien may be prevented by an agreement providing for advance payments to the contractor, suppose we found such an attempt to take the form of this document being incorporated into and made part of the agreement for any public work, how should a court look at it?

Suppose a bank at the back of a contractor in such a case at the very outset willing to indemnify upon receiving the money, would such a transaction fall within the meaning of s. 32 and be held payment? This question I put to counsel and am yet without an answer.

I cannot assent to such a repeal of the Act.

I agree with Walsh, J., that such a transaction of suspensive holding of money, as evidenced by this receipt, is not a payment within the meaning of the Act.

I think the appeal should be dismissed with costs.

Duff, J.

DUFF, J.:—The appeal should be allowed, and the action dismissed with costs.

Anglin, J.

ANGLIN, J.:—Reversing the judgment of Harvey, C.J., who had dismissed the action, the Appellate Division of the Supreme Court of Alberta held the plaintiffs, the Dominion Radiator Co., entitled to a mechanics' lien in respect of the price of a hot water heating system ($1,019.27) and a water pumping system ($438.71) furnished by them as sub-contractors for Grant Bros. Limited to the defendants, the City of Calgary, for a Children's Shelter. From that judgment the city appeals on three distinct grounds:—(*a*). That the lien in respect of the whole claim had expired before it was registered; (*b*). That the contract for the heating system was entirely distinct and separate from that for the water system and that the lien in respect of the former, at all events, had ex-

pired; (c). That when the city first received a "notice in writing" of the plaintiffs' lien no sum was owing by it to the contractors.

In view of my opinion on the third ground of appeal, I have found it unnecessary to pass upon the other two grounds.

S. 32 (1) of the Alberta Mechanics' Lien Act is as follows:—(See judgment of Idington, J.)

The words in brackets were added by an amendment of 1908.

The lien is created by s. 4 of the Act, and is thereby declared to be "limited in amount as hereinafter mentioned."

By s. 8, it is "limited in amount to the sum actually owing to the person entitled to the lien." By s. 19 it is provided that "the owner complying with the provisions of the Act shall not be liable for any greater sum than he had agreed to pay by contract."

By s. 32, above quoted, a further limitation is imposed, with the result that the lien attaches only to the extent of any moneys owing to the contractor by the owner when the latter receives notice in writing of the lien, or which may subsequently become owing to the contractor.

Admittedly the first notice in writing of the appellant's lien received by the city was the statement of claim in this action, delivered on November 4, 1915. At that time the city had in hand no moneys owing to the contractor, Grant Bros. Ltd. It had paid the last of such moneys in its hands ($1,457.98), to the Bank of British North America on May 19, 1915, upon a claim made by the bank under an assignment from Grant Bros., of which it had received formal notice on February 25, 1915. The appellants' lien was registered on April 1, 1915, and there is evidence of verbal notice of their claim having been given to the city's building superintendent shortly before its registration and again shortly afterwards. On making the payment to the bank the city took from it the following receipt:—(See judgment of Idington, J.)

Upon the foregoing facts, the respondent urges that the payment by the city to the bank after registration and verbal notice of the lien was a fraudulent attempt to defeat it, and should therefore be held void as against the lien holder, and that the terms of the receipt taken by the city confirm this view and also shew that the payment to the bank was not intended to be a genuine

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and absolute payment, and should therefore be disregarded in considering whether there was any sum owing by the city to the contractors when it received notice in writing of the lien—that it was in fact merely a conditional payment of money to be returned to the extent to which the city might be held liable to meet the plaintiffs' lien.

There is no evidence of any collusion or of fraudulent intent on the part of either the city or the bank. No indirect or improper motive has been suggested for the city or its officials preferring the bank's claim under its assignment to that of the plaintiffs. For aught that appears the civic authorities may have acted in the *bonâ fide* belief that the plaintiffs' lien had expired before its registration, and that the city was bound to make payment under assignment of which it had received notice on February 25. Fraud is not to be presumed in this case more than in any other.

The effect of s. 32 as it now stands, is, in my opinion, to make the giving of notice in writing to the owner a condition of the mechanic's or the materialman's lien attaching so as to make the owner liable, just as other sections of the Act make registration and the institution of an action within defined periods conditions of its preservation. There can be no more justification for holding verbal notice to be a sufficient ground for dispensing with the fulfilment of one condition than for treating it as a valid excuse for non-compliance with the others. To hold that the extent of the owner's liability is fixed either by actual verbal notice or by registration would be contrary to the explicit terms of s. 32 and would involve either reading out of that section the words "in writing" or inserting a declaration that registration shall be deemed "notice in writing." Such an alteration of the statute the legislature alone is competent to make.

There is nothing inherently unfair or extraordinary in a provision imposing the giving of notice in writing to the owner as a condition of the existence of such a special privilege as the right to a lien conferred on vendors of labour and material for work upon lands. It may be that in endeavouring to protect the owner from the difficulties of a situation that might arise from the absence of some such provision (illustrated in the cases of *Breckenridge & Lund* v. *Short*, 2 A.L.R. 71, and *Travis* v. *Breckenridge-Lund Co.*, 43 Can. S.C.R. 59, the legislature went

farther in 1908 than was necessary or desirable. But, if so, the responsibility is with it and the remedy in its hands.

Much was made in argument for the respondent of the provision of the Land Titles Act which declares a mechanic's lien when registered to be an encumbrance on the lands. But the existence of the lien itself and its extent depend upon the provisions of the Mechanics' Lien Act. The two statutes must be read together, and registration under the Land Titles Act cannot be taken to create an encumbrance where there is no valid lien under the Mechanics' Lien Act or to neutralize or modify the limitation upon its extent which the Mechanics' Lien Act explicitly imposes.

As to the receipt taken by the city it does not establish that the payment to the bank was conditional. It merely shews that, having some knowledge of a claim of lien which they may have deemed quite unfounded, the civic officials, *ex majori cautela*, sought and obtained from the bank an indemnity against the possibility of that claim turning out to be enforceable. Failure to have done so in reliance upon their own belief, however firm, that no lien in fact existed, or that the assignment to the bank, operating from the date when the city had notice of it, gave its claim priority over that of the plaintiffs, of which it received verbal notice only subsequently, might have been deemed culpable remissness by those to whom the officials were accountable. However mistaken that belief may have been, after the city had paid over to the bank all the moneys in its hands owing to the contractor, there was, in my opinion, no "sum owing by the owner to the contractor" within the meaning of s. 32.

With great respect for the judges who take the contrary view, I am of the opinion that the judgment *a quo* involves a repeal of the amendment of 1908 to s. 32 which the legislature alone can effect. On this branch of the case I agree with the Chief Justice of Alberta, whose judgment, I think, should be restored. The appellant should have its costs here and in the Appellate Division. *Appeal allowed.*

B. C.

C. A.

MARSDEN v. MINNEKAHDA LAND Co.

British Columbia Court of Appeal, Macdonald, C.J.A., Martin, Galliher, McPhillips, and Eberts, JJ.A. April 2, 1918.

COMPANIES (§ VII D—380)—WINDING UP—SUBSTANTIAL INTEREST OF PETITIONER—ONLY CREDITOR DESIRING WINDING UP—DISCRETION. Where it is not made to appear that a petitioner for a winding up order, under R.S.C. (1906) c. 144, has a substantial interest in the winding up, and where he is the only creditor desiring an order to wind up, the order ought not to be made.

[*Re Okell* v. *Morris* (1902), 9 B.C.R. 153, applied.]

Statement.

APPEAL by plaintiff (a judgment creditor) from an order of Morrison, J., refusing to order a winding up under the Winding Up Act (R.S.C. 1906, c. 144). Affirmed.

Sir C. H. Tupper, K.C., for appellant.

A. D. Taylor, K.C., for respondent.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—The preliminary objection was taken by Mr. Taylor, counsel for the respondent, that under s. 101 of the Act an appeal does not lie. I think the objection must be overruled.

In *Re Union Fire Insurance Co.*, 13 A.R. (Ont.) 268, at 295, it was held that an appeal of this nature involves future rights. *Cushing* v. *Cushing*, 37 Can. S.C.R. 427, decides only that in a case of this sort it cannot be said that any sum of money is involved. That case does not decide and could not decide, having regard to the statute there under construction, the question of whether or not future rights are involved in a winding up order.

Then on the merits. After a careful consideration of the facts, and of the very able written arguments which have been submitted to us, I am not prepared to say that the judge wrongly exercised his discretion in refusing to make the winding up order. It was argued that since he has given no reasons for judgment it ought to be assumed that he disposed of the application otherwise than in the exercise of a discretion. I think, on the contrary, it must be assumed that he came to his conclusion judicially, and if the order is one which is discretionary and can be sustained on the assumption that the judge applied his mind to the whole case, then it must be taken that he made the order in the exercise of that discretion.

Appellant's counsel contended that where a statutory notice has been served demanding the payment of a debt which has matured into a judgment, the judgment creditor is entitled *ex debito justitiæ* to the winding up order unless it be established that the

petition is being made use of for some ulterior or improper motive, and he cites several authorities to support that contention. I do not find it necessary to go into a minute discussion of the authorities. The late full court in *Re Okell* v. *Morris* (1902), 9 B.C.R. 153, held that where nothing substantial was to be gained by the winding up order the judge of first instance was right in refusing to make it. If I am to understand by the submission of counsel above referred to that special stress is being laid upon the fact that a demand for payment was made and not met, then I think it right to say that in my opinion it makes no difference in considering the *ex debito* right to an order whether the insolvency be proved by that method or by any other sufficient evidence. However, in that respect there is no distinction to be drawn between this case and *Re Okell* v. *Morris*, *supra*, where no such demand appears to have been made. The decision of the full court, while not binding on this court, was the decision of a court of co-ordinate jurisdiction, which this court by judicial comity will not over-rule except under very exceptional circumstances indeed. *Re Okell* v. *Morris*, *supra*, in a way was a much stronger case for the making of the order than is the one at Bar. There there was neither a voluntary winding up nor an assignment for the benefit of creditors preceding the petition. Here there was an assignment for the benefit of creditors, and the case in respect of its facts is very similar, except in some matters affecting discretion, to that of *Re Maple Leaf Dairy Co.* (1901), 2 O.L.R. 590, where an order to wind up was refused and the proceedings under the assignment permitted to be carried on.

Now the case made out by the petitioner is a strong one in all respects except one. Were it not for that one the numerous English cases cited to us would have great weight. The distinguishing circumstance is this, and it is clearly analogous to a similar circumstance in *Re Okell* v. *Morris*, here the petitioner is the only creditor who wants the company wound up compulsorily, the others want it wound up by the assignee. The petitioner is a secured creditor, and while his counsel appeared to ridicule the idea that a vendor of land under an agreement of sale who had received two-thirds of the purchase money, and who cannot be compelled to convey until the other third is paid, to him, is a secured creditor. Had he conveyed and taken a mortgage back could it be said that he was not a secured creditor, yet his situation is in effect that of a

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mortgagee holding a first mortgage to secure $4,000 on land which not very long before the petition had been sold by him to the company for $12,000.

There is not a tittle of evidence that his security is not ample. The lands are farm lands, and while in argument it was suggested that there was a shrinkage in the value of lands between the date of sale and that of the petition, there is no evidence of it; to use the words of Walkem, J., in *Re Okell* v. *Morris:* "I see nothing to be gained by a winding up order." On the contrary I see danger of loss to the estate by making the order.

In what I have said, I do not wish to convey the impression that a secured creditor cannot be a petitioner for a winding up order. What I do say is that where it is not made to appear that the petitioner has a substantial interest in the winding up, and where he is the only creditor desiring an order to wind up, the order ought not to be made.

I would dismiss the appeal.

Martin, J.A. MARTIN, J.A., dismissed the appeal.

Galliher, J.A. GALLIHER, J.A.:—I agree with the Chief Justice.

McPhillips, J.A. MCPHILLIPS, J.A. (dissenting):—This appeal is from the refusal of Morrison, J., to order a winding up of the respondent under the Winding Up Act, R.S.C. 1906, c. 144, the petitioner therefor, the appellant, being a judgment creditor of the respondent. The respondent, before the application was made, had made an assignment for the benefit of creditors under the Creditors' Trust Deeds Act, R.S.B.C. 1911, c. 130. The fact of the assignment alone would entitle a winding up order being made (see Winding Up Act, c. 144, ss. 3 (*g*), 11 (*c*). The petition for the winding up was opposed by the company and nearly all the creditors. The main ground of objection was that, in view of the assignment, the creditors, other than the petitioner, were satisfied that the assignee should proceed under the terms of the assignment and the provisions of the Creditors Trust Deeds Act, the contention being that the assignment for the benefit of creditors was in effect a voluntary liquidation and Ontario cases were cited to that effect, and that no sufficient case had been made out for the making of a compulsory order for winding up. The onus, however, was upon the respondents to shew that there was no reasonable probability of any benefit accruing to the unsecured creditors for the winding up—(see *Re Crigglestone*

Coal Co., [1906] 2 Ch. D. 327; *Re Krasnapolsky, etc. Co.*, [1892] 3 Ch. D. 174)—and that onus, in my opinion, was not discharged. I cannot bring myself to the conclusion in the present case that the winding up will be unfruitful or that the petition is presented simply for the purpose of making costs (see Emden's Winding Up, 8th ed. (1909), at pp. 36, 37). The petitioner in the present case, in my opinion, is entitled *ex debito justitiæ* to the winding up order—(see *Re Amalgamated Properties of Rhodesia* (1913), Lim., [1917] 2 Ch. 115, Sargant, J.). It cannot be said that an assignment for the benefit of creditors is equivalent to a voluntary winding up; but, even if it were, and were it even that the company was being wound up voluntarily, that would not disentitle a compulsory order being made that it be wound up by the court.

I do not consider it necessary to refer to or discuss in detail all the cases referred to in the written arguments (which by leave upon special grounds were allowed to be presented) but consider it sufficient to say that in my opinion the present case is one in which an order should have gone for the winding up of the company under the Winding Up Act (c. 144, R.S.C. 1906)—I cannot, with great respect to the judge, accept the contrary view at which the judge arrived.

I would, therefore, allow the appeal.

EBERTS, J.A., would dismiss. *Appeal dismissed.*

Eberts, J.A.

EDWARDS v. CITY OF SYDNEY.

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S. C.

Nova Scotia Supreme Court, Russell, J., Ritchie, E.J. and Chisholm, J. March 13, 1918.

APPEAL (§ VII—480)—DAMAGES—AWARD OF REFEREE—CONSIDERATION OF ALL ELEMENTS—APPELLATE COURT—SETTING ASIDE.

In an action for damages for personal injuries the appellate court will not, unless under very exceptional circumstances, disturb the verdict of a jury or of a referee for assessment of damages where consideration has been given to all the different elements of damage in respect to which the plaintiff is entitled to compensation and an award made which was deemed to be fair and reasonable, under all the circumstances.

Statement.

PLAINTIFF claimed damages against the defendant corporation for injuries sustained as the result of tripping over an iron pipe protruding above the sidewalk on one of the public streets of the city of Sydney. There was a default judgment after which an order was made by Longley, J., referring the matter to Finlayson, C.Co.J., as referee for assessment of damages.

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Statement.

The County Court Judge, after hearing evidence, assessed damages in plaintiff's favour at the sum of $2,500.

Both parties appealed, defendant to reverse the decision and reduce the amount of damages and plaintiff to vary the assessment by increasing the amount of plaintiff's damages to $5,000, or such sum as the court should deem plaintiff entitled to on the evidence. Notice was given on behalf of plaintiff that plaintiff would not prosecute his appeal until defendant's appeal was proceeded with.

Robertson, K.C., for appellant; *Ross*, K.C., for respondent.

Russell, J.

RUSSELL, J.:—The County Court Judge, to whom this case was referred, has awarded $2,500 damages in an action of the plaintiff against the City of Sydney. The plaintiff fell violently to the ground because of an obstruction on the sidewalk. Before his fall, he was in good health, and was not conscious of anything wrong with his heart. After the fall he had a leakage from the heart and a hernia. The latter was produced by the accident, and both medical witnesses say that the heart lesion could be so produced. The efficiency of the plaintiff has been reduced it is said 50%. The amount to be awarded is, after all that can be said, mere guess-work. It is argued for the defendant city that if the plaintiff submits to an operation, his efficiency will be restored, and that if he does not undergo an operation, the costs of one should not have entered into the estimate of damages. I am not convinced that the plaintiff does not mean to take the operation, or that he will not do so. Nor do I think it is proved that his efficiency will be completely restored if an operation is performed. The judge has not found that the heart trouble was not caused by the fall. It will certainly continue after the operation, and may have been properly taken into account in assessing the damages. It is not certain that the judge allowed the full 50% for diminution of efficiency, and as to the period for which he should allow there is no definite principle of law that I know of. The amount awarded seems to me not excessive, and I think the defendant's appeal should be dismissed with costs. The plaintiff's appeal I would also dismiss, but without costs, as it has added nothing to the expense of the litigation, and was a mere precautionary step to enable the court to increase the damages if so minded, with notice that it would not be prosecuted if the defendant's appeal was withdrawn.

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Chisholm, J.

CHISHOLM, J.:—This is an appeal from the decision of His Honour Judge Finlayson, sitting as a special referee to assess the damages to which the plaintiff is entitled in consequence of the personal injuries caused to him by the negligence of the defendant.

The plaintiff was walking along one of the streets of Sydney after dark, when he struck a piece of pipe, was thrown violently on frozen ground, and was seriously injured. One of his knees was hurt; his clothes were torn; and the doctor found the following day that he was ruptured in the right side, and had valvular trouble of the heart.

According to the testimony of the doctors the rupture was undoubtedly caused by the fall, and the heart condition also may have been caused by the fall. The chances of the heart becoming normal again are small. The rupture may be overcome by a surgical operation. The chances of a cure without any operation are nil. The doctors who were called do not make it clear whether they think the plaintiff should undergo the operation; but one of them says that by an operation in medium conditions eighty to ninety per cent. are cured of the rupture. The plaintiff has not been operated on; and in his present condition it is considered that his efficiency in his ordinary work, that of constable, has been reduced by 50%.

The County Court Judge assessed the damages at $2,500.

The principles on which an assessment in cases of personal injuries like this should be made are clearly stated by Field, J., in *Phillips* v. *L. & S.W. R. Co.*, 5 Q.B.D. 78, and by Cockburn, C.J., in the same case, in 4 Q.B.D. 406. Cockburn, C.J., says:

> But we think that a jury cannot be said to take a reasonable view of the case unless they consider and take into account all the heads of damage in respect of which a plaintiff complaining of a personal injury is entitled to compensation. These are the bodily injury sustained; the pain undergone; the effect on the health of the sufferer, according to its degree and its probable duration as likely to be temporary or permanent; the expenses incidental to attempts to effect a cure, or to lessen the amount of injury; the pecuniary loss sustained through inability to attend to a profession or business as to which, again, the injury may be of a temporary character, or may be such as to incapacitate the party for the remainder of his life. If a jury have taken all these elements of damage into consideration, and have awarded what they deemed to be fair and reasonable compensation under all the circumstances of the case, a court ought not, unless under very exceptional circumstances, disturb their verdict.

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The contention of the defendant is that the County Court Judge made due allowance for the impairment of the plaintiff's efficiency by 50%, and for the other elements of damage mentioned and in addition included the cost of the operation which has never been performed. In other words, that he allows for the pain and suffering, the expense so far incurred, loss of income up to the time of the assessment, loss of future income on the basis of 50% impairment, and $500 for the expense of an operation which has never been had. If that were the way in which the judge arrived at the amount of the damages, I think he would be in error. The plaintiff cannot have his loss of future income on the basis of a permanent impairment of efficiency of 50%, and also the cost of an operation which, if had, would probably greatly reduce that impairment, and which if not had, does not represent any item of damage at all.

Although the language of the decision appealed from is not free from doubt, I have come to the conclusion that what the judge considered was the cost of the operation, and the probable diminished earning power of the plaintiff after such operation was had. It is true that, earlier in the decision, he alludes to the 50% loss of efficiency, but that I take to be only in the way of summarizing the evidence given as to plaintiff's condition.

I think the defendant's appeal should be dismissed with costs. The plaintiff also gave a notice of appeal, but the appeal was not argued. His cross-appeal should be dismissed with costs and the costs deducted from the plaintiff's costs.

Ritchie, E.J.

RITCHIE, E.J.:—I agree with Chisholm, J.

Appeal and cross-appeal dismissed.

ALTA.

S. C.

CRISTALL v. McKERNAN.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart, Beck and Hyndman, JJ. April 5, 1918.

TRIAL (§ II—40)—TRIAL JUDGE REFUSING TRIAL BY JURY—DISCRETION—PROPER CONSIDERATION—NOT PROCEEDING ON WRONG PRINCIPLE—COURT OF APPEAL.

A court of appeal will not interfere with an order of a judge, refusing a trial with a jury, where he has exercised his discretion after proper consideration of the case and has not proceeded upon any wrong principle.

Statement.

APPEAL from a decision of Walsh, J., refusing to order a trial with a jury.

S. B. Woods, K.C., for appellants; *Frank Ford*, K.C., for respondents.

HARVEY, C.J., concurred with HYNDMAN, J.

STUART, J.:—I think this appeal should be allowed and the issues of fact in the case directed to be tried by a jury. With respect, I venture to disagree with the view expressed by the judge below to the effect that because there are inferences (*i.e.*, I assume of fact) to be drawn from the acts of the parties a jury should not be ordered. Stuart, J.

It is true that under the old rule the action could not be tried by a jury. But in one respect the existing rules are wider because they provide for the trial by a jury of certain "issues," that is, issues of fact, not of the whole action with the expectation of a general verdict one way or the other which is all that could have been done under the old rule.

I do not think sufficient importance has been attached to this distinction nor sufficient effort made to take advantage of the rule which allows issues of fact to be left to a jury for trial.

HYNDMAN, J.A.:—This is an appeal by the defendant Daisy Evelyn McKernan from the decision of Walsh, J., refusing to order a trial with a jury. Hyndman, J.

It is apparent to me that the judge considered very carefully the several issues arising in the action and I am unable to see that he proceeded upon any wrong principle.

The judge, therefore, having exercised his discretion after a proper consideration of the case, I do not think his disposition of the matter ought to be interfered with. (See the decision of the Chief Justice in *Hogan* v. *Northern Construction Co.*, [1918] 1 W.W.R. 652.)

I would therefore dismiss the appeal, with costs.

BECK, J.:—This is a case in which Walsh, J., in chambers, directed the action to be tried by a judge without a jury, dismissing the defendants' application that it should be tried with a jury. Beck, J.

The action is one by one creditor on behalf of himself and all other creditors of the male defendant and by the assignee under the Assignments Act of this defendant to set aside as fraudulent and alternatively as an unjust preference certain transfers to the female defendant his wife.

The action is framed obviously in view of the Assignments

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Act (1907, c. 6), s. 39 (gifts, etc., made by insolvent with intent to prejudice creditors) and s. 40 (gifts, etc., made by insolvent with intent to prefer creditor). The claim does not seek to bring the case within s. 41 (gifts, etc., made by insolvent having the effect of preference, if attacked or (s. 42) if assignment made within sixty days).

It was urged too on the argument that on such a statement of claim it is open to the plaintiff to substantiate his case under 13 Eliz. c. 5, so far as it charges a fraudulent (and not merely a preferential) transaction or in other words he may treat the allegation of insolvency as surplusage. I think this proposition is sound and that notwithstanding the provisions of s. 39 of the Assignments Act the Statute of Elizabeth remains in full effect, being wider in its scope. See May on Fraudulent Conveyances, 3rd ed., pp. 9, 133; 102, 107. *Oliver* v. *McLaughlin*, 24 O.R. 41; *Gurofski* v. *Harris*, 27 O.R. 201.

This view was urged in order to emphasize the position that the substantial question to be tried was not merely that of some technical constructive fraud which it has become the fashion to suppose is best tried by a judge alone, but a question of moral fraud and therefore one dependent upon intention. Even under s. 39 "intent" is of the essence of the plaintiff's case.

Still adhering to the views I expressed in *Salter* v. *City of Calgary*, 27 D.L.R. 584, I think there should be a jury in the present case—at all events to try the issue of fraud.

In that case, I emphasized the importance in many cases of separating the issues. I said that, in such cases as traditionally were cases which would be tried by a jury, there remained the presumption in favor of the party applying for a jury.

It was the common practice in the Court of Chancery to send the issue of fraud to be tried in a common law court before a jury. This practice is still in vogue in England and ordinarily the question of fraud is on request directed to be tried by a jury. (See *Drinkwater* v. *Union Bank* (1885), 1 Times L.R. 362.)

In disagreeing with the judge of first instance, as I do, I am, I think, disagreeing with him as to the principle to be applied in deciding the question of jury or no jury.

I would allow the appeal with costs and direct the case to be tried with a jury.

Appeal dismissed by equally divided court.

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Nova Scotia Supreme Court, Russell and Longley, JJ., Ritchie, E.J. and Chisholm, J. March 12, 1918.

TRIAL (§ V C—290)—CRIMINAL LAW—VERDICT OF JURY—"GUILTY WITHOUT HIS KNOWLEDGE"—EFFECT.

Knowledge is not an ingredient of the offence created by sec. 490 (b) of the Criminal Code; a verdict by the jury of "guilty without his knowledge" is in effect a verdict of guilty.

Statement.

The prisoner was indicted at the sittings of the Criminal Court for that he, being then a dealer in milk bottles, did unlawfully fill bottles with a beverage, to wit, milk for the purpose of sale or traffic therein, which said bottles were then the property of the Scotia Pure Milk Co. Ltd., a body corporate.

The trial took place before Drysdale, J., with a jury.

The jury, after hearing the evidence and the charge of the judge, retired and returned the verdict, "Guilty without his knowledge."

The judge overruled a motion for the discharge of the prisoner, holding that the verdict rendered was in effect one of "guilty" but respited judgment pending the determination of questions reserved for the consideration of the Supreme Court *in banco*.

The questions reserved are set out in full in the opinion of Longley, J., which also set out the substance of the evidence upon which a conviction was sought.

W. H. O'Hearn, K.C., for the prisoner.

A. Cluney, K.C., Crown Prosecutor, for the Crown.

Russell, J.

RUSSELL, J. (dissenting):—We are asked to decide in this case that if in the early morning, before it is clear daylight, a milk dealer's servant, in filling his master's bottles, inadvertently fills a bottle bearing the trade mark of another dealer which happens, without his knowledge, to be among a hundred or more bottles which it is his duty to fill, and the master, in loading the bottles into his waggon for the purpose of delivery to his customers, inadvertently, and not knowing the offending bottle to be among the number, places it with the rest upon his milk waggon, the master on a verdict given by the jury of "guilty without knowledge" is liable to a sentence of 2 years in Dorchester penitentiary with hard labour because the statute for the protection of trade marks enacts that everyone is "guilty of an indictable offence who, being a manufacturer, dealer or trader, or bottler, trades or traffics in any bottle which has upon it the

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trade mark duly registered of another person, without the written consent of such other person, or, without such consent, fills such bottle with any beverage for the purpose of sale or traffic."

At common law an honest and reasonable belief in the existence of facts, which, if true, would make the act for which the prisoner is indicted an innocent act, has always been held a good defence . . . Honest and reasonable mistake of fact stands in fact on the same footing as absence of the reasoning faculty (in infants) or perversion of that faculty as in lunacy . . . The rule above stated is expressed in the phrase "*actus non facit reum nisi mens sit rea*," which in substance means that the full definition of every crime contains expressly or by implication a proposition as to a state of mind" and, if that mental element is proved to be absent in any case, the crime so defined is not committed. The latest and it would seem a perfectly correct statement of the law on this subject is "There is a presumption that *mens rea*, a knowledge of the facts which render the act unlawful, is an essential ingredient in every criminal offence. That presumption is, however, liable to be displaced by the words of the statute creating the offence, or the subject-matter with which it deals, and both must be considered" . . . In some cases enactments by their form seem to constitute the prohibited acts into crimes even in the absence of the knowledge and intention necessary to constitute a *mens rea*. Few, if any, such enactments relate to indictable offences, and usually they prohibit certain acts in the interests of the public revenue or private property. 1 Russell on Crimes (1st Can. ed.), 101.

The Act in this case relates to an indictable offence, and it is not one of those made for the protection of the public revenue, although it is one enacted for the protection of private property. If it had been intended to make the master criminally responsible for the act of his servant and to obviate, in the case of both master and servant, the necessity for the ingredient almost universally necessary to the constitution of a criminal offence, I should have expected, at least before reading the cases hereinafter referred to, to find some intimation or suggestion of that intention in the frame of the statute. It is a hard law in any case that makes a man criminally responsible for the act of his servant, although it is found necessary to do so in the enactment of such laws as those relating to the sale of intoxicating liquors, and it is also found necessary for the protection of the revenue to pass laws which lay heavy burdens of proof upon defendants and exclude the operation of the common law principle that requires *mens rea* in order to the constitution of the crime. The judgment of Wills, J., in *The Queen* v. *Tolson*, 23 Q.B.D. 168, at 171, also shews that there may be nothing in the mere form of the words used to distinguish the cases where *mens rea* is necessary from

those in which it is not. In that case the prisoner came within the express words of a statute which made her guilty of bigamy for having married another person during the life of her former husband. It was plausibly argued that the only excuse she could offer was the one provided for her in the statute to the effect that the section enacting the punishment should not extend to any person marrying a second time whose husband had been continually absent for 7 years, and was not known to her to be living within that time. Notwithstanding this section, however, of which the facts of the case did not enable her to take the benefit, it was held by the majority of the court, no less than 5 judges dissenting, that she was innocent of the crime under the finding of the jury that at the time of her second marriage she, in good faith and on reasonable grounds, believed her husband to be dead. The difficulty of determining whether *mens rea* is a necessary ingredient or not is obviously enormous when nine judges determine one way and five the other in the same case. It is moreover illustrated by the many instances given at p. 173 of this case by Wills, J.:—

> There is no difference, for instance, in the kind of language used by Acts of Parliament which made the unauthorized possession of government stores a crime and the language used in by-laws which say that if a man builds a house or a wall so as to encroach upon a space protected by the by-law from building he shall be liable to a penalty. Yet in *R.* v. *Sleep*, L. & C. 44, it was held that a person in possession of government stores with the broad arrow could not be convicted when there was not sufficient evidence to shew that he knew they were so marked; whilst the mere infringement of a building by-law would entail liability to the penalty.

Quite a number of other pairs of contrasted cases are cited for the purpose of shewing that identical language can be construed in two opposite senses, that, therefore, assistance must be sought *aliunde*, and that all circumstances must be taken into consideration which tend to shew that the one construction or the other is reasonable. Among those circumstances he says it is impossible to discard the consequences, and among such consequences he mentions the nature and extent of the penalty attached to the offence.

> There is nothing that need shock any mind in the payment of a small pecuniary penalty by a person who has unwittingly done something detrimental to the public interest. To subject him when what he has done has been nothing but what any well disposed man would have been very likely to do under the circumstances—to the loss of civil rights, to imprisonment with

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hard labour or even to penal servitude is a very different matter; and such a fate seems properly reserved for those who have transgressed morally as well as unintentionally done something prohibited by law.

The Act under which this prosecution took place subjects the offender to imprisonment in the penitentiary with hard labour.

The case of *Reg.* v. *Prince*, L.R. 2 C.C.R. 154, was cited by counsel for the prosecution. I adopt as to this case the argument of the counsel for the prisoner in *The Queen* v. *Tolson*, *supra*, that:

> The result of that decision is in no sense to displace the doctrine of the necessity for a *mens rea* as a general proposition of criminal law, at least in cases where the act is done under a belief of the existence of a state of facts which, if it really existed, would render the act not criminal nor immoral. In that case the prisoner knew that in taking the girl away from her father he was, altogether apart from the question of her age, doing an improper and immoral act.

This is, I think, a correct statement of the principle on which the majority of the court acted in deciding *Reg.* v. *Prince*, *supra*. Lord Bramwell, who spoke for the majority of the judges, laid stress upon the fact that the act of taking a girl away from her father was a wrong in itself, "not illegal but wrong," and, therefore, the court might well hold that the prisoner who had done such an act did it at his peril, and if it should turn out that she was under the age of sixteen, he was liable to punishment without knowledge on his part that she was under that age. His ignorance of this fact was no excuse. Surely that case is quite distinguishable from the present in which if the facts had been as the prisoner must under the verdict be held to have believed them to be, there was nothing done that could not have been done by a perfectly innocent person. The act of the prisoner in *Reg* v. *Prince*, *supra*, even if the facts had been as he mistakenly believed them to be was a wrongful act. Much depended also in that case, as in the case of *The Queen* v. *Bishop*, 5 Q.B.D. 259, and some others which might have been cited as apparently favourable to the case of the prosecution upon the consequences that might follow if ignorance were held to furnish an excuse. On the other hand, in *Sherras* v. *De Rutzen*, [1895] 1 Q.B. 918, a section of the Licensing Act, 1872 (English), subjected to a penalty any licensed person who supplied any liquor or refreshment whether by way of gift or sale to any constable on duty, unless by authority of some superior officer of such constable. The defendant did the act

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prohibited, but he *bonâ fide* believed that the constable was off duty. His erroneous but *bonâ fide* belief was a defence, although there were no such words as "knowingly" or "wilfully" or any other words of similar meaning in the section under which he was prosecuted.

It must be conceded that the case is a difficult one. Having regard, however, to the general statement in Russell on Crimes, already quoted, that few of the enactments in which the necessity for the *mens rea* is dispensed with are enactments relating to indictable offences, and to the considerations presented by Wills, J., in *The Queen* v. *Tolson*, 23 Q.B.D. 168, where he distinguishes between the case of a mere breach of a municipal by-law and the conviction for a crime involving imprisonment with hard labour, I think it would be a reproach to our jurisprudence if we were obliged to decide that an honest man was liable to imprisonment in the penitentiary for a prohibited act which he did not know he was doing. The case last cited of *Sherras* v. *DeRutzen*, *supra*, is a direct authority for deciding in the prisoner's favour as is also *The Queen* v. *Tolson*, *supra*, and under the authority of those cases, as well as in virtue of the general principles of criminal law, I must hold that the verdict in this case is a verdict of acquittal.

Longley, J.

LONGLEY, J.:—The judge who tried the case has reserved for the court certain questions. The first one was: "Does the verdict in this case amount to a verdict of acquittal?" It may as well be stated that the verdict in this case was "Guilty, without knowledge."

In perusing s. 490 of the Criminal Code of Canada, I have come to the conclusion that no *mens rea* entered into the offence committed. The Act provides that the mere fact of using any bottle or siphon for the sale therein of any beverage, "or the having by any such manufacturer, dealer, trader or bottler upon any bottle or siphon such trademark or name of such other person, or the buying, selling or trafficing in any such bottle or siphon without such written consent of such other person, or the fact that any junk-dealer has in his possession any bottle or siphon having upon it such a trade mark or name without such written consent, shall be *primâ facie* evidence of trading or trafficing within the meaning of par. (*b*) of this section."

The mere act of using the bottle of another party is itself *primâ facie* evidence of guilt.

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In the examination of Scullion the following question is put to him:

Can you tell a Scotia Pure Milk bottle from any other bottle? A. Well, when I look over them, I do at times.

The matter has to be determined by the judge trying the cause as to whether or not it was simply carelessness or inadvertence, and he fixes the penalty accordingly. In my judgment, the verdict "guilty without knowledge" did not constitute a verdict of acquittal. On the contrary, I regard it as distinctly a verdict of guilty. 2nd. "Should I have instructed the jury that a *mens rea* was necessary under 490 (*b*) of the Code, the section under which defendant was indicted and convicted?" In my judgment he should not. 3rd. "If all or any of the foregoing questions are answered favourably to the defendant, should the conviction herein be quashed or a new trial ordered?"

It scarcely becomes necessary to answer this question at present. I think the conviction and verdict of conviction were right.

The court was asked also the following question:—

Was I right in instructing the jury that the defendant was liable criminally under said s. 490 (*b*) for the acts of his servant, and, if so, should I have qualified said instruction by adding that defendant was only criminally liable under said section for the acts of his servant when the servant was acting within the scope of his authority?

I do not think that the judge was at all in error in his charge in that respect. The acts of his servant in this case were purely within his authority.

The jury were justified, perhaps, in adding the words "without knowledge" on account of the judge's charge, but I think that the words "without knowledge" were put in purely as the result of that charge, and have no relation whatever to the question of guilt or innocence. In my judgment the defendant should be handed over to the judge who tried the case for administration of such punishment as he may consider necessary.

Ritchie, E.J.

RITCHIE, E.J., (after setting out the facts):

I have to confess that the distinction attempted to be drawn in this case between *mens rea* and lack of knowledge is too subtle for me. *Mens rea* in the case of receiving stolen goods means knowledge that the goods were stolen. I think in this case it means knowledge on the part of Newcombe that the bottles

were filled by his servant. S. 490 (*b*) is as follows: Everyone is guilty of an indictable offence who:

being a manufacturer, dealer or trader, or bottler, trades or traffics in any bottle or siphon which has upon it the trademark duly registered or name of another person, without the written consent of such other person, or without such consent fills such bottle or siphon with any beverage for the purpose of sale or traffic.

The preceding sub-s. (*a*) which deals with defacing, concealing or removing trademarks has the word "wilfully" before the description of the offence. I must, in construing sub-s. (*b*), assume that parliament left out the word "wilfully" with deliberate intent.

I have come to the conclusion that the statute has made the filling of the bottles an offence, whether done with or without knowledge. From this conclusion, I would gladly escape if I could convince myself that there was any legal way of escape, because Newcombe had no knowledge of the filling of the bottles, or that they were in his possession. The question involved is as to the legal construction to be put on the statute, and I think that it is necessary to look at the object of the statute to see whether knowledge is an ingredient of the offence created. The clear object of the statute is to protect manufacturers, dealers, traders or bottlers in the use of their registered trademark or name.

If knowledge is of the essence of the offence the statute fails to attain the object for which it was passed. This, I think, does not require demonstration. I cannot escape from the significance to be attached to the use of the word "wilfully" in sub-s. (*a*) and its absence from sub-s. (*b*).

The case of *Cundy* v. *Le Cocq*, 13 Q.B.D. 207, is, I think, in point. In that case the Licensing Act, 1872, s. 13, made it an offence for any licensed person to sell any intoxicating liquor to any drunken person. A publican sold intoxicating liquor to a drunken person who had given no indication of intoxication, and without being aware that the person so served was drunk. It was held that the prohibition was absolute and that knowledge of the condition of the person served with liquor was not necessary to constitute the offence. The remarks of Stephen, J., I regard as applicable in principle to this case; at p. 209 he said:—

I am of opinion that the words of the section amount to an absolute prohibition of the sale of liquor to a drunken person, and that the existence

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of a *bonâ fide* mistake as to the condition of the person served is not an answer to the charge, but is a matter only for mitigation of the penalties that may be imposed. I am led to that conclusion both by the general scope of the Act, which is for the repression of drunkenness, and from a comparison of the various sections under the head "Offences against public order." Some of these contain the word "knowingly," as, for instance, s. 14 which deals with keeping a disorderly house, and s. 16 which deals with the penalty for harbouring a constable. Knowledge in these and other cases is an element in the offence, but the clause we are considering says nothing about the knowledge of the state of the person served.

Speaking of the maxim that in every criminal offence there must be a guilty mind, Stephen, J., goes on to say:

In old time and as applicable to the common law or to earlier statutes, the maxim may have been of general application but a difference has arisen owing to the greater precision of modern statutes. It is impossible now, as illustrated by the cases of *Reg.* v. *Prince*, L.R. 2 C.C.R. 154, and *Reg.* v. *Bishop*, 5 Q.B.D. 259, to apply the maxim generally to all statutes, and the substance of all the reported cases is that it is necessary to look at the object of each Act that is under consideration to see whether and how far knowledge is of the essence of the offence created.

Knowledge being, as I think, immaterial, the trial judge was, in my opinion, right in treating the verdict as a verdict of guilty.

There can be no doubt that the parliament of Canada has jurisdiction to make the mere doing of an act without knowledge that it is being done an offence. When a statute so provides then the only question is, has the person charged in fact done the act which the statute has made an offence. I think that is exactly what the statute has done in this case. The *Slaughenwhite* case in 9 Can. Cr. Cas. 173, has no application. There, Girouard, J., delivering the majority opinion of the Supreme Court of Canada, treated "malicious intent" as the essential requirement of the crime. In this case, I think, it cannot upon the true construction of sub-s. (*b*) of s. 490 of the Code be said that knowledge is an essential requirement of the offence.

The trial judge refused to reserve the following question:—

"Was I right in instructing the jury that defendant was liable criminally under said section 490 (*b*) for the acts of his servant, and, if so, should I have qualified said instruction by adding that the defendant was only criminally liable under said section for the acts of his servant when the servant was acting within the scope of his authority?"

From this refusal there is an appeal.

It is said there was something for the jury. I think not.

As a matter of law, Newcombe, in this case, was criminally liable for the acts of his servant. Acting by the servant, the principal did the act which the statute prohibits. As to whether the servant was acting within the scope of his authority there is absolutely no dispute or question about it.

Ritchie, E.J.

The evidence is made part of the case. Scullion, the servant, says that he was employed by Newcombe as "bottle filler." There is no evidence or suggestion the other way. It would, I think, be an absolute farce to put a question to a jury where no such question has arisen in the evidence, where there is nothing upon which a jury could possibly make a finding. The judge was clearly right in his refusal.

The result is that the conviction must be affirmed.

Chisholm, J.

CHISHOLM, J.:—I concur in the opinion of Ritchie, J., and think the questions reserved should be answered as follows: 1. No. 2. No. 3. Disposed of by answers to questions 1 and 2.

As to the question which the trial judge refused to reserve with respect to the liability of the accused for the acts of his servant, I agree with the trial judge that the evidence was all one way, and there was no evidence upon which a jury could possibly find that the acts complained of were outside of the scope of the servant's authority. *Hatch* v. *L. & N.W. R. Co.* (1899), 15 T.L.R. 246.

The appeal from the decision refusing to reserve that question should be dismissed. *Appeal dismissed.*

NOBLE v. LASHBROOK.

Saskatchewan Supreme Court, Appellate Division, Haultain, C.J.S., Newlands' Lamont and Elwood, JJ.A. March 27, 1918.

DAMAGES (§ III J—200)—CLAIM FOR USE AND OCCUPATION—CONTRACT—COMPENSATION.

A claim for compensation for use and occupation, not under a contract affording a basis of compensation, is not for a debt, within the meaning of the rules of the District Courts (Sask.), as to costs, but sounds in damages.

Statement.

APPEAL from a judgment of the trial judge in an action for compensation for use and occupation of a chattel. Reversed.

J. M. Hambidge, for appellant; *P. H. Gordon*, for respondents.

The judgment of the court was delivered by.

Lamont, J.A.

LAMONT, J.A.:—In September, 1916, the plaintiff sold to the defendants a threshing machine, for which the defendants gave

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their notes. The defendants took possession of the machine and commenced threshing. A short time afterwards, it was discovered that there had not been a compliance with the provisions of the Farm Implements Act, and that, therefore, the sale was invalid. The defendants returned the machine to the plaintiff, who returned the defendants their notes. The plaintiff asked the defendants to pay him a fair rental for the use of the machine, or to pay over the earnings. Not receiving any satisfaction, he brought this action, in which he asks:—(*a*) An accounting of the number of days the machine was used; (*b*) $15 for each day the machine was so used; and (*c*) general damages in the sum of $50.

The Judge of the District Court before whom the matter came found that the defendants had used the machine 6 days, and he allowed the plaintiff $10 per day, or $60 in all, with costs fixed on the small debt scale, because, in his opinion, the action being for compensation for the use of the machine, it did not sound in damages. From this judgment the plaintiff appeals, on the ground that the trial judge erred in holding that the action did not sound in damages, thereby depriving the plaintiff of his costs on the District Court scale.

As to the $60 award as compensation for the use of the machine, there is no appeal. We have, therefore, only one question to consider. Is a claim for an unspecified amount, for the use of a chattel, a claim to which the small debt procedure is applicable?

The rules of the District Courts provide as follows:—

> 4. In all claims and demands for debt, whether payable in money or otherwise, where the amount or balance claimed does not exceed $100, the procedure shall, unless otherwise ordered or allowed by a judge, be as follows:—

The rules then provide a simple procedure, with a tariff of costs much lower than the regular District Court scale. If the claim in this case is for a "debt" within the meaning of r. 4 above cited, the trial judge was right in applying the small debt scale of costs. If it was not for a "debt," but sounds in damages, the costs should be awarded on the regular District Court scale.

"Debt" is defined in Goodeve on Personal Property, 5th ed., at p. 162, as follows:—

> A debt is an ascertained sum of money due from one person to another. As a debt must be an *ascertained* sum, damages that may be recovered in an action are not a debt until their amount is ascertained by judgment.

In *Paradis* v. *Hotton*, 3 W.L.R. 317, Wetmore, J., said, at 318:—

A debt is generally understood to be a liquidated sum of money payable by one person to another, at least that is my conception of a debt.

and again at 319.

I have come to the conclusion that in order to constitute a debt within the meaning of the rule ,there must be something ascertained of a fixed or liquidated character to start with.

In that case, the judge held that an action for 12 loads of hay at $5 a load, being the unpaid balance of rent of a farm leased by the plaintiff to the defendant at a rental of two-thirds of the whole crop, was not a "debt."

See also *Cosgrave* v. *Duchek*, 3 W.L.R. 320.

In Stephens' Commentaries on the Laws of England, 15th ed., vol. 3, p. 373, the author says: "Debt lies where the object is the recovery of a certain sum of money alleged to be due from the defendant to the plaintiff."

In Corpus Juris, vol. 1, at p. 996, the distinction between the old action of *assumpsit* and that of debt is made as follows:

As ordinarily stated, the distinction between assumpsit and debt is that the former is to recover damages for the breach of a simple or parol contract, and the latter for the recovery of a debt, *eo nomine* and *in numero*; that assumpsit will lie where the amount is uncertain or unliquidated, and debt only for a sum certain.

In an old work on Pleading, by Saunders, vol. 1, at p. 895, under the title "Debt," I find the following in reference to an action for debt:

It lies upon a simple contract, etc., for the recovery of a sum of money capable of being reduced by averments to a certainty.

and at p. 899:

Debt does not lie unless the claim be for a sum certain or for a pecuniary demand which can readily be reduced to a certainty.

A sum is considered certain when it can be made certain. By this, I take it, is meant where it can be determined by computation. If, for instance, the contract of the parties furnishes a specific mode or rule of payment, or if its terms furnish the means of ascertaining the exact amount due, an action for debt will lie. But where no specific sum is claimed, and neither the contract nor the averments furnish data from which the defendant can determine the amount he owes, the action, in my opinion, cannot be said to be for a "debt," within r. 4.

Again, the claim made and judgment given is for compensation for use and occupation. As between landlord and tenant, the nature of an action for use and occupation of land is well settled,

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and it lies where one person has been in occupation of the land with the consent of the owner under circumstances which entitle the owner to be paid for such occupation.

In 18 Hals., at p. 486, the author says:—

"This remedy is available where a person has been in occupation of land without an agreement fixing the amount of rent; but the action may also be brought when a certain rent has been reserved by a verbal contract or by an agreement not under seal. In either case the compensation is recovered *as damages* for breach of an express or implied agreement to pay for the use of the land, and, where the rent has been fixed, this is evidence of the amount of damages to be recovered, and is usually decisive."

I do not see that the nature of an action for compensation for the use and occupation of a chattel, under an implied contract to pay a reasonable amount for its use, involves different principles from those applicable to an action for use and occupation of land. As the one sounds in damages for breach of implied covenant to pay, so, in my opinion, does the other.

Counsel for the respondent referred to Bicknell & Seager's Division Courts Act, 2nd ed., at p. 86, where it is suggested that an action for use and occupation could be brought under sec. 113 of that Act. That section, however, is wider than our rule, and permits of actions being brought in the Division Court for the recovery of any debt *or money demand*, while our small debt procedure is confined to actions for debt.

I am, therefore, of opinion that the claim in this case sounds in damages, and that the plaintiff is entitled to District Court costs.

The appeal will be allowed, and the judgment in the court below varied by allowing costs on the District Court scale.

Appeal allowed.

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HERDMAN v. MARITIME COAL, RAILWAY and POWER Co., Ltd.

Nova Scotia Supreme Court, Russell and Longley, JJ. and Ritchie, E.J. April 5, 1918.

(Annotated)

NEGLIGENCE (§ I B—5)—RAILWAY TRACK—HABITUAL USER BY PUBLIC—EXTRA ENGINE ON DARK NIGHT WITHOUT LIGHTS.

A railway company which permits the public to habitually use its track, as a short cut, knowing it to be so used, is guilty of negligence, if without giving the public warning it runs an engine, without lights and with a defective whistle, over the track on an extra trip, on a dark and windy night.

[*Lowery* v. *Walker*, [1911] A.C. 10, followed; see note following.]

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HERDMAN v. MARITIME COAL, RAILWAY AND POWER CO. LTD.

Ritchie, E.J.

APPEAL by defendant from a judgment of Drysdale, J., in an action for damages on account of negligence in connection with the operation of a railway train over the line of the defendant company. Affirmed.

H. Mellish, K.C., and *A. G. Mackenzie*, for defendant, appellant; *F. L. Milner*, K.C., and *J. A. Hanway*, for plaintiff, respondent.

RITCHIE, E.J.:—Dr. Herdman, on February 10, 1917, was walking on the track of the defendant company between Maccan and River Hebert in the County of Cumberland, and was overtaken and killed by an engine of the company; the engine was going backwards, and Herdman was struck by the tender.

This action is brought by his widow under the Fatal Injuries Act. The other material facts appear from the questions to and answers by the jury, which are as follows:—

1. Was the proximate cause of the accident that killed Herdman the negligence of the company? If so, state it. What was it? Yes, not having lights and a defective whistle. 2. Notwithstanding such negligence, could Dr. Herdman by the exercise of reasonable care have avoided the accident? We think the doctor was careless but could not have avoided the accident. 3. Up to the time that Herdman was killed, did the public habitually travel along the defendant's railroad between the villages of Strathcona and River Hebert? Yes. 4. If so, did the defendant company have notice of it? Yes. 5. Before Herdman was killed did the defendant company interfere with persons so travelling along the railway? No. 6. Had Herdman reason to believe that an engine would overtake him without blowing the whistle at Pugsley's crossing and without carrying lights? No. 7. Was Herdman prevented from knowing that the engine was coming by the absence of the whistle and lights? Yes. 8. Was an engine running without lights and not sounding a whistle at Pugsley's crossing more likely to kill a foot passenger at the point where Herdman was killed than an engine with lights and sounding a whistle at Pugsley's crossing? Yes. 9. Was the running of the engine which killed Dr. Herdman without lights and without sounding a whistle at Pugsley's crossing a reckless disregard of human life? No, but consider it careless. 11. What amount of damages do you find; and how much do you allow to the widow and how much to the daughter? $6,000 divided as follows: widow $2,500, daughter $3,500.

The case was tried before my brother Drysdale with a jury. The judge gave judgment on the findings in favour of the plaintiff, holding that the case was within the principle of *Lowery* v. *Walker*, [1910] 1 K.B. 173, and on appeal the House of Lords, [1911] A.C. 10. The facts in *Lowery* v. *Walker* were that the defendant who owned a savage horse, which he knew to be dangerous to mankind, put it, without giving any warning, into a field of which he was the

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occupier and which he knew the public were in the habit of crossing without leave on their way to a railway station. The plaintiff, in crossing the field, was attacked and injured by the horse. The County Court Judge found as a fact that the defendant was guilty of negligence in putting a horse which he knew to be dangerous into a field which he knew the public were in the habit of crossing and gave judgment for the plaintiff.

It was held in the House of Lords that the effect of the trial judge's finding being that the plaintiff was in the field without express leave but with the permission of the defendant, the plaintiff was entitled to recover. The decisions of the Divisional Court, [1909] 2 K.B. 433, and of the Court of Appeal were reversed.

The contention for the defendant company is that Herdman was a trespasser, that by wrongfully walking on the track he brought the injury on himself. It was urged on behalf of the plaintiff that from the habitual use by the public of the track to the knowledge of the defendant company a license or invitation to walk on the track could properly be implied. I would have great difficulty in holding that there was a license or invitation in this case by implication, but it is not necessary to go so far. I have come to the conclusion that the plaintiff is entitled to hold her verdict and I base this conclusion upon the judgments in the House of Lords in *Lowery* v. *Walker*.

Lord Loreburn said:—

> Again, the judge, I think, found that there was no express leave given to the plaintiff to be in that field; but I think that the effect of his finding is that the plaintiff was there with the permission of the defendant, because he finds that the field had been habitually used by the public as a short cut, and he says that the defendant was guilty of negligence in putting a horse which he knew to be dangerous into a field which he knew was habitually used by the public.

Lord Loreburn goes on to say that in substance the finding was:—

> That the plaintiff was not proved to be in this field of right; that he was there as one of the public who habitually used the field to the knowledge of the defendant; that the defendant did not take steps to prevent that user; and in those circumstances it cannot be lawful that the defendant should with impunity allow a horse which he knew to be a savage and dangerous beast to be loose in that field without giving any warning whatever to the plaintiff or the public, of the dangerous character of the animal.

The Earl of Halsbury said, referring to the finding of the trial judge:—

In his finding he has raised the real proposition with which we are dealing, namely, whether or not a person who knows that the public are going over his ground, and going over it habitually, is entitled without warning or notice, or any other precaution whatsoever, to put a dangerous beast where he knows it may be probable—and almost certain if the thing continues—that the beast will sooner or later do some injury to persons crossing the ground, and crossing it in one sense with his permission—not that he has given direct permission, but that he has declined to interfere and so acquiesced in their crossing it. If he has acquiesced in their doing so, he is bound to take the ordinary precautions to prevent persons going into a dangerous place where he knows they are going, and going by his acquiescence without notice or warning or any form of security to prevent the injury happening which did happen.

I am unable to discover any principle upon which the facts in this case can be distinguished from the facts in *Lowery* v. *Walker*, *supra*. There is the habitual use for many years of the track by the public, known, permitted and acquiesced in by the defendant company; and with this knowledge, instead of a savage horse, an engine running, on a windy, stormy night, backwards, an extra trip, not a regular train, without lights, and a defective whistle, is put on the track and set in motion. The jury have found that this constitutes negligence and that Herdman was prevented from knowing that the engine was coming by the absence of the whistle and lights. I certainly cannot say that these findings are wrong. If the jury had gone further and said, that under the circumstances, the company was guilty of a reckless disregard of human life, I think that it would be very difficult to properly set aside such a finding. It is, of course, very trite to say that negligence consists of an absence of due care under the circumstances of the case, but it correctly states the law; it follows that the public user of the track with what amounts to the tacit permission of the company is one of the circumstances in this case, which, in my opinion, makes the defendant company liable.

I cannot bring myself to think that the management of this company would be entitled to say we know that this track is in common use for persons walking; we have never taken any effective steps to stop this user, but they have no right to so use it: therefore we will send out an engine at an irregular time and in the evening, without lights and with a defective whistle, so that warning of its approach cannot be given, and we will take the chance of killing one of the persons whom we have, for many years, allowed to walk on the track without interruption. This

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strikes me as an impossible position. On both ends of a bridge on the line there were notices: "Danger; keep off; this means you." There is some dispute as to whether these notices meant keep off the bridge or keep off the track, but assuming that they meant keep off the track, it does not help the defendant company in view of the years of tacit permission. In support of this proposition I quote from the dissenting opinion of Buckley, L.J., upheld in the House of Lords:—

> I wish, in conclusion, only to say a word about *Cooke* v. *Midland Great Western R. Co.*, Ireland, [1909] A.C. 229. Lord Macnaghten there said:—"It cannot make very much difference whether the place is dedicated to the use of the public or left open by a careless owner to the invasion of children who make it their playground." That was a case of children, and there may be some difference, although not, I think, a material difference for the present purpose, between adults and children, but I gather from these words that Lord Macnaghten was in that case of opinion that, if a careless landowner leaves open, and, may I add, allows the public habitually to cross his property, that raises a duty in the owner of the property.

Then, further on, he says:—

> It is proved that, in spite of a notice board idly forbidding trespass, it was a place of habitual resort for children.

Habitual user is thus treated as a relevant fact. Then he proceeds:—

> Now the company knew, or must be deemed to have known, all the circumstances of the case, and what was going on. Yet no precaution was taken to prevent an accident of a sort that might well have been foreseen and very easily prevented.

This must mean that liability may arise from the fact that the landowner knows that he is exposing the persons whom he allows to pass over his ground to danger of which he is aware and they are not.

The defendant company in this case knew when they sent out this engine that they were exposing persons whom they allowed to walk on the track, and who might very likely be so walking by way of a short cut on this dark and stormy evening instead of going round by the road, to danger of which such persons would be unaware, namely, the danger of an engine backing along the track not at a regular time, and without the lights and whistle which the jury find would have prevented the accident. I apply to the facts in this case the law laid down by Buckley, L.J., and I am of opinion that the plaintiff is entitled to hold her verdict and judgment and that the appeal should be dismissed with costs.

The findings of the jury are attacked in the notice as against the weight of evidence, but there is, in my opinion, evidence upon which the findings can properly be supported.

RUSSELL, J.:—I agree.

LONGLEY, J. (dissenting):—The Maritime Coal and Railway Co. operate a small line of railway between Maccan Junction and Joggins Mines and have operated it for several years past. Herdman resided at River Hebert, along the line. He was a doctor, and was employed by the company to attend to their men and received so much salary a month. On a certain evening in February last he went to the house of one Alfred Wynn, who resides at a small town called Strathcona on said line of railway, and he went by the railway a distance of a mile or a mile and a half from his house. He attended to his patient and then he undertook to walk on the railroad to his home, which was not far from the railway. It was a dark and stormy night in February, snowing, and considerable wind prevailing. He wrapped himself up completely and went on the line of railway. The company ran an engine on the line shortly after his going out. It was an engine run backwards, and it seems the whistle was out of order, but that the bell rang occasionally, and in going along to the next station the engine struck and killed Herdman, and his wife brought an action under the Lord Campbell Act to recover. The matter was submitted to a jury and they answered the questions as follows:—

What was the proximate cause of the accident which killed Dr. Herdman? It was the negligence of the company having no lights and defective whistle. Notwithstanding such negligence could Herdman, by the exercise of reasonable care, have avoided the accident? We think the doctor was careless, but could not have avoided the accident.

The 3rd, 4th and 5th questions related to the fact that persons were in the habit of walking along the line of railway, that the company had notice of it and did not, previous to Herdman being killed, interfere with it. The 6th and 7th questions relate to the doctor's belief that an engine would not overtake him without blowing a whistle, and he was prevented from knowing that the engine was coming from the absence of the whistle and lights, and that an engine running without lights and not sounding a whistle was more likely to kill a foot passenger where Herdman was killed than one running with lights and blowing a whistle.

The 9th question was:—

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Was the running of the engine that killed Dr. Herdman without lights and without sounding a whistle at Pugsley's crossing a reckless disregard of human life? No, but it was careless.

In these findings of fact we have the judgment of the jury on the facts of the case before them and there is evidence enough to sustain these findings.

The main question in the case was in relation to the fact that Herdman was walking on the company's railroad and, therefore, only entitled to some act of the company's which it was bound not to perform, and not in relation to the mere running of the engine in particular. The question of the doctor being on a line of railway and being killed by the passing of an ordinary train on that railway was not, as a matter of fact, submitted to the jury by the judge who tried the cause, and that point, I think, constitutes the essence of the whole case.

The running of a train is liable for any act of negligence on its part in regard to any person who is on the track at the time rightly or in regard to anything that relates to a person or persons on the track properly, but the sound principle is laid down that when the person is a trespasser on the track of a railway they are not bound by the same rules at all. They must do nothing actually wrong, but the mere running of a train backward over the track does not seem to me an act of negligence.

Considerable discussion took place on the argument of the common habit of people using the railroad for the purpose of travelling along it, and established the fact that in many instances during the last 16 or 17 years persons had been in the habit of walking on said railroad. But this system is a habit everywhere. There is no line in the Province of Nova Scotia on which people do not walk along the track every day of their lives. The law requires them to keep off the track and makes them liable to a fine of $10 for going on it. But I am not aware of any railroad that has enforced this, nor do I know of any railroad on the other hand which has agreed, formally or informally, that any person should use their track.

Several cases were cited by the counsel for the plaintiff indicating two or three instances where the railway had been held responsible for accidents to parties trespassing upon the railroad. All these cases have been carefully and fully weighed. The one

from Wisconsin laid down the principle emphatically that the plaintiff was liable, but all these were instances in which the party had trespassed on the road and in doing so had either picked up a dangerous thing that was left on the road, or was killed by an explosion on the road. There has been no instance cited in which a person being on the railroad without leave and killed has recovered any damages whatever. The man who walks on a railroad does so at his peril. It is his business to see that he is not overtaken or killed by a passing train and no instance is found in any case in English practice, that I can find, where a person so killed has been entitled to recover damages therefor. In *G. T. R. Co.* v. *Anderson*, 28 Can. S.C.R. 541, the principle is laid down that the trespasser on a railway is not entitled to that serious consideration and that the common habit of people using the railroad track forms no excuse for them to recover damages when a railroad train injures or kills them. The mere killing of a trespasser by the passing of a railway train does not, in my judgment, show cause for recovery against the railway. To make such recovery there would have to be some act wilful and opposed to the ordinary doings of the road. For this reason, I am in favour of setting aside the verdict in favour of the plaintiff and rendering a judgment for the defendant in the case. *Appeal dismissed.*

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ULTIMATE NEGLIGENCE.

There have been several recent important cases on this subject. The first is *Brenner* v. *Toronto R. Co.* (1907), 13 O.L.R. 423, 6 Can. Ry. Cas. 261, 15 O.L.R. 195; 8 Can. Ry. Cas. 100 and (1908), 40 Can. S.C.R. 540, 8 Can. Ry. Cas. 108. Then follow *Herron* v. *Toronto R. Co.* (1913), 11 D.L.R. 697, 28 O.L.R. 59; 15 Can. Ry. Cas. 373; *Loach* v. *British Columbia Electric R. Co.* (1914), 16 D.L.R. 245, 19 B.C.R. 177; 17 Can. Ry. Cas. 21 and *British Columbia Electric R. Co.* v. *Loach*, [1916] 1 A.C. 719, 23 D.L.R. 4, 20 Can. Ry. Cas. 309. With these cases should be read not only the case of *Columbia Bitulithic* v. *British Columbia Electric R. Co.*, 23 B.C.R. 160, 31 D.L.R. 241, and in the Supreme Court in the decision now reported, 37 D.L.R. 64, 55 Can. S.C.R. 1, 21 Can. Ry. Cas. 243, but also *Smith* v. *Regina*, 34 D.L.R. 238; *Critchley* v. *Canadian Northern R. Co.*, 34 D.L.R. 245; *Banbury* v. *City of Regina*, 35 D.L.R. 502, and *Honess* v. *British Columbia Electric R. Co.*, 36 D.L.R. 301. These last all contain recent instances of discussion upon "ultimate negligence" and may be useful where one is confronted with a somewhat similar state of facts.

Decisions upon this point as well as upon the whole subject of negligence are really little more than discussions by persons learned in the law of what is

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usually a difficult question of fact, namely, who is responsible for some injury which one of the litigants has suffered. In its simplest aspect it embraces three enquiries: (1) Is anyone responsible or is it a mere accident involving no actionable negligence? If so, no one is liable. (2) Is the plaintiff responsible? If so, he cannot recover from the defendant. (3) Is the defendant responsible? If so, the plaintiff may recover. In practice, however, few cases resolve themselves into these simple elements. An accident causing injury usually is both unforeseen and happens under circumstances arousing violent emotions and throwing off their balance both the judgment and powers of observation of participants and onlookers. Consequently not only do those participating fail to do the right thing to avert an injury but everybody present is unable to describe accurately just what happened. The latter consideration is important only in weighing testimony but the former has introduced further elements into torts of this kind, and therefore we must also frequently enquire (4) Were both plaintiff and defendant at fault? If so, under our law, there is no sharing the loss but the injured person bears it all. This question frequently involves great difficulty in so unravelling the tangled skein of evidence as to decide whether one or both and if so, which one, is responsible and if the answer is that both are at fault then we are faced with the anomaly that one bears all the loss and suffering while both must share the blame. This in practice leads to one of two results: (*a*) The plaintiff is sometimes absolved from all blame when he is in part responsible (and in these cases the jury will probably assess damage at a figure lower than the true measure of the plaintiff's injury), or (*b*) the courts institute a further enquiry to ascertain whether, though both were originally at fault in rendering the accident probable, yet the defendant had a "last chance" of averting the accident which he ought reasonably to have taken, but of which he did not avail himself. Out of number four, therefore, there develops an enquiry. (5) Whether, notwithstanding the defendant's negligence and the plaintiff's contributory negligence, the defendant could by the exercise of reasonable care have avoided the result of the plaintiff's contributory negligence? If the answer is "Yes" then the plaintiff recovers according to the decision in the Privy Council (*B.C. Elec. R. Co.* v. *Loach*, 23 D.L.R. 4), and we have in this fifth problem what is called the "doctrine" of "ultimate negligence." The doctrine may be put into a somewhat shorter formula as follows: The defendant was negligent and thus injured the plaintiff, therefore the plaintiff may recover; *but* the plaintiff might by the exercise of reasonable care have avoided the consequence of the defendant's negligence, therefore the plaintiff cannot recover; *but* notwithstanding the plaintiff's contributory negligence the defendants might "by the exercise of care have avoided the result of that negligence;" therefore the plaintiff can recover. This is a fair statement of the result of the cases on this point and the application of this relentless logic (which might be carried even further) to complicated states of facts imperfectly remembered and described by flustered eye-witnesses sometimes makes the law look rather silly. It is a strong argument either for some general scheme of insurance against accident or for a division of the loss between people who are mutually at fault. Taking, however, the law as we find it some further discussion of this question may tend to clarify our ideas and perhaps to simplify addresses and charges to the jury. At the outset one might suggest that in the discussion of negligence cases too great reliance has been placed upon other judgments which are decisions upon questions of

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fact. Cases are cited as being on "all fours" with the one under consideration which contain no new statement of principles but which describe an accident that has happened in a somewhat similar fashion. Such cases are most dangerous because, though there may be coincidences, it is impossible that all the circumstances can be the same and the facts reported may not and probably were not all the facts upon which a verdict was arrived at. The law of negligence might be much simplified if we eliminated ninety per cent. of the reported accident cases. Upon this subject the judgment of Meredith, C.J.C.P., in *Sitkoff* v. *Toronto Ry. Co.* (1916), 29 D.L.R. 498, 36 O.L.R. 97, is most apposite. He says at pp. 501-2: "Recent cases in the higher courts of England and in the Supreme Court of Canada are much relied on in this case . . . and we are impressively told that a jury have a right to draw inferences and that this case or that case is stronger than or as strong as or nearly as strong as some case decided in one of those courts; forgetful of these two things, that it is as old as the law that a case may be established on circumstantial evidence and that no case decided on its facts is an authority for a finding of fact one way or other in any other cases to be decided on its facts, however helpful the reasoning in it may be; that no two cases can be quite alike in all their facts and circumstances and that the one question in all such cases as this must be: Could reasonable men upon the evidence adduced in it find that the proximate cause of the injury done was the defendant's negligence?"

The first suggested simplification, therefore, in deciding actions for injuries is the elimination of most of the cases on "all fours" as to facts.

There is further a frequent confusion of ideas which added to the difficulty in presenting evidence in this class of action tends to cloud even more the issues in any particular case.

It is submitted that a mental catalogue of the main classes of action with some distinctions would help to clear up some of this confusion. Such a catalogue might be somewhat as follows:

1. Cases of injury where there is no negligence (or what is the same thing in law), no evidence of negligence causing the accident and where, therefore, there is no liability. Probably the leading modern case for this proposition is *Wakelin* v. *London & South Western Ry.* (1886), 12 App. Cas. 41. Under this heading we learn that not only must the defendant have been careless but his carelessness must cause the injury or it will not be negligence.

2. Cases where the carelessness is that of the person injured. This is not strictly "contributory negligence," but is a case of the injured person being the "author of his own wrong." It implied that the plaintiff alone is negligent and that the defendant is innocent. Instances of this are *Fawcett* v. *Canadian Pacific R. Co.* (1902), 32 Can. S.C.R. 721, and *Andreas* v. *Canadian Pacific R. Co.* (1905), 37 Can. S.C.R. 1. This class of case frequently arises where there is some defect in the employer's plant due to the negligence of the employee who has been injured; and where such cases arise now under the heading "Master and Servant" the intricate legal problems with which we were formerly familiar are now happily solved by some species of Employers Liability Insurance. It is a pity that the distinctive terms for cases where the plaintiff's negligence "contributed" together with the negligence of the defendant in causing the injury and those where they were the sole cause of the injury have not been more carefully employed.

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3. Cases where the combined negligence of plaintiff and defendant caused the injury. It is in cases of this character that the greatest difficulties arise.

Theoretically one might argue for various solutions, for instance: (1) The persons most to blame should suffer, or (2) Both being to blame they should share the loss, or (3) The persons last to blame should suffer regardless of the degree of carelessness on the part of either, or (4) The person injured should not recover if he is at all to blame.

The first of these has much to be said for it in theory and the last seems illogical and unfair, but in fact the degree of culpability is seldom an element in English common law except perhaps in assessing damages, 21 Hals. 361; and the last has had much influence upon it. The second like the first has no place in the common law and the third has from time to time emerged and in Canada since the judgment in the *Brenner* case has been digested under the caption "Ultimate Negligence."

Our law in endeavouring to solve these problems has for its main enquiry conducted a search for what it called the "Proximate Cause" and in theory the results should have been simple and satisfactory. Certainly some such limitation of the enquiry is necessary for "it were infinite for the law to consider the causes of causes and their impulsion one of another:" Lord Bacon quoted in *Metropolitan* v. *Jackson*, 3 App. Cas. 193, at 210. Therefore damages for injuries depend on the "proximate cause" of the injury somewhat as follows:—1. Was negligence the proximate cause of the injury at all? If not, then there is no cause of action. 2. Was the plaintiff's negligence the proximate cause? Then of course he cannot recover. 3. Was defendant's negligence the proximate cause? Then plaintiff recovers. 4. Was their joint negligence the proximate cause? If so, plaintiff cannot recover anything.

It is in respect of the third and fourth questions that the doctrines of "contributory" negligence and "ultimate" negligence arise. Even though it involves repetition it is worth while remarking that contributory negligence presupposes carelessness on the part of the defendant; but involves the proposition that as the plaintiff might have but did not avoid the consequences of defendant's negligence he contributed to his injury by his negligence, and so the proximate cause was not defendant's negligence but the negligence of the plaintiff in failing to do what he should have done to avert the consequences of the defendant's neglect. See Beven on Negligence, 2nd ed., 156 and 157.

Ultimate negligence in theory involves proof of facts which removes the "proximate cause" a step further from the initial wrongdoing. The defendant was negligent but that does not create the cause of action because of the plaintiff's subsequent want of care; the plaintiff was negligent but that does not deprive him of his claim because the defendant was careless in not averting the consequence of the plaintiff's earlier negligence so that is the proximate cause and so plaintiff recovers. For this proposition the case of *Davies* v. *Mann*, 10 M. & W. 546, is usually cited. There the plaintiff hobbled his donkey and turned him out on the highway. The defendant was driving at a "smartish pace" which was construed as being negligent driving and killed it.

A majority of the court assumed that plaintiff was negligent but said that the defendant might but for his later negligence have avoided the accident and so the defendant was made liable. The question there really was whether

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the animal was lawfully on the highway and if not what duty one owed to an animal not lawfully there. It would seem almost as though analagous decisions would be those bearing on one's duty to a trespasser rather than cases bearing on questions of negligence or contributory or ultimate negligence; but the decision has always since been cited as authority for the statement that though plaintiff may have been negligent yet if defendant might by exercising proper care have avoided the accident his negligence is the proximate cause. See *Radley* v. *London and North Western Ry.* (1876), 1 App. Cas. 754. Such a decision as this does not involve any element of antecedent negligence on the part of the defendant. It is not a question of who began to be negligent first; but merely whether (1) the carelessness of the contestants is severable and (2) which of them had the last chance of avoiding injury. If (1), the combined carelessness is not severable then the proximate cause is joint negligence and so neither can sue or recover from the other; but if (2), the carelessness is severable then the court enquires who is finally responsible and that is the proximate cause which enables the other careless person to recover. It was thought that when there has been contributory negligence on the plaintiff's part there must be some new (*i.e.*, later) negligence on defendant's part in order to found a cause of action for the plaintiff. See Anglin, J., *Brenner* v. *Toronto R. Co.*, 13 O.L.R., 424, 6 Can. Ry. Cas. 262. If so this would involve merely a consideration of the various negligences in chronological order. The formula would be as follows:—

First:—Defendant was negligent, later plaintiff was negligent, but later still defendant was again negligent and so defendant's was the proximate cause and he is liable. This is what no doubt led Anglin, J., to invent the term "Ultimate" negligence and though it is pretty hard to apply even this formula, which sounds quite simple, to actual facts, the courts have not stopped at this but have made the defendant liable even though his carelessness was not the last or "Ultimate" negligence speaking chronologically. In the very case in which the learned judge coined this attractive but dangerous term he held the defendants liable for negligence which was antecedent to the plaintiff's negligence and he decided that this "anterior negligence" amounted to "ultimate" negligence; see p. 437, which shews the danger of attractive terms when applied to the hard facts of actual cases.

In that case the plaintiff was negligent in crossing a street car track at a street crossing. The defendant's motorman was required to shut off power at this crossing by the company's rules, but did not do so. Thus both were negligent but Anglin, J., separated their negligence and held (speaking for a Divisional Court) that though the motorman's negligence was antecedent to that of the plaintiff yet as it continued down to the collision it was the proximate cause of the accident and judgment was given in Divisional Court for the plaintiff. In the Court of Appeal for Ontario, 15 O.L.R. 195, 8 Can. Ry. Cas. 100, this judgment was reversed, not for any misstatement of the law in the Divisional Court but because the Court of Appeal thought there had been no misdirection at the trial and in the Supreme Court (40 Can. S.C.R. 540, 8 Can. Ry. Cas. 108), the judgment of the Court of Appeal was upheld and while there is but little discussion of the law Duff, J., says, at p. 556: "The principle is too firmly settled to admit in this court any controversy upon it; that in an action of negligence a plaintiff whose want of care was a direct and effective contributory cause of the injury complained of cannot recover,

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The matter has again arisen in the British Columbia cases above referred to and the Privy Council without making itself responsible for the term "Ultimate" negligence has adopted Mr. Justice Anglin's reasoning and decided that though the plaintiff may have been negligent later than the defendant yet if the defendant's earlier negligence put it out of his power to avoid danger when he saw it then the plaintiff may recover. This, therefore, is the law but it is submitted that it is not "Ultimate" negligence and one wonders whether that term were not better dead. It is bound to create confusion and if one may suggest a different formula the following is offered:

1. The joint negligence of plaintiff and defendant when not severable prevents the plaintiff from recovering.

2. The court will analyze the conduct of the parties to find out (*a*) whether their careless acts are severable and (*b*) whose negligence was the proximate cause of the accident.

3. If the carelessness is severable the court will hold the defendant liable not only if he was the last one negligent, but also if by his prior carelessness he prevented himself from avoiding the consequences of the plaintiff's want of care.

Probably this formula will not help much more than others but it may avoid the introduction of new terms into the already redundant and confusing nomenclature of the law of negligence, a defect referred to by the Privy Council in the *Loach* case. To repeat what was said at the outset the difficulty is not in providing names or even rules applicable to the law of negligence, but in making the facts of each case actually tried fit into any formula.

Some day when we are more enlightened we shall insure against all accidents to the public not criminal just as we insure against injuries to servants and then these ill-fitting and complicated rules of negligence in accident cases will largely become obsolete.

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Ex. C.

THE KING v. TORRENS.

Exchequer Court of Canada, Cassels, J. November 20, 1917.

EXPROPRIATION (§ III E—165)—COMPENSATION—BUILDING LOTS—LOSS OF ACCESS.

An expropriation of building lots by the Crown does not entitle the owner to special damages for the depreciation in value to the remainder of the lots because of their being cut off from the proposed extension of a public street, the losses, if any, being offset by the advantages.

Statement. INFORMATION for the vesting of land and compensation in an expropriation by the Crown.

Hanson, K.C., for plaintiff; *A. J. Gregory*, K.C., for defendant.

Cassels, J. CASSELS, J.:—An information exhibited by His Majesty upon the information of the Attorney-General of Canada, to have it

declared that certain lands, the property of the defendant, Eliza Torrens, required for the line of the Intercolonial Railway, are vested in the Crown, and to have the compensation money payable in respect of the lands expropriated ascertained.

Fredericton is a city containing a population of between seven and eight thousand people. While beautifully situate, it is a city which, according to the evidence, has not advanced in growth for a number of years past. There are a few large manufactories located there.

It is quite clear from the evidence that the building of factories at Fredericton is not active. The factories are few and far between and real estate does not command large values.

Somewhere about 20 years ago, probably a longer period, Mrs. Torrens had a plan prepared by Mr. Beckwith, a civil engineer, who died several years ago. This plan is marked ex. "A" in the suit. The plan was never registered. It is in point of fact inaccurate, as I will point out later; but a glance at this plan will indicate the contentions on the part of Mrs. Torrens.

York St. is a street that runs up from King St. on the south, passing the lands of Mrs. Torrens, and leads to the station of the Canadian Pacific Railway in Fredericton. Aberdeen St. was opened in the year 1898. It was opened on the north-westerly side of York St., extending to York St. but not extended beyond York St.

On the plan to which I have referred, Mrs. Torrens divided her property into 3 lots fronting on York St. Each of these lots contained a frontage of 53 ft., and extended southerly about 150 ft. She also laid out 5 other lots, numbers 4, 5, and 6; also 7 and 8. These two latter lots are not shewn on Beckwith's plan. In addition to the 8 lots which she owned according to the plan, there was reserved 50 ft. on York St. for the extension of Aberdeen St. In point of fact she had not the 50 ft. to reserve. From McKnight's evidence, the engineer, she had only 35.2 ft.

The railway has expropriated a portion of this so-called reserve for the extension of Aberdeen St. but have not taken all the land belonging to Mrs. Torrens so reserved. They have expropriated 14,533 sq. ft., which have a frontage of 33 ft. on York St. and running back southerly a distance of 410 ft.

No portion of the lots numbers 1 to 8 inclusive has been taken

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by the railway. There is still a strip of land a portion of the so-called reserve between the southern boundary of lot 3 and the lands expropriated by the railway. The measurements in regard to this strip differ. On York St. there are several feet, but as the expropriated piece goes south-easterly it narrows down and is not so wide at the rear of lot 3 as at the front on York St. I will refer to this more in detail later on.

At present I am endeavouring to explain the situation in order to understand the claim made by the defendant. I may mention that Mrs. Torrens never intended to dedicate the portion reserved by her for the proposed extension of Aberdeen St. She apparently contemplated that the city would extend Aberdeen St. from York St. south-easterly as far as Regent St.; and her idea was that the city would have to expropriate this reserve and pay her compensation for the land so taken for the extension of Aberdeen St. The city has never done so and Aberdeen St. has never been extended beyond York St.

The defendant, as set out in her answer, states that the land so taken, referring to that portion of the proposed extension of Aberdeen St. (to which I have referred) formed part of a larger tract of land fronting 209 ft., more or less, on York St., and preserving the width throughout. The said larger tract of land, owned by the said Eliza Torrens, had been sub-divided prior to the taking of the said land for railway purposes, into 8 building lots, and in the said sub-division provision was made for a portion of the land required for the extension of Aberdeen St. She alleges that 3 of the said building lots, numbers 1, 2 and 3, front on York St., each with a width on York St. of 53 ft., and a depth of 150 ft., and the remaining land fronting on York St. 50 ft., and running back preserving the same width for a distance of 405 ft., was set apart or laid out as a portion of the land required for the extension of Aberdeen St., the same being in prolongation south-easterly of said Aberdeen St., and it was the intention of the City of Fredericton to extend the said Aberdeen St. taking in the said strip of land in prolongation of said Aberdeen St. Five of the said building lots, namely, numbers 4, 5, 5, 7 and 8, front on the said proposed extension or prolongation south-easterly of Aberdeen St.

She proceeds to allege that the said lot 3 is bounded south-westerly by the said proposed prolongation or extension of Aberdeen St. as laid out a distance of 150 ft.

The defendant then states that upon the taking and using of the said land for railway purposes, it became impossible to extend the said Aberdeen St. as was intended, and the said lots 4, 5, 6, 7 and 8 are forever cut off from access to any public street, and have become useless for building lots.

She claims the sum of $6,160. Of this amount she claims for the value of the land actually taken $1,500. She sets up a claim of $500 for the depreciation in value of lot No. 3; $300 for depreciation in value of lot No. 2; $300 for depreciation in value of lot No. 1; and $3,000 for the depreciation in value of lots 4, 5, 6, 7 and 8.

I have had the opportunity of viewing the premises in question with the counsel for the various parties, and I am of opinion that the claim made for the value of the land taken is excessive. I am also of the opinion that any claim for depreciation of the various lots, 3, 2 and 1, 4, 5, 6, 7 and 8, has not been sustained by the evidence in the case.

I think there can be no question but that the future of these lots, 4, 5, 6, 7 and 8, can only be for factory purposes, if in point of fact they can be sold to any person desiring to erect factories upon this particular property. Moreover, as I will point out more in detail, Mrs. Torrens must have held the same view, as these rear lots, 4, 5, 6, 7 and 8, had been leased by her for a period of years, ending in the year 1928, for use as coal and wood yards, to be held and used in conjunction with the land held by Mr. Baird fronting on York St. I will have to deal with the evidence more in detail, but I desire to point out that the lease of lot 3, and the leases of the rear lots 4, 5, 6, 7 and 8, all expire about the same time, namely, 1928; and that Mrs. Torrens is now receiving a cash payment for that portion of the so-called reserve for Aberdeen St. expropriated. The balance of the so-called reserve, the property of Mrs. Torrens, has since the expropriation been leased to Mr. Baird for a period of 14 years from November 22, 1914. Mr. Baird has obtained access to these rear lots by means of a lane from York St. The various leases are renewable on terms set out in these instruments. These rear lots, from 4 to 8 inclusive, as I have stated, can only be of use for factory purposes—and the construction of the Intercolonial Railway on the land in question has

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enabled the lessee of these rear lots, 4 to 8 inclusive, to obtain trackage accommodation, a matter of considerable value to the lots; and if there were any damage occasioned by the expropriation of this so-called reserve to the lots, it is more than compensated by the additional value given by reason of the railway facilities.

The evidence of Mr. Mitchell, the Mayor of Fredericton, impressed me as having the greatest weight in regard to the value of the lots taken. He places the area of the land taken at 14,533 sq. ft. Of this land taken he puts a value on the part fronting on York St., and running back a distance of 150 ft., of ten cents a square foot. The square feet of this particular piece are 5,700. For the balance in the rear, amounting to 8,753 sq. ft., he places a value of 5 cents a square foot, amounting to $437.50, or in all $1,007.50. And in my opinion if she receives this amount, together with 10% for compulsory taking and interest to the date of judgment, she will be well compensated.

(The judge here quoted a portion of the evidence and continued.)

It is quite apparent from Mr. Winslow's view that Mrs. Torrens would gain nothing by simply dedicating that portion of the proposed extension of Aberdeen St. for her own lots, in order to enhance the value of these lots from 4 to 8 inclusive, and I agree with his view. Because, as I have stated, in addition to her getting compensation for that portion of the reserve, and these rear lots being only capable of being used for factory or other purposes, she can always give the requisite amount of land off lot 3 taken in connection with what is left of the proposed reserve for Aberdeen St.

The leases in question are produced. One is dated April 25, 1907; another, May 9, 1910; and they run, as I have pointed out, for a long period. Baird by sub-lease assented to by Mrs. Torrens is the lessee, and I have called attention to the fact that these leases if not renewed will expire in 1928, and at that time if the leases are not renewed Mrs. Torrens can deal with the property in any manner in which she thinks best.

Mitchell's evidence explains the position of matters. He is asked in regard to the value of the railway trackage: he states:—

I think it is increased in value even if there is no access from York St. for warehouse purposes. (He goes on to point out):

These lots (referring to the lots from 4 to 8) were leased by Baird from the Torrens' estate, also lot 3 on York St. He controlled the lots in the rear and on York St. at the time the expropriation was made, and he still occupies the back lots and is provided access to them.

Mr. Hooper points out that the lots in question are dedicated for factory purposes. He states that for residential purposes it will be of very small value. He is asked:—

Q. Wouldn't the proper way of dealing with this land be, to start with some 8 feet on what is the proposed street still left below that lot which was sold? A. Yes. Q. Wouldn't the best way of utilizing that property be, to take the 14 ft. utilizing what is left of the proposed roadway, and run it into the property at the rear? A. Yes. Q. By utilizing that wouldn't that make the property in the rear more valuable? A. I think so. Q. You would get what you would lose, in making the lane offset by the additional trackage? A. Yes.

And as I have pointed out, in addition to that, she gets the immediate cash sale for that portion of her land reserved for the proposed extension of Aberdeen St. expropriated.

I think she is fully compensated if she receives the amount of $1,007.50 with 10% added and interest to the date of judgment.

I do not think the tender a proper tender. If Baird has any interest there should have been a separate tender. It is stated by counsel that he makes no claim.

Before any amount is paid to Mrs. Torrens a consent should be filed on behalf of Baird.

In dealing with the question of costs, it is to be observed that a very considerable portion, if not the greater part of the evidence, is based on the claim put forward in regard to Aberdeen St., and the injury or loss to Mrs. Torrens by reason of the depreciation of these various lots from 1 to 8, and on the best consideration I can give to the case, and for the reasons stated, I have come to a conclusion adverse to the claim of Mrs. Torrens.

In view of this I think Mrs. Torrens ought not to be allowed the full costs of the action, although she recovers something more than the amount of the compensation tendered. She certainly would not be entitled to the costs of the trial so far as they were enhanced by the abortive attempt to establish damages arising from the fact that the expropriation prevents any extension of Aberdeen St. If the costs were taxed there would have to be a set-off between the items relating to the issues upon which each

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party succeeded. I think that the sum $50 will fairly represent the difference that Mrs. Torrens would be entitled to if such a set-off were made.

There will be judgment in favour of Mrs. Torrens for $1,007.50 with the usual 10% added thereto, together with interest at the rate of 5% per annum from the date of the expropriation. She will also have costs fixed at the sum of $50. There will be no costs to the plaintiff. *Judgment accordingly.*

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GALLAGHER v. TORONTO R. Co.

Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., Riddell and Lennox, JJ., Ferguson, J.A., and Rose, J. November 23, 1917.

AUTOMOBILES (§ III D—350)—ACCIDENT—DUTY TO PERSON USING—FINDINGS OF JURY—SETTING ASIDE VERDICT.

In an action for damages for injury to an automobile on a highway the findings of the jury should not be disturbed although they have not directly indicated the connection between the negligence found and the accident, if they did on the evidence reasonably draw the inference that the effective cause of the accident was the "excessive rate of speed," and that the plaintiff was not guilty of contributory negligence.

[See Annotations, 1 D.L.R. 783, 39 D.L.R. 4].

Statement.

APPEAL by defendants from the judgment of a County Court Judge upon the findings of a jury, in favour of the plaintiff, for the recovery of damages in an action for injury to the plaintiff's automobile by reason of the negligence of the defendants' motorman. Affirmed.

R. McKay, K.C., for appellants; *I. F. Hellmuth*, K.C., for respondent.

Meredith, C.J.C.P.

MEREDITH, C.J.C.P.:—If we do not allow our minds to be distracted from the case which each of the parties to the action made at the trial, a proper determination of this appeal appears to me to be attended with no real difficulty.

The plaintiff's case was: that, while he was lawfully driving his motor-carriage upon a highway, a street-car of the defendants, driven by one of their servants, following his car, ran into it, causing the injury to it for which he sought damages: and the defendants' case was: that, while lawfully running their car upon their track behind the plaintiff's carriage, the carriage was sudden-

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ly, and without any warning to following traffic, stopped; thus causing the accident and injury to the plaintiff's carriage.

If the plaintiff's story were true, he ought to recover damages from the defendants, unless it was shewn that the accident was caused by circumstances of which the effect could not be avoided by reasonable care on their part: whilst, if the defendants' story were true, the plaintiff could have no right of action against the defendants. He was driving on the car-track, where the cars had the right of way; he was driving on the more dangerous part of the highway, that is, where more in danger of injuries such as those in question; and it was plainly his duty to give warning, in the usual manner, to following traffic, if any change in the movement of his carriage, which might cause an accident, took place. He did not know how closely cars, or other vehicles, might be following him.

It is quite clear, therefore, that the rights of the parties depended upon the question, which story was the true one; and it seems to me to be clear, too, that the jury gave credit to the story of the plaintiff, and discredited that of the defendants: and there was obviously evidence upon which reasonable men could so do.

The jury have not stated their finding in that form; but, having regard, as one must, to the real questions involved in the trial, it seems to me to be plain enough that substantially that is what they meant: what they were trying was the case presented to them on the whole evidence: and what their verdict means, necessarily means, I think, is, that the defendants' story was not proved; that, having regard to the condition of the road, the driver of the street-car, proceeding with knowledge of the position and nearness of the plaintiff's carriage in front of him, followed it at a negligently high rate of speed, and that that negligence was the cause of the running down of the carriage, an accident which could have been avoided with ordinary care: and all that seems to me to be really admitted by the driver of the car in his testimony as to the sudden stopping of the carriage. But for that excuse his own evidence should have condemned him, because, even if it were true that he sounded the gong, it was plain that the plaintiff did not hear, or at all events did not heed, it. And I cannot agree with any one who asserts that—even

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if he knew that the plaintiff heard it—he would be justified in rushing on because he had a right to assume that the plaintiff would clear the way in time; accident might prevent clearing the way; and, even if obstinacy prevented it, that would be no excuse for running down the obstinate, and in the wrong, man. One may *assume* that another will do his duty, but every one *knows* that sometimes the other cannot, and also, pretty often, will not.

But in this case the driver of the car, whether he sounded the gong or not, knew that the plaintiff gave no kind of indication that he had any warning. Hence the driver knew of the need for something more to justify him than sounding the gong, and so accounted for the accident in the way I have mentioned, a way which would put the blame on the plaintiff: but the jury have absolved him from that blame in finding him not guilty of any negligence: and that the accident was caused by the defendants' negligence.

I cannot think the case one for a new trial, either on the ground of uncertainty as to findings, or of anything that took place at the trial of which the appellants complain. The amount involved is only about $200; and costs of a new trial, on both sides, might exceed that sum.

I am in favour of dismisssing the appeal.

Lennox, J.

LENNOX, J., agreed that the appeal should be dismissed.

Ferguson, J.A.

FERGUSON, J.A.:—The first three questions to and answers of the jury are as follows:—

"1. Were the plaintiff's damages caused by the negligence of the defendants? A. Yes.

"2. If so, in what did such negligence consist? A. Excessive rate of speed.

"3. Was the plaintiff guilty of any negligence which contributed to the collision? A. No."

The expression "excessive rate of speed," as used by the jury, is, to my mind, a relative term, it does not mean a rate beyond that fixed by statute, by-law, or regulation, but a rate of speed beyond which the defendants' street-car would not have been driven by a motorman exercising the care which a man of common prudence would have exercised, having regard to all the circum-

stances adduced in evidence, including the nature, condition, and use of the highway, and the amount and nature of the traffic which actually was at the time, or which might reasonably be expected, upon the highway. In other words, the standard is fixed by the rate of speed at which a reasonably prudent and competent man would have driven if placed in the position of the defendants' motorman, at the time and place and under the conditions proven to have existed at the time of the accident.

Whether or not that standard had been exceeded, and whether or not the excess of that standard was the cause of the accident, are, I think, questions of fact for the jury, and in arriving at the answers it is not our, but their, knowledge, experience, and judgment, that are to be applied to the evidence. The jury have answered both questions in favour of the plaintiff; and, as I view the matter, the question before us in appeal is not whether the speed was excessive, or whether the excessive speed was the cause of the accident, but, was there before the jury any evidence on which they could make these findings?

It is common knowledge that in the city of Toronto, with its population of nearly half a million people, Yonge street is the main north and south and Bloor street one of the main east and west arteries of traffic. There was, before the jury, evidence that the plaintiff drove his automobile south on Yonge street, turned into Bloor street, and, when proceeding west on Bloor street at a rate of about 12 miles an hour, was overtaken by the defendants' street-car, and his automobile smashed and damaged. There was also evidence that the street-car was travelling at from 15 to 20 miles an hour; that there had been a recent fall of snow; and that the pavement and rail were slippery. The collision and damage are established. The jury were asked to find how and why the collision occurred. The plaintiff's evidence was directed to the theory that the defendants' car overtook and smashed his automobile because the motorman was either unable or unwilling to check the speed of his car. The defence theory was that, after leaving Yonge street, the plaintiff drove his automobile past and on to the tracks in front of the defendants' car, and there stalled or otherwise suddenly checked the speed of his automobile, so that the motorman did not have an opportunity to stop the street-car in time to avoid the accident, and that the plaintiff was the author of his own damage.

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The plaintiff's evidence is, that he did not pass the street-car, but was at all times ahead of it, and that he did not stall, stop, or suddenly slow up. The jury have accepted the plaintiff's theory; but, instead of finding that the motorman did not try to avoid the accident, have in effect said that he was unable to stop, not because the plaintiff did what the motorman says the plaintiff did, but because the motorman was driving his car at such a high rate of speed as to deprive himself of the control necessary to enable him, on a slippery rail, to check or stop his car quickly enough to avoid hitting the plaintiff's automobile, travelling ahead of him at the rate of 12 miles an hour.

I am of the opinion that there is abundant evidence to support the jury's finding of negligence, and that such negligence was "excessive rate of speed," and also that this is not such a case as *Reed* v. *Ellis*, 32 D.L.R. 592, 38 O.L.R. 123, where the Court was of the opinion that there was no evidence that the negligence found was the proximate cause of the accident.

The difficulty which presents itself to my mind is, whether we should, as was done in *Ryan* v. *Canadian Pacific R.W. Co.*, 37 O.L.R. 543, 32 D.L.R. 372, grant a new trial, on the ground that the jury have not by their answers indicated the connection between the negligence found and the accident, or dismiss the appeal on the ground that the jury on the evidence did reasonably draw the inference that the effective cause of the accident was the "excessive rate of speed:" *Billing* v. *Semmens*, 7 O.L.R. 340, 344; *Toben* v. *Elmira Felt Co.* (1917), 11 O.W.N. 375.

I have come to the conclusion that the latter is the proper result, and am assisted to that conclusion by the opinion that the plaintiff's story (if believed) cast upon the defence the burden of explaining the cause of the accident; why the motorman did not or was unable to stop his car was a fact peculiarly within his own knowledge; he went into the box and told his story, which the jury have not accepted; they have, on the contrary, accepted the plaintiff's story, and found "no contributory negligence." In view of that finding, the only other reasonable explanation of the cause of the accident is, I think, to be found in the answers made to questions 1 and 2, and the verdict might, if necessary, be supported on the principles enunciated in *McArthur* v. *Dominion Cartridge Co.*, [1905] A.C. 72, discussed and explained in our Courts in *Grand Trunk R.W. Co.* v. *Hainer*

(1905), 36 S.C.R. 180, and *St. Denis* v. *Eastern Ontario Live Stock and Poultry Association* (1916), 36 O.L.R. 640, 30 D.L.R. 647.

ROSE, J. (dissenting):—The plaintiff's motor-car, which he was driving westerly in Bloor street, was struck from behind by a car belonging to the defendants, and damaged. The defendants' witnesses say that the motor-car overtook and passed their car, turned on to the rail immediately in front, and, after proceeding a very short distance, "stalled," and was struck before the street-car could be stopped. Taking the findings with the Judge's charge, I assume that the jury rejected this evidence, and found that the motor-car had been ahead of the street-car for some distance, and was struck while in motion.

The jury found that the damage was caused by the negligence of the defendants, and that the negligence consisted in "excessive rate of speed." The defendants contend that there is no evidence to support this finding; and I think their contention is correct.

There was contradictory evidence as to the rate of speed at which the street car was running. The motorman swore to a very moderate rate; the plaintiff said he was travelling at the rate of 12 miles an hour, which, he says, "is not fast," and that the street-car overtook him; a witness called by the plaintiff put it at from 15 to 20 miles an hour. The plaintiff thought the rail was not slippery; the defendants' motorman said it was. Assuming the jury to have accepted the evidence of the witness who thought the street-car was running at from 15 to 20 miles an hour, there was absolutely no evidence that, even if the rail was slippery, the speed was so great as to put it out of the power of the motorman to make as sudden a stop as a prudent motorman ought to have assumed that he might be required to make in order to avoid injury to persons or vehicles lawfully using the highway; and, without something from which the jury might infer that the speed was excessive in that sense, it was not open to them to say that the speed was negligently excessive.

I would allow the appeal with costs and direct judgment in the County Court dismissing the action with costs.

RIDDELL, J., agreed with ROSE, J. Riddell, J.

Appeal dismissed; RIDDELL *and* ROSE, JJ., *dissenting.*

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Nova Scotia Supreme Court, Longley and Drysdale, JJ., Ritchie, E.J., and Chisholm, J. March 12, 1918.

THEFT (§ 1—40)—ON HIGH SEAS—FOREIGNER—BRITISH SHIP—PROCEDURE.
Proceedings for the trial of a foreign subject charged with theft on a British ship, committed on the high seas, should not be taken under s. 591 of the Criminal Code but under s. 686 of the Merchants Shipping Act, 1894 (Imp.); The consent of the Governor-General is not required before instituting proceedings.
[*The King* v. *Heckman*, 5 Can. Cr. Cas. 242, followed.]

Statement.

APPLICATION of a prisoner confined in the common gaol at Halifax for discharge from custody under the Liberty of the Subject Act, R.S.N.S. 1900, c. 181. An order was made by Chisholm, J., referring the application to the Supreme Court *in banco*.

The prisoner was a native of Denmark, though residing with his family at Grimsby, England.

The nature of the charge upon which he was arrested and the grounds upon which his release was sought appear fully from the judgments.

J. J. Power, K.C., for prisoner, in support of application.

A. Cluney, K.C., Crown Prosecutor, *contra*.

Longley, J.

LONGLEY, J.:—In this case some time last autumn the prisoner was charged with having committed a theft upon the high seas from a vessel which arrived at that time in Halifax. The Act under which the prisoner was tried has the following condition, Criminal Code, s. 591:

> Proceedings for the trial and punishment of a person who is not a subject of His Majesty and who is charged with any offence committed within the jurisdiction of the Admiralty of England shall not be instituted in any court in Canada except with the leave of the Governor-General and on his certificate that it is expedient that such proceedings should be instituted.

The party was taken before the stipendiary magistrate of Halifax and a certain preliminary examination gone into and the party committed for trial before the Supreme Court of Nova Scotia.

At the October sittings of the Supreme Court the leave of the Governor-General had not been received in Halifax, evidently owing to the absence of the Governor-General in some other part of Canada. Since October, the leave has arrived, and is in the hands of the police authorities, but the Crown did not feel at liberty to go on and prefer an indictment at the October sittings of the Supreme Court.

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The defendant, by J. J. Power, K.C., his attorney, has moved the court to order the discharge of the defendant on the ground that the assent of the Governor-General had not been received, and that no preliminary examination should have taken place before the stipendiary magistrate of Halifax. He cites a case, *The King* v. *Heckman*, 5 Can. Cr. Cas. 242, in which Ritchie and Weatherbe, JJ., give a decision, in the main, in favour of the case not being considered by the preliminary court of the magistrate in Halifax until the leave of the Governor-General had been received, and they based their decision on the case of *Thorpe* v. *Priestnall*, [1897] 1 Q.B. 159. There was then in operation a certain law in England in regard to the Sunday Observance Act of 1871 as follows:—

> No prosecution shall be instituted for any offence under the Sunday Observance Act, 1676, except by and with the consent in writing of the chief officer of the police district in which the offence is committed.

In that case it was decided that the preliminary examination was a part of the proceedings and that nothing could be done under those proceedings.

The only question that remains is whether the decision of the learned judges, based upon this particular Act, was a correct one in respect to the Canada Criminal Act.

"Proceedings shall not be instituted in any court in Canada" are the words in s. 591, "without the leave of the Governor-General." It is not difficult to see a great distinction in the operation of the two Acts. The one requires the assent of the chief of police in the police district in which the offence against Sunday was supposed to have been committed. The Canadian Criminal Act provides that no "trial or punishment" of any person, etc., shall take place unless with the leave of the Governor-General. The first case was simply a proceeding to attain the assent of the police officer in the very district in which the matter was to be held, and the other requires the assent of the Governor-General who may be hundreds of miles away and difficult of obtaining immediate access to. Therefore, in order to make the Act workable, it is necessary that there should be a preliminary examination in the first instance in order to obtain authority for holding the person committed, and it is therefore contended on behalf of the Crown that the mere holding of an inquiry by the

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stipendiary magistrate is not "proceeding with the trial and punishment" of the party, and that, if any such interpretation were given to it, it would make the clause absolutely unworkable and not subject to reason or common sense in the matter.

The point is a difficult one, and it is one that will require the very best consideration of all the circumstances. I am disposed to take the view that the Act is imperative and the words "proceedings shall not be instituted in any court in Canada" mean what they say and that Neilson is entitled to be discharged.

I think that Neilson is not entitled to be discharged by the Merchants Shipping Act. I think that s. 591 is a special section creating an offence committed within the jurisdiction of the Admiralty, and I think the provision of the Merchants Shipping Act applies to this case.

Drysdale, J.

DRYSDALE, J.:—I do not think that the limitation in s. 591 of the Code prevents a magistrate from arresting a man charged with crime on the high seas. If this were so it would seem to me that s. 656 is inoperative. I have no doubt that a magistrate has authority under s. 656 to arrest a man in this country who is here charged with crime on the high seas, regardless of s. 591.

I would refuse the application for discharge referred to the court by Chisholm, J.

Ritchie, E.J.

RITCHIE, E.J.:—The information charged that Neilson, "then being a foreign subject, did on or about the 25th day of August, A.D. 1917, on a British ship, to wit, the "Triumph," then on the high seas, unlawfully steal $65 or thereabouts, the property of one Jasper Anderson."

S. 591 of the Code is as follows: (See judgment of Longley, J.)

Neilson was arrested at Halifax under a warrant issued by the stipendiary magistrate of the City of Halifax, and was by him committed for trial. Application is now made for Neilson's discharge on *habeas corpus* on the ground that the information was laid without the leave or the certificate of the Governor-General. The question is as to whether the laying of the information is the institution of the proceedings.

I am of opinion that it is. No sound distinction can be drawn between the words "institution of proceedings" and the words "commencement of proceedings."

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I think that the statement of this proposition is sufficient without referring to the books; but I may add that it is in accordance with the opinion of the late Ritchie, J., and the late Sir Robert Weatherbe in *The King* v. *Heckman*, 5 Can. Cr. Cas. 242 If this were the only point involved I am of opinion that Neilson would be entitled to be discharged, but the Crown relies on s. 686 of the Merchants Shipping Act, which is as follows:—

> Where any person being a British subject is charged with having committed any offence on board any British ship on the high seas or in any foreign port or harbour, or on board any foreign ship to which he does not belong, or, not being a British subject, is charged with having committed any offence on board any British ship on the high seas, and that person is found within the jurisdiction of any court in His Majesty's dominions, which would have had cognizance of the offence if it had been committed on board a British ship within the limits of its ordinary jurisdiction, that court shall have jurisdiction to try the offence as if it had been so committed.

I think that Neilson is caught by this section and is therefore not entitled to be discharged. As to this I follow the opinion of the late Ritchie, J., in *The King* v. *Heckman*, *supra*, and am unable to agree with the opinion of the late Sir Robert Weatherbe.

Under s. 686 of the Merchants Shipping Act, Neilson is to be tried as if the offence had been committed on board a British ship within the limits of the ordinary jurisdiction of the court. Such an offender, as Sir Robert Weatherbe says, when he comes within the jurisdiction of the court, is subject to the general law of the place regulating the procedure for trying him, and also, I think, to the general law of procedure preliminary to the trial; but s. 591 of the Code is not the general law regulating procedure; it is a special section applicable only to a special case, namely, an offence committed within the jurisdiction of the Admiralty; but under the section in the Merchants Shipping Act the offender is to be tried as if the offence had been committed within the limits of the ordinary jurisdiction of the court; therefore, I think, s. 591 of the Code is not applicable.

In my opinion the application should be refused.

Chisholm, J.

CHISHOLM, J.:—This is an application for the discharge from custody of one Hans Neilson, a subject of the Kingdom of Denmark, who is charged with theft committed on a British ship on the high seas, and who has been committed by the stipendiary magistrate in and for the City of Halifax for trial in the Supreme Court. The ground upon which his discharge is sought is that

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the stipendiary magistrate had no jurisdiction to make the commitment without first obtaining the leave of the Governor-General and a certificate from him that it is expedient that such proceedings should be instituted. S. 591 of the Code is invoked. Such leave or certificate was not obtained before the applicant was committed. The offence charged was committed on the high seas and beyond the marginal seas or territorial waters of any country.

I have come to the conclusion that s. 591 has no application to an offence such as the one charged in this case.

This section is a reproduction, almost literally, of s. 3 of the Territorial Waters Jurisdiction Act, 1878 (Imp.); and it was re-enacted in Canada, I presume, for the purpose of emphasizing the necessity in cases to which the section applies of obtaining the leave and certificate of the Governor-General before proceedings are taken for the trial and punishment of the offender.

Before considering the section in more detail, it may be well to state what the law was in respect to offences committed on the high seas before the passing of the Territorial Waters Jurisdiction Act, 1878.

It is a generally accepted principle of international law that every sovereign state has exclusive jurisdiction over its public and private ships in all places outside the jurisdiction of a foreign state. All ships, with the persons and cargoes carried by them—leaving aside questions of contraband, etc., arising in times of war—are considered, while on the high seas, to be under the exclusive dominion of the state whose flag such ships legally carry. Westlake, 3rd ed., p. 185, sec. 154; *The Queen* v. *Kinsman* (1853) James (2 N.S.R.) 62; *Wilson* v. *McNamee*, 102 U.S. 572.

In the last mentioned case Swayne, J., said:—

> A vessel at sea is considered as a part of the territory to which it belongs at home. It carries with it the local legal rights and legal jurisdiction of such locality. All on board are endowed and subject accordingly.

Bliss, J., in our own court, in the case of *The Queen* v. *Kinsman*, *supra*, dealing with an offence by an American citizen on an American ship on the high seas, said:

> We have no difficulty in deciding in favour of the prisoner. This court has no jurisdiction. The case of *The Brazilian Slaver*, 2 Car. and Kir. 53, cited in *The Queen* v. *Clark*, is in point. The doctrine there established recognizes the principles laid down in Vattel, and the decision in that case

has been approved by Kent and Wilson. We must consider the ship is part of the soil of the country to which she belongs. She is, as has been said in the books, a floating island, and the citizens of the country to which she belongs who are on board are subject to the laws of that country and for offences committed in her while on the high seas they can be tried by no other laws.

And in Hall's International Law (6th ed.), p. 249, it is stated that:—

> A state has administration and criminal jurisdiction so as to bring all acts cognizable under these heads, whether done by subjects or foreigners, under the disciplinary authority established in virtue of state control on board the ship and under the authority of the state tribunals.

Several statements to the same effect will be found in the elaborate opinions given by several of the judges in the well-known *Franconia* case (*R.* v. *Keyn*, 2 Ex.D. 63).

That has always been and is now the law as administered in English courts, and a foreigner for any offence committed on a British ship on the high seas is subject to arrest, trial and punishment in the same way as if the offence were committed within the body of one of the counties of England. As early at least as 1806 (54 Geo. III. c. 54) provision was made for the trial of such an offence in the colonies; and at a later date by the Admiralty Offences (Colonial) Act, 12 & 13 Vict., c. 96, it was enacted that all persons charged in any colony with offences committed on the sea may be dealt with in the same manner as if the offences had been committed upon any waters situate within the limits of such colony and within the limits of the local jurisdiction of the courts of criminal justice of such colony.

The situation then was that a foreigner on a British ship on the high seas was subject to British law and the foreigner on a foreign ship on the high seas was not subject to British law, but to the law of the country whose flag the ship was entitled to carry.

In the *Franconia* case, arising out of a collision within three miles of the coast of England between a foreign and a British ship, and resulting in the death of a British subject on the British ship, the master of the foreign ship was indicted for manslaughter; and the question arose whether a foreigner on a foreign ship was amenable to the laws of England for an offence committed on a British subject within the territorial waters of the realm. The majority of the court held that he was not within the jurisdiction of the Admiralty and was not answerable in the English courts for the offence complained of.

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In consequence of this decision the Territorial Waters Jurisdiction Act, 1878, was passed; and it dealt and dealt only with offences committed on board foreign ships, whether by foreigners or by British subjects on board such ships, within the territorial waters of Her Majesty's dominions, that is, within one marine league of the coast measured from low water mark.

Parliament in passing this Act was assuming a new jurisdiction; that over foreigners on foreign ships in territorial waters, a claim of jurisdiction to which other nations might not assent, and, doubtless to prevent misunderstanding with other nations, if possible, a restriction was placed upon the institution of proceedings for trial and punishment in the case of such offences by making it necessary, before instituting the proceedings, to obtain the consent of one of Her Majesty's principal Secretaries of State, together with a certificate that the instituiton of such proceedings is expedient. In the Dominions out of the United Kingdom such consent and certificate are to be obtained from the Governor of the Dominion. Ss. 2 and 3 of the Territorial Waters Jurisdiction Act are as follows:—

2. An offence committed by any person, whether he is or is not a subject of Her Majesty, on the open sea within the territorial waters of Her Majesty's dominions is an offence within the jurisdiction of the Admiralty, although it may have been committed on board or by means of a foreigh ship, and the person who committed such offence may be arrested, tried and punished accordingly.

3. Proceedings for the trial and punishment of a person who is not a subject of Her Majesty and who is charged with such offence as is declared by this Act to be within the jurisdiction of the Admiralty, shall not be instituted in any court of the United Kingdom except with the consent of one of Her Majesty's Principal Secretaries of State, and on the certificate that the institution of such proceedings is in his opinion expedient, and shall not be instituted in any of the dominions of Her Majesty out of the United Kingdom except by the leave of the Governor of the part of the dominions in which such proceedings are proposed to be instituted, and on his certificate that it is expedient that such proceedings should be instituted.

In England from the earliest days down to the present time it has been the accepted law that the criminal jurisdiction of the Admiralty attaches to all British ships and to foreigners on board British ships, while outside the territorial waters of other states, and while they are on the high seas or in British territorial waters, including all ports, havens or rivers, below bridges, where great

ships go. And since 1878 the Admiralty has jurisdiction over foreign ships within the territorial waters and the persons on board such ships, whether such persons are foreigners or British subjects. The jurisdiction in that regard of the Canadian courts, at least from 1849 down to 1892, was the same.

In 1892, s. 591 of the Criminal Code was passed. It is as follows: (See judgment of Longley, J.).

This section it is contended applies to the case of a foreigner on a British ship on the high seas, notwithstanding the fact that the Admiralty of England has always had criminal jurisdiction in respect of offences committed on British ships on the high seas, and has always apprehended and handed over to the proper courts for trial and punishment persons, British or foreign, committing such offences under such circumstances, without the permission of the administration branch of the government. *R.* v. *Keyn* (1876), 2 Ex. D. 63; *R.* v. *Anderson* (1868), L.R. 1 C.C.R. 161; *R.* v. *Leslie*, 8 Cox, C.C. 269.

Why then should the Parliament of Canada impose a restriction never theretofore imposed by any other British legislative body? What state reason is there for it? Why should permission be a pre-requisite in relation to an offence as to which it has never been required in the United Kingdom, or, so far as I can ascertain, in any other British dominion? I can see no reason. And, if the Parliament of Canada intended so unusual a departure, would it not be expected that by the use of a short phrase to that effect, it would indicate that, in adopting the language of the English statute, it was intended to apply it to another and a different state of facts?

I prefer to adopt the view that, in copying into the Criminal Code s. 3 of the English Act, almost verbatim, the Parliament of Canada intended that it should be adopted with the interpretation, the definitions, and the application to which it is subject in the original Act. If that view is correct, it applies only to offences committed within territorial waters and by persons on board a foreign ship; and has no application to offences committed on board British ships on the high seas.

Besides, I am of opinion that the proceedings had before the stipendiary magistrate are not proceedings for the trial and

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punishment of the offender. These proceedings are merely preliminary to the offender being put upon his trial. S. 656 of the Criminal Code, first enacted by the Parliament of Canada in 1869 (32-33 Vict. c. 50 s. 3), makes provision for the immediate arrest of a person who has committed an offence on a British ship on the high seas by a justice of any territorial division in Canada where the accused is found or is suspected to be.

I am of opinion, for the reasons given above, that the application should be dismissed. *Application refused.*

ONT.
S. C.

NORTHERN LUMBER MILLS, Ltd. v. RICE.

Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., Lennox, J., Ferguson, J.A., and Rose, J. December 7, 1917.

MECHANICS' LIENS (§ VIII—60)—PART OF CLAIM MATURING—RIGHT OF ACTION —ALL CLAIMS TO BE DEALT WITH AT TRIAL.

When any part of a claim under the Mechanics and Wage Earners Lien Act (R.S.O. 1914, c. 140) has matured, an action lies, and in that action all claims whether then payable or not are to be dealt with at the trial as provided for in sec. 37.

[See Annotation, 9 D.L.R. 105.]

Statement.

APPEAL by defendant from a judgment of a District Judge in an action brought under the provisions of the Mechanics and Wage Earners Lien Act to enforce a lien for materials supplied for the erection of a house. Affirmed.

J. M. Ferguson, for appellant; *R. McKay*, K.C., for respondents.

The judgment of the Court was delivered by

Meredith, C.J.C.P.

MEREDITH, C.J.C.P.:—The questions involved in this appeal are: (1) whether the action, out of which it arises, was altogether premature; and (2), if not, whether it was premature in part.

The action was brought, under the provisions of the Mechanics and Wage Earners Lien Act, to enforce a lien, under that Act, for materials supplied for the erection of a house.

The price of these materials was to be paid in three payments: before action the first two had become payable; the third had not.

A cause of action arose upon default in payment of each of these instalments; and so, apart from the provisions of the enactment, the action would have been properly brought as to the first two, but improperly as to the third: and so our search for

light upon the subject is narrowed down to a search of the provisions of this enactment: and such a search discovers nothing expressly provided upon the subject: neither the framers of the Act, as it originally was, nor of any of the many patches put upon it, from time to time, to remedy defects in it, seem to have had such a question, as is involved in this case, in mind: and the question which we face now is, whether there is enough in the Act, in its present form, to sustain the action, or whether there is need for another patch, because convenience on all hands calls for another patch if the action be premature in any respect: otherwise there might be multiplication of needless litigation; and much difficulty in working out the rights of all parties fairly and conveniently.

It is quite plain, from sec. 37 of the Act, that immature claims of lien-holders are to be brought in and dealt with upon the trial of the action. The purpose of the enactment is, to "adjust the rights and liabilities of and give all necessary relief to all parties to the action and all persons who have been served with the notice of trial" (sec. 37(3)), in the one action and upon the one trial—a thing necessary in working out the purposes of the Act—and the "persons who have been served with the notice of trial" are, among others, "all lien-holders who have registered their claims as required by this Act" (sub-sec. (2)); not merely lien-holders whose claims are payable.

And, in addition to that, sec. 39 provides that: "Where property subject to a lien is sold in an action to enforce a lien, every lien-holder shall be entitled to share in the proceeds of the sale in respect of the amount then owing to him, although the same or part thereof was not payable at the time of the commencement of the action or is not then presently payable."

Sections 24 and 25 expressly deal with a case such as this, in which there is a "period of credit;" but they leave the questions which we have now to answer unsolved, and indeed throw no great light upon them: and sec. 32, so much relied upon for the respondents, is, at most, not very helpful, if helpful at all, to them: its provision is not that the action shall be taken to have been brought on behalf of all lien-holders, but is, "on behalf of the other lien-holders."

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There is nothing in the Act which gives a right of action when nothing is yet payable to the plaintiff; the contrary, rather, appears; and, on the other hand, it would be extraordinary if a plaintiff, having a right of action, upon a matured claim, could not get the benefit of the Act in respect of a claim not then matured, though every other lien-holder could.

It seems, therefore, plain enough to me, having regard to all the provisions of the Act, that the plaintiffs might at the trial bring in their claim in respect of the lien for the amount which was not payable when the action was commenced; and indeed that they were bound to do so, if they brought it in at all, in order that the provisions of sec. 37, and the general purposes of the Act, might be complied with.

In short, when any claim is ripe for action, and the defendants are unable, or fail, to pay or settle it, an action lies, and in that action all claims, whether then payable or not, are to be dealt with at the trial as provided for in sec. 37.

How otherwise should it be? Another action for the immature claim when it became mature? But the Act requires all to be dealt with in the one action; and another action might be too late; the land might have been sold and the proceeds distributed, in accordance with the provisions of the Act, before the second action could prevent it, or could be brought if the period of credit were long.

The appeal should be dismissed.

Appeal dismissed.

ACKLES v. BEATTY.

N. S.

S. C.

Nova Scotia Supreme Court, Russell and Drysdale, JJ., Ritchie, E.J., and Chisholm, J. March 27, 1918

SALE (§ III A—50)—OPTION—EXPIRATION OF TIME—SUBSEQUENT SALE—QUANTUM MERUIT.

At the expiration of the time limit in an option agreement with a broker, the owner is entitled to consider the matter at an end, unless the broker can shew either that there was an entirely new agreement, or that the terms of the old option were either by express agreement, or by implication continued until the sale was effected, he can only recover on the basis of *a quantum meruit*.

[See annotation 4 D.L.R. 531.]

Statement.

APPEAL from the judgment of Harris, C.J., in favour of plaintiff, with costs in an action to recover commission and costs claimed by plaintiff in connection with services rendered by plain-

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tiff as defendant's agent in connection with the sale of timber land. Reversed.

H. Mellish, K.C., and *F. L. Milner*, K.C., for appellant.

V. J. Paton, K.C., and *J. A. Hanway*, for respondent.

Russell, J.

RUSSELL, J.:—The plaintiff's agreement with the defendant was, in effect, that if the plaintiff would, within 60 days, secure a sale of defendant's property for any sum over $29,000, $14,000 of which at least should be paid defendant in cash, the plaintiff should have whatever the selling price was over and above $29,000.

The plaintiff did not secure a sale of the property of such a nature as to entitle him to the surplus over $29,000. The sale that he made was not for $14,000 cash, the balance remaining on mortgage. Defendant had to take a property valued at $5,000 and wait a year for the next $5,000, the remaining instalments being spread over further periods. He had also to covenant for the purchase of timber to be cut by the purchasers from the property. Other obligations also were imposed upon the defendant in the agreement for purchase secured by the plaintiff.

I do not see how it can be contended by plaintiff that he ever performed the conditions on which the defendant bargained to let him have the surplus over $29,000 for which the property was sold.

It would be competent for the defendant to extend the time for the exercise of the so-called option and it may be possible that the trial judge has rightly held that the time was extended by mutual agreement evidenced by conduct. But, even if the time was extended, it remains true that the plaintiff has not performed the conditions that would entitle him to the surplus. That he has not performed them exactly goes without saying, but neither has he performed them substantially. He has done the defendant a service, in effect, a sale of his land, or, rather, in bringing him a customer who has entered into an agreement respecting the land, and for that service he is entitled to be paid a reasonable amount.

I think that under the evidence the amount he has received is reasonable, that the appeal should be allowed with costs, and the claim dismissed with costs.

Drysdale, J. Ritchie, E.J.

DRYSDALE, J., and RITCHIE, E.J., concurred with CHISHOLM, J.

Chisholm, J.

CHISHOLM, J.:—The plaintiff, a real estate broker, brings this action against the defendant to recover a balance claimed to be due

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for services in securing a purchaser for certain timber lands of the defendant. The defendant admits that the plaintiff is entitled to a fair and reasonable commission for said services, and before action brought he paid the plaintiff $2,000, an amount, he contends, that more than compensates the plaintiff for said services.

In March, 1916, the defendant wrote the following letter to the plaintiff:—

N.D. Ackles, Amherst, N.S. Amherst, N.S., March 27th, 1916.

I hereby agree to sell all that certain tract of timber land situate at Farmington, Cumberland and Colchester Counties, Nova Scotia, as described by deed and plan of same, for the price or sum of twenty-nine thousand dollars ($29,000) nett. I hereby agree to give you this option for a period of sixty days from above date. You are to have full right and control to sell to any party or parties you may have in view. You are to make your commission over and above the price of $29,000 as above stated. I agree to furnish guide for your first cruising. After that you are to furnish your own guide. Terms of sale cash, or $15,000 can remain on mortgage at 6% interest. I agree to bind myself, my heirs or assigns, to carry out this agreement and to give a good title to said land.

(Sgd.) W. F. BEATTY.

This option, as the defendant termed it, was to continue for a period of 60 days from March 27, 1916. The plaintiff was unable to find a purchaser for the property within the 60 days; and he says in his evidence that between the expiration of the period and the time of the sale in September no talk took place between himself and the defendant with reference to what the plaintiff should get if he succeeded in making a sale. He, however, continued his efforts to find a purchaser; and finally, early in September, 1916, he brought a purchaser to defendant and a sale was agreed upon for the price of $35,000. Of this amount $5,000 was to be paid by means of a conveyance by the purchaser to the defendant of a certain property in the town of Amherst; $5,000 was to be paid on September 6, 1917, and the balance by instalments running over several years. According to the defendant's testimony, the plaintiff when he got the purchaser "on the string" asked for another option which was refused. The defendant says, however, that if the plaintiff made a satisfactory sale he promised the plaintiff he would use him right.

To recover the amount he claims the plaintiff must shew either that there was an entirely new agreement, independent of the old one, between himself and defendant, whereby the plaintiff was to receive as compensation for his services the excess of

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the purchase price over $29,000; or he must shew that the terms of the option of March 27, 1916, were, either by express agreement or by implication, continued until the sale was effected. It is not enough to shew that he performed the service.

The plaintiff states positively that not a word passed between himself and defendant on the subject between May 27 and the date of the sale in September; so there could not have been any express agreement made between the parties, even on the plaintiff's own evidence. Was there then any implied agreement by which the option was continued? Did the defendant, by permitting the plaintiff to treat with intending purchasers after the expiration of the option, thereby agree that, in the event of the plaintiff securing a purchaser, the plaintiff should be compensated in accordance with the terms mentioned in the option of March 27, 1916? I do not think it should be so held. At the expiration of the period mentioned in the option, the defendant was entitled to consider the matter at an end; and for any services the plaintiff should perform after that period the defendant is bound to pay, not on the basis of the lapsed agreement but on the basis of a *quantum meruit*.

The only evidence we have of what would be a fair commission on the sale is that of the defendant who says that 5% is large. 5% of $35,000 is $1,750, and the amount paid by the defendant was in excess of that, namely, $2,000.

I think the defendant's appeal should be allowed and the plaintiff's action dismissed with costs. *Appeal allowed.*

COLLINS v. GUARDIAN CASUALTY Co.

B. C.

C. A.

British Columbia Court of Appeal, Macdonald, C.J.A., and Galliher, McPhillips and Eberts, JJ.A. April 2, 1918.

INSURANCE (§ III E 2—110)—ACCIDENT—AUTOMOBILE—SAND ON ROAD—TERMS AND CONDITIONS OF POLICY.

A pile of sand on the roadway is not part of the road-bed and is not within the exceptions contained in an accident insurance policy, insuring an automobile but excluding all loss or damage caused by "striking any portion of the road-bed or by striking the rails or ties of any street, steam or electric railway."

[See annotation, Automobiles, 39 D.L.R. 4.]

Statement.

APPEAL by defendant from the judgment of a Co.J. in an action on an accident insurance policy. Affirmed.

A. D. Taylor, K.C., for appellant; *E. J. Grant*, for respondent.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—The County Court Judge accepted the evidence of Lee and two other witnesses for the plaintiff and

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rejected as unworthy of belief the evidence of the other witnesses in the case.

The pile of sand on the roadway, the existence of which was sworn to by Lee and the other two credible witnesses, must be taken to have been established; that the accident was caused by the plaintiff's car encountering said pile of sand is a fair inference from the evidence of the credible witnesses aforesaid, and of the evidence of defendant's witnesses so far as same was in plaintiff's favour.

The question, then, is one of interpretation of the policy. It insures the plaintiff against

> loss or damage caused solely . . . by being in collision with any other automobile, vehicle, or other object, either moving or stationary, excluding, however (2), all loss or damage caused by striking any portion of the road-bed or by striking the rails or ties of any street, steam or electric railway.

If it were not for the said exception, I should have no hesitation in applying the *ejusdem generis* rule to that language. The exception, however, appears to me to alter the case. To have a meaning "other object" must extend to things not *ejusdem generis* with "automobile and vehicle."

Then is contact with the pile of sand on the roadway a collision with an object?

Whatever may be the strict meaning of "collision" the term is construed by the policy itself when it speaks of collision with either a moving or a stationary object. So that no difficulty here arises from the use of the word "collision." One may doubt whether the insurer meant to protect the insured against such an accident as occurred to the plaintiff, but the language used in the policy is that of the insurer and should be strictly construed against the insurer. I am unable to say that the trial judge came to a wrong conclusion. While the legal question is not free from doubt, the best construction I can put upon the policy is that it insures against collision with a pile of sand on the roadway, which would be just as much an "object" as would be, for instance, a large boulder placed on the roadway. At all events, the insurer has used language wide enough when strictly construed against it to make it liable to the plaintiff for the loss in question.

I would dismiss the appeal.

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GALLIHER, J.A.:—In the face of the manner in which the trial judge who saw the witnesses has expressed himself, I think it is hopeless to attempt to set aside his finding as to how the accident occurred.

It remains, then, to determine whether the damage sustained is such as is insured against under the policy.

Mr. Taylor contends that what happened was not a collision, and further that what happened is within the exceptions under the head of "Collision" in the policy at A.B. 194 (2): All loss or damage caused by striking any portion of the road-bed, or by striking the rails, or ties of any street, steam or electric railway.

We are concerned only with the first part of (2).

Accepting the evidence of Lee, Robbins and Watts, the car struck a pile of sand and turned over, causing the damage.

Lee says, A.B. 47: "This sand was partly on paved part of road and partly off." A.B. 28: "Sand was thrown there the night before in the course of digging out a motor which was stuck." A.B. 63: "The sand pile was a foot to eighteen inches high at a curve in the road." "If it had not been for sand the car would not have turned over."

I see no difference in striking a pile of sand that high and in striking a boulder which might have fallen on the road.

The pile of sand was no part of the road-bed.

We then come to the objection as to its not being a collision.

The words of the policy are "coming into collision with any other automobile, vehicle, or other object *either moving or stationary.*"

If it had not been for the words *in italic* it might be that we could not, in strictness, say this was a collision, but to my mind these words qualify it and make the striking of a stationary object a collision within the meaning of the policy.

The appeal should be dismissed.

GALLIHER, J.A.

MCPHILLIPS and EBERTS agreed that the appeal should be dismissed. *Appeal dismissed.*

MCPHILLIPS, J.A.
EBERTS, J.A.

MAN.

C. A.

MAHAN v. MANNESS.

Manitoba Court of Appeal, Perdue, Cameron, Haggart and Fullerton, JJ.A. April 15, 1918.

PRINCIPAL AND AGENT (§ II—6)—OWNER GIVING AGENT POWER TO COMMIT FRAUD—INNOCENT THIRD PARTIES—LIABILITY OF PRINCIPAL.

An owner of property, who intrusts an agent with all the indicia of title with instructions to borrow a certain sum, cannot redeem the securities without paying a *bonâ fide* lender all he has lent on the property, although the agent has fraudulently borrowed in excess of the instructions and misappropriated the amount borrowed.

Statement. APPEAL by plaintiff from a judgment of the trial judge dismissing an action to set aside a mortgage and redeem securities. Affirmed.

G. A. Elliott, K.C., for appellant; *W. Manahan*, for respondent.

Perdue, J.A. PERDUE, J.A.:—The trial judge has made certain findings of fact in this case. From these findings it appears that the plaintiff authorized one Vizena to borrow and receive for her $200. For this purpose she handed her certificate of title to him. Vizena then employed a solicitor who prepared a transfer of the land. Vizena took the plaintiff to the solicitor's office where she met him, the solicitor, for the first time. The name of the transferee was left blank in the transfer but a consideration of $200 was filled in. The trial judge specifically finds that the plaintiff signed the transfer with knowledge of its effect for the purpose of getting a loan of $200. Vizena in fraud of the plaintiff negotiated through one Hackett a loan of $500 from the defendant, who was not aware of the excess of authority. This amount, less certain taxes on the land, was paid by the defendant in good faith to the solicitor who, after deducting a bill of his own against Vizena, handed all the rest of the money to the latter. None of the borrowed money ever reached plaintiff's hands. The defendant says that he was informed by the solicitor that the money was being borrowed for Miss Mahan, the plaintiff. Defendant believed, from his conversation with the solicitor, that the latter was agent of and acting for the plaintiff. Defendant, therefore, made the cheque for the greater part of the money payable to the solicitor. Defendant states that he had no knowledge of Vizena.

After the cheque had been delivered by defendant to the solicitor the latter gave him a letter setting out the terms of the transaction, and the remedy on default in payment. This letter is as follows:—

J. W. Manness, Esq., St. Agathe, Man. June 23rd, 1915.

I beg to acknowledge receipt from you of cheque for $400 and cash $71 being the amount loaned on lots one and two (1 and 2) block two, plan 1177, D.G.S. 49, St. James, less taxes on the same.

I hand you herewith transfer from Jane Mahan covering the above property together with duplicate certificate No. 128096.

This cheque is received from you, and the documents delivered to you on the understanding that at any time within a period of one year from the date hereof you will upon receipt of five hundred ($500) dollars, together with interest thereon at the rate of 12% per annum for the period of one year, deliver up transfer of the above mentioned property free of all encumbrances, together with duplicate certificate of title of same.

It is understood that in the event of the said sum together with interest not being paid to you within one year from the date hereof you will be at liberty to treat said land as your own and dispose of same in any way you may see fit. (Signature of solicitor.)

The solicitor states that in this transaction he was acting for Vizena and not for Miss Mahan, the plaintiff. He further states that Vizena had brought the certificate to his office and had given him instructions to prepare the transfer; that Vizena at the same time said "he had a deal" with Miss Mahan. The solicitor, from what he states, believed that when the transfer was signed the property belonged to Vizena. In handing over the documents and receiving the money the solicitor acted on instructions from Vizena, and no doubt, in good faith, relying on what Vizena had told him.

We are only interested in the present issue which is between the plaintiff and the defendant alone. There is no fraud proven or alleged against defendant. Clearly, he acted in good faith.

The solicitor came to the defendant bringing with him the indicia of the plaintiff's title and a signed transfer of title from her, the transferee's name being left blank. He handed over these papers for the purpose of closing the loan previously arranged. The letter of June 23, setting out the terms of the loan, formed part of that transaction. The only name mentioned in the body of the letter is that of the plaintiff and anyone reading the letter would believe that she was the person borrowing the money. On the principle laid down in *Brocklesby* v. *Temperance Permanent Building Soc.*, [1985] A.C. 173; *Fry* v. *Smellie*, [1912] 3 K.B. 282, and other cases, the plaintiff cannot, in the circumstances, redeem the securities without paying the lender what he has lent.

I cannot see that the fact that the defendant and the solicitor were at cross purposes as to who the acutal borrower was, makes

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any difference, as long as the defendant parted with his money in good faith believing that it was going to the proper person. One has much sympathy for the plaintiff but, unfortunately for herself, she trusted Vizena and placed in his hands the means for committing the fraud. In those circumstances, where she and the defendant are equally innocent, she must bear the loss.

In the *Brocklesby* case, Lord Herschell, L.C., said (p. 181)

> But, if one is to choose, there being admittedly no authority to the contrary, on whom the loss ought to fall in such a case as the present, surely it should rather fall upon one who has selected the agent to raise money for him, who has trusted him for that purpose with his securities, and who, if he has limited his authority, has trusted him not to exceed that limit, than that it should fall upon those who, finding him in possession of the deeds with authority in fact to borrow, had no knowledge of the limitation of the amount which he was authorised to raise upon the security of the deeds.

I would also refer to the remarks of Lord Watson, at p. 183, and of Lord Macnaghten, at p. 184 of the same case, to like effect. I think the same principle should be applied in this case. I would add that the fact that the consideration in the transfer was only $200 does not appear to me to affect the decision.

The appeal must be dismissed with costs.

Cameron, J.A.

CAMERON, J.A.:—The facts of this case are fully set forth in the judgment of Metcalfe, J., who dimsissed the action.

In *Rimmer* v. *Webster*, [1902] 2 Ch. 162, it was held by Farwell, J., that where the owner of property gives all the indicia of title to another person with the intention that he should deal with the property, the principles of agency apply, and any limit that he has imposed on the agent's dealing cannot be enforced against an innocent purchaser or mortgagee from the agent, who has no notice of the limit.

In *Brocklesby* v. *Temperance Permanent, etc., Society*, [1895] A.C. 173, it was held that where a principal entrusts an agent with securities and instructs him to raise a certain sum upon them, and the agent borrows a larger sum upon the securities and fraudulently appropriates the difference (the lender acting *bonâ fide* and in ignorance of the limitation), the principal cannot redeem the securities without paying the lender all he has lent, although the agent has obtained the loan by fraud and forgery, and although the lender did not know that the agent had authority to borrow at all, and made no inquiry.

In *Lloyd's Bank* v. *Cooke*, [1907] 1 K.B. 794, an action on a promissory note which had been fraudulently filled up and negotiated, the doctrine of estoppel as laid down in *Brocklesby* v. *Temperance Society*, was applied and the holder was held entitled to recover.

In *Fry* v. *Smellie*, [1912] 3 K.B. 282, where the agent had borrowed on shares a less sum than that stipulated, it was held that the lender was entitled to recover. Vaughan-Williams, says, at p. 293, that the use of the word "estoppel" in such cases is not altogether accurate, but that

> It is really an instance of the application of the rule that when one of two innocent persons must suffer, the person who rendered it possible, for the wrongdoer to do the wrong, by reason of the trust he imposed on the wrongdoer, should suffer rather than the person who suffers from the agent having that opportunity.

In view of the findings of fact made by the trial judge it seems to me this case comes directly within the foregoing decisions. The only point that might differentiate this case lies in the fact that the transfer was filled up for $200 and this, it is argued, was sufficient to give notice. The plaintiff authorized Vezina to borrow and receive on her behalf $200 and for that purpose entrusted her indicia of title to him. The defendant might possibly have been put on inquiry as to the limitations of Vezina's authority by reason of the statement in the transfer that the consideration was $200, but was that statement such as necessarily imposed on the lender the duty of instituting an investigation? Ordinarily, in such circumstances, the borrower might take the statement as immaterial. The lender might well imagine that the consideration expressed in the transfer was merely nominal, the main security being the handing over of the certificate of title. All the lender knew was that a loan of $500 was being asked for on the security of the certificate and the transfer collateral thereto, which were sufficient for the purposes in view, and were so represented by the acts, words and conduct of those entrusted with those documents, and he was not called upon to make further inquiry.

The doctrine of notice does not extend to circumstances which may only by possibility affect property.

> Nor is notice that certain circumstances exist which may by possibility affect the property in dispute sufficient to put a man on inquiry, if he appear to have acted fairly in the transaction.
>
> Kerr on Fraud and Mistake, 4th ed., p. 269.

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Moreover, notice may be excluded, by representation.

A man to whom a particular and distinct representation is made is entitled to rely on the representation, and need not make any further inquiry, although there are circumstances in the case from which an inference inconsistent with the representation might be drawn, and which independently of the representation would have been sufficient to put him upon inquiry. *Ib* p. 271.

Under the judge's findings of fact the payment made to the solicitor was properly made.

I would dismiss the appeal.

Fullerton, J.A.

FULLERTON, J.A.:—The plaintiff, who owned two lots of land, gave her certificate of title to one Vezina, and authorised him to borrow thereon the sum of $200. At Vezina's request she attended at the office of a solicitor practising in the City of Winnipeg, and there executed a transfer of the property, the name of the transferee being left blank and the consideration stated being $200. Plaintiff says she never read the transfer, nor was it read to her, but she believed it was a document necessary to be executed in order to give security on her property for the loan of $200. Some months after she had executed the transfer she learned that Vezina had borrowed from the defendant on the security of the certificate and transfer the sum of $500; which he had appropriated to his own use. By her statement of claim in this action, plaintiff asks "that it may be declared by this honourable court that the defendant has no mortgage, lien or charge upon the said land and that he may be ordered to deliver up to the plaintiff the said certificate of title and the said transfer."

The evidence shews that Vezina went to the solicitor, explained to him that he had made a deal with the plaintiff by which he was to receive the property referred to in her certificate in exchange for certain lands which he was transferring to her, and gave him instructions to draw the transfer.

After the transfer had been executed, Vezina instructed the solicitor to attend at the office of one Hackett, deliver the certificate and transfer and receive from Hackett the sum of $500. The solicitor carried out his instructions and received $471, the balance, $29, being retained for taxes against the property. He paid to Vezina the amount received from Hackett, less some $50 or $60, the amount of an account he had against Vezina. Either at the time of delivering the certificate and transfer to Hackett or the following day he gave either to Hackett or defendant a letter addressed to defendant reading as follows:—

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Dear Sir: I beg to acknowledge receipt from you of cheque for $400 and cash $71 being the amount loaned on lots one and two (1 and 2) block two, plan 1177, D.G.S. 49, St. James, less taxes on the same. I hand you herewith transfer from Jane Mahan covering the above property together with duplicate certificate No. 128096. This cheque is received from you, and the documents delivered to you on the understanding that at any time within a period of 1 year from the date hereof you will upon receipt of ($500) together with interest thereon at the rate of 12% per annum, for the period of 1 year, deliver up transfer of above mentioned property free of all encumbrance, together with duplicate certificate of title of same. It is understood in the event of the said sum together with interest not being paid to you within one year from the date hereof you will be at liberty to treat such land as your own and dispose of same in any way you may see fit. Yours very truly.

The defendant admits that Hackett was his agent in connection with the negotiation of the loan, but says that he did not know Vezina in the matter at all, thought he was making a loan to the plaintiff, and supposed the solicitor was acting as her solicitor. He further says that he paid the money to the solicitor in Hackett's office.

Neither Vezina nor Hackett were called at the trial.

Elliott, who appeared on behalf of the plaintiff, contended that authority given a solicitor to negotiate a loan does not make him the agent of the client to receive the money. This is undoubtedly correct, but I do not see that it has any application here. Although defendant thought that the solicitor was the plaintiff's solicitor, he was not so in fact. He was employed by Vezina and paid by him.

The trial judge finds as a fact "that the plaintiff authorised Vezina to borrow and receive on her behalf $200."

This finding is amply supported by the evidence. Plaintiff also, as above noted, gave Vezina her certificate of title, in order that he might pledge the same for a loan of $200.

Under the facts proved it appears to me that the principles laid down in a line of cases, of which *Brocklesby* v. *Temperance, Permanent Building Society*, [1895] A.C. 173, is one of the leading must be applied. The headnote to that case reads as follows:—

> Where a principal entrusts an agent with securities and instructs him to raise a certain sum upon them, and the agent borrows a larger sum upon the securities and fraudulently appropriates the difference (the lender acting *bonâ fide* and in ignorance of the limitation) the principal cannot redeem the securities without paying the lender all he has lent, although the agent has obtained the loan by fraud and forgery, and although the lender did not know that the agent had authority to borrow at all, and made no inquiry.

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The only doubt I have entertained in this case is with regard to the question of notice. The consideration mentioned in the transfer is $200, while the amount of the loan was $500. Was this sufficient to put the defendant on inquiry? I was at first inclined to think it was, but after consideration I have arrived at the conclusion, though not without doubt, that it was not. Defendant had the letter from the solicitor in which the terms of the mortgage were fully set out, and he also had the transfer executed by plaintiff and the certificate of title. He would therefore pay little attention to the consideration mentioned in the transfer.

I would dismiss the appeal with costs.

Haggart, J.A.

HAGGART, J.A., concurred with Perdue, J.A.

Appeal dismissed.

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ALBERNI LAND Co. v. REGISTRAR-GENERAL OF TITLES. (Annotated.)

British Columbia Court of Appeal, Macdonald, C.J.A., Martin, Galliher, McPhillips, and Eberts, JJ.A. April 2, 1918.

DEEDS (§ II—40)—RESERVATIONS AND EXCEPTIONS—EASEMENTS—REGISTRATION.

Reservations in a conveyance of land of "all coal, coal oil, petroleum, etc., within, upon or under the same" are exceptions and reservations from the grant and not easements, and should not be registered as charges, a certificate of indefeasible title may issue subject to these reservations a memorandum of which should be endorsed on the certificate.

The incorporeal rights, such as rights of entry and rights of way, are easements, and not subject to reservation, but if they are easements of necessity incidental to the getting of the minerals there is no need to register them as a charge.

[See annotation following.]

Statement.

APPEAL by petitioner from an order of Morrison, J., dismissing a petition against registering coal reservations as charges against land.

H. A. Maclean, K.C., for appellant; *J. C. Gwynne*, for respondent.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—I would allow the appeal.

The appellant being owner in fee and holding a certificate of indefeasible title to, *inter alia*, the lands in question, sold and conveyed them to a purchaser "saving and reserving . . . all coal, coal oil, petroleum, oil springs, iron and fire-clay within, upon or under the same," and all rights to get and win same, and to enter and use the lands for such purposes. The purchaser applied for registration of his conveyance and for a certificate of

indefeasible title. The registrar notified the appellant that he would register the purchaser's title and issue to him a certificate of indefeasible title free of said exceptions and reservations unless appellant should apply within a specified time to register said exceptions and reservations as a charge on the lands conveyed to the purchaser. The appellant thereupon filed a petition against what the registrar proposed to do which came on before Morrison, J., for hearing, and was by him dismissed. The appeal is from that order.

I am unable to take the view urged upon us by the registrar that the reservations of coal, etc., were in reality easements, and hence ought to be registered as charges on the fee in order to preserve them. In my opinion they are exceptions and reservations from the grant, and not easements. S. 22 (2) of the Land Registry Act clearly contemplates the issue of certificates of indefeasible title in respect of land—*subject to conditions, exceptions and reservations*. A memorandum of these is to be endorsed on the certificate. I do not say that apart from that section the registrar's course herein would be right, though I think it would not, but it is unnecessary to decide that question.

What I have said above I have said with reference to the corporeal property excepted from the grant, not the incorporeal rights, such as rights of entry and rights of way. The former are proper subjects of exception and reservation: the latter are not. They are easements, and by the combined effect of the decisions in *Durham* v. *Walker* (1842), 2 Q.B. 940, 967, 114 E.R. 364; and *May v. Belleville*, [1905] 2 Ch. 605, must I think be taken to be grants of easements, and if they are no more extensive than the implied easements of necessity incidental to the getting of the minerals and oils except from the grant there is no need to register them as a charge, but if they go beyond and are more comprehensive than easements of necessity, appellant doubtless will be advised as to what course he should take. That question is not before us for decision.

I am, therefore, of opinion that the certificate of title to be issued to the purchaser should have endorsed thereupon the exceptions and reservations of coal, coal oil, petroleum, oil springs, iron and fire-clay within, upon, or under the lands described in the certificate.

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MARTIN, J.A., allowed the appeal.

GALLIHER, J.A.:—I agree with the Chief Justice.

MCPHILLIPS, J.A.:—I would allow the appeal.

EBERTS, J.A., would allow appeal. *Appeal allowed.*

ANNOTATION.

PROFITS À PRENDRE.

Annotation.

A *profit à prendre* is a right to enter upon the land of another and take some profit of the soil, such as minerals, oil, stones, trees, turf, fish or game. The right to take water is not a *profit à prendre*, but an easement, *Race* v. *Ward*, 4 E. & B. 702, 119 E.R. 259.

A *profit à prendre* differs from an easement in this, that an easement entitles the dominant owner to enter his neighbour's land and make some use of it, while a *profit à prendre* entitles the owner of it to take some profit from the soil. It differs also in this, that an easement must be appurtenant to some land other than that over which the easement exists. In other words, there must be a dominant tenement to which the easement is appurtenant, whereas a *profit à prendre* may exist in gross, that is, as a separate inheritance enjoyed independently of the ownership of any land, *Shuttleworth* v. *Le Fleming*, 19 C.B.N.S. 687; *Welcome* v. *Upton*, 6 M. & W. 536; *Barrington's Case*, 8 Rep. 136.

It differs also from the ownership of the soil. Thus, a grant of all the coal or other mineral in or upon certain land, is a grant of part of the land itself, and passes complete ownership in the mineral to the grantee. But a grant of the right to enter, search for and dig coal, and carry away as much as may be dug, is a grant of an incorporeal right to enter and dig, and passes the property in such coal only as shall be dug, *Wilkinson* v. *Proud*, 1 M. & W. 33; *Chetham* v. *Williamson*, 4 East 469; and see *McIntosh* v. *Leckie*, 13 O.L.R. 54. The grant of such a right does not prevent the owner from exercising his right, as owner, of taking the same sort of thing from off his own land. The right granted may limit, but does not exclude, the owner's right. Clear and explicit language must be used in order to give the grantee the right to the exclusion of the land-owner, *Duke of Sutherland* v. *Heathcote*, [1892] 1 Ch. at p. 484.

It differs also from a mere license of pleasure or personal license, which must be exercised by the licensee only and is not assignable. Thus, if a land-owner grants merely the right to shoot, fish or hunt, without the liberty to carry away what is killed, it is a mere personal license, or license of pleasure, and is not assignable, or exercisable with or by servants, *Wickman* v. *Hawker*, 7 M. & W. at pp. 73, 77, 79; *Webber* v. *Lee*, 9 Q.B.D. at p. 317, *per* Bowen, J. But if, with the right to kill, there is given also the right to carry away what is killed, or part of what is killed, then the grant is of an incorporeal hereditament, a *profit à prendre*, *Wickham* v. *Hawker*, 7 M. & W. 63; *Webber* v. *Lee*, 9 Q.B.D. 315; *Rex* v. *Surrey Co. Ct. Judge*, [1910] 2 K.B. at p. 417. And so, being for profit, this right may be exercised with or by servants, and *a fortiori* is that so when the right is granted to one, his heirs and assigns, *Wickham* v. *Hawker*, 7 M. & W. 63. Each grant must be interpreted by itself; but a grant of the "exclusive right of fishing" has been held to imply the

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right to take away such fish as may be caught, and so to be a *profit à prendre*, *Fitzgerald* v. *Firbank*, [1897] 2 Ch. 96.

A *profit à prendre* is an interest in land, and an agreement to grant one is therefore within the Statute of Frauds, *Webber* v. *Lee*, 9 Q.B.D. 315; *Rex* v. *Surrey Co. Ct. Judge*, [1910] 2 K.B. at p. 417; *Smart* v. *Jones*, 15 C.B.N.S. 724. And it cannot be sold under an execution against goods, *Canadian Railway Acc. Co.* v. *Williams*, 21 O.L.R. 472. But it has been held that such a right, resting in agreement not under seal, is not such an interest in land as entitles the possessor of it to compensation under the wording of the English Lands Clauses Consolidation Act, 1848, from a railway company which expropriates part of the land which is subject to the right, *Bird* v. *G.E.R. Co.*, 19 C.B.N.S. 267.

Being an incorporeal hereditament, a *profit à prendre* must be created or transferred by deed, *Bird* v. *Higginson*, 2 A. & E. 696; 6 A. & E. 824; *Bird* v. *G.E.R. Co.*, 19 C.B.N.S. 268. But a writing, void as a grant, may operate as an agreement for one, and specific performance of it will be enforced in a proper case. And so, where a land-owner asked an injunction to restrain one who had such an agreement from shooting over his land, the injunction was refused, and specific performance of the agreement by the execution of a proper deed was ordered, *Frogley* v. *Lovelace*, John. 333. And where the circumstances are such that specific performance would be granted, the rights of the parties would now be adjusted as if the formality of a deed had been observed, *Walsh* v. *Lonsdale*, 21 Ch.D. 9.

Where a lease of sporting rights has been made not under seal, and the tenant has actually enjoyed the rights thereunder, he will be liable to perform any agreement made therein on his part, *Adams* v. *Clutterbuck*, 10 Q.B.D. 403.

Where land is granted or leased, and the right of sporting over it is reserved by the instrument to the grantor, this is not properly a reservation or exception, but is a re-grant of a new right exercisable over the lands of the grantee or lessee; and therefore the deed should be executed by the grantee or lessee; and where a right was so expressed to be reserved to the grantor and another, it was held to operate as a re-grant to the persons to whom the so-called reservation was made, *Wickham* v. *Hawker*, 7 M. & W. 63.

Where a grant to shoot or sport over lands is made, and no restriction as to user of the land is imposed upon the land-owner, the grantee takes merely the right to shoot or sport over the lands as he finds them from time to time. And so, a lessor of the right to shoot over his lands is not prevented from cutting timber in due course, although the result may be to interfere with the shooting, *Gearns* v. *Baker*, 10 Ch. App. 355. And the owner may also sell in lots for building purposes, or make the necessary roads through his property, but the purchaser would necessarily take subject to the shooting rights if he had notice of them, *Pattison* v. *Gilford*, L.R. 8 Eq. 259. And, on the other hand, where a lease is made of lands reserving to the lessor all the shooting and sporting rights, the tenant may use the land in the ordinary way under his lease, *Jeffrys* v. *Evans*, 19 C.B.N.S. 246. Where there is a grant of the right to sport for a term of years, and the grantee covenants with the owner of the land to leave it well stocked with game, the benefit of this covenant runs with the reversion, and on breach it may be sued on by the assignee of the reversion, *Hooper* v. *Clark*, L.R. 2 Q.B. 200.

Where a right to shoot was enjoyed from year to year on payment of an

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annual sum, and the landlord gave less than half a year's notice to determine the right, after a shooting season had closed, it was held to be a reasonable notice, under the circumstances, and sufficient to determine the right, and the court refused to hold that half a year's notice was necessary, *Lowe* v. *Adams*, [1901] 2 Ch. 598.

At common law the property in game, when alive and free, is temporary, and consequent upon possession of the soil, *Graham* v. *Ewart*, 11 Ex. at p. 346; *Lonsdale* v. *Rigg*, 11 Ex. at p. 672. There is no right to game as chattels, *Blades* v. *Higgs*, 12 C.B.N.S. at p. 513. But when game is killed or otherwise reduced into possession, the property becomes absolute. So, at common law, if a man keeps game on his land he has a possessory property in it as long as it remains there, but if it escapes into the land of his neighbour, the latter may kill it, for then he has the possessory property. If a trespasser starts game on the grounds of another and hunts and kills it there, the property continues in the owner of the land. But if one, having no license to do so, starts game on the land of one and hunts it into, and kills it on, the lands of another, it belongs to the hunter; but he is liable in trespass to both land-owners, *Sutton* v. *Moody*, 1 Ld. Raym. 250, explained in *Blades* v. *Higgs*, 11 H.L.C. at p. 632; *Churchward* v. *Studdy*, 14 East 249; *Lonsdale* v. *Rigg*, 11 Ex. at p. 672.

Where the public have a right of navigation on water covering land of a private owner, there is no right to shoot wild fowl from a boat under guise of the exercise of the right of navigation, *Fitzhardinge* v. *Purcell*, [1908] 2 Ch. 139; *Micklethwaite* v. *Vincent*, 8 T.L.R. 268. And that is so, also, where the waters have been made navigable by artificial means, *Bealty* v. *Davis*, 20 O.R. 373. Nor can one of the public use a highway for the purpose of shooting game which strays or flies over the highway from the lands of the adjoining proprietor who owns the fee in the soil of the highway, *Harrison* v. *Rutland* (*Duke of*), [1893] 1 Q.B. 142; and see *Hickman* v. *Maisey*, [1900] 1 Q.B. 752; *Reg.* v. *Pratt*, 4 E. & B. 860, 119 E.R. 319.

The right to kill game is somewhat affected by statute in Ontario. By R.S.O. (1887) c. 221, s. 10, it was provided that "in order to encourage persons who have heretofore imported or hereafter import different kinds of game, with the desire to breed and preserve the same on their own lands, it is enacted that it shall not be lawful to hunt, shoot, kill or destroy any such game without the consent of the owner of the property wherever the same may be bred." And a penalty was provided for breach of the Act. In an action by the owner of preserves for the value of deer which had strayed from the preserves upon the defendant's land and had there been killed by the defendant, the opinion was expressed that the Act was not intended to affect the common law right of the owner of any other land to kill and take any such game as might from time to time be found upon his land, and that the preserver of the deer had no right of action against the defendant, *Re Long Point Co.* v. *Anderson*, 19 O.R. 487; reversed on the ground that prohibition would not lie: 18 A.R. 401. In other words, the defendant acquired a temporary possessory property in the game as soon as it came upon his land. The result would seem to be, if this opinion is correct, that the penalty provided by the Act could not be enforced in a similar case, because to do so would be to exact a penalty from the defendant for killing his own deer. This would restrict the operation of the Act to hunting or killing game either on the preserved property or elsewhere than on the land of the person who kills it.

Annotation.

This enactment, somewhat modified, was continued in R.S.O. (1897) c. 287; and by R.S.O. (1914) c. 262, s. 22, it is now provided that (1) "where a person has put or bred any kind of game upon his own land for the purpose of breeding and preserving the same, no person, knowing it to be such game, shall hunt, shoot, kill or destroy it without the consent in writing of the owner of the land." (2) "This section shall not prevent any person from shooting, hunting, taking or killing upon his own land, or upon any land over which he has a right to shoot or hunt, any game which he does not know or has not reason to believe has been so put or bred by some other person upon his own land." And penalties are provided for infringement of the Act. By the express wording of this enactment, the common law right of the owner of land to kill game which he finds thereon is preserved, provided that he does not know or has not reason to believe that it is preserved game, and the expression of this right seems to predicate that if the landowner does know or has reason to believe that the game is preserved, he must not kill it on his own land.

There is nothing in this enactment to change or affect the character of the right to shoot or kill game. In other words, it still remains an incorporeal right, and should be created or assigned by deed, although the "consent in writing" of the owner of the land is all that is required by the Act. But a proper consent, if not under seal, would no doubt be treated as an agreement for a deed as before mentioned.

THE KING v. MONTGOMERY-CAMPBELL AND NORTHFIELD COAL Co.

CAN.

Ex. C.

Exchequer Court of Canada, Cassels, J., December 12, 1917.

EXPROPRIATION (§ III C—157)—LAND LEASED—PORTION EXPROPRIATED—RIGHTS OF OWNER—RIGHTS OF LESSEE.

On expropriation of a portion of leased land the owners are entitled to compensation for the land taken and for injurious affection to the remainder without regard to the special use of the land; the lessees are entitled to compensation for interference to business and necessary expenses of removing to another site.

[See annotation, 1 D.L.R. 508.]

Statement.

INFORMATION for the vesting of land and compensation in an expropriation by the Crown.

Hanson, for plaintiff; *A. J. Gregory* and *J. J. F. Winslow*, for defendants, Montgomery-Campbell; *M. G. Teed*, K.C., and *Jas. Friel*, for Northfield Coal Co.

Cassels, J.

CASSELS, J.:—The evidence in this case was taken at the same time as the evidence in the case of *The King* v. *Henry Montgomery-Campbell* and *Herbert Montgomery-Campbell*. The information was exhibited to have it declared that certain lands expropriated are vested in the Crown, and to have the compensation ascertained.

The defendants, Henry Montgomery-Campbell and Herbert Montgomery-Campbell, are the owners in fee of the lands in ques-

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tion. They leased the property to their co-defendants. The date of the lease is July 18, 1913, and it is a lease for a period of 21 years. A right of purchase is given by the Montgomery-Campbells to their co-defendants the Northfield Coal Co., Ltd., to purchase the properties in question at any time within 10 years from July 1, 1913, for the price of $1,000. This right has not been exercised, although it is stated that the coal company contemplated purchasing.

The land prior to the expropriation contained 12,523 sq. ft. The railway have expropriated the whole of the lands fronting on Aberdeen Street. According to Mr. Winslow, 7,225 sq. ft. have been expropriated. According, however, to Ross Thompson, who is a civil engineer, there is left in the property after the expropriation some 7,200 ft.

The plan known as the Colter plan, which is marked ex. "E" in the case, shows the situation of the property as it existed before and after the expropriation. It is admitted that the coal shed of the coal company is partly erected on lands belonging to the Canadian Pacific Railway. It has been erected since the year 1913, and apparently with the consent of the railway.

The Crown offers by the information the sum of $1,278 together with interest from October 2, 1914, the date of the filing of the plan, up to the date of tender, namely, June 14, 1916.

At the trial it was agreed between counsel that the sum of $1,000, the price at which the option of purchase was fixed, should be accepted as the market value of the land, without regard to the erections thereon, or to any special value it might have to the lessees for the purposes of their particular business.

The Montgomery-Campbells, by their defence, claim the sum of $2,970. They claim for the value of the land taken under the lease $650; for severance $150; in all $800. They also made a claim for Aberdeen St. which was not entertained at the trial, the parties being left to any independent proceedings that they might be advised to take as against the city in any action to which the city would be a party.

The contention is put forward that when the Crown expropriated part of Aberdeen St., it ceased to be any longer a street, that there was a reverter to the grantors, namely, to the Campbells. On the present record the defendants, the Montgomery-Campbells,

claim that by reason of the expropriation the lands, the value of which have been agreed upon as being $1,000, have been depreciated by the sum of $800, leaving what is left as of a value of $200 only.

The lessees, The Northfield Coal Co., Ltd., claim by their defence the sum of $6,345, made up as follows:—Value of leasehold interest in land actually taken, $1,000; injurious affection to the residue of the leasehold lands not actually taken, $1,000; value of coal shed, $765; value of scale-house, $100; value of scale installed, $235; loss of business site, $1,000; damages for loss of business, $2,000; removal expenses, etc., and interest, $245; total, $6,345.

By the information it is stated in par. 6:

that His Majesty the King is willing to provide and construct and hereby offers to provide and construct a good and sufficient crossing for horses, teams and vehicles over the said lands so taken as aforesaid, for the use of the defendants or such of them as may be found entitled, his, it, or their heirs, successors and assigns.

The information was filed on September 9, 1916, and for the first time the offer of this crossing was given to the defendants. Without a crossing the defendants would not have access to their premises.

At the trial of the cause, it having been pointed out that one crossing would not be sufficient as coal carts entering the premises do not have room to turn, the Crown made an offer of two crossings at any point to be designated by the defendants, the effect of which would be to enable coal carts to enter by one crossing and depart by the other. I suggested that the undertaking should be in writing and signed, and filed as required by the statute. A written undertaking has been placed on file.

The Canadian Pacific Railway siding is used in connection with the coal shed as well as with the Everett property situate alongside.

In reference to this plan ex. "E" there is some confusion in regard to the lettering, but there is no difficulty when the distances are looked at. For instance, from the iron pipe to the letter marked "D," as it appears on the plan, the distance is 155 feet; the distance on the railway is 123 ft.; and the distance on the other side from the iron pipe is 109 ft.

As shown by the plan in connection with the coal shed, the

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defendants had a "scales house" for the purpose of weighing their coal, this being raised about 3 ft., the idea being to prevent flooding and also freezing during the winter. Having this scales house and scales elevated require approaches on both sides, which are practically of about 28 ft. on the inner side, and 24.8 ft. on the street side. The railway, as appears on the plan, have cut off the greater part of the scales house, rendering it useless.

The contention was raised by the counsel for the Crown that the company did not require a weigh-scales at their premises, there being a provision in the city's by-laws requiring all coal to be weighed on the city's scales prior to delivery. I do not think the contention well founded. The defendants were entitled to carry on their business in a manner which they considered best in their own interest, and I think according to the evidence of Baird that they were right in having their own scale-house.

It is quite clear that a scale-house can be erected elsewhere on the premises as left after expropriation. It is not necessary to have it higher than one foot, which would require short approaches. This scale-house can be constructed of cement, and the scale removed as well as the building which protects it. It is a mere matter of expense. It will probably cost, according to Mitchell, the sum of $300. The rail of the railway is only 12 inches above the surface of the lot. This is shown by Mitchell, the mayor, who measured it the night previous to the giving of his evidence, and would not be a serious grade for teams.

The coal shed is in precisely the same position now as it was prior to the expropriation. The only interference with the property is the cutting off the portion of the land fronting on Aberdeen St. and the destruction of the scales-house.

There was considerable evidence given at the trial in regard to the difficulty of loading and unloading from the Canadian Pacific Railway siding, but whatever difficulty existed after the date of the expropriation also existed prior thereto. There has been no change in the facilities for carrying on the particular business there, other than the frontage on Aberdeen St. taken and the destruction of the scales-house, to which I have referred.

I think it was the duty of those acting for the Crown to have made the offer of the crossings at the time the land was taken, and it may be that technically the Northfield Coal Co., Ltd.,

would not have the right to cross the lands so expropriated. I think, however, had the lessees really contemplated the continuance of the business they would have approached the Crown officers, and no doubt would have acquired the necessary crossing. They neither did that nor did they investigate to find out whether other suitable premises could be obtained. I think the evidence shows that there would be no difficulty in obtaining such premises together with trackage. Any new site may not be as favourably situate for the purposes of their business as the present one. To my mind there are certain facts that have to be kept in mind. In the first place, as I have mentioned, the City of Fredericton is a small place, the whole population being under 8,000. The coal supply is from the Minto mines, and is usually sold direct, according to the statement of the witness to which I will refer, the the Intercolonial Railway being the largest purchaser.

It is quite apparent from the evidence which I will quote of the officers of the coal company that they had not intended to enter upon an extended business in the City of Fredericton. The business done during the portions of the years 1913 and 1914 is comparatively small, and a certain portion of it was not loaded into the shed.

I can quite understand that if the defendants intended or contemplated a large and extensive business the taking away of this portion of their land might diminish it to such an extent as to prevent them from so extending their business to a great extent. Had, however, such been their intention, the moment they made up their mind to stop carrying on business at the site in question they would have looked out for another site.

Mr. James Barnes is president of the Northfield Coal Co. He is asked:—

Q. How long has the Northfield Coal Co. been operating? A. We commenced operations I think in 1907. Q. Where is your mine? A. Minto, Kent County. Q. You have been doing business in Fredericton? A. Yes. Q. For how long? A. I think we purchased this property in connection with the Minto property in 1913.

He then refers to the lease with the option of purchase.

Q. Before that had you been doing business in Fredericton selling coal? A. Not to a very great extent.

He states that the business in Fredericton was managed from the office in Minto through an agent. He then proceeds to state:—

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That when the railway put down a trial line, we pulled up stakes, when we saw what was going to happen, after building up the properties. Then we waited developments, and did very little. The next thing was, the government expropriated. We were advised not to interfere with it at all then.

He said:—

Q. Do you remember when it was that you found that it (referring to the railway) was laid out through your land? A. I could not give the exact date.

Q. But when you did find out, you stopped doing business? A. We dropped right out.

He is asked:—

Q. Have you yourself set any damages, have you any figure in your mind as to how much you are damaged?

A. No. I cannot say off-hand now. The secretary-treasurer might be able to do so.

In answer to a question he states:—

We were holding that as part of our mining property in Minto. We used this as a safety valve. We got rid of any demurrage. If a man did not call for his coal for a day we shipped it on here.

He also states that they never used the coal shed to its full capacity. "I think we could put 8 or 10 cars in it."

I do not think this is correct. A car holds an average of 35 tons. Lately they have been loading them up to as much as 40 tons, probably on account of shortage of cars; but, I think it clear that it would never have paid them to fill the coal shed right up to its full capacity. The expense would be too great. Baird points that out. Barnes is asked:—

Q. You were not doing a very active coal business in the summer of 1914? A. Where? Q. Right there, at that coal shed? A. We did not do very much. Q. Did you do anything during the whole summer, from the time the warm weather came in? A. We kept this here, to take the surplus. Q. So you had no surplus during the summer of 1914? A. We did not send it there.

And he goes on to point out that after the war was declared the Minto mines cannot supply the demand. "There has been a good demand."

Q. Did you ever try to provide another location, did you ever seek another location? A. No, I did not.

James M. Kennedy was the secretary-treasurer of the Northfield Coal Co. He says:—

The mines are at Minto, in Kent County. Q. And carry on operations there? A. Yes.

Q. Soft coal, bituminous coal? A. Yes.

He is asked by his counsel:—

Q. Tell me, what induced you to open this plant in Fredericton? A. We had two reasons. One was, the irregularity of the I. C. R. orders. Some weeks there would be 120 or 150 tons, and the next week 200. Then it would

drop to 150, while our labour was pretty nearly the same, especially during the winter season, and we thought by having a shed over here that when we got stuck with a car of coal on our hands which we could not put in to the I.C.R. we could slip it over here and retail it. The next was that we could obtain better prices than the I.C.R. was paying at the time.

He refers to the cost of the buildings, but places a much higher figure upon them than what they cost.

Moses Mitchell, who constructed them, states their cost.

Mr. Kennedy of the company states:

Q. When did you commence? A. The first car came here in November, 1913, or part of a car. Q. That autumn or that year? A. That year, 1913. Q. You continued during that winter, did you? A. We continued during that winter, and up to the following June. In that time we sold over 800 tons, between 800 and 900 tons I think. Q. How much coal did you ship in that period? A. We shipped 893.78 tons. Q. That was sold and disposed of, practically all of it? A. All here. Q. On these premises? A. Through this agency. Q. But on these premises? A. I said through this agency we had established here. Q. Was it through these premises? A. Yes, through these premises, sure, as far as is known to me. It was sent to Baird's order, our agent.

Now Baird points out that a certain portion of the coal never went through the premises at all. The profits of the company were 66 cents, apparently, per ton over and above what they were getting in Minto.

He is asked:—

Q. You never tried to get another site?

A. We never tried to get another site; the one we had pleased us.

Taking the evidence of the other witnesses I am of opinion that with the two crossings, and with the scale-house rebuilt on a different site on their premises, the Northfield Coal Co., if they wish to, can carry on all the business that can be done in Fredericton; and it has to be borne in mind that there are other coal agencies furnishing coal to the people in Fredericton.

Baird, who was their agent, shows the situation of the property. He is asked:—

Q. Assuming that you had two crossings conveniently located across the railway, is there any trouble to utilize that property as a coal shed? A. It could be used, I think, in a small business, but its usefulness for a big business is done. Q. Was there ever any big business done there? A. No. There was a great chance for a big business.

He also goes on to point out there were other sites to be obtained although in his opinion the one in question was the best.

He also points out what I have previously referred to, that the only difference in carrying on the business as formerly would be the crossing of the railway and the elimination of the scales.

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He refers to the area left as about 5,200 sq. ft., differing from the measurement of Ross Thompson referred to.

I asked Baird the following question:

Q. Coal in Fredericton would be dealt with the same as anywhere else. Suppose I order 10 or 20 tons of coal; the coal would come on the railway, it would go to the carts, be taken to the weigh scales and then to my house? A. Half of it might be sold that way. The shed is there for transient orders coming in, and for the people who want coal during the winter. If I had kept it in the business alone, I would have unloaded a lot into the carts.

Mr. Friel—Off the track?—A. Yes.

HIS LORDSHIP—If you got an order, you would put the coal right into the cart and send it to the house? A. There are good facilities for that yet, there.

(He states further in reference to the site that): It was an ideal site before. Of course it is a pretty good site yet.

Mitchell refers to the cost of the buildings and shows, for instance, that the cost of the coal shed which the defendants value at $765 in their defence, practically was about less than half. His idea of the cost of moving the buildings and the scales would be in the neighbourhood of $1,000. In regard to the value of what is left, he says, that if the measurement given by Ross Thompson at 6,700 sq. ft. is correct, what is left would be worth $500—if there are 5,225 ft. left, at $400 placing the value at 8 cents.

I am of opinion that if the defendants are allowed $500 for the value of the land taken, and the injurious affection to the balance, without regard to the special use, they will be amply recompensed for what has been taken.

As I have stated, it was agreed that the value of the land without reference to the present use, or without regard to the buildings, is $1,000.

A question arises in regard to the disposition of this $500. It seems to me that the defendants could agree among themselves. The Coal Company are under a covenant to pay the rent, which is $60 a year. If they continue to be tenants they would be entitled to the interest on this $500 during the currency of the lease. If they subsequently become purchasers, they would have to pay the $1,000 under the terms of their agreement, but they would receive the $500 part of the value of the land which has been turned into money. If the parties cannot come to an agreement, perhaps a statement of the views of the counsel could be forwarded to the registrar.

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I think that as far as Henry Montgomery-Campbell and Herbert Montgomery-Campbell are concerned, they are entitled to a judgment for $500, to which I would add ten per cent. for compulsory taking, making in all $550, to be dealt with as I have suggested, and they should get their costs of the action.

The undertaking as to the two crossings should also be inserted in the formal judgment.

In regard to the Northfield Coal Co., I think if they are allowed $1,000 for all the loss they have been put to, and for the interference with their business, and their having to place their scales upon a different site, they will be amply compensated—and I give judgment for the Northfield Coal Co. for the sum of $1,000, and interest to the date of the judgment. I think this will cover every reasonable claim, including any sum for compulsory taking if they are entitled to it. They are also entitled to their costs of the action. *Judgment accordingly.*

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B. C.

C. A.

British Columbia Court of Appeal, Macdonald, C.J.A., and Martin and McPhillips, JJ. November 6, 1917.

COMPANIES (§ VI F—345)—VOLUNTARY LIQUIDATION—BANK CREDITOR—ELECTION TO TAKE SECURITIES—RELEASE OF SURETY OF DEBTOR.

If a creditor bank elect to take securities at a valuation in payment of a debt of an insolvent corporation, in process of voluntary liquidation, the bank is bound even though there is no statutory provision for such valuation, and a surety for the debtor is released to the extent of that valuation.

Statement.

APPEAL and cross-appeal from the judgment of the trial judge in an action against the sureties of an insolvent company. Affirmed.

Douglas Armour, for appellant; *W. B. A. Ritchie*, K.C., for respondent.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—I would dismiss the appeal and the cross-appeal. I agree with the trial judge. The principal debtor, R. B. Johnson, Limited, being in process of winding up voluntarily under the provisions of the B.C. Companies Act, and the bank having made its claim as a creditor, and valued its securities at a stated sum, was permitted by the liquidator to keep its securities at the valuation. I think the bank elected to take its securities in payment of the sum at which they were valued, and to that amount the debt of the principal debtor to the bank was satisfied,

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and hence it follows that, to that extent, the sureties, the respondents in this appeal, are released.

The contention of counsel for the bank was that there was no provision in the Companies Act for valuing securities, and, therefore, what was done was futile. Assuming that to be so, without examining or determining the point, I think this contention is beside the mark. If the transaction was not affected by statute it was a composition effected with the principal debtor by which the bank agreed to and did accept and deal with the securities in question as its own.

Martin, J.A.

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

McPhillips, J.A.

MCPHILLIPS, J.A.:—In my opinion the trial judge arrived at the right conclusion—I would dismiss the appeal and cross-appeal.

Appeal and cross-appeal dismissed.

QUE.

C. R.

PAUSS v. WRIGHT.

Quebec Court of Review, Martineau, Greenshields and Lane, JJ. December 31, 1917.

SALE (§ II C—35a)—*By sample—Delivery—Acceptance—Obligations.*]—Appeal from a judgment of the Superior Court in an action for the price of goods sold and delivered.

The defendants pleaded that the goods were ordered on samples and when delivered were found not according to the sample, and unfit for the use for which it was intended, a defect which plaintiffs well knew or should have known.

The defendants claim to have at once notified the plaintiffs and tendered to them an unmanufactured portion of the goods. They also claim damages which they offer in compensation for part of merchandises which they have retained and manufactured.

The Superior Court maintained the action by the following judgment:—

Considering that the evidence discloses that part of the goods in question had gone through a process of manufacture by the defendants before any complaint as to said goods had been made by them;

Considering that the alleged defect complained of was an apparent defect, susceptible of being established before the goods were accepted;

Considering that the witnesses examined on behalf of the plaintiffs, under the commission in this cause issued to England, testify that the goods in question in this cause, when shipped from England, were all according to sample;

Considering that defendants have accepted said goods and submitted part of them to a process of manufacture, have no claim against plaintiffs in respect of said goods;

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Considering that direct evidence has been given by the witnesses in England that the goods when shipped from England by the plaintiffs were all according to sample and this evidence has not been contradicted and it has been nowhere shewn that the goods in question were not according to sample when sold and delivered to the defendants;

Considering that the whole controversy in this cause is as to whether the goods, the price of which is claimed by the present action, were sold and delivered according to sample;

Considering that the evidence on behalf of the plaintiff taken under the commission in England clearly establishes that the goods were sold according to sample when shipped, and this evidence has not been contradicted;

Considering that more credence should be given to the evidence of the witnesses examined in England, where the goods were sold and shipped, than to the evidence of the defendant's witnesses examined in Montreal who inspected the goods in question after they had undergone a long sea voyage and after a portion of same had undergone a process of manufacture;

Considering that the plaintiffs have established the material allegations of their action and also of their incidental demand and of their plea to the defendant's incidental demand;

Considering that the defendants have failed to prove the allegations of their plea to the principal action and of their incidental demand and that the tender made by them is insufficient;

Considering that the plaintiff's action and cross-demand are well founded:

Doth reject the plea and incidental demand of the defendant, and doth declare the tender made by the defendant insufficient, and doth condemn the defendants to pay to the plaintiffs the sum of $850.41, the amount of their principal action and of their incidental demand, with interest thereon from date of service of process of said demands, and the whole with costs.

Fleet, Falconer & Co., for plaintiffs.

Trihey, Bercovitch & Co., for defendants.

The judgment of the Court was delivered by

GREENSHIELDS, J. (after having established the facts and issue in question): It is not difficult to determine upon the facts established and practically admitted, what the obligations and responsibilities in law were, so far as plaintiffs are concerned. They undertook to deliver to the defendants' agent in Liverpool a quantity of goods upon an order given by the defendants on a sample or samples furnished by the plaintiffs; they were bound to discharge that obligation, and were bound, therefore, to make delivery of goods which would meet the requirements as called for by the samples. If they have done this, and have established the fact by legal and sufficient proof, I should say they are entitled to recover the price of the goods. If after such delivery in accordance with the sample, something happened to those goods, from any cause whatever other than a cause attributable to the

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plaintiffs, such as a defect in the manufacture, or in that part of the manufacture called "dyeing," then the loss must rest upon the defendants.

It is stated by the counsel for the plaintiffs and by the judgment under review, that the evidence or proof is contradictory.

I do not find the proof contradictory. I do admit, however, that it is unsatisfactory. One thing is certain, it would appear to me, that when the goods in question finally reached the tailor, they were not according to sample. Apart entirely from the question as to the delay in making this claim, the fact is that a condition did then exist, which, in the absence of any justification, would entitle the defendants to attack the quality of the goods.

The plaintiffs have sought to clear themselves from any responsibility.

It should be here stated that when the goods had been completed by the plaintiffs, or the process of manufacture had been completed, and when the sample swaths were sent from the four pieces to the defendants, the plaintiffs retained what they called "reference pieces" taken from each of the four bales or rolls of cloth. They kept these pieces for future reference in case of repeat orders.

Before the institution of the action, the defendants sent to the plaintiffs one or more of the sample swaths received from the plaintiffs, and at the same time sent to the latter one or some of the suits which had been cut from the rolls of cloth. The plaintiffs sent these goods as received to the Bradford Conditioning House, which is a corporation or body apparently acting under government authority, with power to settle disputes between textile manufacturers and textile merchants in England. At least one of the sample swaths and one of the suits cut from a roll were examined by officers or employees of this conditioning house. The sample swaths had never been submitted to any process here. The suit had been sponged and handled by the cutter and the trimmer. Strange to say, the result of that impartial and apparently careful examination by the members of this body, with long and varied experience, revealed the fact, as testified by them, that the sample swath was in perfect condition, and was in every respect up to the sample with which it was compared. The "reference piece" kept by the plaintiffs taken from the

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same rolls, was also submitted to a similar test, and was found by the witnesses to meet the requirements of the sample, and were proper merchantable goods of the class ordered. When they came to an examination of the suit cut from rolls, they found an entirely different condition, and they found that the cloth was defective and was not up to sample. Indeed, it was freely admitted in the argument at Bar, that at the time of the trial in this case, these large samples sent by the plaintiffs to the defendants came up to the requirements of the samples from which the defendants selected the goods.

The finding of these witnesses in England created at once a serious and difficult question.

It is established in proof by the defendants' witnesses even, that one part of a roll of cloth of this kind is not better or worse than another part: therefore, when the plaintiffs cut from the large roll the sample swath, they obtained a sample exactly similar to the bulk. In general terms, the plaintiffs established by the testimony taken under the commission that the goods as delivered by them when and as delivered by them to the defendants' agents in England, delivery of which was accepted, they were at the moment up to sample.

The members of this conditioning house, without any positive statement, suggest that the goods that were found defective had been submitted to excessive heat—hot ironing, or something of that kind. On the other hand, suggestion is made by the defendants that the defect was by the dyeing. The dyer denies this.

There is testimony that one roll of these goods, which were not shipped to the defendants because they had refused to accept the first shipment, had been sold to another manufacturer, delivered to him, accepted by him, paid for by him, and no complaints made.

There is nothing in the record to enable a clear positive statement to be made as to what brought about the condition in which these goods were found when the defendants' tailor started his work upon them. If the plaintiffs have proven to the satisfaction of the Court that the goods were according to sample when delivered, they have relieved themselves of the burden of proof which rested upon them, and it then becomes obligatory on the part of the defendants to point out the cause of the defect and attach to the plaintiffs the responsibility for that cause.

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The trial judge found in favour of the plaintiffs: accepted the proof made by the plaintiffs as conclusive, that they delivered to the defendants' agent the goods as ordered and in proper condition and according to sample. It is true the trial judge suggested some causes as determining the defective condition, but the proof is far from satisfactory upon this point.

I am disposed to accept as an established fact, that the goods were manufactured and completely manufactured, and were when manufactured delivered to the defendants' agent in entire accordance with the sample, and if this be the case, then the plaintiffs' responsibility ceased, and the intervening defect, not traced to the plaintiffs, cannot defeat the latter's claim for the payment of the goods.

Under these circumstances, I should confirm the judgment on this ground only, and entirely independent of the other questions raised by the plaintiffs' counsel. *Appeal dismissed.*

ALTA.
S. C.

Re WOOD AND HUDSON'S BAY CO.
and three other cases.

Alberta Supreme Court, Walsh, J. March 14, 1918.

CRIMINAL LAW (§ II F—65)—*Stated case—Sec. 761 Criminal Code—Rules of court (Alta.)—Preliminary objection.*]—Hearing of stated case under section 761 C.C. Refused.

R. A. Smith, for applicant; *W. S. Gray*, for respondent.

WALSH, J.:—The police magistrate at Lethbridge has, upon the application of the informant, stated a case under s. 761 of the Code, arising out of his conviction of the defendant in each of these cases. A preliminary objection to my right to hear the case was raised by Gray, counsel for the defendants, based upon the admitted fact that the notice in writing of the appeal with a copy of the case as signed and stated, which is required by s. 761 (3) (*c*), has not been given to the other parties to the proceedings. Smith, for the applicant, meets this objection with the argument that there is no need to give this notice in this jurisdiction, because of our rules of court relating to cases stated under this section, which are to be found at pp. 189 and 190 of the Alberta rules of court, 1914.

My personal opinion is that Smith's point is well-taken. I

think that the rules in question constitute in themselves a complete code of the practice to be observed in the stating of a case under this section, which entirely displaces the provisions of the various clauses of sub.-s. 3. They otherwise provide for the doing of the things which are by that sub-section directed to be done, and compliance with the requirements of the sub-section is, therefore, no longer necessary, for in its own words they are only to be done "if there be no rule or order otherwise providing." There is nothing in our rules requiring service of a notice of the appeal with a copy of the case before the case is filed, and so if I was giving effect to my own personal view of the matter, I would overrule the objection.

I realize, however, that if this is the right view our rules should be changed, for it does not seem right that the first notice that a respondent gets of the fact that a case has been stated, should be when he is served with notice of the time and place of hearing the appeal under r. 5 if it is taken to the Appellate Division or with a copy of the appointment fixing the time and place for the hearing under r. 6 if it is taken before a judge in chambers, and that he even then should not be furnished with a copy of the case. And so in order that this might be done, if my view is the right one, I have consulted all of my brother judges who are available for consultation, including all of the members of the Appellate Division, and they are unanimously of the opposite opinion to that which I have expressed. They all think that that portion of sub-s. 3 (*c*) which requires service of the notice before the case is filed is still effective, the rules not having otherwise provided with respect to that requirement, and, therefore, that an amendment of the rules is unnecessary. I feel that I should, in deference to this unanimous opinion of my brothers, dispose of this point in accordance with their view of the question, rather than give effect to my own isolated opinion. I do so with less hesitancy than I might otherwise have, because I argued the point with them very fully, and with all of the force of the very strong contrary view that I have of the matter, and so it cannot be said that theirs is but a casual view of the point unaided by argument. This disposition of the point will probably save the informant the costs of a successful appeal by the respondent if I did not take this course.

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In this view of the matter the service of the notice of appeal and a copy of the case is, I think, under the sub-section, a condition precedent to the right of the applicant to file the case, and to my right to hear it, and that condition not having been complied with, I am without jurisdiction to deal with the case, and must, therefore, decline to do so.

There will be no costs of the application to either party.

Judgment accordingly

STROSCHERER v. SCHULZ.

Alberta Supreme Court, Simmons, J. March 14, 1918.

VENDOR AND PURCHASER (§ I—5)—*Agreement for sale of land—Crop payment—Abandonment of agreement—Crop grown on other land—Injunction.*]—Action for specific performance of an agreement for sale.

SIMMONS, J.:—The defendant is the purchaser from the plaintiff of the west half of section 22, 29, 10 west of the 4th meridian, Province of Alberta, under an agreement of sale which contains the following provision:—

It is understood and agreed by and between the parties hereto that the purchaser shall pay to the vendor the full net proceeds of 100 acres of wheat now on the north-west quarter of section 23 in township 30, range 9, west of the 4th, as soon as the same is marketed or immediately after threshing or not later than December 15, 1917, less sufficient for seed for 1918.

The land on which the crop was grown is different from that which is the subject matter of the agreement for sale. It is admitted that the defendant entered into possession of the property described in the agreement referred to, and later abandoned his agreement. The plaintiff brought action upon the agreement for specific performance and for restraining the defendant from disposing of his said crop, and an injunction was in force restraining the defendant from disposing of any part of the said crop. The defence claims that since the crop in question is not upon the land purchased by the defendant that the plaintiff is anticipating execution by restraining the said crop, and that sub-s. 4 (2) of s. 15, c. 3 of the Statutes of Alberta, 1916, is violated by the plaintiff's proceeding against the said crop. The said sub-section reads as follows:—

(2). Where any action or proceeding has before the date of the passing of this sub-section been taken or shall thereafter be taken in any court, either

under the provisions of this section or to enforce the observance of the covenants, agreements, stipulations or conditions contained in any agreement for the sale of any land, and personal judgment has been or shall be obtained therein, no execution shall issue thereon until sale of the land mortgaged or encumbered or agreed to be sold has been had or foreclosure ordered and levy shall then be made only for the amount of the judgment or mortgage debt remaining unsatisfied with costs.

I am of the opinion that the sub-section in question does not apply, as, in the agreement, the crop grown upon a specific area of land was ear-marked in such a way as to become the property of the vendor, subject to the application by the vendor of the same upon the purchase price. *Judgment accordingly.*

KNOLINSKI v. NELSON.

Alberta Supreme Court, Appellate Division, Stuart, Beck and Hyndman, JJ. February 26, 1918.

Costs (§ I—14)—*Practice—Order for security for—Consent—Mistake—Setting aside—Application for new date.*]—Appeal by defendant from an order of Lees, D.C.J. Affirmed.

A. S. Watt, for appellant; *A. U. G. Bury*, for respondent.

The judgment of the court was delivered by

STUART, J.:—The court dismissed this appeal with costs at the close of the argument on January 31; but as a point of practice of some importance was involved, it is desirable that a short statement be made of the effect of the decision.

His Honour Judge Lees had, upon the application of the defendant, made an order for security for costs against the plaintiff, who resided in one of the Eastern States. The order fixed 1 month as the time within which security should be given and also stated that if the prescribed security was not given within the time fixed, the action should stand dismissed without further order. Contrary to the express direction of r. 725, the order did not contain the words; "unless a judge on special application shall otherwise direct."

The order, as drawn and presented to the judge for signature, had endorsed upon it the consent of the solicitors for the plaintiff and this circumstance no doubt accounts for the oversight in the omission of the words quoted.

The plaintiff did not deposit the security within the time prescribed, although the money was in his solicitor's hands and by a slight delay the time was allowed to elapse. The defendant then caused a formal judgment to be entered by the clerk dismissing the action with costs.

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The plaintiff then applied to His Honour Judge Lees upon notice for an order setting aside the judgment and allowing the plaintiff still to perfect his security and proceed with the action. From this order the defendant appealed.

One ground of appeal was that, inasmuch as the order for security had been made on consent, it could not be set aside by the judge making it.

In *Mullins* v. *Howell*, 11 Ch.D. 763, it was decided by Jessel, M.R., that "the court has jurisdiction to discharge an order made on motion by consent when it is proved to have been made under a mistake though that mistake was on one side only."

In the present case clearly all parties, plaintiff, defendant and the judge, made a mistake in not inserting in the order for security the words above referred to. It is clear that at least the judge did not intend to make an order in contravention of the expressed terms of the rule. For the mistake the defendant was primarily responsible because he, *i.e.*, his solicitor, drew the order.

R. 9 says that "every order made by a judge may be varied or discharged upon notice by the same judge." It was suggested that the discharging order must be made *in court* and reference was made to some English rule. But our r. 8 says that "except as otherwise provided all motions, applications and hearings, other than trials and actions, may be disposed of by a judge in chambers."

It is, therefore, I think plain that His Honour Judge Lees had power to set aside his order, and that being set aside, the judgment based upon it necessarily fell with it.

Both the order and the judgment were irregular. When they were set aside I think the whole matter was at large and the judge had power to fix a new date for perfecting the security.

In this view, it is unnecessary, perhaps, to consider what would have been the situation if the omitted words had been in the order and an application had been made, after the time fixed had elapsed without the security being perfected, to stay proceedings and to allow further time. I do not think we really need to consider the case from the point of view suggested, viz., that the order should be at least treated as if it had contained the omitted words and so consider the argument that the "special application" must be made before the prescribed time and cannot be made afterwards. But even if this were the case, it seems clear that the special application can be made after the prescribed time has elapsed.

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It is to be noticed that old r. 520 did not, in terms, enact that the words in question must be in the order. In that rule they are referred to only as something which the defendant might ask for.

There are two reasons for holding that the order appealed from was properly made and would have been so even if the original order had been regular. The first lies in the effect of the words wrongly omitted. Unless those words are effective to allow an order to be made saving the action even after the lapse of the prescribed time, then they are quite useless. Before the time has elapsed, the time can be extended in a proper case under r. 556. That rule contains a very substantial alteration of the English rule from which it was taken. Marginal r. 967 only permitted the enlargement of the time fixed by an order *enlarging time* but not of the time fixed by an order in the first instance though it also of course permitted enlargement of the time fixed by a rule of court. Therefore, it was quite unnecessary to insert in r. 725 the words improperly admitted from the order in question if all that was meant was, that the application could be made before the lapse of time. Before the lapse of the prescribed time under r. 556 the time could be extended in any case. Secondly, under the final clause of r. 556, it is especially provided that an application for an order enlarging time can be made after the lapse of the prescribed time, and there seems to be no reason why this rule should not apply to an order for security for costs, even though made in the stringent terms as to dismissal of the action for default prescribed by r. 725. The technical theory that the action is dead and there is no action pending in which an application can be made is clearly wiped out by these new provisions. The more sensible view was adopted, that it was rather absurd to leave the defaulting plaintiff to the only recourse open to him, viz., payment of costs and the commencement of a new action.

The whole matter was left to the judge to deal with upon such terms as he might deem just. And there is the additional advantage that a difficulty about the possible intervening operation of a statute of limitation is entirely avoided.

It will thus be seen that the basis of the decision in *Hutchinson* v. *Twyford*, 3 W.L.R. 66, and also of the numerous English decisions cited by the appellant, is entirely gone.

Of course, an application after the lapse of time should be

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made with reasonable promptness in view of all the circumstances and requires special grounds to support it. That is what is meant by the term "special application." In the present case these conditions existed. The time was made unusually short in the first instance and the money had reached the solicitors' hands before the date fixed. *Appeal dismissed.*

ROYAL BANK OF CANADA v. NESBITT.

Alberta Supreme Court, Walsh, J. March 15, 1918.

PLEADING (§ I—110)—*Amendment of—Rule 105—Application.*]—Appeal from an order of a local judge. Reversed.

H. W. Menzie, for plaintiff; *I. C. Rand*, for defendants; *R. A. Smith*, for Hansen.

WALSH, J.:—This action is brought for the specific performance by the defendants of an agreement on their part to buy certain lands from one Hansen, which the plaintiff claims to be entitled to enforce under an assignment of the same made to it by Hansen. The defendants plead to it *inter alia*, that by this agreement, Hansen agreed upon payment of the purchase price that he would immediately transfer the lands covered by it to the defendants subject only to the conditions and reservations expressed in the original grant thereof from the Crown, and that Hansen was not then and is not now nor is the plaintiff the owner of the said lands according to the said stipulations because of a reservation to the C.P.R. Co. of all of the coal lying under a part of the same by reason whereof they repudiate the said agreement. The defendants further counterclaim against the plaintiff and Hansen upon the same allegations of fact, and ask for rescission of the contract and re-payment of all sums paid under it. The plaintiff replied to this defence and counterclaim, and the defendant Hansen pleaded to the counterclaim. The defendants moved before Jackson, J., as local judge, at Lethbridge, to strike out the plaintiff's reply and Hansen's defence or in the alternative certain paragraphs of them. This application was dismissed, and the defendants now appeal from so much of the order as dismissed their application to strike out par. 2 of the reply, and pars. 9 and 10 of Hansen's defence to the counterclaim.

Par. 2 of the reply alleges that there was no intention on the part of Hansen to sell or on the part of the defendants to buy any part of the lands in question except subject to the reservation

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of all the mines and minerals, and the right to work the same, and that there was a mistake of fact of all parties to the agreement that the mines and minerals and the right to work the same had been reserved to the Crown in the grant of every portion thereof, and that the same was signed by them in the belief that it embodied the true intention of all the parties and the plaintiff asks that it be rectified so as to give effect to the true intention of the parties in this respect. The ground of the objection to this paragraph is that it constitutes what in former days was called a departure from the statement of claim.

R. 105 says, "No pleading shall, except by way of amendment, raise any new ground of claim or contain any allegation of fact inconsistent with the previous pleadings of the party pleading the same." The statement of claim alleges that the document upon which the action is founded is the agreement of the parties. The reply is that that document is not the agreement of the parties, but that something else is and it asks rectification of the document which it put forward in its statement of claim as the agreement between the parties, so as to make it conform to what it now says was the true agreement. There is, in my opinion, a plain inconsistency between the allegations of fact set out in the reply and those contained in the statement of claim which brings the reply into open conflict with r. 105.

No written judgment was given by the local judge, but I was told on the argument that he refused to strike out this paragraph because he thought it well pleaded under the authority of *MacLaughlin* v. *Lake Erie and Detroit River R. Co.*, 2 O.L.R. 151. That at any rate was the authority relied upon by the plaintiff before me. With great respect I am unable to agree that that case justifies the conclusion that this paragraph can stand. That action was for an injunction restraining the defendants from infringing a patent of the plaintiff. The statement of claim alleged the making of an agreement between the plaintiff and the defendant under which he supplied it with certain of the mechanisms covered by his patent, but his action was not based upon that agreement at all. It was founded upon alleged infringements of the plaintiff's patent rights apart entirely from this agreement. The defendant pleaded that it had the right under that agreement to do the things complained of. The plaintiff replied that if the agreement gave the defendant the right thus claimed it did not

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express the true agreement, and that it should be rectified. It was held that this did not constitute a departure, but I think it is obvious that this was so held because the plaintiff's action was not founded on the agreement. The Master in Chambers thought it was a departure and ordered the reply struck out. But Meredith, C.J., now Chief Justice of Ontario, before whom the case came by way of appeal from the Master in Chambers, said, at p. 155:

> If I viewed the statement of claim as Mr. Blake contended and the Master in Chambers seems to have thought that it should be, as an action brought on the agreement mentioned in par. 5, and to enforce its provisions against the respondent company, I should uphold the order appealed from, for in that case the second and third paragraphs of the reply would be inconsistent with the statement of claim, and what under the old form of pleading was termed a departure from the original pleading, but I am unable to agree that the claim of the appellants is on the agreement and to enforce its provisions.

This is the foundation of the judgment of the learned Chief Justice, and it strongly supports the contention of the present defendants, for this action is unquestionably on the agreement and to support its provisions. Though not so plainly expressed in the judgments of the Divisional Court, I think it clear that they upheld the Chief Justice for the same reasons that led him to his conclusion. I regard the *MacLaughlin* case as an authority for the defendants rather than the plaintiff.

This appeal must be allowed and par. 2 of the reply must be struck out, but the plaintiff will have leave to amend its statement of claim as it may be advised.

Par. 9 of Hansen's defence to the counterclaim alleges that there never was, and is not now, any coal lying on or under the land in question. I think that under the judgment of the Appellate Division in *Innis* v. *Costello*, 33 D.L.R. 602, 11 A.L.R. 109, I must hold that this is not a defence to the action. Par. 10 of his defence sets up that if there is any coal on or under these lands, it would be impossible to work it, and it would be of absolutely no value to the defendants. If par. 9 is bad so is *a fortiori* par. 10, for if it is no defence to say there is no coal there, much less is it one to say there is coal there but it cannot be got out.

This appeal must also be allowed, and these paragraphs struck out.

The defendants will have the costs of the appeal in any event

Appeal allowed.

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Saskatchewan Supreme Court, Newlands, Lamont and Elwood, JJ.A. April 26, 1918.

SALE (§ II D—44)—SALE OF ENGINE—WARRANTY—CONDITION—REPUDIATION—DAMAGES.

When an engine of a stated horsepower is ordered, its ability to develop the horsepower is a condition. If it does not develop the horsepower the purchaser may either reject the engine and treat the contract as repudiated, or may accept the engine and sue for damages for delivery of an inferior article.

Statement.

APPEAL from the judgment of Haultain, C.J.S., in an action to recover the purchase price of an engine. Affirmed.

F. L. Bastedo, for appellant; *C. E. Gregory*, K.C., for respondent.

Newlands, J.A.

NEWLANDS, J.A.:—In this case I am of the opinion that defendant is entitled to recover on his counterclaim by virtue of a breach of the warranty that the engine would develop its rated brake horse power. It never did develop this horse power.

The provision in clause 9 of the contract, "that the purchaser shall not be entitled to rely on any breach of the above warranty" unless certain notices are given does not, in my opinion, apply to the warranty that it will develop certain power, but only to the warranty that it is well made, and of good material, because clause 9 goes on to say that a notice of the defect complained of is to be sent "whether such defect be in workmanship or material, containing a description of the same."

Its not developing its rated horse power may not come from a defect of either material or workmanship. The engine may be perfect as to both material and workmanship, but, because it was not built to develop such horse power, it may fail to comply with the warranty and therefore the above required notice could not be complied with.

I think the appeal should be dismissed with costs.

Lamont, J.A.

LAMONT, J.A.:—This is an action for the purchase price of an engine alleged to have been sold by the plaintiff to the defendant under an agreement in writing made between the parties on April 1st, 1913. By that agreement, the defendant requested the plaintiff company to ship him one of their 60 brake horse power gas tractors, with usual fixtures and certain extras, which he agreed to receive on arrival and, subject to the terms and warranties of the contract, pay for the same the sum of $3,328. The

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agreement further provided that the property in and title to the said goods should remain in the vendor until full payment of the purchase price, and that, upon default, the vendor might repossess the goods. Then, under the heading of "warranty," the plaintiffs warrant "the said tractor to be well made of good material and, if properly operated, will develop its rated brake horse power."

The defence is: (1) That the defendant was induced to execute the said agreement by misrepresentation on part of the agent of the company; (2) that he agreed to purchase on the following warranties and conditions:—(*a*) The engine was warranted that it was well made and of good material and workmanship. (*b*) That if properly operated it would develop its rated brake horse power. (*d*) That on firm level footing the 60 brake horse power tractor would do the equivalent or daily work of 25 ordinary work horses which work week after week without change.

This clause (*d*) was not in the contract the defendant signed, but was in the plaintiffs' 1912 form of contract, a copy of which had been previously given to the defendant by the agent, and the defendant says that the agent told him, at the time that he executed the contract of agreement, that the warranties in that form were the same as in the copy which he already had.

Then par. 10 of the statement of defence reads:—

> 10. The defendant further says that none of the said conditions and warranties were complied with or fulfilled and he therefore became and is entitled to repudiate the agreement.

In his counterclaim, the defendant repeated the above allegations, and again alleged the non-performance of the conditions and warranties and claimed: (1) the sum of $3,328 plus freight: (2) an order cancelling the said agreement.

The action was tried before the Chief Justice of this court, who held against the defendant on the ground of misrepresentation, but found that the engine was not in proper shape when delivered, that it failed to comply with the warranty, that it practically never did satisfactory work, and that it was useless to the defendant, and, while he gave judgment for the plaintiffs on their claim because the statement of defence was inaptly worded to support a defence in diminution of extinction of the claim, he gave judgment on the counterclaim for the defendant for an amount equivalent to the purchase price. From this judgment both parties

appeal—the plaintiffs against the judgment for the defendant on the counterclaim, and the defendant on the ground that the plaintiffs' action should have been dismissed, because the defendant refused to accept the engine.

First, as to a point of pleading. It was contended by counsel for the plaintiffs that as the statement of claim expressly alleged that the machinery ordered was duly delivered in accordance with the terms of the contract, and as that was not expressly denied, the defendant could not contend that he had not received the engine ordered. It is true that the defendant does not say, in so many words, that the engine ordered was not delivered, but he does say that it was a condition of his order that the engine should—among other things—develop its rated horse power, and that such condition was not complied with and that, therefore, he is entitled to repudiate. Although, no doubt, it would have been more satisfactory if the statement of defence had been less badly drawn, yet, in my opinion, sufficient is alleged to enable the court to give judgment for the defendant if the evidence establishes the truth of his plea. The day has, I think, gone by when the rights of parties are to be determined by the niceties of pleading when all the facts are before the court.

The evidence, in my opinion, well warrants the finding of the Chief Justice. That the engine was not in proper shape when delivered was established by the plaintiffs' expert Snook, who, on April 30, wrote the plaintiffs—in part—as follows:—

> This engine was in very bad shape most everything was loose on it.
>
> I got it unloaded all right and took it out to start it to work and I could not get any power out of it then I found the valves were leaking, so I took them out and ground them.
>
> Then it seemed to work all right, but it would overheat very bad, so I considered then that the only thing to do was to find out where the cooling oil was stopped.
>
> And I found that the long pipe from the pump to the sections was made too long and I had to cut off about two inches.
>
> The engine was sent out in very bad shape. I worked on the engine seven days getting things adjusted right and finding out the trouble.
>
> I do not think this is a very good advertisement for our engine to have such trouble with a new engine on the start and any one could see it was just through neglect on the man's part that put this pipe in, he did not trouble to get it the right length.
>
> I have got both Mr. Dougall's engine and Mr. Wells' engine working fine now, also Mr. McDonald's.

It will be observed that, in the last clause, Snook says he had

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the Wells engine working fine. Other experts of the plaintiff company who, from time to time, worked on the engine testified that they got the engine working all right. This evidence the Chief Justice rejected, for he found, in accordance with the testimony of the defendant's witnesses, that the work of the engine was most unsatisfactory. The trial judge does not find, in so many words, that the engine did not develop its rated horse power, but the evidence to which he gave effect shows that the trouble was that it did not have power enough to pull the ploughs. The cause of this want of power he found to be due chiefly to overheating.

Further, the evidence shews that a 60 brake horse power engine should plough at least 15 acres per day. According to the plaintiff's 1912 form, it should do the work of 25 horses. Three horses, according to the evidence, should plough from one and a half to two acres per day. Twenty-five horses at the same rate should plough from 12½ to 16 acres per day. The best the defendant's engine could do was 5 acres per day. From the findings of the trial judge and the evidence no other conclusion, in my opinion, can be drawn than that the engine was never able to develop its rated horse power. The reason for this can in no way be attributed to a want of proper operation on the part of the defendant, for the engineers in whose charge he placed the engine were recommended to him by the agent of the plaintiff company.

The engine delivered not being able to develop as a working proposition its rated horse power, what are the rights of the parties?

In *Wallis Son & Wells* v. *Pratt & Haynes*, [1910] 2 K.B. 1003, Fletcher Moulton, L.J., whose dissenting judgment was adopted by the House of Lords, [1911] A.C. 394, says, at p. 1014:—

> Inasmuch as by the law the obligation to deliver the kind of goods stipulated for in a contract of sale is an obligation which has the status of a condition, this breach gave to the purchasers the choice of the two remedies, either of rejecting the goods and treating the contract as repudiated or suing for damages for delivery of the inferior article.

In *Alabastine Co., Paris* v. *Canada Producer & Gas Engine Co.*, 17 D.L.R. 813, Meredith, C.J., in giving the judgment of the Ontario Appellate Division, at p. 817, says:—

> One of the rules deduced from the authorities is that "where the subject-matter of the sale is not in existence, or not ascertained, at the time of the

contract, an engagement that it shall, when existing or ascertained, possess certain qualities, is not a mere warranty, but a condition, the performance of which is precedent to any obligation upon the vendee under the contract; because the existence of those qualities, being part of the description of the thing sold, becomes essential to its identity, and the vendee cannot be obliged to receive and pay for a thing different from that for which he contracted": Benjamin on Sale, 3rd Am. ed., par. 895, quoting from the Leading Cases, vol. 2, p. 27.

On the argument before us, counsel for the defendant produced a type-written copy of the judgments of the Supreme Court of Canada in the *Alabastine* case, which, so far as I am aware, have not been reported. According to the copy, Davies, J., said:—

The pith of the judgment appealed from is the inability of the Appellate Division to say that the findings of the trial judge were clearly wrong, especially in the failure of the appellants to furnish an engine capable of continuously carrying 250 horse power, as guaranteed.

If that finding is accepted and the article contracted for was, in its substance and essence, not delivered at all and was rejected by the purchaser as in this case, then I am of opinion that the authority upon which the Chief Justice of Ontario relied in reaching the conclusion he did—*Wallis Son & Wallis* v. *Pratt & Haynes*, [1910] 2 K.B. 1003; and on appeal to the House of Lords, confirming the dissenting judgment of Fletcher-Moulton, L.J., [1911] A.C. 394—is applicable to the case before us.

and Idington, J., said:—

The contract of appellant was to manufacture for respondent a gas engine which was to be used in its factory and to be of the type specified in the contract and to develop two hundred and fifty (250) actual brake horse power, when operated on natural gas of a specified quality. The trial judge found it when so used did not develop that power and in this he was upheld by the Court of Appeal.

There is certainly evidence from which such inference may be properly drawn as to justify that finding.

There is, therefore, left to us no ground for interfering therewith.

The court was unanimous in dismissing the appeal.

These judgments, in my opinion, establish that, where an engine of a stated horse power is ordered, its ability to develop the horse power is a condition. If it does not develop the power stated, the purchaser may either reject the engine and treat the contract as repudiated, or he may accept the engine and sue for damages for the delivery of an inferior article. On such an order the vendor, to succeed in an action for the price, must show that the engine delivered complied with the condition or that the purchaser accepted the engine delivered. In this case, the engine did not comply with the condition. Did the defendant accept it? This point presents more difficulty.

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In the *Alabastine* case, the engine was delivered in August and started to run on the 10th of that month. The pistons were found to be too tight and had to be filed down. This took 2 or 3 weeks. The engine was again started, but one thing after another gave such trouble that by the middle of October the engine had run only a few days. On October 22, the air cylinder cracked and a new one was not obtained until December, then the engine ran a few days when the babbit melted out of a bearing. Early in January it was started again, but worked very little until February. It would run part of the time and then stop. In March it appears to have run fairly well, but on the 25th of that month it went to pieces. During the whole 7 months the vendors had charge of making the repairs, and they were endeavouring to put the engine in shape to do proper work. It was held that, under these circumstances, there had been no acceptance of the engine.

In the case at bar, the engine was received in April, and was unloaded and taken to R. M. Kinnear's place by Snook, the plaintiff company's expert. Snook was in charge for a week or 10 days. During this time the engine was not working properly, not being able to plough over 5 acres a day. According to the defendant's evidence, he complained to the plaintiffs' agents Leary and Snook. That they said: "Give us a chance." They further said that Snook had to go on another job, but that as soon as they could get another expert they would send him out and they would either make it work or take it back, but to keep on working until they got another expert. After two weeks at R. Kinnear's, in which only 50 acres was ploughed, the engine was taken to W. Kinnear's place. The defendant says that he was expecting the expert every day, but as he did not come he went to Davey, the plaintiffs' agent at Readlyn, and that Davey told him he had sent for Leary or an expert to come out. No expert came. The defendant was informed that no expert was available at that time, but that as soon as one came he would be sent out. Two weeks were put in at W. Kinnear's ploughing 50 acres. When they went to the defendant's own place, where three weeks were spent ploughing between 30 and 40 acres. Then the defendant moved it to Davey Bros., the agents of the plaintiff company. During these weeks, the defendant says he complained repeatedly to Davey Bros., and went to Leary several times, but was told that experts

were hard to get, but as soon as one could be got he would be sent out; but to keep on, and that "he (Leary) would see that the engine would work right or they would take it back." After leaving the farm of Davey Bros., the defendant spent 5 days at Berry's doing 20 acres; and 13 days at Egglestone's ploughing 13½ acres. While at Berry's, Leary and an engineer named Douglas came but failed to make the engine do any better work. The defendant ceased attempting to plough, and pulled the engine to the engine house and said he would not touch it again, and he wrote to the company under date of July 9th—but it would appear the real date was August 9—the following letter:—

To the Hart-Parr Co. Readlyn, Sask., July 9, 1913.

Will you please send me at once one of your best experts as the engine you sold me has never given satisfaction since I have it?

I have asked our agents here and also Mr. Leary at Viceroy and so far have given me no assistance.

Now it is up to the company to make this engine do what they promised to do. I have had first-class engineers and they cannot make it nor it will not develop the power. Leary was here yesterday, he said he would send me an expert and if he could not make it do the work I would get another engine. Now the threshing time is at hand and I have a 36 separator, and if this engine fails to do the work I shall send it back and sue for damages, as I have over seven thousand dollars worth of work on hand this fall.

I have not even made running expenses with this engine this summer, for it has never developed more than 15 horse power at any time, since I have it.

Please give this your earliest attention as I am tired asking for something to be done.

A. E. WELLS.

To this the plaintiffs replied on August 12, promising an expert. The expert did not come. The defendant left the engine where it was until threshing time, then he bought a separator and took the engine threshing. After he had been threshing a few days, Davey came to collect the amount of the note then due. He says the defendant refused to pay, but he admits that the defendant said to him that if the company would make the engine run properly for 3 days he would give them security for the purchase price. In about a week the expert came. He spent 4 days on the engine, and then left because the ground had become too frozen to give it a ploughing test. The engine remained where the expert left it until January, when the company repossessed it.

On this evidence, can the defendant be said to have accepted the engine?

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Up to the time the defendant wrote to the company the letter of August 9, there was, in my opinion, no acceptance. Up to that date, all that took place amounted to nothing more than a trying out of the engine, within what was held in the *Alabastine* case, and had the defendant done nothing more he would, in my opinion, have been entitled to reject it. He, however, bought a new separator and took the engine out threshing knowing that it had not been made right. He did this after he had set it aside as being useless, and after he had notified the company that it would not develop power. This conduct on his part, in my opinion, is consistent only with a decision on his part to keep the engine, and rely on his right to recover damages for the delivery to him of an engine inferior to the one ordered. From the moment he took it out threshing, he must be held to have accepted it. Having accepted it, he cannot have rescission of contract, but only damages for breach of condition or breach of warranty.

For the plaintiffs, it was contended that the defendant could not recover on the ground of breach of warranty, by reason of a clause in the contract to the effect that the purchaser shall not be entitled to rely upon breach of warranty unless notice of defect be given to the company not more than 10 days after its first use by the purchaser, unless within a reasonable time after such notice, the vendor fails to remedy the defect. This clause, in my opinion, does not help the plaintiffs. By their letter of August 12 they acknowledged receipt of notice. This was before the defendant accepted the engine. Having notice, they failed, within a reasonable time, to remedy the defect. The Chief Justice found that the engine was useless to the defendant and awarded damages to the extent of the purchase price. As Wells swore that he told Zebedee, the last expert, who was at his place in October, that the engine was no use to him the way it was, there is evidence to support this finding.

In my opinion, the judgment of the chief Justice in awarding damages for breach of warranty was right.

The appeal should be dismissed with costs.

Elwood, J.A.

ELWOOD, J.A. (dissenting):—The statement of claim in this action alleges that by an agreement in writing, under seal, dated April 1, 1913, the plaintiff agreed to sell to the defendant, and the defendant agreed to purchase from the plaintiff company, certain

machinery, *inter alia*, "one 60 brake horse power gas tractor, with usual fixtures, with extension rims," payable as therein set forth: that "the said machinery was duly delivered by the plaintiffs to the defendant, in accordance with the terms of the said agreement," and the claim is for the purchase price, being the amount of the several promissory notes given therefor.

The statement of defence denies the execution of the agreement, but does not deny the delivery of the machinery. It alleges breach of several warranties and conditions, *inter alia*, (*a*) The engine was warranted that it was well made and of good material and workmanship; (*b*) that if properly operated it would develop its rated horse power.

It is also alleged, by way of defence, that the contract was induced by certain misrepresentations.

By way of counterclaim, the defendant, in effect, repeats the allegations contained in the statement of defence and claims judgment for the sum of $3,328 and an additional sum of $134 paid for freight and repairs, and, in the alternative, for cancellation of the agreement, and relief from liability thereunder.

The Chief Justice, before whom the case was tried, found against the defendant on the claim for misrepresentation, and ordered judgment for the plaintiff for the amount of its claim, and judgment for the defendant on the counterclaim in an amount equal to the amount agreed to be paid. From this judgment the plaintiff appeals, and the defendant cross-appeals, claiming to be entitled to set up breaches of warranty in diminution and extinction of the plaintiff's claim.

At the trial, the plaintiff proved the agreement in writing referred to in the statement of claim, and this agreement is one in which the defendant requests the plaintiff to ship to him "one of the *vendor's* 60 brake horse power gas tractors," etc. The agreement, *inter alia*, contains the following:—

7. The said tractor is warranted to be well made and of good material and, if properly operated, will develop its rated brake horse power, provided that such parts or portions of said goods as are not manufactured by the vendor, or are second hand, or rebuilt, or repaired, are not warranted, expressly or impliedly, by statute or otherwise. Belting, spark plugs, coils and magnetos are not manufactured by vendor.

9. The purchaser shall not be entitled to rely upon any breach of above warranty, unless notice of the defect complained of, whether such defect be in workmanship or material, containing a description of the same and setting

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out the time at which the same was discovered is given to the vendor at its said home office by registered letter, posted not more than seven days after such discovery, and in any event not more than ten days after its first use by the purchaser, and unless the vendor fails to remedy such defect by substitution of parts or otherwise within a reasonable time after the receipt by it of such notice.

10. No attempt by the vendor or by any person or persons on its behalf to remedy any defect in the said goods shall be deemed to be a waiver of any of the provisions herein contained, and no act shall be deemed to be a waiver unless an intention to waive is expressed in writing, duly signed on behalf of the vendor at its home office.

The Chief Justice found that the engine would not do proper work; that it practically never did satisfactory work, and that it did not comply with the warranty and failed to do the work to any reasonable amount and was useless to the defendant.

I think that the fair result of the evidence and the judgment is, that it did not develop its rated horse power. It is contended by the respondent that, the engine not having developed its rated horse power, it failed to fulfill one of the conditions of the sale, and that what was delivered was of a different description to what was ordered, and that, under what was laid down in *Wallis Son & Wells* v. *Pratt & Haynes*, [1911] A.C. 394, and *Alabastine Co. of Paris* v. *Canada Producer & Gas Engine Co. Ltd.*, 17 D.L.R. 813, 30 O.L.R. 394, the defendant was entitled to return the engine and there was a total failure of consideration.

In *Schofield* v. *Emerson Brantingham Implement Co.*, 38 D.L.R. 528, the Supreme Court of Saskatchewan *en banc* held that, where, under an agreement requiring the seller to ship "one of *your* big four 30 horse power gas traction engines," the seller did ship one of such engines, the purchaser received what he agreed to purchase even although the engine did not develop 30 horse power.

It seems to me that the order in the case at bar is such that, if the plaintiff did ship to the defendant one of *its* 60 brake horse power gas tractors, the defenadnt received the engine that he ordered, even if it did not develop its rated horse power. The only evidence that the plaintiff did ship one of *its* 60 brake horse power gas tractors is the allegation in the statement of claim above referred to, that by an agreement in writing, under seal, dated April 1, 1913, the plaintiff agreed to sell to the defendant, etc., "one 60 brake horse power gas tractor," etc., and "that the said machinery was duly delivered by the plaintiffs to the defendant,

in accordance with the terms of the said agreement," and the failure of the defendant to deny the above allegation of delivery and the production at the trial of the agreement in writing, showing that it was for one of the *vendor's* 60 brake horse power gas tractors. It will be observed that the statement of claim does not allege that the plaintiff was to ship one of *its* 60 brake horse power gas tractors, but to ship one 60 brake horse power gas tractor"; but there is the reference in the claim to the agreement in writing and, when that agreement was put in at the trial, it appeared that the order was for one of the vendor's 60 brake horse power gas tractors.

In my opinion, the effect of the allegations in the statement of claim, which were not denied, coupled with the contents of the agreement in writing, is to show that one of the *vendor's* 60 brake horse power gas tractors was ordered and shipped.

In any event, I am very strongly of the opinion that the evidence shows that the conduct of the defendant in dealing with the engine, after its receipt, was such as to constitute an acceptance by him of the engine, and, in that case, he would not be at liberty to rely upon a breach of conditions, but would have to rely upon the warranty.

So far as the warranty is concerned, it will be observed that—by clause 9—the purchaser is not entitled to rely upon the breach of warranty unless notice of the defect is given to the vendor at its head office by registered mail posted not more than 7 days after the discovery of the breach, and in any event not more than 10 days after its first use by the purchaser. No such notice was given.

It was contended, however, that the vendor, having attempted to remedy the defect must be deemed to have waived the requirement as to notice of defect.

The evidence, to my mind, does not bear out the contention that there was an intention to waive the notice of defect, and clause 10, above referred to, provides that no attempt by the vendor to remedy any defect shall be deemed to be a waiver of any of the provisions therein contained.

The result, therefore, in my opinion, is that the Chief Justice was incorrect in allowing to the defendant any damages for breach of warranty, and there should be judgment for the plaintiff for the amount of its claim and costs; judgment dismissing the defendant's counterclaim with costs, and judgment for the plaintiff for its costs of this appeal. *Appeal dismissed.*

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DOWLER v. EDWARDS.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart, Beck and Hyndman, JJ.A. April 25, 1918.

BILLS AND NOTES (§ III C—77)—DISHONOUR—NOTICE OF—DUE DILIGENCE—DISCHARGE OF ENDORSER.

The Bills of Exchange Act (R.S.C., c. 119) provides the method and time in which notice of dishonour of a promissory note is to be given; a holder cannot elect to give personal notice if delay is caused thereby.

Statement. APPEAL from the judgment of the trial judge, refusing to discharge an endorser of a promissory note. Reversed.

H. A. Chadwick, for appellant; *H. D. Mann*, for respondent.

Harvey, C.J. HARVEY, C.J.:—The plaintiff is the holder of a promissory note in the following terms:—

$70. Calgary, Alta., Dec. 4, 1916.

Three months after date I promise to pay to the order of J. G. Edwards of 213 Lougheed Bldg., Calgary, at the Merchants Bank of Canada, Calgary, Alta., the sum of seventy 00/100 dollars. Value received.

(Sgd.) GEO. ROBINSON.

and bearing the endorsement, "JOSEPH G. EDWARDS."

The note was duly presented for payment but was dishonoured and on the last day of grace the plaintiff went to the place of address of the defendant specified in the body of the note but failed to find him there and not until 8 or 10 days later did he find the defendant and then for the first time was notice of dishonour given to him. The action was tried by His Hon. Winter, J., who gave judgment for the plaintiff but we have no reasons before us for his judgment.

S. 96 of the Bills of Exchange Act (R.S.C., c. 119) provides that notice of dishonour must be given to an endorser and that "any endorser to whom such notice is not given is discharged." S. 97 provides that, the notice must be given not later than the juridical or business day next following the dishonour. S. 103 provides that such notice

shall be sufficiently given if it is addressed in due time to any party to such bill entitled to such notice at his customary address or place of residence, or at the place at which such bill is dated, unless any such party has, under his signature, designated another place, in which case such notice shall be sufficiently given if addressed to him in due time at such other place.

The section further provides that the notice will be effectual if deposited in the post office with postage prepaid, within the time specified and that too notwithstanding that the party to whom it is addressed is dead. S. 104 provides that a notice duly posted is duly given notwithstanding any miscarriage by the post office.

S. 105 provides that:—

> Delay in giving notice of dishonour is excused where the delay is caused by circumstances beyond the control of the party giving notice, and not imputable to his default, misconduct or negligence.

In England there is no provision for giving notice by mail to the place where the bill is dated and it has been held that delay was excused where the address given was wrong or illegible and apparently when the endorser could not be found delay would then be excused. See *Studdy* v. *Beesty*, 60 L.T.N.S. 647, but Maclaren in his work on Bills of Exchange (5th ed.), at p. 300, says:

> The only circumstances likely to arise in Canada to cause excusable delay in giving notice, would be the death or sudden illness of the holder, or some accident to the person making out the notices, or to the messenger charged with taking them to the post office.

Since the holder is permitted to satisfy the statutory burden by simply posting a letter properly addressed even though that letter may never reach the addressee, who indeed may be dead, I am at a loss to understand how it can be said that the delay in the present case in giving notice of dishonour, there being no evidence other than as indicated, was caused by circumstances beyond the plaintiff's control. The delay in giving the notice in the form in which he gave it may perhaps be said to have been so caused but it could not be said about the alternative method of giving notice provided by the statute. It is unimportant to consider whether the address in the body of the note is one given by the endorser, though it certainly does not appear to be under his signature, because, if it is not, the notice could be sent to the place at which the note is dated, and in case of doubt a notice could be sent to each, as is very common, and it is no answer to say that the notice so addressed would probably not reach the defendant, because it might reach him and in any event the statute provides that the holder has done his duty when he has done what he can do, even though actual notice may not reach the endorser. I can see no way of avoiding the conclusion that the defendant is discharged by s. 96, no notice of dishonour as required having been given and there being no sufficient excuse for such failure.

I would allow the appeal with costs and dismiss the action with costs.

STUART, J.A.:—I agree with the opinion of the Chief Justice. It may seem hard on the plaintiff to lose his security for this small

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loan. But it was not necessary for him to take his security in the form which was adopted. A simple guarantee in writing was possible. He deliberately adopted, however, the common method in mercantile transactions, in trade and commerce, and I think he must be held to have been acquainted with the statutory rules applicable thereto. The decision in this case, although it deals with a small amount, will apply to transactions in which enormous amounts are involved and the general rule, which is I think as stated by the Chief Justice, must be applied.

Beck, J.

BECK, J. (dissenting):—I doubt the correctness of the result arrived at by my brother judges that the appeal should be allowed; but I, in any case, am not satisfied that the ground of their decision is correct.

The Bills of Exchange Act (c. 119, of 1906), says, *inter alia* by (s. 97), that notice of dishonour in order to be valid and effectual must be given not later than the juridical or business day next following the dishonour of the bill and (sub-s. (*c.*), corresponding to English Act, s. 49, (9) that in case of the death, if known to the party giving notice, of the drawer or endorser, to a personal representative, if such there is and with reasonable diligence he can be found; (s. 98) that notice of dishonour may be given (sub-s. (*d*), corresponding to English Act, s. 49, 5) in writing or by personal communication; (s. 105, corresponding to English Act s. 50, 1) that delay in giving notice of dishonour is excused where the delay is caused by circumstances beyond the control of the party giving notice and not imputable to his default, misconduct or negligence, and that when the cause of delay ceases to operate the notice must be given with reasonable diligence; (s. 103) that notice of the dishonour shall *be sufficiently given* if it is addressed in due form to any party entitled to notice, *at his customary address* or place of *residence* or *at the place at which the bill is dated* unless such party has, *under his signature*, designated another place, in which case such notice shall be *sufficiently given* if addressed to him *in due time* at such other place: and, (2) that such notice so addressed *shall be sufficient*, although *the place of residence* of such party is other than *either of the places aforesaid* and shall be deemed to have been duly served and given for all purposes, if it is deposited in any post office, with the postage paid thereon, at any time during the day on which presentment has been made or on the next follow-

ing juridical or business day and that such notice shall not be invalid by reason only of the fact that the party to whom it is addressed is dead, and (s. 104, corresponding to English Act, s. 49, 5) that where notice of dishonour is duly addressed and posted, as provided in the last section, the sender is deemed to have given due notice of dishonour, notwithstanding any miscarriage by the post office; and (s. 106, corresponding to English Act, s. 50, 2) that notice of dishonour is *dispensed with* when, after the exercise of reasonable diligence, notice as required by the Act cannot be given to, or does not reach, the drawer or endorser sought to be charged.

In the English Act there is no provision corresponding to s. 103. S. 97 differs from the English Act. That Act provides (s. 49 (12)) that the notice must be given within a reasonable time after dishonour, and that, in the absence of special circumstances, notice is *not* deemed to have been given within a reasonable time, unless where the person giving and the person to receive notice reside in the same place the notice is given or sent off in time to reach the latter on the day after the dishonour of the bill and where their residences are different places on the day after the dishonour, if there be a post at a convenient hour on that day and if there be no such post on that day then by the next post thereafter.

Under the English Act it has been held that the "circumstances beyond the control of the party giving the notice and not imputable to his fault, misconduct or negligence" (s. 105), cover not only circumstances directly affecting the position of the party to give the notice, *e.g.*, serious illness, but also circumstances directly affecting the position of the party to whom notice is to be given, *e.g.*, that his address is unknown.

The reasoning of the other members of the court, in effect, is practically that the difference between the English Act, s. 49 (12) and our Act, s. 97, and the insertion of s. 103 in our Act providing for a *sufficient* method of giving notice, limits the force of s. 105 to circumstances directly affecting the position of the party to give the notice. In my opinion this conclusion is incorrect. If we suppose the case of a holder starting out to give notice of dishonour "by personal communication" (s. 98 (*d*)) and, failing to find the endorser at the address furnished by the endorser, continuing his search persistently and promptly for a week, from

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address to address given him in answer to his enquiries, I think that at the end of the week he could give a valid notice if he had then found the endorser or, having exhausted all reasonable efforts, failed to find the endorser or to ascertain his address, he would be entitled to further delay for the purpose of giving notice. S. 103 is a method provided for the purpose of enabling the holder to save himself, if he wishes to avail himself of it, from the trouble, inconvenience, and responsibility of taking steps to give actual notice to the endorser by doing something, which, in a large number of instances, will be quite ineffective to accomplish that result.

Hyndman, J.

HYNDMAN, J., concurred with Harvey, C.J.

Appeal allowed.

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Ex. C.

THE KING v. HALIFAX ELECTRIC TRAMWAY Co.

Exchequer Court of Canada, Cassels, J. February 6, 1918.

EXPROPRIATION (§ III C—140)—VALUE OF LANDS AGREED TO BE CONVEYED BY CROWN—VALUE TO OWNERS—NO ALLOWANCE FOR SPECULATIVE VALUE NOR FOR INCREASED COST OF BUILDINGS OR OPERATION.

The value of lands agreed to be conveyed by the Crown under an agreement for complete reinstatement of the owners of a gas and electric plant site expropriated by the Crown is not the value to the grantors, but to the owners, who are entitled to compensation according to the terms of the agreement only. No allowance will be made for the speculative value of the land expropriated, or for the additional value of the old site in regard to the increased cost of erection of buildings or of cost of operation.

Statement.

INFORMATION for the vesting of land and compensation in an expropriation by the Crown.

T. S. Rogers, K.C., and *T. F. Tobin*, K.C., for plaintiff; *H. A. Lovett*, K.C., and *L. A. Lovett*, K.C., for defendant.

Cassels, J.

CASSELS, J.:—An information exhibited on behalf of His Majesty the King by the Attorney-General of Canada to have it declared that certain lands referred to in the information are vested in His Majesty, and to have the compensation therefor ascertained.

The properties in question comprise a parcel of land in the City of Halifax upon which were erected the gas plant and electric light plant, and also a portion of the Halifax Tramway Co.'s plant. The tramway organization operates the gas plant and supplies gas to the City of Halifax; they also operate the electric tramway and the electric light company, and furnish electric light to the people of Halifax.

At the trial counsel for the plaintiff and defendants kindly offered to furnish a statement shewing the dimensions in square feet of the property expropriated, also of the property owned by the defendants and utilized for the purposes of their new plant—also the property purchased by the Crown on the west side of Water St. to be conveyed to the defendants, and also of the land part of which was known as the government wharf property and conveyed to the defendants.

Owing to the terrible disaster which occurred in Halifax there was delay in furnishing this memorandum which was received by the registrar on February 4, 1918.

I may add that my reasons for judgment were prepared long prior to the Halifax catastrophe and I have not been influenced in any way by what occurred since.

The Crown by the information tendered to the defendants the sum of $364,923. The details of this tender are set out in par. 7 of the information.

The defendants by their statement of defence claim the sum of $901,812.84.

The particulars of their claim are set out in the defence. In the particulars, s. "K." sets out:—

> The property expropriated has for some 75 years been utilized as the site of the gas works, and from its character, size and location has special adaptation to the conduct of the defendant's undertaking of supplying gas to the citizens of Halifax. By reason of the long user, above mentioned, the defendants are not subject to injunction or damage suits by adjoining proprietors on account of the emission of fumes or noxious gases incident to the carrying on of the undertaking, but under the laws of the Province of Nova Scotia, as interpreted by its Supreme Court, the defendants are liable to be enjoined at the suit of neighbouring proprietors, if they conduct these operations on a new site.

This claim need not be considered, as on the argument of the case, H. A. Lovett stated that they had come to an arrangement in regard to this claim, and it was unnecessary for the court to consider it.

The defendants set out the following:—

> So far as the defendants are aware at the present time it will be impossible for the defendants to secure another site in a location sufficiently near the centre of the city to enable the undertaking to be successfully carried on as a business enterprise, except on payment of very large sums to neighbouring

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proprietors for the conveyance of their properties, or for prospective damage to their properties.

The defendants are willing to co-operate with the Crown in the selection of a new site, but claim that they are entitled to be indemnified by the Crown against loss and damage to their business by reason of the plant being located on such new site.

The expropriation plan was registered on February 13, 1913. The representatives of the Crown and of the defendant company acted together in a friendly manner in endeavouring to procure new premises for the defendants in lieu of the premises expropriated by the Crown, and eventually the new site upon which the present plant is erected was procured.

In order to reinstate the defendants, it was eventually agreed between the representatives of the Crown on the one part, and the representatives of the company on the other part, that the company should utilize the property owned by them not expropriated, and that the Crown with the object of reinstating the defendants upon lands sufficient for the operation of their business should convey to the company a certain piece of land the property of the Crown forming part of what is known as the old lumber yard in the City of Halifax, and should also procure a further piece of land on the west side of Water Street, these two parcels of land being contiguous to the lands of the company not expropriated, the three parcels containing the square feet shewn in the memorandum annexed.

The information was filed on March 29, 1915, and the statement in defence on July 14, 1915.

On August 14, 1917, and shortly previous to the trial, an agreement was arrived at, as follows:—

1. It is agreed between the parties that all items of compensation at issue in this action are settled as follows, subject only to determination by the court of the matters provided for in pars. 3 and 4 hereof, and that His Majesty the King shall pay to the defendant, the Halifax Electric Tramway Co., Ltd., the following sums, viz.: (*a*) As the value of all the buildings upon the lands described in par. 3, sub-ss. 4, 5, 6, 7, 8, 9, 10, 11*a*, 11*b* of the information the sum of $17,500; (*b*) As the value of the car barn, storage shed and buildings upon the lands described in par. 3, sub-s. 12, of the information the sum of $20,000; (*c*) As the value of the gas plant, consisting of coal and coke handling plant, retort benches, carburreted water gas set, scrubber, condenser, gas blowers, annular condenser, exhausters, tar extractor, washer, scrubber, purifiers, oil tanks, stationmeters, pipes and valves in yard, steam and feed pipe, etc., described in par. 4, sub-s. "A," of the information, the sum of $152,460; (*d*) For the cost of removal of auxiliary machinery, the sum of $500; (*e*) As the value of the gas plant buildings, consisting of meter repair shop,

wagon shed and storeroom, blacksmith shop, oxide shed, boat house, coal store, drip and valve houses attached to large and small holders, retort house, purifying house, exhaust and scrubber house, condenser house, meter house, oxide building, chimney and fences, described in par. 4, sub-s. "B," of the information, the sum of $82,145; (*f*) For expropriation of tracks, Pleasant St. to Point Pleasant Park, the track extending south from Morris St. to car barn or storage shed, including tracks in shed and yard, described in par. 4, sub-s. "C," of the information, the sum of $23,695; (*g*) As compensaton for increased cost of operation of new tracks, the sum of $7,750; (*h*) For cost of increased track and overhead construction, the sum of $13,835; (*i*) For cost of connecting new gas plant with gas main, not included in tender, $6,867.25; (*j*) For cost of additional expenses to tram company in carting coal pending completion of new premises, not included in tender, $1,500; (*k*) For gas plant machinery, not included in tender, consisting of that part of the boat house equipment, blacksmith shop and testing laboratory not removed by defendant and expense in removing part taken away $2,500; (*l*) The value of the wharf structure on the lands and lands covered with water, described in par. 3, sub-ss. 1 and 2*b*, of the information $5,000; Total $335,752.25.

2. The defendant, the Halifax Electric Tramway Co., Ltd., admits having received from His Majesty the King the sum of $250,000 on account of compensation payable herein, as follows, viz.: On December 21, 1915, the sum of $100,000; On March 15, 1916, the sum of $50,000; On May 31, 1916, the sum of $50,000; On November 28, 1916, the sum of $50,000; Total $250,000.

3. The following matters referred to in the information are to be tried and the amount of compensation to be paid by the Crown determined by the Exchequer Court, subject to the rights of appeal by either party, viz.: (*a*) The value of all the lands and lands covered with water of the defendant (exclusive of buildings and fixtures and of the wharf structure) expropriated by the plaintiff under the provisions of the Expropriation Act, c. 143, R.S.C. 1906. (*b*) The compensation indemnity and relief, if any is allowed by the court, to which the defendant may be entitled under par. 2, sub-par. "K," of the defence herein. 4. (1) The parties also agree that the value to the defendant of the lands on the west side of Lower Water St. and south side of Fawson St. in the City of Halifax, described in a certain undertaking given by His Majesty to the defendant, the Halifax Electric Tramway Co., Ltd., on December 22, 1916, whereby His Majesty undertook within a reasonable time after the questions at issue herein are finally determined to convey or cause to be conveyed the said lands to the said defendant, the Halifax Electric Tramway Co., Ltd., shall be determined and disposed of in this action, and that the amount for which His Majesty is to receive credit by reason of providing and conveying said lands to the defendant, the Halifax Electric Tramway Co., Ltd., is to be finally settled and determined herein, subject to the rights of appeal by either party. Proceedings to be amended accordingly. (2) Nothing herein contained shall prejudice any claim which the defendant, the Halifax Electric Tramway Co., Ltd., may have for compensation for the value and cost of demolition of the two car barns on the east side of Water St., property of defendant, to enable the said defendant to use land offered by government for its gas plant, which claim for compensation, if any, is also to be adjudged in this action.

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Sub-s. "B" of par. 3 of the agreement need not be considered, as it refers to the defence, as previously indicated, withdrawn from my consideration. I think the agreement in question shews an extremely liberal offer on the part of the Crown. It is practically recouping the defendants the full value of the plant, and also compensating them; and paying them other sums, such, for instance, as compensation for increased cost of operation of the new tracks, the cost of increased track and overhead construction, etc.

The effect of this agreement is that all matters in controversy between the parties have been agreed upon, with the exception of clause 3 of the agreement, namely, the value of all the lands and lands covered with water of the defendants exclusively of buildings and fixtures.

And secondly, what is covered by cl. 4 of the agreement, that is the value to the defendants of the lands procured by the Crown and agreed to be conveyed to the defendants, to which I have referred.

It will be noticed that there is a difference in regard to the basis for ascertaining the value of the lands which have been expropriated, and the basis upon which the lands procured by the Crown and conveyed to the defendants. In the former case the value of the lands expropriated is to be ascertained, and it has been pressed with force by counsel for the defendant that that value is the value to the defendants to be ascertained according to the principles settled by such cases as *Corrie* v. *MacDermott*, [1914] A.C. 1056; *Cedars Rapids* v. *Lacoste*, 16 D.L.R. 168, [1914] A.C. 569; *Pastoral Finance* v. *The Minister*, [1914] A.C. 1083; *Lake Erie* v. *Schooley*, 30 D.L.R. 289, 53 Can. S.C.R. 416; and I may refer to a very important case not reported in the regular reports, but to be found reported in full in Hudson on Compensation (1905), *Metropolitan & District Railway Co.* v. *Burrow*.

Later on when I discuss the value of the lands expropriated I will deal with this contention of the defendants.

In ascertaining the value of the lands agreed to be conveyed to the defendants by the Crown the value to be ascertained is not the value to the grantors, but it is the value to the company. For instance, a portion of these lands was at the time the Crown procured them covered with buildings. These buildings were

of no value to the defendants. They necessarily had to be torn down, and the only offset the Crown is entitled to would be an offset for the value to these defendants for the purposes of their new works. I will have to give my views later on when dealing with the value of these lands.

The Crown, it will be noticed by the agreement which I have cited in full, has at various times advanced sums of money to the defendants, amounting in all to the sum of $250,000.

The defendant taking advantage of the large sums of money agreed to be paid by the Crown, set to work to rebuild their plant, and with a much larger and more efficient plant upon the new site, the Crown in the meantime allowing them to remain in occupation of their old premises so as not to have their business interfered with.

In the report of the president and directors of the Halifax Electric Tramway Co., Limited, for the year ending December 31, 1915, the directors report as follows:—

> Considerable sums have been expended during the year on capital account in order that the company would be in a position to meet the growing demand upon its services. The principal items of expenditure under this heading are new cars, and electrical equipments for the same, extensions of electric lighting system, gas mains, and additions to repair shop building. Work has been started on the construction of the new gas plant to replace the old plant which has been expropriated by the Dominion government. *Upon the completion of this work the company will have the most modern and economical plant obtainable.*

An analysis of the schedules shewing the increased earnings from years 1904 to 1915, shews a steady increase in the volume of their business. The report for the year 1916 might also be referred to as shewing an increase in the business for the year 1916 over that of 1915, and no disruption of their business caused by the movement to the new premises.

The first question that I am called upon to determine is the market value of the lands expropriated by the Crown. I will deal subsequently with the claim put forward on behalf of the defendants' counsel for the added value, namely, the special value to the defendants over and above the market value by reason of the lands expropriated having a greater value to the defendants than the lands upon which they have been reinstated.

The only evidence called on behalf of the defendants was the evidence of Henry Roper. He is called not as an expert in land

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values. At the opening of his evidence, Mr. Lovett states as follows:—

I am examining Roper, my Lord, as to the estimates on the buildings. Perhaps his qualifications will be admitted?" Counsel for the Crown stated "Certainly."

If it were necessary to qualify Roper as an expert on land values, no evidence of his qualification as such has been given.

During the progress of his evidence, having testified to the value of the buildings, he is asked as follows:—

Q. Assuming that those building were on that property (referring to the property expropriated) with no machinery in them, and with no business carried on there, with no equipment in them, what would you say would be the fair market value in 1913 of that property? A. As a water site property? Q. Yes. A. Including the wharf? Q. The whole of the land, land covered with water, wharves, and buildings empty? A. Including the wharves? Q. Yes. A. 75 cents a foot. Q. Including the buildings as well, without any equipment in them? A. I would say the land was worth about 75 cents per foot, and those buildings $60,000.

I called Mr. Lovett's attention in the following way:—

HIS LORDSHIP:—Supposing before it comes to a conclusion that the market value is the only thing that is open in regard to your lands, I don't think you gave any evidence in regard to that.

Mr. Lovett:—Our evidence is in, as far as we intend to give any evidence in that respect.

Dealing with the market value of the lands expropriated apart from the special claim put forward on the part of the defendants, I am of opinion that the values placed upon it by Clark and his associates is the full value, and also a very liberal value.

Mr. Clark places a value on a portion of the lands of 50 cents per sq. ft. for the land, and 30 cents per sq. ft. for that portion covered with water.

Mr. Lovett apparently was himself impressed with the liberality of his valuation, as when I mentioned it, the following will be found reported in the evidence: (His Lordship is referring to Clark.)

HIS LORDSHIP:—His whole evidence is given as to the value of the land. The 50 and the 30 are for the land without the buildings.

Mr. Lovett:—A good market price, my Lord.

HIS LORDSHIP:—That is what the Crown offered?

Mr. Lovett:—Yes, my Lord.

The property referred to in the evidence is immediately adjoining the property that was in question before the court in the case of *The King* v. *Wilson*, 22 D.L.R. 585, 15 Can. Ex. 283.

These values were allowed in that particular case, and on appeal to the Supreme Court of Canada this case was affirmed.

I think Clark and his associates have, as I have stated, made a liberal offer. The perusal of his evidence would indicate that he and his associates valued the land as if there was a business being carried on upon it. As to the value of the other lands expropriated, I accept Clark's valuation, and will deal later with any special claim.

If the sum allowed by Clark and his associates, namely, $73,271, as shewn by the attached memorandum, is allowed, I think that would compensate the defendants amply for the value of the lands expropriated based upon market value.

The next question arises as to the value to the defendants of the lands agreed to be conveyed to the defendants. The agreement in question reads:—

> that the value to the defendants . . . shall be determined and disposed of in this action, and that the amount for which His Majesty is to receive credit by reason of providing and conveying said lands to the defendants is to be finally settled and determined herein, etc.

I will deal first with the lands on the west side of Water St. These lands embrace an area of 39,180 sq. ft., and upon them were erected buildings. Clark, in his evidence, states that he paid for these lands the sum of $65,750 for the whole block. He stated, however, that the government were held up and that the fair market value for these particular lands would be $45,000. That includes all the property on the west side of Water St. He is asked by Mr. Rogers, counsel for the Crown:—

> Q. Making due allowance for the value of the buildings, in accordance with your opinion and judgment, what would the value of the land be? A. I valued the buildings at about $25,000.
>
> Q. What would the square foot value of the land be without the buildings? A. About 50 cents, roughly speaking.
>
> HIS LORDSHIP:—About $20,000? A. About $20,000 for 39,180 feet of land.
>
> *Mr. Rogers*:—On the basis of $45,000? A. On the basis of $45,000.

This land was being acquired by the defendants for the purpose of reinstatement; and as I have pointed out they are to be charged with the value of the land to them. It is manifest that the buildings were of no use and would have to be demolished.

I think, therefore, that under the terms of the agreement set out, which is a reinstatement agreement, the Crown should at the

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outside receive credit for the value of the land at the sum of $20,000, less, however, certain deductions that will have to be made on account of placing the land in shape for the purposes of the defendants' business. There is not much contest in regard to these items:—

Net cost of demolishing old buildings, excavating to street level and filling in cellars, $8,268.03; The retaining wall on Morris St., which would appear to be essential, $637.58; Cost of completion, cutting off slope and grading portion of street level, $2,500; Demolishing remaining building, $75; Estimated cost of retaining wall on west boundary corner-lot and protecting adjoining building, $2,206 = $13,686.61.

I do not think the estimated cost of retaining wall along the west boundary of the property should be allowed. This wall is not built and most likely never will be built.

The above items amount to $13,686.61. I think on the evidence it is shewn that this expenditure is required in order to place the defendants in the same position in regard to the lands as they were before the expropriation.

It would leave to the Crown an offset in respect to this property of only the sum of $6,313.39, a very small amount compared to the $65,000 paid for this particular piece of land.

The area of the land agreed to be conveyed by the Crown and forming part of the old lumber yard is as stated, 37,900 sq. ft.—land 20,100 sq. ft. and land covered by water 17,800 sq. ft. This land is valued by Clark at the sum of $15,390, viz., 50 cents a sq. ft. for land and 30 cents per sq. ft. for land covered by water. From this amount there should be deducted:—1. Cost of removal of cable huts, $100; (2) Expense caused by retention of cables and cable huts while work was going on, $500; Expense caused by removal of store-house and contents after original location was fixed by government engineer, $200; (3) Excavation grading to level of street and filling in lower portion to water front level, $2,362.48; (4) Construction of concrete retaining wall across centre of car barn and on property between car barn and gas works to separate high and low levels, $3,328; (5) Piling work for car barn, $2,037.75; (6) Constructing coffer-dam, $1,160; Excavating to rock foundation and building reinforced concrete foundation wall, $2,064; (7) Concrete piers built for car barn column supports, $1,060; (8) Cost of excess amount of concrete used in car barn wall foundation due to physical defects of site, details drawing 134C, $1,536 = $14,348.23

Rogers, counsel for the Crown, stated that with reference to the items in ex. 16, on p. 7 of the evidence, numbered 1 to 8, aggregating $14,348.23, as to expenditures with reference to the lumber yard property, the Crown is satisfied that the estimates made in respect thereof are not excessive.

This would leave an offset of $14,348.23 which, deducted from the value of the lands, would leave the sum of $1,041.77. Deducting these two items of $6,313.39 and $1,041.77, in all $7,355.16, from the value of the lands expropriated, $73,271, there would be due the defendants the sum of $65,915.84 for the lands.

I come now to deal with the claims put forward by counsel for the defendants. Apparently they are not satisfied with the liberal treatment accorded to them by the representatives of the Crown—having got so much they desire to get more. They allege that the lands expropriated are better adapted for the erection of their new plant and that a saving of over $100,000 would be gained had they erected their plant on their property expropriated instead of on the new site.

A further ground is put forward on the part of the defendants that the cost of operation of the business of the company on the new site as compared with what the cost would be had the new plant been erected on the old premises would amount to $7,900 a year, and they ask that this amount should be capitalized and a further sum in the neighbourhood of $160,000 be added to their claim. This method of arriving at the sums is dangerously in line with the method condemned in the case of the *Pastoral Finance* v. *The Minister*, [1914] A.C. 1083; and the *Lake Erie & Northern R. Co.* v. *Schooley*, 53 Can. S.C.R. 416, 30 D.L.R. 289.

Both of these claims, namely, the claim for the alleged additional value of the old site as compared with the new site, in regard to the increased cost of the erections and also the increased cost of operation, is to my mind of a very imaginative character.

Mr. Malison is the managing director of the tram company and gives evidence. It would appear that the business was stopped on the old site in April, 1917. His evidence in chief shews what took place between himself and Gutelius. The defendants were to get from the Crown, lands sufficiently wide to serve the purposes of the company.

Portions of his evidence explain the situation and capacity of

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the plant, etc., on the new premises as compared with the old premises. It must also be borne in mind that the Crown has paid the full value of the old plant, which has been in steady use a long number of years and that by the assistance of the Crown they have what is an up-to-date plant. Necessarily a considerable sum of money would have to be advanced by the company for the purpose of obtaining a much better result from the new plant on the present site than of a plant similar to that situate on the old property.

A considerable amount of evidence was given in regard to the probable future of Halifax. One prominent witness seemed to figure on a growth to a population of 150,000. It has been a city for a great number of years with the present population of under 50,000, and I think it would strain the credulity of a judge to figure on any basis of this character. If such an event did occur, there is no trouble in building another gas holder, the site for which was marked out on the plan of the property west of Water St., and there will be no difficulty in doubling the capacity of each of these gas holders—and there will be ample for the supply for a community even far in excess of what these imaginative gentlemen look forward to. So with regard to car barns. There is ample room for any addition,—and if the population of Halifax ever did increase to a very large extent, it will be proper practice, as admitted by Malison on his re-examination, towards the end of the evidence, to place car barns in different portions of the city, a practice in vogue in all other cities.

In the case of *Corrie* v. *MacDermott*, [1914] A.C. 1056, which I have referred to, the defendants desired to construe the words "the value of the land to them" as if they read the unrestricted value—and their Lordships held that was the incorrect way of viewing the case, and that they were only entitled to the value of their interest in the lands, and there is language in that case which would indicate that an agreement should be construed by reference to the law governing ordinary cases of expropriation. I think the case before me is of an entirely different character. It seems to me to allow any such claim as put forward on the part of the defendants would be doing violence to the whole intention of the parties. I think they have entered into an agreement which provided for a complete reinstatement of the defendants, and

having regard to all the circumstances of the case this is the view that I entertain.

There will be judgment for the defendants for the sum of $401,668.09, from which will be deducted the sums referred to in the agreement advanced by the Crown. The defendants have had occupation of their former premises, and have been carrying on, as I have stated, their business as usual until April of 1917. They should be allowed interest on the balance of $151,668.09 from that time until judgment. The defendants are entitled to their costs of the action. *Judgment accordingly.*

COX v. COX.

Alberta Supreme Court, Hyndman, J., May 7, 1918.

DOMICIL (§ 1—1)—CONFLICT OF LAWS—FOREIGN DIVORCE—FRAUD—NO BONA FIDE DOMICIL—RECOGNITION IN CANADA.

An absolute decree of divorce granted by a foreign court, confessedly obtained on an untrue statement of facts, and for a cause not recognised by Canadian law, to one who had at the time no bona fide domicile in the foreign state, is not effectual in Canada.

ACTION for a declaratory judgment that the marriage contract entered into between plaintiff and defendant was null and void. Judgment for plaintiff. Statement.

H. W. Maclean, for plaintiff; *R. C. Burns*, for defendant.

HYNDMAN, J.:—The material facts of the case are, that the parties hereto went through a form of ceremony of marriage on June 9, 1915, before the Rev. J. F. Hunter, a clergyman at Blairmore, Alberta, the defendant giving her name at the time of such ceremony as Frances Ethel Bell. Hyndman, J.

The defendant was born in England and is 39 years of age. In the year 1897 she was lawfully married to one Herbert Edwin Bell, in London, England, England being the home of both parties.

In 1903, Bell and the defendant, as man and wife, immigrated to the Province of Saskatchewan and lived together there until the year 1906. In the month of March of that year a disagreement arose between them and Bell left his wife, went to England, and later on to Minneapolis, in the State of Minnesota, U.S.A., and afterwards returned to Canada, and for a time, at least, resided in the City of Calgary, and has never since cohabited with the defendant, and since the year 1906, when Bell left the defendant,

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she has not resided at any time in the State of Minnesota or any other part of the United States, but has resided only in various parts of Alberta and Saskatchewan. There is no evidence of the exact length of time which Bell spent in England, Minnesota or Canada since their separation, and it is impossible on the evidence to say whether or not the State of Minnesota was for any length of time his *bonâ fide* domicile. The only evidence that Bell established his domicile in Minnesota, in addition to the allegations in the divorce proceedings themselves, was a letter from him, dated at Minneapolis, to his infant daughter, but I do not regard this letter as at all sufficiently establishing a change of domicile from Canada or England to Minneapolis.

On December 19, 1908, said Bell caused to be issued a complaint out of the District Court, 4th Judicial District, County of Hennepin, State of Minnesota, against the defendant praying for a divorce and alleging amongst other things:—1. That plaintiff and defendant intermarried at London, England, October 6, 1897, which said marriage has not been dissolved. 2. That plaintiff now does and for more than 1 year last past has resided in the County of Hennepin and the State of Minnesota. 3. That the plaintiff is 31 years of age and the defendant is 31 years of age. 4. That there is one child living, Myrtle Ethel, aged 9, the issue of said marriage. 5. That ever since said marriage plaintiff had demeaned himself toward said defendant as a true and faithful husband. 6. That the defendant disregarding her duties as a wife, on or about December 7, 1906, wilfully and without just cause deserted plaintiff and for more than 1 year past, has been wilfully absent from him without a reasonable or just cause.

Wherefore plaintiff prays that he may be divorced from said defendant and that he have such other and further relief as to the court shall seem just and equitable.

On June 8, 1909, the defendant filed an answer to the said complaint as follows:—

ANSWER.

Now comes the defendant and for her answer to the complaint herein:—Denies each and every allegation, matter and thing in the said complaint contained except as it is hereinafter admitted or qualified. Admits that the plaintiff and defendant intermarried at London, England, on October 6, 1897, and that said marriage

has not been dissolved. Admits that the plaintiff and defendant are each 31 years of age. Admits that there is one child living, Myrtle Ethel, aged nine (9) years, the issue of said marriage.

Wherefore, defendant prays that the complaint of the plaintiff herein be dismissed.

A trial took place at Minneapolis on April 5, 1909, of which the defendant was duly notified, but did not appear in person nor by attorney, and judgment was rendered granting an absolute decree of divorce, the principal ground being "that the defendant did, on or before the 7th day of December, 1906, and without fault on the part of the plaintiff, wilfully desert plaintiff, and that during all of the time since said December 7th, 1906, defendant has been wilfully absent from plaintiff without reasonable or just cause."

"AS CONCLUSIONS OF LAW."

The court finds that the plaintiff is entitled to an absolute divorce from the defendant, that the bonds of matrimony heretofore existing between the plaintiff, Herbert Edwin Bell, and the defendant, Frances Ethel Bell, be, and the same are, hereby dissolved; and that said parties are hereby absolutely divorced from each other.

Let judgment be entered accordingly.

Subsequently thereto, as above stated, on June 9, 1915, the plaintiff and defendant went through a form of marriage before the said Rev. J. F. Hunter. They had known each other for about 2 months previously. The plaintiff was aware that the defendant had been married and was divorced in the United States and, at the time, I am satisfied thought such divorce was legal.

Almost immediately after the ceremony doubts arose in the minds of the parties as to the validity of the divorce and, about 1 week afterwards, the defendant left the plaintiff and they have never since lived together. It has been proved to my satisfaction that, at the time of the second alleged marriage, defendant's husband, Bell, was living. There are then two questions for determination, namely:—(1) Whether when the second marriage was entered into, the plaintiff and defendant had the capacity to contract marriage, that is, was the divorce relied on valid and such as to enable the defendant to contract a valid marriage which in the absence of such divorce she could not have done, and (2) Has the court the jurisdiction to make a declaratory judgment to the effect that the marriage between the parties hereto was null and void.

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It is clear that, under the circumstances, Bell could obtain a divorce in Canada only by Act of Parliament, and then only in case he successfully established adultery on the part of his wife. There would be no possibility of Bell obtaining a divorce on the ground of desertion only in Canada, either in parliament or in any of the provinces with courts having jurisdiction in divorce.

The courts in England have surrendered the theory once held that no English marriage could be dissolved by a foreign divorce. (See *Lolley's* case and *McCarthy* v. *De Caix*, in note to *Warrender* v. *Warrender* (1835), 2 Cl. & F. 488, at 567, 568) and it is now admitted that, where the parties to such a marriage are bonâ fide domiciled in a foreign country, the tribunals of that country have jurisdiction to pronounce divorce which will be held valid. But they are not bound by any principle of international law to recognize as effectual the decree of a foreign court divorcing spouses who at its date had their domicile in England. (*The King* v. *Woods*, 7 Can. Cr. Cas. 226, at 228, 229.)

In *Wilson* v. *Wilson* (1872), L.R. 2 P. & D. 435, 442, Lord Penzance said:—

It is both just and reasonable, therefore, that the differences of married people should be adjusted in accordance with the laws of the community to which they belong, and dealt with by the tribunals which alone can administer those laws. An honest adherence to this principle, moreover, will preclude the scandal which arises when a man and a woman are held to be man and wife in one country and strangers in another.

And this view was concurred in by the Judicial Committee of the Privy Council in *LeMesurier* v. *LeMesurier*, [1895] A.C. 517.

The principal cause assigned by Bell in his suit for divorce was desertion by his wife. It appears to me to have been the very reverse. The evidence establishes that Bell left (deserted) his wife and certainly it cannot be gathered that she deserted him.

The facts in this respect are very similar to *Magurn* v. *Magurn*, 11 A.R. (Ont.) 178. Hagarty, C.J.O., at 180, says:—

The cause assigned was desertion by the wife. No such desertion as a court could recognize had taken place. The whole proceeding was a contrivance of defendant to impose upon the court, a method to obtain a colourable release from a distasteful union. . . .

We have thus a decree for divorce confessedly obtained on an untrue statement of facts, and for a cause not recognized by our law, urged as a bar to enforcing the claim of a wife against her husband.

In the case at bar, I am of the opinion that the husband Bell had no *bonâ fide* domicile in the State of Minnesota, but that his short residence there was merely for the purpose of enabling him to take the action he did, in order to obtain a decree of divorce in the courts of that State.

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Such being the case, it seems to me clear that the judgment so obtained granting him an absolute decree of divorce cannot be regarded as effectual in this province.

The question, then, remaining for decision is whether or not this court has jurisdiction to pronounce a declaratory judgment to the effect that the alleged marriage in Alberta is null and void. There is no question of course but that our provincial court has no jurisdiction to grant a divorce or to dissolve a marriage on any ground, that being (up to the present at any rate) regarded as exclusively within the jurisdiction of the Parliament of Canada, but it seems to me that this is not a case which should be considered as strictly falling under the head of marriage and divorce. This court, over and over again, indirectly at least, declares whether or not marriage ceremonies are effectual, for instance in a prosecution for bigamy. Under circumstances such as here, the court will find whether or not a person accused of bigamy is or is not guilty. That surely must depend on whether a certain form or ceremony of marriage was valid or null and void. Also, in an action where two alleged widows claim the property of a deceased person. In such a case it is necessary for the court to decide which is the rightful claimant, consequently, involving consideration and determination as to which marriage ceremony was valid. Furthermore, our Rules of Court contemplate an action of this kind as being within the jurisdiction of the court otherwise there is no necessity for r. 159, which is as follows:—

> Notwithstanding anything contained in the next preceding two rules, no order for final judgment of nullity of marriage shall be made whether or not there is default in defence, until the judge is satisfied of the truth and sufficiency of the facts on which the claim for such judgment is founded.

Why should not the court do directly, what it may do indirectly?

The act of declaring a certain form or ceremony of marriage null and void to my mind is an entirely different thing from a judgment dissolving a marriage. An application to dissolve a marriage is necessarily made on the assumption that a valid marriage had taken place, which is quite different from the case here.

This same point was raised in the case of *Hardie* v. *Hardie*, 7 Terr. L.R. 13, the facts being practically similar. Wetmore, J., says:—

> This is an action brought by the plaintiff against the defendant for a judgment declaring the marriage between him and her to be null and void on

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the ground that the defendant had before such marriage been married to another person and that such person was alive at the time of such marriage to the plaintiff.

It is not stated in the judgment whether or not an alleged divorce was obtained as in this case, but if I come to the conclusion that the divorce in question was invalid it seems to me that the two cases ought to be considered as on the same basis. At p. 14, Wetmore, J., goes on to say:—

> There is no doubt that if the facts set out by the plaintiff in his statement of claim are true the marriage was not merely voidable but it was null and void from the beginning, and that being so, I am of the opinion that this court has as much authority to declare such marriage null and void as it would have to declare one null and void by reason of fraud or by reason of such other absence of some essential preliminary. This judgment is not at all at variance with the one I gave in *Harris* v. *Harris*, 3 Terr. L.R. 289, on January 25, 1895. That judgment went on an entirely different ground. And I do not decide that this court has jurisdiction to dissolve a valid marriage or declare a voidable marriage void or to decree a judicial separation. I merely decide that it has power to make a judgment declaring a marriage void which was void *ab initio*.

In my opinion, there was no valid decree of divorce of the said defendant Herbert Edwin Bell and their marriage contract in London, England, is still undissolved. If such be the case, then it follows as a matter of course that no other valid or binding marriage can be entered into by either Bell or his wife such as can be recognized in this country, and any form of ceremony of marriage the parties might go through with would result not in a voidable marriage, but one absolutely void *ab initio*.

In my opinion, this is a very different situation from one, for instance, where the parties, though competent to marry, fail to comply with some requirement imposed by provincial legislation, such as age or consent of parent, or where there was fraud or duress practised. There, perhaps, a voidable marriage is contracted and would stand until dissolved and it is quite distinguishable from a case such as this where one of the parties is already married and therefore leaves nothing to be dissolved. Divorce assumes the previous existence of a marriage status. In *A.* v. *B.* (1868), L.R. 1 P. & D., 559, at 561, Sir J. P. Wilde says:—"The distinction between 'void' and 'voidable' is not a mere refinement, but expresses a real difference in substance." In the case of *Hardie* v. *Hardie* (*supra*), Wetmore, J., continues:—

> As to the second point of law raised (that the plaintiff alleged the marriage to be an illegal marriage and one prohibited and a nullity by statute and there-

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fore no action lies whatever). . . . The contention is that because the plaintiff's statement of claim alleges facts which if true rendered the marriage void he cannot bring this action.

The answer to it is to be found in the statement of defence wherein the defendant denies a most material statement of fact in the claim, and alleges that the person alleged to be her first husband was not alive when the marriage was contracted between her and the plaintiff. If effect were given to such a contention a person could never get authoritative relief from a bigamous marriage, and if he desired to contract another marriage would have to do so at the possible risk of being prosecuted for bigamy.

It seems to me that the reasoning of Wetmore, J., in the case referred to is sound, and I think should be followed in this case.

There will, therefore, be judgment for the plaintiff as prayed for, viz., that the marriage contract between the plaintiff and the defendant on June 9, 1915, be declared to be null and void.

I think it is a proper case in which there should be no costs.

Judgment accordingly.

CITY OF CALGARY v. CANADIAN WESTERN NATURAL GAS Co.

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Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Idington, Duff and Anglin, JJ. November 28, 1917.

MUNICIPAL CORPORATIONS (§ II F—174)—GAS FRANCHISES—EXCLUSIVE GRANT—TERRITORIAL LIMIT.

Agreements for supplying gas "throughout" a city, and regulating the prices chargeable to the "inhabitants of the city," are not limited to the city as it was when the agreements were entered into, but are applicable to all extensions of the city subsequently made; a reference in the agreement to the exclusive rights and privileges granted and a provision that "the city shall not grant similar privileges to any person, firm or corporation" are not exclusive as against the city itself.

Statement.

APPEAL from the judgment of the Appellate Division of the Supreme Court of Alberta, 33 D.L.R. 385, 10 A.L.R. 180, reversing in part the judgment of Ives, J., at the trial, 25 D.L.R. 807.

The respondent is the assignee of a certain agreement dated August 14, 1905, between the appellant and one Dingman, entered into by authority of a city by-law duly submitted to a vote of the ratepayers, and passed by the council. At that date, the area comprised within the municipal boundaries of the city appellant was approximately 1,800 acres. These boundaries were extended from time to time by Acts of the Legislature, and, at the date of the institution of the present action, the city area had been increased to approximately 25,000 acres. One clause of the agreement contained the following words:—

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that the exclusive right and privileges hereby granted to the said company shall continue subject to the terms and conditions herein expressed . . . and the said city shall not . . . grant to any person, firm or corporation the right to construct or lay mains or pipes or connections on, in or through the streets of the said city for the supply of natural gas . . .

The contention of the company respondent was that the franchise, rights and privileges conferred under the agreement extended to the new territory added since the date of the agreement, and that the said franchise, rights and principles were exclusive as against the city.

The trial judge found against the company respondent on both grounds, and maintained the action of the city appellant. But on appeal to the Appellate Division of the Supreme Court of Alberta, the appeal was allowed in part, the court reversing the judgment of the trial court on the first ground, and maintaining it on the second ground. Both parties appealed to the Supreme Court of Canada.

Lafleur, K.C., and *C. J. Ford*, for appellant; *Sinclair*, for respondent, Canadian Western Natural Gas Co.; *Anglin*, K.C., for respondent, The British Empire Trust Co.

Fitzpatrick, C.J.

FITZPATRICK, C.J.:—As to the first question on which a declaration is sought, viz.: whether or not the respondents' franchise, rights and privileges are limited to and do not extend beyond the area of the city as shewn on the plans filed in the Land Titles Office on August 14, 1905, the judge, who tried the action, gave judgment for the appellant, because he thought the question precluded by the authority of the decision of the Privy Council in *City of Toronto* v. *Toronto Railway Co.*, [1907] A.C. 315. That decision was upon the particular contract which the court was asked to construe, and I do not think it attempted to lay down any principle which could govern in the present case.

The agreement under consideration in that case, provided for a right to the city to require the company to lay street railway tracks on streets to be designated by the city. It was a question not of a right granted to the company, but an obligation imposed upon it. That this feature of the nature of the subject matter of the contract in dispute was what mainly motived the judgment of the Privy Council is clear. Beyond saying that their Lordships agreed with the reasons for judgment of the majority of the judges of the Supreme Court of Canada it was only added that

the injustice involved in the contrary view, which would enable the corporation to compel the railway company to extend their lines at an indefinite expense, and for indefinite distances where the maximum fare chargeable for any distance is five cents seems to their Lordships insuperable.

I have gone through, and very carefully considered all the cases between the corporation and the company which are referred to in the judgment of Harvey, C.J., but I am unable to appreciate the difficulty he finds in reconciling them. In my opinion nothing is gained by any attempted comparison between them.

I do not underrate the weight of Stuart J's. argument when he says:—

> Even without precedent or authority I should have come to the conclusion that Dingman did not by virtue of his original contract enter into any obligation to supply gas outside of the original limits of the city and that therefore as a necessary corollary they acquired no right to do so by virtue of the mere original contract itself.

I cannot, however, agree that this is a necessary corollary. It may be a question in view of the provision of clause 18 how far the obligation extends but nothing is to be gained by a consideration of that here.

I think the grant in this case is of a right within the limits of the city as now determined.

As regards the second question, whether or not the franchise, rights and privileges granted to the defendant are exclusive as against the plaintiff, I was at first disposed to agree with the view taken by the majority of the judges in the Appellate Division, that they were not exclusive. But whilst I fully appreciate the force of the contention that the city has in terms only debarred itself from granting similar rights to any other person, firm or corporation than the defendant, I think we must again look to the whole of the contract for the purpose of ascertaining the extent of the rights thereby granted. It seems to me that, considering the circumstances in which the contract was entered into, and the whole tenor of the clauses referring to the exclusive rights, intended to be granted to the company, it is impossible to suppose that either party contemplated the reservation to the city of a right of entering into competition with the company whilst undertaking to grant to it an exclusive privilege as against all others. The competition by the city might well be more powerful and injurious to the rights of the company than that of any private commercial body. On this point, therefore, I agree with the conclusion of Beck, J., in the Appellate Division.

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The appeal should be dismissed and the cross-appeal should be allowed to the extent that it asks that the judgment appealed from should be varied in so far as it affirms the judgment of Ives, J., that the provisions of the statute of the Province of Alberta, being c. 64 of 1911-12, and the by-laws and agreements therein referred to, do not exclude the plaintiff from itself exercising within the area included in the City of Calgary on the said August 14, 1905, rights, powers and privileges similar to those by the provisions of the said statute, by-laws and agreements vested in the said defendants, by reversing the said judgment, and the judgment of Ives, J., to the extent aforesaid.

Davies, J.

DAVIES, J. (dissenting):—The defendant respondent company is the assignee of an agreement made between the City of Calgary and one Dingman, under the authority of a by-law duly passed and approved by the ratepayers, dated August 14, 1905. This action was brought by the city to obtain declarations: First, that the rights and privileges granted by the city under this Dingman agreement did not extend to the several extensions of the city boundaries which were made after the agreement was entered into, but was confined to the area of the city within the municipal boundaries at the date the agreement was entered into, and, secondly, that such rights and privileges were not exclusive as against the city itself but only as against grantees of the city.

The trial judge decided both points in favour of the city.

From his judgment an appeal was taken to the Supreme Court of Alberta, which reversed the decision of the trial judge on the first question, and held that the franchise (so called), granted to Dingman by the agreement of 1905, was not limited to the area of the City of Calgary as it existed at the date of the agreement, but extended to and covered the various extensions of the city's boundaries which were subsequently made. The appeal court confirmed the trial judge's finding as to the exclusive character of the franchise, and as to this there is a cross-appeal.

Two of the judges of the Appellate Division, Stuart and Scott, JJ., based their judgment that the Dingman franchise must be held to extend to the extensions of the city's area solely upon the construction placed by them upon an agreement made in January, 1911, between the city and the Calgary Natural Gas Co., Dingman's assignee, permitting the gas company to charge a higher

price for the gas they supplied than that fixed by the Dingman agreement.

These judges were of the opinion that certain words and phrases of that agreement refer to the city in a "territorial sense" and must be held to be so used with reference to the then existing conditions, at a time when the various extensions of the city's area had been made. Stuart, J., says:—

> Upon this narrow ground, as I have said with some hesitation on account of the extreme narrowness of it, I think the first question should be answered in favour of the defendant (33 D.L.R., at 408).

I mention this because I am quite in accord with the general reasoning of Stuart, J., as to the construction of the Dingman agreement when entered into in 1905, and the effect of the subsequent conduct and action of the officials of the city upon that agreement.

I am of opinion that the Dingman agreement of 1905, when entered into by the parties, had reference solely to the territorial area of the city as it then existed and that it was not then contemplated by either party to it that it should extend to and cover any extensions of that territorial area which might subsequently be made. I do not think the language of the agreement was ambiguous. The City of Calgary at the time that agreement was made had clearly defined territorial limits which must be held to have been known to all parties to the agreement.

I am also of the opinion that the subsequent action and conduct of the city officials cannot be held to have enlarged or extended the scope of such an agreement granting a franchise over the streets of the city, or bind the corporation on any ground of estoppel or acquiescence to such enlargement or extension.

I was a party to the judgment of this court in the appeal of *Toronto Railway Co.* v. *City of Toronto*, 37 Can. S.C.R. 430, in which appeal we decided that the right to determine, decide upon and direct the establishment of new lines of tracks and tramway service in the manner therein prescribed applied only within the territorial limit of the city as constituted at the date of the contract.

In that case there had been an agreement of sale and purchase between the Toronto City Corporation and the Toronto Railway Co., confirmed by an Act of the Ontario Legislature, under which

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the railway company acquired not merely the material of the railway undertaking in suit, but also, as was clearly provided, the exclusive right "to operate surface street railways in the City of Toronto" in the fullest possible way within the period of the agreement. On appeal to the Judicial Committee of the Privy Council, that learned Board held that on its true construction territorial additions to the city made during the term of the agreement were not within its scope.

In delivering the judgment of their Lordships, Lord Collins says, [1907] A.C., at p. 320.

> The reasons given in the judgments of Sedgewick and Idington, JJ., with whom Davies, J., concurred, seem to their Lordships so full and satisfactory as to make it unnecessary to say more than that they adopt and agree with them. The injustice involved in the contrary view, which would enable the corporation to compel the railway company to extend their lines at an indefinite expense, and for indefinite distances, where the maximum fare chargeable for any distance is 5 cents, seems to their Lordships insuperable. Their Lordships are of opinion, therefore, that on this point the corporation fails.

I confess myself quite unable to discover any difference in principle between that case and the present appeal.

It does seem to me that if parties seek for and obtain from a city corporation an exclusive franchise, right and privilege for many years over the streets of the city, and the granting of which franchise depends upon a majority vote of the municipal voters being first obtained, such franchise will not be construed as extending to territorial additions to the city made during the term of the franchise, even assuming the power of the city to make any such agreement with such possible extensions unless there are either express words shewing an intention that the franchise granted shall be so extended or other language used from which such an intention must fairly and reasonably be drawn.

Their Lordships in the quotation I have above made from their reasons for judgment in the *Toronto Corporation* v. *Toronto Railway*, *supra*, approving of the judgment of this court for the reasons given by it, point out that the holding of a contrary view to the one they gave effect to in that case involved an injustice to the railway company.

And so in the case before us, the construction of the Dingman franchise agreement contended for by the respondents might have resulted in grievous injustice to Dingman and his assignee.

We must put ourselves in the place of the parties at the time the agreement was entered into, and construe the agreement in the light of the facts and circumstances then known or ascertained by both parties. If the agreement is construed to cover extensions of the city then the benefits to and obligations of both parties must be reciprocally so extended.

It must be remembered that when the Dingman agreement was entered into the discovery of natural gas in enormous quantities such as was subsequently discovered had not been made.

The whole franchise to be granted is predicted in par. 4 of the agreement upon the finding by Dingman within a fixed period "of a sufficient and paying supply of natural gas which can be utilized in the said city."

The "said city" there referred to is no doubt the Calgary of that day covering an area of 1,800 acres with a population of about 12,500, as compared with its subsequent extension and enlargement to approximately 25,000 acres with a population of some 80,000 or 90,000.

What if Dingman, within the term fixed, had found a sufficient supply of gas for the city, as it was in area and population when he entered into his agreement, and had gone on under his franchise rights incurring large expenditures to carry out his contract? Could he with each rapid extension of the area and population of the city have been forced to supply gas to these extended areas, or, the quantity discovered not being sufficient, forfeit his charter or pay damages?

It seems hardly conceivable that, in the light of the knowledge then possessed, he so intended to bind himself or the city to bind itself with respect to further possible extensions of the area and population of the city. The obligations of the parties under the Dingman contract must be construed as mutual and reciprocal, and cannot be extended as far as one is concerned and confined as regards the other party.

The words in question, "the City of Calgary," were not ambiguous at the time the Dingman agreement was entered into. On the contrary, they, at that time, had a clear, definite, well understood meaning and only one. Subsequently, changes in the territorial area by the addition of new territory may have created conditions which, if they were to control in the construction of

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the agreement, might make the words ambiguous. But, in my judgment, these words must be construed and interpreted as they would have been the day after the agreement was entered into had any dispute as to their meaning then arisen. *Wallis* v. *Pratt*, [1911] A.C. 394; *North Eastern R. Co.* v. *Hastings*, [1900] A.C. 260.

If I am right in my construction of the agreement when made, then the question arises whether any subsequent action of the city or its officials operated to create such extension.

The agreement of January, 1911, on the language of which two of the judges of the Appellate Division held that the franchise agreement had been extended to the enlarged territorial area of the city, had for its sole object and purpose as recited in its preamble the change in the limitation on the price to be charged for gas supplied from not exceeding 25 cents per 1,000 feet for domestic purposes to 35 cents and from not exceeding 15 cents for power purposes to 20 cents. It was made in response to an application on behalf of Dingman for the increased price on the ground of increased costs incurred and to be incurred by him in his search for gas at further points from the city than any contemplated when he entered into the agreement and agreed to the maximum prices he could charge for the gas.

I am quite unable to understand how such an agreement as this, having one only object, namely, a change in the price chargeable for the gas supplied provided for in the original agreement of 1905, could be construed as operating to effect such an important and radical change as the extension of the latter agreement to areas and populations it did not originally extend to or contemplate. I not only think it, as called by the judge who depended upon it, a "narrow ground," but, with great respect, an unsafe and untenable one. No reference whatever is made to the area covered by the agreement, or to any extension of that area.

I have read with great care the several by-laws passed by the city after the agreement of August 14, 1905, was entered into, and which are relied upon together with other official or *quasi* official acts and conduct as operating to create an extension of the territorial area covered by the original scope of that agreement, but find myself unable to reach a conclusion that, taken together, they had that effect.

An agreement such as that of August, 1905, granting such a franchise as that agreement did on its streets, requiring as it did to make it binding on the city the safeguards provided of a by-law of the city council authorizing it and an approving vote by the ratepayers cannot, it seems to me, be altered and extended in such material ways as it is contended this agreement has been, except by equally solemn steps.

The ratepayers of the city approved of the by-law ratifying the original agreement, but there never was any by-law enacted, enlarging or extending the territorial area covered or any vote submitted to the ratepayers for that object.

After the agreement of 1905 was completed, there were many by-laws passed having reference to that agreement and altering and extending its minor terms. By-law 646 extended the time within which active drilling operations might commence to May 21, 1906. By-law 863 extended the time within which the company might demonstrate the character of gas fields contiguous to Calgary until August 14, 1910, and continued the exclusive term of the agreement for 15 years from August, 1905. By-law 1097 authorized further extended development works for six years from August 14, 1910, but confirmed and continued the agreement in other respects. By-law 1114, which I have already commented upon, permitted an increased price for gas to be charged. By-law 1212 gave the city's assent to certain assignments of the Dingman franchise and agreement.

None of these by-laws, in my opinion, affect the question of the territorial area over which the agreement extended, or attempted to enlarge or extend that area, and the question whether the original agreement extended to new territory added from time to time must depend upon the construction given to its language.

I have already expressed my opinion on that point to the effect that the agreement does not so extend, and I am of the opinion that the by-laws passed, the letters written by the mayor and the controllers, and the action taken by the engineer and other officers of the city, cannot alone or collectively operate to create that extension.

I agree with the contention of counsel that all the evidence as to acts and statements of officials of the city could not enlarge the

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franchise granted, and that it was quite incompetent for city officials or employees by negligence, laches, or personal acts and conduct to change the construction which the franchise agreement originally bore or to extend that franchise over a larger territorial area than it originally covered, by any negligent administration of the affairs of the city. I am unable to find any evidence that any plans as required by s. 5 of the agreement were ever furnished to or approved of by the city council with respect to these enlarged areas or that any action was ever taken by the council with respect to the extension of the operations under the franchise agreement into the new or added territory.

No plans seem to have been officially fyled with the clerk of the council, but certain plans (two) were left, it was stated by counsel, with the city commissioners and engineer. None, however, were approved by the council shewing that the company contemplated operating beyond or outside of the original city limits.

So far as the commissioners were concerned, their powers and duties seem to have been solely of an executive and administrative character, as defined by s. 182 of the city charter. Nothing in the prescribed powers and duties of these commissioners would enable them to extend the limited character of the franchise granted Dingman. As to these powers and duties see s. 16, c. 36, statutes of Alberta, 1908.

Nothing less than an act done by the corporation itself acting within its powers, under the authority of its municipal council, could extend the franchise of 1905 to the added territory. There is, of course, no pretence that such an act was done or attempted.

On the other branch of the case, I am of the opinion that the exclusive character of the franchise granted to Dingman is exclusive of any similar grant which otherwise might be made by the city to some other company or person, and not exclusive as against the city itself.

If exclusive as against the city it must be under the words in s. 9 "the city shall not grant to any person, firm or corporation the right to construct or lay mains, etc."

The words granting the franchise to Dingman do not contain the word "exclusive," but the term is used in a subsequent part of the agreement as the "exclusive rights and privileges hereby granted."

The terms of the grant itself are, "doth hereby grant to the said company full power, license and authority, etc."

I think the meaning of the term "exclusive" as used in the agreement may well be determined to be those rights which might be acquired by a grant from the city, and which the city agreed it would not during the period mentioned in s. 9 "grant to any person, firm or corporation;" I do not think they included the city itself if it then had or subsequently obtained the power of operating natural gas works.

The rule of construction of exclusive grants is that they should be construed most strongly against the grantee, and I do not find appropriate words used in the agreement which would exclude the city itself. A proper and reasonable construction of the word "exclusive" in the sense used here is the one I adopt and which I think must be held to express the intention of the parties. The grant itself in s. 4 of the agreement gives to the grantee "full power, license and authority . . . to open up and lay mains." Nothing in that section is said about the grant being an exclusive one.

In par. 9, the grant is spoken of as the "exclusive rights and privileges hereby granted to the company," etc., and the same paragraph goes on to provide that the city shall not "grant to any person, firm or corporation the right to construct," etc.

That seems to me, in the absence of any express words excluding the city itself to limit and define the extent of the exclusive grant—that it is exclusive as against any grantee of the city.

I would for these reasons allow the appeal, and dismiss the cross-appeal with costs.

IDINGTON, J. (dissenting):—I am of the opinion that the franchise granted by the agreement of September 6, 1905, between appellant and Dingman, was limited to the area that the then boundaries of the city included, and that the same has not, as regards its territorial limits, been extended by anything which has since transpired. Idington, J.

If a manufacturer possessed of a large factory or a merchant of a large shop or warehouse had contracted with some one to supply for a fixed term of years the lighting or heating necessary for the efficient carrying on of his business in such premises, and then added thereto as the necessities of a growing business de-

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manded, what would be thought of either party to such contract insisting that inasmuch as it was self evident the business would grow, and it must require more light and heat, therefore that was within the contemplation of the parties, and the contract was binding in relation to the added buildings and business or work therein?

Yet, stripped of all verbiage and confusing collateral matters, needed only to be had regard to as part of the history which brought the parties concerned herein into contractual relations with each other, when we bear in mind the express definition of the word "street" in the first paragraph of the said agreement, wherein does the supposed assertion of right to apply the contract in the cases I submit to the extension differ from that set up by the respondents herein?

To carry the illustration out fairly, it may be said we must assume that in either of the given cases, the lighting or heating, without a word of agreement, had in fact been supplied and accepted for a year or two and then rejected.

Would any one contend that then either party was bound to continue it for the remainder of the fixed term of years? I cannot think so. I can see how the original contract might by inference be applied to determine the measure of remuneration or other liability in relation to that extended, but how such contract could be held as a matter to be considered in the construction of the original contract is past my comprehension. I can conceive also in such a given case something transpiring between the parties to constitute a new contract.

But here there is the limited power of the appellant, which is only able to contract in such ways as the statute enables it, as an impassable barrier, and hence the respondents are driven to argue that what was done must be looked to as aiding in the construction of an ambiguous contract.

Wherein is the contract which relates to certain streets as defined in the contract at the date thereof ambiguous? It seems to me the unambiguous thing in the case. And the conduct relied upon is something taking place years after the contract had been made.

Again that conduct is not that of the appellant, but of some of its servants, who could not be held as entitled to furnish anything a court should rely upon as the conduct of the appellant.

Then it is said there was an amendment of the contract by which the rate of remuneration was changed and increased 6 years later, and thereby a new contract made which must be held as an interpretation of the original contract. As it speaks of "the inhabitants of the city" which had been increased in fact, both in area and population, it is said it must be taken to have amended the contract. Unfortunately for the argument the express terms of the new agreement ratified by the legislature limit it to the substitution of prices named for those in the contract "as though the said prices were mentioned therein instead of the said prices mentioned in par. 17 thereof."

The term "street" is defined in the original contract of 1905 as follows:—

> That wherever the word "street" occurs in this agreement, it shall be held to mean any street, avenue or lane shewn as such on the plans of the said city registered in the Land Titles Office for the South Alberta Land Registration District.

I am unable to see how the parties could have more carefully restricted the terms of the amendment, unless they had, from abundant caution, needlessly used words limiting the inhabitants to those concerned under the contract.

I cannot find in this either a new contract or an interpretation of the old one.

Again it is said the original contract might not be so in an ordinary case but that this is a contract with a growing city, and it must be presumed to have contemplated such growth, and hence intended to contract despite the express words of the contract limited to streets as defined.

Any one conversant with how cities in Canada have grown by the annexation of suburban villages or towns which usually have some lighting system of their own, dependent often upon contracts for long terms of years, would be tempted to say that the men making such a contract as here in question extend to future annexation were unfit for such positions of trust, not only as in excess of their powers but as raising a needless barrier in the way of annexing suburban villages and towns.

The obviously prudent course for such men in all such cases would be not to create such a conflict of interests, but to keep their city free to deal with the suburban village or town as little

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untrammelled as possible either by lighting or waterworks contracts or other public utilities.

I should not but for the force with which this argument was pressed have thought it worth considering.

Moreover, it is to be observed that the only exercise of any right or authority within the bounds of any city or town conferred upon the company are conditional upon a consent expressed by by-law on such terms and conditions as the by-law may provide for the exercise of such power within some prescribed area. Such I take it is the meaning of the ordinance respecting water, gas, electric and telephone companies enacted in 1901, before anything in question herein. There has never been any clear assent of the character required enabling the company or those under whom it claims to operate anywhere within the city of Calgary, except in that specifically described.

As to the argument founded upon by-laws having been voted upon in the course of years after the city boundaries were extended, and final ratification by the validating Act of the legislature, I fail to see how any of these transactions can change a line or letter of the contract, except so far as specified. And the streets as originally specified remained unchanged. As to by-laws having been voted upon where the law was duly observed and resort was had to the proper and usual form of authorization, how can all that affect the contract? Whether the subject matter directly concerned all those voting or not, or such voting was validated by the legislature matters little.

It frequently happens that a whole city is called upon to sanction what only in truth concerns a small part of it. And it is quite usual to get legislative sanction to overcome the doubts and fears of those having financial dealings based on such actions.

The fact that the contract in question was tested so often, and in so many ways as these votings and enactments shew, and that no one ever suggested amending it, demonstrates to my mind that the parties concerned felt they dared not venture to propose so radical a change of what was plain and clear lest their whole scheme should fall to pieces if public attention were drawn to it. Sometimes the promoter sees it wiser to trust to future development, including perhaps a lawsuit, than risk losing everything. Be that as it may, I see nothing in it all to justify our reading into

all these transactions what is not there. The legislature is the proper place to go to if there has been an error.

There is, I respectfully submit, a confusion of thought in importing into the case such arguments as founded upon the primary powers and duties of a municipal corporation relative to public order, and cases decided thereon with the modern additions thereto of power to carry on certain classes of business commonly referred to as public utilities. In exercising the latter functions the municipal corporation and its contracts must be treated as any other business corporation.

I still think *Toronto* v. *Toronto Street R. Co.*, [1907] A.C. 315, was decided correctly on the question which has been referred to so much in argument herein, though I purposely abstained from reading our opinions thereon till I had formed my conclusion in this case.

I think Ives, J., was right, and that his judgment in this regard should be restored.

The respondent has cross-appealed on the question of its exclusive right barring the city itself from using its new power. If I am right in the conclusion I have reached, this is not of much consequence.

But as the question is submitted, I may say that, in my opinion, the terms of the contract do not seem to anticipate or provide against the city doing its own work, but only, if at all, against its granting to others the like powers conferred on respondent's assignor, and hence the cross-appeal should be dismissed.

The appeal should be allowed with costs throughout and the cross-appeal dismissed with costs.

DUFF, J.:—The appeal and the cross-appeal should be dismissed with costs. Duff, J.

ANGLIN, J.:—On at least two occasions the municipal corporation of Calgary formally and deliberately dealt with the franchise granted by it to A. W. Dingman in 1905 as covering territory subsequently annexed to the city. After the annexations of 1906, 1907 and 1908, it modified the terms of the franchise by an agreement authorized by a by-law submitted by the council to the vote of all the ratepayers of the city, including those in the annexed territory. After the further annexation of 1910 it again, in January 1911, modified the original agreement in most im- Anglin, J.

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portant particulars by a further agreement, authorized by a by-law likewise submitted to the vote of all the ratepayers of the city as then constituted, including those resident in the annexed area. Legislation confirmatory of these agreements and by-laws was obtained on the joint application of the city and the respondent gas company. I am satisfied that whatever may have been the proper construction of the Dingman franchise at the date of its execution, as to the area of its operation, the subsequent acts to which I have alluded have made it impossible for the appellant successfully to maintain that that area is now restricted to the limits of the city as it existed in 1905. Stuart, J., has pointed to the language of the agreement of 1911, which makes it clear that the parties to it were then dealing with the franchise as covering the entire area of the city at that time. I would, if necessary, be prepared to support that judge's conclusion that

> this constitutes an agreement—an implied one, no doubt, but none the less potent—that in the original contract with which they were dealing and which they were amending those words ("the city"—"the city of Calgary") should thereafter be given a new and wider meaning.

By another act, the significance of which cannot be met by the suggestion that it was that of a mere official acting without authority, the city again recognized that annexed territory was within the franchise. By a resolution passed in January, 1914, which recited the franchise conferred on Dingman by agreement of August, 1905, and subsequently assigned to the Canadian Western Natural Gas, Light, Heat and Power Co., the city council, exercising a right conferred by s. 155 of Ordinance 33 of the North-West Territories, requested Stuart, J., to investigate certain interruptions in the services of the respondent gas company in territory annexed to the city after 1905.

Throughout the entire period from 1906 to 1914, when the present contest arose, everybody interested appears to have regarded and acted upon the Dingman franchise as applicable to the subsequently annexed territory equally with that comprised within the city limits in 1905. Every official of the city who was called upon from time to time to act under the contract—the mayor, the commissioners, the engineer—so dealt with it on innumerable occasions.

I think there is a presumption that these acts were duly authorized, and that in the absence of proof to the contrary they

should be taken as amounting to an acquiescence by the city in the construction placed on the Dingman franchise by the respondent gas company. The responsible officials of the city knew that under permits issued by them large sums of money were being expended by the company in the construction of works in annexed territory, on the assumption that they were covered by the Dingman franchise. Indeed, this must have been known to every citizen. The carrying out of these works was facilitated in every way possible by the civic authorities. It would be so inequitable to permit the municipality now to set up that the operation of the franchise is confined to the area of the city as it existed in 1905 that, in my opinion, it cannot be allowed to do so. Some observations of Lord Shaw of Dunfermline, in delivering the judgment of the Judicial Committee in *Winnipeg Electric R. Co.* v. *City of Winnipeg*, [1912] A.C. 355, at 372-3 ,4 D.L.R. 116, at 130-1, seem to be very closely in point. In the present case there is the added circumstance that rights of innocent third parties have intervened which would be seriously jeopardized were the contention of the city to prevail.

Without expressing any view as to what construction should have been placed upon the agreement of 1905, but for the subsequent matters to which I have referred, or as to the applicability to it of the decision in the *Toronto Railway* case, [1907] A.C. 315, I am, for the reasons I have indicated, of the opinion that the judgment *a quo* on this branch of the case should be affirmed.

On the question raised by the cross-appeal, I have failed to find in the agreement of 1905 anything which binds the city not to exercise in competition with the defendants any powers to supply its inhabitants with natural gas which it then had or might afterwards acquire. On this branch of the case, I agree with the views expressed by the Chief Justice of Alberta and Stuart, J.

The case of *Knoxville Water Co.* v. *Knoxville*, 200 U.S.R. 22, cited by the trial judge, is very closely in point. Better authority than a decision of the United States Supreme Court on such a question it would be difficult to find.

I would dismiss, with costs, both the appeal and the cross-appeal. *Appeal and cross-appeal dismissed.*

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GREER v. GODSON.

British Columbia Supreme Court, Macdonald, J. March 16, 1918.

BROKERS (§ II B—12)—COMMISSION—SUFFICIENCY OF SERVICE—CONDITIONAL SALE.

A broker is only entitled to commission if he carries out the terms of his employment in their entirety. An action for commission for the sale of a chattel is therefore premature if the sale is subject to a condition which has not been complied with at the time the action is brought.

Statement. ACTION by a broker for commission on sale of a ship. Dismissed.

A. D. Taylor, K.C., for plaintiff; *A. H. MacNeill*, K.C., for defendant.

Macdonald, J. MACDONALD, J.:—In November, 1916, defendant became owner of the S.S. "Zafiro." It was decided to reconstruct the ship and the plaintiff was consulted as to her earning capacity and other matters, also as to the registration of the ship in Canada.

The reconstruction of the boat proceeded and eventually she was registered under the name of S.S. "Bowler," and permission to transfer the flag of the ship to one of the Allied nations was obtained. From the time the reconstruction of the ship was decided upon, and up to September 10, 1917, the plaintiff frequently advised with the defendant and was employed by him as a broker to dispose of the vessel. Plaintiff was in constant communication with the defendant, who was, to his knowledge, interesting other brokers in the contemplated sale. It is true that, during this period, the position of the plaintiff towards the defendant was somewhat altered by options for purchase being given to the plaintiff. They were, however, given at the time for a particular purpose and when they ceased to exist the relationship of principal and agent was again resumed.

The price at first fixed for sale of the ship was $175,000, but, through extra expense involved, and more particularly the great demand for ships, the price was increased from time to time until it reached, and remained firm, at $250,000 for some months. If the plaintiff succeeded in making a sale at this figure he was to receive, as commission, 5%, though the amount was also estimated at $10,000. Plaintiff says that this commission, if earned, would only have been divided as to one-fifth with one Robertson. He intended that the other brokers engaged in making the sale should receive their commission by disposing of the property at an increased price. As the local market for the sale of the ship was

necessarily limited, it became necessary to seek purchasers abroad and the plaintiff communicated with likely purchasers and brokerage firms at different points throughout the United States. He placed the proposition particularly before brokers in Seattle and Tacoma. Through Robertson of Vancouver, he got in touch with Aldridge of Seattle. He in turn got into communication with Dorr, of the American Mercantile Co. of Tacoma. The latter party discussed the prospects of sale with Ward, of Saunders, Ward & Co., brokers, who occupied adjoining offices. The position then was that Aldridge, Dorr and Ward were endeavouring to obtain a purchaser of the ship at $275,000. The intention was that this coterie of brokers should divide $25,000, being the excess over the $250,000, amongst themselves as commission, should they make a sale of the property. Then Ward offered the ship for sale to Thorndyke & Trenholm of Seattle at $275,000 without commission to them. Extensive correspondence passed between Ward's firm and Thorndyke & Trenholm. Description was given with sufficient particularity to warrant Thorndyke in coming to Vancouver to personally inspect the ship. It was contended that his visit did not arise from the correspondence referred to, but through a chance conversation he had with two parties in Victoria some months previous. I stated, during the argument, that I did not think any weight should be attached to such contention. The nature of the correspondence was such as to satisfy me that it formed the basis upon which Thorndyke acted. I do not think he paid the slightest attention, nor acted, in any way, upon the interviews in Victoria. It is not material as to the state of mind in which Thorndyke was in when he came to Vancouver. Whether he was endeavouring to undermine the other brokers, and deal direct with the owner, does not affect the issues involved herein.

After viewing the ship, Thorndyke called upon the defendant. He did not tell him how he obtained information as to the boat, but asked whether it was for sale and the purchase price. Defendant then quoted to Thorndyke the same figures that Ward had already given him, viz.: $275,000. On his return to Seattle, Thorndyke could have communicated with Ward what had occurred and kept him advised of any progress towards completion of a sale. He did not see fit to do so, but kept in direct communication with the defendant. There were proposals back and forth, but finally

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terms of sale were arranged on September 10, 1917. An agreement of sale was executed, showing that, subject to certain conditions, the ship was sold to H. J. Scott, representing Scott's Agency, of Mobile, Alabama, U.S.A., for $260,000, of which $50,000 was paid as a deposit and the balance became payable upon the fulfilment of the conditions subsequently referred to. This price was not to the defendant. No commission was paid by him.

If he receives $260,000 he will thus have obtained $10,000 more than he was willing to accept according to instructions given to the plaintiff and, if successful in this action, will also be relieved from payment of commission and thus have gained another $18,000 at least. Plaintiff contends that under these circumstances, thus shortly outlined, he should be entitled to a commission of 5% on $260,000. He also claims the sum of $5,000 for services rendered to the defendant outside of those pertaining to the duties of a broker.

As to the claim of $5,000, I think well to deal with this in the first place. I think the plaintiff was of great assistance to the defendant in obtaining registration of the ship and in assisting towards the transfer of the flag. He also gave information as to the earning capacity of the boat. It was never intended, however, that the plaintiff should receive remuneration for these services. Both parties had been friends for a score of years, and, even if the plaintiff were not hoping to receive a reward through the sale of the ship, I think he would have been inclined to assist the defendant in the manner indicated. Plaintiff made no charge for these services at the time and was candid enough to admit that he would not now be making a claim therefor were it not for the refusal of the defendant to pay any commission in connection with the sale. I am thus of the opinion that there is no legal liability resting upon the defendant with respect to the claim of $5,000.

Returning, then, to the more important branch of the case, the plaintiff's contention, shortly put, is this: that he set the ball rolling towards what was the ultimate goal desired, viz.: the sale of the ship and thus is entitled to a commission. He, as a broker, brought about a sale.

A number of grounds were alleged by the defendant in support of his contention, that he was not liable to pay plaintiff for any commission in connection with the sale. *Inter alia*, it was con-

tended that the commission of $25,000, to be divided by the brokers, was in the nature of an undisclosed profit on the transaction and prevented recovery. Then, it was submitted that Thorndyke was an independent broker, also that plaintiff was not the effective agent in that he was not the purchaser. Further that, even if Thorndyke & Trenholm were sub-agents of plaintiff, they were too remote from the plaintiff to allow him to reap the benefit of their services. These and other grounds were advanced, but while I have considered them, as I have come to a conclusion that is fatal to the plaintiff's claim upon another branch of the case, I do not think it is advisable for me to discuss them, much less express any opinion.

Leaving aside the question of whether Thorndyke & Trenholm were plaintiff's sub-agents, or were agents for the purchaser, and assuming even that plaintiff procured the prospective purchaser of the ship, was the transaction such as to enable him to receive remuneration? He would only be entitled to commission if he carried out the terms of his employment in their entirety or at any rate substantially. He must show that the party produced as a purchaser was "able, ready and willing" to complete the purchase. The agreement for sale of the ship, dated September 10, 1917, between the defendant, as vendor, and J. M. Scott, a member of the Scotts Agency of Mobile, provides that the purchaser shall pay $50,000 upon delivery of the agreement duly executed and that the vendor shall execute a bill of sale and such further documents as may be reasonably required to enable the ship to be legally transferred. It is further provided that the ship shall have the following rating at the time of delivery, viz.: "Bureau Veritas Rating $\frac{5}{6}$ L.I.I." and that the balance of the purchase money, viz., $210,000, is to be paid, subject to certain conditions. The obtaining of the rating referred to is not one of such conditions, but a subsequent paragraph of the agreement provides, *inter alia*, that if the vendor fails to obtain such rating, then, the instalment of the purchase money paid by the purchaser shall be returned to him. The agreement also provided that the delivery of the ship should be on or before the 13th day of November, 1917. This date has long since elapsed. The delivery has not taken place, but the evidence shows that the agreement is still considered binding between the parties. Plaintiff filed this agreement as a portion of

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his evidence. It was proved that the rating required had not been obtained and this prevented the delivery of the boat and the carrying out of the terms of the agreement. The transaction was, in my opinion, only a conditional sale. It was important from the purchaser's standpoint to have this rating secured. This is established by the evidence and, in these days of great demand for ships' tonnage, it can be assumed that parties, desirous to secure the ship, would not raise an unwarranted excuse to avoid completion of a contract of this kind. So plaintiff did not procure a purchaser having the necessary qualifications that would warrant him claiming compensation. In other words, he did not produce a purchaser who was willing to buy the ship thus offered without any conditions. He inserted a condition in his proposed purchase, which had to be complied with before entering into either a binding contract to purchase or making payment of the purchase price. Neither can the plaintiff, at present at any rate, claim any commission upon the amount already paid, as it practically amounted to a deposit or evidence of good faith and may be returned to the purchaser. Defendant admitted that some progress had been made towards obtaining this rating and that he was desirous of making delivery of the ship. He hoped that, at an early date, the Bureau Veritas would be prepared to grant the necessary classification. Then the sale would be completed and the defendant would have received the full purchase price of $260,000. That event has not yet occurred. This action, therefore, whether the plaintiff has a claim or not for commission, in my opinion, is premature. This ground was not outlined in the statement of defence. It was argued that the denials therein were sufficient to enable the defendant to avail himself of this defence. Defendant might have some strength in taking this position in the view that the plaintiff might be required to prove that he produced a purchaser willing to complete a sale. His difficulty, however, is that in the statement of defence, he practically admits that the sale was consummated. He refers to the transaction as being a completed one as follows:—

In the further alternative, *the sale of the vessel referred to was consummated through the agency of Thorndyke & Trenholm*, brokers of Seattle, Wash.

So I consider the pleadings did not disclose nor make an issue of the ground upon which the defendant has succeeded. The evidence,

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however, was before the court showing the non-performance of this condition, so I require to deal with it. It was contended that it formed a complete defence to the action. At the close of the argument, I called upon defendant's counsel to elect, whether he would adhere to the pleadings as they stood, or apply for an amendment setting up such defence. He availed himself of the privilege and pleaded alternatively that the transaction was not a sale and the plaintiff was not entitled to any commission.

Under these circumstances, the question arises as to the disposition of the costs of this expensive litigation. If the defendant had properly pleaded and made an issue of the defence upon which he has succeeded, then, the plaintiff would be at liberty to pursue one of two courses. He could proceed to trial upon such issue and would have to bear the result with costs. If he, however, were satisfied that he could not successfully meet such attack, then, he could apply for discontinuance of the action and would probably be granted leave to sue again, should he be so advised. Plaintiff, on account of the nature of the pleadings, did not have an opportunity of adopting either of these proceedings. In allowing an amendment, setting up the defence, I stated that I would impose such terms as appeared reasonable.

It is a difficult matter to determine what amount of costs should be borne by the defendant through an amendment at such a stage of the proceedings. The time of the trial consumed, in connection with the issue upon which he succeeded, was very light. I have not given an opinion, as to the effect of the other defences raised by the defendant. If the defendant had this successful issue properly raised before the court at the trial, and, at the close of the plaintiff's case, had applied for dismissal of the action on that account, I would have acceded to his request. I have also to take into account that the plaintiff, in my opinion, fails, as to the claim of $5,000. Taking this, and other matters, into consideration, I think a fair disposition of the costs would be, in dismissing the action, to allow the defendant his general costs of the action and costs applicable to a trial for one day only. There will be judgment accordingly. *Action dismissed.*

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SMITH v. CRAWFORD.

Saskatchewan Supreme Court, Appellate Division, Haultain, C.J.S., Newlands and Lamont, JJ.A. April 26, 1918.

VENDOR AND PURCHASER (§ I E—25)—NO TITLE IN VENDOR—REPUDIATION BY PURCHASER—RIGHTS OF PARTIES.

If the vendor in a contract for sale of land has no title in himself, or is not in a position to compel the registered owner to supply him with title, the purchaser may as soon as he becomes aware of the fact repudiate the contract and need not give the vendor time to secure title.

[*Forrer* v. *Nash*, 35 Beav. 167, 55 E.R. 858; *Bellamy* v. *Debenham*, [1891] 1 Ch. 412, followed.]

Statement.

APPEAL by defendant from a judgment at the trial in an action for specific performance of an agreement for sale of land. Reversed.

J. F. Frame, K.C., for appellant; *W. F. Dunn*, for respondent.

Lamont, J.A.

LAMONT, J.A.:—This is a vendor's action for specific performance of an agreement for the sale of land. By an agreement bearing date July 10, 1910, the G.M. Annable Co., Ltd., agreed to sell to the defendant, who agreed to buy certain lots therein set out for $350, payable by instalments, the last of which became due July 8, 1911. The agreement contained a clause that no interest was to be payable if the whole of the purchase money was paid by March 1, 1911. It also provided that on payment of the purchase money and interest the vendors would convey or cause to be conveyed to the purchaser the said lands. The defendant never paid any money at all on the lots. On October 2, 1913, by an agreement in writing, the Annable company assigned to the plaintiff all its interest in the said agreement and in the lots therein set out. On December 1, 1913, the plaintiff commenced this action.

In his statement of defence the defendant denies that the plaintiff was the owner of the land, and that he was ready and willing to convey, and alleged that he was not in a position to call for title. He also set up the following:—

That on March 1, 1911, the defendant called at the office of the G. M. Annable Co., Ltd., and tendered to the plaintiff as manager or agent for the said company the sum of $350 being the amount alleged to be due on that date for the said lots, and the plaintiff at that time told the defendant that the G. M. Annable Co., Ltd., could not, at that time produce title, and that he, the said plaintiff, did not know whether or not the G. M. Annable Co., Ltd., would ever be able to produce title to the said lots, and the defendant thereupon notified the plaintiff as agent or manager for the G. M. Annable Co., Ltd., that he forthwith terminated any agreement which he might have with the G. M. Annable Co. Ltd. because of the non-production of title.

At the trial, which took place in 1917, the plaintiff's certificate

of title was put in evidence. This shewed that the plaintiff became the registered owner of the land on May 19, 1914. There was no other evidence of title. The manager of the G. M. Annable Co., Ltd., who gave evidence, stated that he himself had bought the land, of which the lots formed a part, from the Dominion government, and that he sold the same to G. M. Annable, who turned it over to the company, but the trial judge, very properly pointed out that he could not shew title in that manner and that the documents must be produced. Effect was not given to the defendant's contention that he had repudiated the contract, as set out in par. 11, evidently because the defendant could not shew that the man in the office of the Annable company—whose name he did not know—who told him the company could not make title, had any authority to make any such statement on behalf of the company. Judgment was given for the plaintiff, with a reference as to title, there being a dispute as to whether the lots in the certificate of title were the same as those covered by the agreement, the numbering being different as a new plan had been made. On the reference, no evidence of title other than plaintiff's duplicate certificate was put in. The matter was referred back to the trial judge, who held that title had been shewn and gave the defendant 3 months in which to pay $516, the amount found to be due, and, in default of such payment, ordered a sale of the lots. The defendant now appeals.

The chief ground of appeal is, that there was no evidence adduced either before the trial judge or on the reference, that the plaintiff had title, or was in a position to compel title to be made to himself at the time he brought this action.

That the plaintiff became the registered owner on May 19, 1914, is established. This was some months after action was brought. By what chain he made his title does not appear. There was no evidence that the Annable company was ever the registered owner of the lots in question, or was ever in a position to compel title to be made to it. All we know is that, after action brought and before the hearing, the plaintiff acquired title to the lots. The question is: Is this sufficient, or must a vendor suing for specific performance have had title or be in a position to compel title when he commences his action?

Under the agreement in this case, the payment of the last

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instalment and the conveyance to the purchaser are reciprocal and concurrent acts. Under such an agreement, it is the duty of the purchaser to bring in his last instalment when the day for completion arrives. It is likewise the duty of the vendor, if he is the registered owner, to execute a transfer and deliver it to the purchaser in exchange for the money. If the vendor is not the registered owner, but is in a position to compel the registered owner to convey to him, he is entitled to a reasonable time to procure the conveyance. *Gregory* v. *Ferrie*, 3 S.L.R., 191. But he must be in a position to compel title. For it is a well-established rule that if the vendor in a contract for the sale of land has no title in himself, or is not in a position to compel the registered owner to supply him with title, the purchaser may, as soon as he becomes aware of that fact, repudiate the contract, and need not give the vendor time to secure title. *Forrer* v. *Nash*, 35 Beav. 167, 55 E.R. 858; *Bellamy* v. *Debenham*, [1891] 1 Ch. 412.

If, therefore, a purchaser having a right to repudiate the contract does, in fact, repudiate it for want of title in the vendor before the vendor has title, it is a good defence to an action for specific performance, and the fact that the vendor is in a position to make title at the hearing is of no avail. There are cases, it is true, where it has been held sufficient for the vendor to shew at the date of the hearing that he has a good title.

In *Coffin* v. *Cooper*, 14 Ves. 205, 33 E.R. 499, a purchaser was held bound although the title had been got in by Act of parliament after the master had reported against the title.

In *Thomson* v. *Miles*, 1 Espinasse 184, a vendor sold a 40-year lease. When he brought his action he had a lease for 38 years only. Between the time he brought his action and the hearing he obtained a lease for another year. It was held to be sufficient.

These, however, were cases in which there had been no repudiation by the purchaser and the want of title was not set up as a defence in the pleadings.

In *Halkett* v. *Dudley*, [1907] 1 Ch. 590, at 603, Parker, J., says:—

> There was a case also, *Wynn* v. *Morgan*, 7 Ves. 202, which, though not precisely in point, is yet, I think, worth referring to. The head-note is this: "Where the time, at which the contract was to be executed, is not material, and there is no unreasonable delay, the vendor, though not having a good title at the time the contract was to be executed, nor when the bill was filed,

but being able to make a title at the hearing, is entitled to a specific performance." Of course that makes the same principle applicable up to the hearing where no plea, at any rate, of want of mutuality could be taken advantage of or was, in fact, raised by the answer.

A plea of want of mutuality cannot be taken advantage of if the purchaser knew of the defects of his vendor's title at the time he entered into the contract (*Paisley* v. *Wills*, 18 A.R. (Ont.) 210); nor if although at the time of entering into the contract he was not aware of the defects in the title, he, on subsequently becoming aware of them did not repudiate, but treated the contract as a subsisting one. *Hoggart* v. *Scott*, 1 Russ. & M. 293, 39 E.R. 113; *Eyston* v. *Simonds*, 1 Y. & C.C.C. 608, 63 E.R. 1038.

It would, therefore, seem that it is sufficient if the vendor make title at the hearing in cases where there has been no repudiation and no plea setting up want of title, and also in cases where such plea is set up but the purchaser has lost his right to repudiate, but that, in cases where the purchaser has not lost his right to repudiate and has repudiated, it is incumbent upon the vendor to shew that he had title at the time the purchaser repudiated.

In the case at bar, the defendant had not lost his right to repudiate, because, after the time he says he learned that the Annable company could not make title, he did nothing to recognize the contract as a subsisting one, and, in his plea, he not only sets up want of title, but alleges that, before action brought, he had repudiated the contract. His allegation, in par. 11 above cited, is, in my opinion, in itself a repudiation of the contract even although it be held that what took place on March 1, 1911, did not amount to repudiation.

In *Hartt* v. *Wishard-Langan Co.*, 9 W.L.R. 519, Perdue, J.A., with whom Richards, J.A., concurred, said, at p. 543:—

> The act of the plaintiff in bringing the suit for the return of the money he had paid, alleging that the vendors have not a good title, is a sufficient repudiation of the contract on his part. Where the objection is not mere refusal to answer requisitions as to title, but that the vendor has not a good title, a notice of rescission of the contract or demand for the deposit does not appear to be necessary before commencing suit: *Want* v. *Stallibrass*, L.R. 8 Ex. 175.

And in *Reeve* v. *Mullen*, 14 D.L.R. 345, Stuart, J., in giving the judgment of the Alberta Court *en banc*, said:—

> I agree with the view expressed by Perdue and Richards, JJ., in *Hartt* v. *Wishard-Langan Co. Ltd.*, 9 W.L.R. 319, at 543, rather than in that of Howell, C.J., and Phippen, J. I think the commencement of the action was itself a sufficient notice of rescission and that when such an action as this is begun by

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the purchaser it is sufficient to throw the obligation on the vendor of shewing a good title in the ordinary way.

If the commencement of an action for a return of moneys paid constitutes a repudiation of the contract, so, in my opinion, does an allegation in a statement of defence that the contract had already been determined when the plaintiff brought his action. Repudiation is merely a notification by one party to a contract to the other that the party giving the notice is not going to perform the contract. It may be given expressly, or it may be implied, as where a party has put it out of his power to perform.

Par. 11, in my opinion, is express notice to the plaintiff that the defendant considered the contract at an end. It was, therefore, incumbent upon the plaintiff to shew that he had a title, or was in a position to compel title to himself at the time the defendant repudiated the contract. He was not the registered owner; the onus was, therefore, upon him to establish his title.

In *Tucker* v. *Jones*, 25 D.L.R. 278, at 280, my brother Elwood, in giving the judgment of the court *en banc*, said:—

> In *La...es* v. *Kusch*, 24 D.L.R. 136, I find the following: "Having pleaded title, the vendor must prove it." There are numbers of other authorities which, I think, decide the law beyond question, that the duty of the vendor is not merely to shew a title, which he does by producing an abstract, but to make a title, which he does by proving the matters set forth in the abstract.

In *Baskin* v. *Linden*, 17 D.L.R. 789, it was held that an action by a vendor of realty for the purchase-price was premature if launched before the vendor himself had title, or the right to title, enabling him to convey, although during the pendency of suit his title was perfected. In giving judgment, Mathers, C.J., said:—

> Since the action was begun, the plaintiff has procured a conveyance from his wife and has procured discharges of the two last-mentioned mortgages. His title is now complete, but his right to bring this action must be tried by the condition of his title at the time it was commenced. If he had then no title, or no right to compel a title, he had no right to sue for the purchase-money (*Hartt* v. *Wishard*, 18 Man. L.R. 376).

The plaintiff was, therefore, under an obligation to prove that he had title, or could compel title, at the time his action was brought, or, at latest, when the statement of defence was filed. He failed to prove it. There is no evidence whatever that the plaintiff, prior to May, 1914, was in a position to call for title. On receiving the registrar's report, the trial judge should, in my

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opinion, have remitted the matter back to him to report on the state of the title at the time the plaintiff commenced his action.

The appeal should be allowed with costs, the judgment of the court below set aside and the question of title referred back to the registrar for a report thereon as of the date on which the action was begun. As the plaintiff did not prove his title at the trial as he should have done, the costs of all references should be borne by him in any event.

Haultain, C.J.S.

HAULTAIN, C.J.S., concurred with LAMONT, J.A.

Newlands, J.A.

NEWLANDS, J.A.:—This is an action by the assignee of an agreement of sale to collect the amount due thereon from the purchaser. The contract was made between the G.M. Annable Co., Ltd., and defendant for the sale of lots 23, 24, 25, 26 and 27, block 6, Townsite of Drinkwater, and was dated July 8, 1910. The consideration was $350 and was payable $100 on December 1, 1910, $200 on April 1, 1911, and $50 on July 8, 1911, together with interest at 7% if not paid before March 1, 1911. Time was made of the essence of the agreement.

The defendant claims that on March 1, 1911, he went into the office of the G. M. Annable Co., Ltd., and tendered the whole amount due, but was informed that the company had not acquired title to this land and might never do so. Nothing more was done until this action was brought on December 1, 1913. The Annable company had assigned their interest to the plaintiff on July 8, 1910, but neither they nor the plaintiff had a title to the land until after action brought.

It further appeared at the trial that the plan, according to which the above described lots were sold to defendant, had never been registered, but that a new plan had been made and registered which described these lots by different numbers. The plaintiff did not have the evidence at the trial to prove the identity of the lots sold, with the lots shewn on the plan, so a reference was made by the trial judge to the local registrar to allow plaintiff to prove his title.

The defence is, that time being of the essence of the contract, and the vendors not being able to perform for want of title, the defendant was relieved from further performance of the contract upon his part.

As defendant did not make the first payment as provided by the

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contract, the provision as to time being of the essence of the contract may be considered to have been waived by him, and as he did not rescind the contract when he found the vendor could not perform on account of lack of title as he had a right to do, the contract is still in force and performance may be compelled by either party.

His next defence is that plaintiff had no title at the commencement of the action, and therefore cannot recover.

In *Thomson* v. *Miles*, 1 Espinasse 184, Lord Kenyon said:—

> that it had been solemnly adjudged, that if a party sells an estate without having title, but before he is called upon to make a conveyance, by a private Act of Parliament, gets such an estate as will enable him to make a title, that that is sufficient; that here the plaintiff being enabled to make a title, and the defendant never having applied for it, that he should not be allowed to set up against the plaintiff a want of title, though the power of making that title was obtained after action brought.

Here the defendant claims to have applied for his title, but the vendor was unable to furnish it. This evidence was objected to and was ruled out, the trial judge saying, "I do not see how this is evidence. I do not know who this man was," *i.e.*, the man to whom defendant claimed to have applied for his title.

This case, therefore, comes under the decision in *Thomson* v. *Miles*, *supra*, and it is sufficient that plaintiff was able to make title at the trial.

Two objections were taken on the appeal to the judge's judgment; 1. That defendant should not have been made to pay the costs of the reference, and; 2. That he should not have been charged interest on the purchase-money.

As to the first, I am of the opinion that plaintiff should have been prepared at the trial to prove the identity of the lots sold with the lots which were numbered differently on the registered plan. It was, therefore, the fault of the plaintiff that there was a reference, and he should pay the costs incurred thereby.

And as to the second, as plaintiff could not make title until after action brought, he is not entitled to charge interest.

The judgment should therefore be amended accordingly, and defendant should have the costs of the appeal.

Appeal allowed.

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Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart, Beck and Hyndman, JJ. April 25, 1918.

DAMAGES (§ III A—60)—AGREEMENT FOR SALE OF LAND—PRESUMPTIONS—AGENT'S AUTHORITY—VENDOR REFUSING TO NEGOTIATE.

A memorandum of agreement for the sale of land, drawn up and executed in Alberta will, in the absence of evidence to the contrary, be presumed to refer to land in that province, although the number of the meridian is omitted from the description, especially where the vendor owns lands which answer the description.

A clause in the memorandum that, "In the event of your disposing of the said land at the price above stated, I agree to pay you one dollar per acre commission," is sufficient consideration.

The agent must not go beyond the authority given him, but the vendor must not unreasonably entirely refuse to negotiate.

Statement

APPEAL from a judgment of Ives, J. Affirmed.

A. M. Sinclair, for appellant; *Hogg* & *Jamieson*, for respondent.

The judgment of the court was delivered by

Stuart, J.

STUART, J.:—This is an appeal by the defendant from a judgment of Ives, J., whereby he gave the plaintiffs judgment for $880 and costs, being the amount of a commission claimed by the plaintiffs to have been earned by them in respect of a proposed sale of certain land of the defendant.

The oral evidence shewed that the defendant was, in May, 1917, the equitable owner, under an agreement of purchase from the Canadian Pacific R.Co. of the north half of s. 23, township 13, range 24, west of the 4th meridian.

On May 16, 1917, the defendant signed and delivered to McIntyre, one of the plaintiff firm, a document in the following words:—

To A. N. McINTYRE & Co.

I, Edwin C. Law, being the present owner and possessor of the north half of section 23, township 13, range 24, hereby agree to sell the said land at the price of $31 an acre including my interest and share in the present lease now existing in connection with the above land. The purchaser to pay at least $2,000 cash and the balance arranged on terms not to exceed 4 years, unless otherwise agreed to. In the event of you disposing of the said land at the price above stated I agree to pay you one dollar an acre commission and in the event of you obtaining a larger price, you to allow me $30 per acre net. You to benefit by any amount over $30 an acre.

Dated at Carmangay, Alta., this 16th day of May 1917.

Witness, A. N. McIntyre. EDWIN C. LAW.

On May 23, McIntyre secured from one Allan an offer in writing to purchase the lands above described which read as follows:—

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I hereby agree to purchase the north half of section 23, in township 13, and range 24 west of the 4th mer., for the purchase price of $10,240, and will pay $2,500 as each payment and the balance on terms covering 4 years with -% interest on deferred payments, and I hereby tender my cheque for $100 in good faith and as part of the purchase price, the balance of the cash on purchase price to be paid when the agreement for sale is completed.

(Signed) G. W. ALLAN.

At the same time McIntyre received from Allan a cheque for $100 payable to McIntyre. Having received these documents, McIntyre, on the same day, the 23rd, went and saw the defendant. He saw him again on the 25th and also on some later occasions. The sale to Allan was never consummated. The plaintiffs claim that the failure to complete the sale was due to the default of the defendant and that in the circumstances they were entitled to recover their agreed commission.

The defendant relied upon two defences. First, it was contended that the memorandum of May 16 does not comply with c. 27 of the statutes of 1906. It will be observed that that memorandum does not refer to the meridian. It speaks of "range 24" but does not say west of any meridian. It was therefore argued that the land, the subject matter of the proposed transaction, was not identified sufficiently, even assuming that direct oral evidence of what meridian was intended is inadmissible. In my opinion, there are at least two possible answers to this contention. First, the document itself shews that it was drawn up and executed in Alberta and this is also shewn by oral evidence, which, upon this point, was undoubtedly admissible. In these circumstances, I am inclined to the view that the document ought to be read as referring to land within this province until it is shewn that the parties were in fact negotiating about land beyond the boundaries of the province. Possibly analagous cases might be suggested. If the memorandum referred to a house and lot by its street number in "Edmonton" surely, in the absence of evidence to the contrary, the memorandum would be read as referring to the city of that name in this province and not as suggesting that the proposed vendor might own a house and lot on a similarly named street in the town to which John Gilpin took his famous pilgrimage. Or if the parties were in Ontario and described the land as in "York" or in "Aylmer" surely the town or county of that respective name would be understood without any necessity of disproving the ex-

istence of property owned by the proposed vendor in the English county of York (or Yorkshire) or the Quebec town of Aylmer. Judicial notice of our system of surveys under Dominion laws might perhaps make a difference, but we can certainly take notice of the fact that in township 13 there is only one range 24 in this province. But, in any case, and as the second answer, the memorandum describes the section as being "owned and possessed" by the proposed vendor. The oral evidence did shew that the defendant did own a half section answering the description in the document in range 24 west of the fourth meridian, which is in this province. That was sufficient, I think, to identify the property in the absence of any evidence that the defendant owned the corresponding half section in any other range. The burden, in my opinion, then lay upon the defendant of shewing that the document still held an ambiguity owing to the vendor's owning such another half section.

It was also argued that the memorandum does not set forth any consideration for the agency contract and is, therefore, insufficient. With respect to this contention, I think there is no doubt that the agent must be shewn to have agreed to do something for the doing of which he was to receive from the principal the agreed commission. This would be so quite aside from the requirements of the statute. There must always be something more than a *nudum pactum*, though of course in many cases the fact that something has in fact been done upon request is deemed to be sufficient consideration to support an implied promise to pay for it. In the present case, however, it is admitted that all that was in fact agreed upon is stated in the memorandum. The memorandum, indeed, upon the evidence in this case, seems itself to constitute the agreement, a situation which sometimes arises where it is evident that the parties intended such a result rather than that they verbally agreed and then made in writing a memorandum as a record thereof, confessedly such in its nature, as in *Kidd* v. *Millar*, decided at this sitting of the court.

This being so, it becomes a question merely of the proper interpretation of the written document itself. Does it disclose any consideration?

It will be observed that the document begins by a mere state-

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ment of the defendant's willingness to sell his land at a certain price and within certain specified limitations as to terms. The terms are not exactly defined and there is much room left for negotiations and indeed for disagreement with respect thereto. It then proceeds: "*In the event of your disposing of the said land at the price above stated,* I agree to pay you one dollar an acre commission &c." as quoted. Now it seems clear that we have here a statement of the consideration for which the plaintiffs were to receive their commission. They were to receive it "in the event of their disposing of the said land at the price above stated." And again they were to get everything over $30 an acre "in the event of their obtaining a larger price." Whatever the proper interpretation of these words may be there would appear to me to be no room for doubt that a consideration is stated. The meaning may be uncertain, and this may be important on another aspect of the case, but clearly the plaintiffs were to do something in connection with "disposing of" the land in order to earn their commission and surely this is ample consideration.

The first defence under the statute therefore, in my opinion, fails.

The next defence amounts in substance to this, that the plaintiffs had not been shewn in fact to have done what they had agreed to do.

It seems to me that as stated by Ritchie, C. J., in *McKenzie* v. *Champion*, 12 Can. S.C.R. 655, the material initial enquiries ought to be what the plaintiffs were really employed to do, and then what they did do; or, in other words, what did the plaintiffs agree to do in order to be entitled to their commission, and, did they do that? This involves the interpretation of the written document of May 16. No oral evidence was given as to what the agreement was.

It, therefore, amounts to this, what interpretation ought we to put upon the words, "In the event of *your disposing* of the said lands at the price above stated" and the words "in the event of *your obtaining* a larger price" read in the light of the general purport of the whole document?

Now, it will have to be admitted, I think, that the plaintiffs did not agree, as a consideration for the promised commission, to do anything more than they were authorised to do. It is impossible

to hold that the parties intended that the plaintiffs, as regards specific acts, should have to go beyond the authority given them before they would be entitled to the agreed remuneration. This means, at least, that, of course, the plaintiffs themselves were not to conclude a binding bargain with a purchaser. Very specific words would in any case be necessary to constitute such an authority. It is also obvious from the terms of the document that the defendant retained the right of decision within the field of the unspecified terms. Clearly, the plaintiffs were authorised only to obtain from a proposed purchaser an offer which corresponded to the terms of the agency agreement and also, of course, to assist in, but not to control, the further negotiations which necessarily had to take place between this proposed purchaser and the defendant.

All this it is clear, and indeed undisputed, that the plaintiffs did. But were they thereupon, and without more, entitled to claim their commission? I think not. Another event had to occur as a condition of the commission becoming payable. I think the words "your disposing of," and "your obtaining a larger price" ought, in the circumstances, to be interpreted as meaning "in the event of my disposing of &c., *through your efforts*," and "in the event of my obtaining &c., through *your efforts*." This amounts to saying that the proper interpretation of the agreement is that before a commission under the contract could be said to have become payable the defendant must have actually concluded a sale of the property. And I think there is no way of avoiding this result. The contract quite clearly shews that the parties contemplated that negotiations as to exact terms should take place in which the defendant should be entitled to enjoy his freedom of decision. In no conceivable sense of the words above repeatedly quoted can it, in my opinion, be held that the parties agreed that, if a person were found who made an offer merely in the terms of the agency contract with the door wide open to disagreement upon the exact terms, thereupon without actual agreement the property could be said to have been "disposed of," or a larger price said to have been "obtained." I think the agents, the plaintiffs, must be held to have so understood and agreed.

But this does not conclude the case unfavourably to the plaintiffs. In such an agency agreement as that entered into here the law will, in my opinion, add an implied term to the effect that the proposed

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vendor, the principal, will not, unreasonably, entirely refuse to negotiate. I think he must be held to have impliedly agreed to negotiate in good faith with the purchaser proposed and to demand only such terms as, considering all the circumstances, might be conceivably demanded in perfect good faith.

The trial judge gave no reasons for his judgment. In such a case, we must, upon appeal, assume that he took a correct view of the law as we conceive it to be, as long as, upon that view of the law, and upon any reasonably possible finding as to the facts, the judgment can be sustained.

I think, therefore, that if it was a reasonable inference to make from the evidence that the defendant did not negotiate in good faith and that it was for that reason that the sale was not completed the judgment ought to be upheld. This, I think, would constitute such a "default" upon the part of the employer as is referred to in Hals., vol. 1, at p. 194, and particularly in the case of *Fisher* v. *Drewett*, 39 L.T. 253, 48 L.J. Ex. 32, there cited. At the trial an amendment was asked for and allowed in order to set up an alternative claim for damages. It would appear to be rather as damages than as for an agreed and earned commission that the plaintiffs can recover if at all. See Ogden Law of Real Estate Agents 60, *Adamson* v. *Yeager*, 10 A.R. (Ont.), 477. *Kennerley* v. *Hextall*, 24 D.L.R. 418, 8 A.L.R. 500.

We must also, in the circumstances, assume where the evidence of the parties is conflicting, that the trial judge accepted the account given by the plaintiff as the true account of what occurred unless of course there is something in the admitted circumstances to indicate that the judge was clearly wrong.

Now McIntyre swears that, on May 23, he showed the written offer of Allan to the defendant, that the defendant then said, "That's good. I will call Milner and Noble up and find out what there is against the place in order that we may get the papers made," that he, McIntyre, then assured defendant that Allan was ready to go ahead at any time, that he, McIntyre, saw defendant again on the night of the 25th, that the defendant then said, "Say, Archie, we should get more money for that land, I have got a deal on that I can get $35 an acre for that land," that he, McIntyre, said that the land was alright but that he did not know what to do about Allan, and that then the defendant said, "I would rather pay you more

commission and call Allan's deal off," and that he, McIntyre, then said. "That is not fair to Allan."

Now, there is no specific denial of these assertions of McIntyre in the evidence of Law. On cross-examination only Law was asked, "Did you ever express to anybody a desire to shake Allan in this transaction, this previous transaction, did you ever say anything about shaking Allan?" and he answered, "I don't remember, no." Then Law swears that on the morning of May 25 he posted a letter to McIntyre refusing to go on any further with the negotiations with Allan. McIntyre swears he never received this letter. But the trial judge must have either believed or disbelieved Law when he said he sent this letter. If he disbelieved him it would go far towards assisting in the conclusion that he had not been acting in good faith. If he believed him, it might still have a similar effect upon the judge's mind because it would fit in very well with McIntyre's account, already quoted, of what Law had said the evening of the same day. Law also stated that it was on the first interview on the 23rd that McIntyre told him that Allan required a transfer and a mortgage back as the form of the transaction. McIntyre stated this was not spoken of until the interview of the evening of the 25th. I can see nothing in the evidence which would make it impossible for the learned judge to accept McIntyre's account and if he did so, then Law, according to his own story, had decided to refuse to negotiate before he had heard of the proposition with regard to the mortgage.

I am, therefore, of opinion that there was ample evidence upon which the trial judge could come to the conclusion that the defendant Law did not pursue the negotiations with Allan in good faith and that it was really in consequence of the intervening opportunity of obtaining a higher price that he decided to withdraw and this, even though upon McIntyre's evidence there were some subsequent negotiations. As a fact he did within a few days sell for $32, all cash.

This being so, I think the defendant was liable in damages and that in the circumstances the damages should be fixed at the amount of the commission, namely, $880, as was done in *Roberts* v *Barnard*, 1 Cab. & El. 336.

The appeal should be dismissed with costs.

Appeal dismissed.

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ROGERS v. CALGARY BREWING & MALTING Co. (Annotated).

Supreme Court of Canada, Fitzpatrick, C.J., and Davies, Idington, Duff and Anglin, JJ., November 28, 1917.

BILLS AND NOTES (§ IV D—104)—CHEQUE—UNREASONABLE DELAY—PAYMENT WITH DRAFT—DISHONOUR—DISCHARGE OF MAKER.

The maker of a cheque is discharged from his liability if the agent of the payee, instead of insisting on prompt payment out of funds then available, allows an unreasonable time to elapse, and then accepts a draft, which is dishonoured, on another bank, immediately after which the drawee goes into insolvency.

[*Calgary Brewing & Malting Co.* v. *Rogers*, 34 D.L.R. 252, affirming 33 D.L.R. 173, reversed.]

Statement. APPEAL by defendant from the Saskatchewan Supreme Court, affirming the judgment of Haultain, C.J., in an action on account. Reversed.

J. A. Ritchie, for appellant; *P. M. Anderson*, for respondent.

Fitzpatrick, C.J. FITZPATRICK, C.J.:—The Bank of Montreal, acting as agent for the respondent to collect the amount of appellant's cheque or draft on the Estevan Security Co., sent that cheque direct to the drawee by post, and, instead of insisting upon prompt payment out of the funds which the appellant then had available with that company for the payment of his cheque, chose to give the company almost one month's delay, and at the end accepted a worthless draft of the company which immediately after went into insolvency. On these facts, I do not entertain any doubt that the appellant was discharged of his liability to the respondent for the amount of the cheque or draft, and that the appeal ought to be allowed. I am inclined also to doubt that there was a good presentment, and in any event notice of non-payment was not given in a reasonable time.

Suppose the Estevan Co. had had sufficient funds with the Union Bank on which the draft was made, but the Bank of Montreal, in place of taking cash, had again accepted the draft of the Union Bank on some other bank. The process might have gone on indefinitely. Could it be suggested that the liability of the appellant would always have continued, and that he could have been held responsible for the failure of the Union Bank or any subsequent bank whose draft the Bank of Montreal might have taken? It would be just as true as in the present case that the respondents had never received cash.

It is no use for the manager of the Bank of Montreal to say that

it did not appoint the Estevan Security Co. their agent, because the bank does not appoint private bankers its agents if that is what it, in fact, did. Suppose, as counsel for the appellant suggested, it had sent the cheque to the express company for collection, and it had taken the worthless draft instead of the cash, what answer could the Bank of Montreal have had in face of this action of its agent? Why should it be allowed to repudiate the agency, because it sent it direct to the company on whom it was drawn? Further, the Bank of Montreal did not repudiate the discharge by the draft, did not send back the draft, but accepted and presented it in due course.

I observe that Brown, J., says that he does not think the case of *Donogh* v. *Gillespie* (21 A.R. Ont. 292), is applicable to the case at bar. If it could be held to be so, I should not be able to accept it as a binding authority. If an agent presents a cheque and accepts a banker's draft in place of cash, I cannot think the principal can claim that, in so doing, he was not acting within the scope of his agency. In a sense, every blunder or improper action on the part of an agent is unauthorized by his principal. Such a limitation on the liability of the principal for the acts of his agent would, however, render impossible any dealing with an agent; parties so dealing cannot always know the precise instructions he has received with reference to carrying out the transaction in which he is authorized to act.

As a matter of fact, I should suppose the transaction was carried out in accordance with common banking practice and the intention of the Bank of Montreal.

The appeal should be allowed with costs.

Davies, J.

DAVIES, J.:—In this appeal, I would, very much, have preferred to refer the case back for a new trial, so that the cause of the long delay on the part of the Estevan Security Co. in remitting to the Bank of Montreal its draft on the Union Bank of Winnipeg which was dishonoured, in payment of the cheque or bill of exchange of the appellant Rogers in favour of the respondent which the bank had forwarded to the Estevan Co. for payment, might be explained and the responsibility for that delay determined.

As, however, this view is not shared by my colleagues, I cannot see that any useful purpose will be served by my dissenting,

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formally, from the judgment allowing the appeal proposed to be delivered.

So far as my personal assent to that judgment is concerned, I simply desire to say that it is given with very grave doubt, arising out of the absence of any evidence on the material fact of delay above referred to.

Davies, J.

The only plea placed upon the record by the appellant was one of payment, and that did not call for any explanation of this delay, and that was, I assume, the reason why no evidence on the point was given.

Idington, J.

IDINGTON, J.:—The appellant owed respondent and gave it a cheque on the Estevan Security Co., a private bank in Bienfait in Saskatchewan, for $700, dated November 11, 1914, for which due credit was given in an account rendered on the 30th of the said month, by respondent to appellant. Respondent then, on the 14th of the same month, indorsed it over to the Bank of Montreal (at Calgary) where respondent carried on business, as I infer from the date of credit given in said account, and the stamp marking of that bank on the face of the document.

The trial judge says this was done for collection, but I cannot so find from the evidence. That is barren of a good many details relative to the dealings with this cheque regarding which we might have been informed.

In law, however, I cannot say that there is any substantial difference in the result so far as appellant is directly concerned, whether it was left for collection or discounted, and placed to the credit of respondent.

In either event it was the act of the respondent that entrusted it to the Bank of Montreal, which must be held the agent of respondent, unless treated as holder of the cheque.

The bank sent it direct to the Estevan Security Co. But when it did so does not appear.

It does appear that the said banking company sent as its payment of it, a cheque dated December 10, 1915, in favour of the Bank of Montreal on the Union Bank at Winnipeg, which seems to have been accepted by said Bank of Montreal without objection, and in turn sent by it to Winnipeg for presentation.

The Union Bank refused payment of that cheque, and the Bank of Montreal had it protested on 14th of the said December.

On December 16, 1914, the respondent telegraphed appellant as follows:—

To A. C. Rogers, Bienfait. December 16th, 1914.
Bank advise draft seven hundred Estevan Secdrity on Union Bank unpaid. See Security Company at once. C. B. & M. Co., LTD.

The Estevan Security Co. had closed business that day by reason of its insolvency.

The appellant had money in that private bank sufficient to meet the cheque which was handed over to him with his bank book, marked by a stamp of that company, as paid on December 10.

I am of the opinion that upon the foregoing facts, the judgment of the trial judge and of the majority in appeal upholding it, cannot be sustained and should be reversed.

I have chosen to call the document now in question a cheque, though on a private bank, and thus not a cheque within the meaning of our Banking Act but under that properly called a "bill of exchange."

There was a time when that distinction could not properly have been made, and when it would have been called, as I have called it, a "cheque."

I have done so designedly for the reason that there are some considerations which I need not dwell upon, which shew that the position of the respondent holder would be worse if in relation to a bill of exchange than a cheque.

The curious may find in the case of *Robinson* v. *Hawksford*, 9 Q.B. 52, many cases and authorities referred to where the law is discussed at a time when the distinction between a cheque on a private banker and a charetered bank did not seem to exist.

And though it was urged then that the original consideration could have been sued upon, Patterson, J., remarked that he thought not when the holder had vitiated the cheque by unreasonable delay.

Be that as it may, I am clearly of the opinion that the respondent cannot recover herein; if for no other reason than the credit given coupled with the most unreasonable delay which clearly led to the loss of apparently the entire sum through the bank accepting another cheque or bill in its stead, upon the principle laid down in the cases of *Smith* v. *Ferrand*, 7 B. & C. 19; *Strong* v. *Hart*, 6 B. & C. 160; *Lichfield Union* v. *Greene*, 26 L.J.Ex. 140; and by the late Mr. Justice Street (no mean authority) unheld in appeal, in *Boyd*

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v. *Nasmith*, 17 O.R. 40; and that the appeal should be allowed throughout, and the action be dismissed with costs.

DUFF, J.:—I am of the opinion that this appeal should be allowed with costs.

ANGLIN, J.:—I am, with respect for the judges who have taken the contrary view, of the opinion that this appeal should be allowed.

The material facts are as follows:—An inland bill of exchange drawn by the appellant on the Estevan Security Co. payable on demand at Bienfait, Manitoba, was deposited by the payee (respondent) with its bankers at Calgary on November 14, 1914, for the present I assume for presentment and collection. These bankers had no agency at Bienfait. Instead of employing the Bank of Hamilton, which had a branch office there, to execute their mandate, the bankers sent the appellant's bill by post directly to the Estevan Security Co., presumably on the day they received it. From that time until December 10, nothing further is known of the bill, so far as is disclosed by the record. On December 10 the Estevan Security Co. (with which from November 11 the appellant had funds on deposit sufficient to meet his bill) sent to the respondent's bankers a draft on the Union Bank at Winnipeg for the amount of the bill and on the same day stamped the latter "Paid." On presentment at Winnipeg, the Union Bank refused to honour the Security Company's draft. The latter company suspended payment on December 16, and on the following day, the appellant received a telegram, sent on the 16th, informing him that his cheque (bill) had not been paid. Owing to the hopeless insolvency of the Estevan Security Co. any claim the respondent might have to rank in its liquidation in respect of his deposit with it is of little, if any, value.

Assuming that the respondent's bankers adopted a usual and proper course in sending the bill drawn by the appellant by the post to the drawees (Bills of Exchange Act, R.S.C. c. 119, s. 78 (*d*); s. 90 (2)), they thereby constituted the latter their agents to present to themselves. If so, they must be accountable for the conduct of those agents in regard to the presentment for payment and a like accountability rests on the respondent. If there was a presentment, either it was grossly dilatory if not made until December 10, or, if it was made in due course after the receipt of the bill by

the Security Co., there was what must, in the absence of any explanation, be deemed an inexcusable delay in giving notice that payment had been withheld. Unless the bankers received the money by return of post, the absence of an answer should have been considered as a dishonour and notice thereof should have been given promptly. At all events, at least, some inquiry should at once have been made, and that should have been followed up by steps to enable the appellant to protect his interest. So far as is disclosed by the evidence, nothing whatever was done. I am, therefore, of the opinion that, assuming there was a presentment, the bill, because there was undue and unaccounted for delay either in that presentment or in giving notice of dishonour by the agents of the holder, for which it cannot escape responsibility, the drawer is discharged. If authority for this view be needed, the case of *Bailey* v. *Boderham*, 16 C.B.N.S. 288, supplies it.

It is a fair inference from the facts in evidence, that if the bill had been presented across the counter, as it might have been, it would have been paid. That the drawer was damnified to the extent of the face value of the bill by the failure of the bankers to discharge their duty, is therefore apparent. It follows that it is immaterial whether the instrument should be regarded as a cheque or as an inland bill of exchange. For reasons concisely stated by Winter, D.C.J., in *Revelstoke Saw Mill Co.* v. *Fawcett*, 8 W.W.R. 477, I think it is not a cheque but a bill payable on demand, with the result, accurately stated by that learned judge, that, without proof of actual damage (which, however, exists in this case), the drawer was discharged not merely in respect of the bill, but also from his liability on the original transaction for which it was given.

Although the only plea of the defendant is payment, the defence of the negligence in regard to presentment and notice of dishonour was fully investigated at the trial, and the issue upon one or both of these defaults was clearly before the court. Moreover, the defence based on the bankers' default is tantamount to a plea alleging that the plaintiff is thereby estopped from denying payment. No injustice to the plaintiff on the grounds of surprise or otherwise can result from allowing the defendant to take advantage of any legal defence disclosed by the facts in evidence. Under these circumstances it would savour of extreme technicality to deprive him of the benefit of any such defence because not explicitly raised in his plea.

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If, as is by no means improbable, the respondent's bankers, when they received the appellant's bill, placed the amount of it to the customer's credit, they would, under the circumstances in evidence, find great difficulty in maintaining a right to debit its account with the amount of the bill when eventually returned to them as unpaid. If they had not that right, the plea of payment might well be regarded as actually established. Moreover, there is not a little to be said for the view that the defendant, if then still liable, was discharged when the bankers took the Security Co.'s draft on the Union Bank instead of insisting on payment of his bill in cash. No doubt when that draft was issued the amount of the defendant's bill was charged against his account with the Estevan Security Co., and, as Brown, J., points out, he would thereafter have been to that extent unable to obtain payment from it of his deposit. It may be that after so charging up the bill to appellant's account, the Security Co. should be regarded as having held the amount thereof, as agents for the respondent's bankers and therefore for the respondent.

I prefer to rest my judgment, however, upon the effect of the negligence of the respondent through its agents in regard either to presentment or to notice of dishonour.

The appellant is entitled to his costs in this court and in the Supreme Court of Saskatchewan *en banc* and judgment should be entered dismissing the action with costs. *Appeal allowed.*

Annotation.

ANNOTATION.

Cheques—Delay in presenting for payment.

The Bills of Exchange Act, 1890 (53 Vict. c. 33) was a re-enactment with little modification of the English Bills of Exchange Act, 1882. In the revision of 1906, however, many alterations were made in the arrangement and constitution of the sections. Many of the sections of the new Act consist of subsections of the old Act and even more frequently sections of the old Act have been divided into parts and sub-sections and now appear in separate sections of the new Act.

S. 166 of the Act of 1906 (R.S.C. 1906, c. 119) corresponds with s. 74 of the English Act of 1882. Clause *a* is as follows:—

(*a*) Where a cheque is not presented for payment within a reasonable time of its issue, and the drawer or the person on whose account it is drawn had the right, at the time of such presentment, as between himself and the bank, to have the cheque paid, and suffers actual damage through the delay, he is discharged, to the extent of such damage, that is to say, to the extent to which such drawer or person is a creditor of such bank, to a larger amount

Annotation.

than he would have been had such cheque been paid. This clause was passed to mitigate the rigour of the common law rule. At common law the omission to present a cheque for payment did not discharge the drawer until six years had elapsed, unless some injury resulted to him from the delay. *Robinson* v. *Hawksford* (1846), 9 Q.B. 51; *Laws* v. *Rand* (1857), 3 C.B.N.S. 442. But by the common law if a cheque was not presented within a reasonable time and the drawer suffered actual damage by the delay, the drawer was absolutely discharged, even though the damage suffered was less than the amount of the cheque, *e.g.*, where the bank failed, but ultimately paid a substantial portion of its liabilities, *Alexander* v. *Burchfield* (1842), 7 M. & G. 1061. It will be seen that the former part of the common law rule is impliedly preserved by the Act, namely, that if the drawer does not suffer damage by the delay, the holder may present a cheque within any period not exceeding the period of limitation of action. The drawer of a *bill of exchange* payable on demand is, however, by s. 86 of the Act, discharged if the bill is not presented for payment within a reasonable time after its issue. But see *Vermette* v. *Fortin*, 52 Que. S.C. 229, where it was held that more than two years was a reasonable time under the circumstances. The drawer of a *cheque* in such case is discharged only if he had the right at the time of presentment, as between himself and the bank, to have the cheque paid, and suffers actual damage through the delay and only to the extent of such damage.

In *Revelstoke Sawmill Co.* v. *Fawcett*, 8 W.W.R. 477, F., in settlement of a claim for material supplied, sent to R. a cheque drawn on the Dominion Trust Co. R. did not present the cheque for five days. Upon presentation it was dishonoured, the Dominion Trust Co. having suspended payment. It was held that if the Dominion Trust Co. was an incorporated bank so as to come within the definition of bank contained in the Bills of Exchange Act, F. was discharged, as to the amount of actual damage suffered by him through the delay in presentation, and R. under s. 166, sub-sec. (*b*) of the Act, became a creditor in lieu of F. of the Dominion Trust Co. But if the Dominion Trust Co. was not an incorporated bank as defined by the Act, not only was F. discharged, in respect of the bill, but he was also discharged from his liability on the original consideration for which it was given.

Clause B. of s. 166: The holder of such cheque, as to which such drawer or person is discharged, shall be a creditor, in lieu of such drawer or person of such bank to the extent of such discharge, and entitled to recover the amount from it.

This clause has adopted the principle of the civil law and modified the general rule of s. 127, that a cheque does not operate as an assignment of funds in the hands of the bank. If the drawer is discharged under clause (*a*) the holder may recover from the bank out of the drawer's funds, to the extent to which the drawer is discharged, *Banque Jacques-Cartier* v. *Limoilou* (1899), 17 Que. S.C., at p. 223. If, however, the drawer had no funds to his credit, but was authorized to overdraw, the drawer would still be discharged, but the holder could not prove against the bank.

If the delay in presentment is pursuant to an agreement between the drawer and the holder, the drawer would have to bear the loss resulting from the failure of the bank in the meantime.

Marreco v. *Richardson*, [1908] 2 K.B. at 593: The holder should present the cheque within a reasonable time of its issue, not only to guard against the contingency of the bank failing (see *Revelstoke Sawmill Co.* v. *Fawcett*, *supra*)

Annotation. but to guard against any possible revocation of the bank's authority to pay, as by its receiving notice of the customer's death, the holder should also bear in mind that he may be put to much trouble and inconvenience by his neglect to present the cheque within a reasonable time because banks in general understand it as a rule of business not to pay old cheques without enquiry. The drawer's account may be overdrawn, or he may have ceased to have an account with the bank, or might have become insolvent in the interval.

REASONABLE TIME.—Sub-sec. 2 of s. 166 is as follows:—"In determining what is a reasonable time, within this section, regard shall be had to the nature of the instrument, the usage of trade and of banks and the facts of the particular case."

This clause considerably relaxed the stringency of the old common law rule and became necessary in view of the increase in the circulation of cheques in place of cash or bank notes. The old cases laid down the following principles, and in so far as they embody the present usages of trade and banks they will still control the meaning of the words "reasonable time" in the statutory definition:

(1) If a person who receives a cheque, and the banker on whom it is drawn are in the same place, the cheque must in the absence of special circumstances be presented for payment on the day after it is received, *Alexander* v. *Burchfield* (1842), 7 M. & Gr. 1061.

(2) If the person who receives a cheque and the banker on whom it is drawn are in different places, the cheque must in the absence of special circumstances be forwarded for presentment on the day after it is received, and the agent to whom it is forwarded must in like manner present it or forward it on the day after he receives it. *Hare* v. *Henty* (1861), 20 L.J.P.C. 302, *Prideaux* v. *Criddle* (1869), L.R. 4 Q.B. 455, *Heywood* v. *Pickering* (1874), L.R. 9 Q.B. 428.

(3) In computing time, non-business days must be excluded, and when a cheque is crossed, any delay caused by presenting the cheque pursuant to the crossing is probably excused. As to unreasonable delay in presentment of cheques in view of the evidence as to the usage of trade, see *Banque Jacques-Cartier* v. *Limoilou, supra,* where it was held that a cheque issued on the 11th of the month and presented on the 15th was not presented within a reasonable time; see also *Legarè* v. *Arcand* (1895), 9 Que. S.C. 122, where one day's delay was held to be unreasonable in view of the fact that there had been a run on the bank and that suspension was likely to follow.

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THE KING ex rel. BURNS v. FIELDING.

Nova Scotia Supreme Court, Russell, Longley and Drysdale, JJ., Ritchie, E.J., and Chisholm, J. March 12, 1918.

INTOXICATING LIQUORS (§ III B—60)—NOVA SCOTIA TEMPERANCE ACT—CLUB—LIQUOR IN CLUB BUILDING—JURISDICTION OF MAGISTRATE.

On an information under the Nova Scotia Temperance Act against a member of a club for unlawfully keeping liquor in the club building, the question is one of fact to be determined by the stipendiary magistrate, no question of jurisdiction arises on which a writ of prohibition can issue.

[*Hawes* v. *Hart*, 18 N.S.R. 42, distinguished.]

Statement. MOTION on behalf of Michael F. Burns for an order that a writ of prohibition do forthwith issue directed to George H. Fielding,

stipendiary magistrate in and for the City of Halifax, to prohibit him from further proceeding or making a conviction on a certain information and complaint laid by E. S. Tracey, inspector under the N.S. Temperance Act for the City of Halifax, charging the relator with having, between certain dates specified, unlawfully kept for sale intoxicating liquor contrary to the provisions of Parts I. and II. of the N.S. Temperance Act and Acts in amendment thereto then in force in the City of Halifax.

J. J. Power, K.C., for the relator, in support of application; *Nem. con.*

Russell, J.

RUSSELL, J.:—This is an application for a writ of prohibition. The stipendiary magistrate of Halifax city was about to convict the member of an incorporated club of keeping liquor for sale under the circumstances appearing in the evidence. The practice was for the club to keep liquor in an ice chest or box. Any member desiring to drink it could help himself from the stock and deposit the price. It seems that there was sometimes a person in charge of the stock and sometimes there was no one. I think this was a sale by the club to the member. If the club were unincorporated it is conceivable that every member would be liable for keeping the liquor for sale. But the corporation is a distinct juristic person and the property in the liquor as well as the possession of it was in the corporation. The member had neither property nor possession and so far from keeping the liquor for sale he himself was the purchaser of the liquor consumed. It is probable that the legislature never intended to put the member of an incorporated club in any different position from that of the member of a club not incorporated. But in construing a criminal statute I do not think we are at liberty to indulge in any speculations of that nature.

I do not, however, think that the case is one for a writ of prohibition. I think the magistrate had jurisdiction under the information to inquire into the question whether the defendant charged in the information was or was not guilty of the offence.

I cannot see that there was any preliminary question to be decided upon which his jurisdiction depended as was held in the case of *Hawes* v. *Hart*, 18 N.S.R. 42, by one or more of the members of the court. The only question he had to decide was whether the defendant had committed the offence charged. That decision

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Drysdale, J.

involved the interpretation of a section of the N.S. Temperance Act. So may every case that comes before the court under the provisions of the Act. I think the magistrate had jurisdiction to decide that question.

DRYSDALE, J.:—This application is for a writ of prohibition to prevent the stipendiary magistrate from proceeding further with an information against Michael F. Burns laid by one Edwin S. Tracey, whereby Burns is charged with keeping for sale intoxicating liquor contrary to the terms of the N.S. Temperance Act. Burns is the vice-president of an Athletic Club and the charge against him is keeping or having in the club house liquor against the terms of s. 6(3), whereby he is deemed to violate s. 5 of c. 2 of the Acts of 1910.

A careful reading of the legislation convinces me that it was intended to cover just such a case as this evidence discloses against Burns. The difference between incorporated and unincorporated societies is abolished and the keeping or having in the club house liquor for the use of any person resorting thereto not only makes the club liable, but shall be deemed a violation of s. 5 by the members or persons so resorting. Whether Burns kept liquor in the club for himself and others or for himself contrary to the spirit and meaning of s. 6 (3), is a question of fact to be determined by the magistrate and not for our consideration, except to say that the case as made before the magistrate warrants him in proceeding. I would refuse the writ.

Ritchie, E. J.

RITCHIE, E.J.:—Fielding is the stipendiary magistrate for the City of Halifax; Tracey is the inspector for the purpose of enforcing the N.S. Temperance Act. An information was laid against the relator, Michael F. Burns, for unlawfully keeping for sale intoxicating liquor contrary to the provisions of the Act. Burns is a member of the "Resolutes Amateur Athletic Club of Halifax." The club was incorporated by c. 153 of the Acts of the Province of Nova Scotia for the year 1901. The objects of the club as stated in its Act of Incorporation are: "The promotion and encouragement of athletics and the physical improvement of its members." It is, therefore, very clear that the keeping of beer for the members was not one of the objects of the club. Beer can hardly be regarded as promoting and encouraging athletics or the physical improvement of the club members. Apart from this the evidence

shews that the beer was owned and kept by the members and not by the club as a club.

The case came on for trial before the stipendiary magistrate. He intimated that he thought it was a case for conviction but also intimated that he would hold his hand to enable the relator to apply to this court for a writ of prohibition, and the application now comes before the court.

S. 5 of the Act makes it an offence to keep intoxicating liquor for sale. Beer is a malt liquor which comes within the definition of "intoxicating liquor" as defined in the Act.

Sub-s. 2 and 3 of s. 6 of the Act are as follows.—

2. Any incorporated or unincorporated society, association or club, or any member, officer or servant thereof, or person resorting thereto, that sells or barters liquor to any member thereof, or to any other person, shall be held to have violated s. 5 of this Act, and shall incur the penalty provided for the unlawful sale of liquor.

3. The keeping or having in any house or building, or in any room or place occupied or controlled by such society, association or club, or any member or members thereof, or by any person resorting thereto, of any liquor for sale or barter, shall be a violation of s. 5 of this Act.

By an amending Act (1 Geo. V. 1911 c. 33 s. 4) the sub-s. 3, above quoted, was repealed and the following substituted:—

The keeping or having in any house or building, or in any room or place occupied or controlled by such society, association or club, or any member or members thereof, or by any person resorting thereto, of any liquor shall be deemed a violation of s. 5 of this Act.

The words "for sale or barter" are intentionally struck out. Therefore the question of fact is, did Burns keep or have the beer in the club building? I think there is evidence upon which the stipendiary magistrate can hold, if he thinks proper to do so, that Burns had or kept the beer in the club building. This question of fact is entirely for him, and is not subject to the control of this court. Burns, as I have said, was a member of the club and its vice-president.

Robert Horner swears:—"The ale belongs to the members of the club." William White swears:—"The ale belongs in part to me. It belongs to all the members of the club."

If it belonged in part to White, it also belonged in part to Burns and he drank it in the club.

In the view which I take of the evidence, it is not necessary to discuss the cases cited. It is urged that the prosecution was out of time. I think there is no ground for this contention.

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Chisholm, J.

In my opinion the application should be refused.

CHISHOLM, J.:—The sections of the N.S. Temperance Act which have to be considered are s. 6 (2) of c. 2 of 1910 and sub-s. (3) of said s. 6 as amended by s. 4 of c. 33 of 1911. They are as follows:—(The sections referred to are quoted in full in the opinion of Ritchie, E.J.)

Sub-s. (2) makes it an offence against the Act for the club, or any member or officer or servant thereof, to sell or barter liquor to any member of the club, or to any other person. The sale by the club or by any of its members, officers or servants is the offence defined in that sub-section. Sub-s. (3), as it originally stood, made it an offence to keep or have for sale or barter in any house, building, room or place controlled or occupied by any such member or controlled or occupied by any person resorting thereto. Those who are capable of committing this offence are, I take it, persons or clubs who kept or had, in such defined premises, liquors for purposes of barter and sale to anybody to whom a sale could be made. The amendment of 1911 makes such having or keeping of liquor in such permises, no matter whether kept or had for purposes of sale or barter or not, a violation of the Act.

The question then is, did the defendant, by himself alone, or with others, keep or have liquor in premises occupied or controlled by the club or by its members or officers of which he was one? If we are permitted to look at the evidence I should say with hesitation that he did. He was a member of the club and was its vice-president and he and his fellow members permitted the liquor to be kept there.

I am of opinion that the application for the writ of prohibition should be refused. *Application refused.*

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Saskatchewan Court of Appeal, Haultain, C.J.S., Newlands, Lamont and Elwood, JJ.A. March 27, 1918.

MASTER AND SERVANT (§ IE—21)—REFUSAL OF SERVANT TO DO WORK—RIGHT OF MASTER TO DISCHARGE—VILE NAMES—CONDONATION.

Refusal on the part of a servant to perform the duties for which he was hired, gives the master the right to dismiss him, but does not justify the master in insulting him by calling him vile names. The servant does not necessarily condone the offence because he does not leave the employ immediately, especially if the offence is again committed after a few days after which the servant does leave the employ.

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APPEAL by plaintiff from a judgment of the trial judge dismissing an action for recovery of wages. Reversed.

D. A. McNiven, for respondent.

HAULTAIN, C.J.S., and NEWLANDS, J.A., concurred with LAMONT, J. A.

Lamont, J.A.

LAMONT, J.A.:—The facts in this case are simple. The defendant hired the plaintiff to work for him on his farm from April 10, 1917, until the fall of the same year at a wage of $60 per month. The plaintiff worked until July 17. On July 15 the defendant's wife asked the plaintiff to milk the cows; the plaintiff at first refused but subsequently did it. Next morning some words took place between plaintiff and defendant, in the course of which the plaintiff said that he could not get along with people that had worked out. The defendant considered this remark to refer to his wife and to cast a slur upon her, and he used abusive and insulting language toward the plaintiff. According to the plaintiff he called him a "liar and a bastard" several times. The defendant admits that he called him a "cur" and a "bastard." On the evening of July 17 the plaintiff asked the defendant if he was of the same opinion still; the defendant said he was. According to the plaintiff's evidence, the defendant repeated the offensive names he had called him the day before. The defendant's evidence on the point is this: "On Tuesday night he asked me if I was still of the same opinion. I said 'Yes' until he apologised, and I could then withdraw everything I said. He said he would quit." The plaintiff left the defendant's employ the next morning.

The findings of the trial judge are as follows:—

I consider that the contract was an entire contract, payable at the termination of the contract, at the rate of $60 per month.

The evidence shews that the plaintiff refused to do work which he was lawfully called upon to do on the Sunday morning when he was instructed to milk the cows. The evidence also shews that the defendant used insulting language to the plaintiff on the Monday and the Tuesday.

The defendant had the right, when the plaintiff refused to milk the cow, to discharge him immediately, but had no right to use insulting and abusive language to him. On the other hand, when the defendant used insulting and abusive language to the plaintiff, he, no doubt, had a right to leave the employ, had he done so immediately. He did not, however, leave immediately but took time to think the matter over, and on the Wednesday following he left the employ.

The defendant, by not discharging the plaintiff immediately on his refusal to work, condoned what had taken place, and the plaintiff, by not leaving

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immediately after the abusive language was used to him, also condoned the use of the abusive language.

He thereupon dismissed the action, but directed that each party pay his own costs.

In my opinion, the District Court Judge erred in dismissing the plaintiff's action. The hiring was from April 10th to the fall "at a wage of $60 per month." This is a monthly hiring and the wages accrued due at the expiration each month of service: *Grant* v. *Bradley*, 4 S.L.R. 505. The plaintiff is, therefore, in any event, entitled to 3 months' wages, less $10 which he had received. Whether he is entitled to be paid for the 7 days he worked after July 10th depends on whether or not he was justified in leaving. If he was justified, he is entitled to be paid; if not, he cannot recover any wages for work done after July 10.

The question, therefore, is, did the language used towards him by the defendant on Monday morning and persisted in on the evening of the following day justify the plaintiff in quitting the service?

In *Clouston* v. *Corry*, [1906] A.C. 122, the Privy Council held that there is no fixed rule of law defining the degree of misconduct which will justify dismissal from the service. That it is a question of fact for the jury, whether the degree of misconduct was inconsistent with the fulfilment of the express or implied conditions of service so as to justify dismissal. I take it that the principles governing the right of an employer to dismiss his servant will also govern the right of a servant to abandon his employment. In the case just referred to, their lordships say that "any misconduct inconsistent with the fulfilment of the express or implied conditions of service will justify dismissal."

What are the implied conditions of service? So far as the servant is concerned these depend, in a great measure, upon the nature of his employment and his master's business. He is bound, however, to obey all lawful orders of his master, to be honest and diligent in his master's business and not abuse his confidence in matters appertaining to his service—Smith on Master and Servant, 5th ed., p. 99.

Furthermore, the master is entitled to be treated with respect by his servant. On the other hand, the servant is also, in my opinion, entitled to decent treatment at the hands of his master.

There are many servants whose feelings are as fine and whose sensibilities are as susceptible as those of the master, and a master has no right to make the conditions of living, on the part of his servants, intolerable to a man of decent feeling. To call a man a "cur" is to call him a low, ill-bred, surly or cowardly fellow; it is a term of contempt—(New English Dictionary). To call him a "bastard" is to cast aspersions upon his birth and parentage. No evidence was given by the defendant that these words were used by him and understood by the plaintiff in a sense other than their ordinary meaning. I think it would have been open to him to show (if such were the fact) that they were mere terms of abuse used and understood in a sense less degrading than their true meaning. No such evidence was given. Indeed, from the fact that the defendant persisted in them after a lapse of two days, the conclusion might fairly, I think, be drawn, that they were not mere terms of abuse uttered in a moment of anger.

The trial judge has found, as a fact, that the employment of the language used by the defendant toward the plaintiff afforded ample justification for the plaintiff's leaving his employment. This being a question of fact, I do not think it should be disturbed. Moreover, I agree with the conclusion reached by the trial judge. The conditions of employment, in my opinion, would be intolerable if a master were permitted to use such language towards his servant, and the servant could only escape therefrom by losing his wages if he refused to submit to it.

The trial judge, however, held further that the plaintiff had condoned the use of this language by the defendant. With deference, I am of opinion, there is no evidence to support this. The fact that the plaintiff did not leave at once is, to my mind, under the circumstances, no evidence. His waiting two days before asking the defendant if he still believed he was the kind of man his words implied, would indicate that he thought the defendant might have used the terms as a result of momentary anger, and that after time had cooled his anger, he would retract. At any rate the question on Tuesday night shows he was not condoning the defendant's offence. On the defendant's refusal to retract unless the plaintiff apologised, the plaintiff left. I cannot, in this, see evidence of condoning the use towards himself of the contemptuous and insulting terms used, but, even if there had been, in effect the de-

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fendant reiterated the words he had formerly used. If the defendant had any real grievance against the plaintiff because the plaintiff had refused to milk the cows, he might, according to the finding of the trial judge, with which I also agree, have dismissed the plaintiff; but where a master decides not to exercise his right of dismissal the failure on the part of a servant to perform the duties for which he was hired does not give the master a right to insult him as the defendant in this case insulted the plaintiff. This point is touched upon by Wetmore, J., in *Owen* v. *James*, 4 Terr. L.R. 174, at 176, where he says:

> A mere expression of opinion by an employer that his hired man is not doing as much work as he ought to do, at any rate unless the remark is couched in language which a reasonable man would not submit to, is not sufficient to justify a hired man breaking his contract of hire.

In my opinion the language of the defendant was such as no man could reasonably be called upon to submit to.

Reference was also made to certain authorities which indicate that a single offence is not sufficient to justify dismissal from or abandonment of an employment. I do not think any definite rule can be laid down. Every case must be determined upon its own circumstances and the nature of the offence. See *McBride* v. *Brooks*, 4 S.L.R. 124. I, therefore, think the plaintiff was justified in leaving.

The appeal should, in my opinion, be allowed with costs; the judgment below set aside and judgment entered for the plaintiff for the amount of his claim and costs.

Elwood, J.A.

ELWOOD, J. A.:—This is an action brought by the plaintiff to recover wages, at the rate of $60 a month, from April 10, 1917, until July 16, 1917, on which latter date the plaintiff left the defendant's employment.

The evidence shows that the hiring was under a verbal agreement to work from April 10 until the fall of that year at a wage of $60 a month. Nothing was said as to when the wages were to be paid. On the day preceding that upon which the plaintiff left, the plaintiff and defendant had some words, in the course of which the defendant made use of some very insulting language to the plaintiff. On the following day the plaintiff asked the defendant if he had the same ideas, and he said "Yes" and called him the

same names again. I am satisfied that these words were intended as merely words of abuse. The plaintiff thereupon left the employment and brought this action, which was dismissed by the District Court Judge, who held that the plaintiff left his employment without justification, and that, as terms of the employment had not been completed, the plaintiff was not entitled to anything.

So far as the 3 months which the plaintiff did complete are concerned, I am satisfied that the plaintiff is entitled to his wages for those months. *Johnston* v. *Keenan*, 3 Terr. L.R. 239; *Taylor* v. *Kinsey*, 4 Terr. L.R. 178.

The question of whether the plaintiff is entitled to wages for the few days that he worked in the fourth month, would depend on whether or not he had any justification for leaving the employment.

In 26 Cyc., p. 986, it is stated that a servant is not justified in abandoning his contract before the expiration of the term unless good and just causes exist therefor, and that, generally speaking, any breach of the express or implied provisions of the contract of employment by the master, or any act or neglect on his part which is prejudicial to the safety, health, comfort, morals or reputation of the servant will be deemed sufficient grounds for abandonment. In the notes to the above it is stated that a mere disagreement or rude remark by the master is no justification, neither is harsh language by the master. I cannot find any case in which it has been held that mere abuse by words or insulting language are sufficient grounds for the servant abandoning his employment. I quite realize that the relationship of master and servant is greatly different from what it was in early days. Formerly, a servant was practically a mere chattel; the master could do with him practically what he liked. He could chastise him. But conditions have greatly changed, and I apprehend that conduct which would not in the early days have justified a servant in abandoning his employment would be held to-day as sufficient grounds for abandonment. There are cases in which it has been held that a servant may be dismissed for gross insolence or rudeness to his master, but it has been held that a single instance of insolence on the part of a servant is not sufficient ground for dismissal. *Edwards* v. *Levy*, 2 F. & F. 94.

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In the case at bar, the insulting language used was practically on an isolated occasion. While it is true it was repeated the next day, it was only repeated on the invitation of the servant, and even then, the master said in reply to the servant's question, that he was of the same opinion until the servant apologised for something he had said, and that, on an apology being given, he would withdraw. I can quite conceive that continued abuse of a servant by mere words might be a ground for abandonment, but I am of the opinion that, in the circumstances of this case, a sufficient ground for abandonment was not shown.

The appellant, in my opinion, is entitled to judgment for $180.00, less cash received on account, $10. The appellant is entitled to have his costs of the action and of this appeal.

Appeal allowed.

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APPELBE v. WINDSOR SECURITY Co. Ltd.

Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., and Riddell, Lennox and Rose, JJ. December 7, 1917.

MORTGAGE (§ VI E—90) — MORTGAGORS AND PURCHASERS RELIEF ACT — MORTGAGES EXECUTED PRIOR TO AUGUST, 1914 — PROHIBITION AGAINST.

The prohibition against proceedings under the Mortgagors and Purchasers Act, 5 Geo. V. c. 22 (Or), and the amendment thereto, 6 Geo. V. c. 27 (O), and the Statute Law Amendment Act, 7 Geo. V. c. 27 s. 59, as to mortgages, is expressly and plainly confined to mortgages "made or executed prior to August 4, 1914." A mortgage made after that date although in substance a renewal is not within the Acts.

[See Annotation 22 D.L.R. 865.]

Statement.

APPEAL by plaintiff from an order of Sutherland, J. dismissing an action (brought without the leave of a Judge) to recover the principle money secured by mortgage. Reversed.

J. H. Rodd, for appellant.

W. E. Raney, K.C., for respondents.

Meredith, C.J.C.P.

MEREDITH, C.J.C.P.:—The single question involved in this appeal is: whether the prosecution, without the leave of a Judge, of such an action as this, is prohibited by the recent moratory legislation of this Province.

That legislation is comprised in these enactments: the Mortgagors and Purchasers Relief Act, 1915—5 Geo. V. ch. 22 (O.)—an Act to amend the Mortgagors and Purchasers Relief Act—6 Geo. V. ch. 27 (O.)—and the Statute Law Amendment Act, 1917—7 Geo. V. ch. 27, sec. 59.

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APPELBE v. WINDSOR SECURITY CO. OF CANADA LIMITED.

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Though these enactments must be deemed to be remedial enactments, and as such must be liberally interpreted, we must take care that we do not go a step further and extend their provisions to things which some may think ought to have been, or even were intended to have been, but in fact were not, covered by them.

As to mortgages, the prohibition against proceedings, for the recovery of the principal moneys secured by them, is expressly and plainly confined to mortgages "made or executed prior to the 4th day of August, 1914" (sec. 2 (1) (*a*) of the first enactment); and even in regard to them the prohibition is, by sec. 4 of the first enactment, further curtailed so as to exclude mortgages made before that day which have been extended or renewed after it. But, by the second enactment, this further curtailment was reduced so that it now covers such mortgages only where the "extension or renewal is for not less than three years, and the rate of interest provided for in the original mortgage is not increased by such extension or renewal."

Hitherto this case seems to have been dealt with as if there were some prohibition contained in these enactments against proceeding on some mortgages though made after the 4th day of August, 1914: but that is plainly not so. The prohibition, as I have said, is expressly and plainly confined to mortgages made before that day; that is, before the war, which, and its effect, mortgagors could not prevent; and does not touch mortgages made after the beginning of the war, the making of which, mortgagors could prevent—the making of which is their own act.

The mortgage in question having, admittedly, been made after the 4th day of August, 1914, how is it then possible to bring this action within the prohibitory words of these enactments?

To say that it is in substance only a renewal of a mortgage made before that day, cannot help the respondents; it was none the less a mortgage made after that day, and so one without, expressly and plainly without, these enactments. We cannot add to the words "made or executed prior to the 4th day of August, 1914," such words as "or re-made or re-executed after that day:" nor does there seem to be any good reason why the Legislature should do so; their purpose was, as I have said, to protect those injuriously affected by the war, not those who, with a full knowledge of the war and its effect, choose to make mortgages.

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This case can be brought within the provisions of the enactment only: (1) by ignoring the fact that they affect only mortgages "made or executed after the 4th day of August, 1914;" or else (2) by turning the curtailing section, 4, into an enlarging provision, and then unwarrantably and inexcusably holding that by implication a mortgage made after the 4th day of August, 1914, is brought within the enactment if it can be called an extension or renewal of one made before that day. I say "unwarrantably and inexcusably" mainly because to do so is to attribute to the Legislature the want of ability to state in plain words a simple purpose.

But, if that were not so, how can it be found that the mortgage in question was only an extension or renewal of another mortgage, another mortgage which long since ceased to exist, and was, long since, formally discharged, and the discharge of it duly registered: and not only that, but a mortgage made by an entirely different mortgagor, the other mortgagor having, and having had since the discharge of his mortgage, no interest in the mortgaged property or in any dealings with it, and indeed no kind of liability in respect of mortgage or mortgaged property: and a mortgage different in all respects from the other; the only semblance of likeness in them being that the mortgaged lands were the same in the first as they are in the second of these mortgages, and that each was given by a purchaser—a different purchaser—to secure payment of part of his purchase-money?

There may be an "extension" or a "renewal" of a mortgage without making a new one, and to such an "extension or renewal" the Act is plainly applicable.

The appeal should be allowed and the order appealed against set aside.

Riddell, J.

RIDDELL, J., agreed that the appeal should be allowed.

Rose, J.

ROSE, J.:—Section 2 of the Mortgagors and Purchasers Relief Act, 1915, imposes restrictions upon the right to enforce payment of the principal money secured by mortgages made before the 4th August, 1914. Certain exceptions from those restrictions are made by sec. 4, as amended in 1916. The mortgage in question is not within the words of sec. 2, in that it was made after the 4th August, 1914: the question is, whether it must, nevertheless, be

held to be affected by sec. 2 because it is not excepted from it by sec. 4: that is to say, sec. 4 enacts that sec. 2 shall not apply to extensions or renewals of a certain description made after the 4th August, 1914; and the question is, whether sec. 2 is to be held applicable to this mortgage, because it is an extension or renewal which does not answer the description of the extensions or renewals so expressly excepted from the operation of sec. 2.* In so stating the question I am assuming that the mortgage sued upon is an "extension" or "renewal," although there is much to be said for the contention that it is neither the one nor the other, but is a new mortgage.

I think that the answer to the question is to be found in a case that was not brought to Mr. Justice Sutherland's attention: *West Derby Union Guardians* v. *Metropolitan Life Assurance Society*, [1897] A.C. 647. In that case the House of Lords had to consider a statute of 1871, which is set out in the report of the case in the Court of Appeal: [1897] 1 Ch. 335. The statute enacted that if, at any time, Poor Law Guardians should be able to borrow money at a rate of interest lower than the rate secured by a charge previously made by them, they might, with the authority of the Poor Law Board, borrow the requisite amount to redeem the balance secured by such charge; but no express power was given to redeem without the consent of the persons to whom the money secured by the charge might be payable. There was, however, a proviso in these words: "Provided that in the event of any loan outstanding at the time of the passing of this Act, no such redemption shall take place without the consent of the person or persons to whom the loan shall be owing;" and the argument was that, in view of these words, it must be held that there was power to redeem without consent in the case of loans that were not outstanding at the time of the passing of the Act. The House of Lords did not give effect to this argument. There was a difference of opinion as to what the proviso really meant, but all were agreed that, whatever it meant, it had not the effect contended for.

Thus, Lord Watson said (pp. 652, 653): "I am perfectly clear

*Section 4, as amended, excepts an extension or renewal for not less than three years, where the rate of interest provided for in the original mortgage is not increased by such extension or renewal. The mortgage made in 1915 was payable at the expiration of two years, with interest at 7 per cent. *per annum*, the rate in the earlier mortgage was 5 per cent.

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that if the language of the enacting part of the statute does not contain the provisions which are said to occur in it, you cannot derive these provisions by implication from a proviso. When one regards the natural history and object of provisoes, and the manner in which they find their way into Acts of Parliament, I think your Lordships would be adopting a very dangerous and certainly unusual course if you were to import legislation from a proviso wholesale into the body of the statute, although I perfectly admit that there may be and are many cases in which the terms of an intelligible proviso may throw considerable light upon the ambiguous import of statutory words."

Lord Herschell amplified what Lord Watson had said about "the natural history and object of provisoes," saying (p. 656): "One knows perfectly well that it not infrequently happens that persons are unreasonably apprehensive as to the effect of an enactment when there is really no question of its application to their case; they nevertheless think that some Court may possibly hold that it will apply to their case, and they suggest if it is not intended to be applicable no harm would be done by inserting a proviso to protect them; and, accordingly, a proviso is inserted to guard against the particular case of which a particular person was apprehensive, although the enactment was never intended to apply to his case, or to any other similar cases at all. If the construction contended for were adopted the result would be this: Having put in a proviso which was thought to be needless in order to satisfy certain persons, or a particular class of persons, and allay their fears, you would have the enactment so construed against the intention of the Legislature as to impose a liability upon a number of people who were not so apprehensive, or perhaps were not present, and therefore did not think it necessary or were not in a position to protect their own interests by a proviso."

Lord Davey said (p. 657): "It seems to me that the whole argument of the appellants really comes to the old and apparently ineradicable fallacy of importing into an enactment, which is expressed in clear and apparently unambiguous language, something which is not contained in it, by what is called implication from the language of a proviso which may or may not have a meaning of its own."

It seems to me that not only the passages that I have extracted

but also the whole of the reasoning in the *West Derby* case applies with equal force to the statute under consideration here: and I am therefore of the opinion that the Mortgagors and Purchasers Relief Act does not restrict or limit the right to take or continue proceedings for the recovery of the principal money secured by the mortgage of the 8th February, 1915, whether or not that mortgage is held to be an extension or renewal of the mortgage made by a former owner of the land in 1911: see also *McLaughlin* v. *Westgarth* (1906), 22 Times L.R. 594, 75 L.J. (P.C.) 117.

I would allow the appeal.

LENNOX, J. (dissenting):—An appeal from an order of Mr. Justice Sutherland dismissing this action, on a mortgage, for foreclosure, commenced without leave of a Judge.

The mortgage upon which the plaintiff bases his claim for $28,025, with interest at 7 per cent. per annum, payable half-yearly, was executed on the 8th day of February, 1915, and by its terms was made payable on the 8th day of February, 1917. There is no interest in arrear, nor is there any claim arising out of non-payment of taxes or insurance premiums.

It is contended by the defendant company that this mortgage is merely a renewal or extension of, and admittedly it is based upon and arises out of, a mortgage of the same land, securing payment of a balance of the purchase-money of this land and taxes, etc., executed on the 8th February, 1911, at 5 per cent. half-yearly, of which the plaintiff was assignee, and which had one year to run when the mortgage first above mentioned was made. The defendant company derived their title under the first mortgagor: and assumed payment of the mortgage indebtedness.

The consideration for the mortgage of February, 1915, was made up of the balance of principal money then owing on the mortgage of February, 1911, $27,625, and $400 of taxes upon the mortgaged property, then paid by the plaintiff at the request of the company. See paragraphs 8 and 9 of the plaintiff's affidavit. The payment of these taxes was provided for and secured by the original mortgage. This is important, for the inclusion of taxes is the circumstance upon which the plaintiff bases the contention that the mortgage of February, 1915, was not an extension or

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renewal of the mortgage of February, 1911, but a new mortgage: and that it is not affected by the Mortgagors and Purchasers Relief Act, 1915, 5 Geo. V. ch. 22, or the amendment thereof (1916), 6 Geo. V. ch. 27.

When the mortgage was executed in 1915, or afterwards, a discharge of the mortgage of 1911 was executed, and it was stated during the argument that the discharge has been registered; it was not shewn or stated when the discharge was executed or when or by whom it was registered. The mortgages are not in Court. I presume it was the ordinary statutory discharge. The Mortgagors and Purchasers Relief Act was assented to on the 8th April, 1915, or exactly one month after the execution of the second mortgage.

The principal provisions of this Act and amending Act, in so far as they appear to be directly relevant to the question in appeal, are:—

Section 2 (1), which reads: "No person shall" (without leave of a Judge) "(*a*) take or continue proceedings by way of foreclosure or sale or otherwise, or proceed to execution on or otherwise to the enforcement of, any judgment or order of any Court, whether entered or made before or after the passing of this Act, for the recovery of principal money secured by any mortgage of land or any interest therein made or executed prior to the 4th day of August, 1914."

Eliminating from this clause irrelevant provisions, having regard to the facts of this case, it reads: "(*a*) take . . . proceedings by way of foreclosure . . . for the recovery of principal money secured by any mortgage of land . . . made or executed prior to the 4th day of August, 1914."

The thing dealt with here is the money secured, and the restraint is upon the enforcement of payment of that money if secured *by any mortgage* executed before the 4th August. But for the word "*principal*," and the specific exceptions contained in sec. 4, the restraint would apply to the interest as well, and to taxes too, perhaps, but for the same section.

Section 4 (1), as amended by 6 Geo. V. ch. 27, sec. 1, reads: "Subject to the provisions hereinafter contained, sections 2 and 3 shall not apply to any contract for sale or purchase or to any mortgage [made or entered into after the 4th day of August, 1914.

or to any extension or renewal made or entered into after the 4th day of August, 1914, of a mortgage made or entered into prior to that date where such extension or renewal is for not less than three years, and the rate of interest provided for in the original mortgage is not increased by such extension or renewal] nor to the proceedings taken for the recovery of interest (including arrears of interest which may under the terms of any such mortgage or extension or renewal have been or may be added to the principal money secured thereby) or rent or taxes or insurance or other disbursements for which the mortgagor was liable in the first instance, and as to which he is in default," etc. The amendment was effected by striking out certain words and introducing other words at that point. The words within the square brackets above are those introduced by 6 Geo. V. ch. 27, sec. 1. Before amendment, sec. 4(1) down to the words "nor to the proceedings," where the words introduced end, read: "Subject to the provisions hereinafter contained, sections 2 and 3 shall not apply to any contract for sale or purchase or *to any mortgage or extension or renewal thereof made or entered into after the 4th day of August, 1914.*"

Under this part of sec. 4 (1) two matters were originally provided for: (1) that secs. 2 and 3 shall not apply to a mortgage made after the 4th August, 1914, a wholly unnecessary provision; nor (2) to an extension or renewal of any such mortgage; but, reading the whole section, and having regard to the way the other provisions have been interpreted, and to give effect to every part, it is necessary to interpret "extension or renewal" as applying to an extension or renewal, after the 4th August, of any mortgage.

Whether I interpret the opening words of sec. 4 (1) literally, as first suggested, or so as to give effect to the later provisions as to interest, insurance, etc., as these provisions have been understood and given effect to, and as I think the whole section must be interpreted, the result is:—

(1) That the Legislature, in passing sec. 4 (1), interpreted sec. 2 (1) (*a*) as *per se* including extensions or renewals of mortgages, as well as mortgages; has treated mortgages and renewals and original mortgages as practically the same thing: and, to limit it and clearly define its scope, introduced the words I have above italicised. This is not, perhaps, according to decided cases, *per se* a determining factor.

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(2) That, although it is clear that sec. 2 cannot apply to a mortgage transaction *originated and entered into* after the 4th August, 1914, yet the amending Act cannot apply to the transaction in question here, unless it is to be treated as to all intents a new mortgage "made *or entered into*" on the 8th February, 1915; for the facts do not conform to any of the provisions as to extension or renewal contained in this amendment. "Made or *executed*" are the words used in sec. 2.

(3) That the intention of the Legislature was not so much to protect mortgagors and purchasers from a personal liability which they might be unable to discharge—although actions on the covenants etc. are included—for a personal judgment cannot very much prejudice a man who has nothing to meet it, as to prevent land and interests in land from being lost while, owing to the war, they are comparatively unsalable.

(4) That the Act should receive a liberal interpretation in favour of the debtor; and, unless the transaction between the parties clearly excludes the operation of sec. 2, the action was properly dismissed.

Clauses (*b*), (*c*), and (*d*) of sec. 2 (1) are distinctly relevant—particularly (*d*), dealing with proceedings for the recovery of a balance of purchase-money, whether secured by a mortgage or not, but I have not found it necessary to quote them.

The learned Judge (Mr. Justice Sutherland) said: "Upon the evidence it seems to me plain that, though in form a new one, the mortgage in question is in substance and fact an extension or renewal of the pre-existing mortgage." I agree. In every particular it is the old mortgage indebtedness, including the taxes, as I have said, which the company realised they could not discharge by 1916, and cannot meet now, and it was time for payment of this indebtedness that was provided for by the contract entered into, and it is what the statute provides for; the form of the instrument —evidence of liability—was not the important point either in the view of the Legislature or the parties. If this property had been subject to a large second mortgage, registered, but at the time unknown to the mortgagee, and known to him now—with the second mortgagee claiming priority—would the plaintiff be contending for what he now contends for? And, although it is imprudent to decide a case before it is heard or argued, and I will not

attempt it, I may ask: "Would a Court, upon the facts here, in dealing with such an issue, relegate the plaintiff to the position of a second mortgagee?" The evidence fully sustains the conclusion of the learned Judge as to how the transaction was regarded by all parties at the time it was entered into—indeed it does not appear that the present contention was entertained by the plaintiff or his solicitors until about the time the application came up for argument in the Court below.

In support of the application, an affidavit of Thomas Henry Kilgore, who was secretary in February, 1915, but is now not connected with the company, was filed, in which he sets out in detail the negotiation for and the carrying out of what he speaks of as an extension or renewal of the mortgage. The plaintiff in his affidavit in reply reviews the whole matter from his standpoint; and, although he questions the date at which negotiations were entered upon, there is no suggestion anywhere that what was taken was regarded as anything but an extension or renewal of the mortgage. In paragraph 5 he says: "I say that the affiant (Kilgore) is mistaken in respect to the date of his first interview with me for the purpose of obtaining an extension of the time for payment of the mortgage debt." Paragraph 6: "It was not until after the interest fell due and in March (?), 1915, that the said affiant first approached me for a renewal of the mortgage. . . . I pointed out . . . that I did not desire to renew or extend the mortgage . . . but on pressure . . . I finally consented to renew the mortgage for two years instead of three years from February 8th, 1915;" and in paragraph 8: "I therefore paid the sum of $400, the taxes upon the property, and a mortgage was taken for the original principal sum and the $400, making a total of $28,025." Kilgore was cross-examined on his affidavit, on the 18th October last, and the form of the questions put seems to shew quite clearly that there was no thought then of claiming that the mortgage in question was anything other than an extension or renewal of the previous mortgage. I would judge from it and the plaintiff's affidavit that the ground then relied on was a specific promise that the renewal mortgage would be promptly paid off at maturity, that the property is of great value and readily salable, and that the company are in a position to pay; and I would judge that the property, if subdivided, is worth more than

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double and probably many times the amount of the mortgage; that, without subdivision and the registration of a plan, it is not likely to be sold except at a great sacrifice; that, if a plan were registered, it is possible that a little of it might now be sold—there is no certainty; and that the plaintiff has steadily refused to concur in subdivision and registration, perhaps for justifiable causes, but the honesty and justice of his refusal, if it is honest and just, has not been disclosed. Dealing with the matter as it has been presented to this Court, I think the order made is substantially right.

But the $400 has not ceased to be taxes by being included in the mortgage in question, and payment of taxes is a condition of statutory extension for payment of principal money. This $400 the plaintiff should have now if he desires it. I have not overlooked the registration of the discharge and the possibility—I do not say that it is more—that this might be set up by the original mortgagor if sued on her covenant in the original mortgage; but the plaintiff evidently regarded this as of no practical consequence, and I think it is of no consequence, taking the value of the land, on the plaintiff's own shewing, into account. There is no remedy lost by delay, for clause (*d*) of sec. 2 (1) suspends the right of action against the original mortgagor.

The discharge of the mortgage has presented more difficulty to my mind than any other question, but it was the way in which the plaintiff, who had the right and power to decide, decided to carry out the extension to which he agreed, and ought not to stand in the way of protecting property which the Legislature designed to protect.

I am of opinion that the appeal should be dismissed.

Appeal allowed.

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Ex. C.

THE KING v. THOMAS NAGLE.

Exchequer Court of Canada, Cassels, J. November 12, 1917.

EXPROPRIATION (§ III C—135)—COMPENSATION—GRAVEL LANDS—VALUE.

In an expropriation of gravel lands by the Crown the basis of compensation is the true or fair market value of the property as a whole; the value to the owner, not the value to the Crown expropriating it is to be considered. The amount awarded may be allowed to go to a mortgagee.

Statement.

INFORMATION exhibited by His Majesty the King on the information of the Attorney-General of Canada, plaintiff, and one

Thomas Nagle, defendant, for the vesting of land expropriated by the Crown.

Hanson, for plaintiff; *H. O. McInerney*, for defendant.

CASSELS, J.:—The information asks that certain lands expropriated by the Crown should be declared vested in His Majesty the King, and that the compensation for the lands should be ascertained and settled.

The lands in question comprise 59,680 acres. The expropriation plan was registered on May 8, 1916. On April 21, 1917, the Crown tendered the sum of $1,492 in full compensation for the lands taken and for all damages.

The defendant by his defence claims the sum of $30,000.

When the case came on for trial, it appeared that the defendant Nagle was a mortgagee of the lands in question. One Joseph Bennett Hachey was in reality the owner of the lands subject to the said mortgage. By agreement Hachey was added as a defendant to the action, and McInerney appeared for him as solicitor and counsel, and subsequently a defence was filed for Hachey.

From the evidence of O'Dwyer it would appear that of the 60 acres expropriated by the Crown, about 32 acres were composed of gravel.

The Crown expropriated the lands in question for the purpose of obtaining gravel for use upon the Intercolonial Railway. At the time of the expropriation, the pit had not been opened. It was after the expropriation that the railway opened the pit and took the gravel therefrom.

It appears that the general manager of the railway permitted Hachey to take certain carloads of gravel; and, according to Mr. Hachey, the amount of gravel that he took has to be paid for by him to the railway, and it is not a matter in question before me.

There is no doubt that the gravel from the lands expropriated is gravel of a fine quality. This is conceded by all parties.

It would also appear that there was considerable gravel upon the balance of the 105 acres not expropriated by the railway, and a claim is put forward upon the part of the defence for injury by the severance of the lands, the defendants claiming that they have no means of working the gravel pit on the land not taken.

The lands in question, comprising 105 acres in lot No. 26, block No. 36, South Gloucester Junction, were purchased by

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Hachey at public auction, and the Crown grant to him is dated February 12, 1914. The price paid by him for the 105 acres was the sum of $525, or at the rate of $5 per acre.

The evidence given at the trial is of an unsatisfactory nature. A great mass of it is as to the quantity of gravel contained in the lands expropriated, the various witnesses differing considerably as to quantities. I had grave doubts at the trial as to the admissibility of this class of evidence. As I understand the law, what I have to ascertain is the true or fair market value of the property as a whole. I thought it better to allow the evidence, as it might have some bearing on the intrinsic value if supplemented by evidence of the market value.

In the case of *The King* v. *Kendall*, 8 D.L.R. 900, at 906, 14 Can. Ex. 71, at 81 the judge states:—

> that the property in question must be assessed at its market value in respect of the best uses to which it can be put by the owner, taking into consideration any prospective capabilities and any inherent value it may have. One must discard the idea of arriving at its value by measuring every yard of sand and gravel on the bar.

The Judge cites a decision of the Supreme Court of Massachusetts, namely, the case of *Manning* v. *Lowell*, 173 Mass. 100, and also some other cases, and rightly distinguishes the case of *Burton* v. *The Queen*, 1 Can. Ex. 87, as this latter case was not an expropriation of lands, but merely the taking of a certain quantity of gravel. The case of *The King* v. *Kendall* was taken by way of appeal to the Supreme Court of Canada, and the judgment was sustained. The decision in the Supreme Court has not been reported, but I have had the benefit of a perusal of the judgments. The reasons for judgment of Idington, J. it seems to me, deal with the question in the way it was dealt with by the Judge in the court below. The statement is as follows:—

> A mass of evidence was given relative to the cubic contents of sand and gravel to be found within the area in question and the market value of such material. This sort of evidence might well have some bearing upon the intrinsic value of the property in question, but unless supplemented by evidence of the true or fair market value of the property as a whole must be held of little value for the reasons given by the trial judge. Of direct evidence of the latter kind little appears in the case, and I cannot say that the amount adjudged is obviously erroneous.

These remarks are very apposite to the case before me.

A second proposition of the law is one of considerable importance in the present case. It is too well settled to need comment,

that in dealing with the value of the lands in question, it is the value to the owner that has to be considered and not the value to the Crown expropriating it.

The language in the reasons of the judges in the case of *Sidney* v. *North Eastern R. Co.*, [1914] 3 K.B. 629, has strong application to the facts of the present case. Curiously enough, in the *Sidney* case the decision in *Cedars Rapids Power Co.* v. *Lacoste*, [1914] A.C. 569, 16 D.L.R. 168, was not referred to, although apparently decided before the decision in the *Sidney* case.

The result of the evidence in the present case is that, outside of the Intercolonial Railway, there is no market for the gravel from the pit in question except to a very trifling extent.

Albert E. Trites, a witness examined by the plaintiff, is probably the one best qualified as a witness. He gave his evidence in a satisfactory manner. He is a railway contractor to a large extent, and has been such for over 40 years. He is asked:—

Q. As such have you had considerable experience with gravel and gravel pits?—A. Yes. Q. You know gravel pretty well as a result of that long experience?—A. I think so.

He then goes on to explain how he was called upon in the Crown Lands office in Fredericton, to report on certain lots. He then proceeds to give evidence in regard to the gravel pit in question, that is lot No. 26. He states, what is uncontradicted, that the gravel is all of a good quality. As I have mentioned before, the pit was opened by the railway, after the expropriation. He places a value of $300 per acre upon the portion of the land expropriated which contains gravel. On his cross-examination he points out that in placing this valuation upon the pit, he is placing a value on it to the railway and not to the owner. I quote some portions of his evidence:—

Q. Upon what did you base your value of $250 per acre of ballast ground down there, on 27, and $300 on 26; how did you arrive at that figure, how did you make that up? A. My idea was that if anybody wanted it, it would be worth that much money. Q. To the person taking it? A. To the person taking it. Q. If the railway wants it you thought it would be worth that much to the railway? A. That was my idea. Q. In other words, your value of $300 an acre is based on what you think it is worth to the railway? A. That is my idea. Q. If the railway was not a purchaser, Mr. Trites, if there was no Intercolonial Railway to sell it to—eliminate that for the time being—what would you say would be the market value of that gravel land altogether, leaving out of consideration the railway? A. I could not say. The demand would be very light for large quantities. Q. The demand would be almost negligible, would it not,

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as far as you are aware; can you suggest any market for that ballast outside of the railway? A. Nothing further than what is used for private use and the roads. Q. That would be very small, would it not? A. It would not amount to any big quantities, for the time being. Q. I agree with that, that the railway is the market for this ballast? A. The railway is the big market. Q. And practically the sole market? A. Largely the sole market. Q. And it appears to have been the only market up to this year from what we have heard to-day? A. Yes. Q. You know of no market outside of what has been said to-day? A. No. Q. You would not say there was a market to haul that gravel to Moncton? A. The distance would be against it. Q. They get gravel a good deal nearer? A. They get it nearer. Q. This is about 120 miles from Moncton? A. I think so. It is a long haul. Q. So that your figure of $300 and $250 per acre respectively was based on a value to the railway? A. Certainly. Q. So you based it on Hachey's value to the Intercolonial Railway? A. Certainly.

And further on he says:

Q. You knew no other market in 1916 for this property except the Intercolonial Railway? A. No extended market.

HIS LORDSHIP:—No practical market? A. No practical market.

Mr. Hanson:—No commercial market? A. No commercial market on a large scale.

He says further:

I think the demand for the gravel, outside of the railway, would be for small quantities.

Had there been other railways competitors with the Intercolonial Railway the case might be different, but it is beyond question there was no other competitor. I think it is also quite evident there was no market for the gravel at Moncton. The expense of the haul would be too great to make it a commercial venture, and, as the evidence shews there are other quarries within a short distance from Moncton containing all the gravel that could be required. For instance, the Anagance pit, etc. O'Dwyer in his evidence gives details of the various pits.

Now we have, as I have stated, the fact that the whole 105 acres were purchased by Hachey in the fall of 1913 for the sum of five dollars an acre, viz., for $525. At the time of the expropriation the lands were in the state in which they were at the time of the purchase. There had been no attempt to develop them.

A letter was produced purporting to be signed by one White and Robertson, containing an alleged offer of $200 an acre. I do not think that this offer was intended as a genuine offer. Hachey himself does not seem to treat the matter as if it was *bonâ fide*. He is asked the question:—

Q. Was that a *bonâ fide* offer? A. It came indirectly to me. It did not come to me personally. Q. As a matter of fact, did you regard this as a serious offer? A. No, I don't know as I did.

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I think that if the defendant intended to seriously rely upon such an offer they should have called these two gentlemen. I have but little doubt that when Hachey purchased the lot in question he contemplated that he would be able to sell it to the railway, and had that in view when purchasing.

On the best consideration I can give to the case and having regard to the law that governs, as I understand it, the offer of the Crown of $1,492 is more than ample to compensate Mr. Hachey for the loss of the 60 acres and any damage on the severance.

I think the tender of the Crown is ample, and that the amount tendered, together with interest up to the date of the tender from the time of expropriation, is sufficient to cover all claims the defendant can reasonably have, including any allowance for compulsory taking, and I think the Crown are entitled to their costs of the action, to be paid by the defendants.

The amount allowed should go to the mortgagee.

Judgment accordingly.

SASK.

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GOOSE LAKE GRAIN Co. v. WILSON.

Saskatchewan Court of Appeal, Haultain, C.J.S., Newlands and Lamont, JJ.A. April 26, 1918.

GARNISHMENT (§ I A—1)—AGREEMENT TO PURCHASE—ALLEGATIONS IN STATEMENT OF CLAIM—WHEN GARNISHEE SUMMONS CAN ISSUE.

Where an agreement is to purchase an entire property and the statement of claim shews that the first payment was payable only on delivery of the transfer, no cause of action is shewn upon which a garnishee summons can be issued until the statement of claim alleges that a transfer had been delivered or tendered.

Statement.

APPEAL from a judge in chambers affirming an order of the local master dismissing an application to set aside a garnishee summons. Reversed.

J. A. Allan, K.C., for appellant; *J. F. Frame*, K.C., for respondent.

Haultain, C.J.S.

HAULTAIN, C.J.S., concurred with LAMONT, J.A.

Lamont, J.A.

LAMONT, J.A.:—This is an appeal from an order dismissing an application to set aside a garnishee summons.

On April 26, 1917, the plaintiff and defendant entered into the following agreement:—

April 26, 1917.

I hereby agree to purchase from the Goose Lake Grain & Lumber Co., Ltd., the property and lots known as the Temperance Hotel in the Village of Harris,

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more particularly described as lots 4 and 5, block 3, plan G. 52, on the following basis:—

For the lots I agree to pay the sum of $500 in cash upon delivery to me of the transfer of the said lots together with clear certificate of title, the said payment to be made within not less than 30 days.

The amount payable for the building is to be arrived at in the following manner: The Goose Lake Grain & Lumber Co., Ltd., will appoint Mr. W. W. Smith, and I will appoint D. McFadden, who, together, will inventory the amount of material in the building, making due allowance for waste and lap. The price at which the various items will be extended is to be the wholesale price list which was in effect on January 1, 1912. The amount found to be due according to the above computation will be paid by me to the Goose Lake Grain & Lumber Co., Ltd., within 30 days after the inventory is taken and extended. Not including hardware.

W. W. SMITH, Witness. (Sgd.) H. E. WILSON.

The inventory of the materials in the building was taken, and the price thereof computed at $1,608.65. A dispute having arisen between the parties as to the correctness of the inventory, the defendant declined to pay. On May 30, 1917, the plaintiff brought this action, alleging that the defendant agreed to purchase from the plaintiff company, who agreed to sell to the defendant, "the property known as the Temperance Hotel in the Village of Harris in the Province of Saskatchewan, and more particularly described as lots 4 and 5 in block 3 in the Townsite of Harris." It further alleges that for the said land, without the buildings, the defendant agreed to pay the sum of $500 in cash, upon delivery to him of a transfer for the said land together with a clear certificate of title. The plaintiff claims the full purchase price of $2,108.65.

After the issue of the writ, the plaintiff took out a garnishee summons and served the same upon the defendant. The defendant then made an application to set aside the summons issued upon the following grounds, among others: (1) that there was no debt due or accruing due from the defendant; (2) that the claim of the plaintiff was not for a debt or liquidated demand.

The application was dismissed by the local master. An appeal was then taken to a judge in chambers, who held that:

As the statement of claim alleged that the $500 to be paid with respect to the land was to be paid upon delivery of a transfer, and there being no allegation that a transfer was either delivered or tendered, no cause of action was set forth as to that sum.

He, however, held that the balance of the claim became payable irrespective of the tender or delivery of the transfer, and that, therefore, the application was properly dismissed. From that decision, this appeal is brought.

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I concur with the judge in chambers in his conclusion that no cause of action is made out in respect of the $500, the first payment to be made under the agreement, but I am, with deference, unable to agree that the purchase price of the building became payable irrespective of whether or not the defendant could get title to the land on which the building stood. As I read the agreement, the defendant did not make two separate and distinct purchases. What he bought was "the property and lots known as the Temperance Hotel." This, in my opinion, is a single purchase, although the purchase-price was arrived at by placing a certain valuation on the lots and another on the building. I cannot see anything in the agreement that would justify the conclusion that the defendant was to pay for the building if the plaintiff was unable to give him a title to the lots. Furthermore, as the agreement provided that the delivery of title was to be at a time prior to the time fixed for the payment for the building, it is, to my mind, clear that the parties contemplated that title should be given before the defendant was called upon to pay for the building. Although the words used in the second paragraph of the agreement are: "within not less than 30 days," I think there can be no doubt that the parties meant within 30 days. As the agreement was to buy an entire property, and as the statement of claim shows that the first payment was payable only on the delivery of the transfer, I am of opinion that until the statement of claim alleges that a transfer had been delivered, or tendered, no cause of action is shown upon which a garnishee summons can be issued.

The appeal should, therefore, be allowed, the order dismissing the application reversed, and the garnishee summons set aside.

The appellant is entitled to his costs of this appeal and the costs of the applications in chambers.

Newlands, J.A.

NEWLANDS, J.A.:—The plaintiff brought an action against defendant for the amount due under an agreement of sale between them, and issued a garnishee summons for the purpose of attaching certain moneys due defendant. The defendant applied to set aside this garnishee summons on the ground that the action was not for a debt or liquidated amount, but my brother Elwood held that a part of the claim was for a debt, and that, therefore, the garnishee summons was properly issued.

R. 505 provides that any plaintiff in an action for a debt or liquidated demand may issue a garnishee summons.

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Is this an action for a debt or liquidated demand? The amount claimed is the entire amount due under an agreement for the sale of land. The fact that the judge held that plaintiff could not recover as to part, because he had not pleaded the performance of a condition upon which the same was payable, cannot affect the form of action.

The title to the land in question is still in the plaintiffs. They allege in their statement of claim that they are the registered owners thereof. The action is, therefore, one for specific performance, and not for a debt or liquidated demand.

In *Landes* v. *Kusch*, 24 D.L.R. 136, the judgment of the court, which was given by my brother Lamont, states that the remedies open to a vendor upon an agreement for the sale of land are as follows:—

He may: (1) Sue for the purchase-money; (2) Sue for damages; (3) Enforce his vendor's lien; (4) Sue for specific performance; (5) Rescind the contract. But in order to succeed at law under (1) in an action for the purchase-money he must have conveyed the property to the purchaser. In Bullen & Leake, p. 285, note (*m*), I find the law summarised as follows:—In order to support a claim for the purchase-price of land sold or assigned, there must have been a conveyance of assignment to the defendant. (*East Lambton Union* v. *Metropolitan R. Co.*, L.R. 4 Ex. 309). A mere giving of possession is not enough. In the absence of conveyance or assignment the claim must be for specific performance or damages.

The same principle is laid down in 25 Hals. 489, as follows:—Hence the vendor cannot recover the purchase-money, notwithstanding that the purchaser has been let into possession, unless the conveyance has been executed; but, on a resale at a lower price, he can recover the difference in price and the expenses of the resale.

The reason for this is that the vendor cannot, apart from contract to that effect, hold the land and at the same time have the purchase-money.

As it is only in an action for a debt or liquidated amount that the plaintiff can issue a garnishee summons before judgment, and as this is not such an action, the summons must be set aside with costs and this appeal allowed with costs.

Appeal allowed.

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British Columbia Court of Appeal, Macdonald, C.J.A., Galliher, McPhillips and Eberts, JJ.A. April 2, 1918.

COMPANIES (§ IV E—96)—PROPERTY ACQUIRED NOT AUTHORISED BY CHARTER —AGREEMENT FOR SALE—VALIDITY.

A company incorporated by Act of Dominion Parliament having obtained an indefeasible title to real property of a greater value, and for other purposes than authorised by the incorporating Act, may properly enter into an agreement for sale of the said property and recover arrears due under such agreement.

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APPEAL by plaintiff from the tria ljudgment, 37 D.L.R. 199, dismissing an action to recover arrears due under an agreement for sale of land. Reversed.

Davis, K.C., for appellant; *S. S. Taylor*, K.C., for respondent.

MACDONALD, C.J.A.:—The appellant was incorporated by Act of the Dominion Parliament by which it was given power to acquire and hold land "for the purpose, use or occupation of the company, but not to exceed in British Columbia an annual value of $10,000." Notwithstanding this limitation of its powers, the company entered a transaction by which it acquired a parcel of land, which I think on the face of the transaction was not required by the company for the purposes aforesaid, in exchange for shares in its capital. The land was formally conveyed to the company, and it in due course obtained from the registrar of titles a certificate of indefeasible title. Contemporaneously with this transaction, and I think as an integral part of it, the company entered into an agreement with its managing director and another director, the defendants in this action, to sell the same land to them for a price which would equal the value of the shares given in exchange for the land. The purchase-money was made payable by instalments, and several of the instalments together with interest were paid by the defendants from time to time. Eventually they made default, and this action was brought to recover arrears. The defendants resisted on the ground that the transaction was *ultra vires* of the company, and they counterclaimed to recover back the moneys which they had already paid, amounting to upwards of $9,000. Judgment was given at the trial in their favour on both these issues, and from that judgment the plaintiff appeals.

In my opinion the acquisition of this land by the appellant was *ultra vires*. What then are the rights of the parties so far as this litigation is concerned? The land has been conveyed to the company by a proper and formal conveyance, and the effect of that is to vest the property in the company. In Brice on Ultra Vires, 3rd ed., p. 84, this proposition is stated:—

> Property legally and by formal transfer or conveyance transferred to a corporation is in law duly vested in such corporation, even though the corporation was not empowered to acquire such property.

This is founded, *inter alia*, on the language of the Privy Council

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in *Ayers* v. *South Australia Banking Co.* (1871), L.R. 3 P.C. 548, at 559, where it was said:—

> But the only point which it appears to their lordships is necessary to be determined in the present case is this, that whatever effect such a clause (prohibiting the transaction) may have, it does not prevent property passing either in goods or in lands under a conveyance or instrument which, under the ordinary circumstances of law, would pass it.

The property then being vested in the company, what is it to do with it? It is unlawful to hold it. It must get rid of it, or at all events it is right that it should, and the question is whether or not it can enter into a valid agreement to sell it. Whatever might be said against enforcing the contract of sale against a purchaser entitled to a good title, when the circumstances of this case are considered, I think nothing can be said against enforcing the agreement against the defendants.

As I read the evidence they, or at least the defendant Berg, engineered the whole transaction. The agreement of sale from the plaintiff to the defendants is dated December 30, 1911, and the minutes of the directors show that the company agreed to take the property from Elderkin, the vendor to the company, in exchange for shares on January 12, 1912, that is to say, these defendants agreed to buy the property before it was acquired by the company.

Now, they are presumed to know the law, and knowing the law, if they choose to enter into an agreement to buy property the plaintiffs' title to which they were cognizant of, I think they are bound to take such title as the plaintiff can give them, and leaving the question of estoppel out of consideration altogether, are not entitled to object to the title which they agreed to buy. Assuming that the exchange made between Elderkin and the plaintiff can be set aside by the shareholders on the ground that it was *ultra vires* of the company to enter into it, still such action is only a contingency affecting the title. The plaintiff's title is analogous to a fee simple subject to be divested by the happening of some uncertain event, and if a purchaser with full knowledge of such a title choose to agree to take it, he cannot insist upon something better.

It was argued by Mr. Davis, counsel for the plaintiff, that no one but the Crown could object to the breach by the company of the provisions of its Act of incorporation. While I doubt that

proposition, I do not find it necessary to decide the question. I prefer to found my judgment on the reasons I have above stated.

I would, therefore, set aside the judgment appealed from and direct that judgment should be entered for the plaintiff, which, if the sum is not agreed upon, may be settled by a reference to the registrar.

GALLIHER, J.A.:—I would allow the appeal for the reasons given by the Chief Justice.

McPHILLIPS, J.A.:—The appeal is one from the judgment of Morrison, J., in which he dismissed the action with costs. The action was brought upon an agreement for sale of land, the amount claimed being the balance due, viz., $17,694.38, together with interest thereon, and that in default of payment, the agreement be declared to be cancelled and void and all moneys payable thereunder be forfeited, foreclosure, and possession of the lands.

The plaintiff, the appellant, is an incorporated company, being incorporated by private Act of the Parliament of Canada (c. 110, 9-10 Edw. VII., 1910). The lands agreed to be sold to the defendants, the respondents, are situate in the City of Vancouver, in the Province of British Columbia. The respondents in their defence plead that the appellant had no right, power or authority to hold or sell the lands or give any agreement for the sale thereof and the agreement for sale entered into between the appellant and the respondents was illegal, null and void, and claimed the return of the purchase-moneys already paid in pursuance of the terms of the agreement for sale. The learned trial judge not only dismissed the action, but gave judgment for the return of the purchase-moneys paid in respect of the agreement for sale—that is, allowed the counterclaim of the defendants.

The trial judge, in his reasons for judgment, said:—

> From the evidence I find that the property in question was not required for the purpose use or occupation of the new company (the appellant) and that the company had no power to sell it.

It is to be noted that the statute and the section thereof upon which the respondents relied, as showing the illegality in the holding of the lands or that it was an *ultra vires* holding, was not specifically pleaded. The section as contained in the private Act of incorporation upon which the judge proceeded and as quoted by him in his reasons for judgment, reads as follows:—

> 14. The new company may acquire, hold, convey, mortgage, lease or

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otherwise dispose of any real property required in part or wholly for the purposes, use or occupation of the new company, but the annual value of such property held in any province of Canada shall not exceed $5,000, except in the Province of British Columbia where it shall not exceed $10,000.

It will be seen that there is really no prohibition against the holding or the disposing of lands unless it could be said to be inferential prohibition—the provision is one of a restrictive nature.

Evidence was led to show that the lands in question in the action were purchased by the appellant for one Elderkin and the managing director, one of the respondents (Berg), was an active party in bringing about the purchase and represented to the appellant—the company—that the lands could be immediately, after the acquirement thereof, sold for at least the purchase-price—the object of the transaction being that in the result Elderkin would become a shareholder to the extent of 170 shares at $130 a share for shares of $100 each fully paid, and this was carried out—the purchase-price of the lands paying for the shares. It was not part of the necessary proof of the appellants in the action to in any way go into the prior transaction—it is a matter for further remark that the other respondent in the appeal (Creelman) was a director of the company and seconded the resolution to carry out the transaction of purchase of the lands. It is now said, and it was submitted as well at the trial, that the transaction was illegal, void and *ultra vires* of the company, and that contention was given effect to by the learned tria judge, that is, he held "that the property in question was not required for the purpose, use or occupation of the new company, and that the company had no power to purchase it"—with great respect to the learned judge, all that was before him was whether the agreement for sale could be enforced—the purchase was an executed contract, and Elderkin the vendor to the company is not a party to this action. The matter for consideration it seems to me, upon this appeal, is solely whether the agreement for sale is an enforceable contract. Admittedly the appellant is vested with an indefeasible title in the lands even as against the Crown—s. 8 of the Land Registry Act Amendment Act, 1913, s. 22 of c. 127, R.S.B.C., 1911, reads as follows:—

22 (1) Every certificate of indefeasible title issued under this Act shall, so long as same remains in force and uncancelled, be conclusive evidence at law and in equity, as against His Majesty and all persons whomsoever, that

the person named in such certificate is seized of an estate in fee-simple in the land therein described against the whole world, subject to . . .

And no action is maintainable for the recovery of any land for which a certificate of indefeasible title has issued save as provided in s. 25A. as enacted in s. 14 of the Land Registry Act Amendment Act, 1914, which reads as follows:—

25A. No action of ejectment or other action for the recovery of any land for which a certificate of indefeasible title has issued shall lie or be sustained against the registered owner for the estate or interest in respect to which he is so registered, except in the following cases, namely:—

(*a*) The case of a mortgagee or encumbrancee as against a mortgagor or encumbrancer in default.

(*b*) The case of a lessor as against a lessee in default.

(*c*) The case of a person deprived of any land by fraud as against the person registered as owner through fraud in which such owner has participated to any degree, or as against a person deriving his right or title otherwise than *bonâ fide* for value from or through a person so registered through fraud:

(*d*) The case of a person deprived of any land improperly included in any certificate of title of other land by wrong description of boundaries or parcels.

(*e*) The case of a registered owner claiming under an instrument of title prior in date of registration under the provisions of this Act, or in any case in which two or more certificates of title may be issued under the provisions of this Act in respect to the same land:

(*f*) For rights arising or partly arising after the date of the application for registration of the title under which the registered owner claims:

(*g*) For rights arising under any of the clauses of s. 22 of this Act.

It will be therefore seen that so far as conveying a good title to the respondents, the appellant is capable of doing this even as against the Crown. In this connection the case of *McDiarmid* v. *Hughes* (1889), 16 O.R. 570, is much in point. It was there held:—

A conveyance of lands to a corporation not empowered by statute to hold lands is voidable only and not void under the statutes of mortmain, and the lands can be forfeited by the Crown only.

Where, too, a corporation is empowered by statute to hold lands for a definite period, without any provision as to reverter, and holds beyond the period, only the Crown can take advantage of it, and it is not a defence to an action of ejectment that the lands were acquired by the plaintiff from the corporation after the period fixed by the statute.

In any case if it be that the appellant rightly acquired the lands no question can arise, and as to this I am of the opinion that the evidence does not support the contention made that the agreement for the sale of the lands is in its nature an illegal contract or *ultra vires* of the appellant. The words of the statute already quoted in part read as follows: "may acquire, hold, convey, mortgage, lease, or otherwise dispose of any real property required

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in part or wholly for the purposes, use or occupation of the new company." It will be observed that the word "purpose" is severable from "use or occupation." Now it may well be argued that the acquirement of the lands was in the way of carrying out the *purposes* of the company, *i.e.*, to sell shares and thereby obtain further capital to carry out the undertaking in the way of the "purposes" of the company, although I admit that there is room for considerable argument to the contrary—yet the language of the legislature is not to be read in too confining a manner, but should be read in a workable manner. It is a subject for comment that even the legislature admits of land being acquired which shall not be "wholly for the purposes" of the company. With some considerable hesitation, I admit, I take the view that it cannot be said that the appellant in executing the agreement of sale executed a contract illegal in its nature or *ultra vires* of its powers, and that it is a contract which is capable of enforcement.

The facts, in my opinion, fall short of showing that the lands agreed to be sold are not lands completely vested in the appellant, with the right of sale thereof.

In *Houston & others* v. *Burns* (1918), 34 T.L.R. 219, [1918] W.N. 24, the House of Lords had for consideration a will which had these words: "public, benevolent or charitable"—and stress was laid on the punctuation. Here we have the same punctuation, there is a comma after the word "purposes" and at p. 220 the Lord Chancellor is reported as follows:—

> The Lord Chancellor then referred to the authorities as to the effect to be given to punctuation in a will. These authorities he said were not quite uniform but he thought that for this purpose the punctuation of the original will might be looked at, and reading this clause as punctuated the words "public, benevolent or charitable" were clearly to be read disjunctively.

The contract sued upon is not in its nature illegal, nor is it declared by statute to be void, and it is a contract dealing with land vested in the company. Can it be that the situation is that of an *impasse* and inhibition exists against the sale thereof? I do not consider that I am constrained by statute or other law to so decide. Further, the defence here is a most remarkable one, the respondents being at the time of the transactions under review directors of the company (one of them being the managing director) and the active and moving parties throughout now contend that all that was done in the way of the acquirement of the lands and

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the agreement for sale thereof to themselves were transactions in their nature illegal or *ultra vires*—and liability is resisted upon this ground. Here all that was contracted for by the respondents is capable of being conveyed, and in my opinion there is no prohibition against the appellant from selling the lands in question. Upon this point I would refer to the language of Jessel, M.R., in *Yorkshire R. Wagon Co.* v. *Maclure* (1882), 21 Ch. D. 309, at 315:—

> In *Montreal & St. L. L. & P. Co.* v. *Robert* [1906], A.C. 196, Lord Macnaghten, at p. 200, said: The company acting *bonâ fide* must be the sole judge of what is required for the purpose of its business. It appears therefore to their lordships that the transaction in itself was not *ultra vires* and consequently the first question must be answered in the affirmative.

There can be no question that if it were established that upon the true construction of the statute incorporating the appellant the particular contract challenged in the present action is prohibited expressly or impliedly then it is the duty of this court to hold that the contract is illegal and void and the judgment of the trial judge would be right even to the extent of directing the repayment of the money paid: *Baroness Wenlock* v. *River Dee Co.*, 10 App. Cas. 354, 362; *A. G.* v. *G. E. Rly. Co.*, 5 App. Cas. 473, at 486; *Trevor* v. *Whitworth*, 12 A.C. 409, 433; *Brit. S. Africa Co.* v. *DeBeers Con. Mines*, [1910] 1 Ch., at p. 374, affirmed in C.A., [1910], 2 Ch. 502; *Sinclair* v. *Brougham*, [1914] A.C. 398, at 440, 451; *Bonanza Creek Gold Mining Co.* v. *The King*, [1916] 1 A.C. 566, at 577, 578, 26 D.L.R. 273; and *Att'y-Gen'l of Ontario* v. *Att'y-Gen'l for Canada*, 26 D.L.R. 293, [1916] 1 A.C. 598, 114 L.T. 774. This appeal would be easy of determination were it possible to rely on *Ayers* v. *South Australia Co.*, L.R. 3 P.C. 548, but the difficulty in placing complete reliance thereon arises from the fact that what was there being considered was, the charter of the bank. (*The Brit. South Africa Co.* v. *DeBeers*, *supra*, was also the case of a charter), but in the present case it is one of possible statutory restriction: See *Bonanza Creek Gold Mining Co. Ltd.* v. *The King*, *supra*, at 583, 584. Could the *Ayers* case be relied upon to support the present case the language of Lord Justice Mellish, at 554, would be very much in point.

The onus, however, was upon the respondents of demonstrating that the contract is void, *i.e.*, is in excess of the company's powers: (*Hire Purchase Furnishing Co.* v. *Richens* (1888), 20

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Q.B.D. 387, and per Erle, J., in *Mayor of Norwich* v. *Norfolk R. Co.*, 4 El. & Bl., 397, 413, 119 E.R. 397), and not on the company which is relying on it to on its part shew that the corporation was authorized to enter into it and in view of all the surrounding circumstances the defence is so unconscionable that I cannot persuade myself that the case is so clear that effect must be given to the defence, as unquestionably it would appear to me to be beyond all controversy that the respondents can be conveyed an absolutely indefeasible title to the lands which they have contracted to purchase. The onus which was upon the respondents in my opinion has not been effectually discharged, and were I wrong in this the further question might arise whether the respondents would be rightly entitled upon the special facts of this case to recover *upon their counterclaim* the purchase-moneys already paid—Smith on The Principles of Equity, 5th ed. (1914), at p. 800, states a well-known maxim:—

"he who comes into equity must come with clean hands," and as a rule no relief will be given to one who has been guilty of unconscientious dealing respecting the subject matter of the suit.

I would, with great hesitation, though, allow the appeal.

Eberts, J.A.

EBERTS, J.A., concurred in allowing the appeal.

Appeal allowed

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Re UNION SUPPLY Co. CAVEAT.

Saskatchewan Court of Appeal, Haultain, C.J.S., Newlands, Lamont and Elwood, JJ.A. April 26, 1918.

1. APPEAL (§ IV F—135)—GROUND NOT PREVIOUSLY RELIED ON—APPEAL COURT SHOULD NOT CONSIDER—EXCEPTIONS.
A court of appeal should not consider a ground not previously relied on, unless satisfied that it has all the evidence bearing upon it that could have been produced at the trial, and that the party against whom it is urged could not have satisfactorily explained it under examination. [*S.S. Tordenskjold* v. *S.S. Euphemia*, 41 Can. S.C.R. 154, referred to.]

2. COURTS (§ II B—180)—LOCAL MASTER—MORTGAGE—JURISDICTION TO DETERMINE VALIDITY.
The local master has no jurisdiction to determine whether or not a mortgage is void under sec. 40 of the Assignments Act, R.S.S. c. 142. an action must be brought in court to set aside the mortgage.

Statement.

APPEAL from an judgment of the local master, in an action to have a mortgage declared void under sec. 40 of the Assignments Act, R.S.S. c. 142. Affirmed.

P. H. Gordon, for Imperial Canadian Trust Co.

F. L. Bastedo, for Union Supply Co. Ltd.

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RE UNION SUPPLY CO. CAVEAT.

Elwood, J.A.

HAULTAIN, C.J.S., concurred with ELWOOD, J.A.

ELWOOD, J.A.:—On December 28, 1915, the Speers Trading Co. Ltd. was indebted to the Union Supply Co Ltd. in the sum of $91.88, and, desiring further advances of goods from the Union Supply Co. Ltd., agreed to give, and did give, a mortgage to the Union Supply Co. Ltd. for the amount of the above-mentioned indebtedness and such further advances of goods. For some reason not disclosed in the material, this mortgage could not be, or, at any rate, was not registered. The Union Supply Co. Ltd. on January 13, 1916, registered a caveat to protect its interest under said mortgage. On January 31, 1916, the Speers Trading Co. Ltd. assigned for the general benefit of its creditors to the Imperial Canadian Trust Co. On April 13, 1917, the assignee caused a notice to be sent out under s. 130 of the Land Titles Act to lapse said caveat. The Union Supply Co. Ltd. thereupon applied to the local master at Prince Albert for an order continuing the caveat. The motion was heard by the local master and an order made continuing the caveat and directing the Imperial Canadian Trust Co. to pay the costs of the proceedings. From this order the Imperial Canadian Trust Co. now appeals.

It was contended, on the argument before us, that no reason was shown by the Union Supply Co. for not having registered its mortgage and that, therefore, the caveat was bad and should not have been continued, the contention being that where a mortgage is given that can be registered no caveat can be filed.

S. 125 of the Land Titles Act does not limit the cases in which a caveat may be filed to claims arising under non-registrable instruments, and I am of opinion that that section of the Act is sufficiently broad to permit the filing of a caveat, even if founded upon an instrument that can be registered. However, in the view that I take of this case, it does not seem to me to be necessary to decide the case on that point.

The question of the right to file a caveat does not appear to have been taken before the local master. It would appear from his judgment that the sole question before him was whether or not the mortgage to the Union Supply Co. was void under s. 40 of the Assignments Act, R.S.S. c. 142, inasmuch as it was made within 60 days before the Speers Trading Co. Ltd. made the assignment for the benefit of creditors.

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Elwood, J.A.

Even if the assignee is correct in contending that a caveat cannot be filed with respect to a mortgage which is capable of registration, that question, as I have intimated above, does not appear to have been raised before the local master. If it had been raised before him, then an opportunity would have been granted the Union Supply Co. to show the reason for not registering the mortgage. It seems to have been taken for granted that the mortgage *could not* be registered. In fact, the appellant's factum uses the words: "For some reason not disclosed in the material this mortgage *could not* be registered."

Many causes may occur for not being able to register a mortgage. For instance, there might be a defect in the affidavit of execution, and I apprehend in such a case a caveat could properly be filed.

Under the circumstances, I do not think it is open to the appellant to now contend that the caveat was improperly filed. He is driven, it seems to me, to rely upon his contention that the mortgage is void under the Assignments Act. The local master held that the latter is not a question that he could deal with, but must be dealt with by action in court to set aside the mortgage, and that, as the appellant was unsuccessful in setting aside the mortgage in the proceeding before him, it must pay the costs of the application. I agree with the judgment of the local master in this respect.

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

Lamont, J.A.

LAMONT, J.A. (after setting out the facts):—For the assignees, two contentions are made: (1) that, the mortgage being a registrable instrument, it should itself have been registered, and the caveat was, therefore, not properly lodged; (2) that, in any event, the order should have continued the caveat for a limited time only, unless, within that time, the caveators brought an action to establish their right under the mortgage.

In my opinion, the first of the above contentions is not open to the appellants. It was not raised before the local master. Had it been raised, the reason why the mortgage was not registered would no doubt have appeared. The reason it was not raised may have been that counsel, who appeared before the local master for the appellant, was satisfied that the mortgage was not itself registrable, which it would not be where, for example, the land was wrongly described.

In *S.S. Tordenskjold* v. *S.S. Euphemia*, 41 Can. S.C.R. 154, the Supreme Court held that a court of appeal should not consider a ground not previously relied on, unless satisfied that it has all the evidence bearing upon it that could have been produced at the trial, and that the party against whom it is urged could not have satisfactorily explained it under examination.

Lamont, J.A.

Not being satisfied that had the point been raised before the local master, the caveators could not have satisfactorily established that their mortgage was for some reason unregistrable, I am of opinion we cannot consider this ground of appeal. (2) Taking the caveat therefore as properly lodged, I think the order of the local master was right.

S. 58 of the Land Titles Act (8 Geo. V. 1917, c. 18, s. 64) reads:—

58. (*a*) After a certificate of title has been granted no instrument shall until registered pass any estate or interest in the land therein comprised. . . or render such land liable as security for the payment of money *except as against the person making the same.*

The mortgage unregistered, therefore, was good as against the Speers Trading Co. That company could not have compelled the mortgagees to bring an action on their mortgage on pain of having their caveat removed. If the mortgagors could not do it, neither can their assignees for the benefit of creditors. The right of such assignee to call for the removal of a caveat is no higher than that of his assignor, unless the statute gives him a higher right. This is not a case in which there is a question as to the making of the mortgage being prohibited—as in *Re Ebbing*, 2 S.L.R. 167—nor is it a case of subsequent encumbrancees or other third parties claiming against the mortgagors and desiring to have the priorities determined. In the latter case I think it is the established practice to continue the caveat for a limited time only. I am, therefore, of opinion that the appeal should be dismissed with costs.

Newlands, J.A.

NEWLANDS, J.A.:—The respondent lodged a caveat against the above lot, claiming an interest therein by way of mortgage. This mortgage was made by the Speers Trading Co. Subsequent to the making of said mortgage and the lodging of the caveat, the Speers Trading Co. made a general assignment for the benefit of their creditors to the Imperial Trust Co. and they became the registered owners of said lot. They then caused a notice to be given under s. 130 (now s. 136) of the Land Titles Act to have the caveat lapse unless a judge's order was filed continuing the same. The Union

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Supply Co., therefore, made this application under said s. 130 (now 136) to continue the caveat, and an order to that effect was made by the local master, from whose decision this appeal was taken.

In his decision, the master states, "For some reason which does not appear from the material filed, the mortgage was not registered." That being the case, I am of the opinion that the caveat should not have been continued, at least not longer than was necessary for the mortgagee to have his mortgage registered, or to bring an action against the mortgagor or his assignee if something was required to be done by either of them in order that such mortgage could be registered.

By s. 67 of the Land Titles Act, R.S.S. c. 41, no instrument shall be effectual to render the land liable as security for the payment of money as against any *bonâ fide* transferee of the land unless such instrument is duly registered thereunder. By s. 87 (now s. 98), when land is to be made security in favour of any mortgagee, the mortgagee shall execute a mortgage and a memorandum of the mortgage shall be made upon the certificate of title.

It is, therefore, the clear intention of the Act that a mortgage shall be registered.

By s. 125 (now 128) any person claiming to be interested in land under any unregistered instrument may lodge a caveat with the registrar. This section is not in substitution of the sections that require the registration of instruments, nor does it provide an alternative method in place of registration. Its purpose is to protect interests in land until they are completed between the parties and put in registrable form, or until such interests are enforced by the Courts.

To hold otherwise would be to turn what the legislature intended as a land titles system into a mere registration system. If a mortgage can be lodged by way of caveat and remain there, so can a transfer, and there would be nothing to prevent subsequent transferees from continuing to lodge their transfers by way of caveat and avoid the expense of registering them, and a certificate of title would cease to be conclusive evidence that the person therein named was entitled to the land for the interest therein named.

I am, therefore, of the opinion that the mortgagee of land can

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only lodge a caveat for the temporary purpose of having his mortgage completed in a registrable form, either by such action as may be necessary on the part of the mortgagor or by proceedings in court; and, when an application is made to a judge for an order to continue a caveat which has been lodged to protect such a mortgage, it is the duty of the mortgagee to produce evidence to shew that he has the right to have the caveat continued either until completed by the mortgagee or until enforced by the court.

I would, therefore, amend the order of the local master to continue the caveat for one month to enable the mortgagee to have his mortgage completed so that it can be registered or to bring such action as may be necessary to enforce his rights in court, and I would allow the appeal with costs.

Appeal dismissed.

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Re MACKEY.

Nova Scotia Supreme Court, Harris, C.J., Longley and Drysdale, JJ., Ritchie, E.J., and Chisholm, J. April 3, 1918.

HABEAS CORPUS (§ I D—24)—DISCHARGE OF PRISONER—JURISDICTION OF SUPREME COURT TO SET ASIDE.

The Supreme Court of Nova Scotia has no jurisdiction to set aside an order for discharge in the nature of *habeas corpus*.

[*Re Blair*, 23 N.S.R. 225, followed.]

Statement.

APPLICATION by counsel on behalf of the Attorney-General of Nova Scotia for an order to discharge, rescind, vacate and set aside the order and judgment delivered and made on March 15, 1918, by Russell, J., discharging Frank Mackey from the custody of the keeper of the common jail at Halifax, where he was imprisoned under a warrant of commitment made by McLeod, a justice of the peace in and for the county of Halifax, wherein the said Frank Mackey was charged with unlawfully killing one William Hayes. Notice was given that in the event of the said judgment and order being set aside the court would be moved for an order for the re-arrest and re-committal to jail of said Mackey in respect of said charge.

The deceased William Hayes was pilot in charge of the steamer "Imo," and lost his life as the result of the explosion following her collision with the steamer "Mont Blanc" in Halifax harbour on the morning of December 6, 1917. Mackey was pilot in charge of the "Mont Blanc." By direction of the Honourable the Minister

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Statement.

of Marine a formal inquiry as to the cause of the explosion on the "Mont Blanc" was held before Drysdale, Local Judge of the Admiralty Division of the Exchequer Court of Canada, with Capt. Demers, of Ottawa, and Capt. Walter Hose, R.C.N., of Halifax, as nautical assessors, as the result of which it was found that the explosion on the "Mont Blanc" was undoubtedly the result of the collision and that such collision was caused by violation of the rules of the road and that the pilot and master of the "Mont Blanc" were wholly responsible for such violation. Proceedings were then taken against Mackey and the captain of the "Mont Blanc" which resulted in their commitment for trial.

Andrew Cluney, K.C., Crown Prosecutor, for the Attorney-General; *W. J. O'Hearn*, K.C., for Frank Mackey.

Harris, C.J.

HARRIS, C.J.:—The accused was committed for trial for manslaughter by a stipendiary magistrate and applied to Russell, J., for his discharge from custody under *habeas corpus*. That judge, after perusing the evidence, came to the conclusion that the evidence did not justify the charge of manslaughter and ordered the discharge of the prisoner.

The Attorney-General has applied to the Court to discharge the order of Russell, J., as irregular and on other grounds.

The motion is met at the outset by an objection that this court has no jurisdiction to set aside an order for discharge in the nature of *habeas corpus*.

In view of the importance of the question raised by the motion, I regret that I am obliged to decide that the preliminary objection must prevail.

The question was raised in 1881, in *Re McKenzie*, 14 N.S.R. 481, and a court consisting of DesBarres, McDonald, James and Weatherbe, JJ., decided that the court had no jurisdiction to hear an appeal in such a case.

In 1883, in *Ex parte Byrne*, 22 N.B.R. 427, the Supreme Court of New Brunswick, composed of Allen, C.J., Palmer, Weldon, Wetmore and King, JJ., expressly held that such an order could not be set aside or revised by the court and Palmer, J., at p. 430, said:—

> And it appears to me that the great purpose of the writ of *habeas corpus* is the immediate delivery of the party deprived of his personal liberty. The allowance of a writ of error, appeal, or other exception to the order of discharge would be inconsistent with the object of the writ and many of the

provisions of the Habeas Corpus Act. The consequence of allowing these would be either that all further proceedings would be stayed, which would be wholly inconsistent with the object of the writ, or the judge must deny the party appealing the usual delay which the fair determination of the case would then require; and as such appeal is so inconsistent with the purpose of the writ, the provisions of the Habeas Corpus Act and the Consolidated Statutes on the subject, the conclusion, I think, must be that no such appeal lies. (See, also, p. 433.)

In *Re Blair*, 23 N.S.R. 225, a strong court, consisting of McDonald, C.J., Weatherbe, Ritchie, and Townshend, JJ., and Graham, E.J., held that the court had no power to review, by way of appeal or otherwise, the order of a judge discharging a prisoner on *habeas corpus*, and Ritchie, J., in giving the reasons for the decision of the court, refers to the case of *Cox* v. *Hakes*, 15 App. Cas. 506, in which the House of Lords had so decided, and he distinguishes the case *Re Sproule*, 12 Can. S.C.R. 140, where the Supreme Court of Canada had reviewed an order made by the late Henry, J.

I refer also to the case of *Wyeth* v. *Richardson*, 10 Gray (Mass.) 240, the decision of that eminent judge, Shaw, C.J.

I think the preliminary objection must prevail and the application be dismissed.

LONGLEY, J.:—I am compelled to the conclusion that Mr. O'Hearn's objection that this court has not jurisdiction to hear an appeal in this case is sound and conclusive. An attempt was made to cite a case of a similar character which was decided in 12 Can. S.C.R. 140, *Re Sproule*, but it is quite manifest that the grounds on which they set aside the judgment of Henry, J., in that case were, first, that the man had been tried by a competent jury and convicted, and, second, that the right to issue a writ of *habeas corpus* was confined in that court to cases arising from the parliament of Canada and was not universal as in the case of our court.

Longley, J.

In *Re Blair*, 23 N.S.R. 225, the case is thoroughly discussed and judgment delivered, in which five judges concur. The judgment was read by Ritchie, J., and if this case had been the one then before the court instead of the case then under discussion, he could not have used words more absolutely appropriate to the question. He holds that when a judge of the Supreme Court issues a writ of *habeas corpus* and deals with it, that that is final and cannot be reviewed by another court, and I think it would be

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out of the question to ask this court now to override the decision which the court then delivered on so grave and important a question.

It may be necessary to refer to *Cox* v. *Hakes*, 6 T.L.R. 465, simply for the fact that the ground upon which they place their judgment was the overwhelming necessity of maintaining the writ of *habeas corpus* and the liberty of the subject.

I therefore conclude that this court has no jurisdiction to hear the matter.

Drysdale, J.

DRYSDALE, J. (dissenting):—In this case Mackey was charged with manslaughter and, after inquiry before a stipendiary magistrate, was committed for trial. A judge of this court, viz., Russell, J., undertook to issue a writ of *habeas corpus* and not only inquired into the regularity of the proceedings, but to pass upon the guilt or innocence of the accused. In my view, this was a proceeding absolutely beyond the power of the judge.

The first question before us is as to our jurisdiction. Can we remedy the unlawful acts of a judge in this court? I think *The Queen* v. *Sproule*, *supra*, is conclusive and binding upon us that we have inherent power to correct an abuse of the powers of the court by any single judge. I am of opinion that any single judge of this court who undertakes, after committal by a magistrate, to pass upon the guilt or innocence of an accused person, and to take such charge out of the regular course of procedure, viz., the process of trial by grand and petit jury, and of his own motion to pass upon the guilt or innocence of the accused is clearly abusing the process of the court; that we have the power to correct and restrain such abuse and ought to do so. In this case the judge undertook to pass upon the merits of the charge against the accused and, taking advantage of the writ of *habeas corpus*, ordered the discharge of the accused. This, to my mind, was not in due process of law, but was an abuse of the process of the court. I think the writ was improvidently issued, the order therefor and the order for the discharge of the accused improperly made, and I think such order ought to be rescinded and discharged. Our jurisdiction to hear the case after a discharge by *habeas corpus* was challenged and argued and *Re Blair*, *supra*, was relied upon. I cannot appreciate the attempted distinction in that case from *Re Sproule*, the latter a binding authority. I would follow the

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Supreme Court of Canada, as indeed I must. In fact, it was not contended by counsel that if the judge did something outside of and beyond his powers his orders were the subject of correction and revision. I never heard of the power claimed for any judge in this country to review the merits of a criminal charge and to pass upon the innocence or guilt of the accused, call the process *habeas corpus* or what you will. Such power does not exist, and I would rescind the order made herein.

Ritchie, E. J.

RITCHIE, E.J.:—Russell, J., has made an order discharging Mackey from custody under the Liberty of the Subject Act. Cluney, K.C., for the Crown, moved the court for an order rescinding the order of my brother Russell. O'Hearn, K.C., for Mackey, took the point that the order was final and that the court had no jurisdiction to entertain the application. He relied on the *Blair* case, 23 N.S.R., 225. I cannot distinguish that case from the present one. This court, I think, has only two alternatives, either to overrule it, or to follow it. The point was squarely decided that the court has no power to review or set aside an order for discharge in a case of this kind. To overrule the *Blair* case would mean being in direct conflict with the House of Lords in the *Cox* case, 15 App. Cas. 506. I am not prepared to take that position, and I may add that the court in the *Blair* case was a strong one, Weatherbe, Townshend, Graham, and Ritchie, JJ. But it is said that the *Sproule* case, 12 Can. S.C.R. 140, is the other way, and that it is binding upon this court, and of course it is, if it is applicable. The late Ritchie, J., in the *Blair* case, successfully distinguished the *Sproule* case. I entirely agree in the distinction which he makes. I refrain from quoting, but I incorporate the words in which he draws the distinction as part of this opinion. I am of opinion that we are concluded by the *Blair* case and *Cox* case, and that the *Sproule* case is not applicable, and therefore think that the application should be refused.

Chisholm, J.

CHISHOLM, J.:—I concur in the conclusion arrived at by the majority of the members of the court. In my opinion the case of *Re Blair*, 23 N.S.R. 225, concludes the matter, and effect must be given to the preliminary objection taken by O'Hearn, K.C.

Application refused.

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HAY v. CANADIAN PACIFIC R. Co.

Saskatchewan Court of Appeal, Haultain, C.J.S., Newlands and Lamont, JJ.A. April 26, 1918.

CARRIERS (§ II G—101b)—PASSENGER ON TRAIN—REQUEST TO BRAKEMAN TO STOP TRAIN—REFUSAL—AGREEMENT TO SLOW UP—DIRECTIONS TO PASSENGER WHEN TO JUMP—PASSENGER ACTING ON INSTRUCTIONS—INJURY—NEGLIGENCE.

A request by a passenger to a brakeman to allow him to get off the train at a certain station, casts upon the brakeman the obligation of seeing that the proper steps are taken to have the train stopped, and upon the company the obligation of stopping it; if the brakeman acting within the apparent scope of his employment refuses to stop the train but slows it down, and allows the passenger to jump from it, telling him when to jump, the company is guilty of negligence and liable for resulting injuries, unless the train was travelling at such a speed that no reasonable man would jump from it even under the direction of a train official.

[See also *Grand Trunk Railway Co.* v. *Mayne*, 39 D.L.R. 691.]

Statement.

APPEAL by defendant from the judgment of the trial judge dismissing an action for damages for personal injuries. New trial ordered.

W. E. Knowles, K.C., for appellant; *J. A. Allan*, K.C., for respondent.

Haultain, C.J.S.

HAULTAIN, C.J.S.:—I agree that appeal should be allowed with costs and a new trial ordered.

Lamont, J.A.

LAMONT, J.A.:—This is an appeal from a judgment dismissing the action of the plaintiff who sued for damages for personal injuries.

The trial Judge found as follows:—

On or about June 26, 1916, the plaintiff boarded a train operated by the defendant, running east from Maple Creek, and purchased a ticket from the conductor to Piapot. Before reaching Cardell, a flag station west of Piapot, the plaintiff discovered that he had forgotten some papers that he required and decided that he would, if possible, leave the train at Cardell, where it made a crossing with another train, and return to Maple Creek for these papers. He states that he asked the brakeman if he would stop the train at Cardell to let him off, and that the brakeman said he would not stop the train but that he would slow it up, and that the plaintiff could jump off. He then went to his seat, and in a few minutes the brakeman waved him to come to the end of the car, and when he got onto the platform the brakeman opened the vestibule door and plaintiff got down on the lower step, the brakeman standing behind him. The brakeman said not to jump off until he told him to, and he waited a short time and then the brakeman told him to jump and that he jumped. When he jumped, the plaintiff fell and one of his feet went under the train and in consequence his foot had to be amputated above the ankle. . . .

The brakeman denies the statement that he told the plaintiff that he would slow up the train, or that the plaintiff could jump, or that he ever instructed him to jump. The brakeman is not now in the employ of the Canadian Pacific R. Co., and has not been for some considerable time.

Both of these witnesses impressed me as being truthful. I think, under the circumstances, I should accept the evidence of the plaintiff rather than that of the brakeman, who may have forgotten the exact conversation.

He also found that the train at the time of the accident was going about 12 miles per hour.

The grounds upon which the trial judge based his judgment are found in the following paragraphs:—

In the case at bar, there was no obligation on the part of the defendant, under the particular circumstances, to allow the plaintiff to get off the train at Cardell. If he had liked, he might have insisted on having the train stopped, and there would then probably be an obligation to allow him to alight safely, but, in his examination for discovery, he clearly states that he did not want to insist if it slowed down. . . .

(The reason why the plaintiff did not insist was because he thought he could jump off all right.)

It seems to me, under these circumstances, that the plaintiff was taking the chance of his ability to alight safely. The mere fact that the brakeman told him to jump does not, to my mind, affect the question. The brakeman, at best, was merely giving his opinion.

If there was an obligation on the part of the railway company to stop the train in order to let the plaintiff get off, had he insisted upon it (and the evidence supports that finding), I am, with deference, of opinion that the same obligation existed upon mere request. Insistence on the part of the plaintiff would not give him any right which was not his upon request; such request being made to the proper official. The plaintiff made his request to the brakeman. The evidence shows that assisting passengers on and off the train is part of a brakeman's duty. I, therefore, think that a request made to the brakeman cast upon him the obligation of seeing that the proper steps were taken to have the train stopped, and upon the defendants, the obligation of stopping it. The brakeman did not intimate to the plaintiff that he had no authority in the matter; on the contrary, he intimated that he had. He said he would not stop, but would slow down. The defendants being under an obligation to allow the plaintiff to get off at Cardell, and having refused to stop the train the question is, was the act of the plaintiff in jumping off when it slowed down the act of a reasonably prudent man?

The plaintiff says that he jumped on the instructions of the brakeman, and that he thought the brakeman ought to know whether he could make it safely or not. He says that when he went down from the platform to the step, the brakeman said,

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"Don't jump until I tell you to jump." To this the plaintiff replied, "All right." After going a little further, the brakeman said, "Jump off here." The plaintiff jumped and was injured.

As he agreed not to jump until the brakeman told him to, it seems to me impossible to say that the plaintiff was acting upon his own judgment.

The facts of this case, in my opinion, bring it within what was held in *Curry* v. *C.P.R. Co.*, 17 O.R. 65.

In that case a passenger, on the invitation of the conductor, attempted to board a moving train. It was there argued that the danger to the plaintiff in boarding a train in motion was so obvious that he had no right to act on the conductor's invitation. It was held that this was a matter to be determined by the jury.

In the case at bar, the finding and the evidence show that there was a duty resting upon the defendants to afford the plaintiff ordinary and reasonable facilities for alighting at Cardell. That duty they did not perform. The defendants' servant—acting at least within the apparent scope of his authority—invited the plaintiff to get off the train while in motion. In my opinion this constitutes negligence for which the defendants must be held responsible, unless the danger involved in acting upon the invitation was so obvious that no reasonably prudent person would have made the attempt.

In *Edgar* v. *Northern R. Co.*, 11 A.R. Ont. 452, at p. 455, Patterson, J.A., said:—

> The train having slowed, but not stopped, at Lefroy station, it may properly be held that the only facility afforded or intended to be afforded to the passengers for alighting was the slackening of speed to the extent to which that was done. The duty of the company to the passenger was to afford reasonable facilities for alighting with safety, and by reason of neglect of that duty the accident to the female plaintiff happened, unless she herself contributed to it by negligence on her part.

The bare fact that a passenger jumps from a train in motion and is injured is not conclusive evidence that he was the author of his own wrong.

In Beven on Negligence, Can. ed., at p. 972, the author states the law as follows:—

> Yet the fact that a passenger on a railway train attempts to alight while the train is in motion cannot be held contributory negligence as a conclusion of law. *Primâ facie* evidence of negligence undoubtedly it is; but circumstance are frequently shewn that may excuse it and devolve the determination of the quality of the act on the jury.

If a train were going at 30 miles per hour, I take it that there would be no occasion to leave it to a jury to find whether or not a passenger jumping off upon the invitation of the train official was guilty of negligence which caused his injuries. No jury could reasonably find that he was not so guilty. On the other hand, if a train were going at 2 miles per hour it might, in my opinion, well be found that in jumping off under instructions a passenger would not be guilty of any negligence. Where a train—as here—was going at 12 miles per hour, would a reasonably prudent man, under the circumstances in which the plaintiff found himself, be justified in acting on the invitation of a train official? The circumstances to be considered as I find them are, that there was an obligation on the defendants to stop the train; their refusal to do so; a statement that they would slow down and let him jump off; his acquiescence therein; his agreement not to jump until the brakeman gave the word, and the brakeman's instructions to jump. Under these circumstances, I am of opinion that the determination of the quality of his act is for the judge or jury charged with the duty of finding the facts. I cannot find in the judgment anything to justify the conclusion that this question has been passed upon. In his judgment the trial judge does say:—

> There must always be some danger in attempting to alight from a moving train, and, in this case, the danger was as obvious to the plaintiff as to the brakeman.

But here we are met with the difficulty that the brakeman thought it was safe for him to jump; otherwise he would not have directed him to do so. And further on the Judge says:—

> While it might be that there would be liability for permitting, say, a child of tender years to get off a moving train, it seems to me that there is no such liability to an adult who is mentally capable of appreciating what he is doing, at any rate where there is no obligation to permit him to alight.

The basis of his whole judgment is that there was no obligation on the part of the defendants to stop the train and, therefore, no negligence on their part. What his finding would have been had he been of opinion that the obligation to stop did exist, I cannot say. I am, therefore, of opinion there should be a new trial to determine the question.

The appeal should be allowed with costs and a new trial ordered. The costs of the former trial to be costs in the cause.

Newlands, J.A.

NEWLANDS, J.A. (dissenting):—The plaintiff, who was a passenger on defendant's train, travelling from Swift Current to

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Piapot, changed his mind as to his destination and got off the train at Cardell and was injured. He brings this action for damages.

The following is the negligence which plaintiff alleges the defendant company was guilty of, and which he claims caused the accident for which he asks damages.

The plaintiff wishing to alight from said train was informed by the brakeman that he could do so and the brakeman opened the door leading from the said train and permitted the plaintiff to step off the same. The said train was moving rapidly and the plaintiff, acting on the instructions of the said brakeman and not knowing that the said train was moving at such a rate of speed as to be dangerous for a passenger to alight, stepped off the said train and as a consequence the suction of the train drew him under the train and crushed one of his feet making it necessary to have it amputated.

The plaintiff, when he got on the train at Swift Current, bought a ticket from the conductor from Swift Current to Piapot. There was, therefore, no contract between the plaintiff and defendant company to let him off the train at Cardell. The plaintiff knew that the train would not stop at Cardell to let off passengers. He says that the brakeman told him that the train would not stop, but he would slow it up at Cardell and he could jump off and the trial Judge so finds. He further says when he was ready to get off the brakeman said not to jump off until he told him to, and that he waited a short time and the brakeman told him to jump and he did so. This the trial Judge also finds to be the fact. The trial Judge further finds that the train was travelling at the rate of about 12 miles an hour.

There being no contract between the plaintiff and the defendant company to carry the plaintiff to Cardell—and as the plaintiff was aware that the train would not stop there to allow passengers to alight—the only acts of which the defendant company are guilty are that their servant, the brakeman, allowed the plaintiff to get off a moving train, and advised him of the proper moment to do so. This brings up the question as to whether the brakeman was acting within the scope of his duty in permitting and advising the plaintiff when to get off a moving train.

No evidence was produced to show that a brakeman had any such duties. If the brakeman had any duty, it was to prevent a

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passenger from alighting from a moving train, which every man of common prudence knows must be attended with danger. If a passenger intended to get off, he could only be prevented by force, which the company would not be justified in using in the case of a man of mature years, unless the danger of an accident was inevitable.

If such a man wishes to alight from a moving train it must be left to his own discretion whether he will do so, and any advice given by a brakeman as to the safest time to do so would only be his opinion, for which his employers could not be liable.

Newlands, J.A.

All the cases cited on the argument were cases where the plaintiff had arrived at his destination and it was the duty of the company to provide a safe means of alighting from the train, but they did not do so.

In this case, no such duty was imposed upon the defendant company, and, when the plaintiff decided to get off a moving train, I am of the opinion that he must be considered to have accepted the risk of doing so. Whatever assistance the brakeman gave him was not in the course of his duty, but simply to minimise the risk which the passenger was voluntarily assuming, and I can find no negligence, either in the facts as set out in the statement of claim, or in the evidence given at the trial. Unless the defendant company is guilty of negligence, the plaintiff cannot recover, and, as, in my opinion, they were not so guilty, the appeal should be dismissed with costs.

Appeal allowed.

N. S. TRAMWAYS & POWER Co. v. EMPLOYERS LIABILITY ASSURANCE Co.

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Nova Scotia Supreme Court, Harris, C.J., and Longley, Drysdale, Chisholm and Mellish, JJ. April 5, 1918.

INSURANCE (§ III D—65)—AGAINST BODILY INJURIES—CLAUSE INSERTED COVERING PROPERTY OF EVERY DESCRIPTION—CONSTRUCTION.

A clause added to a policy insuring against bodily injuries that "notwithstanding what is within written this policy is hereby extended to cover loss from liability for damage to property of every description" includes not only the physical injury to property but the loss incident to the inability of a building to perform its usual function while it is being repaired.

Statement.

QUESTIONS of law stated for the opinion of the Court arising out of a policy of insurance by which the defendant company insured the plaintiff against loss by accident. The questions upon

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which the opinion of the Court was sought are stated fully in the judgments.

W. H. Covert, K.C., for plaintiff; *L. A. Lovett*, K.C., for defendant.

HARRIS, C.J.:—The plaintiff company was insured by the defendant corporation under a policy by which the defendant corporation agreed to indemnify it against loss from the liability imposed by law upon the assured for damages on account of bodily injuries suffered by any person or persons other than the employees of the assured. A clause was subsequently added by which it was provided that "notwithstanding what is within written this policy is hereby extended to cover loss from liability for damage to property of every description, etc."

An electric car of the plaintiff company left the rails and injured a building leased and occupied by one Amyooney and the stock of goods in the building.

It is admitted in the stated case that the plaintiff company thereby became liable to Amyooney for not only the physical damage done to the building and contents but also for loss of profits while the repairs were being affected.

The question is whether the policy of insurance covers the damages payable to Amyooney for loss of profits.

It will, perhaps, be useful to re-state what the defendant corporation agreed to do by its policy with the added clause.

It is, as I read it, to indemnify the plaintiff company against loss from the liability imposed by law upon it for damages on account of bodily injuries, and against loss from the liability imposed by law upon it for damage to property of every description.

It will not be denied that if the plaintiff company became liable for damages on account of bodily injuries sustained by a person injured on its electric cars it would be liable for all the damage sustained by that person by reason of his being incapacitated for work for a period of time. His incapacity to earn wages, or his loss through inability to attend to his business would be an element to be taken into consideration in assessing the damages for his injuries and I do not see how it could be contended that the defendant corporation would not be liable to indemnify the plaintiff company for the whole of the damages the plaintiff company was compelled to pay, including the portion awarded to the individual

by reason of his inability to earn wages or attend to his business for the time being.

In the same way, the plaintiff company becomes liable to Amyooney for not only the physical injury to the property but also for the loss or injury incident to that physical injury, viz., the inability of the building to perform its usual functions while it is being repaired.

If the defendant corporation is liable in the former case, I do not see why it is not liable in the latter.

Harris, C.J.

The policy requires the defendant corporation to indemnify the plaintiff company against loss from the liability imposed upon it by law for damages to property and part of that damage imposed upon it by law is due to the fact that the property is by the injury rendered for a time incapable of the use to which it was formerly put.

The plaintiff company has suffered a loss through, or by reason of, its liability for damages to the property and the whole of that damage was what the defendant corporation agreed to indemnify the plaintiff company against.

The liability for damage to the property includes the loss of profits just as much as the physical damage and it is, in my opinion, covered by the policy and there should be judgment for the plaintiff company.

LONGLEY, J.:—I concur.

Longley, J.

CHISHOLM, J.:—In this matter, I am of opinion that the defendant company is not liable to the plaintiff company for the loss of profits mentioned in para. 5 of the stated case. The defendant company, in express terms, indemnified the plaintiff company "against loss from the liability imposed by law upon the assured for damages on account of bodily injuries, including death resulting therefrom." The liability imposed by law is well understood in the case of bodily injuries.

Chisholm, J.

The above-mentioned clause was afterwards extended by agreement to "cover loss from liability for damage to property of every description resulting from accident caused through the operation of the electric cars owned by the assured."

I think the added clause only covers the damage to physical or tangible property and does not include loss of profits or other consequential losses; and if indemnity of so wide a character were

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intended, such losses should be specificially mentioned. 17 Hals. 365, 521; Bunyon on Fire Insurance, pp. 35 and 154.

I am unable to find anything in the added clause to cover consequential losses.

DRYSDALE, J.:—I agree in this opinion.

MELLISH, J.:—By an agreement in writing between the plaintiff and defendant, the latter undertook to indemnify the plaintiff against loss from the liability imposed by law upon the plaintiff "for damage to property of every description resulting from any accident caused through the operation of the electric cars owned by the assured" (the plaintiff).

Such an accident occurred. One of the plaintiff's cars was derailed and ran into a retail store-keeper's building. In the stated case (para. 5) it is agreed that we are to assume that the plaintiff is liable to the store-keeper for loss of profits resulting from this accident.

The question for our opinion is whether under said agreement the plaintiff is entitled to indemnity from the defendant against the loss from such liability for loss of profits. The question, I think, should be answered in the affirmative.

I think that the words of the agreement may be fairly said to mean an undertaking to indemnify the plaintiff company against any loss which they may be legally liable to pay, by reason of their having, in the operation of their electric cars, accidentally damaged any description of property. The loss of profits in question, I think, clearly, the plaintiffs were liable to pay by reason of such damage. The words "for damage to property" in the agreement, taking it as a whole, were intended, I think, as the equivalent of "by reason of damaging property." This, perhaps, is made more clear by reference to the clauses dealing with personal injuries.

It is also to be noted, as pointed out by Longley, J., on the argument, that "profits" are a species of property as well as a building. I am assuming, however, that the word "property" as used in the agreement means tangible property, as, for example, a building or a carriage. Bearing this in mind, and using the very words of the agreement, the plaintiff's "liability for damage to property" of a third party resulting from such an accident is not limited to the mere diminution in value of the property. They are liable as tort feasors for the negligence of their servants and not as underwriters

insuring the property damaged. And the defendant undertakes to indemnify the plaintiff against the whole loss from such liability and not a part of it.

For the above reasons I consider the cases dealing with insurance policies and property and the liability of underwriters thereto inapplicable.

Judgment for plaintiff.

SUMNER v. McINTOSH.

Saskatchewan Court of Appeal, Newlands, Lamont and Elwood, JJ.A. April 26, 1918.

SPECIFIC PERFORMANCE (§ I E—30)—SALE OF LAND—REGISTERED PLAN—VENDOR OFFERING EXACTLY WHAT PURCHASER AGREED TO BUY.

A purchaser who agrees to purchase lots according to a registered plan is bound by the agreement; whether the registered plan creates a restrictive covenant or not is immaterial; if the vendor offers the purchaser exactly what he agreed to buy specific performance will be enforced.

Statement.

APPEAL by defendant from the judgment at the trial, granting specific performance of an agreement for sale of land. Affirmed.

John Milden, for appellant; *Borland, McIntyre & Co.*, for respondent.

Lamont, J.A.

LAMONT, J.A.:—By an agreement in writing, under seal, the plaintiff agreed to sell and the defendants agreed to buy lots 15, 16, and part of lot 17, in block 6, Saskatoon, "according to a plan of record in the Land Titles Office for the Saskatoon Land Registration District as plan F.J.," for $35,000, payable in instalments.

Plan F.J. was registered in 1907 by the original owners of the land covered by the plan. The land is laid out in lots, the greater part of which face on Saskatchewan Crescent, the street nearest to the river, and on Poplar Crescent, which runs parallel thereto. On the plan, through all the lots on the east side of Saskatchewan Cres.—including the lots in question in this action—a line is drawn 20 ft. from the street line, and on the line is written the words: "No buildings to be erected between this line and the west side of Saskatchewan Crescent." A similar line is drawn through the lots on the west side of Saskatchewan Cres. and also through the lots on each side of Poplar Cres. In 1911, the plaintiff became the registered owner of the lots covered by the agreement of sale above referred to. The defendants made default in the payments under said agreement, and the plaintiff brings this action and asks pay-

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ment of the amount due under the agreement. The defendants resist the plaintiff's claim on the ground that plaintiff shows that the land was laid out under a general building scheme for the development of the property, and that the line drawn on the plan, and the notification that no buildings are to be erected between that line and Saskatchewan Cres., constitute a restrictive covenant which would be binding on the defendants and that, therefore, the plaintiff cannot make title in accordance with the agreement.

The clause in the agreement respecting title reads as follows:—

In consideration whereof, and on payment of all the said sum of money, with interest as aforesaid, in manner aforesaid, the vendor doth covenant, promise and agree to and with the purchaser to convey and assure or cause to be conveyed or assured to the purchaser the *parcels of land* with the appurtenances *as aforesaid* by a transfer under the Land Titles Act, subject to the conditions and reservations contained in the original grant from the Crown, prepared by the vendor's solicitors at the expense of the purchaser.

The plaintiff has a certificate of title in which the description of the property is identical with that contained in the agreement of sale, and she offers a transfer of the same clear of encumbrances.

The sole question is: Is the prohibition as to building—which is endorsed on the plan—a restriction which makes the property which the defendants would take under a transfer from the plaintiff different from that which they agreed to buy? In my opinion it is not.

I agree with counsel for the defendants that the plan shows that the land was laid out in pursuance of a building scheme which satisfies the conditions laid down in *Reid* v. *Bickerstaff*, [1909] 2 Ch. 305, but I do not see how that helps the defendants. They agreed to buy lots 15, 16, and part of lot 17, in block 6, "according to plan F.J." They are offered a transfer of this identical property. If the prohibition endorsed on the plan is effectual to bind an owner holding a certificate of title of these lots, it is equally effectual to bind a purchaser who agrees to buy the lots according to the plan which alone creates the restriction. For a purchaser who buys according to a plan is bound by the plan.

In Hogg's Australian Torrens System, at p. 763, the author says:—

And references to maps deposited in other public offices than the registry are also noted in a certificate of title, and such references have the effect of practically incorporating the maps referred to in the certificate of title, so as to fix with notice of their contents any one who inspects the certificate of title.

If on the other hand, however, the prohibition endorsed on the plan is ineffectual to bind an owner who holds a certificate of title of lots according to the plan, it creates no restriction whatever and the defendants will take clear of the restriction.

The evidence shows that the defendant, Robert McIntosh, who was buying for his wife, inspected the certificates of title before the execution of the agreement.

In my view, it is not necessary to determine on this appeal whether the line drawn on the plan across the lots—together with the words of prohibition endorsed thereon—create a binding restriction on all who purchase according to the plan, and I express no opinion upon that point.

It was pointed out by counsel on the argument that, under our Land Titles Act, a plan is an instrument (s. 2 (1)), and that "every instrument shall become operative according to the tenor and intent thereof when registered" (s. 58 (2)).

The intent of the owner who registered the plan is, in my opinion, clear; he intended to create a binding restriction. Whether or not he succeeded in doing so may possibly have to be determined some day, but, as I have already said, so far as this appeal is concerned, it is not in my opinion necessary to deal with it. As the plaintiff offers the defendants exactly what they agreed to buy, the appeal should be dismissed with costs.

ELWOOD, J.A., concurred with Lamont, J.A. Elwood, J.A.

NEWLANDS, J.A.:—This is an action by the vendor of land for specific performance. The defence is that the plaintiff cannot give a good title to the land because the same is subject to a restrictive covenant. Newlands, J.A.

What is alleged to be the restrictive covenant in this case is a dotted line, on the registered plan of the property in question, 20 feet from the street on which said lots face, together with the words, "No buildings to be erected between this line and the east side of Saskatchewan Crescent."

This plan was prepared under the Land Titles Act and registered in the Land Titles Office for the Saskatoon Land Registration District as plan F.J.

The provisions as to plans under the Land Titles Act (8 Geo. V., 1917, 2nd sess., Sask.), subdividing land for which a certificate of

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title has been granted into blocks and lots, are contained in s. 80 of that Act and are, briefly, as follows:—

(4) The plan shall clearly illustrate and represent the survey as made on the ground in accordance with the Saskatchewan Surveys Act. (That Act provides how the actual survey on the ground is to be made.) (5) Every such plan shall be certified (form K) by the surveyor who made the survey, and signed by every owner or his agent, and each signature shall be witnessed and attested in the manner herein provided for the attestation of instruments to be registered under the Act. (The form referred to certifies the correctness of the plan.) (17) On the registration of a subdivision plan, the registrar shall cancel the existing certificate of title and issue to the owner certificates of title to the property in blocks and lots as shown on the plan.

I am of the opinion from the above provisions, that a plan of subdivision is to be a copy of the actual survey on the ground, properly authenticated by the signatures of the surveyor making the same and the owner of the property, and its only purpose under the Act is to show the location and boundaries of the lots and blocks, the subdivision of which it represents, and that any reference to a registered plan in a certificate of title, or any instrument made subsequently to the registration thereof, is only for the purpose of fixing such location and boundaries.

Such plan does not affect the title to any land otherwise than as provided in said s. 80 (11) which vests the title to all streets, lanes, parks, or other reserves for public purposes, shewn on such plan, in His Majesty in the right and to his use of the Province of Saskatchewan.

The manner in which an owner may affect his title is provided for by other sections of the Act. For the purpose of this case, I need only refer to ss. 74, 75 and 76.

S. 74 provides that when land is intended to be transferred, or a right of way or other easement is intended to be created or transferred, the owner shall execute a transfer, and such transfer shall contain such description as is necessary to identify the land, and shall contain an accurate statement of the estate, interest or easement intended to be transferred or created.

S. 75 provides that no words of limitation are necessary in a transfer of land in order to transfer all or any interest therein, but every instrument transferring land shall operate as an absolute transfer of all such right and title as the transferor has in the land at the time of its execution, unless a contrary intention is expressed in the transfer.

S. 76 provides that when an easement or incorporeal right, in or over any land, is created for the purpose of being annexed to or used or enjoyed with other land has been granted, the registrar shall make a memo. of the instrument creating such easement or incorporeal right upon the certificate of title of the dominant and servient tenements respectively.

The certificate of title of the plaintiff for the land in question is a clear certificate to the land. I take it, therefore, that the transfer to her contained no reservations of any kind, as, otherwise, the registrar would have made a memo. of such reservations upon them.

The effect of a certificate of title is stated in s. 174 and is to the effect that, except in certain cases which are not in question here, it is to be conclusive evidence, as against His Majesty and all persons whatsoever, that the person named therein is entitled to the land included in the same for the estate, or interest, therein specified, subject to the exceptions and reservations implied under the provisions of the Act.

A restrictive covenant not being one of the exceptions or reservations implied under the Act, and the plaintiff having a clear certificate of title for the land in question, she has an unencumbered estate in fee simple.

It not being the intention of the Act that a plan of subdivision should shew any more than the location and boundaries of the blocks and lots marked out on the ground, and the plaintiff's transferor having made no reservation in the title he transferred to her, and not having created by transfer or transferred to any other person or annexed to any other property any estate, easement or incorporeal right, no such estate, easement or incorporeal right exists and the plaintiff is, therefore, the absolute owner of the property.

In *Re Jamieson's Caveat*, 10 D.L.R. 490, 6 S.L.R. 296, the Supreme Court of Saskatchewan held that, in order to create a similar easement or incorporeal right in favour of adjoining land, it must be created under the provisions of ss. 74, 75 and 76 above referred to.

But even admitting that the words referred to on the plan created a restrictive covenant, the defendants have, by their agreement of sale, agreed to accept a title to the lands in question with such restriction.

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The agreement of sale describes the land as according to plan F.J. This is the only description given of the land. The plaintiff covenants to convey and assign to the purchaser "the parcels of land with the appurtenances aforesaid by a transfer under the Land Titles Act subject to the conditions and reservations contained in the original grant from the Crown."

The expression "the parcels of land with the appurtenances aforesaid" is the land already described as being according to plan F.J., so that if the words on the plan make a restrictive covenant, then the covenant to transfer according to the plan would mean to transfer subject to such restrictive covenant.

I am, however, of the opinion that the words on the plan create no cloud on plaintiff's title but that she has an unencumbered estate in fee simple in the land and that she can transfer such an estate to the defendants, but that under any circumstances she can transfer to defendants all the estate in these lots that they agreed to purchase.

The appeal should therefore be dismissed with costs.

Appeal dismissed.

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Ex. C.

THE KING v. VASSIE & Co.; JOSEPH ALLISON; PRUDENTIAL TRUST Co.; PETRIE MANUFACTURING Co.

(4 cases).

Exchequer Court of Canada, Cassels, J. November 5, 1917.

EXPROPRIATION (§ III C—135)—LANDS ADAPTED FOR SPECIAL PURPOSE—VALUATION—ALLOWANCE FOR COMPULSORY TAKING.

On an expropriation of lots specially adapted for warehouse purposes the same value per square foot does not attach to small lots as to larger lots. The owners are entitled to an allowance for the compulsory taking in addition to the value of the land.

Statement.

INFORMATION for the vesting of land and compensation in an expropriation by the Crown.

Daniel Mullin, K.C., for plaintiff; *F. R. Taylor*, K.C., and *C. F. Sanford*, for defendants.

Cassels, J.

CASSELS, J.:—These four cases were tried together before me at St. John, it being agreed that the evidence adduced should be treated as if adduced in each separate case, with the right to any of the parties to adduce any further evidence that would be applicable to the particular case.

The informations were exhibited to have it declared that certain lands in the City of St. John fronting on Prince William St., and

running through to what is called St. John or Water St., are vested in His Majesty the King, and to have the compensation for these lands ascertained. The lands are expropriated for public works, namely, the erection of an elevator in the City of St. John.

I will have to deal separately with each case, but before doing so may mention some facts which are common to all of the four cases.

Ex. No. 1 in the case of *The King* v. *Vassie* shows the different properties in question. Lot No. 1 is the property of Vassie & Co. The Allison lot on the same plan is lot No. 6, which is marked on the plan "The Salvation Army." The Prudential Co. lots are lots 3 and 5 on the plan—and Petrie lot is marked 8 on the plan. All of these properties are unquestionably excellent warehouse sites, if there are warehouses to be erected on them.

The evidence of all the witnesses agrees that Prince William St. is one of the best streets in the City of St. John. On the east side of this street is erected the post-office and a large number of other public buildings, banks, etc. On the west side of the street, and fronting on the street, all of these lots, from 1 to 8 inclusive, is vacant property (with the exception of one or two sheds) having no buildings on them.

St. John or Water St. is considerably below the level of Prince William St., and is not far from the water of the harbour of St. John. It is proved that having this difference in level between Prince William St. and Water St. is of considerable advantage for the purposes of wholesale warehouses. All the properties in question have railway trackage, a matter of considerable importance for a warehouse property.

Prince William St. and Water St. are so situate that any person carrying on business on the sites in question would save considerably in the way of cartage from the proximity of these particular sites to the Customs House, and also to the waterfront, and to the railways. The saving of haul being considerable both by reason of the distance saved and the hills which are avoided.

I think it may be taken for granted, having regard to the evidence, such as that given by Senator Thorne, a very experienced and capable witness, and also to evidence given by other witnesses, that it would be difficult if not impossible to obtain in St. John in any other situation property equally adapted for the purpose

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of the erection of a wholesale warehouse and carrying on the business thereon. Other properties might be obtained, but the most available sites are covered by buildings, unsuitable as a rule for warehouse purposes—and to acquire such sites would necessarily involve considerable expenditure by reason of these buildings having to be torn down as useless for the purposes of a warehouse business. On the other hand, the values of properties in the City of St. John have been and are extremely low compared to values in any other city in the western part of Canada, such as Quebec, Montreal, Toronto, Winnipeg, etc. These properties have for a great number of years been lying idle and unoccupied, and with the exception of the McClary Manufacturing Co., no warehouse has been erected.

Before dealing with the individual cases I may mention that, in my opinion, the same value per sq. ft. does not attach to small lots as to a larger lot. Deal, for instance, with the Vassie & Co.'s lot. There is a frontage on Prince William St. of 150 ft., also a frontage on St. John or Water St. of 150 ft., with a depth of a little over 91 ft.

The Prudential Trust Co.'s property, lot No. 5, has a frontage of only 25 ft. on Prince William St. and 25 ft. on St. John or Water St. The Prudential Trust Co.'s lot, No. 3, has a frontage of 50 ft. on Prince William St. and on Water St.; the Allison lot has a frontage of 50 ft. on both streets—and the Petrie lot 104 ft. frontage on Prince William St. and on Water St., with a depth of practically 93 ft.

For certain classes of business the smaller lots may be all right, but for a large warehouse business as the Vassie & Co. contemplate it would be essential to have the larger lot.

I mention these facts because the Crown in making their various tenders have tendered in each case at the rate of $1.50 per sq. ft., treating all the lots as of the same proportionate value whether the lot in question contained a larger or a smaller frontage.

Dealing first with the case of *The King* v. *Vassie & Co., Ltd*:

This property, as I have stated, is lot No. 1 on the plan. It has a frontage of 150 ft. on Prince William St. and also the same frontage on St. John or Water St. The depth is about 91 ft. from Prince William to St. John St. The area of the property in question is 13,737 sq. ft. The expropriation plan was registered on October 7, 1916. The Crown tendered on March 8, 1917, $20-

605.50 and interest at 5% from the date of the filing of the expropriation plan to the date of the tender, less, however, interest on $15,000 from August 1, 1917. On this date the Crown advanced on account the sum of $15,000, which amount with interest from August 1, 1917, has to be deducted from the amount allowed. The Crown also tendered an additional sum of $200 with interest to the date of the tender as compensation for certain sheds or buildings erected on the land.

The amount tendered by the Crown is practically at the rate of $1.50 per sq. ft. No amount was allowed for the compulsory taking.

The defendants by their defence set up that they had carried on for years an extensive wholesale dry-goods business, and that the defendant purchased the said lands for the special purpose of building thereon a building with offices, warehouse and sample-rooms, in which to carry on its said business, and that the situation of the said lands is especially adapted for the purposes of the defendant's business.

They further allege that they incurred considerable expense in having plans prepared for such offices, sample-rooms and warehouse by an architect in the City of Boston; also that it would be less expensive for the defendant to carry on its business on the said lands than at the place where the said business is now carried on.

They claim the sum of $27,474 for the lands, and $500 for the sheds.

The first witness called for the defence was the Hon. Walter Edward Foster. He is the vice-president and general manager of Vassie & Co., and I may say that Foster's evidence was given in a very fair manner, in respect to the claim put forward. During the progress of his examination I asked Taylor the following question:—

Q. You claim peculiar damages. Is there any issue between you and the Crown as to the value of the land as land?

Mr. Taylor: I think so, my Lord.

HIS LORDSHIP: The defence seems to set up special damages.

Mr. Taylor: We think there are special damages. We think the land is worth at least the amount we claim, as land, apart from the special damages.

HIS LORDSHIP: You are only claiming the value of the land apparently; you do not set up anything special.

Mr. Taylor: We do not set up any special damages outside the value of the land.

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Then Mr. Taylor further states:—

We are simply claiming what we asked the government for the land. We told the government we would take that amount.

I allowed Taylor to amend setting up the claim of the additional value to the defendants by reason of the adaptability of the premises for their particular purposes, and a defence was filed claiming in addition to the sums claimed by their defence the sum of $5,000. I thought that the defendants should have the right to put forward any claims which they considered they were legally entitled to put forward, and counsel for the Crown did not oppose such application.

The defendant company purchased the land in January, 1913, for the sum of $15,000. This purchase was from the City of St. John, who owned the land. I gather from the evidence that the city was willing to make their bargain with Foster for the sale of this particular property to them at this price of $15,000. Probably the city would be influenced by the desirability of having a warehouse erected upon this vacant property, and while the price was $15,000 in order to protect themselves, it being difficult to ascertain the real value, it was arranged that the property should be put up for sale at auction with this upset price of $15,000—and after due advertisement the sale took place, and there being no other bidders, it was knocked down to the defendants at this sum of $15,000.

I hardly think that this particular sale should be taken as the real test of its value. It is quite apparent from the evidence that other bidders were deterred from bidding by reason of the fact that they knew that the defendant company wanted the property. The evidence for instance of Mr. Bruce, a very satisfactory witness, shews these facts.

Mr. Foster, in his evidence, points out the particular value of this property for the purposes of their business. There is no doubt that the defendant company intended to erect a large warehouse building on this particular piece of property. Plans were prepared for the erection of the buildings by an architect in Boston. These plans are filed as an exhibit in the case. Delays took place, as explained by Foster, when the breaking out of the war on August 4, 1914, changed the whole aspect of affairs. The defendants prudently abandoned for the time the idea of erecting new buildings, not knowing what effect the war might have upon their business; and, I rather gather from what Foster states, that they prob-

ably have not reconsidered the question of building, and in the meantime on the date mentioned the expropriation plan was filed.

Mr. Foster states that, in his opinion, the property has not risen in the market since 1913. I asked him this question:—

Q. You bought these lands in 1913? A. Yes.

Q. Has that property risen in the market since 1913? A. No, sir, I would not say so.

Further on I asked him this question:—

Q. The real question is, as between 1913 and 1916, has the property risen in value? A. I would not say that it has.

And he goes on to point out that the market value could not be obtained.

I think from the evidence of Thorne and Bruce and other witnesses, that there was a considerable improvement in the value of property between the date of the purchase in January, 1913, and and the fall of 1916, when the expropriation plan was filed. There had been considerable improvement in the City of St. John generally. The harbour was being improved, and other additional works were in contemplation.

I gather that what Foster meant was that on account of the war there would be great difficulty in selling the property—not that property generally had not increased in value between the two dates. This I also think must be the view of those representing the Crown, because the tender in question is a very large advance upon the purchase price.

The difficulty is to get evidence of what the market value is. It appears from the Crown's evidence that some of these other lots between block 1 and block 8 had been acquired at the price of $1.50 per sq. ft. As I have said, if intervening lots were worth $1.50 a square foot, the value of lot 1 for the reasons I have stated is of greater value.

Foster stated that he was willing to hand it over to the Crown for what he paid with interest, pointing out, however, that five or six per cent. interest would not, of course, compensate him for the locking up of the capital.

It is difficult to arrive at an exact valuation of property of this nature, having regard to the fact of the effect of the war on realizing from real estate.

The amount offered by the Crown does not include anything for compulsory taking.

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After the best consideration I can give to the case, I think if, to the sum of $20,805.50, there is added the sum of $4,194.50 to cover any allowances for compulsory taking, and any other claims, such as the plans and special adaptability of the site, a fair result will be arrived at—and I allow this amount with interest thereon from the date of the expropriation up to August 1, 1917, at which date the $15,000 was paid on account and must be credited, and interest on the balance would run to the date of the judgment. The defendants are entitled to their costs of the action.

THE KING v. ALLISON.

It is needless to repeat what I have already stated in a general way. This property is No. 6, with a frontage of 50 ft. on Prince William St., and also 50 ft. on St. John or Water St. It has a depth practically of 92 ft. between these two streets.

On this property there will have to be a certain amount of excavation. The date of the expropriation is the same, October 7, 1916. The area of the property is 4,617 sq. ft. The Crown tenders $7,225.50, made up as follows: The sum of $1.50 per sq. ft. for the land, and an additional sum of $300 as compensation for an easement and right of way and sewerage over an alleyway, making the total amount tendered $7,225.50.

I think, if there were added to this amount ten per cent. for compulsory taking, namely, $722.55, the defendant will be amply compensated.

I, therefore, give judgment for the amount of $7,948.05. The defendant is entitled to interest on this amount from the date of expropriation to the date of judgment. The defendant is also entitled to the costs of the action.

THE KING v. PRUDENTIAL TRUST COMPANY

In this case two properties are expropriated, namely, lot No. 3 and also lot No. 5. In respect to lot No. 3 there is an annual charge of $8 per annum payable to the City of St. John. This sum is payable in perpetuity.

I pointed out that I thought the city should be a party to the action, as their rights were expropriated as well as the rights of the Prudential Trust Co. The statement was made that an agreement had been come to whereby the city had released any rights they had in it for the sum of $300. This, however, apparently had not been assented to by all the parties. Baxter, K.C., who is solicitor for

the city, appeared in court, and agreed that the city should be added as a party defendant, and that he would file a short defence. Subsequently an agreement was arrived at in court that the sum of $200 should be deducted from the sum to be allowed to the Prudential Trust Co., and the judgment in the case will have to direct that this $200 should be deducted from the allowance and be paid over to the city in full of their rights in regard to this charge of $8 per annum—and in drawing the judgment, care must be had to the fact that the rights of the city are also expropriated.

There is also apparently a mortgage upon the property, and the mortgagee is not before the court. It is stated by counsel that there will be no difficulty in arriving at the amount payable. This mortgage should also be provided for in the formal judgment.

Lot No. 3 contains a frontage of 50 ft. on Prince William St. and a similar frontage on St. John St., with a depth practically of over 91 ft.

Lot No. 5 contains a frontage on Prince William St., with the same frontage on St. John St.

The tender of the Crown for lot No. 3 was $6,898.50, and for lot No. 5, $3,457.65.

I think that if to the amount tendered by the Crown there is added 10% for the compulsory taking, the defendants will be fully compensated.

I would, therefore, allow the sum of $6,898.50 for the lot No. 3, less the sum of $200, the amount payable to the City of St. John, leaving the sum of $6,698.50, to which I would add 10%, making $7,368.35.

In regard to lot No. 5, to the sum tendered of $3,457.65 should be added 10%, namely, $345.76, making in all the sum of $3,803.41.

On these respective amounts interest should be added from the date of the expropriation, namely, October 7, 1916, to the date of judgment.

The defendants are also entitled to the costs of the action. There will be no costs to or against the City of St. John.

THE KING v. THE PETRIE MANUFACTURING CO., LTD.

This property is lot No. 8 on the plan. It contains a frontage on Prince William St. of about 104 ft., also the same frontage on St. John St., with a depth of about 93 ft.

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The Crown tendered the sum of $14,526.30, together with an additional sum of $200 for the sheds situate on the property. The defendants claim the sum of $20,336.82 for the lands, and $800 for the sheds.

In this case I would add to the amount tendered the sum of $1,000. I think the size of the lot makes it of more relative value than the smaller lots. I would also add 10% on the total amount for the compulsory taking. This will make in all the sum of $17,298.93, to which must be added interest from the date of the expropriation, namely, October 7, 1916, to judgment. The defendants will also be entitled to their costs of the action.

As I undertook at the trial to do, I have gone very carefully over all the evidence in these various cases, and, after the best consideration I can give to the cases, and with the knowledge I have of the properties in question, I have arrived at the conclusions stated above. *Judgment accordingly.*

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DOUGLAS v. McKAY.

Nova Scotia Supreme Court, Harris, C.J., Longley, J., Ritchie, E.J., and Chisholm and Mellish, JJ. April 5, 1918.

LANDLORD AND TENANT (§ III D—110)—PARTITION WALL—CLOSED DOOR—ILLEGAL ENTRY—DAMAGES.

A landlord who breaks down a partition wall by taking down a case of type and unscrewing a door securely fastened to the wall, and then unhooking a second door, to gain access to the premises, makes an illegal entry and is liable in damages, for wrongful distress for rent.

Statement.

APPEAL from the judgment of Russell, J., in favour of plaintiff in an action claiming damages for alleged illegal distress for rent. Varied.

C. J. Burchell, K.C., and *F. D. Smith*, for appellant.

W. L. Hall, K.C., and *N. R. McArthur*, for respondent.

Harris, C.J.

HARRIS, C.J.:—The facts in this case are not in dispute. The Standard Printing Co. occupied one-half and one Brodie the other half of what was originally one shop but which had been converted into two shops by running a partition through the middle from the front to the rear of the building. The entrances to both shops were by doors on the front and rear. In the partition which was run to divide the shop there was a door opening into the part occupied by the Standard Printing Co.

Brodie was a printer as well and the two tenants sometimes borrowed one another's type and material, and they used this door

in the partition in going back and forth. Eventually, however, Brodie put a hook on his side of the door and fastened it and then he had a second door fitted into the frame and held in place by screws, and against this second door he put heavy cases of type and thereafter there was no communication between the two rooms. What Brodie did was not objected to, but was acquiesced in by the Standard Co. Later Douglas bought out the Standard Co.'s plant after that company had got into financial difficulties and he paid rent, but the premises were not used, except for storing the plant.

On one occasion in the winter season, the door in the rear of the premises occupied by plaintiff was found to be open and the snow was coming in and Brodie wanted it closed and he got the landlord, the defendant McKay, to come and they took down the case of type, unscrewed the second door in this partition, unhooked the first door and entered plaintiff's premises and fastened up the back door, and on retiring they hooked the first door on Brodie's side and set up the second door in the place it formerly occupied, placing the case of type against it, but they did not put in the screws to hold the second door in place.

When the landlord came to distrain, he found the plaintiff's premises locked up and he went into Brodie's part of the property and requested Brodie to take down the case of type, remove the second door, and unlatch the first door which Brodie did, and the landlord, in this way, got into plaintiff's premises, and then distrained on the plant which was afterwards sold, and the plaintiff brought an action for wrongful distress and obtained a verdict for $2,500, and there is an appeal.

The short question is as to whether this entry was legal, and I am clearly of opinion that it was not.

What took place when the hook was put on the door and the second door was screwed in and the case of type placed against it, amounted to a closing up by the two tenants of the door which previously existed, and thereafter the partition is to be regarded as without any door or opening in it.

The place where the door had been was closed up and the door fastened with the hook, and the second door and the case of type became a part of the closed partition. When Brodie and the landlord broke down this partition to get into the premises of the plaintiff they were trespassers, and the wall, so far as the landlord

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is concerned, must be taken to have been in the same condition when he came to distrain as it was before he and Brodie took the screws out of the second door. The landlord could not do anything at that time to help himself in subsequently making a distress and the premises should, I think, be regarded as having been in the same position when the distress was made as they were just before the wrongful entry was made by the landlord and Brodie when they went to fix the back door, *i.e.*, the second door is to be regarded as still held in its place by the screws. This view, however, is not necessary to enable the plaintiff to recover. After this wrongful entry to close the back door, the partition between the two premises was closed just as effectually in one sense as before. In its new condition, it was part of the partition between the two properties and the landlord could not get into the plaintiff's premises without breaking down the partition between them. What he did was to get Brodie to move his case of type, take down the second door and unhook the latch on the first door and it is argued that Brodie had a right to do this and, having done it, that the landlord, then finding the door unlocked, had a right of entry. I think this contention cannot be upheld. I doubt very much Brodie's right to interfere with the partition which had been erected between the two premises, but assuming that he could do so, what he did on this occasion was done at the request of the landlord and it must all be regarded as of the landlord, and it was, I think, clearly such an entry as could not be justified for the purpose of distress.

In *Nash* v. *Lucas* (1867), L.R. 2 Q.B. 590, a broker went with a warrant of distress for rent to the premises the front door of which he found fastened. In the course of the day, a man in the employ of the landlord was allowed by the tenant to enter at the front door in order to get access to the area for the purpose of removing and repairing a grating over it which was in a dangerous state. While the repairs were going on the tenant left the house, having fastened both the front and area doors, and the man who had got into the area to refix the grating found himself unable to get out. The broker suggested to the man to try the window which opened into the area and was closed. The window was found to be unfastened, the man pulled the sash down, got into the house and unfastened the front door from the inside. The

broker then entered through the front foor (thus opened) and distrained. It was held that the transaction must be taken as one and that as the entry was by opening a window the distress was unlawful.

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Cockburn, C.J., at p. 593, said:— Harris, C.J.

It is quite unnecessary to decide, if the defendant and the broker had not been parties to the original trespass, whether, on the door being opened by a third person, the entry for the purpose of making the distress would have been lawful. Here the broker himself suggests to Back to open the window and get into the house, and so out by the front door, and the defendant himself was present, and the broker afterwards enters on the door being opened by Back as the broker had suggested. It must therefore be taken that both the defendant and the broker were parties to the trespass, or act, whereby access was obtained. . . . The entry here was therefore unlawful.

Mellor, J., at p. 595, said:—

Now the broker here recommends the mode of entry which led to his subsequent access to the house by the open door . . . consequently as the entry must be taken to have been through the window, the distress was not lawful.

Shee and Lush, JJ., concurred.

In the case at bar, all that Brodie did in breaking down the partition wall (by removing the type and the second door and unhooking the first door) was done on the suggestion and at the request of the landlord, and must be regarded as his act. It is not questioned, if it is to be so regarded, that the entry and the distress were illegal and the plaintiff is entitled to recover.

The only other question is as to the amount of the judgment. The trial judge gave the plaintiff $2,500 damages. He had paid that sum for the plant some 4 years before, and in the interval it had been idle and had deteriorated by rust and otherwise, and a careful perusal of the evidence convinces me that $1,500 was its full value at the time of the distress.

I think the judgment should be varied by reducing the damages to $1,500, and the appeal should be dismissed, and there should be no costs to either party on the appeal.

RITCHIE, E.J.:—I am of opinion, though not without some doubt, that the sound conclusion to draw from the authorities is that the entry made by the defendant amounted to a breaking. I would, therefore, dismiss the appeal. I agree that the damages be reduced to $1,500 and that there be no costs to either party. Ritchie, E. J.

CHISHOLM, J. (dissenting):—The plaintiff brings this action against his landlord and the landlord's bailiff for damages for an Chisholm, J.

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illegal distress. He alleges:—(1) That the defendants illegally broke into the demised premises in order to distrain; and (2) That at the time the distress was made there was no actual demise of the premises at a specific rent.

The defendants uphold the distress; and claim, in the event of the distress being held to have been illegal, that the amount of damages found by the trial judge, who decided in favour of the plaintiff, namely, $2,500, is excessive.

The only point urged on the appeal by the counsel for plaintiff was with respect to the manner in which the bailiff entered the demised premises. There is no dispute between the parties as to the facts touching the entry.

[The judge here set out the facts in connection with the entry and continued.] This entry, the plaintiff claims, constituted a breaking in and was illegal.

With respect to the right to distrain, it is said in 11 Hals' Laws of England, p. 163:—"The right to distrain necessarily involves the right to enter on the premises where the chattels are for the purpose of taking possession of them. The right implies a license for the distrainer to enter the premises in any way short of breaking into the premises, although he does that which in the case of any other person would be a trespass."

It is not enough, therefore, to prove that the defendants were guilty of a trespass on the plaintiff's premises, but it must be shewn, in order to enable the plaintiff to succeed, that there was a breaking into the premises by the defendants.

One of the earliest cases on the subject is *Gould* v. *Bradstock* (1812), 4 Taunt. 562, 128 E.R. 450. There, the landlord took up the floor in his own apartment (there being no ceiling in the tenant's apartment, which was under the landlord's), and through the aperture entered the tenant's mill below. Lord Mansfield, C.J., in the course of his judgment, said:—

> The defendant removed the floor of his room, which floor was his; it is said, that it served as a ceiling to the tenant below, but that, at most, could only make him tenant in common, and one tenant in common, although he probably might have some remedy or other for being disturbed in the use of his ceiling, cannot bring trespass against his companion.

In the present case it cannot, I believe, be successfully contended that the plaintiff had an interest as tenant in common in the cabinet of type or the other door, both of which were the prop-

erty of Brodie, and he could not maintain an action of trespass against Brodie for removing them.

In *Nash* v. *Lucas*, L.R. 2 Q.B. 590, the landlord's employee found himself locked in an area, part of the demised premises, where a grating was being repaired, and at the landlord's suggestion he opened a window looking out on the area, which was closed but unfastened, entered the house and unfastened the front door from the inside, and through the door thus opened for him, the bailiff entered and distrained. It was held that the whole transaction must be taken as one and that the distress was illegal. In this case Cockburn, C.J., said:—"The later authorities say you may open a door which is only fastened by a latch."

In *Crabtree* v. *Robinson* (1885), 15 Q.B.D. 312, it was held that entry into a house for the purpose of distraining may lawfully be made by further opening a window which is partly open.

That, of course, is not the usual way of entering a house, and I mention the case as well as the two cases next following, to shew that the entry for the purpose of making a distress need not be, as was formerly contended, by the usual way of entering the premises.

In *Miller* v. *Tebb* (1893), 9 T.L.R. 515, the bailiff entered a house a few doors off, went along the roofs of the intervening houses until he came to the plaintiff's roof, where he found a sky-light partly open. He opened it further, entered the premises and distrained. The Court (Esher, M.R., Bowen and Kay, JJ.) held the entry was legal, and was the same as if the bailiff had entered by an open window.

In *Long* v. *Clark*, [1894] 1 Q.B. 119, the bailiff, in order to effect a distress for rent in a house, went through the next house and into the yard at the back. He then climbed over the wall into the yard of the house in which he was directed to distrain, and entered and distrained. Held, a lawful distress.

Lord Esher, M.R., said:—

He (the landlord) cannot go into any building or into any house if he can only do so by breaking into it. He can go in at the door, which is the most obvious way of entering; but further, he can go in by a window if it is left open. There is no trespass in doing either of these acts, because he does not break in. So it is incorrect to say, as has been suggested, that the landlord cannot go into the house if he finds a hole in the side of it, and for the same reason, that in so entering he is not breaking in.

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It has been urged by counsel for plaintiff that the case of *Nash* v. *Lucas*, above mentioned, governs the case now under consideration. I am unable to so regard it. I think it is distinguishable. In *Nash* v. *Lucas*, Back, the man who opened the window, passed into the house and unfastened the front door fron the inside. Back was the landlord's servant, and in doing this he, in effect, carried out the directions given to him by his master; for his master was present when the bailiff suggested that line of conduct. Moreover, the servant, as I regard it, committed a trespass in opening the window, entering the house and opening the front door as he did; he committed an unlawful act for which probably both himself and his master could have been held liable as joint tort feasors; and all the acts had necessarily to be regarded as one transaction. Every step the servant took was illegal—the opening of the window, the entry into the house and the unfastening of the front door. Pollock on Torts, pp. 77 and 206, 207. If these acts had been lawful, the case would be on a parity with the case at bar. In the latter Brodie moved aside his own cabinet and door, chattels in which the plaintiff had no property; he had a right to do this; and I cannot see how, in doing it, he could possibly expose himself to an action for trespass or any other kind of an action by plaintiff. He did not make these articles fixtures by placing them against the doorway. If he was not liable himself for moving the articles around, if he was doing a perfectly lawful act in moving them, the landlord, for whose accommodation he moved them, cannot, as it appears to me, be under any liability because, at his request, Brodie did an act which it was lawful for him, Brodie, to do. It is suggested that the plaintiff in some way acquired a right to have the second door and the cabinet maintained as a barrier; that these became part of the wall. How did he acquire such a right? I do not know how that proposition can be established on the evidence before us.

After the removal of the cabinet and the loose door, we have a swinging door secured by an ordinary gate hook, which the bailiff raised with his finger and entered. Lord Cockburn stated in *Nash* v. *Lucas*, *supra*, that the later authorities were to the effect that you could lift a latch or hook to make an entry. He was referring to a case where the latch was the property of the tenant, during the tenancy, not where, as in this case, it was the property

of another tenant and used for the other tenant's security. On a consideration of the whole evidence, I think the entry was made in a legal manner, and that, on that point, the plaintiff must fail.

The question as to whether the entry was forcible or not was the only one argued before us.

Chisholm, J.

I think the appeal should be allowed with costs and the action dismissed with costs.

Longley, J.

LONGLEY, J (dissenting):—I concur in the opinion of Chisholm, J.

Mellish, J.

MELLISH, J.:—In making the distress from which this action arises, I think the defendant found the demised premises closed and illegally broke into them and is, therefore, liable in trespass.

The fact that the defendant, in effecting the entrance, was assisted by one who, on his own account, might have had a right to remove the obstructions to a free entrance, in my opinion, makes no difference.

The damages awarded are, I think, excessive. The goods distrained were appraised and sold at auction for less than $700, and this value is sworn to by a number of witnesses as about right.

Giving the fullest effect to the credibility of the witness who put a higher value on the goods, I do not think he evinces such a knowledge of the actual condition of the plant and of the value of such an equipment as would justify the court in accepting it as establishing his value of the property in preference to that given by the plaintiff's other witnesses, considering, too, the amount realized from the sale. I do not think we would be justified, under the evidence, in finding that the goods were sold at so great a sacrifice.

It perhaps can be fairly inferred from the plaintiff's evidence that he paid $2,500 for the property, although he is not precisely clear on that point. Clearly, it has greatly depreciated in value since that purchase was made. He has made no use of it,

I think if the damages were reduced to $1,500, the plaintiff would receive sufficient having regard to the value of the property and its illegal seizure.

The judgment appealed from should be reduced accordingly, without costs of the appeal to either party.

Even assuming the defendant did not break in, as to which I have no doubt, before dismissing the action, I should like to hear

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counsel on a further point not taken at the present hearing. As at present advised, I am of opinion that the defendant would at least be liable for excessive distress.

As the amount of rent was not definitely fixed between plaintiff and defendant, the plaintiff could only distrain, if at all, I think, for the balance due by the former tenant. Plaintiff appears to have kept up the tenancy of the room on the written promise of the defendant that he would make a reasonable reduction in the rental for a reasonable time. This was never settled.

Judgment varied.

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McENTEE v. GRAND TRUNK PACIFIC R. Co.

Saskatchewan Court of Appeal, Haultain, C.J.S., Newlands, Lamont and Elwood, JJ.A. April 26, 1918.

MASTER AND SERVANT (§ II A4—85)—RAILWAY TRACK—ACCUMULATION OF ICE—TRAP—DUTY OF EMPLOYER—NEGLIGENCE—LIABILITY.

It is the duty of the employer to provide safe premises for his servants to work; allowing ice and snow to accumulate along the side of a railway track so as to be a trap for a workman walking along the track in the performance of his duty is negligence and if the cause of an accident the company is liable. The fact that the accident happened on a highway is no defence, the duty being founded not on ownership but on possession.

Statement.

APPEAL by defendant from the judgment of the trial judge in an action for damages under the Workmen's Compensation Act. Affirmed.

J. A. Allan, K.C., for appellant; *P. M. Anderson*, for repondent.

Newlands, J.A.

NEWLANDS, J.A.:—This is an action at common law for damages brought by the widow of a deceased workman under the Act Respecting Compensation to the Families of Persons Killed by Accidents, against the masters of the deceased man for having been guilty of negligence, whereby the workman lost his life. The jury found that the defendant company was guilty of negligence in omitting to remove an accumulation of ice and mud parallel to and adjoining the south side of the railway track at the public crossing at Lewvan.

The evidence showed that the deceased was a conductor in the employ of the defendant company. That, at the time of the accident, he was performing the ordinary duties incidental to his employment, that of switching cars from the main track to a switch. In doing so, he had to walk along the track, and at the

proper time to pull a lever which released the car which was to go on the switch.

In order to do this work, he had to walk close to the cars across a highway which was crossed by the railway, and, in doing so, slipped on a ridge of ice and mud parallel to the track. This ridge was from 4 to 6 inches in height, some 2 feet from the track, and sloped towards it. It had been there for some 3 weeks before the accident. When he slipped, his legs went under the cars and were cut off by the same passing over them.

The defendant's appeal against the verdict on two grounds: (1) That there was no evidence that the defendants knew of this accumulation of ice and mud along the track and the jury was not asked to make any finding upon this question, and (2) that the accident happened on a part of the highway over which defendants had no control.

As to the first ground of appeal, it is the duty of the master to provide safe premises for his servants to work.

In Macdonell on Master and Servant, 2nd ed., p. 297, he says:—

> The master's duty to his servant as to the safety of his premises is the same as that owed by an occupier of property towards any member of the public coming, by invitation, express or implied, on his premises on business of common interest. He must "use reasonable care to prevent damage from unusual danger, which he knows or ought to know."

Bigham, J., in *Marney* v. *Scott*, [1899] 1 Q.B. p. 986, says, at p. 991:

> The effect of the authorities is correctly and clearly stated in Pollock on Torts, 5th ed., at p. 477: "The duty is founded not on ownership, but on possession—in other words, on the structure being maintained under the control and for the purposes of the person held answerable. It goes beyond the common doctrine of responsibility for servants, for the occupier cannot discharge himself by employing an independent contractor for the maintenance and repair of the structure, however careful he may be in the choice of that contractor. Thus, the duty is described as being impersonal rather than personal. Personal diligence on the part of the occupier and his servants is immaterial. The structure has to be in a reasonably safe condition so far as the exercise of reasonable care and skill can make it so." And on p. 482: "The possession of any structure to which human beings are intended to commit themselves or their property, animate or inanimate, entails this duty on the occupier, or rather controller. It extends to gangways or staging in a dock . . . to a temporary stand . . . to carriages travelling on a railway or road . . . to ships."

Further on he says:

> Now, I do not think that the mere fact that the defective state of the ladder was patent (as I think it was, in the sense that a slight examination

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would have detected it), and that the defendant did nothing to remedy it, is sufficient to fix him with a breach of the duty which, in my opinion, he undertook He must have had a reasonable opportunity of ascertaining that a defect existed; the circumstances must have been such that, though he did not know of the condition of the ladder, he ought to have known of it; and if he ought to have known of it, and might either have remedied it or warned the plaintiff of the danger and did neither, and hurt resulted to the plaintiff, then and only then, can that want of reasonable care be imputed to him which will make him liable. . . . In this case I think the defendant ought to have made some examination of the ladders into the holds. The slightest examination would have shown him that this ladder was in such a condition as really to make it a trap; and, taking this view, I hold that he was guilty of a breach of the duty which I think the law imposed on him.

In this case, the evidence shows that the defendants could have seen the condition of the track upon a slight examination. The accumulation of mud and ice was quite apparent, and it was so placed as to be a trap to a workman walking close to the track in the performance of his duty. The jury have found that defendants were negligent in not removing this mud and ice. If they could have removed it, it follows that they could have seen it and, therefore, they ought to have known it existed and that it was a source of danger to employees walking along the track.

Now, if defendants were guilty of a breach of duty in not removing this ice and mud, they were guilty of negligence, and, as the jury have found that this negligence caused the accident, they are liable in damages.

I am, therefore, of the opinion that it was not necessary to ask the jury the question whether defendants knew of this danger. It is quite apparent from the evidence that they ought to have known it, and would have if they had made the slightest examination of the premises, this crossing being a place where the servants of the company had to work in order to switch cars at this point.

Even if it had been necessary to put this question to the jury, r. 650 cures the defect. That rule provides that a new trial shall not be granted because the verdict of the jury was not taken upon a question which the judge at the trial was not asked to leave to them unless in the opinion of the court some substantial wrong or miscarriage has been thereby occasioned in the trial.

The judge was not asked to leave this question to the jury. The objection was only taken by the defendant's counsel after verdict, and no substantial injustice has been done because on the evidence the jury must have found that the defendants could have ascertained the danger.

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As to the second ground of appeal, the fact of the accident happening on the highway does not affect defendants' liability. It was not being used as a highway, but as part of the premises on which defendants' servants had to work and, as is stated in Pollock on Torts, in the quotation above given, "the duty is founded not on ownership, but on possession."

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

Newlands, J.A.

HAULTAIN, C.J.S., and LAMONT, J.A., concurred with NEWLANDS, J.A.

Haultain, C.J.S. Lamont, J.A.

ELWOOD, J.A.:—This is an action brought by the plaintiff as administratrix of the estate of H. R. McEntee, deceased, under an Act Respecting Compensation to the Families of Persons Killed by Accident, for the benefit of herself and her children.

Elwood, J.A.

On December 6, 1916, the deceased, who was employed as a conductor on the defendant railway, was proceeding with his train from Regina to Northgate. At Lewvan, a station on said line, it was necessary to do some switching. A short distance south of the station the railway crosses a public highway. At this point the railway grade is some height above the highway level, and from the highway on either side to the grade are approaches. At the point of the accident,—which was where this highway crossed the railway lines,—the deceased was attempting to uncouple some cars, for the purpose of having the same shunted into a switch, and in doing this was walking at the side of the cars for the purpose of operating the lever which uncoupled the cars; he slipped on something on the ground, and, in consequence, fell under the cars and received injuries from which he subsequently died.

The evidence shews that the spot at which he slipped was about 2 ft. from the outside of the rail nearest to him and where the highway was approaching to cross the railway; that at this point there was an accumulation of mud and ice from 4 to 6 inches high; that it sloped rather suddenly toward the rails; that this accumulation had probably been brought about by wheels of wagons crossing the track, gathering up mud below and depositing it about this spot, and from water dripping thereon from water tanks of the defendant company, and that this condition of affairs had existed for several weeks prior to the accident.

The jury found that the injury complained of was caused by

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the negligence of the defendant company, "by the defendant company omitting to remove an accumulation of ice and mud parallel to and adjoining the south side of the railway track at the public crossing at Lewvan." Damages were awarded and judgment entered for the plaintiff, and from this judgment the defendant appeals.

On the appeal a number of questions were raised, but, in the view I take of the case, it is not necessary that I should deal with them all.

For the respondent it was contended that s. 238A (*a*) of the Railway Act cast the duty upon the defendant company of maintaining the approach to the railway at the crossing in question. For the appellant it was contended that the duty of the railway company was only to maintain the crossing between the rails and, at the most, for a foot on either side. That section is as follows:

238A. In any case where a railway is constructed after the nineteenth day of May, one thousand nine hundred and nine, the company shall, at its own cost and expense (unless and except as otherwise provided by agreement, approved of by the Board, between the company and a municipal or other corporation or person), provide, subject to the order of the Board, all protection, safety and convenience for the public in respect of any crossing of a highway by the railway. 8 and 9 Edw. VII. c. 32, s. 6, as amended, 9-10 Edw. VII. c. 50, s. 14.

In the case of *Moggy* v. *C.P.R. Co.*, 3 M.L.R. 209, the following sections of the then Railway Act were under consideration:

Section 7, sub-section 6, by which railway companies have power "to construct, maintain and work the railway across, along or upon any stream of water, watercourse, canal, highway or railway which it intersects or touches but the stream, watercourse, highway, canal or railway so intersected or touched, shall be restored by the company to its former state, or to such state as not to impair its usefulness." Also section 15, sub-section 2: "No part of the railway which crosses any highway without being carried over by a bridge, or under by a tunnel, shall rise above or sink below the level of the highway more than one inch; and the railway may be carried across or above any highway within the limits aforesaid."

Those sections, so far as they may be material to the consideration of the case at bar, are similar to ss. 154 and 236 of our present Act.

At p. 212 of the above case, Taylor, J., in delivering the judgment of the Court, says:—

We consider the Supreme Court of New York to have correctly expressed the law, and that where a railway company has crossed a highway, the duty of the company is not merely to provide a crossing upon which the rails do not rise more than an inch above, or sink an inch below the level, but also to

construct and maintain such approaches at each side as may be necessary to enable persons using the highway to avail themselves of the crossing. It is only where they have done that, that they can be said to have restored the highway to its former state, or to such state as not to impair its usefulness.

In *Bird* v. *C.P.R. Co.*, 1 S.L.R. 266, the above quotation from Taylor, J., is quoted with approval at p. 277 by Johnstone, J., and Wetmore, C.J., although expressing hesitation, agreed with the result arrived at by Johnstone, J., and held that the company was liable for negligence at common law apart from the statute.

In *Hertfordshire County Council* v. *Great Eastern R. Co.*, [1909] 1 K.B. 368, a company being authorized to carry their railway across a highroad on the level, constructed the railway at a slightly higher level than the road, and, in order to bring the road up to the level of the railway, raised it by means of inclined planes on either side of the railway under powers conferred by their special Act. The Act was silent as to any obligation of the company to repair the roadway upon the inclined planes. It was held that there was imposed upon the company by the common law, as a condition of the statutory authority to interfere with the highroad, an obligation to keep in repair the roadway upon the whole of the inclined planes, including those portions which lay outside the fences of the railway.

S. 238A of our Act was passed after the cases of *Moggy* v. *C.P.R. Co.* and *Bird* v. *C.P.R. Co.* were decided, and it seems to me that whatever doubt may have existed as to the obligation of the railway company to maintain the approaches prior to the passing of s. 238A that doubt is removed by that section.

The headnote to the case of *The King* v. *The Inhabitants of the County of Kent*, 13 East 220, 104 E.R. 354, is as follows:—

> The Medway Navigation Co. being empowered under a local Act to make the river navigable, and to take tolls; and "to amend or alter such bridges or highways as might hinder the passage or navigation, *leaving* them or others as convenient in their room," etc.; and they, having 40 years ago destroyed a ford across the river in the common highway, by deepening its bed, and built a bridge over the same place, are bound to keep such bridge in repair, as under a continuing condition to preserve the new passage in lieu of the old one, which they destroyed for their own benefit.

This case is referred to with approval in *Hertfordshire County Council* v. *G.E.R. Co.*, *supra*.

I am of the opinion that the obligation cast upon the company, by s. 238A of our Act, to "*provide* protection, safety and convenience for the public" is not complied with if the company fail

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to maintain that condition. It is, in the words of Lord Ellenborough, C.J., at p. 226 of *The King* v. *Inhabitants of the County of Kent, supra*, "a continuing condition."

The evidence is quite clear that at the point of the accident it was not safe for the public. Several witnesses testified as to its unsafe condition, and instanced cases of horses having stumbled and slipped on this obstruction.

It was not contended that the deceased was not properly in the discharge of his duty upon that part of the roadway where the accident occurred; he was where the company had a right to expect he would be, and the company was bound to see that that portion of the roadway with respect to which it had the above obligation to the public was in such a condition that its servants could discharge their duties with safety.

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

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Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart, Beck and Hyndman, JJ.A. April 25, 1918.

EXECUTION (§ I—8)—LIEN—SUBSEQUENTLY ACQUIRED LANDS—

In Alberta an execution against lands filed in the Lands Titles Office binds all lands of the debtor owned at the time of filing or subsequently acquired by him while the execution remains in force.

[*Per* Beck and Hyndman, JJ., Harvey, C.J., and Stuart, J., *contra*, *Lee* v. *Armstrong*, 37 D.L.R. 738, followed.]

Statement.

APPEAL from the judgment of the trial judge in an action to cancel an execution against land. Affirmed by equally divided court.

J. B. Barron, for appellant; *P. A. Carson*, for respondent.

Harvey, C.J.

HARVEY, C.J.:—The Robin Hood Mills Limited are the execution creditors of one Kiva Haimson. The execution issued out of the District Court for the District of Calgary, directed to the sheriff of the judicial district of Calgary and was registered in the Land Titles Office for the South Alberta Land Registration District on April 1, 1914, and has remained in full force and effect since that date. On September 26, 1917, letters patent from the Crown in favour of the execution debtor for a quarter section of land not in the judicial district of Calgary but in the South Alberta Land Registration District was received by the registrar of said last-mentioned district and a certificate of title was granted pur-

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suant to the letters patent in the name of the execution debtor and a memorandum was endorsed thereon stating that his title was subject to the execution. Subsequently a transfer from the execution debtor to his wife, Rebecca Haimson, the present applicant, was registered and a certificate of title granted to her, her title likewise being stated to be subject to the rights of the execution creditors. She applied to the registrar to have the memorandum cancelled and he referred the question to a judge who held that the execution bound the lands, but gave no reasons for his conclusion.

On the facts stated it is seen that at the time the execution was registered it did not and could not bind these lands because the debtor did not then own them and the question then arises would it *ipso facto* bind them, upon his becoming the registered owner. This question was considered in *Lee* v. *Armstrong*, recently decided (1917), 37 D.L.R. 738, and I then gave reasons for concluding that it would not. My opinion, however, was a dissenting one in that case and the judge who heard this application may have considered that the case mentioned decided this question in the other way since the two judges who were of a contrary opinion supported the judgment below which was thus sustained by reason of an equal division on the appeal. In that case, however, the point was not raised or considered before the judge below and, therefore, so far as this question is concerned, the case apparently decides nothing, and I, therefore, feel bound to maintain the view I then expressed since I am still of the same opinion. It is thus unnecessary to consider the consequences of the fact that the lands in question are not within the bailiwick of the sheriff to whom the writ is directed though it is apparent that the facts of this case in this regard differ from the facts in the case of *Lee* v. *Armstrong*, *supra*.

I would, therefore, allow the appeal with costs and declare that the execution does not bind the lands in question. I would give the applicant the costs of the application below.

STUART, J.A.:—I agree with the view of the Chief Justice and adhere still to the views I expressed in *Lee* v. *Armstrong*, 37 D.L.R. 738.

Stuart, J.

With regard to one special argument made by the counsel for appellant I am at liberty to say that all the members of the Court

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are of opinion that it is untenable. This is the argument that inasmuch as the particular writ in question directed the sheriff to seize lands of the debtor "within the Judicial District of Calgary," the effect of the writ and of its registration is necessarily limited to such lands notwithstanding the words of the statute, 1917, c. 3, s. 40, which adds a new sub-s. 3 to s. 77 of the Land Titles Act. It seems clear that, even without the words relied upon, the writ so far as the sheriff's authority under it is concerned would necessarily be so limited; and also that even if the writ had contained instead, the words "within the South Alberta Land Registration District," so far as the sheriff's authority would be concerned he would still have no authority to act beyond his bailiwick. The result effected by the statute is a purely statutory one and there can be no reason why, merely because words of pure surplusage were inserted in the writ; the effect of the statute should be limited. The words of s. 41 of the Land Titles Act do not seem to me to be of any assistance. I think there is no "estate or interest specified" in a writ of execution and that those words of the section cannot be applied to such a document. The writ is a mere command to the sheriff to do a certain thing. Any "interest" that may arise on account of it is a creation either of statute or at any rate of the general law.

Beck, J.

BECK, J.A.:—I concur in the conclusion reached by Hyndman, J., for reasons stated by him as well as those which I have already put forward in *Lee* v. *Armstrong*, *supra*.

Hyndman, J.

HYNDMAN, J.A.:—The facts are set out in the judgment of the Chief Justice.

The main question for decision is:—Does the execution registered in the Land Titles Office bind only the lands owned by the defendant at the time of its registration or does it also extend to and bind after-acquired lands?

It seems clear that, aside altogether from the effect of the Real Property Act, 1886, and our present Land Titles Act, a writ of execution had the effect of binding not only the lands owned by the execution debtor at the time of the issue of the writ or date when same was placed in the hands of the sheriff but also all the lands afterwards acquired by him during the life of the writ. *Ruttan* v. *Levisconte*, 16 U.C. Q.B. 495.

Previously to the passing of the Territorial Real Property Act,

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the execution bound all lands of the debtor after coming into the hands of the sheriff up to the date of its expiry. The Act did not alter the effect of the writ itself but merely required that in order to be binding as before on the lands of the debtor that the sheriff should cause a copy thereof to be filed or lodged in the Land Titles Office at the same time specifying what lands should be charged thereby and in that event no transfer, mortgage, etc., "shall be effectual except subject to the rights of the execution creditor under the writ while the same is legally in force."

This section was amended in 1894, the effect of the amendment being to dispense with the necessity for the sheriff filing a memorandum of the lands intended to be charged. The matter so far as this case is concerned, therefore, now stands as follows (s. 77 of the Land Titles Act before the amendment of 1917):—

> The sheriff, or any duly qualified officer, after the delivery to him of any execution or other writ affecting land, if a copy of such writ has not already been delivered or transmitted to the registrar, shall, on payment to him of fifty cents by the execution creditor named therein, provided that said writ is in force, forthwith deliver or transmit by registered letter to the registrar a copy of the writ and of all endorsements thereon certified under his hand and seal of office, if any; and no land shall be bound by any such writ until the receipt by the registrar for the registration district in which such land is situated of a copy thereof, either prior to this Act, under the law then in force or subsequent hereto; but from and after the receipt by him of such copy no certificate shall be granted and no transfer, mortgage, encumbrance, lease or other instrument executed by the execution debtor of such land shall be effectual except subject to the rights of the execution creditor under the writ while the same is legally in force; and the registrar on granting a certificate of title and on registering any transfer, mortgage, or other instrument executed by the debtor affecting such land, shall by memoranda upon the certificate of title in the register and on the duplicate issued by him express that such certificate, transfer, mortgage, or other instrument is subject to such rights.

There is a difference of opinion among the members of this court on the question, Beck and Walsh, JJ., holding that it does bind after-acquired property, whilst the Chief Justice and Stuart, J., are of the contrary view. (See *Lee* v. *Armstrong* (1917), 37 D.L.R. 738.)

After the best consideration I can give the question I have come to the conclusion that the execution does extend to the lands of the debtor acquired by him at any time during the currency of the writ whilst it remains registered in the proper Land Titles Office. It seems to me that the Real Property Act did not take

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away from the writ any of its attributes which it formerly possessed but made it necessary only, in order to be effective as before in charging lands of the debtor, that it should be registered—at first requiring a memorandum of the lands of the debtor, but afterwards removing that requirement. Before the amendment the sheriff would have to furnish perhaps fresh memoranda of newly-acquired lands from time to time should the debtor become the owner of such, the same writ remaining operative. Therefore, it seems to me, it would follow as a matter of course, that as the result of the amendment, the necessity of filing a memorandum of the lands to be charged in the first instance being dispensed with, any future-acquired lands would become automatically bound.

S. 77 (in part) reads:

> And no land shall be bound by any such writ until the receipt by the registrar for the registration district in which such land is situated of a copy thereof either prior to this Act, under the law then in force or subsequent hereto but from and after the receipt by him of such copy no certificate of title shall be granted and no transfer, mortgage, encumbrance, lease or other instrument executed by the execution debtor of such land shall be effectual except subject to the rights of the execution creditor under the writ while the same is legally in force.

It will be noticed that the reading is, "no transfer shall be effectual, &c., &c., except subject to the rights of the execution creditor."

If, before registration was required, the writ bound after-acquired lands, although there is no express direction to that effect I cannot see any reason why, after registration, the rights of the execution creditor should be in any way curtailed. Just as before in order to bind such lands it was necessary to place the execution in the hands of the sheriff, so now it binds similarly after registration. It would appear to me that the registered writ should be looked upon as a continuing one, always speaking up to the time of its expiry and thus binding or charging any lands of which the debtor from time to time becomes seized or possessed.

I would therefore dismiss the appeal with costs.

Appeal dismissed, the Court being equally divided.

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Manitoba Court of Appeal, Perdue, Cameron and Fullerton, JJ.A. May 13, 1918.

BILLS AND NOTES (§ I B—5)—PROMISSORY NOTE—SALE OF DISEASED ANIMAL—SALE PROHIBITED—NOTE VOID—CONTAGIOUS DISEASES ACT.

The Contagious Diseases Act, R.S.C. 1906, c. 75, s. 38, is in force in Manitoba notwithstanding R.S.M. 1913, c. 8. The Act prohibits and makes illegal the sale of any animal afflicted with an infectious disease, and a promissory note given for the purchase price of such animal is void; knowledge on the part of the vendor is immaterial.

[*Nickle* v. *Harris*, 3 S.L.R. 200, followed; *Manitoba El. & Gas Co.* v. *Gerrie*, 4 Man. L.R. 210; *Bartlett* v. *Vinor*, Carthew 252, 90 E.R. 750; *Forster* v. *Taylor*, 5 B. & Ad. 887, 110 E.R. 1019; *Bensley* v. *Bignold*, 5 B. & Ald. 335, 106 E.R. 1214, referred to.]

Statement.

APPEAL from the judgment of a County Court Judge in an action on a promissory note given in part for the purchase price of cattle.

F. M. Burbidge, K.C., for appellant; *A. C. Campbell*, for respondent.

Perdue, J.A.

PERDUE, J.A.:—The plaintiff sued in the County Court of Winnipeg on a note for $433.50, given for certain chattels sold to defendant. The chattels included four cows. Shortly after the sale, the defendant had the cows examined by a veterinary surgeon and it was found that they were all affected with tuberculosis. Before the trial, one of the cows died of that disease. The others were practically valueless. The defendant counterclaimed for $240, the value of the cows. He also raised the question of illegality in the contract. The County Court Judge entered a verdict for the plaintiff for the amount sued for and dismissed the defendant's counterclaim, on the ground that plaintiff, at the time of sale, had no knowledge that the cows were diseased.

Both the Parliament of Canada and the Legislature of Manitoba have passed enactments dealing with the selling or disposing of animals infected with any infectious or contagious disease, and imposing a penalty for breach of the enactment: see R.S.C., 1906, c. 75, s. 38; R.S.M., 1913, c. 8, s. 26. The Dominion enactment provides that:—

> Every person who sells or disposes of, or puts off, or offers or exposes for sale, or attempts to dispose of or put off any animal infected with or laboring under any infectious or contagious disease, or the meat, skin, hide, horns, hoofs or other parts of an animal infected with or laboring under any infectious or contagious disease at the time of its death, whether such person is the owner

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of the animal, or of such meat, skin, etc., or not, shall, for every such offence, incur a penalty not exceeding two hundred dollars.

By s. 2 (*e*) tuberculosis is declared to be included in the expression "infectious or contagious disease."

There is no doubt that the federal authority has power to enact such a provision, although it has been held that the province also may pass legislation dealing with the same subject: *R.* v. *Stone*, 23 O.R. 46; *R.* v. *Wason*, 17 A.R. (Ont.) 221. The Dominion Act prohibits a sale of an animal afflicted with an infectious disease by making such sale in effect a criminal offence and imposing a punishment on the offender; while the provincial Act protects private rights within the province by prohibiting such sales and enforcing the prohibition by a fine. See Lefroy, Leg. Power in Canada, 353-355. Parliament has power to declare anything a crime and it must be held that the section above cited is within its powers to enact.

The plaintiff in this case sold the cows in question to the defendant while they were suffering from an infectious disease, thereby committing an offence against the above cited s. 38. The County Court Judge found as a fact that the plaintiff at the time he made the sale had no knowledge that the cows were affected with the disease. The statute, however, in express words makes the offender liable and does not intimate that want of knowledge shall be an excuse.

In *Sherras* v. *De Rutzen*, [1895] 1 Q.B. 908, Wright, J., said:—

> There is a presumption that *mens rea*, an evil intention, or a knowledge of the wrongfulness of the act, is an essential ingredient in every offence; but that presumption is liable to be displaced either by the words of the statute creating the offence or by the subject matter with which it deals, and both must be considered.

He goes on to say:

> Apart from isolated and extreme cases . . . the principal classes of exceptions may perhaps be reduced to three. One is a class of acts which in the language of Lush, J., in *Davies* v. *Harvey*, L.R. 9 Q.B. 433, are not criminal in any real sense, but are acts which in the public interest are prohibited under a penalty.

He gives the following as examples of cases coming within this class. In *Att'y-Gen'l* v. *Lockwood*, 9 M. & W. 378, 152 E.R. 160, the innocent possession of liquorice by a beer retailer was held an offence under 56 Geo. III. c. 38. *Reg.* v. *Woodrow*, 15 M. & W. 403, 153 E.R. 907, was a case under a statute which declared that a tobacco dealer should be liable to a penalty for having in his

possession adulterated tobacco. A dealer was convicted under the statute although he had no knowledge or cause to suspect that the tobacco in his possession was adulterated. The statute did not contain the word "knowingly" or any other similar word importing that a scienter must be proved. Pollock, C.B., said that persons who deal in an article are made responsible for its being of a certain quality, and the enactment applied whether the party knew of the adulteration or not. *Fitzpatrick* v. *Kelly*, L.R. 8 Q.B. 337, and *Roberts* v. *Egerton*, L.R. 9 Q.B. 494, are cases under statutes dealing with sales of adulterated food. To these may be added the cases of *Mullins* v. *Collins*, L.R. 9 Q.B. 292, a case under a License Act and *Blaker* v. *Tillstone*, [1894] 1 Q.B. 345, in which the defendant was charged with selling meat unfit for human food.

I need not deal with the other classes of cases referred to by Wright, J., in *Sherras* v. *De Rutzen*, as the present comes under the first class mentioned by him.

In *Nickle* v. *Harris*, 3 S.L.R. 200, Newlands, J., held under the above Act (R.S.C. 1906, c. 75, s. 38), that it was not necessary to prove knowledge of the presence of the disease on the part of the seller, that any sale of diseased animals was contrary to the Act, and that the seller being liable to a penalty thereunder, the contract was void and the plaintiff could not recover.

I think that the fact of want of knowledge by the plaintiff of the diseased state of the cows sold did not protect him from the liability imposed by the statute. The statute was intended for the protection of the public. There being a breach of the prohibition contained in the statute the contract for the sale of the cows is void: *Manitoba El. & Gas. Co.* v. *Gerrie*, 4 Man. L.R. 210; *Bartlett* v. *Vinor*, Carthew 252, 90 E.R. 750; *Forster* v. *Taylor*, 5 B. & Ad. 887; *Bensley* v. *Bignold*, 5 B. & Ald. 335, 106 E.R. 1214.

The parties admitted that the consideration for the promissory note sued upon was severable. The defendant is entitled to a deduction of $240 from the amount of the judgment, and also to the costs of this appeal, such verdict and costs also to be set off against the judgment.

CAMERON, J.A.:—The plaintiff sued the defendant on a contract in writing, in the form of what is ordinarily called a lien note, to pay $433.50. Part of the consideration for which the

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instrument was given was for cows purchased at an auction sale, which were subsequently discovered to have been affected with tuberculosis. The County Court Judge before whom the action was tried gave a verdict for the plaintiff for the full amount claimed, on the ground that the cows were sold without a warranty and that the plaintiff had no knowledge that they were affected with tuberculosis.

The defendant appeals on the ground that the knowledge of the plaintiff is immaterial in view of the provisions of the governing statutes, one of which is provincial and the other Dominion, dealing with the same subject-matter.

S. 26 of c. 8, R.S.M. is as follows:—

Any person bringing or attempting to bring into any market, fair or other place any animal known by him to be infected with or laboring under any infectious or contagious disease shall be liable to a fine of one hundred dollars. Any person who sells or disposes of, or puts off, or offers or exposes for sale, or attempts to dispose of or put off, any animal infected with or laboring under any infectious or contagious disease, or any animal respecting which there is cause for suspicion that it is infected with infectious or contagious disease, or the meat, skin, hide, horns, hoofs or other parts of any animal infected with or laboring under any infectious or contagious disease at the time of its death, whether such person is the owner of such animal or of such meat, skin, hide, horns, hoofs or other parts of such animal, or not, shall for every such offence incur a penalty of one hundred dollars.

Ss. 37 and 38 of c. 75, R.S.C. provide that:—

37. Every person who brings or attempts to bring into any market, fair or other place, any animal known by him to be infected with or labouring under any infectious or contagious disease, shall, for every such offence, incur a penalty not exceeding two hundred dollars.

38. Every person who sells or disposes of, or puts off, or offers or exposes for sale, or attempts to dispose of or put off any animal infected with or labouring under any infectious or contagious disease, or the meat, skin, hide, horns, hoofs or other parts of an animal infected with or labouring under any infectious or contagious disease at the time of its death, whether such person is the owner of the animal, or of such meat, skin, hide, horns, hoofs or other parts of such an animal, or not, shall, for every such offence, incur a penalty not exceeding two hundred dollars.

As to the validity of both these Acts there can be no question. That of the Dominion Act was affirmed in *Brooks* v. *Moore*, 4 W.L.R. 110.

Whatever question there may be arising from the peculiar wording of the Provincial Act, it seems clear, on a purview of the Dominion Act and a consideration of its objects that a *mens rea* on the part of the vendor is not a necessary element of an offence

against s. 38. Instances of legislation having this characteristic are to be found in Crankshaw, Criminal Code of Canada, p. 25, and Maxwell on Statutes, pp. 165, 166. The above sections of the Dominion Act were discussed by Newlands, J., in *Nickle* v. *Harris*, 3 S.L.R. 200. He points out that the word "knowing" occurs in sec. 37 (as it does also in s. 36, and knowledge is essential under s. 35) but is omitted in s. 38. He says: "I think this case is very similar to cases under the Public Health Act, 1875 (Imp.), where it has been held that it is not necessary to convict a person under that Act for selling or exposing for sale diseased meat," and quotes at length from the judgment of Coleridge, C.J., in *Blaker* v. *Tillstone*, [1894] 1 Q.B. 345, in which he says:

> We are dealing with a statute passed for the protection of the public, the purpose of which would be defeated if it were necessary to show a guilty knowledge in the seller.

Newlands, J.'s conclusion is:

> I think, therefore, that parliament intended by s. 38 to prohibit the sale of an animal infected with a contagious or infectious disease, whether the vendor knew it to be so infected or not, they having found it necessary to pass the most stringent regulations to prevent the spread of disease amongst animals (p. 204).

He, accordingly, held the contract for which the notes were given in that case illegal and the notes sued on void. I consider the reasoning of Newlands, J., in this judgment satisfactory and convincing.

Does the contravention of the above s. 38 give rise to a right of action? It may well be considered doubtful whether an affirmative answer could be given to this question in view of the authorities as they now stand. See *Atkinson* v. *Newcastle Waterworks Co.*, 2 Ex. D. 441, at 448; Maxwell on Statutes, p. 664; Craies' Hardcastle, p. 213; and *Ward* v. *Hobbs*, 4 App. Cas. 13. The decision in *Couch* v. *Steel*, 3 El. & Bl. 415, 115 E.R. 1193, is now modified: On the wording of the statute in question in *Groves* v. *Wimborne*, [1898] 2 Q.B. 402, it was held, however, that an action was maintainable.

In the case before us, however, these considerations do not arise, as the party asserting the invalidity of the transaction to the extent that the affected animals were part of it is not the plaintiff in the action but the defendant as he was in the case before Newlands, J., and no court will "allow itself to be made

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the instrument of enforcing obligation which is illegal." *Per* Lindley, M.R., in *Scott* v. *Brown*, [1892] 2 Q.B. 724, at 728. In determining the effect of a penal statute, if the legislature intended to prohibit the contract itself, for the protection of the public the maxim *ex dolo malo non oritur actio* applies and no action will be maintainable upon it. Broom's Legal Maxims, 564.

The imposition of a penalty by the legislature in any specific act or omission is *primâ facie* equivalent to an express prohibition. Pollock on Contracts, 8th ed., p. 308 (quoting from the decision in *Cope* v. *Rowlands*, 2 M. & W. 149): "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."

In *Man. Electric & Gas Co.* v. *Gerrie*, 4 Man. L.R. 218, Killam, J., adopted the principle laid down by Holt, L.C.J., in *Bartlett* v. *Vinor*, Carthew 252, 90 E.R. 750.

Every contract made for or about any matter or thing which is prohibited and made unlawful by any statute is a void contract, though the statute itself does not mention that it shall be so but only inflicts a penalty on the offender because a penalty implies a prohibition though there are no prohibitory words in the statute.

I refer also to *Brown* v. *Moore*, 32 Can. S.C.R. 93, at 97, where Strong, C.J., says: "It is also settled that the imposition of a penalty for the contravention of a statute avoids a contract against the statute."

I have been considering so far the application of the Dominion statute only to this case. The Dominion parliament has jurisdiction over criminal law and the provincial legislature over property and civil rights. The Dominion parliament having exercised its jurisdiction and forbidden certain transactions, what effect has that legislation on contracts affecting property within the ambit of the provincial legislature? The position is not precisely the same as in England where all the legislative jurisdictions are found in one parliament. The question was considered by the full court of this province in *Hooper* v. *Coombs*, 5 Man. L.R. 65, where there was an agreement by which the plaintiff was to ship a certain quantity of whiskey from this province into the North West Territories. The North West Territories Act, quoted by Killam, J., at p. 69, forbids the importation into the North West Territories from any other province or elsewhere, without the special permission of the Lieutenant-Governor. A penalty was imposed for

infraction of the Act and liquors so imported were made liable to seizure. Thus the law, though a Dominion enactment, was in force in the Territories only. But it was held that it was a law of Canada that no liquors should be imported into the Territories and

> that no court in Canada should so far countenance a disobedience of that law, as to offer its assistance in enforcing a contract made for the purpose of its breach.

Per Killam, J., p. 73. See also *L'Association St. Jean Baptiste* v. *Brault*, 30 Can. S.C.R. 598, where it was held that a contract in furtherance of a project for the operation of a lottery forbidden by the criminal statutes of Canada is unlawful and cannot be enforced in a court of justice. Here, too, it was expressly held that it was the duty of the courts to notice illegalities of this nature *ex officio*.

Here we have a case where the two legislatures have apparently legislated effectively on the same subject matter. In *R.* v. *Stone*, 23 O.R. 46, Rose, J., held *intra vires* a Dominion Act directed against frauds in supplying milk to cheese factories, similar to an Ontario Act already held *intra vires* in *R.* v. *Wason*, 17 A.R. (Ont.) 221. Rose, J., at p. 49, adopts the argument of Edward Blake in *R.* v. *Wason*:

> The jurisdiction of the provinces and the Dominion overlap. The Dominion can declare anything a crime, but this only so as not to interfere with or exclude the powers of the province of dealing with the same thing in its civil aspect, and of imposing sanctions for the observance of the law; so that though the result might be an inconvenient exposure to a double liability, that possibility is no argument against the right to exercise the power.

See Lefroy, Legislative Power in Canada, p. 354 *et seq.*

The case of *Rothwell* v. *Milner*, 8 Man. L.R. 472, was decided by Bain, J., with reference to the Manitoba statute only, and on the authority of *Ward* v. *Hobbs*, *supra*, and other similar cases. The plaintiff was the purchaser of a glandered horse and brought the action for damages. The County Court Judge had held that he was without knowledge of the defect so that the decision is apparently *obiter* so far as it holds that the position of the plaintiff was unaffected even if he had knowledge. As, however, the purchaser was the plaintiff who sued for damages, and as the Dominion enactment was not involved, the decision is not applicable here.

There can be no question, in my opinion, that the Dominion enactment applies, that the defendant is entitled to rely upon it

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and that its effect is to invalidate the contract sued upon to the extent of the amount of the consideration given for the diseased cows.

The judgment entered in the County Court should be reduced by that amount, $240. The defendant is entitled to his costs of this appeal, to be credited upon the balance of the judgment.

FULLERTON, J.A.:—The plaintiff had an auction sale of personal property at which the defendant purchased 4 cows and some machinery. He gave the plaintiff a lien note for $433.50, covering the purchase price of the cows, $240, and the purchase price of the machinery, $193.50.

A day or two after the purchase, defendant had the cows examined by a veterinary surgeon, who found that they were all infected with tuberculosis. Defendant thereupon notified the plaintiff of the fact and requested him to take the cows back, which the plaintiff declined to do, but brought this action to recover the amount of the lien note.

No question arises as to the right of the plaintiff to recover the price of the machinery, the dispute relating solely to the right of the plaintiff to recover the purchase price of the cows.

The argument before us was confined to the question of the legality of the contract.

The defendant contends that the contract is made in contravention of s. 38 of R.S.C., c. 75, entitled the Animal Contagious Diseases Act.

Myers, Co.C.J., before whom the case was tried, found that the plaintiff had no knowledge of the diseased condition of the cows, and on the authority of *Rothwell* v. *Miller*, 8 Man. L.R. 472, gave judgment in favour of the plaintiff for the full amount claimed.

Rothwell v. *Miller* was an action for damages for selling a horse afflicted with glanders. The case turned on the construction of s. 16 of the Diseases of Animals Act, 54 Vict. c. 17 (Man.). Bain, J., who tried the case, held that, even if it had been proved that the defendant had committed a breach of the statutory duty, he could not be held to be liable to the plaintiff for damages.

The case we are dealing with is quite a different one. Here the plaintiff is suing on a contract of sale which defendant says is illegal and if he is correct in his contention there clearly can be no recovery.

S. 38 of the Animal Contagious Diseases Act, above referred to, while it does not in terms prohibit the sale of diseased animals, imposes a penalty for so doing, which, in effect, amounts to a prohibition.

Holt, L.C.J., in *Bartlett* v. *Vinor*, Carthew 252, 90 E.R. 750, said:

> Every contract made for or about any matter or thing which is prohibited and made unlawful by any statute, is a void contract, though the statute itself doth not mention that it shall be so, but only inflicts a penalty on the offender, because a penalty implies a prohibition, though there are no prohibitory words in the statute.

On the part of the plaintiff, it is urged that, as he had no knowledge of the diseased condition of the cows at the time of the sale, there can be no breach of the statute. In other words, that guilty knowledge is a necessary ingredient of the offence. While this is the general rule in the case of crimes, there are many statutes under which a man may be convicted, even though he acted quite innocently and without any intention of infringing the provisions of the statute.

For example, the *Att'y-Gen'l* v. *Lockwood*, 9 M. & W. 378, 152 E.R. 160, was an action against a retailer of beer, licensed under 1 Wm. IV. c. 64, and 4 & 5 Wm. IV. c. 84, for the penalties imposed by 56 Geo. III. c. 58, s. 2, for having, in his possession, liquorice, being one of the prohibited articles therein enumerated.

It was there held to be unnecessary, in order to render him liable, to aver or prove that he had liquorice in his possession to be used as a substitute for malt or hops, or with any criminal intention.

In *Regina* v. *Woodrow*, 15 M. & W. 403, 153 E.R. 907, the defendant was convicted for having in his possession adulterated tobacco, although he had purchased it as genuine and had no knowledge or cause to suspect that it was not so.

Whether, on a prosecution for a statutory offence, it is necessary to prove knowledge on the part of the person accused, depends entirely upon the proper construction to be placed on the particular statute.

An examination of the sections of the Animal Contagious Diseases Act preceding s. 38 will shew how the latter section should be construed.

S. 36 provides that every person who turns out, keeps or grazes

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upon any forest, wood, &c., any animal *knowing* it to be infected with or labouring under any infectious or contagious disease shall incur a penalty.

S. 37 imposes a penalty on every person who brings or attempts to bring into any market, &c., any animal *known* to him to be infected with or labouring under any infectious or contagious disease.

S. 38 omits all reference to knowledge in the party selling, of the existence of disease in the animal sold.

The inclusion in ss. 36 and 37 of the words relating to knowledge and the exclusion from s. 38 of any such words, shew clearly that the legislature intended, in the case of a sale of a diseased animal, that mere proof of the sale should be sufficient to convict.

In *Nickle* v. *Harris*, 3 S.L.R. 200, the plaintiff sold the defendant a team of horses which, it was found as a fact, were, at the time of the sale, infected with glanders though the plaintiff had no knowledge that the horses were so infected.

The horses were subsequently destroyed by the government officials and the plaintiff sued to recover the price.

As here, the case turned entirely upon the construction of s. 38 of the Animal Contagious Diseases Act.

Newlands, J., who tried the case, held that knowledge of disease on the part of the seller was immaterial and gave judgment for the defendant.

In my opinion, the contract sued upon in this case, in so far as it related to the cows, was an illegal contract and the plaintiff therefore cannot recover.

I will allow the appeal as to the sum of $240, the purchase price of the four cows, the judgment to stand for the balance of $193.50.

Judgment accordingly.

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New Brunswick Supreme Court, Appeal Division, Hazen, C.J., White and Grimmer, JJ. April 19, 1918.

APPEAL (§ VII M—635)—JURY—QUESTIONS SUBMITTED—UNANSWERED—IMPORTANCE TO DECISION—INSTRUCTION BY JUDGE—NEW TRIAL.

If the jury does not answer questions submitted to them, which are of great importance to the right determination of the issues involved, on the ground that they do not understand one of the questions, and if they are not further instructed by the judge, a new trial will be ordered.

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APPEAL by plaintiff from a verdict entered for defendant at the Carleton County Circuit, before Barry, J., and a jury. Plaintiff moves to set aside verdict for defendant on counterclaim, and to enter a verdict for plaintiff, or for a new trial.

A. J. Gregory, K.C., for plaintiff; *P. J. Hughes, contra.*

The judgment of the Court was delivered by

HAZEN, C.J.:—There is no question in this appeal with respect to the plaintiff's claim, which was for the recovery of the price of work and labour in compressing hay and for which the trial judge directed judgment to be entered for the sum of $388.93 with costs. The questions involved are with regard to the counterclaim set up by the defendants, and on which after certain questions had been answered by the jury, judgment was ordered for $760, with costs.

The plaintiff's claim was for work and labour performed in the month of April, 1915. The facts in respect to the defendant's counterclaim for damages for breach of contract are that prior to the plaintiff's cause of action, namely, in the months of October and November, 1911, a contract was entered into between the plaintiff and defendants whereby the plaintiff agreed to purchase from the defendants, dealers in hay and country produce, 15 carloads of No. 1 timothy at $12 a ton; 15 carloads of No. 2 timothy at $11 a ton; and 20 carloads of C.M. (clover mixture) at $10 a ton, for shipment f.o.b. at place of shipment or equal freight to West St. John, and to be shipped in November or early December, 1911, according to shipping orders of the plaintiff from time to time.

This contract is contained in certain correspondence that passed between the parties, and its terms are to be gathered from four letters. On October 20, 1911, the plaintiff wrote asking the defendants if they were in a position to offer No. 1 and No. 2 timothy hay and C.M. for November and December shipment: "If so we will be pleased to have your lowest price for 10 to 20 cars each f.o.b. your station."

On October 22 the defendants acknowledged the receipt of this and named a price of $12 a ton on good hay and $1 less on each of the other qualities "all f.o.b. here (Florenceville) as shipping point." To this the plaintiffs replied on October 30, saying:—"We will take 50 cars of hay from you, 15 cars of No. 1, 15 cars of No. 2, and 20 cars of C.M. Shipment in November and early

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December," and the defendants on November 2 wrote plaintiffs confirming "the sale of 50 cars of hay" and on November 3 the plaintiffs wrote acknowledging receipt of defendants' letter confirming sale and saying "shipping instructions will be sent you as soon as we arrange freight."

The counter claim is for damages for breach of this contract by the plaintiffs in not giving shipping orders and accepting the hay which plaintiff agreed to buy from defendants in 1911, with the exception of 65 tons thereof.

In addition to the correspondence which constituted the contract, certain other letters passed between the parties. The defendants on December 13 wrote asking when the plaintiffs would be able to take delivery of the hay and the latter replied that they expected to be able to give shipping instructions early in January. On receipt of this the defendants under date of December 19 stated that as soon as the plaintiffs were open to handle the hay they (the defendants) would be pleased to ship the same and asking if the plaintiffs were open to buy any more. No reply was received to this, and on January 12, 1912, the defendants wrote again asking: "What about our hay contract," adding that they did not want to be hard if the market was not up to the plaintiffs' expectation, but that they had bought the hay with the expectation of the plaintiffs taking it, and stated that they could sell the hay in the American market but the prices would not warrant as much out of it. On the same day the plaintiffs wrote defendants that they had been unable to secure freight space from West St. John and giving them orders to ship 5 cars of No. 1 to Boston—and defendants replied that they would ship the same, but calling attention to the difference of grading in the Boston market. The plaintiffs subsequently ordered the shipment of some more cars to the Boston market—some of which were shipped. No further communication took place between the parties until March 23, 1912, when the plaintiffs wrote the defendants as follows: "We have been so long in giving you orders for the shipment of the hay purchased from you, that we do not know whether you are prepared to fill your order now or not, but, if so, we would like to get 10 cars of No. 3 shipped to West St. John for export to Liverpool," and, on March 21, the defendants replied that the hay had been held for the plaintiffs

until March 1, and on account of storage they were then forced to sell and sell below cost. And on March 27 the plaintiffs replied stating that they were sorry that they were not in a position to give orders to ship the hay earlier, but that space from West St. John to England was held at impossible rates. This was in March, 1912, and it does not appear that further communication of any sort took place between the parties with regard to the transaction (except a letter of December 23, 1915, dealt with hereafter) for nearly 4 years, or until January 15, 1916, when the defendants rendered plaintiffs an account for $872, made up as follows:—To contract 50 cars hay, 500 tons—By delivery 64 tons; 436 tons at $2=$872.

At this point it might not be irrelevant to say that Barry, J., in charging the jury, said:—

It will be for you to consider why the McCain Co., having an alleged claim of $850 against the Scott people, have waited 4 years before asserting it. That is an element for you to take into consideration in coming to a conclusion in this case.

It is evident that the defendants did nothing to assert their claim for damages until the plaintiffs sought to recover the amount due by the defendants for work and labour in pressing hay in April, 1915, a claim which was practically not disputed. The contract, as has been pointed out, was for the delivery of hay in November and December, 1911, on shipping orders to be given by the plaintiffs, and the correspondence referred to shows that there was a breach of contract on the part of the plaintiff, who in his letter of March 27 states that he was not in a position to give to defendants an opportunity of shipping the hay earlier as "space from St. John to England was held at impossible rates."

I stated a few minutes ago that no communication took place between the parties between March, 1912, and January, 1916, except a letter of December 23, 1915, written by the defendants to the plaintiffs, in which letter the following occurs:—

In reference to this old account, our loss on the transaction of your not being able to take the hay purchased from us was fully $1,000. Now, of course, had it been the other way, we certainly would have had to supply you with the hay regardless of the outcome. We did not do as some of our other dealers did—*force the stock on you which we knew you would be compelled to take at a loss.* However, to square the matter away and drop the matter entirely, and hoping to make the difference up next time, *discount your account* $200 and we will call the deal off.

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They add the hope that another season the plaintiffs may be in a position to secure a government contract and that "We can supply you with a lot of stock." I take the meaning of this offer to be that if the plaintiffs would reduce the amount of their claim against the defendants for pressing hay in 1915 by the sum of $200 that the defendants would pay the balance and release their claim for damages for the breach of contract.

In charging the jury the judge below said, and I concur in his remarks, that it is abundantly clear that there was a contract for a definite quantity of hay at a definite price, the hay to be shipped in November and early December of 1911. It was not shipped, and the shipping orders were not sent in by the plaintiffs. There was, therefore, on the face of the matter, a breach of contract on the part of the plaintiffs.

The questions submitted to the jury were as follows:—

1. Did the plaintiffs and the defendants by correspondence dated October 20, October 22, October 30, November 2 and November 3, 1911, enter into a contract for the purchase and sale of 15 carloads of No. 1 timothy at $12 a ton, 15 carloads of No. 2 timothy at $11 a ton, and 20 carloads of C.M. at $10 a ton, for shipment f.o.b. at place of shipment or equal freight to West St. John and to be shipped in November or early December, 1911, as per shipping orders of the plaintiffs? A. Yes.

2. Did the plaintiffs fail to give to the defendants shipping orders for the delivery of any part of the 50 carloads of hay, called for by the contract and if so how many carloads? A. 50 carloads.

3. How many tons of hay did the defendants deliver under the contract? A. Not any.

4. In how many carloads of hay did the plaintiffs give the defendants shipping orders? A. 22 carloads.

5. At what time or times were the shipping orders given? A. During the first three months of 1912.

6. Did the defendants by delivering hay after November and December, 1911, waive or abandon any right they may otherwise have had to insist upon delivery unless within the time mentioned in the contract for delivery? No answer.

7. Have the defendants by delay in asserting any claim they may have had for damages for failure of the plaintiffs to give shipping orders lost their right to recover such damages if any? A. No.

8. Before selling the hay intended for delivery to the plaintiffs did the defendants call upon them to take same off their hands? A. Yes.

9. Did the defendants notify the plaintiffs of their (defendants') intention to sell the hay on a falling market? A. No.

10. Was the contract set up in the counterclaim mutually abandoned by the parties? No answer.

11. At what sum do you assess the damages for the defendants on their counterclaim? A. 38 cars of hay of 10 tons each—$760.00.

The following questions were submitted by the defendants:

12. Did the defendants wait a reasonable time for the plaintiffs to take the hay? A. Yes.

13. Did the plaintiffs give shipping instructions for the hay within a reasonable time? A. No.

On these questions and answers the trial judge directed a verdict for defendants on their counter-claim for $760. The jury failed to answer the sixth and tenth questions, and when asked by the judge why they had not done so, replied that they did not seem to understand one of them—which one is not stated. Their omission to answer these questions has, in my opinion, an important bearing upon the case for reasons which will subsequently appear.

The plaintiffs move for a new trial upon a number of grounds, including verdict against evidence, improper admission of evidence, and improper direction. It was argued under the latter head that the judge erred in view of the evidence in charging the jury that the correspondence established a contract for the hay to be shipped in November or early December. After carefully reading and considering the correspondence, I am of opinion that it does establish such a contract, and the trial judge was fully justified in so charging. Neither can I see that the defendants' case was in any way prejudiced by the judge's charge.

If a man makes a contract with another man for the delivery of any specific merchandise at a specific time and for any reason fails to carry out his part of the contract, fails to furnish shipping facilities or to furnish cars or to accept and take delivery of the goods according to the contract at the time and at the place specified, certainly the vendor, or the seller of the goods, is entitled to damages for the breach of the contract on the part of the purchaser. There is no doubt about that.

It is not contended that the judge was in error in so charging as an abstract proposition of law, but that the effect of this statement taken in conjunction with the statement that the correspondence established a contract for the hay to be delivered in November or early December was to charge the jury that no matter what qualification or interpretation the parties themselves had put upon the actual words used, or what waiver of conditions or abandonment of the contract by mutual consent had taken place, still the defendants were entitled to have the jury find upon the evidence that the plaintiffs had broken the contract and that the defendants were entitled to damages. It is further claimed that the effect of this portion of the charge was emphasized by another

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portion of the charge wherein he told the jury that if the plaintiffs agreed to accept 50 carloads of hay for delivery in November and December, and did not take it or did not send shipping orders any court would say they were entitled to pay damages. These statements, which, after all, are isolated ones, must be read in connection with the other portions of the charge, which taken as a whole, was, I believe, a fair one and was not calculated unfairly to prejudice the defendant's case. Objection is also taken to that portion of the charge with regard to the alleged staleness of the defendants' counterclaim, the contention being that he did not go far enough and should have stated to the jury that the defendants never notified the plaintiffs of any claim for damages, nor presented any claim, until upwards of 3 years after the alleged damage occurred, and only then as a ground for the plaintiffs rebating $200 of the amount due from the defendants to the plaintiffs. These were statements in the evidence that were not disputed. In his charge, however, on this point, the judge said:—

> Several reasons were set up by the plaintiffs why the defendants should not recover on their counterclaim. They say the claim is a stale one—they do not use that word, but that is the effect of it; that it is a trumped up account, it is a stale account; that this claim arose in 1911, and it was not until 4 years afterwards, in 1915, that the plaintiffs heard anything about it. That is the evidence and that is a fact you must take into consideration. True it is that the defendants say these people were not within the jurisdiction of our courts; they had to wait till they came into the Province of New Brunswick before they could assert their claim for damages. That is quite true; but they are now asserting their claim when these people came down here to New Brunswick to sue for a claim that is really not contested. Courts look with disfavor upon stale claims. . . . It will be for you to consider why the McCain Company, having an alleged claim of $850 against the Scott people, have waited 4 years before asserting it. That is an element for you to take into consideration in coming to a conclusion in this case.

The attention of the jury was thus drawn to the matter in question, the trial occupied a comparatively short time, and all the evidence was fresh in their minds, and I do not see any good or sufficient reason for interfering with the judgment on this ground. A judge is not expected to refer to the evidence in minute detail, and his not doing so is not a ground for a new trial. The plaintiffs claim that the evidence shews that the contract was finally rescinded or abandoned by mutual consent. Much can be said in support of such a contention. The fact that, when the plaintiffs furnished no shipping orders in November and December, the

defendants did not regard the contract as thereby rescinded or exercise any right of then re-selling the hay and charging the plaintiffs with the loss if any; the letter of December 19 wherein the defendants stated that, as soon as the plaintiffs were open to handle the hay, the defendants would be pleased to ship the same; the letter of defendants to plaintiffs on December 23 in which they said: "We did not do as some of our other dealers did—force the stock on you which we knew you would be compelled to take at a loss"; the fact that the defendants did not assert their claim for damages after the same were incurred and not until the plaintiffs were claiming against them for work and labour for pressing hay; the fact that the defendants failed to notify the plaintiffs of their intention to sell the hay and charge them with the loss; the fact that A. D. McCain in Montreal offered to pass receipts and square accounts, to wipe out his account if the plaintiffs would wipe out theirs; the fact that defendants paid plaintiffs large sums of money for pressing hay long after the alleged breach of contract occurred; and the fact that the defendants offered "to call the deal off" if plaintiffs would discount their account $200; are all factors that are entitled to consideration in connection with such a contention, at the hands of the jury.

The importance of this was recognized by the judge, who left to the jury question No. 10:—"Was the contract set up in the counterclaim mutually abandoned by the parties?" and which was unanswered.

The plaintiffs also claimed that the defendants had waived their right to recover by their actions subsequent to entering into the contract, and the judge instructed the jury on that point, stating that a waiver would be any act done by the McCain people after the contract was made, from which the reasonable inference might be drawn that they intended no longer to rely upon the Scott Co.'s contract. Based on the plaintiff's contention that there was a waiver by the defendants, the judge submitted question 6: "Did the defendants by delivering hay after November and December, 1911, waive or abandon any right they might otherwise have had to insist upon delivery orders within the time mentioned in the contract for delivery."

I stated previously that the jury stated that they did not seem to thoroughly understand one of these questions, and this was

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the only reason given for not answering both. They were not further instructed with regard to them by the judge and the verdict was entered as already stated. In my opinion, questions 6 and 10 were of very great importance to a right determination of the issues involved, and the plaintiffs were entitled to answers to them. One of the vital points in the case was involved in the question No. 10, "Was the contract set up in the counterclaim mutually abandoned by the parties?" Had this question been answered in the affirmative, and there was evidence upon which reasonable men could have so answered, the defendants could not have succeeded upon their counterclaim. I am not saying that the answer would necessarily have been yes, or that there was no evidence upon which reasonable men could not have found a negative answer, but I do say that the question was an important one, and the plaintiffs were entitled to the jury's finding upon it, as it dealt with one of the important defences put forward in answer to the counterclaim.

So far as question No. 6 is concerned, there is absolutely no finding by either the judge or jury on the plaintiffs' contention that the defendants had abandoned any right they might otherwise have had to insist upon delivering orders within the time mentioned in the contract for delivery. This point was urged by plaintiffs' counsel at the trial, and was one that was evidently regarded as vital to the defence. Had the jury answered it in the affirmative, and in my opinion reasonable men might have done so, the defendant could not have succeeded on his claim.

Question No. 8: Before selling the hay intended for delivery to the plaintiffs did the defendants call upon them to take the same off their hands, was answered "Yes." I cannot find any evidence to support this answer, and the judge told the jury that McCain admitted he did not.

The counsel for the defendants contended that this case was on all fours with *Ogle* v. *Vane* (1867), L.R. 2 Q.B. 275, and that, on its authority, the motion should be refused. In view of the reasons that I have given, the contention does not particularly apply, but I am of opinion that the cases are distinguishable. In the case cited there was an absolute refusal on the part of one of the parties to the contract to deliver the goods. The circumstances in this case are different.

I think there should be a new trial so far as the counterclaim is concerned, with costs to the plaintiff of the appeal.

New trial ordered.

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BAKER v. RICHARDS.

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British Columbia Court of Appeal, Macdonald, C.J.A., and Martin, Galliher, McPhillips and Eberts, JJ.A. April 2, 1918.

LEVY AND SEIZURE (§ III A—40)—GOODS SEIZED UNDER FI. FA.—COSTS OF EXECUTION.

A sheriff seizing goods under a writ of *fieri facias* is only entitled to costs of the execution until such time as he receives notice of an assignment for the benefit of creditors.

[Creditors' Trust Deeds Act (R.S.B.C. 1911, c. 13), considered.]

Statement.

APPEAL by defendant from judgment of Clement, J. Affirmed.

Stacpoole, K.C., for appellant; *C. G. White*, for respondent.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—I would dismiss the appeal.

Martin, J.A.

MARTIN, J.A., dismissed the appeal.

Galliher, J.A.

GALLIHER, J.A.:—Under and by virtue of a writ of *fieri facias*, the sheriff of Victoria seized certain goods on the premises of one John Meston, at the hour of 11 o'clock in the forenoon on June 8, 1917, and on the same day the said Meston made an assignment for the benefit of his creditors under the Creditors Trust Deeds Act, being c. 13, R.S.B.C., 1911, and notice in writing of the said assignment was served upon the said sheriff about 3.30 o'clock of the same day.

The sheriff at once agreed to withdraw on payment of his fees, and made up his bill, amounting to $270.79, which amount included an item for poundage of $219.34.

The plaintiff, who was the assignee, offered to pay the said bill, less the item for poundage, but the sheriff refused to accept same and remained in possession until June 28, when an order was made by Clement, J., holding that the sheriff was unlawfully in possession having been offered the lawful costs of the execution creditor at the time notice was served upon him. Upon this order being made the sheriff withdrew.

The real question is as to whether the sheriff was entitled to poundage.

Other grounds of appeal were—(a) that no tender was ever made to the appellant. As to this, it is quite clear it would have been useless to tender the amount less the poundage and tender

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was waived: see *Bark Fong* v. *Cooper* (1913), 49 Can. S.C.R. 14, at 31, 16 D.L.R. 299, at 309; also *Wexelman* v. *Dale*, 35 D.L.R. 557, 10 S.L.R. 289. (b) The execution creditor was not party to the action. In support of this Stacpoole cited *Hilliard* v. *Hanson* (1882), 21 Ch.D. 69, but if the sheriff was in the wrong in retaining possession, this case is really against him: see remarks of Jessel, M.R., on pp. 71-2.

In my opinion, there was no necessity for joining the execution creditor.

Mr. Stacpoole further argued that the sheriff was entitled to possession money up to the date of the order.

This is, I think, disposed of by the case of *Re Harrison*; *Ex p. Sheriff of Essex*, [1893] 2 Q.B. 111 (not cited), where Williams, J., says, at p. 113:—

Upon getting a notice his (the sheriff's) duty is to hand over the goods or the proceeds and upon doing so he will get the costs of execution down to that time and nothing more. And further:—In my judgment costs of execution means the costs of execution up to the time notice is given.

And the judgment of Bruce, J, is to the same effect.

There remains then for consideration only the question of poundage. I find this dealt with in *Re Thomas; Ex. p. Sheriff of Middlesex*, [1899] 1 Q.B. 460, which I think is conclusive against Mr. Stacpoole's contention.

Of course we have no exactly similar provision as in the English Bankruptcy Act, but our Creditors Trust Deeds Act (R.S.B.C. 1911, c. 13), before referred to, at s. 14 (2) contains this provision:—

> Every such assignment shall take precedence of all judgments, of all executions against goods, and of all attachments of debts not completely executed by payment, subject to a lien in favour of such execution creditors for their costs.

I see no reason why the principle enunciated in the English cases should not apply.

The appeal should be dismissed.

McPhillips, J.A.

McPHILLIPS, J.A.:—I do not decide that the claim as made for poundage was a claim that could have been insisted upon under the Creditors Trust Deeds Act (c. 13, R.S.B.C. 1911) this becoming unnecessary owing to the counsel for the appellant upon the argument having abandoned same, save as to the poundage upon the costs. This poundage, however, would be so small in

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amount that the maxim *de minimis non curat lex* may be usefully applied. The poundage, if a rightful or legal claim under s. 14 (2) of the Creditors Trust Deeds Act under the language "subject to a lien in favour of such execution creditors for their costs," might, under the circumstances of the present case, extend to poundage upon the whole sum directed to be levied under the writ of execution. The sheriff being in possession before the assignment of sufficient goods to satisfy the writ, the following cases, not cited upon the argument, bear upon the point—*Smith* v. *Antipitzky* (1890), 10 C.L.T. 368 (a decision of His Hon. McDougall, J., of the County Court of York—upon a statute for all practical purposes of construction similar to that of British Columbia; and, if it were to be followed, would support the claim as made by the appellant), and *Montague* v. *Davies*, [1911] 2 K.B. 595.

I agree in dismissing the appeal.

EBERTS, J.A., would dismiss appeal.

Eberts, J.A.

Appeal dismissed.

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(Annotated.)

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Supreme Court of Canada, Fitzpatrick, C.J., and Davies, Idington, Duff, and Anglin, JJ. March 5, 1918.

ARBITRATION (§ I—5)—PROVINCIAL STATUTE—REFERENCE TO THE CROWN—CONSTRUCTION—CONSTITUTIONAL LAW.

A reference to the Crown in a provincial statute is to the Crown in right of the province only, unless the statute makes it clear that the reference is to the Crown in some other sense. Sec. 5 of the Ontario Arbitration Act does not apply to a submission by the Crown in right of the Dominion.

Statement.

APPEAL from a judgment of the Exchequer Court of Canada, 33 D.L.R. 88, in favour of respondent on the claim to enforce an award of arbitrators, but allowing the suppliant's claim for damages. Affirmed.

The suppliant is a licensee of fishing rights in the Detroit River which the Dominion Government agreed to purchase, the price to be settled by arbitration. Each party appointed an arbitrator and the two chose a third but before any proceedings were taken the Government gave notice revoking the submission and announcing its intention to abandon the purchase. The Government arbitrator having withdrawn, the other two proceeded to arbitrate and made an award in favour of the suppliant for a large amount and a petition of right was filed by the suppliant to enforce the

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award or, in the alternative, for damages. The Judge of the Exchequer Court refused enforcement but gave judgment for damages with a reference. The suppliant appealed against the refusal to enforce the award. The Crown did not cross-appeal.

McGregor Young, K.C., for appellant.

Hogg, K.C., for respondent.

Fitzpatrick, C.J.

FITZPATRICK, C.J.:—The only question that falls to be decided on this appeal is the contention of the appellant that the Crown in right of the Dominion of Canada is bound by the Ontario statute, the Arbitration Act, R.S.O. (1914), c. 65.

The Judge of the Exchequer Court holds against the view that in dealing with rights arising in any province regard must be had to the laws of the province as they were in force at the time of the passing of the Exchequer Court Act, 50 & 51 Vict. 1887. He quotes s. 10 of the Interpretation Act, R.S.C. (1906), c. 1.

> The law shall be considered as always speaking, and whenever any matter or thing is expressed in the present tense, the same shall be applied to the circumstances as they arise, so that effect may be given to each Act and every part thereof, according to its spirit, true intent and meaning. (And continues:)—I do not think the view put forward can be upheld. If such a construction were placed on the Exchequer Court Act innumerable absurdities might arise, as the statute laws of the various provinces are from time to time repealed or varied.

So that but for other reasons which I shall presently discuss the judge would apparently hold that the Dominion Crown would be bound by the Ontario Arbitration Act.

It may be well to clear up at once an obvious error in the suggestion that it is always the laws in force at the time of the passing of the Exchequer Court Act to which regard must be had. The error has probably arisen from judicial decisions upon clause (c) of s. 16 (now s. 20) of that Act, by which it was determined that it imposed a liability upon the Crown which did not previously exist. The Crown, however, was of course liable in many cases, as of contract for instance, before the passing of the Exchequer Court Act. *Thomas* v. *The Queen*, L.R. 10 Q.B. 31. The principle is the same, however, viz., that the liability is such as existed under the laws in force in the province at the time when the Crown became liable.

The judge's holding seems rather inconsistent with his subsequent statement that "the local legislature could not enact laws making the Crown, represented by the Dominion, liable."

I think too that difficulties, not to say absurdities, may arise whether the view is taken that the liability of the Dominion Crown is to be ascertained with reference to the laws of each province as they were in force when the Crown first came under liability, or as they may be from time to time varied by the statutes of the province. The question, however, has already been settled so far as this court is concerned by judicial decision.

In the case of *Armstrong* v. *The King*, 11 Can. Ex. 119, in which the cause of action arose under s. 16 (*c*), Burbidge, J., after referring to the case of the *City of Quebec* v. *The Queen*, 2 Can. Ex. 252, at 269; 24 Can. S.C.R. 420; *The Queen* v. *Filion*, 24 Can. S.C.R. 482; *Ryder* v. *The King*, 9 Can. Ex. 333; 36 Can. S.C.R. 462; and *Paul* v. *The King*, 38 Can. S.C.R. 126, added:—

I think, too, that it may be taken to be settled by the general concurrence of judicial opinion in the cases referred to that it was the intention of parliament that the liability of the Crown should be determined by the general laws of each province in force at the time when such liability was imposed.

On the appeal of the same case, 40 Can. S.C.R. 229, Davies, J., said:—

I think our previous decisions have settled, as far as we are concerned, the construction of the clause (*c*) of the 16th section of the Exchequer Court Act and determined that it not only gave jurisdiction to the Exchequer Court, but imposed a liability upon the Crown which did not previously exist and also that such liability was to be determined by the general laws of the several provinces in force at the time such liability was imposed.

Although this was a case under s. 16 (*c*) of the Exchequer Court Act by which a particular liability was for the first time imposed upon the Crown, the same principle, as I have said, must apply to all cases and the liability in each be ascertained according to the laws in force in the province at the time when the Crown first became liable in respect of such cause of action as is sued on. In other words, the local legislature cannot subsequently vary the liability of the Dominion Crown, or at any rate, cannot add to its burden.

This was the opinion expressed by Burbidge, J., in *Powell* v. *The King*, 9 Can. Ex. 364, at 374, where he said:—

The question is whether an assignment of a claim against the Government of Canada, made in the Province of Ontario, gives the assignee a right to bring his petition therefor in his own name; or, in other words, whether the Crown as represented by that government is bound by the statutes that have from time to time been passed by the legislature of that province to enable the assignee of a *chose in action* to bring an action thereon in his own name. . . . There is, I think, no reason to think that these statutes were or are

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binding upon the Crown; but even if it were conceded that the Crown, as represented by the Government of the Province of Ontario, was bound thereby, I should be of opinion that the Crown as represented by the Government of Canada is not bound. The only legislature in Canada that would have power in that respect to bind the Crown, as represented by the Dominion Government, would, it seems to me, be the Parliament of Canada.

If I have rightly appreciated the reasoning of the Judge of the Exchequer Court (Cassels, J.), he holds that, whilst in an ordinary case the Dominion Crown would be bound by a provincial statute, the present case may be distinguished on the ground that the statute affects a prerogative right of the Crown. I find it very difficult to discover any principle on which such a conclusion could be arrived at.

The right to revoke a submission to arbitration was, prior to its curtailment by the Ontario statutes, one common to all subjects within that province. I do not understand how such a right as this can be considered as one of the prerogatives of the Crown, so as to base on this a conclusion that it could not be legislated against by the provincial legislature. It seems to me that the argument must involve any right of the Crown.

I do not derive any assistance from the authorities referred to in the judgment. The case of *Burrard Power Co.* v. *The King*, 43 Can. S.C.R. 27, involved a question of Dominion property and the B.N.A. Act, 1867, reserves to the Dominion Parliament the exclusive legislative authority over such property. The quotation from Chitty's "Prerogatives of the Crown" to the effect that:—

> Acts of Parliament which would divert or abridge the King of his prerogatives, his interests or his remedies in the slightest degree, do not in general extend to, or bind the King, unless there are express words to that effect

seems rather pointless, since the statute now in question does expressly purport to bind the King.

It is, however, unnecessary for me to comment further on the judgment. I agree with Anglin, J., that the provincial Act, read as a whole, cannot be interpreted as applicable, for the reasons he gives, to bind the Dominion Crown.

And, in any event, the provinces have, in my opinion, neither executive, legislative nor judicial power to bind the Dominion Government. Provincial statutes which were in existence at the time when the Dominion accepted a liability form part of the law of the province by reference to which the Dominion has consented

that such liability shall be ascertained and regulated, but any statutory modification of such law can only be enacted by parliament in order to bind the Dominion Government. That this may occasionally be productive of inconvenient results is one of the inevitable consequences of a divided authority inherent in every federal system such as provided by the constitution of this country.

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I agree also with Anglin, J., that s. 19 of the Exchequer Court Act merely recognizes pre-existing liabilities; and cases falling within it must be decided not according to the law applicable to the subject matter as between subject and subject, but to the general law of province in which the cause of action arises applicable to the Crown in right of the Dominion.

The respondent, in his factum, declares that he is content to abide by the judgment of the Exchequer Court and to pay to the appellant the damages assessed by the referee. I agree with the conclusion of the judgment, though basing my opinion upon different grounds from those of the judge.

The appeal should therefore, I think, be dismissed with costs.

DAVIES, J.:—I concur in the opinion of Anglin, J.

Davies, J.

IDINGTON, J.:—The appellant represents a suppliant who had sought by means of a petition of right to enforce an alleged award made pursuant to an alleged submission by him and the respondent to the determination of arbitrators. The claim so made has been dismissed by Cassels, J., and hence this appeal.

Idington, J.

It seems to me there are several rather formidable and indeed some insuperable obstacles in the way of the appellant. In the first place, on the argument, I asked counsel for the appellant, what authority any one agreeing on behalf of respondent to the alleged submission had for doing so. He admitted he had not in fact considered that matter but said he would consider it. Since then he has been good enough to hand in a memorandum which first refers to the material in the case shewing that the object of the Minister was to serve the fish breeding establishment of the Dominion, and next refers to the Appropriation Acts of 1910, by which one appropriation of $241,725 "to salaries, building and maintenance of fish breeding establishments" and another for $80,575 alike thereto, had been made and then refers to the report of the Auditor-General for the fiscal year 1910-1911 ending March 31, 1911, which shews, he says, that $101,572.34 of this appropriation was not used.

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I assume this is all that can be found, and it falls very far short of anything that by implications of the most liberal kind could extend to the purchase by the Minister of a property worth nearly $200,000 if the award is right.

There is no express authority to be found anywhere in these statutes relative to anything of that magnitude.

The Act, c. 44 of the R.S.C. 1906, defines the Minister's duties and powers and they, neither expressly, nor by implication, authorize the acquisition of such a costly property.

What he proposed to buy was a license of occupation for 21 years issued by the Province of Ontario to have the effect of a lease of certain parcels of land covered by water, for which $50 a year was to be paid by the licensee.

I can easily see authority to the Minister implied in the Act I have referred to enabling him to deal with what looked like a routine transaction even assuming the licensee were given double or treble what was apparently involved and the personal property that it was proposed to buy.

But when in the mind of the licensee and some of the arbitrators it became apparent that for some reason or other the transaction was going to result in one of such magnitude as seemed to transcend anything the Minister could reasonably have anticipated, he found his way out by revoking the authority given and properly did so if not bound irrevocably by the submission.

It is quite true he did not expressly ground it on the want of authority, but upon mistake on the part of some of the arbitrators as to the scope of the submission and what was intended thereby, which is perhaps another way of saying so.

I have, however, no hesitation in coming to the conclusion that if the transaction involved in the award was of the magnitude it indicates, there never was authority in any one on behalf of the respondent to bind him by a submission of that kind, the arbitrators presumed to find in it, and hence the proceeding is null.

I am not overlooking the fact that Ministers every day rightly deal with what involves far more than in question herein. But the authority of some statute always has to be relied upon in the last analysis; or their conduct and contracts on behalf of respondent must be ratified by parliament.

And when it comes to a question of routine transactions each

case must stand on its own merits as to whether or not it falls within the scope of what may reasonably be held to be of that character. And it must be borne in mind that even as regards contracts made by a Minister in respondent's name or on his behalf in the course of the routine discharge of duty it rests, or should rest, upon the express provision of some statute, or in the necessary implications found therein.

That is recognized in the order for damages to be assessed which has been made herein by the trial judge.

Lest, however, this vulgar mode of looking at such things should be considered as an unwarrantable assumption of the limitations of or a repudiation of the existence of the Royal prerogative, a vital force in which in the eyes of some, in regard to affairs of state at least, we must be held to live and move and have our being, let us consider the legal aspects involved from that point of view.

Let it be observed that no one in argument impugned the doctrine of the common law, as laid down by the trial judge, that it was quite competent for respondent to have withdrawn from such a submission.

Reliance is placed upon the provisions of the Ontario Arbitration Act. Indeed the appellant's counsel seemed to rest his entire case thereon and the implications in the provisions of the Exchequer Court Act.

There seems to me to be assumed in that argument an interpretation of the provisions of the said Arbitration Act, which is, by no means, obvious, on close examination thereof, in relation to the old well-established rule, generally speaking, in the construction of Acts of Parliament, that the King is not included unless there are words to that effect.

The Arbitration Act in itself does include the King in these terms:—

S. 3:—This Act shall apply to an arbitration to which His Majesty is a party.

If that had been passed in the like legislation enacted by the Dominion Parliament then there would have been an end of argument on the point.

But can we for a moment assume that the local legislature intended thereby to include the Crown on behalf of the Dominion

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or, for that matter, on behalf of the Crown in England or elsewhere in many parts of the Empire where it stands for many varying shades of meaning in relation to the Royal prerogative?

I cannot think so or impute to the legislature any intention to go beyond what it was entitled to enact in relation to, and to be acting only within its proper sphere of activity.

The inquiring mind may see how this distribution of the Royal prerogative in the federal system has been worked out in other regards by the Judicial Committee of the Privy Council in the case of the *Bonanza Creek Co.* v. *The King*, 26 D.L.R. 273, [1916] 1 A.C. 566, at 286 *et seq.*

And when we turn to the Interpretation Act of the province, 7 Edw. VII. c. 2, we find the following in s. 7 (5):—

> The words "His Majesty," "Her Majesty," "The King," "The Queen," or "The Crown," shall mean the Sovereign of the United Kingdom of Great Britain and Ireland for the time being.

S. 7 (53) of that Act provides:—

> No Act or enactment shall affect in any manner the rights of His Majesty, his heirs or successors, unless it is expressly stated therein that His Majesty shall be bound thereby.

Surely these provisions can only mean in relation to that which, as a whole, relative to its own powers the legislature was entitled to speak. If so then the enactment relied upon can only have relation to submissions in which His Majesty on behalf of the province might happen to be an actor.

I had occasion in the recent case of *Hamilton* v. *The King*, 35 D.L.R. 226, 54 Can. S.C.R. 331, to consider the possible application of Ontario Statutes of Limitation expressly made to bind the Crown, and formed a decided impression that they never could have been intended to extend to cover the case of a like question arising between the Crown and a subject relative to property held by the Crown on behalf of the Dominion and claimed to have been acquired by His Majesty's subjects by virtue of the Statutes of Limitation.

The more I have considered the matter the more I see nothing but confusion likely to arise in defining judicially the relative rights of the Dominion and the provinces by assuming legislation of either in this regard in attempting to fasten on the other its own view of the prerogative.

Again this Arbitration Act evidently was intended to work out

the solution of litigious questions. And to carry into effect the principle contended for in its widest possible extent, would produce some curious results which I venture to think were neither intended nor expected.

For example; why was it not followed up by this appellant with the legal machinery therein provided to enforce it? I imagine it must have been because, if ever relied upon, it was concluded it would not stand such a strain. I must conclude it never was intended to be and hence is not applicable to a submission between respondent on behalf of the Dominion and a subject.

Properly speaking this submission was only intended for an appraisement or valuation but unfortunately in law as laid down by Sir Alexander Cockburn in *In Re Hopper*, L.R. 2 Q.B. 367, at 373, the terms of the submission having contemplated the examination of witnesses and a judicial investigation and determination it must be held to be a submission in arbitration. And again I am tempted to ask by what authority? Needless, however, in my view to pursue that inquiry.

The other ground taken by appellant as to the applicability of the Act by means of the Exchequer Court Act falls with that view I have expressed if sound.

The only possible part of the Exchequer Court Act, s. 20, applicable herein, is sub-s. (*d*), which is as follows:—

(*d*) Every claim against the Crown arising under any law of Canada or any regulation made by the Governor in Council.

It will be observed that the first obstacle in appellant's way is the meaning of the ambiguous expression "any law of Canada" which I may say has never yet been determined though considered in the case of *Ryder* v. *The King*, 36 Can. S.C.R. 462, and other cases but got in that case from the majority of this court an interpretation tending to narrow its operation and defeat such contentions as appellant sets up herein.

In the next place, if my view of the Arbitration Act be correct, it is not a law of "any part of Canada" in such way as to help appellant, being limited by its very terms to the possible cases of submission by the Crown on behalf of the province and not capable of extension to any other case where the Crown is concerned.

I think the appeal should be dismissed with costs.

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DUFF, J.:—The appeal should be dismissed with costs.

ANGLIN, J.:—The Crown has not appealed against the decision of the Exchequer Court holding it answerable to the suppliant in damages for breach of a contract to purchase certain fishing rights held by him.

The suppliant, however, not content with this relief, seeks to have it determined that the Crown is bound by an alleged award as to the purchase price (which the agreement stipulated should be fixed by arbitration) made, after notice of revocation of the authority of the arbitrators had been given on its behalf, by two of the three arbitrators appointed to determine it.

The Crown maintains its right to revoke the authority of an arbitrator before the award has actually been made; the appellant denies that right.

He contends that the liability of the Crown under the Exchequer Court Act is to be determined according to the law of the province in which the cause of action arises; that its liability is the same as would be that of a subject under like circumstances; and that the Ontario Arbitration Act (9 Edw. VII. c. 35; R.S.O. 1914, c. 65), which takes away the right of revocation and is made applicable in explicit terms to "His Majesty," defined by the "Interpretation Act" as meaning, "the Sovereign of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the seas (7 Edw. VII. c. 2, s. 7 (5))," applies to the Crown in right of the Dominion.

The cause of action arose and all the proceedings have taken place in Ontario, and no doubt the construction and legal effect of a contract made and to be performed in any province of Canada must ordinarily be determined in the Exchequer Court according to the general law of that province.

There are, however, two fallacies in the appellant's contention —one the assumption that liability *ex contractu* of the Crown in right of the Dominion depends upon the Exchequer Court Act; the other, that a series of decisions, culminating in *The King* v. *Desrosiers*, 41 Can. S.C.R. 71, holding that a liability of the Crown imposed by clauses of s. 20 of that Act is the same as would be that of a subject under like circumstances in the province in which the cause of action arises, applies to cases falling within s. 19. This latter provision (originally found in s. 58 of 38 Vict. c. 11)

does not create or impose new liabilities. Recognizing liabilities (*in posse*) of the Crown already existing, it confers exclusive jurisdiction in respect of them upon the Exchequer Court and regulates the remedy and relief to be administered. In regard to the matters dealt with by this section there is no ground for holding that the Crown thereby renounced whatever prerogative privileges it had theretofore enjoyed and submitted its rights and obligations to be determined and disposed of by the Court according to the law applicable in like cases between subject and subject. The reasons for which it was so held in regard to liabilities imposed by s. 20 are stated by Strong, C.J., in the earlier part of his dissenting judgment in *The City of Quebec* v. *The Queen*, 24 Can. S.C.R. 420; see, too, *The Queen* v. *Filion*, 24 Can. S.C.R. 482; *The King* v. *Armstrong*, 40 Can. S.C.R. 229; and *The King* v. *Desrosiers*, 41 Can. S.C.R. 71. No other law than that applicable between subject and subject was indicated in the Exchequer Court Act as that by which these newly created liabilities should be determined. Placing upon that section a "wide and liberal"—a "beneficial construction"—"the construction calculated to advance the rights of the subject by giving him an extended remedy," —it was the view of the former chief justice, and is now the established jurisprudence of this court, that it was thereby "not intended merely to give a new remedy in respect of some pre-existing liability of the Crown but that it was intended to impose a liability and confer a jurisdiction by which the remedy for such new liability might be administered in every case in which a claim was made against the Crown, which, according to the existing general law, applicable as between subject and subject, would be cognizable by the courts."

But, since s. 19 merely recognizes pre-existing liabilities, while responsibility in cases falling within it must, unless otherwise provided by contract or statute binding the Crown in right of the Dominion, be determined according to the law of the province in which the cause of action arises, it is not that law as applicable between subject and subject, but the general law relating to the subject-matter applicable to the Crown in right of the Dominion which governs. That law in the Province of Ontario is the English common law except in so far as it has been modified by statute binding the Crown in right of the Dominion.

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By the English common law, while an agreement to submit any matter to arbitration has always been irrevocable like any other contract, and the breach of it entails liability for damages, the authority of the arbitrator, because in its nature revocable, might be withdrawn by any party to the submission at any time before the award was made, even though declared irrevocable by express words in the agreement. Legislative action alone could render it irrevocable. In England it was first sought to control this power of revocation by a statutory provision that every submission to arbitration might be made a rule of court (9 & 10 Wm. III. c. 15), thus subjecting the party who might attempt to escape from the carrying it out to the penalties of contempt, but still leaving him the actual power of revocation. By the Act 3 & 4 Wm. IV. c. 42, s. 39, it was, however, expressly provided that the authority of an arbitrator under a submission containing a provision that it might be made a rule of court should not be revocable without the leave of the court. By 17 & 18 Vict. c. 125, s. 17, it was further enacted that every submission might be made a rule of court, unless a contrary intention should appear. It was not until 1889 that the term or condition of irrevocability, then declared to attach to every submission which did not provide otherwise, was also made applicable to the Crown (52 & 53 Vict. c. 49, ss. 1 & 23).

There is no Dominion statute in point.

The introduction of English law into Upper Canada in 1792 carried with it the Imperial statute 9 & 10 Wm. III. c. 15. None of the later Imperial legislation regarding arbitrations extends to Ontario. The provincial statute, 7 Wm. IV. c. 3, s. 29, however, is similar in its terms to the Imperial statute 3 & 4 Wm. IV. c. 42, s. 39, and, since 1859 (C.S.U.C., c. 22, s. 179), it has been substantially the law of Ontario, as is now provided by s. 5 of the Arbitration Act (R.S.O. 1914, c. 65), that the authority of an arbitrator appointed under a submission, which does not contain a stipulation to the contrary, is irrevocable, "except by leave of the court," and that every submission shall have "the same effect as if it had been made an order of the court."

The application of this section of the Arbitration Act was first extended to the Crown in 1897 by an amendment declaring that that statute "shall apply to any arbitration to which His

Majesty is a party" (60 Vict. c. 16, s. 46; R.S.O. 1914, c. 65, s. 3).

Until that provision was enacted, although a subject could not do so, the Crown in right of the province was at liberty to revoke the authority of an arbitrator appointed under a submission to which it was a party. Of course the Crown in right of the Dominion had the same right and, unless it has been taken away by the provincial statute of 1897, it still exists.

S. 5 of the Ontario Arbitration Act, were it applicable and *intra vires*, would compel the Crown in right of the Dominion, if it would preserve its right of revocation, to safeguard that right by explicit reservation in every submission by it to arbitration in respect of any difference in regard to property or rights in Ontario. If that were the purview of s. 3 of the Ontario Arbitration Act it would, in my opinion, be *pro tanto ultra vires*. Provincial legislation cannot *proprio vigore* take away or abridge any privilege of the Crown in right of the Dominion. An interpretation that would render it *ultra vires* should, of course, be placed upon a statute only if unavoidable.

That it was never intended that s. 5 of the Ontario Arbitration Act should apply to the Crown in right of the Dominion is reasonably clear from its provisions. Thus, if applicable, it would require the Crown in right of the Dominion should it desire to withdraw from a submission, in the absence of an express reservation therein of that right, to seek the leave of the provincial Supreme Court (s. 2 (*a*); Interpretation Act, s. 20 (*dd*)), and it would purport, since the submission would "have the same effect as if it had been made an order of court" (*i.e.*, of the Supreme Court of Ontario), to subject the Crown in right of the Dominion to the jurisdiction of that court, although by s. 19 of the Exchequer Court Act the Dominion Parliament has given to the Exchequer Court of Canada "exclusive original jurisdiction in all cases . . . in which the claim arises out of a contract entered into by or on behalf of the Crown (in right of the Dominion)."

The provincial legislature never intended to attempt anything of the sort.

I think it may be accepted as a safe rule of construction that a reference to the Crown in a provincial statute shall be taken to

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be to the Crown in right of the province only, unless the statute in express terms or by necessary intendment makes it clear that the reference is to the Crown in some other sense. This would seem to be a corollary of the rule that the Crown is not bound by a statute unless named in it.

It does not at all follow that, because the liability of the Crown in right of the Dominion is to be determined by the laws of the province where the cause of action arose, that liability is governed by a provincial statute made applicable to the Crown in right of the province, since it is by the provincial law only so far as applicable to it that the liability of the Crown in right of the Dominion is governed. Nor is it a reasonable or proper inference that by executing a submission to arbitration in regard to a matter arising in any province of Canada the Crown in right of the Dominion intended to become bound in respect thereof by a provincial statute otherwise not applicable to it.

I would dismiss the appeal. *Appeal dismissed.*

Annotation.

ANNOTATION.

The "Crown."

In the principal case all the judges apparently concur in the proposition thus expressed by Anglin, J., at 40 D.L.R. 353 at 365, 56 Can. S.C.R. 176 at 194,:—

"Provincial legislation cannot *proprio vigore* take away or abridge any privilege of the Crown in right of the Dominion."

The proposition, indeed, seems obviously true, and it is a good many years since the same view was expressed by the Minister of Justice, when, with reference to a British Columbia Act, he said that he apprehended that:—

"It is incompetent to a provincial legislature to so legislate as to impose a liability upon the Crown in right of Canada and that in so far as this Act is intended to have that effect, it is *ultra vires*": Prov. Legisl. 1901-3, pp. 83-4.

If the principal case were carried to the Privy Council we might expect a very interesting judgment upon "the Crown" and its relation to colonial legislatures—a matter which does not seem to have been discussed in detail by any of the standard writers on the constitutional law of the British Empire.

So far back as *Calvin's* case, decided in 1608, 7 Rep. 27 b., we have it decided that the Crown is one and indivisible, and cannot be severed into as many distinct kingships as there are kingdoms. And so it was held in that case that notwithstanding the existence of two separate kingdoms (England and Scotland) at the date of the decision, yet every subject of James I., born after his accession to the throne of England in 1603, no matter in which country he was born, was a subject of both. This was because allegiance is due to the King as a person; and the Lord Chancellor of that day, with the unanimous concurrence of twelve other judges, held that a Scottish born subject of the King was no alien in England. And so in *Gavin Gibson and Co.* v. *Gibson*, [1913] 3 K.B. 379, Atkin, J., pointed out that the effect of *Calvin's* case was to establish that throughout the Empire the King acts

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everywhere as the same individual, and that all subjects everywhere are his subjects, and not those of any particular State or colony; that a subject of the King in one part of the Empire is equally his subject elsewhere.

In the last case there was no question of legislation—of the power of this or that legislature to bind the Crown—as, *e.g.*, to bind the King to accept a certain man as a subject of his. Where there is no such question of legislative power involved, the unity of the Crown came neatly out, as Mr. Keith observes in his great work on Responsible Government in the Dominions, vol. 3, p. 1456, in *Williams* v. *Howarth*, [1905] A.C. 551. In that case the New South Wales Government were sued in a New South Wales court, on a contract to pay a soldier ten shillings a day for service in South Africa. The Imperial Government had paid him four shillings and sixpence a day, and the New South Wales Government claimed to set this amount off against the total claim. The Privy Council held that this could be done, and they stated that in such a case there could be no difference asserted between the Crown in its several positions as the Crown in the United Kingdom and the Crown in the State of New South Wales. As the Lord Chancellor said, p. 554:—

"The plaintiff was in the service of the Crown, and his payment was made to the Crown. Whether the money by which he was to be paid was to be found by the colony or the Mother Country was not a matter which could in any way affect his relation to his employer, the Crown."

When it is a case of legislation binding the Crown, other considerations arise. And so in the very recent case in England of *Rex* v. *Francis, Ex parte Markwald* (1918), 34 T.L.R. 273, a Divisional Court held that an alien who, born in Berlin, enters Australia and is duly granted there a certificate of naturalization under the powers conferred by the Commonwealth Constitution Act, 1900, is a subject of the King only in Australia, and remains an alien in other parts of the King's Empire, including the United Kingdom. The local legislature could not bind the King to accept a man as a subject of his, except within the territorial limits of its jurisdiction.

The fact is we are forced by constitutional circumstances—or at all events it is convenient under the circumstances of the Constitution of the British Empire as it exists to-day—to draw a distinction between "the King" and "the Crown." It is quite true, as Mr. Keith, quoting Lord Haldane, says, in his recent work on Imperial Unity and the Dominions, p. 385, that "the King is not a local but an Imperial institution, and is present in each of his dominions, and represented by his Ministers"; who in their turn, are, under responsible government, controlled by the local legislatures. It is also true as said by Pollock and Maitland in their History of English Law, 2nd ed., p. 515, that:—

"There is something anomalous in the ascription to a King of powers that he may not lawfully exercise in person—something which suggests that our "King" is rather a figment of law than a man."

Perhaps, instead of calling the King "a figment of law," it is preferable to say that "the Crown"—that "magic circlet," as the same learned writers somewhere call it—is in our constitutional law used as a symbol. When we wish to speak of the King, not as a man, but as a symbol, we usually employ the term "the Crown."

We speak of a statute not binding "the Crown"—we do not say "the

Annotation. King"—except by express words or necessary intendment. "The Crown," in such use of the expression, is the symbol of executive power.

And so in Halsbury's Laws of England, vol. 6., p. 425, it is said:—

"Where representative or representative and responsible government has been conferred upon a colony . . . the prerogatives in relation to government become assimilated to those exercisable by the Crown with regard to the Imperial Government, though delegated to the governors of the various colonies."

And again, vol. 27, p. 166:—

"When we talk of the Crown being bound by the provisions of a statute, if directly or by necessary implication referred to, "the Crown" means not only the King personally, but, also, the officers of State when acting on behalf of the Crown in discharge of executive duties, whether in the United Kingdom or anywhere within British Dominions."

Now a gift of legislative power carries with it a corresponding executive power, even where such executive power is of a prerogative character, unless there be some restraining enactment. The authorities are collected in Canada's Federal System, pp. 24, 25; and see *Bonanza Creek* case, 26 D.L.R. 273, [1916] 1 A.C. 566. There is no such restraining enactment in the case of our provincial legislatures, except that they may not affect the office of Lieutenant-Governor: B.N.A. Act, s. 92, sub-sec. 1. Consequently our provincial legislatures can in the matters and within the territorial limits to which their legislative power extends, affect the executive power. In other words they can bind "the Crown" so far as it symbolizes provincial executive power, but no further. They cannot bind "the Crown" so far as it symbolizes executive power over the Dominion as a whole; or so far as it symbolizes executive power over the United Kingdom; or so far as it symbolizes executive power over the Empire as a whole, where there has been a reserve of such executive power in granting self-government to the Dominions, or where statutes of the Imperial Parliament extending to the Empire generally permit or require the exercise of such Imperial power.

As the Judges of the Exchequer Chamber say in *Phillips* v. *Eyre* (1870), L.R. 6 Q.B. 1, 20:—

"A confirmed Act of the local legislature lawfully constituted, whether in a settled or a conquered colony, has *as to matters within its competence and the limits of its jurisdiction*, the operation and force of sovereign legislation, though subject to be controlled by the Imperial Parliament."

The Executive, of course, comprises the King and his Ministers, the chief of which form the Cabinet: Anson's Law and Custom of the Constitution, 11th ed., vol. 1, p. 41.

The question of the right of a Dominion or provincial legislature to interfere with the King's prerogative as the fountain of justice, to allow an appeal from the local courts to the Judicial Committee of the Privy Council, is subject to some special considerations. Is this a local or an Imperial exercise of prerogative?

The Privy Council has not, apparently, yet passed upon the effect of s. 1025 of the Dominion Criminal Code, R.S.C. 1906, c. 146, which purports to forbid appeals to it. It was unnecessary for them to do so in *Toronto R. Co.* v. *The King*, 38 D.L.R. 537, [1917] A.C. 630. Keith, Imperial Unity and the Dominions, pp. 367-9, questions the power, but mainly, if not alto-

gether, because of the provisions of Imp. 7-8 Vict. c. 69, by which, he thinks, the power to prevent the operation of the prerogative is taken away from nearly all Dominion legislatures. See also his Responsible Government in the Dominions, vol. 3, pp. 1357 *et seq.* **Annotation.**

Space will not permit further discussion of the matter here. Reference may be made, however, in respect to it, to *Cuvillier* v. *Aylwin* (1832), 2 Knapp P.C. 72; *Re Wi Matua's Will*, [1908] A.C. 448; *Cushing* v. *Dupuy* (1880), 5 App. Cas. 469; Clement's Law of the Constitution, 3rd ed., pp. 157-164.

In any event, it is an academic question in the main. John Bull's sons have grown into big boys now, and the parental authority cannot go beyond gentle suasion. If any self-governing Dominion expressed a real desire to do away with the appeal from its Courts to the Privy Council, there can be no doubt that the right so to do would not be disputed by the Imperial authorities.

Toronto. A. H. F. LEFROY.

COSSEY v. McMANUS.

N. S.
S. C.

Nova Scotia Supreme Court, Harris, C.J., and Longley, Chisholm, and Mellish, JJ. April 5, 1918.

BILLS AND NOTES (§ VI A—150)—BILL OF EXCHANGE—ACCEPTED—DISHONOURED—RETURNED TO DRAWER—DRAWER'S RIGHTS.

A drawer of a bill of exchange made payable to the order of a third party, and duly accepted, can, upon the dishonour and return of the bill, maintain an action against the acceptor in his own name, without first obtaining the indorsement of the payee.

APPEAL from the judgment of Drysdale, J., in favour of plaintiff in an action on a bill drawn by plaintiff on defendant, in favour of the Royal Bank of Canada, and placed by plaintiff in the hands of the bank for acceptance and collection. The bill was accepted by defendant but was dishonoured at maturity and was thereupon returned by the bank to plaintiff who sued upon it without having obtained the indorsement of the bank. Statement.

HARRIS, C.J.:—Ever since 1747, when the Court of King's Bench decided the case of *Parminter* v. *Symons* and an appeal from it was dismissed by the House of Lords, or the High Court of Parliament as it was then called (2 Bro's P.C. 43), 1 E.R. 780, it has been the law of England that where a bill was drawn by one person upon and accepted by another, payable to a third person, and the drawer was compelled by the failure of the drawee to pay the holder, the drawer could without the indorsement of the holder recover on the bill in an action against the drawee. Harris, C.J.

The decision of the Court of King's Bench is thus reported in 2 Bro's P.C., at pp. 46-7:—

The court after solemn argument, and time taken to consider, in Hilary Term was unanimously of opinion . . . that by the custom of merchants

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the defendants were bound by their acceptance and that an indorsement by the payee was not necessary; and the rather for that in the present case the plaintiff had made title in another way, viz: by payment of the money, and therefore gave judgment for the plaintiff in the action.

The House of Lords affirmed the judgment of the Court of King's Bench.

We find this same rule incorporated in s. 140 of the Bills of Exchange Act.

Notwithstanding this we are asked to say that where a bill is drawn by a merchant upon his customer in favour of a bank and not discounted but deposited with the bank for collection and accepted but not paid, the merchant cannot on its return sue on the bill without the indorsement of the bank.

No doubt the custom by merchants of drawing drafts upon their customers and making the drafts payable to their bankers through whom the drafts are sent for acceptance and collection is of modern growth, but no reason can be suggested for requiring the indorsement of the bank in such a case which would not have applied with equal or greater force where the draft had been discounted by the bank and then paid by the drawer.

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

Longley, J.

LONGLEY, J.:—I concur with Chisholm, J.

Chisholm, J.

CHISHOLM, J.:—This is an action on a bill of exchange drawn by the plaintiffs upon the defendant payable to the order of the Royal Bank of Canada at Halifax, N.S., and accepted by the defendant payable at said bank. The bill was handed by the plaintiffs to the bank with instructions to procure the defendant's acceptance and, in the event of acceptance and dishonour, to be returned to the plaintiffs or, to adopt the very language of the instructions, to be handed to plaintiffs' solicitors for suit. The bill was not discounted; it was simply delivered to the bank for collection. It was dishonoured after acceptance, and upon dishonour, it was returned to the plaintiffs, but without any indorsement by the bank. The plaintiff sued on the bill, adopting in their statement of claim the form given in Bullen and Leake's Precedents of Pleadings (7th ed.) 82.

The defence is that the plaintiffs are not the holders of the bill, and the sole question for determination is whether the drawer of a bill of exchange made payable to the order of a third party and duly accepted, can, upon the dishonour and return of the bill,

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maintain an action against the acceptor in his own name, without first obtaining the indorsement of the payee.

The trial judge decided in favour of the plaintiffs, being of opinion that the case was governed by s. 140 (*a*) of the Bills of Exchange Act. This appeal is from his decision.

I am of opinion that the decision of the trial judge must be affirmed. It is not disputed that if the bill had been discounted, and the drawer had received the proceeds, and afterwards, when it was dishonoured, had taken up the bill and repaid the bank he would be entitled to maintain his action. It was so decided as far back as 1748 in the House of Lords in the case of *Parminter* v. *Symons*, 2 Bro. P.C. 43, 1 E.R. 780, which held that the drawer of a bill accepted generally and protested by the payee for non-payment and afterwards by himself, could, in his own name, and without any previous assignment or indorsement from the payee, maintain an action against the acceptor. The following is an extract from the report:—

> The court (King's Bench) after solemn argument, and time taken to consider, in Hilary Term, 1747, was unanimously of opinion as to the first objection, that the plaintiff's action was well brought; that by the custom of merchants, the defendants were bound by their acceptance; and that an indorsement by the payee was not necessary; and the rather for that in the present case the plaintiff had made title another way, viz: by payment of the money.

And further:—

> The acceptance of a bill of exchange amounts to a promise in law to pay, and this action of assumpsit against the acceptor is founded upon good consideration. . . . Every bill of exchange imports a command to the drawee to pay; and his acceptance is not only an admission of effects or money in his hands sufficient to pay, but it is an undertaking by the acceptor as well with respect to the drawer as the payee, to pay the bill; and every undertaker is bound by law to perform his engagement.

The judgment of the King's Bench was accordingly affirmed.

There are other cases, English as well as American, to the same effect. S. 140 (*a*) of the Bills of Exchange Act is a codification of the law as decided by these cases. It is as follows:—

> 140. Subject to the provisions aforesaid as to an accommodation bill, when a bill is paid by the drawer or an indorser, it is not discharged; but,—
>
> (*a*) Where a bill payable to, or to the order of, a third party is paid by the drawer, the drawer may enforce payment thereof against the acceptor, but may not re-issue the bill.

If the drawer can maintain an action in his own name where he has negotiated the bill and afterwards recovered back his prop-

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erty in it by repayment, are not the reasons in favour of his right to maintain an action even stronger where he has not negotiated it, has not attempted to part with his property in it, but has merely passed it over to the payee for collection? It would seem to me to be so.

The usual way to transfer property in a negotiable instrument is by endorsement; but it is not the only way. The law merchant gives these instruments in many respect the character and currency of money; and transfer by indorsement being not only an easy and easily authenticated mode of transfer but also a mode by which in certain cases a transferee can obtain a better title than his transferor himself had, an indorsement may have been regarded as essential in all cases.

But property in a negotiable instrument could be transferred by assignment and delivery, and the rights of the transferee could be fully protected in equity: and the transfer could be made by word of mouth accompanied by delivery.

The following cases establish the right to make a transfer in that way: *Whistler* v. *Forster*, 14 C.B.N.S. 248, (per Erle, C.J.) 143 E.R. 441; Daniels on Negotiable Instruments, s. 664 (*a*); Story on Bills of Exchange, s. 201, note; 2 Randolph on Commercial Paper, s. 788; 3 Randolph on Commercial Paper, s. 1877; *Osgood* v. *Artt*, 17 Fed.R. 575 (*per* Horlan, J.); *Hughes* v. *Nelson*, 29 N.J.Eq. 547 (*per* Van Fleet, V-C.); Story's Equity Jurisprudence, s. 1047; *Buntin* v. *Georgen*, 19 Gr. (Ont.) 168, (*per* Spragge, V-C.); *Durham* v. *Robertson*, [1898] 1 Q.B. 765, at 769 (per Chitty, L.J.); *Dixon* v. *Buell*, 21 Ill. 203.

It is not necessary, however, in view of the decision of *Parminter* v. *Symons*, *supra*, and the provisions of s. 140 (*a*) of the Act, as well as the view I have taken that the plaintiffs never parted with their property in the bill, to discuss the question upon which there is so much learning in the books, whether the plaintiffs, at the commencement of the action, were the legal holders or the equitable holders of the bill.

Counsel contended in support of his argument that when the defendant accepted the bill the payee may have been under some liability to him, and that the payee may have relied, when he accepted the bill, upon such liability in enabling him to make payment on the maturity of the bill. In other words, when the

bill was returned to the plaintiffs it was subject to all the equities, burdens and offsets existing between the drawee and the payee.

I do not think it is necessary for us in this action to decide that the bill was subject to such defences and equities. If any such equities could have been set up, we would have expected the defendant to raise them. It is not alleged that they exist in this case. It will be time enough to decide whether they can be maintained when the actual case arises.

I think the appeal should be dismissed with costs.

MELLISH, J.:—I think this appeal should be dismissed with costs. The bill sued on was drawn by plaintiff on defendant payable to the order of the Royal Bank and accepted. The bill was placed by the drawer with the bank for collection but was dishonoured at maturity and returned to the plaintiff without indorsement. It is contended that the plaintiff cannot recover because it is not indorsed by the payee.

Under the Code, which I think is confirmatory of the pre-existing law, the acceptor by accepting the bill undertakes to pay it according to its tenor. This undertaking is, I think, enforceable by the drawer who is the rightful holder of the bill, notwithstanding the fact that it has not been indorsed. The bank merely held it on plaintiff's behalf for collection and defendant has failed to perform his contract.

Appeal dismissed.

SCOWN v. HERALD PUBLISHING Co.

Supreme Court of Canada, Fitzpatrick, C.J., and Idington, Anglin and Brodeur, JJ. March 5, 1918.

LIBEL AND SLANDER (§ I—1)—NEWSPAPER—PROPRIETOR AND PUBLISHER—LIBEL AND SLANDER ACT.

A publishing company which is both proprietor and publisher of a newspaper, substantially complies with s. 15 of the Libel and Slander Act (1913 Alta. c. 12, 2nd sess.) by inserting a notice at the head of the editorials: "The . . . published at . . . by the . . . publishing company."

[*Scown* v. *Herald Publishing Co.*, 38 D.L.R. 43, affirmed.]

APPEAL from the decision of the Appellate Division of the Supreme Court of Alberta, 38 D.L.R. 43, reversing the judgment at the trial in favour of the plaintiff. Affirmed.

The only question raised on this appeal is whether or not the statement in the "Herald" that it was "Published at Calgary,

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Statement.

Canada, by The 'Herald' Publishing Co." was a compliance with the requirements of s. 15 of the Libel and Slander Act that "the name of the proprietor and publisher and address of publication" shall be stated. The appellant contends that the fact of the company being both proprietor and publisher should appear and that the address of publication should be more specific. The trial judge agreed with this but was reversed on appeal.

Geo. H. Ross, K.C., and *Barron*, for appellant.

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

Fitzpatrick, C.J.

FITZPATRICK, C.J.:—Plaintiff (appellant) recovered $300 damages for libel. It is agreed that the only question on this appeal is whether the respondent company can claim the protection which is given by the Libel and Slander Act (Alta. 1913, c. 12, 2nd sess.) in view of the provision of s. 15 (1), which is as follows:—

No defendant shall be entitled to the benefit of ss. 7 and 13 of this Act, unless the name of the proprietor and publisher and address of publication is stated either at the head of the editorials or on the front page of the newspaper.

It is admitted and agreed that the only words published at the head of the editorials or on the front page of the newspaper in question approaching the requirements of the said s. 15 were as follows:—

THE HERALD.

Established 1883, Evening and Weekly. Published at Calgary, Canada, by The Herald Publishing Co. Limited.

Ives, J., the trial judge, concluded that s. 15 was not complied with, as the name of the proprietor was not stated.

The majority of the appeal court (Stuart, J., dissenting) reversed the judgment on the ground that "the stating the name of the publisher as is done in this case is stating the name of the proprietor as well."

I would dismiss the appeal because I agree with Anglin, J., where he says that the spirit of s. 15 was substantially complied with by the respondent.

Idington, J.

IDINGTON, J. (dissenting):—The question raised herein is whether s. 15 of the Alberta Libel and Slander Act was complied with by the respondent in publishing at the head of the editorials or on the front page of a newspaper by printing therein the following:—

THE HERALD.

Established 1883. Evening and Weekly. Published at Calgary, Canada, by The Herald Publishing Co. Limited.

If that was not a compliance with said section the appeal herein should be allowed and the judgment for the plaintiff at the trial restored.

Said s. 15 is as follows (See judgment of Fitzpatrick, C.J.):—

It so happens that in this instance the proprietor and publisher are identical, but, quite clearly, the proprietor may be and sometimes is an entirely different party from the publisher.

Such a thing has been known as the publisher being a man of straw used by a proprietor of substance as a tool for disseminating libels.

I think that possibly was within the range of vision of the draftsman of this Act which was designated to protect respectable newspaper proprietors and publishers and at the same time facilitate the enforcing of the legal remedies open to any one suffering at the hands of either such.

The clear intention was that every issue should contain the necessary information to enable any one so wronged to reach promptly and effectively the wrongdoer, whether proprietor or publisher. That intention might be frustrated by the courts holding, as the court below has, that only the name of the publisher need be printed as directed. And the mere accident that in this case the publisher happens to be also proprietor, does not meet the requirement of the statute.

It obviously was intended to furnish full information at a glance to be read by all concerned without being under the necessity of going to the expense of instituting legal proceedings to obtain it.

The proprietor might be liable in damages as a publisher for printing and giving to his ostensible publisher copies of the publication, or might be liable to be enjoined from continuing to print any defamatory matter regarding some person whom he desired to attack in that way.

This legislation to ameliorate the conditions of the public press imposes a very simple price as preliminary to enjoyment thereof.

It is idle to point to the use of the singular number of the word name as indicative of any legislative purpose to enable a purchaser thereby to fulfil the requirements of the statute; for the same sort of reasoning would justify the publication of only one name out of many proprietors or publishers. My opinion is that the respondent failed to comply with the law. I am also far from thinking

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that "the address of the publication" required, is satisfied by the words, "Calgary, Canada." It might have been quite sufficient in 1883.

It is not only the well-known and highly respectable newspaper, such as I assume that in question herein to be, that we must keep in view, but also the possibly obscure and disreputable publication that may emanate in a large city from some place almost, if not altogether, unknown and difficult to discover, that has to be considered in determining the true construction to be put upon an Act of this kind.

This substitute for registration required by legislation elsewhere, if lived up to, will, I suspect, be well worth while making it so full and clear that no complaint is likely to arise.

I think the appeal should be allowed with costs and the judgment entered by Ives, J., be restored.

Anglin, J.

ANGLIN, J.:—It is conceded that if the defendant has complied with s. 15 of the Libel and Slander Act of Alberta (c. 12, of 1913, 2nd sess.) this action has been rightly dismissed by the Appellate Division for non-compliance by the plaintiff with s. 7 of the same statute.

At the head of the editorials in the defendant's newspaper there was printed:—

> The Herald. Established in 1883. Evening and Weekly. Published at Calgary, Canada, by The Herald Publishing Company Limited.

It is common ground that The "Herald" Publishing Company is both publisher and proprietor of the "Herald."

The appellant objects that "the address of publication" is not given with sufficient particularity, and that the fact that The "Herald" Publishing Co. is the proprietor of the newspaper as well as its publisher is not stated.

The address as given would be sufficient for post office purposes and it supplies the information necessary to enable any person affected to comply with s. 7 of the statute. I agree with the majority of the Judges of the Appellate Division that the objection to it should not prevail.

It would almost seem from the use in s. 15 of the word "name" in the singular and the non-repetition of the preposition and article "of the" that the legislature did not contemplate or provide for the case where the publisher and the proprietor of a newspaper

should be other than the same person or body. The fact that only one address—that of publication—is required to be given tends to strengthen this view. Yet the proper construction may be "the name (or names) of the proprietor and publisher," or *reddendo singula singulis*, "the name of the proprietor and (the name of the) publisher," and when, as may happen, the proprietor and the publisher are different persons or bodies the spirit of s. 15 would not be satisfied or its purposes accomplished unless both names were stated.

It is contended for the respondent that, read literally, the statute prescribes merely the printing, in either of the two designated places, of "the name" of the publisher and proprietor. But that interpretation would seem to ignore the significance of the use of the word "stated" which implies more than the mere printing of the name. Moreover, while the printing of the name in prominent characters at the head of the editorials might, without more, afford some indication that it is that of the publisher and the proprietor of the newspaper, the mere printing of it in some inconspicuous part of the front page, as the statute permits, would not convey that information. I agree with Harvey, C.J., that the spirit of s. 15 would not be satisfied were the information that the name printed is that of the proprietor and publisher not furnished—at least substantially. It should not be overlooked, however, that it is by implication from the use of the word "stated" rather than because the statute explicitly so directs that we reach the view that this is its proper interpretation. Where, as here, the same person or body is both the proprietor and publisher, the spirit of the section, to which, in the absence of explicit direction, effect should be given, is, in my opinion, substantially and sufficiently complied with and its purpose is attained by the printing in either of the designated places of the statement that the newspaper is published by that person or body.

I would dismiss the appeal.

BRODEUR, J.:—I concur with Anglin, J.

Brodeur, J.

Appeal dismissed.

MAN.

C. A.

O'GRADY v. LECOMTE.

Manitoba Court of Appeal, Perdue, Cameron and Fullerton, JJ.A. May 13, 1918.

BILLS AND NOTES (§ I—1)—INSTRUMENT VALID ON FACE AS NOTE—INDEPENDENT MEMORANDUM WRITTEN AT BOTTOM—EFFECT.

An instrument which on its face complies with all the requirements of a valid promissory note is not invalidated as such by a memorandum written at the foot of the document, which constitutes an independent agreement relating to something to be performed immediately upon payment of the note.

Statement.

APPEAL from a judgment of Metcalfe, J., on a stated case asking for a declaration whether or not the document therein set forth was a promissory note. Reversed.

E. K. Williams, for appellant; *W. B. Towers*, for respondent.

Perdue, J.A.

PERDUE, J.A.:—This is an action on a promissory note. The note is partly printed and partly written and in its completed form is as follows:—

Winnipeg, 1st Decr., 1910.

On 15th Sept., 1911, without grace, after date I promise to pay to the order of O'Grady, Anderson and Co., Ltd., at the Bank of Nova Scotia, Winnipeg, the sum of Three thousand ..... /100 Dollars.
Value received. (Signed) Joseph Lecomte.
No.

Stock certificate for 50 shares Gas Traction Co. Ltd. attached to be surrendered on payment.

The note was indorsed to the order of the Bank of Nova Scotia by the payees, and indorsed by the bank to the plaintiff, without recourse.

The point of law to be decided came before Metcalfe, J., on a case stated to the Court of King's Bench, in which the following question was submitted to the Court: "Is the document a promissory note?" The judge answered the question in the negative and it now comes before this court on appeal from his decision.

Counsel for defendant relies upon *Dominion Bank* v. *Wiggins*, 21 A.R. (Ont.) 275; *Prescott* v. *Garland*, 34 N.B.R. 291; *Bank of Hamilton* v. *Gillies*, 12 Man. L.R. 495, and other "lien note" cases, where an agreement has been embodied in the note reserving in the vendor the title and right of ownership of the property for which the note was given until payment should be made; or some clause to a like effect.

The plaintiff's counsel points out that doubt has been raised as to the authority of the above decisions and cites the following cases in support of that contention: *Yates* v. *Evans*, 61 L.J.Q.B.

446; *Kirkwood* v. *Carroll*, [1903] 1 K.B. 531; *Merchants Bank* v. *Dunlop*, 9 Man. L.R. 623; *Robt. Bell Engine Co.* v. *Topolo*, 32 D.L.R. 77.

It does not appear to me to be necessary in this case to enter into a discussion of the decisions relating to the negotiability of "lien notes." The document in question differs widely from the ordinary lien note. Upon its face it complies with all the requirements of a valid promissory note under the Bills of Exchange Act: see s. 176. The memorandum written at the foot of the document does not in any way qualify the absolute nature of the document as a promissory note. There is still the unconditional promise of the maker to pay at a fixed time a sum certain in money to the order of a specified person (the body corporate which is the payee in the instrument being, for the purposes of the Act, a "person": R.S.C. (1906), c. 1, s. 34 (20)). Notwithstanding the memorandum, or anything contained in it, all the terms of the instrument will have to be performed by the signer just as if nothing had been underwritten on it.

The memorandum points to something which is quite apart from the promise contained in the note. The added words constitute an independent agreement which relates to something to be performed immediately upon the payment of the note or simultaneously therewith. A stock certificate has been attached to the note and is to be surrendered to the maker "on payment" of the note. Until the note is paid the maker has no right to ask for the certificate. When payment is made his right accrues to have the note with the attached stock certificate surrendered to him.

In *Yates* v. *Evans*, 61 L.J.Q.B. 446, a joint and several promissory note made by a principal and surety was payable by instalments. It contained a clause in the body of it and before the signatures of the makers, to the effect that time might be given to either maker without the consent of the other, and without prejudice to the rights of the holders to proceed against either party. It was held by Hawkins and Wills, JJ., that it was a good promissory note. This case was approved and followed by the Court of Appeal in *Kirkwood* v. *Carroll*, [1903] 1 K.B. 531, overruling *Kirkwood* v. *Smith*, [1896] 1 Q.B. 582.

S. 176 (3) of the Bills of Exchange Act declares that "a note is not invalid by reason only that it contains also a pledge of col-

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lateral security with authority to sell or dispose thereof." It seems to me that it may be implied from the instrument in this case and from the admission that the instrument was given for the price of the stock, that the stock certificate was attached as a pledge to secure the payment promised to be made on the date mentioned. In *Chesney* v. *St. John*, 4 A.R. (Ont.) 150, a mortgage on land had been given by the plaintiff to secure payment of $1,100, of which $200 had been paid, and the balance of $900 was payable in 9 equal annual instalments with interest; at the same time plaintiff gave the mortgagee 9 promissory notes for the payment of the instalments and interest. The first of these notes contained these additional words, "which when paid is to be endorsed on the mortgage bearing even date with this note." It was held by the Ontario Court of Appeal, following *Wise* v. *Charlton*, 4 Ad. & E. 786, 111 E.R. 979, that the instrument was a negotiable promissory note. See also *Fancourt* v. *Thorne*, 9 Q.B. 312, 115 E.R. 1293. These cases, decided before the framing of the Act, illustrate the meaning of sub.-s. 3. In *Central Bank of Canada* v. *Garland*, 20 O.R. 142, it was held that where collateral security is given with a promissory note, the right to such collateral goes with the note. This was affirmed by the Court of Appeal, 18 A.R. (Ont.) 438.

A dealer, in shipping goods to a purchaser, in order to secure payment before parting with control over the goods, usually follows the practice of drawing a bill of exchange on the purchaser through a bank, with the bill of lading attached to the bill of exchange. On payment of the latter to the bank the bill of lading is surrendered to the purchaser. That, it appears to me, is a transaction similar to the one now before the court, the difference being that the intention is embodied in a memorandum underwritten on the note instead of being indicated in the correspondence or in the verbal understanding between the parties.

I would allow the appeal and declare that the document in question is a promissory note. The plaintiff is entitled to the costs of this appeal and of and incidental to the stated case in the Court of King's Bench payable to him in any event of the cause.

Cameron, J.A.

CAMERON, J.A.:—This action came before Metcalfe, J., on a stated case asking for a declaration whether or not the document therein set forth was a promissory note.

The document is as follows:—

Winnipeg, 1st Decr., 1910.

On 15th Sept., 1911, without grace, after date I promise to pay to the order of O'Grady, Anderson and Co. Ltd., at the Bank of Nova Scotia, Winnipeg, the sum of Three Thousand ..... /100 Dollars.
Value received Joseph Lecomte.
No.

Stock certificates for 50 shares Gas Traction Co. Ltd. attached to be surrendered on payment.

The part in italic was written on the document before it was signed and, at the time it was signed, the document was for the price of the stock. The stock was attached to the document.

On the back of the note the following appears:—

Pay to the order of the Bank of Nova Scotia. O'Grady, Anderson and Co. Limited. J. W. deC. O'Grady, president; W. A. deC. O'Grady, secy. treas.

Pay to the order of J. N. deC. O'Grady, without recourse, for the Bank of Nova Scotia, F. W. Ross, manager.

In his judgment Metcalfe, J., says:—

From the case, the amendments, and the argument I take the facts to be:—1. O'Grady, Anderson & Co. Ltd., owning 50 shares of the stock of the Gas Traction Co., sold the same to the defendant. 2. The price being $3,000, O'Grady, Anderson & Co. Ltd. took a document in printed form, which, except for the writing in the next clause mentioned, is a promissory note; whereby the defendant promised to pay to O'Grady, Anderson & Co. Ltd. $3,000, at a future date. 3. Written on the face of this "note" before and at the time of signature by the defendant appeared the words:—"stock certificate for 50 shares Gas Traction Co. Ltd., attached to be surrendered on payment." 4. The plaintiff now sues as indorsee of a promissory note.

The trial judge held, largely on the authority of *Dominion Bank* v. *Wiggins*, 21 A.R. (Ont.) 275, that the document in question was not a promissory note.

For my part, I am unable to see how this document can be regarded in any other light than as a promissory note. The decision in *Kirkwood* v. *Smith*, [1896] 1 Q.B. 582, which influenced subsequent decisions in the Canadian courts, is no longer an authority, being overruled by *Kirkwood* v. *Carroll*, [1903] 1 Q.B. 531, where the authority of the judgment in *Yates* v. *Evans*, 61 L.J.Q.B. 446, was restored. Evidently in *Kirkwood* v. *Smith*, s. 97 (2) of the Imperial Bills of Exchange Act (our s. 10), providing that the rules of the common law, save as they are inconsistent with the Act, shall continue to apply to bills of exchange, promissory notes and cheques, was not brought before the court. It was by ignoring this provision that the court was induced to

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hold that s. 83 (3) of the Imperial Act (our s. 176 (3)), providing that "a note is not invalid by reason only that it contains also a pledge of collateral security with authority to sell or dispose thereof" was exclusive.

In *Merchants Bank* v. *Dunlop*, 9 Man. L.R. 623, the plaintiffs sued as indorsees of two promissory notes, payable to the Watson Manufacturing Co., stating on their face that they were given for a binder and that the property therein should remain in the company until payment; also that the payees were to provide all repairs required and any improvements that might be added to their binders before the maturity of the note. It was held by Killam, J., that the instruments were promissory notes, and that the special provisions therein were to be taken as a memorandum of the consideration for the defendant's promise to pay and not as a condition qualifying the promise. This decision was given in 1894, two years before the judgment in *Kirkwood* v. *Smith*.

In *Bank of Hamilton* v. *Gillies*, 12 Man. L.R. 495, the "lien note" sued on contained other and more exacting provisions than those contained in the instrument discussed in *Merchants Bank* v. *Dunlop*, and Killam, C.J., in his judgment rests his decision on those additional provisions and, apparently, entertained some question as to his former judgment in *Merchants Bank* v. *Dunlop*. In any event the decision of the Chief Justice and those of the other members of the court were based upon the *dicta* in *Kirkwood* v. *Smith*. Moreover, it was held by Killam, C.J., that the terms of the document there in question, a "lien note" retaining the title, ownership and property of the article for which it was given did not pass from the vendors, precluded the possibility of its being considered a pledge of collateral security. Chief Justice Killam in his judgment expressed his dissatisfaction with the reasoning of Maclennan, J., in *Dominion Bank* v. *Wiggins*, *supra*.

In *Robert Bell Engine Co.* v. *Topolo*, 32 D.L.R. 77, though, in the circumstances a consideration of the status of the "lien note" there in question was not necessary for the decision, Lamont, J., reviews with care the various authorities, pointing out that the decision in *Kirkwood* v. *Smith* has been overruled by that in *Kirkwood* v. *Carroll*, leaving the law in England as it was declared to be in *Yates* v. *Evans*.

Now this transaction can clearly be regarded as one involving

a pledge of the certificate mentioned in the instrument. Lecomte bought these shares, representing certain rights and interests in the Gas Traction Co., and gave his promissory note in payment therefor. As a pledge of collateral security, he gave the payees the certificate, the evidence of his ownership of the shares purchased by him, which was to be delivered to him on his payment of the note. The promise to pay is absolutely unconditional, and the transaction is covered by s. 176 (3) of the Act.

Let us look at the transaction in another light. Let us take it that the document expresses a promise by the maker to pay and implies a promise by the payees to deliver the certificate on the same day.

It was stated in Chalmers on Bills, 1st ed., that:—

A bill must not be expressed to be given for an executory consideration and (in the footnote) that "an executory" (*i.e.* a future) consideration expressed in the instrument would render it conditional and so invalid as a bill.

This was based on the decision in *Drury* v. *Macaulay*, 16 M. & W. 146, 153 E.R. 1135, where the court considered the performance of the promise was made conditional by the terms of the instrument. Chalmers, J., modified his opinion, as in the 7th ed. he says (p. 12): "The expression of an executory consideration on the face of a bill may perhaps make it conditional," and in the footnote he says, "But see sub.-s. 3 *post*."

I make the following extract from the work of Russell, J., on Bills, (1909), pp. 66-67, in which he deals convincingly, in my opinion, with the subject of executory considerations as affecting negotiability of instruments in the form of promises to pay:—

But it does not necessarily follow that the promise is conditional, because the consideration is executory. Although the consideration for a promissory note be in fact executory the promise may nevertheless be absolute. If, for instance, the note were payable at one month and the executory consideration were to be performed 2 months after date, it could not be pretended that the promise in the note was not absolute although the consideration was executory. Probably if both promises were to be performed on the same day and the note was not negotiable it might be contended that each was conditional on the performance of the other, and *a fortiori* if the executory consideration were to be performed before the maturity of the note. But in either case the fact of the note being payable to order would very fairly rebut the presumption that it was intended to be conditional on the performance of the consideration, as, by the very terms of the contract, it would be within the contemplation of the parties that the promise contained in the note might be exigible by one party and the performance of the consideration due from another. On the whole it is difficult to see any good reason why the expression in the bill of an

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executory consideration should be held to invalidate it, unless, at all events, it could be read as the expression of a condition precedent to the obligation to pay the amount of the note.

Cameron, J.A.

Let us apply the above to the present case. Here the note is made payable to order and that clearly goes to rebut the presumption that it was intended to be conditional, as it was obviously in the contemplation of the parties that the promise to pay might be exigible by one party, while the delivery of the certificate might be due from another. And, above all, it is not possible to read the added memorandum as a condition precedent to the obligation to pay the amount of the note. On the contrary, the provision is precisely the opposite, for the certificate is "to be surrendered in payment" of the note. No uncertainty therefore can possibly be imported into the payment of the note by the provision as to the certificate, which is to be surrendered only on payment of the note.

Looking at the transaction thus as one not involving a pledge, the instrument in question, in my opinion, is plainly a promissory note within s. 176 of the Act. To use the words of Wills, J., in *Yates* v. *Evans*, "These words which have been added . . . do not qualify the obligation created by the promissory note."

I think the appeal must be allowed.

Fullerton, J.A.

FULLERTON, J.A. (dissenting):—This action came before the trial judge by way of a stated case.

O'Grady, Anderson & Co. Ltd. sold fifty shares of the stock of the Gas Traction Co. to the defendant for the sum of $3,000, and took from him a document in the following form:—(See judgment of Perdue, J.A.).

The plaintiff sues as indorsee.

The sole question involved is whether the above document is a promissory note.

The contention of the defendant is that the words added after the signature qualify the promise and make it conditional.

S. 176 of the Bills of Exchange Act, 53 Vict. c. 33, defines a promissory note as follows:—

> A promissory note is an unconditional promise in writing made by one person to another, signed by the maker, engaging to pay, on demand or at a fixed or determinable future time, a sum certain in money, to, or to the order of, a specified person or to bearer.

S. 176 (3) says that "a note is not invalid by reason only that

it contains a pledge of collateral security with authority to sell or dispose thereof."

In *Dominion Bank* v. *Wiggins*, 21 A.R. (Ont.) 275, Maclennan, J.A., in 1894 held, with the concurrence of the other members of the Court of Appeal, that an instrument in the form of a promissory note, given for part of the price of an article, with the added provision "that the title and right to the possession of the property for which this note is given shall remain in" (the vendors) "until this note is paid," was not a promissory note. In delivering judgment, Maclennan, J.A., at pp. 277-8, said:—

I think that stipulation is fatal to the instrument as a negotiable promissory note. It imports that the money which is to be paid is the consideration for the sale of the property, and that neither the title nor the right to possession was to pass until payment. If that is so, it follows that the purchaser is not compellable to pay when the day of payment arrives unless at the same time he gets the property with a good title, and the payment to be made is therefore not an absolute unconditional payment at all events, such as is required to constitute a good promissory note. It is in effect a conditional payment. It is evident that even if when the note was signed possession was given, the payees could resume it at any time, for any reason, or for no reason; could do so next day, out of mere whim or caprice; and for anything contained in the writing, in the way of agreement by the vendors, they could sell the property to some one else, while the note was current, even against the will of the purchaser. But whether the purchaser could interfere to prevent that or not, they could sell and make a good title to a purchaser for value without notice. Having the title, and also the possession, such a sale with delivery would be unimpeachable as against the purchaser, and if such sale were made, then clearly the maker of the note would not be liable to pay it at maturity. He could say, I am ready to pay, but I want my property, and if it was not forthcoming, he could not be required to pay. But if the vendors still had the property, it is obvious that the payment of the money and the delivery of the property were to be contemporaneous acts, and neither of the parties was bound to perform his part, unless the other was ready to perform his.

In 1899 the case of *Dominion Bank* v. *Wiggins* was considered and followed by the full court of New Brunswick in the case of *Prescott* v. *Garland*, 34 N.B.R. 291.

Tuck, C.J., after fully considering the American authorities which hold a contrary view, said, at p. 296:—

Between the apparently conflicting opinions of two strong courts, Ontario Appeal and United States Supreme, if one had to depend upon these alone it would be difficult to decide. I can find no decision of an Imperial court directly in point, and none that is absolutely binding upon this court. In this condition of things I have to depend upon my own view of the law, as applied to the circumstances of this case. It seems to me that the stipulation that the title of the property should remain in Prescott until the note was paid, and that in the meantime the harness should be only on hire is fatal to the instru-

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ment as a negotiable promissory note. . . . There is not an absolute unconditional promise by the maker of the promissory note to pay the money, for he may not have the goods at the time payment is to be made. My judgment is based upon the view that the sale was not an absolute one, but only an agreement to sell upon condition that the purchaser should pay his note at maturity.

In *Bank of Hamilton* v. *Gillies*, 12 Man. L.R. 495, the instrument sued on contained the usual provisions of a promissory note with the additional provision that the title, ownership and property for which it was given should not pass from the payee until payment in full. The court held that the instrument sued on could not be regarded as a promissory note. Dubuc, J., and Bain, J., both approved of *Dominion Bank* v. *Wiggins*.

In *Frank* v. *Gazelle*, 6 Terr. L.R. 392, Harvey, J., considered both *Dominion Bank* v. *Wiggins*, and *Bank of Hamilton* v. *Gillies*, and followed them.

It is true that in all the cases referred to, following *Dominion Bank* v. *Wiggins*, reference is made to the case of *Kirkwood* v. *Smith*, [1896] 1 Q.B. 582, and a certain amount of reliance placed upon its authority.

In the latter case, the plaintiff sued as endorsee of a document, described as a promissory note, which provided for payment of certain money by instalments, the whole to become due on default in payment of any one instalment, and contained the following clause:—

> No time given to, or security taken from, or composition or arrangements entered into with, either party hereto, shall prejudice the rights of the holder to proceed against any other party.

The court held that the document was not a promissory note. Lord Russell says, at p. 585:—

> S. 83 defines certain qualifications which are admissible, and are not inconsistent with the fact of an instrument being a promissory note. I think it is safer to take the provisions of sub-s. 3, by which "a note is not invalid by reason only that it contains also a pledge of collateral security with authority to sell or dispose thereof," as importing that, if the document contains something more than is there referred to, it would not be valid as a promissory note.

In *Kirkwood* v. *Carroll*, [1903] 1 K.B. 531, the instrument sued on contained an exactly similar provision as in *Kirkwood* v. *Smith*, and the Court of Appeal held it to be a valid promissory note, expressly overruling *Kirkwood* v. *Smith*.

The authority of *Kirkwood* v. *Carroll* can have no bearing on the reasoning in *Dominion Bank* v. *Wiggins*, as it merely decides

that s. 176 (3) of the Bills of Exchange Act is not exclusive and, therefore, if words are added to an instrument other than a pledge of collateral security, they do not necessarily prevent it being a promissory note.

In my opinion, the cases of *Dominion Bank* v. *Wiggins*, *Bank of Hamilton* v. *Gillies*, and *Frank* v. *Gazelle*, should be followed in the present case.

While the document in question here does not expressly provide that the title to and right of possession of the certificate of stock shall not pass until payment of the note, it impliedly does so and clearly the defendant could not acquire possession until payment of the note. If in an action on the note by the payee the maker had set up the defence that he was ready and willing to pay the note, but that the payee had neglected and refused to deliver to him the certificate, I cannot think that any court would compel him to pay. Holding the document not to be a promissory note works no hardship on an indorsee. When he takes the note, he sees on its face that as a condition of payment, or at least upon payment, the payee has bound himself to deliver the certificate, and it would require little imagination on his part to infer that the note represented the purchase price of the stock.

On the other hand, to hold otherwise would open a wide door to the perpetration of fraud.

I am of the opinion that the promise to pay is conditional on the surrender of the stock certificate and that, therefore, the document sued on is not a promissory note.

This conclusion might, I think, be supported on another ground.

In *Kirkwood* v. *Carroll*, the court said that *Yates* v. *Evans* was rightly decided. In the latter case, which is reported in 61 L.J.Q.B. 446, the document sued on as a joint and several promissory note made by a principal debtor and a surety contained the following provision:—

> Time may be given to either without the consent of the other and without prejudice to the rights of the holders to proceed against either party, notwithstanding time may be given to another.

A reference to the judgments in this case would appear to show that the whole question considered was whether the above clause amounted to an agreement or was merely a consent or license.

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The inference appears to be that if the clause in question amounted to an agreement on the part of either of the parties to the document other than a promise to pay it would not be a promissory note.

It was further urged by counsel for the appellant that the provision as to the stock certificate was a pledge within the meaning of s. 176 (3) of the Bills of Exchange Act.

It appears to me that the short answer to this contention is that the defendant was not the owner of the shares and therefore could not pledge them.

In *Prescott* v. *Garland*, 34 N.B.R. 291, Barker, J., at p. 299, said:—

> If the effect of the instrument in this case was to pass the property in the chattel to the vendee at the time the agreement was made, it might possibly be said that the right to resume possession and sell in order to realize the purchase money would not amount to more than a pledge of the property and therefore be within the exception contained in s. 82 (of the Bills of Exchange Act 1890—now s. 176.) But where the property does not pass, but both the right of property and right of possession remain in the vendor until payment of the purchase price, the vendee has nothing to pledge to the vendor as a security within the meaning of the section.

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

CAN.

S. C.

STAHL v. MILLER.

Supreme Court of Canada, Fitzpatrick, C.J., and Idington, Anglin and Brodeur, JJ. March 5, 1918.

PRINCIPAL AND AGENT (§ II—8)—CONFLICT OF DUTY—TRUSTEE FOR SALE—AGENT FOR PURCHASER.

A trustee for the sale of land is not competent to purchase the trust property as agent for a stranger; if the principal repudiates the purchase as soon as the facts come to his knowledge he is entitled to rescission of the contract.

[*Stahl* v. *Miller*, 37 D.L.R. 514, reversed.]

Statement.

APPEAL from the decision of the Court of Appeal for British Columbia, 37 D.L.R. 514, by an equal division of opinion upholding the judgment at the trial in favour of the defendants. (By inadvertence of the reporter, the report of the judgment of the Court of Appeal states that Martin, J., was in favour of dismissing the appeal to that court whereas he and McPhillips, J., were to allow it.)

A. L. P. Hunter, for appellant; *Cassidy*, K.C., for respondents.

Fitzpatrick, C.J.

FITZPATRICK, C.J.:—The appellant carried on speculations in real estate in Vancouver through the firm of J. J. Miller, real

estate brokers in that city, and the respondent, William Miller, was a partner in the firm. On March 13, 1907, the appellant gave the respondent, William Miller, a power of attorney

> to execute for him all documents, agreements for sale and deeds of land in connection with the purchase or sale of lands in Vancouver and absolute authority to do all acts deeds, matters and things necessary to be done in and about the premises.

By an order of the Court of British Columbia, made on September 13, 1910, certain lands of one Christina Kildall, deceased, were vested in the respondents, W. Miller and Kildall, upon trust for sale and to stand possessed of the proceeds upon the trusts therein mentioned "with liberty to the trustees to employ the firm of J. J. Miller & Co. as agents for the subdivision and sale of the said lands at a commission, etc.," and it was further ordered "that the trustees receive by way of remuneration as trustees, etc."

J. J. Miller, who or whose firm were agents for the appellant, on December 10, 1910, purchased of the lands of the deceased Christina Kildall six lots for the appellant; and the respondent William Miller signed the agreement as one of the vendors and also acting under his power of attorney signed the name of the appellant as purchaser.

The appellant had no knowledge of the transaction until after it was completed and, as J. J. Miller retained the documents in his possession, the appellant was not informed of all the facts until he obtained the agreements on October 23, 1915. On November 15, 1915, he wrote to the respondents giving notice to rescind the contracts for sale.

On the trial Macdonald, J., gave judgment for defendants apparently on the ground that they were only trustees and the Kildall estate was not before the court.

On appeal, Macdonald, C.J.A., thought that lapse of time and also the fact that the transaction was a fair one was a sufficient defence. Neither of these grounds can prevail here. *Hitchcock* v. *Sykes*, 49 Can. S.C.R. 403, 23 D.L.R. 518.

It is also argued that although the respondents are the registered owners of the property they are not in reality the beneficial owners and therefore there is no conflict of duty by reason of the fiduciary relationship in which William Miller stood. But William Miller by the order of the court had absolute power to sell, and he had authority to buy under his power of attorney from the appellant.

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For his services as trustee, W. M. Miller was entitled to a commission on the sale and in addition he received his share of commission paid the firm of J. J. Miller, who were the selling agents for the respondents. A trustee for sale is no more competent to purchase the trust property as agent for a stranger to the trust than he is to buy it for himself.

As I am of opinion that this case cannot be distinguished from the numerous cases in which it has been clearly established that an agent cannot act for both vendor and purchaser, the appeal should be allowed.

Reference may be made to the case of *Clark* v. *Hepworth*, 39 D.L.R. 395, 55 Can. S.C.R. 614, recently before this court, and to *Armstrong* v. *Jackson*, 86 L.J.K.B. 1375, [1917] 2 K.B. 822.

I entirely concur in the disposition made by Mr. Justice Anglin of the objection that the proper parties are not before the court.

Appeal allowed with costs.

Idington, J.

IDINGTON, J.:—The respondents, being registered owners of the lands in question which had been subdivided into small lots, entered into three written agreements purporting to be for the respective sales of some six in all of said lots to the appellant for prices therein named.

The respondents for themselves each executed these agreements and Miller did likewise on behalf of appellant by virtue of a power of attorney he held from the appellant.

This was done without consultation with appellant and without disclosure to him of the position they occupied as trustees for the sale of the said subdivision.

The respondent Miller was a member of a firm sometimes designated "J. J. Miller" and at other times as "J. J. Miller & Company," carrying on business as real estate agents in Vancouver.

The appellant was a farmer in British Columbia, resident some 50 odd miles from Vancouver, who had some years previously paid the firm $1,500 to invest.

It was stated by counsel for appellant, and not denied, that on several occasions prior to this transaction parts of that money or other moneys coming into the hands of said firm as agents of the appellant had been used in making real estate purchases for him, but in each case only after having submitted to him the proposal so involved.

In this instance now in question that prudent and proper course was departed from in the way already stated without any excuse so far as I can see unless presuming upon the confidence they had acquired by reason of the said prior dealings.

The appellant was first informed of these transactions in an incidental sort of fashion by letter some months afterwards.

He does not seem to have been for some years fully informed of what really did take place, and then, on discovery of the nature of the transactions thus entered into, sought to be relieved therefrom and went so far as to propose to sacrifice what had been paid and give a quit claim of any interest he might be supposed to have acquired. The respondents declined this offer. It was not until he sought and got the assistance of a solicitor that he discovered the use which, as stated above, had been made of his power of attorney.

The respondents, it turned out, were trustees for the family of the respondent Kildall. As such they were entitled to a commission, and beyond that the J. J. Miller firm were entitled to a further commission as real estate agents effecting such sales, as made, of the lots in question. Of this latter commission the respondent Miller was entitled to receive and did receive one half.

The alleged sales are now attacked herein and rescission sought by appellant on the ground that the relations of the respondent Miller to him, and the duties owing thereunder, were such as to render it impossible in law for him as vendor to bind appellant without full disclosure of his actual position and interest in promoting such sales and then thereupon procuring the actual assent of appellant thereto.

It seems too clear for argument that a sale made under such circumstances was void and could only be upheld by something in the nature of ratification. These sales have been upheld by the trial judge and the equal division of the Court of Appeal.

The trial judge seemed to recognize the principles of law governing such a transaction, but to feel unable to give relief because the respondents were in fact trustees appointed by the court and had not been attacked as such, and that respondent Kildall owed no duty to the appellant.

I cannot assent to either of these propositions. In the first place, I think and most respectfully submit that the sooner the

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court which had control of such a trustee called upon him to explain and if possible excuse such an apparently loose mode of discharging his duties as its appointee, the better.

The appearance of the documents should have indicated to him that his co-trustee was, as attorney for the alleged vendee, venturing on a something that called for explanation. He should not have been a party thereto unless and until it was made quite clear that the proposed vendee in truth understood and approved of his attorney's action in buying.

The reasons assigned by the Court of Appeal for dismissing the appeal are of a different and more arguable nature. With great respect, however, I am unable to adopt them.

I do not think the appellant was called upon to give his evidence or explanation until something much more direct and cogent had been given than appears in the evidence of J. J. Miller.

The respondent Miller had, apart altogether from his monetary interest, placed himself in the position of attempting to discharge two inconsistent duties. One he owed to his *cestuis que trustent* and the other to the appellant.

His relation to the former also as a partner of the firm which had been given the duty of selling the lands in question has been made the basis for a number of ingenious submissions which are untenable, however plausible.

I think the appeal should be allowed with costs throughout and the alleged agreements of purchase rescinded and the moneys paid by appellant or received by respondents on account of the transactions in question be repaid with interest.

Anglin, J.

ANGLIN, J.:—The respondents, as trustees for the sale of the Kildall estate, sold the property in question to the appellant. In the agreement of sale, however, they assumed the position of vendors in their personal capacity.

On their own statement, one of them, William Miller, was a partner in the firm of "J. J. Miller," carrying on business as real estate agents at Vancouver, B.C. J. J. Miller, the other partner in the firm, was the agent for the sale of the property. He was at the same time the agent of the appellant, who resided at Whonnock, B.C., to invest moneys deposited by the latter with the firm of "J. J. Miller" in desirable real estate, and, as such, he bought from the respondent trustees the property in question for the appellant.

William Miller, the other member of the firm, and one of the trustees for sale, as attorney for the appellant, executed on his behalf the agreement to purchase.

Upon the mere statement of these facts the conflict of duty on the part of J. J. Miller is so apparent that it is obvious that the transaction must be voidable by the appellant unless he was aware of the agency of J. J. Miller for the vendors when the contract was made or subsequently learned of it and with such knowledge ratified or acquiesced in what had been done. If the facts that the trustees for sale were to be remunerated by a 3% commission and the sales agent by a 7% commission are taken into account, the element of interest in conflict with duty is super-added.

The Chief Justice of the Court of Appeal thus summarizes the evidence as to knowledge and acquiescence on the part of the appellant—quite fairly, if I may say so:

> J. J. Miller, while not quite positive, says that shortly after the making of the agreement in question, and therefore about 5 years prior to the bringing of this action, he told the appellant that it was the Kildall estate and not the defendants who were the real vendors of the property. He also adverts to certain advertisements which he says appellant must have seen and which he thinks disclosed the fact that J. J. Miller was the selling agent of the Kildall estate:

and on this evidence the Chief Justice assumes knowledge and finds ratification by the appellant apparently because he "did not think fit to give evidence . . to rebut the evidence of J. J. Miller."

With great respect, the suggestion of an interested witness that "the appellant must have seen" certain advertisements, and that he "thinks" these advertisements "disclosed the fact that J. J. Miller was the selling agent" cannot be accepted as satisfying the burden of proof which lay on the respondents, rescission being sought, to establish that the dual position of their agent, J. J. Miller, and the conflict between his duty to them and his duty to the appellant and between his interest and the latter duty became known to the appellant, and that he either expressly or by implication elected to uphold the transaction. *Cavendish-Bentinck* v. *Fenn*, 12 App. Cas. 652, at 666; *De Bussche* v. *Alt*, 8 Ch. D. 286, at 313. The respondent did not make a *primâ facie* case of the knowledge essential to ratification or acquiescence such that the appellant was called upon to displace it. On the contrary, there is really

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nothing whatever to shew that he knew anything of J. J. Miller's agency for the vendors until he saw the sale agreement some five years after it had been made; and he then promptly repudiated liability and sued for rescission within a reasonable time afterwards. Indeed, there is very little to indicate that he was aware at any earlier date that William Miller, his own attorney, was also one of his vendors. As put by the trial judge:

> There is no evidence before me to shew that the plaintiff knew that the purchase made on his behalf had been in the manner indicated. When it was brought to his attention by the agreement being produced he then took the position by letter, signed by himself, but probably prepared by his solicitor, that he intended to set aside the transaction on the grounds that are now urged.

I am, with respect, of the opinion, that the appellant's right to avoid the transaction, regardless of whether it was fair or unfair, advantageous or otherwise at the time it was entered into, is beyond question.

Objection is taken, however, to the constitution of the action in that the defendants are sued in their personal capacity, whereas they sold, in fact, as trustees for the Kildall estate. In the agreement for sale, the vendors are not described as trustees. By it they purport to sell as beneficial owners and to assume the obligation of vendors in their personal capacity. They would, therefore, appear to have no good ground for contending that the necessary parties are not before the court. If for any reason they thought it desirable either in their own interest or in that of the Kildall estate to have that estate represented in this action by themselves in their capacity of trustees, it was their privilege, at any time before trial, to apply for the requisite amendment. Not having done so they should not be heard now to set up as a matter of right that it should have been made. But, as a matter of grace and indulgence, if they desire it, since it will entail no delay, expense or inconvenience to the plaintiff, I would be disposed to allow such an amendment to be made now. Judgment should be entered for the appellant as prayed in the statement of claim against the respondents in their personal capacity; and, if they elect to amend, also in their capacity as trustees.

The appellant is entitled to his costs of the litigation throughout.

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Brodeur, J.

BRODEUR, J.:—Stahl had given a power of attorney to William Miller and to the firm J. J. Miller, of which William Miller was a member. He had left some money in the hands of the firm J. J. Miller for investment.

It happened that the Kildall estate, of which William Miller was one of the trustees, had some property for sale; and an agreement for sale of some lots was then signed by the trustees of the Kildall estate of which William Miller was one, in favour of Stahl, and the agreement was then signed by William Miller as agent for Stahl. The result is that Miller appeared in the same acts as one of the vendors and as agent of the purchaser.

The price which was paid was given by the Miller firm out of the moneys belonging to Stahl. The taxes were paid in the same way and Stahl was never told that his agent had been, at the same time, his vendor.

Some years after, when he discovered this illegal transaction, he repudiated it and took proceedings in rescission.

It is a settled rule that an agent authorized to buy cannot buy from himself and that if he does so without disclosing the fact to his principal the latter may repudiate the transaction. *Harrison* v. *Harrison*, 14 Gr. 586; *Gillett* v. *Peppercorne*, 3 Beav. 78, 49 E.R. 31.

The fairness of the transaction is immaterial; and the agent might be acting with the best of good faith; but it does not make any difference, because an agent will never be allowed to place himself in a situation in which, under ordinary circumstances, he would be tempted to do that which is not the best for his principal. *Bank of Upper Canada* v. *Bradshaw*, L.R. 1 P.C. 479.

Besides, in this case, it is proved that the Miller firm which sold the lots for the Kildall estate was having a commission on those sales, and then William Miller, who was a member of that firm, who had a share in that commission, was naturally interested in disposing of those lots in favour of Stahl, which he had no right to do, being the agent of Stahl.

Stahl should, therefore, succeed in setting aside the agreement for sale and the judgment *a quo* should be reversed with costs of this court and of the courts below. *Appeal allowed.*

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Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren and Magee, JJ.A., Lennox, J., and Ferguson, J.A. December 10, 1917.

BILLS AND NOTES (§I A—4 a)—BLANK FORM—SIGNED—STRIKING OUT MATERIAL PART—BILLS OF EXCHANGE ACT (R.S.C. 1906, c. 119, s. 31)—ALTERATION APPARENT—HOLDER IN DUE COURSE.

Striking out the place of payment printed in a form which is intended to be used as a promissory note and which has been signed, and delivered, and inserting another place of payment, is a material alteration, and is excluded by s. 31 of the Bills of Exchange Act (R.S.C. 1906, c. 119); the alterations being apparent, an indorsee does not become a holder in due course, but is put upon inquiry, and can stand in no better position than the party endorsing the notes to him.

Statement.

APPEAL from the judgment of Falconbridge, C.J.K.B., in an action on two promissory notes. Affirmed.

The judgment appealed from is as follows:—The plaintiff is described in the statement of claim as a retired farmer. He is, in truth, a usurious money-lender. I formed the worst opinion possible of him as a witness. He is shifty and unreliable, and I would not accept his evidence generally when it is contradicted. I came to this conclusion at the trial without reference to his record in the Courts, which I have since turned up. I refer to *Bellamy* v. *Porter*, 13 D.L.R. 278, 28 O.L.R. 572, and to *Bellamy* v. *Timbers* 31 O.L.R. 613, 19 D.L.R. 488.

Nevertheless, I am bound to come to the conclusion that the defendant is mistaken when he says that the signatures to the notes sued on are not his. I have not been trying cases, civil and criminal, involving questions of disputed handwriting, for about 30 years, without thinking that I am nearly as good an expert as most of the gentlemen who give evidence before me.

Experts (reaching the limit as to number) gave evidence in the plaintiff's favour; and the defendant's only witness on this line, a gentlemen of experience and respectability, rather fell down on cross-examination. So I find that the defendant is mistaken (and I use the phrase advisedly) in thinking those two signatures are not his.

If the transaction were in other respects unimpeachable, the renewal of the old notes—and other circumstances—would constitute good consideration, without any advance of money at the time of taking these notes.

But I find that the notes sued on were altered after signature, and without the authority of the defendant, by the plaintiff, or by his procurement, by changing the place of payment.

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I find, too, that the plaintiff must have known from the whole course of business, and in fact did know, that the defendant was only an accommodation maker for Aitken & King; and the plaintiff gave time to the principal debtors without the authority of, or reference to, the defendant.

I give the defendant leave to amend his statement of claim by setting up these two defences.

It is significant that the plaintiff brings his action on the eve of the earlier note sued on being barred by the Statute of Limitations. He rested for years without making any demand on the defendant for payment.

The defendant succeeds on matters not originally pleaded by him. I dismiss the action with costs, which I fix at the sum of $100.

J. M. Pike, K.C., for appellant.

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

Maclaren, J.A.

MACLAREN, J.A.:—The plaintiff appeals from a judgment of Chief Justice Falconbridge dismissing an action brought by the plaintiff as the holder in due course of two promissory notes, against the defendant as maker.

A firm of Aitken & King was indebted to the plaintiff, and Aitken induced his brother-in-law, the defendant, to sign, for the accommodation of the firm, a number of engraved skeleton forms of promissory notes, which were to be filled up by Aitken and used for the business of the firm.

Among these were the two instruments now in question, which, when delivered to Aitken, were in the following form; the words and figures being in engraved script, and the signatures of the defendant written with pen and ink:—

(1)

$..... 19

.....months after date.....promise to pay

.....or order

at The Canadian Bank of Commerce.....

.....Dollars

Value received J. L. Williams.

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(2)

$.....Chatham, Ont.....19 Due.....
.....months after date.....promise to pay
to the order of.....
at the Dominion Bank here the sum of
.....Dollars
Value received. J. L. Williams.

When produced at the trial the two notes were in completed form as follows:—

(1)

$2300.$\frac{00}{xx}$ Due October 6/10.
Chatham Oct. 6th 1909

One year ~~month~~ after date I promise to pay
Aitken & King or order
office of Aitken & King
at The ~~Canadian Bank of Commerce~~ here
Twenty-three hundred $\frac{xx}{100}$ Dollars
Value received.
J. L. Williams.

(2)

$650.$\frac{00}{xx}$
Chatham, Ont. April 8, 1910. Due April 8-11

One year ~~months~~ after date I promise to pay
to the order of Aitken & King.....
office of Aitken & King
at the ~~Dominion Bank~~, here the sum of
Six Hundred and Fifty $\frac{xx}{100}$ Dollars
Value received.
J. L. Williams.

In his statement of defence and at the trial the defendant denied his signatures, and a large amount of evidence was taken on this point, but the learned Chief Justice found that in this the defendant was mistaken, and this finding was not challenged before us.

The plaintiff claims to be a holder in due course of these notes. The evidence is, that he received them on their respective dates, or shortly after, from Aitken, as collateral security for the notes of the firm held by him, and that they were then in the same form and condition as above lastly indicated. The testimony of Aitken on behalf of the plaintiff is, that these two notes with others were signed by the defendant as skeleton notes and delivered to him to be filled up as accommodation notes, and that he (Aitken) subsequently filled up and completed these two notes as they now appear, and endorsed and delivered them to the plaintiff as collateral security as aforesaid.

The first question to be decided is, whether or not the plaintiff, in these circumstances, is a holder in due course of these notes.

Section 56 of our Bills of Exchange Act reads as follows:—

"A holder in due course is a holder who has taken a bill complete and regular on the face of it, under the following conditions, namely:—

"(*a*) That he became the holder of it before it was overdue and without notice that it had been previously dishonoured, if such was the fact;

"(*b*) That he took the bill in good faith and for value, and that at the time the bill was negotiated to him he had no notice of any defect in the title of the person who negotiated it."

Section 186 of the Act makes the above sec. 56 applicable to promissory notes as well as to bills.

The plaintiff would appear to fulfill all the conditions of sec. 56, except as to the notes being regular on their face when he took them; and as to his not having notice of defects in the title of Aitken & King at the time the notes were negotiated to him.

So far as I am aware, the words "complete and regular" in connection with a bill or note were first introduced by the English Bills of Exchange Act, 1882, when the expression "holder in due course" was substituted for the cumbrous old phrase "*bonâ fide* holder for value before maturity without notice," and was from there copied into our Bills of Exchange Act, and the American Negotiable Instruments Law, without change. We are not now concerned about the word "complete;" but I have not seen in any English, American, or Canadian case any attempt to give a definition of the word "regular." In the latest standard English

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and American dictionaries the meanings given vary considerably; dependent largely upon the noun which they are meant to qualify. The following are some of the definitions which would seem to be most appropriate and best adapted to a bill or note:—"formally correct; made according to rule; formed after a type; conforming to a consistent plan; normal; agreeable to established customary forms."

If one should apply any of these or similar definitions in connection with the two notes now sued upon, and set out *verbatim et literatim* above, it would at once be seen how utterly inapplicable and inappropriate they would be.

These notes, when taken by the plaintiff, were glaringly irregular on their face, having erasures and interlineations, not authenticated by initials or otherwise. The first of these alterations, erasing the word "month" and writing in the preceding blank space " one year," would not, in my opinion, affect the notes, as Aitken had the right to insert "twelve" before "months," and what he has done is equivalent to that.

The erasure, however, of the words "Canadian Bank of Commerce" as the place of payment of one of these notes and the words "Dominion Bank" as the place of payment of the other, and the insertion and interlineation of the words "office of Aitken & King" as the place of payment in each case, is a very serious matter. Section 145 of the Act provides that:—

"Where a bill or acceptance is materially altered without the assent of all parties liable on the bill, the bill is void, except as against a party who has himself made, authorised, or assented to the alteration, and subsequent endorsers."

Section 146 of the Act makes a change of the place of payment a material alteration, and one which avoids the bill or note if not assented to. It is put upon the same plane as an alteration of the sum payable; there are no degrees of materiality.

Moreover, these two forms made the notes payable at the bank where Aitken & King kept their account, so that the defendant had a special interest in retaining the place of payment, as the banks would then bring pressure to have these accommodation notes paid.

If the claim of the appellant is upheld, then the maker of a note for $100, delivered with a single blank for the number of

months it had to run, might be held liable for $1,000, if the holder should choose to make this alteration, and transfer it for value before maturity to a party who took it in good faith.

If, as suggested, the provisions of the second part of sec. 31* apply only to completed bills and notes, which answer to the definitions of these instruments in secs. 17 and 176, and not to such incomplete instruments as may have one or more blanks to be filled up in order to perfect them, and make them meet the requirements of the definitions in these sections, then there is absolutely nothing in the Act to meet the case of the instruments containing one or more blanks which are to be filled with something to meet the requirements of the definition; and, moreover, there is nothing in the Act to authorise their being filled up at all by anybody. And yet experience and an examination of the reports will shew that these latter classes of cases form a vast majority of the reported cases on the subject.

In my opinion, sec. 31 should be construed so as to include all those defective instruments which are delivered by the party signing them to be filled up and completed by a subsequent holder as complete bills and notes. If there had been such a grave omission and oversight in these Acts, I think it would have been discovered before the present time, either in England, the United States, or Canada. Even if the suggested interpretation of the latter part of sec. 31 were correct, it would not avail the appellant in this case, as sec. 10 of our Act would then apply the rules of the common law of England, including the law merchant, which, it will be seen from the cases referred to and cited below, would be fatal to the claim now urged on behalf of the appellant.

It was not claimed at the trial or before us that the defendant had given any special authority or direction regarding the filling up of these two notes, or that he had done or given anything beyond the *primâ facie* authority indicated in the latter part of sec. 31. It was proved on the part of the plaintiff that the notes were signed and delivered in blank, and that they were filled up and the erasures and interlineations made, by Aitken, some time

*31. Where a simple signature on a blank paper is delivered by the signer in order that it may be converted into a bill, it operates as a *primâ facie* authority to fill it up as a complete bill for any amount, using the signature for that of the drawer or acceptor, or an endorser: and, in like manner, when a bill is wanting in any material particular, the person in possession of it has a *primâ facie* authority to fill up the omission in any way he thinks fit.

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after he had received them from the defendant; and there is no evidence that the defendant knew that the notes had ever been filled up and used until several years later, when the plaintiff sent him a threatening letter.

The English cases on the point are so numerous and so uniform in effect that I will not discuss or make extracts from them, but will merely quote a summary of their effect by the leading text-writers and make a simple reference to a few of the leading cases.

Chitty on Bills, 11th ed., p. 142. After a statement of the presumption, in the case of ordinary written contracts, that any alterations were made after execution, the author proceeds: "With respect to bills and notes, a contrary rule has been laid down, namely, that if the instrument appears upon the face of it to have been altered, it lies upon the holder to shew, that the alteration was made under circumstances which leave the instrument still available."

Smith's Leading Cases, 12th ed., vol. 1, p. 841: "If a bill or note exhibit the appearance of alteration, it lies upon the holder to account for it."

Byles on Bills, 17th ed., p. 309: "Where an alteration appears on the face of a bill or note, it lies on the plaintiff to shew that it was made under such circumstances as not to vitiate the instrument."

Chalmers on Bills of Exchange, 7th ed., p. 241: "Where a bill appears to have been altered, or there are marks of erasure on it, the party seeking to enforce the instrument is bound to give evidence to shew that it is not avoided thereby."

Halsbury's Laws of England, vol. 2 (Bills of Exchange), p. 557: "Where an instrument appears to have been altered, it rests with the party who seeks to enforce the instrument to give some evidence of what the circumstances were."

Reference may be had to the following cases: *Knight* v. *Clements* (1838), 8 A. & E. 215; *Clifford* v. *Parker* (1841), 2 M. & G. 909; *Bishop* v. *Chambre* (1827), 3 C. & P. 55; *Johnson* v. *Marlborough* (1818), 2 Stark. 313; *Engel* v. *Stourton* (1889), 5 Times L.R. 444. The cases shew that a material alteration which is apparent is sufficient to raise a suspicion.

There have been two cases under our Canadian Act which have come before our Courts, one in the Superior Court of Quebec,

and the other in the Supreme Court of Nova Scotia. In both of these the decisions were against the plaintiffs, the holders of the altered notes: *Gourré* v. *Voskoboinik* (1913), Q.R. 45 S.C. 101; *Langley* v. *Lavers* (1913), 13 D.L.R. 697.

In the United States, before the adoption of the Negotiable Instruments Law, when the common law and the law merchant were generally followed, the leading case on the subject was *Angle* v. *North-Western Mutual Life Insurance Co.* (1875), 92 U.S. 330, a unanimous judgment of the Supreme Court of the United States. In that case it was expressly laid down that "where a party to a negotiable instrument intrusts it to another for use as such, with blanks not filled up, such instrument so delivered carries on its face an implied authority to complete the same by filling up the blanks; but the authority implied from the existence of the blanks would not authorise the person intrusted with the instrument to vary or alter the material terms of the instrument by erasing what is written or printed as part of the same."

This case has been generally recognised as the leading authority on the point in the various Courts of the United States and by the text-writers, the legal cyclopædias, etc.; and the Negotiable Instruments Law, which has been adopted by nearly all the States, and which on this point has used the very language of the English Act above quoted, has been generally interpreted as laying down the same law as the authorities above quoted.

The only decision to the contrary that I have been able to find in the American text-books or encyclopædias of law, is *Corcoran* v. *Doll* (1867), 32 Cal. 82 (cited in Daniel on Negotiable Instruments, para. 1419, in all the editions erroneously as *Corcoran* v. *Dale*). The author does not indicate his approval of the case or make any comment upon it; but in making an extract from the judgment in the *Angle* case, *supra*, he has italicised the words "is written or printed"—it may be to emphasise and call attention to the fact that it had overruled in this respect the *Corcoran* case.

An examination of the *Corcoran* case will shew that it differs widely from the present case, both in its facts and its law. The Court there held that "where a printed form was used and an alteration made only as to the printed matter, the presumption is that it was made prior to the execution of the contract and made to suit it to the terms agreed upon between the parties." Here there

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is no such presumption, and the plaintiff's chief witness, Aitken, proved that the alterations were made after the execution and delivery of the blank notes to him. Another reason given in the *Corcoran* case is, that the two printed words "monthly" "quarterly" appeared together as to interest payments, and it was clear that one of them was intended to be erased, and that the erasure was "incontestably" made before execution, and similarity of ink etc. indicated that the other erasures were made at the same time. Here the very opposite is proved. In California it was held that there is a presumption in favour of written matter over printed matter. I am not aware of any such presumption in our law. The *Corcoran* judgment also was under a special Practice Act not in force here. I cannot find the *Corcoran* case cited in any American text-book except Daniel, nor can I find it cited in "Cyc." or "Corpus Juris," or that it has been followed or even cited in any other State or even in California itself.

The latest American case of the highest authority which I have been able to find is one that is on all fours with the present, and the alteration was, as here, a change of the printed name of the bank where it was made payable, without the consent of the maker: *First National Bank* v. *Barnum* (1908), 160 Fed. Repr. 245, 251. All the American authorities are reviewed, and it was held that the implied authority to fill in blanks did not carry with it the right to erase what was written or printed, and insert something else; also that, the erasure and interlineation being apparent and material, the plaintiff could not become a holder in due course; and the action was dismissed.

The following are short extracts from some of the leading American text-books and legal cyclopædias, which are offered as a fair summary of American law on the subject:—

Greenleaf on Evidence, 16th ed., vol. 1, para. 564: "If, on production of the instrument" (a bill or note), "it appears to have been altered, it is incumbent on the party offering it in evidence to explain this appearance."

Randolph on Commercial Paper, vol. 1, para. 182: "This power . . . only extends to a case where a blank has been left in the instrument, and does not include any authority to make additions . . . In like manner a blank implies no authority to make an erasure."

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Cyc., vol. 7 (Commercial Paper), p. 623: "The power to fill blanks includes power to supply mere verbal omissions; but not to make additions or erasures."

Am. & Eng. Encyc. of Law, 2nd ed., vol. 2, p. 257: "Of course, the implied authority to fill blanks left in an instrument does not embrace the right to make a new instrument by erasing or altering what is written or printed."

Corpus Juris, vol. 8 (Bills and Notes), p. 188, para. 318: "Likewise erasures are not authorised."

The following leading cases are also referred to: *Mahaiwe Bank* v. *Douglass* (1862), 31 Conn. 170; *Hoffman* v. *Planters National Bank* (1901), 99 Va. 480; *Adair* v. *Egland* (1882), 58 Iowa 314; *Cornog* v. *Wilson* (1911), 231 Pa. St. 281.

I am consequently of the opinion that the erasures and interlineations of the places of payment of the notes in question, made after their execution and delivery by the defendant, being so clearly apparent, prevented the plaintiff from becoming a holder in due course, and that the onus was on him to prove that the defendant had authorised or assented to these erasures and interlineations, which he has failed to do; and that in consequence the judgment was right in dismissing the plaintiff's action, and should be affirmed.

The trial Judge also held that, as the defendant was only a surety, to the knowledge of the plaintiff, and as the plaintiff had given time to the principal debtors, the defendant was released upon this ground. As I am of the opinion that the defendant never became either a surety or a debtor, it becomes unnecessary to consider this question.

MAGEE, J.A., agreed with MACLAREN, J.A. Magee, J.A.

MEREDITH, C.J.O.:—This is an appeal by the plaintiff from the judgment dated the 25th May, 1917, which was directed to be entered by the Chief Justice of the King's Bench, after the trial of the action before him sitting without a jury at Chatham on the 23rd and 24th April, 1917. Meredith, C.J.O.

The appellant sues as holder in due course of a promissory note for $2,300, dated the 6th October, 1909, made by the respondent, payable to the order of Aitken & King, and by them endorsed to the appellant, and of another promissory note dated the 8th April, 1910, for $650, made by the respondent, payable to the order of Aitken & King, and by them endorsed to the appellant.

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The notes were endorsed to the appellant before they became due, and for valuable consideration.

By his statement of defence, the respondent denied making the notes, and he further alleged that the appellant "never gave any value or consideration" for the notes, and that he received them and first dealt with them after their maturity.

Pursuant to leave given by the learned trial Judge in his reasons for judgment, the statement of defence has been amended; the nature of the amendments I will afterwards mention.

The notes sued on are both on printed forms; and, in the form on which the note for $2,300 is made, the place of payment named is "The Canadian Bank of Commerce here," and, in the form on which the note for $650 is made, the place of payment named is "The Dominion Bank here." When the notes were produced and put in evidence at the trial, the words "Canadian Bank of Commerce" in the one and the words "Dominion Bank" in the other are stricken out, by lines drawn through them, and the words "office of Aitken & King" are written over the words that are stricken out.

The respondent, in his testimony at the trial, deposed that the signature to neither of the notes was in his handwriting, and he called an expert in handwriting in support of his defence. The learned trial Judge found in favour of the appellant on this issue; but he dismissed the action on the ground that the notes had been materially altered by the changes that had been made in the places of payment, and on the further ground that the respondent, to the knowledge of the appellant when he acquired the notes, was only an accommodation maker for Aitken & King, who were the principal debtors of the appellant, and that he had given an extension of time for payment to the principal debtors, without the authority of or reference to the respondent and without reserving his rights as against the respondent, and these are the defences which were allowed to be set up by amendment.

Contrary to my first impression, I agree with the conclusion of my brother Maclaren, that the result of the changes made in the places of payment of the notes, as stated in the blank forms signed by the respondent, is, in the circumstances, that the appellant cannot recover upon them.

The question is not, as it appears to have been treated by the

learned Chief Justice, one to which sec. 145 of the Bills of Exchange Act applies, because what were altered were not promissory notes, but blank forms intended to be filled up and used as promissory notes; and, if the appellant is to fail, it is because the effect of handing to Aitken & King the signed blank forms was to authorise them to fill up the blanks, but not to make any change in anything material that was printed in the forms; and because, the changes that had been made being apparent, the appellant did not become holder in due course, but was put upon inquiry, and can stand in no better position than Aitken & King, who endorsed the promissory notes to him—as to which see, in addition to the authorities referred to by my brother Maclaren, *Henman* v. *Dickinson* (1828), 5 Bing. 183, 184.

The opinions of the large number of text-writers referred to by my brother Maclaren and the American cases which he cites, make a strong case for the position he takes, that Aitken & King had no authority to make the changes in the places of payment which they made.

I may point out, however, that the two previous decisions of the Supreme Court of the United States of America referred to by that Court in *Angle* v. *North-Western Mutual Life Insurance Co.*, 92 U.S. 330, as authority for the statement made by Clifford, J., to which my learned brother refers, do not warrant what is said as to "erasing what is written or printed as part" of the instrument.

In Daniel on Negotiable Instruments, 6th ed., para. 142, what is said by Clifford, J., is quoted, and the words "is written or printed" are italicised, but no further reference is made to them, and no reason is assigned for their being printed in italics.

In another case, *Corcoran* v. *Doll*, 32 Cal. 82, the action was on a promissory note which had been made on a printed form, which mentioned as the place of payment "at the banking house of Doll & Simpson in Red Bluff," and, referring to the interest, the words "payable monthly quarterly" formed part of the printed form. When the note was adduced in evidence at the trial, the words as to the place of payment were erased by a red line drawn through them with a pen, and the word "monthly" had been similarly erased. In delivering the opinion of the Court, which was in favour of the plaintiff, Sanderson, J., said (p. 89):—

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S. C.

BELLAMY v. WILLIAMS.

Meredith, C.J.O.

"Where printed forms are used they frequently have to be altered to suit the terms of the contract, and where an alteration is made only as to the printed matter the presumption is that it was made prior to the execution of the contract, and made to suit it to the terms agreed upon between the parties."

Notwithstanding the respect that ought to be shewn to what was said by Clifford, J., and to the apparently unanimous opinion of the text-writers, it is nevertheless the duty of this Court to come to its own conclusion as to what the law is with reference to the subject I am considering.

What has led me finally to concur with my brother Maclaren is the language of sec. 31. The section provides that:—

"Where a simple signature on a blank paper is delivered by the signer in order that it may be converted into a bill, it operates as a *primâ facie* authority to fill it up as a complete bill for any amount, using the signature for that of the drawer or acceptor, or an endorser; and, in like manner, when a bill is wanting in any material particular, the person in possession of it has a *primâ facie* authority to fill up the omission in any way he thinks fit."

And it is, I think, the proper conclusion that the right to make changes in a blank form intended to be filled up and used as a promissory note, as to a material particular, such as the place of payment undoubtedly is, is excluded by the section, the right being as it is limited to filling up blanks.

Lennox, J.
Ferguson, J.A.

LENNOX, J., and FERGUSON, J.A., concurred.

Appeal dismissed with costs.

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EX. C.

YOUNG v. THE SHIP "MINNIE A."

Exchequer Court of Canada, Prince Edward Island Admiralty District, Stewart, Loc. J. in Adm. April 23, 1918.

1. MASTER AND SERVANT (§ I C—13)—SHIP DRIVEN ON COAST—SAILORS ACTING AS SALVORS—RIGHT TO WAGES.

If a ship is driven on the coast and becomes a wreck and the sailors escape to the land, and successfully act as salvors so as to save enough to pay their wages, they are entitled to them, though not to salvage.

2. COURTS (§ IA—1)—SEAMAN—OWNER OF SHIP INSOLVENT—ACTION FOR WAGES IN EXCHEQUER COURT.

An action by a seaman for the recovery of wages under $200 may be brought in the Exchequer Court under s. 191 of the Canada Shipping Act, where the owner of the ship is insolvent or where neither the owner nor the master resides within 20 miles of the place where the seaman is discharged or put ashore.

ACTION *in rem* for wages.

J. J. Johnston, K.C., and *W. E. Bentley*, K.C., for plaintiff.

C. G. Duffy, for defendant, Capt. Dix.

STEWART, L.J., in Adm.:—This is an action *in rem* brought by the plaintiff to recover against the ship "Minnie A" the sum of $206 for wages due to the plaintiff as seaman on board the said ship for 6 months and 12 days at $30 a month, and 16 days overtime at night work, at $2 a day.

The plaintiff's affidavit leading to the warrant upon which the ship was arrested was made on February 19 last.

This affidavit states that the plaintiff was discharged and put ashore from said ship at Port au Basque in the Island of Newfoundland and that neither the owner or master is or resides within 20 miles of Port au Basque and that she is a British ship, registered at Arichat in the Province of Nova Scotia.

On March 4 last, Edward Dix, master and owner, appeared in this action.

At the trial it was proved that the plaintiff at the time he engaged to serve as a seaman was a resident of Point Edwards, Cape Breton, and that he continued to be a resident of Cape Breton after being discharged from his service. That he came to Charlottetown some time in the month of February last to commence proceedings for the recovery of his claim. It was also proved that Edward Dix, the owner of the ship, was and had been for many months previous to July 1, 1917, a resident of North Sydney, Cape Breton, and that he came to reside and took up his residence in Charlottetown on the last named day and has had his residence here since then.

The first question to be determined is the amount which the plaintiff is entitled to recover.

The vessel is 46 tons register, capable, it is stated, of carrying a cargo of about 60 tons.

She had as a crew Capt. Dix, the plaintiff, and a young boy, Stanley Bragg, as cook.

It is admitted that the plaintiff was hired as seaman at $30 a month. He was not employed for any stated time or for any particular voyage but evidently for the coasting trade between the Maritime Provinces and Newfoundland. The service commenced at Glace Bay where a cargo of coal was taken on for the

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Magdalen Islands. Leaving Glace Bay with this cargo she proceeded to the Magdalen Islands via North Sydney. Arriving there, she discharged cargo at Amherst Breakwater, after which she anchored in Pleasant Bay. Here a storm arising on August 1, she parted her cables and was driven on the beach. Fearing she might go to pieces, the captain and crew left her, taking up their abode ashore. The captain states they saw her next morning and that he and the plaintiff went aboard and fished out their clothes with a boat hook, she being full of water. The captain further states that he entered a protest and wired Salter & Sons, North Sydney, the agents of the insurers that the vessel was ashore and that he expected she would be a total wreck and that Salter & Sons replied to save her if there was any chance. There was a Mr. Gaudet at this place who appears to have represented Salter & Sons, and between him, the captain and crew they succeeded in refloating the vessel. They then towed her to the harbour where she was caulked and such temporary repairs made as would enable her to sail back to North Sydney.

She arrived there some time in the latter part of August on a Saturday, when she was run ashore. On the following Monday she was floated and docked where she lay for 2 days. Then she was put on the slip for repairs. A survey was held and the repairs were made and completed about September 15, when she was again ready for use.

She then, with the same captain and crew, sailed carrying cargoes between North Sydney, Sydney, Margaree, Cape Breton, Montague and Grand River, Prince Edward Island, Pictou, Nova Scotia and Port au Basque, Newfoundland. To some of these places she made several voyages. Her last voyage was from Sydney with a load of coal for Port au Basque which she reached some time in January, 1917. Here she discharged her cargo, and here the services of the plaintiff as seaman on board the vessel came to an end.

There is some dispute as to when they were actually terminated. The captain says on January 15, 1917, the plaintiff, on January 26. They are all agreed that they did not leave Port au Basque for their homes until January 26, 1917. The plaintiff swears that he was discharged from service on January 26, while the captain states that he laid the vessel up at Port au Basque

on January 15. He kept no log. They both depend on their recollection. I will allow the plaintiff until January 26.

There is also a trifling discrepancy in the evidence as to when the plaintiff's services began. The plaintiff claims it was on July 14. Bragg, the cook, states that his commenced on that day, while the captain maintains that they both were taken on on July 15. Here also recollection is the sole dependence. It is true that the captain produced a memorandum book in which is entered first his account against the plaintiff and then his account against the cook. The first charge in this account against the plaintiff is on September 16, and the first one against Bragg is on September 17. I am satisfied that these accounts were not opened before these charges were made. I hold that the contract of service began on July 14, 1916.

As to the amount to be allowed for wages, two issues were presented to the court, one by the plaintiff, who, while denying that his services as seaman terminated with the wreck occasioned by the storm at the Magdalen Islands, claimed that Capt. Dix agreed to pay him $2 extra a day for 16 days overtime at night work performed at the Magdalen Islands, and on the voyage from there to North Sydney; another by Capt. Dix who, while denying that he made any agreement to pay the plaintiff anything extra, contended that the plaintiff's services as seaman terminated immediately after the wrecking of the vessel at the Magdalen Islands, only to recommence on September 15 following, when she was repaired and again ready for sea.

The responsibility rests upon each party of proving their respective issues. *Ei incumbit probatio qui dicit, non qui negat.*

It is admitted that the plaintiff and the cook worked on and about the vessel during all the days' delay occasioned by the storm which drove the vessel ashore, at the refloating at the Magdalen Islands and North Sydney, and at the repairs made at these respective ports. The defendant Dix claims that the underwriters took charge of the refloating and repairs—that their agents hired these men and even himself at the Magdalen at the rate of $2 a day. The plaintiff denies this and states that he was promised the $2 a day by Capt. Dix. There is here a direct contradiction. The captain does, however, admit that he may have told Young to pump the vessel, "the same as I would tell the other men."

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It is true that Bragg, the cook, stated in his evidence that the agent Gaudet told him he would get $2 a day. He also stated on cross-examination:—"I was on board ship when she was in dry dock taking my orders from Capt. Dix, and when in Sydney, Capt. Dix told me to paint the vessel." Speaking of his work about the vessel when she was being repaired at Sydney and his pay for such, this witness states: "I never put in a bill, my amount was put in Capt. Dix's bill. Dix told me he handed in my bill to the insurance company. Dix's bill and mine were all in one bill. I suppose he was putting in the bill to get his insurance."

It is evident that there was an expectation entertained of extra pay for the services performed in connection with the refloating and repairing.

I am not satisfied that the plaintiff has established his claim for extra pay and this part of his claim I must disallow.

The defendant Dix contends that there should be deducted from the plaintiff's claim not only the whole time between August 1 and September 15 but that he should be charged for his board and lodging with which the Captain claims to have supplied him during that time. This contention is based on what took place at the Magdalen Islands immediately after the storm and on s. 183 of the Canada Shipping Act.

I have to look more at what was done than what was said, especially if what was done appears inconsistent with what was said. *Non quod dictum est sed quod factum est, inspicitur.*

Did Dix terminate the services of the plaintiff as a seaman at the Magdalen Islands? The meaning of the word "terminate" is by no means obscure. It is to put an end to—to make to cease, to bring to completion. Did the Captain discharge his crew? Did he dismiss them from his service as seamen? Did he pay them off?

In no part of his evidence does he so assert. We find him giving them orders at the Magdalen and at North Sydney, and on the refloating and repairing and on the somewhat dangerous voyage from the Magdalen Islands to North Sydney. I find also from the evidence this same crew going to work on the vessel at North Sydney in their previous capacities, after the completion

of the repairs, without a word being said by either party as to a new hiring.

Mr. Duffy seems to depend entirely on s. 183, but the termination there contemplated is that consequent upon a complete wreck and total loss and abandonment of the ship.

The total expense of repairs in this case was much below the value of the ship when repaired.

A temporary abandonment never vacates a seaman's contract.

The *spes recuperandi* in this case was never wholly absent.

Dr. Lushington in "*The Florence*," 16 Jur. 572, at 573, says:—

If a ship be driven upon a coast and becomes a wreck, and the mariners escape to the shore, the contract enures to this extent at least, that if they act as salvors and successfully, so as to save enough to pay their wages, they will be entitled to them though not to salvage: if they do not exert themselves, their wages are lost.

Parsons on Maritime Law, vol. 2, p. 589, says:

In case of wreck, or other peril, the seamen are bound to stay by the vessel, and do all that can be done to save her, or her cargo, or as much as can be saved.

Again at p. 590:

It is settled that the duty of the seamen to remain by the ship is not at an end on the occurrence of a shipwreck, but that they are bound under the contract to save as much of the vessel as possible.

Mr. Duffy also contends that the plaintiff's services at the Magdalens and North Sydney were in performance of a special contract and that as s. 10 of the Admiralty Court Act, 1861 (24 Vict. c. 10), was, by the Imperial parliament, omitted from the Vice-Admiralty Courts Act, 1863 (26 Vict. c. 24), this court has no jurisdiction to award the plaintiff pay for such services in an action *in rem*.

I cannot agree that there was any special contract. Assuming, however, that there was, the jurisdiction of this court is derived from the Imperial Colonial Courts of Admiralty Act, 1890 (53 & 54 Vict. c. 27), and the Admiralty Act (R.S.C. 1906, c. 141), and not from the Canada Shipping Act.

S. 2 (2) of the Imperial Act enacts:—

The jurisdiction of a colonial Court of Admiralty shall, subject to the provisions of this Act, be over the like places, persons, matters and things as the Admiralty jurisdiction of the High Court in England, whether existing by virtue of any statute or otherwise and the Colonial Court of Admiralty may exercise such jurisdiction in like manner and to as full an extent as the High Court in England and shall have the same right as that court to international law and the comity of nations.

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S. 10 of 24 Vict. c. 10 is still law, but the Vice-Admiralty Courts Act, 1863, has been repealed.

See also "*The Chieftain*," Br. & Lush. 104; *The Queen* v. *Judge of the City of London Court*, 25 Q.B.D. 339.

I hold that the plaintiff is entitled to compensation for his services as seaman from July 14, 1916, until January 20, 1917, both inclusive, at the rate of $30 a month. This amounts to $191.61.

As to the payments made to him, the evidence is not altogether satisfactory. The plaintiff produces a memoradnum book which shows that he received altogether in six payments $23. These payments were made at different times while he was engaged on the various voyages. Their entry in the book was made at one time and after his services terminated at Port au Basque. There is no other writing in this book and the entries are utterly worthless as corroboration of the plaintiff's evidence. I do not think the plaintiff knows how much or what he received and made the entries from mere guesswork.

I am not too sure about the defendant's entries being made at the times they purport to have been made. Although in some doubt I have decided to allow him credit for all cash payments stated by him to have been made on account of wages. These amount to $44. I will also allow him $5.50 for the boots and oil coat and $17.50 for the plaintiff's board while working at the herring contract. I disallow all other claims. These will total $67. Deducting this from the amount allowed the plaintiff will leave a balance of $124.61 in favour of the plaintiff.

S. 191 of the Canada Shipping Act provides that no suit for the recovery of wages under $200 shall be instituted by any seaman in the Exchequer Court on the Admiralty side unless certain circumstances pointed out in the section exist.

Two of these were relied on by Mr. Bentley—(*a*) where the owner of the ship is insolvent within the meaning of any Act respecting insolvency for the time being in force in Canada, or (*d*) where neither the owner nor the master is or resides within 20 miles of the place where the seaman is discharged or put ashore.

As to (*a*), it was proved before me that Dix purchased the vessel in the year 1916 for $1,000, that at the time of purchase he gave a mortgage on her to the vendor for $1,000, and that this

mortgage is still unpaid, and that on the day of purchase he insured her for $800, making the loss payable to his vendor. It was also proved that A. A. MacDonald & Bros., of Georgetown, recovered a judgment against Dix in the Supreme Court of this province on March 20, 1915, for the sum of $640.59 debt and costs; that the suit in which this judgment was recovered was commenced by the issue of a bailable writ under which the Captain was arrested and lodged in Kings' County jail; that about a month after the recovery of the judgment against him the Captain swore out of jail under the provisions of an Act of the Legislature of this province for the relief of insolvent debtors. The said judgment still remains unpaid.

It is not quite clear what is meant by "an Act respecting insolvency for the time being in force in Canada."

There is an Act in force in this province for the relief of insolvent debtors and also an Act respecting assignments for the benefit of creditors, while the Winding-Up Act is in force all over Canada. I hold Dix to be in fact insolvent, and that this case comes within exception (*a*).

I also hold on the evidence that it comes within exception (*d*).

There is another section, 192, which deals with the question of costs and provides if any suit for the recovery of seamen's wages is instituted against a ship in the Admiralty Court, and it appears in the course of the suit that the plaintiff might have had as effective a remedy for the recovery of his wages by complaint to a judge, magistrate or two justices of the peace under Part III. of the Canada Shipping Act, the judge shall certify to that effect and thereupon no costs shall be awarded to the plaintiff.

The judge in this province before whom a seaman may sue for wages in a summary manner is the Judge of the several County Courts.

Mr. Bentley, referring to the ss. 187 and 190 of the Act and the provisions in the latter section, that if sufficient distress cannot be found the amount of wages and expenses may be levied on the ship, contends that this could not be done in this case since the summary proceedings would have to be taken before the County Court Judge or magistrate having jurisdiction in the county in which the master or owner resides, that is in Queens' County, and

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such judge or magistrate would have no jurisdiction over the vessel, as she is and had been in Kings' County.

I fail to see the force of this contention.

The word "jurisdiction" has been defined as the right to act judicially—the lawful power to hear and determine and to enforce such sentence.

Another authority has given the following definition: "It is the right of administering justice through the laws by means which the law has provided for that purpose."

The laws of this province authorize the County Courts to issue execution against the goods and chattels of the party against whom judgment shall have been recovered, and the sheriff with whom the same may be placed for execution to execute the same in any of the counties of this province, and all other writs or processes issued out of said courts may, in like manner, be executed in any of the counties of this Island.

Provision is made in s. 743 of the Criminal Code enabling distress warrants to be executed outside of the county of the convicting magistrate by having the same endorsed by a justice of the peace residing within the county where it is intended to have the same executed.

If there was nothing further in the way, I would be forced to hold that the plaintiff, in this case, could have had as effectual a remedy for the recovery of his wages by complaint to a judge, magistrate or two justices of the peace and would certify accordingly.

But this case presents two peculiarities which were not referred to at the trial, and which seem to me to be sufficient to take it outside of the qualification imposed by s. 192 of the Canada Shipping Act.

In view of the insolvent condition of Dix and the mortgage on his vessel for the full amount of the purchase money, and that the summary proceedings which could be taken before a judge, a magistrate or two justices of the peace would not be a proceeding *in rem* to enforce a maritime lien for seamen's wages, but one merely resulting in an execution or warrant to seize and sell the ship in satisfaction of the judgment, I find it impossible to hold that the plaintiff would have, in such proceedings, as effectual a remedy for the recovery of his wages as he has by his action in this court.

The Imperial Statute, 4 Anne c. 16, s. 17, limits all suits and actions in the Admiralty Court for seamen's wages to 6 years after the cause of such suits or actions shall accrue and not after.

But s. 305 of the Canada Shipping Act provided that no order for the payment of money shall be made in any summary proceeding under this part unless such proceeding is commenced:—(*a*) within 6 months after the cause of complaint arises, or (*b*) if both or either of the parties are during such time out of the provinces, then within 6 months after they both first shall be at one time within any of the said provinces.

Ss. 187, 188, 189 and 305 of the Canada Shipping Act are all in Part III. of that Act.

The term "complaint" is a technical one descriptive of proceedings before magistrates, and parliament has, in said sections 187-189, made the term "complaint" descriptive of the summary proceedings to be taken before a judge, magistrate or two justices of the peace, for the recovery of seamen's wages.

The difference between cause of action and cause of complaint is merely nominal. An American judge has defined a cause of action as composed of the right of the plaintiff and the obligation, duty or wrong of the defendant, and these combined constitute the cause of action. This appears to me to be an equally good definition of a cause of complaint.

In this case, both parties appear to have been residing in Cape Breton, in the Province of Nova Scotia, from January 27 until July 1, 1917. This fact makes s. 305 (*b*) inapplicable to this case.

The plaintiff made attempts at different times in Cape Breton to obtain payment of his claim by negotiation and otherwise, but without result. I do not think he delayed his summary proceedings in order to be in a better position after they became barred to bring his action here.

I find that the plaintiff is entitled to recover in this action the sum of $124.61 in respect of his claim, together with costs, and I condemn the ship "Minnie A.," her sails, tackle and apparel in the said sum and in costs, and I order that in default of payment the said ship, her sails, tackle and apparel be sold by public auction by the marshall of this court, and the proceeds thereof paid into court to abide its further order. *Judgment accordingly.*

B. C.

C. A.

STEPHEN v. MILLER.

British Columbia Court of Appeal, Macdonald, C.J.A., and Martin, Galliher McPhillips and Eberts, JJ.A. April 2, 1918.

EXECUTORS AND ADMINISTRATORS (§ IV C 2—110)—REMUNERATION—COMMISSION—DISBURSEMENTS.

Remuneration to trustees, of a percentage of the gross value of the estate, should be allowed on the gross value as of the time when the accounts are passed, a valuation should then be made by the registrar of the unrealized assets and the percentage based on that valuation.

Trustees who have been allowed a commission to manage the estate will not be allowed as a disbursement, commissions paid to agents on collection of interest of mortgages in which some of the estate moneys were invested.

Statement.

APPEAL by plaintiff from an order of Macdonald, J., affirming the registrar's report, as to remuneration of trustees of an estate. Allowed.

Davis, K.C., for appellant; *Cassidy*, K.C., for respondent.

Macdonald, C.J.A.

MACDONALD, C.J.:—I concur in the judgment of my brother Galliher.

Martin, J.A.

MARTIN, J.A., allowed the appeal.

Galliher, J.A.

GALLIHER, J.A.:—Motion and cross-motion to vary registrar's report. Macdonald, J., before whom the motions were heard, dismissed both motions and affirmed the registrar's findings.

Both parties appealed. There are three items in dispute: (1) An item of $4,861.07 allowed the defendants under an order of Morrison, J., fixing the remuneration at 5% on the gross value of the estate and objected to by plaintiffs. This sum is represented by 5% on $97,221.50 being the amount still outstanding and unrealized, and being for arrears of principal and interest due under agreements of sale from the estate to purchasers.

The registrar allowed this item treating the 5% as applicable (under the order of Morrison, J.) to the total sale value of the property and the judge below confirmed the registrar.

With respect I think this was an error. In my opinion the 5% should be allowed upon the gross value of the estate as of the time when the accounts were being passed, and there should have been full evidence allowed and a valuation then made by the registrar of the unrealized assets and the 5% based on that valuation. There should be a reference back to the registrar on this item.

(2) An item of $2,036.10 allowed by the registrar and confirmed by the judge below and objected to by plaintiffs.

This was for commission paid the London and British North American Company Limited on collection of interest of mortgages in which some of the moneys of the estate were invested.

It appears that Mrs. Stephen, one of the plaintiffs (who at the time was also one of the trustees), requested that the investment of the moneys and the collection of interest be given to the above company, and the other trustees concurred.

The defendant trustees are claiming to be allowed for this as a disbursement under the order of Morrison, J., in addition to their 5% remuneration.

It is proper, under the authorities, for trustees to employ agents for such purposes and to have agents' charges allowed as disbursements and the only question is, should they be allowed this as a disbursement since they have already been allowed 5% for managing the estate, of which these moneys collected form a part? I find this dealt with in the case of *Cox* v. *Bennett* (1891), 39 W.R. 308, in appeal. The headnote is:—

> Trustees who have been appointed by the court to receive the rents of, and to manage a trust estate, receiving a commission upon the rental, will not be allowed to charge additional payments made by them to a collector of rents.

Lindley, L.J.:

> The substantial question is, whether the trustees should be allowed the payments made by them as commission to the rent collectors whom they employed. What were the trustees directed to do? The order of the 1st February, 1876, contained nothing authorizing them to pay that commission as well as the commission to themselves, it simply ordered that the trustees should be at liberty to deduct out of the income an allowance of £3 per cent. for their management of the testator's real and leasehold estate. Nothing was said as to two commissions, but the trustees appear to have paid the salary to the collectors and to have passed their accounts. In 1882 the second order was made; there is nothing in that order to shew that the court ever contemplated two commissions. There are not sufficient grounds for allowing these payments, and the appeal must be dismissed, with costs.

Kay, L.J.:

> In 1882 an order was made that the trustees should receive the rents and receive a commission of £3 per cent. as stated in the order of 1876. It is almost impossible that the court should allow such a commission as the one now in question. The beneficiary now, being separately represented, objects to the two commissions and the objection must be allowed.

With Kay, L.J., I may say that it seems to me almost impossible that it could have been in contemplation of Morrison, J., when the order was made that this double charge should be made

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STEPHEN v. MILLER.

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against the estate. It is not, as I view it, a proper item to allow as a disbursement under the circumstances.

The registrar's report should be varied accordingly.

(3) $8,000 disallowed the defendants being a charge for rent of offices and hire of clerk for 80 months averaged at a lump sum of $100 per month.

The work done was in connection with the sale of the property of the estate and the collection of deferred payments by the firm of J. J. Miller & Co. of which the defendant Miller was a partner.

By an order of the court the sale of the estate was placed in their hands and they received the usual commission upon such sales and the defendant Miller shared in such commission. He has also been allowed 5% trustee's remuneration on the gross value of these sales and collections and now seeks to claim $8,000 additional by reason of the extra expense incurred by his real estate firm and himself in handling the property.

Cox v. *Bennett*, *supra*, applied to this also. Moreover, the defendant Miller as trustee contracted with himself, as he was interested in this $8,000 item, being a partner in the J. J. Miller firm, without disclosure to the *cestui que trust*, in fact nothing was heard of this item until new trustees had been appointed and the proceedings taken for the passing of accounts and statements were rendered from time to time without inclusion of any part of this item. This gives one the impression that the whole thing was an afterthought. Trustees cannot so contract with themselves or their firm without full disclosure and acquiescence by the beneficiaries. Moreover, two of these beneficiaries were infants when Miller took charge.

The defendant's appeal is dismissed with costs, and the plaintiff's appeal allowed with costs.

McPhillips, J.A.

McPHILLIPS, J.A.:—I concur in the judgment of the Chief Justice.

Eberts, J.A.

EBERTS, J.A., agrees. *Appeal allowed.*

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Supreme Court of Canada, Fitzpatrick, C.J., and Davies, Idington, Duff and Anglin, JJ. March 5, 1918.

CONTRACTS (§I E—84)—ORAL—RIGHT OF WAY—PRESIDENT OF COMPANY—AUTHORITY—ACQUIESCENCE—REPUDIATION.

An oral agreement for valuable consideration entered into by the president of a commercial company, who had at the time ostensible authority to bind the company, and which has been acted upon and acquiesced in for a number of years will not be set aside.

APPEAL by defendant from the Ontario Supreme Court, Appellate Division, affirming the judgment at the trial, in an action to determine the amount of compensation for a right of way over defendants' land. Affirmed. Statement.

H. J. Scott, K.C., for appellants; *Nesbitt*, K.C., for respondents.

FITZPATRICK, C.J.:—This appeal should be dismissed with costs. Fitzpatrick, C.J.

DAVIES, J.:—I concur in the opinion of Anglin, J. Davies, J.

IDINGTON, J.:—The respondent began to construct its railway through the yard of the Acton Tanning Co. at Acton some time in 1913. And when the latter insisted upon being compensated and proceeded to have an arbitrator named, under the Railway Act in question, to fix the compensation for such expropriation, the application was opposed by respondent on the pretension that the late Walter D. Beardmore, who was the president of the said Acton Tanning Co. at the time of the entry upon its lands, had assented to what was done and agreed that there should be no compensation demanded. Idington, J.

Thereupon the application was directed to stand over until the respondent had had an opportunity to establish by means of this suit what it then alleged.

The trial judge entered judgment for the respondent and the Appellate Division of the Supreme Court of Ontario has upheld same. Hence this appeal.

The Acton Tanning Co. had, prior to the existence of the respondent, expended some $40,000 in order to have sidings constructed by the Grand Trunk Railway Co. connecting the line of that railway with the tanning company's works, and that railway company had expended a considerable sum besides in such construction.

This had apparently been done under a written agreement between the companies which is not in evidence save indirectly

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by reference made to it as a possible obstacle to carrying out the project of respondent as it might desire. It was admitted in argument that it had provided for the Acton Tanning Co. agreeing to give the Grand Trunk R. Co. the exclusive right to the carriage of its freight. An opinion was got from the respondents' solicitors that this provision being against public policy was not binding.

The question of the business policy of thus ignoring an important agreement certainly was deserving of consideration on the part of others as deeply concerned in the management of the appellant company's business as the late Mr. Beardmore.

The further questions of discarding or at all events meddling with the works so constructed thereunder and substituting thereby the new line or rearranging the tracks to provide for that new line and the old, each having suitable access to appellant's company's business premises, also seem to be of a character that demanded they should be brought under the notice of the company's directors and shareholders.

The annual freight expenditure for shipment over the Grand Trunk amounted to about $100,000. This fact alone helps to realize the magnitude of the problems presented to appellant company by the incoming of the new line.

The question of the location of such a line when it was proposed to bring it through the yard of the appellant company's business premises, must necessarily have raised grave matters for the consideration of its directors if at all a matter of bargaining, as it is claimed to have been.

Of course the respondent could probably expropriate such a route without regard to consideration thereof by any one.

It is said that the future extensions of the buildings had been mentioned as a possible necessity of the appellant company, but in relation thereto the selection between coming through on the north instead of the south side of said buildings was decided by the late Mr. Beardmore and that was acted on accordingly without reference to the other directors.

Three or four different lines had been surveyed by respondent's engineers for the purpose of going through the village of Acton. It is said by the respondent that of these the most expensive was chosen by the late Mr. Beardmore. Again nobody else was consulted. For a corporate company giving away or agreeing to sell

any of its lands used in and for its business premises, I venture to think no president thereof has any authority in law unless formally conferred upon him by the by-laws of the company, or at all events by the board of directors, and possibly also the majority of the shareholders.

When these several extraordinary powers relative to matters involving the future of the company alleged to have been exercised by the late Mr. Beardmore were dealt with in argument, counsel for respondent did not seem to rely much upon the inherent authority of a president, but upon that contained in articles of a partnership which he referred to as a holding company.

I shall presently advert to the provisions so relied upon, but meantime I think it well to set forth exactly what the appellant company was, and how constituted and governed.

The company was incorporated in the year 1889, under and by virtue of an Act respecting the incorporation of Joint Stock Companies by Letters Patent, being c. 157 R.S.O. 1887. The majority of the shares were held by members of an unincorporated firm known as Beardmore & Co., which was composed of Walter D., George, Alfred and Frederick Beardmore. These gentlemen held shares in other companies, incorporated in like manner, I presume, to the Acton Tanning Co., and had divers establishments carried on by such like corporations or otherwise by unincorporated management.

The by-laws of the company provided for a board consisting of three directors to be elected annually by the shareholders of the company, of whom two should form a quorum and the majority of the members of the board should govern in all matters.

The president was to have a casting vote in the event of a tie. He was to call meetings of the board whenever he might deem it necessary and also at the request of two directors, each member having one day's notice of the meeting.

He was bound to call a meeting of the stockholders at the written request of two or more shareholders holding at least one-quarter of the capital stock of the company.

Such being the tenor of the by-laws there seems little ground for the implication of there being a right inherent in the president to exercise such autocratic powers as it is alleged he exercised in this instance.

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Then let us turn to the articles of partnership and see what, if any, authority they conferred on him for exercising the corporate powers of the company in such regards as involved in the momentous questions presented to him as president.

Walter D. Beardmore was not only to the eyes of the world apparently the most active man managing these various concerns above referred to, but also, by an agreement entered into on December 31, 1904, between them, was constituted, it is said, the manager of the whole.

So much turns, in my opinion, upon the powers conferred upon the said Walter D. Beardmore by virtue of the said agreement that I think it well to get accurately seized of a fairly correct understanding thereof. I think that may be accomplished by a careful consideration of the first three sections of the said agreement, and s. 11, much relied upon, and the latter part of s. 7 thereof.

There is nothing unusual in the agreement save in the magnitude of the business if we look at it as articles of partnership. The articles provide for the continuance thereof for a period of 5 years from January 1, 1905; that the head office of the firm should be at the City of Toronto; that the said partnership was intended to comprise and include:—

(*a*) The business of the present firm of Beardmore & Co. of Toronto and Montreal.

(*b*) The business of the present firm of Beardmore & Co. of Acton.

(*c*) All shares of the capital stock in the Muskoka Leather Co. Limited, the Acton Tanning Co. Limited, and the Beardmore Belting Co. Limited, owned by the said parties, including the stock in any of the said companies standing in the name of the wife of the first party as to which the first party undertakes to secure transfers or declarations of trust in favour of the firm forthwith on the execution of these presents.

And the capital of the said partnership shall be the interest of the parties in the said premises valued as hereinafter provided, estimated to amount approximately to $1,275,000 to be contributed by the said partners approximately in the following proportions—$500,000; $400,000; $250,000 and $125,000 by the first, second, third and fourth parties respectively. Said shares of stock in said companies shall continue to be held in the name of said partners individually but shall be so held in trust for the firm.

S. 11, which I have referred to, was as follows:—

11. Each partner shall at all times give such supervision and attention to the partnership business as may be necessary for the efficient management thereof, but the first party shall have the general oversight and direction of the business.

and is really the most important in the whole document, when we come to consider what turns upon it.

Now the proposition of law which we are gravely urged by counsel arguing for the respondent company to adopt, that the president of such a company as the tanning company, armed only with the powers conferred upon him as its president, and the cl. 11 quoted above in the partnership agreement, was entitled to ignore his fellow shareholders, his partners in business, and make such a bargain conceding not only the right of way, but all that was involved in determining where the right of way was to be exercised, is to my mind not only startling but absolutely unfounded.

But when we find that counsel taking that stand relies upon para. 11 of the partnership agreement, it is necessary to consider that. I have done so, and read same many times and I fail to find therein anything but a general oversight and direction of the business.

It is to be observed that it was the business that was being conducted there, and not the disposition of the property or a radical changing of its application that was being dealt with by this partnership agreement.

And when we find further that the partners who executed this agreement were not the only persons concerned, but that Clark, who had for years acted as superintendent of the carrying on of the business of the company in question, held 13 shares which had not yet become the property of any one of the partners, but which we find referred to in the following language in para. 7 of the agreement:—

> And in case stock in the Acton Tanning Co. Ltd., now standing in the name of James E. Dunn and John Clark shall revert to said third party same shall be deemed the property of the firm,

we may ask how he came to be ignored.

We also find in the agreement when it was executed that there seems to have been a large block of stock held by the wife of the said Walter D. Beardmore. He bound himself by these articles of agreement, as appears in the passage quoted above, to procure the transfer thereof to the firm.

I am not sure whether that ever was obtained or not but in argument it was admitted that there were thirteen shares held

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by Clark which had not ceased to be his property at the time in question. We find also that Walter D. Beardmore only held 35% of the entire assets at the time of the said articles, and at the time in question by renewal thereof which was in force then, a slight fraction less than that proportion of the entire interest in these amalgamated businesses.

I submit it is rather an untenable argument which in one breath emphatically holds that the majority of the shareholders in an incorporated company were, without any meeting, without consultation with the minority shareholders, simply because they constituted the majority, entitled to disregard the minority without going through the form of calling a meeting of the shareholders, and then in the next breath try to maintain the position that Walter D. Beardmore, who himself was only the holder of a minority of the shares, could by such slender authority as contained in para. 11 of the agreement, ignore the majority and deal with such an important piece of business as that in question in the way he is alleged to have done.

It looks very much as if either argument was only supposed to be good for the purposes of this case and that we are asked to adopt one or other of them to maintain the respondents' contention.

I am unable to accept either proposition. I think there was no authority in Walter D. Beardmore, by virtue of his position under the articles of agreement, to make such a bargain as it is claimed he did.

I am further of the opinion that if the majority of the shareholders had actually authorized such a transaction and ignored entirely in doing so the minority shareholder, or shareholders, in sanctioning such an agreement, they were doing so without authority in law.

In any way I can look at the transaction, it was of such an important character that it is hard to suppose that any man of experience in business would venture upon a binding contract such as the late Walter D. Beardmore is alleged to have made without consulting his partners and fellow shareholders.

I can understand a man in his position tentatively taking the position that it would be a wise thing for his company to consider, and on that supposition was entirely within his rights in submitting to Sir William Mackenzie the proposition for his assent.

That, however, is very far from the contention that is set up by the respondents. It must involve a binding bargain or amount to nothing so far as the disposition of this case is concerned. Unless there was a definite conclusive bargain made which would entitle the court to stay proceedings for arbitration under the Railway Act, this action must fail.

What transpired may be very cogent evidence, if admissible at all, in the way of minimizing compensation to be awarded in such an arbitration, but with that we have nothing to do.

The other members of the firm, holding nearly two-thirds of the entire capital invested in the business and profits to be derived from carrying it on, had never been consulted.

It seems a most remarkable thing that the late Mr. Beardmore who felt such a delicacy in acting without consulting his brothers in relation to a matter which was but a fractional part of what was involved in the very execution of the contract now set up, should write as follows:—

The Marlborough-Blenheim,
Atlantic City, N.J.,
October 28th, 1912.

Dear Sir William:

I have been in Boston, New York and Philadelphia, for a few days, and returning here find Ansell's (Annesley's) note (your secretary) enclosing consent to Acton crossing. Up till now I have not thought it well to mention the matter to my brothers. I am not sure that it would be policy to do so now, but you will agree with me that under the present circumstances it would hardly do for me to sign the consent without their concurrence. I expect to be home on Saturday or Sunday at the latest and will see Mr. Royce. I may tell you that a short time since when Mr. Hewson, the Grand Trunk Railway resident engineer, spoke to me about the matter, I told him at once that the G.T.R. must not look to me for any help as I would not oppose the crossing.

W. D. Beardmore.

and yet he readily presumed not only to have absolute power, but to be taken as having asserted it.

I cannot see why, and still less when we realize the relations that existed between Sir William Mackenzie and himself, and the manner in which the subject was approached and handled throughout.

In the course of their social intercourse, Walter D. Beardmore and the said president, Sir William Mackenzie, are said to have got into conversation on the subject of freight from the Acton company's premises, and the desirability of greater facilities of

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shipment therefrom. This sort of conversation had taken place more than once, but it is alleged that on an occasion shortly after the trial lines had been run, it had become apparent that one of the favourite schemes of the engineers would, if executed, come too close to the home of Willie Beardmore, son of Walter D. and a son-in-law of Sir William Mackenzie. This feature of the project led to something more definite than had previously taken place.

A good deal, in fact a great deal, has been argued both before us and in the courts below, as to the exact nature of the final conversation on the subject.

Walter D. Beardmore is dead and the only direct evidence of the conversation is that given by Sir William Mackenzie. Much has been said about the exact nature of the conversation and whether there was any necessity for having it corroborated by some material evidence.

In my view of the case I do not think I need reach a very definite opinion on many of the issues thus raised. I need only to apprehend accurately what it is that is involved in that which Sir William Mackenzie states. His statement is alleged to maintain the proposition that the company, of which he is the head, was to have the right to pass through the yard of the appellant, the Acton Tanning Co., in the course of constructing their road.

Indeed, he expresses the matter in somewhat different terms in the course of his evidence, but what he tried to make definite was that there was to be no cost of right of way to his company. He says:—

> We were going in there and he was not paying us to go in and we were not paying. We were not to pay anything to go in to give them the service.

It is quite clear that there was no definite location finally decided upon in these conversations. It is tolerably clear that they were to go through the yard but the exact spot that they were to pass over was even changed in the course of carrying out the instructions given pursuant to what the engineer, Wilkie, says in his evidence he supposed to be based upon what was a tentative agreement between William Mackenzie and Beardmore.

There was no doubt in the service of the respondent someone as solicitor to prepare and have executed conveyances of the right of way as soon as agreed upon, and all the more likely to have

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that speedily completed if it was to be got for nothing. Why was that not done if a definite and completed bargain had been reached?

There were accounts rendered respondents and paid, which had plainly as possible emphatically intimated that the appellants recognized no such bargain as now set up, and were waiving no claim to the usual compensation for right of way.

These explicit statements never were reported or denied or challenged in any way until Walter D. Beardmore had died.

I have already intimated my decided opinion that there existed no authority in Mr. Beardmore to make such a bargain and hence it is not necessary I should enter into an elaborate examination of the question of the right to specific performance if he had.

I venture, however, to suggest that the principles upon which courts of equity have uniformly acted in such cases of doubt and difficulty and possible injustice being done by the decree of specific performance, form an insurmountable barrier in the way of any one seeking to enforce against those not actually parties to it, such an indefinite and incomplete arrangement resting only upon alleged conversation had with a man dead before it was sought to have it fulfilled and founded on such doubtful authority on the part of him so dead, and so inconsistent with his conduct in relation thereto in his lifetime and described by as intelligent a witness as the engineer who located the line where it is because he had been told there was a tentative agreement being made.

It is urged that the definite claim to compensation was not made until the road had been constructed.

That is no unusual occurrence in railway building or execution of works under municipal authority if the records of this court are taken as a guide.

I think the appeal should be allowed and the action dismissed with costs throughout.

DUFF, J.:—The appeal should be allowed with costs.

Duff, J.

ANGLIN, J.:—This litigation is attributable to the neglect, too common in transactions between persons intimately connected by ties of friendship, marriage or blood, to apply business methods to business matters. Assuming the plaintiff's contention to be right, the most ordinary precaution for its officials to take would have been to have had a memorandum of its agreement with the defendants prepared, or a deed of the right of way executed. If,

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on the other hand, the defendants' position is correct, their allowing the railway company to enter and occupy a right of way through their property without opposition or protest and their subsequent inaction for at least three years evinces such neglect of most obvious business precautions that, coupled with other attendant circumstances, it affords evidence of no little cogency against the claim which they now prefer.

The material facts appear in the judgments delivered by the trial judge and in the Appellate Division.

To the plaintiffs' demand for a declaration that it is in possession of the right of way which it occupies through the defendants' yards under an agreement whereby, in consideration of its locating its railway where the defendants desired and paying the cost of removing certain buildings, sheds, piles of tan bark, etc., making certain improvements in the defendants' yards by filling, grading and otherwise, and providing for necessary changes in the location of Grand Trunk Railway spurs, it should obtain its right of way through the yards without other or further cost, whether for value of land taken or for injurious affection of adjacent property of the defendants, three defences are raised—denial of the making of the alleged agreement; a plea of the Statute of Frauds; and a repudiation of the authority of the late Walter D. Beardmore, its president and managing director, to bind the defendant company by such an agreement if made.

The first question is so purely one of fact that the finding of a trial judge, unanimously affirmed on appeal, would ordinarily be conclusive upon it. Whatever agreement there was was made between Sir William Mackenzie, the president of the plaintiff railway company, and the late Walter D. Beardmore. An alleged absence of corroboration of Sir William's evidence is chiefly relied upon by appellant. After giving the circumstances that led up to the arrangement being made, Sir William's evidence was:

Mr. Nesbitt: I understood Henderson (the railway company's solicitor) to say that he had gone to see you and had told you of the southerly line? A. Yes, I was informed of the other lines and lines that it would cost less money to build.

Q. And that Mr. Beardmore was asking you to go through there, and that they would not go there unless you said so, and I think he said something about the Davies arbitration? A. I don't remember anything about that coming up particularly, but the Beardmores were very anxious to have this accommodation, and were willing that there would be no expense to them

or to us, no more than building the line. Walter Beardmore is the one that talked to me about it most I think nearly all the time, but I did mention it to George at one time in my office, and he said, oh, it was all right as far as he was concerned, that Walter attended to that business. Matters went on and we went through there.

Q. Did you have any arrangement or bargain with Walter Beardmore as to the terms on which you were going through? A. As I said this moment, there was to be no cost; we were going in there and he was not paying us to go in and we were not paying. We were not to pay anything to go in to give them the service.

Q. It was free of cost both ways? A. Yes.

Again on cross-examination he said:

When you were discussing the matter with Walter Beardmore, and you said he could have all this without it costing anything, had you anything in mind as the right of way? A. Why, of course, we could not give them the service without getting into the yard.

Q. The point is that if he could get it in there without costing him anything, what arrangement was made with the Grand Trunk? The question is how you and he, at that time, understood that the right of way was to be paid for? A. We were to have free right of way, and we were to do all our own work, anything done in the yard, like re-arranging, or getting rid of any buildings, or anything of that kind.

Mr. Mowat: It is suggested that you and Walter Beardmore thought it was mutually advantageous to you to have the railway close to their shops and it is suggested that Walter did this without authority, and without consultation with his brothers? A. I don't know anything about that; but I did mention it to George.

Q. And he said, "Walter is attending to that?" A. He said it was all right as far as he was concerned.

The anxiety of the Beardmores to have the railway go through their yards is deposed to by Mrs. W. D. Beardmore and her daughter. The objection of the right of way men and engineers to this route as more costly and difficult, and its ultimate selection solely because of an explicit direction of Sir William Mackenzie and upon the understanding that he had arranged with the Beardmores for the right of way through their yards is also well established. Moreover, it is undisputed that the railway company did work of filling swamps, and holes, cutting down side hills, grading, making roads, etc., thus improving the Beardmore yards, and paid for the cost of rearranging shipping facilities and removing tan bark and cement blocks—all quite outside any obligations of a company merely carrying out a railway project in the ordinary way and attributable only to some special arrangement. But, apart from the corroboration afforded by those circumstances, deposed to by several witnesses, explicit confirmation of Sir

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William Mackenzie's statement is given by Wicksteed, consulting engineer of the plaintiff company. He says:—

Q. Did you have anything to do with any bargain between him (W. D. Beardmore) and Sir William, or is your knowledge merely hearsay? A. Hearsay and inference. I was present at several interviews and it was quite evident to me that there was an understanding between them. That is as far as I can say.

Q. The conversation proceeded on that basis? A. Quite so.

Q. You were there when he was claiming that certain expenditures should be made? A. Yes.

Q. And apparently it was assumed that they should be made by reason of a previous arrangement to that effect? A. Quite so. Sir William deputed me to arrange the details in several instances.

Q. Where was the meeting with Mr. Beardmore held? A. In Mr. Beardmore's own office, on Front St.

Q. The office of Beardmore & Co. A. Yes, on Front St.

And on cross-examination:

Q. What was your understanding as to the actual right of way on which the railway was? Who was to pay for that? A. The tenor of all the conversations that I heard between Sir William and Mr. Beardmore—and I heard many—was that the right of way was free. The damage such as the removal of bark piles and such things as that were to be paid.

Mr. Mowat: You understood that the lands inside the yard were to be free? A. Yes.

Q. Where do you say the yards ended? Where was freedom to stop and payment to begin? A. The portion occupied by the work and bark piles.

Q. The area which would be occupied by buildings and bark piles? A. Yes.

Q. Roughly speaking, how much would that be? How far east of the easterly building? A. I would say about half a mile altogether.

Q. A half a mile from east to west? A. Yes, about 3½ acres.

Q. Your understanding was that outside of that the railway was to pay for the land taken at the average price in the district? A. I inferred that, at least I saw no reason to infer otherwise.

If corroboration were necessary I think we have more than enough here. I have not overlooked the adverse comment on Wicksteed's evidence based on a memorandum of November 18, 1913, in connection with voucher No. 851. Wicksteed was not confronted with that memorandum on cross-examination, as he should have been if it were proposed to rely upon it to impugn the credibility of his oral testimony. On the other hand, his letter of October 21, 1913, which is in evidence, refers to the fact that running through the Beardmore property "has saved us a large sum in right of way." Both these documents were before the trial judge. He saw and heard both Mackenzie and Wicksteed and he appears to have fully credited their testimony.

The verisimilitude given it by the probabilities arising upon the surrounding circumstances no doubt weighed with the judge. To overturn in this court a finding thus supported and unanimously affirmed by the court of last resort in the province is practically impossible. It must be assumed to be correct.

For the reasons given by the Chief Justice in the Common Pleas, delivering the judgment of the Appellate Division, the Statute of Frauds probably has no application. The action is not brought to charge (the defendants) upon any contract or sale of lands, tenements or hereditaments, or any interest in or concerning them.

That the respondent is rightly in possession of the right of way is not questioned. There is no suggestion that it is a trespasser. It has admittedly given some consideration therefor—whether the whole or only a part is the matter in issue. The real plaintiffs are the appellants, who seek to recover an alleged balance of that consideration; the real defendant, the respondent, who resists their claim.

If the statute otherwise had application the case would appear to be taken out of it by part performance. The taking possession of the right of way and the construction of the railway without any proceedings having been taken under the expropriation clauses of the Railway Act, and without protest of any kind, the improvements made by the railway company in the defendants' yards and its expenditures for them on new buildings and the removal of piles of tan bark, etc., must be referred to some contract and may be referred to the alleged one; they prove the existence of some contract and are consistent with the contract alleged. Fry on Specific Performance, 5th ed., par. 582; 27 Hals. No. 49, at p. 31; *Wilson* v. *Cameron*, 30 O.L.R. 486. These facts are only consistent with the assumption of the existence of a contract the terms of which equity requires, if possible, to be ascertained and enforced. *Maddison* v. *Alderson*, 8 App. Cas. 467, 485.

There remains the defence of alleged lack of authority on the part of the late Walter D. Beardmore to bind the Acton Tanning Co. by the agreement to which Sir Wm. Mackenzie has deposed. The evidence puts it beyond doubt that the Acton Tanning Co. was merely one of several subsidiary instrumentalities of the firm of Beardmore & Co. It was owned and controlled by, and carried on for and in the interest of that partnership. All the

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shares of its capital stock, except 13 shares held by one Clark, an employee, were owned by the Beardmore partners. All its earnings, except the insignificant fraction representing the dividend on Clark's 13 shares, passed for distribution into the partnership funds of Beardmore & Co. So negligible was Clark's position as a shareholder considered—so much were he and his shares regarded as under Beardmore control, that, as Alfred Beardmore tells us, in the adjustment made when Walter D. Beardmore retired in 1915, these 13 shares were included in the assets of Beardmore & Co.

Walter D. Beardmore was the senior member of the partnership composed of himself and his three brothers, George, Alfred, and Frederick. His interest in the firm was four-tenths. His son, Walter Williams Beardmore, speaking of his late father's position in the business, says:—

Q. Who composed the firm of Beardmore & Co.? A. My father, Walter D. Beardmore, G. W. Beardmore, A. O. Beardmore, and F. W. Beardmore.

Q. Four brothers? A. Yes.

Q. Who was the active manager? A. W. D. was. He was the head of the firm and always took the initiative in the business.

Q. Would you say the leading part? A. Yes.

Q. Known to the public as Beardmore & Co.? A. Yes.

Q. What form did his activity take? A. He took part in every detail of the business, Muskoka Leather, Acton Tanring Co., Montreal and Toronto.

Q. Would you say that he was the governing mind? A. He certainly was, and recognized by all the managers in the different departments as the one.

Q. As the directing mind? A. Yes, as the directing mind.

Q. Just to follow that: I notice that in all this correspondence the name of Beardmore and Co. is signed even when apparently it was the business of the Acton Co.? A. Yes.

Q. Was that common? A. Yes, quite common.

Q. Would you say that the whole of the business for all varieties of leather so far as the public was concerned was carried on under the name of Beardmore & Co.? A. Absolutely.

Mr. Alfred Beardmore says:

Q. Your brother is the person who had the direction and control of the business? A. Yes, Walter.

Q. He was the head of the family and the head of the business? A. Oh, yes, decidedly.

Q. So far as the public was concerned? A. Yes.

Q. Frederick, George and yourself were of a retiring disposition? A. Sometimes.

Mr. George Beardmore says:

Q Your brother Walter was very active in business prior to the time when he had the stroke? A. He always was, yes.

Q. And so far as the public was concerned he was the outstanding figure of Beardmore & Co.? A. Oh, yes, naturally, he was the head of the firm.

Frederick Beardmore was not a witness.

The partnership articles of Beardmore and Co. include in its assets all the shares of the capital stock of, *inter alia*, the Acton Tanning Co. owned by the partners. They provide specifically for the manner in which the balance sheet of the Acton Tanning Co. shall be prepared and they contemplate the reversion of the Clark shares to the firm.

They contain this clause:

11. Each partner shall at all times give such supervision and attention to the partnership business as may be necessary for the efficient management thereof but the first party (Walter D.) shall have the general oversight and direction of the business.

A short time previously, as managing director and in the course of his "general oversight and direction," Walter D. Beardmore had secured the entrance of the Grand Trunk Railway into the Beardmore yards by an expenditure of from $40,000 to $60,000, so important was it to the business to have direct shipping facilities by rail. That Walter Beardmore made, and was regarded as having full authority to make, this arrangement with the Grand Trunk R. Co. is the evidence of his son and is the only reasonable inference from the testimony of Alfred O. Beardmore. There is no suggestion that any resolution, formal or informal, of the directors of the Acton Tanning Co. was deemed necessary for this purpose.

Sir William Mackenzie tells us that when he spoke to George Beardmore about the plaintiff company giving the Beardmores' Acton business a connection and freight service, George Beardmore told him it was all right as far as he was concerned—that Walter attended to that business.

George Beardmore, called as a witness, does not contradict this statement, and from his somewhat indefinite evidence, I would infer that he had known that his brother Walter was making an arrangement for bringing in the plaintiff's railway. He says:

Q. All you can say is that he (Walter) did not talk to you about the bargain about the road coming in? A. He did not talk a great deal about it. Really I have forgotten what the conversations were. I can not fix the exact conversations that we had, but he has always consulted me upon any decisions, and in fact sometimes left them to me to decide.

Of course it is not denied that the partners were fully aware of the advent of the plaintiff railway company and of the con-

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struction of its line and also of the work done in levelling and making roads and of the payments for removing bark piles, buildings, etc. It is equally impossible to suggest that they did not know that the railway had come in without any expropriation proceedings under some friendly arrangement, though not informed of its precise terms, or that they were ignorant that whatever arrangement was made had been entered into by the late Walter D. Beardmore on their behalf and on behalf of the company they controlled.

Having regard to the position he occupied and to his relations with his brothers and the Acton Tanning Co., as disclosed by the evidence, I am satisfied that it was, in fact, within the authority of the late Walter D. Beardmore in the course of his management of the business of Beardmore & Co. to negotiate and settle the terms on which "the advantage"—as Alfred Beardmore says it is—of having the plaintiffs' railway pass through the Beardmore yards should be secured. Their freight business with the Grand Trunk Railway amounted to $100,000 a year. A recent strike on that railway had made the desirability of a second connection very plain and the benefit to the shipper of competition in carriage is obvious. It seems to me to be quite within the scope of the authority of the president of such a company as the Acton company, entrusted with "the general oversight and direction of the business," to arrange and settle the terms on which it should obtain railway connection and shipping facilities.

That the authority to make an agreement such as that under consideration might have been conferred by its directors on the president and managing director of a company such as the Acton Tanning Co. will scarcely be questioned. That Walter D. Beardmore was held out to the world as having full authority to act for all the interests controlled by Beardmore & Co., and that Sir William Mackenzie dealt with him as clothed with that authority is the only fair conclusion from the evidence. This aspect of the case is covered by the judgment of this court in *McKnight Construction Co.* v. *Vansickler*, 24 D.L.R. 298; 51 Can. S.C.R. 374.

There was no notice to the plaintiff or to Sir William Mackenzie of any limitation on Walter Beardmore's ostensible authority. The letter from Atlantic City of Oct. 28, 1912, relied on by the appellants, had reference not to the terms on which the plain-

tiffs' railway should enter the Beardmore yards but to its crossing of the Grand Trunk Railway. Having regard to the tenor of that letter, Walter Beardmore's subsequent formal consent to that crossing would rather strongly suggest that he had consulted his partners and fellow-directors, and had secured their approval and concurrence.

But if that were not the case and if the other partners, who knew what had occurred in connection with the bringing in of the Grand Trunk and were aware that the only arrangement for the entrance of the plaintiff railway had been made with Walter Beardmore, did not mean to acquiesce in his authority to make a binding agreement on their behalf and on behalf of the Acton Tanning Co., their conduct in allowing it to enter their yards and to build its line of railway through them without any suggestion of opposition or of protest—in demanding and accepting as having been promised by Sir William Mackenzie, benefits not usually incidental to railway construction, unless under special agreement, and in failing to institute any proceedings to recover compensation until some months after Walter Beardmore's death, 4 years after the railway had first come in, is to me inexplicable.

On the grounds, therefore, that the late Walter D. Beardmore had actual authority to make the arrangement deposed to by Sir William Mackenzie—that, if not, he had ostensible authority to do so—and that that arrangement has been so far acted upon and acquiesced in by the defendants that they should not now be heard to question his authority to enter into it, I conclude that the agreement, which it has been found was in fact made, is binding upon the defendants and cannot be repudiated by them.

Appeal dismissed.

CHEESEMAN v. CANADIAN PACIFIC R. Co.

New Brunswick Supreme Court, Appeal Division, Hazen, C.J., White and Grimmer, JJ. April 19, 1918.

APPEAL (§VII 4—485)—JURY VERDICT—JUSTIFICATION—EVIDENCE—SETTING ASIDE.

A verdict of a jury will not be set aside if they were justified in coming to the conclusion that the direct cause of the accident was in the arrangement and equipment of the train, and if there was evidence upon which they might properly find that the negligence of the company was in the system employed for the operation of the particular train.

Statement.

APPEAL by defendant from verdict entered for plaintiff on trial before McKeown, C.J., K.B.D., and a jury, to have verdict set

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aside and a verdict entered for defendant, or for a new trial. Affirmed.

F. R. Taylor, K.C., for appellant; *D. Mullin*, K.C., for respondent.

HAZEN, C.J., agreed with Grimmer, J.

WHITE, J., took no part.

GRIMMER, J.:—This was an action for negligence, and was tried before McKeown, C.J., and a jury, at the Saint John Circuit, June, 1917, resulting in a verdict for the plaintiff for $12,000. The action was brought under Lord Campbell's Act, and, in the alternative, under the Workmen's Compensation Act.

The plaintiff intestate was an engineer in charge of a locomotive on the freight train of the defendants', whose destination was St. John. The train was dispatched or had started apparently from the City of Montreal. On its way, when at or near Greenville, in the State of Maine, a truck of one of the freight cars which was loaded with frozen hogs intended for overseas shipment, became unworkable, and was there removed. An auxiliary truck, so-called, was placed under the car and the train proceeded. The placing of the auxiliary truck interfered with the braking arrangements of the car, rendering the brake on one end entirely useless, and also rendering the air brake inoperative. The train passed Brownville, where the damage to the car might have been repaired, and arrived at McAdam Junction, where it also could have been repaired. The train was rearranged at McAdam, and two locomotives were attached thereto, there being 47 cars of freight on the train. The deceased was in charge of the second engine. Before leaving McAdam it was disclosed by the evidence that the defendant's inspector examined the brakes for the purpose of ascertaining whether or not a sufficient percentage were in operation, and having satisfied himself that 90 per cent of the brakes were working, he allowed the train to proceed without having apparently discovered that there was an auxiliary truck under the car, as alleged, nor was it known to the conductor who was in charge that there was an auxiliary truck anywhere on the train, though he discovered the same after the train arrived at Harvey on its way to St. John. It seems the car with the auxiliary truck was placed immediatley next the second engine and attached thereto. When nearing St. John, and about 5

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miles therefrom, the train became stuck on a grade, and in the effort to take it over, 4 cars were broken away. The conductor then determined to take 5 cars and proceed with them to Fairville and return for the balance of the train. This proceeding was carried out, and the two engines with 5 vans attached arrived at Fairville, where it was proposed to put them on a siding. After taking water, the engines backed the cars on a siding and disconnected therefrom. They then proceeded towards the main track, but before passing the vans a collision took place whereby the accident which led to the death of engineer Cheeseman resulted. Immediately upon the disconnection of the engines from the cars, the brakeman in charge, one O'Leary, attempted to set the hand brakes on the car which was next the engine, when he discovered that the cars were moving down the grade. He then made an effort or attempt to reach the second car and set the hand brakes on that, but before it could be done the accident occurred. The conductor in charge, one Sullivan, states that the cars ran back on the siding and struck the engine, thereby causing the accident. This, shortly, is a statement of the facts.

Several questions were left by the Chief Justice to the jury, from the answers to which the verdict for the plaintiff was entered. In answer to question No. 1 the jury found that the death of the deceased was not caused by the negligence of any employees of the defendant company. In answer to q. 3 they found that the accident was caused by defect in the equipment or arrangement of the train, and that the defect consisted in the auxiliary truck and defective brakes on the freight car, the brakes being connected with only one truck, therefore, not having sufficient power to hold the cars, which ran back and struck the engine on the main line at Fairville No. 1 siding. In answer to q. 7 they found that the final cause of the accident was negligence on the part of the Canadian Pacific R. Co., which had the last chance of avoiding the accident. It was disclosed in the evidence in this connection that the direct effect of placing the auxiliary truck under the freight car was to render absolutely ineffective the braking facilities upon the end under which the truck was placed, leaving only the brake upon the other end, which could be made effective by the hand brake. The jury also found that there was no negligence on the part of any of the employees of the defendant

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company. It was argued on behalf of the plaintiff that the accident was caused by the negligent system which was used by the defendant company in the operation of this train, and particularly in respect to the use of the auxiliary truck under the freight car, as stated. This was denied and strongly argued against on behalf of the defendant company, which was prepared to, and did admit its liability for the payment of $2,000 under the Workmen's Compensation Act. It then becomes necessary to shortly, as I believe it is only necessary to do, discuss the authorities in respect to the question which arises as to the defendant's liability, in view of the operation of this car as part of the system used by the defendant company.

I may first remark that, under the rules relating to the operation and inspection of air brakes and air train signals issued by the defendant company to their employees, and which were put in evidence, r. 25 (*a*) provides distinctly that more than two consecutive brakes must not be cut out on a freight train *and none on the car next the engine*, which must always have a quick action triple in good working order. It will, therefore, appear that the car in question, having been placed next the engine, which was in charge of the deceased, was in direct violation of the rules prescribed by the defendant company, and which at that time it appears were in the hands of the employees who were operating the train, and the inspector at McAdam, whose duty it was to see that the train was properly arranged and in proper working order before it left that point.

In *Webster* v. *Foley* (1892), 21 Can. S.C.R. 580, it was held:—

A master is responsible to his workmen for personal injuries occasioned by a defective system of using machinery, as well as for injuries caused by a defect in the machinery itself.

The judgment of the court in this case was delivered by Strong, J., who quoted as an authority which commended itself to his judgment as applying generally to cases of this kind, the case of *Smith* v. *Baker*, [1891] A.C. 325, in which judgments were delivered by Watson and Herschell, L.JJ. Quoting from Lord Watson's judgment, at p. 353:—

It does not appear to me to admit of dispute that, at common law, a master who employs a servant in work of a dangerous character is bound to take all reasonable precautions for the workman's safety. The rule has been so often laid down in this house by Lord Cranworth, and other noble and learned Lords, that it is needless to quote authorities in support of it. But,

as I understand the law, it was also held by this house, long before the passing of the Employers' Liability Act (43 & 44 Vict. c. 42), that a master is no less responsible to his workmen for personal injuries occasioned by a defective system of using machinery than for injuries caused by a defect in the machinery itself.

Referring to the judgment of Lord Herschell in the same case, we find him stating as follows, at p. 362:—

It is quite clear that the contract between employer and employed involves on the part of the former the duty of taking reasonable care to provide proper appliances, and to maintain them in proper condition, and so to carry on his operations as not to subject those employed by him to unnecessary risk. Whatever the dangers of the employment which the employed undertakes, amongst them is certainly not to be numbered the risk of the employer's negligence, and the creation or enhancement of danger thereby engendered.

We find this judgment approved of in the case of *Williams* v. *Birmingham Battery and Metal Co.*, [1899] 2 Q.B. 338, at p. 342, where Smith, L.J., in delivering a judgment quoted in part the passage which I have just recited from Lord Herschell's judgment, and adds these words:—

This being the master's duty towards his man, if the master knowingly does not perform it, it follows that he is guilty of negligence towards the man.

Romer, L.J., in the same case says, at p. 345:—

If the employment is of a dangerous nature, a duty lies on the employer to use all reasonable precautions for the protection of the servant. If by reason of breach of that duty a servant suffers injury, the employer is *prima facie* liable.

Keeping these judgments in mind and applying the facts in this case, I am of the opinion that the jury in coming to its conclusion as it did, had in view the fact that the accident was directly attributable to the placing of the auxiliary truck under the car, whereby one-half at least of the braking facilities of that car were rendered absolutely useless. Having before them also the evidence as it was given by the brakeman in charge of the car, and the conductor in charge of the train, from which it appeared that the brakeman had made an effort to hold the cars by the brake on the car next the engine, but was unable to stop them in their progress down the siding, and also the evidence of the conductor that the cars almost immediately after they were disconnected from the engine began to move down the siding, I am of the opinion that they were justified in coming to the conclusion that the direct cause of the accident was in the arrangement and equipment of the train, by the placing of the auxiliary truck under the

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van, and the defective brake on the car, and that there was evidence upon which they might very properly find that the negligence was the negligence of the defendant company, in the system which they employed for the operation of this particular train.

It was strongly argued by counsel for the defendant company that there was no evidence of any defect in the equipment or arrangement of the train, and that if there was a defect in the equipment or arrangement of the train this defect was not due to negligence on the part of the defendant company, and consequently that there was no liability. In this I cannot concur, as it very plainly appears from the evidence that the defect which has been pointed out was known to the employees of the company at Greenville, that the train was allowed to proceed from that point with the defect existing, that it also—as pointed out—passed through Brownville, a point at which the defect could have been remedied, and it was also allowed to pass through the hands of the officials of the company at McAdam, where it could also have been remedied and was sent on to its destination in the same condition in which it started from Greenville, and under this statement of facts as developed in the evidence, it appears to me that unless this method had been adopted and approved of as a part of the general system of operation of trains of this nature the defect could never have been allowed to remain so long without having been remedied. It was also strongly argued that it was necessary on account of the freight contained in this car to have it sent forward rapidly to its destination, but as the accident happened in a season of the year when the weather was cold there would not appear to be much reason why attention should be given to that line of argument. Also, it was contended that a transfer of the freight could not have been made because the cars were sealed by the United States authorities while passing through the State of Maine, and it would take some 2 days or more to get permission from the Customs authorities to break these seals. This, also, does not appear to be a very valid reason for continuing the defect, as the train, having arrived at McAdam Junction, it would have been only a matter of a few hours to reload that freight into a perfectly good car before sending it forward to its destination, and thus the accident which did occur might very easily and without much delay have been avoided and the life of the engineer saved.

In view, therefore, of the authorities and of the evidence, I am of the opinion that the jury was justified in coming to the conclusion they did in respect to the cause of the accident, and they were justified in answering the questions which were submitted to them as they did, and therefore that the verdict must be sustained. *Appeal dismissed.*

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Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart, Beck and Hyndman, JJ. March 27, 1918.

INTOXICATING LIQUORS (§ III D—70)—MEDICATED WINE—REGISTERED—CONTAINING MORE THAN 2½% PROOF SPIRITS—DRUGGIST—SALE BY.

A patent medicine registered under the Proprietary and Patent Medicine Act (1908, c. 56, Dom.) which contains more than 2½% proof spirits, but is so medicated as to cause nausea and sickness *before* intoxication is not an intoxicating liquor within the meaning of the Alberta Liquor Act (1916, c. 4, s. 23).

Statement.

MOTION to quash a conviction of a druggist under the Liquor Act (1916, c. 4, s. 23), for unlawfully selling liquor.

Conviction quashed.

Harvey, C.J.

HARVEY, C.J.:—I agree with my brother Beck that there is no conflict between the Liquor Act (c. 4 of 1916), and the Proprietary and Patent Medicine Act (c. 56 of 1908 (Can.)). The latter Act is apparently quite new law and, by its terms, appears to be intended to have a restrictive and regulative rather than a permissive operation. Before it was passed, persons were free to do the acts now prohibited or restricted, but subject of course to the laws of any province in which they desired to perform these acts. There is no suggestion that in respect to the acts and things not prohibited by the Act or impliedly permitted, because there is no express permission, upon compliance with the terms imposed by the Act any greater right would exist than would have existed but for the Act.

I think, therefore, there is no foundation for the argument that the sale of this "Tonic Port" is permitted by the Dominion Act and that the prohibition of the provincial Act cannot apply to it.

It is, however, contended that it is not a liquor which is prohibited by the provincial Act. Although it is "liquor" without more to which the prohibitions of the Act apply, it is clear that, unless there were some limitation to the word, it would include

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even water. The limitation is found in the definition given by the Act which is as follows:—

> The expression "liquor" or "liquors" shall include all fermented, spirituous and malt liquors, and all combinations of liquors, and all drinks and drinkable liquids which are intoxicating; and any liquor which contains more than two and a half per cent. (2½%) of proof spirits shall be conclusively deemed to be intoxicating.

Leaving aside the first portion of the definition, we find that "all combinations of liquors and all drinks and drinkable liquids which are intoxicating" are liquors within the meaning of the Act. It is argued that the word "drinkable" limits the meaning of the word "liquid" because the word "liquid" itself means something which is not eatable and therefore can only be consumed by drinking and the word is therefore valueless if it simply means "capable of being drunk," and it must therefore mean "suitable for being drunk" or fit for drinking. But it will be observed that this does not carry us very far for the adjective is not applied to any of the other described liquors and by the terms of the definition any "combination of liquors" or any drink which is intoxicating, however nauseous, is liquor within the meaning unless the terms are qualified in the same way and I can see no justification whatever for any such qualification. It appears to me that the word "drinkable" must be given its common meaning though its use in this connection thus appears unnecessary. The use of unnecessary words not merely in statutes but in documents is so common that no very strong argument can be based upon it.

Then it is suggested that the purpose of the Act being simply to prevent drunkenness, it should be deemed that it intends to apply only to such liquors as, being suitable for drinking as a beverage, may be likely to cause drunkenness. My answer to that is that the Act distinctly and definitely declares what liquors are within it and it makes no such qualification and I am unable to see upon what ground the court is entitled to do so. But it is said nothing is intoxicating unless it can be used in such a way as to intoxicate, and that the evidence in this case shews that this "Tonic Port" cannot be drunk in sufficient quantities to cause intoxication, and that it consequently is not intoxicating. That evidence, however, which is given by the witnesses for the defence is answered by Crown witnesses who controvert the conclusions reached by the defence witnesses upon the grounds given by them. There is

nothing, moreover, in the evidence of the defendant's expert witnesses to warrant the conclusion that, by the exercise of a perseverance which might perhaps be more commendable in a worthier cause, the nausea caused when one first tries to drink the liquor in question may not wear away and disappear in later efforts. Most smokers of tobacco could probably furnish evidence of such a possibility.

I am of opinion, however, that the latter part of the definition was inserted for the purpose of preventing just such a controversy and uncertainty as is presented by the evidence in this case. Every one with any experience in the administration of law prohibiting the use of intoxicating liquors, and everyone who is familiar with reports of such cases, is aware of the fact that it is very common to find directly contradictory evidence upon the question of the intoxicating effect of any particular liquor. The legislature has said that if a liquor contains 2½% of proof spirits it must be taken conclusively as intoxicating for the purpose of the Act and whether it will in fact intoxicate all persons or some persons or no persons is entirely beside the question.

The "Tonic Port" in question, therefore, containing over 35% of proof spirits, must be held to be intoxicating and it is therefore a prohibited liquor within the meaning of the Act.

It was contended, however, that the defendant should not be convicted unless he had a guilty mind, in other words intended to sell liquor contrary to the provisions of the Act. But even if that be right the burden is on the defendant of satisfying the magistrate of his innocence in this respect as in other respects, because s. 51 provides that the burden of proving the right to keep or sell shall be on the person accused.

The defendant gave no evidence and the only admission bearing on the point is the one which admits that the defendant "could not, with reasonable diligence, have obtained knowledge of such medicine being contrary to the provisions of the Proprietary or Patent Medicine Act or any other Act or law." This admission is framed in accordance with s. 14 of the Proprietary or Patent Medicine Act as one of the things which a person charged under that Act must establish as a defence. For the reasons I have stated, I am of the opinion that a defence under that Act would

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have no bearing on a charge under our Act and it is seen that the admission is not that the defendant did not in fact know that the liquor in question contained more than 2½% of proof spirits which and perhaps more would be necessary before a defence could be established on this ground.

Then it is objected that the offence charged, of which the defendant was convicted is not one within the terms of the Act.

S. 23 provides that no one shall sell liquor except as authorised by the Act. Then follow a proviso which authorises the sale by a druggist for strictly medicinal purposes and under a *bonâ fide* prescription from a physician and another proviso substituted in 1917 authorizing a sale for medicinal purposes of a combination of alchohol and other liquid under an approved formula.

It is apparent from these provisos that it is forbidden by the Act for a druggist to sell, even for strictly medicinal purposes, without a prescription and even upon a prescription for other than strictly medicinal purposes, but the conviction is for selling without a prescription and not for strictly medicinal purposes. It may perhaps be said that this is all in favour of the accused for, if it is an offence to sell in the absence of either of the qualifications, it must certainly be so in the absence of both. But there is the other proviso which authorizes a sale for medicinal purposes (without stating strictly) under the circumstances mentioned without a prescription.

This illustrates the difficulty a prosecutor is under if he attempts to negative the exceptions in his charge which is no doubt the reason for the rule that it is not necessary to negative such exceptions (see s. 717, Criminal Code). If the charge in this case had simply been of a sale contrary to the provisions of the Act then it would be open to the defendant to bring himself within the exceptions. I do not think, however, that it is necessary to consider the matter further for ss. 62 and 63 provide that a conviction shall not be quashed for any defect of form or substance if the merits have been tried and there is evidence to support a conviction for some offence under the Act for which the appropriate penalty has been adjudged. As far as the merits are concerned, the defect, if any, is merely a matter of form, the offence being one of a sale prohibited by s. 23 and the penalty being the appropriate one for such offence.

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In my opinion, therefore, the application fails in all of the grounds raised and I would consequently dismiss it and affirm the conviction. As the prosecution and appeal were by arrangement and apparently for the purpose of obtaining a declaration of the law on the questions involved, and the Crown has not asked for costs, I would make no order as to costs.

Stuart, J.

STUART, J.:—I concur with Hyndman, J.

Beck, J.

BECK, J.:—This is a motion to quash on a stated case a conviction under the Liquor Act (c. 4 of 1916). The conviction was for that the defendant "being a chemist or druggist on January 21, 1918, at etc., unlawfully did sell liquor for other than strictly medicinal purposes without a prescription from any registered medicinal practitioner, contrary to the provisions of s. 23 of the Liquor Act."

That section prohibits, amongst other things, the selling of "any liquor except as authorized by this Act." The section is subject to the following provisos:—

(1) Provided that the provisions of this section shall not prevent any chemist or druggist, duly registered as such, from keeping, having and, subject to the further provisions of this section, selling liquors for strictly medicinal purposes; but no such sale for medicinal purposes shall be made, except under a *bonâ fide* prescription from a registered practitioner, on which prescription no more than one sale of liquor shall be made, and unless such sale is recorded as provided by this Act.

Provided (this is a substitution by c. 22, of 1917, of s. 6) "that nothing in this section contained shall prevent any member of the Alberta Pharmaceutical Association carrying on business as a chemist and druggist from having in his possession or selling for medicinal purposes any combination of alcohol with any other liquid prepared according to any formula approved of by the Lieutenant-Governor in Council. . . .

(2) Any chemist or druggist who colourably for medicinal purposes sells liquors to be consumed by any person as a beverage shall, on summary conviction, etc.

S. 2 (*c*) says that,

Unless the context otherwise requires, the expression "liquor" or "liquors" shall include all fermented, spirituous and malt liquors, and all combinations of liquors and all drinks and drinkable liquids which are intoxicating; and any liquor which contains more than two and a half per cent. of proof spirits shall be conclusively deemed to be intoxicating.

On August 22, 1917, an order-in-council was passed approving of certain formulae for combinations of alcohol with other liquid; on October 3, 1917, this order was amended so as to read—so far as material to the present case—as follows:—

3. Any formula for any patent or proprietary medicine containing

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alcohol and other liquid for which a license has been issued under the Dominion Patent or Proprietary Medicine Act, excepting formulæ for:

(*a*) Tonic wine, invalid port, invalid wine, alcoholic liquid, malt extract, blackberry brandy or stomach bitters;

(*b*) Any preparation which does not contain sufficient medication to prevent its use as a beverage or which contains alcohol in excess of what is necessary as a solvent or preservative.

The Proprietary or Patent Medicine Act is c. 56 of 1908 (Dom.).

Counsel agreed upon the following admissions of fact:

"Counsel for the Crown admits:—

(1) That the accused is a duly registered chemist and druggist and a member of the Alberta Pharmaceutical Association. (2) That the liquid in respect of which the information has been laid is the patent medicine known as "Kennedy's Tonic Port." (3) That the said "Kennedy's Tonic Port" is a proprietary or patent medicine within the meaning of the Proprietary or Patent Medicine Act.

"Counsel for the accused admits:—

(1) That the said patent medicine is to be taken internally by drinking, the dose appearing on the face of the container, and was sold at the time mentioned in the information laid herein, in the ordinary course of business as a druggist, but without any prescription from a registered medical practitioner. (2) That the said patent medicine contained:—alcohol by weight 15.43%, alcohol by volume 19.00%, being more than the 2½% of proof spirits.

"Counsel for the Crown admits:—

(1) That the said patent medicine was duly registered pursuant to the provisions of the Proprietary or Patent Medicine Act. (2) That the name and number under which the medicine was so registered with the words "Proprietary or Patent Medicine Act" and also the manufacturer's name and address appeared on the face of the container of the said patent medicine. (3) That the accused sold the said patent 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 contrary to the provisions of the Proprietary or Patent Medicine Act or any other Act or law. (4) That the accused has given notice in writing to the Crown that he will rely upon the defence provided for in s. 14 of the Proprietary or Patent Medicine Act and has also given notice in writing to the Crown that he purchased the same from Druggists Sundries Co. Ltd., a body corporate created by letters patent under the provisions of the statute of the Dominion of Canada known as the Companies Act. (5) That the said Druggists Sundries Co. Ltd. is a body corporate created by letters patent as aforesaid, with powers, *inter alia*, to manufacture, buy and sell medicinal preparations and generally carry on wholesale and retail business as manufacturers, buyers and vendors of all kinds of medicines and chemicals, patented articles, scientific appliances, surgical instruments and supplies; to carry on the trade of chemists, druggists, apothecaries, and traders, importers and manufacturers of medicinal and pharmaceutical preparations . . . the operations of the company to be carried on throughout the Dominion of Canada and elsewhere. (6) That the said Druggists Sundries Co. Ltd. has procured from the Minister of Inland

Revenue a numbered certificate of registration as a manufacturer of proprietary or patent medicines, and has complied with all of the provisions of s. 3 of the Proprietary or Patent Medicine Act. (7) That the said Druggists Sundries Co. Ltd. has been duly licensed under the provisions of the said the Proprietary or Patent Medicine Act to dispose of the said patent medicine until March 31, 1918, by certificate from the Department of Inland Revenue for Canada, granted April 11, 1917, under the hand of the Deputy Minister of Inland Revenue. (8) That the said patent medicine complies in all respects with the provisions and requirements of the Proprietary or Patent Medicine Act. (9) That the defendant was one of the selling agents and distributors of the said Druggists Sundries Co. Ltd. in the sale of the said "Kennedy's Tonic Port." (10) That the said patent medicine is a combination of alcohol, quinine-sulphate and other substances, excepting ether, contained in the British Pharmacopœia on October 3, 1917.

It is admitted by both counsel that the bottle of "Kennedy's Tonic Port" produced contains the liquid sold by the accused and the said bottle, its labels and contents, are, by consent of both counsel, tendered as ex. "A."

Oral evidence was directed to the question whether the medication designated Kennedy's Tonic Port is "liquor" within the interpretation clause of the Liquor Act.

Dr. Field, a chemist, said that, it being admitted that the liquid in question contained alcohol by weight 15.43% and by volume 19.00%, these figures would, according to recognized tables, be equivalent to 35.47 proof spirits.

Dr. Mahood said that a liquid containing so much alcohol would be intoxicating, that anything over 4% is recognized as intoxicating; that he had made no analysis of this liquid; that whether or not it would intoxicate might depend upon the quantity and character of the other ingredients and whether the effect of the compound would be to produce sickness at the stomach before enough to intoxicate could be taken.

Dr. Coleman said that a liquid containing so much alcohol would be intoxicating; that he knew nothing of "Kennedy's Tonic Port"; that, not knowing the other component parts of the liquid, he could not say whether one could retain a sufficient quantity upon the stomach to become intoxicated, though he believed one could do so.

Dr. Rose said that he knew "Kennedy's Tonic Wine"; that in his opinion it was not intoxicating, because that bottle is practically a compound tincture. It is not a wine at all. It is loaded with numerous medicinal extracts from various products and

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drugs and contains in the bottle itself as much as 34 grains of quinine alone in addition to varying quantities of some 34 more alkaloids extracted from cinchona bark; and quoting his evidence:—

There are various bitters included in it, such as ginseng and columba, capsicum and innumerable volatile oils from the different preparations which this one is made from. My reason for saying that this one is not intoxicating is this, in a wine glass full you have 3.4 grains of quinine, you have in addition varying quantities of other alkaloids including the bitters ginseng. The moment you exceed three grains of quinine in a dose the person becomes subject to what is called quininism; when he reaches half a bottle he has taken 12 grains and by the time he has swallowed the whole bottle he is suffering severely from quininism such as deafness, deaf as a post, and partially blind and intensely sick of the stomach; that degree that you would arrive at in swallowing the whole bottle commences also immediately after you increase the dose from a wine glass full. The physiological action of this wine is this, there is a pleasant aroma to the taste immediately it is swallowed, in the stomach there is a pleasurable sense almost instantly followed by the faintest symptoms of nausea that is not of such an extent to be disagreeable by one glass, but the moment you exceed that to two or three you have much more and long before a person can be intoxicated with that wine he is so sick that he has no desire to take more, but he vomits it up.

Dr. Cruikshank, a chemist, said he knew "Kennedy's Tonic Port." He said he drank half a bottle and it did not intoxicate him; but made him sick.

Dr. Andrews was somewhat indefinite but said the question of nausea or intoxication would depend on the component parts of the compound.

Kennedy, the general manager of the Druggists Sundries Co., the manufacturer of the liquid in question, explained, at length, that, owing to its medication, the liquor was not intoxicating, because one would become sick before the stage of intoxication would be reached.

The Proprietary or Patent Medicine Act provides among other things that no proprietary or patent medicine shall be manufactured, imported, exposed, sold or offered for sale if it contains alcohol in excess of the amount required as a solvent or preservative or does not contain sufficient medication to prevent its use as an alcoholic beverage, still, although every manufacturer or importer of proprietary or patent medicines is obliged to obtain a license from the Minister of Inland Revenue, the license is general and does not relate to specific medicines; and again, though the Minister may have samples of such medicines taken and analysed, this is not made the rule, nor apparently the custom as a condition precedent to such medicines being offered for sale.

There is not, in my opinion, any conflict between the Proprietary or Patent Medicines Act and the Liquor Act. The former prohibits druggists and chemists from selling certain kinds of medicines without being licensed to do so. A license under that Act authorizes such a person to sell such medicines as in truth conform to the requirements of s. 7 already partly quoted, one of those requirements being, as already pointed out, that when any such medicine contains alcohol, there shall be sufficient medication to prevent its use as an alcoholic beverage. I think there is no conflict, because I think that the clear intention of the Liquor Act in its interpretation of "liquor," is to give to that word the meaning of liquor which, to substitute the words of the Dominion Act, can be used as an alcoholic beverage; and that in neither Act is absolute possibility or impossibility of such use intended, but that, in both cases, the kind of liquor, the sale of which is prohibited, is liquid, which is commonly known or adapted for reasonable use as a drink or beverage for human consumption or which is reasonably capable of being used as a substitute for such a beverage or of being converted into such a beverage. See the Victoria decision of Cussen, J., in *Gleeson* v. *Hobson* (1907), Vict. L.R. 148, discussing the meaning of the word liquor under a similar Act.

In any case, under either Act, the question whether the liquid in question comes within the prohibition is a question of fact. No decision or certificate of an analyst under the Dominion Act is conclusive; neither, in my opinion, is the implied assertion, by way of exception, as in the order-in-council already quoted, conclusive, even had it designated by name the precise liquid in question, that the liquid is a prohibited liquor.

Having adopted the foregoing views of the law applicable to the case, it seems to me that the sole remaining question is the question of fact, not whether "Kennedy's Tonic Port" is a liquor within the meaning of the Liquor Act, but whether the Crown has shewn it to be liquor of that character, for I think the onus was on the Crown. The magistrate, after hearing the evidence concerning the liquor, says that he has no hesitation in saying that "Kennedy's Tonic Port" is a drinkable liquid which is intoxicating. If I were satisfied that the magistrate, while applying the evidence, held to the interpretation of the important words, which in my opinion ought to be applied to them, I should be inclined to accept his

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finding on this question of fact, but I am, in truth, satisfied to the contrary, and reading the evidence, I think the evidence of the witnesses, who express an opinion regarding the liquor to the effect that, though there is a very considerable quantity of alcohol contained in it, yet it is so medicated as to cause nausea and vomiting before sickness, and, therefore, is not drinkable or a beverage or an intoxicant in the fair meaning of the words clearly prevails over the other witnesses; these latter speaking in each instance, I think, without precise knowledge of the ingredients or actual physical effect, but merely drawing a conclusion based upon the quantity of alcohol contained in the liquor.

I would, therefore, quash the conviction on the ground the Crown has failed to prove that the liquor in question is liquor of the character intended by the Liquor Act, and I would give the applicant costs.

Hyndman, J.

HYNDMAN, J.:—This is a motion by way of a stated case to quash a conviction against the above named defendant (applicant) made by W. S. Davidson, police magistrate for the City of Calgary, for that the said defendant "being a chemist or druggist," on January 21, 1918, at 109 8th Avenue E., Calgary, unlawfully did sell liquor for other than strictly medicinal purposes without a prescription from any registered medical practitioner, contrary to the provisions of s. 23 of the Liquor Act.

Oral evidence was given on one point only, namely, whether or not the liquor in question was intoxicating, but certain admissions were made in writing both by the Crown and the accused, which are set out in the judgment of my brother Beck, and it is, therefore, unnecessary for me to repeat them.

A large number of objections are raised by the applicant to the validity of the conviction, the only ones to which I propose to refer being numbers: (3) "That the magistrate erred in holding that "Kennedy's Tonic Port" is a drinkable liquid which is intoxicating," and (12) "That the magistrate erred in not holding that the sale of the patent medicine in question was according to a formula approved by the Lieutenant-Governor in Council."

Under the objection first mentioned, the question arises whether or not the word "liquor" as defined in the Act embraces every liquid containing more than 2½% of alcohol or only such liquors or liquids as can be used "as a beverage."

The word "liquor" or "liquors" shall include all fermented, spirituous and malt liquors, and all combinations of liquors and all drinks and drinkable liquids which are intoxicating; and any liquor which contains more than two and a half per cent. (2½%) of proof spirits shall be conclusively deemed to be intoxicating.

Undoubtedly the purpose of the Liquor Act was to put a stop to the use of alcoholic liquors as a beverage and mixtures of fermented, spirituous and malt liquors with any other substances, which could be used as a beverage.

Apart altogether from the common knowledge which we have of the public agitation for the enactment of prohibitory legislation, I think it can be fairly inferred from the reading of the Act itself that that was the main object to be achieved. The expression "as a beverage" occurs in at least 6 different sections of the Act, viz., 12, 13, 23, 24, 32 and 37. It seems to me that the terms "liquor," "drinks and drinkable liquids" should not be interpreted in a wider sense than is necessary for the proper observance or carrying out of the spirit of the Act.

Prior to the passing of the Liquor Act, patent medicines were not considered as falling within the provisions of the old Liquor License Ordinance, which, by the terms of the Liquor Act, was repealed. There was no interference with the sale of genuine patent medicines. The admission by the Crown that the mixture in question, which is licensed under the Patent Medicines Act, complies in all respects with the provisions and requirements of that Act, necessarily means that the same is so medicated that it cannot be used "as a beverage," for s. 7 of the Patent Medicines Act reads:—

No proprietary or patent medicine shall be manufactured, imported, exposed, sold or offered for sale—(*b*) if it contains alcohol in excess of the amount required as a solvent or preservative, or does not contain sufficient medication to prevent its use as an alcoholic beverage.

Now it seems to me that if the words "drink and drinkable liquids" were intended to mean everything that can be taken in through the mouth or swallowed, that there would be no necessity for the use of the words "drink" and "drinkable" at all, for any liquid, even the strongest kind of acids, are capable of being swallowed and the word "liquid" would itself be sufficient. It would, therefore, seem to me that the words "drink" and "drinkable liquids" are intended to be restrictive to some degree and the extent of which must be arrived at by a consideration of the

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intention and object of the Act, as above stated, in my opinion, that object in view was to put an end to or suppress the indulgence in intoxicating liquor for the pleasure (real or imagined) which is derived from its use, in other words, "as a beverage." It being once proved satisfactorily that this element is lacking in the mixture and established that the liquid is so medicated that it cannot be used as a beverage then I would say it cannot have been within the contemplation of the Act.

Whether the liquor in question is not capable of being used as a beverage is, I think, one of fact to be proved in each particular case and not simply to be inferred from the fact of its being a patent medicine, for it might well be that a mixture through fraud or deception on the Government or the public though licensed as a patent medicine might not in fact comply with the provisions of the Patent Medicine Act.

In the present case, however, the Crown admits without any reservation that this liquid does in fact comply with its provisions and the oral evidence justifies such an admission.

But even if it can be said that patent medicines are not excepted from the terms of the Act it seems to me that a mixture admitted, as here, to be incapable of use as a beverage, should be held to fall within the permitted formulæ described in the order-in-council passed by the Lieutenant-Governor in Council on October 3, 1917, namely (3) (*a*) and (*b*) (See judgment of Beck, J.).

There is to my mind a clear distinction in the order-in-council between tonic wines, etc., mentioned in (*a*) and preparations referred to in (*b*).

There is no evidence before us of the nature and composition of the tonic wines, etc., and the use of the name "Kennedy's Tonic Wine" might reasonably be held to be of such consequence as to place the onus on the defence of demonstrating satisfactorily to the Court that it does not resemble substantially the liquids mentioned in (*a*). In other words, the name given the mixture may be misleading, placing the party charged with selling it on the defensive, but nevertheless capable of explanation and the liquid being distinguished. In other words, such a description might reasonably amount to *primâ facie* evidence of the contents being within the prohibition. In the ordinary case the finding of fact by the magistrate as to whether it did or did not fall within (*a*)

or (*b*) would be conclusive; but in the present case by reason of the admission referred to I am unable to see in what manner the Crown can avoid the conclusion that this particular mixture is not one of the wines mentioned in the order-in-council and that it does come under the meaning of s. (*b*) thereof.

On these two grounds alone, therefore, I would allow the application with costs and quash the conviction.

Conviction quashed.

GUARDIAN ASSURANCE Co. v. GARRETT.

British Columbia Court of Appeal, Macdonald, C.J.A., and Martin, McPhillips and Eberts, JJ.A. April 2, 1918.

COMPANIES (§ I D—15)—NEW CORPORATION—APPLICATION TO REGISTER—SIMILARITY OF NAMES—SIMILARITY OF BUSINESS—DECEIVING PUBLIC—INJUNCTION.

An injunction will be granted to restrain a proposed new company from applying for registration where the circumstances point to an intention on the part of the new company to do business under a name which might easily be mistaken for the name of an existing company, doing the same class of business, and thereby deceive the public. It is not necessary to wait until the company actually commences to do such business.

[*Hendricks* v. *Montagu* (1881) 17 Ch. D. 638 referred to.]

Statement.

APPEAL by plaintiff from judgment of Clement, J. Reversed.

E. C. Mayers, for appellant.

G. F. Cameron and *E. J. Cameron*, for respondent.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—The plaintiff brought this action against the Superintendent of Insurance, appointed under the British Columbia Fire Insurance Act, c. 133, R.S.B.C., and one A. S. Matthews, to restrain the latter from applying for and the former from issuing a license under said Act, to do business in this province, to the Guardian Fire Insurance Co., a foreign company incorporated under the laws of the State of Utah.

The plaintiff's opposition to the granting of the license was founded on the similarity of the foreign company's name to that of the plaintiff.

The action was tried before Clement, J., and was by him dismissed on June 26, 1917. Since then, but before the hearing of this appeal, namely, on September 30, 1917, the Insurance Act, 1917, was passed by the Parliament of Canada. This Act had its inspiration from the judgment of the Privy Council in *Att'y-Gen'l for Canada* v. *Att'y-Gen'l for Alberta*, [1916] 1 A.C. 588, 26 D.L.R.

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288, in which it was held that s. 4 of the Insurance Act, 1910, was *ultra vires* the Dominion parliament, but in which it was also held that it would be within the power of parliament by properly framed legislation to require a foreign insurance company to obtain a license from the Dominion before doing business in Canada, even in a case where the company desired to carry on its business only within a single province.

At the time, therefore, of the application for the license in question there was no valid Dominion legislation affecting the licensing of foreign insurance companies in Canada.

There is no express provision in the B.C. Fire Insurance Act against licensing a company with a name so similar to that of another company as to be calculated to deceive the public. Such sections are to be found in the English Companies Act, in our own Companies Act, and in the said Dominion Act of 1917, but the absence of such a provision in the B. C. Fire Insurance Act does not, as I read the judgment of the Court of Appeal in *Hendriks* v. *Montagu* (1881), 17 Ch.D. 638, affect the power of the court to restrain the applicant Matthew from making or persisting in his application. That case, I think, meets the objection of Clement, J., that this action was premature. As I read that case, it seems to me clear that when the circumstances point to an intention on the part of a company to do business under a name which might easily be mistaken for the name of an existing company doing the same class of business, and thereby deceive the public, the court will at once interfere: it will not wait until the company actually commences to do such business, if its conduct be such as to make it reasonably certain that what is sought to be restrained is in furtherance of a plan to carry on such business.

On the merits, I am clearly of opinion that the plaintiff's contention is sound, and that the court ought to interfere to restrain the defendant Matthew from persisting in his application for a license for this company, whose name, in my opinion, is so similar to that of the plaintiff as to be calculated to lead persons doing business with it to the belief that they were doing business with the plaintiff company. In this result, I do not find it necessary to consider whether the court can restrain the superintendent of insurance, or whether some other proceeding, such as prohibition, is the apt one. The superintendent of insurance was not repre-

sented by counsel before us. The respondent Matthew will, therefore, pay the costs.

The appeal should be allowed.

MARTIN, J.A., allowed the appeal.

McPHILLIPS, J.A.:—With great respect to the trial judge, I am entirely unable to accept the view at which he arrived. In my opinion, the appeal should succeed. That the action is premature or that the relief and remedy claimed should not, upon the facts, be granted may be said to be concluded by what may be stated to be the leading case on the point: *Hendriks* v. *Montagu* (1881), 17 Ch.D. 638, 50 L.J. Ch. 456 (C.A.), the *Law Journal* head-note thereof reads as follows:—

An injunction was granted to restrain a proposed new company from applying to the Registrar of Joint Stock Companies for registration under a name which, in the opinion of the court, was calculated to deceive, although the company had not begun to carry on its business.

It is not necessary, to entitle the plaintiffs to an injunction, that the defendants should have a fraudulent intent. They are responsible for the reasonable consequences of their action.

The statutory right to register must not be exercised in such a way as to violate some other right, or offend against the law.

The appeal has been ably argued—counsel upon both sides have very exhaustively and elaborately canvassed the case law bearing upon the question for determination but I do not think that it is necessary to, in detail, discuss or review the cases. It is clearly apparent to me that that which is attempted is such that cannot be permitted. The appellant is a company which has had existence since 1821, has been continuously in business ever since that time; it is a British company, world widely known under the name of the Guardian Assurance Company Limited, and has done business in the Province of British Columbia for the last 25 years, and has a license under the Insurance Act, 1910, (Canada, c. 32) and is authorized to do business in British Columbia under the British Columbia Fire Insurance Act (c. 26, 1911). The respondent Matthew has applied to the superintendent of insurance acting under the British Columbia Fire Insurance Act for the issuance of a license under the British Columbia Fire Insurance Act for a company which was incorporated in the State of Utah, one of the United States of America, under the corporate name of The Guardian Fire Insurance Company. This latter company is without a license under the Insurance Act, 1910 (Can.), (see s. 4).

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That a license to do business under the Insurance Act, 1910 (Can.), is a pre-requisite to the doing of any insurance business in Canada or any province thereof by any company incorporated by a foreign state cannot in my opinion be gainsaid (see *Re Insurance Cos. & Att'y-Gen'l for Canada* v. *Att'y-Gen'l for Alberta* insurance case, [1916] 1 A.C. 588, 26 D.L.R. 288; and *Farmers Mutual Hail Insurance Ass'n* v. *Whittaker*, 37 D.L.R. 705.

That upon the facts of the present case, through the similarity of the name, injury would result from the intended action of the respondent Matthew I have no doubt. If it were allowed, unquestionably it would be calculated to deceive and would deceive the public to the prejudice of the appellant. Further, the doing of it would be running counter to the law and should rightly be restrained by the court.

I have no doubt that if a license were obtained under the British Columbia Fire Insurance Act in the name of the Guardian Fire Insurance Company, it would, upon the facts before us upon this appeal, be a proper case for the intervention of the court, and would entitle the appellant to an injunction restraining the use of the word "Guardian." Recent cases which support this view are: *Ewing* (*Trading as the Buttercup Dairy Company*) v. *Buttercup Margarine Company Limited*, [1917] 2 Ch. 1; *Albion Motor Car Co.* v. *Albion Carriage and Motor Body Works* (1917), 33 T.L.R. 346.

Reverting again to *Hendriks* v. *Montagu*, 17 Ch.D. 638, and to the question for decision in this appeal it occurs to me that the best way to indicate the opinion at which I have arrived is to quote and adopt the language of Brett, L.J., as it is peculiarly applicable to the facts which are before us on this appeal. At p. 648 he said:—

> The question is simply whether the name they have adopted for a business of the same kind and in the same city is so like the name of the plaintiffs which they have used as their trade name for so long a period as in fact to enable the defendants to appropriate, or to result in the defendants, in fact appropriating a material part of the business of the plaintiffs' company, by misleading people to suppose that they were dealing with the plaintiffs when, in fact, they were dealing with the defendants. The question is whether we can come to the conclusion that that will be, in fact, the effect of their using the name which they propose to use, and that must depend in the first place not upon whether the names are identical, but upon whether they are so alike that we are of opinion that in truth and in fact it would have that effect. I do not think that judicially we could decide

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that as a matter of law. It is a question of fact whether the name is so similar to the other that it would lead to that result in business. It is not a question of law at all, but of fact upon the evidence. We have the evidence before us, and we are here to judge of the effect of that evidence. If the names were identical I do not say whether one might or not come to a conclusion without any more evidence, but as it is, I think that evidence was admissible and was necessary. . . . That evidence seems to me to be satisfactory evidence of the fact, and therefore I think we ought to come to the conclusion, as I do as a matter of fact, that the similarity of the names would, in truth, have that effect. That seems to me all that it is necessary to decide. It is possible, no doubt, as a matter of possibility, that it would not, but that is not the case here upon the evidence; the question is whether we are of opinion, sitting as a tribunal judging of the fact, that it will—not whether it is possible it might not, but whether in truth it will; and that, to my mind, is made out. Then it is said this is an application for an injunction *quia timet*, and that it ought not to have been made under the Act, and that the Master of the Rolls so held. But that does not seem to me to have been the ruling of the Master of the Rolls. He seems to have thought the application might have been made *quia timet*, but that the evidence before him was not sufficient. The case before Vice-Chancellor Hall seems to me to be precisely in point. With regard to the other proposition, that we could not restrain these parties from applying to be registered, it seems to me that the application to be registered is a step in carrying into effect the intention and a part of the injury, and that therefore this court can prevent the defendants, and enjoin them from making that application. The whole application, therefore, for an injunction in this case ought to be granted.

McPhillips, J.A.

Therefore, for the aforesaid reasons, my opinion is that the appeal should be allowed and an injunction granted, the respondents to be restrained in the terms set out in the statement of claim.

EBERTS, J.A., would allow appeal. *Appeal allowed.*

Eberts, J.A.

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LAVIE v. HILL.

Nova Scotia Supreme Court, Harris, C.J., Drysdale, J., Ritchie, E.J., and Chisholm, J. April 5, 1918.

INTOXICATING LIQUORS (§III H—90)—SEIZURE UNDER WARRANT—REASONABLE TIME PENDING PROCEEDINGS—RIGHT OF MAGISTRATE TO DETAIN—REPLEVIN.

Where intoxicating liquor has been seized under warrant (s. 46 of c. 2, N.S. 1910) and brought into court, the magistrate may lawfully detain it for a reasonable time pending proceedings for its condemnation, and no other court has a right to interfere with such possession.

Statement.

APPEAL by defendants from the judgment of Longley, J., in an action of replevin to recover possession of a quantity of intoxicating liquor seized in the City of Sydney, C.B., by the defendant Anthony under a warrant issued by the defendant, Hill, stipendiary magistrate of Sydney. Reversed.

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Finlay MacDonald, K.C., for appellants; *R. M. Lanville*, K.C., for respondent.

HARRIS, C.J.:—The plaintiff, according to his own evidence, was in January, 1917, unlawfully engaged in keeping for sale and selling intoxicating liquor at Sydney, contrary to the provisions of the N.S. Temperance Act. He was then approached by the provincial inspector, to whom he admitted that he was running several places in which he was selling liquor illegally, and was told that he must close them or he would be proceeded against. He agreed to close and says that he did close all these places within the next few days. He claims that the provincial inspector told him that he would give him a few days to ship the liquor back to the people from whom he had purchased it in Montreal. The plaintiff had, at that time, paid for the liquor, and of course could not ship it back to the original vendors without their consent, and he says that he told the provincial inspector that he would write to the vendors and as soon as he got a reply would ship back all his stocks of liquors. He stated that when he went to ship the liquors he found that there were no cars available and he then got one A. K. Chisholm to grant him the privilege of storing the liquors in his barn. A part, at least, was stored in Chisholm's barn, and after a time it is said that Chisholm went into the hay business and wanted the liquors removed and plaintiff then arranged to store them on the premises of one Murdock Morrison—who was to remove them from the Chisholm barn at night. One load was removed when the inspector for the City of Sydney seized all the liquors at both places under search warrants issued by the defendant Hill, the stipendiary magistrate for the City of Sydney, under s. 46 of the N.S. Temperance Act. The two search warrants were issued on the information of the inspector for the city and one of them, issued on March 19, 1917, authorized the search of the house and premises of Murdock Morrison, and the other, issued on March 22, authorized the search of the house and premises of A. K. Chisholm, and to bring the intoxicating liquor found, in each case, before the stipendiary magistrate Hill to be disposed of and dealt with according to law.

Morrison and Chisholm were both arrested and charged before the stipendiary magistrate with keeping liquor for sale on the 19th and 22nd days of March respectively, and after a trial they

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were acquitted. The liquors, seized on the respective premises of Morrison and Chisholm, and amounting to more than a ton in weight, were, at the conclusion of the trials, demanded in open court by the counsel of Morrison and Chisholm, and this demand not being complied with, the solicitor of Morrison and the plaintiff on March 22, 1917, and of Chisholm and the plaintiff on March 23, served the magistrate and the inspector, the two defendants, with notices demanding the return of the liquors seized on the premises of Morrison and Chisholm respectively. Morrison and Chisholm are described in these notices as warehousemen and the plaintiff is described as the owner of the liquors.

The liquors not having been given up to Lavie he commenced this action to recover them and took out an order for replevin, under which the liquors were delivered to the plaintiff and, thereupon, shipped by him to Montreal.

The case was tried by Longley, J., who gave judgment for the plaintiff with damages of $1 and costs against both defendants, and the defendants have appealed.

Counsel who argued the appeal agreed that the two search warrants were executed on March 23 or 24, and the trials of Morrison and Chisholm took place a few days later. The writ, in the present action, was issued on March 27, and on April 4, the order for replevin of the liquors was issued which, however, we were told was not, by arrangement with the inspector, executed until some time in May.

It will be seen from the foregoing recital of the facts, that, prior to the time when this action was begun, the proceedings against Morrison and Chisholm had been dismissed, and when the action was commenced, no proceedings were pending against anyone else for keeping for sale the liquors in question. The liquors were, nevertheless, still before and held by the magistrate. I should add that the plaintiff on cross-examination admitted that on April 29, 1917, he was convicted of either selling or keeping for sale liquor (which it was does not appear). I mention this fact, but it does not, so far as I can see, affect the question in dispute in this action. The conviction was not put in, and it does not appear that it was with respect to the liquors in question or had any connection with them. So far as appears, his conviction was with respect to other liquor.

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The point here therefore seems to be whether the liquors in question were lawfully held by the magistrate on March 27, there being, then, no proceedings pending against any person for keeping them for sale.

For the defendants it is argued that, although the proceedings against Morrison and Chisholm had failed, they still could have proceeded against Lavie for keeping the liquors for sale, and they so intended, and on his conviction could have condemned and forfeited the liquors and that they had a reasonable time to take such proceedings and that the liquors were meantime lawfully detained by the magistrate.

The inspector having proceeded against Chisholm and Morrison, and having on their trials obtained information that Lavie was the owner of the liquors and that he was the real occupier of the premises upon which the liquors were found, was bound to proceed against Lavie and put himself in a position where he could have the liquors condemned and forfeited. It must, I think, be assumed that he would have taken this course within a reasonable time, because it was his duty as an inspector to do so, and it must also, I think, be assumed that the reason he did not subsequently take the necessary proceedings was because he thought he could not have the liquors forfeited after they had been taken under the order for replevin.

Whether this latter view was warranted, and what effect the delay in taking proceedings for the forfeiture of the liquors may ultimately have on the question as to the ownership of the liquors or otherwise, are questions not argued by counsel on either side and I, therefore, refrain from expressing any opinion upon them and confine myself to the question raised in this action.

I have not been able to find any authority to aid me in the interpretation of s. 50 of the Act upon which the question turns, but I have reached the conclusion that that section gave the inspector a reasonable time to commence proceedings against the plaintiff for keeping the liquors for sale—that this reasonable time had not expired when the plaintiff's action was commenced and that the liquors were therefore lawfully held by the magistrate at the time of the commencement of the action.

I should add that, in my opinion, no hard and fast rule can be laid down as to what is a reasonable time after liquors have been

taken under a search warrant within which proceedings must be taken for their condemnation and forfeiture. Each case must depend upon the facts and circumstances connected with it and no undue delay can be justified. Ss. 46 to 50, obviously, I think, do give a reasonable time for the institution of these proceedings, and the court will have to determine in each case whether, under the circumstances, there has or has not been an unreasonable delay. Harris, C.J.

The provisions of s. 36 of the Act of 1911 were referred to, but in my opinion they do not apply to the case. The proceedings having been taken by the issue of a search warrant under s. 46 the rights of the parties have to be decided under that and the four following sections of the original Act.

This action, so far as the stipendiary magistrate is concerned, would, I think, also fail for want of the notice of action required by s. 12 of c. 40 of R.S.N.S., 1900. The notices given were not the notices required by the Act. They do not specify the court in which the action was intended to be brought and the action was brought before the expiration of one month after the notices. The judgment against the stipendiary magistrate would, therefore, obviously be unjustified in any event.

For the reasons stated, I think the action should be dismissed with costs and the appeal allowed with costs.

DRYSDALE, J.:—I think the goods in this case were legally taken and properly in the custody of the magistrate. I think that replevin lies for an illegal detention quite as well as for an improper taking. It is said there was illegal detention of the goods in question in this case after a demand duly made by the owner for their return. I think the goods being properly in the custody of the magistrate the prosecution had a reasonable time within which to take proceedings against the owner looking to confiscation after discovery as to ownership that the plaintiff attempted replevin without giving the officers a reasonable time to take proper steps against the true owner. In short, replevin was attempted before there was an illegal detention. I think illegal detention would quite justify replevin, but the circumstances in this case do not shew such illegal detention. Drysdale, J.

RITCHIE, E.J.:—I agree. Ritchie, E. J.

CHISHOLM, J.:—I think the appeal must be allowed with costs, and the action dismissed with costs. Chisholm, J.

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I do not see how proceedings of replevin can be maintained in a case like the present. There was no defect of jurisdiction in the magistrate. There was not and could not be any objection as to the character and constitution of the tribunal, and the magistrate sitting as such tribunal had jurisdiction both as to place and subject matter. It seems reasonable that whenever intoxicating liquor is seized by an officer of the court and brought into court with a view to its condemnation, the liquor is to be considered as in the custody of the court and under its control for the time being; and no other court has a right to interfere with that possession unless such interference is expressly authorized by statute. If, whenever liquor is seized under regular process, it can be replevied and shipped out of the jurisdiction, the object of the statute can, in all cases, be most effectually defeated.

Mellish, J.

MELLISH, J.:—In my opinion the statement of claim herein discloses no cause of action. The right to the possession of the goods in question did not at the time of the commencement of the action depend on their ownership but upon whether they had been kept for sale in violation of the N.S. Temperance Act, not necessarily by the parties proceeded against but by any person (1910, c. 2, s. 50.).

Of course the plaintiff cannot rely for his right to the possession of these goods upon the illegal agreement alleged in his reply and in his testimony to have been made between him and the inspector of licenses to the effect that the plaintiff, although the goods were liable to forfeiture as being kept by him for sale in violation of said Act, he, the plaintiff, should, nevertheless, be at liberty to send them out of Nova Scotia beyond the operation of the Act.

It would further appear from the evidence that the goods, or at least part of them, were liable to forfeiture under the Dominion Statute, 1916, c. 19, s. 1, for having been illegally brought into the province.

There is no allegation or proof that the goods were kept for an unreasonable or improper length of time by the magistrate.

I have the gravest doubts as to the right in any case to resort to replevin proceedings to recover the possession of goods from a magistrate who has had the goods properly brought before him with a view to their forfeiture to His Majesty and destruction.

Here, however, it is unnecessary to determine that point. The evidence plainly discloses that at the time of the commencement of the action the plaintiff was liable under the N.S. Temperance Act for having unlawfully kept these goods for sale within the limited period and contrary to its provisions and that the forfeiture provisions of s. 50 above referred to were applicable.

Although I do not think the point was argued in the appeal, I think the magistrate was entitled to notice of the action. R.S.N.S., 5th series, c. 40, s. 12, pleaded in par. 4 of the defence.

The appeal should be allowed and the action dismissed with costs and a return of the goods ordered.

Appeal allowed and action dismissed.

Re OTTAWA SEPARATE SCHOOLS.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee' Hodgins, and Ferguson, JJ.A. December 10, 1917.

CONSTITUTIONAL LAW (§ II A 1—154)—DENOMINATIONAL SCHOOLS—APPOINTMENT OF COMMISSION FOR—AUTHORITY OF LEGISLATURE OF ONTARIO.

The Act of 7 Geo. V., c. 59, respecting the appointment of a Commission for the Ottawa Separate Schools, is within the legislative authority of the Legislature of the Province of Ontario.

[*Ottawa Separate School Trustees* v. *Ottawa Corporation*, 32 D.L.R. 10, [1917] A.C. 76, and the Act of 5 Geo. V., c. 45, distinguished. See annotation 24 D.L.R. 492.]

Statement.

THE following question was referred by the Lieutenant-Governor in Council to this Court:—

Are the provisions of the Act respecting the Appointment of a Commission for the Ottawa Separate Schools, 7 Geo. V. ch. 59, within the legislative authority of the Legislature of Ontario?

The Act was assented to on the 12th April, 1917.

The preamble is as follows:—

"Whereas the Board of Trustees of the Roman Catholic Separate Schools for the City of Ottawa has heretofore neglected and refused to conduct the said schools according to law, and it is desirable to provide for the appointment of a Commission to conduct and manage the said schools in case the Board makes further default."

And the enacting provisions are as follows:—

"1. Whenever the said Board shall neglect or refuse to conduct

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the schools under its control according to law the Minister, with the approval of the Lieutenant-Governor in Council, may appoint a Commission of not less than three nor more than seven persons to act in place of the Board.

"2. The Commission may take possession of and administer the property and assets of or under the control of the Board and may levy and collect any rates and taxes which the Board might otherwise be entitled to levy and collect and shall exercise and perform the rights, powers, privileges and duties of the Board in place of the Board.

"3. The conduct and management of the schools shall be restored to the Board by the Minister of Education whenever it shall appear that the schools will be conducted by the Board according to law.

"4. If any question arises as to whether the circumstances justify the appointment or the continuance of a Commission it shall be determined on summary application to the Supreme Court at Toronto.

"5. The Supreme Court may on summary application make any order that may be necessary to secure to the Commission appointed under this Act possession of the property and assets to which it is entitled.

"6. The Commission shall be a corporation and the Minister of Education with the approval aforesaid may appoint Commissioners in addition to or in substitution for Commissioners theretofore appointed, provided the number of persons forming a Commission shall not at any time exceed seven.

"7. The Commission shall conduct the said schools in accordance with the Separate Schools Act.

"8. The Minister of Education, with the approval of the Lieutenant-Governor in Council, may from time to time advance moneys from the Consolidated Revenue Fund to the Commission to enable it to carry on the schools under its control.

"9. This Act shall come into force on and from a day to be named by the Lieutenant-Governor in Council by his proclamation."

McGregor Young, K.C., for the Attorney-General for Ontario, after referring to the Act 5 Geo. V. ch. 45, which had been declared to be *ultra vires* by the Judicial

Committee of the Privy Council (see *Ottawa Separate Schools Trustees* v. *Ottawa Corporation*, [1917] A.C. 76, 32 D.L.R. 10), said that the judgment in question held that sec. 3 of the Act was invalid under sec. 93 (1) of the British North America Act, since it prejudicially affected the right of the supporters of the Roman Catholic Separate Schools in Ottawa to elect trustees for the management of the schools. In this connection reference was made to the judgment of the Privy Council in *Ottawa Separate Schools Trustees* v. *Mackell*, [1917] A.C. 62, 32 D.L.R. 1, in which it was held that a regulation issued by the Department of Education, restricting the use of French in schools, was valid and binding. It was in consequence of the failure of the trustees to conduct the schools according to law that the Legislature of Ontario passed the Act which has been declared invalid by the Privy Council; and the question for the decision of this Court is, whether or not the provisions of the Act of 7 Geo. V. ch. 59 are *intra vires* of the Legislature. Does the difference between the two Acts get rid of the objectionable features of the legislation which have been condemned by the Privy Council, or is the Act of 1917 in effect a re-enactment of the Act of 1915, and therefore subject to the same objections as the earlier Act? The difference is indicated in sec. 1 of the Act of 1917, which provides that a Commission is only to be appointed when the Board "shall neglect or refuse to conduct the schools under its control according to law." Furthermore, it is provided by sec. 3 that the conduct and management of the schools shall be restored to the Board "whenever it shall appear that the schools will be conducted by the Board according to law." Then comes the important sec. 4, not found in the earlier Act, under which any question as to the appointment or continuance of a Commission shall be determined on summary application to the Supreme Court at Toronto. [MAGEE, J.A.:—Why not take the ordinary remedies against trustees who refuse or neglect to perform their duties?] That point is covered by the judgments of the Privy Council in the cases referred to. It is clear that the ordinary remedies are insufficient. [MEREDITH, C.J.O., thought that the course taken by the Legislature was illogical. The Board should not retain its status as a corporation in case of neglect or refusal to exercise its powers

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according to law.] It is submitted that the scheme of the statute is quite logical. The Board is left as a corporation, with a view to its reinstatement, when it shall become apparent that it will obey the law. The objection of the Privy Council is not directed against the principle of the earlier Act, but is aimed at the manner in which it has been framed. It is submitted that the objectionable features have been eliminated in the Act now under review. Reference was made, upon the question of "prejudicial effect," under sec. 93, provision 1, of the British North America Act, to the judgment of Meredith, C.J.C.P., in *Ottawa Separate School Trustees* v. *City of Ottawa* (1915), 34 O.L.R. 624, 627, 24 D.L.R. 497.

N. A. Belcourt, K.C., and *J. H. Fraser*, for the Ottawa Separate School Board, argued that the provisions of the statute of 1917 are in substance and essence the provisions to the same purpose contained in the statute of 1915, which has been declared invalid by the Privy Council, because it prejudicially affects a right or privilege with respect to Roman Catholic Separate Schools within the meaning of sec. 93, provision 1, of the British North America Act. It is plain from the judgment of their Lordships (*Ottawa Separate Schools Trustees* v. *Ottawa Corporation*, *supra*) that the mere creation of the power given by the Act, independently and outside of its exercise, constitutes the incurable defect of the legislation reviewed by them, and the same defect is apparent in the legislation which is now in question. It is the creating of the power which is *ultra vires*, whether exercised or not. The only distinction that can be made between the two statutes is, that, by sec. 4 of the Act of 1917, the discretion of the Minister of Education in appointing such a Commission may on summary application be reviewed by this Court, and that, by sec. 3, the conduct and management of the schools shall be restored to the Board by the Minister whenever it shall appear to him that the schools will be conducted by the Board according to law. It is submitted that sec. 4 has no legislative value because it is not provided with any sanction whatever. It is clear that the jurisdiction of the Court could not be exercised unless the Minister had previously exercised the power of appointing a Commission, which under the judgment of the Privy Council constitutes the prejudice, and renders the legislation *ultra vires*. All that would be secured by this section would be an academic opinion, which would leave the

power of the Minister wholly intact. As to the power of the Minister under sec. 3 to restore to the Board the conduct and management of the schools, it is absolutely unfettered, not being subject even to the illusory recourse to the Court for an opinion, as provided for with regard to sec. 4. It would always be in the power of the Minister to withhold *in toto* and indefinitely the rights, privileges, powers, and duties of the Board. Section 3 is, therefore, open to all the objections found against the former law by the Privy Council. The trustees, as such, are not amenable to the Legislature or to the Minister of Education, but only to the Roman Catholic Separate Schools ratepayers of the city of Ottawa, and to the Courts, which can compel them to perform their duties, by various means, such as mandatory injunction, imprisonment, personal condemnation to pay damages, and the imposition of fines and penalties prescribed by the school laws.

MEREDITH, C.J.O.:—Question referred by the Lieutenant-Governor in Council, under the authority of the Constitutional Questions Act, R.S.O. 1914, ch. 85, to the Appellate Division of the Supreme Court of Ontario for hearing and consideration. Meredith, C.J.O.

The question referred is: Are the provisions of the Act respecting the Appointment of a Commission for the Ottawa Separate Schools, passed in the 7th year of His Majesty's reign and chaptered 59, within the legislative authority of the Legislature of the Province of Ontario?

It has been declared by the Judicial Committee of the Privy Council that a former Act for the appointment of a Commission for these schools (5 Geo. V. ch. 45), as framed, was *ultra vires*.

The reasons for the decisions of the Judicial Committee are reported: *Ottawa Separate Schools Trustees* v. *Ottawa Corporation*, [1917] A.C. 76, 33 Times L.R. 41, 32 D.L.R. 10; and we have also had the opportunity of hearing read the shorthand report of the argument before that Board.

All that has been decided is that the Act 5 Geo. V. ch. 45, as framed, is *ultra vires*, and there is nothing to indicate or to require us to hold that, in the circumstances which exist as to these schools, it is not competent for the Legislature to make provision for meeting the conditions which these circumstances have

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created and by a properly framed enactment to suspend the powers and functions of the Separate School Board if and so long as it refuses to conduct the schools under its management in accordance with the law. Indeed, the careful wording of the declaration of the Judicial Committee, and the fact that it is limited to the Act *as framed*, appear to me to indicate the contrary and to warrant the inference that, in the view of the Judicial Committee, it would be competent for the Legislature to pass such an enactment as I have mentioned, or at all events to leave open the question of its right to do so.

The Lord Chancellor said 32 D.L.R. at p. 13:—

"The case before their Lordships is not that of a mere interference with a right or privilege, but of a provision which enables it to be withdrawn *in toto* for an indefinite time. Their Lordships have no doubt that the power so given would be exercised with wisdom and moderation, but it is the creation of the power and not its exercise that is subject to objection, and the objection would not be removed even though the powers conferred were never exercised at all. To give authority to withdraw a right or privilege under these conditions necessarily operates to the prejudice of the class of persons affected by the withdrawal."

This I take to be the key-note of the judgment; and, if the objectionable feature of the legislation of 5 Geo. V. ch. 45, referred to by the Lord Chancellor, is not present in the Act now in question, in my opinion it is not *ultra vires*.

The important differences between the two Acts are: that the Act of 1915 gave to the Minister of Education, if in his opinion there was a failure to comply with the provisions of the Act, having obtained the approval of the Lieutenant-Governor in Council, the power to appoint a Commission and to vest in it the powers of the School Board, including the right to deal with and administer its rights, properties, and assets, and to suspend or withdraw all or any of the rights, powers, and privileges of the Board, and whenever he might think it desirable to do so to restore them or any part of them and to revest them in the Board; while the Act in question gives the right to appoint a commission only when the Board, in fact, neglects or refuses to conduct the schools under its control according to law; and the provision as to the restoration to the Board of the conduct and management of the

schools is, that they shall be restored by the Minister of Education whenever it shall appear that the schools will be conducted by the Board according to law.

Another difference is, that the Act in question provides by sec. 4 that:—

"If any question arises as to whether the circumstances justify the appointment or the continuance of a Commission it shall be determined on summary application to the Supreme Court at Toronto."

It is contended by counsel for the School Board that the power of the Minister of Education to appoint a Commission is the same as it was under the previous Act, and that it is only after a Commission has been appointed, and it has taken possession of the schools and their property, and actually begun the conduct of the schools and the administration of their property, that resort can be had to the provisions of sec. 4.

With that contention I do not agree. It is only if and when the Board neglects or refuses to conduct the schools under its control according to law that the power to appoint a Commission arises; and any attempt or threat to appoint or the appointment of a Commission, when the facts do not justify the appointment, would be an unlawful act, and the doing of it or the acting of a Commission so appointed could be restrained by injunction, just as any other unlawful act may be.

It was also contended that it is only when it appears to the Minister that the schools will be conducted by the Board according to law that the conduct and management of the schools are to be restored by the Minister. I do not so understand sec. 3; it is by it made the duty of the Minister to restore when it appears—not appears to him, but, in fact, appears—that the schools will be conducted by the Board according to law; and that duty, like any other duty, may be enforced by the law.

The use of the words "shall appear" was evidently thought to be an accurate expression to be used in fixing the time when the restoration is to take place, because the Commission and not the Board would be in possession when the right to restoration would arise, and what in effect the section provides is, that, whenever there exists an honest intention on the part of the Board to conduct the schools, if the conduct and management of them are

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restored to it, according to law, the right to have them restore arises, and that right is not dependent on the view of the Minister as to whether the honest intention exists, but upon whether or not it, in fact, exists; and I am inclined to think that, if a Board which honestly intended to conduct its schools according to law should express that intention to the Minister, and require him to restore to it the conduct and management of its schools, he would be bound to restore them—and, if he refused to do so, the right of the Board might be enforced by mandamus.

But, however that may be, I see nothing in sec. 4 which is open to objection.

The expression "continuance of a Commission" is not, I think, well chosen, but what is plainly meant is, that, where the Minister and the Board differ as to whether the condition upon which the right to have the conduct and management of the schools restored to the Board exists, there shall be the easy and speedy way for determining the matter in dispute which sec. 4 provides.

The provisions of the Act in question are not, in my opinion, open to the objection which was held to be fatal to the validity of the earlier Act, but are *intra vires* the Legislature by which they were enacted.

Even if it were not as clear as I think it is that the effect of the decision of the Judicial Committee is not to declare that it is not competent for the Legislature to meet such conditions as exist in the case of these Ottawa schools, by providing for the suspension of the powers of the Board if and while it refuses to obey the law and insists upon conducting the schools under its charge in defiance of the law, I would decline to take the responsibility of holding that where such conditions exist the Legislature is powerless to provide an effective remedy for ensuring that the schools shall be conducted according to law and for securing to those Separate School supporters who are desirous that the law should be obeyed the privileges which they are entitled to enjoy under the provisions of the British North America Act—always provided that, where the remedy is the suspension of the powers of the Board, that suspension is to continue only so long as the purpose and intention to disobey the law exist.

The consequences of giving effect to the contention of counsel for the Board would be destructive of the Separate School system.

It would mean that a School Board, whenever it chooses to do so, may conduct the schools under its control and management as it pleases; it may teach in them what it pleases and teach it as it chooses; it may refuse to appoint or employ qualified teachers and may employ and pay unqualified ones; and, so long as the majority of the supporters of the schools approve of what the Board does, there would be open no effective remedy for these abuses or effective means for securing to a minority desirous of having the schools conducted according to law, its right to have them so conducted. If it were attempted to dissolve the corporation, the same objection that is now urged would be raised; and, if the Board's contention is well-founded, such a step would be a violation of the rights of the supporters of the schools: to remove the members of the Board from office would be a useless thing to do, for their places would be filled by others who would follow the course that their predecessors had followed; and resort to the ordinary machinery and process of the Courts would afford no effective remedy; and, while the schools were being conducted in defiance of the law, the Board would go on exercising the power of levying taxes which it possesses, for the support of schools which were being unlawfully conducted, and levying these taxes not only from those who approve of what is being done but from those who are opposed to its being done. A minority that does not approve may, no doubt, withdraw from supporting Separate Schools and become Public School supporters, but to compel them to do this would be to deprive them of the privilege they hold dear of sending their children to schools in which religious instruction according to the tenets of the Roman Catholic Church will be imparted to them as part of their education, instead of sending them to the Public Schools and contributing to the support of those schools. It must be borne in mind that in urban municipalities a minority cannot withdraw and set up Separate Schools conducted and managed by trustees chosen by themselves, for all the schools in such municipalities are controlled and managed by one Board chosen by the Separate School supporters of the municipality.

I decline, unless compelled to do so by a decision which is binding on this Court, to hold that a system so unworkable, and in my opinion so unfair, has been fastened upon the people of Ontario by the British North America Act; and, in my judgment, no such decision has yet been pronounced.

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I would, for these reasons, answer in the affirmative the question referred.

MACLAREN and MAGEE, JJ.A., agreed with MEREDITH, C.J.O.

HODGINS, J.A.:—I concur in the judgment of my Lord the Chief Justice, which I have had the advantage of perusing, and agree that the expressions used in the judgment in the earlier case, *Ottawa Separate Schools Trustees* v. *Ottawa Corporation*, [1917] A.C. 76, 32 D.L.R. 10, must be treated as having been carefully weighed and not to be pressed beyond their plain import. To carry them further would have very serious consequences; and this Court, being fully apprised of the situation, should be careful not to read into that judgment anything not actually decided by it.

The right and privilege dealt with by the Judicial Committee was that of electing trustees and through them managing the Separate Schools. That the trustees so chosen were bound to manage the schools in accordance with the law is demonstrated by the result of *Ottawa Separate Schools Trustees* v. *Mackell*, [1917] A.C. 62, 32 D.L.R. 1.

The Judicial Committee point out that the trustees, if they refuse to comply with the regulations and thus violate their duty, are amenable to process of attachment. But, if that remedy was enforced, the right to manage in accordance with the law would still remain with the class for whose benefit the school was established, notwithstanding the default of its agents. It was, therefore, the substitution—indefinite in point of time and depending for its cessation upon the uncontrolled view of a designated Minister—of a nominated Board in place of the elective body provided by the original statute, that determined the case adversely to the Commission. The right and privilege of establishing and managing schools was, so far as the class was concerned, exercised by the election of trustees through whom that establishment and management were to be carried out. It seemed to their Lordships that the right and privilege so to be exercised was prejudicially affected even though the elected trustees refused to exercise that part of the right which it was their duty to perform. And this was so because, as I understand the judgment, the substitution effected by the statute was so complete as to eliminate, for a pos-

sibly indeterminate period, the underlying right, and was not limited to supplying an interim method for performing the neglected duty.

The present statute appears to avoid that difficulty; and, while not couched, as is pointed out by my Lord the Chief Justice, in language absolutely incapable of being criticised, it is, I think, reasonably clear and definite in avoiding the vice of the earlier enactment.

It seems to have been considered by the Judicial Committee that if the trustees and their supporters failed "to observe the duties incident to the rights and privileges created in their favour the result is that the children of Roman Catholic parents are under obligation to attend the common schools, and thus lose the privileges intended to be reserved in their favour under provision 1 of sec. 93 of the British North America Act, 1867" 32 D.L.R. at p. 14. This conclusion, however, leaves out of consideration the position created by the school legislation now in force in this Province. The children of Roman Catholic parents have no statutory right to attend the Public Schools. That right is confined, by sec. 6 of the Public Schools Act, R.S.O. 1914, ch. 266, to the children of supporters of the Public Schools, for whom alone Public School trustees are obliged to provide accommodation. (See sec. 73, clause (*d*)). And the Truancy Act, R.S.O. 1914, ch. 274, gives no right to attend Public Schools to children of Separate School supporters.

When Separate Schools are once established, the supporters of Public and Separate Schools are segregated for the purpose of taxation in support of each class of schools, and it would create confusion worse confounded, both in regard to the physical accommodation of the children and in the collection of rates and taxes for establishing and maintaining these different schools, if children of Separate School supporters attempted to attend the Public Schools, already filled to overflowing.

The system adopted by the Legislature enables the supporters of Separate Schools to exempt themselves from Public School taxes by a notice, if given before the 1st March in any year. When once that is done, it is not possible for a Separate School supporter to enable his child to attend a Public School unless he elects, by formal notice given to the clerk of the municipality before the second Wednesday in the following January, to abandon

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the support of a Separate School and to become a supporter of a Public School. And, while this notice also allows him to escape the tax for the future maintenance of the Separate Schools, it does not exempt him from liability for that imposed before his withdrawal, nor from his share of any debenture or mortgage debt incurred for the purchase of a site and the erection of a school while he was a Separate School supporter.

While, therefore, their children are not free to attend Public Schools, nor Public School trustees bound to provide for them, the Separate School supporters themselves are unable to escape from the rates, and are actually finding the money which is being spent in paying unqualified teachers and in other illegal ways. Such a situation requires a remedy in the interest of all concerned. A solution of the serious difficulty, created by the refusal of elected trustees to conform to their statutory duties, through the appointment of a statutory body charged with administration, only during the period of contumacy, cannot, in my view, if proper safeguards are provided for the resumption by the trustees of their functions, when they are ready, in good faith, to carry them out, prejudicially interfere with a right which carries with it the obligation of conformity with the law.

Ferguson, J.A.

FERGUSON, J.A.:—The Province has a right to regulate the conduct and management of Separate Schools—*Ottawa Separate Schools Trustees* v. *Mackell*, [1917] A.C. 62, 32 D.L.R. 1—but not to enact legislation, the effect or form of which is to deprive, or confer on the Minister of Education power to deprive, Separate School supporters of the right and privilege which they enjoyed at Confederation of electing trustees with power to manage their Separate Schools *according to law: Ottawa Separate Schools Trustees* v. *Ottawa Corporation*, [1917] A.C. 76, 32 D.L.R. 10.

Counsel for the Attorney-General submits: that the fatal objection to the legislation of 1915 was, that it permitted the right and privilege of the Separate School supporters to manage their denominational schools to be withdrawn, not temporarily, but in such a manner and to such an extent that the withdrawal might possibly amount to a total extinction of the right and privilege. It seems plain that the Act of 1915 gave to the Minister of Education a discretion not only as to when he might name Commissioners

with power to assume control of the schools, but also gave him the power, in the exercise of his uncontrolled discretion, to say when the management should be restored, thus conferring on him not merely a power to declare and effect a temporary suspension, but the power to withdraw at and during his pleasure the right and privilege enjoyed by the class. The words of that Act (5 Geo. V. ch. 45, sec. 3) were:—

"If, in the opinion of the Minister of Education, the said Board fails to comply . . . he shall have power . . . to suspend or withdraw . . . and whenever he may think desirable to restore . . ."

While there was nothing in the Act of 1915 to interfere with or restrain the exercise of the Minister's discretion and power in assuming or in letting go of control, there is in the Act of 1917 both limitation and restraint. Under the Act of 1917, the Minister's power does not accrue till the School Board does in fact neglect or refuse to conduct the schools according to law, and his power and control ends when in fact the Board will conduct the schools according to law, and the Act provides that these questions of fact are, in case of dispute, to be settled by the Supreme Court, and there is also in the Act a peremptory requirement of restoration of control so soon as these facts are established. The words of the Act of 1917 are:—

"Whenever the said Board shall neglect or refuse to conduct . . . according to law the Minister . . . may appoint a Commission . . . The Commission may take possession . . . and exercise . . . the rights . . . of the Board . . . Conduct . . . of the schools shall be restored . . . whenever . . . the schools will be conducted . . . according to law. . . . Any question . . . shall be determined on . . . application to the Supreme Court . . ."

In my opinion, the Act of 1917 differs in pith and substance, as well as in form, from the Act of 1915, declared by the Judicial Committee of the Privy Council to be *ultra vires*.

Counsel for the Separate School Board submits that, while it may have been established by the *Mackell* case that the Province has a limited right to regulate the conduct and management of the Separate Schools, it is established by the *Ottawa Corporation*

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case (*supra*) that the Province may only enforce its regulating legislation by process in the nature of injunction or attachment. In his written argument he says:—

"The Board of Trustees and the trustees, *quâ* trustees, are amenable only:—

"1st. To the Roman Catholic Separate Schools ratepayers of the City of Ottawa, who elected them and can defeat them.

"2nd. To the Courts, which may compel the Board and the members thereof, by mandatory injunction, to perform any duty in which they may have failed, and that by (*a*) imprisonment, (*b*) personal condemnation to pay any damages resulting from their alleged misconduct, (*c*) the imposition of fines and penalties prescribed by the School Laws.

"But, as such trustees, they are not amenable to the Legislature.

"If a corporation or a trustee fails or neglects to perform its or his duty or obligation according to law, the remedy consists in compelling such corporation or trustee to perform such duty or obligation according to law. It does not lie in depriving the corporation or the trustee of all its or his rights, privileges, powers, and duties.

"With regard to educational matters, the Provincial Legislature is always subject to the restriction or limitation of provision 1 of sec. 93 of the British North America Act, in this, that such legislation must not prejudicially affect any right or privilege with regard to denominational schools, under pain of complete nullity.

"The Privy Council has held that the right or privilege to conduct schools and manage the property thereof is a right or privilege which cannot be taken away and entrusted to others without prejudicially affecting the right or privilege of Roman Catholic Separate School supporters guaranteed by the British North America Act.

"The limitation imposed on the Legislature by provision 1 of sec. 93, British North America Act, 1867, is, of course, equally binding on the Courts. Whilst in the case of any corporation, municipal, joint stock, or other, the Courts may make an order to dissolve, wind up, or for a receiver, temporarily or permanently, or any other order with regard to the conduct of such corporation or administration of its property, it is not, since the judgment of the Privy Council, open to urge that such an order could now be

made by the Courts with regard to the Board or the schools in question."

I have quoted this argument at length, in order that we may have before us just what the issue is between the parties in reference to the construction of the Act submitted for our consideration. I take the effect of the foregoing argument to be that, while the Province is authorised to suppress rebellion in the Separate Schools, it has not power to follow that up by disqualifying the trustees, and, thereupon, by taking control and carrying on the schools even temporarily, if in so doing its legislation in any way effects or supersedes the right and privilege of the Separate School supporters to manage their schools. It is a question of construction; and, after carefully considering the Act in the light of Mr. Belcourt's argument, I would not construe the Act as transgressing the limitations claimed by Mr. Belcourt in the foregoing submissions.

As I see it, the question is, does this legislation of 1917, in form or in effect, take away or supersede the right of the Separate School supporters to elect and maintain in office, and to have their schools and school property managed by, elected trustees who do and will conduct and manage the schools *according to law*, or does it simply restrain these trustees from acting while they persist in refusing so to conduct the schools, and follow that declaration up by providing for the interim preservation of the property and business of the Separate School supporters, during the time that the elected trustees, by their refusal to act according to law, render themselves unable to exercise the powers of the office of trustee?

By the joint effect of the decisions of the Judicial Committee of the Privy Council in the *Mackell* and *Ottawa Corporation* cases, the power of the Province to regulate is subject to the restriction that the carrying out of the regulations is placed in the hands of elected trustees. This must mean legally qualified trustees. The right of the Province is limited to regulating; the right of the class to managing according to law. The trustees elected owe to the class and to the Province the duty to manage according to law, and a violation of that duty may be restrained by injunction and punished by attachment; but it would appear that, in the opinion of the Legislature, these remedies have proven inadequate, and I read the legislation submitted for our consideration as an Act

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to provide more adequate remedies. I do not read the Act as school legislation, under sec. 93 of the British North America Act, creating a new limitation upon, or as suspending, withdrawing, or interfering with, the right and privilege of the Separate School supporters to have their denominational schools managed by a Board elected by themselves. I consider and would construe the Act as legislation under sec. 92, and as enacting only that the elected trustees by their own voluntary illegal acts disqualify themselves from acting as trustees while they contumaciously refuse to act according to law, and that, by thus acting, they create a condition of affairs wherein the Separate School supporters have not in office persons able and qualified in the eyes of the law to act as their agents and trustees. As a result of these voluntary and illegal acts of the persons elected to be trustees, and their consequent inability to act as such, the trust estate is without managers. If this condition existed in reference to the property and business of an ordinary corporation, the Courts of this Province would, on application, appoint receivers and managers to preserve for the *cestuis que trust* their property, business, and rights, until the same could be handed over to duly appointed and qualified trustees.

No adequate machinery can be provided by the Courts for carrying on and conducting the business of a public body such as a Separate School Board; and, in the absence of such machinery, no effective order could be made; this Act purports to furnish the machinery; but, instead of leaving to the Courts the appointment of such receivers and managers, it provides that they may be appointed by the Minister of Education; the jurisdiction and right of the Minister being limited to appointing and authorising the receivers and managers to take control only when a certain condition has in fact arisen, not when in his opinion it has arisen or it is just and equitable.

The legislation empowers the receivers and managers appointed by the Minister to perform the duties of their office during such time only as the Separate School supporters fail to provide a Board of trustees qualified and willing to manage the schools according to law.

For these reasons, I am of the opinion that the legislation now submitted for our consideration is in essence and in form an Act

to provide means of conducting the Ottawa Separate Schools, and of preserving and administering their property and revenues, during such time only as the Separate School supporters shall fail effectively to exercise their right and privilege, *i.e.*, during such time as there are not in office duly qualified trustees willing and thus able to perform their duties, and is in pith and substance an Act to provide more adequate remedies and protection for the Separate School supporters injuriously affected by the wrongful acts of the persons chosen by them as their agents, and that the legislation does not transgress the limits claimed by counsel for the School Board, and is not open to the criticism directed to the legislation of 1915, of creating what is or what might be an effective instrument to deprive the Separate School supporters of their rights and privileges.

Were I of the opinion that the legislation of 1917 did in fact transgress the limits claimed by Mr. Belcourt, and did provide for a temporary suspension of or interference with the right of the Separate School supporters to enjoy and maintain denominational schools managed by trustees elected by themselves, I would not be prepared, in the absence of binding authority, to say that such an Act, the purpose and essence of which is to enforce regulating legislation which it has been established the Province has the right to enact, was *ultra vires* of the Provincial Legislature; and, for the reasons stated in the opinions of my Lord the Chief Justice and my brother Hodgins, with which I agree, I do not read the pronouncement of the Judicial Committee, in the *Ottawa Corporation* case (*supra*) as having decided that it is not within the power of the Legislature of Ontario to enact such legislation as is necessary for the administration of justice in the Province, and the protection of the property and civil rights of the Separate School supporters and of every member of that class, whether of the majority or minority in the class, against the wrongdoing of their agents and trustees: see the British North America Act, sec. 92, provisions 13 and 14.

Question answered in the affirmative.

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BANK OF HAMILTON v. BAMFIELD.

British Columbia Court of Appeal, Macdonald, C.J.A., and Martin, McPhillips and Eberts, JJ.A. April 2, 1918.

PRINCIPAL AND SURETY (§ II—15)—GUARANTEE TO BANK—DEFENCES.

One who freely and voluntarily enters into guarantees and a collateral agreement with a bank, the bank acting upon them to its detriment, cannot set up the defence that he did not intend to undertake the liability shewn to exist, and that he would not have entered into the guarantees if he had known the true state of the accounts.

Statement. APPEAL by defendant from judgment of Gregory, J. Affirmed.

Livingstone, Armour & O'Dell, for appellant; *S. S. Taylor*, K.C., for respondent (and Brown).

Macdonald, C.J.A. MACDONALD, C.J.A.:—I would dismiss the appeal.

Martin, J.A. MARTIN, J.A., dismissed the appeal.

McPhillips, J.A. MCPHILLIPS, J.A.:—This appeal has relation to two guarantees given to a bank and a contemporaneous agreement referring to the guarantees relative to collateral security and guaranteeing all sums then due and accruing due and owing to the bank (the respondent in the appeal) from T. R. Nickson, Mary Nickson, wife of T. R. Nickson, and T. R. Nickson and Alfred St. John, carrying on business as T. R. Nickson and Co., and from T. R. Nickson and Co. Limited, the guarantor being the defendant (the appellant in the appeal). The form of the guarantees may be said to be the usual form in use by the banks of Canada, and read respectively "for the due payment of the sums which are now or shall at any time thereafter be owing to the bank from T. R. Nickson and Co., of Vancouver, B.C., and T. R. Nickson and Co. Limited, of Vancouver, B.C." (the principal debtor). It would appear that previous to the giving of the guarantee of January 2, 1914, guarantees prior in date existed, but when executed by the appellant were made subject to a condition which the bank throughout refused to accept or be bound by, although the singular situation seemed to be present throughout a long time, that advances were made presumably upon the faith of these guarantees. Whilst this would not appear to be good business procedure, yet the only explanation that is forthcoming may be said to be that it was always expected that the condition would, in the end, be withdrawn; it was a condition which would operate to defer payments if liability accrued under the guarantee. This condition of things was present at the time of the giving of the guarantees sued upon, and a great deal of reliance is placed upon the fact that the bank,

nevertheless, kept insisting that the appellant was liable upon these previous guarantees. In my opinion, it cannot be considered that these previous guarantees were operative or effective, the parties never being *ad idem* in relation thereto. However, in the way I view matters, this is wholly immaterial, also it is immaterial as to what was understood with respect to the collateral securities held by way of assignments of money due to the principal debtor by the City of Vancouver, as at the time of the giving of the guarantees sued upon, the appellant must be held to have been fully acquainted with all the facts and circumstances, and as to the value of these assignments of moneys due by the City of Vancouver and that they fell far short of the value previously placed thereon, namely, $70,000. The appellant was a director of the T. R. Nickson Co. Ltd., and it is a matter of fair inference that the business affairs of the principal debtor were well known to him, or should have been. It cannot be said, upon the facts, that there was any fraudulent concealment and misrepresentation practised upon the appellant, the guarantor, by the bank, and consideration for the giving of the guarantees is well established, fortified to the further degree, that, in the giving of the guarantees sued upon, the condition previously insisted upon was removed or not insisted upon, and a further express advance was thereupon made of the very considerable sum of $30,000. The trial judge found in favour of the bank and upheld the guarantees, directing a reference to find the true amount due in respect thereof, and I cannot persuade myself, notwithstanding the very elaborate and able arguments of counsel for the appellant, that the trial judge arrived at a wrong conclusion, and he had the benefit of seeing and hearing the witnesses throughout a long trial, and it would appear that the case was gone into with much care, and all the available evidence was before the court, and the trial judge has remarked upon the evidence in such a manner as would disentitle this court from disturbing the judgment unless it were clearly of the opinion that there has been error in law, the principles upon which appellate courts are to act in such cases, in my opinion, prevent any contrary opinion being arrived at. See *Coghlan* v. *Cumberland*, [1898] 1 Ch. 704; *Re Wagstaff*, [1908] 1 Ch. 162; in *Lodge Holes Colliery Co.* v. *Wednesbury Corp.*, [1908] A.C. 323, Lord Loreburn, L.C., at p. 326:—

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When a finding of fact rests upon the result of oral evidence it is in its weight hardly distinguishable from the verdict of a jury, except that a jury gives no reasons. The former practice of Courts of Equity arose from the fact that decisions often rested upon evidence on paper, of which an appellant court can judge as well as a court of first instance.

It cannot be successfully gainsaid that the appellant freely and voluntarily entered into the guarantees and agreement—and the bank acted upon them to its detriment in making very considerable advances—and the learned trial judge construed them and gave effect to them in accordance with the true intent, meaning and understanding of the parties as expressed in the writings. (See *Bank of Montreal* v. *Munster Bank* (1876), I.R. 11 C.L. 47, *per* Fitzgerald, J., at p. 55; *Barber* v. *Mackrell* (1892), 68 L.T. 29 (C.A.); *York City & County Banking Co.* v. *Bainbridge* (1880), 43 L.T. 732.) That the appellant did not intend to undertake the liability now shewn to exist and would not have entered into the guarantees and contemporaneous agreement had he known the true state of accounts and the shrinkage of the collateral from about $70,000 to $7,000, or that he never intended to incur the liability that is now shewn to exist, is of no avail. He was in no way imposed upon by the bank. In *Stewart & Macdonald* v. *Young* (1894), 38 Sol. Jo. 385, Wills, J., said:—

> That a surety will not be relieved from liability because the language of the guarantee carries more than the parties may have contemplated—even though the court may be of the opinion that had the surety understood this he would not have entered into the guarantee. See *Steele* v. *Hoe* (1849), 14 Q.B. 431; *Broom* v. *Batchelor* (1856), 1 H. & N. 255; *Chalmers* v. *Victors* (1868), 18 L.T. 481; *Hoad* v. *Grace* (1861), 7 H. & N. 494.

(Note (t) p. 474, Hals. Laws of England, vol. 15, and also see *Taff Vale R. Co.* v. *Davis & Sons*, [1894] 1 Q.B. 43; and *Jacker* v. *International Cable Co.* (1888), 5 T.L.R. 13); *London Assurance Co.* v. *Bold* (1844), 6 Q.B. 514, 115 E.R. 192.

Upon the whole case, therefore, my opinion is that the appellant is liable upon the guarantees and upon the contemporaneous agreement, for the balance that may be due and owing by the principal debtors as set forth in the two guarantees, and the contemporaneous agreement. That balance, of course, can only be that which constitutes a legal debt due and owing by the principal debtors. See *Swan* v. *Bank of Scotland* (1836), 10 Bli. (N.S.) 627, 6 E.R. 231.

I would dismiss the appeal.

Eberts, J.A.

EBERTS, J.A., would dismiss appeal. *Appeal dismissed.*

UNION NATURAL GAS Co. v. CHATHAM GAS Co.

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Supreme Court of Canada, Fitzpatrick, C.J., and Davies, Idington, Duff and Anglin, JJ. March 25, 1918.

CONTRACTS (§ II D—157)—SUPPLY OF GAS "IN THE CITY"—EXTENSION OF CITY LIMITS—RIGHTS OF PARTIES.

A contract by the producers to supply all the gas required, to a company empowered to distribute and sell to consumers "in the city" does not extend to territory annexed to the city after the contract was made.

[*Union Natural Gas Co.* v. *Chatham Gas Co.*, 38 D.L.R. 753, reversing 34 D.L.R. 484, reversed; *City of Calgary* v. *Canadian Western Natural Gas Co.*, 40 D.L.R. 201, 56 Can. S.C.R. 117, distinguished.]

Statement.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario, 38 D.L.R. 753, setting aside the judgment at the trial, 34 D.L.R. 484, in favour of the plaintiffs and ordering a new trial. Reversed.

The facts are as follows:—

In 1906, the predecessors in title of the Union Natural Gas Co. which owned gas leases in the townships of Raleigh and East Tilbury contiguous to the City of Chatham entered into a contract with the Chatham Gas Co. which supplied the inhabitants of the city. By this contract the Union Co. agreed to supply to the Chatham Co. all the gas required by the latter and to furnish gas to no other person or company in the city so long as the Chatham Co. continued to take it, and the latter agreed to take all it needed from the Union Co.

In 1915, while this contract was still in operation, the Dominion Sugar Co. established a refinery on land in Raleigh which, in the following year, was annexed to the city. The Chatham Gas Co., by contract in writing, agreed to supply the gas required by the Sugar Co. and claimed that the Union Co. was obliged by its contract to furnish this extra supply. The Union Co. denied this and brought action for a declaration that it was only obliged to furnish gas for distribution in the city, according to the limits thereof in 1906, when the contract was made and for an injunction against the Chatham Co. diverting its gas to the annexed territory.

The trial judge was of opinion that the contract of 1906 covered the annexed territory, but considered the agreement with the Sugar Co. to be unfair to the Union Co. and granted a qualified injunction against diverting the gas to the territory annexed under the contract with the Sugar Co. or entering into any other contract therefor without the approval of the court. Both parties appealed

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to the Appellate Division which, without considering the merits of the case, ordered a new trial with liberty to add the Dominion Sugar Co. as a party to the action. The Union Co. then appealed to the Supreme Court of Canada.

When this appeal was called counsel for the respondent moved to quash it for want of jurisdiction, it being an appeal from a judgment ordering a new trial in the exercise of judicial discretion. The motion was directed to stand until the appeal was heard on the merits and by the judgment now reported the jurisdiction of the court was maintained.

Tilley, K.C., for the appellants.

Hellmuth, K.C., and *Pike*, K.C., for respondents

Fitzpatrick, C.J.

FITZPATRICK, C.J.:—I have read with great care the elaborate and able judgment of Lennox, J., before whom this action was tried, but as the strength of a chain is its weakest link, so the value of his conclusion depends upon the weakest point upon which it is based. The judge has formed the opinion, as surprising to me as I think it is without foundation, that the contract between the appellant's predecessors in title and the respondent for the supply of natural gas to the latter constituted them partners in the respondent's undertaking and operation of its franchise for distributing gas in the City of Chatham; and the learned judge going so fully, as I have said, into the case, gives little reason for his opinion on this point beyond a paraphrase of the agreement which does not seem to carry the matter any further than the document itself. The absence of such reason renders unnecessary more than a brief statement of the considerations which have led me to a contrary conclusion.

The judge has held that the respondent

> Is seized and possessed of a franchise of the same character, and with the same incidents, obligations and duties in the whole of the City of Chatham, as it now is, as this company was seized of and subject to in the area constituting the City of Chatham before and at the date of the annexation. And he continues: Considering the whole agreement, *i.e.*, between the parties . . . I have come to the conclusion that the proper interpretation is that its provisions were intended to extend to and include not only the City of Chatham as it was bounded and constituted at the date of the agreement, but land which might thereafter be annexed as well.

It seems in any case too much to say that "its provisions were intended to extend," since this must depend on the previous finding as a legal conclusion that the franchise did so extend;

perhaps at most it could be said that it follows from the previous finding that they must be considered to so extend, but indeed the real reason for the judge's interpretation is given in his previous statement as follows:—

> If the franchise of this company (the respondent) included the right and obligation to supply gas in territory subsequently acquired, the right to share in the benefit of this franchise was conferred, and the correlative obligation to furnish the additional gas required for customers in the added territory was imposed upon the Union Co. by the agreement of 1906. It might not always be so, but it seems quite impossible in the circumstances of this case to hold that "City of Chatham" means one thing as regards area in relation to the rights and obligations of the Chatham Co. and the city corporation, and another thing as regards the rights and obligations of the parties to the agreement of 1906. Why? Because the document of 1906 is in substance and effect a partnership agreement and practically nothing else.

Here we have the real reason for holding that the agreement, whatever its intention, extended to the territory subsequently added to the city. There is no other; for there is no reason that I can find why "the City of Chatham" should not mean one thing as regards the area covered by the respondent's franchise, and another as contemplated by the agreement of 1906 between the parties. On the contrary, I think there are good reasons why this should be so. In granting a franchise within the city, the corporation is naturally dealing with the area subject to its jurisdiction, whatever that may be, but parties making an agreement as private individuals for the supply of a commercial commodity in a particular area, are dealing with a geographical area; and are not concerned with any question of what particular municipal jurisdiction it comes under. In the case of *The City of Calgary* v. *The Canadian Western Natural Gas Co.*, 40 D.L.R. 201, 56 Can. S.C.R. 117, recently heard on appeal to this court and which was referred to in the argument, it was pointed out that between the years 1905 and 1914, the area comprised within the municipal boundaries had been extended from 1,800 to 25,000 acres, whilst the population had grown from 12,500 to 90,000. The franchise which was involved in that case was held to extend to the added territory; but it would surely be impossible, in a private contract for the sale of any commodity, to hold, without the plainest evidence of the intention of the parties, that the area within which it was to be supplied was not that covered by the proper description at the date of the contract, but such an enormously increased area as in

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the instance of the City of Calgary, and because the area within the jurisdiction of the City Corporation, no party to the contract, had been subsequently enlarged. It would be only reasonable to suppose that if the area were to be increased more than twelvefold the intention would be that the parties owning the franchise would have to make quite other arrangements for so changed a subject-matter of the contract. The conditions in the one case not only might, but probably would, be wholly unsuitable in the other.

As Lord Loreburn said in *Tamplin S. S. Co.* v. *Anglo-Mexican Petroleum Co.*, [1916] 2 A.C. 397, at 403:—

> A court can and ought to examine the contract, and the circumstances in which it was made, not of course to vary, but only to explain it, in order to see whether or not from the nature of it the parties must have made their bargain on the footing that a particular thing or state of things would continue to exist.

If we look at the particular contract, we find that it starts with the recitals:—

> Whereas the Chatham Co. is the owner of a system of mains and pipes laid through, under and along the streets, squares, highways, lanes and public places of the *City of Chatham* by and with the authority and sanction of the said city, also of certain rights and franchises to distribute and sell gas to the inhabitants of the said city.
>
> And whereas the parties hereto have agreed for the supply by the producers (the appellants) to the Chatham Co. of natural gas, and for the sale and distribution *in Chatham aforesaid* of the same by the said Chatham Co. on the terms and conditions following.

In the first of these recitals there is an identification of the respondent's system of pipes in the City of Chatham as it existed at that time, and the agreement is for the supply of gas by the appellant in Chatham aforesaid. In other words, read as a whole, the contract is merely one by which the appellant agrees to sell the respondent a quantity of natural gas at a certain fixed price, which quantity is determined by the capacity of the system of mains and pipes then laid through, under and along the streets, squares, highways, lanes and public places of the City of Chatham as it then was. If there be doubt, I presume that the rule laid down by Pothier in his Treatise on Obligations, No. 97, would apply. The contract is interpreted as against him who has stipulated and in favour of him who has contracted the obligation. *City of Toronto* v. *Toronto R. Co.*, [1907] A.C. 315.

And in estimating the probable intention, I do not think we can overlook the facts that the contract contemplates the supply

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by the appellants of gas outside the city therein mentioned to others than the respondent, and that at the time of its execution the appellants held a ten days old grant of the franchise from the Corporation of the Township of Raleigh, which included the area in question here. This franchise, in so far as the 51 acres are concerned at any rate, is still in existence. The appellants, moreover, hold numerous similar franchises in other neighbouring municipalities. S. 33 of the Municipal Act, R.S.O. (1914), c. 192, provides:—

> Where a district is annexed to a municipality, its by-laws shall extend to such district . . . and the by-laws in force therein shall cease to apply to it, except those relating to highways . . . and except by laws in force conferring rights, privileges, franchises, immunities or exemptions which could not be repealed by the council which passed them.

If we conclude that the agreement of November 3, 1906, is not as the trial judge finds "articles of partnership" between the parties, and there is nothing else to shew that the area as regards the contract is necessarily the same as that embraced in the respondent's franchise, but rather the contrary, then it becomes unnecessary to determine in this action what is the limit of the area covered by the respondent's franchise.

The appellant's claim is for a declaration that it is not bound under the contract of 6th (3rd) November, 1906, to supply gas to the respondent except for distribution within the limits of the City of Chatham as it then existed; and the consequent relief sought is an injunction restraining the respondent from diverting the gas supplied to it by the appellant to or for the purpose of the respondent's contract with the Dominion Sugar Company, one of its principal customers, whose factory is situated within the territory added to the city.

The trial judge found against the appellant and held that:—

> The proper interpretation of the agreement is that its provisions were intended to extend to and include not only the City of Chatham as it was bounded and constituted at the date of the agreement, but land which might thereafter be annexed as well; and that it follows that the respondent will be entitled to obtain from the appellant a sufficient supply of natural gas for its customers on the annexed land.

And referring to the claim for an injunction the judge says:—

> This prayer is based on the assumption that it would be declared that the agreement applies only to the city as it then was.

The finding being otherwise, no such injunction as was prayed could of course be granted; but the judge has entered into a

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consideration of the contract made between the respondent and the Dominion Sugar Co. and, being of the opinion that it was not one under which the respondent has a right to divert gas to the Sugar Co. against the will of the appellant, has granted "a qualified injunction" restraining the respondent from so diverting gas under any agreement unless and until it is approved by the court.

Against this judgment both parties appealed, and the Appellate Division, apparently approving the judgment as to the refusal of the declaration sought by appellant, decided that, in view of the Sugar Co. not having been a party to the proceedings, there would have to be a new trial with liberty to the appellant to add the Sugar Co. as a party defendant.

The judgment on trial being now reversed, there is, of course, no ground on which a new trial could be ordered. The appellant is entitled to the declaration and consequential relief sought.

The appeal will, therefore, be allowed, and the judgment on trial set aside; and it will be declared that under the contract of November 3, 1906, between Symmes and Coste, the predecessors in title of the appellant and the respondent, the appellant is not bound to supply gas to the respondent except for distribution within the limits of the City of Chatham as it then existed or in special cases with respect to which agreements exist. The respondent will be restrained by injunction from diverting gas supplied to it by the appellant otherwise than in accordance with such declaration.

In *Hartlepool Gas and Water Co.* v. *West Hartlepool Harbour and R. Co.*, 12 L.T. 366, the dock company were supplying their own water to their lessees in breach of their covenant to take all their water from the water company. The water company were held sufficiently satisfied with damages for breach of the covenant.

In the present case the defendant is diverting and supplying to strangers gas and water respectively belonging to the plaintiff to which the defendant has no right except under its contracts which do not provide for this.

It is no answer for the defendant to say: We have made a contract with strangers to give them your gas or water to which we have no right, and, therefore, we cannot be stopped appropriating and giving away your goods. Neither is it necessary to hear what the receiver of the misappropriated goods has got to say.

DAVIES, J.:—I am of the opinion that this appeal should be allowed and the judgment of the Appellate Division should be set aside and that it should be declared that appellant is not bound to supply gas for the territory annexed to the City of Chatham since the agreement in question was entered into, and I am also of the opinion that an injunction should be granted in aid of that declaration.

Davies, J.

I concur generally in the reasons for judgment stated by Idington, J., costs, of course, to follow the result.

IDINGTON, J.:—The appellant, as the assignee of the rights of H. D. Symmes and D. A. Coste under a contract made on November 3, 1906, between them and respondent, brought an action for the construction thereof, and in the event of appellant's contention relative thereto being maintained, for an injunction restraining the respondent from violating same.

Idington, J.

The trial judge's construction of the contract failed to maintain the appellant's contention yet he fell far short of satisfying respondent.

Hence both served notice of appeal to the Appellate Division of the Supreme Court of Ontario which, without expressing any opinion on the merits of any of the several contentions set up, set the learned judge's judgment, which had granted an injunction against respondent, aside and directed a new trial with liberty to appellant herein to add the Dominion Sugar Co. as defendants.

Upon appeal here from said judgment the objection is raised that it was merely in the exercise of its discretion that the Appellate Division directed a new trial, and hence no appeal would lie here, and further that nothing but questions of practice and procedure were involved in the appeal.

I am afraid that something more is involved, and that we cannot, by that easy way, evade the duty of deciding the questions raised.

In the first place, the then prevalent application of the rule relative to non-interference with the discretion of an appellate court granting a new trial got rather a bad blow from the Judicial Committee of the Privy Council in the case of *Toronto R. Co.* v. *King*, [1908] A.C. 260. We, following what had been the usual practice in this court up to that time, of assuming that when the court below in any case had, for one or other apparently good

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reason, decided to grant a new trial, it had exercised its discretion and hence, under s. 45 of the Supreme Court Act, now involved, no appeal would lie, refused to hear the appeal of *King* v. *Toronto R. Co.*

The railway company was unwise enough as the result shewed to appeal to the Privy Council from the judgment of the Ontario Court of Appeal there in question to have the action dismissed, and that ended not only in the company's appeal being dismissed, but also the trial judgment which had been given against the company, being restored. That led to our examining in other cases thereafter the foundation for such alleged discretion as ground for declining jurisdiction instead of assuming it to exist.

When so examined herein, I fail to find any reason for declining jurisdiction. I also fail to find any adequate reason for the court below granting a new trial.

I have considered all the cases cited by Hodgins, J., and supplemental thereto on the same point by counsel for the respondent in their factums. None of them seem to me to touch what is involved in the alleged necessity for the Sugar Co. being made a party to this suit.

The test of whether or not a party is necessary to the due constitution of a suit, was neatly put by Lord Cairns in the case of *Kendall* v. *Hamilton*, 4 App. Cas. 504, where he says, at p. 516:—

> I conceive that the application to have the person so omitted included as a defendant ought to be granted or refused on the same principles on which a plea in abatement would have succeeded or failed.

Pleas of abatement being abolished, as he had observed, did not prevent the application of the test. Such an objection, if relied upon, may still be taken by objection, in the pleading, to the relief being granted unless and until the necessary party has been added or, I imagine, by a motion in chambers.

No such course was taken and adhered to herein. If so taken and adhered to, it should not have prevailed.

When the nature of the relief sought is such that parties to the original transaction giving rise to the litigation, and thus in privity with him complaining, have obviously a direct interest in having the question correctly decided they may have, though perhaps not actually necessary to the proper constitution of the suit, a clear right to be added.

Some of the cases cited are of this character as, for example, that of a party suing and alleging he sues on behalf of all other shareholders, when in fact he does not.

Other cases, such as those concerned in the construction of a will or its validity, have given rise to those concerned being added.

These several cases seem to have been disposed of by application in chambers.

In short, I think the rule was correctly laid down by Buckley, J., in the case cited by Hodgins, J., of *McCheane* v. *Gyles* (No. 2), [1902] 1 Ch. 911, at 917, as follows:—

> Looking at the rule you must, in order to say that a person who is not a party ought to be added, find either that he "ought to have been joined," or that his "presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter."

I understood it to be admitted in argument that the rule in Ontario is in substance the same as that he quoted. And surely if, as in that case, for any reason the absence of a co-trustee of him sued, or the representative of such a co-trustee alleged to have been equally at fault with the one so sued, can furnish no bar to the validity of the proceeding, the absence of one who never had anything to do with the contract in question or the creation of the obligation of which a breach is complained, cannot be heard to complain so long as the one bound by such obligation and answerable in damages is a party and liable also to have the substitutionary relief of an injunction granted against him.

It is not necessary to determine the question here of whether or not, for purposes of discovery, for example, or otherwise, some third party or stranger to the creation of the obligation in question, yet who has improperly intervened in thwarting the due observance of the obligation by those who were parties to its creation, might properly have been made a party defendant. The distinction between those who may properly be made parties and others who must, is old and often found applicable.

One rather curious feature of this case is that it has not been suggested that the Kent Co., an incorporated holding company, possessed of all respondent's shares, except some held by its directors for qualification purposes, and which seems to have manipulated the whole business transactions now complained of

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and is to protect the Sugar Co. in event of litigation, is a necessary party.

And yet the agreement between that company and the Sugar Co. expressly provides for the defence of respondent in case of litigation in some features of its dealings through that company being handed over to the Sugar Co. if it so desire.

I imagine the legal mind that constructed some of the devices in question had not the same view of the law requiring those conspiring to defeat a solemn obligation directly resting upon others than themselves being necessary parties to litigation arising thereout, that the judgment of the Appellate Division implies.

I conclude that such like parties are neither necessary parties to this suit nor entitled as of right to intervene and hence no new trial is necessary.

Moreover this is not a common law action, but essentially a judicial proceeding in the nature of suits or proceedings in equity within the meaning of the excepting part of s. 45 of the Supreme Court Act. And as we held in *Clarke* v. *Goodall*, 44 Can. S.C.R. 284, a case may present both common law and equity features, and later have to be observed in this connection.

I have, therefore, no doubt of our jurisdiction to hear the appeal and give the judgment which the court appealed from should have given.

I cannot agree with the trial judge's construction of the contract as being that which was within the contemplation of the parties. Nor am I free from doubt as to the form of the judgment granting an injunction.

I am of the opinion that the respondent has violated and threatens to continue violating its covenants with the assignors of the appellant which it is entitled to claim the observance of and, under the circumstances in question herein, to have that observance enforced by an injunction of the court.

The agreement of November 3, 1906, between the respondent and Messrs. Symmes and Coste, provided that the latter should for a term of years, yet unexpired, furnish the former, from sources therein referred to, with natural gas.

I shall presently deal with the questions raised as to the extent of the supply intended by the contract, but meantime think it well to dispose of another aspect of the case presented.

The said agreement, by clauses 10 and 11 thereof, provided as follows:—

10. It is further agreed that the net prices to be charged and collected from consumers of natural gas in Chatham shall be as follows: 25 cents per thousand cubic feet for consumers using natural gas for heating, cooking and other purposes during the months of October to March inclusive; 35 cents per thousand cubic feet for consumers using said gas for heating, cooking and other purposes during the months of April to September inclusive; 35 cents per thousand cubic feet all the year round for consumers using natural gas for cooking, but not for heating, and 15 cents per thousand cubic feet for consumers using 250,000 cubic feet per month or more, excepting what gas shall be used by the Chatham Co. at their own works, for which the net price to be paid the producers shall be 7½ cents per thousand cubic feet.

11. It is further agreed that for all gas furnished hereunder the Chatham Co. shall pay the producers as follows: As long as the gross receipts from the sales of gas are less than $60,000 a year, 60 per cent. of the gross receipts shall be paid by the Chatham Co. to the producers, and as soon as the gross receipts from sales of gas amount to over $60,000 per year, then the Chatham Co. shall pay 66⅔ per cent. of the gross receipts to the producers and settlement to be made at the end of the year from the time said natural gas is supplied by the producers or at the end of each following year at the same date whenever said receipts have proven to be more than $60,000.

It then further provided for the keeping of the necessary meters, books and records, and rendering of accounts whereby the observance of said agreement should be carried out. The binding nature of the limitations upon the prices to be charged was of the essence of the contract.

That was fully recognized by respondent for many years in many ways, and especially by several agreements made between itself and others who had become the assignees of the said Messrs. Symmes & Coste, varying the prices and classification thereof either in general or in reference to the supply to particular individuals or companies.

For some reason or other they were unable to agree in like manner with regard to the Sugar Co.'s request for a supply, and in consequence thereof the respondent most unjustifiably proceeded by indirect means to supply the Sugar Co. at a lower rate than it was entitled to serve any one in its class under above quoted clauses or any modification thereof.

That was attempted, moreover, to be put in execution by a deceptive and circuitous method which if maintained would be destructive of the efficacy of the contract.

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The Kent Co., above referred to, as holding all the shares in respondent company, save such as needed to qualify the directors of the respondent, seemed to have such a curious conception of the obligations of a contract that it undertook to circumvent the provisions of that in question herein, and imagined that it could do so by a juggling of words to accomplish its end.

It was content to have the directors of the respondent as its puppets pretend in words it was observing the terms of the contract, whilst it, the real master, behind, was emasculating the vital efficiency thereof by handing back to the Sugar Co. the rebate that reduced these words to a nullity.

In my opinion such a scheme was conceived in fraud, and is destitute of any legal defence to maintain it in face of the powers of a court of equity which has long exercised the jurisdiction of suppressing fraud.

I think the appellant is entitled to an injunction so framed as to prohibit the violation by the respondent, directly or indirectly, of the terms of its contract in question.

What I am inclined to doubt, but express no opinion upon, especially in the absence of argument directed to the point, is whether or not the injunction granted by the trial judge does not go so far as to exercise a supervision over the execution of the respondent's business in a way that courts of equity have uniformly declined to accept the burden of in granting injunctions.

In the view I have reached and am about to express I need not, if agreed to by a majority of the court, form such a definite opinion as might otherwise be necessary on this point.

Coming to the question which, beyond all others, the parties concerned seemed most anxious to have decided, of whether or not the contract bound the appellant's assignors, and hence it, to furnish natural gas to serve those needing such service beyond the bounds of the city as they existed at the date of the contract, I desire at the outset to remove any impression that may be derived from the mutual course of conduct which was observable throughout in serving consumers beyond the said limits.

If a contract is ambiguous the surrounding circumstances must be considered by way of illuminating that which may have been imperfectly expressed.

In other words, if we would understand what men have expressed we must realize the business they were about.

That cannot be extended beyond the immediate acts following the signing of their contract.

I, therefore, exclude all that was done by way of subsequent contracts, evidenced only by the conduct of the parties in the interpretation or construction of the contract in question.

Such subsequent transactions must stand or fall on their merits.

The construction of the contract in question depends upon the meaning to be attached to the words "City of Chatham" used therein, at the time it was executed.

Stress has been laid upon the word "customers" and it has been connected in argument with the existence of a customer or customers outside the bounds of the city at the time of the making of the contract, as indicative of some intention to operate beyond the then city limits and hence to extend to any obtainable customers.

It is also pointed out that in the first clause the producers were bound to furnish a high pressure line of sufficient capacity for all the requirements of the Chatham Co. and its consumers. The subsequent clauses make clear what is meant. The requirements of the company were specially referred to and a lower price therefor charged than to others, being its customers. Again the producers are restrained in clause 4 from furnishing gas to any one outside Chatham excepting the supply shall be greater than that required by the company for itself and its consumers for all purposes.

And again in clause 6 the company is bound to take and supply the gas to its consumers in Chatham.

Inasmuch as the contract is clearly intended to be reciprocal this provision and the entire absence of any provision for outside customers, seems to put beyond peradventure what was meant by the word "customers." Clearly it was only those within the city that were actually provided for.

The supply to any others outside must depend upon collateral contracts and whether these were *intra vires* or not does not concern us here.

The scope and purpose of the written contract was the sale of gas in the City of Chatham to customers to be found therein and served there.

All other more or less irrelevant issues being eliminated, we

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have to determine whether it was only the then City of Chatham or also a future greater Chatham that was within the contemplation of the parties in thus framing their contract.

The plain literal meaning of the words surely limits the contract to that which was then existent just as much as if the supply contracted for had been for a given factory or block of buildings. What right would any one so bound have to extend it beyond the then present limits? What right have we to extend it beyond?

Suppose the city had so decayed, or grown in another direction than anticipated, as to render it expedient for purposes of its municipal government to have the limits changed and a part of it cut off, and in that cut off part there was a single factory to which a service pipe of the respondent had extended, could it be said that the appellant might then refuse to furnish gas for that factory, simply because the boundaries of the city had been changed for municipal purposes?

I put the converse case in order to bring out clearly what is involved in the contention of respondent. I venture to think no court would heed very much such a contention as assumed on the part of appellant in the case I put.

Moreover there may occur at any moment in a rapidly growing city the annexation of a suburban village already equipped with a plant of its own, or a service supplied by a gas or water company; could the contracting parties serving, just as here, the rapidly growing city, pretend they had as of course in such a contingency thereby the right to serve the village annexed and discard what existed there for the like service? That seems inconceivable, yet it is what had happened and been contended for unsuccessfully in the analogous case of street railways in Detroit.

I cannot help thinking that the process of reasoning which rests upon the application of by-laws enacted for the general good government of a municipality to any new annexation thereto, and pressed on us as being relevant to and of necessity governing the determination of the contractual rights either of the municipality or those ancillary companies contracting for the service to be given the inhabitants thereof, is essentially unsound.

I submit there is a confusion of thought in such a mode of reasoning. The promiscuous mingling of the governmental jurisdiction of a council with the contractual relation of the corporate

body does not help to anything but to confuse and mislead. And none the less so when we know that the mode of entering into a contract must be by a by-law and the legislative function must also be discharged by a by-law.

To apply that mode of reasoning as sought herein must inevitably lead to unjust and possibly in some cases disastrous consequences.

Whatever may be said and there is much in favour of the reasonable expectation of a local company incorporated under and by virtue of the statute whereby respondent was first and secondly constituted, being liable to be defeated by the narrower construction of the said statutes than respondent contends for, is to my mind far outweighed by the consequences liable to flow from the maintenance of such contention.

It is to be observed that this sort of corporate companies are by the statutes enabling their creation so limited as to capital and time of existence as to shew they were only intended as a temporary expedient.

And, as if anticipating the very argument set up herein derivable from their creation by by-law and the enactment that in case of annexations the by-laws of the annexing municipality are to prevail, the statute has been amended to read as follows:—

S. 33. Where a district or a municipality is annexed to a municipality, its by-laws shall extend to such district or annexed municipality, and the by-laws in force therein shall cease to apply to it, except those relating to highways, which shall remain in force until repealed by the council of the municipality to which the district or municipality is annexed, and except by-laws conferring rights, privileges, franchises, immunities or exemptions which could not have been lawfully repealed by the council which passed them.

I call attention to the excepting part of this new clause which I may be permitted to suggest is of very doubtful import.

Clearly it was intended to prohibit the very conflict I have suggested as possible by virtue of annexations of villages to towns or cities.

Evidently the draftsman did not suppose that such a conflict was in law possible by a claim on the part of those supplying a service to the larger and annexing municipality, as here in question.

The Municipal Franchises Act, 2 Geo. V., c. 42, seems on the facts presented to be an impossible barrier in the respondent's way herein, unless its contention that by virtue of the annexation

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it obtained by force of its charter a right to serve the annexed part is maintainable.

I have suggested all I need say in that regard.

My opinion is that the instrument before us is but a contract which related to a limited period and only contemplated a service for the purposes of the City of Chatham as it existed at the date thereof.

The like reasoning which supported that part of the judgment of this court in the case of *Toronto R. Co.* v. *Toronto*, 37 Can. S.C.R. 430, and the court above in the same case, [1907] A.C. 315, relative to the boundaries of the city at the date of the contract being the governing line and limit of the operation of the contract, seems to me to support the opinion I express.

I recognize, however, that as has been so often said, decisions upon one contract may be of little service in determining the meaning of another. As illustrations, however, they are no doubt useful.

And in closing I may be permitted to say that I have a great reluctance to extending by implications, unless so clear as to be necessary to execute the purpose of the parties as expressed, that which is not expressed in a contract, and especially so when that contract is one in common use likely to bring undesirable consequences as the result of such treatment. I have more faith in parties being able to express what they want than in any guess a court is likely to make.

The respondent argues that its charter by its very nature shews it was intended to operate in the whole of the municipality whatever might be its bounds and the company to serve all the inhabitants thereof.

I have already illustrated how such a contention if upheld might produce undesirable results and attempted to shew thereby how doubtful the proposition may be in law.

The tendency of these several statutory changes I have just cited as illustrative of the minds of legislators relative to such a contention, rather suggests that the view put forward as to the scope of such like charters has not been generally accepted and hence cannot fairly be said to have been one of the things which inevitably must have been present to the minds of Symmes & Coste in framing the contract, and hence necessarily within the contemplation of the parties.

It may well be that the powers of a corporate company must form in arriving at an agreement the subject of due and full consideration in some cases. But it does not in this sort of case necessarily go beyond attention being paid to the actual fact of its having power to do that which the parties contracting with it have presented to their minds.

And if the respondent had clearly the widest sort of corporate power entitling it to go far beyond the bounds of the city in carrying on its business, that fact could not expand the plain literal meaning of the words used.

There is far more force in the counter argument of appellant that this unexpected demand upon its material appliances and resources would render it necessary to double its capacity.

That, however, is a contingency that possibly might have arisen had chance brought the Sugar Co. to locate within the bounds of the city as they existed at the date of the contract.

Neither argument seems to me entitled to much weight relative to the construction of the contract.

The lastly mentioned one, however, does bring added force to the appellant's case by emphasizing the unjustifiable conduct of the respondent in seeking to destroy the efficacy of the contract relative to the rates to be charged.

I conclude that the parties having, in framing this contract, had in contemplation only a service for the inhabitants of the city as then delimitated, it should be so declared and an injunction be granted as prayed, and alternatively that in any event the appellant is entitled to have the respondent enjoined against departing from the terms of the contract as modified.

The appeal should be allowed and the injunction granted as prayed for with costs to the appellant throughout.

DUFF, J.:—I am of opinion that the appeal in this case should be allowed in part. Duff, J.

ANGLIN, J. (dissenting):—The foundation for, as well as the occasion of, this action is alleged contravention by the defendant of its contractual obligation to the plaintiff involved in a contract for a supply of natural gas made by the defendant with the Dominion Sugar Co. No other breach of the contract between the plaintiff (assignee of Symmes & Coste) and the defendant is suggested in the statement of claim. In addition to a judgment Anglin, J.

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declaratory of the rights of the plaintiff and defendant *inter se* as to the area within which the latter in entitled to distribute natural gas supplied to it by the former, the plaintiff expressly prays for an injunction restraining the defendant from supplying to the Sugar Co. natural gas furnished by it.

The trial judge held that upon the proper construction of the contract between the plaintiff and the defendant the situation of the Sugar Co.'s refinery did not preclude the defendant from supplying it with gas furnished by the plaintiff. In his opinion, however, the contract between the defendant and the Sugar Co. was unfair to the plaintiff and such that the defendant was not entitled to require the plaintiff to supply gas to enable it to be carried out, in that, although to provide means of furnishing the quantity of gas which the Sugar Co. might need would entail a duplication of the plaintiff's plant at great expense, there was no obligation on the part of the Sugar Co. actually to take more than a trifling quantity of gas, and that a collateral agreement for a rebate gave that company an undue preference over other Chatham consumers, and was also contrary to the bargain as to prices to be charged by the defendant to its customers fixed by its contract with the plaintiff. He granted an injunction restraining the defendant from diverting gas supplied by the plaintiff to the Sugar Co. under the existing agreement between that company and the defendant and under any other agreement that might be made or other conditions that might arise until sanctioned by the court.

The Appellate Division, expressing no opinion upon the construction of the contract between the plaintiff and defendant as to the area within which gas furnished under it might be supplied by the defendant to its customers, but disapproving of the order disabling it from making any agreement with the Sugar Co. except with the sanction of the court, was unanimously of the opinion that in the absence of the Sugar Co. the action was not properly constituted. The course suggested by the court, that that company might be added with its own consent and that of the present parties and the case determined on the record so amended, having for some reason been found unacceptable, the judgment of the trial judge was set aside, and a new trial ordered, with liberty to the plaintiff to add the Sugar Co. as a party defendant. From that judgment the plaintiff now appeals.

It is obvious that the first matter for consideration is whether the appellant is entitled *ex debito justitiæ* to obtain the relief which it seeks without the Sugar Co. being brought before the court, or whether, either because that company is a necessary party, or because judicial discretion would be properly exercised in directing that it should be added as a defendant, in order that it may have an opportunity of upholding any rights which its contract with the defendant purports to confer before it should be determined that those rights are non-existent, the order pronounced by the Appellate Division should be sustained.

Under its contract with the defendant it is natural gas furnished by the plaintiff that the Sugar Co. is to receive. The obligation of the defendant to supply and that of the Sugar Co. to take is to "continue so long as natural gas can be obtained or secured by the Gas Co. (the defendant) under and pursuant to the terms of the agreement between the Gas Co. and the producers (the plaintiff)." It may at least be arguable that if the plaintiff is unwilling and cannot be compelled to furnish gas to the defendant for delivery to the Sugar Co. there is a failure of the subject matter of the contract between the defendant and the Sugar Co., and that consequently an action by the latter against the former for damages for breach of contract would not lie. As Hodgins, J., points out, we are not dealing with the ordinary case of "a contract for the supply of a commercial article," in respect of which, upon his vendor's failure to deliver, a sub-purchaser would have the ordinary recourse in damages.

Under these circumstances, if the construction should be placed upon its contract with the defendant for which the plaintiff contends, the effect might be to determine that the Sugar Co. has no rights whatever against the present defendant. Such a determination of the Sugar Co.'s rights and position behind its back, though not binding upon it as *res judicata*, could not but prove prejudicial to it in any future contest over the same question. Moreover, unless the Sugar Co. should be deterred by the practical effect of an adverse judgment rendered in this action from seeking to enforce its contractual claims, a second litigation of the same question (its right as a customer of the defendant within the present limits of the City of Chatham to be supplied with natural gas furnished by the plaintiff) must ensue—a result which it is now the policy of the

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courts to obviate, when that may be done without seriously prejudicing or embarrassing the plaintiff, by adding parties not otherwise necessary, but proper to be added within the limits prescribed by the rules. *Clifton* v. *Crawford*, 18 P.R. Ont. 316, 318; *Cornell* v. *Smith*, 14 P.R. Ont. 275, 276.

While an injunction forbidding the present defendant from delivering to the Sugar Co. gas received from the plaintiff would not bind the Sugar Co. so as to render it technically liable for a breach thereof because it would not be enjoined from receiving the gas, yet it would be just as effectively prevented from taking gas furnished by the plaintiff as if it had been so enjoined because such taking, with knowledge of the injunction, would be "assisting in setting the court at defiance"—would "obstruct the course of justice"—would "contumaciously set at naught the order of the court"—and would therefore properly render the Sugar Co. punishable for contempt. *Seaward* v. *Paterson*, [1897] 1 Ch. 545, at 554 *et seq.*; *Scott* v. *Scott*, [1913] A.C. 417, at 457.

The case of *Hartlepool Gas & Water Co.* v. *West Hartlepool Harbour & Rly. Co.*, 12 L.T. 366, cited by Hodgins, J., is indistinguishable in principle from that at bar. In alleged violation of an agreement with the plaintiff, the defendant in the Hartlepool case, *supra*, supplied its lessees (P.S. & Co.) with water not obtained from the plaintiff. Kindersley, V.-C., although he thought, as then advised, that the defendant could be restrained from doing this, was:—

> Quite satisfied that the court cannot express any such opinion in the absence of P. S. & Co. so as to deal with them in such a manner as most materially to affect the important interests of those absent parties. . . . If the defendants had not entered into any lease or contract with P. S. & Co., I should grant the injunction, but inasmuch as they have entered into this lease or contract, I cannot grant an injunction without doing such prejudice to P. S. & Co. as ought not to be done to an absent party. It is not because the defendants would not (*sic*) be liable to an action by P. S. & Co. or to any inconvenience which might arise, but it is because the court, on principle, will not ordinarily and without special necessity interfere by injunction, where the injunction will have the effect of very materially injuring the rights of third persons not before the court.

The interests of their lessees (P.S. & Co.) in that case would have been affected by an injunction against the defendants precisely in the same manner as those of the Sugar Co. would be affected by an injunction against the present defendant.

It is, no doubt, quite within the power of the court to determine the construction of the contract between the parties to it in this action as now constituted. In that sense the Sugar Co. is not a necessary party. If it rests on the contrary view, the judgment of the Appellate Division, even were this not an equitable action, would not be non-appealable under s. 45 of the Supreme Court Act. Yet, having regard to all the circumstances, and particularly to the obvious prejudice to the Sugar Co.'s contractual claims which must result from a judgment adverse to the defendant, to the occasion for and object of the present action, the form which it has been given, the allegations of the statement of claim and the relief sought, and to the desirability of having an adjudication in it which will preclude a second action upon the same issue, in my opinion, the order directing a new trial and giving the plaintiff liberty to add the Sugar Co. as a defendant may well be supported as one that might have been made in the exercise of a judicial discretion which could not be held to have been erroneous.

For these reasons it would seem to me to be improper to grant relief by injunction in the absence of the Sugar Co.; relief by way of damages for breach of contract is not asked and would scarcely be appropriate; and the circumstances are not such that the discretionary power of the court (*Re Berens*, (1888) W.N. 95), to pronounce a declaratory judgment unaccompanied by consequential relief, which, wide as it is (*Guaranty Trust Co.* v. *Hannay & Co.*, [1915] 2 K.B. 536, at 562, 564), is always acted upon "with extreme care and caution" (*North Eastern Marine Engineering Co.* v. *Leeds Forge Co.*, [1906] 1 Ch. 324, 329); *Faber* v. *Gosworth Urban District Council*, 88 L.T. 549, 550, and usually only if it does not involve "interfering with the rights of other persons" (*Austen* v. *Collins*, 54 L.T. 903), should be exercised.

In England, where the provision for pronouncing declaratory judgments, formerly contained in the statute 15-16 Vict. c. 86, s. 50, is now found in an extended form in a Rule of Court (O. XXV., r. 5), its validity in this latter form has been upheld by the Court of Appeal on the ground that it does not confer jurisdiction in the sense that without it the court would lack "power to deal with and decide the dispute as to the subject-matter before it," but merely enables it to do so "in a different manner, under

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different circumstances and when brought before it by a different person," and that it is therefore "only dealing with practice and procedure." *Guaranty Trust Co.* v. *Hannay & Co.*, [1915] 2 K.B. 536, at 563-4, 570. In Ontario the former Chancery Order, No. 538, which corresponded with the former Imperial statute (15 & 16 Vict. c. 86, s. 50) is now replaced, likewise in an extended form, by s. 16 (*b*) of the Judicature Act, which is identical with the present English O. XXV., r. 5. Under the Ontario statute, as under the English Rule of Court, whatever may be the proper view as to the scope and character of the provision itself, the propriety under any given set of circumstances of exercising the power which it enunciates cannot be other than a matter of practice and procedure—just such a matter as it has been time and again decided should be finally determined by the Appellate Court of the province in which it arises, and, without questioning our jurisdiction, has been held to be a proper subject of appeal to this court. *Emperor of Russia* v. *Proskouriakoff*, 42 Can. S.C.R. 226; *Green* v. *George*, 42 Can. S.C.R. 219; Cameron's S.C. Practice 85; *Arpin* v. *Merchants Bank*, 24 Can. S.C.R. 142.

I would, therefore, be disposed to dismiss this appeal without any expression of opinion upon the construction of the contract between the plaintiff and the defendant.

In deference, however, to the contrary opinion on this aspect of the case held by the majority of the court, I proceed to state briefly my view upon the proper construction of the contract between the plaintiff and defendant as to the area within which the defendant is entitled to distribute natural gas supplied by the plaintiff.

The contract requires that the producers (the plaintiff) shall furnish to the defendant natural gas "through a high pressure line or lines of sufficient capacity for all the requirements of the Chatham Co. and its consumers:" that they shall so "furnish to the Chatham Co. natural gas in sufficient quantities at all times for the purposes of the Chatham Co.'s present and future consumers, and the Chatham Co.'s own use . . . and shall use due diligence at all times in prospecting and drilling wells for gas so that the supply may be continuous for all the purposes of the Chatham Co., and . . . shall make any reasonable expenditure that may be necessary to make the supply continuous:" and that

they "shall not furnish natural gas in Chatham during the continuance of this contract to any person or corporation other than the Chatham Co. so long as the Chatham Co. continues to take its supply from the producers." It requires the Chatham Co. to take its supply from the producers (the plaintiff), unless they are unable to deliver it, and forbids the producers supplying any person or corporation outside the city, except "customers along their high pressure line, between the field and Chatham, unless the supply from time to time shall be greater than that required by the Chatham Co. for itself and its consumers for all purposes." It requires the Chatham Co. to maintain and operate "a system of mains, pipes, fixtures and apparatus suitable and sufficient to distribute the gas to be supplied under this contract to any person, firm or corporation in the said City of Chatham desiring to use the same."

Two features stand out as essential and predominant in this contract—the defendant is obliged to take all its gas from the plaintiff (so long as it can furnish sufficient for the defendant's business) and to provide for its distribution to every person in Chatham desiring to use it; the plaintiff is obliged to supply (as far as it can or as due diligence and reasonable expenditure will enable it to do so) all the gas required by the defendant for itself and all its customers. The franchise of the defendant to distribute, and the obligation of the plaintiff to furnish gas (within the limitation stated) would therefore appear to be co-extensive and coterminous and to have been intended to remain so during the term of the contract between the plaintiff and the defendant. The limit of the plaintiff's obligation is the requirements of the Chatham Gas Co. within its franchise.

The Chatham Gas Co. was constituted in 1872, under a power then enjoyed by municipal corporations (C.S.C., c. 65) enabling them to incorporate companies "for supplying cities, towns and villages with gas and water," by a by-law of the Town of Chatham which recited the desirability of "lighting with gas the streets and buildings of the said town" and gave it authority for that purpose to "lay down pipes or conduits under any of the streets or public squares of the town." It was "re-created and re-constructed" under the same statutory authority (R.S.O. (1877), c. 157) by a by-law passed in 1884, and its corporate existence was formally

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recognized and declared by the Ontario statute 48 Vict. c. 81. The right to substitute natural gas for artificial gas, if it did not already possess it, was conferred upon it by a by-law in 1906, when its agreement with the plaintiff was made.

It was the obvious purpose in creating this corporation that its franchise and its functions should be territorially co-extensive with the area of the municipality. The creation of such a company was the means provided by the legislature for the carrying on of a public utility under municipal authority and control for the benefit of an entire city, town or village. It was intended that the Chatham Gas Co. should supply the needs of all citizens. Its franchise was perpetual. It would seem to follow that, as the municipal limits should extend, the franchise of the Gas Co. with its co-related powers and obligations should also extend. If not, it would lose its municipal identity and the purpose of its creation would be defeated.

When the territory within which the refinery of the Dominion Sugar Co. is situated was brought into the City of Chatham, the franchise, powers and obligations of the Chatham Gas Co., in my opinion, automatically extended to the area so annexed, subject, it may be, to any existing right or franchise of the plaintiff or any other company within the annexed territory. R.S.O., (1914) c. 192, s. 33; *Wentworth* v. *Hamilton Radial Electric R. Co.*, 54 Can. S.C.R. 178, 33 D.L.R. 439. There was no exclusive gas franchise in this annexed territory.

Moreover, assuming that the contract should be construed as the plaintiff contends, I am by no means satisfied that it is entitled in this action as now framed to a declaration that its contractual obligation with the defendant is restricted to supplying gas to be distributed within the limits of the City of Chatham as it existed at the date of the contract, November 6, 1906. The plaintiff well knew that at that time the defendant was supplying gas to a considerable number of consumers outside the limits of the city and it has since continued, with the knowledge and acquiescence of the plaintiff, to supply these and other outside consumers with natural gas furnished by the plaintiff. The plaintiff has for upwards of ten years under the terms of the contract knowingly taken its 60%, or 66⅔%, of the defendant's receipts from such customers. If granted the declaration it seeks, the plaintiff would

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be entitled now to require the defendant to cut off all these customers. A general injunction restraining it from supplying consumers outside the limits of the city as they were in 1906 would have that effect and would seem to be open to the objections that it would be unfair to many persons not represented and also *ultra petita*, the only injunction asked being to restrain the supplying of gas to the Sugar Co. It may be worthy of the plaintiff's consideration whether there should not also be representation of other outside consumers.

In the absence of the Dominion Sugar Co. the only observation I desire to make upon other features of its contractual relations with the defendant referred to in the judgment of the trial judge is that, at all events without some explanation not in the record, at least one of them—that providing for a rebate through the medium of a holding company—savours of methods which a court of justice cannot countenance.

If required now to dispose finally of the present action I should dismiss it. *Appeal allowed.*

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Nova Scotia Supreme Court, Harris, C.J., Ritchie, E.J., and Chisholm, J. April 5, 1918.

LANDLORD AND TENANT (§ III E—117)—NOTICE TO QUIT—RECEIPT OF RENT —WAIVER.

If a tenant pay money *as rent* accrued after the expiration of a notice to quit, and the landlord *accept it as such*, this is conclusive evidence of a waiver of the notice.

Statement.

APPEAL from the judgment, decision or order of the Judge of the County Court for District No. 1, ordering the issue of a writ of possession directed to the sheriff of the County of Halifax commanding him forthwith to place the landlord of the appellant in possession of premises occupied by the appellant as a harness shop.

The judge found all the facts in favour of the landlord, whose application was made under the provisions of the Overholding Tenants Act, R.S.N.S. 1900, c. 174.

He found that the tenancy was a monthly one at $25 per month, the rent running from the beginning of each month and becoming due and payable at the end of each month.

Also, in regard to the question of waiver, raised on behalf of the tenant, that, to be effective, the waiver must be clear, while

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in the present case the payment accepted by the landlord, and which was relied upon as constituting a waiver, appeared to have been treated as a payment on account.

J. J. Power, K.C., and *O. R. Regan*, for the tenant, appellant; *Thos. Notting*, for the landlord, respondent.

Chisholm, J.

CHISHOLM, J.:—This is an application under the provisions of s. 6 of the Overholding Tenants Act, c. 174, R.S.N.S. (1900), by the tenant who seeks to set aside an order of the Judge of the County Court for District No. 1, directing the issue of a writ of possession to place the landlord in possession of the demised premises.

On the argument, counsel for the applicant contended (1) that the tenancy began on the middle of the month and not on the first day of the month, (2) that the tenancy was a yearly one and not a monthly one, and (3) that, after giving notice to quit, the landlord waived his right to enforce the actual quitting by accepting payment of rent for a period subsequent to the date mentioned in the notice to quit for the termination of the tenancy. The landlord's notice to quit is as follows:—

Take notice that you are required to quit and deliver up the shop and premises situate on Portland St., Dartmouth, owned by me and at present occupied by you as a harness shop on August 1, 1917.

Dated at Dartmouth, N.S., June 30, 1917. (Sgd.) W. McV. SMITH.

To Edgar D. Smith, Dartmouth.

Assuming that the tenancy began on the first day of the month, and the landlord cannot complain of the assumption, on August 1, 1917, the tenant owed the landlord 2 months' rent, namely, $50. He did not deliver up the premises as demanded, but continued in occupation. On August 15, 1917, a demand for possession was made which he ignored; and the landlord thereupon began proceedings under the above-mentioned Act to recover possession of the premises. Owing to illness of one of the counsel engaged, the matter did not come on for hearing until February, 1918. In November, 1917, the tenant sent the landlord a cheque as follows:

Dartmouth, November 5th, 1917.

The Royal Bank of Canada.
Dartmouth Branch.

Pay to W. McV. Smith or order one hundred and twenty-five dollars.
(Rent to Nov. 1st, 1917.) E. D. SMITH.
$125.00.

On November 1, 1917, the tenant, according to the landlord, owed the landlord the $50 already mentioned, as rent for June

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and July, and he had been in possession during August, September and October. The landlord acknowledged receipt of the cheque by the following letter:—

$125.00.

Mr. E. D. Smith, Dartmouth, Nov. 6, 1917.

Your cheque for one hundred and twenty-five dollars to hand has been placed to your credit. WM. McV. SMITH.

The landlord cashed the cheque.

Besides the sum of $50 claimed as rent the tenant would be liable either for rent or for use and occupation for the months of August, September and October. The cheque, however, expressly stated that the payment was "rent to November 1st, 1917," and the landlord must be held to have accepted the cheque as for rent. The result of the acceptance of the cheque under such conditions is thus laid down in Foa on the law of Landlord and Tenant, 4th ed., pp. 624-5:—

A notice to quit cannot strictly speaking be waived; for once a valid notice is given, the tenancy will inevitably be determined upon its expiration. . . . The most usual employment, however, of the term "waiver" is in cases, not where there has been any withdrawal of the notice or negotiations for a fresh tenancy before its expiration, but where the tenant not having quitted at the time fixed by it, there has merely been some act by the parties at a subsequent period indicating an intention to treat the tenancy as still on foot. . . . What acts on either side amount to a waiver of a notice after its expiration is ordinarily a mixed question of law and fact; the intention with which the act was done being for a jury, and its legal effect for the court, to decide. If the tenant, for instance, pay money *as rent* accrued after the expiration of the notice, and the landlord, or his agent being specially authorized in that behalf, accept it as such, this is conclusive evidence of a waiver; nor would it apparently make any difference if it were accepted by the landlord under protest and without prejudice to his rights.

The amount of the cheque was paid *eo nomine* as rent and received as such, and that amounts to a waiver of the enforcement of the notice to quit. *Goodright, dem. Charter* v. *Cordwent*, 6 T.R. 219, 101 E.R. 520.

Without determining the other questions raised on the argument, I am of opinion that the decision of the learned Judge of the County Court, the order made therein for a writ of possession, and the said writ must be set aside with costs in this court and before the Judge of the County Court.

HARRIS, C.J., and RITCHIE, E.J., concurred. Harris, C.J. Ritchie, E.J.

Application allowed.

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CLEUGH v. CANADIAN PACIFIC R. Co.

British Columbia Court of Appeal, Macdonald, C.J.A., and Martin, Galliher, McPhillips, and Eberts, JJ.A. April 2, 1918.

APPEAL (§ VII L—485)—NEGLIGENCE—VERDICT OF JURY—EVIDENCE EQUALLY CONSISTENT WITH OTHER VIEW.

A verdict of a jury that an accident was caused by the neglect and lack of proper supervision of a ship's officer in not having the gang plank sufficiently manned, will be set aside where the evidence is equally consistent with it being attributable to the impetuosity of one or more fellow servants.

Statement.

APPEAL by defendant from judgment of Gregory, J., in an action for damages for injuries sustained. Reversed.

McMullen, for appellant; *E. A. Lucas*, for respondent.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—The question to be decided is: Was plaintiff's injury brought about by the negligence of the second officer of the defendant's vessel in the exercise of superintendence within the meaning of s. 3 (2) of the Employers' Liability Act?

The second officer of the ship undoubtedly in the exercise of superintendence ordered the gang-plank to be put out and in obedience to the order the plaintiff and several other deck hands, whose duty it was to do so, put out the plank, and in the operation the plaintiff was pushed overboard and injured.

The jury found the second officer's negligence to have been "neglect and lack of proper supervision." The only neglect and want of supervision suggested in the evidence is that he did not have the plank fully manned. There is evidence of witnesses on both sides that there were 5 men including the plaintiff on the plank. There is no satisfactory, indeed no evidence of any value, that there were fewer than 5, and there is no evidence of any value that there ought to have been more than 5, and none whatever that it was customary to have more than 5. The second officer himself says that to have only 3 or 4 men on the plank would be "short-handed." The plaintiff does not say that to have only 5 men would be to have the plank undermanned; he was under the erroneous impression that there were only 3 at the plank, and his evidence at p. 37 would indicate that three men could have put it out without accident. He there said: "If there had only been three and they had been differently distributed, it is not likely it would have occurred."

According to Boyer, a witness for the plaintiff, someone must have jerked the plank, causing it to swerve and push the plaintiff

overboard. Now, at one place, this witness says he does not know how many men were on the plank, speaking of those other than the plaintiff and himself. He said: "There might have been 3 or 4 for all I know." Later on, he ventures the opinion that there were not a sufficient number of men, and again he says it would be pretty hard work for 4 to put out the plank, and again "5 men were at the plank."

The witness Mackie describes the accident at p. 72. He says:—

> Cleugh was at the corner of the gang plank just the same as this (showing). He was on this corner (showing), 3 fellows on one side and 2 on the other shoved the plank out on a rush. Cleugh kind of lost his footing and went overboard.

And again on the same page:—

> He fell by the rush of the plank; the shoving of the plank out. He lost his legs by the rush.

And again the same witness, on p. 78, says:—

> Q. You want 6 men in case 1 man is stronger than another, is that it? A. You don't want 6 men to put it out if everybody lifts together. And again:—Q. It is not a question of numbers; it is a question of equality of strength? A. Strength, yes.

The evidence in my opinion is just as consistent with the occurrence being attributable to the impetuosity of one or more of the fellow servants of the plaintiff as with the suggestion that the work was being done with an insufficient number of men. The operation was of the simplest and commonest kind, and if, in the performance of this daily round of putting out the plank, it is the duty of the employer or superintendent to stand over the men and direct each one of them and assign each to his place, and as to what strength he should put forth, it must be on the assumption that the men themselves have neither intelligence or responsibility.

In this result it becomes unnecessary to decide whether the plaintiff is within the class of persons entitled to the beneficial provisions of the Employers' Liability Act. In view of the admission by the statement of defence that plaintiff was a "labourer," and in another and later paragraph of the same statement of defence an indirect denial that he was a labourer, and having regard to our rules of pleading, I have grave doubts whether it is open to us to say that he was not a labourer, assuming that a seaman is not within the Act, but for the said admission plaintiff must have put facts in evidence to shew that he was not

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of the ship's company. I refer to this branch of the case only to make it clear that I do not decide it.

I would allow the appeal.

MARTIN, J.A., allowed appeal.

GALLIHER, J.A.:—The case really simmers down to one very narrow point: was the plank undermanned and was it that undermanning that caused the accident?

The jury's answer to the question: "In what did the defendants' negligence consist" is "neglect and lack of proper supervision of officer Thompson."

That might mean as to how the men were placed, but would also include the number of men used.

The weight of evidence is, I think, rather in favour of 5 men, but it certainly establishes that at least 4 men were engaged in the operation of putting out this gang plank.

As to the weight there is a conflict of evidence, and it seems a pity the plank was not weighed by defendants if it could conveniently have been done.

The witnesses for the defence say it weighed from 300 to 400 pounds.

For the plaintiff, Boyer, one witness says, p. 69: "I guess it would weigh 800 or 900 pounds," and the plaintiff himself says at p. 34:—"Well, if you said it weighed nearer 800 pounds I would think you were better informed." And Mackie, another witness for the defence, described it as a heavy plank. Both sides were merely guessing at the weight of the plank, and the jury must exercise their common sense. No doubt they have seen these planks many times. I know I have, scores of times, on the different ships crossing from Victoria to Vancouver.

It is not for me to hazard a guess, but I think the common sense of the jury would not warrant their concluding (if they did) from the evidence as to the size and construction of the plank that it weighed 800 pounds.

But supposing that they were entitled to so believe, when you consider the evidence as to the condition of the tide at the full, the ship's deck from which the plank was being launched from 2 to 4 feet above the dock, the manner in which the plank was rushed out (see Boyer, at p. 69, and Mackie, at p. 72), and that the impetus carried the plank 18 inches beyond the vessel's side, it is

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not a reasonable finding that the plank was undermanned—when I say reasonable, I mean reasonable in the sense that Courts of Appeal should regard the findings of juries.

The description of how the accident occurred as given by any of the witnesses would not support that finding.

I would allow the appeal.

McPHILLIPS, J.A.

McPHILLIPS, J.A.:—The action was one at common law and in the alternative under the Employers' Liability Act (c. 74, R.S.B.C., 1911). The jury found a verdict under the Employers' Liability Act. The *onus probandi* was upon the plaintiff (respondent) to establish that he was within the scope of that Act, but it is clear upon the evidence that he was a seaman and therefore would not be within its provisions. (See *Hanson* v. *Australian Steam Nav. Co* (1884), 5 N.S.W.L.R. 447; *Froy* v. *Balmain Steam Ferry Co.* (1886), 7 N.S.W.L.R. 146.) It is urged though that this was not pleaded. In my opinion where, in the statement of claim, the Act relied upon is stated and the facts in relation to the claim are pleaded, that the defence need only go to a denial of the facts—"neither party is bound to place in his pleading an objection in point of law" (Bullen & Leake's Precedents of Pleading, 7th ed., 1915). The claim the plaintiff made in his statement of claim in part par. 11 reads as follows:—

> In the alternative the plaintiff claims to recover against the defendant under the Employers' Liability Act.

We find this language at p. 446 of Bullen & Leake:—

> If a plaintiff in his statement of claim asserts a right in himself without showing on what facts his claim of right is founded, or asserts that the defendant is indebted to him or owes him a duty without alleging the facts out of which such indebtedness or duty arises, his pleading is bad (see *ante* Bullen & Leake, at p. 36); and may be struck out. If, however, the plaintiff asserts certain facts and then states the inference of law which he draws from them, the defendant must deny those facts or they will stand admitted. But he need not and should not deny that they create the alleged right or duty. That is a question of law which he should raise by an objection in point of law, on the argument of which he will be taken to have admitted the facts *ad hoc*.

The facts alleged as supporting the action under the Employers' Liability Act were denied. The plaintiff's evidence established that the plaintiff was a deck-hand on the "Princess Beatrice," a ship of the defendant (appellant), and the accident took place at the time of the launching of the gang plank at No. 7 Dock at the City of Vancouver, and the plaintiff was at the time acting in

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obedience to an order of the second mate—that officer acting in superintendence at the time. Were the action one maintainable under the Employers' Liability Act, I am clearly of the opinion that the verdict of the jury could not be disturbed or the judgment entered thereon by the trial judge in favour of the plaintiff.

That a deck-hand is a seaman cannot admit of any doubt, and the ship was, at the time, being propelled by her own steam and coming to the dock to be made fast thereto. It is not open to any doubt that the employment of the plaintiff was that of a seaman upon a ship—the plaintiff was not "employed in a casual and temporary employment of this character when the vessel was not employed in a self-navigating manner." The above quoted language is that of Farwell, L.J., in *Chislett* v. *MacBeth & Co.* (1909), 25 T.L.R. 761, [1910] A.C. 220, and that case is quite distinguishable. With deference to the very careful and able argument of counsel for the respondent, I cannot accede to the contention advanced that the defendants are now precluded from raising the point of law that the plaintiff cannot succeed under the Employers' Liability Act; the case relied upon, *London, Chatham & Dover R. Co.* v. *South-Eastern R. Co.* (1880), 40 Ch.D. 100, was one of a number of cases of like nature, where the court, after delay in insisting upon the right to arbitration, refused to give effect to it. Lindley, L.J., at p. 107, concisely states the point of decision:—

> They give (referring to ss. 4 and 26 of the Railway Act, 1859) either railway company a right to insist on going to arbitration under the Act, and to exclude the case from the jurisdiction of the courts; but to say that the court has no power to determine the dispute if the parties waive their right is quite another matter. Having regard to the course which was adopted in the court below, I think the defendants must be treated as having waived this objection in the court below, and it would not be right for us to entertain it on appeal.

In the present case, the objection is one of law, and goes to the root of the matter, in short, is the action one which is maintainable, one which ought to have gone to the jury, and is it one that, upon the verdict of the jury, the judge in the court below rightly entered judgment? The Court of Appeal in the exercise of its jurisdiction "shall have the power to draw inferences of fact and to give any judgment and make any order which ought to have been made and to make such further or other order as the case may require" (Or. 58, rr. 4, 8a, 686, p. 32, Rules of Court of Appeal). It is true

that to raise this point of law for the first time in the Court of Appeal is a late stage at which to raise it; yet I am not able to satisfy myself that it is a fatal objection (see *Ex p. Firth*, 19 Ch.D. 419; *Misa* v. *Currie*, 1 App. Cas. 554; *The "Tasmania,"* 15 App. Cas. 223; *Karunaratne* v. *Ferdinandus*, [1902] A.C. 405; *Connecticut Fire Ins. Co.* v. *Kavanagh*, [1892] A.C. 473. I cannot see upon the facts as I view them that anything would be gained by directing a new trial, as it would not be possible by way of evidence to shew that the plaintiff was other than a seaman; therefore, in my opinion, the appeal should succeed, but I think there is good cause for depriving the defendants of any costs here or in the court below, the point not being taken at the trial and presented for the first time in this court (*Re O'Shea*, [1895] 1 Ch. 325; *Montefiore* v. *Guedalla*, [1903] 2 Ch. 26; *Jenkins* v. *Price*, [1908] 1 Ch. 10).

EBERTS, J.A., would allow appeal. *Appeal allowed.*

WAMBOLDT v. HALIFAX & SOUTH WESTERN R. Co.

Nova Scotia Supreme Court, Harris, C.J., and Longley, Drysdale, and Chisholm, JJ. April 5, 1918.

MASTER AND SERVANT (§ II B—135)—APPLIANCES—REASONABLY FIT FOR THE WORK—DEFECT—FINDING OF JURY—NEW TRIAL.

A railway company is not obliged to have the best appliances for the purpose of discharging freight if the appliances used are reasonably fit for the purpose. If the jury give no finding from which it can be inferred what the defect was which led to the accident, a new trial will be ordered.

MOTION on behalf of defendant company for an order setting aside findings of the jury (except the finding in answer to the second question) and directing a new trial, or, in the alternative, that plaintiff's action be dismissed with costs.

The action was by plaintiff, a workman in the employ of the defendant company to recover damages for injuries sustained while engaged in unloading freight from one of the defendant's cars, owing to the failure of the defendant to provide suitable appliances for the purpose.

S. Jenks, K.C., for appellant; *W. A. Henry*, K.C., for the Dominion Atlantic R. Co.; *J. A. McLean*, K.C., for respondent.

HARRIS, C.J.:—The plaintiff was a baggage master on the defendant company's railway between Lunenburg and Middleton, and it was his duty to unload the freight from the car at Middleton on the arrival of the train at that station.

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Middleton is the junction point between the defendant company's railway and the Dominion Atlantic Railway, and the station and buildings are owned by the Dominion Atlantic Railway Co. The station had been burned some months previously, and an appliance known as a footboard, which had previously been used for discharging freight from cars had been burned. This footboard was about 4 feet wide and hooked on to the car at the bottom of the door so as to make the level of the footboard the same as the bottom of the car, and on the platform end the footboard was tapered off so that it fitted the platform, and it was possible with the footboard to unload freight from the car by means of a truck. After the fire took place the cars were unloaded by placing 2 planks 14 ft. long and each about 14 inches wide from the platform to the car. The total width of the planks was only about 28 inches as compared with 4 feet, the width of the footboard, and the planks were 3 inches thick and were simply laid on the bottom of the car at one end and on the paltform at the other end, and they were square at both ends, and it was difficult to use the truck on them because the wheels of the truck would have to be pulled or pushed up over the ends of the planks.

There was a large stove weighing 250 to 300 pounds to be taken out of the car, and the plaintiff and another employee were carrying it on the two planks. The plaintiff was going backwards and he stepped off the edge of the plank unexpectedly, and the descent of the 3 inches to the platform brought the stove to that side and it came on to the plaintiff's leg and broke it, and this action has been brought to recover damages.

The jury found that the plaintiff was not guilty of negligence in stepping off the planks. They found that there was a defect in the ways, plant, works, machinery, etc., and in answer to a question as to what that defect was, said "no footboard."

Davies, J., in *Thompson* v. *Ontario Sewer Pipe Co.*, 40 Can. S.C.R. 396, at 397, said:—

> It is a trite law that negligences or shortcomings of the defendants in any action of negligence, however numerous, will not make them liable for injuries plaintiff may have sustained unless there is a direct connection found by the jury, with evidence to sustain it, between the injury sustained and the negligence found.

There were several differences between the footboard and the planks, some of which could or might have been, and some of

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which could not have been the cause of the accident, and again the jury might have thought that if there had been a footboard the plaintiff would have been using the truck and would not have been carrying the stove.

Some of the jury may have had one particular thing in mind and some another in reaching a conclusion that there was a defect in the ways or plant, and some of them may have reached their conclusions by reason of defects or supposed defects which did not cause the accident. It goes without saying that only defects which caused the accident ought to have been considered, and it is, I think, impossible to say that the jury did not reach their conclusions on wrong grounds. It is not the law, as I understand it, that the company was obliged to have the best appliances for the purpose of discharging the freight. They were bound to have appliances reasonably fit for the purpose. They had a substitute for the footboard, and before they can be made liable the jury ought to say in what respect the substitute was insufficient or defective, but they have not given us any finding from which it can be inferred what the defect was which led to the accident.

For this reason, I think there must be a new trial. I regret this result, but I cannot see any escape from it.

LONGLEY, J., concurred. Longley, J.

DRYSDALE, J.:—I agree. Drysdale, J.

CHISHOLM, J. (dissenting):—This is a motion to set aside the findings of the jury (except the finding in answer to the second question) in an action for damages for injuries to the plaintiff resulting from the negligence of the defendant company. The plaintiff was baggage master on the train of the defendant company running between Lunenburg and Middleton, and on December 19, 1916, sustained serious personal injuries at Middleton station while removing a stove weighing between 250 and 300 pounds from one of the cars of the company to the platform of the station. Previously there had been an appliance known as a foot-board, about 4 feet wide, fastened as plaintiff believes "with a cross-piece and bolted on and sloping off the back behind, firm." It tapered off right down thin so that the wheels could go up. The plaintiff says with respect to the loading of the stove at Lunenburg:— Chisholm, J.

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We put it on at Lunenburg; had a footboard that fastened on the car, hooks on the car. We had a truck with two wheels. We bent the stove, shoved the truck under and hauled it on the car. That is the safe way of doing it.

A fire had occurred at the Middleton station some time previously to the accident, and the footboard then in use was destroyed. After the fire the company improvised planks, and on the day of the accident what was used was 2 planks about 14 feet long and 13½ inches in width. They were 3-inch planks, were not tapered off, so that the truck could not be used over them. One plank was a little longer than the other, and they were not fastened together. The plaintiff was backing out, and as he got to the end of the planks his left foot stepped off and the stove came down on him. The plaintiff complains of a defect in the condition and arrangement of the ways, works, machinery, plant, building and premises of the company. The questions submitted to the jury and their answers are as follows:—

1. Did the plaintiff voluntarily undertake the work of removing the stove with knowledge of the risk? A. No. 2. Did the accident happen by reason of the plaintiff stepping off the planks on to the high platform? A. Yes. 3. Did the plaintiff slip off the planks? A. (No answer.) 4. If so, what was the cause of such slipping? A. (No answer.) 5. Could plaintiff by the exercise of ordinary care have avoided the accident? A. No. 6. Did the injury sustained by plaintiff result from his conforming to the orders of Chipman? A. Yes. 7. Was the plaintiff guilty of negligence in stepping off where he did? A. No. 8. Was there a defect in the ways, plant, works, machinery, etc.? A. Yes. If you answer "yes," state what the defect was. A. No footboard. 9. Did the plaintiff suffer the injury complained of by reason of said defect? A. Yes. 10. If there was a defect was the company or Chipman guilty of negligence in not remedying that defect? A. Yes. 11. Was the accident caused by the negligence of the plaintiff? A. No. If so, in what did such negligence consist? A. (No answer.) 12. If you find the plaintiff was negligent, answer this question: Notwithstanding the plaintiff's negligence would the accident have happened if the defendant company or Chipman had exercised reasonable care in the premises? A. No. 13. Did the plaintiff fear that if he disobeyed the orders of Chipman he would be dismissed from his position? A. Yes. 14. What damages do you award? A. $1,500.

The company does not complain of the judge's charge to the jury, but complains of the answers made. It is contended that the answer to the eighth question is not responsive. It is further contended that even if the eighth question is properly answered there is no evidence to show that the absence of the footboard caused the accident; and we are asked to hold that the plaintiff

stepped off the planks voluntarily, and, therefore, the accident was not caused by the planks.

I cannot agree to the contention that the answer to the eighth question is not responsive. The jury were not asked as to what was the defect in the planks; they were asked if there was a defect, and if so what, in the ways, works, machinery, plant, building and premises used in delivering freight at Middleton; and the answer in effect is that the whole arrangement or system was defective because the usual footboards were not provided. A perusal of the evidence shows that the term footboard had a well understood meaning among the railway employees. They were complaining about not being supplied with footboards, and at the time of the accident footboards had been ordered. The plaintiff in his testimony describes what the "ordinary footboard" is. The witness Feindal does the same; and when asked how they unloaded the freight before the fire, he replied: "Footboards and trucks." He goes on to say that if they had footboards the accident would not have happened. He also says there should be a better arrangement. The company's conductor is asked what system did you have before the fire; and he answers "footboards and trucks"; and asked about the later system he answered: "It is not a very good system."

I think the answer of the jury to the eighth question is responsive and has evidence to support it.

As to the next point, that there is no evidence that the absence of a footboard caused the accident, I think there is such evidence. It is agreed that the planks were dangerous. If there were a footboard, the plaintiff and Feindal would have been able to use a truck; they would have a way 4 feet wide; it would not be necessary for either of them to walk backwards on two unfastened planks, 13½ inches wide; and the plaintiff would be under no necessity of stepping off as he did. The jury have found that he was in the exercise of ordinary care when he did so. It is true that it was voluntary, but the jury finds that it was not negligent; and I am not prepared to say that a jury could not, as reasonable men, come to such conclusion.

I see no grounds for disturbing the verdict of the jury, and I think the action for a new trial should be dismissed.

New trial ordered.

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CITY OF QUEBEC v. LAMPSON.

Supreme Court of Canada, Fitzpatrick, C.J., and Davies, Idington, Duff and Anglin, JJ. March 5, 1918.

1. CONTRACTS (§ II—128)—EMPHYTEUTIC LEASE—AGREEMENT—CONSTRUCTION—INTENTION OF PARTIES.
In construing an agreement respecting the unexpired term of an emphyteutic lease, the intention of the parties must be sought, and however ambiguous and involved the language may be, if the intention can be ascertained with reasonable certainty, effect must be given to it.

2. COURTS (§ III—195)—EMPHYTEUTIC LEASE—EXISTENCE OR NON-EXISTENCE OF PROPRIETORSHIP—SUPREME COURT ACT—JURISDICTION.
Under clause (B), s. 46, of the Supreme Court Act (R.S.C. 1906, c. 139) the court has jurisdiction to determine the proprietorship of land held under an emphyteutic lease.

Statement.

APPEAL from the judgment of the Court of King's Bench, appeal side, maintaining the judgment of the Superior Court, District of Quebec, 49 Que. S.C. 307, and maintaining the action with costs.

The immoveable property in question in this case was leased by the respondent to one Giguère for a period of 25 years; and subsequently, the unexpired portion of this lease, to wit 2 years, was sold for taxes due by the tenant and purchased by the appellant. The appellant then leased that unexpired portion to one Mrs. Falardeau; and the agreement between them contains this provision:—

Il est convenu entre les parties, que la dite Cité de Québec sera tenue et obligée de consentir à la dite Dame Falardeau un titre de vente de ses droits et prétentions sur les dits baux emphytéotiques lorsque la dite somme de deux cents piastres aura été entièrement payée, et alors la dite Dame Falardeau entrera en pleine propriété du susdit immeuble, sujet toutefois au paiement de la dite rente emphytéotique.

Mrs. Falardeau entered into possession of the property immediately after the lease was made, and she fulfilled all her obligations to the appellant, her vendor and to the respondent, the landlord; but she did not apply for nor obtain a deed of sale.

The appeal turns upon the meaning of the above clause, interpreted in accordance with the above facts and the intentions of the parties, and the question to be decided is whether Mrs. Falardeau or the appellant has the proprietorship of the immoveable leased.

L. A. Taschereau, K.C., and *J. E. Chapleau*, K.C., for appellant; *C. Angers*, K.C., and *Louis Larue*, for respondent.

FITZPATRICK, C.J.:—I am of opinion, with all possible respect, that we have jurisdiction to hear this appeal under s. 46 (*b*) of the Supreme Court Act. By this action, the plaintiff (respondent here) claims: (*a*) the possession as landlord of a lot of land held as he alleges, by the city, under an emphyteutic lease; and (*b*) the payment of different sums of money for arrears of rent, for damages and for repairs. The question at issue between the parties relates therefore to the right or title to property held under emphyteutic lease. Emphyteusis carries with it alienation; and, so long as it lasts, the lessee enjoys the rights attached to the quality of a proprietor. Art. 569 C.C. "Le droit de l'emphytéote est réel et puisqu'il s'exerce dans un immeuble, c'est un droit réel immobilier." Laurent, vol. 8, No. 352. *Delisle* v. *Arcand*, 36 Can. S.C.R. 23. This point was not raised at the argument.

On the merits, I have reached the conclusion that the city is not now, and has not been for many years, to the knowledge of Lampson, in possession of the property in question, and that whatever rights the city acquired under the sheriff's title, hereinafter referred to, were assigned to Falardeau. The facts are not in dispute. The whole controversy turns upon the obligation of the city to pay rent for the property during the occupancy of Falardeau and that obligation depends upon the effect to be given the deed made by the city to Falardeau. Was it a mere lease, as Lampson contends, or did it operate to transfer the title to the realty for the unexpired term of the lease?

I do not think that either of the parties to these proceedings ever intended to argue that emphyteutic rent can be collected from a tenant who has, by valid assignment, parted with his rights in the property held under the emphyteutic lease. The confusion has, I think, arisen out of the claim which appears to have been made that novation was effected by the substitution of Falardeau as the debtor of the rent in place of the city with the consent of Lampson. That is the question which the Chief Justice who tried the case deals with; and I agree with that distinguished judge, who held that a case of novation was not made out. I have, however, the misfortune to be unable to agree to the construction which the Chief Justice puts on the deed by the city to Falardeau. It is, I grant, difficult to imagine how such a simple agreement as the parties evidently had in contemplation

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could have been so clumsily expressed. But, in construing a deed what must be sought is the intention of the parties; and however ambiguous and involved the language they used may be, if that intention can be ascertained with reasonable certainty, then effect must be given to it. Archibald, J., in the case of *Stevenson* v. *Rollit*, 42 Que. S.C. 322, at 328, gives the rule of construction applicable to deeds which contain a promise of sale of an immoveable when followed by actual possession. As that judge says, the answer to the question as to whether the right of property has or has not passed must be gathered from the promise of sale as to the intention of the parties. If there is

a clause in the promise of sale *which provides that the right of property should not pass*, the courts have never held that, notwithstanding such provision, the right of property did pass.

But, in the absence of such a provision, the effect must be given to article 1478 C.C.

Les parties ont stipulé expressément qu'elles entendaient faire un contrat de location, mais le rapport de droit, tel qu'il résulte objectivement des clauses de l'acte, correspond au contrat de vente dont l'élément spécifique, transfer de propriété, se trouve réalisé. S. v. 1888, 1. 87; D. 96, 1. 57; D. 98, 1. 271.

This appeal, as I understand the contentions of the parties, turns upon the question as to whether it was the intention of the city not to part with the property held under emphyteutic lease until the "titre de vente," *i.e.*, the title deed or writing evidencing the sale was taken out by Mrs. Falardeau. There is no doubt that the deed of lease contains a promise of sale and that Mrs. Falardeau entered into possession thereunder. But it is said it was a condition of the deed that the title should not pass until Mrs. Falardeau had applied for and obtained her deed of sale.

The property in question was leased by Lampson to one Giguère for a term of years under emphyteutic lease and subsequently the unexpired portion of that term was sold for taxes due by the tenant. It was purchased by the city and the agreement now in question was then entered into. By that agreement, the city leased to Mrs. Falardeau for two years the unexpired portion of the lease to Giguère, the lessee undertaking to pay to the city $200 in eight equal instalments of $25 each and to Lampson, the landlord, his emphyteutic rent. In a word, by the terms of the lease, Mrs. Falardeau assumes all the obligations of a proprietor and, in addition, agrees to pay the city for its interest the $200 above mentioned. Then the lease contains this provision:

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Il est convenu entre les parties, que *la Cité de Québec sera tenue et obligée de consentir à la dite Dame Falardeau un titre de vente* de ses droits et prétentions sur les dits baux emphytéotiques lorsque la dite somme de deux cents piastres aura été entièrement payée, et alors la dite Dame Falardeau entrera en pleine propriété du susdit immeuble, sujet toutefois au paiement de la dite rente emphytéotique.

This appeal turns upon the meaning of that language. I construe that clause, read with all that precedes, to mean that, when the sum of $200 has been paid, Mrs. Falardeau becomes the owner of the unexpired term of Giguère's lease acquired by the city under the sheriff's title and, in addition, the city binds itself to give a deed conveying to Mrs. Falardeau all its rights and pretensions to the unexpired portion of the lease. Mrs. Falardeau entered into possession of the property immediately after the lease was made to her and she fulfilled all her obligations to the city, her vendor, and to Lampson, the landlord; and it is now for us to say what was in all these circumstances the intention of the parties when they made that agreement. It is reasonably clear that Mrs. Falardeau meant to acquire and the city to sell all the right of the latter in the property. The total consideration stipulated for was the sum of $200 and when that sum was paid to the city Mrs. Falardeau had fulfilled her part of the agreement. She could then, at any time, force the city to give her the paper title, which would be merely evidence of the fact that she had performed her part of the agreement. The language of the deed, as I have already said, is not happily chosen; but why should we assume that the taking out of the paper title by Mrs. Falardeau was a condition of the sale? Nothing remained to be done by her when she had completed her payments and it is not easy to see why the city should make it a condition of the sale that Mrs. Falardeau should take out a deed. What could be the possible object of such a stipulation?

The language of the instrument is:—

Il est convenu . . . *que le cité sera tenue et obligée de consentir à un titre de vente* . . . lorsque la dite somme de deux cents piastres aura été entièrement payée.

I can find in these words no trace of any intention by the city to retain the title to the property after the $200 had been paid. When that sum was paid, Mrs. Falardeau had fulfilled all her obligations to her vendor and she was entitled absolutely and of

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right to her "titre de vente"—document of title. The city could not refuse to give it to her and therein this case is clearly distinguishable from such cases as *Stevenson* v. *Rollit*, 42 Que. S.C. 322; *Hogan* v. *City of Montreal*, M.L.R. 1 Q.B. 60; *Thomas* v. *Aylen*, 16 L.C.Jur. 309; *Grange* v. *McLennan*, 9 Can. S.C.R. 385; 28 L.C.Jur. 69, which will all be found collected at pp. 29 and 30 of Mignault, vol. 7. That learned author sums up his analysis of all these cases thus:—

> Quelle interprétation devra-t-on donner à la clause par laquelle le vendeur s'engage à donner un titre lorsque le prix sera payé? *C'est une question d'interprétation* de l'interprétation de l'intention des parties.

It is difficult for me to find in the language of the instrument an intention to give the purchaser the right to enjoy the property for years, and then permit her by refusing to exercise her discretionary right to take the paper title to defeat the whole scheme of the agreement. It is not, I insist, the vendor which stipulates, as in the cases referred to by Mignault, for the retention of the title for its own protection, but the purchaser who neglects to exercise her right to ask for and obtain the evidence of the transaction entered into with the city. Under the Code, sale is perfected by the consent alone of the parties (Arts. 1472 C.C.; 1025 C.C.). No deed is necessary and the paper title gave no additional force or effect to the transaction in so far as Mrs. Falardeau was concerned. The latter, as I have already said, entered into possession immediately after the lease was passed, made her payments within the stipulated time and thereafter dealt with the property as if it was her own, not only to the knowledge of the city but also of Lampson, who treated her as his emphyteutic tenant.

It is said that there was no obligation on the part of Mrs. Falardeau to acquire the emphyteusis; but that was the consideration for the payment of $200. The emphyteusis was the thing sold or for which she agreed to pay and did pay the $200 and of which she entered into possession immediately when the deed was made. As for tradition, I assume that Pothier's definition will be accepted by the majority:—

> La tradition réelle est celle qui se fait par une préhension corporelle de la chose faite par celui à qui on entend en faire la tradition, ou par quelqu'un de sa part. *Il n'est pas nécessaire* pour la tradition réelle qu'il en soit fait un acte par é crit.

(Art. 1493 C.C.). The obligation to deliver is satisfied when the

buyer enters into possession with consent of seller. Title passes by the effect of the contract (Art. 1025 C.C.).

On the whole, I am of opinion that the appeal should be allowed with costs.

DAVIES, J.:—I concur with His Lordship the Chief Justice.

IDINGTON, J.:—I concur with His Lordship the Chief Justice.

DUFF, J. (dissenting):—I am to dismiss for want of jurisdiction, with costs.

ANGLIN, J. (dissenting):—The plaintiff, as emphyteutic lessor sues the City of Quebec, as purchaser, at a judicial sale for taxes, of the unexpired term of two emphyteutic leases, for an unpaid balance of the ground rent or *canon* accrued since the purchase, for the cost of neglected repairs which the emphyteutic lessee was bound to make, and for delivery up of the leased premises, the emphyteusis having now expired. To this claim the city pleads that it sold its interest in the premises to one Mme. Falardeau, and that she has been the sole proprietress thereof under the emphyteutic leases since August 1, 1896. In his reply the plaintiff denies that Falardeau had acquired title as emphyteutic proprietor and alleges that his rights against the defendant remained unaffected by any agreement made by the defendant with her.

The trial judge, 49 Que. S.C. 307, maintained the action, holding that the city by purchasing the leaseholds at a judicial sale became personally responsible to the lessor for payment of the rent or emphyteutic *canon* as well as for the other obligations of the original lessee; that a *lien de droit* was thereby established between it and the lessor whereby the latter became creditor and the former debtor in respect of the rent and other obligations of the leases; and that, in the absence of novation, the city was not relieved of the liability thus assumed merely by reason of the occupation or enjoyment of the leasehold premises by Mme. Falardeau *à titre d'emphytéote*, her payments of rent to Lampson, and a statement made by her that she had acquired the city's rights.

The Court of King's Bench unanimously affirmed the judgment for the plaintiff, on the ground, however, that, although an alienation of the emphyteusis made by the city in good faith would have relieved it of future obligations to the emphyteutic landlord, there has not in fact been such an alienation to Falardeau.

IDINGTON, J.

DUFF, J.

ANGLIN, J.

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Having regard to the nature of an emphyteusis—it conveys the immoveable for a time to the lessee (art. 567 C.C.); so long as it lasts he enjoys all the rights attached to the quality of a proprietor—may alienate, transfer and hypothecate the immoveable so leased (art. 569-570 C.C.); his interest may be seized and sold as real property (art. 571 C.C.); he is held for all the real rights and land charges to which the property is subjected (art. 576 C.C.); the rent itself is an immoveable (art. 388 C.C.):—

En effet, le bail emphytéotique est une aliénation de la propriété utile au profit du preneur pendant tout le temps que doit durer le bail, la propriété directe demeurant reservée au bailleur;

(Merlin, Rep. vbo. Emphytéose, 1, 3)—I entertain no doubt that the issue as to the existence or non-existence of this proprietorship in the defendant "relates to title to lands or tenements" within clause (*b*) of s. 46 of the Supreme Court Act, and that we have jurisdiction to hear this appeal.

That the City of Quebec by its purchase of the unexpired term of the emphyteutic leases at the judicial sale thereof assumed the obligations of the emphyteutic lessee is not now questioned. It has, of course, not been suggested that its undertaking was more extensive or more onerous. Agreeing, as I do, with the view which prevailed in the Court of King's Bench, that the plaintiff is entitled to succeed on the ground that the city never effectively parted with its interest to Mme. Falardeau, it is unnecessary to pass upon the *considerant* as to the absence of proof of novation, on which the Chief Justice of the Superior Court reached the same conclusion. It should perhaps be noted, however, that the case of *Credit Foncier Franco-Canadien* v. *Young*, 9 Q.L.R. 317, cited by him, would seem not to be in point. The lease, under which, in the absence of novation, the original lessee was there condemned to pay rent accrued after he had transferred his interest, reserved much more than a nominal rent and did not contain a stipulation obliging the lessee to improve the property and was therefore held not to be an emphyteusis, but an ordinary lease. The opinion of Merlin seems to conflict with the view taken by the Chief Justice and to point to the conclusion that, apart from any consideration of novation, on alienation of an emphyteusis, unless perhaps in the exceptional case where "le preneur par le contrat d'arrentement a promis fournir et faire valoir la rente, et a ce obligé tous

ses biens," or has otherwise expressly assumed a personal obligation to remain responsible thereafter (*Dubois* v. *Hall*, 7 L.C.R. 479), his liability for future rent ceases. Merlin, Rep. (5th ed.), vol. 7, Vbo. "Déguerpissement," s. III., 1; s. IV., 1, and s. V., 1. The facts that an emphyteusis is terminated by the total loss of the estate leased, or by abandonment (art. 579 C.C.), that it imports the power of alienation, and that the rent itself is an immoveable, seem rather to support the view that, at all events in the absence of some explicit agreement by the lessee to remain liable for the rent after and notwithstanding a transfer of it, his personal liability terminates on its complete and *bonâ fide* alienation. It is unnecessary, however, to dwell further upon this aspect of the case, since I am of the opinion that in the present instance there has not been the complete and effective alienation or transfer of the emphyteusis by the city which the appellate judges think would suffice to terminate its liability to the lessor. As put by Lavergne, J.:—

Une fois substituée au preneur originaire, le Cité de Québec ne pouvait se libérer de ses obligations quant au canon emphytéotique et au maintien de la propriété en bon état, que par une aliénation de bonne foi, ou le déguerpissement aux termes des articles 579 et suivants.

There is no question of abandonment here.

After acquiring the emphyteusis the city sublet the premises to Falardeau for 2 years from the 1st of August, 1894, at a rental of $100 a year, payable quarterly, Falardeau undertaking to pay in addition the emphyteutic rent and all rates and taxes and keep the buildings in repair. This lease contained the following clause:

Il est convenu entre les parties, que la dite Cité Québec sera tenue et obligée de consentir à la dite Dame Falardeau un titre de vente de ses droits et prétensions sur les dits baux emphytéotiques lorsque la dite somme de deux cents piastres aura été entièrment payée, et alors la dite Dame Falardeau entrera en pleine propriété du susdit immeuble, sujet toutefois au paiement de la dite rente emphytéotique.

As I translate it into English, this clause reads:—

It is agreed between the parties that the said City of Quebec shall be held and obliged to give to the said Dame Falardeau a deed of sale of all its rights and claims upon the said emphyteutic leases when the said sum of $200 shall have been wholly paid, and thereupon the said Dame Falardeau shall enter into full proprietorship of the aforesaid immoveable, subject always to the payment of the said emphyteutic rent.

Although she paid the $200 as stipulated, a deed of transfer of the emphyteusis from the city has never been executed. Her

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lease from the city is the only title Mme. Falardeau has to the property. As Lavergne, J., says:—

L'appelante a consenti a Madame Falardeau un simple bail pour deux ans, avec promesse de lui transférer la propriété une fois la somme de $200 payée; elle ne lui a jamais consenti la vente promise.

Pelletier, J., makes the same statement: I agree with the construction placed by those judges on the clause which I have quoted from the city's lease to Falardeau. Pelletier, J., says:—

L'acte que nous avons devant nous est un bail avec une clause déclarant que, au cas de l'accomplissement de deux conditions, Mme. Falardeau pourrait devenir propriétaire; ces deux conditions sont: 1o, le paiement de $200 par Mme. Falardeau à la Cité de Québec; 2o. la passation d'un titre. La clause du bail citée plus haut dit que c'est alors, c'est-a-dire après l'accomplissement de ces deux conditions, que Mme. Falardeau entrera en propriété de l'immeuble en question.

Pour que Mme. Falardeau serait devenue propriétaire, il fallait démontrer d'abord qu'elle avait payé les $200, et en second lieu que l'acte de transmission par la Cité de Québec à elle avait été passé.

As put by Lavergne, J.:—

Madame Falardeau pouvait devenir propriétaire en vertu du bail et de ces conditions après avoir payé la somme de $200; secondement, par la passation d'un titre après l'exécution de ces deux premières conditions; il est dit dans le bail: "c'est alors que Madame Falardeau entrera en pleine propriété de l'immeuble." Il n'y a jamais eu de titre donné par la Cité Québec à Madame Falardeau.

When she should have paid the $200, Mme. Falardeau would become entitled to a transfer of the city's title: when that transfer should have been made (*alors;* thereupon) she would enter into full proprietorship. That, in my opinion, is the intent and effect of the provision invoked by the city: The making of the transfer was a condition precedent to the passing of the property. *Stevenson* v. *Rollit*, 42 Que. S.C. 322, at 329, 330; *Hogan* v. *City of Montreal*, M.L.R. 1 Q.B. 60.

A promise of sale with delivery and possession has not the effect of conveying the right of property to the promisee, when it appears from the terms of the contract that such was not the intention of the parties, but that on the contrary they meant to effect this result by a subsequent act. *Renaud* v. *Arcand*, 14 L.C.J. 102; 7 Mignault, p. 29. The question is one of intention. *Grange* v. *McLennan*, 9 Can. S.C.R. 385.

The evidence establishes that, since 1896, a dispute had been pending between the Falardeaus and the city as to a right of way or passage forming part of or adjoining the leased premises. The

landlord had closed up this passage. The Falardeaus deemed it essential to the full enjoyment of the property. They claimed that it was in fact appurtenant to the leasehold and insisted on being given a title to it. The city contested this claim and refused to give a deed including the passage. The Falardeaus declined to take a deed without it. Matters were allowed to rest in that position. As David Falardeau put it in giving his testimony:—

Par La Cour:

Q. Vous ne l'avez pas encore eu?

R. Je ne l'ai pas encore eu, le titre, seulement ils ne nous ont pas dérangés dans la possession de la propriété, on a toujours été en possession de la propriété.

Par M. Larue, procureur du demandeur:

Q. N'est-il pas vrai que vous avez demandé vos titres a la cité de Québec a plusieurs reprises et que la cité de Québec a refusé, qu'elle n'a pas voulu en donner?

R. Non pas qu'elle refuse de nous en donner, mais seulement ils m'ont offert un titre que je ne trouvais pas acceptable.

Par M. Chapleau, procureur de la défenderesse.

Q. A cause du passage.

R. A cause du passage, je voulais faire clairer le passage et puis, ils n'ont pas. . . .

Par M. Larue, procureur du demandeur:

Q. Tant que vous n'aviez pas de passage pour sortir, il était inutile pour vous d'avoir un titre.

R. Je ne pouvais pas continuer mon commerce la, ça ruinait mon commerce, ça nous a ruinés completement. Ils ont offert un titre mais il n'était pas acceptable pour nous.

The appellant urges two grounds in support of its contention that, notwithstanding that no deed had ever been delivered to Mme. Falardeau, she became the emphyteutic tenant under the Lampson leases and that it (the city) was thus relieved from the obligations incurred when it purchased at the sale for taxes. It relies on some payments on account of the emphyteutic rent made by Falardeau after August, 1896, and other alleged acts and admissions of her status as emphyteutic tenant: and it invokes art. 1478 C.C.

As found by the learned trial judge, Mme. Falardeau did pay $100 on account of the rent due Lampson subsequent to August, 1896. The city had paid $60. A balance of about $690 remains unpaid. I find nothing in what Mme. Falardeau has done inconsistent with the tacit renewal of her lease from the city (art. 1609 C.C.) pending the adjustment of the question as to the lane or passage. While holding under that lease she would be bound to

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comply with its terms. They required her to pay the emphyteutic rent and to keep the premises in repair, etc. Her conduct and that of her husband is explicable on the assumption that, while Mme. Falardeau actually continued to hold under the lease from the city, they fully expected that she would eventually become proprietor of the emphyteusis. It does not import an election to forego their objection to the title offered by the city. As put by the Chief Justice of the Superior Court:—

Tous ces faits cependant ne sauraient constituer, en faveur de la cité, une fin de non-recevoir.

On the other hand, their persistent refusal to accept a transfer unless it included the passage is inconsistent with the Falardeaus having intended that the emphyteusis should actually vest in Mme. Falardeau without the formality of a deed. Taking all the circumstances into account they do not justify a finding that she waived the giving of the deed by the city and that all parties tacitly consented to treat the promise of sale contained in the lease as having been carried out.

There appear to be two formidable obstacles to the application to this case of art. 1478 C.C. In the first place, the promise itself is unilateral. The document contains no agreement by Mme. Falardeau to purchase. The city was, no doubt, bound to sell and convey to her on payment of the sum of $200, but there was no corresponding obligation on her part to take or acquire the emphyteusis. Neither was there any delivery or any taking of possession under the promise of sale such as might import an agreement on Mme. Falardeau's part to become the owner of the property. In delivering the judgment of the majority of the Court of King's Bench in *Thomas* v. *Aylen*, 16 L.C. Jur. 309, at 315-6, Badgley, J., says:—

It is also urged that by art. 1478 C.C. *la promesse de vente avec tradition et possession actuelle équivaut à vente;* . . . Now the article at the utmost is only a general expletive of *promesse* with both tradition and possession combined, but as a rule of law allowing it that effect, it could not annul the covenants and conditional stipulations of the parties themselves, which are exceptions to the maxim and qualify the rule, leaving the conditional sale such as it is stipulated, according to the covenants of the parties, in conformity with the stringency of another legal rule paramount to that of the article, that *modus et conventio vincunt legem.* . . . It must be observed that the expressions *tradition et possession actuelle*, constituents required to make up the equivalent of sale of the article, are not the legal synonyms of each other. Tradition is the known legal complement and satisfaction of a sale, "*la tradi-*

tion est la transmission du droit de propriété, c'est transférer sa possession dans l'intention de nous en faire avoir la propriété," and it is also expressed in different terms in the 1492 art: "*C'est la translation de la chose vendue en la jouissance et possession de l'acheteur,*" whilst, on the other hand, possession even though *actuelle,* is the mere occupancy of the *immeuble vendu,* the simply permitted use of the land.

The only "tradition" or delivery of the premises by the city was made under its lease to Mme. Falardeau as its tenant. It had no relation to the conditional promise of sale. Her continued possession after the term of two years had elapsed may well be attributed to a tacit renewal of it pending the settlement of the dispute as to a question of title. This dispute still remains unsettled at the expiry of the emphyteusis in 1913. If, therefore, article 1478 has any application to a promise of sale unilateral and subject to a condition to give title upon payment of the price (*Keegan* v. *Raymond & al.*, 40 Que. S.C. 371; *Levy* v. *Connolly*, 7 Q.L.R. 224; *Richer* v. *Rochon*, 10 Que. S.C. 64), such as that with which we are now dealing, there never was the delivery or "tradition" *under it* requisite to enable the city to invoke that article. I also incline to think that the possession of Mme. Falardeau, because consistent with a tacit renewal of the lease from the city and therefore not necessarily ascribable to the promise of sale, was not of the character required by the article. But possession without "tradition" would not suffice.

I would, for these reasons, affirm the judgment of the Court of King's Bench and dismiss this appeal with costs.

Appeal allowed.

CLARK v. CITY OF WINNIPEG AND WINNIPEG ELECTRIC R. Co.

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Manitoba Court of Appeal, Perdue, Haggart and Fullerton, JJ.A. June 4, 1918.

1. HIGHWAYS (§ IV A—145)—NUISANCE—SNOW AND ICE—REMOVAL OF FROM HIGHWAY.

The efficient removal of snow and ice from a highway, in accordance with statutory powers given, by a municipality does not create a nuisance for which damages can be recovered.

[*Elliott* v. *Winnipeg Electric R. Co.*, 38 D.L.R. 201, followed.]

2. HIGHWAYS (§ IV A—154)—SNOW AND ICE—LIABILITY OF MUNICIPALITY—REPAIRS.

In determining whether a highway is in repair at the time an accident occurs, it is necessary to take into account the nature of the country, the character of the roads, the care usually exercised by municipalities in reference to such roads, the season of the year and the nature of the accident.

*June 26, 1918, *Elliott* v. *Winnipeg Electric R. Co.*, 38 D.L.R. 201, was reversed by Can. Supreme Court and trial judgment restored.

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CLARK v. CITY OF WINNIPEG AND WINNIPEG ELECTRIC R. CO.

Perdue, J.A.

APPEAL by defendants from a judgment at the trial in an action for damages for injuries caused by ice and snow on highway. Reversed.

E. J. McMurray, and *J. F. Davidson*, for plaintiff; *T. A. Hunt*, K.C., and *H. Preudhomme*, for the City of Winnipeg; *R. D. Guy*, for the Winnipeg Electric R. Co.

PERDUE, J.A.:—This action is brought by the widow of the late George A. Clark, who sues on her own behalf and on behalf of the infant son of herself and the deceased. The action is brought against the City of Winnipeg and the Winnipeg Electric Railway Company. Both of the defendants are charged with acts of negligence which led to the death of the deceased. On February 9, 1916, Clark, who was a teamster, was driving a team of horses attached to a sleigh loaded with wood along Higgins St. in the City of Winnipeg. The load, from some cause as to which there is no direct evidence, was overturned and the deceased was pinned under it and received injuries which caused his death. Higgins St. runs east and west and has on it two lines of street railway belonging to the Winnipeg Electric R. Co. On each side of the railway lines there is a clear space of 16 feet between the outside rails and the curb which is available for the general street traffic. Vehicles going west take the right or north side of the street and those going east keep to the opposite side. The street has an asphalt pavement and, apart from the snow upon it at the time of the accident, it was in good repair.

The snowfall in the winter of 1915-1916 had been very heavy. At the time of the accident there was a considerable quantity of snow on the spaces on each side of the tracks. The snow had been removed by the company from the tracks and from 18 inches outside the tracks, and had been spread over the rest of the street in accordance with the provisions of by-law No. 543 of the City of Winnipeg, validated and confirmed by Act of the Legislature, 55 Vict. c. 56, s. 34; see schedule to this Act, clause 2 (*f*). The city had also removed the snow from the inside portion of the sidewalk, for the benefit of pedestrians, and had thrown the snow so removed upon the outside portion of the sidewalk and the adjoining portion of the 16-ft. strip. The result was that a hummock of snow was formed partly on the sidewalk and partly on the street which reduced the width of the space available for vehicles. There

was also a slope of about 3 feet in width between the north rail and the level part of the driveway. The result was that there was left for vehicles a smooth snow-covered driveway of about 9 ft. in width. The depth of the snow on the street was a matter of considerable controversy. Measurements were made by Mr. Wilkins, a civil engineer in the employ of the railway company, and by another skilled person, Mr. Bower, who was in the employ of the city. These measurements were made by taking the levels with instruments and for all practical purposes they are in agreement. From the answer of the jury to the fifth question put to them, it would appear that they accepted the measurements made by Bower. The snow was smooth and icy, and, from the measurements of Wilkins and Bower, the driveway of about 9 ft. wide was nearly level. The depth of the snow was 6 to 8 inches, there being a slight slope towards the railway track. Between this level driveway and the track there was the strip above mentioned, about 2 ft. 8 inches, or 3 ft., wide, the surface of which sloped down from the driveway to the bare top of the rail. The fall in this slope was about 6½ inches.

The accident occurred about 3 o'clock in the forenoon. No one who gave evidence saw what happened or what caused the load to upset. The persons who arrived on the ground after the accident found that the box of the sleigh had partly overturned, the wood or a large part of it, had been thrown upon the north rail, more of it to the north side than to the south, and the deceased was found under the wood and between the tracks. The box of the sleigh was upon, or immediately north, of the north rail and the sleigh was north of that. A witness (Eleanor) says that the box seemed to lie nearly "straight," that is, as I understand it, parallel to the track.

The following are the questions submitted to the jury, together with the answers returned:—

1. Was the Winnipeg Electric R. Co. guilty of any negligence that caused the accident? A. Yes.

2. And if so, in what did that negligence consist? A. In allowing the snow to become slanted up from the tracks which when it became hard and icy was not safe for public traffic.

3. Was the City of Winnipeg guilty of any negligence that caused the accident? A. Yes.

4. And if so, in what did that negligence consist? A. In neglecting to force the street railway company to remove the snow that caused the danger to traffic, and in not removing it themselves.

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5. How, in your opinion, did the accident occur? A. In pulling his team out to pass the milk sleigh the hind bob slid down the slope to Point 1ft. 8in. shewn on the model exhibited by Mr. Bower from the city engineer's department, the sudden stop caused the box to overturn.

6. If your verdict be in favour of the plaintiff against either of the defendants, or against both of them, what damages do you award? A. $4,000 in all.

Taking the case of the Electric R. Co. first, the answers to questions 2 and 5 do not disclose a liability. The answer to question 2 finds that the negligence on the part of the company, which caused the accident, consisted in allowing the snow to become slanted up from the tracks. The answer to question 5 declares that the accident occurred by the hind bob of the sleigh sliding down to point 1 ft. 8 inches shewn on the model exhibited by Bower; that the sudden stop caused the box to overturn. Now this point, 1 ft. 8 inches on the model, was outside the 18-inch strip from which the company was bound to clear the snow: see 55 Vict. c. 26, schedule A, s. 3 (*f*). If the snow had been wholly removed from the 18-inch strip the accident would not have been prevented but would rather have been aggravated. No order had been given to the company by the city to remove the snow from the street. At all events the evidence does not shew that any such order was given. No negligence was shewn as to the manner in which the company disposed of the snow removed from the tracks. The accident was caused, according to the findings, by a condition of the street for which the company was not responsible.

The question of the company's liability where an accident is caused by snow on the street was fully dealt with by this Court in *Elliott* v. *Winnipeg Electric R. Co.*, 38 D.L.R. 201. The judgment in that case had not been pronounced when the present case was tried. In the present case no negligence causing the accident was shewn on the part of the company. The plaintiff has failed to shew any breach by the company of the by-law or legislative contract with the city. For the reasons given in the *Elliott* case a nonsuit should be entered in this case as against the company.

The position of the City of Winnipeg remains to be considered. Objection was taken to the charge delivered by the judge when dealing with the duties and liabilities of the city in regard to snow and ice upon the streets. The judge read to the jury s. 722 of the Winnipeg Charter, which imposes upon the city the duty of keep-

ing streets, bridges and highways in repair, and then said to them: "So the duty is cast upon the city to keep the streets in repair." The jury was, in effect, instructed that the city's duty to repair was absolute. No exception was made of cases where the obstruction to, or unsafe condition of, the street was due to natural causes, and where the facts might furnish to the city authorities a valid excuse for the want of repair. I can find nothing elsewhere in the charge which would modify the above statement. The jury was left with the impression that climatic conditions or natural causes were not to be taken into account.

The leading case on the subject is *Caswell* v. *St. Mary's &c. Road Co.*, 28 U.C.Q.B. 247. That action was against a road corporation which charged tolls, but the principles laid down in the judgment have been generally accepted and extended to municipalities in regard to their duties to repair. The accident in that case was due to the condition of two or three rods of the road caused by a snowdrift left upon it. In giving the judgment of the court, Wilson, C.J., said:—

> It is by no means an easy matter to lay down any general rule on the subject, but it is clear that the company cannot be required to clear the snow off the ground whenever it falls, or even to remove the ice which may form there. It would frequently be an impossible work to attempt it, and it would be mischievous and a nuisance in some cases to effect it. Snow is looked for in this country and provided for as forming the best and most suitable means of travelling during the winter, and even when it falls to a great and unusual depth it is not the duty of any person or body of persons to remove it from the roads. Those who use them at such a time must use them as best they can while this natural and unavoidable impediment lasts.

At p. 254, Wilson, C.J., deals with the manner in which such a case should be left to the jury. He says:—

> It must be a question of fact altogether for the jury to say whether the place alleged to have been out of order was dangerous, and if so from what cause, and if from a natural cause or process whether the persons liable to repair the road could reasonably and conveniently, as regarded expenditure and labour, have made it safe for use. If the obstruction or danger could properly and reasonably have been removed, then the persons on whom the burden lay to keep the road in order should be held to the fulfilment of their duty to make it safe and useful for the public, at whatever season of the year or from whatever cause the impediment or difficulty may have happened.

Caswell v. *St. Mary's* has been followed in several cases and was expressly approved by the Supreme Court of Canada in *Cornwall* v. *Derochie*, 24 Can. S.C.R. 301, 303.

The jury was not instructed upon the question of negligence

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as applicable to this case, although the question was asked, was the City of Winnipeg guilty of negligence? The jury should have been charged upon this point.

The question involved in this case is one of very great importance. The street railway must be operated. The vast majority of the citizens depend upon it as means of conveyance. In order to operate it, the tracks must be kept clear of snow. By the terms of the by-law and contract, which have the force of an Act of the legislature, the street railway company is permitted to spread the snow swept from between and from each side of its tracks over the rest of the street. When there is a considerable quantity of snow the result is that a slope will form at the edge of the snow surface, tending towards the tracks. The only way of getting rid of this slope is by removing the snow either wholly or partially from the street. In the case of an exceptionally large fall of snow such as had occurred in the winter of 1916, before this accident took place, the removal of the snow and ice from all the streets in this city on which the street railway lines are laid, to an extent sufficient to obviate all danger to vehicles, would be a matter of such enormous labour and expense that it is a grave question whether it could be "reasonably and conveniently" performed. This and other questions that arise in considering the duties and the liabilities of the city are essentially matters for consideration by the jury, after it has been fully and properly instructed. No instruction on these matters was given to the jury in the present case.

There are a number of other objections to the charge which are set out by the defendants in the grounds of appeal. In the view I take as to the want of instruction upon the question of negligence, I need not deal with the other objections, although some of them are of importance.

There is another point to which I would refer. Not a single witness was called who saw the accident take place. That it happened in a busy part of the city, on a street on which there is much traffic, and that no one saw it, appears to me to be an unlikely combination of circumstances. The man who drove the sleigh belonging to the Crescent Creamery Co., although he was one of the first upon the ground and helped to carry the injured man away, was not called as a witness. I feel that much more information as to the facts could have been furnished to the judge

and jury if greater diligence had been used. It is only human to feel the deepest sympathy for the plaintiff who has lost, in such distressing circumstances, her husband and the sole support of herself and her child. I deeply regret that the delay and expense of a new trial must be incurred and would be glad if some means could be devised whereby it might be avoided. In the meantime this court must set aside the judgment against the city and order a new trial. The costs of the former trial and of this appeal will be costs in the cause to the successful party.

Perdue, J.A.

HAGGART, J.A., concurred in the judgments of Perdue and Fullerton, JJ.A.

Haggart, J.A.

FULLERTON, J.A.:—The respondent has recovered a verdict against both defendants for damages for the death of her husband George A. Clark, caused by the alleged negligence of the defendants. The deceased was employed by one Betts as a teamster and on the day of his death was taking a load of wood to the south end of the city. While proceeding west along Higgins Ave. and at a point between 30 and 40 ft. east of Annabelle St., the load in some way upset and caused him injuries from which he died.

Fullerton, J.A.

The negligence charged against the Winnipeg Electric R. Co. is:—(*a*) In removing snow and ice on its tracks upon Higgins Ave. in such a manner as to leave adjacent to its said tracks an accumulation of snow and ice forming a steep, smooth, icy declivity from 3 to 4 ft. long descending to the rail at an angle of 25 to 40 degrees whereby the width of the street was diminished by 3 or 4 ft. (*b*) In neglecting to remove or cause to be removed the said accumulation of snow and ice, either in part or in whole from said street. (*c*) In spreading snow and ice removed from its tracks upon the surface of Higgins Ave.

There was the usual contradiction between the witnesses of the plaintiff and of the defendant company as to the angle of declivity of the snow and ice which admittedly sloped up from the north rail to a point about 3 feet north of the north rail and was caused by the sweepers of the company clearing the tracks. No one saw the accident and no one can say positively how it occurred. The jury made the following finding as to the manner in which the accident occurred:—"In pulling his team out to pass the milk sleigh the hind bob slid down the slope to point 1 foot 8 inches shown on the model exhibited by Mr. Bower from the city engi-

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neer's department, the sudden stop caused the box to overturn." It appears to me that this finding is at best a mere guess on the part of the jury. Warren, who was one of the first on the scene, says, in his evidence, that the Crescent Creamery sleigh was standing just ahead of where the accident happened, not very close. So far as one can gather from the evidence the Creamery sleigh was standing from 45 to 50 ft. ahead and it is unlikely that the deceased would turn out to pass this sleigh until he got much nearer to it.

The evidence shews that from the summit of the incline there was a level road from 8 to 9 ft. wide. The driver of the Crescent Creamery sleigh, who assisted in carrying the injured man into an adjoining store, was not called at the trial though there is nothing to suggest that his evidence was not available.

In the case of *Elliott* v. *Winnipeg Electric R. Co.*, 38 D.L.R. 201, the plaintiff when attempting to board a street car belonging to the defendant, slipped and fell on the bank thrown up by the sweeper and sustained severe injuries. This court held that the plaintiff had failed to shew any negligence on the part of the defendants, which caused or contributed to the accident.

I am unable to distinguish this case from the one in hand, and must therefore allow the appeal of the Winnipeg Electric Railway Company, and dismiss the action as against it.

The case against the City of Winnipeg stands on a different footing, however. Section 722 of the Winnipeg Charter provides that:—

> Every public road, street, bridge and highway, and every portion thereof, shall be kept in repair by the city, and in default of the city so to keep in repair, the city shall, besides being subject to any punishment provided by law, be civilly responsible for all damages sustained by any person by reason of such default.

Counsel for the City of Winnipeg took a number of objections to the charge of the trial judge to the jury. One objection was that the trial judge failed to give the jury any definition of negligence, or to indicate what the duty of the city was under the above quoted section.

For anything that appears in the charge the jury may have assumed that the duty of the city was an absolute one to keep the streets in repair—in other words, that all the plaintiff need prove to entitle her to a verdict was that the street was out of repair, and that the accident happened in consequence thereof.

The authorities shew that the city is not an insurer against accidents upon its streets and that an action does not necessarily lie for every defect which occasions injury.

In *Castor* v. *Township of Uxbridge*, 39 U.C.Q.B. 113, Harrison, C.J., at p. 122, dealing with a similar provision in the Ontario Municipal Act, said:—

> The statute prescribes no standard of repair, nor does it in any manner declare what is to be deemed non-repair. It would not be practicable for the statute to do so. It would be absurd to require the municipality to keep all its roads in the same state of repair . . . during all seasons of the year.

The question whether a highway is in repair or not at the time of the occurrence of an accident is, in general, a question of fact. In the determination of the question, it is necessary to take into account the nature of the country; the character of the roads; the care usually exercised by municipalities in reference to such roads; the season of the year, and the manner and nature of the accident.

In *Lucas* v. *Township of Moore*, 3 A.R. (Ont.) 602, Patterson, J.A., said, at p. 608:—

> It is now well settled . . . that the obligation expressed by the general phrase, "keep in repair"—a phrase which is applied equally to an allowance for road in a newly surveyed and organised township, and to a crowded street in the business part of a city—is satisfied by keeping the road in such a state as is reasonably safe and sufficient for the requirements of the particular locality, and that in deciding whether any municipal council is chargeable with default, regard must be had to such considerations as the means at the command of the council and the nature of the ordinary traffic of the locality.

Reading the charge as a whole, it appears to me that the judge took it for granted that the conditions existing were dangerous to traffic and placed the matter before the jury in that way. In one part of his charge, at p. 212, he said:—"Now it is for you to say whether that condition of affairs can be allowed to continue, for if, in the opinion of the employees of the city, that is perfectly safe, how many more cases are we to have before some remedy is found, that's all?"

Again, at p. 212, the judge said "they (the city authorities) say nothing was wrong apparently they saw nothing wrong about it at all, and they were quite content to leave it as it was. And, even to-day, they attempt to justify the position of affairs, and say the slope, or a slope, such as you could see there, covered with ice, is alright to drive a heavy load along."

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The judge also said to the jury, at p. 201:—"Then Mr. Warren was cross-examined and he said this: From curb to hummock there were about 8 ft. of a fair driveway, provided there was no obstruction there. But there was an obstruction there. The Crescent Creamery sleigh was close to the hummock.

"Now, you see, gentlemen, the position that they placed the man, Clark, in. He is driving along that roadway with a heavy team, and right at the very point, apparently, there was one of the Crescent Creamery Co.'s sleighs standing, no doubt delivering milk in there somewhere. Now there is no law that compels a cart or sleigh like that to be right up against the curb. So that that cart or sleigh was standing at perhaps a foot or two away from the curb, and if so, no matter what its position was, Clark had to get around it or else wait there for some time . . ."

As I have pointed out already, the evidence does not support the above statement as to the position of the Crescent Creamery Co.'s sleigh, and doubtless the jury acted on it in making their finding as to the cause of the accident.

Objection was also taken that evidence had been improperly received.

The plaintiff tendered evidence to shew that a few days after the accident someone, presumably one of the defendants, sent men to the place and removed a considerable quantity of snow and ice from the street. This evidence was objected to, but was received and referred to by the trial judge in his charge. Under the authorities, this evidence should not have been received. *Hart* v. *Lancashire*, 21 L.T.N.S. 261; *Pudsey* v. *Dom. Atlantic*, 27 N.S.R. 498; *Cole* v. *C.P.R. Co.*, 19 P.R. (Ont.) 104.

I think the verdict against the city should be set aside and a new trial ordered. *New trial ordered.*

ALTA.

S. C.

Re WAR RELIEF Act; Re CREDIT FONCIER FRANCO-CANADIEN Co.

Alberta Supreme Court, Appellate Division, Harvey, C.J., and Stuart, Beck and Hyndman, JJ. May 30, 1918.

MORATORIUM (§ I—1)—WAR RELIEF ACT—PROCEEDINGS PENDINGIT WHEN ACT CAME INTO FORCE—PAYMENT OF ARREARS OF INTEREST—APPLICATION OF ACT.

The War Relief Act (Alta. 1918, s. 3) does not apply to proceedings pending at the time the Act came into operation, but after proceedings have been commenced a mortgagor may pay all arrears of interest and other charges leaving nothing but the principal in arrear, and proceedings, although properly commenced, could then only be continued in contravention of the section.

[See annotation, 22 D.L.R. 865.]

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S. C.

RE WAR RELIEF ACT; RE CREDIT FONCIER FRANCO-CANADIEN CO.

Harvey, C.J.

REFERENCE by the Registrar of Land Titles to determine the effect of s. 3 of the War Relief Act upon proceedings pending when the Act came into force.

R. D. Tighe, for the mortgagee; *H. J. Dawson*, the registrar, in person.

The judgment of the court was delivered by

HARVEY, C.J.:—Paragraph 1 of s. 3 of the said Act provides that:—

No person shall take or continue proceedings by way of foreclosure or sale or otherwise, or proceed to execution on or otherwise to the enforcement of, any judgment or order of any court, whether entered or made before or after the passing of this Act, for the recovery of principal money secured by any mortgage of land or any interest therein made or executed prior to the fourth day of August, 1914.

Three other paragraphs of the section prohibit the taking or continuing of other specified proceedings, but the registrar is only concerned with par. 1. S. 4 provides that:—

Where default is made in payment of interest, rent, taxes, insurance or other disbursements which the mortgagor or purchaser has covenanted or undertaken to pay, the mortgagee or vendor, his assignee, or personal representative shall have the same remedies, and may exercise them to the same extent, and the consequences of such default shall in all respects be the same as if this Act had not been passed.

Provided, however, that before any action or proceeding shall be commenced for default for any cause mentioned in this section leave shall be obtained from a judge.

Under s. 6 the judge may grant the leave unless the mortgagor satisfies him that his inability to pay is directly or indirectly attributable to the war.

Under the mortgage in question there is default in the payment of principal, interest, taxes and insurance. Proceedings for foreclosure were begun last November and the property had been offered for sale when the Act came into operation. The sale having proved abortive the mortgagee desires now to continue the proceedings and obtain an order of foreclosure if the property cannot be sold and the registrar desires to know whether such may be done.

The first question which naturally presents itself is:—Does the Act apply to proceedings begun before it was passed? or is it only intended to apply to future proceedings? The general principle is stated by Maxwell on Statutes (5th ed.) at p. 360 to be that:—

When the law is altered pending an action, the rights of the parties are decided according to the law as it existed when the action was begun, unless the new statute shews a clear intention to vary such rights.

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RE WAR RELIEF ACT; RE CREDIT FONCIER FRANCO-CANADIEN CO.

Harvey, C.J

And in *Re Suche & Co.* (1875), 1 Ch. D. 48, in which it was sought to take advantage of a provision of the Judicature Act, which came into operation while winding-up proceedings were in progress, which authorized claimants to "come in under the winding-up of such company and make such claims against the same as they may be respectively entitled to by virtue of this Act," it was held by Jessel, M.R., after consultation with several of the other judges, that the Act did not apply. At p. 50 he says:—

> 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.

Compare also par. 48 of s. 7 of The Interpretation Act. We must then start with the presumption that the legislature did not intend to affect the rights of parties to pending proceedings and endeavour to see whether there is anything in the Act which seems to rebut that presumption. At once is suggested the view that since s. 3 prohibits, without exception, the taking of proceedings, there can be no future proceedings and, therefore, the only ones which could be continued would be those pending. If the section stood alone it seems to me that that consideration would be conclusive in establishing the application to pending proceedings. But s. 4 authorises the taking of proceedings in the cases and under the conditions specified and when those proceedings are begun they may be begun to recover not merely interest, etc., but the principal, because the section preserves all the mortgagee's rights and remedies, but after the proceedings have been begun the mortgagor may pay up all arrears of interest and the other charges specified, leaving nothing but principal in arrear and if the proceedings were then continued they would be continued for principal and for principal alone. Such proceedings, though properly begun and begun after the commencement of the Act, would then come within the prohibition of the section and could be continued only in contravention of s. 3. It is thus apparent that there are proceedings other than those pending to which the prohibition of s. 3 can apply, and there is thus no value in an argument which rests solely on the view that such is not the case.

There appear to me also to be other reasons for concluding affirmatively that the legislature intended what the general rule of interpretation states it is presumed to have intended.

The paragraph of s. 3 above set out prohibits, in terms, the taking or continuance of proceedings to enforce any judgment or order of any court whether made before or after the passing of the Act. That clearly prohibits the continuance of pending proceedings to the extent specified but if the continuance of all pending proceedings were prohibited it would be quite unnecessary to make this special provision.

But it does more; it prohibits the continuance of proceedings for the enforcement of any judgment or order entered or made after the passing of the Act. Now there could not be a judgment after the passing of the Act unless proceedings could be continued to it. As I have pointed out, the proceedings commenced after the Act under the provision of s. 4 could not be continued to judgment for principal money, other than as part of the whole indebtedness because upon the interest, taxes, etc., being paid all further proceedings would be stayed, but if the interest, etc., remain in default s. 2 would not apply because the remedies in that case are not affected by the Act. Hence it is only by the continuance of pending proceedings that there can be any judgment for principal money as such or any judgment including principal money to which the Act applies after the passing of the Act and while the provision as respecting the enforcement of a judgment before the passing of the Act would be simply unnecessary if the prohibition applies to pending proceedings yet insofar as it relates to judgments after the Act it would be meaningless and could have no application.

Then there is the general consideration. A mortgagee, who has not begun proceedings, may, upon obtaining leave of a judge, begin and carry through proceedings, but if he has already started proceedings he would be absolutely debarred from relief if the section stays all proceedings, for I presume no case would be found where the proceedings were not in respect of principal as well as interest, etc., and no means is provided whereby he can obtain leave to proceed.

It seems unreasonable to suppose that the legislature intended such a consequence or even that he should be required to start all over again, where he would be permitted to do so, and incur a duplicate set of costs. The Act is stated to be "for the relief of mortgagors and purchasers," but it would be a sorry relief to impose a double set of costs on them.

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RE WAR RELIEF ACT; RE CREDIT FONCIER FRANCO-CANADIEN CO.

Harvey, C.J.

It is suggested that it might be intended to apply to pending proceedings but only to stay them in so far as they are for the recovery of principal money, but to allow them to proceed insofar as they are for interest, taxes, etc. Apart from the great difficulty of working out such an interpretation in actual practice it is to be observed that that view is at direct variance with the principle of s. 4, which provides in effect that if the interest, taxes, etc., are not paid, in a proper case the creditors may proceed as if the Act had not been passed, in other words, that he may proceed not merely for the interest, taxes, etc., but for principal money as well if it is due. It seems to me that the clear intention of this section is that as regards any mortgagor or purchaser in respect to lands in a city or town, to which only by s. 9 the Act applies, if he keeps his interest and other specified charges paid up he shall have an absolute immunity from any proceedings for the principal, but if he fails in this, then, unless he can show that his failure is attributable to the war, the mortgagee or vendor shall not be interfered with by the Act in any respect, subject, however, to the right of the debtor at any time by paying up all interest, taxes, etc., to render the proceedings proceedings, for principal money only and so prohibited to be further continued by s. 2. In other words, in respect to proceedings begun after the passing of the Act they will, when permitted at all, be proceedings for principal as well as interest, etc., and it would be strange if it was intended that the Act should apply to pending proceedings that they should be in any different position as they would be in this and also in that, as I have stated, there is no way whereby leave may be given to continue them as there is to commence new proceedings.

It may well be also that the legislature did not overlook its own Act passed since the commencement of the war whereby it had given power to a judge or a master to stay all proceedings in mortgage actions at any time upon such terms as he might think fit (1916, c. 3, s. 15, pt. 5), which of course is applicable to the proceedings pending when the present Act was passed.

No hardship, therefore, can result and no failure of the intention to relieve need follow as a consequence of the interpretation I have suggested, viz.: that other than as covered by that special provision the paragraph in question does not apply to proceedings pending at the time the Act came into operation.

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It is probable that the same rule applies to the other paragraphs of s. 3, but I have not considered them in detail.

By agreement there will be no costs of this reference.

Harvey, C.J.

Judgment accordingly.

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Saskatchewan Court of Appeal, Haultain, C.J.S., Newlands, Lamont, and Elwood, JJ.A. May 17, 1918.

RAILWAYS (§ II—30)—RAILWAY RULES—SWITCH-STAND AND FIXED SIGNAL—DIFFERENCE BETWEEN—NEGLIGENCE—DAMAGES.

A switch-stand is not a fixed signal within the meaning of the railway regulations and is governed by different rules; an engineer is not guilty of negligence in passing a red light on a switch-stand, although compelled by the railway rules to stop where such light is shewn as a signal.

Statement.

APPEAL by defendant from the judgment at the trial, in an action for damages, for injuries sustained in the course of employment. Affirmed by equally divided court.

J. A. Allan, K.C., for appellant; *P. M. Anderson*, for respondent.

Haultain, C.J.

HAULTAIN, C.J., concurred with Elwood, J.A.

Newlands, J.A.

NEWLANDS, J.A.:—This is a common law action for damages. The respondent is an engineer in the employment of the appellants, who was injured in the performance of his duties. The jury found the appellants guilty of negligence, and further found that there was no contributory negligence on the part of respondent.

This appeal is taken on the ground that the jury was perverse in finding no contributory negligence on the part of the respondent. The grounds of the appeal are that the rules of the appellant company forbid an engineer controlling a train from passing a fixed signal without knowing the colour of such signal; that it was admitted by the respondent that he passed a switch light at a point marked "Y" on the plan of the Moose Jaw yards, put in at the trial as ex. "A", without knowing the colour of such switch light, or that such light was burning; and that, by reason of such negligence, he took his train from the east-bound track to the west-bound track, which resulted in a head-on collision with a west-bound train, and caused the accident by which he was injured.

It was admitted by counsel on the argument before this court, that, if a switch light is a fixed signal, respondent should not have passed this point without ascertaining that this light was burning,

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and, if so, the colour of it. If this light shewed red, it was set for a divergent track; if green, for the east-bound track, which was the track he was to follow. His train took the switch at this point and went over to the west-bound track. The respondent did not know if this light was burning, or, if it was burning, what colour it shewed.

Newlands, J.A.

The question, therefore, for this court to decide is, whether a switch light is a fixed signal according to the rules of the appellant company.

A fixed signal is defined by the rules as "a signal of fixed location indicating a condition affecting the movement of a train."

Under the heading of "Colour Signals" in the rules it says red indicates "stop," and green "proceed."

At the trial it was proved that a red light on a switch-stand did not necessarily mean "stop," nor a green light "proceed," but the red light shewed that the switch was set for a divergent track, and a green light that it was set for the track the train was on. Whether the train would stop or proceed depended not on the colour of the light but on the orders it had received, that is, whether it was to continue along the track it was on, or diverge on to another track.

As the colour red, when used as a signal, means "stop," and the colour green "proceed," and as that is not the meaning of those colours when used on a switch-stand, I am of the opinion that a light on a switch-stand is not—according to the rules—a signal, and it cannot, therefore, be a "fixed signal."

The respondent did not, therefore, break the rule referred to, and the jury was not perverse in finding that there was no contributory negligence on his part. The appeal should be dismissed with costs.

Lamont, J.A.

LAMONT, J.A.:—This is an action for damages for personal injuries received by reason of a collision of two of the defendants' trains.

The plaintiff was an engineer on one of these trains, namely, "The Tri-City Express," running from Moose Jaw to Regina and Saskatoon. The collision occurred just outside of the Moose Jaw yards. Between Moose Jaw and Regina the defendants' line is double-tracked; east-bound trains take the track on the south side, and west-bound the north. It was the duty of the defendants'

switchman to line up the switches so that the plaintiff's train would proceed from the station platform to the east-bound main line track, and follow that track eastward.

At a little after 10 p.m. on the night of January 4, 1916, the plaintiff received the signal to start on his run. He also received from switchman Wheeler the signal that all switches were properly set. He then started his engine and went eastward, proceeding from track No. 1 to track No. 2 and thence to the east-bound main line. The night was dark and stormy, the thermometer stood at 30 degrees below zero, and a strong wind was blowing from the north-west, which blew smoke and exhaust steam to the plaintiff's side of the engine so that it was impossible for him to see ahead. Near the east end of the yard, a switch connects the east-bound with the west-bound main line. The plaintiff's train, instead of keeping on the east-bound track, took the switch and passed over to the west-bound track, and shortly afterwards collided with a west-bound train, with the result that the plaintiff was injured. The plaintiff did not know that his train was on the wrong track until after the collision.

At the trial the jury found that the defendants had been guilty of negligence in not having the switch properly set so as to allow the plaintiff's train to proceed along the east-bound track. They also found that the plaintiff had not been guilty of any negligence. Judgment was, therefore, given for the plaintiff, and from that judgment the defendants now appeal.

The defendants contend: (1) that, on the evidence, the jury was not entitled to find that the accident was caused by the negligence of the defendants, and (2) that, in any event, the jury could not properly find that the plaintiff had not been guilty of contributory negligence.

The first of these contentions may be answered shortly. The correctness or otherwise of the finding that the defendants were guilty of negligence depends on whether the switch at the point designated "Y" on the plan of the tracks filed,—*i.e.*, the switch connecting the east-bound with the west-bound main line,—was or was not properly set. On that point we have the evidence of the defendants' trainmaster, Hawkins, who, on examination for discovery, testified that, if this switch had been properly lined up the

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plaintiff's train could not have gone over to the west-bound track, and that it was the duty of switchman Wheeler to properly line it up. This evidence, coupled with the fact that the plaintiff's train did go over the switch, justified the jury in drawing the inference that the switch had not been properly set, In fact, in my opinion, that was the only inference that could reasonably be drawn.

Then was the jury justified in finding that there had been no contributory negligence on the plaintiff's part? This, in my opinion, depends upon whether or not the switch-stand at "Y,"—equipped as it was with disc and lights,—was a "fixed signal" within the meaning of the train rules filed. R. 401 reads:—

> Engineers must know the indications of all fixed signals before passing them.

The plaintiff admits that he could not and did not see the light on the switch-stand at "Y" before his train passed it and turned onto the west-bound track. If that light was a fixed signal, it was his duty to know what it indicated, and his failure in that respect would be negligence contributing to the injury. A "fixed signal" is defined as

> a signal of fixed location indicating a condition affecting movements of a train.

Then, at p. 97 of the book of rules, under the heading of "Fixed signals," we have different kinds of fixed signals set out, among which is the following:—

> Target signal.—A disc supported in such a way that it may stand either parallel with or at right angles to a track on which it governs movements. The indications are given by the position of the disc. At night, an additional indication is given by lights of prescribed colours corresponding to the positions of the disc.

As the switch-stands in the Moose Jaw yards have on the top thereof a disc which may stand either parallel or at right angles to the track, and as at night, when the switch is set for a diverging track, it has in addition a light which shews red, and when set for the track on which it is placed a light which shews green. it was contended that it answers the description of a "target signal," and, therefore, must be held to be a "fixed signal."

I agree that if the rules had declared a switch-stand equipped with disc and lights to be a "fixed signal," the plaintiff could not succeed, because the defendants have the right to say what should constitute a fixed signal on their railway; but, the defendants not having said so, I cannot accept the argument that every disc sup-

ported in such a way that it may stand either parallel with or at right angles to a track, and which has lights of prescribed colours as additional indications, must necessarily be a "target" or "fixed signal." A target signal, it is true, must possess certain defined characteristics, but it does not follow, in my opinion, that everything that may possess these specified characteristics is necessarily a target signal, unless there is found a declaration in the rules to that effect. The plaintiff has testified that a disc equipped with lights as indicators attached to a switch-stand is not a signal at all within the meaning of the rules; that it is only a switch indicator. His evidence on that point was in no way contradicted. The rules themselves seem to me to point to the correctness of the plaintiff's testimony. R. 506 says:—

> Signals and switch indicators which are in service and evidently out of order must be reported by wire to the superintendent.

Here is an express recognition that signals and switch indicators are two separate and distinct things. Then again, under the heading of "Signals," r. 10, which deals with colour signals, says that the red colour indicates "stop," and r. 661 is as follows:—

> Trains and engines may be run to but must not be run beyond a signal indicating stop.

While r. 104 reads:—

> The target of a switch parallel with the main track or a green light indicates the switch is set for the main track; the target at right angles to the main track or a red light indicates the switch is set for a diverging track.

The fact that a red light as a signal indicates "stop," and that a red light on a switch-stand indicates merely that the switch is set for a diverging track, which would not mean "stop" if the train was to take the diverging track, would also support the plaintiff's testimony that a disc or light on a switch-stand is not a signal within the rules. It will also be observed that the disc on a switch-stand is referred to in r. 104 not as a "target signal," but as "the target of a switch." On cross-examination, the plaintiff was asked if the description of a target signal could apply to anything other than the switch-stands under discussion, and he answered "no." This, however, in my opinion, does not advance the matter any, for he also testified that there were no fixed signals in the Moose Jaw yards outside the order boards. In any event, it is, in my opinion, a question of fact whether the target of a switch is a "target signal" within the rules, or is simply a switch indicator and not a signal at all. It is not a question of construing the rule.

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The rule is clear. It is a question of determining whether or not a disc or light placed on a switch brings it within the rule, and this, in my opinion, is a question of fact for the jury. That, in the opinion of the trial judge, it was a question for the jury is seen from the fact that he left to them the question, "Did switch-stands 'X' and 'Y' comply with rules on pp. 97 and 98 of ex. '1' defining a target signal?" To this they answered "No." Although I think it would have been a little better to have framed the question simply to ask if the switch-stand at "Y" with disc or lights was a "fixed signal" within the meaning of r. 401, yet I think the answer of the jury to the question covers the ground sufficiently. After having had pointed out to them what constituted a target signal, they say, by their answer, that the switch-stand was not a target signal. In my opinion, the trial judge was right in leaving the question to the jury, and the jury answered it in accordance with the only evidence on the point before them. The light on the switch-stand at "Y" not being a "fixed signal," r. no. 401 has no application.

The only remaining question then is: Was the act of the plaintiff in going past the switch-stand at "Y" without making sure that it was properly set for the east-bound track, the act of a reasonably prudent man under the circumstances?

The circumstances to be considered are, that the plaintiff, having received the signal from the switchman, was justified in believing the switch to be properly set; the character of the night; the fact that, owing to the wind and frost, the plaintiff could not see the switch lights from his side of the engine; the fact, also, that he instructed the fireman to keep a look out on his side and that the fireman signified to him that everything was right, and further that, owing to the slowness with which the train was moving, it was impossible for the plaintiff to know when he took the switch. The jury having considered these circumstances, which appeared in evidence, found that the plaintiff was not guilty of negligence in not knowing that his train crossed to the west-bound track. I think that finding is conclusive.

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

Elwood, J.A.

ELWOOD, J.A.:—The plaintiff—at the time of the accident which gave rise to this action—was an engineer in the employ of

the defendant company, upon a train proceeding from Moose Jaw in an easterly direction to Regina. The proper course for the train to pursue was to leave Moose Jaw yards on track No. 1, proceed a certain distance, cross over to track No. 2, and from there cross to track No. 3 and then proceed on track No. 3 to Regina. On the night of the accident, the train proceeded in the above order to track No. 3. After it had proceeded a certain distance eastward on the latter track, it came to the switch which was apparently set for a cut-off connecting with track No. 2. There are two switches at this cut-off, one on track No. 3 and the other on track No. 2. Both of these switches were apparently set so as to cause the train to proceed from track No. 3 to track No. 2. The train proceeded along the cut-off on to track No. 2, and then proceeded for about three-quarters of a mile on track No. 2 when a head-on collision occurred with a west-bound train, in consequence of which the plaintiff was injured, and this action is brought for damages resulting from such injury.

The plaintiff says in his statement of claim that the negligence of the defendant consisted in not having switches properly set to proceed on the east-bound track.

The evidence shews that on these various switches are discs or targets; that, when the switch is set for a train to proceed along a certain track, the disc is parallel to the track; that when the switch is set for a train to proceed by a cut-off from one track to another, the disc is set at right angles to the track; that, between sunset and sunrise, green and red lights are used; the green to indicate the same direction as when the disc is parallel to the track, and the red to indicate the direction when the disc is at right angles to the track. On the occasion in question, the lights from track No. 1 to track No. 3 indicated red, as they properly should.

There is no evidence as to the position of the switches or what lights were shewing at the cut-off leading from track No. 3 to track No. 2. It is assumed that the fact that the train having proceeded from track No. 3 to track No. 2 indicates that the switches were set so as to permit the train to so proceed. It seems further to have been assumed that, at the point at which the train diverged from track No. 3 to track No. 2, the light shewing was red. The only evidence in that respect is that of the plaintiff, in which he was asked this question:—

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Q. Or had your fireman continued in that position up to the time he came to those lamps he would see they were red? A. Yes.

In order to entitle the plaintiff to succeed, he must shew that the switches were improperly set by some employee of the defendant company, and I think the fair result of the evidence is that, if the switches were improperly set, they would shew red lights. The evidence further shews that the plaintiff knew the yards and route he was to take, and the position of the various switches, and that, if he had known that the switch leading to the cut-off from track No. 3 to track No. 2 had been improperly set and if he had known that it indicated red, he would and should have stopped and had the switch turned, so as to permit him to proceed along track No. 3 upon which he was.

R. 401 of the defendant company is as follows:—

Engineers must know the indication of all fixed signals before passing them. At railway crossings, drawbridges, junctions, or train order offices, they will require the firemen to observe and communicate the indication of the signals.

And it was admitted on the argument before us, that, if either the light or the disc or target on the switch, at the cut-off leading from track No. 3 to track No. 2, is a fixed signal, then the plaintiff cannot succeed, because he did not know the indication of that signal before passing it.

At the trial, the jury found that there was negligence on the part of the defendant, and that that negligence consisted in not having switches properly set to allow the train in question to proceed on the east-bound track. It further found that switch-stands at "X" and "Y" did not comply with the rule defining a fixed signal. Damages were assessed to the plaintiff, and from that judgment the defendant appeals.

The switch at "Y" is the one at the cut-off leading from track No. 3 to track No. 2. In the above rules a fixed signal is defined as follows:—(For definitions of "fixed signal" and "target signal" see Lamont, J.A.).

At the trial, the plaintiff admitted that there was nothing to which the definition of a target signal would apply except the disc or target set on a switch-stand.

The trial judge apparently left it to the jury to say whether the switch-stands at "X" and "Y" were fixed signals. The evidence was all the one way. The learned trial judge was, in effect, leaving it to the jury to interpret the rules as to what constitued a fixed signal. The interpretation of those rules was for

the judge, and not for the jury. He did, in his charge, interpret the rules as to a fixed signal to cover a disc or target on a switch-stand, and, in the light of his charge, the finding of the jury that these were not fixed signals was perverse.

In my opinion the trial judge was correct in interpreting the disc or target on a switch-stand to be a fixed signal. It will be noticed that a "fixed signal" is "a signal of fixed location indicating a condition affecting the movement of a train." The target on the switch is of "fixed location," and it does indicate a condition affecting the movement of a train. If it is set parallel with the track, the train proceeds on the main track; if it is set at right angles, the train proceeds by a cut-off. At night, if it shews green it indicates that the train may proceed along the main track; if red, it indicates the train may proceed by a cut-off.

The switch-stand with the disc in question complied with all of the definitions of a target signal given above, and a target signal, —it will be noted—is one of the signals under the heading "Fixed signals."

Under the heading "Signals," and under the sub-heading "Visible signals, colour signals," red is stated to indicate "stop;" green "proceed," and, for other uses prescribed by the rules, yellow "proceed with caution, and for other uses prescribed by the rules."

It was urged by the respondent that red on these switches did not always mean "stop." That is quite true. The colours on the switches indicate the position of the switches; and the evidence of the plaintiff is that had he seen red at switch "Y" he would have stopped, because he would have known that it was set improperly, and as he should have proceeded on track No. 3, and not by the cut off, it was a signal to him to proceed no farther and to see that the switch was set so as to permit him to proceed on his proper course.

I am very strongly of the opinion that the reference to "visible signals" in the rules, to which I have referred above, is intended to cover other than "fixed signals." If I am correct in concluding that the signal on a switch-stand is a "fixed signal," then, as the plaintiff did not know the indication of the signal at switch-stand "Y" before passing it, r. 401 would disentitle him to damages.

In my opinion, therefore, the appeal should be allowed with costs, and plaintiff's action dismissed with costs.

Appeal dismissed, the Court being equally divided.

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S. C.

McKILLOP v. ROYAL BANK OF CANADA.

Supreme Court of Canada, Fitzpatrick, C.J., and Davies, Idington, Duff and Anglin, JJ. March 5, 1918.

BANKS (§ VIII B—175)—EXECUTION DEBTOR—ADVANCE FOR CROPPING LAND—ASSIGNMENT OF LEASE—BILL OF SALE OF SEVERED CROPS—BILLS OF SALE—ORDINANCE (CON. ORD. N.W.T. c. 43).

A bank, which had notice of executions against a debtor who was also indebted to the bank at the time, advanced money to put in and harvest a crop grown partly on the debtor's homestead which he had leased to his infant son on a crop payment lease, and partly on other land also leased by the son on a similar lease; both leases were assigned by the son to the bank and both father and son undertook that the proceeds of the sale of the crops would be applied first in payment of the advances and next to the payment of the old debt of the father's to the bank: bills of sale of the severed crop were subsequently given to the bank under a covenant for further assurance in the assignments.

FITZPATRICK, C.J., *held*, that the transactions were not fraudulent as against the father's creditors but as the bank had notice of the executions at the time of entering into the transactions, it lost its security on the father's share of the crop grown on the homestead, but the rest of the grain in which the father had no interest remained as security to the bank.

IDINGTON and ANGLIN, JJ., *held*, that so far as the bills of sale of the crops were intended to secure the past debt to the bank they were fraudulent and void, and the assignments were void, under s. 15 of the Bills of Sale Ordinance (Con. Ord. N.W.T., c. 43). IDINGTON also *held* that the transactions were void under the Bank Act (s. 76, ss. 2 (c).

DAVIES and DUFF, JJ., dissented without giving written reasons.

Statement.

APPEAL by defendant from a judgment of the Alberta Supreme Court, 33 D.L.R. 268, 10 A.L.R. 304, reversing the judgment at the trial, in an interpleader issue. Reversed in part.

Nesbitt, K.C., for appellants; *G. H. Montgomery*, K.C., and *R. A. Smith*, for respondent.

Fitzpatrick, C.J.

FITZPATRICK, C.J.:—I agree with the finding of Beck, J., delivering the judgment of the Appellate Division, that there was nothing fraudulent about the transaction in question in this case. It was, however, a complicated one and as conflicting interests are involved it becomes necessary to decide the strict legal rights of the parties concerned.

The record before the court is not satisfactory, as it contains merely a schedule of the principal exhibits; for such important documents as the assignments of the leases to the respondent we have nothing but an extract contained in one of the factums.

The position of the matter is this: J. T. C. Gwillim made a lease of his homestead farm to his son Wilfred Gwillim for one year, reserving rents of $1 and one-half of the crop to be raised that year. The lessee assigned the term by way of security to the respondent. Except to receive his rent J. T. C. Gwillim had formally nothing further to do with the matter. That he may have remained on the

farm and with his son raised the crop is not a fact that can have any effect on the legal rights of any parties concerned. It is said in the appellants' factum that he assigned his interest in the lease, and in the crop to be grown on the land, to the bank, but I cannot find that he ever purported to do so.

As to the McClure lease taken by Wilfred Gwillim and similarly assigned to the bank as security, J. T. C. Gwillim had nothing to do with this.

Now if there were nothing else in the case, it would be clear that, after harvesting the crops, Wilfred Gwillim would have to hand over to his lessors the respective proportions of the crops agreed on by way of rental and the rest in each case would be his own property or to be disposed of in accordance with his arrangements with the bank.

It is claimed that the assignments which in terms included his right and interest in the crops to be raised during the term of the leases are invalid under the provisions of s. 15 of the Bills of Sale Ordinance, c. 43 of the Con. Ord. N.W.T., which is as follows:—

> 15. No mortgage, bill of sale, lien, charge, encumbrance, conveyance, transfer or assignment hereinafter made, executed or created, and which is intended to operate and have effect as a security, shall in so far as the same assumes to bind, comprise, apply to or affect any growing crop or crop to be grown in future in whole or in part, be valid except the same shall be made, executed or created as a security for the purchase price and interest thereon of seed grain.

Even if the assignment were invalid it would not help the appellants if the only result were to leave the property in the balances of the crops, after handing over the rentals, vested in Wilfred Gwillim.

In my opinion, however, that is not the effect of the section. It has application, I think, only in the case of an attempted assignment of the crop, not in that of an assignment of the land including the crops growing or to be grown upon it. In the case of an ordinary mortgage, the crops, before severance, are of course available to the mortgagee as part of his security.

After the severance of the crops, the bank, for greater security, took from J. T. C. Gwillim and Wilfred Gwillim a bill of sale of the grain on the homestead farm, and a bill of sale from Wilfred Gwillim for that on the McClure farm. The objections offered to these bills of sale are: 1, that at the time the bank had

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notice of the writs of execution, and, 2, that they were not duly registered as required by ss. 6 and 11 of the Bills of Sale Ordinance, c. 43, Con. Ord. N.W.T.

I think the first objection ought to prevail against the claim of the bank to J. T. C. Gwillim's one-half share of the crop on the homestead farm, not certainly on account of r. 609 of the Alberta Rules of Court, for no rule of court could have any such effect if it were not otherwise the law. The provision has its origin in the Statute of Frauds, 29 Car. II. c. 3, s. 16, and now appears in the English Sale of Goods Act, 1893, 56 & 57 Vict. c. 71, s. 26. It is unquestionable law.

But as against the rest of the grain, which I have been assuming was the property of Wilfred Gwillim, neither objection could be of any avail, for he had no execution creditors and under the Bills of Sale Ordinance it is only as against creditors that bills of sale are void.

I now come to the consideration which on the above facts and their normal consequences have led the trial judge and the Appellate Court to come to opposite conclusions. The trial judge thought that the whole transaction was a sham designed to afford an unfair preference to the bank, one amongst a number of J. T. C. Gwillim's creditors. Mr. Justice Beck in the Appellate Division, on the other hand, found no evidence of fraud in the transaction which he thought was a legitimate attempt to create, with the assistance of the bank, a valuable asset in the hands of the debtor who in return for such assistance was to allow it to be used after liquidating the advances required for its production in discharge of the bank's existing claim, the balance, if any, being available as an asset in the hands of the then insolvent debtor for his other creditors.

There were certainly underlying motives which do not appear on the face of the transaction, but I think Beck, J., has taken the correct view, and as I have already said, I can see nothing fraudulent in the proceeding which did not remove any property of the debtor out of the reach of his creditors, and by which they could not possibly be damaged. I do not see how they can legitimately object to the respondent having the benefit of property which but for its intervention and the arrangement effected, would never have come into existence.

At first sight it undoubtedly appears to be a ground of suspicion that the son Wilfred should admit the existence of a debt due by himself to the bank which he did not owe. This, however, was a family arrangement. The connection between the father of a family living on and working a farm with the aid of his minor sons is a very close one. The incapacity of the father for want of means to work his farm would mean want of work for the son as well and destitution for the whole family. I do not think it is fair under such circumstances to say that the son had nothing to gain by the transaction. The interest of the family was a matter of concern to him and one in which his own interest was bound up. He, of course, adventuring nothing, had nothing to lose by the transaction. If the father, owing to his insolvency, was unable to obtain the necessary advances to work his homestead farm, I do not see why the son should not undertake it and in return for the assistance afforded by the bank accept a liability for his father's debt limited to being discharged out of property to be produced as the result of his operations.

I may add that I think we should strive as far as possible to uphold the transaction. It is a matter of public policy that crops should be raised on the land rather than that it should lie idle. The legislature has recognized this by providing in the Act respecting Seed, Grain, Fodder and other Relief, being c. 14 of the Statutes of Alberta, 1915, that a charge representing money and interest agreed to be paid in consideration of the advance of seed, grain and fodder for animals shall take priority over all other liens, taxes, charges or other encumbrances.

In the result the appeal should be allowed to the extent of one-half of the crop grown on the homestead farm and judgment entered on the issue that so much of the goods being part of the goods seized under the execution were at the time of the said seizure the property of the said J. T. C. Gwillim.

There will be no costs to either party. The half share of J. T. C. Gwillim of the crop as rental had not been delivered, and was not strictly liable to be taken in execution, and the appellants will therefore pay the sheriff's costs.

DAVIES, J. (dissenting):—I would dismiss this appeal with costs. Davies, J.

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IDINGTON, J.:—This is an appeal from the Supreme Court of Alberta holding in an interpleader issue between appellants as execution creditors of J. T. C. Gwillim and the respondent, that the latter was entitled to the crops grown upon a homestead quarter section owned by said Gwillim and upon a half section leased by the infant son of said Gwillim from a third party.

The trial judge found, as a fact, that said infant son was but the *alter ego* of the debtor who was insolvent at the time of the making of said lease.

This finding of fact can hardly be disputed under all the surrounding facts and circumstances unless we discard common sense in dealing with the matter. I, therefore, throughout accept the finding as determining so far as it goes the relations and rights of the parties.

The executions against Gwillim had been placed in the sheriff's hands at various times from the year 1910, to the year 1915, and had been kept renewed and in force until the trial in 1916, covering thus the periods in question when the several transactions took place upon which the respondent's claim is founded, and the seizure by the sheriff.

It is somewhat difficult to understand how a judgment debtor could enter into any transaction whereby he could transfer property as if free from encumbrance within the bailiwick of a sheriff holding such executions.

Yet by reason of some discussion of points of law which I respectfully submit are more or less irrelevant to the business in hand, such seems to have been the result of the judgment appealed from, that it is held possible to so transfer. A solution of the problem of whether or not a bargain for the transfer of non-existent property falls within the Statute of Elizabeth surely has little relation to the real question presented by the facts found herein.

That question is whether or not there can be upheld as against existent executions, an assignment of a lease held by a judgment debtor or his *alter ego*, in the presence of such an array of executions well known to the assignee and in law binding the lease if as found the property of the debtor. For the title of the respondent to the crop as against appellant depends entirely upon the assignment of the lease procured in the son's name.

Such result I submit should not be reached if we pay heed to

the peculiar facts and circumstances in this case and the law relative to the effect of executions which we find in No. 609 of the Alberta Rules of Court, as follows:—

> Subject to the provisions of any statute a writ of execution shall bind the goods of the judgment debtor from the time of delivery thereof for execution to the sheriff of the judicial district within which the goods are situate, but not so as to prejudice the title to such goods acquired by any person in good faith and for valuable consideration, unless such person had, at the time when he acquired his title, notice that such writ had been delivered to the sheriff and remained in his hands unexecuted.

To understand properly the foregoing and what I am about to express hereafter requires a knowledge of the actual transactions which took place between the parties and are involved in the maintenance of the respondent's claim. The judgment debtor was possessed of a homestead free from liability to seizure. The exemption therefrom, however, did not extend to the crops grown thereon, save the limited quantity exempted for seed and 6 months' provisions.

In his insolvent condition he bethought himself of a scheme whereby he might save these crops thus liable from the above mentioned executions. He decided to lease the homestead to his infant son then 17 years of age and made a lease dated March 1, 1915, purporting to be for one year from said date, for the yearly rental of $1. This was drawn upon a printed form which had inserted at the end thereof a typewritten covenant by the lessee with the lessor to cultivate the land in a good and husbandlike manner, and at the proper season seed the same in wheat or other grain as the lessor might consent to, and harvest and thresh the crops in due season at his own expense, and immediately after threshing deliver in the name of the lessor at the nearest elevator a one-half share in kind as the same came from the machine of all wheat and other grain grown upon the said land, which was to be by way of additional rent to that reserved as above. This was followed by a covenant to furnish the lessee with all grain necessary for the seeding. The lease was assigned on May 20, 1915, by the said infant son to the respondent, by an assignment which recited the making of the lease; that by the terms thereof the lessee was entitled to one-half of the crop to be raised on the said lands during the said term; that the said lessee was then indebted to the respondent in the sum of $2,513, which represented a past indebtedness of the party hereto of the first part as a customer and that in order to

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better secure the party of the second part the repayment of the said indebtedness, the said lessee had agreed to execute the assignment.

The instrument proceeds then, in the operative part, to transfer all the interests acquired under the lease, and his said share of the crop, followed by a covenant that he would, on request, execute such further assurance as the respondent might require. That was followed by a proviso that the instrument was only to operate as and by way of collateral and additional security to the said indebtedness, and as soon as the same is fully paid and satisfied should cease and become void and of no further effect. The judgment debtor, though not a party to the instrument, signs as if he were and the signatures are followed by a paragraph which acknowledges this assignment as signified by his signature thereto. This, though clumsily done, no doubt was intended to be, and was, effective only for the purpose of assenting to the assignment by the lessee who was prohibited from assigning without leave.

On April 8, 1915, a memorandum was made which provided that Mr. Gwillim (without stating which of them) agreed to lease 250 acres or more of section 15, tp. 11, r. 21, from Mr. Oliver; Gwillim to furnish the seed and do all the necessary work connected with the seeding and harvesting, Oliver to pay one-third of the threshing bills; Gwillim agreeing to give Oliver one-third of the crop delivered at the elevator. This informal scrap of paper is signed by Wilfred Gwillim and N. W. Oliver in the presence of one Fletcher.

This lease was assigned on May 19, 1915, by the said Wilfred Gwillim to the respondent by an assignment which recited the making of the said memorandum, the terms thereof, and that the said Wilfred Gwillim was then indebted to the respondent in the sum of $2,513, which represented a past indebtedness as a customer, and that in order to secure the respondent the repayment of the said indebtedness he agreed to execute the instrument. By the operative part of the said assignment, in consideration of the said indebtedness, the said Wilfred Gwillim assigned all his rights, titles, estate and interest both legal and equitable in and to the lease and land mentioned and to his share of the crop so to be raised thereon, as aforesaid. The instrument further provided for further assurances such as required and might be necessary in

relation to the premises, but that notwithstanding anything to the contrary was to operate merely as and by way of collateral and additional security to the said indebtedness and as soon as the same was fully paid and satisfied these presents should cease and become void. These assignments of leases were drawn by the solicitor of the bank.

The grain now in question in this issue was grown for the greater part on this last mentioned parcel of land. Some of it was the product of farming the homestead. If the two transactions had been kept throughout entirely separate and independent of each other, different considerations possibly might be applied to the resulting effect upon the validity of part of the respondent's claim.

As I understand the facts, however, the assignments though dated on different days were but the result of one agreement which had been made between the respondent and the judgment debtor whereby they were to finance the operations under the said lease, and they had made advances accordingly. I assume for the present that the indebtedness owing by the lessee was that owing by the father. The first question that arises is what titles could pass to the bank by the last mentioned assignment?

These executions bound the term created by the lease from the landlord Oliver to the infant son of the debtor as his *alter ego*.

Of the notice to the respondent of these executions there is left no manner of doubt, for its agent, who had the business in charge and procured the assignment of that lease, says expressly as follows:—

Q. Then he was in difficulties with other people besides the bank? A. Oh, yes.

Q. For how long had you known he was in that condition? A. Quite a long time, I think, in fact back as far as 1912.

Q. Had you any difficulty with his account in any way, by reason of these other creditors trying to attach it or anything of that kind? A. I don't remember anything of that.

Q. Do you know whether or not they had judgments or executions against him? A. Oh, yes.

Q. And he was in that condition of having a lot of executions outstanding for a year or two before this transaction took place? A. Yes.

Q. So that the trust account was opened for that purpose, so that it could not be seized on executions? A. Yes.

Q. Had the son ever had an account with the bank? A. No.

It seems absurdly comical to try to rest a claim to these crops

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grown upon the land leased from Oliver by reason of an assignment of a term which is itself bound by the executions and through the term so bound entitles the execution creditors to all the fruits derivable from the lease.

I will deal with the lease of the homestead to the son presently so far as its peculiar features and all relative thereto suggest a possibility of differentiating them in favour of respondent.

Meanwhile I wish to follow up the other grounds upon which the respondent's claim as a whole is rested.

The respondent was approached by the father who was notoriously insolvent and owed it from $2,000 to $3,000 (possibly the $2,513 referred to in the assignment though not proven), with several suggestions rejected, and finally with this scheme of a lease to his son of the homestead, and that to the son by Oliver being assigned to respondent and it would make advances to help carry on the farm and get the crops as security.

The respondent assented to the proposal and made advances accordingly before and after the bank's solicitor had prepared the assignments of the said leases and got them executed.

Beck, J., says the father and son signed jointly a note to the bank for $2,513, being the amount then owing by the father to the bank, and that the assignments of leases declared they were given to secure that.

I cannot find that in the evidence which is obscure on the point. Possibly the facts were cleared up by admissions of counsel before the court below in a way we were not favoured with, or more probably he only assumed the fact from the recital, which assumption is not borne out by the evidence.

The respondent's agent in his examination seems to indicate that there was a joint note for the old debt as Beck, J., suggests, but on being shewn the bundle of exhibits failed to identify any such note and pointed to a note for $1,700, dated the very day one of those assignments was given, which destroys the assumption, and hence I must deal with that aspect of the case alternatively.

Assuming first Beck, J.'s, impression correct, then it is to be observed that there is nothing in the assignments of the leases which secures anything beyond that sum, for they each expressly provide that upon the payment of the said sum then the assignment is void. And neither professes that there is anything secured

beyond that sum, or any ulterior purpose to be served by reason of any such assignment.

Yet it is contended that the respondent was in some way secured by said assignment for the advances made by respondent for seed wheat for the Oliver place, and other expenses of operating these farms during that season of 1915. On what does it rest?

Clearly it cannot rest on these instruments, which are expressly confined to the securing of the old indebtedness to the extent of $2,513.

If they could be upheld as against the execution creditors the proper judgment would be to restrict the claim to that sum and that alone.

The son, however, being but the agent or tool of the judgment debtor father in taking the Oliver lease and, as already pointed out, the same being bound by the executions, that part of the crop cannot be held by respondent even for the old indebtedness.

What then can such claim rest upon?

The agent of respondent many times in course of his examinations says he expected he would get the crops to repay the advances first for 1915 and then have a right to apply so much of the balance as needed to pay the old indebtedness.

I rather think it was a mere expectation that he should be enabled to do so by the goodwill of the father and that the assignment of the leases was but a lever, as it were, which would help in some way to secure a future assignment thereof.

The fact that the assignments made no provision therefor, except in relation to the past indebtedness, and yet were followed in September by bills of sale which respectively pretend to have been made pursuant to a mere covenant for further assurance, is most suggestive.

These bills of sale were apparently prepared as early as August but failed of prompt execution for some unexplained reason.

The agent of the respondent in his evidence puts the matter of agreement for and nature of title, thus:—

Q. And you got the son to assign everything to the bank and you considered the son had no further interest in the crop? A. The agreement that we had, as I said before, was that when the crop was harvested the first money received would go to pay the new debt contracted by the father and son; when that was paid any further moneys would first go to pay the old indebtedness to the bank.

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Q. And what would become of the balance? A. The balance they stated they intended to pay on other liabilities.

Q. Whose? A. Gwillim's.

Q. Which Gwillim? A. J. T. C. Gwillim.

Q. Then I am correct in saying that the son had no interest in the crop at all after he had turned these securities over to you? A. Well, I could not say that; he was doing the work and presume he would get certain pay from it.

Q. What I mean is, as far as the crop itself was concerned, you would consider that any balance would go to pay the father's debts? A. That's the agreement upon which I—the bank—advanced them the money; first get that paid up and then the old indebtedness, and on that understanding the bank loaned them the money to put the crop in.

Q. You were asked in Toronto (Q. 96): "So far as you were concerned you were treating the whole proceedings of that account as being properly accountable to the father? Answer, Yes." A. All the proceeds of the crop would certainly go to the trust account of J. T. C. Gwillim, and be disbursed from that account.

Q. The son had no right to sign cheques on that account? A. No.

Q. He was a minor? A. Yes.

Q. Now, these assignments and bills of sale were taken by way of collateral security to the indebtedness, not taken as transfers of the crop to you as to the bank? A. The bill of sale was.

Q. The bills of sale? A. That's the way I understood it.

Q. But you were to account for any surplus to the trust account? A. Yes.

Q. The bill of sale was then not really an actual bill of sale as we understand it, but by way of mortgage? A. Yes, I presume it is. We were not buying the crop.

Q. You have already told us that you had knowledge of the executions that were outstanding at the time? A. Yes.

Why did the business take this most circuitous course? Why did the assignments not provide for it all? Can there be a shadow of doubt that it was because the agent and his solicitors were confronted with two well-known statutory provisions against such agreements?

In the first place the Banking Act by s. 76, (2) (*c*), prohibits that and other like dealings, as follows:—

2. Except as authorized by this Act, the bank shall not, either directly or indirectly,—

(*c*) lend money or make advances upon the security, mortgage or hypothecation of any lands, tenements or immovable property, or of any ships or other vessels, or upon the security of any goods, wares or merchandise.

It is apparently assumed by the judgment appealed from that the crops were on the date of these assignments of leases non-existent. If we would apply common knowledge to at least the wheat crops and probably all, they had by May 20, been growing for a long time and were just as assignable and exigible then as

ever, but being chattels were goods upon which, under the circumstances, the bank could not advance.

And in the next place, there had stood for 20 years an enactment in force in the North West Territories, and in Alberta since its creation, which for good reasons had prohibited any such bargain as might create just such a claim as in question herein.

That enactment is s. 15 of the Bills of Sale Ordinance, as follows:—(See judgment of Fitzpatrick, C.J.).

It would be difficult to use more comprehensive language than in this enactment prohibiting bargaining for a "security upon a growing crop or crop to be grown in the future."

Either the share of the crop was within the express words of the operative part of each assignment of the lease in question or it was not.

If it was within them, clearly there was an express infringement of the very language of the statute for each of the instruments so assigning the said share of crop was on its face intended to be by way of security only and the evidence of respondent's agent puts that beyond all peradventure.

If it was so intended then I incline to think and submit that each of the assignments of the said leases designed to produce such effect was itself, by reason thereof, void, for the whole purpose thereof was to procure that forbidden by the law.

When we find that the bank held a second mortgage on the homestead, and a chattel mortgage on the stock not seized, which together according to the agent's evidence, seemed ample, the whole transactions seem designed in truth only to secure the advances for 1915, and thus falling within both statutory prohibitions and hence void.

And if it can be said that this illegal part of each of the objects of the instruments are severable from the legal, then, at all events so far as they may have the contravention of the statute in view or be intended to give vitality to a contract declared invalid, they must be held null and void.

I fail to see how the parts are severable, for what you cannot do directly you cannot do indirectly.

If there is no such contract, then there is no foundaition for the respondent's claim.

And if, as I have already observed, these crops were growing

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(as in all human probability they were) on the date of each assignment, the executions then in the sheriff's hands bound them.

Doubtless, it was on account of these manifest objections in law to the assignments and that contained therein, that more explicit provision was not made therein and hope was rested on the peculiar provisions by way of future assurances which was inserted in each and a foundation laid for the bills of sale which on their face are alleged to be made pursuant thereto.

The scheme seems to have miscarried for the respective bills of sale relating to each crop or share thereof which was the only other ground upon which the claim has been rested, was one which the respondent's counsel did not seem disposed in argument here to attempt to rest his client's claim upon.

It is difficult to see how he could, for clearly they were each intended to be instruments which in fact were only mortgages and there was no pretence of any compliance with the statute in such case provided relative to the affidavit to be made.

That statute by s. 6, provides as follows:—

6. Every mortgage or conveyance intended to operate as a mortgage of goods and chattels which is not accompanied by an immediate delivery and an actual and continued change of possession of the things mortgaged shall within 30 days from the execution thereof be registered as hereinafter provided together with the affidavit of a witness thereto of the due execution of such a mortgage or conveyance and also with the affidavits of the mortgagee or one of the several mortgagees or the agent of the mortgagee or mortgagees if such agent is aware of all the circumstances connected therewith and is properly authorized by power in writing to take such mortgage in which case a copy of such authority shall be attached thereto (save as is hereafter provided under s. 21 hereof) such last mentioned affidavit stating that the mortgagor therein named is justly and truly indebted to the mortgagee in the sum mentioned in the mortgage, that it was executed in good faith, and for the express purpose of securing the payment of money justly due or accruing due, and not for the purpose of protecting the goods and chattels mentioned therein against the creditors of the mortgagor or of preventing the creditors of such mortgagor from obtaining payment of any claim against him; and every such mortgage or conveyance shall operate or take effect upon, from and after the day and time of the filing thereof.

There was no pretence of its observance. They were not only vitiated thereby, but as being in fact founded upon what was illegal, were doubly so.

As to the contention that the transfers were preferential it seems hardly necessary to dwell upon that when in my view, as already expressed, the executions well known to the agent of the

bank bound everything and prevented any of these several contrivances from having any validity as against the execution creditors now appellants.

Coming to the lease of the homestead from father to son and the question arising peculiar to it, and all implied therein, we find that one-half of that crop belonged by the terms of the lease to the judgment debtor, and there does not appear a tittle of evidence that he ever assigned that to the respondent except by the bills of sale already referred to.

The assignment of the lease by the son to the respondent could not have such effect, and the father's assent to that assignment could not enlarge its operations, but only waive the covenant of the lessee against assignment of the term.

What answer can be made to this I am unable to understand, and hence clearly his half of the crop rightly seized.

All the authorities relied upon cannot and do not help. It is quite clear that a man can assign without impediment, his homestead, absolutely or any part thereof, to a stranger. But, as already stated, the law does not exempt the crops he may grow thereon. And a lease cannot help him out of that difficulty. The lease itself, or rather the term created, is chattel property liable to execution against chattels, and need not touch the legal estate in the land.

Again it would be quite competent for the owner of a homestead to bargain for the sale of a part of his crop without offending against the provisions of s. 15 of the Bills of Sale Ordinance; and hence many of the cases cited and relied upon are maintainable for that reason.

The share of the crop which the son was to retain by the terms of the lease of the homestead would, but for the peculiarities of the case I am about to advert to, have been at his disposal and for valuable consideration could have been assigned to a purchaser. But that is not what was attempted, nor could it be in the case of a bank by reason of its incapacity to so bargain.

The son owed the bank nothing until he signed as surety for his father cotemporaneously with the assignments of the leases, and how that could be properly termed a past indebtedness so far as he was concerned, puzzles one.

The truth is the whole scheme was framed by the father to

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defeat his creditors and had created at the moment of putting it in force a term which was properly seizable by sheriff under executions. It seems idle to say there was no present property to be affected, for not only did the term exist when the respondent took an assignment of it, but also the growing crops.

It is not only the Statute of Elizabeth, but also the common law long before it, that forbade the fraudulent transfer of that which was exigible.

And with great respect it seems to me that there is a misapprehension of the scope of the case of *Blakely* v. *Gould*, 24 A.R. (Ont.) 153, which was the assignment of a non-exigible contract that was in question, in assuming that it touches this case where at the very inception of the transaction in question there was the creation of a term which was exigible as were also the growing crops when the respondent knowing the facts and purpose thereof accepted the assignment and still more when it accepted the bills of sale.

It is from these points of view that the purpose of the debtor must be held to have a bearing. And that purpose formed in his own mind until something was done in pursuance of it, could injure no one, but can be looked at and considered when effect is actively given to it in order to affect and transfer that which is exigible and defeat the executions binding same.

However all that may be, the many other grounds already fully stated render it unnecessary to pursue the subject.

I think if the advance, about $500, for seed grain made by the respondent could have been, and I imagine it might have been, severed, if at the time and possibly at the trial attention had been given the matter, it ought to have been maintained unless possibly for the offence against the Banking Act.

The respondents have chosen otherwise. I think the appeal should be allowed with costs throughout.

Duff, J.

DUFF, J. (dissenting):—I am of opinion that this appeal should be dismissed with costs.

Anglin, J.

ANGLIN, J.:—I am, with respect, of the opinion that this appeal should be allowed.

The findings of the learned trial judge, that the lease from J. T. C. Gwillim, the father and execution debtor, to Wilfred Gwillim, his minor son, was made with the object of defeating or

hindering the creditors of the former; that the lease of the McClure farm was taken by Wilfred for his father; that Wilfred had no real beneficial interest in either property; and that, at all events as against the father's creditors, the lease to the son of the homestead must be looked upon as non-existent and the father must be deemed the lessee of the McClure property, appear to be so fully warranted by the evidence that they cannot be disturbed. The father's insolvency and the bank's knowledge of it, likewise found, are incontrovertible. However, I accept the finding made by the Appellate Division, although in reversal of that of the trial judge, that there was no intent on the part of the bank manager to defeat, hinder or delay the creditors of J. T. C. Gwillim, and I deal with the case on the assumption that the honest purpose of the bank was by advancing money to J. T. C. Gwillim to enable him to grow and harvest a crop, which he probably otherwise would have been unable to do, from the proceeds of which all parties interested—the bank, Gwillim himself, and his other creditors—might benefit. I am fully satisfied, however, that the bank manager knew that Wilfred was a mere "stool pigeon" for his father, that the latter was the sole beneficial owner, and that the bank's real transaction was with him as such and with him alone.

For a past indebtedness to it of $2,513 (a debt of his father which Wilfred purported to assume) the Royal Bank on May 19, 1915, took as security assignments from Wilfred Gwillim of the two leases above mentioned and of the assignor's share in the crops to be grown on the leased premises. These assignments expressly provide that they shall operate only as collateral security for the existing indebtedness and that the assignor shall retain possession and deliver his share of the crops, when grown and harvested, to the nearest elevator in the name of the bank. They also contain covenants for further assurance. Strangely enough, however, they make no reference to further advances. Yet it seems reasonably clear that they were intended to secure further advances to be made by the bank to enable J. T. C. Gwillim to produce and harvest the crops. The evidence of the bank manager puts it beyond doubt that he so regarded the assignments and also that it was only upon the crops growing or to be grown that substantial security was to be obtained thereby. The leases them-

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selves, apart from the crops, had no substantial value, as the respondent in its factum very frankly admits.

Whether because he doubted the efficacy of the bank's security on the crops, or because he wished to provide expressly that they should stand as security for the additional advances made after the assignments of the leases were taken, the bank manager, on the 15th of September, after the crops had been severed, took from Wilfred Gwillim and J. T. C. Gwillim a bill of sale of the entire crop grown on the Gwillim homestead and from Wilfred Gwillim a bill of sale of his share of the crop grown on the McClure property, the consideration in each document being stated to be $3,262 then due and owing to the bank.

These instruments contain statements that they are given pursuant to the covenants for further assurance in the assignments of the leases and, although they secure sums of money not mentioned in those assignments, I have no doubt that the fact is that they were so given and were intended to make good, as far as possible, the agreement made in May that the bank should have security for its past indebtedness and for the future advances then contemplated on the crops to be grown on the two farms. Otherwise as bills of sale given to secure only a past indebtedness their invalidity on the ground of fraudulent preference would seem incontrovertible. There cannot be the slightest room for doubt that the substantial, if not the sole, purpose of the entire transaction was in the first instance to give the bank security on the crops to be grown and afterwards, if possible, to perfect that security.

By s. 15 of the Bills of Sale Ordinance, c. 43 of the Con. Ord., N.W.T., it is enacted that:—(See judgment of Fitzpatrick, C.J.).

That the assignments of the leases to the bank were "intended to operate and have effect as a security" and not otherwise is incontestible. They assume to "comprise" and "bind" "a crop to be grown in future in whole or in part." That was their only real purpose. They were admittedly not given "as a security for the price . . . of seed grain." They were, in my opinion, "assignments" within s. 15, and were invalid in so far as they "applied to or affected any growing crop or crop to be grown." Since the subsequent bills of sale expressly purport to have been given in pursuance of the agreement for security on the crops to be grown, in partial fulfilment of which the assignments of leases

had been taken, they were tainted with the illegality of the agreement on which they were founded; or, if that agreement, because of its invalidity, should be regarded as non-existent, they were void, as against the creditors of J. T. C. Gwillim, as securities given for past indebtedness which operated as a fraudulent preference.

For reasons which it deemed sufficient the legislature has apparently sought to protect the farmers of Alberta against their own improvidence or the rapacity of some money-lenders by preventing the tying up as security of growing or future crops, thus, as far as possible, insuring to the man upon the land the means of subsistence. The policy which underlies this legislation is similar to that which inspired the exemption of homesteads. With its wisdom we are not concerned. That the legislature appreciated its scope and drastic character is apparent from the express exception made in favour of securities taken for the price of seed grain.

In some cases, s. 15 may operate to the serious disadvantage of the honest and even frugal farmer who has met with misfortune by preventing him from availing himself of the only security he can offer to obtain advances that might enable him to put himself upon his feet again. This may be such a case. But if, influenced by these considerations, or because it appears unassailable on moral grounds, or even positively meritorious, we should permit a transaction such as that before us to stand, s. 15 of the Bills of Sale Ordinance would be rendered ineffectual. Care must be taken that legislation is not frittered away by judicial interpretation in "hard cases." That the courts may not do without usurping the province of the legislature and ignoring or brushing aside the wholesome limitation upon their own function—*jus dicere, non jus dare*.

I am, for these reasons, of the opinion that at the time of its seizure by the sheriff the grain in question was as against the Royal Bank the property of J. T. C. Gwillim.

I also incline to think that the assignments of lease were void as against those creditors of J. T. C. Gwillim whose executions were in the sheriff's hands when they were made. The bank manager admits that he had knowledge of these executions when he took the assignments. Indeed he tells us that it was arranged at that time that the account through which future advances were to be made to aid in producing and harvesting the crop should stand in the name of "J. T. C. Gwillim in trust" in order to pre-

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vent its being attached by those creditors. The modifications of s. 16 of the Statute of Frauds made by Alberta Rule of Court No. 609, if authorized by s. 24 of c. 3 of the Alberta Statutes of 1907, does not help the respondent. The rule reads:—

Subject to the provisions of any statute a writ of execution shall bind the goods of the judgment debtor from the time of delivery thereof for execution to the sheriff of the judicial district within which the goods are situate, but not so as to prejudice the title to such goods acquired by any person in good faith and for valuable consideration, unless such person had, at the time when he acquired his title, notice that such writ had been delivered to the sheriff and remained in his hands unexecuted.

So far as the right of the bank to the crops in question depends upon the assignments of leases it would therefore appear to be subject to the executions which were in the sheriff's hands when they were made. Any rights under the bills of sale subsequently taken cannot be higher. I rest my judgment, however, on the applicability of s. 15 of the Bills of Sale Ordinance.

Appeal allowed in part.

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Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., Riddell, Lennox and Rose, JJ. December 21, 1917.

EXPROPRIATION (§ III B—115)—MUNICIPAL ACT—ARBITRATION TO ONLY FIX AMOUNT OF COMPENSATION FOR LANDS TAKEN—MUNICIPALITY MAY PROCEED OR WITHDRAW.

An arbitration under the provisions of the Municipal Act (R.S.O. 1914 c. 192) in regard to compensation for land expropriated is had only to fix the amount of the compensation after which, with a knowledge of the price that must be paid if the land be taken, the municipality may proceed or withdraw in the manner and under the circumstances set out in the Act; an award is binding and conclusive as to the price to be paid if the land is finally taken and as to that only.

Statement.

APPEAL by the City of Toronto from a judgment of Masten, J., 40 O.L.R. 550, directing the enforcement of an award. Reversed.

Irving S. Fairty and *C. M. Colquhoun*, for appellants.

I. F. Hellmuth, K.C., and *J. A. Paterson*, K.C., for the trustees, respondents.

Meredith, C.J.C.P.

MEREDITH, C.J.C.P.:—This case discovers some extraordinary things, and affords to those who seek it one answer at least to the oft-asked question: why do ratepayers of municipalities get so little of that which is good for the great taxes they are obliged to pay?

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Some time, before the war, some one devised an expensive and extravagant scheme mainly for the "improvement" of a street in a somewhat central part of the city of Toronto. Expensive because it meant the widening of the street for the distance of over a mile, with the consequent demolition of buildings of all kinds; and extravagant as it involved an expenditure of a million and a quarter dollars or more.

Early in the year 1914, the municipal council of the city adopted the scheme and took the initial steps for the purpose of carrying it into effect as a "local improvement."

But no work was ever done upon the ground, of any sort, in furtherance of it: no land-owner was in any manner interfered with in the possession of his property: in that respect all remained, and remains until this day, just as if the scheme had never been devised. The property of a few of the land-owners was purchased; and in regard to that of the respondents, which is altogether church property, the usual arbitration proceedings were had, in accordance with the provisions of the Municipal Act and the Municipal Arbitrations Act, for determining by arbitration "the amount of compensation," and an award was made fixing the compensation for this property at $57,500; but, as I have said, nothing further was done, nor was the ownership or possession of the property in any way interfered with; on the contrary, all things relating to possession went on there as usual, and just as if the street-widening scheme had never been even dreamed of.

In the beginning, the respondents were unwilling to part with their property; and naturally so, for it had long been their place of worship, and doubtless that of the forefathers of some of them for more than one generation. And, when arbitration proceedings were taken to ascertain the real value to them of their property, they, naturally perhaps, put it at what may fairly be termed a very high price, more than double that which the Official Arbitrator found to be its real money value to them.

The scheme fell to the ground, and has been abandoned. The lands are not needed; the land-owners who professed to be so loath to part with them at any price, can now retain them with all their valued associations: but, strange to relate, these respondents now will not; they insist upon the city corporation taking upon their hands something even more difficult to manage than

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the proverbial white elephant, this Presbyterian church and church property, including the organ, and at a price less than one-half of that which they so stoutly throughout have maintained, and have testified, that it is worth; leaving to the unfortunate ratepayers the payment of the loss, which must fall upon some one if this appeal fails, with nothing more gained for their money than, possibly, a knowledge where some of it this time has gone without any good—to them—results.

If, in such circumstances, a municipality can, in a summary proceeding or indeed in any kind of legal proceedings, be compelled to take and pay for such lands, the law can hardly be deemed to be as it ought to be, but one can hardly believe that such it is; that, as it stood before a very recent amendment* made to meet this case, notwithstanding the failure of the scheme, and notwithstanding the fact that the actual rights of these land-owners in no way have been interfered with, they can all compel the municipality to take and pay for their lands; an intolerable state of affairs; and one which would be anything but creditable to any one, having regard to the provisions of the Municipal Act, R.S.O. 1914, ch. 192, governing the case, which make it as plain as words can that an arbitration is had only to fix the amount of the compensation, after which, with a knowledge of the price that must be paid if the land be taken, the municipality may proceed or withdraw in the manner and under the circumstances set out in the Act.

The whole case is covered by the provisions of the two enactments I have mentioned. Within them must be found authority for anything and everything that was done—otherwise there is no authority.

That which the municipality set out to do was to widen a highway; and their powers in that respect are contained in the highways and bridges sections of the Municipal Act, Part XXI. Their powers to expropriate lands for that purpose are contained in the acquisition of land and compensation sections of the Act, Part XV.; and the method of fixing the compensation to be paid is provided in the arbitrations sections of the Act, Part XVI., and the Municipal Arbitrations Act, R.S.O. 1914, ch. 199.

Section 347 of the Municipal Act provides that if the expropriating by-law "did not authorise or profess to authorise any

* See the Municipal Amendment Act, 1917, 7 Geo. V. ch. 42, secs. 6, 7, 8.

entry on or use to be made of the land before the award, except for the purpose of survey, or if the by-law gave or professed to give such authority, but the arbitrators by their award find that it was not acted upon, the award shall not be binding on the corporation, unless it is adopted by by-law, within three months after the making of the award; and if it is not so adopted, the expropriating by-law shall be deemed to be repealed," and the corporation shall pay costs, and damages, if any.

The appellants rely upon this legislation, and also upon power to rescind their by-laws generally, in support of the position they have assumed throughout, namely: that they are not, and never were, under any legal obligation to take or to pay for the respondents' property.

The respondents contend that that legislation is not applicable to the appellants; that, if it were, the facts of this case do not bring it within the provisions of the section; and that the appellants had no power to repeal their by-laws.

Before considering these questions, it may be well to state some things which must always be borne in mind, in considering them, in order that a right conclusion may be reached:—

The first is, that the appellants have only such powers as are conferred upon them by statute; the second, that there was no contract, legislative or otherwise, between the parties, respecting the sale or purchase of the land: and the third, that the appellants were acting throughout in the public interest only—to give all His Majesty's liege subjects a better highway.

The respondents' contention, that sec. 347 of the Municipal Act is not in any case applicable to the appellants, though pressed at great length, has throughout seemed to me to be quite without any real force. The way it is put is this:—

The appellants, being a "corporation of a city having a population of not less than 100,000," are within the provisions of the Municipal Arbitrations Act, to which the arbitration sections of the Municipal Act are, by sec. 332 of that Act, made subject; and, as sec. 7 of the Municipal Arbitrations Act makes an award, made by the Official Arbitrator mentioned in it, binding and conclusive upon all parties to the reference, unless appealed from—and this award was not—sec. 347 cannot be applicable.

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But such an argument is obviously inconclusive. Until we know in what respect the award is binding and conclusive, it is but wasted words: and, when we know that it is binding and conclusive as to the price to be paid, if the land be taken finally, and as to that only, and that the Official Arbitrator has no power to consider any question but the amount of compensation, it does seem to me to be a pity to waste energy upon such a contention.

The purpose of the Municipal Arbitrations Act was to give to the City of Toronto really, though its identity was concealed under the 100,000 population provision, a more experienced and better arbitrator and arbitration proceedings than those provided for in the Municipal Act; and now it is applicable also to some other municipalities, as well as to all others that may choose to come under its provisions. But, in such a case as this, whosoever the arbitrators may be, their power and their duty is the same: to determine "the amount of the compensation," if not mutually agreed upon: the Municipal Act, sec. 325(2).

Much reliance was put upon the fact that, before the revisers of the statutes, in 1913, got their busy hands upon these two enactments, the provision for making them run together was contained in these words: "This Act shall be read with and as part of the Municipal Act;" now they are: "The provisions of this Part" —that is, the arbitration sections, Part XVI., of the Municipal Act—"shall be subject to the Municipal Arbitrations Act." But wherein is any difference in substance or effect? One may prefer the composition of the revisers, another may not: but is there really anything else in the contention?

And what possible reason can be advanced for including a city of 99,999 inhabitants, and excluding one of 100,000; and of including all municipalities, little or big, who bring themselves within the Act, and excluding all that do not, in regard to the important provisions of the section in question, sec. 347 of the Municipal Act?

The other points run deeper, and yet seem to me to create no great difficulty if the things which I first mentioned are not lost sight of.

Any difficulty there may be, in the first place, is upon the respondents. Where do they find, and shew us, anything in either Act that binds the municipality, in the circumstances of

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this case, to take the land and pay the price? As I have said, there is no contract of any kind to do so: if bound in any way, it must be by something contained in one of the enactments to which I have referred. All that we have been referred to is the provision making the award binding and conclusive; but, as the arbitrator was in no way concerned in this question, had no authority of any kind in respect of it, and did not deal with it, that provision is helpless to them. And all that I can find in any of the enactments upon which an argument in their favour might be hung is that section of the Municipal Act which they so earnestly disown and try to reject—sec. 347. It might be urged that the method of bringing the matter to a conclusion provided for in that section ought to be taken as excluding all others, and, therefore, if the appellants are not within its provisions, they were bound. But that was not the purpose of that legislation; it seems to be rather an enabling than a disabling enactment: and it would be contrary to reason that in a case such as this the municipality should be bound, with all the disastrous consequences, simply because the Official Arbitrator did not state in his award that which is an admitted fact, that the expropriation by-law was not acted upon, or because that by-law "professed" to authorise an entry on the land before award, when in truth no such entry was made or ever intended or ever thought by any one to be intended to be made. It assuredly cannot be that rights involving more than a million dollars were to hang upon such flimsy threads. Can it be otherwise than that this is another provision, in aid of the public interests, leaving untouched the power of the municipality to repeal its own by-laws, in such a case as this, in which nothing whatever has resulted prejudicial to the respondents' rights; but who can, under the award, which is binding and conclusive in that respect, recover from the appellants the costs of the arbitration proceedings? In short, the Legislature has provided in this section that which one Judge termed "an automatic repeal of the by-laws," under certain circumstances, without interfering with the municipality's autonomy in that respect.

I am firmly of opinion that the respondents have failed to point to anything, or to give any good reason for, depriving the appellants of their right to repeal the by-laws in question; and I am firmly of opinion that they had such a right, and, having

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exercised it, there is an end to this matter, except to this extent, that leave to enforce the award might be given as to costs only: but that is unnecessary, as the appellants are and always have been ready and willing to pay the costs.

I am also of opinion that the appellants are within the provisions of sec. 347; and that, by virtue of it, the by-laws in question are repealed. Here again we must not get too near to the grindstone of words. We must look at the substance of things, not the narrow letter. We must try to perceive that which the Legislature intended and to give effect to that intention and take care against depending too much on the meaning of particular words, or a single word, so as to bring about that which no one can think was intended.

It is contended that one of the by-laws in question does "authorise or profess to authorise" an entry on or use of the respondents' land, before the award. But it manifestly does not in words, and the inclination of my mind is to hold that the enactment relates only to an expressed authorisation, the only proper method of giving such authority, and the method always adopted. If, however, the giving of such authority may be implied from other words, and from surrounding circumstances, what is there from which it can be implied in this case? It would not only be against the interests of every one to do so, but would be something like an insane thing. Give a right of entry to or use of this church, where divine services were being carried on regularly just as before; give a right of entry to all the houses and places of business along one side of this central street for a mile in extent? And give it to whom; and for what purpose? Assuredly it should require very plain words giving such a right before finding that it was actually given.

The words relied on are: that the lands are "hereby expropriated and taken;" and that "the same are hereby declared to form part of the said highways;" and the somewhat strained argument is: that, if they are highways, the public have a right to use them; and so, in declaring the lands, intended to be added to the street, part of a highway, the right of entry by the public was authorised. But that is not so; the public are not authorised and have no right to travel upon a highway in course of construction before it is thrown open to them. The only authorisation

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that could be given would be to use the highway for the purposes of highway traffic; and it would be childish to contend that any such right was, or could have been intended to be, given whilst the church covered the ground, and was in use, as I have said, and still is. And, if there were not authorisation, there was no profession of authorisation.

What other words were applicable though no intention to give right of entry or use? The by-law necessarily expressed the purposes of the possible taking; and it might as well be then declared a highway, and perhaps must have been, because no other by-law was to be passed: so what could the declaration mean, in all the circumstances of the case, but this: subject to all the law on the subject, this is a highway; and is to be opened for traffic if, under such law, the by-law be not repealed before it is so opened.

Is it possible to believe that, if the question had been raised by some one riding into the church during divine service, the respondents would have taken the position they take now for the purpose of selling the property; is it possible to believe that they would not rigorously have prosecuted the ruffian and have laughed at any contention that the church was a highway and the man within his legal right in riding through it?

And, on yet another ground, I am of opinion that the application of the respondents for leave to enforce the award, as if a judgment or order of the Court, should have been dismissed.

As I have said, the appellants have such powers only as legislation has conferred; and anything in excess of such powers has no force or effect; therefore, unless they had power to create a highway by a mere declaration, such as that contained in the by-law in question, the declaration can have no such effect as that contended for by the respondents; it could only be treated as declaring that in due course, that is, when everything had been done which the law required to be done before they could make it a highway, it should be a highway; and that is, as I have said, in my opinion, the purpose and effect of the by-law and of all that is said in it.

The only power which a municipality has to widen a highway is that conferred in the highways and bridges sections of the Act —Part XXI.—and the section conferring it is sec. 472, but that

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section is controlled by sec. 475, which makes certain proceedings necessary before a by-law for widening, among other things, may be passed. These things were not done; therefore, the appellants had no power to pass the by-law in question, if it be interpreted as contended for by the respondents.

The "acquisition of land and compensation" sections of the Act—Part XV.—in no way enlarge the powers of a municipality in that respect; they give power to acquire land, but only such land as under the enactment the municipality have power to acquire for purposes authorised by it, and only in the manner authorised by the Act.

Nor does the Local Improvement Act—now a separate enactment, R.S.O. 1914, ch. 193, formerly the local improvements sections of the Municipal Act. Its purpose and effect is merely to put the cost, in certain cases, of work which is otherwise within the power of the municipality, mainly upon the locality most benefited by it. It cannot do away with the requirements of sec. 475 of the Municipal Act. The course is plain and simple; having acquired the right to widen the highway, under secs. 472 and 475, the municipality can, under Part XV., acquire compulsorily any lands needed for the purpose, and, under the local improvements legislation, can make those most benefited pay most.

An answer to this point was made thus: A municipality may profess to do that which it has no power to do, and sec. 347 covers a profession of authorisation as well as a valid authorisation. That is all very true, but what has it to do with the question here involved? Section 347 is dealing only with a valid award, and providing for its ceasing to be binding. If it be of no effect, because the subject dealt with was *ultra vires* of the corporation, as legislation is required to end its effect, it never had any; it never had any, no matter what professions of authorisation may have been made.

And, if all this were not so, what sort of reason can be advanced for any Court of justice refusing to send back the award to the Official Arbitrator so that that which is an unquestionable, and an admitted, fact—that no right of entry or use of the property in question was ever in any kind of manner acted upon—may be set out in the award? What excuse can any one give for depriving

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this religious congregation of the place of worship of its members' forefathers, and for fastening upon the ratepayers of the municipality a white elephant at a cost of over half an hundred thousand dollars, without even giving these respondents the privilege of joining with such ratepayers in such ownership and payment—the respondents being tax-free wherever their place of worship may be? Why not allow the insertion now of that which, if thought of at the time, should have been inserted as a matter of course, the fact being admitted: why not thus put all as they were, saving the religious congregation from the injustice of extracting from the ratepayers of the municipality this large sum of money, and burdening them with a church which they cannot, but the respondents can, carry on, and do that upon the extremely technical ground that that which is a fact and ought to have been set out in the award was not so set out, on some other day than this?

I should have thought the omission left the arbitration and award proceedings incomplete in this respect, and that not only has the arbitrator power, but that it is his duty, yet to dispose of the matter: but, if that be not so, who can doubt that the omission may be now set right in one way or other under the 10th, 11th, and 12th sections of the Arbitration Act, R.S.O. 1914, ch. 65, the enactment under which the respondents are seeking to have the award put in force—sec. 14.

I would allow the appeal, discharge the order appealed against, and dismiss the application for leave to enforce the award.

Riddell, J.

RIDDELL, J.:—This is an appeal by the Corporation of the City of Toronto from the judgment of Mr. Justice Masten (1917), 40 O.L.R. 550. Many points of more or less difficulty are raised; and I attack the problem in what seems to be the logical order.

The facts are set out in sufficient detail (with one exception shortly to be mentioned) in the judgment of the learned Judge appealed from.

The first question is, whether sec. 347 of the Municipal Act, R.S.O. 1914, ch. 192, applies to the City of Toronto. I agree with Mr. Justice Masten's view that it does.

It was strongly urged that, by sec. 332, this and other sections of Part XVI. are made subject to the Municipal Arbitrations Act,

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R.S.O. 1914, ch. 199, that the latter Act is complete in itself, and consequently the application of sec. 347 is excluded from those municipalities which come under ch. 199.

The change in language in the legislation of recent years, it is said, makes this more clear; the former Municipal Arbitrations Act, R.S.O. 1897, ch. 227, sec. 16, had the provision, "This Act shall be read with and as part of the Municipal Act;" but in 1913, by the statute (Municipal Act) of that year, 3 & 4 Geo. V. ch. 43, sec. 332, the language of the present section 332 was employed; so that sec. 347 became explicitly subject to the provisions of the Municipal Arbitrations Act. The whole effect of a provision that Act A shall be subject to Act B is to cause the provisions of Act B to prevail if and when the provisions of the two Acts are inconsistent and irreconcilable; it does not authorise us to reject any provision of Act A if it is reconcilable and consistent with the provisions of Act B.

I find nothing in ch. 199 which is inconsistent with sec. 347 of ch. 192. Chapter 199 is concerned with determining an amount as the equivalent for land taken, etc., not at all with the question whether the land shall be taken or not. Section 7, which makes the award "binding and conclusive upon all parties," refers to the amount as fixed by the arbitrator if anything is to be paid, not to whether the city corporation must necessarily pay at all. I agree with Mr. Justice Masten that sec. 347 may be appealed to by the Corporation of the City of Toronto, holding as I do that sec. 347 is not inconsistent with ch. 199.

The provisions of sec. 347 being applicable, it is necessary to see if a case is made out for their application. That is so only "if the expropriating by-law did not authorise or profess to authorise any entry on or use to be made of the land before the award . . . or if the by-law gave or professed to give such authority, but the arbitrators by their award find that it was not acted upon."

While not without some doubt, I think the by-law, by professing to make this land at once a public highway, professed to authorise its use as such forthwith. In my view, it is wholly immaterial whether the by-law was effective for the purpose; it is enough to see what it purported to do. Then did the arbitrator by his "award find that it was not acted upon?"

In the formal award nothing is said of this. We may, however, read the reasons as part of the award: *Parsons* v. *Township of Eastnor* (1915), 34 O.L.R. 110, 23 D.L.R. 790. From these reasons it sufficiently appears that the city corporation did not use the premises as a highway, but that "the church has been continuing its regular services, the Sunday School has also been carried on as usual, the resolve to move to another site at some time remaining unchanged."

On the argument, it was not contended by the respondents that any use had been made of the premises; it was stated and not denied that no use had been made of them.

There being a specific power given, by legislation undoubtedly within the powers of the Legislature, to decline to pass a by-law adopting the award, and such declination being enacted by valid legislation to effect a repeal of the expropriating by-law, I decline to enter into a question of what the rights would have been at the common law, or what fair dealing calls for on the part of the city corporation. The city corporation must be the judge as to how their powers are to be exercised; so long as they do not exceed their statutory powers, the Court cannot interfere.

I would allow the appeal, but I would give no costs here or below.

Had the non-exercise of the use professed to be authorised by the by-law not appeared in the award (including the reasons), the question would still be open whether the Court would enforce an award in which there was a defect in not setting out, as it should, an undisputed fact material to the award.

LENNOX, J.:—I agree that the appeal should be allowed and that there should be no costs. Lennox, J.

ROSE, J.:—I agree with what has been said by Mr. Justice Riddell, except in one particular, which does not affect the result. Rose, J.

With much deference, I suggest that a by-law which "did not authorise or profess to authorise any entry on or use to be made of the land before the award" means a by-law which did not expressly authorise or profess to authorise such entry or use. Otherwise, as it appears to me, the words quoted are almost meaningless; for sec. 324 enacts that, at any time after the

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passing of a by-law for expropriating land, the corporation, by leave of the Judge and upon payment of the requisite amount into Court, may enter, but that such leave and payment shall not be necessary where the land is being expropriated for or in connection with the opening, widening, altering or diverting a highway: so that, if the expression "authorise any entry" means "so affect the land as that the law will authorise an entry," there is no valid expropriating by-law that does not authorise an entry. Therefore, while agreeing that we may look at the reasons for the award, I think it is unnecessary to look at them: I think this by-law did not authorise any entry on or use of the land, and could be repealed. *Appeal allowed.*

SASK.

C. A.

COLONIAL INVESTMENT & LOAN Co. v. SMYTH.

Saskatchewan Court of Appeal, Haultain, C.J.S., Newlands and Lamont, JJ.A. May 17, 1918.

MORATORIUM (§ I—1)—VOLUNTEERS AND RESERVISTS RELIEF ACT—DISCHARGED VOLUNTEER—APPLICATION.

S. 3 of the Volunteers and Reservists Relief Act (Sask. stats. 1916, c. 7), continues the protection afforded by the Act, until 6 months after the conclusion of the war; this protection applies to all who have once joined the Canadian forces as volunteers although subsequently discharged. [See annotation, 22 D.L.R. 865.]

Statement.

APPEAL from a decision of Elwood, J.A., that the provisions of the Volunteers and Reservists Relief Act did not apply to one who had joined the overseas forces but who had subsequently been discharged. Reversed.

J. A. Allan, K.C., for appellant; *F. W. Turnbull*, for respondent.

Haultain, C.J.S.

HAULTAIN, C.J.S.:—I concur in result.

Newlands, J.A.

NEWLANDS, J.A.:—The defendant joined as a volunteer the forces raised by the Government of Canada on account of the war now existing, on February 4, 1916, and was discharged from such forces on April 11, 1917. On October 26, 1917, a writ was issued by plaintiffs and served on defendant for the foreclosure of a certain mortgage given by the defendant to plaintiffs. On a motion to set aside the writ of summons and the service thereof, the local master held that the issue and service of the writ were contrary to the provisions of the Volunteers and Reservists Relief Act, Stats. 1916, Sask., c. 7, and set the same aside. From this decision the plaintiffs appealed to a judge in chambers and he

allowed the appeal. From this decision defendant appealed to this court.

In a preamble to the above-mentioned Act, it is stated that:—

It is expedient to provide for the protection of the property and interests of persons who have joined as volunteers the forces raised by the Government of Canada for the defence and security of Canada

and in s. 2 it says:—

2. This Act is passed only for the protection of the property and interests held *bona fide* in their own right by persons who have joined or who may at any time hereafter join as volunteers the forces raised by the Government of Canada on account of the war now existing . . . and its provisions shall apply to such persons exclusively.

S. 3 provides that:—

Notwithstanding any provision in any . . . mortgage . . . made by a volunteer . . . either before or after the date when this Act comes into force, no action . . . for cancellation, sale or foreclosure . . . shall be had or taken during the continuance of the present war or until the expiration of six months after the conclusion thereof.

At the time the action was brought the defendant had ceased to be a volunteer. Does the Act, therefore, apply to him? I think both the preamble and s. 2 shew that it does. The Act is for the protection of the property of persons who join the forces as volunteers; the defendant did that.

S. 3 refers to him only as a "volunteer." That, I think, must be given the interpretation contained in the preamble and s. 2: "A person who has joined the forces as a volunteer." Having once joined these forces, he became a volunteer and was entitled to the protection of the Act, and that protection was to continue during the present war and until the expiration of 6 months after the conclusion thereof. This time has not yet arrived.

I think, therefore, the decision of the local master was right.

The respondent asks that the writ be held good as to the claim for possession under s. 7 of the Act. This section, in my opinion, only applies to possession taken under the Land Titles Act, and not to an action at law.

He further asks that the court dispense with the provisions of the Act under s. 16 thereof.

I do not think that application can be made to this court. The application is to be made to a judge, who may "permit any act to be done." The permission should therefore be got before the act is done, and, as the judge is given an absolute discretion by s. 17, it is one that a court of appeal could not interfere with.

The appeal should be allowed with costs.

SASK.

C. A.

COLONIAL INVESTMENT & LOAN CO. v. SMYTH.

Lamont, J.A.

LAMONT, J.A. (dissenting):—The defendant was appointed commanding officer of the 209th Battalion. He took the battalion over to England, where it was broken up. He then went over to France for 2 weeks, returned home, and was discharged. After his discharge, the plaintiff commenced this action against him, claiming payment of a mortgage. On being served with the writ, the defendant moved to set it aside as being contrary to the provisions of the above mentioned Act. The question is: Is a person who enlisted, but who was subsequently discharged, protected from the obligation of paying his mortgage debt until 6 months after the conclusion of the war?

I agree with my brother Elwood that he is not. S. 3 of the Act reads as follows:—

> Notwithstanding any provision in any . . . mortgage . . . made by a volunteer . . . either before or after the date when this Act comes into force, no action . . . for cancellation, sale or foreclosure . . . shall be had or taken during the continuance of the present war or until the expiration of six months after the conclusion thereof.

In my opinion, the clause "any mortgage made by a volunteer" is capable of two interpretations. One is, that it means a mortgage made by one who was a volunteer at the time the mortgage was made; the other is, that it means a mortgage made by one who is a volunteer at the time the action is begun.

The latter, in my opinion, is the true meaning. The section affords protection to actual volunteers, and this is in no way affected by s. 2 or the preamble to the Act. It is a matter of common knowledge that hundreds who enlisted were rejected after a few weeks' service, on the ground that they were physically unfit, and were discharged. If the contention on behalf of the defendant prevailed, all such would be exempt from paying their honest debts until after the close of the war. I cannot think that such ever was the intention of the legislature. Since this action was begun, the legislature has made legislative provision for such cases.

The appeal in my opinion should be dismissed with costs.

Appeal allowed.

NOVA SCOTIA DREDGING Co. v. MUSGRAVE & Co.

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Nova Scotia Supreme Court, Russell, Longley and Drysdale, JJ., Ritchie, E.J. and Chisholm, J. March 12, 1918.

PRINCIPAL AND AGENT (§ II A—12)—UNDISCLOSED PRINCIPAL—JUDGMENT AGAINST—SETTING ASIDE.

A judgment against an undisclosed principal will be set aside where there is no evidence connecting him with the contract.

Statement.

APPEAL by defendant Johnson from a judgment of Harris, J., in an action on an agreement in writing, made January 3, 1917, between plaintiff company and the defendant Musgrave & Co. for the hire of a dredge and scow for wrecking purposes. The action was against the defendant Musgrave & Co. as agents acting for and on behalf of an undisclosed principal. Plaintiff claimed against the defendant Johnson as such principal and in the alternative against the defendant Musgrave & Co. Reversed.

H. Mellish, K.C., for appellant; *L. A. Lovett*, K.C., for respondent.

Russell, J.

RUSSELL, J.:—The "Dayolite," a tank steamer belonging to the Standard Oil Co., and worth about $250,000, was aground at Port Hawkesbury on or about December 17, 1916, and Shatford, the agent of the Imperial Oil Co., which is a subsidiary company to the Standard Oil Co., had been urged by the latter to take steps to get the steamer afloat. He had endeavoured to procure a contract with various parties to do the work but nothing definite was concluded. His wife's uncle, an official of the Dominion government, had had considerable experience in such business, and at Shatford's request visited the scene of the wreck in order to report on the situation. In the result, a contract was made by Shatford's company with "Musgrave & Co., Agents" (that was the firm name of Musgrave, who was doing business through his wife), the understanding and intention being that Johnson should superintend the work. The arrangement between Johnson and Musgrave was that the former should have two-thirds of the net profits, according to Musgrave's testimony, three-fourths according to Johnson's. The plaintiffs hired a dredge to Musgrave, for the rent of which this action is brought. The agreement as to the dredge is in writing, signed by "Musgrave & Company, Agents" as the contractors, but Johnson is joined in the action as an undisclosed principal against whom relief is sought in the alternative, and the learned trial judge has found that Johnson was the real principal,

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Musgrave's name being merely used as a cover. No reasons are given for this finding and all the direct evidence is opposed to it. The trial judge was, of course, at liberty to disbelieve all the witnesses who testified that the facts were as they appear in the written documents, but it would still be necessary that there should be some affirmative evidence before there could properly be a finding that Johnson was liable as an undisclosed principal.

The finding, if it can be justified at all, must depend on circumstantial evidence, but all the circumstantial evidence in the case seems to me to be perfectly consistent with the theory that Johnson, being a government official, did not wish to enter into competition with influential capitalists with whom it would be very natural for a government official to desire to be on friendly terms, that he was unwilling for this reason to be a contractor with the Standard Oil Co., that he was nevertheless willing and desirous of exerting his skill in the effort to float the steamer, that Musgrave & Co. were anxious to secure his services and willing to give him the lion's share of the profits as fair wages for his skill and experience, that Shatford was willing to give the contract to Musgrave & Co. as principals, all the more because of the knowledge that they would employ his relative on such favourable terms and because of his confidence in Captain Johnson's practical knowledge of the business to be undertaken.

The only persons who can positively know what were the actual relations between the parties are Musgrave and Johnson themselves, and both of them swear distinctly that Musgrave was the principal and Johnson the agent of Musgrave. The first important piece of evidence in the case presents Musgrave in the position of a principal. When Billman, the president of the plaintiff company, and Johnson, the defendant, at Mulgrave, drew up a memorandum of the contract for the hiring of the dredge, Musgrave revised it and made a number of pencil alterations. There is no evidence that these were subsequently submitted to Johnson's approval, but even if they had been I do not see that it would militate against the evidence of both of them that Johnson was employed by Musgrave. The latter would naturally wish that the arrangements should be satisfactory to both of those who were so vitally interested in the success of the undertaking. The only piece of written evidence in the case, apart from the agree-

ments, is a telegram of December 27, 1916, from Musgrave, who was in Meteghan, in connection with some wrecking operations in that place, to Captain Johnson at Halifax, authorising him "to hire tugs and make arrangements for all the gear required for floating the ship." If Johnson were the real principal in the business he would not be taking his directions and receiving authority from Musgrave. He would not need such authority and it is too much to suppose that such a telegram was sent for the purpose of disguising the actual relations between the parties. There could have been no thought at that time that any circumstances were likely to arise in which the publication of such a message would be useful.

The following colloquy took place between the trial judge and the defendant Johnson:—

THE COURT:—Who was it (the contract) with, you or Musgrave? A. Musgrave. Q. I suppose it is a fact that you were the real contractor? A. I was not the contractor and we never mentioned that at all. Q. It is rather unusual for a man doing the work to get three-quarters per cent., and the other man only one-quarter? A. I never saw the contract. Q. Is not that the real thing that had taken place; you did not want to do it yourself because you were a government employee, and I suppose Musgrave was really called in as a cover; is not that the real thing? A. No; Musgrave was trying to make as much as he could, the same as I was. I had nothing to do with the making of the contract and I never saw it. Musgrave's idea, as he told me, was to re-let it again.

The evidence of Shatford shews that he made several attempts to procure a satisfactory contract with other persons before applying to Capt. Johnson. It is as follows:—

Mr. Mellish:—Q. You had an offer from Brookfield which you refused? A. Yes, I then communicated with Brister & Sons. This was before I sent Johnson down. Brister said he could not make an offer but he would go down and ascertain the position of the ship and find out what was necessary. Beazley Bros. also called up and wanted to know if the matter was open and I said yes and I would like them to go down and see the wreck and make an offer for taking her off. They sent a man down. Then it came to me that it would be a good idea for me to get an independent report and I telegraphed and asked permission and I engaged the most practical man I knew of, and that was Capt. Johnson. He made his report. About this time Brister returned and I was after them for an offer. I did not get it for a couple of days. I communicated with Brookfield again and he said he would send another man down. He sent that man down and in the meantime he would not make an offer until he got a second report. I also asked Beazley Bros. for an offer. They said they could not do the work alone. The job was rather too heavy for them, but they had associated themselves with Brister and Capt. Wells, who owned a dredge, and they were combining to make us an offer. A day or

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two later I got an offer from Brister at $75,000. Brookfield's man also returned and he reported that the job was heavy and he would not undertake it at this time of year. It was midwinter. Q. And then you entered into this contract? A. I then looked round to see if I could not do better than $75,000. Our New York people were urging me all the time to make some effort to get the vessel off.

The judge was not satisfied with the evidence of this witness and the following conversation occurred:—

THE COURT:—Shatford, I am not quite satisfied about this contract. Who went first to Musgrave about it? A. Well, I am in doubt about that. I have been asking myself that question to-day as to whether Musgrave came to me or whether I went to Musgrave. It is not clear to me; I was negotiating with so many people about that time and being urged by my people that I don't know how I at first came to do business with Musgrave & Co. Q. Capt. Johnson is the man you wanted to do the job? A. Yes. Q. Did Johnson tell you he could not take the contract as he was a government employee? A. No. I don't think he put it that way, but I think I understood that he did not want to make a contract. Q. And then either you or he suggested calling in Musgrave? A. Oh, he came to me and said Musgrave would do the work or Musgrave spoke to me about it, or—it is not quite clear to me how it came about but I was satisfied when Musgrave and Johnson became identified together. Q. But Johnson was really the man you wanted to do the work? A. Yes, he was the man I wanted to see engaged in doing the work. Q. And you would have made a contract with him if he had been open to make it; Musgrave is not the man you would have called in to do this job; you would have got Brister or Brookfield or some other man, it was more in their line. I mean they are the men who are known to be doing this sort of work; they have appliances for it? A. Yes, but I had confidence in Musgrave's energy. Q. I am not asking you that; Johnson was the man you wanted? A. I wanted Johnson to superintend the work.

All of this seems to me to be consistent with the evidence of both Musgrave and Johnson that the real contractor was Musgrave and that Johnson was employed by him.

Whether judgment can be given against "Musgrave & Company, Agents" is not a simple question. The case was dismissed as against that defendant and there is no appeal from the decision. The interests of the two defendants were adverse because there had to be an election by the plaintiff. Both defended by the same solicitor but they were represented by different counsel at the trial. Both defended on the ground that there was nothing due to the plaintiffs from either, but this defence has been abandoned and the result is that "Musgrave & Company, Agents" should be held liable to the plaintiffs.

The question is whether judgment can be given against them without their having been heard on the argument. They did not,

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of course, appeal because they were satisfied with the judgment. But it is suggested that they must be held to have known that the court on the hearing of the appeal would be obliged to give the judgment that should have been given in the court below. As I understand the law, it was not open to them, having signed a contract as principal to offer evidence that they were not liable although it was open to the plaintiff to tender evidence to bring in an undisclosed principal, the latter being no contradiction of the writing, as the former would be. *Higgins* v. *Senior*, 8 M. & W. 834, 151 E.R. 1278, and *Trueman* v. *Loder*, 11 Ad. & E. 589, 113 E.R. 539.

I understood Mellish to be willing that Musgrave & Co. should be regarded as parties before the court on the appeal. On that understanding the rule will be that the appeal be allowed and judgment against Musgrave & Co. for the amount claimed, less the $50 paid, with costs of the trial, the defendant Johnson to have the costs of the appeal against the plaintiff and costs of the trial against Musgrave & Co. under the cases cited in the decision of the trial judge.

If that understanding does not hold, the only thing this court can now do is to allow the appeal with costs, but I think the court should lend a willing ear to an application by the plaintiffs under O. 57, r. 3, to extend the time for appealing from the decision dismissing the claim against Musgrave & Co.

Drysdale, J.

DRYSDALE, J.:—This was a contract between the plaintiff company and Musgrave & Co. The charge is, and the judgment below is, that Johnson is either a partner in the contract or an undisclosed principal. The trial judge found that the defendant Johnson was either a principal contractor or an undisclosed principal. The matter arises apparently in this way, that Johnson, who has been found a principal, was either a principal in the contract or a partner with the contractor. There is not much room for doubt that the contract made between the Standard Oil Co. and Musgrave & Co. was a straight contract for a certain amount of money to float a ship. Johnson's liability depends entirely upon whether he was a partner or a silent partner with Musgrave & Co. One is naturally suspicious that Johnson might have been a partner or interested in the contract. The trial judge apparently took for granted that Johnson was a silent partner or a contractee with Musgrave & Co.

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After a careful reading of the book of the evidence I cannot find any evidence that Johnson was either a partner with Musgrave & Co. or a contractee. I think the plaintiff failed to establish any connection between the Standard Oil Co. and Johnson except as this might involve a dealing between Johnson and Musgrave & Co. Certainly this required evidence of some sort. Whilst it was suspicious, there is an absolute negation of any relation between Johnson and Musgrave & Co. except what is sworn to by the two principals, namely, Musgrave and Johnson. I observe that the trial judge took for granted that the defendant Johnson was part and parcel of the Musgrave contract. I cannot assume this without evidence. Nearly everything in the case is in writing, and if Musgrave's contract with the Standard Oil Co. shewed me any opportunity to say that Johnson was a partner with him I would hesitate; but, to my mind, the evidence is all the other way. I would reverse the findings of the trial judge and say that you cannot have a judgment against an undisclosed principal without some evidence in favour of or connecting him with the contract.

It was observed that the trial judge had given judgment in favour of Musgrave & Co. It is quite open to argument that Musgrave & Co. is liable instead of Johnson, but Musgrave & Co. is not before the court.

I would say that plaintiffs' chances against Musgrave & Co. will all depend upon an application to extend the time for appeal from the judge's dismissal of Musgrave & Co.

Ritchie, E. J.

RITCHIE, E.J.:—The Standard Oil Co. are the owners of the tank steamer "Dayolite." She went ashore near Port Hawkesbury. An agreement in writing was entered into between the Standard Oil Co. and Musgrave & Co., whereby it was among other things provided that the Standard Oil Co. were to pay $42,000 to Musgrave & Co. for the work of floating the steamer and delivering her in Halifax.

The plaintiffs bring their action against Musgrave & Co. and Peter G. Johnson to recover for the hire of a dredge to be used in getting the "Dayolite" afloat. As to this, there was a written agreement between the plaintiff company and Musgrave & Co.

The case was tried before Harris, J., without a jury. The result of the trial was that it was held that Musgrave & Co. were

not liable and that Johnson was. The sole question argued on the appeal, which was taken by Johnson, was as to whether or not Johnson was the undisclosed principal of Musgrave & Co., and this is the only question the court is asked to deal with.

The trial judge has made the following findings:—

1. That the defendant Johnson was the real contractor with the Standard Oil Co. 2. That the name of Musgrave & Co. was used simply as a cover as Johnson being a government employee and for other reasons did not wish to make the contract in his own name. 3. The defendant Johnson was the real contractor with the plaintiff company for the use of the dredge.

There were other findings which were not made the subject of attack.

It is open to the plaintiffs, if they are so advised, to move to extend the time in which to appeal against the judgment in favour of Musgrave & Co.

I approach the consideration of the findings with respect and a desire to uphold them if I can properly do so, but my duty is not to shrink from overruling them if on full consideration I come to the conclusion that they are wrong. I am unable to support the findings because I think they do not find support in the evidence. The uncontradicted evidence in my opinion is the other way. In the first place, I go to the contract which is ex. F. 3; it is on its face a contract with Musgrave & Co. as principals without any mention of Johnson. *Primâ facie* it correctly states the contracting parties; of course it may be that it is a mere cover and that Johnson was the real party but before I can so hold I must have evidence, something more than mere suspicion. I turn next to the preliminary memo. of agreement which is ex. F. 1, which is also between the plaintiff company and Musgrave & Co. Billman is the president of the plaintiff company; he was first approached by Musgrave in regard to obtaining the services of the tug, and he told him that Johnson would meet him at Mulgrave. The meeting took place and F. 1 was drawn up but not executed. The next day Musgrave made alterations in F.1 and executed it. The draft had apparently satisfied Johnson but was revised by Musgrave. In usual course I think the agent does not do this if the principal is on the spot. I turn to the telegram which is ex. F. 4. and I find Musgrave authorising Johnson "to hire tugs and make arrangements for all gear required for floating ship 'Dayolite.'" If the findings are right we have the unique position of the agent giving authority to the principal.

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Ritchie, E. J.

We have not the advantage of knowing the reasons upon which the judge based his findings, and, therefore, do not know what his view was in regard to this telegram. It is, of course, possible that it was written for the purpose of being read in court if Johnson was ever sued, that it was part of the scheme to successfully use the name of Musgrave & Co. as a cover; but I cannot adopt any such view without clear evidence and there is no evidence of any kind to support it. Again the telegram, which is ex. F.5., is not the kind of telegram that an agent would send to his principal; it gives instructions and calls upon Johnson for "full particulars" as to why he has not taken a different course. In one sense, Johnson was the real man in the transaction, that is to say, he was the man who did the practical work; but that does not make him a principal.

In the course of the trial, the judge expressed the view that it was unusual for a man doing the work to get three-quarters per cent. and the other man only one-quarter, but this all depends upon the facts of the particular case. If I have a contract to do a certain piece of work and decide not to do it myself but get another man to do it, in ordinary course I think that man would receive more money than I would.

I refrain from occupying space with quotations from the evidence of Musgrave, Shatford and Johnson; it is sufficient to say that I cannot uphold the findings unless I disbelieve the evidence of these three witnesses. Of course, it is possible that these three men have committed perjury, but I see nothing in this case which would justify me in coming to that conclusion. I quite understand that Shatford wanted Johnson to do the work; that Johnson could not take a contract and that it may be that the fact that Shatford knew that Musgrave intended to employ Johnson to do the work was the reason he made the contract with Musgrave, but I cannot see that this is any reason why I should disbelieve the evidence that he did make the contract with Musgrave.

In my opinion, the appeal of Johnson should be allowed and as against him the action should be dismissed with costs.

Chisholm, J.

CHISHOLM, J.:—I concur in the opinion of Drysdale, J.

Appeal allowed.

QUE.

S. C.

SWIFT CANADIAN Co., Ltd. v. OUIMET.

Quebec Superior Court, Weir, J. May 30, 1917.

BANKS (§ IV A—60)—CHEQUE—DELEGATED AUTHORITY TO SIGN—DUTY OF BANK.

A cheque signed by delegated authority is notice to the bank that the person signing only has a limited authority to sign and the bank is bound to enquire as to the extent of such authority.

Statement.

ACTION to recover the amount of cheques improperly paid.

Weir, J.

WEIR, J.:—Whereas it appears from the evidence and proceedings of record that the said three cheques were endorsed and cashed by the said J. T. Doucher at the defendant in sub-warranty's branch offices at Coteau Station and at Valleyfield; that said Doucher was, at the time, foreman in charge of the plaintiff's ice warehouse at Coteau Station, and received the ice of plaintiff to be stored therein and delivered out the ice to the plaintiff's customers upon orders received from the head office in Chicago, and was also in charge of the men employed at Coteau Station in so receiving, storing and delivering the said ice to plaintiff's customers, one of whom was the principal defendant; that he was not authorised by the plaintiff to receive payments on its account in cash or cheques, or to endorse its name upon cheques or negotiable instruments; that the said Doucher was in plaintiff's employ from the year 1907 to March 15, 1914, when he was dismissed; that the cheques in question were never received nor endorsed by the plaintiff before the endorsements thereof were made by the said Doucher who cashed the said cheques at the offices of the defendant in sub-warranty and appropriated the proceeds thereof; that all invoices were made at Chicago and the amounts thereof collected from there; that on several occasions, the said Doucher remitted proceeds of collections made by him, which were accepted by the head office, although he had been expressly instructed that he should not collect any moneys; that principal defendant at certain dates sent his payments of the accounts due by him to plaintiff to the head office at Chicago, and on other occasions, sent them to plaintiff's office at Coteau Station. That in the year 1914, plaintiff ascertained from the Grand Trunk R. Co., that more carloads of ice had been shipped to defendant than had been reported to them and the discovery of the frauds perpetrated by the said Doucher was made; that in addition to the frauds in connection with the defendant, the said Doucher also received several payments from parties in

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Alexandria, without the knowledge of or authority from plaintiff, and similarly sold ice to local parties at Coteau Station, whereof he failed to account to the plaintiff; to the knowledge of the defendant in sub-warranty, that the plaintiff had no banking account at Coteau Station or Valleyfield or with the defendant in sub-warranty; that the defendant in sub-warranty never made any inquiries of plaintiff as to the authority or powers of the said Doucher, that on September 25, 1913, the said Doucher received from defendant, the sum of $600 in payment of ice furnished by plaintiff and did not immediately account therefor to plaintiff, and in the next month, he received from defendant his cheque for $400 dated October 14, 1913, which he cashed at the local branch of the defendant in sub-warranty, and adding $200 to the proceeds thereof, he sent the sum of $600 by cheque on the defendant in sub-warranty to the plaintiff, who credited the amount to the account of defendant, in payment of the invoice for which defendant had paid his cheque of $600, dated September 25, 1913.

Considering that plaintiff did not receive the proceeds of the 3 cheques pleaded by defendant as payment made to it and the said 3 cheques were never received by it, having been sent by defendant to its warehouse at Coteau Station, instead of to its office in Chicago, the place where they should have been sent, according to the custom between plaintiff and defendant; and the said cheques were received by plaintiff's employee, one Doucher;

Considering that the proceeds of the said cheques were appropriated by the said Doucher, who had no authority from plaintiff to receive the same or to endorse the name of plaintiff thereon, or to negotiate the same, and therefore the said Doucher was acting beyond the actual limits of his authority from plaintiff;

Seeing s. 151 of the Bills of Exchange Act, R.S.C. (1906), c. 119, s. 51;

Considering that signature by procuration operates as a notice that agent only has a limited authority to sign, and that the defendant in sub-warranty in receiving the said cheque so endorsed by the said Doucher as agent of plaintiff was bound to inquire as to the extent of the said Doucher's authority and did not do so, *Bryant* v. *Quebec Bank*, [1893] A.C. 170;

Considering that any signature which purports to be put on by delegated authority is in effect a signature by procuration, Grant's Law of Banking, 6th ed. p. 293;

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Considering that the cheques in question were payable to plaintiff's order and it has not been proved, either that the said Doucher had express authority to endorse them or that the plaintiff had such knowledge of a practice by the said Doucher of endorsing cheques to its order, as would justify the conclusions that there was a tacit approval of the practice by plaintiff; *Canadian Pacific R. Co.* v. *Bank of Hochelaga*, 18 Que. K.B. 237;

Considering that an agent cannot enlarge the actual authority of his own acts without some measure of acquiescence on the part of his principal, whose rights and liabilities as to third parties are not affected by any apparent authority, which his agent has conferred upon himself, simply by his own acts or representations, express or implied; 31 Cyc., p. 1332;

Considering that plaintiff cannot be held responsible for the said fraudulent and felonious acts of its employee Doucher and that its responsibilities are governed by the Bills of Exchange Act, passed by the Dominion parliament, and not by art. 1054 of the Civil Code of Lower Canada;

Considering that the defendant in sub-warranty in accepting the false endorsements of plaintiff's name upon the three cheques in question, guaranteed the genuineness thereof to the defendant in-warranty, La Banque d'Hochelaga, to whom the defendant in sub-warranty sent the said three cheques for collection and by whom the said three cheques were paid and charged to defendant's account;

Considering that defendant and the defendant in sub-warranty have failed to maintain their pretensions and that the plaintiff has made good its claim;

Considering that the defendant in warranty was not authorised to charge the amount of the said 3 cheques without the true endorsement of plaintiff to the account of defendant;

Doth adjudge and condemn defendant to pay and satisfy the plaintiff the sum of $910.09 with interest to plaintiff and costs;

Doth adjudge and condemn defendant in warranty to indemnify the said defendant as plaintiff in warranty to the amount of the said condemnation in capital, interest and costs; together with the costs of defendant's action in warranty;

And doth adjudge and condemn La Banque Provinciale du Canada as defendant in sub-warranty to indemnify La Banque

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d'Hochelaga as plaintiff in warranty the amount of the said condemnation against it in capital, interest and costs; as aforesaid to wit; the sum of $910.09 with interest and costs, for which the principal plaintiff has obtained judgment herein against the principal defendant and the costs of the principal defendants' action in warranty against the said La Banque d'Hochelaga, and the costs of the said La Banque d'Hochelaga as plaintiff in sub-warranty, and doth dismiss the plea of the said defendant in sub-warranty in answer to paragraphs 3 and 4 of principal plaintiff's answer to defendant's plea, with costs.

Judgment for plaintiff.

CAN.
Ex. C.

CANADIAN PACIFIC R. Co. Co. v. S.S. "STORSTAD."

Exchequer Court of Canada, Quebec Admiralty District, Dunlop, L.J. in Adm. April 27, 1915.

COLLISION (§ I—3)—OPEN SEA—RULES OF NAVIGATION—NEGLIGENCE.
The rules of navigation governing the open sea apply to open water of the St. Lawrence river; it is negligent for a ship approaching another in a fog to alter her course and fail to reverse engines, in violation of rules 16, 21, and 29, where the other vessel has obeyed rule 23.
[See also *C.P.R. Co.* v. *S.S. "Storstad,"* 34 D.L.R. 1 (annotated).]

Statement.

ACTION for damages resulting from a collision.

A. Geoffrion, K.C., for plaintiff J. W. Griffin; *W. P. Sedgwick*, of New York Bar, for defendant.

Dunlop, L.J. in Adm.

DUNLOP, L.J. IN ADM.:—The plaintiff, as the owner of the steamship "Empress of Ireland," claims the sum of $3,000,000 against the ship "Storstad" for the loss of the steamship "Empress of Ireland," and the amounts paid or that may hereafter be paid for loss of life, or personal injury to members of the crew or others, whether under the Workmen's Compensation Act or otherwise, and for other and all losses and damages occasioned by the collision which took place in the St. Lawrence River, near Father Point, on May 29, 1914, and for costs.

Whereas the plaintiff, by its statement of claim, alleges as follows:—(1) That between 1.45 and 2 o'clock a.m., on May 29, 1914, the steamship "Empress of Ireland," 8,028 net, registered tonnage, of which the plaintiff is the owner, whilst on a voyage from Quebec to Liverpool, with passengers and general cargo, was between 6 and 7 miles to the northward and eastward of Father Point, which is on the south shore of the River St. Lawrence;

(2) there was fog and no wind and the tide was about half flood, although there remained a current down stream running at the rate of about one and a half knots; (3) the "Empress of Ireland" had dropped her pilot near the Father Point gas buoy, and had then got under way, taking a course of n. 470 deg. E. magnetic, until she had the Cock Point gas buoy abeam, when the course was changed to n. 73 deg. E. magnetic; (4) that the lights of another ship, which turned out to be the "Storstad," were first seen several miles off before the fog shut in and bearing at first about 4 points on the starboard bow of the "Empress of Ireland," but when the latter altered her course, off Cock Point buoy, the "Storstad's" lights bore about a point or a point and a half on the starboard bow of the "Empress of Ireland" and the vessels would have passed each other starboard to starboard, at a safe distance, if the "Storstad" had not subsequently altered her course in the fog; (5) there had been intermittent fog earlier in the night, but the weather was clear when the "Empress of Ireland" left Father Point, and it was somewhat later, a little after altering the course off Cock Point buoy, that fog coming from the south shore was seen to be dimming the "Storstad's" lights; the "Empress of Ireland" was duly exhibiting the regulation lights for a steamship under way; (6) that seeing said fog, the engines of the "Empress of Ireland" were reversed full speed and her whistles blown 3 short blasts, which signal was a few minutes later repeated. When the "Empress" was stopped in the water her engines were stopped and two long blasts were twice sounded on her whistle. When the lights of the "Storstad" were seen coming out of the fog, the master of the "Empress" hailed the "Storstad" to go astern and in the hope of avoiding or minimizing the effect of a collision, the engines of the "Empress" were ordered full speed ahead and her helm hard-a-port; (7) nevertheless, the "Storstad" came on at a considerable speed and the "Storstad's" stem struck the starboard side of the "Empress of Ireland" about amidships, causing her to sink soon after; (9) that the helm of the "Storstad" was improperly ported; (10) that the "Storstad" failed to keep her course and pass the "Empress of Ireland" starboard to starboard; (11) that the "Storstad" was navigated at an immoderate rate of speed; (12) that those in charge of the "Storstad" failed to reduce her speed and sound her fog signal before she ran into the fog;

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(13) that the engines of the "Storstad" were not in due time slowed, stopped or reversed; (14) that no competent officers were on duty on the "Storstad"; (15) that those in charge of the "Storstad" neglected to comply with articles 16, 27 and 29 of the International Rules in force in Canadian waters. And plaintiff claims—

(1) A declaration that it is entitled to the damage proceeded for; (2) the condemnation of the defendant and its bail in such damage and costs; (3) to have an account taken of such damage with the assistance of merchants; (4) such other and further relief as the nature of the case may require.

The defendant, by its statement of defence and counterclaim, alleges in substance the following: (1) That except as hereinafter admitted, the several statements contained in the plaintiff's statement of claim are denied; (2) the defendant is owner of the Norwegian steamship "Storstad," of 6,028 gross tonnage; (3) that at about 2 a.m., on the 29th May, 1914, the "Storstad," while on a voyage from Sydney, Cape Breton, to Montreal, with a cargo of coal, came into collision with the "Empress of Ireland" at a point about 7 miles to the northward and eastward of Father Point, in the River St. Lawrence; (4) the "Storstad," proceeding up the river, passed Metis Point at about 12.35 a.m. There was no wind; the tide was flood, but in spite of the tide, there was a current setting down the river at the speed of between one and two knots; the "Storstad" left Metis Point about 3 miles off and proceeded on a course of west one-quarter south magnetic, for a distance, measured by patent log, of 6 miles, and then on a course of west of one-half south magnetic for a distance, measured by patent log, of 5 miles; and thence on a course of west by south magnetic, which course she held until the collision; (5) that at about the time when the "Storstad" changed her course to west by south, those in charge of her sighted the masthead lights of a steamer, which proved to be the "Empress of Ireland"; the lights were several miles away and were on the port bow of the "Storstad." As the vessels proceeded, those on board the "Storstad" saw the green light of the "Empress" still on the "Storstad's" port bow. Shortly afterwards the "Empress" changed her course, so that, in addition to her masthead lights, her red light was visible to those on the "Storstad" and her green light was shut

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out. The vessels were then 2 miles away and the "Empress" was a point or more on the "Storstad's" port bow; (6) that shortly after a bank of fog, which had been moving out from the southern shore of the river, dimmed and finally shut out the lights of the "Empress." The "Storstad's" engines were at once slowed, and, about 2 minutes later, when the fog bank enveloped the "Storstad" also, her engines were stopped; (7) that 4 or 5 minutes after the "Storstad's" engines had been stopped, her wheel was ported in order to prevent the current swinging her head to port and in the direction of the "Empress" and in order thus to insure ample space for clearance. The "Storstad" did not swing under the port wheel, since her steerage way was lost, or nearly so. The engines of the "Storstad" were then ordered slow ahead, because it was desirable to preserve steerage way, and immediately thereafter the green light and masthead lights of the "Empress" were seen on the "Storstad's" port bow, moving across her bow. The "Storstad's" engines were at once put full speed astern and kept so until the collision. The stem and the bluff of the starboard bow of the "Storstad" struck the starboard side of the "Empress" about amidship, the vessels, at the moment of the contact, forming an angle of about 3½ points. The "Empress" continued to go ahead across the bow of the "Storstad," which was swung around in the direction of the "Empress's" movement. As soon as the vessels touched, the "Storstad's" engines were ordered ahead, for the purpose of keeping her stem in the wound, but the headway of the "Empress" caused the vessels to separate. At the time the vessels came together, the "Storstad" was still heading west by south. (8) That as soon as the fog set in, fog whistles of one long blast were blown by the "Empress," and were answered by the "Storstad." Shortly thereafter, 2 signals of 3 whistles each were heard from the "Empress"; all the "Empress's" whistles sounded on the "Storstad's" port bow. The "Storstad," so long as she retained headway, continued to blow fog signals, but when it was found that she had lost steerage way, a signal of 2 long blasts was sounded on her whistle. When, after the lights of the "Empress" were seen through the fog, the "Storstad" went full speed astern, a signal of 3 blasts was blown on her whistle. (9) The defendant charges against the plaintiff, its agents and servants, the following faults: (*a*) In keeping a bad

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lookout; (*b*) in that she was in charge of incompetent officers; (*c*) in attempting to cross the bow of the "Storstad" although the vessels, when the fog shut in, were clear to pass port to port; (*d*) in failing to hold her course and to pass the "Storstad" port to port; (*e*) in changing her heading and course to port in the fog; (*f*) in that, having headed across the bow of the "Storstad," she put her engines full speed astern, reduced her speed, and thereby caused collision; (*g*) in that she attempted to pass the "Storstad" too close; (*h*) in that she failed to comply with articles 15, 16, 18, 19 and 22 of the International Rules of the Road at Sea, which were then and there in force; (*i*) in that she blew a signal of 3 whistles when the vessels were enveloped in fog, contrary to art. 28 of the said Rules; (*j*) in that she failed to indicate her position and manœuvres by blowing proper or sufficient whistles; (10) that no blame and resulting damage is attributable to the steamship "Storstad" or to any of those on board of her.

And by way of counterclaim defendant says:—

That the collision has caused great damage to the defendant and to the steamship "Storstad," and claims:—(1) A declaration that the defendant is entitled to the damage asked under its counterclaim; (2) the condemnation of the plaintiff in the damage caused to the "Storstad" and to defendant, and in the costs of this action; (3) to have an account taken of such damage with the assistance of merchants; (4) such further and other relief as the nature of the case may require.

The plaintiff, in answer to the foregoing defence, prays *acta* of the allegations contained in the 3rd, 7th and 8th paragraphs of the said defence; as to paragraph 9, it takes exception to the allegations as to "other faults that may develop at the hearing" and "others in future respect which will be pointed out at the trial," the same being illegal, otherwise denies said paragraph; that plaintiff denies all the other allegations of the defence, except in so far as the same are in accordance with the statement of claim and this answer. And as to the so-called counterclaim, plaintiff alleges: That the same is illegal and incompetent to the defendant; and without waiver of said allegations, it denies the same in any event.

The pretensions of the parties are set forth in the pleadings, a summary of which is given in the present judgment.

The plaintiff moved to strike from paragraph (9) of the defence, the words "(*k*) and in other and further respects which will be pointed out at the trial" . . . as being illegal. This motion was granted by judgment of this court of date of the 15th December, 1914.

After the issues had been joined on February 12, 1915, the plaintiff moved to amend its preliminary act and statement of claim by adding the words "in the middle of the river but at the place of the collision and all along the shores the current ran up stream" to par. 6 of the plaintiff's preliminary act and par. 2 of the statement of claim, on such conditions, as to costs, as the court may deem appropriate.

I thought it better to hold this motion over until the trial, and I am of opinion that same can be granted, and it is granted, costs of same to be paid by plaintiff, as appears by judgment on said motion, of even date.

I grant this motion more especially because evidence in support of it has been adduced before this court, without any objection being made thereto.

Evidence in this cause is very voluminous because, by consent of parties, it is agreed that all the evidence taken and exhibits filed before the Commission of Enquiry into the casualty of the "Empress of Ireland," held at Quebec on June 14, 1914, and following days, would be read and used as evidence to all intents and purposes as if taken in this case, the whole as appears by consent of the parties of date June 23, 1914, and filed August 12, 1914.

Under said consent, the right was reserved to each party to recall any witness examined in said enquiry and to put in further evidence, if desired, and that said agreement was made effective in all respects, in and for any class of action, counterclaim, or any action or proceedings against the "Empress of Ireland."

A very large amount of additional evidence was taken before this court, in Montreal, and the record is, consequently, very voluminous.

The question as to who, if anyone, is to blame for the collision in this case depends largely on which of the two stories put forward by the respective owners of the respective vessels, is to be accepted.

The evidence on material points is absolutely contradictory.

The main difference between the two vessels' stories is to be

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found in the description of the way in which the two vessels were approaching each other at the time when the "Empress of Ireland" changed her course after having obtained an offing from Father Point. Father Point is the place where the "Empress of Ireland," the outwardbound ship, had dropped her pilot; it is also the place where the inwardbound ship, the "Storstad," was to pick up her pilot. It is situated on the south side of the river.

The witnesses from the "Storstad" say they were approaching so as to pass red to red, while those from the "Empress of Ireland" say they were approaching so as to pass green to green.

I feel that I am safe in making the assertion that the "Storstad" never saw the red light of the "Empress" at any time, which can be proved by converging courses. But it is within the bounds of possibility that the "Empress" might have seen the green light of the "Storstad" at some time, and the assessor quite agrees with me in this finding.

I am going to prove later that the "Empress" was stopped in a position which is indisputable, and the present position of the wreck will verify it, whereas the "Storstad," having nothing to verify her position by, might have been somewhat to the south, in which case the "Empress" might have seen the "Storstad's" green light at some time. The fact that the "Storstad" ported her helm and ran into the "Empress" on the starboard side shews that the "Storstad" must have been somewhat to the south. So, of the two stories of green to green of the "Empress," and red to red of the "Storstad," the "Empress" has the best of the argument, as hers is a possibility, but the "Storstad's" is an impossibility. Now, having shown that there is a possibility of the "Empress" having seen the green light of the "Storstad" at some time, it immediately places her in the enviable position of being a passing ship instead of a crossing ship. The stories are absolutely contradictory and we have to determine which is the more probable.

The whole trend of the evidence taken at Quebec was evidently made with the purpose of establishing which of the two vessels had changed her course in the fog, and this was the main question the commission had to decide.

The defendant, in opening its case, charged the plaintiff with three faults: (1) that the alteration of the "Empress's" course at Cock Point buoy was, according to it, a wrong thing to do; (2) that

the speed of the "Empress" was maintained until the collision took pla and (3) the "Empress of Ireland" is charged with not having a proper lookout.

As to the alteration of the course at Cock Point buoy, the defendant pretends that by so doing, a risk of collision was produced.

A manœuvre is wrong if it creates a risk of collision. The test, therefore, is whether this manœuvre created a risk of collision. A further test is again if it did create a risk of collision, did it contribute to the disaster in question? If a given manœuvre creates a risk of collision, it would be a breach of the rule, and if it creates a risk of collision which contributed to the collision or caused it, then it would be a fault. As is well known, there is a difference between the English law and our law that used to exist and which has been very recently abolished. All the English jurisprudence is under the old law. In England, formerly, a breach of the rules was presumed to have contributed to the collision or caused it, unless the contrary was proved. Whilst, in our law, the plaintiff has to prove the breach of the rule, and also that it caused or contributed to the collision.

In this particular case, either the ships were, for some minutes to the knowledge of each other, green to green, or they were, for some minutes before the collision, to the knowledge of each other, red to red, after the Cock Point buoy alteration.

There is no suggestion that the ships were head-on or nearly head-on. The ships were passing ships, each one seeing the other. Even if the ships were either red to red, or green to green, to the knowledge of each other, for some minutes before the fog, the courses were safe: there was no risk of collision at that moment.

The anterior manœuvre had not created a risk of collision and the material and vital question is, as was stated in Quebec by everybody before the commission, which ship destroyed the safe position? The ship which altered its course was at fault.

If the ships entered the fog red to red, the courses were absolutely safe. If red to red is safe, then green to green is equally safe.

I cannot see that there should be any difference in the "Empress's" favour in that risk. What is true of red to red must be true of green to green, so on defendant's statement, there is

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nothing in the suggestion that the initial manœuvre created a risk of collision, or otherwise created a dangerous position, or that the initial manœuvre, in any way, caused or contributed to the collision, since the ships were each on passing courses, and each knew that they were on passing courses before the fog set in.

As to the second alleged fault, that the speed of the "Empress of Ireland" was maintained until the collision took place, I will take this into consideration when I treat of the responsibility for the accident.

As to the third alleged fault, that the "Empress of Ireland" had no proper lookout, this has certainly not been established, as the witness Carroll was in the crowsnest lookout and faithfully fulfilled his duty and remained there to the last moment.

It has also been charged that the "Empress of Ireland" changed her course, not by reason of any wilful alteration of her wheel, but in consequence of some uncontrollable movement which was accounted for on the assumption that the telemotor steering gear was out of order and on the theory that having regard to the fulness of the stern of the "Empress," the area of the rudder was insufficient.

It may be remarked that this was not pleaded by the defendant and, in my opinion, the evidence shews clearly that the steering gear was in good order, and there is not a shadow of evidence to shew that there was anything wrong with it at the time of the collision, or that it, in any way, contributed to the said accident.

In addition to the evidence taken before the commission at Quebec, which will hereafter be referred to by the number of the questions applicable to the different matters at issue in this cause, the Liverpool pilot, who was examined for the first time before this court, testified that he had been pilot in charge of the "Empress of Ireland" while she was proceeding to sea ever since the ship was launched, some time in the year 1906, and he spoke in the highest terms of her steering gear. I do not think this question requires a more detailed explanation.

Much comment has been made on the fact that Capt. Kendall says, just before the ship sank, he looked at the compass and found her head S.E. The present position of the wreck is with her head N.E.

When we take into consideration the fact that there was no light for him to see the compass by, and take into consideration

that he was steering eastward, it would be easy for him to confound S.E. with N.E. There is also another explanation. Nothing will cause deviation of the compass more than a heavy jar. The "Empress" had jar enough to send her to the bottom. Then the angle of the ship was 45° or more, and no ship has her compass adjusted for such a serious heeling error, so that this compass which he looked at might be altogether useless, and the S.E. that Capt. Kendall imagined he saw might be several points out.

The evidence being so contradictory, the witnesses from the "Storstad" saying that they were approaching so as to pass red to red, while those of the "Empress of Ireland" say they were approaching so as to pass green to green, the stories are irreconcilable, and we have to determine which is the more probable.

In order to place the responsibility for the disaster, the first point I will dispose of is the position of the "Empress" at the time of the collision, say at 1.55 a.m. I think I am entitled to state positively that it was 1,200 or 1,500 feet to the eastward or past the place where the wreck now lies and that is marked on the defendant's chart or diagram No. 3, produced by Mr. Griffin, one of the defendant's counsel, in illustration of his argument from the position of the churches, namely:—It lies N. 62½° W., 7⅛ miles from Ste. Flavie church. It lies N. 11° E., 4⅝ miles from St. Luce church. It lies N. 45° E., 6¾ miles from Father Point Lighthouse.

The position of the wreck has been checked by me, with the assistance of the assessor, and it agrees with the above bearings.

I know the position of the wreck and I know by many witnesses that there was a current of 1 mile an hour running westerly, and it is well known that the "Empress" sank 15 minutes after the collision. She drifted back with the current 15 minutes after she was struck. This places her position exactly at the time of the collision 1,200 or 1,500 feet to the eastward or past the wreck, provided she was lying dead in the water, as she claims to be at the time of the impact.

We have the evidence of Capt. Kendall (q. 20), Capt. Murray (q. 4079), Brennan (q. 138), Murphy (q. 2177 to 2194), that she could be stopped dead in the water from 2 to 3 minutes, and cases have been cited where it has been done, such as off Point Lynas, off the Welsh coast, in 2 minutes and 15 seconds (q. 4199).

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On the present occasion, we have the evidence of Capt. Kendall (p. 26), Brennan, that on seeing the "Storstad's" light being shut out by the fog, they reversed their engines for 3 minutes, blowing, while doing so, 2 whistles of 3 short blasts, to let the "Storstad" know that she was reversing. Then, according to the evidence, she blew 2 whistles of 2 long blasts, indicating that she was stopped in the water, which is verified by Jones, the first officer (q. 1764), Capt. Kendall (q. 218), Murphy (q. 2194), Brennan (q. 2149), Liddell (q. 2540), and Miss Townsend (q. 7205). Tufteness and Saxe heard the 3 short blasts twice (qq. 1092, 1094), which is important and material evidence, as Tufteness admits he heard the "Empress's" 3 short blasts about one or two minutes apart. Therefore, he admits she was reversing for that time, sufficient to bring her to a standstill.

Saxe (q. 4650) also admits the same, though the "Storstad" denies at all times hearing the "Empress's" 2 whistles of 2 long blasts saying she was stopped.

After carefully considering all the evidence, I have come to the conclusion that the "Empress" was stopped. I think it has been established that the "Empress's" position, at the time of the collision, was 1,200 to 1,500 feet eastward from the wreck, notwithstanding the contradictory evidence that has been produced. The fact remains that she was dead in the water 15 minutes before she sank, and she had to be from 1,200 to 1,500 feet past the position where the wreck now lies, notwithstanding all arguments to the contrary.

Having established the position of the "Empress" dead in the water at the time of the collision, I will review the action of the vessels which led to the collision.

I will first speak of the courses of the two ships, which I consider as most important. The evidence is emphatic that the "Empress" was steering a final course of N. 73° E. and never varied this course. I am forced to accept it, and the assessor concurs, and the same applies to the "Storstad's" course of w. by s.

Now, it is shown by the chart or diagram prepared at my request by the assessor, verified by me, and signed by me and the assessor for identification and thereto annexed, that these two courses were converging and that two ships approaching each other, in opposite directions, on these courses would meet or cross

each other at a given point. This crossing point must be the position of the "Empress" after she was stopped in the water at the time of the collision.

It having been proved that the "Empress" was stopped in the water, and that her position was from 1,200 to 1,500 feet to the eastward of the wreck, by looking at the chart, it will be seen that during the whole time the "Empress" was following her n. 73° E. course. She had the "Storstad" on her starboard bow and disposes finally of the contentions of the "Storstad" that she saw the "Empress's" red light. At a distance of 1½ or 2 miles apart, where both parties agree they last saw each other before the collision, and when their lights were commencing to be dimmed by the fog, the "Empress" would be shewing the "Storstad" her green light, and the "Storstad" would be shewing the "Empress" her red light, unless the "Storstad" was to the southward, as I think she was, then she would be shewing her green light. This can be verified by looking at the chart. I think it is quite probable that at this time the coloured lights of both ships were obscured by fog, but if they saw any coloured lights at this time, they would have to be as stated by me.

Now, I will take up the question of the action of the two ships when they both arrived at the position of 1½ to 2 miles apart, after which they were obscured by the fog until the time of the collision, which is proved to be about 8 minutes. They enter this area of one mile and a half to two miles going full speed, say 16 miles per hour for the "Empress" and 11 miles per hour for the "Storstad." Therefore they were approaching each other at the rate of 27 miles an hour. At this rate of speed, they would have either collided or passed clear in 3 or 4 minutes.

Considering the close proximity of the vessels at this time, any change of course might have been imprudent, particularly as they were running into a fog bank, and this explains the fact that at this point, say at 1.47 a.m., the "Empress" ordered her engines full speed astern, and notified the "Storstad" by the appropriate whistle of 3 short blasts that she had done so.

Instead of following the example of the "Empress" and reversing her engines, the "Storstad" merely slowed her engines and continued her speed; about 8 minutes after the "Empress" started to reverse her engines, the collision occurred, say at 1.55 a.m.

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Any difference of opinion as to the time here seems to be absolutely of no importance, as we have the evidence of the "Empress" that she was reversing for 3 minutes and the evidence of the "Storstad" that she knew the "Empress" was reversing, having heard her signal of 3 short blasts.

Now, what happens in this interval of 8 minutes before the collision occurred?

The "Empress" goes about a quarter of a mile, or practically 3 ship lengths, under reversed engines before she is brought to a standstill. The evidence shews that this took 3 minutes. During these 3 minutes the "Storstad" is going on with no effort to check her speed other than slowing her engines, and must be going at a speed of say 8 knots, which is a compromise between full speed, 11 knots, and slow speed, 5 knots. She would cover the distance of nearly half a mile.

This leaves the ships about three-quarters of a mile apart, and 5 minutes yet to go before the collision occurred. The "Empress" is dead in the water and the "Storstad" is continuing on her course. At some part of this period, she claims she came to a dead stop, then ported her helm, only affecting her heading a quarter or half a point, and ordered slow speed ahead again.

I will make some observations as to the probable speed of the "Storstad" at the time of the collision.

At a mile and a half apart, the "Storstad" was going 11 knots an hour with the current. She then slowed her engines. At the time of the order to slow down, she was still going 11 knots. It would take some time to come back from her 11 knot speed to slow speed, which is about 5 knots an hour. Therefore, when the next order to slow engines was given 2 minutes later, by the evidence, it was reasonable to suppose that she was going at 8 knots per hour. As it would take her some time to come to a standstill from a speed of 8 knots an hour without reversing her engines, and taking into consideration how close she was to the "Empress" after these first orders were given, I cannot see how she can have lost her way, particularly as she again started slow speed ahead before the collision, and after her order to stop.

Her next order was full speed astern and that was only 30 seconds before the collision.

She, therefore, seems to have maintained her speed all through the short period before the collision, and it is my opinion that at

the time of the impact she was going at not less than 6 knots an hour, and probably more.

The depth she penetrated into the "Empress's" side, which the evidence gives all the way from 10 to 18 feet, and the condition of her own bows after colliding, would go to substantiate this speed.

I would mention that the "Storstad" is built longitudinally, or Isherwood system, and consequently very strong, and the damage to her bows was very extensive.

In my opinion, three facts have been established.

The position of the "Empress" when she was stopped in the water, 15 minutes before she sank—the fact that the "Empress" was stopped in the water—and the fact that at the time of the impact, the "Storstad" was travelling at least at a rate of 6 knots an hour, or probably more.

In arriving at my finding as to the responsibility for the collision, other considerations come in, which I will enumerate later, but I would like to mention that I consider the evidence on both sides, other than that above referred to, immaterial and of little value.

For instance, the defendants, on their chart and in the calculations of course and distance, etc. . . . have gone on the assumption that the current was against them at the rate of a mile and a half per hour, while it was in their favour 1 mile per hour, so that on their own contentions, with their own chart, they would be in a position past the wreck before they ever started the manœuvres that occurred just previous to the collision.

They base their contention that the "Empress" could not cover the distance to the wreck and remain dead in the water for some time before the collision, on the theory that when the "Empress" started from a point one mile n. 43° W. from Father Point buoy, she had stopped to let her pilot off, but it appears that her engines had never been stopped, but were only slowed down, as is the usual practice, as I am advised by the assessor, and, therefore, she did not lose any time in the warming-up process of her engines, which would have happened had they been stopped, but was able to increase her speed rapidly.

The coloured lights were as I have represented them. If you will follow out the courses of the ships to the time of impact, on

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the chart hereto annexed and above referred to, you will see that the lights would appear as I have stated.

I am confirmed in my opinion that these vessels approached each other on their converging courses more rapidly than they realized, and as the "Empress" had the "Storstad" on her starboard bow, she adhered to the green light story, and as at the same time the "Storstad" had the "Empress" on her port bow, she adhered to the red light story, in order to evade responsibility for the collision.

Art. 23 of the Rules of the Road says:—

Every steam vessel which is directed by these rules to keep out of the way of another vessel, shall, on approaching her, if necessary, slacken her speed, or stop or reverse.

The "Empress" obeyed this rule.

Art. 16.—A steam vessel hearing, apparently forward of her beam, the fog signal of a vessel the position of which is not ascertained, shall, so far as the circumstances of the case admit, stop her engines, and then navigate with caution, until danger of collision is over.

Art. 21.—When, in consequence of thick weather, or other causes, such vessel finds herself so close that collision cannot be avoided by the action of the giving-way vessel alone, she also shall take such action as will best aid to avert the collision.

Art. 29.—Nothing in these rules shall exonerate any vessel . . . of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case.

Attention might be called to the way the "Empress of Ireland" was navigated. She had 3 first-class officers on the bridge, namely: Capt. Kendall, Jones, first officer, and Moore, third officer.

On the "Storstad," Mr. Tufteness, first officer, was in charge, perhaps assisted by Saxe, third officer, though the latter claims he had nothing to do with the navigation of the ship.

In my opinion, Tufteness, in not stopping the "Storstad," when he heard the first 3 blasts from the "Empress," made a great error of judgment, and to my mind, had Capt. Andersen, the master of the "Storstad," been called earlier and had been on deck, he would immediately have stopped his ship and avoided the whole calamity.

I cannot emphasize this neglect too strongly.

I regret very much to have to find Tufteness at fault in violating articles 16, 21 and 29 of the Rules of the Road above quoted. Through his neglect or inexperience, in my opinion, the cause of the accident was the speed of the "Storstad" and the porting and

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hard-a-porting of her helm, and the "Storstad" is entirely to blame for the said accident, because Tufteness had the opportunity to take the speed off his ship, the same as the "Empress" did, and if he had not ported her helm, I believe he would have gone clear and the collision would not have occurred.

I regret very much to have to impute blame to anyone in connection with this lamentable disaster and I would not have done so, and would not do so, if I had felt that any reasonable alternative was left to me.

There is nothing to shew that the disaster was in any way attributable to the St. Lawrence route, and, being open water, all sea rules apply.

In conclusion, I am of the opinion that Tufteness, the first officer of the "Storstad," was wrong and negligent in altering the course of the "Storstad" in the fog, as he undoubtedly did, and that he was also wrong and negligent in keeping the navigation of the vessel in his own hands and in failing to call the captain when he saw the fog coming on.

I am further of opinion that no fault or blame is attached or attributable to the "Empress of Ireland," and, consequently, I am of opinion that plaintiff's action must be maintained, with costs, and the counterclaim of the defendant rejected, and the defendant is condemned by the present judgment to pay to the plaintiff the sum to be found due to the said plaintiff, and in costs, and doth further order that an account should be taken and doth refer same to the Deputy-registrar, assisted by merchants, to report the amount due the plaintiff in respect of its claim, and that all accounts and vouchers, with the proof in support thereof, shall be filed within 6 months from the date of the present judgment. *Judgment for plaintiff.*

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Supreme Court of Canada, Fitzpatrick, C.J., and Davies, Idington, Duff and Anglin, JJ. March 11, 1918.

ADMIRALTY (§ I—1)—COLLISION AT SEA—SHIP SOLD TO PAY DAMAGE CLAIMS—CLAIMS FOR LIFE AND PERSONAL INJURIES—DISTRIBUTION.

The proceeds of the sale of a ship sold under an order of the court to satisfy claims for loss of life and property arising from a collision on the high seas, should be distributed in accordance with the provisions of the Imperial Merchant Shipping Act (1898, s. 503), under which the claimants for loss of life or personal injury are entitled to seven-fifteenths of the fund paid into court and must rank *pari passu* with the claimants for loss of property for the balance of their claims.

[*Can. Pac. R. Co.* v. *S.S.* "*Storstad*," 34 D.L.R. 1, varied, and see annotation, 34 D.L.R. 8.]

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APPEAL from the judgment of the Quebec Admiralty Division of the Exchequer Court of Canada, Maclennan, J., 34 D.L.R. 1, who confirmed the report of the deputy district registrar as to the distribution of the fund in court amounting to $175,000.

Aimé Geoffrion, K.C., and *A. R. Holden*, K.C., for appellant.

G. F. Gibsone, K.C., *Errol Languedoc*, K.C., and *Eug. Angers*, for the respondents.

FITZPATRICK, C.J.:—The appellants' steamship "Empress of Ireland" was sunk with great loss of life in a collision with the S.S. "Storstad," a foreign ship, in the St. Lawrence River off Father Point on May 29, 1914. The "Storstad" proceeded to Montreal where she was arrested in a suit for damages brought by the appellant in the Exchequer Court, Quebec Admiralty District. She was subsequently sold by order of the court and the proceeds, $175,000, paid into court to take the place of the ship and to avail for all parties interested therein.

Judgment in the suit was pronounced in favour of the plaintiff's claim and a reference directed to the deputy registrar to report the amount due. A large number of intervenants and claimants came in and established their claims and the deputy registrar made his report admitting claims to the total amount of $3,069,483.94 of which $469,467.51 were for loss of life and the balance for loss of property including over $2,000,000 claimed by the appellant as the value of its ship, the "Empress of Ireland." The fund in court being insufficient to satisfy all claims, the deputy registrar collocated the amount *pro rata* in favour of the life claims so far as the same was sufficient and excluded all other claims from participation in the collocation.

On motion by the appellant to vary the report and seeking to be collocated for its claim as admitted, judgment was given confirming the report; from this judgment the present appeal is brought.

The question for determination turns, I think, upon the construction to be put upon s. 503 of the Imperial statute the Merchant Shipping Act (1894). That Act, so far as material parts are concerned, is expressly extended to the whole of His Majesty's Dominions. A statute of the Imperial parliament, so declared to extend to all His Majesty's Dominions, is binding on all courts in Canada, those of admiralty no less than the civil courts. It is upon this statute that the Local Judge in Admiralty has rested his judgment.

Part VIII. of the Imperial Merchant Shipping Act, 1894, is under the caption "Liability of Shipowners" and comprises ss. 502 to 509 inclusive. S. 503, so far as material, is as follows:—

503. (1) The owners of a ship, British or foreign, shall not, where all or any of the following occurrences take place without their actual fault or privity; (that is to say):

(*a*) Where any loss of life or personal injury is caused to any person being carried in the ship;

(*b*) Where any damage or loss is caused to any goods, merchandise, or other things whatsoever on board the ship;

(*c*) Where any loss of life or personal injury is caused to any person carried in any other vessel by reason of the improper navigation of the ship;

(*d*) Where any loss or damage is caused to any other vessel or to any goods, merchandise, or other things whatsoever on board any other vessel, by reason of the improper navigation of the ship;

be liable to damages beyond the following amounts; (that is to say):

(*i*) In respect of loss of life or personal injury, either alone or together with loss of or damage to vessels, goods, merchandise, or other things, an aggregate amount not exceeding fifteen pounds for each ton of their ship's tonnage; and

(*ii*) In respect of loss of, or damage to, vessels, goods, merchandise, or other things, whether there be in addition loss of life or personal injury or not, an aggregate amount not exceeding eight pounds for each ton of their ship's tonnage.

(2) For the purposes of this section—

(*a*) The tonnage of a steam ship shall be her gross tonnage without deduction on account of engine rooms; and the tonnage of a sailing ship shall be her registered tonnage:

Provided that there shall not be included in such tonnage any space occupied by seamen or apprentices and appropriated to their use which is certified under the regulations scheduled to this Act with regard thereto.

(*b*) Where a foreign ship has been or can be measured according to British law, her tonnage, as ascertained by that measurement shall, for the purpose of this section, be deemed to be her tonnage.

(*c*) Where a foreign ship has not been and cannot be measured according to British law, the surveyor-general of ships in the United Kingdom, or the chief measuring officer of any British possession abroad, shall on receiving from or by the direction of the court hearing the case, in which the tonnage of the ship is in question, such evidence concerning the dimensions of the ship as it may be practicable to furnish, give a certificate under his hand stating what would in his opinion have been the tonnage of the ship if she had been duly measured according to British law, and the tonnage so stated in that certificate shall, for the purposes of this section, be deemed to be the tonnage of the ship.

(3) The owner of every sea-going ship, or share therein, shall be liable in respect of every such loss of life, personal injury, loss of or damage to vessels, goods, merchandise, or other things as aforesaid arising on distinct occasions to the same extent as if no other loss, injury, or damage had arisen.

The tonnage of the "Storstad" is 6,028 tons and the amount realised by her sale and forming the fund now in court is less than £7 for each ton of such tonnage.

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It is contended by the appellant: (1) That inasmuch as no limitation of liability has been obtained or sought for by the owners of the ship, the section has no application and that in the distribution of the fund all claims should be paid ratably. (2) That in any event the section does not give any right to preferential payment.

In an action *in rem* there can be no liability beyond the value of the *res*. Prior to 1862 the ascertaining of the value of the ship was a fruitful source of litigation and expense.

To obviate this and also in order that bad and inferior ships should not have an advantage, in case of collision, over good and valuable ships, 25 & 26 Vict. c. 62 was passed. That Act struck a rough average value for all ships at £15 or £8 per ton, the valuation to be at the higher or lower rate according as the collision was accompanied by loss of life or personal injury or not. In 1894 it was repealed, but in substance re-enacted by 57 & 58 Vict. c. 60, s. 503. (Marsden on Collisions, 6th ed., pages 151-2.)

The Merchant Shipping Act is a complete code of law relating to the subject and Part VIII., under the caption "Liability of Shipowners," must have been intended to deal comprehensively with the subject. It is clear that in a very large number, probably a majority, of cases the value of the ship is, as in the present instance, less than the statutory amount. I do not think it can be maintained that the Act has its application only where the value is the "rough average value" fixed by the statute and not where it is the actual value of the ship.

We should not, if it can be avoided, construe the Act as making a reservation in favour of the life claims in the case of the statutory value and none at all in the case of the actual value which may be little less or indeed equal to it since there can be no limit of liability unless the real value is greater than the statutory value.

But whilst I think the registrar was right in his report in holding that the distribution of the fund must be in accordance with s. 503, I think that he has taken a mistaken view of the effect of the section as affecting the particular case. I do not think you can take the maximum amount given in the section when the actual amount is less, it is the proportion that must be observed, that is to say, the amounts reserved for the life and other claims must respectively abate in the proportions which the actual fund bears to the amounts fixed by the statute. It is not seven-fifteenths of an amount equal to £15 per ton to which the life claimants are entitled but seven-

fifteenths of the fund of $175,000. This would be about $81,000 and leave some $93,000 against which the life claimants would be entitled to rank for the balance of their claims *pari passu* with the other claimants. This, of course, subject to the deduction of costs out of the fund.

I confess that I have some difficulty in following the construction which the courts have placed upon s. 503 as to the reservation in favour of the life claims. The case of the "*Victoria*," 13 P.D. 125, decided in 1888, was, of course, upon the statute of 1862 then in force, but the provisions of this are for all practical purposes identical with those in the statute of 1894 and the construction then placed upon what is s. 503 in the latter does not seem to have been ever questioned since that time. It must now be accepted as laying down the law correctly.

I do not see the necessity of the cross-appeal. The order of September 26, 1916, against which this is brought simply extends the time for filing claims. It does not, and from the nature of the things cannot, be any adjudication on the claims which may be brought in. The cross-appellants in their factum say that "the judgment decides two things: First, that (after providing for costs) the fund in court to be distributed exclusively among claims founded upon loss of life; secondly, that claims for loss of life filed up to October 10, 1916, are to be considered *and apparently to be collocated*." I can see no grounds for this supposition. It will be open to the cross-appellants on the further inquiry to raise the objection that any new claims are statute barred or for any other reason inadmissible. The cross-appeal should, I think, be dismissed with costs.

The judgment should be varied as above indicated and the whole matter remitted to the deputy registrar for further inquiry and report as directed by the judgment so varied.

The costs of all parties other than of the cross-appeal should be paid out of the fund in court.

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

I would vary the judgment below by directing that the sum for distribution be apportioned to a fund upon which claimants for loss of life or personal injuries should be entitled to rank exclusively seven-fifteenths and to another upon which these claimants shall be entitled to rank for unsatisfied balances *pro rata* with claimants

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for loss of property. Costs of the appeal out of the fund. I would dismiss the cross-appeal with costs.

IDINGTON, J. (dissenting):—The judge below held that in the case of the bankrupt owner of the vessel in fault and the losses suffered thereby, exceeding her value, the classes of sufferers referred to in s. 503 of the Imperial Merchants Shipping Act, 1894, or some of them, must be preferred over others in sharing the proceeds of her sale. Whether such holding can be maintained or not must depend upon the scope and purpose of part 8 of the said Act in which the section is found.

An ambiguous section often, indeed generally, has been made to respond to and subserve the obvious purview of the Act in which it is found.

The history of the enactment now in question does not enable that mode of treatment to be successfully applied herein. The Shipping Act of 1894 has been the growth of legislation extending over many years, and relates to so many subjects that it is impossible to gather much help from it as a whole in order to be enabled to interpret and construe part 8 thereof, which is all that really is involved or has to be considered in the disposition of the question raised. The enactments contained therein represent the last feature of legislation of that kind applied to the hazardous employment of shipping. The original liability of shipowners for loss suffered by shippers through the misconduct and especially negligence on the part of servants of the shipowners in managing the thing given them in charge, is said to have been unlimited in England until the year 1734. See Marsden on Collisions, 5th ed., 148.

Then 7 Geo. II., c. 15, limited shipowners' liability for loss of cargo by theft of master or crew to the value of the ship.

26 Geo. III., c. 86, limited the loss from theft by strangers or by fire.

Then 53 Geo. III., c. 159, furnished the first limitations of liability in the case of collisions.

The substance of these enactments was incorporated into the Shipping Act of 1854. In 1862 many amendments were made to that Act by the enactment of 25 & 26 Vict., c. 63, s. 54, which in substance adopted the same terms as appear in s. 503 of the Shipping Act of 1894, now in question. By s. 1 of the said amending Act it was enacted as follows:—

This Act may be cited as the Merchants Shipping Amending Act, 1862, and shall be construed with and as part of the Merchants Shipping Act, 1854, hereinafter termed the Principal Act.

When we have regard to this enactment and turn to the said Principal Act we find in s. 514, thereof, the following:—

514. In cases where any liability has been or is alleged to have been incurred by any owner in respect of loss of life, personal injury, or loss of or damage to ships, boats or goods, and several claims are made or apprehended in respect of such liability, then, subject to the right hereinbefore given to the Board of Trade of recovering damages in the United Kingdom in respect of loss of life or personal injury, it shall be lawful in *England or Ireland* for the High Court of Chancery, and in *Scotland* for the Court of Session, and in any *British* possession for any competent court, to entertain proceedings at the suit of any owner for the purpose of determining the amount of such liability subject as aforesaid, and for the distribution of such amount ratably amongst the several claimants, with power for any such court to stop all actions and suits pending in any other court in relation to the same subject matter; and any proceeding entertained by such Court of Chancery or Court of Session, or other competent court, may be conducted in such manner and subject to such regulations as to making any persons interested parties to the same, and as to the exclusion of any claimants who do not come within a certain time, and as to requiring from the owner, and as to payment of costs, as the court thinks just.

It was doubtless under this enactment that proceedings were taken in many cases that arose under the said Shipping Act as amended by said s. 54.

Turning then to part 8 of the Shipping Act of 1894, we find s. 504 providing in substance for that which was enacted in the clause just quoted.

When we consider the frame of the Act of 1854, or of the said amending Act of 1862, we find each subject matter, as it were, which is dealt with legislatively, made to appear under a defining caption. Having regard to that system of defining subject matter we need not concern ourselves much with the general purview of the Act as a whole. We should further confine ourselves to looking at the purview of the enactments appearing under each of these respective captions, unless, indeed, as in the case of the amendment by s. 54 in the amending Act of 1862, we find it relates to cognate matters in the principal Act, and then, of course, we should consider all such together. It is to be observed that there is nothing expressed in the Act of 1894 which lends the slightest colour to the claim of priority by anyone over others in relation to damages which the ship as such was responsible for, and has been condemned to answer, much less to the proceeds of her sale resulting from the condemnation against her.

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The same is true of each of the several enactments giving to shipowners a right to secure limitations of liability. It so happened, however, that the courts which had been entrusted with the power of giving effect to the relief provided by these several Acts of limitation, in administering these laws, on the application of the shipowners invoking protection, gave relief only upon payment into court of a sum or sums based on the application of the measurements specified in the Act, and priorities were thus created, indeed of necessity sprang from the course of judicial relief given in each of the classes of cases provided for.

That, however, is surely very far removed from the possibility of constituting the fund realised out of the sale of the vessel, in an action in *rem*, as this is, at the suit of another party like appellant, one which must be administered on the basis which the courts have adopted in an entirely different sort of proceeding.

S. 504, forming part of said part 8, expressly provides that upon such claims as in question in that part of the Act being taken or apprehended, then the owner may apply to a competent court and invoke the relief given him or it by the preceding section.

The enactment was substantially in principle the same as s. 514 above quoted from the Act of 1854.

The numerous cases which had to be dealt with under the last mentioned section indicate that any preference or priority given to any claimant invoking said section, or the powers therein, was solely in furtherance of the privilege given to the shipowners and for the purpose of effectively working out the scheme of the limitation clause or clauses.

S. 504 of the Act of 1894, with which we have to deal, I think has been treated in the same way as in acting upon it the like principles have been applied. This section alone seems to render this part of the Act operative and give the court power to determine the amount to be paid and administer the fund thereby created.

Unless and until this part of the Act has thus been made effective and operative there can be no claim under it.

The case of "*The Victoria*," 13 P.D. 125, relied upon below, was one of the very many decisions passed upon questions raised under the amendment of 1862, and was simply the result of an application to the Court of Chancery under the s. 514 above quoted. It decides nothing to support the present contention of priority in

relation to the fund derived from the sale of the vessel in this action in *rem*. In not a single case so far as I can find has the construction of the amendment of 1862, or the part 8 of the Act of 1894, been otherwise brought into question or declared to have any effect.

Indeed being a case of privilege given the owner only under certain circumstances, it seems impossible for the question otherwise to arise and when raised the issue must be tried as other questions; upon pleadings and proof.

For aught we know the owners may have been privy to the wrong done which is in question here. That suggestion may appear remote when a case has been tried without one word of contention or evidence relevent thereto having been set up, but it is to be observed the case being in *rem* does not necessarily involve the privity of the owner or its individual responsibility.

Such being the conclusions which I have reached upon the construction of the Act relied on, it is needless to pursue the many other questions raised, for admittedly under the Canada Shipping Act there can be no claim to the priority alleged.

The appeal must be allowed with costs.

As to the cross-appeal by some claimants that others are barred by the limitations of the time within which those entitled in virtue of Lord Campbell's Act must bring action, it seems to be rather late now to raise such a question for the first time.

There is nothing in the judgment appealed from to indicate that such a contention was set up below.

The objection to the right of the judge to amend the order as to the original time fixed for bringing in claims does not cover the ground.

The case of *The "Alma,"* [1903] P. 55, cited in the factum is not in point.

That is where owners had taken proceedings to establish a limitation under the sections I have already discussed and the question raised before the judge in charge of working out a reference thereunder, was whether or not he could let in claims which were not presented within the time limit originally fixed by the judgment giving relief.

It presented no case based on the Statute of Limitations or the clause of Lord Campbell's Act limiting the time.

When those cross-appealing saw any claim competing with

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theirs presented bofore the referee they may have been entitled to raise the objection of the Statute of Limitations, or the corresponding limitation in Lord Campbell's Act, but failing to do so, or someone entitled to do so failing to object, I cannot think it can now be raised for the first time and the cross-appeal should therefore be dismissed with costs which would seem to be trifling if worth noticing in view of the factum.

Duff, J.

DUFF, J.:—I think the appeal should be allowed with costs.

Anglin, J.

ANGLIN, J.:—Arrested and held liable at the suit of the owners of the "Empress of Ireland," with which she collided, the S.S. "Storstad" was sold under an order of the court made in the action by consent of all parties interested. The proceeds of the sale are in court. The respective rights in the distribution of them, on the one hand of persons entitled to maritime liens on the delinquent ship for damages for loss of life or personal injuries, and on the other of persons entitled to similar liens in respect of loss of or injury to property resulting from the collision, form the subject of this appeal. The priority of the claim of the plaintiff for its costs incurred in securing the arrest and condemnation of the offending ship is not contested, nor is her liability to any of the claimants found entitled by the registrar now disputed. The money available, however, will answer but a fraction of the claims and falls far short of either the £15 per ton fixed by s. 503 of the English Merchant Shipping Act, 1894, or the $38.92 per ton fixed by the Canada Shipping Act (R.S.C., c. 113, s. 921), as the limit of the owner's liability.

The question at issue between the parties is whether all the recognised claimants are entitled to rank *pari passu* upon this fund, as it is conceded would be the case if the Canada Shipping Act should govern or if neither it nor the English Merchant Shipping Act should apply, or whether claimants in respect of loss of life or personal injuries are entitled to whatever preference s. 503 of the latter Act provides for. There is also a question as to the extent of this preference.

Neither the "Storstad" nor the "Empress of Ireland" was registered in Canada. The registry of the "Storstad" was Norwegian, that of the "Empress of Ireland," British. Part 8 (s.s. 502-509) of the Imperial Merchant Shipping Act, 1894 (57-8 Vict., c. 60), is by s. 509 made applicable to the whole of His Majesty's

Dominions; and by s. 735, the power of the legislature of any British possession to repeal wholly or in part any of its provisions is restricted to their application to ships registered in that possession. The Merchant Shipping Act of 1854 (17 & 18 Vict., c. 104), contained similar provisions—ss. 502 and 547. I have no doubt whatever that if this case falls within either of them, the liability of the defendant and the rights of the plaintiff and other claimants *inter se* must be determined by s. 503 of the Imperial Act rather than by s. 921 of the Canada Shipping Act, which is *in pari materia*.

The heading of part 8 of the Imperial Act is "The Liability of Shipowners." It was presumably intended to be exhaustive. By s. 503 (s. 54 of the Act of 1862), it limits the liability of the shipowner to £15 per ton of the delinquent ship's tonnage in respect of loss of life or personal injury either alone or together with loss of or damage to property, and £8 per ton in respect of loss of or damage to property whether it is or is not accompanied by loss of life or personal injury. No doubt

the *ordinary* mode of obtaining this limitation of liability is for the shipowner to pay the statutory amount into court in an action in which he asks a decree limiting his liability to that sum (Carver's Carriage by Sea, 5th ed., p. 36.).

But, having regard to the history of the limitation of shipowners' liability in English law, I agree with the Local Judge in Admiralty that it is not made dependent on such an action being taken.

S. 503 enacts in general terms a limitation upon the claimants' right of recovery. The only condition attached is that the loss shall have occurred "without (the owner's) actual fault or privity." I cannot think that this term imports that the fact of absence of personal fault or privity must be established in a proceeding in which it is alleged by the owner as an actor. It must suffice if it appears and is found, as is the case here, in a suit in which the liability of the ship is determined—or, it may be, if the contrary does not appear, since such privity or fault should not be presumed. As the local judge points out, s. 504 is permissive. It enables the shipowner where it is his interest to do so, to protect himself against multiplicity of action with the harassing consequence of burdensome costs, which are not within the limitation. It affords him "the full benefit of having the whole case settled at once" and enables him to obtain a speedy release of his vessel, which

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may be worth much more than a sum equal to £15 or £8 per ton of its tonnage, as the case may be.

The company that owned the "Storstad," however, had no interest to invoke the protection afforded by s. 504. She was, so far as appears, its sole asset, and, if not, she was, at all events, the only property owned by it subject to the process of the Canadian court. She was worth only £5 10s. per ton of her tonnage as was proved by the result of her sale. The company therefore had nothing to gain by instituting proceedings under s. 504; the claimants could not force it to do so; and they were not taken.

S. 503 is not merely an enactment for the shipowner's benefit limiting his liability. It contains a substantive provision for the advantage of claimants in respect of loss of life and personal injuries upon whom it confers valuable rights of priority. A construction which would make the existence and enforceability of those rights entirely dependent on the shipowner's seeking and obtaining a judgment under s. 504 declaratory of the limitation of his liability and fixing the amount thereof would seem so utterly unreasonable and so contrary to what parliament apparently intended should be the effect of the statute that, in my opinion, it should not prevail. Whether loss of life and personal injury claims are to have a limited preference over loss of property claims or are to rank *pari passu* with them on the entire fund available was not left to be determined by the action or the inaction of the shipowner whether prompted by interest or purely spontaneous.

An argument in support of the contrary view rests on the juxtaposition of ss. 503 and 504 in the Act of 1894. But in the Act of 1854 the section corresponding to s. 503 of the statute of 1894 was s. 504 and that corresponding to s. 504 of 1894 was s. 514. When s. 54 of the Act of 1862 replaced s. 504 of the Act of 1854, s. 514 was left unaltered. Compare ss. 1 and 4 of 26 Geo. III., c. 86; 53 Geo. III., c. 159, s. 1 and s. 7; and see the speech of Lord Blackburn in the *Stoomvaart Maatschappy Nederland* v. *The Peninsular and Oriental Steam Nav. Co.*, 7 App. Cas. 795, at 814 *et seq.* There is no interdependence between the two provisions. Their juxtaposition in the Act of 1894 has not the significance suggested.

Subject to the priority of the plaintiff for costs of the suit in which the offending ship was seized and its liability determined, the proceeds of the sale of it in court form part of the amount for

which the owners are liable under the Merchants Shipping Act. Their liability to have their ship confiscated for the purpose of making good the damage inflicted is part of the personal liability, which that statute has limited. *Leycester* v. *Logan*, 3 K. & J. 446, 451. It follows that credit must be given upon the owner's statutory liability for any sums received by claimants out of the proceeds of the sale of the ship. If those proceeds should be distributed otherwise than in the proportions in which the full amount of the statutory liability, if paid into court by the owners, would be distributed, on the final disposition of the balance of the statutory liability, should it be realised, payments to the claimants would be so adjusted that they would be allowed thereout only such sums as would make the total amount to be received by each equal to what would have been his share in the full amount of the statutory liability had it been paid into court in the first instance. *The "Crathie,"* [1897] P. 178, 181. The balance of the statutory liability of the owners of the "Storstad" certainly may not, and in all probability will not be realised. Were the court to distribute the money now available *pro rata* amongst all the claimants, as the plaintiff contends for, the policy of s. 503 of the Merchants Shipping Act would be defeated. It would be equally disregarded were the entire proceeds of the sale of the ship devoted to a fund available exclusively to satisfy demands in respect of loss of life and personal injury. The statute does not give them any such priority. It provides for the concurrent establishment of two distinct funds in which it defines different rights.

To carry out the policy of the Act the proceeds of the sale of the ship in court must be treated as a realisation *pro tanto* (as in fact they are) of the owners' statutory liability and distributed as such amongst the several claimants in the same proportions in which the full amount of that liability, if available, would have been distributed. The sum on hand for distribution will therefore be apportioned between the two funds—to one of them seven-fifteenths of it, and to the other the remaining eight-fifteenths. According to the rule laid down in *The "Victoria,"* 13 P.D. 125, and subsequently acted on in *The "Alma,"* [1903] P. 55, and *The "Inventor,"* [1905] 10 Asp. M.C. 99, the former fund will be distributed *pari passu* amongst recognised claimants in respect of loss of life and personal injury, and in respect of any deficiency, these

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claimants will share *pro rata* in the latter funds with the approved claimants in respect of loss of life and injury to property.

The judgment in appeal should be varied accordingly.

An order of the Local Judge in Admiralty extending the time for filing claims until October 10, 1916, has been made the subject of a cross-appeal on the assumption that it determined that all claims which should be filed before the date so fixed would be *ipso facto* eligible for collocation in the distribution. The order does not so provide. Any claims filed pursuant to it must be adjudicated upon by the referee and will be open to all defences to which they are subject. The cross-appeal was misconceived and unnecessary.

Judgment varied.

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Manitoba Court of Appeal, Perdue, Cameron and Fullerton, JJ.A. June 4, 1918.

1. WILLS (§ III G—125)—GIFT ABSOLUTE—RESTRICTING BY OTHER PROVISIONS—PRECATORY WORDS.

Mere precatory words in a will are insufficient to restrict a gift absolute, unless the intention to do so is clear.

[*Perry* v. *Perry*, 37 D.L.R. 89, affirmed.]

2. APPEAL (§ VII J—415)—STATEMENT OF CLAIM—FAILURE TO SUPPORT—SUBSTITUTION OF NEW CLAIM.

A plaintiff who has failed to support the case made in his statement of claim, cannot, after the action has been tried, be permitted to abandon that claim and substitute an entirely new and inconsistent one.

Statement.

APPEAL from a judgment of Mathers, C.J.K.B., 37 D.L.R. 89, dismissing an action for the repayment of certain moneys and the discharge of a certain mortgage. Affirmed.

E. J. McMurray and *J. F. Davidson*, for the plaintiffs; *Richards & Co.*, for defendants.

Perdue, J.A.

PERDUE, J.A.:—All the facts of any importance in this case have been set out in the elaborate and carefully considered judgment of the Chief Justice of the Court of King's Bench, before whom the trial took place. The main object of the suit was to set aside a mortgage made by the defendant Jemima Whitney Perry in favour of the defendant Haig, and to obtain payment to the plaintiffs of certain moneys alleged to have been unlawfully paid to him by the said Mrs. Perry. Charges of fraud, duress and misconduct were made against Haig and the members of the firm of Campbell, Pitblado & Co. The Chief Justice has found that there was no foundation for these charges, and that no

attempt was made at the trial to sustain them. With this finding I am in complete agreement. In fact, on the appeal, no argument was made in support of these charges or any of them.

The questions discussed by counsel for the plaintiff on the appeal turned on the construction of the will of the late W. H. Perry, and whether his widow and main beneficiary, Jemima Whitney Perry, was put to her election, whether she would take under the terms of the will, or against it and retain the property already standing in her name.

I will first deal with the interpretation of the will, although I feel, after perusing the full and able discussion of that subject by the Chief Justice, that little remains for me to add.

One thing stands out clearly on a perusal of the will; the testator assumed that he had a disposing power over both the 1,200 acres of wild land, and the home farm on which he and his family resided. He expresses a wish that the 1,200 acres be sold and the proceeds divided amongst his 8 sons that are named in the will, their shares until the time of payment to be placed in their names at interest in a savings bank. This land was, as the Chief Justice finds, the property of Mrs. Perry, although the testator had provided the means by which it had been acquired. Then, in clear terms, he bequeaths to his wife the home farm, expressing the desire that it should be worked as long as possible and whenever this became impossible from any good cause, that the farm should be sold, the money obtained from the sale to go to his wife. The testator, no doubt, felt that he had by his own work and exertions accumulated all the property and that he ought to have the right to say what should be done with it after his death, notwithstanding the fact that the more valuable part of it stood in his wife's name and was in fact her property. It is very often the case that when a man for one reason or another places property in his wife's name, he still continues to treat it as his own, his wife usually adopting his view as to the management or disposition of it. I have no doubt that the testator in the present case believed that his wife after his death would fall in with the wishes expressed in his will as to the disposition of her property, as well as to that which belonged to himself. The 1,200 acres having been disposed of, as the testator thought, he

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then bequeathed to his wife the farm on which they resided, referred to as the home farm. The bequest is clear and positive, but a wish is expressed as to the working of the farm "as long as possible." When the working of the farm became impossible (no doubt in the sense of impracticable) it was to be sold and the money obtained from the sale was to go to his wife.

So far the intention and meaning of the will are clear enough. Then comes the clause relating to his daughter. He had, as he believed, provided for the sons and he thought his wife might provide for the daughter. He says: "I wish and do want that my only daughter, Edith Florence, shall inherit from her mother a share equal to that of the boys named above, and the balance to be divided in equal shares between all our children then living." The expression "wish and do want" indicates a wish or request. The words "shall inherit from her mother" show that the expected share of the daughter is to come from the mother and not from the testator.

The word "inherit," in its strictly legal meaning, is used in contradistinction to acquiring by will, but in popular use this distinction is often disregarded: See Century Dictionary, pp. 3097-8. In the will in question, which was not drawn by a lawyer the word is used in a popular sense. We often hear the expression "inherited under his father's will" or some similar use of the word. In *Watkins* v. *Frederick*, 11 H.L.C. 358, 11 E.R. 1371, the following expression was found in the will: "the elder son to *inherit* before the younger." Lord Westbury construed the expression "to inherit" as equivalent simply to the verb "to take." The latter words of the clause relating to the division of "the balance" between all the children "then living" must refer to a disposition of money or property at his wife's death. The testator would not expect his wife to divide her property amongst the children in her lifetime, and he had in his mind some date, or the happening of some event upon which the division should take place amongst the children "then living." This would naturally be the date of his wife's death. I think the proper meaning to put on the clause is that the testator expresses a wish that his wife should divide her property by her will in a certain way. The mode of division he suggests may not only refer to the proceeds of the sale of the farm, if sold, but may include all the wife's property. She did in

fact possess property other than the farm mentioned in the will. The testator had no power to impose a trust upon his wife's own property, but he might express his wish or desire as to how she should dispose of her property by her will. The clause is uncertain as to what property is referred to in connection with the word "balance."

The Chief Justice has gone very fully into the decisions relating to the modern doctrine of precatory trusts. A summary of the later cases and a discussion of the trend of modern authority relating to that subject are found in *Re Atkinson*, 80 L.J. Ch. 370. In that case Cozens-Hardy, M.R., said, at p. 373:—

> With regard to *Hill* v. *Hill*, [1897] 1 Q.B. 483, I desire for this purpose to adopt the observations of Lord Esher as shewing that the court ought to be very careful not to make words mandatory which are a mere indication of a wish or a request. The whole will must be looked at, and the court must come to a conclusion as best it can in construing, not one particular word, but the will as a whole, as to whether the alleged beneficiary is or is not a mere trustee or whether he takes beneficially with a mere superadded expression of a desire or a wish that he will do something in favour of a particular object, but without imposing any legal obligation.

In *Re Hamilton*, [1895] 2 Ch. 370, was a case in which the testatrix gave legacies to her two nieces for their separate use and added; "I wish them to bequeath the same equally between the families of O. and P." It was held by the Court of Appeal that there was no precatory trust. Lindley, L.J., said in that case, p. 373:—

> You must take the will which you have to construe and see what it means, and if you come to the conclusion that no trust was intended, you say so, although previous judges have said the contrary on some wills more or less similar to the one which you have to construe.

In *Johnson* v. *Farney*, 9 D.L.R. 782, 14 D.L.R. 134, 29 O.L.R. 223, the testator had left his property to his wife, and added, amongst other suggestions: "I also wish if you die soon after me that you will leave all you are possessed of to my people and your people equally divided between them." The wife had property of her own and the wish expressed covered this property as well as that which the testator was leaving to her. It was held by the Appellate Division, affirming the decision of Boyd, J., that the wish was no more than a suggestion, and did not impose a trust.

Much reliance was placed by the plaintiff upon *Comiskey* v. *Bowring-Hanbury*, [1905] A.C. 84. In that case the testator bequeathed to his wife the whole of his real and personal estate and property absolutely

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in full confidence that she will make such use of it as I should have made myself and that at her death she will devise it to such one or more of my nieces as she may think fit and in default of any disposition by her thereof by her will or testament I hereby direct that all my estate and property acquired by her under this my will shall at her death be equally divided among the surviving said nieces.

In that case the House of Lords, reversing the judgment of the Court of Appeal, held that there was an absolute gift to the wife subject to an executory gift at her death to such of his nieces as should survive her, equally if more than one, so far as his wife should not dispose by will of the estate in favour of the surviving nieces or any one or more of them. This intrepretation turned upon the words "I hereby direct." Lord Halsbury, L.C., said, p. 88:—

> To my mind it is clear that he (the testator) is contemplating that she (the wife) shall have the full use of the property during her lifetime, and that after her death one or more of his nieces is to be the object of his bounty and if his widow does not select one or more, then they are all to share alike.

In the present case there is no direction, but only the expression of a wish. Again, in the *Comiskey* case the subject of the bequest is definite and certain—the whole of the testator's real and personal estate and property—while in the present case the bequest of "the balance" may refer to the proceeds of the home farm only, or it may include both that and his wife's own property.

I think the words used in the clause in question in the present case are no more than a suggestion on the part of the testator that his wife should bequeath to the daughter an amount equal to that received from the testator by each of the sons, and that she should divide the balance of her property amongst all the children of herself and her husband living at the time of her death. If this is, as I think it is, the correct interpretation of the will, Mrs. Perry became the absolute owner of the home farm and was at liberty to deal with it as such.

We next come to the question of election on the part of Mrs. Perry. The Chief Justice states in his judgment that he pointed out to plaintiffs' counsel that the only possible way in which the estate as represented by the executor could become interested in the 1,200 acres would be if the widow were compelled to elect, and had elected to take what was given to her under the will, and had relinquished her title to the 1,200 acres. The question of election was not raised in the pleadings. The Chief Justice says

that no application to amend was made until after the trial. He then goes on to say:—

> The action was based upon the theory that the testator owned both the wild lands and the home farm. That is the case the plaintiffs attempted to prove and they must stand or fall by it. I believe in freely permitting amendments so that the real controversy between the parties may be tried, but the plaintiffs having utterly failed to support the case made in their statement of claim, cannot, after the action has been tried, be permitted to abandon that claim and to substitute an entirely new and inconsistent one, requiring a re-alignment of parties.

These are cogent reasons for declining to consider the question of election in this suit. Mrs. Perry was no doubt anxious to assist her children in their attack on the members of the firm of Campbell, Pitblado & Co. Accordingly in her defence she makes the admission that, although the 1,200 acres were registered in her name, she held the land solely as trustee for her husband, and after his death for the beneficiaries under his will. Yet, as the evidence shows, she claimed and retained the land as her own after her husband's death and disposed of it for her own use. This, as the Chief Justice finds, was done with the acquiescence of W. T. Perry, the executor. The proceeds of the 1,200 acres have been dissipated by Mrs. Perry and lost to the estate. The question is not one of election. It is a matter that rests between the beneficiaries on the one side and Mrs. Perry and the executor on the other. Purchasers for value, not aware of the trust, if there was one, are not affected by a breach of it.

The real object of this suit was to set aside the mortgage given to Mr. Haig on the home farm and other land and to recover the money paid by Mrs. Perry in connection with the Sherbrooke Street property. If the Perry family desire to call the executor and Mrs. Perry to account in respect of their dealings with the estate, they can do so by a new suit or proceeding. The appeal in the present suit must be dismissed with costs.

Cameron, J.A.

CAMERON, J.A.:—This action is brought by all the children of W. H. Perry (in his lifetime residing near Plympton, in this province), with the exception of two who had assigned their interests to one of the plaintiffs, and the eldest W. T. Perry, against Jemima Perry, widow of W. H. Perry, and the said W. T. Perry, executor of the will of W. H. Perry, and against the members of the firm of Campbell, Pitblado & Co. The action involved the construction of the will of W. H. Perry and in the pleadings

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relief is asked against the defendant Haig for the repayment of certain moneys and the discharge of a certain mortgage. The action came on for trial before the Chief Justice of the King's Bench, who dismissed it as against all the defendants. The will in question, the facts involved and the pleadings, together with his conclusions on the facts and the law involved, appear fully in the judgment of the Chief Justice. On the appeal from this judgment to this court the branch of the case asking for the repayment of moneys paid the defendant Haig, and for the discharge of the $5,000 mortgage given by Jemima Perry on what are known as the "home farm" and the Portage la Prairie farm, was abandoned, the finding of the Chief Justice, fully exonerating the firm of Campbell, Pitblado & Co. from all charges against them, being unequivocally accepted.

Though the question is not directly raised by the pleadings, it is contended that the testator having devised to the widow lands which were his own, and also lands which were hers, she was put to her election, and that in fact she elected against the will, by taking and disposing of the 1,200 acres mentioned in the will, which were at the time of her husband's death and had been her property for some years prior thereto.

The question is whether the widow, if she has elected against the will, has forfeited her title under the will to the home farm. If her election against the will results in a forfeiture, the contention is sound. If, on the other hand, all that is raised by the election is the question of compensation to the disappointed devisees, no question of title is involved, and the matter is not one that concerns us in this action.

Now there may well be a question whether there was an election here. The fact of the widow dealing with the 1,200 acres as she did is not necessarily conclusive. To establish election by conduct it "must be by a person who has positive information as to his rights to the property, and with that knowledge really means to give the property up." Theobald on Wills, 7th ed., 112, and cases there mentioned. But it seems to me immaterial for the purposes of this case, to decide whether or not there has been an election.

The question "whether the principle governing cases of election under a will is forfeiture or compensation" is discussed in Jarman

on Wills, at p. 537: "The strong current of the authorities, particularly those of a recent date, is in favour of the principle of compensation." And the author of the 6th edition, vol. 1, of the work concludes the citation from Mr. Jarman's original work with the statement: "It is now generally accepted as the settled doctrine of the court," p. 538.

The subject is discussed by Mr. Swanston in the note to *Gretton* v. *Haward*, 1 Swans. 409, 36 E.R. 443, cited in Jarman on Wills, p. 537. He favours the doctrine of compensation in cases of election as contradistinguished from forfeiture and points out that the infliction of forfeiture on a devisee electing to take against the will, beyond the extent of compensation to those whom his election disappoints, would be inconsistent with the principle on which the doctrine rests. The court interferes for the purpose of carrying out the intention of the testator and interferes only to the extent that is necessary to effect that purpose. To go further and effect forfeiture would disappoint the testator's intention. The modern cases clearly recognize the doctrine of compensation as now settled. *Re Vardon's Trusts*, 28 Ch. D. 124, 31 Ch. D. 275; *Cooper* v. *Cooper* (1874), 7 H. of L. 53. In *Rogers* v. *Jones*, 3 Ch.D. 688, at 689, Jessel, M.R., says:—

> If a person whose property a testator affects to give away takes other benefits under the same will, and at the same time elects to keep his own property, he must make compensation to the person affected by his election to an extent not exceeding the benefits he receives.

This passage is cited and followed by Swinfen-Eady, J., in *Re Booth*, [1906] 2 Ch. 321, at 325.

It follows, therefore, that even if the contention is sound that the widow has elected as against the will, her title to the home farm is wholly unaffected, and while she may be liable to make compensation to the disappointed sons, that concerns an issue which does not arise in this suit. Her right to mortgage that property and the rights of the mortgagees under the mortgage thereon, in the circumstances of the case, are both unimpeachable.

The main question in the case arises upon the construction to be given to the following clauses of the will:—

> I leave and bequeath on my wife J. Whitney this farm our home; and I wish the farm should be work as long as possible and whenever this would become impossible from any good cause, this said farm shall be sold and the money obtained from said sale to go to my wife. I wish and do want that my only daughter Edith Florence shall inherit from her mother a share equal

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to that of the boys named above and the balance to be divided in equal shares between all our children then living.

As to the effect of the above clauses of the will, s. 26 of our Wills Act, c. 204, R.S.M., has an application. It provides:—

Where any real estate is devised to any person without any words of limitation such devise shall be construed to pass the fee simple or other the whole estate or interest which the testator had power to dispose of by will in such real estate unless a contrary intention appear by the will.

So that the widow, under the first of the cited clauses, takes the fee simple absolutely, unless a contrary intention appears.

What is the meaning to be given to the word "inherit" as used by the testator? In the New Oxford Dictionary the following definitions are given:—"to take or receive (property, esp. real property, or a right, privilege, rank or title) as the heir of a former possessor (usually an ancestor) at his decease: to get, or come into the possession of, by legal descent or succession"; "to be heir to (a person); to succeed as heir; to come into or take possession of an inheritance."

And there is also given as a transferred sense:—"to come into possession of, as one's right or divinely assigned portion; to receive, obtain, have or hold as one's portion."

The Century Dictionary gives as a meaning:—"to receive by transmission in any way."

The Imperial Dictionary gives the following:—"In law, to take by descent from an ancestor; get by succession as the representative of the former predecessor; receive as a right or title descendable by law from an ancestor at his decease: in law it is used in contradistinction to acquiring by will: but in popular use this distinction is often disregarded."

If we accept the contention for the plaintiffs and take the words "I wish and do want" of the above last quoted clause of the will as imperative, and if we give the word "inherit" the meaning generally assigned to it as involving succession, the effect of it would be to create a life interest in the widow in the "home farm." If, however, under the same condition, we take the word "inherit" in the popular sense indicated in the Imperial Dictionary as equivalent to the term "acquire by will," then there arises an absolute gift to the widow, subject to an executory gift to the children as set out in the clause. I would be inclined to think that that clear and specific direction as to the division amongst

the children would tend to the adoption of former construction. However that may be, it seems to me that the result is the same.

My own view is that the doctrine of "precatory trusts" so called is not directly applicable to the question before us for determination in arriving at the testator's intention. The term "precatory trusts" is an awkward one. As said by Rigby, L.J., in *Re Williams*, [1897] 2 Ch. 12, at 27:—

> This phrase is nothing more than a misleading nickname. When a trust is once established it is equally a trust and has all the effects and incidents of a trust whether declared in clearly imperative terms by a testator or deduced upon a consideration of the whole will from language not amounting necessarily and in its *primâ facie* meaning to an imperative trust.

If we assume the contention as correct that the widow takes merely a life estate, with remainder over, there can be no question of a trust, precatory or otherwise, except in a limited sense. It is simply a case of a tenancy for life in the widow with remainder over as set forth. There is, it is true, a sense in which a tenant for life is trustee for the remaindermen.

> He (the tenant for life) is a trustee in the sense that he cannot injure or dispose of the property to the injury of the rights of the remainderman or acquire an outstanding title for his own exclusive benefit but he differs from the trustee of a pure trust in that he may use the property for his exclusive benefit and take the income and profits. 40 Cyc. 616-617.

See also Lewin on Trusts, 12th ed., p. 711. But it is not this limited and special trusteeship that is meant when "precatory trusts" are spoken of in any of the cases that I have examined. Such special trusteeship arises by operation of law upon the creation of a life tenancy and does not need to be deduced from uncertain terms of the will. Once the tenancy for life is established, the fiduciary obligations of the tenant for life to the remaindermen arise also.

On the other hand, let us take it as established that there is here a devise of an absolute gift to the widow, with an executory gift over to the children named, that is, that there is a direction to the widow to leave the property by will in the proportions set forth. This case would, on the above assumptions, be similar to *Comiskey* v. *Bowring-Hanbury*, [1905] A.C. 84, where it was held that there was an absolute gift of the testator's property to his wife, subject to an executory gift of the same at her death to such of her nieces as should survive her, equally, if more than one, so far as his wife should not dispose of by will of the property in

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favour of the surviving nieces. In the opinion of the House of Lords, the question of precatory trusts did not there arise. See Jarman on Wills, p. 880.

But there seems to be no reason in principle why precatory words as they are construed in the case of wills, where it is sought to deduce a trust from the expressions used therein, should not be similarly construed, when either a tenancy for life or a gift with an executory gift over is attempted to be established. "Mere precatory words are insufficient to render the estate less than absolute." 40 Cyc. 1612. This principle is in accordance with that laid down in the English cases that where an absolute estate is given it is not to be restricted unless the intention is clear. Such also is the effect of the section in our Wills Act already cited.

On a review of the authorities on the subject of words such as these used here, "I wish and do want," it is clear that the modern decisions are against the implication of a trust from the use of precatory words. Many of these decisions were cited to us and appear in the judgment of the Chief Justice.

Where the words of a gift expressly point to an absolute enjoyment and power of disposition by the donee himself the natural construction of subsequent precatory words is that they express the testator's belief or wish without imposing a trust. Jarman 873.

Here we have a gift absolute of the fee simple of the home farm to the wife. The power of sale is superfluous and can be disregarded as the widow has full power of disposition. The fair conclusion is that after making this absolute gift the testator had no intention of doing more than express a desire that his daughter and the other children named should share ultimately as he indicated, and he had no intention of restricting the fee simple given his wife. As for the words themselves, "I wish and do want," they come within those which can be termed "vague expressions of wish or advice" which the courts are reluctant to construe as creating trusts. Jarman, p. 877, *Lambe* v. *Eames*, L.R. 6 Ch. App. 597; *Re Hutchinson & Tenant*, 8 Ch. D. 540; *Re Adams & Kensington*, 24 Ch. D. 199, 27 Ch. D. 394; *Re Diggles*, 39 Ch. D. 253; *Re Hamilton*, [1895] 2 Ch. 370; *Re Williams*, [1897] 2 Ch. 12; *Re Oldfield*, [1904] 1 Ch. D. 549. If it was the intention of the testator to make a disposition by his will that should enure positively to the benefit of his children, subject to the life or other interest of his wife, it was easily competent for him to do so, and in view of the

foregoing considerations it does not appear to me that we can read such a positive direction out of the words he has actually used.

Even if we were to give to the words "I wish and do want" an imperative significance sufficient to create a life estate with remainder over, or an absolute estate subject to an executory gift, there remains an uncertainty as to the subject of the devise in the expression "shall inherit from her mother a share," the effect of which must be considered. Does that mean "inherit from her mother a share of her mother's property" or "inherit from her mother a share of my property" or "inherit from her mother a share of the home farm?"

In the case of a trust the subject of the gift must be certain. This must be an elementary consideration, and scarcely requires authority to support it. It can only be created "where the testator points out the objects, the property, and the way in which it *shall* go," *per* Arden, M.R., in *Malim* v. *Keighley*, 2 Ves. Jr. 333, 30 E.R. 659, discussed in Lewin on Trusts on p. 150. "Though some property may be mentioned out of which a trust is to be performed, that is not enough, if it is not clear what the property is," if, for instance, "the precatory words apply not only to the property given by the testator, but to all the property of the legatee," Theobald, 490; *Eade* v. *Eade*, 5 Madd. 118; 56 E.R. 840; *Parnall* v. *Parnall*, 9 Ch. D. 96; *Mussoorie Bank* v. *Raynor*, 7 A.C. 321. "There must also be a definite subject," Jarman 872. And these considerations are applicable where it is asserted the testator intended to create a life estate, or to give an absolute estate subject to an executory gift. Clearly the subject of the gift over must be certain, or the gift is ineffectual.

Who is able to say beyond doubt, whether the testator meant to say here that the daughter shall inherit from her mother a share of her mother's estate or of her father's whole estate, going to the mother, or of the particular farm specifically devised?

If we were at liberty to insert after the word "share" the words "of the said farm," this difficulty would be disposed of. But to do that we would be falling back upon conjecture, which we are not at liberty to invoke. Jarman, p. 588. The mother had property of her own, and that fact and the uncertainty of the meaning of the words in the clause referred to lead to the conclusion that

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the testator was merely expressing a wish and not imposing an obligation. Even if the introductory words of the clause were: "I direct," then the uncertainty of the subject matter of the gift is such that it would be impossible to give effect to the gift over, or the executory gifts, as the case may be. As Bowen, L.J., in *Re Diggles*, 39 Ch. D. 253, points out, "uncertainty of the property and object are reasons for not construing the will as creating a trust." And the same reasoning is applicable where it is sought to restrict an absolute gift in a will by the effect of succeeding expressions with reference to the subject or object of the gift which are vague and uncertain.

In my judgment, therefore, the appeal must be dismissed.

Fullerton, J.A.

FULLERTON, J.A.:—The only question discussed on the argument was the right of the plaintiffs to set aside a certain mortgage for $5,000, bearing date November 17, 1914, made by the defendant Jemima Whitney Perry to the defendant John T. Haig, and covering the northeast quarter of section three in township ten and range five, east of the first principal meridian in the Province of Manitoba.

The plaintiffs are the children of the late W. H. Perry, who died on December 3, 1907. The only property, other than farming utensils, of which he died possessed, was the property covered by the above mortgage, which, for convenience, we will call the "Home Farm."

He left a will in the following terms:—

PLYMPTON, Aug. 20, 1906.

I W. H. Perry, sound in mind but sick in the body, do hereby make my last and only will.

I wish that the 1,200 acres of wild land I possess to be sold at the best conditions possible and the amount of said sale to be divided in equal shares between my eight sons living at home, viz: Charles Arthur, Walter Alexander, Robert Gordon, Edward Fancourt, Alfred Ernest, Frederic Bailey, Harvey Warren Wilkinson, Russell Earl.

In no case can they touch or handle their capital before they go and settle or at the age of 21 years old. The said shares to be placed at interest in a savings department of a chartered bank at their proper names.

I leave and bequeath on my wife, J. Whitney, this farm, our home; and I wish the farm should be work as long as possible and whenever this would become impossible from any good cause, this said farm shall be sold, and the money obtained from said sale to go to my wife.

I wish and do want that my only daughter, Edith Florence, shall inherit from her mother a share equal to that of the boys named above, and the balance to be divided in equal shares between all our children then living.

And I do appoint my son, William, the executor of this my only and last will.

Signed in the presence of W. H. PERRY.

D. FERGUSON, THOMAS WILSON, F. ROYAL, M.D.

The transactions leading up to the making of the mortgage attacked in this action are described by the Chief Justice, who tried the case, as follows:—

On the 14th September, 1912, J. T. Haig, entered into an agreement to sell to Mrs. Perry Lot 246 on Sherbrooke St., Winnipeg, for $27,225, payable $6,806.25 cash, upon the execution of the agreement, and a like sum on the 14th September in each of the years 1913, 1914 and 1915 with interest at 6%. The sale was negotiated by a real estate agent with whom Mr. Haig had listed the property for sale, Mr. W. T. Perry therein representing his mother. On September 18, 1912, the latter paid to Mr. Haig $6,431.25 and on the following day a further sum of $87.50; these two sums, together with $200 previously paid, representing the cash payment after the adjustment of taxes, etc., had been made.

Mrs. Perry failed to make the payment of either principal or interest which fell due under the agreement on the 14th September, 1913, but in lieu thereof she gave her promissory note for $8,056, payable on the 14th July, 1914, to J. T. Haig and Isaac Pitblado, who owned a half interest in the lot sold, and she at the same time transferred to them her interest in some real estate situate on Balmoral Street and Young Street, and gave a mortgage on the home farm for $8,056, as security for the payment of the said promissory note. The Balmoral St. and Young St. lands were part of those received in exchange for the wild lands. Later Mrs. Perry, with the consent of Haig and Pitblado, traded her interest in these latter lands for 240 acres of farm lands, near Portage la Prairie, hereinbefore referred to, these latter lands being conveyed to Haig and Pitblado.

The note was not paid when it fell due, and Pitblado and Haig sued Mrs. Perry upon it. After action a settlement was arrived at, Mr. H. V. Hudson, a well-known solicitor, therein acting for Mrs. Perry. By the terms of the settlement Mrs. Perry was to give a quit claim deed of the property on Sherbrooke St., purchased from Mr. Haig, and to give a mortgage upon the home farm and the 240 acres near Portage la Prairie for $5,000 payable $300 in November, 1915, and 1916, $400 in November, 1917, $500, in November 1918, and the balance in November, 1919. This quit claim deed and mortgage were to extinguish all claims against Mrs. Perry, all other securities were to be returned to her, and the $8,056 mortgage was to be discharged.

In the statement of claim these various transactions are set out and it is charged in par. 14 that defendant Haig, by duress and by the fraudulent representation that he required a note as accommodation in order that he could raise money, induced Mrs. Perry to sign the promissory note.

Par. 15 charges that defendant Haig compelled and induced, by the representations referred to, Mrs. Perry to assign, as security, the properties on Balmoral and Young Streets and further induced

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and coerced Mrs. Perry to execute the mortgage for $8,056 on the home farm.

Par. 16 alleges that the properties on Balmoral and Young Streets were, with the consent of Haig, exchanged for the 240 acres of farm land near Portage la Prairie, and that Haig induced and coerced Mrs. Perry to convey them to him.

Par. 18 alleges that Mrs. Perry was unable to pay the said note and that Haig induced Mrs. Perry to quit claim the lands on Sherbrooke St. purchased from Haig whereby the estate was improperly and illegally deprived of the said lands.

Par. 21 alleges that Mrs. Perry had only a life interest in the home farm.

In so far as the mortgage was in question in the action, only two questions were discussed at the trial: 1. Was Haig guilty of any fraud in connection with the taking of the mortgage? 2. Was Mrs. Perry the owner of the home farm or had she only a life interest therein?

The Chief Justice found that there was not a tittle of foundation for the charge of fraud, duress or other wrongdoing on the part of the defendant Haig, and counsel for the appellants on the argument admitted that this finding was correct.

He also held that under the will Mrs. Perry took the whole estate in the farm.

The 1,200 acres of wild land referred to in the will did not belong to the deceased, but were the separate property of Mrs. Perry. After the death of her husband she disposed of all these lands.

The statement of claim in the action claimed these lands as part of the estate and a great deal of evidence was given on this issue.

The Chief Justice pointed out to the plaintiffs' counsel on the trial that the only possible way in which the estate, as represented by the executor, could become interested in these 1,200 acres would be if Mrs. Perry were compelled to elect and had elected to take what was given her by the will and relinquished her title to the 1,200 acres of land. No application was made at the trial to amend, nor was the question argued.

Counsel for the appellants sought to raise the question of election on the argument before us, and as his right to do so

depended on a careful examination of very lengthy pleadings, he was permitted to present his argument on the question.

I have carefully examined the statement of claim and have arrived at the conclusion that an amendment is necessary before the question of election can be dealt with. I do not think any amendment should be granted at this stage.

The only other question I have considered is the construction of the will. The construction placed upon the will by the Chief Justice appears to me to be the correct one.

I would dismiss the appeal with costs. *Appeal dismissed.*

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WOODSTOCK ELECTRIC RAILWAY, LIGHT & POWER Co. v. DOMINION TANNERIES, Ltd.

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New Brunswick Supreme Court, Appeal Division, Hazen, C.J., White and Grimmer, JJ. April 19, 1918.

ASSIGNMENT (§ III—30)—AGREEMENT TO SUPPLY ELECTRIC POWER—NOTICE OF ASSIGNMENT NECESSARY—N.B. JUDICATURE ACT, 1909, s. 19 (6).

An assignment of an agreement to supply a corporation with electric power and light for a term of years is unenforceable until notice of the assignment is given in accordance with s. 19 (6) of the New Brunswick Judicature Act, 1909.

APPEAL by defendant to set aside verdict entered for plaintiff on trial before McKeown, C.J., K.B.D., without a jury, and to enter a verdict for defendant, or for a new trial. Affirmed. Statement.

J. C. Hartley, K.C., for appellant; *A. B. Connell*, K.C., for respondent.

The judgment of the Court was delivered by

GRIMMER, J.:—The plaintiff company is a corporation whose head office is at the town of Woodstock in the county of Carleton, and whose chief business is the manufacture and sale of electric light and power in said town and its vicinity. Grimmer, J.

In the year 1912 it entered into an agreement with J. D. Dickinson & Sons, Ltd., a corporation located in said town, to supply it with certain electric power and light for a period of 10 years upon the terms and conditions set out in the said agreement. The contract apparently was in full operation until October 6, 1916, when the Dickinson Co. assigned the same to the defendant company, the Dominion Tanneries, Ltd., which had purchased all its physical assets. Without the formal making of a new or fresh contract, the defendant company took and continued to take from

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the plaintiff, the power and light necessary to the operation and carrying on of its business. Under the contract above mentioned the plaintiff was to furnish sufficient electric power to operate 2 motors of 50 h.p. each, and fully light the tannery establishment of the Dickinsons, and the residence of John F. Dickinson, during the term of the contract, and subject to its provisions and "at the times as said Dickinsons shall require the same," at a stated price of $1,800 per year, payable at the rate of $150 per month.

After the advent of the defendant company, certain changes were made in their power plant, particularly by the addition of 2 transformers and 3 motors, being two of 10 h.p. and 1 of 5 h.p. respectively. The plaintiff also installed two meters, one of 220 volts, and one of 2,200 volts for the purpose of ascertaining the amount of power and light used.

The defendant company also increased its general plant by the erection of two warehouses for storage purposes.

This action was brought to recover the sum of $1,725.67 for electric power and light supplied by the plaintiff to the defendant in the months of October, November and December, 1916, and during the months of January and February, 1917. The plaintiff claimed it was entitled to be paid for the power and light supplied, at the regular rates charged to its customers in the town of Woodstock, namely, at the rate of 2 cents per kilowatt, hour for all the electric power and light supplied at the defendant's plant.

The defendant relied upon the so-called Dickinson contract, under the assignment thereof, as a defence to the action, and it thus became necessary for the judge who heard the cause to make a finding in respect to the validity thereof. After considering the evidence, he delivered a judgment holding that the assignment was legally and properly made, and that the defendant was the legal and proper assignee of the lighting and power contract entered into between the plaintiff and J. D. Dickinson & Sons, Ltd., but that the defendant could not avail itself of the assignment as a defence to this action, inasmuch as the notice required by s. 19(6) of the Judicature Act had not been given to the plaintiff before action brought.

In this, in my opinion, as hereinafter explained, he was correct, as it clearly appears from the evidence, as well as being admitted by the defendant's solicitor, that notice of the assignment of the

contract was not given until after service of the writ in this action was accepted by the said defendant's solicitor.

I am also of the opinion the contract under the provisions of the above-recited Act is one that might and could be assigned, but as for the reasons herein stated, the defendant cannot rely upon the assignment as a defence to the action, it becomes unnecessary to discuss or labour the general effect thereof, so far as the several interests of the parties thereto are concerned.

The trial judge also found that, while practically no new contract had been entered into between the parties as to the supply of power and light, that while the manager of the defendant company had asked for a new contract which he could submit to the head office of the defendant in Chicago, and while an offer had been made by the plaintiff, which however had not been accepted by the defendant, yet the defendant was content to pay what might be a fair and reasonable price for the services rendered by the plaintiff, to be determined in the last resort by the courts, and he ordered a verdict and judgment to be entered for the plaintiff for $1,725.67, the sum agreed upon between the parties for which the defendant would be liable, if unable to take advantage of the assignment of the contract.

Against this judgment the defendant appeals, alleging error on the part of the judge: (1) in holding that other elements had been introduced by the assignment which affected the burden of the contractor's obligations; (2) in holding that, by s. 19(6) of the Judicature Act (1909), written notice of the assignment of the contract was necessary before the same would become operative against the plaintiff, and (3) in failing to hold that the assignment was equitable, and that, therefore, no notice of it was required.

In view of the judge's finding, as I understand the result thereof, no consideration need here be given the first objection.

As to the second, it is very clear to me that, under the section of the Judicature Act quoted, provided certain sections are complied with, any debt or other legal chose in action may be assigned so as to vest in the assignee the legal right to the same and the remedies therefor, with power to give a good discharge. The conditions which must be complied with are (1) the assignment must be in writing under the hand of the assignor, (2) the assignment

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must be absolute, and not purporting to be by way of charge only, (3) and express notice in writing of the assignment must be given to the debtor, trustee, or other person from whom the assignor would have been entitled to claim the debt or chose in action. Such an assignment takes effect only from the date of the notice, and operates under the statute only as from the date of such notice. 4 Hals. 367.

It was a well-known rule of the common law, that no possibility, right, title or thing in action, could be granted to third parties for it was considered a different rule would result in multiplying litigation, as it would in effect be transferring a lawsuit to a mere stranger. At law, therefore, with the exception of negotiable instruments, bills of exchange, and some other few securities, this, unless the debtor assented to the transfer, continued to be the general rule, until the Judicature Act, 1873, was passed. If the debtor assented, then the right of the assignee was complete at law, so that he might maintain an action against the debtor, upon the implied promise to pay the debt, which is the result of such promise.

Now, however, by the Judicature Act, 1873 (36 & 37 Vict. c. 66) of which the said s. 19(6) of our Act is a copy, any absolute assignment by writing under the hand of the assignor, of any debt, or other legal chose in action, of which express notice in writing has been given to the debtor, trustee, or other person from whom the assignor would have been entitled to claim such debt, &c., is effectual in law to pass the legal right in such debt or chose in action, from the date of such notice, and all remedies for the same, subject however to certain conditions contained in said section.

It is plainly and distinctly stated in the section that to make the assignment effective, express notice in writing, under the hand of the assignor, must be given to the debtor, or other person entitled thereto, or who is expected to be charged or bound thereby, and not only must this first be done, but it has been held that such an assignment only takes effect from the date of the notice.

Therefore, as the notice in this case was not given until after the suit was commenced, the judge, in my opinion, was correct in the opinion he arrived at in this respect.

There is nothing to the third objection.

An examination of the facts and evidence upon which the judge based his finding that the defendant was content to pay what might be considered a fair and reasonable price for the power and light supplied them, discloses, as stated, that the contract was assigned on October 6, 1916. That no notice thereof was given the plaintiff, but having heard of the sale of the Dickinson property and plant on the street, as a first intimation of its refusal to be bound thereby, or to be considered as consenting thereto, the plaintiff proceeded within a few days to place a meter in the Dickinson house, which, under the contract, was to be supplied with light without extra charge. This it was stated by Carvell, the plaintiff's managing director, was done because they took the ground that the contract was null and void and was cancelled by the assignment, and that neither Dickinson nor the defendant were entitled to any benefit thereunder. Also, that having satisfied himself that the defendant had bought the physical assets of the Dickinson Co., on the 10th or 11th of October he gathered up three of the directors of the plaintiff company and went with them down to the defendant's plant. That they were shewn through the plant and found it was being operated by power supplied from their works. That they then returned to town and found one Willard, the defendant's manager, who was absent when they went through the plant, and told him what they had done, and that as he was using electricity supplied by them, an arrangement of some kind would have to be made. That a meeting of the plaintiff's directors was called and a letter was written and sent to the defendant company (the same being personally delivered to Willard) under date of October 11, by which a new contract was proposed, the plaintiff stating at what prices it would furnish current for lighting, and supply power for operating the defendant's plant.

It appears that Carvell discussed the contents of the letter with Willard, who stated he knew nothing about electricity, but that their expert was coming, and he would talk to him about it. In a few days the expert, Nash, arrived, and afterwards stated to Carvell the only objection he had to offer was, that it was too much, or too high, if it was about a cent and a half a kilowatt hour, it would suit him all right. A number of conversations took place between these parties in respect to the requirements of the de-

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fendants, the changes they proposed to make in the plant, the power that would be required, during most of which he, Carvell, on behalf of the plaintiff, reiterated their repudiation of the assignment of the Dickinson contract, and absolutely refused to be bound thereby, or to recognise the same.

No answer was ever received to the plaintiff's letter, nor does it appear the parties ever came together thereon, but notwithstanding the assertions of the plaintiff with respect to, and their repudiation of the original contract and its assignment, and that though Willard stated he had no authority to make or accept a new contract, but that it would have to be put up to and accepted by Chicago (meaning the head office of the defendant company), the defendant continued to take and receive what power and light it required, from the plaintiff.

Also, without elaborating the evidence at too great a length, it appears the expert, Nash, in attending to his duties, procured and installed in the defendant's plant and at its expense, 2 transformers, and 3 small motors, to provide additional power, and which were installed at the defendant's expense.

The plaintiff also purchased and installed 2 meters for measuring the electricity sold to the defendant under the following circumstances: Carvell states the expert Nash had been away, and upon his return, in view of rumours he had heard, he went to see him. He found him at the Carlisle Hotel, and said to him, "Are you people going to take power from us or not? I want to know." He said, "Certainly we are, what put that in your head?" "I (Carvell) said, 'That is all right, I understood you weren't, and I wanted to be positive, so as to know whether to buy meters or not.' He said, 'Go ahead and buy your meters.'"

This the plaintiff did and installed the meters on the 13th or 14th of December. They also sent monthly statements to the defendant for the light and power supplied to it, and in no case was any acknowledgment of the receipt of the statements by the defendant ever made, nor any payment thereof, nor was any claim or protest made or entered, that they should not be called upon to pay save only as, and according to the terms and conditions of the assigned contract.

Upon this, and much other similar evidence which it seems quite unnecessary to labour further, coupled with the fact that 2 new warehouses for storage purposes were built by the defendant

and became an addition to its plant, necessarily involving the use of electric light over and above that used and required before they were erected, I am fully of the opinion the learned trial judge had before him sufficient evidence to justify him in reaching the conclusion that while in fact no new contract had been entered into between the parties, yet the defendant had been taking its supply of light and power from the plaintiff under an implied contract, being content to pay what might finally be considered a fair and reasonable price, and I think the finding and judgment should not be disturbed. The appeal will be dismissed with costs.

Appeal dismissed.

Re ELLIOT.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Magee, Hodgins, and Ferguson, JJ.A., and Rose, J. December 10, 1917.

1. EXECUTORS AND ADMINISTRATORS (§ II A—24)—DELAY IN DISTRIBUTION OF ESTATE—ORDER AUTHORISING TO BORROW—SUCCESSION DUTIES.
An order authorising executors to borrow a sufficient amount to pay succession duties, a small sum advanced by the executors, an existing mortgage on the property, and the executors' commissions up to the time of the application, on the security of a mortgage on the testator's property, is properly made where the distribution of the estate is delayed under the will.

2. EXECUTORS AND ADMINISTRATORS (§ IV C—100)—EXPENDITURES—PERMANENT REPAIRS—APPORTIONMENT BETWEEN CAPITAL AND INCOME.
The burden of expenditures made by executors for repairs and improvements of a permanent character, made in order to procure a tenant for the property, should be apportioned between capital and income in accordance with the rule in *In re Freman*, [1898] 1 Ch. 28, 33.
[*Brereton* v. *Day*, [1895] 1 I.R. 518; *Re Smith*; *Bull* v. *Smith* (1901), 84 L.T.R. 835, followed.]

Statement.

APPEAL by Edward John Elliot from an order of the Judge of the Surrogate Court on passing the accounts of the executors of the will of John S. Elliot, deceased, and from an order of BRITTON, J., allowing the executors to mortgage the real estate for $21,000.

By his will and a codicil to it, the testator appointed his wife and the Toronto General Trusts Corporation his executors, and directed that the income of his estate, until the period of the distribution of his estate, which was not to be later than 10 years from the date of his decease, after paying all expenses for upkeep, taxes, repairs, and other necessary expenses, be used and expended by his wife in maintaining a home for herself and their children, and in the support, maintenance, and education of the children, and that, when the period of distribution arrived, the corpus of the estate should be divided between his wife and his

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three children—two-thirds in equal portions between the children and one-third to his wife absolutely.

Statement.

The order of BRITTON, J., was made on the application of the executors, and it authorised them to borrow, on the security of a mortgage of the testator's hotel property, the sum of $21,000, which was required to pay: (1) succession duties; (2) some small advances which had been made by the Toronto General Trusts Corporation, amounting to about $300; (3) an existing mortgage on the property; and (4) the executors' commission, on passing their accounts and administering the estate up to the time of the application; and the order provided for the application of the money borrowed for these purposes.

Grayson Smith, for appellant.

C. J. Holman, K.C., for the executors and the widow of the testator, respondents.

The judgment of the Court was read by

Meredith, C.J.O.

MEREDITH, C.J.O. (after setting out the facts as above):—The order of Mr. Justice Britton was, we think, properly made. Any question as to the application of the payment for succession duties will be dealt with on the passing of the accounts of the executors, but it was proper that these duties should be paid in the first instance by them.

The appeal from the order of the Judge of the Surrogate Court relates to expenditures made by the executors for repairs and permanent improvements and in the purchase of trade-fixtures from an outgoing tenant of the hotel property, which was owned by the testator at the time of his decease, the nature of which I shall afterwards mention.

No question is raised as to the propriety of making those expenditures; but the appellant contends that they should be charged against income, and not, as the learned Judge decided, against capital.

The hotel property was, at the time of the death of the testator, under lease. Upon the expiration of the lease, the tenant offered the trade-fixtures in the hotel, which belonged to him, for sale. Such fixtures were necessary for the hotel; and, if they had been removed by the tenant, the cost of replacing them would have been between $1,500 and $2,000; and, the tenant being willing to leave them in the hotel if he were paid $690, the executors, deeming it to be for the benefit of the inheritance,

as it no doubt was, to purchase them at that price, purchased them from him; and this sum of $690, made up of two items in the executors' account, has been, as I have said, charged against capital.

The expenditure for repairs and improvements amounted to $1,000. These repairs and improvements were made in order to convert a stable, which had been used in connection with the hotel, into a garage. It was necessary to make them in order to procure a tenant, and they were of a permanent character. By the terms of the lease which was entered into, provision was made for making them, and it was provided that the executors should contribute $1,000 to the cost of them, and that the tenant should pay the remainder of the cost, and be recouped by a deduction of $20 from each month's rent until he should have been repaid the whole of his expenditure.

It was found by the learned Judge that, at the time of the decease of the testator, the premises were in "a considerable state of dilapidation," and part of this expenditure was for repairs which were necessary on that account. The whole of the expenditure did not exceed $2,500, and it is found by the learned Judge that it was necessarily made in order to obtain a tenant at a fair rental.

I do not think that the executors were justified in purchasing the trade-fixtures or making the permanent improvements without having obtained the sanction of the Court; but I have no doubt that, if they had applied under the Settled Estates Act for authority to make them, the authority would have been given on proper terms, as was done in *In re Freman*, [1898] 1 Ch. 28, 33, and in an earlier case of *In re Hotchkys*, 32 Ch. D. 408.

In *In re Freman*, North, J., held that the right thing to do was that the money required for the repairs that were in question in that case should be borne by the capital, but the tenant for life would have to keep down the interest on that capital; that, if the money were taken out of other personal estate, the tenant for life would get so much less income because that investment would not produce income; and if, on the other hand, the money were borrowed on mortgage, the interest on the mortgage would have to be kept down by the income, and the income of the tenant for life would be reduced by the provision that would have to be made to keep down the interest on the mortgage.

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In the *Hotchkys* case it was said that the burden of repairing ought to be thrown upon the estate in such a way as not to throw it entirely upon the tenant for life or upon the remainderman.

Both of these cases were cases in which the repairs were necessary in consequence of want of repair which existed at the time of the death of the testator under whose will the tenant for life and the remainderman took, but the principle of the decision is applicable to any expenditure which neither the tenant for life not the remainderman is under an obligation to make.

Inasmuch as, by the will of the testator in the case at bar, repairs were to be paid for out of income, any want of repair arising after the death of the testator must be made good out of income, but this obligation does not extend to dilapidation existing at the time of his death. It was so decided in *Brereton* v. *Day*, [1895] 1 I.R. 518, where the obligation of the tenant for life was to pay the "head-rents and other outgoings," and in *Re Smith*, *Bull* v. *Smith*, 17 Times L.R. 588, 84 L.T.R. 835, where the obligation was to pay "all rates, taxes, outgoings, and repairs."

There was not before the learned Judge, and there is not before us, the material necessary for apportioning the burden of the expenditures in question in accordance with the rule laid down in *In re Freman*; and, unless the parties can agree as to this, the case must go back to the Surrogate Court to be dealt with in accordance with that rule.

It does not appear how the monthly deductions to which the tenant is entitled under the terms of his lease have been dealt with. If the executors deduct them from the income, it is probable that the widow will pay out of her income more than she would be called upon to pay according to the rule for apportioning the burden of the expenditures in question which should be applied.

If the parties desire it, the case may be spoken to on the question as to the reference back.

If the case goes back to the Surrogate Court, the appellant should pay the costs of the appeal as to these expenditures, if it be determined that less than has been charged to capital should have been charged to it; but, if the opposite conclusion is reached, there should be no costs of the appeal to either party, as each

party has failed in maintaining the proposition for which he contended.

The appeal from the order of my brother Britton should be dismissed with costs.

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WILCOX & FROST Ltd. v. LAMARRE.

Quebec King's Bench, Archambeault, C. J., Lavergne, Cross, and Carroll, JJ. January 24, 1918.

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CONTRACTS (§ IV—330)—IMPLIED CONDITION—DELIVERY BY GENERAL CARGO SHIPS—IMPOSSIBILITY OF PERFORMANCE—RELEASE.

A vendor is released on the ground of impossibility of performance, if an implied condition in the contract, that freight space could be booked for certain deliveries, by general cargo ships in the ordinary course of transport, cannot be realised. If there is no such implied condition it must be proved that the goods could not be shipped from another port or on any tramp vessel.

Statement.

APPEAL from the judgment of the Superior Court in an action for damages for failure to deliver goods under a contract. Reversed.

The action is in damages for failure to deliver hay. The appellant, a company dealing in hay and doing business in London, England, claims $2,854.54. The contract was made in the following terms:—

We hereby confirm the sale of 600 tons of clover mixed hay at the rate of 80s. c.i.f. London on the basis of 15s. frt. from Boston. Any difference of above freight rate to be at your debit if over, or credited, if less. Delivery to be made in about equal amount of 150 tons each month of December, January, February and March next. Terms: 90% on documents, balance as soon as London weight ascertained. All hay to be sound and not less than 1911 crop. Yours truly (signed) W. LAMARRE & CIE.—Accepted (signed) WILCOX & FROST, directors.

The damages claimed consist in the difference between the contract price and the market prices at the place at which delivery should have been made, less the lighterage and dock dues.

The defence may be summarised in three points: (1) denegation of any fault in the non-performance of the respondent's obligations; (*b*) impossibility of delivering the hay on account of the cessation of ocean-carriage of hay on ships bound for London; (*c*) no suffering of damages on the part of appellant, inasmuch as the excess freight chargeable to the appellant would have made the cost of the hay greater than the cost of replacing it.

The Superior Court found that the respondent had made default in delivery, but that the appellant had suffered a loss only in

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respect of one of the quantities deliverable monthly, and that the loss was $282.08 for which sum judgment was given against the respondent.

In appeal the judgment was reversed and a sum of $929.84 was granted.

Meredith, Holden & Co., for appellant; *J. S. Lamarre*, for respondent.

CROSS, J.

CROSS, J:—The defendant takes the ground that she is not liable at all, but as she has not appealed, she recognises that if she makes good her contention the result will be dismissal of the appeal, but not the setting aside of the judgment so far as it is against her.

As regards the facts, it may be said generally that the dispute has arisen out of the great difficulty encountered in securing cargo-space for transport of hay from Boston to London at the times at which shipments were to have been made.

Both parties realised that difficulty. On her part, the respondent sent the first car-load of hay to Boston only on December 19, and the next—say 24 tons in all—in the beginning of January and she does not appear to have sent forward any more.

On the part of the appellant, I find that, in a letter from the appellant to the respondent, dated October 24, 1911, it is said:—

> We are now in correspondence as to which will be the best way and cheapest to get the hay shipped which we have bought of you. Ronald who is our Boston agent informs us that the present rate from Boston to London is £1 2s. 6d. per ton but we hope to do even better than this at this time of the year. This is an exceedingly dear rate and we do not think that it can last.

In a letter from the respondent to the appellant, dated December 1, the respondent said, *inter alia*: "We are ready to ship a few loads, but would not do so before we made sure of the freight," and went on to propose that, in view of the difficulties encountered by both seller and buyer, the contract should be cancelled on her paying a small damage, and added: "Your reply will be awaited with more or less anxiety, but we don't want to be the cause of any (*sic*) for you, as we offer to pay or stand by our contract."

On December 20, 1911, the appellant cabled to the respondent:—

> Letter now in post for you. Commence shipments soon as possible.

and on the same date said by letter that its terms for a cancellation would have to be such that it did not think that the respondent

would accept them and added "meantime shall feel greatly obliged if you will hurry forward 100 tons or 200 tons as quickly as possible."

In a letter of January 9, 1912, to the appellant, the respondent repels the idea that she was seeking to withdraw from her contract and goes on to point out that she had hay ready for shipment, but held it back on account of the appellant's statement about freights in the letter of October 24 and to oblige it, and she adds:—

To cancel all troubles we offered "a small compensation" on Dec. 1, but to-day we think different and we shall ask you to provide for freight at once or we shall require a compensation from you as you took it upon your responsibility to stop our booking of freight through Ronald as he was your agent. We want you to advise us what freight you may have and have it so we shall have through bills of lading as we do not care to ship hay to any ports and have same there under car rental for any indefinite period.

In an answering letter to the respondent of January 24, the appellant said *inter alia*:—

We do not wish for a minute for you to suppose that we had any thought of your withdrawing from your contract . . . but according to our contract we have nothing whatever to do with the engagements of freight and if you cannot engage freight under a certain figure you do not have to pay the difference . . . We cannot see in our letter of October 24 that we advised you in any way except to say that the freights were high and we anticipated that they would be lower, but this did not stop you from booking freight if you thought it advisable.

In another letter to the respondent, dated February 2, the appellant says:—

We therefore regret to say we must repudiate the December and January shipments of hay under contract dated August 31, 1911, unless same is shipped within 21 days from the date of this letter, holding you responsible for damages through non-delivery.

That letter would have crossed in transit a letter from the respondent dated February 6, in which, after saying,

We have two cars lying in Boston since 1st part of December and surely you do not expect us to be paying car rental on any more. We turned over a few cars to Liverpool people at a price to pay the hay and demurrage but we are not to bill any more under the same conditions.

She goes on to take the ground that it is for the appellant to engage freight space, adding that she interprets the letter of October 24 differently but saying:—

We quite agree that in 1st half of December it was our duty to book freight and make you pay for same; but on the other hand it was none of our business to book freight in 1st half of October for Dec. shipment and at a cost over price mentioned . . . Our agreement does not mention who is to book the frt. . . . and consequently beg to advise you that on or about the 20th of this month we shall dispose of the bal. of our hay—say 150 tons—unless we have your cable advising us of through frt. for same amt. In that

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case we shall forward 150 tons at once and it will be considered as balance of our contract.

Afterwards, the respondent appears to have shipped about a car-load of hay to the appellant, but, under date of April 9, the appellant writes:—

We are in receipt of your letter of the 1st with account attached for shipment of hay per S.S. "Lancastrian." We regret we had to wire you on receipt of same as per enclosed confirmation for two reasons: 1. Being that you have drawn against us for more than according to your contract. 2. Being that the freight is over £18 and not £15 as you have credited us on your account.

The exhibits relating to the shipment substantiate the facts on which this refusal was grounded and they are corroborated by the testimony of the witness Frost, and that testimony was not contradicted.

Another consignment of about 11 tons was shipped shortly afterwards and was paid for; 11 tons only were received by the appellant.

In November, shipowners would not let cargo space for hay from Boston to London for December or January. Besides, there was a longshoremen's strike at Boston during part of January which delayed the loading of hay though it did not entirely prevent it as respects other kinds of merchandise.

I consider that the respondent is mistaken in her contention that it was for the appellant to find cargo space, or, in other words, to book freight.

She sold hay c.i.f. London, delivery to be made in specified lots monthly. Under an unqualified c.i.f. contract, the seller effects insurance and incurs the charges for freight and makes the cost of these insurance and freight charges part of the price of the goods. Having so insured and shipped the merchandise, the merchandise is at the risk of the buyer while in transit.

The legal relations involved in such a contract are well expressed in *Biddell Bros.* v. *E. Clemens Horst Co.*, 27 T.L.R. 47, where it was said:—

With regard to a c.i.f. contract, it appeared to be well settled, so that it was not necessary to refer to the authorities or to the *obiter dictum* of Lord Blackburn in *Ireland* v. *Livingston*, L.R. 5, H.L. 395, at 406, that a seller under a c.i.f. contract had, first, to arrange to put on board at the port of shipment goods of the description contained in the contract; secondly, to arrange for a contract of affreightment, so that the goods should be delivered to the buyer; thirdly, to arrange for the insurance of the goods; then he had to make out an

invoice; and, finally, to tender to buyer these documents, so that the buyer might know what freight he had to pay and to enable him to recover the insurance from the underwriters if the goods were lost. Those seemed to constitute the terms of the agreement that the delivery of goods were (*sic*) to be at the port of shipment, conditional, however, upon the goods being found to be conformable to the contract, and the property in the goods then passed to the buyer so as to throw the risk with regard to them on the buyer.

It may be added in reference to that case, that, though the judgment quoted from was reversed in appeal, [1911] 1 K.B. 935, it was restored in the House of Lords, [1912] A.C. 18, 28 T.L.R. 42.

In the case before us the usual agreement as regards the item of freight in a c.i.f. contract is modified by the covenant that the buyer is to be debited with the freight insofar as it may exceed 15s. on the one hand, and credited with the difference if it costs less than 15s.

That modification gave the appellant an interest to have the freight rates kept down, but it did not place upon it an obligation or duty to book freight space. It was still for the seller to incur the freight charge so that, in terms of the contract, he could debit the excess.

There may be cases in which the obligation to deliver on board ship would rest upon one person while the obligation to book space would rest upon another person, but that would be exceptional and the result of special covenant or course of dealing. In general it is the shipper who books freight space, not the consignee, who may, as in this case, be across the sea.

Neither can it be rightly said that the appellant's letter of October 24 is an undertaking on its part to book space or a recognition of an obligation to do so. Later letters, moreover, shew that that view was not persisted in by the respondent.

I take it to be proved that it was impossible to engage freight space in ships to carry hay from Boston to London between the beginning of December and February 10, but that, later in February, freight space could be had at 27s. 6d. plus 5% primage, and could be had in March at 20s. plus 5% primage.

Notwithstanding that it was not a contract-requirement that the hay should be shipped at Boston, it was in the contemplation of both parties that it would be shipped there.

I agree with the view of the learned trial judge that the appellant's letter of October 24 (while not relieving the respondent from

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the obligation to book freight space) excused the respondent from the obligation to ship before December. I also agree that the respondent has proved the impossibility of making shipment before the latter half of February.

The appellant, in its letter of cancellation, gave until February 23. I take it to be proved that, though there were in fact a few small shipments sent from Boston to London in the latter half of February, it was impossible for the respondent to ship the 300 tons of the December and January quantities before February 23, as demanded by the appellant, and, as regards those 300 tons I consider that the contract stands cancelled by the appellant without responsibility on the part of the respondent because of performance having been impossible.

Then, as regards the 300 tons deliverable at Boston as representing the February and March quantities and which I infer can be treated as due for arrival in London in March and April respectively; I consider that the respondent stands in default, not merely for the reason that the contract put her in default by lapse of the covenanted delays for delivery, but also because she repudiated her obligation to deliver and announced her decision not to implement the contract by her letter of February 6.

Freights could have been booked for London arrivals in March and April at 20s. and 5% primage, or, 21s. The surplus freight chargeable to the appellant would consequently be 6s. per ton.

The 11 tons delivered should be deducted from the 150 tons deliverable in February, and if the respondent had delivered the other 139 tons the c.i.f. London cost would have been 86s. per ton. I take it to be proved that the c.i.f. London market price per ton for March delivery was 100s., and that the appellant's damage on these 139 tons was 14s. per ton.

Then, if the respondent had delivered the 150 tons, making the March quantity (the last quantity contracted for), the c.i.f. London cost would have been 86s. per ton. I take it to be proved that the c.i.f. London market price per ton for April delivery was 98s. and 6d., and that the appellant's damage on these 150 tons was consequently 12s. and 6d. per ton. The calculation therefore is:—139 tons at 14s. = £97 6s. 0d.—150 tons at 12½ = £93 15s. 0d. = £191 1s. 0d., or in Canadian currency, $929.84, and I would fix at this sum the extent of the respondent's liability in damages.

It appears to me that the judge must have fallen into error in the recital:

47. Considérant que d'après une réponse dudit témoin Kitts au contre-interrogatoire soumis par la demanderesse, il appert que ce prix de 100s. donné par lui comprend les 4s. 1d. pour les charges ci-dessus mentionnées et en plus sa commission pour ventes faites par lui de foin semblable à celui de la défenderesse, en février 1912 à Londres, ces charges et cette commission variant, dit-il, de 7s. 3d. à 8s.

The witness Kitts, being asked to give "the c.i.f. market price in London per ton" answered:

For the month of March, 1912, 98s. 6d.,

and, in answer to the cross-interrogatory, said:

I base my answer to the interrogatory No. 9 upon sales effected by me during the months referred to at alongside wharf price, which price includes charges in addition to a c.i.f. price for lighterage, commission, London clause charge and port dues—a difference of from 7s. 3d. to 8s. per ton.

That answer makes it clear that the witness Kitts did what others of the witnesses also did, namely, he deducted lighterage and port charges from the London market price in order to arrive at the c.i.f. price of 100s. instead of having included these charges in the 100s. as the *considerant* would indicate. The effect of Kitt's testimony is that the market or ashore price would have been 7s. 3d. per ton above 100s., not that much below 100s.

In the foregoing observations the different grounds of defence have been treated of.

At the hearing counsel for the respondent was understood to take the further ground that, inasmuch as Boston was the place of delivery, the appellant had failed to prove its damage claim, inasmuch as no proof was made of the market price of hay at Boston at the times when delivery should have been made.

That ground is not well founded. Having regard to the nature of the c.i.f. contract, the seller's obligation, it is true, was to make delivery at Boston or at some port in America on shipboard, but it was to be such a delivery and accompanied with such documents as would procure to the buyer receipt of the goods at London at a preascertained cost. In such circumstances the buyer's remedy included the right to procure at London goods in replacement of those which he was entitled to receive there from the seller: *Wertheim* v. *Chicoutimi Pulp Co.*, [1911] A.C. 301, at 315.

Reverting to the defence of impossibility of performance, which I have indicated as being made out to the extent above pointed out, a few words may be appropriately be added.

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It may be said that the absolute impossibility, which the law in theory requires to be established before a debtor can be held to have been thereby relieved of his obligation, has not been proved to have existed. It has not been shewn, for example, that the respondent could not have procured space for hay in a tramp steamer or have shipped from some other port—as I consider it was open to her to do. Her applications for freight bookings appear to have been limited to regular-line cargo-boats plying between Boston and London at the rate of about two per month.

I take it, nevertheless, that, in testing the defence here pleaded (and which I have called a defence of impossibility of performance) regard is to be had to the consideration that:—

> Where it appears from the nature of the contract and the surrounding circumstances that the parties have contracted on the basis that some specified thing, without which the contract cannot be fulfilled, will continue to exist, or that a future event which forms the foundation of the contract, will take place, the contract, though in terms absolute, is to be construed as being subject to an implied condition that if before breach performance becomes impossible without default of either party, and owing to circumstances which were not contemplated when the contract was made, the parties are to be excused from further performance. 7 Hals., p. 431.

In this case, the facts and excuses for non-performance are specifically set out in the plea, and I would express my conclusion on the point by saying that the parties contracted subject to the implied condition that freights for ocean-carriage of hay from Boston to London could be booked for December and January deliveries by general cargo ships in the ordinary course of ocean transport; that that implied condition failed of realisation, that there was consequently impossibility of performance within the contractual relation existing between parties and that that impossibility continued until February 23, the time limit set by the appellant for delivery of the first two shipments.

There may be danger of going too far in the direction releasing parties from fulfilment of obligations by assuming the existence of such unexpressed conditions: Anson on Contract: but I consider that my conclusion, in a case such as the present one, is sufficiently supported. In *Horlock* v. *Beal*, [1916] 1 A.C. 486, it was said in the House of Lords that "impossible (of performance) meant impracticable in a commercial sense."

In the circumstances above set forth, the appeal should be maintained and judgment given for the appellant for $929.84.

Judgment: Considering that it has been proved that it was impossible to procure ocean carriage for hay from Boston (whence it was contemplated to ship the hay) to London between the commencement of December, 1911, and February 23, 1912;

Considering that by letter dated February 2, 1912, the appellant gave notice to the respondent that it repudiated the December and January shipments to be made in execution of the said contract, unless the hay in question for them would be shipped within 21 days from the said February 2;

Considering that, in consequence of the impossibility of procuring ocean carriage in the period aforesaid and of the said notice of repudiation, the respondent Dame Lea Lamarre was liberated from her obligation to deliver the said two shipments, to wit, 300 tons of the said hay;

Considering, however, that the said respondent has not proved that it was impossible for her to have delivered and shipped the hay representing the February and March shipments after February 23, 1912, but that, on the contrary, she made default to deliver the same, to wit, 300 tons (less 11 tons which were in fact delivered), and, by her letter of February 6, 1912, gave notice to the appellant that she would dispose of the hay to others, unless the appellant would itself contract for ocean carriage thereof, an obligation which rested upon herself and not upon the appellant;

Considering that the appellant suffered damage by reason of the said default on the part of the respondent to the extent of 14s. per ton in respect of 139 tons of hay, the balance of the quantity deliverable in February, and to the extent of 12s. 6d. per ton in respect of 150 tons deliverable in March, to wit, a total sum of £191 1s. sterling, equal to $929.84;

Considering therefore that there is error in the judgment appealed from which was given in favour of the appellant for $282.08 only;

Considering that the plaintiff-appellant has proved the material averments of its demand to the extent aforesaid and that the defendant-respondent has failed to the extent above indicated to prove the grounds of her defence;

Doth maintain the appeal, doth set aside the said judgment appealed from, to wit; the judgment pronounced by the Superior

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Court at Montreal, on December 11, 1916, and, now giving the judgment which the said Superior Court ought to have given, doth condemn the defendant-respondent, Dame Lea Lamarre, to pay to the plaintiff-appellant $929.84, with interest thereon from October 30, 1913, date of service of summons and costs in the Superior Court and of the appeal in this Court.

LAVERGNE, J., dissented. *Appeal allowed.*

MAN.

K. B.

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Manitoba King's Bench, Metcalfe, J. March 25, 1918.

ALIMONY (§ I—1)—IMPERIOUSNESS—MEANNESS—LEGAL CRUELTY.

Imperiousness and meanness and insisting on running his household on an efficiency method, although extremely maddening to the wife, is not legal cruelty which justifies her in leaving her husband, or which entitles her to alimony.

ACTION for alimony. Dismissed.

W. H. Trueman, K.C., for plaintiff.

A. J. Andrews, K.C., and *F. M. Burbidge*, for defendant.

Metcalfe, J.

METCALFE, J.:—Doubtless the plaintiff's married life has been unhappy. When but twenty, she married the defendant, a widower, and 15 years her senior.

It soon became evident that the marriage was unsuitable. Money was scarce and, in addition to themselves, there were step-children to look after, feed and clothe. The defendant was then employed at a small salary, but after about 15 years of hard work and constant application he has now reached a position of trust and responsibility very respectable in the community.

From the time of his marriage with the plaintiff, he has insisted on running his household on an efficiency method, which, while it may have been satisfactory financially, has been extremely maddening to the wife.

Time was when one might say of his wife:—

> "I will be master of what is my own;
> She is my goods, my chattels."

But he who says it now, either in words or by actions, is courting the direst trouble into his household.

The wife recently left her husband; she says she can no longer stand it. She now sues for alimony.

While I am convinced that the husband was dictatorial and mean in his household arrangements, and in supplying his wife

with money, still I cannot overlook the fact that for a very long time his earnings were very small, and that his mind was constantly upon saving money and getting on in the world. His care of the dollar has brought him financial success, but domestic unhappiness; and constant bickerings and unpleasantness.

Gradually the parties got further apart. The offences of each became magnified, and I must frankly say that I think the evidence on both sides has been exaggerated.

I do not find the husband guilty of such legal cruelty as entitles the wife to alimony. I do not find either a bodily hurt, nor that the wife's health has suffered from the defendant's conduct; nor do I find any reasonable apprehension thereof.

During the trial the husband offered to take his wife back, and to treat her properly. In this, I think he was sincere. The wife, through counsel, rejected the offer, saying she was afraid to go back. I think the step-children helped to make matters worse.

One of the step-children is married and gone. The father says the other step-child will leave the home. Their own son is 14 years of age, and both parties are fond of him.

It is the duty of these two to observe their marriage vows, and make a pleasant home for this young boy. By their love for him they may be subsequently brought closer to each other, and pass into a happy old age together, rather than live hopelessly apart a married man without a wife, and a married woman without a husband.

I think the wife unreasonable in not accepting the defendant's offer, especially considering his acknowledgement of his short-sightedness in the past, and his final generous surrender.

If she fears him, and her counsel says she does, I think her fears are now without reason.

I have carefully considered all the cases cited by counsel, but, feeling as I do on the facts, I do not think a review necessary.

Mr. Trueman argues that the exclusion of a wife from her home, by her husband, is, in itself, a ground for awarding alimony, and cites *Weir* v. *Weir*, 10 Gr. 565 (1864); and *Howey* v. *Howey*, 27 Gr. 57 (1879). The facts in those cases are so widely different from what I find here, that they do not apply. In the first case the husband married a second time. He would not bring his wife to his home, but left her to stay at an hotel, while he himself made

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his home with his family by the former wife. She wanted a home; the husband did not provide one; she persisted, but he, being overruled by his children, continued his refusal. It was held she was entitled to a home or alimony. In the second case the husband, in his wife's absence, put her bed and bedding outside of the house and locked the door. He then went through a form of marriage with another woman with whom he continued to live in the house, thus making it impossible for the wife to return home.

I find nothing in the present case to support a claim for alimony on the ground of exclusion.

The action will be dismissed with such costs to the plaintiff as are permitted under Rule 945 of the King's Bench Act.

Action dismissed.

SASK.

C. A.

Re ROBINSON.

Saskatchewan Court of Appeal, Haultain, C.J.S., Newlands and Elwood, JJ.A. May 17, 1918.

WILLS (§ I E—40)—PERSONS INTERESTED—CITED TO APPEAR—NON-APPEARANCE—PROBATE OF PREVIOUS WILL.

Persons interested in a will having been cited to appear and shew cause why a previous will should not be admitted to probate, and having failed to appear, the court is at liberty to grant probate, or administration with will annexed, of such previous will.

Statement.

APPEAL from a judgment of Lamont, J., refusing to give directions in an application for probate of a will. Reversed.

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

Haultain, C.J.S.

HAULTAIN, C.J.S.:—For the purposes of this case the will of November, 1909, need not be taken into consideration, as it was undoubtedly revoked by the will of 1913. The position then is, that all the parties who are interested in the alleged will of January, 1914, have been cited to appear and shew cause why the alleged will of July 22, 1913, should not be admitted to probate. These parties, having been duly served with the citation, have not appeared or shewn cause as ordered.

In the case of *In the Goods of Bootle, Heaton* v. *Whalley* (1901), 84 L.T. 570, it was decided that where the parties interested under an alleged will have been cited to appear and propound it, and, after being personally served with the citation, have neither appeared nor propounded the alleged will, the court will grant administration as to an intestate. This case was decided on the

authority of *Morton* v. *Thorpe* (1863), 3 Swabey & Tristram 179, where administration was granted to the next of kin, notwithstanding the fact that it was suggested that a will was in existence, when the executor and the persons interested thereunder had been cited to propound such will and had failed to appear to the citation.

Haultain, C.J.S.

In *Crosby* v. *Noton* (1867), 36 L.J. (P. & M.) 55:—

A citation was personally served upon the executor and universal legatee, named in a will of the deceased, calling upon him to bring into the registry the probate of it which had been granted to him, and to shew cause why the probate should not be revoked and declared null and void, and the will itself declared null and invalid. The probate was brought into the registry, but no appearance entered to the citation. The court, although there was no evidence before it as to the invalidity of the will, revoked the probate granted, and ordered probate of an earlier will to issue in common form to the executor named therein.

This case was followed in *In the Goods of George Dennis*, [1899] P. 191. See also *In the Goods of Quick* v. *Quick*, [1899] P. 187.

On the authority of these cases, I think that the appeal should be allowed and leave given to proceed to proof of the will of July 22, 1913. The appellant should have her costs of this appeal, and of her several applications in this matter, out of the estate.

NEWLANDS, J.A., concurred with Elwood, J.A.

Newlands, J.A.

Elwood, J.A.

ELWOOD, J.A.:—The deceased died at Nelson, in the County of Lancashire, England, on January 11, 1914, and at the time of his death had his fixed place of abode at or near Kindersley, in the Province of Saskatchewan. A petition for probate of a will of deceased, dated November 2, 1909, was presented to the Surrogate Court of the Judicial District of Kindersley. From the materials accompanying such petition it appeared that the deceased had made a will in the year 1913, and a further will in England a few days before his death, in the year 1914. In consequence of this, the Judge of the Surrogate Court of the Judicial District of Kindersley caused a citation to issue directed to those interested in the wills of 1913 and 1914 and next of kin of the deceased, and giving notice that in default of appearance to such citation the court would proceed to hear the will of November, 1909, proved in solemn form. No appearance was entered to this citation, except on behalf of the appellant herein, and the Judge of the Surrogate Court of Kindersley referred the matter to the Supreme Court of Saskatchewan, and ordered that no administration or probate should be issued until the contention between the parties should be

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terminated. Application being made to McKay, J., to prove the will of 1909, the application was dismissed and a citation ordered calling upon the next of kin of the deceased and the beneficiary and executors under the wills of 1913 and 1914 to appear, to shew cause why the will of 1913 should not be admitted to probate. This citation issued and was served as directed, and no person appeared thereto except the appellant. A motion was thereupon made to Lamont, J., for directions, and the application thereon was refused. This appeal is therefrom. (See *Crosby* v. *Noton*, 36 L.J.P. 55):—

In the Goods of Quick, [1899] P. 187, in an action brought to set aside an alleged will, the court, on proof of the citation and non-appearance of the alleged legatees, made a grant of administration to the next of kin of the deceased.

In the Goods of George Dennis, [1899] P. 191, the head-note is as follows:—

> The deceased died leaving a document, which he had duly executed as a will, giving all his property to a certain person and appointing her sole executrix.
>
> Upon proof of personal service upon that person of a citation, calling upon her to bring in the will or to shew cause why administration, as upon intestacy, should not be granted to the applicant as next of kin, and upon an affidavit of non-appearance to the citation:
>
> The court upon the authority of *Crosby* v. *Noton* (1867), 36 L.J. (P. & M.) 55, and although there was no evidence before it as to the invalidity of the will, made a grant to the applicant, as upon an intestacy, conditionally upon the applicant swearing, when taking the grant, that he was the next of kin of the deceased.

See also Tristram & Coote's Probate Practice, 15th ed., pp. 297, 303, 304.

It seems to me, from the above, that the persons interested in the will of 1914 having been cited to appear and having failed to appear, the court is at liberty to grant probate or administration with will annexed to any previous will which can be proven, and which has not been revoked, or, in case of their being no such will, grant administration to the next of kin.

The will of 1909 was, apparently, revoked by the 1913 will. So far, it has been impossible to produce the original 1913 will. A copy of it has been sworn to, and execution proven. The evidence of the deponents to several of the affidavits produced shews that the deceased, after landing in England and a day or so before his death, spoke of having left a will in Canada and in-

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dicated where it probably was. The result of this evidence, to my mind, is to shew that the deceased was of the opinion that he had left in Canada a will which he had not revoked, and, in my opinion, therefore, it should be admitted to proof in solemn form, and, upon such proof being made, probate should be granted to the executor named therein, or, in case of his refusing to act, administration with the will annexed granted to the appellant herein.

The costs of the appellant of this appeal and of the various applications made by her should be paid out of the estate.

Appeal allowed.

POPLIS v. CHAPUT.

QUE.

C. R.

Quebec Court of Review, Archibald, A.C.J., Greenshields and Lane, JJ. December 31, 1917.

AUTOMOBILES (§ III C—300)—CHAUFFEUR—INSTRUCTIONS TO TAKE CAR TO GARAGE—GARAGE LOCKED—GETTING KEY—EMPLOY OF MASTER—LIABILITY FOR NEGLIGENCE.

A chauffeur who on taking a car back to the garage in accordance with his instructions, after his master has finished using it, finds the garage locked and goes for the key in order to put the car in the garage, is in the employ of the master while going for the key and the master is liable for his negligence.

[See annotation on the law of motor vehicles, 39 D.L.R. 4.]

Statement.

APPEAL by defendant from the judgment of Martineau, J., in an action for damages caused by an automobile. Affirmed.

Martineau and Jodoin, for plaintiff; *St. Jacques, Filion and Lamothe*, for defendant.

Greenshields, J.

GREENSHIELDS, J.:—The defendant had bought a car from the Comet Motor Co. This car could not be delivered for some 2 or 3 weeks. In the meantime, an arrangement was made by which the company placed at the disposal of the defendant a car which the defendant might use at any time he wished, but always to be driven by the defendant's own chauffeur. The defendant says the arrangement was, that his chauffeur should go to the garage of the company, take out the car, drive it for such time as the defendant required it and then return it to and place it in the garage of the company.

On the day of the accident the defendant's chauffeur took the car out of garage of the company, drove the defendant from somewhere to his home, and went back to the garage for the purpose of

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putting the car in the garage, as he was bound to do. When he arrived at the garage, it was locked; the guardian had gone to his supper and had locked the door and taken the key. The defendant's counsel says the chauffeur should have waited until the guardian returned; he did not do this; he knew where the guardian lived, in order to do what he was bound to do, viz., to put the car in the garage, he started with the car to get the key and proceeded along St. Catherine St. east. Through error he passed the house of the guardian and arriving at Dufresne St. he proceeded to turn the car to come back and retrace his steps. In turning he backed up on Dufresne St. and struck the young boy in question and killed him.

The counsel for the defendant vigorously asserts that the defendant is in no way responsible for the accident, because his chauffeur was not then in his employ, or rather, was not doing the work for which he was employed, he had no right, says the defendant, to go for the key, or, at least, if he did go, he went there for his own purpose, and not for any purpose of the defendant's, and the defendant is not responsible.

I cannot agree with this; but I agree with the finding of the trial judge that if there was a negligent act committed by the defendant's employee while he was going for that key, and which negligent act caused the death of the boy, the defendant is responsible.

The defendant further urges that the plaintiff has not proved that the boy that was killed was his son.

Again I agree with the trial judge. The plaintiff is a Russian, or a Lithuanian. At the time of the institution of the action, or at least at the time of the trial, Lithuania was occupied by a hostile army, the Germans. The statement is made, that it was impossible to get the birth certificate, and it would appear that no attempt was made to get it, if it ever existed. The plaintiff is permitted to state that the child was his son; he had brought him up; he bore his name, and was known as his son. It would appear that the plaintiff had been in this country only 2 years, and knew very few people. A relation of his, however, is examined, who testifies that the boy was always known as the son and bore the name of the plaintiff and lived with him as his son.

Under the circumstances, I consider it is a sufficient proof. If

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it were a matter of proving filiation for the purpose of entering upon an intestate succession, or anything of that kind, I should probably exact better proof, but, in the present case, I think the proof is amply sufficient as found by the trial judge.

The defendant further says that the Comet Motor Co. was sued by the plaintiff, and the plaintiff settled for $100, and gave a discharge to the Motor Co., thereby prejudicing the defendant in any recourse he might have against the Motor Co.

From the facts stated and admitted, the defendant had no recourse whatever against the Motor Co. Even if the defendant is not responsible for the accident, the Motor Co. could not possibly be responsible for the accident, the accident having happened through the negligent act of one who was not in the employ of the Motor Co. But, in any event, the arrangement that was made between the plaintiff and the Motor Co. did not affect in any way the rights of the defendant. The plaintiff saw the number of the car, and he discovered that the owner was the Comet Motor Co., and he sued the Comet Motor Co. as the plaintiff was in ignorance of the arrangement made between the company and the defendant. The Motor Co. pleaded the facts, and thereupon an arrangement intervened by which the plaintiff's lawyers received $100 for their costs. The action was dropped and the Motor Co. was discharged, reserving to the plaintiff any rights he might have against other persons.

To say that this is a bar to the plaintiff's action against the defendant is to state a proposition which I would never accept.

The defendant raises a further question of fact. He says it is not proved that his chauffeur was guilty of any fault. It would appear from the chauffeur's own testimony, that while backing up his car, he saw the boy that was killed; he saw him passing, or about to pass behind his car, and thought that the boy had ample time to pass without him slackening the speed of his retreating car, but contrary to his expectations and judgment the boy was caught and killed.

I should say that it is an act of imprudence and negligence, and I should base my judgment on the testimony of the chauffeur alone, and I should confirm the judgment.

LANE, J., dissented. *Appeal dismissed.*

Lane, J.

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EX. C.

THE KING v. RITHET.

Exchequer Court of Canada, Cassels, J. January 22, 1918.

COMPANIES (§VI C—330)—BONA VACANTIA—RIGHTS OF PROVINCE AND DOMINION—B.N.A. ACT—CONSTITUTIONAL LAW.

The right of *bona vacantia*, in regard to the assets of a defunct English corporation, carrying on business in British Columbia, is vested in the Dominion and does not pass to the province as "revenues" or "royalties" under ss. 102 and 109 of the British North America Act.

Statement. INFORMATION for the recovery of assets of a defunct corporation.

E. L. Newcombe, K.C., and *C. P. Plaxton*, for plaintiff; *J. A. Ritchie*, for defendant.

Cassels, J. CASSELS, J.:—An information exhibited by His Majesty the King, on the information of the Attorney-General of Canada, against Robert Paterson Rithet and the Attorney-General of the Province of British Columbia. The facts are not in dispute.

It appears that a company called the Colonial Trust Co. Limited was incorporated in England in the year 1871, empowered to carry on business in the Province of British Columbia. The company went into liquidation, and by an order of the English court, one Charles Fitch Kemp became the sole liquidator of the said corporation.

By an order of the English court, Kemp, who was then the sole liquidator of the corporation, was authorised to appoint the defendant Rithet as his attorney, and a power of attorney dated December 24, 1879, was executed in his favour by the Colonial Trust Co., and Kemp, the sole liquidator, empowering Rithet to get in and take possession of all the property, assets and effects of the corporation in the Province of British Columbia.

It appears that the defendant Rithet, acting in pursuance of his powers, from time to time recovered and dealt with the assets of the corporation and accounted for the proceeds realised therefrom to the said Kemp as liquidator of the corporation.

The Colonial Trust Co. was finally dissolved on October 7, 1904.

The statutes relating to the dissolution of companies are: 43 Vict. c. 19, and 53-54 Vict. c. 62. These statutes are to be found in *Lindley's Law of Companies*, 6th ed., vol. 2, at pp. 1360 and 1370.

The exhibits filed shew compliance with the provisions of the statutes.

It appears that Kemp, the sole liquidator, died; and on January 4, 1911, the company having been dissolved, and Kemp being dead, Rithet held in his hands the proceeds of assets realised by him, amounting to the sum of $7,215.04. The information alleges that these moneys are still in the hands of Rithet.

By his defence, Rithet brings into court the sum of $7,131.44, claiming to have paid a certain small amount for legal expenses and advice; and Rithet, by his defence, asked to be paid the costs incurred by him.

The claim of the plaintiff is thus stated in the information:—

4. The Attorney-General of Canada, on behalf of His Majesty the King, claims that from the time of the final dissolution of the said corporation, the said moneys in the hands of the defendant Rithet became and were *bona vacantia*, and under and by virtue of the provisions of the B.N.A. Act, vested in His Majesty in the right of the Dominion of Canada, or to which His Majesty in the right aforesaid was and is entitled, and that the said moneys are held by the defendant Rithet as money had and received by him to the use of His Majesty in the right of the Dominion aforesaid.

The defendant, the Attorney-General of the Province of British Columbia, sets out in his defence, as follows:—

2. As to the allegations set out in par. 4 of said information the defendant, while admitting that the moneys in the hands of the defendant Robert Paterson Rithet became and were *bona vacantia*, as therein alleged, denies that the same vested in His Majesty in right of the Dominion of Canada, or are moneys to which His Majesty in such right was or is entitled, or that said moneys are held by the defendant Rithet as money had and received by him to the use of His Majesty in said right, or are moneys held by the said defendant in trust for His Majesty in said right, as therein alleged.

3. The defendant, the Attorney-General of the Province of British Columbia, admits the allegations set out in par. 5 of said information and says, as the fact is, that upon the final dissolution of the Colonial Trust Co., Ltd. the said moneys in the hands of the defendant Rithet became *bona vacantia*, and as such vested in the Crown in right of the Province of British Columbia, and the defendant asks that upon the trial of this action it may be so adjudged and declared.

The case was argued before me, the facts being admitted. Formal proofs of the incorporation of the company, the appointment of a liquidator, the winding-up of the company, the dissolution of the company, and the formal compliance with the various statutes in force relating to the company were adduced.

The case was very ably argued by counsel on both sides. Subsequent to the hearing, able arguments in writing were handed in for my consideration covering every point that counsel could possibly raise in regard to the question.

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At the hearing it was again conceded by counsel for both parties that the moneys in question should be treated as *bona vacantia*, and I am relieved from any necessity of considering the question whether or not there is any doubt as to this proposition. I assume in dealing with the case that the moneys in question are *bona vacantia*, the only question arising being whether these moneys belong to the Crown as represented by the Dominion, or whether the moneys belong to the Crown, as represented by the Province of British Columbia.

The question practically resolves itself into the proper construction to be placed upon the B.N.A. Act, and mainly turns upon the construction to be placed upon ss. 102 and 109. I think there is no doubt but that British Columbia is under the provisions of this statute. In what is called the *Precious Metals* case, *Attorney-General of British Columbia* v. *Attorney-General of Canada*, 14 App. Cas. 295, at 299, Lord Watson refers to the admission of British Columbia into and forming part of the Dominion of Canada.

In the brief furnished me by the counsel for the plaintiff there is an account of the constitutional history of the colony of British Columbia, which as it is of interest I insert in full.

1821.—By an Imperial Act of this year the Hudson's Bay Company was given a monopoly of trade in the territory east and west of the Rocky Mountains not included in the charter granted in 1670 to Prince Rupert and his associates. . . . Under the Act civil and criminal matters came under the jurisdiction of the courts of judicature of Upper and Lower Canada: Short & Doughty's Canada and its Provinces, vol. 21, pp. 62, 63.

1838.—The license of the Hudson's Bay Co. was extended this year for a further period of 20 years: Short & Doughty's Canada and its Provinces, vol. 21, pp. 79,80.

1849.—By an Imperial Act of this year Vancouver Island was constituted a colony. Richard Blanshard was appointed governor with the usual power to appoint a council to aid him in his administration. This Act repealed the previous Act extending the jurisdiction of the courts of justice in the Provinces of Upper and Lower Canada in civil and criminal matters and also a subsequent Act regulating the fur trade and establishing criminal and civil jurisdiction within certain parts of North America, so far as these Acts related to the Island of Vancouver; and made it lawful for His Majesty to provide in that colony for the administration of justice, for the constitution of courts, and appointment of judges. Governor Blanshard found the affairs of the Island so inconsiderable that he declined to give effect to his instructions to establish a representative Government. He tendered his resignation in 1850, but before the acceptance of the same reached him, he, in August, 1851, nominated a Legislative Assembly to assist him in administering the affairs of the colony: Short & Doughty's Canada and its Provinces, vol. 21, p. 89.

1856.—By a proclamation issued this year by Governor Douglas (who succeeded Governor Blanshard), in pursuance of his instruction, the Government of the Island was changed, provision being made for administering the affairs of the Island by a governor by and with the advice of an elective legislative council.

1858.—The license of the Hudson's Bay Co. over the mainland was revoked, and by Imperial Act, 21 & 22 Vict., c. 99, it was organized as a Crown colony: Short & Doughty's Canada and its Provinces, vol. 21, pp. 126, 127.

Her Majesty by order-in-council appointed Sir James Douglas, who was Governor of the Colony of Vancouver Island, also Governor of the Colony of British Columbia. By his commission he was authorized to make laws, institutions and ordinances for the peace, order, and good government of British Columbia by proclamation issued under the public seal of the colony. Her Majesty was authorized to empower, by order-in-council, the governor to institute a legislature consisting of a governor and council or a council and assembly, to be composed of such and so many persons, to be appointed or elected in such manner and for such periods and subject to such regulations as to Her Majesty might seem expedient. Power was given to annex Vancouver Island on receiving an address from the two Houses of the Island Legislature. By a proclamation issued by the governor on November 19, 1858, the English civil and criminal law as it existed at that date was declared to be in force in the colony.

1863.—By an order-in-council this year a change was made in the constitution of the colony of British Columbia, it being provided that the legislative authority of the colony should be vested in the governor with the advice and consent of the legislative council: Short & Doughty's Canada and its Provinces, vol. 21, p. 164 *et seq.*

1866.—By a proclamation of the governor dated November 17, 1866, an Imperial Act, 29 & 30 Vict., c. 67, providing for the union of the Colony of Vancouver Island and the Colony of British Columbia, was declared to be in force, the two colonies being united under the single title of British Columbia. On the union taking effect, the form of government existing in Vancouver Island as a separate colony ceased, and the power and authority of the executive government and of the legislature existing in British Columbia extended to and over Vancouver Island.

1867.—The effect of the proclamation declaring the English civil and criminal law as it existed on November 19, 1858, to be in force in British Columbia, was modified by an ordinance of March 6, 1867, which enacted that the English law as it existed on November 19, 1858, should apply, "so far as the same are not from local circumstances inapplicable." See R.S.B.C. 1871, No. 70.

1870.—By art. 14 of the proposed terms of union of the Colony of British Columbia with the Dominion of Canada, dated July 7, 1870, it was declared that the constitution of the executive authority of the legislature of British Columbia should, subject to the provisions of the B.N.A. Act, continue until altered; but this article stated an intention of the Governor of British Columbia to amend the existing constitution so that the majority of the members of the legislative council should be elective. By an order-in-council passed on August 9, 1870, it was provided that the legislative council should thereafter consist of 9 elective and 6 appointed members. The election of these 9 popular

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members took place in November, 1870 and the first meeting of this quasi-representative body was held on January 5, 1871.

1871.—By an Act entitled the Civil List Act, 1871, enacted by the Governor of British Columbia with the advice and consent of the legislative council on March 27, 1871, after reciting that "it is desirable that a permanent civil list should be established by law," provision was made for an annual appropriation of $78,346.25 out of the general *revenue* of the colony to Her Majesty, her heirs and successors, for the purpose of defraying the expenses of various public services enumerated in the schedule to the Act. It was provided, however, that the Act should not come into operation until it had received Her Majesty's assent and such assent had been proclaimed in the colony. This Act was repealed by an Act of the provincial legislative assembly in 1872.

1871.—By an Act passed on February 14 of this year a legislative assembly of 25 members, 13 elected by the mainland and 12 by the Island constituencies, was substituted for the legislative council. The operation of the Act was suspended until Her Majesty should assent thereto and fix a date for its coming into force. By a proclamation of June 26, 1871, Gov. Musgrave declared that the Act should come into operation on July 19, 1871, the day prior to the entry of British Columbia into the Dominion.

For the purpose of the Colonial Laws Validity Act, 1865, 28 & 29 Vict., c. 63, which regulates the powers of colonial representative legislatures, the term "representative legislature" signifies any colonial legislature which shall comprise a legislative body of which one-half are elected by the inhabitants of the colony (s. 1).

In the *Mercer* case, 5 Can. S.C.R. 538, 8 App. Cas. 767, the late William Ritchie, C.J., elaborately explained the laws as affecting escheats in the Province of New Brunswick.

By the statute reuniting the Provinces of Upper and Lower Canada, s. 50 provided:—

> And be it enacted, that upon the union of the Provinces of Upper and Lower Canada, all duties and *revenues* over which the respective legislatures of the said provinces before and at the time of the passing of this Act had and have power of appropriation, shall form one consolidated revenue fund, to be appropriated for the public service of the Province of Canada.

The words of this statute are similar to the language used in s. 102 of the B.N.A. Act, the language being:

> All . . . revenues over which the respective legislatures of Canada, Nova Scotia and New Brunswick, before and at the Union had and have the power of appropriation.

This statute, 3 & 4 Vict. c. 35 (Imp.) was amended by 10 and 11 Vict., c. 71 (Imp.). It is a statute to authorise Her Majesty to assent to a certain bill of the legislative council and assembly of the Province of Canada for granting a civil list to Her Majesty and to repeal certain parts of an Act for reuniting the Provinces of Upper and Lower Canada.

It became necessary in this case that an Imperial statute should be enacted, as the statute passed by the Canadian parliament

differed from the previous statute as to the apportionment of the civil list. Ss. 50 to 57, inclusive, had to be repealed before the Canadian parliament could enact the statute in question. By this statute, which was sanctioned by the Imperial parliament, it was provided in part:—

And be it enacted that during the time for which the said several sums mentioned in the said schedules are severally payable, the same shall be accepted and taken by Her Majesty, by way of civil list, instead of all territorial and *other revenues* now at the disposal of the Crown arising in this province.

The Imperial statute, 15 & 16 Vict. c. 39, referred to in the arguments in the various reasons for judgment in the *Mercer* case, *supra*, is styled "An Act to remove Doubts as to the Lands and *casual revenues* of the Crown in the Colonies and Foreign Possessions of Her Majesty," and recites certain previous statutes, namely, 1 William IV. c. 25, and 1 Vict.—and it enacts as follows:—

1. The provisions of the said recited Acts in relation to the hereditary *casual revenues* of the Crown shall not extend or be deemed to have extended to the moneys arising *from the sale or other disposition of the lands of the Crown* in any of Her Majesty's colonies or foreign possessions, nor in anywise invalidate or affect any sale or other disposition already made or hereafter to be made of such lands, or any appropriation of the moneys arising from any such sale or other disposition which might have been lawfully made if such Acts or either of them had not been passed.

This section applies to lands or moneys arising from lands. The section of the statute which is important in this case reads as follows:—

Nothing in the said recited Acts contained shall extend or be deemed to have extended to prevent any appropriation which, if the said Acts had not been passed, might have been lawfully made, by or with the assent of the Crown, *of any casual revenues* arising within the colonies or foreign possessions of the Crown (other than droits of the Crown and droits of Admiralty) for or towards any public purposes within the colonies or possessions in which the same respectively may have arisen: *Provided always, that the surplus not applied to such public purposes of such hereditary casual revenues shall be carried to and form part of the said consolidated fund.*

In the elaborate judgment of Gwynne, J., in the *Mercer* case, *supra*, there is a history of the earlier statutes, and of the effect of this statute, 15 & 16 Vict. It is needless for me to repeat what has been so fully gone into in the reasons of the learned judge.

Counsel for the plaintiff and also counsel for the defendant claim that the Province of British Columbia, prior to that colony

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entering into the Union, had the power of appropriation over the moneys in question. In view of the provisions of sec. 2 of the Imp. Act., 15 and 16 Vict. c. 39, I am of the opinion that the view entertained by counsel is correct. I have set out *in extenso* this section. It would seem to me that this section sanctions the appropriation. The proviso as to the surplus would be useless if it were not so.

In dealing with the provisions of s. 102, in the *Mercer* case, 8 App. Cas. 766 at 777, the Earl of Selborne, L.C., refers to s. 102:—

All duties and revenues, etc., before and at the Union, had and have the power of appropriation, as follows:—

The words of exception in s. 102 refer to revenues of two kinds: (1) Such portions of the pre-existing "duties and revenues" as were by the Act "reserved to the respective legislatures of the provinces"; and (2) such duties and revenues as might be raised by them, in accordance with the special powers conferred on them by the Act."

And he goes on to state:

It is with the former only of these two kinds of revenues that their Lordships are now concerned; the latter being the produce of that power of "direct taxation within the provinces, in order to the raising of a revenue for provincial purposes," which is conferred upon provincial legislatures by s. 92 of the Act.

The *Mercer* case was one relating to escheats for lands. It has been fully considered in the judgment of the Supreme Court in the case of *Trusts and Guarantee Co.* v. *The King*, 54 Can. S.C.R. 107, 32 D.L.R. 469, on appeal from the judgment rendered by me, 15 Can. Ex. 403, 26 D.L.R. 129.

In the *Mercer* case the court carefully guarded itself from dealing with anything more than lands or the proceeds of lands. But, it is important to bear in mind that the Lord Chancellor construed s. 102—and at page 774 uses these words:—

If there had been nothing in the Act leading to a contrary conclusion, their Lordships might have found it difficult to hold that the word "revenues" in this section did not include *territorial as well as other revenues*, or that a title in the Dominion to the revenues arising from public lands did not carry with it a right of disposal and appropriation over the lands themselves. Unless, therefore, the casual revenue, arising from lands escheated to the Crown after the union, *is excepted and reserved to the provincial legislatures*, within the meaning of this section, it would seem to follow that *it belongs to the Consolidated Revenue Fund of the Dominion*. If it is so excepted and reserved, if falls within s. 126 of the Act, which provides that "such portions of the duties and revenues, over which the respective legislatures of Canada, Nova Scotia, and New Brunswick had before the Union power of appropriation, as are by this Act reserved to the respective governemnts or legislatures of the provinces."

In *St. Catherine's Milling & Lumber Co.* v. *The Queen*, 14 App. Cas. 46, at 56, Lord Watson states, as follows:—

The only other clause in the Act by which a share of what previously constituted provincial revenues and assets is directly assigned to the Dominion is s. 102. It enacts that all "duties and revenues" over which the respective legislatures of the United Provinces had and have power of appropriation, "except such portions thereof as are by this Act reserved to the respective legislatures of the provinces, or are raised by them in accordance with the special powers conferred upon them by this Act," shall form one consolidated fund, to be appropriated for the public service of Canada. The extent to which duties and revenues arising within the limits of Ontario, and over which the legislature of the old Province of Canada possessed the power of appropriation before the passing of the Act, have been transferred to the Dominion by this clause, can only be ascertained by reference to the two exceptions which it makes in favour of the new provincial legislature.

At p. 57 Lord Watson states, as follows:—

The enactments of s. 109 are, in the opinion of their Lordships, sufficient to give to each province, subject to the administration and control of its own legislature, the entire beneficial interest of the Crown *in all lands within its* boundaries, which, at the time of the Union, were vested in the Crown, with the exception of such lands as the Dominion acquired right to under s. 108, or might assume for the purposes specified in s. 117. Its legal effect is to exclude from the "duties and revenues" appropriated to the Dominion, all the ordinary *territorial revenues* of the Crown arising within the provinces. That construction of the statute was accepted by this Board in deciding *Att'y-Gen'l of Ontario* v. *Mercer*, 8 App. Cas. 767.

It is obvious from a consideration of the B.N.A. Act that certain revenues which, but for the statute, would have belonged to the provinces, were transferred to the Dominion. The Dominion by the statute granted to the provinces large sums of money for the purposes of their civil lists. Having regard to the provisions of s. 102, which refers to certain revenues over which the provinces at the date of the Union had and have power of appropriation passing to the Dominion except such portions as are reserved to the provinces under s. 109, it is apparent that all royalties of every kind were not intended to belong to the provinces under the wording of s. 109. The royalties in that section must have a limited meaning.

I think the meaning of s. 109 was to pass to the provinces royalties arising from lands, mines, minerals, and royalties limited to escheats, or something arising out of lands, as referred to in s. 1 of the statute, 15 & 16 Vict. I do not think it ever was in contemplation that, under that term royalties, all royalties of every

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kind, including *bona vacantia*, were left to the provinces under the provisions of this statute.

Mr. Ritchie, in his able argument, referred to the precious metals, which he says belonged to the Province of British Columbia. But on reference to the *Precious Metals* case, 14 App. Cas. 295, at 301, it is stated:—

> The title to the public lands of British Columbia has all along been, and still is, vested in the Crown; but the right to administer and to dispose of these lands to settlers, together with all *royal* and *territorial* revenues arising therefrom, had been transferred to the province, before its admission into the federal Union.

After the best consideration I can give to the case, I am of the opinion that the claim put forward by the Attorney-General of the Province of British Columbia, to have the moneys in question paid over for the use and for the benefit of the Crown as represented by the province, fails.

In regard to costs, it is conceded by counsel for all parties that the defendant Rithet acted in an honourable and upright manner, and that he should receive the costs of the action. There will be an order allowing Rithet his costs. It is stated that these costs are small, as Rithet did not appear at the trial of the action. I would suggest that counsel agree to an amount and avoid the necessity for a taxation. Failing agreement, the costs will have to be taxed before the registrar in the ordinary way.

I think, under the circumstances of the case, there should be no costs for or against either the plaintiff or the other defendant, the Attorney-General of the Province of British Columbia.

Judgment for plaintiff.

QUE.

S. C.

R. HOE Co. v. Dame FOOTE.

Quebec Superior Court, Maclennan, J. December 24, 1917.

SALE (§ I—11)—CONTRACT OF PURCHASE—GOODS TO BE SET UP—GOODS LOST IN TRANSIT—DELIVERY—RIGHTS OF PARTIES.

Under a contract of purchase, which entitles the purchaser to have machinery erected in good running order on his premises, under the superintendence of the vendor's expert, before he can be called upon to accept and pay for it, the property in the goods does not pass until this condition is complied with and if the machinery shipped in parts is lost in transit the loss falls on the vendor.

Statement.

The facts of the case are as follows:—

A contract of sale of a press and equipment was made by the following correspondence between the plaintiff, a manufacturer

of printing presses in New York, and the defendants, a printing firm in Montreal.

On July 11, 1912, the plaintiff wrote to the defendants:—

We hereby propose building for you one of our latest improved single web electrotype perfecting presses with folder. [Then followed a detailed description of the press and the work it would do, and the letter continued:] We will build this press ready for electric motor drive and place it aboard the cars in New York within 6 months from the date of your acceptance of this proposal for the sum of $15,750 cash payable in 30 days after the press is in running order in your press-room in Montreal, you to supply the motor equipment; we will furnish an expert mechanic to superintend the erection of the press, charging you nothing for his time during regular work hours, you to pay for his travelling expenses and board at $2.50 per day while engaged in this work.

On July 19, the defendants by letter addressed to the plaintiff accepted the latter's offer to supply a press and equipment pertaining thereto on the terms and conditions outlined in the plaintiff's letters of July 11 and 12

except that the press is to be ready for shipment from your factory on March 1, 1913, and to be held by you thereafter awaiting our shipment instructions which will be given not later than May 1, of the same year, and also that the payment of the purchase price shall be made by us within 60 days instead of 30 days from the date the press is in good running order in our press-room at Montreal.

The plaintiff accepted these modifications.

On March 26, 1913, the defendants telegraphed to the plaintiff:

How soon can you ship press? Answer.

and received a reply on the same date:—

Press shipped to-day.

The shipment was made by the plaintiff delivering to the New York Central & Hudson River Railroad, in New York, 39 boxes and crates containing the parts which when assembled would make the printing press contracted for. More than half of the boxes and crates with their contents were destroyed by fire in transit between New York and Montreal.

The plaintiff's action is to recover from the defendants the contract price, the plaintiff contending that its contract was performed when the materials for the press were placed on board the cars of the New York Central & Hudson River Railroad Co., and that at the time of their destruction the goods were at the risk of the defendants. It is admitted that the fire which destroyed the goods while in transit was a fortuitous event and an accident for which the carriers were not responsible.

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The defendants contend that they contracted for a printing press to be perfected, erected and delivered as a whole in good running order in their press-room in Montreal, and that, as these conditions were not fulfilled, the plaintiff's action must fail.

The Superior Court dismissed the plaintiff's action.

Smith, Markey & Co., for plaintiff; *Brown, Montgomery & McMichael*, for defendants.

Maclennan, J.

MACLENNAN, J.:—The determination of this case depends upon the solution of the following questions:—Did the property in the materials for the printing press pass from the plaintiff to the defendants when the plaintiff placed them aboard the cars in New York, or does the contract between the parties on its true construction indicate that the parties intended the property in the press should not pass until it had been erected in running order in the defendants' press-room in Montreal?

The rule of our law that sale is perfected by the consent alone of the parties is subject to some exceptions. When things moveable are sold by weight, number or measure, the sale is not perfected until they have been weighed, counted or measured: C.C., art 1474. This is the same as the law in England. See *Ross* v. *Hannan*, 19 Can. S.C.R. 235. When the seller contracts to manufacture or build a thing with his own materials and the work is to be perfected and delivered as a whole, it is a sale and the sale is not complete and the property does not pass to the buyer until such delivery: C.C., art. 1684. While these are the general principles applicable to the sale of moveables, the rights and obligations of the parties may be modified by the contract into which they have entered. The printing press which was the subject matter of the contract in this case was not in existence at the date of the contract. The plaintiff was a manufacturer of printing presses and by the contract undertook to do three things:—1. To build the press and have it ready for shipment from its factory on March 1, 1913; 2. To place it aboard the cars in New York; and 3. To furnish an expert mechanic to superintend the erection of the press in good running order in the defendants' press-room in Montreal.

The defendants undertook by the contract: 1. To pay the carriage of the press from New York to Montreal; 2. To pay the travelling expenses and board at $2.50 per day of the plaintiff's

expert mechanic while he superintended the erection of the press in the defendants' press-room in Montreal; 3. To pay the purchase price, $15,750, in cash within 60 days from the date the press would be in good running order in their press-room in Montreal.

It will be observed that there is no provision in express terms in the contract between the parties as to when the property in the goods should pass. The press was to have been and was manufactured in New York, where the plaintiffs were to place it aboard the cars and after its arrival in Montreal they were to furnish an expert mechanic to superintend its erection in the defendants' press-room here. The price was not payable until after the press was in good running order in the defendants' printing press-room.

I am called upon to decide whether the placing on board the cars, in New York, of the materials which, when assembled, would constitute the press, was delivery within the meaning of C. C., art. 1684, and of the contract, and at whose risk the goods were when destroyed in transit. The contract must be construed in the sense in which the parties intended, and that construction must be according to the rules of construction judicially laid down in such matters. See Blackburn, Contract of Sale, 3rd ed., p. 189.

What the defendants bargained to get and agreed to pay for was a printing press erected in good running order in their press-room in Montreal, capable of turning out the quantity and quality of work specified in the contract.

The question here is: Having regard to the contract and its subject-matter, where and when was delivery to be made? The plaintiff's work in New York was to get the press ready for shipment; in Montreal, they had to superintend its erection in good running order in the defendants' press-room. When the press was ready for shipment from New York, its component parts were packed in 39 boxes and crates. That was not what the defendants bought. Their contract was for a printing press in good running order, quite a different thing from the unassembled parts contained in the 39 packages shipped from New York. The superintendence of the erection of the press in Montreal by the plaintiff's skilled expert was necessary for the work to be perfected and the press to be delivered as one whole running machine. It was the skill and technical knowledge of the plaintiff's expert that was to direct

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and superintend the labour which would assemble and produce the perfect press in good running order from the parts manufactured in New York and there brought to the stage of a press ready for shipment. The defendants contracted for more work to be done in Montreal to erect the press in good running order, and to produce this result the skill of plaintiff's expert was more important than the labour of the workmen furnished by the defendants.

Lord Blackburn, in a Scotch appeal to the House of Lords, *Seath* v. *Moore*, 11 App. Cas. 350, at 370, said:—

> But it is competent to parties to agree for valuable consideration that a specific article shall be sold, and become the property of the purchaser as soon as it has attained a certain stage; though if it is part of the bargain that more work shall be done on the article after it has reached that stage, it affords a strong *primâ facie* presumption against it being the intention of the parties that the property should then pass.

And at p. 381, Lord Watson said:—

> There is another principle which appears to me to be deducible from these authorities and to be in itself sound, and that is, that materials provided by the builder and portions of the fabric, whether wholly or partially finished, although intended to be used in the execution of the contract, cannot be regarded as appropriated to the contract, or, as "sold," unless they have been affixed to or in a reasonable sense made part of the corpus.

This case was followed by the House of Lords in another Scotch appeal, in 1904, *Reid* v. *Macbeth*, [1904] A.C. 223, and later, in *Laing* v. *Barclay*, [1908] A.C. 35.

In *Bellamy* v. *Davey*, [1891] 3 Ch. 540, at 545, Romer, J., said:—

> The contract was for sale and delivery of a complete tank ready for testing, and until the tank was so completed and delivered up, I think, no property passed.

See *Isherwood* v. *Whitmore*, 11 M. & W. 347, 152 E.R. 837.

In *Roberts* v. *Brett* 6 C.B. (N.S.), 611, at 633, 141 E.R. 595, at 604, Bramwell, B., said:—

> Wherever the obvious good sense of the thing makes the performance of an act a condition precedent, it ought to be so construed.

In my opinion the rights of the parties are determined by the principles laid down in the foregoing authorities which are expressed in our law by art. 1684 of the Civil Code.

The corresponding article in the Code Napoleon is 1788.

The French commentators have construed this article to mean that the thing was at the risk of the workman producing it until it had been delivered to and accepted by the party for whom it was being made, and that delivery was not complete until such acceptance.

22 Baudry-Lacantinerie, Du Contrat de Louage, vol. 2, Nos. 3903, 3904.

In the same sense, see Laurent, vol. 26, No. 6; Pothier, Louage, No. 436; —S. 72. 1. 101;—D.P. 72. 1. 140.

The same principle was held to apply to the delivery of a steam engine. Laurent, vol. 24, 167; —D.P. 72. 2.95.

The same principle was applied by Mathieu, J., in *Murphy* v. *Forget*, 19 Que. S.C. 135.

The press perfected and delivered as a whole within the meaning of the contract and of C. C., art. 1684, was the press erected and put in good running order ready to do its work, and not the unassembled parts shipped from New York.

In my opinion, the property in the press did not pass from the plaintiff to the defendants on the shipment of the parts and, on the true construction of the contract, was not to pass until the press had been erected in good running order under the superintendence of the plaintiff's expert in the defendants' press-room in Montreal. Then and not till then delivery would have been made. As there was no such delivery the parts destroyed in transit were at the plaintiff's risk, and the action must be dismissed.

JUDGMENT:—Considering that the contract between the parties was for the sale of a printing press and equipment to be perfected and delivered as a whole by the plaintiff in the defendants' press-room in Montreal;

Considering that the placing of the unassembled parts of such press aboard the cars of the New York Central & Hudson River R. Co. in New York did not constitute delivery of what the defendants bargained for under said contract;

Considering the defendants were entitled to have said press erected in good running order under the superintendence of the plaintiff's expert in Montreal before the defendants could be called upon to accept and pay for the same;

Considering the property in said goods did not pass from the plaintiff to the defendants on the shipment of the parts from New York, and said parts were at the plaintiff's risk when destroyed in transit by a fortuitous event;

Considering plaintiff has not established the material allegations of its declaration, and that the defendants have made good their defence; doth dismiss the plaintiff's action with costs.

Action dismissed.

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S. C.

REX v. HARRIS.

Ontario Supreme Court, Mulock, C.J.Ex. December 21, 1917.

CRIMINAL LAW (§ IV C—117)—EXCESSIVE FINE—MAGISTRATE'S CONSIDERATION OF EVIDENCE WRONGFULLY ADMITTED.

In sentencing a defendant found guilty of an offence the magistrate should not increase the severity of the sentence because he considers the defendant guilty of another offence with which he has not been charged.

Statement. MOTION to quash a conviction of the defendant, by a magistrate, for a violation of the provisions of sec. 41 of the Ontario Temperance Act, 6 Geo. V. ch. 50, which prohibits a person having intoxicating liquor in any place other than in the private dwelling-house in which he resides. Fine reduced.

W. K. Murphy, for defendant; *Edward Bayly*, K.C., for Crown.

Mulock, C.J.Ex. MULOCK, C. J. Ex.:—The defendant pleaded guilty, and then evidence was adduced before the magistrate to the effect that the defendant had admitted having sold liquor and realised therefrom the sum of $1,500. The magistrate then imposed the maximum fine of $1,000 and costs, or, in the alternative, three months in gaol.

On the argument before me, Mr. Murphy stated that, on the defendant pleading guilty, the magistrate intimated his intention to impose a fine of $200 and costs, but ultimately imposed the maximum penalty, in consequence of the evidence given as to the alleged illegal sale of liquor. At my request, the magistrate has furnished to the Court a statement of his reason for imposing the maximum penalty. It is as follows (after referring to the information, plea of guilty, and the evidence as to sale, he states):—

"It had been my intention, up to the point of hearing this evidence, to treat the case as an ordinary one, and in fact would have placed upon the accused the minimum fine of $200 and costs. However, when this evidence was brought to my attention, I was of the opinion that the accused was selling liquor, and consequently imposed the maximum fine of $1,000 and costs, or, in the alternative, three months in gaol. As per your request, I may say that it was this evidence which, when brought to my attention, influenced me to place this fine on the accused, which I did."

Section 58 of the Act gives the magistrate discretion, within a certain limit, as to the penalty which he may impose, and he has not exceeded the authorised penalty. It appears, however, that he increased the penalty because of his belief that the defendant

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had committed an offence against the provisions of sec. 40, for which offence, if convicted, he would have been punishable.

In effect, the learned magistrate, without an information, has found the defendant guilty of the offence of illegal sale; and, in consequence, has added the sum of $800 therefor to the penalty of $200, which he regarded as the appropriate penalty for the offence of having liquor in an unauthorised place. If, after such sentence, an information had been laid against the prisoner for the illegal sale in question, he would, if found guilty, have been punishable therefor; that is, he would have been punished twice for the same offence; if acquitted, he would stand fined, to the extent of $800, for an offence of which he had been found innocent.

To illustrate further the possible injustice of the case, it is to be observed that under the Ontario Temperance Act the punishment for a second offence is imprisonment only, without the addition of a pecuniary fine. One or other of the two offences in question must be treated as a second offence. The magistrate, by imposing a fine, had in fact decided that the having of liquor in an unauthorised place was the first offence; therefore, the illegal sale must be regarded as the second offence; and, if found guilty, the magistrate would have been obliged to sentence the defendant to a term of imprisonment; that is, the defendant would be suffering a fine of $800, in addition to imprisonment, for the second offence—a punishment wholly unauthorised by the Act.

In fixing the fine in question, the learned magistrate should, I think, have excluded from consideration the evidence as to illegal selling, and his not having done so was not, in my opinion, a correct exercise of the judicial discretion vested in him by sec. 58 of the Act. In sentencing a defendant found guilty of an offence, the Judge should not increase the severity of the sentence because he considers the defendant guilty of some other offence with which he has not been charged (*Rex* v. *Bright*, [1916] 2 K.B. 441); and the defendant is entitled to be relieved from the injustice done him by the disregard of this rule.

Two courses are open to me: either to quash the conviction, in which case the defendant would escape punishment for violation of sec. 41 of the Act, the offence of having liquor in an unauthorised place; or to amend it, as provided by secs. 1124 and 754 of the Criminal Code.

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Where a conviction is, by *certiorari* (or its equivalent, a motion to quash), brought before a Judge, sec. 1124 authorises the Judge to modify the same as may seem just, to the extent provided by sec. 754; and I think that justice requires that the fine imposed be reduced to $200, and this I direct to be done; the order to protect the magistrate. *Judgment accordingly.*

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Ex. C.

LOWE v. THE KING.

Exchequer Court of Canada, Cassels, J. January 24, 1918.

INTOXICATING LIQUORS (§ II A—35)—LICENSE—CUSTOMS—ILLEGAL TAX—RECOVERY—YUKON.

Under the provisions of the statutes relating to the Yukon Territory the Dominion Government has the power to exact a fee for the granting of a permit for the importation or bringing in of intoxicating liquors in the Territory; such exaction is a mere charge for the granting of the permit and not in the nature of customs duties or tax within the provision of the Customs Act (R.S.C. 1906, c. 48, s. 130). Where such a charge has been illegally imposed but paid voluntarily it cannot be recovered back.

Statement.

PETITION OF RIGHT to recover taxes alleged to have been illegally exacted.

W. D. Hogg, K.C., for suppliant.

C. P. Plaxton and *F. P. Varcoe*, for respondent.

Cassels, J.

CASSELS, J.:—This was a petition of right filed on behalf of Robert Lowe, of Whitehorse, in the Yukon Territory. The petition was filed in the Exchequer Court on April 1, 1915. It is stated that the petition was deposited with the Secretary of State on February 12, 1915.

The petition of right alleges as follows:—

2. That for a number of years past your suppliant imported into the said Territory, under permit duly obtained, large quantities of spirituous or malt liquors, wine, ale, porter, beer and lager beer, upon which spirituous or malt liquors he was obliged to pay in addition to the Customs and Inland Revenue tax already paid thereon, a tax of $2 per gallon on all the said spirituous or malt liquors so imported by him into the said Territory as aforesaid, and upon the said wine, ale, porter, beer and lager beer he was obliged to pay a tax of 50 cts. a gallon on such liquors so imported.

3. That during the years between July, 1900, and the present time your petitioner has been obliged to pay, and has in fact paid on account of the said tax upon the spirituous and malt liquors, wine, ale, porter, beer and lager beer so imported into the said Territory as aforesaid to the officers of the Dominion government and those employed under the said officers in the collection of revenue for the said Yukon Territory, the sum of $87,347.

4. That the imposition of the said tax of $2 per gallon on spirituous and malt liquors and the tax of 50 cts. per gallon on wine, ale, porter, beer and lager beer so imported into the said Territory as aforesaid by your suppliant was

and is based upon certain orders-in-council passed by your Majesty's government of Canada from time to time between July 26, 1900, and August 12, 1911, which orders-in-council purport to be founded upon the provisions and powers contained in the Yukon Territory Act, now consolidated in R.S.C., as c. 63, and the money so collected has been and is assigned under the provisions of the said order-in-council to form part of the revenue of the said Yukon Territory.

5. The suppliant alleges and the fact is that the said orders-in-council are *ultra vires* the government of Canada, the said government not having been authorized or empowered by the said Yukon Territory Act to impose the said tax on spirituous or malt liquors, ale, porter, beer or lager beer imported or brought into the said Territory; and the suppliant submits that the sum above mentioned has been exacted from him without warrant or legal authority by the officers of your Majesty's government of Canada, and has been received by your Majesty's said government as money paid to your Majesty for the use and benefit of your suppliant, and should be repaid to your suppliant with interest.

The petitioner claims that it may be adjudged that he is entitled to payment of the sum of $87,347, being the amount of the tax illegally exacted.

To this petition His Majesty the King, represented by the Attorney-General for the Dominion of Canada, filed a defence. The second paragraph of his defence reads, as follows:—

If the suppliant did make such payments as in the third paragraph of the petition of right alleged, which the Attorney-General does not admit, such payments were made voluntarily by him, and the Crown is under no liability to repay them.

In par. 2a the respondent alleges, as follows:—

The alleged debt, cause of action or claim pleaded herein did not accrue within 6 years before this action, and was and is barred by the Statute of Limitations. Exchequer Court Act, R.S.C. 1906, c. 140, s. 33; North-West Territories Act, R.S.C. 1906, c. 62, s. 12; Yukon Act, R.S.C. 1906, c. 63, s. 19; Yukon Consolidated Ordinances, 1914, c. 55, s. 1; 21 James 1., c. 16, s. 3.

On the argument of the case respondent asked permission to supplement his defence by pleading the limitation which is provided by s. 130, c. 48, R.S.C. 1906. This section reads as follows:—

Although any duty of customs has been overpaid, or although, after any duty of customs has been charged and paid, it appears or is judicially established that the same was charged under an erroneous construction of the law, no such overcharge shall be returned after the expiration of 3 years from the date of such payment, unless application for payment has been previously made.

The respondent was granted leave to file this supplemental defence, and although in the view I take of the case it is not necessary to determine this point, if a higher court should take a different view, the question will arise whether or not this s. 130 is applicable to the facts of the case, and would protect the respondent from any

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repayment for a longer period than three years. No application for repayment had been previously made.

In connection with s. 130, in the interpretation the Act respecting the customs, s. 2 (2) contains the following: "All the expressions and provisions of this Act or any law relating to customs, etc." If it were to appear, as Mr. Hogg argued, that the charges imposed and collected are in the nature of customs duties, my view is that this s. 130 would be applicable.

Before dealing with the case it would be well to state that in the year 1902, by the statute 2 Edw. VII. c. 34, the Yukon Territory Act was amended, and for the first time, as far as I can ascertain, sub-s. 2, of s. 8, was enacted. It reads as follows:—

2. Every ordinance made under the authority of this section shall remain in force until the day immediately succeeding the day of prorogation of the then next session of parliament, and no longer unless during such session of parliament such ordinance is approved by resolution of both Houses of Parliament.

The subsequent provision is in regard to publication in the "Gazette."

On the argument, Mr. Hogg, K.C., who appeared for the suppliant, and Mr. Newcombe, K.C., who appeared for the Crown, agreed that this provision of sub-s. 2, of s. 8, c. 23, 2 Edw. VII., had been complied with, and also that all the provisions relating to the advertisement had been complied with.

The Yukon Territory Act (intituled "An Act to provide for the government of the Yukon Territory"), R.S.C. 1906, c. 63, reads as follows:—

113. No intoxicating liquor or intoxicants shall be manufactured, compounded, or made in the Territory, and no intoxicating liquor or intoxicants shall be imported or brought into the Territory from any province or territory in Canada or elsewhere, except by permission of the Governor-in-Council.

114. All intoxicating liquors or intoxicants imported or brought from any place out of Canada, into the Territory, shall be subject to the customs and excise laws of Canada.

I suggested to counsel that it might be well to supplement the admission of facts, which had been agreed upon by a statement shewing whether the liquors referred to were imported or brought into the Territory from any province or territory in Canada, or whether they were imported or brought from any place out of Canada, and the parties have agreed to supplement the admissions which are on file by stating that the liquor above referred to was brought into the Territory from other parts of Canada.

The parties have agreed upon a statement of facts, the first three paragraphs of which read as follows:—

1. That under permits duly issued in pursuance of the provisions of the orders-in-council hereinafter mentioned, the suppliant, trading under the name of Robert Lowe and Company, at Whitehorse, in the Yukon Territory, during the years between June 24, 1901, and April 1, 1915, imported and brought into the said Territory spirituous and malt liquors, ale, porter, beer and lager beer.

2. That during the period aforesaid the suppliant paid to officers of the respondent in the said Territory, in respect of the liquors so imported, the following sums of money:—

1901-2, $16,436; 1902-3, $4,986; 1903-4, $7,785.50; 1904-5, $6,386.50; 1905-6, $9,947; 1906-7, $6,414; 1907-8, $5,650; 1908-9, $5,800; 1909-10, $3,742; 1910-11, $5,125; 1911-12, $5,902; 1912-13, $3,318; 1913-14, $3,501; 1914-15, $1,796 = $86,789.

3. That the said permits were issued and the said payments were made in pursuance and subject to the provisions of the following orders-in-council:—

Orders-in-council dated Feb. 25, 1901, P.C., 256; March 5, 1901, P.C., 257; March 18, 1901, P.C., 579; June 22, 1904, P.C., 1159; Sept. 17, 1908, P.C., 2055; Dec. 9, 1909, P.C., 2475; Aug. 12, 1911, P.C., 1794.

The various orders-in-council under which the fees were exacted are filed as part of the proceedings in the present action.

I have considered the various statutes, relating to the Yukon Territory, c. 6 of 61 Vict. (13th June, 1898), which constitutes the Yukon a judicial district. C. 11, 62 & 63 Vict. (11th August, 1899, repealed the previous s. 8, and provided as follows:—

Provided always that the governor-in-council or the commissioner-in-council may make regulations in respect to shop, tavern and other licenses and may impose fees for the issue of the same.

By c. 41, 1 Edw. VII. (May 23, 1901), it was provided that the Yukon should no longer form part of the North-West Territories.

Colour is afforded to the argument advanced by Mr. Hogg that the fees which were exacted for the granting of the permit were in reality a tax by the language used in one or two of the ordinances which are filed. For instance, the ordinance which is dated September 17, 1908, is headed "Ordinance respecting the imposition of a tax upon ale, porter, beer, or lager beer, imported into the Yukon Territory." It purports to amend a previous ordinance of June 22, 1904, by providing that on and after November 1, 1908, a tax of 50 cts. a gallon be imposed. A subsequent ordinance, passed on December 9, 1909, is an ordinance to rescind an ordinance respecting the imposition of a tax.

Various permits were from time to time obtained by the

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suppliant permitting him to take into the Territory intoxicating liquor or intoxicants. The ordinances would indicate that as a term for obtaining these permits the applicant was asked to pay certain fees which apparently were graduated or based upon the quantity of intoxicating liquors which be sought permission to take into the Territory.

For a time my impression was that these exactions were in the nature of customs dues and in the nature of a tax, but on reflection I have come to the conclusion that they were mere charges made by the Dominion government for the granting of the permit.

It was conceded before me by Mr. Hogg, counsel for the suppliant, and who presented his case with great ability and considerable research, that the Dominion government had the right to impose license fees as a term for the granting of the permits. His contention, however, is that the amounts charged were so excessive as to shew that they were really charged as customs dues or as a tax. If it be once conceded that the governor-in-council had the right to impose a fee for the granting of the permit, I do not think it would be open to the suppliant to question the amount. He paid what was asked, raised no objection, did not pay under protest, but acquiesced in the charges, and no doubt when he came to retail the liquor, the consumer paid what had been advanced for the permit.

I think that a fee could be legally exacted for the granting of the permit. It is not the case of a man having the right to take liquor into the Territory, and then being charged with this so-called tax. He had the right to accept or refuse the permit.

The case of *Chapelle* v. *The King*, 7 Can. Ex. 414; 32 Can. S.C.R. 586, [1904] A.C. 127, is of a different character. In that case the plaintiff had the legal right to mine for ores. Subsequent to the granting of this right the Crown attempted by regulations to alter his contract by requiring him to pay certain royalties. It was held that this was illegal so far as the first license was concerned. Subsequently the Privy Council adopted the judgment of Sir Louis Davies, to the effect that the subsequent licenses were practically new grants, and were subject to the regulations then in force.

The case was somewhat similar to the case of *Booth* v. *The King*, 21 D.L.R. 558, 51 Can. S.C.R. 20, a case referring to the renewal of a license to cut timber.

In the present case before me, as I have pointed out, there was in no sense any change or attempted change of any contract entered into between the Crown and the suppliant. He voluntarily acquiesced in the charge made for the permit, and even if it were to be held illegal as a tax, I do not think he could recover.

In an elaborate judgment of the Court of Appeal in Ontario in the case of *Cushen* v. *City of Hamilton*, 4 O.L.R. 265, it was held that fees having been paid with full knowledge of the facts, under a claim of right, could not be recovered back.

Another case of taxes paid was that of *O'Grady* v. *Toronto*, 31 D.L.R. 632, 37 O.L.R. 139.

I would, in addition to the cases I have mentioned, add the case of the *Grand Trunk R. Co.* v. *Quebec*, 30 Can. S.C.R. 73,—and would refer to the language of Strong, J., at p. 79. It is *obiter*, but nevertheless the opinion of a very eminent judge.

I have also been furnished with an elaborate list of authorities to shew that under the general words authorizing the governor-in-council to enact laws for the peace, order and good government, etc., that as a matter of police regulation there was the power on the part of the governor-in-council to charge these fees. I do not think it necessary to rely upon this point, but I may add that any power to enact a law in the nature of a police regulation would fall rather to the Yukon government than to the governor-in-council of the Dominion.

Claims of this character become serious if after such length of time these moneys have to be paid back.

The case of *Schlesinger*, 1 Court of Claims, p. 16, may be referred to as shewing the views of the American courts.

I think the petition should be dismissed with costs.

Petition dismissed.

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Saskatchewan Court of Appeal, Newlands, Lamont and Elwood, JJ.A. May 17, 1918.

CRIMINAL LAW (§ I—1)—CRIMINAL CODE—S. 355—INTERPRETATION.

To be guilty of theft under s. 355 of the Criminal Code, the accused must have received money or valuable security or other things on terms requiring him to hand over the thing received or the proceeds thereof to some person other than the person from whom he received it, and have fraudulently converted it to his own use.

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THE KING v. FRASER.

Newlands, J.A.

CROWN case reserved by Rimmer, Dist. C.J., on a conviction for theft under s. 355 C.C.

H. E. Sampson, K.C., for the Crown.

D. A. McNiven, for the accused.

NEWLANDS, J.A.:—This is a Crown case reserved. Rimmer, Dist. C.J., convicted the accused of having received from the Lake of the Woods Milling Co., Ltd., a car-load of flour, feed and cereals on terms requiring him to account for and pay for a definite part of the proceeds of the said car of flour, feed and cereals to the said company, did fraudulently omit to account for and pay the same or any part thereof and did during the month of November, 1917, fraudulently convert to his own use the said proceeds, thereby committing theft, contrary to s. 355 of the Criminal Code.

S. 355 of the Code makes it theft for any person who, having received any money or valuable security or other thing whatsoever, on terms requiring him to account for or pay the same, or the proceeds thereof or any part of such proceeds, to any other person not to do so.

The above charge on which the accused was convicted alleges that he received a carload of flour from the Lake of the Woods Milling Co., Ltd., on terms requiring him to account for said carload of flour or the proceeds thereof to them, and that he omitted to do so. There is no allegation that he received any money, valuable security or other thing whatsoever from any other person on terms requiring him to account for the same to the Lake of the Woods Milling Co., Ltd. The "other thing whatsoever" above referred to, would be something of a like nature to money or valuable security, and would not refer to the carload of flour in question.

The charge therefore lacks an essential ingredient to make it an offence under s. 355, which would be an allegation that the accused had received money, valuable security or some other thing as the proceeds of the carload of flour. Now, unless accused did receive such money, etc., he would not be liable under the section, and, as there is no allegation of his so receiving the same in the charge, he could not be convicted of an offence under that section.

Under these circumstances, there is no necessity to answer the questions submitted and the conviction should be quashed.

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Lamont, J.A.

LAMONT, J.A.:—The accused was charged as follows:—

That the accused having received from the Lake of the Woods Milling Co. Ltd., a carload of flour, feed and cereals on terms requiring him to account for and pay for a definite part of the proceeds of the said car of flour, feed and cereals to the said company, did fraudulently omit to account for and pay the same or any part thereof and did, during the months of September and October, 1917, fraudulently convert to his own use the said proceeds, thereby committing theft contrary to s. 355 of the Criminal Code.

In August, or the first part of September, 1917, the accused had received from the Lake of the Woods Milling Co. a carload of flour, under an agreement in writing which provided that he would receive the shipment, and that he would sell it for cash only, at a price which would be a reasonable profit on the price at which the company invoiced it to him and which profit would be his commission. The agreement also contained the following clauses:—

(9) All moneys received or collected by the consignee for, or on behalf of the company shall be securely held by him as a fiduciary trust and shall be used by him for no personal or other purpose whatever, but shall be by him paid over to the company . . . (10) The consignee hereby agrees to purchase any stock on hand that has been consigned over 3 months.

The car was invoiced to the accused at $2,074.30. On October 30, 1917, R. C. Hainstock, a representative of the company, visited the accused and found only $1,240 worth of flour remaining of the carload shipped. This indicated that Fraser had disposed of $977.40 worth of flour, and Hainstock asked him for payment for the same. After obtaining an allowance for certain rebates, the accused gave Hainstock a cheque in favour of the company for $946.89, which cheque was dishonoured. The company then commenced this prosecution. The matter came on for hearing before Rimmer, Dist. C.J., who found the accused guilty, but reserved for the opinion of the court certain questions; the first of which is:—

Am I right in holding that under the terms of the contract ex. "A" and the evidence adduced there was evidence for the Crown that money was received by the accused on terms requiring him to pay the same to the Lake of the Woods Milling Co. Ltd., and that the company did not rely only on the personal liability of Fraser, the accused, as debtor.

S. 355, under which the charge is laid, reads:—

355. Every one commits theft who, having received any money or valuable security or other thing whatsoever, on terms requiring him to account for or pay the same, or the proceeds thereof, or any part of such proceeds, to any other person, though not requiring him to deliver over in specie the identical money, valuable security or other thing received, fraudulently converts the

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same to his own use, or fraudulently omits to account for or pay the same or any part thereof . . . which he was required to account for or pay as aforesaid.

To be guilty of an offence under this section, the accused must have received money or valuable security or other thing on terms requiring him to hand over the thing received, or the proceeds thereof, if he has converted it into money, to some other person, *i.e.*, to some person other than the person from whom he received it, and instead of turning it over he fraudulently converts it to his own use. The gist of the offence is, that he has received something which, in reality, belongs to the person to whom he has to account and to whom he would turn it over if he performed his duty. In this case, the only thing which, under the agreement, the accused was called upon to turn over to the company was money, and it is not suggested that he received any valuable security or thing other than money on behalf of the company. The only charge, therefore, on which the accused could be found guilty under the section, in view of the terms of his agreement with the company, in my opinion is, that he had received or collected certain moneys on terms requiring him to pay over the same and that he had fraudulently converted such moneys to his own use, and the essential facts to be proved would be that he had sold the flour on a cash sale, that he had collected the moneys therefor and used the same for his own purposes.

This, however, is not what the accused is charged with. There is no allegation in the charge that the accused ever received or collected any money on account of sales of that carload of flour. What he is charged with receiving is the carload of flour.

The receiving by the accused of the carload of flour delivered under the agreement, cannot, in my opinion, be held to be a receipt "of money or valuable security or other thing whatsoever" within the meaning of s. 355, because,—as I have already pointed out—to come within that section, the thing received by the accused must be received from some person other than the person to whom the accused is under an obligation to account, although the obligation to account itself may arise by virtue of the agreement. *Reg.* v. *Unger*, 5 Can. Cr. Cas. 270.

I am also of opinion that the words "the proceeds thereof or any part of such proceeds" in s. 355 mean the proceeds of the

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valuable security or other thing received by the accused not from the person to whom he is under obligation to account, but from some other person. For instance, in this case, had the accused, instead of selling the flour for cash, sold it on time and taken the purchaser's note for the price and cashed the note, the cash received would be "proceeds" within the meaning of the section. The term "proceeds," therefore, would not include the cash received by the accused for flour sold by him for cash. The charge that the accused received a car of flour from the company on terms requiring him to pay the proceeds of such flour back to it and that he converted such proceeds to his own use, does not, in my opinion, come within the section. What he should have been charged with is this, that he received certain *moneys* on terms requiring him to pay over the same to the company, and that he fraudulently converted the same to his own use. The only thing which he agreed to hold as a fiduciary trust for the company, was "moneys received or collected by him." As the accused was not charged with the only offence of which the evidence shews he has been guilty, he should, in my opinion, have been discharged.

In answer to the question submitted, therefore, I would say that it is immaterial, so far as this charge is concerned, whether or not the evidence shewed that the accused received *money* on terms requiring him to pay the same to the company, because he has not been charged with that offence.

Elwood, J.A.

ELWOOD, J.A. (dissenting):—The accused was charged for that he, the said Thomas Fraser, having received from the Lake of the Woods Milling Co., Ltd., a carload of flour, feed and cereals on terms requiring him, the said Thomas Fraser, to account for and pay for a definite part of the proceeds of the said car of flour, feed and cereals to the said company, did fraudulently omit to account for or pay the said or any part thereof and did during the month of November fraudulently convert to his own use the said proceeds, thereby committing theft, contrary to s. 355 of the Criminal Code of Canada.

The facts material to this case are the following:—

The said company entered into an agreement in writing whereby the company agreed to ship to the accused, flour, feed or cereals as the accused should designate, and, *inter alia*, the agreement contained the following:—

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(5) The consignee shall be entitled at any time upon payment to the company of the invoice price of the goods to become the purchaser thereof himself.

(9) All moneys received or collected by the consignee for, or on behalf of the company shall be securely held by him as a fiduciary trust and shall be used by him for no personal or other purpose whatever but shall be by him paid over to the company in accordance with the following:—

The consignee shall make fortnightly regular remittances to the company of all moneys on hand at the date thereof received on account of such consignment since the previous remittance less the consignee's proper commission, and shall with each such remittance give a correct statement of all consignment goods on hand. Said statement and remittances to be pursuant to and embodied in forms therefor supplied by the company.

In or about September, 1917, the company shipped to the accused a carload of flour valued at $2,374.30. On October 30, 1917, a representative of the company visited the accused, took stock of the stock in hand and found it to total $1,240.50. The accused was apparently entitled to a credit of $156.30 for reduced prices of stock on hand, and also to credit for $30.61, freight; leaving a balance of $946.89. The accused produced a roll of bills and some cheques, stating that there was $900 in the bills and that he would deposit the whole amount of the bills and cheques in the bank on the following morning—it was then after banking hours—and gave the representative of the company the accused's cheque for $946.89. This cheque was sent to the bank for collection and was returned unpaid on account of insufficient funds.

There was evidence given at the trial of conversations the accused had had with this representative of the company on November 10, when the accused stated that on October 31 he cashed the cheques which he had promised to deposit and put the proceeds in his pocket, together with the balance of the money, and on the morning of the 2nd of November he found he had lost the whole of the money.

There was some evidence of a dispute between the accused and the company over a rebate that the accused claimed to be entitled to, but the amount so in dispute was only a very small portion of the total money owing to the company.

The District Court Judge before whom the accused was tried found the accused guilty. He expressly states in his reasons for judgment that he disbelieves the statement of the accused as to the loss of the money. He says, in his opinion, the money was not

lost at all, and that this story is simply trumped up for the purpose of defrauding the company.

The District Court Judge admitted, as evidence on behalf of the accused, the evidence of one Cornell, who swore that on November 2, the accused had told him that he lost about $1,200. The District Court Judge reserved the following questions for the opinion of the court:—

(1) Am I right in holding that under the terms of the contract and the evidence adduced there was evidence for the Crown that money was received by the accused on terms requiring him to pay the same to the Lake of the Woods Milling Co., Ltd., and that the company did not rely only on the personal liability of Fraser, the accused, as debtor? (2) Am I right in holding at the close of the case for the Crown that the onus was shifted to the accused to prove the absence of fraudulent intent? On opening for the defence, counsel for the accused offered subject to objection of the Crown evidence of E. R. Cornell of a conversation with Fraser relating to the alleged loss of $1,000. I admitted this evidence as part of the *res gestæ* shewing the state of mind of the accused as relevant to the issue of fraudulent intent (Phipson on Evidence, 4th ed., pp. 52, 130), and held that the question was one of weight rather than admissibility. (3) Am I right in so ruling?

On the argument before us, it was suggested that there was no evidence that the accused had sold the goods with respect to which he was short of cash, that he might have sold them on credit and not received the money.

The agreement under which the flour was shipped provides that the accused should make sales thereof for cash only. The evidence shews that a statement was made up by the representative of the company on October 30, shewing a balance amounting to $946.89. That statement refers to sales aggregating $977.50. The accused agreed to the correctness of the statement and gave his cheque therefor. In his letter to the company of November 5, the accused says:—"So I was carrying the money in my pocket until such time as I could get the price adjusted." In a letter of November 12, to the Western Canada Accident & Guarantee Ins. Co., the accused said: "My books shewed $946.00 more or less due the company." There is not a suggestion in the evidence anywhere that the accused had not actually received the money which he is charged with converting, and I cannot see, on the evidence, how any conclusion can be come to other than that the accused had actually received the money.

It was further contended that the parties from whom he had received the money had not required him to account to the com-

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pany for it. To my mind that is quite immaterial. The extract from the contract which I have given above shews that the accused received the money on behalf of the company as a fiduciary trust, and that, in my opinion, is quite sufficient to bring him within s. 355 of the Code.

In *Rex* v. *McLellan*, 10 Can. Cr. Cas. 1, the Supreme Court of the North-West Territories *en banc* held that a railway conductor who takes from a passenger for his transportation a sum much less than the authorized fare and issues no ticket and receipt therefor is guilty of theft, under Code s. 308, if he fraudulently omits to account for and pay to the railway company the money so received, and that money so taken is money received by the conductor on terms requiring him to account for or pay the same to the company within the meaning of Code s. 308.

S. 308, then under consideration, was practically the same as s. 355 of the present Code.

Rex v. *McLellan* was followed in the Supreme Court of Ontario by Clute, J., in *Rex* v. *Sinclair*, 27 Can. Cr. Cas. 327.

In *Regina* v. *Unger*, 5 Can. Cr. Cas. 270, the Ontario High Court of Justice held that the reference in s. 308 of the Code to the terms on which the money was received, means the terms on which the defendant holds the money when he has received it, and that the section is not restricted to cases where the terms are imposed by the person paying the money.

I think there can be no doubt, under the contract in question in this case, that the accused received the money in question on terms requiring him to account for or pay the same to the company. The answer to the first question submitted to us should be "Yes."

As to the second question. When the Crown had proven the receipt of the money and the obligation to account for the flour, the onus was then, in my opinion, on the accused to prove an absence of fraudulent intent. Until an absence of fraudulent intent was proven by the accused, his action in the matter, under the evidence, would be presumed to be fraudulent. The answer to the second question submitted to us should be "Yes."

So far as the third question is concerned, I am of the opinion that the evidence of Cornell was mere hearsay. If evidence of that kind were permitted, it would be a very easy matter for any accused person, after he had committed a crime, to go about the

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country telling prospective witnesses stories that—if believed—would shew an absence of criminal intent. The accused would be manufacturing evidence for himself. I would answer the third question submitted to us "No." *Conviction quashed.*

FRADETTE v. THE KING.

Exchequer Court of Canada, Audette, J. March 11, 1918.

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Ex. C.

LIMITATION OF ACTIONS (§ II F—60)—NEGLIGENCE—ACTION AGAINST DOMINION CROWN—INTERRUPTION OF PRESCRIPTION.

By virtue of s. 33 of the Exchequer Court Act (R.S.C. 1906, c. 140) the provincial laws relating to prescription and limitation of actions apply to an action for personal injuries against the Crown in right of the Dominion. Mere "negotiations" do not operate as an interruption of the prescription.

Statement.

PETITION OF RIGHT to recover damages for personal injuries.

W. Amyot, for suppliant; *E. Belleau*, K.C., for respondent.

Audette, J.

AUDETTE, J.:—The suppliant, who is an employee of the Department of Marine, brought his petition of right to recover damages in the sum of $2,000, as arising out of an accident of which he was the victim while working at Quebec, as boiler-maker on board the steamer "Princess," a steamer owned by the Dominion Government. He claims that in course of this work a piece of steel flew from his tool, lodged in his left eye, and as a result he absolutely lost the use of the eye.

The accident happened on January 30, 1914. The petition of right is dated as of October 12, 1916, and the fiat was granted on November 7, 1916.

S. 33 of the Exchequer Court Act enacts that,

> The laws relating to prescription and the limitation of actions in force in any province between subject and subject shall, subject to the provisions of any Act of the Parliament of Canada, apply to any proceeding against the Crown in respect of any cause of action arising in such province.

Moreover, under art. 2211 of the Civil Code (Que.), the Crown may avail itself of prescription, and the manner in which the subject may interrupt such prescription is by means of a petition of right—apart from the cases in which the law gives another remedy.

Under art. 2262 of the Civil Code the right of action for bodily injuries is prescribed by 1 year, and art. 2267 thereof enacts that in such case the debt is absolutely extinguished, and that no action can be maintained after the delay for prescription has expired.

Counsel at Bar for the suppliant contends, however, that the

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correspondence produced of record amounts to negotiations which would interrupt prescription. In that contention I am unable to acquiesce.

The term "negotiation," as defined in Black's Law Dictionary, is

> the deliberation, discussion or conference upon the terms of a proposed agreement; the act of setting or arranging the terms and conditions of a bargain, sale, or other business transaction.

A demand of payment has been made and the Crown, when informed of the nature of the claim, declines to acknowledge any liability. The claimant cannot bind the other side by a mere demand for payment. It is, at most, a unilateral demand, without mutuality of purpose to negotiate, and it is in its very nature insufficient to interrupt prescription.

It is unnecessary to say any more upon this question; the matter is to my mind too clear. I therefore find that the injury complained of in this case having been received more than a year before the lodging of the petition of right with the Secretary of State, the right of action is absolutely prescribed and extinguished under the provisions of arts. 2262 and 2267 C.C. See also *The Queen* v. *Martin*, 20 Can. S.C.R. 240.

In the view I take of the case, it becomes unnecessary to consider both the question of "negligence" and the question of "public work," and while the accident is most unfortunate, it is, however, to some extent comforting under the circumstances, to know the suppliant has been continued in his work and that he has even received an increase in his wages.

The action is dismissed and the suppliant is declared not entitled to the relief sought by his petition of right.

Action dismissed.

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RICHARDSON v. NUGENT.

New Brunswick Supreme Court, Appeal Division, Hazen, C.J., White and Grimmer, JJ. April 19, 1918.

NEW TRIAL (§ II—9a)—DOCTOR—MALPRACTICE—OPERATION BY ANOTHER DOCTOR—EXHIBITION OF WOUND TO JURY—JURY NOT PROPERLY WARNED.

In an action against a doctor for malpractice, a new trial will be granted, on the ground of improper admission of evidence, where the plaintiff was allowed to exhibit to the jury a wound caused by an operation performed by another doctor, without defendant's consent or knowledge and the jury were not warned that they were not to draw conclusions from its appearance.

APPEAL by defendant to set aside verdict entered for plaintiff before Barry, J., and a jury, or for a new trial. New trial ordered.

J. F. H. Teed, for respondent.

HAZEN, C.J.:—The defendant in this case is a medical practitioner and the action, which was for malpractice, was tried before Barry, J., and a jury at the St. John Circuit Court in October last. On the answers of the jury to the questions submitted, the trial judge directed a verdict and payment to be entered for the plaintiff for $1,000 and costs of suit.

In 1916, the plaintiff, who was engaged as a coal miner, was afflicted by a severe pain in his left side. He was attended a few times by the mine doctor, a physician who was employed by the mining company to attend the miners in its employ in case of sickness or injury. This mine doctor thought from his symptoms that he was suffering from strain, and treated him accordingly, but he did not improve and early in March he called in the defendant, who examined him and diagnosed his case as rheumatic fever, and prescribed what he considered the proper remedies. According to the evidence of the plaintiff his condition became rapidly worse, and the defendant, believing his heart was affected, prescribed other medicines to meet that condition. There is also evidence to the effect that the plaintiff developed severe spasms of coughing and would cough up quantities of pus. The defendant visited the plaintiff for the last time on May 5, and on the fifteenth day of the same month the plaintiff left his home and proceeded to Gagetown, where he consulted Dr. Caswell, who diagnosed the case as one of pleurisy or empyema. He tapped him and drew off 20 ounces of fluid. On the following day he operated by cutting the defendant open in the flesh, cut down the rib and took a piece out and cut down in the cavity and removed between 2½ and 3½ pints of pus. This relieved the defendant's condition and he has been gradually improving since and before and at the time of the trial was able to work and earn $2.50 a day, though he could not perform as heavy work as before his illness and operation. The ground for the action, is, as I understand it, that the defendant, either through not paying the necessary and proper attention to the plaintiff, or through not having the proper skill in diagnosing the case, left the patient in a very bad condition and either rendered necessary an operation that might otherwise have been avoided, or left the patient in such a

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condition that the operation was attended with more serious consequences than would have been the case had the pus been removed at an earlier date. Evidence on this point was given by Dr. Caswell and by Dr. White, a leading practitioner in the city of St. John.

At p. 61 of the stenographer's return, Dr. Caswell is reported as saying in answer to a question by defendant's counsel that the pus could have been formed in the 10 days that intervened between May 5, the last day upon which defendant attended the plaintiff, and May 15, the date on which he first consulted Dr. Caswell, and at p. 65 he says that if defendant had developed pus and Dr. Nugent had continued to attend him it would have been necessary for him to have performed the operation or get somebody to do it. The following question and answer then appear:—

Q. The operation had to come in this man's life whether Dr. Nugent had correctly diagnosed his case or not? A. It had to come. Q. There was nothing that Dr. Nugent did or omitted to do that would cause the formation of pus? A. Not as far as I followed it.

At p. 105 Dr. White is reported as stating there is no medicine that will prevent the formation of pus and on the same page says there is nothing that will prevent it.

This evidence, which is uncontroverted, disposes, I think, of the contention, if any such is made, that the operation performed by Dr. Caswell was the result of Dr. Nugent's want of skill or improper diagnosis, and leaves the plaintiff to depend upon the other contention that the result of not operating sooner and of allowing the pus to remain in the plaintiff's system for a longer time than necessary would have prejudicial results, so far as his recovery and future health was concerned. If Dr. Caswell's evidence is to be relied on, the operation had to come, and the pus could have formed after Dr. Nugent ceased attending him. There is a conflict of evidence on the question of Dr. Nugent's knowledge of the existence of pus in plaintiff's system. The plaintiff and his wife both swore that the defendant was informed that the plaintiff coughed up pus and that some of this matter was kept and shewn him. Defendant denied this, but the jury found the fact against him.

In my opinion, a new trial should be granted on the ground of the improper admission of evidence, the plaintiff having been permitted to exhibit to the jury the wound caused by the operation performed by Dr. Caswell. This evidence is to be found at p. 14 of the stenographer's notes in the plaintiff's examination-in-chief:

Q. Would it be too much trouble for you to open your clothes up here so the jury can see the wound?

Mr. Baxter:—This is subject to objection. I am quite sure it is laid down that you cannot exhibit anything of this kind to the jury.

THE COURT:—I do not know why.

Mr. Powell:—I will take the responsibility of it.

This wound thus exhibited was not the result of an operation performed by defendant. He was not present at and had not advised it, and the evidence of the medical witnesses shews that the operation was not rendered necessary by anything he had done or omitted to do. The exhibit of this unhealed wound was calculated to influence the minds of the jury and arouse their sympathies for the plaintiff, and they might heedlessly conclude that the defendant was to blame for it, and as the plaintiff was in a pitiable condition and had endured suffering someone should be made to compensate him for it.

In *Laughlin* v. *Harvey*, 24 A.R. (Ont.) 438, it was held in an action to recover damages for alleged malpractice that the plaintiff is not entitled to shew to the jury the part of the body in question for the purpose of enabling them to judge as to its condition. In that case, the defendant was a surgeon and the action was brought against him to recover damages for alleged negligence in setting the plaintiff's broken leg. In delivering judgment, Osler, J.A., said:—

> With regard to the remaining objection, namely, that the Chief Justice permitted the plaintiff to exhibit his injured leg to the jury, it is unnecessary to say much. The question has recently been considered in the other division of the court in *Sornberger* v. *Canadian Pacific R. Co.* (*ante* p. 263). I have been favoured with the perusal of the learned Chancellor's judgment in that case and I may be permitted to say that I agree with what is there decided. It was held that the plaintiff might shew the jury the injured limb or body for the purpose of being examined thereon by a physician. The jury were told that they were not to look at the leg and draw any conclusion from its appearance. It was only for the evidence of the doctor who asked to see it in order that he might explain the nature of the injuries more clearly. This seems to me free from objection. But it was not what was done in the case before us. The plaintiff was allowed to exhibit his leg, apparently for no other purpose than that the jury might see it, quite unconnected with the medical evidence of its condition, which was undisputed, and they were not warned that they were not to draw any inference of negligence from its appearance. It seems to me that this was a course which the defendant might well complain of, and that it was calculated to prejudice him extremely with the jury.

For my part, I entirely agree with this and would point out that in the present case, too, the jury were not warned that they

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were not to draw any inference of negligence from the appearance of the wound. Neither was the exhibition made for the purpose of allowing the doctors to explain the nature of the injuries more fully, or for the purpose of being examined thereon by a physician.

If such evidence was properly regarded as inadmissible in *Laughlin* v. *Harvey*, *supra*, in which the plaintiff's leg had been set by the defendant himself, and that constituted the alleged negligence complained of, is there not very much stronger reason in this case for holding it inadmissible, in view of the fact that the operation which caused the wound was not performed by the defendant, and he was in no way connected with it? I have not overlooked the argument of plaintiff's counsel that, even if the evidence was improperly admitted, the objection cannot now be availed of, as no specific grounds of objection were stated at the trial. In view of the statement by defendant's counsel when the evidence was objected to, that he would take the responsibility of it, such a contention cannot succeed, and every objection to the admission of such evidence should be open to the defendant. When able and experienced counsel take the responsibility upon themselves of putting in evidence to which objection has been taken—without argument and without asking for the judge's ruling thereon—they are, in my opinion, precluded from preventing whatever consequences may follow from the admission of that evidence by reason of a technical objection such as was raised by Mr. Teed.

The jury assessed the damages for the injury at the sum of $1,000, as follows: $750 loss of time and wages, $250 suffering and expenses.

No evidence was offered to shew that the plaintiff had been put to any expense whatever. During the judge's charge, counsel for the defendant called attention to this fact in the following words:—

> I understand that the plaintiff was not at any expense. I believe it was paid by the county. If the plaintiff had spent anything for his treatment he naturally would have given evidence of it, and not having given evidence, I think he cannot claim. I suggest it is not for the jury to imagine what it might have been.
>
> THE COURT:—Any expense that a man would have to incur by reason of the unskilful treatment of this physician is recoverable, but if he has not proved that damage to the jury he is the loser.

Nothing else was said about expenses during the trial, and no evidence given in relation thereto, and I can find nothing to warrant the jury's finding in respect to this claim.

As I have come to the conclusion, for the reasons given, that there should be a new trial, I have not deemed it necessary to consider the points involved in the ground that there was misdirection on the part of the trial judge.

Hazen, C.J.

New trial, with costs of motion for new trial.

WHITE, J., agrees with GRIMMER, J.

White, J.

GRIMMER, J.:—I agree that there should be a new trial in this case. The action is one for malpractice, the plaintiff claiming that the defendant, a physician, treated him as a patient so unskilfully, carelessly and negligently, that he suffered loss and damage.

Grimmer, J.

As a result of his illness the plaintiff, although having been attended by the defendant, went to another physician who, without consulting with the defendant, without his knowledge, consent or approval, performed an operation upon the plaintiff, and at the time of the trial the wound thereby caused was still open and unhealed.

Counsel for the plaintiff proposed to exhibit this wound to the jury, apparently just so they might view and examine it.

Counsel for the defendant objected to this, stating he was quite sure it was laid down that anything of this kind could not be done. The trial judge stated he did not know why, whereupon counsel for the plaintiff stated he would take the responsibility for it, and the wound was accordingly exhibited to and viewed by the jury.

This course as well as the evidence was entirely unnecessary to support the plaintiff's case, as there was no dispute that the operation had been performed, or that it was necessary. It was not, however, performed, as stated, by the defendant, nor was he consulted in respect thereto, nor in any way answerable therefor, or the result thereof. The wound was not exhibited for the purpose of having the plaintiff examined thereon by a physician, nor for the purpose of enabling a physician to explain why the operation was necessary, the nature thereof or the disease from which the plaintiff suffered that made the operation imperative.

The jury was not told they might look at the wound, but were not to draw conclusions from its appearance. The plaintiff was allowed to exhibit the wound, apparently for no other purpose than that the jury might see it, and the appearance of a raw, open

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and suppurating wound, in my opinion, was bound more or less to influence the minds of the jury, and induce them to hold the defendant responsible for it, and the subsequent suffering and inconvenience to the plaintiff, particularly as they were not warned to the contrary.

This, as stated in *Laughlin* v. *Harvey*, 24 A.R. (Ont.) 438, was a course which the defendant might well complain of as being calculated to prejudice him extremely with the jury.

In addition, all the medical evidence given in the case makes it abundantly clear, that whether the defendant was ignorant or negligent, whether his diagnosis was right or wrong, the plaintiff's trouble could only be relieved or cured by an operation, and nothing the defendant could have done would have prevented the same.

In my opinion, the admission of this evidence was improper.

There is a further ground upon which I think there should be a new trial, namely, the improper, excessive, and unwarranted assessment of damages.

The jury, in answer to one of the questions, assessed the damages at $1,000: $750 loss of time and wages, $250 suffering and expense. There is no evidence to be found of what, if any, expense the plaintiff was put to or bore in connection with the operation. That there must have been and was suffering, goes without saying, but there is absolutely no evidence of any expenses paid the operating physician, or as a result of the operation. The question of expense was referred to by the judge in his charge to the jury, and they may have understood from his remarks that they were to find the same. While, however, reference was made to the expense of the operation, I do not think, taking it altogether, or as a whole, the judge intended the jury should so find. At p. 131 of the evidence the judge stated:—

> There is no evidence of what he had to pay Dr. Caswell. He was there for a month and was operated upon and had two nurses attending him. But notwithstanding the fact that he has not sworn to the amount of Dr. Caswell's bill, still I think it is right I should mention this to you, that it is a ground of damage. Although there is no amount given by which you can say he paid Dr. Caswell, still it is a ground of damage.

Counsel for the defendant intervened and said:—

> I understand that the plaintiff was not at any expense. I believe it was paid by the county. If the plaintiff had spent anything for his treatment he naturally would have given evidence of it, and not having given evidence, I think he cannot claim. I suggest it is not for the jury to imagine what it might have been.

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Whereupon the judge further stated:—

Any expense that a man would have to incur by reason of the unskilful treatment of a physician is recoverable, but if he has not proved that damage to the jury he is the loser.

It would have been better if the jury had been charged, that while ordinarily the expense incurred as the result of the improper treatment would be a ground of damage, yet, in this case, there was no evidence or proof of expenses, and, therefore, nothing upon which they could find, still I think it is clear from the statement of the judge, last above mentioned, he did not intend his remarks to be construed by the jury as authority upon which they could proceed to assess damages for expenses, but rather as instruction as to what would be the method of procedure in an ordinary case.

In view of the fact, as stated, that there is absolutely no evidence or proof of any expenses incurred by the plaintiff as a result of his illness, the jury's finding or assessment of damages for expenses is but a matter of haphazard or guesswork and cannot be supported or maintained.

For the reasons stated herein I think there should be a new trial. Costs of appeal will be allowed to the defendant.

New trial ordered.

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Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., Riddell, Lennox and Rose, JJ. December 21, 1917.

SCHOOLS (§ IV—74)—UNION SCHOOL SECTIONS—APPORTIONMENT OF TAXES FOR SCHOOL PURPOSES—POWERS AND DUTIES OF ASSESSORS.

The assessors of municipalities comprising a union school section under the Public Schools Act (R.S.O. 1914 c. 266) have power under s. 29(1) of the Act to apportion the amount to be paid respectively for school purposes, and in so doing should equalise the assessments in the municipalities, having regard to the actual values of the properties assessed. They are not bound by the values appearing on the assessment rolls and any irregularity in the manner of determining the amounts, does not afford an excuse for failure to levy and collect the sums required.

Statement.

APPEAL from a judgment of Sutherland, J. in an action to recover $2,650, the proportion alleged to be payable by the defendants, the Municipal Corporation of the Township of Gloucester, of the sum of $5,000, being the sum requisitioned by the plaintiffs, a union school board, for school purposes for the year 1917. Reversed.

A. H. Armstrong, for appellants; *C. J. Holman*, K.C., for respondents.

Meredith, C.J.C.P.

MEREDITH, C.J.C.P.:—The defendants having refused to levy and collect for the plaintiffs more than a part of

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the sum required by the plaintiffs from the defendants for school purposes, this action was brought to compel them to levy and collect, or otherwise make good, the deficiency.

The plaintiffs are a union school board, the supporters of which school reside in part in the Town of Eastview and in part in the Township of Gloucester; and the substantial question between the parties to this action is, whether those who reside in the township have been called upon to pay more, and those who reside in the town less, than is lawful and right.

The provisions of sec. 29 of the Public Schools Act require, at the times and under the circumstances set out in that section, that "the assessors of the municipalities in which a union section is situate shall . . . meet and determine what proportion of the annual requisition made by the board for school purposes shall be levied upon and collected from the taxable property of the public school supporters of the union section situate in each of the municipalities in which such section lies."

And it is admitted that this legislation is applicable to this case: that, in the year 1916, it became the duty of such assessors to meet and determine such proportions, and that they did meet regularly for that purpose, and did in fact make such an apportionment.

But the defendants contend: (1) that such determination is not binding upon them, because the clerk of the town municipality was present at the meeting and advised the method of apportionment which was adopted by the assessors in reaching their conclusion.

Irregularities in such proceedings are, however, no excuse for the defendants' refusal or failure to levy and collect such sums as may be required by the Board for school purposes, as they are imperatively required to do by sec. 47 of the Act.

If the proceedings of the assessors were of no effect, by reason of the things I have mentioned, the defendants would be in the right: but that is not so; the determination of the assessors is not a nullity, whether it could or could not be set aside at the instance of any ratepayer.

It was said that no appeal lies against such a determination; but, even if that were so, it could not make null and void that which otherwise would be valid unless and until set aside. But that may not be so, because sec. 6 of the Department of Education

Act, R.S.O. 1914, ch. 265, provides that "it shall be the duty of the Minister" (of Education), "and he shall have power . . . (*p*) to determine all disputes and complaints laid before him, the settlement of which is not otherwise provided for by law;" and, under clause (*o*) of this section, "to submit a case on any question arising under the Public Schools Act, the High Schools Act or the Separate Schools Act, or this Act, to a Judge of the Supreme Court for his opinion and decision, or, by leave of a Judge of such Court, to a Divisional Court for its opinion and decision."

It was, doubtless, imprudent having the clerk of the one municipality present at the assessors' meeting without giving the clerk of the other municipality an opportunity to be present also: it would, I think, have been prudent to have given each an opportunity to express his views on any question that might have arisen: but an adoption of an imprudent method of procedure does not make the determination of the assessors void.

The defendants also contend: (2) that the assessors proceeded upon a wrong principle in determining the proportion of the annual requisition which each municipality should pay: and effect was given by the learned trial Judge to this contention. His ruling seems to have been: that the assessors had not done that which the Act required them to do, and, therefore, that which they did is ineffectual.

That which they did was that which is quite familiar, because it has to be done annually by county councils in equalizing county rates: they found that the lands liable for these school taxes were in one municipality assessed at amounts very much less than their actual value, whilst in the other municipality they were assessed at amounts very much nearer their actual value; and, bringing the one up to the other in this respect, they apportioned the amount each should pay accordingly: and that assuredly is just what it was their duty to do: that is an equalization of assessments: common sense would rebel at the ratepayers of one municipality evading payment of a just proportion of the school tax, and putting upon the other municipality an unjust proportion, by the simple process of an assessment of their lands at sums much more below their real value, whilst those of the other municipality were assessed at or nearer their real value. If, as it is said, the lands in one municipality

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were assessed—contrary to law and assessor's duty—at one-fourth their actual value and those of the other at three-fourths, the case would be a plain one for doing that which it is said these assessors did, under like circumstances, make each dollar of assessment in the one municipality pay three times as much as each dollar of assessment in the other.

That the assessors proceeded upon the right principle seems to me to be unquestionable: otherwise—that is, acting as the learned trial Judge considered they should—there would be no need for the assessors meeting at all; their duties would be such as required only pencil and paper and "a bit of figuring;" and would leave the mischief, intended by this legislation to be overcome, untouched.

Whether the proper principle, which was adopted, was worked out accurately or not is not a question with which we are concerned. The Act provides methods for the correction of errors, of which no one seems to have seen fit to avail himself.

But I can find no good reason for even suspicion of any serious inaccuracy. The guiding fact was: at how much less than their actual value the lands had been assessed; the assessors who had made these assessments knew, for they had done it; all else was a very simple process.

I would allow the appeal: and direct that judgment go against the defendants for the amount of the plaintiffs' claim with interest from the day on which it ought to have been paid. I see no need for "circumlocutionary methods." The rule is well established now that, when one neglects to do that which legislation requires him to do for the benefit of another, the other may recover such damages as he has sustained by such negligence. Mandamus is resorted to only when there is no other effective remedy. If the defendants have yet the power to levy, they can do so; if not, must the public school be closed because they refused to do that which the statute-law required them to do?

The plaintiffs should have their costs, throughout, from the defendants.

Riddell, J.

RIDDELL, J.:—The plaintiffs are the public school board of a union school section lying in part in the town of Eastview and in part in the township of Gloucester, the corporation of this township being the defendants.

There had been in 1909 an equalization of assessments under the Public Schools Act, now R.S.O. 1914, ch. 266; thereafter the

assessment of that part of the township within the union school section increased by more than ten per cent. Accordingly, the provisions of sec. 29 (1) came in force.

[The learned Judge then read the section, as above.]

The school-house being situated in Eastview, the assessor of Eastview called a meeting pursuant to sub-sec. (3) of this section: the assessor of the township attended, at the time and place specified, with his roll. The two assessors, in the presence of Mr. Washington and perhaps with his assistance, discussed the assessments and agreed that in Eastview the assessment was some 89 per cent. of the real value and in the township some 25 per cent. They agreed to multiply the assessed values in the township by three and equalize on that basis—it will be seen that this was still giving the township a decided advantage.

They signed a document prepared for them by Washington, as follows:—

"We, the undersigned assessors of the Town of Eastview and the Township of Gloucester, having met to equalize the public school assessment of the union school section composed of Eastview and No. 25 Gloucester, equalize the same as follows: Eastview to pay forty-seven per cent.; Gloucester to pay fifty-three per cent."

Notice of this determination was given forthwith, pursuant to sec. 29 (5).

The town corporation paid up its portion: the township corporation refused to be bound by the equalization, and insisted that it was wholly null and void; after repeated demands, this action was brought, the plaintiffs claiming $2,650 (the proportion the township corporation should pay) and interest and also general relief.

The case was tried by my brother Sutherland, who dismissed the action: the plaintiffs now appeal.

The substantial defence was, that the assessors must, in equalizing the assessments, be wholly guided and bound by what appears as the values on the rolls: my learned brother gives effect to that contention.

"I see no warrant for the assessors to do other than take the two completed assessments for the one year, and, from a total of these and a comparison of the respective proportion which each

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bore to the whole, figure and estimate the proportion of the annual requisition made by the Board for school purposes to be levied upon and collected from each respectively.

"I see no warrant for one assessor assuming that he had the right to ignore the proper amount of the assessment in the municipality represented by him, and admit and allow it to be trebled, or for the other assessor to acquiesce in such a course. I do not think it was intended by the Act to clothe the assessors with any such discretion or power.

"I am, therefore, of the opinion that the determination of the assessors in question is invalid and must be set aside." (The formal judgment does not contain this last provision, nor should it, the town corporation not being a party to the action. I do not further notice it—no doubt it is a mere inadvertence).

I am unable to agree in that construction of the statute: had it been but an arithmetical calculation, it might be made by a clerk, and there would be no need of a formal meeting. I think the assessors were selected as the equalizers because they are the persons who should have the most accurate knowledge of the actual value of the property in each municipality—each of them knows, too, how far he has departed from his duty to assess at the actual value: Assessment Act, R.S.O. 1914, ch. 195, sec. 40 (1); sec. 22 (3), column 13; and has perjured himself in his affidavit: Form 7 (sec. 50).

It is notorious that it is a too-common custom for apparently respectable men to violate their statutory duty and swear to a falsehood—if two or three were sent behind the bars for their crime and sued under sec. 206 of the Assessment Act, *pour encourager les autres*, it might help the advance of common honesty in such matters.

In the present case the assessor of Eastview sinned only 11 per cent.—his colleague in the township seven times as much.

It was, I think, the clear duty of these assessors to consider the actual not the nominal value of the properties in town and township: and on that basis the township corporation cannot complain of the award, which was in fact too favourable to them.

Then the rules governing arbitrations have been appealed to as shewing that the "award" cannot stand—it is said that Wash-

ington should not have been present, etc. Without stopping to consider whether this is open to the defendants, as Eastview is not a party to the action, or whether, even if this determination were an arbitration, the alleged irregularities would affect the validity of the decision, I point out that the assessors were not arbitrators—it is only when they disagree, and the inspector comes in, that they become arbitrators: Public Schools Act, sec. 29 (6), (8). Before that, they are officers, in a sense representing their municipalities, whose duty it is to use the best means available to obtain the real value of the lands concerned and to make a fair and equitable equalization accordingly. It is of no importance that they obtain the advice of the clerk or of any one else.

Then it is said that the assessors had no jurisdiction to act, as they could act only "after they have completed their respective assessments;" and it is claimed they had not completed their assessments.

My brother Sutherland says:—

"If in sec. 29 of the Public Schools Act, already referred to, the following clause, 'The assessors of the municipality in which a union section is situated shall, after they have completed their respective assessments and before the first day of June,' etc., refers to the assessments as found in the assessment rolls as finally revised, then it is plain that the assessor for the Town of Eastview had no such roll with him and used no such roll in connection with the equalization. If, on the other hand, as I am inclined to think, the respective assessments referred to mean the assessments made by the respective assessors under sec. 50 of the Assessment Act referred to, and not yet finally revised, then it is plain that the assessor for the Township of Gloucester did not have such an assessment present or use it in dealing with the equalization."

I agree that the assessments mentioned in sec. 29 are not the final revised assessments, and think they are the assessments referred to in sec. 50 of the Assessment Act, R.S.O. 1914, ch. 195. Notice of appeal to the Court of Revision may be given up to the 14th May—secs. 50 (3), 69 (2): after the appeal, the complainant receives a notice 6 days before the sitting of the Court of Revision—sec. 69 (10), (13)—on the 20th May; and the Court of Revision has till the 1st July to complete its labours—sec. 69 (20). It

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might well be impossible to have a revised roll before the 1st day of June—and the assessors are, by sec. 29 of the Public Schools Act, to meet and determine the proportion before the 1st day of June.

And I think it a matter of indifference whether the assessors had their rolls with them: they were not bound by the figures in the rolls.

That each had completed his assessment, as directed by sec. 50 of the Assessment Act, is certain; and the time had therefore arrived for the meeting.

The defendants are clearly wrong: it remains to consider the remedy of the plaintiffs.

Had the money been collected by the township corporation, as it should have been, judgment might go against them for the amount: but the evidence shews that they did not collect the amount; they levied only $1,500 (p. 93) instead of $2,650: the clerk at one time made and sent a cheque for $2,650, but that was a mistake—apparently a mere inadvertence.

The defendants should be ordered to raise the amount and pay it over.

An objection is raised that the prerogative writ of mandamus cannot be obtained in an action. It was so decided by Mr. Justice Street in *City of Kingston* v. *Kingston Electric R.W. Co.* (1897), 28 O.R. 399, following the decision in *Smith* v. *Chorley District Council*, [1897] 1 Q.B. 532: in the Court of Appeal, Osler and Moss, JJ.A., were not satisfied that the Rules and practice extended to the award of such a writ in an action: *City of Kingston* v. *Kingston Electric R.W. Co.*, 25 A.R. 462, at p. 468. I share the doubt, and would not, without the consent of the defendants, award a prerogative writ.

If the defendants do not consent, we should make a declaratory judgment that the plaintiffs are entitled to the writ. No objection can be raised in this action to such a course as was taken in the *Kingston* case—there the declaration of the rights of the plaintiffs was refused because it was wholly unnecessary—the terms of the contract were plain and confirmed by statute, there never was any doubt as to what the rights were, the only difficulty was that of enforcing them: 28 O.R. at p. 404.

With such a declaration, which should be made with costs of

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action and appeal, one of us would sit in Chambers and order the issue of the writ with costs: *Toronto Public Library Board* v. *City of Toronto* (1900), 19 P.R. 329.

If, however, the defendants consent, the appeal will be allowed with costs here and below, and a writ of mandamus issue, the plaintiffs being allowed to amend their statement of claim accordingly.

ROSE, J., agreed with RIDDELL, J.

Lennox J.

LENNOX, J.:—With the very greatest respect for the weighty opinions to the contrary expressed by other members of the Court, I am unable to concur in allowing the appeal. I am not satisfied that the steps contemplated by the statute were taken, or that the judgment in appeal is wrong.

I would dismiss the appeal.

Appeal allowed; LENNOX, J., *dissenting.*

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Exchequer Court of Canada, Cassels, J. August 30, 1917.

1. HARBOURS (§ I—5)—B.N.A. ACT—PROVINCIAL GRANT—EXPROPRIATION—WHARF—COMPENSATION.

Bedford Basin, being a public harbour at the time of Confederation and the property of the Province of Nova Scotia, passed to the Dominion by virtue of the provisions of the British North America Act. A subsequent provincial grant of a water-lot thereon is therefore void and confers no title.

[*Fisheries* case, [1898] A.C. 700; *Attorney-General* v. *Ritchie* (*English Bay* case), 52 Can. S.C.R. 78, 26 D.L.R. 51, followed; *The King* v. *Bradburn*, 14 Can. Ex. 419, referred to.]

2. EXPROPRIATION (§ III C—135)—WHARF—POSSESSORY TITLE—RIGHT OF WAY—LOSS OF PROFITS—COMPENSATION.

It being undisputed that the suppliant was entitled to compensation for the expropriation of a wharf and for the deprivation of the right of way to and from the wharf over the railway tracks; the suppliant was, under the circumstances of the case, entitled to compensation for such expropriation and for the deprivation of the right of way; but the loss of business not affected by the taking of the wharf, or the loss of profits in connection with a business in anticipation but not actually embarked on, were not elements of compensation.

Statement.

PETITION OF RIGHT claiming compensation in an expropriation by the Crown.

Lovett, K.C., and *Barnhill*, for suppliant; *T. S. Rogers*, K.C., for respondent.

Cassels, J.

CASSELS, J.:—This is a petition of right filed on behalf of Edward Maxwell claiming compensation for lands expropriated by the Crown for the construction of works at Halifax in connection with the Intercolonial Railway. The suppliant claims

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$150,000. His claim is of a three-fold character: First, for land expropriated bounded by high water mark on Bedford Basin. Second, for a water lot granted to him by the Crown represented by the Province of Nova Scotia dated April 1, 1873. Third, for damages to his property to the west of the railway used by him for manufacturing purposes and which, he alleges, is destroyed for such purposes by reason of his access to the water being cut off.

A further claim is put forward, namely, that even if his title to the water lot is void, he had title to the wharf and a right-of-way over the railway to reach the wharf.

By the defence the Crown admits the title of the suppliant to the land east of the railway bounded by the high water of Bedford Basin. As to the water lot, the contention of the Crown is that Bedford Basin was at the date of the Confederation Act, March 29, 1867, a public harbour and became the property of the Dominion and that the grant of the water lot by the Province of Nova Scotia after Confederation is void.

The Crown offers the sum of $915.75 as full compensation.

While denying the title of the suppliant to the water lot, included in this tender of $915.75 is the value of the wharf as estimated by the Crown valuators.

It becomes necessary to consider the question whether what is termed Bedford Basin was or was not, at the date of Confederation, a public harbour. If the answer is in the affirmative, then this public harbour became the property of the Dominion by virtue of the provisions of the B.N.A. Act and the grant of the water lot by the Province of Nova Scotia passed no title, and the suppliant would not be entitled to any compensation for the land comprised in this water lot except as to the wharf, title to which may have been acquired otherwise than by this grant. This question I will deal with later.

What constitutes a public harbour in contemplation of the Confederation Act is a question of difficulty. I had occasion to consider the question in the case of *The King* v. *Bradburn*, 14 Can. Ex. 419, at 429. On appeal to the Supreme Court of Canada this case was affirmed. I do not think the judgment of the Supreme Court is reported. It was necessary to pass upon this point as it affected the question of compensation.

In a later case of *Att'y-Gen'l of Canada* v. *Ritchie Contracting*

and Supply Co., 52 Can. S.C.R. 78, 26 D.L.R. 51, the question has been elaborately discussed by the Judges of the Supreme Court. This case is inscribed for hearing before the Board of the Privy Council, and possibly some more light may be thrown on the subject. The decision of the Supreme Court, I think, makes two points clear. First, to be a public harbour under the provisions of the Confederation Act, it must have been a public harbour at the time of the enactment, and second, that a potential harbour, not a harbour at the date of the Confederation Act, but subsequently becoming a public harbour, is not covered by the statute.

In the case of *Att'y-Gen'l of Canada* v. *Ritchie Contracting and Supply Co.*, *supra*, the courts were dealing with English Bay, outside of Vancouver Harbour. There is no similarity between English Bay and Bedford Basin. At the time of the passing of the Confederation Act, according to the views of the judges who gave reasons in that case, English Bay was in no sense a public harbour. It was nearly unknown and practically could at the outside be merely termed a haven or harbour of refuge. It had already been decided by the Supreme Court in *The King* v. *Bradburn*, *supra*, that a mere haven could not be considered a public harbour within the meaning of the statute.

The able argument of Mr. Newcombe, that potential harbours subsequently became public harbours and passed to the Dominion, was not given effect to. To anyone who personally knows Halifax and Bedford Basin, and I imagine most of those who may read these reasons are in that class—if not, the charts will explain—it is apparent that in no sense of the word could Bedford Basin be termed a haven or harbour of refuge. It is a completely land-locked bay—the only entrance thereto being through what is termed "The Narrows," a continuation of "Halifax Harbour." If Halifax Harbour were held not to include The Narrows or Bedford Basin, it would seem rather an anomaly to have a harbour of refuge or haven into which vessels could take refuge from their anchorage in Halifax Harbour.

It is admitted by counsel for the Crown and for the suppliant, both of whom have devoted a great deal of time to investigation, that "no records are in existence either before or after Confederation shewing the geographical limits of the harbour as such by statute or any other way, shape or form."

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The distance from "The Narrows" to Bedford at the head of the Basin is said to be 4 miles. In considering the question I think too much stress must not be laid on the words used as denoting the name of the harbour. For instance, on a map to which I will refer, the words "Halifax Harbour" are written and the words "North-West Arm," but there is no contention that the North-West Arm is not part of Halifax Harbour. Also in respect of Dartmouth—why should Dartmouth not have its harbour termed Dartmouth Harbour? As stated, there is no delimitation of the boundaries of Halifax Harbour, but it is beyond question that Halifax Harbour includes Dartmouth Harbour. I mention these facts, as I think too much stress may be laid on the fact that in the maps the terms "Bedford Basin" or "Bedford Bay" are used. None the less, it may be the harbour of Halifax.

It is conceded by counsel for the suppliant that "this is a basin in which from the time it was first settled the warships and other ships went in and anchored, and to that extent I am perfectly satisfied," says counsel. There can be no question as to this. For over a century the warships of Great Britain used Bedford Basin as the inner harbour of Halifax. Navy Island, situate in the basin, was the property of the British Admiralty. The Duke of Kent's house was situated on the basin. The Admiral's flagship was usually anchored in the basin at Birch Cove. At the head of the basin was Sackville Fort, erected and garrisoned and armed by the British. At Bedford as far back and further than living memory was a wharf, grist mill and other industries, and vessels plied in and out. Along the west shore of the basin were numerous wharves, to which vessels would take cargoes, such as hemlock, etc. Boats would go for pleasure parties, and so on.

If each of these different factors were looked upon separately, possibly it would not amount to strong evidence of Bedford Basin being considered a public harbour within the definition of the *Fisheries* case, but they must be taken collectively and consideration be given to the fact that fifty years have elapsed.

Considering the importance of Halifax Harbour to the Imperial authorities, I think the DesBarres report throws a strong light on the question. A printed copy of this document was discovered by the officers of the Archives Department of Canada as a result of careful enquiry. By the consent of counsel for both parties it has been marked ex. "V" in this case. It is entitled:—

Nautical Remarks and Observations on the Coasts and Harbours of Nova Scotia; Surveyed pursuant to Orders from the Right Honourable the Lords Commissioners of the Admiralty, for the use of the Royal Navy of Great Britain, by J. F. W. DesBarres, Esq., 1778.

He describes Halifax Harbour, otherwise called Chebucto. He gives directions how to approach the harbour from the east. He described Bedford Basin "at the head of Halifax Harbour" and "Sackville River" *at the head of Bedford Basin in the Harbour of Halifax.*

This report differs from a mere statement of someone who may have described it as suitable for a harbour. *It is official.*

If the views of Robinson and Rispin—two visitors from England in 1774—are of any importance, they will be found in ex. "T," in which it is stated that Fort Sackville is distant from Halifax about 12 (sic) miles, situate upon a navigable river that empties itself into Halifax Bay. This document, as well as the following extracts from "A brief description of Nova Scotia, etc., by Anthony Lockwood, Professor of Hydrography, Assistant Surveyor-General of the Province of Nova Scotia and Cape Breton—London, 1818," were furnished by the Archives Department. He describes the Harbour of Halifax as about 16 miles in length, "terminating in a beautiful sheet of water called Bedford Basin, within which are 10 square miles of safe anchorage."

In his "*directions for the harbour*" he states:

From Georges Island to the confluence of Sackville River with Bedford Basin, a distance of seven miles, there is not a single obstruction.

The sailing directions published by James Imray & Son, 1855, treat Bedford Basin as part of Halifax Harbour.

Thomas C. Haliburton (Sam Slick), in his history of Nova Scotia, 1829, treats Bedford Basin as part of Halifax Harbour.

It has to be kept in mind that in dealing with this question of whether Bedford Basin was a public harbour at the time of Confederation the Court has no records of an official kind delimiting the boundaries of the harbour and must arrive at the result from the best evidence obtainable.

I have no hesitation in coming to the conclusion, bearing in view the reasons in the *Fisheries* case, [1898] A.C. 700, and the *English Bay* case, 52 Can. S.C.R. 78; 26 D.L.R. 51, that at the time of Confederation Bedford Basin was a public harbour, the property of the Province of Nova Scotia and passed to the Dominion by the provisions of the B.N.A. Act.

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I think the grant of the Crown, as representing the Province of Nova Scotia, of the water lot was void and gave no title.

The next question to be determined is the right to the wharf.

It is not an important question so far as the actual value of this wharf is concerned, as the Crown has offered what I consider the full value. Mr. Clarke in his evidence shews that $800 and 10% added was allowed for the wharf. Clarke and his associates, however, did not take into account any damages that the suppliant might suffer in respect to his property and business, which property has not been expropriated, and having regard to this branch of the suppliant's claim, it becomes important to consider his legal right to the wharf and the approach thereto across the railway tracks.

The evidence and documents show that as far back as 1819 the property had been in use as a tannery. The wharf in question, although possibly not as long a wharf as at the time of the expropriation, was then in existence and a road went down to the wharf. The wharf was used for the unloading of hemlock logs, the bark from which was used for tanning.

Apparently from time to time the wharf would be partially destroyed and repaired. In 1850, according to the witness Geiser, who worked on the railway, the Nova Scotia Railway, now the Intercolonial Railway, was constructed. Counsel place the date as of 1854, probably the date of completion of the railway. It is not material. Access to the wharf would have been cut off by the railway.

Mr. Rogers argues and the defence sets up that at this time any damage by reason of severance was compensated for by the railway. I do not think this contention well founded. While perhaps not legally compellable, the railway did in fact give a crossing over their tracks so as to provide access to the wharf. This crossing was planked between the rails during the summer months, the planks being removed during the winter, the wharf not being then used. The crossing was guarded by a gate. According to Geiser, the tannery ceased to be operated 25 or 30 years from 1916, about 1891 or 1886. According to Geiser, a siding was put in for the use of the tannery. The plan ex. 4, tracing of Nova Scotia Railway, April 29, 1854, shews Henry Stetson's land and apparently the wharf and road across the railway tracks. Ex. No. 8, a grant from

the Crown of the water lot, August 19, 1881, shews the wharf and apparently the crossing over the railway. Ex. No. 10, a plan from the Department of Crown Lands, September 28, 1906, also shews the wharf. According to the evidence of the witness Renner, an addition of 20 to 25 feet in length was added to the wharf about 30 years ago. The evidence is very indefinite, probably necessarily so from the lapse of time. It might be material if the question of 60 years' title arises, but immaterial practically in this case, as the Crown has tendered compensation for the whole wharf.

Ex. No. 10 referred to is a plan from the Department of Crown Lands, Halifax, September 28, 1906. This plan shews the property as used for the crushing of rock and as it was when Maxwell purchased. I will have to refer to it later. The title, as admitted, is a continuous title from 1819. While at times the wharf was not used when the property was idle, it was held and owned (if there was title) by the legal owners of what was called the tannery property. There was no actual interference with navigation, nor was any objection to the wharf being erected on the foreshore and beyond low water mark ever made by the Crown, and the very object of the present proceeding is to expropriate for the purpose of filling up the place where the wharf was.

Tweedie v. *The King*, 52 Can. S.C.R. 197, 27 D.L.R. 53, and *Booth* v. *Ratté*, 15 App. Cas. 188, the citation from which in the reasons of Sir Louis Davies, at p. 205 of the *Tweedie* case, may be referred to. Also *Hamilton* v. *The King*, 54 Can. S.C.R. 331, 35 D.L.R. 226, *Att'y-Gen'l of Southern Nigeria* v. *Holt & Co.*, [1915] A.C. 599, may be referred to, in which case an irrevocable license from the Crown was presumed.

After the best consideration I can give to the case I am of the opinion that in considering the question of the compensation payable to the suppliant, he should be considered as the owner of the wharf, with the right-of-way over the railway for access to and from his premises west of the railway and from and to the wharf. I do not agree with Mr. Lovett's contention that the wharf and the right-of-way could be leased or sold to McCormack for the use of his company.

The right-of-way across the railway is, I think, limited to the owners of what was known as the Tannery property.

The question of the amount of compensation is difficult to

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arrive at. The suppliant has put forward a ridiculous claim by his petition, in which he claims $150,000. I am informed that this claim was subsequently modified, to what extent I do not know. As far as his business of selling crushed stone is concerned, he is not damnified at all. Ex. No. 10, the map of September 28, 1906, shows the two quarries—stone crushers, etc., and a loading platform. The suppliant admits that the crushed stone was all marketed by rail and teams and the taking of the wharf in no way affects this business. He has, since the expropriation, rented the property to one Henninger at a rental of $1,000 a year for 2 years with a right of renewal.

In regard to his claim for anticipated loss of profits by reason of his being prevented from prosecuting a business of making cement and chimney moulds, the method adopted by the suppliant in presenting this claim is, in my opinion, entirely erroneous. He had not embarked in this business. He endeavours to show that by a certain expenditure of money a business could be built up which would yield him an annual return of so many thousands of dollars per annum, and from this hypothetical conjecture of profits to be realized from the operation of this conjectural business he deduces this absurd value of $150,000. This method of arriving at the value is expressly negatived in the judgment of the Lords of the Privy Council in *Pastoral Finance Association* v. *The Minister*, [1914] A.C. 1083, and by the judgment of the Supreme Court in *Lake Erie & Northern R. Co.* v. *Schooley*, 53 Can. S.C.R. 416, 30 D.L.R. 289.

On the evidence before me it is very difficult to arrive at any satisfactory result. The claim put forward is one not in my opinion meritorious. The Crown valuators allowed nothing for this claim, not taking into account any damage the suppliant might be entitled to by reason of the depreciation of the value to the suppliant of the property as a whole. Some damage has no doubt resulted.

I think if, in addition to the sum allowed, $2,000 is added, the suppliant will be fairly compensated.

Judgment will issue for $2,915.75 and interest from the date of the expropriation. As both parties have succeeded on different issues and considering the claim put forward, no costs should be awarded to either party. *Judgment accordingly.*

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Exchequer Court of Canada, Cassels, J. April 26, 1917.

BUILDING CONTRACTS (§ I—10)—PROGRESS ESTIMATES—FAILURE TO PRESENT CLAIMS—TERMS OF CONTRACT—BAR TO ACTION.

Failure to present a claim, as provided for and required by the terms of a building contract, for work done, is, if urged and relied on, a complete bar to an action.

Statement.

PETITION OF RIGHT to recover for work performed under a building contract.

R. A. Pringle, K.C., and *L. Cotè*, for suppliants; *Howard*, and *E. E. Fairweather*, for respondent.

Cassels, J.

CASSELS, J.:—A petition of right filed on behalf of the petitioners the Gilbert Brothers Engineering Company, Limited, claiming the sum of $115,000 and interest. The claim is made for work alleged to have been performed by the petitioners, under the terms of a contract bearing date September 15, 1897.

It is admitted that the contract is correctly set out in the petition of right with the correction made at the trial of clause 12 of the contract as there set out.

The contract provided for the payment of the sum of $425 per day of 12 hours, during which the said plant is in actual operation, etc., but nothing turns upon that portion of the contract.

Clause 12 proceeded:—

And further, if it should be determined upon by Her Majesty's Minister of Railways and Canals to improve the said channel by deepening and widening the same below the original or contract grade, then Her said Majesty will pay the said contractors for such work of drilling, blasting and dredging as may be ordered by the said Minister in the deepening and widening the said channel below said grade, the sum of $8.40 per c. yd. *for rock necessarily excavated*, the said sum of $8.40 per c. yd. to cover all cost of removal and deposit of excavated material, drilled, blasted, dredged below and outside of the prism described in the specification annexed to the original contract of William Davis and Sons, of August 5, 1879.

The contention of the petitioners is that work to the extent of over one hundred and thirty thousand odd dollars was performed, for which work they have not been paid. Their contention is that Rheaume, the engineer in charge of the work, acting under the directions of the chief engineer of railways and canals, issued a certificate certifying that the Gilbert Brothers Engineering Company, Limited, were entitled to the sum of about $115,000.

By the prayer of the petition the Gilbert Bros. Co. submit that they are entitled to a final certificate for the sum of $115,000, or

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thereabouts, and to interest thereon since the completion of the work.

The 20th and 21st paragraphs of the petition of right read as follows:—

20. The said L. N. Rheaume, acting under directions of the chief engineer of railways and canals, did revise his figures, as shewn in the statement of final quantities and claims, and issued a certificate shewing that the Gilbert Bros. Co., were entitled to a sum of about $115,000.

21. That the certificate is in the hands of the Department of Railways and Canals and is the final certificate as required by the contract.

In these clauses the petitioners claim that the final certificate under the terms of the provisions of the contract had been signed. If no such certificate had been given, the petitioners' action would fail, as there is no case made on the face of the petition entitling them, as asked by the prayer, to a final certificate.

Since the trial and the argument of the case I have gone carefully over the evidence and the various authorities cited by counsel. A late case of *Hampton* v. *Glamorgan*, [1917] A.C. 13, at 18, may be referred to as shewing how little assistance is afforded from the citations of numerous decisions determined on different contracts. Regretfully, I have come to the conclusion that the defence raised by Howard on behalf of the Crown is a valid defence.

Certain provisions of the contract are important. Clause 1 provides that the word "engineer" shall mean the "chief engineer," for the time being having general control over the work.

Clause 12 reads as follows:—

12. And Her Majesty, in consideration of the premises and of the supplying by the contractors of all the necessary plant for the purpose of surveying the bottom of the channel through the Galops Rapids, in the River St. Lawrence, and of removing alleged obstructions therefrom which may be discovered above the original or contract grade, as above recited, covenants with the contractors that they will be paid for said work the sum of $425 per day of 12 hours, during which the said plant is in actual operation, time to commence when the plant is in position as designated by the engineer in charge. The length of time that the plant is to be so employed to be determined by the Department of Railways and Canals, it being distinctly understood that this agreement of survey may at any time be determined by a 3 days' notice. And further, if it should be determined upon by Her Majesty's Minister of Railways and Canals to improve the said channel by deepening and widening the same below the original or contract grade, then Her said Majesty will pay the said contractors for such work of drilling, blasting and dredging as may be ordered by the said Minister in the deepening and widening the said channel below said grade, the sum of $8.40 per c. yd. for rock necessarily excavated, the said sum of $8.40 per c. yd. to cover all cost of removal and deposit of

excavated material, drilled, blasted, dredged below and outside of the prism in the specification annexed to the original contract of William Davis and Sons of August 5, 1879.

Clause 15 is as follows:—

15. That in the event of its being determined by the said Minister of Railways and Canals to improve the said channel by deepening and widening the same, then, and, in that event only will this clause No. 15, and clauses Nos. 16, 17 and 18 apply and form part of this contract. Cash payments equal to about 90% of the value of the work done, approximately made up from returns of progress measurements and computed at the prices agreed upon or determined under the provisions of this contract, will be made to the contractor monthly, on the written certificate of the engineer stating that the work, for or on account of which the certificate is granted, has been performed, and stating the value of such work computed as above mentioned, and the said certificate shall be a condition precedent to the right of the contractor to be paid 90%, or any part thereof; the remaining 10% shall be retained till the final completion of the whole work to the satisfaction of the engineer for the time being, having control over the work, and within 2 months after such completion the remaining 10% will be paid. And it is hereby declared that the written certificate of the said engineer certifying to the final completion of the said works to his satisfaction shall be a condition precedent to the right of the contractor to receive or to be paid the said remaining 10% or any part thereof.

Clauses 16, 17 and 18 are as follows:—

16. It is intended that every allowance to which the contractors are fairly entitled will be embraced in the engineer's monthly certificates; but should the contractors at any time have claims of any description which they consider are not included in the progress certificates, it will be necessary for them to make such claims in writing to the engineer within 30 days after the date of the despatch to the contractors of each certificate in which they allege such claims to have been omitted.

17. The contractors in presenting claims of the kind referred to in the last clause must accompany them with satisfactory evidence of their accuracy, and the reason why they think they should be allowed. Unless such claims are thus made during the progress of the work, within 30 days, as in the preceding clause, the contractors shall be forever shut out and shall have no claim on Her Majesty in respect thereof.

18. The progress measurements and progress certificates shall not in any respect be taken as binding upon the engineer, or as final measurements, or as fixing final amount; they are to be subject to the revision of the engineer in making up his final certificate, and they shall not in any respect be taken as an acceptance of the work or release of the contractors from responsibility in respect thereof, but they shall at the conclusion of the works deliver over the same in good order, according to the true intent and meaning of the contract.

Clause 23 of the contract, on which a good deal of stress is laid by Mr. Pringle, is as follows:—

23. It is hereby agreed that all matters of difference arising between the parties hereto upon any matter connected with or arising out of this contract, the decision whereof is not hereby especially given to the engineer, shall be referred to the Exchequer Court of Canada.

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It is conceded by Mr. Pringle, counsel for the petitioners, that the petitioners received progress estimates from time to time, and that all the money certified as due by the progress estimates has been paid.

It is also conceded that the drawback of 10% referred to in the contract has also been paid. Mr. Pringle stated further that the drawback had been paid prior to the 43rd estimate.

On the opening of the case the following discussion took place:—

THE COURT:—Does the $115,000 represent the drawback or what?

Mr. Pringle:—I think not.

THE COURT:—You got your progress estimates from time to time?

Mr. Pringle:—Yes, all signed properly in accordance with the contract.

THE COURT:—Has the money been paid on the progress certificates?

Mr. Pringle:—Yes.

THE COURT:—Then those are not in question?

Mr. Pringle:—No.

THE COURT:—Then what is before me in the form of the claim of $115,000—is it the 10% drawback, plus a rectification of the progress estimates?

Mr. Pringle:—I would not like to say that the 10% drawback was included. I think that was paid to them.

It is important to bear in mind that the drawback has been paid, as the 15th clause of the contract provides:—

> And it is hereby declared that the written certificate of the said engineer, certifying to the final completion of the said works to his satisfaction, shall be a condition precedent to the right of the contractor to receive or to be paid the said remaining 10% or any part thereof.

The certificate there required is as to the drawback of 10% not now in question.

T. S. Rubridge was the superintending engineer of the works until he died in the year 1904.

L. N. Rheaume, a witness in the case, and upon whose evidence the petitioners rely, was appointed superintending engineer on June 25, 1904. Killaly was the local engineer in charge from 1898.

M. J. Butler was the chief engineer from 1905 until 1910, when he retired from the service, and W. A. Bowden was appointed chief engineer.

It is conceded by counsel for both parties that Butler was the chief engineer for the time being, having control over the work during his appointment, and Bowden after the retirement of Butler. Counsel for the petitioner undertook to file copies of the orders-in-council making these appointments. They have not

been filed. If it becomes of importance they may be put in. There is no dispute on the part of counsel as to these facts.

The Crown by their defence rely on the provisions of clauses 16 and 17 of the contract, and as I have stated, I have come to the conclusion that the defence is well founded in law.

The work under the contract was completed in September of 1906. It is alleged by the petitioner that the claims in question were not placed in the progress estimates and it is conceded that no objection or claim was made by the contractors, as required by the provisions of these clauses 16 and 17. It is alleged that an agreement was entered into between the petitioner and the engineers in charge.

Paragraph 12 of the petition of right reads as follows:—

12. That estimates were given from time to time as the work progressed, but there was a thorough and distinct understanding between the Gilbert Bros. Engineering Co., Ltd., and the engineers in charge that the question of excavation below grade done by the Gilbert Bros. was absolutely necessary in order to obtain grade, and should remain in abeyance until such time as there was a final sweeping of the channel and the quantities could be ascertained, and in the estimates given by the engineer in charge, at different times, there was a clear reservation in regard to the work done below grade. For instance, in estimate No. 43, the engineer puts in "Allowance on rock necessarily excavated below grade pending a final adjustment of this item." Again, in estimate No. 42 there are several allowances for necessary excavation above grade which had not previously been measured, and there is an allowance on rock necessarily excavated below grade, pending final adjustment. So that the estimates of the engineer in charge bear out the contention of the Gilbert Bros. that the necessary excavation below grade, for the purpose of completing the work, was to be considered and disposed of in the final estimate after the sweeping was done.

If any such agreement was entered into it was with Killaly, and he had no authority to vary the terms of the contract. The claims in question should, if allowable, have appeared in the progress estimates, and the course provided by clauses 16 and 17 adopted, if not so included. Killaly in his evidence states as follows, referring to work now claimed for:—

Q. Now were those quantities obtained at that time in such a shape that they could have been included in the progress estimates? A. So far as the soundings off the dredge were concerned, they might have been included in the estimate. They might have been included in the estimates.

Q. What estimates? A. In the monthly progress estimates.

Q. We have been informed that they were not so included? A. No material below grade was returned in progress estimates during the course of the work, except in one estimate that has been referred to.

This estimate referred to is what they call estimate No. 43.

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Mr. Rheaume in his evidence states as follows:—

Q. Was there any way of arriving at the actual quantity of excavation below grade until the channel was swept? A. There was approximately, for all practical purposes to establish the principle of it. But the figures probably would not be correct, but you would get a fair approximation.

Q. Was it done, as a matter of fact, until the channel was swept? A. Not to my knowledge; it might have been done.

He states further:—

Portions of the work thus far completed, although not swept, could have been approximately estimated under this to shew the quantity below grade.

Mr. Pringle:—Q. Was it? A. It was not done in my time; it might have been done before.

Q. Was it done in your time? A. Not in my time.

Mr. Bowden states, "I would consider that substantially the whole of the amount should have been included in the progress estimate."

THE COURT:—Subject to readjustment for the final certificate?

The witness:—Subject to readjustment for the final.

M. J. Butler, as I have stated, was the chief engineer for the time being, having the control of the work at the time the contract was completed. The effect of Butler's evidence is that he finally dealt with the matter, and intended to give a final certificate. It is quite clear from his evidence that he neither intended to allow or disallow the claim in question. His view apparently was that under the clause of the contract to which I have referred, the claim in question should be left to the court. This was the view he entertained and he acted upon it and gave what he intended to be a final certificate.

Referring it to the court did get rid of the legal difficulties raised by clauses 16 and 17 of the contract.

My view is that after what took place before Butler, the subsequent chief engineer, Bowden, had not the right to reopen the matter.

I think the principle laid down in *Murray* v. *The Queen*, 26 Can. S.C.R. 203, is applicable to this case. The facts in the *Murray* case are not similar to the facts in this case, as in the *Murray* case the amount in question had been paid. If in point of fact Butler dealt with the case I do not think that the subsequent engineer had the right to reopen the matter.

In the case of *Murray* v. *The Queen*, *supra*, at p. 212, the judge points out objections might have been raised to the right of the petitioner. He states:—

These and other minor objections presented themselves to us as conclusive reasons, if urged and relied on, why the contractors could not as a matter of technical law (*though not of natural justice*) maintain their action.

In the case before me, the Crown relies upon the objections.

Even if the dealing with the matter by Butler was not final, I do not think the subsequent reopening by Rheaume and Bowden could deprive the Crown of the defence which they have raised. Both of these gentlemen seem to be of opinion that the claim of the petitioner to the extent of $115,000 is a meritorious claim.

I have to deal with the case as it comes before the court from the legal point of view. It is for the advisers of the Crown to say whether or not under the circumstances of the case such a claim should be paid. There may be reasons as suggested by Mr. Howard why the claim is not a meritorious one. It is not for me to pass upon this point.

In the case of *Gilbert Blasting & Dredging Co.* v. *The King*, 7 Can. Ex. 221, at 236, the judge, the late Burbidge, J., states as follows:—

> By the twenty-sixth and twenty-seventh paragraphs of the contracts the contractors agreed that they should have no claim on Her Majesty for anything not included in the progress estimates, unless the claim was made and supported by satisfactory evidence, and repeated every month. Nothing of the kind was done with respect to the present claim. Sometimes one feels that there may be some hardship in the Crown invoking these provisions against a contractor's claim. But perhaps one ought not to have that feeling where the contractor during the progress of the work lies back and does not give any intimation that he thinks himself entitled in any way to that for which afterwards he puts forward a claim. At all events it is for the Crown to say when these provisions shall be invoked against a claim, and when they may be waived. In the present case the Crown relies upon them, and they constitute, I think, a bar to the whole claim.

This case was affirmed by the Supreme Court of Canada, 33 Can. S.C.R. 21.

I have therefore come to the conclusion, as I have stated, that the petitioners fail in their action, which must be dismissed with costs. *Action dismissed.*

KIDD v. MILLAR.

Alberta Supreme Court, Appellate Division, Harvey, C.J., and Stuart, Beck and Hyndman, JJ. April 19, 1918.

SPECIFIC PERFORMANCE (§ I E—30)—*Agreement for sale of land—One purchase contemplated—Different parcels owned by husband and wife separately—Wife not joined as party—Statute of*

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Frauds.]—Appeal from the judgment at the trial in an action for specific performance of an agreement for sale. Allowed.

Ross, K.C., for plaintiff; *W. T. D. Lathwell*, for defendant.

The judgment of the court was delivered by

BECK, J.:—This is an action—purchaser against vendor—for specific performance of an alleged agreement for the sale of a half section of farm land. Simmons, J., who tried the case, gave judgment for the plaintiff. The defendant appeals.

The defendant owned the half section in question. His wife owned an immediately adjacent quarter section. The two parcels had been used together as one farm, the dwelling house in which the defendant and his wife lived being on the quarter section, the outbuildings, or most of them, with the adjacent yards used in connection with the quarter section, being on the half section though the half section was temporarily in the possession of a tenant, there being also a house upon it.

The negotiations between the plaintiff and the defendant related on every occasion to the two parcels, the wife being present, at all events when the memorandum relied upon was made. That memorandum was as follows:—

Delia, Alta., Sept. 25, 1917.

I, William Millar, agree to sell Jno. Kidd the east ½ of 30, 30, 17-4 for the sum of ten thousand one hundred dollars.

WILLIAM MILLAR
JOHN KIDD

Received four hundred and sixty-one dollars and five cents on the above property.

WILLIAM MILLAR.

I, Mrs. Wm. Millar, agree to sell Mr. John Kidd, the S. E. ¼ of 31, 30, 17, 4 for the sum of ($5,600) five thousand six hundred dollars.

MRS. WM. MILLAR,
JOHN KIDD.

Interest begins on Apr. 1, 1918, at 6 per ct. per annum on balance.

It is quite clear from the evidence that, as I have already said, both parties throughout the negotiations had in their minds a single sale and purchase of the two parcels as a totality, and that the only reason for separating the two in the memorandum was that the husband owned one and the wife the other. In this view, in which we all agree, the plaintiff not having set up the alleged agreement in that aspect and joined the wife as a party, must fail.

Personally, I think there are other obstacles to the plaintiff's success.

On the face of the memorandum it does not satisfy the Statute of Frauds inasmuch as it contains an implication, in the clause

relating to interest, that the sale is not for cash, but partly for cash and partly for deferred payments, the dates and amounts of which are not defined. Assuming that, this being an implication, parol evidence is admissible to rebut the presumption, I think the evidence fails to establish a distinct agreement that the purchaser should have the two alternative options, either to pay the whole in cash or to pay in any definitely fixed instalments. Rather, the evidence shews, I think, that both parties contemplated the preparation of further "writings," the precise nature of which—whether a formal agreement, a transfer and mortgage, or a transfer and the assumption of an existing mortgage and a second mortgage for the balance—was left to be settled later.

Again assuming the admissibility of parol evidence and supposing the terms regarding the intended deferred payments were indefinite, and assuming that a party may waive provisions for his own benefit, it seems to me that the purchaser here is not in a position to say that he will pay the total purchase price in cash, for two reasons: first, it was not what was in the minds of the parties, and, secondly, it is not evident that the spreading of the balance of the purchase price over a term of years at interest was a provision solely for his benefit.

Again, I am not at all sure that the arrangement, that the purchaser should pay for the breaking at a price to be ascertained must not be treated as part of the entire contract and not being embodied in the memorandum the memorandum was insufficient.

What is set up as part performance is clearly, I think, insufficient. The removal by the purchaser of some machinery to the farm was, he says himself, made in expectation only of a previous proposal—not the one in question—being concluded. It was not with reference to the agreement now alleged.

I would allow the appeal with costs and dismiss the action with costs. *Appeal allowed.*

CHOMA v. CHMELYK.

Alberta Supreme Court, Scott, J. May 17, 1918.

VENDOR AND PURCHASER (§ I D—29)—*Agreement for sale of land—Absence of written consent of wife—Full knowledge of transaction—Dower Act.*]—Action to set aside an agreement for sale of

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land on the ground that the wife did not consent in writing to the sale. Action dismissed.

N. D. Maclean, for plaintiffs; *S. B. Woods*, K.C., and *H. H. Robertson*, for defendant.

SCOTT, J:—On May 31, 1917, the plaintiff Petro Choma, who is the husband of the plaintiff Kasko Choma, entered into an agreement with the defendant to sell the land in question herein, which is a homestead within the meaning of the Dower Act (c. 14 of 1917) for $3,650, payable $1,000 at the date of the agreement and the remainder in annual instalments extending over a period of 7 years. By the terms of the agreement the defendant became entitled to possession until default made in payment of the purchase money. He made the down payment and shortly after the date of the agreement, entered into possession and carried on farming operations thereon during the year 1917, but he permitted the plaintiffs to occupy the dwelling-house thereon and they are still in occupation thereof.

The plaintiffs charge that the agreement for sale was entered into without the consent in writing or otherwise of the female plaintiff, and that it is therefore null and void under the provisions of the Act referred to. They also charge that the purchase price was grossly inadequate and that the defendant by duress and undue influence compelled the male plaintiff to enter into the agreement. They seek a declaration that it is null and void, the delivery up of same for cancellation and an injunction restraining the defendant from taking possession of or occupying the premises.

The female plaintiff did not give her consent in writing to the agreement but the evidence satisfies me that with full knowledge of the transaction she fully consented to it. She was aware of the negotiations leading up to the sale. During their progress she became aware that the defendant would be unable to purchase unless he could sell another property owned by him in order to procure the necessary funds, and she thereupon busied herself in procuring a purchaser for him. She was present at the time the agreement was executed and had full knowledge of its effect, and she made no objection thereto. After its execution and after her husband had received the down payment she asked him to secure to her the payment of $200 out of the purchase money. He was then willing to pay her a sum out of the moneys he had received

but she was unwilling to accept a cash payment and asked him to secure its payment to her.

In order to determine the issues in the action it is necessary to consider the intention and effect of the Act referred to.

The title of the Act shews that it is one relating to dower. That word has a clear and definite meaning. In Webster's dictionary it is defined as "That portion of or interest in the real estate of a deceased husband which the law gives to his widow during her life." Blackstone says in vol. 2, p. 129:—

> Tenant in dower is where the husband of a woman is seized of an estate of inheritance and dies, in this case the wife shall have the third part of all the lands whereof he was seized at any time during his coverture to hold to herself during the term of her natural life.

The right to dower is merely an inchoate right dependent upon the wife surviving her husband. Neither at common law nor under any English statute did it give her any right to or any interest in his lands during his lifetime. He might sell his entire interest therein or make any other disposition thereof without her consent but any such sale or disposition thereof would be subject and subject only to her inchoate right to dower.

Up to the passing of the Act no right of dower existed in this province. In England, by the Dower Act of 1835, the common law right of dower was restricted to lands owned by the husband at the time of his decease and which he had not disposed of by will. It was entirely abolished in this province by the effect of the Territories Real Property Act and the Land Titles Act. In my view the intention of the Act was not only to restore the wife's right to dower in respect to her husband's homestead but also to increase, not the quality, but only the quantity thereof. That this was the intention is shewn by s. 4, which provides that every disposition of his homestead by a married man and every devolution thereof upon his death intestate shall be subject to an estate for life of his wife *hereby declared to be vested in the wife so surviving.* I cannot avoid the conclusion that that was the sole intention of the legislature and that, except as to the quantity of the estate, it was not the intention to extend the wife's interest in the homestead beyond that which she would have possessed had the common law right of dower existed.

I can find nothing in the Act evincing an intention to give the wife any interest in or control over the husband's homestead during

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his lifetime. He may leave it and take up his residence elsewhere. S. 5 does not prohibit a change of residence. It merely provides that without her consent in writing his residence shall not *for the purposes of the Act* be deemed to be changed, that is, that a change of residence without her consent would not operate to disentitle her to a life estate in the property after his death. If he changes his residence she would be in duty bound to accompany him. What, in such case, would become of the homestead? Surely he would have the right without her consent to lease it to a tenant in order to prevent its running to waste. If he left it with the intention of never returning to it he should have the right to lease it for the remainder of his life, and, if so, why should he not be permitted to sell or dispose of his entire interest in it subject of course to her right to dower therein?

S. 3 provides that every disposition by the husband of his homestead without the consent in writing of his wife shall be null and void.

In many statutes the terms "null and void" have been given a very much restricted meaning (see Stroud's Judicial Dictionary under term "void") and in view of what appears to me to be the manifest intention of the Act I am of opinion that those words in s. 3 must be taken to mean that such dispositions of his homestead by a married man without his wife's consent in writing shall be null and void only in so far as they may prejudice or affect her estate in dower therein.

In Upper Canada it was provided by 1 Wm. IV. c. 2 (Con. Stat. U.C., c. 35) that a married woman seized of real estate might convey her interest therein by deed executed by her jointly with her husband but that she should execute same in the presence of certain officials who should examine her apart from her husband respecting her free and voluntary consent to such conveyance and give their certificate to that effect and that, if any such deed be not so executed acknowledged and certified, it should not be valid or have any effect. It was held that, notwithstanding this provision, a conveyance by a husband and wife which was not executed or certified in the manner provided by the statute was nevertheless effectual to convey the husband's interest in the land (see *Doe dem McDonald* v. *Twigg*, 5 U.C.Q.B. 167).

There was no evidence to support the charge that the purchase

price was inadequate or that there was any duress or undue influence on the part of the defendant.

The plaintiffs also allege that the defendant wrongfully converted to his own use a crop of hay and oats grown upon the land in 1917, and they claim the value thereof.

The evidence shews that by agreement between the male plaintiff and the defendant the latter was to have the crop of hay and oats grown in that year and that he was to give the male defendant thereout 60 sacks of oats and 4 loads of hay, and it is also shewn that the defendant has fulfilled that agreement.

I dismiss the plaintiff's action with costs.

The plaintiffs paid into court the sum of $1,000, being the amount of the down payment made by the defendant and, on March 30, 1918, obtained an injunction restraining the defendant from taking possession and occupation of the land in question and from interfering with the plaintiffs' right to possession.

The defendant counterclaims a declaration that the agreement for sale is valid and binding, for possession of the premises, special damages to the amount of $2,000 and general damages to the amount of $1,000.

I hold that the defendant is entitled to a declaration that the agreement for sale is valid and binding in so far as it relates to the sale of the male plaintiff's interest in the lands.

The defendant has undoubtedly sustained damage by the plaintiffs having obtained the injunction referred to but, as the amount of the damage cannot at present be ascertained, there will be a reference to the clerk to ascertain the amount.

As there may be an appeal from my judgment and as it is expedient that some provision should be made for the working of the land during the present summer and carrying on the usual farming operations thereon, I hereby appoint the defendant receiver of the premises with authority to crop the same and carry on farming operations thereon in case he should elect to do so, subject however to right of the plaintiffs to occupy until the end of this action the dwelling-house and appurtenances. The defendant will not be required to give any security as such receiver as the money in court to the credit of the cause constitutes a sufficient security to the plaintiffs. *Action dismissed.*

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FIELDHOUSE v. BUXTON.

Alberta Supreme Court, Appellate Division, Harvey, C.J., and Stuart, Beck, and Hyndman, JJ. April 3, 1918.

JUDGMENT (§ VII C—282)—*Action for an accounting between partners—Default judgment—Application to set aside—Great delay.*]—Appeal from an order of Simmons, J., setting aside a default judgment. Reversed.

A. Stuart, K.C., and *H. C. Boyd*, for appellant; *Frank Ford*, K.C., for respondent.

The judgment of the court was delivered by

HYNDMAN, J.:—This is an appeal from the order of Simmons, J., who set aside a judgment recovered by the plaintiff against the defendant under the authority of r. 163.

The history of the case is substantially as follows:—The action was one for an accounting of the partnership dealings between the parties.

The writ and statement of claim were issued on September 21, 1908, both parties then residing in Vermilion, Alberta, and where, or in the vicinity of which, they have since lived. The defendant did not appear. Motion for judgment was made on October 4, 1909; motion for judgment of amount found due December 15, 1909. On January 21, 1910, a reference was ordered to the clerk of the court to take the accounts between the parties and an appointment by the clerk was taken out on the same day. The clerk made his report on February 8, 1910, and on the same day it was ordered by Beck, J., that the plaintiff have judgment for the amount found due by the clerk, viz., $2,738.41, and on May 8, 1911, judgment was formally entered for the sum of $2,738.41 and $74.08 costs.

Upon this judgment, execution was issued on the same day and returned by the sheriff *nulla bona*. Subsequently, on November 11, 1913, the defendant was examined on discovery in aid of execution, but refused to answer certain questions put to him regarding an inheritance from his father, who lived in the United States of America. Later on, in a newspaper advertising the Vermilion District, defendant's name was mentioned as a man possessed of a very valuable farm, stock, machinery, etc. A search of the records disclosed the facts that all the property referred to stood in the name of his wife.

The plaintiff then gave notice of motion for an order for the examination of the defendant's wife as to the property and means of the defendant, and for an order requiring defendant himself to answer more satisfactorily the questions which he had previously refused to answer. This motion was returnable September 7, 1915. Then for the first time the defendant took exception to the judgment by way of a counter motion to have it set aside; that is, about 4½ years after the date of entry of formal judgment and 7 years after the issue of the writ.

A copy of each proceeding beginning with the writ and statement of claim down to the reference to the clerk to take account, was served on the defendant personally, and he must or should have been fully aware of everything of importance transpiring in the course of the action. Add to this his examination as a judgment debtor when he must necessarily have known of the existence of the judgment; and the fact that he moved to set it aside only after vigorous action is taken by the plaintiff towards realizing upon it 2 years afterwards, and it seems to me a duty is cast upon him of not only showing in the clearest manner that he has a good defence and that the plaintiff will not suffer any prejudice, but that he had some reasonable excuse for delay in taking action to open up the judgment.

In my opinion, defendant's affidavit upon which he bases his application is very unsatisfactory and does not offer any adequate excuse for his delay in moving. He says that at the time the action was brought against him he was in straitened circumstances, made default in appearance, and judgment was entered against him. He admits that he made a search of the records on November 11, 1913, and could find no report as having been made by the receiver and that he was informed by his solicitor that no report was filed since. If there had been no partnership, as he contends, I fail to see why he should be so interested in the report of the receiver. But any such search would certainly reveal the fact that a judgment had been entered 2 years prior to that date even if, by any possibility, he did not actually know it before. Notwithstanding all these circumstances, he still stands by until nearly 2 years later and acts then only by way of a counter move to the plaintiff's efforts to realize something on his judgment. There is nothing in his statement to satisfy the Court that whilst

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at the time of the writ he was in impecunious circumstances, that this state of affairs continued until 1915, a period of 7 years.

Defendant's main contention seems to be that there was no partnership between them at all and, even admitting there was, there is nothing to shew that defendant was to participate in the losses of the business. Granted a partnership existed, I would think that in the absence of express agreement each member would contribute equally toward the losses.

Although undoubtedly the arrangement was a very loose one, a perusal of the whole material leads me to the conclusion that some sort of a partnership did exist.

If defendant had made his application within a reasonable time or even within 2 or 3 years afterwards he might have been considered well entitled to have the judgment opened up, but the evidence is that several of the plaintiff's material and important witnesses are now either dead or, for other reasons, not available, and it is clear to me that he would be seriously prejudiced.

In applications such as this, I do not think any hard and fast rule can be laid down, but each case must be settled on its own merits. There is no doubt that the Court has power in its discretion to open up any judgment, whatever length of time may have elapsed between its date and that of the application.

But the element of time and knowledge of the proceedings are of very great importance in the consideration of such a case, as showing acquiescence, lack of diligence, laches, etc. If defendant did not actually acquiesce in the judgment he is certainly chargeable with lack of due diligence or wilful delay. These circumstances, added to the prejudice which would undoubtedly result to the plaintiff, in my opinion, constitute overwhelming reasons why the case should not be reopened. (See *Cannan* v. *Reynolds*, 5 El. & Bl. 301, 119 E.R. 493; *Haigh* v. *Haigh*, 31 Ch. D. 478, 484; *Atwood* v. *Chichester*, 3 Q.B.D. 722; *Regina Trading* v. *Godwin*, 7 W.L.R. 651.

I would, therefore, allow the appeal with costs, set aside the order appealed from, and dismiss the application with costs.

Appeal allowed.

GREGORY v. PRINCETON COLLIERIES; Re EXECUTION ACT.

B. C.

S. C.

British Columbia Supreme Court, Gregory, J. January 11, 1918.

STATUTES (§ II A—95)—*Construction of—Judgment creditor—Trust deed filed with Registrar of Joint Stock Companies—Land Registry Act, R.S.B.C. 1911, c. 127.*]—Application to vary the registrar's report and then to confirm the same as varied.

W. J. Whiteside, for plaintiff; *H. G. Lawson*, for defendant.

GREGORY, J.:—In my opinion the report must be confirmed as it stands. The registrar was duly directed to enquire and report on what lands, etc., of the judgment debtor were liable to be sold to satisfy the judgment debt of the plaintiff Gregory.

The plaintiff Gregory, subsequent to the trust deed hereafter mentioned, recovered judgment against the Collieries Co. and duly registered same in the land registry office; all other material facts are set out in the statement of admitted facts. The contest is between the judgment creditor and the trustees under a deed of trust and mortgage made by the Collieries Co. to secure an issue of debentures and of which three-fifths have been issued.

This trust deed, while filed with the registrar of joint stock companies, has not been registered in the land registry office.

There can be no doubt that in equity and apart from provincial statutes the claim of the trustees should prevail.

The judgment creditor relies upon the combined effect of ss. 34, 73 and 104 of the Land Registry Act, R.S.B.C. (1911), c. 127. S. 34 provides that the registered owner of a charge (and admittedly he is so registered) shall be *primâ facie* entitled to *the estate or interest of which he is registered* subject to other registered charges, etc. S. 74 provides that when two or more charges are registered they shall, as between themselves, have priority according to their respective dates of registration; and s. 104 provides that no instrument purporting to transfer, charge, etc., an interest in land shall pass *any* estate or interest either at law or in equity in such lands until the same shall be registered, etc.

Under s. 34, the judgment creditor is only *primâ facie* entitled to the estate or interest in respect *of which he is registered*, and to ascertain what that estate or interest is it is necessary to refer to s. 27 of the Execution Act, R.S.B.C. (1911), c. 79, which is the sole authority for effecting such registration. That section provides that a judgment may be registered and when registered

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"shall form a lien and charge on *all the lands of the judgment debtor.*"

In the very similar case of *Entwisle* v. *Lenz* (1908), 14 B.C.R. 51, the full court held that when an owner in fee conveyed his lands to another and the conveyance was not registered the owner became a dry trustee and he no longer in reality owned the lands, and this in spite of s. 74 of the then Land Registry Act, which, with its amendment then in force, is identical with s. 104 of our present Act.

This decision is binding upon me and appears to put an end to the case. It is true that in the present case the judgment creditor still retains an equity of redemption in the lands, but this equity the registrar's report preserves to the judgment creditor. It would therefore appear that the judgment creditor only has a lien or charge on the equity of redemption—that is, *the estate or interest in respect of which he is registered*, for that is all the judgment debtor really owns. Or if the judgment creditor is, in the words of the Act, *primâ facie* entitled, etc., to what he now claims, his *primâ facie* right is defeated by the prior equity of the trustee. The whole law applicable to contracts and conflicting equities is not done away with because of the Land Registry Act, for example, the provisions of that Act cannot be taken advantage of to enable one to commit a fraud. *Chapman* v. *Edwards* (1911), 16 B.C.R. 334.

As to s. 73 of the Land Registry Act, I have been referred to the unreported decision of Clement, J., in *Bank of Hamilton* v. *Hartney*, November 21, 1917, but in that case the contest was between two *registered* owners of charges and so strictly within the terms of that section. In the present case the trustees have not registered their charge. It was argued that it would be absurd to now give the trustees an advantage which they would not have, had they complied with s. 104 of the Land Registry Act, but this argument is disposed of by the remarks of Lord Hobhouse in the Judicial Committee of the Privy Council in *White* v. *Neaylon* (1886), 11 App. Cas. 171. See also *Jellet* v. *Wilkie*, 26 Can. S.C.R. 282, the remarks of the Chief Justice at p. 292.

Report confirmed.

McLEOD v. McLEOD. B. C.

C. A.

British Columbia Court of Appeal, Martin, Galliher, McPhillips, and Eberts, JJ.A. April 3, 1918.

JUDGMENT (§ I A—5)—*Option to purchase—Abandonment—Judgment by confession.*]—APPEAL by plaintiff from judgment of Hunter, C.J.B.C. Affirmed.

Wheeler and *Symons*, for appellant; *A. H. MacNeill*, K.C., and *Housser*, for respondent.

MARTIN, J.A., dismissed the appeal.

GALLIHER, J.A.:—The trial judge found that the plaintiff should have confessed judgment upon the filing by the defendants of the abandonment of the option to purchase given by the company to George McLeod and transferred to the defendant Aldridge —and dealt with the case from that point of view, treating the other issues raised in the statement of claim as incidental to the main relief prayed for, viz., the cancellation of the option above referred to.

While these issues were, in one sense, incidental to the main issue, three of them were also distinct issues, apart altogether from the question of the option given, and plaintiffs were entitled to have these tried out and pronounced upon. These were the 32,000 shares issued to J. D. McLeod, the 28,000 shares issued to Marvin for his services to the company, the $250 cash paid and $18,000 shares issued to Marvin for the Summit Group & Hill Top No. 5.

The latter transaction took place subsequent to the option.

Other issues were raised which I will deal with in order.

The interest of Aldridge was concerned only with the option, and I will deal with that last.

In view of the evidence and the circumstances in this case, and after a perusal of the authorities cited, this does not seem to me to be a case where the plaintiff was called upon, nor can he be said to have proceeded wrongly in not confessing judgment.

In reference to the exceptions taken in the notice of appeal that the trial judge failed to adjudicate upon certain questions, I think those under headings (b), (d), (e) and (f) (in view of the fact that the option was abandoned) are the only ones we are called upon to consider.

(b) On October 4, 1916, the directors authorised the sale of 50,000 shares of treasury stock for the purposes of the company.

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C. A.

The plaintiff seconded the resolution, 32,000 of these shares were bought by J. D. McLeod, a brother of the defendant George A. McLeod, and were paid for.

Suspicion is thrown on this sale by the plaintiff, and it is claimed that it was done for the purpose of maintaining control of the company by the group represented by George A. McLeod.

Fraser v. *Whalley*, 2 H. & M. 10, 77 E.R. 361; and *Punt* v. *Symons*, [1903] 2 Ch. 506, were cited to us, but the facts in this case do not bring it within those authorities, and I do not feel justified in applying the principle there laid down.

As to (d). It is true there were irregularities in connection with the holding of meetings and the notice given for amendment of the articles of association.

The resolution amending the articles was passed on February 4, 1916, and was seconded by the plaintiff. Why this is regarded as part of a scheme to obtain or maintain control of the company I fail to see.

There is no suggestion that these amendments were not proper to be made, they were acted upon for a period of about a year without complaint from any one; the irregularity could have been set right at any time.

I would refer to *Foss* v. *Harbottle*, 2 Hare, 461, 67 E.R. 189; *Southern Counties* v. *Rider*, 73 L.T. 374; and *Normandy* v. *Ind. Coop & Co. Ltd.*, [1908] 1 Ch. 84.

(e) In order to fully appreciate this ground of appeal one must look at all the circumstances bearing on the objects of the company.

The evidence is that his company was what is known as a holding company, *i.e.*, they would acquire properties either by staking or purchase in their initial stage for the purpose of rounding out a holding which would be attractive to intending purchasers.

They had little money for actual development nor was it their object to develop extensively, the whole scheme, in short, being to acquire and sell with as little expenditure as was possible.

Such being the case, it was all the more important that those associated with the management and control of the company should not to their own advantage and contrary to the interests of the company acquire surrounding properties which might be very beneficial in rounding out the scheme for which the company existed.

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Further, the staking of these claims in the interest of Marvin was done by one Creelman, at that time engaged in building trails for the company on their holdings.

In my view, these claims should be taken to have been staked for the company, and that Marvin was merely a trustee: see *Cook* v. *Deeks*, [1916] 1 A.C. 554, 27 D.L.R. 1. In this view, I do not think s. 19 of c. 157, R.S.B.C. 1911 (the Mineral Act) applies. The $250 paid him by the company, less amount paid for staking, should be returned and the shares issued to him in connection therewith should be delivered up to be cancelled.

As to (f). Marvin had given considerable of his time to the company for which he had received no remuneration.

There was no money in the treasury available for the purpose, and the shares were voted to him in lieu thereof.

I see nothing wrong in this. The plaintiff himself did not object to the principle but merely moved a resolution to defer the matter until the annual meeting. It is, moreover, a question of internal management, and courts do not usually interfere as to such unless in cases of fraud.

As to Aldridge, the outstanding option was transferred to him and he was a necessary party to any proceedings to set it aside.

There should, I think, be costs against him up to the time of the filing of his abandonment or disclaimer as contained in his defence; after that date, costs to Aldridge, including costs of appeal.

As against the other defendants plaintiffs should have the costs of appeal.

MCPHILLIPS, J.A.:—I remain of the opinion that I formed at the time of the argument of the appeal—and with all deference to the able presentation of the appeal by Mr. Wheeler, counsel for the appellant, I am satisfied that the exceptions taken to the change in the articles of association and other matters of internal management, and administration of the affairs of the company, cannot, upon the authorities, be the subject of intervention by the court. None of them can be said to be of an *ultra vires* nature, and where irregular are capable of being set right by the directors and shareholders.

With respect to the claimed trusteeship of Marvin of the Sunset

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Group, I am in agreement with the judgment of my brother Martin.

I would, therefore, dismiss the appeal.

EBERTS, J.A., would dismiss.

Appeal dismissed.

MAN.
K. B.

WALKER v. WALKER.

Manitoba King's Bench, Galt, J. May 5, 1918.

DIVORCE AND SEPARATION (§ II—5)—*Jurisdiction of Provincial Courts.*]—In this case, 35 D.L.R. 207, 39 D.L.R. 731, Galt, J., has granted an absolute decree of divorce. At trial Mrs. Walker merely testified to fact of husband's impotency; that she had lived with him for over 9 years and marriage had never been consummated. An application was then made by John Allen, Deputy Attorney-General, on behalf of the province, to the Court of Appeal (now constituted of three judges, Perdue, Cameron, and Fullerton, no appointment having been made of a successor to the late Howell, C.J.), for leave to take case direct to Privy Council, as it is felt that a ruling of the highest tribunal in the land should be obtained as to right of K. B. Courts of province to deal with matrimonial causes and divorce matters. Action of province in appealing to Privy Council being dictated by fact that respondent did not take any part whatever in proceedings in court below, either in person, or by counsel.

N. B.
S. C.

O'LEARY v. SMITH.

New Brunswick Supreme Court, Appeal Division, Hazen, C.J., White and Grimmer, JJ. April 19, 1918.

NEW TRIAL (§ II B—16)—*Jury—Verdict against the weight of evidence.*]—Appeal from King's Bench Division by defendant, to set aside verdict entered for plaintiff at the St. John Circuit, on trial before Barry, J., and a jury, and to enter a verdict for the defendant, or for a new trial. New trial ordered.

J. C. Hartley, K.C., and *R. P. Hartley*, for appellant.

M. G. Teed, K.C., and *J. F. H. Teed*, for respondent.

The facts of the case were as follows: The plaintiff sold to the defendant, two carloads of potatoes containing 499 barrels, for which the plaintiff claimed $1,832.75, viz., $1,621.75 for the

potatoes at $3.25 per barrel, and $211 for freight, rent and demurrage. The case was tried in the City of St. John, before Barry, J., with a jury, in October, 1917, and upon answers returned by the jury to questions left them, a verdict was ordered to be entered for the plaintiff for the sum of $1,832.75. From this, the defendant appeals, largely, on the ground that the verdict is against the weight of evidence.

The potatoes were purchased in November, 1916, at or near Shippegan, in the County of Gloucester, by one Morrison, an agent of the plaintiff. A large number of farmers were involved in the purchase, and the potatoes were hauled and delivered at Shippegan a few days prior to November 11. There they were stored partly in a cookroom occupied by the plaintiff's men, and partly in barns. From these buildings on the 10th and 11th November, or thereabouts, they were loaded on the plaintiff's steam tug called the "O'Leary Lee," where they were stored in the hold of the vessel. Some of the potatoes were in bags and some were loaded in bulk. From Shippegan they were carried to Newcastle, where they arrived on the 14th or 15th of November, and were transferred from the steamer to cars on the wharves, and, in due course, they were shipped out from Newcastle, to the defendant at Centreville, in the County of Carleton. On the arrival of the cars at Centreville, it was found that the potatoes were badly frozen, one car being practically worthless and the other so much injured as to contain only 180 barrels or thereabouts of good potatoes. So far as the plaintiff was concerned, the contract between himself and the defendant appears to have been for the delivery of 500 barrels of potatoes in merchantable condition, f.o.b. on cars at Newcastle.

HAZEN, C.J. (after reviewing the facts and the evidence said):—The jury evidently arrived at the conclusion that the potatoes were frozen in transit between Newcastle and Centreville, as stated in the plaintiff's factum, by a process of elimination—that is, having accepted the evidence of the plaintiff's witnesses that the potatoes were in good condition when they arrived at Newcastle they found that they were frozen in transit between the points mentioned although there is no direct evidence to that effect. I, however, regard the evidence given by Messrs. Hatfield, Gilliland, Tracy and others as to the condition that the potatoes were in in the cars when they arrived at Centreville as of the utmost importance.

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If their evidence is true, and it is uncontradicted, they could not have been frozen upon the cars. Had they been so frozen, they could not have been in the condition that the witnesses described, and there is nothing whatever to impeach the truth of the testimony given by these witnesses in any respect. We, therefore, have the fact that there is no direct evidence of the potatoes having been frozen between Newcastle and Centreville and further evidence given by men of long experience in the potato trade, whose business it was to handle potatoes, that they could not have been frozen upon the cars. The evidence given by these people is the evidence of men of knowledge and experience, whose business it is to examine potatoes and see what condition they are in, who are actively engaged in their shipment, and who, in the present instance were called upon to examine the condition in which these cars of potatoes were when they arrived at Centreville. The evidence of the plaintiff's witnesses at Newcastle and at Shippegan is the evidence of men who are not engaged in the potato business, who have had very little experience in connection with it, and who were not particular in examining the potatoes when they were being loaded or unloaded with a view of seeing whether they were affected by frost or not. I think that this is an element for consideration in connection with the case. [Reference to *Aiken* v. *McMeckan*, [1895] A.C. 310.]

It cannot be said in the case under consideration that the evidence in favour of the potatoes having been put on board the cars at Newcastle in good merchantable condition can be regarded as evidence of the same quality as the evidence given of their condition when they arrived at Centreville, which evidence, if true, precludes the possibility of their having been in good merchantable condition when they were placed upon the cars. I am forced to the conclusion, after careful consideration of the whole evidence, that the verdict in this case is not one which the jury reasonably viewing all the evidence could properly find.

It was asserted by the defendant that it was a term of the contract that the plaintiff should load the potatoes in refrigerator cars heated at each end with an economy heater. The jury found that this was not the case. It is claimed on behalf of the defendant that the judge was in error in stating that he understood O'Leary denied that that was a term of the contract, while,

on the other hand, Smith said it was, and in further directing the jury in regard to this question in the following language: "That is a term of the contract asserted by Smith, but denied by O'Leary. You may remember that Smith stated positively that that was one of the terms of the contract."

Having read the evidence carefully, I cannot find that O'Leary made any such denial. I do find that he stated that Smith told him to see that the cars were heated, but he says he does not remember his going into any details as to how they should be heated. This certainly is not a denial of Smith's evidence that it was agreed that the plaintiff should load the potatoes in refrigerator cars heated at each end with economy heaters, and I think the judge was in error in directing the jury as he did.

GRIMMER, J. (after reviewing the facts and the evidence at length, said):—The question for the jury was purely one of fact, and if the evidence which was furnished by disinterested witnesses on the part of the defendant can be relied upon, it is difficult to believe that the potatoes could have been frozen while in transit, as has been found by the jury; but taking the evidence as a whole I am not satisfied that the verdict is one which the jury could reasonably or properly find, and, in my opinion, there must be a new trial. I have arrived at this conclusion reluctantly, realizing fully the right the jury has to find on all the facts, but I am entirely unable to close my eyes to the evidence given by the potato experts who examined the cars on their arrival at Centreville. Evidence such as that which has been supplied by Hatfield, Tracy, and Gilliland, whose veracity is in no way attacked, and whose statements to me are conclusive, so much so that I am quite unable to understand how the jury arrived at their finding that the potatoes were frozen in transit, and I am basing the conclusion at which I have arrived on the fact that, viewing the evidence on the whole, the verdict is one, as I have stated, which the jury could not reasonably or properly find.

WHITE, J., agreed. *New trial ordered.*

QUE.
C. R.

LAMONTAGNE LIMITED v. C. PARSONS & SON.

Quebec Court of Review, Archibald, Acting C.J., and Martineau and Lane, JJ. May 30, 1918.

CONTRACTS (§ IV E—365)—*Breach—Measure of damages—Market value.*]—Appeal from a judgment of the Superior Court in an action for damages for breach of contract. Affirmed.

The plaintiffs claimed from the defendants the sum of $999, which they alleged were the damages they suffered through defendants' refusal to deliver 500 sides of harness leather one of their travellers sold to them in August, 1916. Defendants admitted the order was solicited by one of their travellers, who, they said, had no authority to make the sale without consulting defendants as to their willingness to sell and their capacity to deliver the quantity of goods mentioned.

In dismissing the appeal, Archibald, A.C.J., said the ground of damages which plaintiffs had set up was not the true measure of damages; that there was no proof that plaintiffs had suffered any damages at all, inasmuch as it was not shewn that when defendants notified plaintiffs the order was rejected, plaintiffs could not have bought the same goods from other persons; and because there was no proof that any complete contract was made for delivery of the goods in question.

Archibald, A.C.J., made some pertinent observations in discussing the principle of law that the true measure of damages is to be found in the difference between the contract price and the market price at the date of a breach of the contract. He said there had not been entire unanimity in the decisions of the courts with regard to this principle, but he found the Privy Council judgment in the case of *Wertheim* and the *Chicoutimi Pulp Co.*, [1911] A.C. 301, was decisive of the measure of damages in the present case.

And as there is no satisfactory proof of the market price of goods similar to those which were bought from the defendant on August 10, 1916, the judgment *a quo* dismissing the plaintiff's action must be confirmed.

It is true defendants claim they could have sold the goods if they had them at an advance of five cents a pound, and that might possibly be interpreted as an allegation that the market price of those goods at the time was five cents greater than the price at which plaintiffs bought from defendants.

But the word "market price" at which a retailer sells to his customer does not mean the same thing as the market price at which the retail merchant buys from the wholesale merchant. The market price in this latter case means the price at which the retailer can go into the open market and buy from

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other wholesalers—that is, the market price for him is the price which he would be obliged to pay to some other traders for similar goods. There is no proof in the record as to the price at which plaintiff in this case could have bought these goods. The difference between the price at which a retail merchant buys his goods and that at which he sells them does not represent an accurate measure of the profit which the retail merchant makes. There are the costs of sale and of delivery, the danger of insolvency of the purchaser, a share of the fixed expenses of the establishment, etc. It is the duty of a merchant who has bought goods to go, when the vendor has declined to deliver, into the market and supply himself with other goods for the purpose of his trade similar to those which he had bought, and his loss is the difference between the price he has to pay and the price for which he had contracted to buy.

Appeal dismissed.

COULOMBE v. ROUILLARD.

Quebec Superior Court, Weir, J. April 5, 1918.

S. C.

SALE (§ I C—15)—*Automobile—Conditional sale—Insurance—Destruction by fire—Rights of parties.*]—Action on several promissory notes, given in payment for an automobile, sold under the condition that the owner retained the ownership until full payment of the notes. The owner insured the automobile against fire. A fire occurred and the automobile was destroyed, the owner being indemnified by the insurance company.

The court dismissed the action, cancelled the contract and declared the notes null and void on the ground that the owner was not entitled to be paid both by the defendant and the insurance company.

The court held that the loss by fire of the auto must be borne by the plaintiff as owner and he according to his contract had the right to be indemnified by the insurance company; his recourse, if any, was against the company, not against the defendant.

McDONALD v. GRAND TRUNK R. Co. and CITY OF MONTREAL.

Quebec Court of Review, Archibald, A.C.J., Martineau and Lane, JJ. January 9, 1918.

C. R.

MASTER AND SERVANT (§ II A—43)—*Railway—Injury to employee—Notice—Negligence—Damages.*]—Appeal by defendant, the City of Montreal, from the judgment of the Superior Court in an action for damages for death of railway employee. Affirmed.

The facts are as follows:—

The action is formed by the widow of C. J. Scarff, personally and as tutrix for her minor children. The deceased, a brakeman

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in the employ of the Grand Trunk R. Co., was killed while at duty on a train. The plaintiff declares that the accident happened through the gross and common fault of the man in charge of the engine, and of the guardian of the gates at De Courcelles St. She claims jointly and severally from the defendants the sum of $20,000, and made an option for a jury trial.

The Grand Trunk R. Co. pleaded, in substance, by a denegation of its responsibility. It alleges that the deceased was alone the cause of his death.

The City of Montreal pleaded in law and in facts denying that it was responsible for the accident, and amongst other grounds says: (1) The accident took place on August 21, 1915, and the present action was served on the city on November 14, 1916. Therefore the action is prescribed by the prescription of six months enacted by the charter of the City of Montreal; (2) the notice of action required by art. 536 of its charter was only given on October 16, 1916, more than a year after the accident, and is insufficient, irregular and illegal. It also accuses the deceased of fault and negligence.

The case was submitted to a jury who gave a verdict for the sum of $6,000 on behalf of the plaintiff and her children.

Walsh and *Walsh*, for plaintiff; *A. E. Beckett*, K.C., for Grand Trunk R. Co.; *Laurendeau, Archambault*, for City of Montreal.

The Superior Court, on this verdict, rendered the following judgment:

(The first six *considérants* concern the inscription in law of the plaintiff and that of the defendant which are both dismissed.)

Proceeding to render judgment upon the merits of the plaintiff's action:—

Considering that the jury sworn to try the issues between the parties, have rendered the verdict which established that the following facts are proved:

The plaintiff Dame Maud McDonald was the lawful wife of Charles J. Scarff on August 21, 1915; she is now the tutrix of Frances Scarff; Frances Scarff is the lawful issue of the marriage of the late Charles J. Scarff and the plaintiff Dame Maud McDonald. Charles Scarff, on August 21, 1915, while in the employ of the defendant, the Grand Trunk Railway Co. of Canada, as brakeman, in the district of Montreal, did meet with an accident which resulted in his death. The city of Montreal did not receive within 30 days from the date of this accident a written notice containing the particulars of the damages sustained, indicating the names, surnames, occupation and address of the persons who suffered the same, giving the cause of such damages and specifying where the same occurred. The reason why the City of Montreal did not receive such a notice within 30 days from the date of the accident is because the plaintiff did not know that Racicot was in the employ of the

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City of Montreal until October 16, 1916. The accident was due to the sole fault of both defendants the Grand Trunk Railway Co. of Canada and the City of Montreal, such fault consisted: 1.—As regards the defendant the Grand Trunk R. Co. of Canada, represented by Brunet, that it was not in constant communication with both ends of the train; 2.—As regards the defendant the City of Montreal, represented by Racicot, that it did not act in concert with the Grand Trunk R. Co.'s employees, and by opening the gates at the crossing while the train was in motion. The accident was not due to the common fault of Charles J. Scarff with both or either of defendants. The plaintiff Dame McDonald and her child Frances McDonald suffered damages by reason of the death of Charles J. Scarff to the amount of $6,000. It is not possible for the jury to determine separately the proportion in which the fault of each of the defendants concurred in causing the damages suffered by the plaintiff and her child. The jury having found that the plaintiff and her child are entitled to damages assessed the same in favour of the plaintiff Dame McDonald to the extent of one-third, and in favour of the child Frances McDonald to the extent of two-thirds;

Considering that the reason which the jury found why the plaintiff did not, within 30 days from the accident, give notice of her claim to the defendant the City of Montreal is a valid reason in law;

Considering that the jury has found, as a matter of fact, that the accident happened solely by the combined fault of both the defendants, and that it is impossible for them to determine separately the proportion in which the fault of each of the defendants concurred in causing the damages suffered by the plaintiff and her child;

Considering that under the circumstances the fault of both the defendants was concurrent, and that the obligation of both defendants has arisen from a common quasi-offence which is therefore joint and several, C.C., art. 1106;

Considering that the present action was served upon the defendant the Grand Trunk R. Co. of Canada within the legal delays and before prescription could accrue in *faveur* of the latter company and which does not plead prescription;

Considering that the service of the action thus made upon the defendant the Grand Trunk R. Co. of Canada, a joint and several debtor, was an act which by law, interrupted prescription with regard to the other joint and several debtor, the City of Montreal, C.C., art. 2251;

Considering that the plaintiff's action against the defendant the City of Montreal is not prescribed;

Considering that the verdict is in accordance with the weight of evidence, and that the plaintiff in whose favour a verdict has been rendered, is entitled by law to a judgment in her favour, C.P. arts. 491 & 498 (4), doth reject with costs, the motion of defendant the City of Montreal, asking that the plaintiff's action be dismissed *non obstante veredicto*, and alternatively that the case be reserved for the consideration of the Court of Review; doth grant with costs the motion of the plaintiff asking that judgment be rendered in her favour in accordance with the verdict of June 16, 1917; doth condemn the defendants jointly and severally to pay $2,000 to the plaintiff personally, and $4,000 to the plaintiff in her quality of tutrix to her minor child Frances Scarff, with interest on both sums from the present date and the costs, including the costs of the jury trial.

The Court of Review confirmed this judgment.

SASK.

K. B.

FIDELITY TRUST CO. v. HALL.

Saskatchewan Court of King's Bench, McKay, J. May 3, 1918.

VENDOR AND PURCHASER (§ III—39)—*Agreement to purchase lands—Default in payments—Assignment by purchaser—Rights of parties.*]—Action to recover possession of lands sold under an agreement for sale and for damages. Judgment for plaintiff.

J. K. Sparling, for plaintiff; *W. A. Boland*, for defendant.

MCKAY, J.:—The facts of this case are shortly as follows:—By agreement dated July 23, 1912, the defendant agreed to sell to Cosmo J. MacFarlane, trustee for a proposed company to be known as the Yorkton Nurseries, Limited, and the said MacFarlane agreed to buy from the defendant the east half of section 14 and the north-east quarter of section 11, all in township 26 and range 4 west of the 2nd meridian in the Province of Saskatchewan, saving and excepting thereout that portion of the east half of said section 14 taken for the right-of-way of the Grand Trunk Pacific Railway, for the price of $60,000, to be paid in the following manner:—The sum of $2,000 upon the execution and delivery of contract; the sum of $4,000 on or before November 1, 1912; the sum of $6,000 on or before November 1, in each and every of the years 1913, 1914, 1915, 1916, 1917, 1918, 1919, 1920 and 1921, together with interest from the date of said agreement at the rate of 7% per annum, payable on November 1 in each and every year until said purchase price was paid.

The said agreement contained the following provision:—

> The purchaser shall after March 1, 1913, have the right of possession to said premises, and shall have the right to occupy and enjoy the same until default be made in the payment of said sums of money, or the interest thereon, or any part thereof on the days and times and in the manner above mentioned.

Default was made in the instalments of principal and interest which fell due on November 1, 1914, and said instalments were still unpaid and in default at the time of trial.

The said MacFarlane, on August 30, 1912, assigned said agreement to the Yorkton Nurseries, Ltd.

The Yorkton Nurseries, Ltd., by lease dated December 27, 1913, leased the said lands to the defendant for the term of 1 year from March 1, 1914, and the defendant went into possession of said lands and cultivated the same under the said lease. By lease dated March 1, 1915, the Yorkton Nurseries, Ltd., again leased

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the said lands to the defendant for 1 year from March 1, 1915, and continued in possession of said lands.

By an assignment under seal and dated June 3, 1913, the defendant assigned and transferred the said agreement dated 23rd July, 1912, and the said lands to plaintiff, and the plaintiff is the registered owner of the said lands.

On April 19, 1915, the plaintiff made a written demand upon the defendant for possession of the said lands, and, the defendant having refused to give up possession, the plaintiff thereupon brought this action against defendant, demanding possession, and claiming $1,500 for mesne profits.

The defendant's counsel, to put it shortly, argued that as defendant had entered into a *bonâ fide* lease, and had paid the rent to his landlord by endorsing the same on a note which he held from his landlord, and had done certain ploughing before the demand for possession was made, he should not be disturbed, and quoted Bell's Landlord and Tenant (1904), p. 134, which refers to the Imperial Act 12 & 13 Vict. (1849) ch. 26, s. 2. Even if this Act were in force in this province I do not think it is applicable to the case under consideration.

Counsel for defendant also urged that by virtue of the Lieutenant-Governor's proclamation of November 5, 1914, issued pursuant to c. 2 of the statutes of Saskatchewan, 1914, the plaintiff could not succeed on its claim. In my opinion, this proclamation does not affect the plaintiff's case in any way, as the plaintiff is in this action taking proceedings in court to enforce his claims under said agreement.

The plaintiff contends that the lessor, the Yorkton Nurseries, Ltd., cannot give a greater interest in the land than it could itself claim under the said agreement of sale; and that the said the Yorkton Nurseries, Ltd., could be put out of possession immediately after default in payment of the instalments of principal and interest falling due on November 1, 1914, and that the defend ant, who claims under a lease from the Yorkton Nurseries, Ltd., can in like manner be dispossessed. I am of the opinion that this contention is right.

There is a long line of cases holding that a purchaser, who has gone into possession under an agreement to purchase, may be dispossessed on default of payment of instalments.

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In *Doe dem. Stodders* v. *Trotter*, 1 U.C. Q.B. 310, Robinson, C.J., is reported as follows:—

The defendant was in on an agreement to purchase, having failed in his engagement to pay on certain days; but, notwithstanding such failure, he contends that he cannot be treated as a trespasser without evidence of an explicit demand of possession, and that there was no such evidence here. There is clearly no such principle of law; on the contrary, the general principle is, that where a party's right to possession depends on his making certain payments, if he fails, he is liable to be dispossessed without notice.

In *Doe dem. Phillpotts* v. *Crouch*, 5 U.C.Q.B. 453, the headnote—which fully explains the nature of the case—is as follows:—

A. contracts to sell B. certain land for a sum of money, to be paid by annual instalments, and the defendant went into possession under B. upon some understanding or condition, not explained at the trial; default was made in the payments to A.—*Held, per Cur.*, that A. could bring ejectment against the defendant without notice or demand of possession.

Robinson, C.J., in delivering the judgment of the court in this case, stated as follows:—

The defendant being in possession, not under the lessor of the plaintiff, Dunlop, by any immediate privity with him, but as assignee, or upon some agreement or understanding with Gibbs, to whom Dunlop had agreed to sell the estate upon certain conditions, they can be in no more favourable position for retaining possession against the lessor of the plaintiff, than Gibbs himself would have been, if he had made no assignment of his interest.

Then if Gibbs had continued in possession, having entered under his written contract, which was produced, and proved on the trial, the fact would have been, that having a right to enter, and to possess the land "until default should be made in payment," he would have been holding possession against the true owner on the day of the demise laid, notwithstanding he had made default in payment.

. . . . .

Gibbs or his assignee can stand in no better situation, after default made in their contract, than a mortgagor or an overholding tenant.

See also *Parker* v. *Boulton*, 6 M. & S. 148, 105 E.R. 1198.

The next question is: What damages is plaintiff entitled to? In 10 Hals., p. 341, the learned author there states as follows:—

Where a trespass consists of a wrongful and unauthorized user of the plaintiff's land, the measure of damages is not the depreciation in the value of the plaintiff's land, or the amount required to repair the injury which has been suffered, but such reasonable payment in the nature of rent as would have been required for a license to make such use of the plaintiff's land during the period whilst it was so used.

The rent defendant agreed to pay for the land was $1,500, and, according to the evidence, this was a fair rent. I will therefore allow plaintiff that amount.

There will be judgment for plaintiff for possession of the land, and $1,500 damages, with costs. *Judgment for plaintiff.*

GREAT WEST PERMANENT LOAN Co. v. McEVERS. SASK.

C. A.

Saskatchewan Court of Appeal, Haultain, C.J.S., Lamont and Elwood, JJ.A. May 17, 1918.

DISCOVERY AND INSPECTION (§ IV—31)—*Foreclosure action—Affidavit of default—Examination on—Personal knowledge.*]—Appeal from a judgment of McKay, J., reversed.

G. W. Forbes, for appellant.

G. A. Ferguson, for respondent Thomas Watson.

The judgment of the court was delivered by

ELWOOD, J.A.:—This is an action for foreclosure of a mortgage given to the plaintiff by the defendant George McEvers, on property situate in the City of Regina.

McEvers did not enter an appearance to the writ. Watson, who was a subsequent encumbrancee, entered an appearance, but delivered no defence. An application was made to the Master for foreclosure, and he made a fiat for an order *nisi* for foreclosure, and gave leave to the defendant Watson to cross-examine one Lewis B. Willan, the manager at Regina of the plaintiff, who had made an affidavit of default which was used on the application before the Master. In that affidavit, Willan swore to the advance of the money secured by the mortgage, and verified a statement contained in the statement of claim shewing the condition of the mortgage account. He also stated in the affidavit that the plaintiff had not been in possession of the mortgaged premises, nor in receipt of the rents and profits therefrom, and that since the action had been commenced he had been advised by Walter F. McEvers that he had an interest in the lands covered by the mortgage. On the cross-examination on this affidavit, it appeared that Willan did not have a personal knowledge of all of the matters to which he deposed; that he had been manager at Regina since July 22, 1916, and that information as to the state of the mortgage account must in part have been from entries made in books and documents prior to his becoming manager at Regina, and that for some time plaintiff was in receipt of the rent of the property covered by the mortgage and that this rent was collected by him.

On the application before the master the mortgage was put in. It contains an acknowledgment by the mortgagor of the receipt of the mortgage moneys. It provided for repayment of the mortgage to the mortgagee, at its head office in Winnipeg, by payments of

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$25.65 on the first day of each month after the date of the mortgage for a period of 96 months, the first of such payments to be made on September 1, 1913.

There has been no taking of accounts under the order of the master, and the order *nisi* for foreclosure has not been taken out. The defendant Watson appealed from the order of the master to McKay, J., who allowed the appeal on the grounds that the cross-examination of Willan shewed that he did not have a personal knowledge of the condition of the mortgage account, and from the judgment of McKay, J., this appeal has been taken.

Apart from the affidavit of Willan, there was before the master the statement of claim, setting forth the mortgage and the condition of the account. As I have stated above, the mortgagor did not appear to the writ, and Watson filed no defence. There was also the mortgage, which, as I have stated above, contained an acknowledgment by the mortgagor of the advance of the money, and shewed the dates upon which payments matured, and about 45 of these payments matured before the date of the writ. The cross-examination of Willan shews that he has been the manager at Regina since July 22, 1916, for the plaintiff; that, while the money was payable at the head office at Winnipeg, he during that period had the collecting of the money; that no payments had been made during that period; that he had the collecting of the rents, and that these rents were insufficient to cover the payments that were falling due during the period.

It is quite true that there was the possibility of payments having been received at the head office of the plaintiff. The property, however, was situate in Regina, where Willan had his office, and Willan was collecting the rents of the property, and there is at least a probability that any payments on the mortgage would be made to Willan. He has sworn positively that no payments were made to him, and I am of the opinion that a *primâ facie* case was made out for the plaintiff. Payment is a matter of defence, and no such defence was raised. The practice appears to be for the master to make a fiat such as he did in this case, after which the accounts were taken, and, on the completion of taking of the accounts, the amount found due is inserted in the formal order *nisi* which is taken out. If nothing is found to be due on such taking of accounts, then the matter, in my opinion, should be referred back to the

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master to be dealt with, and, of course, no formal order *nisi* would be taken out.

It was further objected that there was no affidavit that George McEvers and Walter F. McEvers were entitled to the protection of the provisions of the Volunteers and Reservists Relief Act.

I have spoken to McKay, J., and he informs me that that question was raised on the appeal before him, and that it was stated by counsel that these parties were not volunteers or reservists and that, if necessary, an affidavit to that effect would be filed before the formal order was taken out, and on this statement of fact the matter was not pressed. I have also spoken to the master, who informs me that, before making his fiat, he is quite sure that he was satisfied in some way that these parties were not volunteers or reservists. I think, under these circumstances, effect cannot be given to this objection, and that the plaintiff, before taking out a formal order *nisi*, should file an affidavit shewing that these parties are not volunteers or reservists.

In my opinion, therefore, the appeal should be allowed with costs, and the order of the master should be restored, and the plaintiff should also have its costs of the application before McKay, J. *Appeal allowed.*

DE VISSCHER v. WEIR.

Saskatchewan Court of King's Bench, Bigelow, J. May 9, 1918.

K. B.

VENDOR AND PURCHASER (§ II—33)—*Agreement for sale of lands—Assignment—Default in payment—Judgment—Foreclosure—Powers of local master.*]—Appeal from a decision of a local master refusing to set aside an order of foreclosure. Allowed.

T. D. Brown, K.C., for appellant; *F. W. Turnbull*, for respondent.

BIGELOW, J.:—On October 26, 1912, the defendant Cowden agreed to sell to defendant Weir a certain parcel of land for $3,840, payable $300 in cash on the execution of the agreement, $500 in 2 months, $368 on October 26, 1913 to 1917, and the balance of $1,200 by assuming the mortgage, with interest at 6%, payable with each instalment of principal.

On March 4, 1913, Cowden assigned said agreement to defendant Vanatter, and on July 25, 1915, Vanatter assigned said agree-

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ment to plaintiff. Defendant Weir made the payments up to and including October 26, 1914. Default was made in payment due October, 1915, and on July 8, 1916, plaintiff sued on the agreement, asking not only the deferred instalments, but, under the acceleration clause, the two remaining instalments and interest, $1,219.49 in all.

The plaintiff claimed payment of the full amount due and judgment for the same, and, in default of payment, that the agreement be determined and cancelled.

The defendant Weir did not appear, and on October 30, 1916, the local master at Saskatoon granted an order "that the plaintiff be at liberty to sign judgment against defendant Weir for the amount due under the agreement of sale and to issue executions, and that in default of payment of the said judgment the plaintiff be at liberty to proceed to further relief as claimed in statement of claim." Formal judgment was signed on November 10, 1916, for $1,138.80, and costs taxed on November 18, 1916, at $95.59. Executions were issued on November 11, 1916, for $1,138.80, which did not include any costs which were not then taxed.

About December 1, 1916, the sheriff realized under the executions a sum of $1,000 and $940.35 was paid to the plaintiff's solicitor about February 2, 1917.

On July 20, 1917, an order was made by the acting local master at Saskatoon adjudging that the amount owing under the agreement was $309.45, with certain interest, and ordering defendants to pay into court said amount within 5 months, and that in default there will be an order of absolute foreclosure.

On said order, the executions issued against defendant Weir were stayed until further order.

On February 28, 1918, the local master at Saskatoon made a final order of foreclosure, so called. The defendant Weir knew nothing of the stay of proceedings under the executions, and had no personal knowledge of the order made July 20, 1917, and on February 22, 1918, wrote the sheriff, who held the executions, for a statement of the balance due. On February 25, 1918, the sheriff sent the defendant the following letter:—

KINDERSLEY, Feb. 25, 1918.

WM. WEIR, ESQ.,
Dinsmore, Sask.

As requested in yours of the 22nd inst. I am enclosing herewith a statement shewing the amount necessary to clean up the judgment in this office

against you. Send in the money to this office and upon receipt of same I will file a certificate of discharge. W. R. GORDON, Sheriff, per J.

The statement attached to the letter shewed $245.70 was still due, and on February 28, 1918, the defendant remitted to the said sheriff the sum of $246 as in the sheriff's letter.

An application was made to the local master at Saskatoon to set aside and vacate the order made on July 20, 1917, and also the final order made February 28, 1918, and for certain alternative relief. The local master states that he would grant the application if he was of opinion that he could do so, but decides that he has no jurisdiction to do so, and relies on the decision in *Coe* v. *Smiley*, 4 S.L.R. 43, at 45.

With due deference, I am of the opinion that the local master was wrong. Our r. 235 provides that any judgment by default, whether under this order or any other of these rules, including a judgment entered by order of the court or a judge under r. 232, may be set aside or varied by the court or a judge.

The judgment complained of was a judgment by default, and I hold that the local master had ample jurisdiction to deal with it.

See *Winnipeg Church Extension Ass'n* v. *Markiewicz*, 37 D.L.R. 697, 28 Man. L.R. 221.

Should the judgments or orders complained of be set aside or varied? I am of the opinion that the said orders should be set aside for the following reasons:—(1) The plaintiff having elected a remedy affirming the contract, issued executions and obtained most of his money, could not afterwards change his election and have the contract cancelled, at any rate without giving back the money realised on his first election. It would be most inequitable if a vendor could, by execution, obtain almost all his money, and then alter his election so as to disaffirm the contract and cancel his agreement.

See judgment of Parker, Master, in *Harper* v. *Henderson* (unreported), March 14, 1914:—

> It would never do to allow plaintiff to harass a purchaser with an execution in the hands of the sheriff, and at the same time put an end to his contract, so that if a vendor having elected to take a personal judgment should realize any moneys thereon, I would certainly refuse to grant him an order for cancellation or forfeiture on a subsequent application, at all events, only on condition that he refunded to the purchaser all moneys realized under the execution. For the present, I will follow the practice of holding the vendor to his election, except probably where, on a subsequent application (after electing to take

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personal judgment) he satisfies me that no moneys have been realized under the judgment and that his executions have been withdrawn.

I cannot find any reported case where that practice has been adopted, or, in fact, where similar circumstances have called for a decision, but I adopt that practice as reasonable, excepting, of course, that executions would not have to be withdrawn in so far as they cover costs. *Jackson* v. *Scott*, 1 O.L.R. 488.

Mr. Turnbull cited the case of *Cameron* v. *Bradbury*, 9 Gr. 67, as authority that the plaintiff could collect part of his money under execution and afterwards cancel, but I cannot see that that case is authority for any such proposition.

In *Standard Trust* v. *Little*, 24 D.L.R. 713, at 719, the following is quoted with approval:—

"Let us first consider what is meant in law by an election of remedies." It not infrequently happens that for the redress of a given wrong, or the enforcement of a given right, the law affords two or more remedies. Where these remedies are so inconsistent that the pursuit of one necessarily involves or implies the negation of the other, the party who deliberately and with full knowledge of the facts, invokes one of such remedies, is said to have made his election, and cannot, thereafter, have the benefit of the other.

Let us apply the above quotation to the present case. The two remedies, judgment for the recovery of the money, and full foreclosure and cancellation are inconsistent. The one affirms the contract, the other disaffirms it. Where the plaintiff, with full knowledge of the facts, invoked the remedy of personal judgment, he made his election; and where, as in this case at any rate, he has realised money on the executions, I do not think he should be allowed to alter his election and proceed with an inconsistent remedy.

Saskatchewan Gen'l Investment v. *Applegate*, 10 W.W.R. 522, was a case where a vendor recovered a judgment for the amount due under an agreement of sale and a portion was realised under execution, and then an application was made for cancellation. The master refused such an order, and, on appeal, McKay, J., made an order declaring that plaintiff was entitled to a vendor's lien for the balance and a sale. It seems to me that that procedure bears out what I have advocated above. The order for sale still affirms the contract, and it is still carrying out the election made by the vendor. An order for cancellation would be quite different. (2) The order of July 20, 1917, should never have been made, as there were then no arrears unpaid on the agreement.

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The final payment under the agreement was not due until October, 1917. The plaintiff had collected by execution more than enough to pay all arrears. Statutes of Sask. (1914), c. 20, s. 4. (3) The order was wrong, because it only stayed the executions instead of setting them aside. Even if the plaintiff had the right to vary his election and proceed to cancel after recovering part of his money on the executions, the executions should have been set aside and not stayed. No part of the executions was for costs, so *Jackson* v. *Scott*, above referred to, would not apply. See *Standard Trust* v. *Little*, *supra*. (4) The order should have provided for the delivery of a conveyance of the property to the purchaser on payment by him of the purchase money due. *Regina Brokerage* v. *Waddell*, 27 D.L.R. 533, 9 S.L.R. 154; *Cooper* v. *Morgan*, [1909] 1 Ch. 261.

If this were all that was wrong, it would be a matter of varying the order instead of setting it aside.

On the argument, defendant complained of the original judgment October 30, 1916, on the ground that the statement of claim did not allege that the plaintiff had title, or was ready and willing to convey the land. *Landes* v. *Kusch*, 24 D.L.R. 136.

But that judgment is not attacked in the notice of motion, and, even if it were, the answer would be that although the statement of claim did not contain these material allegations, the affidavit on which the judgment was obtained did, and it would be merely a matter of amending the statement of claim to conform with the material before the court.

The defendant, as an alternative, applied for order extending the time for appealing from the orders complained of, and, by way of appeal, from such orders. In the circumstances of this case, I would have granted such relief if necessary.

Other reasons were advanced for setting aside the orders in question. I do not consider it necessary to deal with them now.

The appeal is allowed, and the orders July 20, 1917, and February 28, 1918, are set aside with costs both before the local master and on appeal. *Appeal allowed.*

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